

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.

APPELLANTS' OPENING BRIEF

Rachael Paschal Osborn, WSBA No. 21618
2421 W. Mission Ave.
Spokane, WA 99201
(509) 209-2899
rdpaschal@earthlink.net

Thomas F. Graham, WSBA No. 41818
1923 N. Fife St.
Tacoma, WA 98406
(206) 568-3359
tomasfrederic@yahoo.com

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I. Introduction

This case concerns whether the Department of Ecology (Ecology) violated state law when it processed amendments to Washington State University's (WSU) water rights, authorizing the university to use substantially more water than it has beneficially used in the past. The Pollution Control Hearings Board's (PCHB) approval of those amendments was based on interpretations of the 2003 Municipal Water Law (MWL) which the Washington Supreme Court has since repudiated. Moreover, basic water law principles relating to beneficial use and loss for nonuse were ignored. Appellants request that this Court find that the PCHB's interpretations of the law as applied to WSU's nonuse of water and Ecology's amendments of WSU's water rights be found unconstitutional and in violation of statutes and law.

II. Assignments of Error

A. Assignments of Error

Appellants raise the following assignments of error:

1. The PCHB erred by issuing the Order on Summary Judgment (as amended on reconsideration), dated January 18, 2008, granting summary judgment to Ecology and WSU on legal issues 1, 2, 3, 4, 5, 6, 8, 9, 12, 13, 14, and 17, as numbered in the PCHB decision. CP 13, AR 85.¹

2. The PCHB erred by issuing the Findings of Fact, Conclusions of Law, and Order, dated April 17, 2008, approving Ecology's changes to six groundwater rights held by WSU to serve its Pullman campus, see AR 89, and by issuing its Order Denying Reconsideration Re: Final Decision, dated June 6, 2008. AR 95.

¹ The Administrative Record (AR) is duplicated in the Clerk's Paper (CP) No. 13. We cite AR citations for the remainder of the brief.

3. The Board erred by issuing the Final Order's Findings of Fact 16, , "Ecology approved each of WSU's change applications except for the one associated with Well No. 3", to the extent the finding determines approval of those change applications were correct.

4. The Board erred by issuing the Final Order's Findings of Fact 17 to the extent the board found that Well No. 7 is more than supplemental in nature or that WSU's primary certificates were for municipal supply purposes.

5. The Board erred by issuing the Final Order's Findings of Fact 18, to the extent the Board found that the amount of water originally authorized under Permit No. G3-28278P is not legally dependent on amounts authorized under invalid Claim No.098524.

6. The Board erred by issuing the Final Order's Findings of Fact 19, to the extent the Board found or adopted the determination or reasoning of Ecology as described in the finding.

7. The Board erred by issuing the Final Order's Conclusion of Law 2, to the extent that the board concluded that WSU retained water rights equal to the amount originally authorized on its original permits, claims, and certificates for amounts never put to beneficial use.

8. The Board erred by issuing the Final Order's Conclusion of Law 3, including that "the invalidity of Claim No. 098524 did not require Ecology to subtract the quantities associated with that claim from the quantities authorized under Permit No. G3-28278P."

9. The Board erred by issuing the Final Order's Conclusion of Law 4, including the conclusion that Permit No. G3-28278P was not "*calculated from, or legally dependent on,* WSU's other pre-existing water rights or claims."

10. The Board erred by issuing the Final Order's Conclusion of Law 5 including that "Ecology's approval of the change application for Permit No. G3-28278P did not unlawfully enlarge the right represented by that permit."

11. The Board erred by issuing the Final Order's Conclusion of Law 12, including that "Appellants failed to meet their burden of demonstrating impairment such that RCW 90.44.100(2) would preclude approval of the change applications." The Board's findings of fact are not sufficient to support the conclusion given that appellants were erroneously excluded from presenting evidence on the issue of enlargement.

12. The Whitman County Superior Court erred by issuing its Decision on Petition [sic] for Review of Administrative Decision, dated November 3, 2011, CP 93, upholding the PCHB's Order on Summary Judgment (as amended on reconsideration), AR 85, Findings of Fact, Conclusions of Law, and Order, AR 89, and Order on Reconsideration Re: Final Decision. AR 95.

B. Issues Pertaining to Assignments of Error

Appellants raise the following issues pertaining to assignments of error:

1. In *Lummi Nation v. State of Washington* the Supreme Court ruled that the MWL does not facially violate separation of powers and due process because it may be interpreted in a manner that does not adjudicate past facts. Does the PCHB's determination that the MWL exempts WSU's unused historically non-municipal water rights certificates from a determination of past relinquishment offend separation of powers? (Assignments of Error 1 (PCHB Legal Issues 1-4, 8), 12.)

2. After enactment of the MWL, Ecology adopted an informal policy to conduct "simplified determinations" of the past use of municipal water rights in the amendment process. In *Lummi Nation*, the Supreme Court held that detailed analysis of water rights in the amendment process saves the MWL from due process violations. Does Ecology's use of the simplified determination policy to process WSU's water rights amendment violate due process and the

requirement that agency policies not conflict with statutory directives? (Assignments of Error 1 (PCHB Legal Issue 1-4), 12.)

3. Under the Washington water code, a water right is perfected when the full amount of water authorized is put to actual beneficial use. May water rights held by certificate that have not been put to full use be considered perfected? (Assignments of Error 1 (PCHB Legal Issues 1-5), 12.)

4. Does the expansion of WSU's water rights exempt them from supplemental review under the State Environmental Policy Act (SEPA), Ch. 43.21C RCW? (Assignments of Error 1 (PCHB Legal Issue 1-4, 17), 12.)

5. Does the "new information" mandate of SEPA regulation WAC 197-11-600(3)(b)(ii) require Ecology to evaluate the declining condition of the Grande Ronde Aquifer when processing the WSU water right amendments? (Assignments of Error 1 (PCHB Legal Issue 17), 12.)

6. Did the PCHB improperly limit the evidence to be submitted in support of Appellants' impairment and public welfare claims based on its holding that, pursuant to the MWL, there was no expansion of WSU's rights? (Assignments of Error 1 (PCHB Legal Issues 1-4, 12, 14), 2, 11, 12.)

7. Does the expansion of WSU's water rights shield them from review under the "safe sustaining yield" mandate of RCW 90.44.130? (Assignments of Error 1 (PCHB Legal Issue 1-4, 13), 12.)

8. Does the "safe sustaining yield" inquiry under RCW 90.44.130 apply in the groundwater right amendment process? (Assignments of Error 1 (PCHB Legal Issue 13), 12.)

9. Were WSU's water rights lost as a result of its longstanding failure to put water to use with reasonable diligence? (Assignments of Error 1 (PCHB Legal Issue 5), 12.)

10. Did WSU abandon Claim No. 098523 (appurtenant to Well No. 2)? (Assignments of Error 1 (PCHB Legal Issues 9), 12.)

11. Did the PCHB use the wrong standard for summary judgment review of WSU's efficiency when ruling that layperson testimony could not raise genuine issues of material fact? (Assignments of Error 1 (PCHB Legal Issue 6), 12.)

12. Must Ecology evaluate reasonable efficiency, a component of the beneficial use standard for water rights, in the groundwater amendment process? (Assignments of Error 1 (PCHB Legal Issue 6), 12.)

13. Ecology denied amendment of WSU's Claim No. 098254 (appurtenant to Well No. 3), finding that it was *invalid*. Can this *invalid* water right serve as the *primary* right for WSU's supplemental Permit No. G3-28278P (appurtenant to Well No. 7)? (Assignments of Error 2-11, 12.)

III. Statement of the Case

A. Procedural History

A detailed procedural history of this matter is set forth in the PCHB Order on Summary Judgment (as amended on reconsideration) (Jan. 18, 2008), AR 85 at 4-7, (appended in App. 4) and the PCHB's Findings of Fact, Conclusions of Law, and Order (Apr. 17, 2008), AR 89 at 3-5 (appended in App. 5).

In summary, WSU claimed or was issued seven water rights between 1935 and 1983. WSU failed to put over half its water rights to use at any point since they were issued. In 2004 WSU applied to Ecology's Water Resources Program to amend its seven water rights to allow it

to pump any authorized quantity from any of its eight wells (see App. 1 table summarizing WSU water rights). AR 89. Environmental analysis was prepared by WSU and was not supplemented by Ecology. AR 22, Ex. 10. Appellants Cornelius and Palouse Water Conservation Network (PWCN) filed letters of objection with Ecology detailing their concerns. Ex. A-27 with Att. 5. Ecology processed the WSU applications and approved the proposed amendments in 2006. AR 1 at 3-4. Appellants timely appealed Ecology's decisions to the PCHB. AR 89 at 5. In January 2008 the PCHB issued an amended summary judgment order, resolving most issues against Appellants. AR 85. In that order, the PCHB ruled that it would not decide any constitutional claims, AR 85 at 8-10, a holding it reiterated in its Order of Clarification. AR 79.

The PCHB held hearings in late January 2008 to resolve the three issues not decided on summary judgment.² AR 85 at 50. The PCHB issued its Final Order in April 2008, and an order denying reconsideration in June 2008. AR 89; AR 95.

Appellants timely appealed to Whitman County Superior Court. The court issued its final order affirming the PCHB on November 3, 2011. CP 93. Appellants then appealed the PCHB's orders to this court.

Meanwhile, in September 2006 an unrelated lawsuit was commenced that brought facial challenges to the constitutionality of certain provisions of the Municipal Water Law. *Lummi Nation v. State of Washington*, 170 Wn.2d 247, 241 P.3d 1220 (2010). The court there decided that the Municipal Water Law was facially constitutional. Appellants Cornelius and Sierra Club, and Respondents WSU and Ecology were parties to the *Lummi Nation* suit.

The same water law provisions at issue in *Lummi Nation* figure prominently in the PCHB's decisions regarding the WSU water rights at issue in this appeal. Thus, Whitman

² Although two issues, impairment and public welfare, were decided in the Final Order, AR 89 at 32-37, it is the summary judgment ruling limiting evidence relating to these two issues, AR 85 at 39-42, 45, to which Appellants assign error in this appeal.

County Superior Court stayed the present appeal until *Lummi Nation* was finally resolved in October 2010.

B. Facts Relevant to Case

1. WSU Water Rights

WSU originally held seven water rights for the Pullman campus. Ecology determined one of the seven, Claim No. 98524, was invalid when processing WSU's applications to amend. WSU did not appeal that determination. The table appended in Appendix 1, reproduced from Ecology's Reports of Examination, provides basic information about each of WSU's six rights, which include two claims, three certificates, and one permit that is also a supplemental right.

Ecology relied on and applied the MWL when it processed WSU's applications for amendments. *See* RCW 90.03.015(3), (4); RCW 90.03.330(3). Ecology found that all of WSU's water rights were for "municipal water supply purposes" and therefore, "3,312 acre-feet of inchoate water [is] available for future use by WSU." *E.g.*, Ex. A-19 at 3, 6 (Report of Examination (ROE) for Water Cert. No. G3-22065C) (each of the approved ROEs contains identical language). Ecology found that WSU had historically failed to use more than half of its authorized water rights, but nevertheless concluded that "WSU has continued to exercise their right from other sources well." *Id.* at 3

2. The decline in Grande Ronde Aquifer water levels

The status of the Grande Ronde Aquifer (Aquifer or GRA), source of supply for all of WSU's water rights, provides important context for the issues in this case. The parties agreed and the PCHB found that declining water levels in the aquifer "threaten all water users in the basin":

[A]ll parties concede the Grande Ronde Aquifer (GRA) is experiencing a long-term and troubling trend of declining water levels that, if not adequately

addressed, will threaten all water users in the basin. The testimony and evidence were undisputed in this respect . . .

AR 89 at 3. Specifically, water levels in the Aquifer have declined an average of 100 feet since the 1930's when measurements began. AR 89 at 21-22 (FF 38). These declines have affected all wells across the basin, including the domestic well owned by Appellant Scott Cornelius. He recorded a decline of 12.5 feet over fifteen years in his private well. AR 89 at 18-19 (FF 30). Appellants Sierra Club Palouse Group and PWCN also have many members who depend on the Aquifer for drinking water, either individually or as customers of public water suppliers. Ex. A-27, Att. 5; AR 89 at 17-19 (FF 28-30).

The PCHB's Final Order described the uncertainty surrounding the Aquifer's water capacity:

The extent and availability of groundwater resources in the GRA are poorly known, due in part to a lack of precise information about the aquifer's rate of recharge. It is therefore impossible to predict with any degree of certainty how long the water in the GRA will last.

AR 89 at 20; *see generally* AR 89 at 19-22 (FF 32-40). The PCHB also found that pumping exceeds recharge in the Aquifer, directly affecting the Pullman-Moscow region:

The GRA is a declining aquifer because the pumpage from the GRA exceeds the amount of recharge into the GRA. . . . Increases in aggregate pumping from the GRA in the Pullman-Moscow region will necessarily cause water-level declines within the aquifer

AR 89 at 21 (FF 36-37). Water level declines threaten the Palouse Basin communities which depend on the GRA as their "sole source" of water supply. Ex. A-27.

At present, the only recognized method to slow or reverse the aquifer declines is to reduce pumpage. AR 89 at 21. Consolidation of WSU's water rights will unquestionably increase WSU's access to and ability to pump more water. AR 85 at 29. The likelihood of increased water usage created by the WSU water right amendments would exacerbate declines in the aquifer that threaten senior water rights holders and Pullman basin citizens. The over-

appropriation and decline of the GRA demonstrates that increased use by WSU will impact existing water users. Beneficial use provisions of water law apply to municipal water suppliers in order to avoid such illegal impacts.

3. WSU's historic nonuse of its water rights.

WSU's nonuse of its water rights is substantial. As noted by Ecology, WSU has historically used only about 37 percent of the rights it holds on paper, pumping a maximum of only 1,977 acre-feet per year (afy) out of the authorized 5,300 afy. Ex. A-1 at 3.

WSU's water department staff produced a table of water use that was introduced as an exhibit that all parties relied on before the PCHB. The table summarizes WSU's annual water usage from each well for each year through 2006. AR 52, Ex. 2 (appended at Appendix 2).³ Further, the table demonstrates WSU's continuous failure to use over half of its authorized water rights.

The WSU water use table is the factual predicate for Petitioner's assignments of error in this appeal. The table is particularly helpful when reviewed in conjunction with the WSU water rights summary, which identifies the maximum quantity authorized for each of WSU's rights. App. 1. For example, the summary indicates that WSU was authorized to withdraw 720 afy from Well No. 2, but the table confirms that WSU stopped pumping from Well No. 2 in 1978. See Section IV(F)(2), *infra* (argument re abandonment of Claim No. 98523). The summary indicates that WSU was authorized to withdraw up to 2,260 afy from Well No. 4, but the table confirms that WSU pumped a maximum of only 1,090 afy in 1969 from Well No. 4. See Sections IV(D)(1) and (3), *infra* (arguments re relinquishment and non-perfection of Cert. 5070-

³ This document, "WSU Pullman Campus Water System – Annual Volumes Pumped in Acre-Feet," was derived from a table that tracked WSU's pumpage in million gallons per year. AR 20, Ex. 1. The afy table is utilized here because of ease of comparison with the quantities set forth in WSU's water rights, which are also quantified using the afy measurement. One acre-foot equals 325,851 gallons.

A). Similarly, WSU was authorized to withdraw up to 720 afy from Well No. 5, but from 1986 to 1996 WSU failed to pump from that well at all. The annual pumpage from Well No. 5 never exceeded 228 afy. *See* Sections IV(D)(1) and (3), *infra* (arguments re relinquishment and non-perfection of Cert. 5072-A).

Despite the discrepancies between authorized water rights and actual use, the PCHB adopted WSU's argument that it was pumping quantities authorized by one water right from other, unauthorized wells. AR 85 at 37-38. The evidence of such a practice does not appear in App. 2's actual use figures. For example, contrary to the PCHB's ruling on abandonment, AR 85 at 34-38, the WSU water use table does not show that WSU pumped equivalent quantities from Well No. 3 when it stopped using Well No. 2 in 1978.⁴ The chart demonstrates that there was no equivalent increase in use of Well No. 3.

The PCHB acknowledged that WSU had never used the full measure of its water rights: "The historical pumping data relied upon by all parties in this proceeding also shows that the quantities authorized in the certificates far exceeded the amount of water that had previously been put to actual beneficial use under the permits." AR 85 at 20. Similarly, WSU acknowledged throughout the proceedings that it has failed to use the amount of water it is authorized to use and that its water use has declined over time. AR 24 at 5; AR 27 at 3. Nevertheless, WSU's defense rests on its claim that its rights were preserved by virtue of unauthorized pumping from various wells.

WSU's continuous failure to use substantial amounts of its allotted water is the critical reason why the PCHB orders were in error. The declining condition of the GRA makes WSU's attempt to expand its rights critical to senior water right holders and the citizens of the Pullman-

⁴ The water right for Well No. 3 was deemed invalid by Ecology, *see* Ex. A-5, and Sections IV(F)(2) and (4).

Moscow region. These two facts, WSU's nonuse and the condition of the Aquifer, underlie Appellants' assignments of error in this appeal.

IV. Argument

A. Standard of Review

1. Review of Agency Order

This appeal, challenging decisions of the PCHB, is governed by the Washington Administrative Procedure Act (APA), Ch. 34.05 RCW. Whitman County Superior Court provided a first level of appellate review, but this court reviews the PCHB decision from the same position as the superior court and applies APA standards directly to the PCHB record. RCW 34.05.558; *City of Union Gap v. Dep't of Ecology*, 148 Wn. App. 519, 525, 195 P.3d 580 (2008). The relevant APA judicial review standards authorize the court to grant relief if the order is in violation of constitutional provisions, is outside the statutory authority of the agency, erroneously interprets or applies the law, is not supported by substantial evidence, or is arbitrary and capricious. RCW 34.05.570(3).

The PCHB was required to interpret and apply the Municipal Water Law to a number of issues in this appeal. Under the "error of law" standard, this Court may substitute its judgment for that of the agency. *RD Merrill v. Pollution Control Hrgs. Bd.*, 137 Wn.2d 118, 142-43, 969 P.2d 458 (1999). When the inquiry requires construction of a statute, review is de novo. *Port of Seattle v. Pollution Control Hrgs. Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004); *Motley-Motley v. Ecology*, 127 Wn. App. 62, 71-71, 110 P.3d 812 (2005). Absent ambiguity, the Court does not defer to an agency's interpretation of a statute. *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005).

Because the decision appealed (but for one issue) is a summary judgment order, there are no findings of fact. The court must therefore overlay the APA standard of review with the

summary judgment standard. Facts in the record are viewed in the light most favorable to the nonmoving party. This court evaluates facts in the record de novo and the law in light of the error of law standard, also de novo. *Skagit County v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 317-18, 253 P.3d 1135 1140 (2011), citing *Verizon Northwest, Inc. v. Wash. Emp't Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). A recent case discusses the relationship between the “substantial evidence” and “error of law” standards in reviewing a summary judgment order involving municipal supply water rights and relinquishment.

[T]he substantial evidence standard applies only to an agency's findings of facts. The Hearings Board's order here did not include findings. And findings are neither necessary nor helpful for our review of a summary judgment. There is no dispute over the material facts here, in any event. Instead, the question before us, specifically whether Ahtanum meets one of the statutory criteria to excuse nonuse, is a question of law.

Union Gap, 148 Wn. App. at 525-26 (citations omitted).

2. Review of Constitutional Claims

The PCHB disclaimed jurisdiction over all constitutional issues, both facial and as applied. AR 85 at 9-10, AR 79. WSU opposed that ruling, but did not appeal it. The *Lummi Nation* decision was issued after conclusion of the PCHB case. This court's review of Cornelius' separation of powers and due process claims is conducted pursuant to the APA standards of review for constitutional claims and de novo review. RCW 34.05.570(3)(a), (d). That these issues were not heard or decided by the PCHB is not a bar to review. *Peste v. Mason County*, 133 Wn. App. 456, 469-70, 136 P.3d 140 (2006) (failure to raise due process issues before hearings board does not preclude raising them on appeal). *Lummi Nation* serves as intervening precedent and does not bar review. *Lang v. Wash. Dep't of Health*, 138 Wn. App. 235, 247-48, 156 P.3d 919 (2007) (court's evaluation of agency due process review employed new rule announced by Supreme Court subsequent to agency review). Moreover, it is the

function of the judiciary to enforce separation of powers rules. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009).

3. Review of State Environmental Policy Act Claims

For State Environmental Policy Act (SEPA) claims, agency action is evaluated under the clearly erroneous standard. *Kettle Range Cons. Gr. v. WA Forest Prac. Hrgs. Bd.*, 120 Wn. App. 434, 455-56, 85 P.3d 894 (2003). However, review of agency decisions on questions of law is de novo, based on the administrative record. *Dioxin/Organochlorine Ctr. v. Pollution Cont. Hrgs. Bd.*, 131 Wn.2d 345, 352, 932 P.2d 158 (1997).

B. Basic Elements of Washington Water Law.

Both surface and groundwater rights are created when “available public water is appropriated for beneficial use”:

Both the surface water code and the groundwater code are premised on the doctrine of prior appropriation, which applies when an applicant seeks to obtain a water right in this state. RCW 90.03.010; *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000); *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232, 240-41, 814 P.2d 199 (1991). Under the prior appropriation doctrine, a water right may be acquired where available public water is appropriated for beneficial use, subject to existing rights. RCW 90.03.010. . . . Thus, before a groundwater permit may be issued to a private party seeking to appropriate groundwater, Ecology must investigate and affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare. RCW 90.03.290.

Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 7-8, 43 P.3d 4 (2002).

When Ecology finds that an application meets the four-part test described above, the agency issues a water permit authorizing the user to commence use of water. RCW 90.03.290(3), 90.44.050, 90.44.070 (additional requirements for groundwater permits). To maintain the water right, the user must exercise reasonable diligence in constructing the water works and putting the authorized amount of water to use. RCW 90.03.320. Once the project is complete, Ecology confirms the use and issues a certificate for the amount of water actually used

or “perfected.” The permit holder loses the right to any authorized water not put to use. RCW 90.44.080. “Perfection” of an appropriative right is a term of art, and requires that a water right must be appropriated and actually applied to a beneficial use. *RD Merrill*, 137 Wn.2d at 129 (emphasis added).

Water rights may also arise from water use that commenced prior to adoption of the water codes (1917 for surface water, 1945 for groundwater). Such historical water use is documented through a water right “claim” that serves as indicia of the right. Claims are filed with Ecology pursuant to the Claims Registration statute, RCW 90.14.041.

Once a water right is established by claim or certificate, the water user maintains the right through continuous, beneficial use of the allotted quantity. 90.44.220, .230. Water rights are lost for nonuse under various mechanisms, including cancellation, RCW 90.03.320, rescission,⁵ relinquishment, RCW 90.14.130, and common law abandonment. *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 777-81, 947 P.2d 732 (1997). Critical to this case, the right is lost at the time the nonuse occurs. E.g., RCW 90.14.130 (when it appears a water right has reverted to the state for nonuse, Ecology shall issue an order of relinquishment); *Union Gap*, 148 Wn. App. at 526-27 (discussing relinquishment and time of loss statute RCW 90.14.130); *Motley-Motley*, 127 Wn. App. at 75, 77-78 (relinquishment review focuses on historic facts of nonuse); see *Dep’t of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985) (riparian rights forfeited at time of nonuse, 15 years after 1917 surface water code enacted, rather than date officially adjudicated).

Water users may seek amendments to their claims, permits, and certificates, as did WSU in this case. RCW 90.03.380; 90.44.100. It is well settled law that, in determining whether to

⁵ Rescission is an administrative process to revoke a water right in full or part because the authorized use was never perfected. See Dept. of Ecology, PRO 1000 Water Resources Program Procedure, § XXIII(B) (rev. 10-23-90).

authorize an amendment, Ecology must conduct a tentative determination of the extent and validity of the water right. RCW 90.44.100(2)(c); *RD Merrill*, 137 Wn.2d at 127. If a water right has not been perfected, it is not eligible for amendment.⁶ If a water right has been relinquished or abandoned, it is also not eligible for amendment. *PUD No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 798, 51 P.2d 744 (2002); *Twisp, supra*. A water right holder loses a right that is used inefficiently or wasted. *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 478-79, 852 P.2d 1044 (1993). A lost right is not eligible for amendment.

When processing an application to amend, Ecology must evaluate the history of use of the water right. To establish the extent and validity of the right, permit writers evaluate year-by-year usage, particularly if there are indications of historic nonuse. AR 23, Ex. 2 at 3-4.

C. The PCHB's determination that WSU's water rights were for "municipal water supply purposes" applied the Municipal Water Law in an unconstitutional manner under the separation of powers and due process doctrines described in *Lummi Nation v. State of Washington*.

1. Background

It is undisputed that WSU has failed across the decades to use more than half of the water quantities authorized by its permits, claims, and certificates. Major portions of these rights became invalid at the point in time that the university failed to put the authorized amount of water to use or stopped using the right for a specified time. Under Washington's statutes and case law they were lost for nonuse at that time.

Disregarding this rule, the PCHB applied the MWL to determine that WSU's rights were still valid for the historically authorized quantities instead of the amounts actually used. In so doing, the PCHB erroneously reinstated water rights that had been lost or relinquished years

⁶ The sole exception is for unperfected groundwater permits, which may be amended. RCW 90.44.100. WSU holds one water permit.

earlier. Cornelius contends the PCHB erred by interpreting and applying the Municipal Water Law in a way that violates constitutional separation of powers and due process protections.

An ‘as applied’ challenge occurs where a plaintiff contends that a statute's application in the context of the plaintiff's actions or proposed actions is unconstitutional. If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. . . .

Wash. State Republican Party v. Pub. Disclosure Comm'n, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000).

The history of the 2003 MWL begins with Ecology's practice of issuing certificates for unperfected water rights. It is hornbook law that water users are required to actually use their rights in order to maintain them. Nevertheless, in the mid-20th century, the Water Resources Program began to issue certificates to certain water suppliers on the basis of their system capacity, instead of actual use. That “pumps and pipes” practice has been the subject of two Supreme Court decisions, *Lummi Nation, supra* and *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 947 P.2d 1241 (1998).

In *Theodoratus*, the permit holder challenged Ecology's change in practice to no longer apply the pumps and pipes policy when the project was complete; and instead base the final certificate on quantities actually used. The court upheld Ecology's mid-course correction of the permit, holding the 40-year pumps and pipes practice to be *ultra vires*. The decision did not involve municipal water purveyors. *Id.* at 594.

After *Theodoratus*, the Washington State Legislature enacted the MWL. Laws of 2003, 1st Spec. Sess., ch. 5. The statute defined the terms “municipal water supplier” and “municipal water supply purposes.” RCW 90.03.015(3), (4). The Law also stated that unperfected

municipal water right certificates created by the pumps and pipes policy were water rights “in good standing”:

(3) This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

RCW 90.03.330(3).

In 2006, Lummi Nation and other groups challenged the 2003 MWL as facially unconstitutional. They argued that certain provisions of the MWL improperly reinstated water rights that had already been relinquished, and that the statute’s “in good standing” language validated the entire amount of water authorized in the original right even where the rights had previously been lost for nonuse. This, the challengers contended, was legislation of facts that had already been adjudicated or were the proper subject matter of the courts.

The Supreme Court rejected the facial challenge, relying on the words of Justice Brachtenbach to explain the difference between legislative findings of fact and adjudication of fact:

All these cases involve the element of adjudication, and we believe that a finding of "economic impossibility" is similarly adjudicatory. A legislature can declare that economic impossibility shall constitute, in the future, a defense in actions involving contractual disputes. A legislature can find that a worldwide shortage of petroleum exists. Finding that existing contracts, entered into at least 6 months prior to the legislation, have become economically impossible to perform, however, is a legal conclusion, a result which follows from examination and consideration of circumstances in a particular case and interpretation and application of legal principles to those facts. As Mr. Justice Holmes wrote in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150 (1908);

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 *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 272, 534 P.2d 114 (1975). The court found the statute constitutional because “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 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* at 265. The Court also rejected the due process challenge, finding that junior users are protected because the “extent and validity” review required during the amendment process, i.e. RCW 90.44.100, remained intact and would operate to reconcile water rights previously lost for nonuse. *Lummi Nation* at 270-71.

2. *Lummi Nation* Separation of Powers

In the present matter, the PCHB interpreted relevant provisions of the MWL in the manner the Supreme Court posited would run afoul of the separation of powers doctrine. The PCHB erred by applying the 2003 definition of “municipal water supply purposes” to the total amount authorized on WSU’s original certificates rather than the amounts perfected and maintained by actual use. The PCHB failed to acknowledge that certain quantities of those rights had been relinquished or otherwise lost prior to the 2003 legislation. The PCHB effectively altered the past legal consequences of WSU’s failure to use its allotted water.

Lummi Nation relied on the *O'Brien* court’s rejection of a new law purporting to find that contracts pre-dating the law were impossible to perform. Such a determination is a legal inquiry that requires consideration of facts and circumstances and application of law to those facts.

Lummi Nation, 170 Wn.2d at 264. Similarly, determining whether an existing water right has in the past been perfected, used beneficially and with reasonable diligence, or relinquished, is a

judicial inquiry. The PCHB's application of the MWL assumed that the Legislature, in enacting the law, made a legal determination that WSU's historic water rights were not lost by operation of the 2003 MWL long before it was enacted. This contradicts the *Lummi Nation* conclusion that the 2003 MWL was constitutional precisely because the Legislature did not change past facts and their legal consequences relating to water rights. *Id.*

The PCHB should have found that WSU water right certificates 5070-A and 5072-A had been partially relinquished due to lack of perfection and lapsed usage for a period greater than five years. Because these two certificates were not issued for "municipal water supply purposes" and the failure to use occurred prior to 2003, they were subject to the relinquishment law. The PCHB erred by applying the 2003 definitions and "in good standing" provision set forth at RCW 90.03.015(4) and 90.03.330(3) to conclude that the originally authorized quantities remained intact. This court should reverse the PCHB's unconstitutional interpretation of the MWL.

The PCHB's erroneous decision that WSU's water rights are valid in the originally authorized quantities permeated several other issues in this appeal. For example, the PCHB's interpretation that the MWL shielded the two certificates from relinquishment led to the PCHB's conclusion that the amendment did not expand WSU's water rights. Holding there was no expansion, the PCHB then erroneously determined that there was no physical change in WSU's water rights that required review under SEPA, that evidence regarding impairment and the public welfare must be limited, and that the statute requiring that the GRA be managed to achieve "safe, sustaining yield" was inapplicable.

Properly interpreted, the MWL prospectively re-defined the purpose of use of certain water rights, and put unperfected water right certificates into good standing. But the MWL did not, and could not from a constitutional standpoint, alter past aspects of WSU's water rights, i.e.,

those portions that were relinquished and lost before the MWL was passed. If those rights were lost for nonuse, the PCHB could not apply the MWL to change that legal conclusion.

3. *Lummi Nation* Due Process

Due process questions arise in this case based on Appellant Scott Cornelius' place in line in the overall scheme of water rights that withdraw from the GRA. As a junior water user, his place in line is properly subject to impact by senior rights, including those of WSU. However, junior rights do enjoy protection from enlargement that results from revival of senior rights that have been lost for nonuse. The PCHB's application of the MWL to revive WSU's relinquished water rights effectively moved the Cornelius right further down the line. The PCHB's limitation on Cornelius' impairment evidence prejudiced his ability to protect his rights in violation of procedural due process. *See Motley-Motley*, 127 Wn. App. at 81 (to establish due process violation in administrative proceedings, party must be prejudiced with regard to preparation or presentation of a defense).

In *Lummi Nation*, the court held that beneficial use requirements applicable to water rights were not disturbed by the MWL. The Court explained that the groundwater amendment process required by RCW 90.44.100 (the statute at issue here) as interpreted by *RD Merrill* (prohibiting transfer of groundwater quantities lost for nonuse) protects the due process rights of junior water right holders. 170 Wn.2d at 270-71. The Court found that the 2003 municipal amendments by themselves do not "resurrect any relinquished rights." *Id.* at 268.

Further, the court explained, a related but unchallenged provision of the 2003 MWL identifies the groundwater amendment process as the point at which inchoate certificates may be revoked or diminished to protect junior right holders. The provision states:

(2) Except as provided . . . for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a

surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015

RCW 90.03.330(2), cited at *Lummi Nation*, 170 Wn.2d at 268, n.12 (emphasis added). The same statute requires that a water right appropriation be “perfected” before a certificate may issue:

(1) Upon a showing satisfactory to the department that any appropriation has been perfected in accordance with the provisions of this chapter, it shall be the duty of the department to issue to the applicant a certificate stating such facts in a form to be prescribed by the director, and such certificate shall thereupon be recorded with the department. . . .

RCW 90.03.330(1) (emphasis added). Thus, under the court’s reasoning, when water right applicants such as WSU apply to amend their water right certificates pursuant to RCW 90.44.100, Ecology is required, pursuant to the MWL, to determine what quantities have been perfected, and to “revoke or diminish” those water rights that do not meet perfection criteria or are otherwise subject to loss for nonuse. The 2003 law did not resurrect rights already lost. *Lummi Nation* at 271.

The *Lummi* Court concluded that Washington law provides “considerable process before any change can be made, and any impact on the rights of others will be at best collateral and indirect.” *Id.* at 270. That “considerable process” is the statutory directive that the Department of Ecology “can approve changes to water rights only to the extent they are valid.” *Id.* at 270-71; see RCW 90.44.100; *RD Merrill*.

4. Conclusion

The reasoning and rulings of *Lummi Nation* control the outcome of this case. The PCHB’s erroneous application of the MWL is the basis for the PCHB’s erroneous decisions on other issues in the summary judgment order.⁷ The fundamental error of the PCHB is the

⁷ Issues 1-4 in the PCHB decision were decided erroneously due to the PCHB’s presumption that retroactive application of the Municipal Water Law to revive lost rights was constitutional. The PCHB disclaimed jurisdiction over constitutional questions, but decided these issues in a manner that, when applied to the substantive issues in the case, erroneously excused WSU’s nonuse of its water rights.

unconstitutional application of the 2003 MWL to hold that WSU's water right quantities are those historically authorized on the original certificates, rather than those amounts actually put to beneficial use. The following four issues address the PCHB's erroneous rulings stemming from this fundamental error.

D. Municipal Water Law Primary Claims

1. The PCHB erred in redefining WSU's non-municipal certificates (5070-A and 5072-A) as municipal, and then reviving relinquished portions of those rights based on the Municipal Water Law.

In PCHB Legal Issue No. 8, the PCHB ruled that, because all of WSU's water rights qualified as municipal supply rights pursuant to RCW 90.03.015(4), they were therefore categorically exempt from relinquishment due to nonuse or non-perfection, relying on the statutory exemption from relinquishment provided for rights exercised for "municipal water supply purposes." RCW 90.14.140(2)(d). AR 85 at 33-34. This ruling was legal error. *Skagit Hill, supra*.

Two of WSU's water right certificates, No. 5070-A (priority 1962) and No. 5072-A (priority 1963) were originally issued for domestic, community domestic, and stockwater purposes. These rights were never fully perfected or utilized. According to WSU's pumpage records, WSU used Cert. 5070-A (appurtenant to Well No. 4) to pump a maximum of 1,090 acre-

In PCHB Legal Issue No. 1, the PCHB ruled that the university met the definition of a municipal water supplier. This conclusion is error to the extent it applies to the originally authorized water rights instead of to the amount historically put to beneficial use. AR 85 at 10-11 and n.5.

In PCHB Legal Issue No. 2, the PCHB held that each of WSU's six rights is presently being utilized for municipal purposes as defined in the statute. AR 85 at 11-16. Again, this conclusion is erroneous when applied to portions of the original WSU rights previously lost for nonuse.

In PCHB Legal Issue No. 3, the PCHB erred by ruling that consideration and application of the critical factors of RCW 90.44.100 is "affected by the application of the MWL," including "Ecology's determination of the validity and extent of the groundwater rights for municipal supply purposes based on past beneficial use." *Id.* at 17-18 (emphasis added). The MWL does not alter Ecology's duty to fully evaluate amendment applications, even for municipal suppliers. See Section IV(D)(2) *infra*.

In PCHB Legal Issue No. 4, the PCHB ruled that the question whether the agency improperly applied RCW 90.03.330(3) to protect WSU's inchoate certificates from nonuse was a re-hash of Legal Issue No. 2. This was error to the extent that conclusion in Issue 2 was error.

feet per year (afy), compared to a total paper authorization of 2,260 afy. *See* App. 2. Approximately 1,100 afy in authorized quantities were never used. Cert. No. 5072-A (appurtenant to Well No. 5) was pumped at a maximum quantity of 228 afy, compared to a total paper authorization of 720 afy. *See* App. 2. Nearly 500 afy in authorized quantities were never used.

The domestic, community domestic, and stockwater purposes that define the two WSU certificates have been treated differently than municipal supply purposes in law and practice. The definitions section of the relinquishment statute defines the term “beneficial use” to include both domestic and municipal purposes, RCW 90.14.031, and then exempts from relinquishment only water rights exercised for “municipal water supply purposes.” RCW 90.14.140(2)(d). Ecology’s practice has been to distinguish between domestic and community domestic purposes versus municipal purposes. The applications and permits for these two water rights indicate designation of domestic and community domestic purposes, despite WSU’s provision of information in the “municipal supply” section of the applications. Exs. A-10, A-11, A-12, A-16, A-17, A-18.

The PCHB has applied relinquishment principles to water rights issued for community domestic purposes. *Olga Water Users, Inc. v. Dep’t of Ecology*, PCHB No. 08-123, Order Granting Motion for Summary Judgment (7/10/09); *Georgia Manor Water Ass’n v. Dep’t of Ecology*, PCHB No. 93-68, Final Findings of Fact, Conclusions of Law, and Order (11/9/94). The Washington Supreme Court has also distinguished community domestic from municipal purposes, most notably in the *Theodoratus* decision, 135 Wn.2d at 606 (Sanders, dissenting).

This Court has recently ruled that non-municipal water rights are subject to relinquishment review, even when proposed for transfer to municipal supply purposes. *Union*

Gap, 148 Wn. App. at 531-33. If the original use of the non-municipal right has lapsed for more than five years, it is subject to statutory relinquishment and the water is returned to public ownership. RCW 90.14.180. WSU's pumpage table reveals that Certificates 5070-A and 5072-A were not used for more than five years. App. 2. WSU partially or fully relinquished these rights by operation of law prior to 2003 because they were not used for municipal water supply purposes before the 2003 MWL became effective.

The PCHB's rulings on Legal Issues 1 through 4 and 8 are interconnected. Ruling first that all of WSU's originally authorized rights presently qualify as municipal supply rights – even the two certificates that were originally issued for domestic, community domestic, and stockwater purposes – the PCHB then retroactively applied that definition to ignore past nonuse. The PCHB decision effectively held that the two certificates had always been municipal supply rights. This was error. RCW 90.03.015(4) and 90.03.330(3) may not operate to adjudicate facts respecting the history of given water right. *Lummi Nation*, 170 Wn.2d at 263-65; *Tacoma v. O'Brien*, 84 Wn.2d at 272. Due process requires that historic nonuse be evaluated and relinquished in the RCW 90.44.100 groundwater amendment process. *Lummi Nation*, 170 Wn.2d at 270-71. Yet the PCHB declined to consider that application of the new MWL to past facts would be unlawful, and refused to apply nonuse principles as part of the extent and validity review of WSU's certificates.

The PCHB erred in holding that WSU's non-municipal water certificates, though historically not used, are exempt from relinquishment based on the presumption that the Legislature effectively re-defined such rights to be for "municipal water supply purposes." This constitutional and legal error is reviewed de novo by this Court, and must be reversed. RCW 34.05.570(3)(a), (d); *Skagit Hill*, *supra*.

2. The PCHB erred in approving use of a simplified determination process for analysis of extent and validity of WSU's water right amendments.

In PCHB Legal Issue No. 3, Appellants questioned whether Ecology could rely on the MWL as a basis for truncated evaluation of WSU's water rights. Ecology moved for summary judgment, acknowledging that it did use a truncated process (referred to as "simplified tentative determination"). AR 29 at 6-9. The PCHB ruled Ecology's analysis proper. AR 85 at 16-8. This was legal error.

The PCHB ruling presents two errors. First, the MWL does not excuse consideration of pre-existing limitations on water rights in the amendment process. *Lummi Nation*, 170 Wn.2d at 270-71. Although RCW 90.03.330(3) put inchoate municipal rights "in good standing," it did not exempt them from the review of nonuse that is required when a water user applies for an amendment. As discussed above, RCW 90.03.330(2) establishes that it is during the amendment process governed by RCW 90.44.100 that Ecology must "revoke or diminish" the quantity of water right.⁸ This provision implements procedural due process because it prevents water users from expanding their rights beyond actual, beneficial use in a manner that affects the vested rights of other water users. *Lummi Nation*, 170 Wn.2d at 270-71.

Second, as shown below, Ecology's "simplified tentative determination" policy contradicts water code statutes and is therefore *ultra vires*. The PCHB committed error in relying on this policy to ignore WSU's historic nonuse of its water rights.

When processing applications for amendments to water rights, Ecology must conduct a tentative determination of the extent and validity of the original rights proposed for change. *PUD No. 1 of Pend Oreille County*, 146 Wn.2d at 793-94; *RD Merrill*, 137 Wn.2d at 127; *Twisp*, 133 Wn.2d at 778-79. This analysis requires review of the historic use of the water right to

⁸ Revocation and diminishment under RCW 90.44.100 are the mechanisms by which Ecology implements statutory relinquishment, abandonment and other loss for nonuse or wasteful use.

determine how much water was actually beneficially used, which in turn governs the quantity available for transfer. *Id.*

In 2004, Ecology issued an informal guidance document entitled “POL 1120 Water Resources Program Policy for Conducting Tentative Determinations of Water Rights” (Aug. 30, 2004). AR 23, Ex. 2. This policy describes mechanisms for examining the historic validity of rights, including year-by-year examination of actual use. The guidance document explains the importance of investigating “whether the materials support a pattern of consistent water use,” and that a “prolonged period of nonuse should be a signal to the investigator” to obtain “a clearer picture of historic water use.” Permit writers are directed to “[e]valuate the instantaneous and annual quantities of water withdrawn and put to beneficial use.” AR 23, Ex. 2 at 3, 4. This approach is consistent with statutes and case law.

However, Section 5(c) of POL 1120 creates an exception, directing permit writers to conduct a “simplified tentative determination” when the “existing right is for a municipal water supply in accordance with RCW 90.03.330(3)” (the “in good standing” proviso). AR 23, Ex. 2 at 3 (§5(c)). For municipal rights, “an investigation of the complete history of the water right is not required.” *Id.* Ecology’s permit writer relied on this policy to ignore WSU’s historic nonuse of water, reviewing water use records only from 1989 through 2004.⁹ The permit writer believed the “in good standing” provision of RCW 90.03.330(3) immunized WSU’s water rights from forfeiture and that historic nonuse was irrelevant to his investigation. AR 23 at 4-5. Relying on

⁹ Q: Do you remember how far back in time the records went?

A: The report of exam indicates I reviewed the records from 1989 through 2004.

Q: And do you have a recollection that you looked at time frames going any further back in time that that?

A: I don’t recall that I did review anything prior to that.

AR 31, Att. 1 at 22-23. Ecology’s truncated review is also reported at page three of each Report of Examination under the heading “Water Use.” Exs. A-1, A-3, A-7, A-13 A-19, A-24.

Ecology's informal policy which was premised on a misinterpretation of the MWL, the PCHB failed to investigate WSU's lack of perfection and diligence, and relinquishment of its rights.

Misuse of the simplified determination process, compounded with the ruling that all of WSU's water rights were, retrospectively, *de facto* municipal water rights led the PCHB to commit fundamental legal error. First, of course, POL 1120's simplified determination process derives from misinterpretation of the MWL and contravenes *Lummi Nation*. See Section IV(C) above.

Second, POL 1120's simplified determination process contradicts statutory requirements and is *ultra vires*.¹⁰ Agency rules must be promulgated in accordance with legislative delegation. This requirement applies not only to "rules with a capital 'R,'" but to every agency "regulation, order, directive or policy." *Mills v. Western Wash. Univ.*, 170 Wn.2d 903, 911, 246 P.3d 1254 (2011) (challenging use of faculty handbook not promulgated as a rule); *State v. Brown*, 142 Wn.2d 57, 62-63, 11 P.3d 818 (2000) (holding Department of Corrections infraction rules, not adopted under the APA, inconsistent with governing statute).

The offending section of POL 1120, §5(c), purports to implement RCW 90.03.330(3) by exempting municipal purpose rights from the extent and validity test usually employed during the groundwater amendment process. This exemption contradicts the detailed evaluation of nonuse required when water amendments are processed. RCW 90.03.330(2); RCW 90.44.100; *RD Merrill* at 127. Ecology's policy is inconsistent with the governing statute, and thus *ultra vires*. See *Theodoratus*, 135 Wn.2d at 587 (rejecting Ecology's 40-year *ultra vires* policy of granting water right certificates based on system capacity).

¹⁰ The bulk of POL 1120 is consistent with RCW 90.44.100(2), which prohibits enlargement of water rights during amendment and requires close examination of the history of use of a water right to achieve that goal. However, Appellants also challenge Section 6 of POL 1120 in Section IV(F)(2) *infra*.

The PCHB's acceptance of, and reliance on Ecology's "simplified tentative determination" process as a basis for evaluating WSU's nonuse was error of law and predicated on the constitutional error of retroactively re-defining all of WSU's water rights as being for "municipal water supply purposes." See Section IV(C), *supra*. RCW 34.05.570(3)(a), (d). This Court reviews these issues de novo, and must reverse.

3. The PCHB erred in ruling that WSU had perfected and beneficially used all of its water rights.

With respect to PCHB Legal Issue No. 5, the PCHB erred in holding that the full quantity of WSU's unperfected groundwater certificates may be amended. In so ruling, the PCHB made two mistakes, deciding first that there is no legal distinction between unperfected permits and unperfected certificates, and second that it need not determine actual perfection of WSU rights. AR 85 at 21-25, 26-27.

Appellants contended below that WSU's three Certificates 5070-A, 5072-A, and G3-22065C, were never fully perfected and therefore not eligible for change.¹¹ RCW 90.44.100(2); *RD Merrill* at 125-27. WSU moved for summary judgment, arguing that perfection requirements do not apply to claims and certificates. AR 29 at 18-19.

The PCHB first erred in holding that the MWL converted WSU's previously lost rights into municipal purposes, thus shielding them from loss for prior nonuse. A water user must demonstrate perfection of its water right in order to amend it. *RD Merrill* at 129-31. This rule continues to apply to inchoate municipal water rights. *Lummi Nation*, 170 Wn.2d at 270-71. The PCHB, however, employed the "in good standing" status of inchoate municipal certificates to bar revocation of never-used water, ruling that:

¹¹ The exception to this rule involves changes to groundwater permits, which are inherently inchoate. Hence, Permit No. G3-28278P is the only one of WSU's suite of rights that is not subject to a showing of perfection at the time of change. However, this rule may not be used to speculate in water or fail to diligently put water to use. *RD Merrill* at 130-31. See Section IV(F)(1), *infra*, re WSU's lack of diligence.

. . . under the 2003 [MWL], the inchoate portion of these certificates need not have been put to beneficial use Accordingly, the Board holds that under the 2003 MWL, Ecology has the authority to change the point of withdrawal of the unperfected or inchoate portions of water rights documented by certificates.

AR 85 at 23. As discussed above, the MWL does not operate to retroactively change the nonuse of historically non-municipal certificates, nor does it exempt any right, non-municipal or municipal, from revocation and diminishment following extent and validity review. RCW 90.03.330(2).

The PCHB compounded its erroneous MWL ruling by misinterpreting perfection requirements. The PCHB found that any type of inchoate water right – permit or certificate – may be changed. AR 85 at 22, 23-25. This stands the essence of *RD Merrill* on its head. That decision carefully distinguished between permits and certificates, calling out the groundwater permit as a specific exception to the otherwise universal requirement that a water right (claim or certificate) be perfected before being eligible for transfer. Perfection is an essential element of water right certification, *RD Merrill*, 137 Wn.2d at 129, and “[i]nsofar 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, i.e., water has been applied to beneficial use.” *Id.* at 133. In so ruling, the PCHB wrongly relied on two appellate decisions, neither involving amendment of groundwater certificates. AR 85 at 24-25. *PUD No. 1 of Pend Oreille County* was addressed to inchoate surface water certificates. 146 Wn.2d at 784-85. *City of West Richland v. Dep’t of Ecology* reviewed unperfected “family farm” groundwater permits. 124 Wn. App. 683, 103 P.3d 818 (2004).

As a corollary its ruling that unperfected certificates are not subject to the *RD Merrill* prohibition on transfer, the PCHB again relied on the MWL to decide that it was “unnecessary for the Board to resolve the question whether any quantity of water authorized for change . . . is

unperfected for purposes of being lawfully transferred.” AR 85 at 27. This too was error. As discussed above, RCW 90.03.330(2) provides that the requirements of RCW 90.44.100 apply when municipal water rights are amended. *Lummi Nation* at 270-71.

The PCHB’s faulty logic represents error of law, disregard of facts, and unconstitutional application of the MWL. Its rulings are subject to de novo review by this Court, and must be reversed. RCW 34.05.570(3)(a), (d) and *Skagit Hill*.

E. Municipal Water Law Derivative Claims

1. Introduction

The PCHB’s reliance on the MWL as a basis to not apply nonuse principles and to permit expansion of WSU’s rights led to erroneous outcomes for three additional legal issues. This second category of Appellants’ claims arises from the PCHB’s approval of Ecology’s failure to consider the physical impacts of WSU’s ability to increase pumping from the GRA as a result of the water right amendments. Holding as a matter of law that WSU was not required to perfect water rights before amendment and that there was no loss for prior nonuse or lapsed use, the PCHB refused to consider whether Ecology erroneously failed to consider adverse physical impacts.

As discussed above, as a result of the amendments, WSU now has the legal and physical capability to increase its pumping. This is likely to cause further declines in the GRA and will inexorably harm groundwater pumping by other parties. AR 19 at 13-18. Such adverse impacts, and the failure to consider them, violate several laws as set forth below.

2. The PCHB erred in ruling that Ecology was not required to supplement SEPA review based on its holding that expansion of WSU's water rights was authorized by the Municipal Water Law, and further erred in ruling inapplicable the "new information" mandate of WAC 197-11-600(3).

The PCHB erred in ruling that SEPA review regarding impacts to groundwater was not required. This error was based on concluding that the MWL authorized expansion of WSU water rights. *See* Sections IV(C), *supra*. The PCHB also erred in ruling that Ecology was not required to consider "new information" (i.e., previously undisclosed information) about the mining of the GRA as part of Ecology's review of WSU's water right amendment applications. This Court reviews these legal errors *de novo*. *Dioxin-Organochlorine Ctr., supra*.

WSU's water right amendments, exceeding 2,250 gallons per minute, were subject to review under the State Environmental Policy Act, Ch. 43.21C RCW (SEPA). As a state agency, WSU served as "lead agency" for SEPA purposes and prepared the initial SEPA checklist in support of its own water right transfers. The checklist did not discuss the declining groundwater levels in the GRA, or how those water levels would be affected if WSU were allowed to materially increase its pumping of groundwater.¹² AR 85 at 5; AR 22, Ex. 10. WSU then issued a "determination of non-significance" (DNS) for the transfers, identifying no water resource impacts. AR 85 at 5; AR 22, Ex. 10.

Ecology relied on WSU's SEPA checklist and DNS when processing WSU's applications to amend its water rights. Ex. A-1 at 6-7. Petitioners requested that Ecology evaluate how approval of the WSU amendments could exacerbate declines in GRA levels. Exs. A-27, A-28. Ecology declined. Ex. A-1 at 6-8. As a result, no discussion or analysis of the potential impact of increased groundwater declines appears in any of the environmental documents. *Id.*

¹² The PCHB stated that the DNS did not "specifically" discuss groundwater declines in the Grande Ronde Aquifer. In fact, the DNS did not discuss this topic at all. AR 22, Ex. 10.

Before the PCHB, Appellants argued several reasons why Ecology erred by not supplementing the SEPA analysis prepared by WSU. Appellants and WSU both moved for summary judgment on issues relating to the SEPA claims. AR 17 and AR 24 at 27-28. The PCHB awarded judgment to WSU, holding that the water right “change itself does not allow any more water to be withdrawn on an instantaneous or annual basis than is allowed under the existing scheme of water rights.” AR 85 at 48. The PCHB also held there was no lack of material disclosure of environmental impacts because declining water levels in the Grande Ronde Aquifer have been known and studied for years.¹³ AR 85 at 49. Thus, the PCHB held, “[t]here was no new information sufficient to trigger any requirement to prepare additional environmental analysis.” *Id.*

Cornelius first assigns error to the PCHB decision that Ecology supplementation of the SEPA analysis was not warranted because there was no “new information.” SEPA regulations require agencies to conduct supplemental environmental review when “new information” about a project is available. WAC 197-11-600(3)(b)(ii). Importantly, the term “new information” means “lack of material disclosure” of significant environmental impacts:

When to use existing environmental documents.

...
(3) Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:

...
(b) For DNSs . . . preparation of a new threshold determination . . . is required if there [is]:

...
(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) . . .

WAC 197-11-600(3) (emphasis added).

¹³ The Board rejected WSU’s argument that Petitioners waived SEPA claims by not objecting to WSU’s DNS. AR 85 at 47. WSU did not appeal that decision.

The lack of material disclosure here was not that aquifer water levels were in decline. Rather, the undisclosed “new information” was the exacerbation of those declines WSU’s increased pumping capacity would cause. *Kiewit Const. Group, Inc. v. Clark Co.*, 83 Wn. App. 133, 142-43, 920 P.2d 1207 (1996) (requiring supplemental EIS because of proponent’s failure to discuss full effects of proposal). Ecology should have supplemented WSU’s DNS because that document did not disclose groundwater impacts associated with the amendments.

The PCHB’s ruling that the amendments do nothing more than allow WSU to pump its historically authorized quantities is wrong for two reasons. First, as discussed above, the proposed amendments would result in expansion of WSU’s remaining water rights by reinstating previously lost rights or portions of rights.

Second, whether quantities to be withdrawn were authorized by WSU’s original water rights is irrelevant to consideration of environmental impacts of proposed agency action. The purpose of SEPA is to evaluate impacts associated with actions taken or authorized by public agencies. RCW 43.21C.030. An agency action is not exempt from SEPA review simply because it is otherwise authorized by law. If otherwise authorized actions were exempt from SEPA review, no action would ever receive environmental review.

It is undisputed that consolidation of WSU’s rights will allow it to pump more water, and that pumping will exacerbate groundwater declines. AR 85 at 29, AR 89 at 21. WSU failed to disclose this material information. Therefore, Ecology’s failure to supplement WSU’s DNS with information on how approval would impact the aquifer was error. The PCHB erred in its unconstitutional interpretation of the MWL to find that WSU would not expand its water rights. The PCHB further erred by misinterpreting the SEPA regulation to hold that no undisclosed

information was available for Ecology to analyze before approving WSU's applications. This Court should reverse.

3. The PCHB erred by excluding evidence relevant to the impairment and public welfare inquiries required for groundwater right amendments.

With respect to PCHB Legal Issues 12 and 14, the PCHB erred in limiting the scope of evidentiary inquiry into impairment and by concluding that there was no detriment to the public welfare. AR 85 at 39-42, 45. The errors are premised on the PCHB's summary judgment conclusions that the MWL authorized expansion of WSU water rights.

Specifically, the PCHB prohibited Appellants from presenting evidence to show: (1) "the consolidation of the rights may allow WSU to pump more of its authorized rights from a declining source aquifer than is presently possible from its existing wells," and (2) that "an increase in the aggregate amount of WSU withdrawals will generally contribute to lowering the level of the [GRA]." AR 85 at 42. Thus at hearing, Appellants' evidence was limited to the question whether the change in location of WSU's pumping would cause interference with private wells.¹⁴ Appellants were precluded from arguing that increased pumping would exacerbate aquifer declines.

As discussed above, WSU's potential exacerbation of already declining GRA water levels is a critical fact in this case. Although the PCHB acknowledged that WSU's increased pumping capacity would have an overall adverse impact on aquifer levels, it found that evidence to be legally irrelevant. AR 89 at 34-35. Once again, this error is premised on the PCHB's unconstitutional interpretation of the MWL that prevented consideration of the expansion of WSU's water rights; violating both separation of powers and procedural due process.

¹⁴ Appellants could not make this showing and the PCHB therefore ruled against the impairment and public welfare claims. AR 89 at 34-35. Appellants' claim of error here is not to the "no well interference due to change of location of pumping" ruling in the Final Order, but to the summary judgment ruling limiting the evidence. AR 85 at 39-42, 45.

- 4. The PCHB erred in ruling that the “safe sustaining yield” mandate of RCW 90.44.130 did not apply based on its holdings that expansion of WSU’s water rights was authorized by the Municipal Water Law, and further erred in ruling that the safe sustaining yield inquiry does not apply in the groundwater amendment process.**

With respect to PCHB Legal Issue No. 13, the PCHB erroneously ruled on summary judgment that analysis of the safe, sustaining yield of the GRA was not required. The PCHB reasoned that such analysis occurs only when a water right is first issued, and not in the amendment process. AR 85 at 42-44. The PCHB also erroneously ruled that no impact on Aquifer levels would occur as a result of the amendments. This decision was based on the PCHB’s determination that WSU’s water rights would not be enlarged – a ruling based on its unconstitutional interpretation of the MWL. These rulings are matters of legal error and this Court reviews them de novo. RCW 34.05.570(3)(d).

Pursuant to RCW 90.44.130, Ecology must manage groundwater rights to prevent over-pumping of aquifers and to maintain a “safe, sustaining yield” of groundwater. The PCHB disregarded the statute, determining that WSU’s amendments were not subject to safe yield analysis and limitations. AR 85 at 11-18. As above, this conclusion was based on the prior conclusion that WSU still retains its originally authorized water rights, including those lost for historical nonuse. As demonstrated above, this conclusion is erroneous because the amendments do enlarge WSU’s rights and will cause adverse physical impacts. AR 85 at 29. The PCHB erred by failing to apply the statute.

Second, the PCHB ruled that RCW 90.44.130’s sustainable water mandate applies only when a new water right is issued and “does not apply to a change in a water right.” AR 85 at 44.

This erroneous interpretation ignores the statute’s broad mandate:

As between appropriators of public groundwater, the prior appropriator shall as against subsequent appropriators from the same groundwater body be entitled to the preferred use of such groundwater to the extent of his appropriation and

beneficial use, and shall enjoy the right to have any withdrawals by a subsequent appropriator of groundwater limited to an amount that will maintain and provide a safe sustaining yield in the amount of the prior appropriation. The department shall have jurisdiction over the withdrawals of groundwater and shall administer the groundwater rights under the principle just set forth, and it 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.

RCW 90.44.130 (emphasis added). Carefully parsed, the statute can apply only *after* water rights are issued. Prior users are protected “as against subsequent appropriators.” *Id.* A “subsequent appropriator” is a party engaged in appropriation. A water right applicant cannot appropriate until after a permit is issued. RCW 90.03.250, 90.03.290(3). The second sentence provides a dual mandate to Ecology to (1) protect prior appropriators (i.e., existing users), and (2) enforce the maintenance of a safe yield of groundwater. RCW 90.44.130. The Supreme Court has also identified RCW 90.44.130 as a mechanism for protection of water rights after a groundwater right is created, and as a basis for Ecology to enforce as between existing water rights. *Campbell & Gwinn*, 146 Wn.2d at 18, n.8. Contrary to the PCHB’s interpretation, the statute limits pre-existing water rights, not new ones.

The PCHB’s ruling is also faulty as a matter of logic. Were the safe yield principle to apply only when water rights are first issued, it would be superfluous, a construction disfavored in the law. *State v. Lodge*, 42 Wn. App. 380, 389, 711 P.2d 1078 (1985). When processing new water rights, Ecology must evaluate whether (1) unappropriated water is physically available and (2) a new appropriation will impair existing users. RCW 90.03.290, 90.44.060; *Postema*, 142 Wn.2d at 101; *Hillis v. Ecology*, 131 Wn.2d at 383-86. The safe yield statute also requires Ecology to evaluate the physical condition of groundwater and expressly implements the prohibition on impairment of senior rights. RCW 90.44.130. Under the PCHB’s interpretation, the safe yield inquiry would effectively duplicate the efforts required for the original permitting process. Moreover, it is only after water rights are issued and groundwater

in decline when it becomes apparent that safe yields are at risk, and groundwater use must be limited. Logically, the safe yield statute requires Ecology to act after water rights have been issued.

Finally, the MWL did not amend RCW 90.44.130 to exempt municipal water rights, and was not written to allow its beneficiaries to mine aquifers, nor to exempt them from regulation when groundwater depletion is occurring. The PCHB is required to apply the safe yield statute regardless of the historic or contemporary purposes of use of WSU's water rights. The PCHB found that WSU's pumping is contributing to serious aquifer decline, and that only by limiting pumpage can the declines be reversed. AR 89 at 20-22 (FF 35-38). By the statute's terms, Ecology was required to apply safe yield standards to the WSU amendment applications to "limit withdrawals . . . so as to enforce the maintenance of a safe sustaining yield." RCW 90.44.130.

The PCHB erred in holding that analysis of the safe yield of the Aquifer was not required because the MWL authorized expansion of WSU's water rights. The PCHB also misinterpreted the applicability of the safe yield statute. Accordingly, this Court should reverse. RCW 34.05.570(3)(a), (d).

F. Water Code Claims

1. The PCHB erred in ruling that WSU exercised reasonable diligence in putting its water rights to beneficial use.

With respect to PCHB Legal Issue No. 5, WSU argued it has exercised reasonable diligence in putting its water to use. AR 85 at 25-27. The PCHB agreed and granted summary judgment to WSU on this issue. The ruling is error because there is no evidence indicating WSU met the legal requirements for reasonable diligence. The permit writer failed to evaluate WSU's

water rights prior to 1989 and thus cannot speak to the critical periods of nonuse and lack of diligence arising prior to that date.

In accord with the evidence, the PCHB found that WSU had never used most of the water authorized by its six water rights, despite acquiring those rights between 1935 and 1983. AR 85 at 25; *see* App. 1. The PCHB also noted that only one of the six rights included the statutorily required development schedule establishing a deadline by which water must be put to use.¹⁵ AR 85 at 26, n.16. Several statutes define and mandate diligence. RCW 90.03.260 (timelines for putting water to use); 90.03.320 (reasonable diligence); RCW 90.03.460 (reasonable diligence to protect inchoate rights). Nevertheless, the PCHB “deferred” to Ecology in deciding that WSU had exercised reasonable diligence in putting its water rights to use. AR 28, Ex. 3.

WSU’s failure to put water rights to use over a course of decades does not constitute reasonable diligence.¹⁶ Washington’s water right construction statute provides:

Actual construction work shall be commenced on any project for which permit has been granted within such reasonable time as shall be prescribed by the department, and shall thereafter be prosecuted with diligence and completed within the time prescribed by the department.

RCW 90.03.320. If a water permit holder fails to put water to use with reasonable diligence, the permit must be cancelled. *Id.* Water users may seek extensions of time to put water to use. *Id.*; *Theodoratus*, 135 Wn.2d at 597. WSU offered no evidence to show that it had sought such an extension.

¹⁵ “The Board notes that Ecology only established a date for putting water to full beneficial use for Permit G3-28278P [citing AR 22]. There is no similar timeline established for perfecting the substantial inchoate portion of WSU’s other water rights.” AR 85 at 26, n.16.

¹⁶ The statutory diligence requirement has applied to WSU’s domestic/community domestic water rights since they were issued. A 1964 Attorney General opinion stated that public utility districts wishing to make use of water for domestic water supply were subject to the diligence requirements of RCW 90.03.320. AGO 63-64 No. 117. This opinion, issued shortly after Ecology issued the WSU 1962-63 permits (now Certificates 5070-A and 5072-A) for domestic, community domestic and stockwater supply, reveals a contemporary understanding that public water suppliers were subject to reasonable diligence requirements.

To hold that WSU had exercised reasonable diligence, the PCHB stated that municipal water suppliers are entitled to flexibility. AR 85 at 26. Such flexibility is expressly described in RCW 90.03.320, which establishes special diligence considerations for municipal water suppliers relating to financing, conservation measures, and future supply needs. RCW 90.03.320.¹⁷ The PCHB did not find that any of these factors excused WSU's failure to put water to use. In fact, WSU produced evidence showing that it serves water to fewer campus dormitories than in the past. AR 53, Ex 1. WSU offered no schedule or plans to demonstrate when and how it intends to put its water rights to use in the future.

Washington cases contain little discussion of the "reasonable diligence" requirement, which has its foundations in pre-water code law. *RD Merrill*, 131 Wn.2d at 136-37. An early case cited by the PCHB points out that diligence is an important element of Washington water law. *In Re Alpowa Creek*, 129 Wash. 9, 15, 224 P. 29 (1924) (calling for "common sense" in determining reasonable diligence). A 1930 case involving competing water claimants awarded rights to a junior priority claimant based on that party's greater diligence in putting water to use. *State v. Icicle Irr. Dist.*, 159 Wash. 524, 294 P. 245 (1930). The anti-speculation policy underlying the diligence rule is driven by the tension between water availability and ever-increasing demand for water. *Theodoratus*, 135 Wn.2d at 593 (citing *Ecology v. Grimes*, 121 Wn.2d at 468); *RD Merrill*, 137 Wn.2d at 130-31. Given the diminishing water levels in the GRA, statutory requirements to promote diligence and protect the public interest are applicable.

The PCHB improperly deferred to Ecology on the question of whether WSU had engaged in reasonable diligence. While deference to Ecology may be appropriate under certain circumstances, deference dissolves when those interpretations conflict with the plain language of

¹⁷ RCW 90.03.460 also provides protection for inchoate water rights, so long as the rights are being applied to beneficial use *with diligence*. The fact that a water right is issued for municipal supply purposes does not mean that it is *per se* being exercised with diligence.

a statute. *Port of Seattle*, 151 Wn.2d at 612, citing *Theodoratus*, 135 Wn.2d at 589. As discussed at n. 9, *supra*, the permit writer did not evaluate WSU's water usage prior to 1989. Ecology's basis for deciding that WSU exercised diligence does not comport with statutory intent that water be put to use within a reasonable timeframe.

The PCHB committed legal error in holding that WSU had diligently used its rights and in its statutorily incongruent definition of "flexibility" for municipal rights. The PCHB's deference to Ecology was also legal error, insofar as deference was not warranted, and not supported by evidence, which this court reviews de novo. *Skagit Hill, supra*. Pursuant to RCW 34.05.570(3)(a), (d), and (e), this Court should reverse.

2. The PCHB erred in ruling that WSU had not abandoned Claim No. 98523.

In PCHB Legal Issue No. 9, the PCHB erred by ruling on summary judgment that WSU had not abandoned Claim No. 98523, associated with Well No. 2. AR 85 at 34-38.

Abandonment is a common law doctrine applicable to municipal water rights. It is proven by a long period of nonuse accompanied by a showing of intent to abandon, as reflected in the conduct of the parties. *Twisp*, 133 Wn.2d at 781-83. Because the PCHB resolved this issue on summary judgment, this Court's review of both law and facts is de novo. *Skagit Hill, supra*.

Appellants alleged 30 years of nonuse based on WSU's 1968 decrease and, in 1977, complete cessation of pumping from Well No. 2, to which Claim No. 98523 is appurtenant. The WSU water use table demonstrates nonuse. *See* App. 2. Evidence of a long period of nonuse raises a rebuttable presumption that abandonment has occurred.¹⁸ *Twisp, supra*. Appellants also submitted documents prepared by WSU, notably its water system plan, which refers to both Well No. 2 and the appurtenant claim as "abandoned," along with water right application

¹⁸ In *Twisp*, the city did not use its water rights for 45 years. *Twisp* cited several out-of-state cases where the presumption of abandonment arose after 29, 23, and 10 years of nonuse. 133 Wn.2d at 781.

correspondence that omits information about Claim 98523. AR 18, Ex.4 at 37 (appended at App. 3), Ex. 5 (chart), Ex. 6 (chart); AR 19 at 5-6; Ex. A-3 at 3 (“No 2 [well] decommissioned and no longer in use”). WSU submitted various documents attempting to prove a continuing claim of right. AR 23, Exs. 3-8; AR 22, Exs. 1-7. Most, however, were irrelevant or indicated the opposite of what WSU contended. For example, WSU’s “rebuttal fact” that Permit G3-28278P, appurtenant to Well No. 7, is a supplemental point of withdrawal for Wells 1, 3 and 4 (Claims 98522 and 98524, and Cert. 5070-A) does not evince intent to continue using Claim No. 98523 and Well No. 2. WSU, joined by Ecology, also argued that it had pumped the quantities of water authorized by Claim No. 98523 from other campus wells, notably, Well No. 3.¹⁹ AR 41 at 2-5. They offered no evidence supporting that assertion. Withdrawal of water from a point of extraction not authorized under the permit is an illegal withdrawal.

There is no Washington precedent indicating that illegal withdrawals demonstrate a water user’s intent to not abandon a water right. Instead, WSU pointed to Section 6 of POL 1120, AR 23, Ex. 2, also discussed in Section IV(D)(2) above. The policy concludes with a section on “de facto” changes in water use that, though unauthorized, purport to obviate abandonment.

POL 1120 is not sufficient to rebut the presumption of abandonment. Ecology cannot adopt policies or rules that conflict with statutory requirements. *Mills, supra; Brown, supra.* Section 6 of POL 1120 conflicts with the many provisions of the water code that define groundwater rights, in part, by their point of withdrawal, and which require water users to seek permission before engaging in self-help in relocating their wells. For example, with respect to new rights, RCW 90.44.060 provides that applications must “set forth: . . . (3) the location of the proposed well or wells or other works for the proposed withdrawal.” Permits identify that

¹⁹ Well No. 3 was authorized by Claim No. 98524, which Ecology found to be invalid in 2006. Ex. A-5. Upon learning of the invalidity, WSU then argued that it actually had been pumping Claim No. 98523 from Well No. 3 throughout the years. AR 41. This argument is not supported by the record.

location as an attribute of the right. *E.g.*, Exs. A-10, A-11. Groundwater certificates must include “the location of each well . . . both with respect to official land surveys and in terms of distance and direction to any preexisting well or wells or works . . . [within] a quarter of a mile.” RCW 90.44.080. *E.g.*, Exs. A-8, A-14. The amendment statute prescribes the process of re-locating wells “at a location outside the location of the original well or wells” as an action that triggers the requirement for an amendment. RCW 90.44.100(1), (2).

Ecology’s “unauthorized relocation” argument has twice been rejected by Washington courts. In *Twisp*, Ecology argued that “an unauthorized, unprotested change in point of diversion is not evidence of abandonment but instead is evidence of nonabandonment.” *Twisp* at 785. The Court rejected the argument, characterizing the withdrawal as illegal: “the town illegally began to draw water from a new source without regard to the 1912 [abandoned] right.” *Id.* at 785-86. In *RD Merrill*, the Court reviewed whether a surface water claim had been perfected by diversion from an unauthorized ditch. 137 Wn.2d at 134-38. The Court ruled that such diversion did not perfect the claim and was therefore ineligible for transfer. *Id.* Illegal withdrawals are new withdrawals and do not, by law, relate to a prior right. POL 1120 does not support WSU’s position because it is legally invalid.

Even if the court determines that Section 6 of POL 1120 is not *ultra vires*, Ecology cannot change fundamental legal aspects of water rights by simply publishing an informal policy. Formal rulemaking under the APA is required. *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 399-400, 932 P.2d 139 (1997). A rule is:

any agency order, directive, or regulation of general applicability . . . (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. . . [but] does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public . . .

RCW 34.05.010(16).

In *Hillis*, Ecology used an informal policy to prioritize basins and batch process decisions. The court found the policy was a “new qualification or requirement” relating to a benefit conferred by law, i.e., the processing of water right applications. *Id.* As such, the Court ordered Ecology to engage in APA rulemaking “to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.”²⁰ *Id.*; see RCW 34.05.310-.395. “The remedy when an agency has made a decision which should have been made after engaging in rule-making procedures is invalidation of the action.” *Id.* As in *Hillis*, Section 6 of POL 1120 changes the legal nature of a water right to one that can be maintained by illegal and unauthorized withdrawal of water. The policy is thus a “new qualification or requirement” relating to a benefit conferred by law. The policy is invalid because it was not made by formal rulemaking and cannot support the PCHB ruling that WSU did not abandon Claim No. 98523.

The evidence also contradicts WSU’s assertion that pumping from Well No. 3 established its intent to not abandon Well No. 2. The annual pumpage table shows that WSU’s use of Well No. 3 had no relationship to Well No. 2. Annual pumpage from Well No. 3 (with a claim for 1440 afy) ranged from a maximum of 1019 afy to a minimum of 83 afy. App. 2. WSU pumped from Well No. 3 as it believed was authorized under its claim for that well. AR 52 (Supp. Wells Decl. in Opposition, ¶ 8). The university only attributed Well No. 3 pumping to Well No. 2 once Ecology declared Well No. 3’s appurtenant claim invalid. Further, Well No. 2 was abandoned in 1978, but the pumpage table reveals that WSU did not increase pumping rates in 1978 for Well No. 3 or any year thereafter to compensate for loss of Well No. 2. The pumpage table

²⁰ Ecology subsequently adopted Ch. 173-152 WAC.

demonstrates that Well No. 3 was used only with the intent to pump Well No. 3's appurtenant water right claim.

Similarly, the permit writer's assertion that he evaluated WSU's beneficial use and found that Claim No. 98523 (for Well No. 2) was fully perfected and pumped at Well No. 3 lacks foundation in evidence. AR 23 at ¶ 18. The permit writer did not evaluate WSU's usage, or lack thereof, prior to 1989. *See* n.9. The permit writer's bald assertion does not create a genuine issue of material fact.

Finally, WSU could not pump Claim 98523 from Well No. 3 for the same reason it could not pump Claim 98524 from Well No. 3. Ecology held Claim 98524 invalid because WSU did not construct the associated well until after 1945 and did not obtain a permit. At that time, the Groundwater Code prescribed that groundwater rights could be obtained only via the permitting process. RCW 90.44.050. Well No. 3 could not be utilized to supply water for another pre-water code claim without obtaining a permit from the state. *Id.*

The evidence shows WSU intended to abandon Claim No. 98523. In abandonment analysis, it is the water user's intent that matters, not Ecology's. *Twisp* at 781. WSU's Facilities Project Manager, Gary Wells, declared that he as an individual, and not the University, assumed Claim No. 98523 was abandoned. AR 51 at ¶ 7. But, as the University's project manager, Wells acted as agent for the University and cannot disclaim the University's liability for authorizing him as its speaking agent. Ex. 51 at 1-2. The analogy to the *Twisp* case is striking. *Twisp* did not know it had a lapsed water right until it was so informed by Ecology staff. *Twisp*, 133 Wn.2d at 784, n.4. As in *Twisp*, Mr. Wells, and thus WSU, described Claim No. 98523 as "abandoned" until Ecology staff apprised him of the legal consequences of making that characterization. Ex. 51 at 2-3. Mr. Wells' well-meaning but post-hoc declaration is not

objective evidence and does not create a genuine issue of material fact. The objective evidence shows that WSU had long since abandoned Claim No. 98523.

3. The PCHB applied the wrong summary judgment standard in dismissing Appellants' reasonable efficiency claim, and further erred in ruling that efficiency analysis is not conducted in the groundwater amendment process.

In PCHB Legal Issue No. 6, Appellants claimed that Ecology should have applied the "reasonable efficiency" prong of the beneficial use standard in evaluating WSU's applications. Appellants alleged that the university's golf course irrigation was wasteful and therefore not a beneficial use. AR 1 at 4. WSU moved for summary judgment on this issue. AR 24 at 2, 20. Appellants responded by submitting material facts, including the Declaration of Scott Cornelius with attached photographs and local climate information. AR 32.

The PCHB's ruled that (1) expert testimony was required to defeat summary judgment and (2) Ecology lacked authority to evaluate reasonable efficiency in the groundwater amendment process.

The PCHB first ruled that Mr. Cornelius' testimony was insufficient to establish a triable issue of fact because he was not an expert. AR 85 at 28. Instead of following the summary judgment standard to treat evidence from Cornelius, the non-moving party, as true, the PCHB declared that lay person evidence is not sufficient to defeat summary judgment. These legal errors are reviewed de novo by this Court. RCW 34.05.570(3)(d); *Skagit Hill, supra*.

Cornelius' evidence focused on facts. In his declaration, Mr. Cornelius stated that

... WSU operated its sprinklers in mid-day last summer, when temperatures exceeded 95 degrees (F), and more importantly, WSU's over-watering has caused run-off and erosion on the hillsides adjacent to the golf course. Photographs reveal rills and other erosive impacts that indicate water is running off the irrigated areas rather than soaking into the soil for uptake by seeded grass.

AR 35 at 27-28, citing AR 32, §§ 3.1-3.5, Att. 6. Cornelius also submitted factual data about the GRA, contending that the declining condition of the water source is a factor to be considered in determining reasonable efficiency. AR 15, Att. 1.

Procedures before the PCHB are governed by the Civil Rules for Superior Court, WAC 371-08-300.²¹ CR 56(e) provides that, with respect to summary judgment motions, affidavits must be submitted setting forth genuine issues of fact for trial.

It is apparent that the emphasis is upon *facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*. Thus, there is a dual inquiry as to whether an affidavit sets forth “material facts creating a genuine issue for trial”: does the affidavit state material facts, and, if so, would those facts be admissible in evidence at trial? . . . A fact is an event, an occurrence, or something that exists in reality. *Webster’s Third New Int’l Dictionary* 813 (1976). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. 35 C.J.S. *Fact* 489 (1960). The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient.

Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359-60, 753 P.2d 517, 519 (1988) (emphasis in original). Cornelius testified to facts from his personal knowledge in his declaration.

Washington’s seminal case on water right efficiency describes the factors that contribute to analysis of efficiency, “including the water duty for the geographical area and crop under irrigation, the claimants’ actual diversion, and sound irrigation practices.” *Ecology v. Grimes*, 121 Wn.2d 459, 468-79, 473, 852 P.2d 1044 (1993). In the context of response to a summary judgment motion, Mr. Cornelius’ declaration, which included personal observations and photographs of water use, run-off and erosion, and data about ambient air temperature, along with information about the condition of the Aquifer, was consistent with the *Grimes* factors, and sufficient to put genuine, material facts into issue. Expert testimony is not required to establish

²¹ The Board may apply a relaxed standard for admissibility of evidence, which should favor Cornelius’ evidentiary showing. WAC 371-08-500.

facts sufficient to defeat summary judgment. *Grimwood, supra*. The PCHB's use of the wrong standard for summary judgment is legal error and must be reversed.

The PCHB also ruled that "Appellants' allegations may be more properly evaluated in the context of an enforcement action, which is beyond the purview of this appeal." AR 85 at 28.

Again, the PCHB committed legal error.

When processing groundwater amendment applications, Ecology must utilize the same criteria as for new water right applications. RCW 90.44.100(2); *RD Merrill*, 137 Wn.2d at 131-32. When processing new applications, Ecology must determine that the proposed use is beneficial, and assign appropriate quantities for that use. RCW 90.03.290(1), (3) (criteria for new water permits); 90.44.060 (extending surface water permit criteria to groundwater). This beneficial use determination addresses the quantity of a water right, and requires that water rights be exercised with reasonable efficiency. *Grimes*, 121 Wn.2d at 468.

Reasonable water efficiency can change over time, because "[w]ater usage must be reasonably efficient and economical in light of other present and future demands upon the source of supply." *Id.* at 460. A water use considered reasonably efficient in the past may no longer be so. Wasted water is not part of the user's right. *Grimes* at 478-79. To ensure that water right efficiency remains relevant with current technology and environmental factors, Ecology must re-determine the reasonable efficiency during the amendment process.

Certainly Ecology is empowered to bring enforcement actions against waste. The *Grimes* decision itself arose in a water right adjudication proceeding. But no provision in law limits water efficiency determinations exclusively to enforcement actions. In fact, the RCW 90.44.100(2) directive to utilize criteria as for a new application indicates otherwise. The PCHB's refusal to consider efficiency is particularly troublesome given declining water levels in

the GRA. The PCHB should have required that reasonable efficiency analysis be incorporated into the water right amendments, to ensure that WSU not waste diminishing public groundwater that is the critical water supply for Palouse Basin communities.

4. The PCHB Erred in Ruling that WSU Permit No. G3-28278P was Supplemental to WSU's Invalid Claim (No. 98524).

In PCHB Legal Issue No. 7, regarding enlargement, the PCHB ruled that WSU's Permit No. G3-28278P was "supplemental" to Claim No. 98524, the water right that Ecology found to be invalid. AR 85 at 30-33. The PCHB concluded that "the invalidity of Claim No. 098524 did not require Ecology to subtract the quantities associated with that claim from the quantities authorized under Permit No. G3-28278P." AR 89 at 30.

WSU Permit No. G3-28278P is identified as a supplemental permit and states:

The quantities granted under this permit are issued less those amounts appropriated under Ground Water Certificate 5070-A, and Ground Water Claims 98522, 98524. The total combined withdrawal under this permit and Ground Water Certificate No. 5070-A shall not exceed 2500 gallons per minute 2260 acre-feet per year.

Thus, this permit is legally dependent on three pre-existing rights as a basis for its existence and authorized quantities. It does not exist separate and apart from those three rights, one of which is not valid.²²

Supplemental water rights "can be used only when the primary right goes unfulfilled." *Twisp*, 133 Wn.2d 733. Therefore, Appellants contend that Permit No. G3-28278P cannot be based on a primary right that is itself invalid, i.e., Claim No. 98524. The PCHB relied on testimony of the permit writer, who in turn utilized Ecology POL 1040, AR 37, Ex. 1, which purports to explain how supplemental rights work. However, that policy states that "the water right holder always has the option of full utilization" of the primary right. *Id.* at 7. Here, WSU does not have the option to use invalid Claim 98524.

²² As argued elsewhere in this brief, the other two primary water rights also suffer from legal deficiencies.

The PCHB's conclusion that the quantities of water represented by WSU's invalid Claim No. 98524 were properly included in Supplemental Permit No. G3-28278P was legal error and should be reversed by the Court. RCW 34.05.570(3)(d).

V. Conclusion

Appellants request that this Court, pursuant to RCW 34.05.574, rule that the PCHB erred as a matter of law and fact in affirming Ecology's decisions approving the amendments to WSU's Groundwater Claim No. 098522, Claim No. 098523, Certificate No. 5070-A, Certificate No. 5072-A, Certificate No. G3-22065C, and Permit No. 28278P, and set aside the decisions of the PCHB appealed herein.

Appellants further request that the Court enter an order vacating the PCHB Summary Judgment Order and Final Order, AR 85 and 89, and remanding the matter to Ecology with a directive to reissue the water right decisions in a manner consistent with legal precedent.

Finally, Appellants request the Court enter such other and further relief that this Court deems just and appropriate.

Section VI. Attorney Fees

Appellants further request the Court award reasonable costs and other expenses associated with bringing this action, including attorney fees as authorized by RCW 4.84.350 and otherwise.

DATED this 17th day of February, 2012.

Respectfully submitted,

Attorneys for Appellants



Rachael Paschal Osborn, WSBA No. 21618
2421 W. Mission Ave.
Spokane, WA 99201



Thomas F. Graham, WSBA No. 41818
1923 N. Fife St.
Tacoma, WA 98406

CERTIFICATE OF SERVICE

I certify that on the 17th day of February, 2012, I caused a true and correct copy of the foregoing Appellants' Opening Brief to be served on the following counsel for parties in the manner indicated below:

Counsel for Respondent Washington
Department of Ecology
Alan Reichman
Attorney General's Office
P.O. Box 40117
Olympia, WA 98504-0117

U.S. Mail
 Hand Delivery

Counsel for Respondent WSU
Frank Hruban
Attorney General's Office
1116 W. Riverside Ave.
Spokane, WA 99201

U.S. Mail
 Hand Delivery

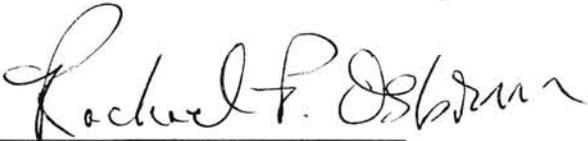
Counsel for Respondent WSU
Sarah Mack & Lynne Cohee
Tupper, Mack, Wells PLLC
1100 Market Place Tower
2025 First Ave.
Seattle, WA 98121

U.S. Mail
 Hand Delivery

Counsel for Respondent Washington State
Pollution Control Hearings Board
Marc Worthy
Attorney General's Office
P.O. Box 40110
Olympia, WA 98504-0110

U.S. Mail
 Hand Delivery

Dated this 17th day of February, 2012 at Spokane, Washington.



Rachael Paschal Osborn