

ORIGINAL

FILED

NOV 13 2012

NO. 304701

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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

Appellants,

v.

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

Respondents.

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**RESPONDENT WASHINGTON STATE UNIVERSITY'S ANSWER  
TO AMICUS CURIAE BRIEFS**

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## I. INTRODUCTION

Four Tribes (“Amici Tribes”) and several organizations (“Aqua Permanente”) have filed *amicus curiae* briefs in support of Appellants’ position on two issues in this APA appeal – each of which was decided by the Pollution Control Hearings Board (“PCHB”) on summary judgment. Respondent Washington State University (“WSU” or “University”) submits the following answer to the arguments by Amici Tribes and Aqua Permanente. WSU also joins in the Department of Ecology’s Answer to Amicus Curiae Briefs (“Ecology’s Answer”).

## II. ANSWER TO AMICI TRIBES

### A. Amici Tribes Ignore the Summary Judgment Standard.

The PCHB decided on summary judgment that WSU had used reasonable diligence in putting to use the inchoate water rights represented by its three “pumps and pipes” certificates. AR 85 at 25-27. The actual issue before the PCHB in this appeal, raised by Cornelius, was: “Whether any quantity of water authorized for change under [WSU’s water rights] is unperfected; and if so, whether Ecology lacks authority to change any of the water rights.” AR 10 at 2 (Issue 5).

Under PCHB jurisprudence and PCHB rules, Ecology’s water right decisions are considered *prima facie* correct, and the burden of proving them wrong is on the party attacking them. *Naselle Water Company v.*

*Ecology*, PCHB No. 07-057 (2007); WAC 371-08-485. Thus, in the PCHB appeal Cornelius had the burden of proving that WSU's partial perfection of its water rights deprived Ecology of authority to change those rights.

WSU moved for summary judgment on Issue 5. AR 24 at 18-19. In response, Cornelius argued, *inter alia*, that WSU had failed to exercise diligence in putting water to use under Certificate Nos. 5070-A, 5072-A, and G3-22065C. AR 35 at 26-28.

WSU provided uncontroverted evidence of its steady growth over time, including its construction of new on-campus apartments and residence halls, since the original issuance of those three "pumps and pipes" certificates. *See Ecology's Answer* at 17-18. WSU also provided uncontroverted evidence of its increasing water usage over time – up to an annual maximum of 2,277 acre-feet in 1984 – before it significantly reduced its pumping as part of its commitment to the Palouse Basin Aquifer Committee. AR 52, Ex. 2; *see also* CP 423-24; CP 432; CP 473-74. Cornelius' opposition to summary judgment relied solely on the fact that each of WSU's three certificates was only partially perfected and that it had been a long time since those wells were drilled. AR 35 at 26-28.

The PCHB granted summary judgment to WSU, ruling that “WSU has exercised reasonable diligence in perfecting the inchoate portions of its water rights.” AR 85 at 27. The PCHB explained:

The Supreme Court has stated that reasonable diligence “must depend to a large extent upon the circumstances.” *In re Water Rights in Alpowa Creek*, 129 Wash. 9, 14, 224 P. 29 (1924). The “reasonable diligence” requirement is a flexible standard, and the Board believes that flexibility in interpreting it is particularly important with regard to water rights for municipal supply purposes. Jurisdictions grow at uneven rates and need to be able to serve their growing populations. In addition, water conservation by governmental entities might be discouraged by the imposition of rigid timelines for putting water to beneficial use.

AR 85 at 26.

The PCHB noted that only one of WSU’s rights – Permit G3-28278P – has a development schedule for putting water to full beneficial use. WSU’s water right certificates, issued under Ecology’s former “pumps and pipes” approach, do not have development schedules for perfecting the inchoate portions of those rights.<sup>1</sup> AR 85 at 26 n.16. However, Cornelius never argued that Ecology should have established development schedules for WSU’s “pumps and pipes” certificates. The PCHB pointed out that “Appellants have not raised, and the Board does

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<sup>1</sup> Of course, the original permits had development schedules – which WSU met – for installing “pumps and pipes” in lieu of requiring actual beneficial use.

not decide, the issue of whether Ecology must establish a construction schedule<sup>2</sup> for the inchoate portion of WSU's certificated water rights." *Id.*

As the non-moving party with the burden of proof, Cornelius was required to identify a disputed issue of material fact. CR 56(c); WAC 371-08-485. He failed to do so. *See* AR 35 at 27-28 (asserting, without citing any evidence, that "[g]enuine issues of material fact exist with respect to . . . the lack of diligence with which the right has been put to use"). The PCHB correctly applied the CR 56(c) summary judgment standard here; the Amici Tribes simply ignore it.<sup>3</sup>

**B. Amici Tribes Misstate the Facts in the Record.**

As pointed out in Ecology's Answer, Amici Tribes incorrectly identify the evidence in the summary judgment record regarding WSU's reasonable diligence in putting water to beneficial use under its three partially-perfected water right certificates. Ecology's Answer at 17-18; *see* Amici Tribes' Br. at 8.

At page 2 of their amicus brief, Amici Tribes also misstate other undisputed facts in the summary judgment record. The combined annual

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<sup>2</sup> The PCHB misspoke in referring to a "construction" schedule; it obviously meant to refer to a development schedule for putting water to full beneficial use. Construction for each of the water rights represented by WSU's water right certificates was completed decades ago, as Cornelius acknowledged. *See* AR 35 at 26-28.

<sup>3</sup> Throughout their brief, the Amici Tribes cite hearing exhibits without identifying where those documents appear (or indeed if they appear) in the summary judgment record before the PCHB. *E.g.*, Amici Tribes' Br. at 2 n.3; 7 n.4; 8; 17 n.8.

water quantity (Qa) under WSU's water right certificates is not 5,300 acre-feet per year; it is 4,580 acre-feet per year (2,260 acre-feet per year under Certificate No. 5070-A; 720 acre-feet per year under Certificate No. 5072-A; and 1,600 acre-feet per year under Certificate No. G3-22065C).

*Compare* Amici Tribes' Br. at 2 *with* AR 85 at 5; AR 23 at 4-6.

The greatest amount of water used annually by WSU over the past 78 years is not 1,988 acre-feet per year in 1994; it is 2,277 acre-feet per year, used in 1984. *Compare* Amici Tribes' Br. at 2 *with* AR 52, Ex. 2.

Amici Tribes' assertions that "over 60% of WSU's claimed water rights have never been actually used" (Amici Tribes' Br. at 2) and "WSU has never used 60% of the water it claims" (*id.* at 8) are also unsupported by the record. The aggregate annual amount of WSU's rights under Water Right Claim Nos. 098522 and 098523 (1,440 acre-feet per year) was used in the 1960's; those two rights are 100 percent perfected. AR 23 at 4; *see* AR 52, Ex. 2 (1,530 acre-feet pumped from wells 1, 2, and 3 in 1962).

The record shows that prior to 2007 WSU had pumped an annual maximum of 1,090 acre-feet from Well 4, which is 48.2 percent of the total authorized amount under Certificate No. 5070-A (2,260 afy). AR 52, Ex. 2; AR 85 at 5. WSU pumped an annual maximum of 228 acre-feet from Well 5, which is 31.7 percent of the total authorized amount under

Certificate No. 5072-A (720 afy).<sup>4</sup> AR 52, Ex. 2. WSU pumped an annual maximum of 1,102 acre-feet from Well 6, which is 68.9 percent of the total authorized amount under Certificate No. G3-22065C (1,600 afy). In the aggregate, WSU's maximum use from Wells 4, 5, and 6 is 2,420 acre-feet – approximately 53 percent of the aggregate annual amount authorized under its three partially-perfected certificates (4,580 afy).<sup>5</sup> AR 52, Ex. 2; AR 85 at 5.

**C. Amici Tribes Misstate Applicable Law.**

The Amici Tribes cite *City & County of Denver v. Northern Colorado Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954), unaccompanied by any specific page citation, for the proposition that reasonable diligence “requires the permit holder to act with vigilance and steady and constant effort with all possible and reasonable expedition.” Amici Tribes’ Br. at 15. The word “vigilance” does not appear in the court’s opinion. The court’s opinion does contain this passage:

Kinney, in his great work on irrigation, says: “Probably the best definition of the word diligence was given by Lewis, C.J., in rendering the opinion in an early Nevada case, Ophir Silver Min.

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<sup>4</sup> WSU’s reasons for not pumping the full annual quantity authorized from Well 5 were also amply explained in the summary judgment record: Well 5 is located very close to a buried hazardous waste site, and prolonged use of Well 5 might exacerbate the risk of contamination. AR 51 at 3-4.

<sup>5</sup> The amount authorized under Permit No. G3-28278P (2,260 afy) is not included in WSU’s total annual maximum, because this amount is “supplemental” to (i.e., in lieu of) the 2,260 afy already authorized from Well 4. AR 23 at 6-7; AR 85 at 30-31.

Co. v. Carpenter, 4 Nev. 534. It is there defined as ‘the steady application to business of any kind, constant effort to accomplish any undertaking.’ ‘It is the doing of an act or series of acts with all possible expedition, with no delay except such as may be incident to the work itself.’” Kinney on Irrigation and Water Rights, Vol. 2, § 735.

*City & County of Denver*, 276 P.2d at 1004. The context of the court’s discussion shows why this case is inapposite. The court was addressing diligence in the context of **construction** of a water project, under Colorado’s unique statutory scheme for obtaining a conditional water right decree recognizing an antedated priority.<sup>6</sup> *Id.* *City & County of Denver* did not address “reasonable diligence” in the context of a permit holder putting water to beneficial use under a permit.

*Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (2007), another Colorado case cited by Amici Tribes (Amici Tribes’ Br. at 18-19), is similarly inapposite. *Pagosa* does not address “the overall importance of the diligence standard in the appropriation system that has been adopted by Washington” (Amici Tribes’ Br. at 18). *Pagosa* – like *City & County of Denver* – addresses Colorado’s unique conditional decree mechanism, which is different from the permit system under Washington’s water code. Under Colorado’s conditional decree

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<sup>6</sup> Colorado law allows the priority for a conditional water right to “relate back to the time when the first open step was taken giving notice of intent to secure it,” provided that “construction thereafter was prosecuted with reasonable diligence.” *Id.* at 999.

system, formal “diligence” proceedings are conducted at regular intervals because “the effect of a long-term conditional right is to preclude other appropriators from securing an antedated priority that will justify their investment.” *Id.* at 316.

Unlike Colorado, Washington’s water law rests on a permit system, under which “reasonable diligence” does not require “vigilance and steady and constant effort with all possible and reasonable expedition” (Amici Tribes’ Br. at 15) in putting a water right to full beneficial use. *See* RCW 90.03.320. Nor does “reasonable diligence” in perfecting a right under our state’s permit system require full perfection within fifteen to twenty years, as Amici Tribes suggest (Amici Tribes’ Br. at 10). *Id.* *See* Ecology’s Answer at 12-22; Brief of Respondent Washington State University at 30-35.

No Washington appellate court has ever endorsed the Amici Tribes’ notions of “reasonable diligence” in applying water to beneficial use under a permit. *Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), is instructive in this regard. In *Theodoratus*, the Supreme Court addressed a water right permit, issued in 1973, which originally called for completion of a residential development by 1980. Ecology granted several extensions to Mr. Theodoratus. Ecology’s file was

“inactive” from 1985 to 1992. Thereafter, Ecology granted another extension to 2001. *Id.* at 587-88. The Supreme Court observed:

There is no issue at this point about whether Appellant has acted with reasonable diligence. If, in the future, Appellant decides to seek another extension of time, the Department will then be required to apply the appropriate statutory standards when deciding whether an extension should be granted, keeping in mind, of course, the statutory requirement that a reasonable time be allowed in which to actually apply water to beneficial use. See RCW 90.03.320.

*Theodoratus*, 135 Wn.2d at 596. If, as Amici Tribes contend, “reasonable diligence” by definition requires full perfection within fifteen to twenty years, the Supreme Court would likely have said so in *Theodoratus*.

Finally, Amici Tribes misstate the law with respect to the absence of development schedules in WSU’s three water right certificates. Amici Tribes’ Br. at 16-20. As discussed above, Cornelius did not ask the PCHB to impose development schedules on WSU’s water rights, and Amici Tribes cannot do so in this appeal. RCW 34.05.554(1) (issues not raised before the agency may not be raised on appeal).

To the extent the Amici Tribes argue that “public policy” and “common sense” dictate **cancellation** of any “pumps and pipes” certificate that does not have a development schedule for perfection of inchoate portions (Amici Tribes’ Br. at 16-20), that argument is contradicted by RCW 90.03.330(3) and should be addressed to the Legislature. *See*

*Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 17 n.7, 43 P.3d 4 (2002) (“policy decisions are the province of the Legislature, not of this court”); *Lummi Indian Nation v. State*, 170 Wn.2d 247, 263, 241 P.3d 1220 (2010) (RCW 90.03.330(3) addresses “an area of the law subject to ongoing legislative refinement in the face of changing conditions”).

### **III. ANSWER TO AQUA PERMANENTE**

Aqua Permanente contends that RCW 90.44.130 requires Ecology to “evaluate” or “review” or “assess” the safe sustaining yield of the Grande Ronde Aquifer when processing WSU’s application to change its water rights, and requires Ecology to “reduce withdrawals” to preserve the aquifer’s safe sustaining yield. Aqua Permanente’s Br. at 8-20. It is not entirely clear whether Aqua Permanente argues that RCW 90.44.130 requires restrictions on only WSU’s rights in connection with WSU’s water right change applications (as Cornelius argued below) or broader restrictions on all groundwater withdrawals in connection with designation of a groundwater management area in the Palouse Basin (which Cornelius did not argue below). Issues not raised before the PCHB may not be raised on appeal. RCW 34.05.554(1).

#### **A. The PCHB Correctly Decided the Issue Raised by Cornelius.**

The PCHB decided on summary judgment that the changes to WSU’s water rights would not “unlawfully deplete” the Grande Ronde

Aquifer. AR 85 at 42-44. The actual issue before the PCHB, raised by Cornelius, was: “Whether the water rights decisions will unlawfully deplete the source aquifer(s).” AR 10 at 3 (Issue 13). WSU moved for summary judgment on the ground that the change decisions do not authorize any increased pumping by WSU beyond the amounts it already has a right to pump, and that Ecology and the PCHB have no authority to restrict WSU’s water rights in connection with a change application where the change would not cause any increased impact beyond what would occur without the change. AR 24 at 26; AR 23 at 8.

In response to WSU’s motion for summary judgment, Cornelius articulated for the first time its theory that the “unmitigated decline in the level of the Grande Ronde aquifer is contrary to the provision of RCW 90.44.130 that Ecology administer groundwater resources ‘to enforce the maintenance of a safe sustaining yield’.” AR 35 at 49-50. Cornelius argued that the second sentence in RCW 90.44.130 requires Ecology “to address the problems of overdraft and water mining in aquifers where withdrawals exceed recharge, as is occurring in the Grande Ronde Aquifer,” that “[t]o date, Ecology has not addressed these problems,” and that the PCHB “has authority to mitigate these affects [sic] by controlling the amount of water WSU withdraws.” AR 35 at 50.

On summary judgment, the PCHB correctly ruled that the “safe sustaining yield” statute, RCW 90.44.130, does not apply to applications for changes to existing groundwater rights, and that the water right changes approved by Ecology would not deplete the aquifer any faster, because WSU could legally and practically pump the same amount of water by modifying or replacing all of its existing wells (albeit at far greater cost than through consolidating its pumping).<sup>7</sup> AR 85 at 44; AR 86 at 3-5. As presented to the PCHB, “Appellants’ arguments regarding aquifer depletion fundamentally challenge the *exercise* of WSU’s water rights, not the change or consolidation of them.” AR 85 at 44 (emphasis in original). The PCHB explained:

Unlike the impairment arguments advanced by Appellants, which necessarily require consideration of the change in the point of withdrawal relative to the location of other right holders, the aquifer depletion argument goes to the heart of the prior appropriation system. Here *there is no allegation that exercise of WSU’s rights via any configuration authorized by the change would affect the aquifer any differently than full exercise of WSU’s rights* from its currently authorized well configuration.

AR 85 at 44 (emphasis added).

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<sup>7</sup> Ironically, in light of Cornelius’ simultaneous arguments that WSU was not exercising “reasonable diligence” in developing its water rights, Cornelius contended to the PCHB that the aquifer would be depleted because “it is reasonable to anticipate the growth in the number of students, facilities, research projects, fire protection requirements, and other aspects of a dynamic educational institution such as WSU” and that such growth “will require additional water withdrawals from the Grande Ronde Aquifer.” AR 35 at 48.

Like Cornelius, Aqua Permanente takes out of context a portion of the second sentence in RCW 90.44.130 in an effort to craft an “obligation” to restrict WSU’s water rights in the course of acting on a change application under RCW 90.44.100. Aqua Permanente’s Br. at 13 (asserting that the “obligation to assess the safe sustaining yield of an aquifer as part of any water rights processing is implicit in RCW 90.44.130”). Aqua Permanente also argues that “Ecology’s evaluation [was] incomplete” (Aqua Permanente’s Br. at 15), ignoring the PCHB’s *de novo* review authority and the basis for its summary judgment ruling.

RCW 90.44.100 does not require Ecology to limit groundwater withdrawals under RCW 90.44.130 when processing applications to change groundwater rights. RCW 90.44.100 explicitly requires “findings as prescribed in the case of an original application,” which means that findings must be made that water is available for a beneficial use, that the appropriation will not impair existing rights, and that the appropriation will not be detrimental to the public welfare. RCW 90.03.290 (incorporated by reference in RCW chapter 90.44 by RCW 90.44.060); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 131-32, 969 P.2d 458 (1999). The determination of water availability must be based upon the time the water right holder applied for the original permit. *Id.* at 132.

As Ecology points out, the PCHB correctly interpreted the “safe sustaining yield” provisions of RCW 90.44.130 in the context of this appeal. *See* Ecology’s Answer at 3-12. The PCHB correctly held that the first provision of RCW 90.44.130 protects senior groundwater rights against subsequent appropriators, by requiring Ecology to protect a “safe sustaining yield” for prior appropriators when it reviews an application for a new groundwater permit. Each of WSU’s water rights issued under the groundwater permit system is expressly made subject to existing (i.e., senior) water rights. AR 31, Att. 3; AR 18, Att. 10; AR 22, Ex. 6; AR 22, Ex. 7. Thus, holders of groundwater rights senior in priority to WSU are already protected under the terms of WSU’s water rights, as required by RCW 90.44.130.

Aqua Permanente claims the second sentence of RCW 90.44.130 requires Ecology “to limit withdrawals in order to maintain safe sustainable yields.” Aqua Permanente’s Br. at 11-13. This argument rests on a misreading of the statute. Beginning with the second sentence of RCW 90.44.130, the Legislature established a mechanism for area-wide regulation of groundwater, including detailed provisions for protection of rights to artificially-stored groundwater. *See, e.g., Jensen v. Ecology*, 102 Wn.2d 109, 685 P.2d 1068 (1984).

The language relied upon by Aqua Permanente (conferring jurisdiction on Ecology “to limit withdrawals by appropriators of groundwater so as to enforce the maintenance of a safe sustaining yield from the groundwater body”) relates solely to establishment and regulation of a groundwater management area. Immediately following its grant of jurisdiction to Ecology “to limit withdrawals by appropriators of groundwater so as to enforce the maintenance of a safe sustaining yield from the groundwater body,” the Legislature continued: “*For this purpose, [Ecology] shall have authority and it shall be its duty from time to time, as adequate factual data become available,<sup>8</sup> to designate groundwater areas or sub-areas, . . .*” RCW 90.44.130 (emphasis added).

The entire text of RCW 90.44.130 is set forth in Appendix 1 hereto. Read in its entirety, RCW 90.44.130 is clearly not intended to confer authority for Ecology or the PCHB to impose *ad hoc* restrictions – in the absence of a groundwater management area designation and comprehensive regulatory program – as individual water right holders seek changes to their water rights. The PCHB correctly refused to apply RCW 90.44.130 to restrict the exercise of WSU’s water rights.

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<sup>8</sup> On summary judgment, Cornelius conceded that “[t]he amount of water available for withdrawal in the Grande Ronde Aquifer is currently unknown.” AR 35 at 40.

**B. RCW 90.44.130 Does Not Require Ecology to Designate a Groundwater Management Area Before Acting on WSU's Change Applications.**

To the extent Aqua Permanente is arguing that the well locations for WSU's water rights cannot be changed because Ecology has failed to establish a designated groundwater area under RCW 90.44.130 (and has thereby failed to restrict all groundwater withdrawals to maintain a "safe sustaining yield" from the Grande Ronde Aquifer), that argument is without merit.

Even if this issue had been raised below, the PCHB is without jurisdiction to direct the performance of a discretionary duty, to grant relief from Ecology's refusal to engage in rulemaking, or to review Ecology's alleged failure to perform a duty that may be required by law. *See* RCW 43.21B.110. The Administrative Procedures Act gives the superior courts exclusive jurisdiction over such a challenge. RCW 34.05.570(4).

Moreover, as Ecology explains, RCW 90.44.100 does not make designation of a groundwater management area under RCW 90.44.130 a prerequisite to the processing of an application to change an individual water right. *See* Ecology's Answer at 6-7. Read in its entirety, RCW 90.44.130 discloses two legislative intentions: (1) to protect senior groundwater appropriators; and (2) to enable comprehensive area-wide

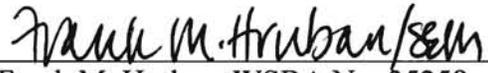
groundwater management aimed at preventing groundwater overdraft “so far as is feasible.” Aqua Permanente’s interpretation of RCW 90.44.130 as a bar to Ecology’s review of water right changes under RCW 90.44.100 is not consistent with either statute. The Court should reject Aqua Permanente’s attempt to use RCW 90.44.130 to obstruct changes to individual water rights.

#### IV. CONCLUSION

Washington State University respectfully urges this Court to reject the arguments of Amici Tribes and Aqua Permanente, and affirm the decisions of the PCHB.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of November, 2012.

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## **APPENDIX 1**

### **RCW 90.44.130**

#### **Priorities as between appropriators — Department in charge of groundwater withdrawals — Establishment and modification of groundwater areas and depth zones — Declarations by claimant of artificially stored water.**

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. For this purpose, the department shall have authority and it shall be its duty from time to time, as adequate factual data become available, to designate groundwater areas or sub-areas, to designate separate depth zones within any such area or sub-area, or to modify the boundaries of such existing area, or sub-area, or zones to the end that the withdrawals therefrom may be administratively controlled as prescribed in RCW 90.44.180 in order that overdraft of public groundwaters may be prevented so far as is feasible. Each such area or zone shall, as nearly as known facts permit, be so designated as to enclose a single and distinct body of public groundwater. Each such sub-area may be so designated as to enclose all or any part of a distinct body of public groundwater, as the department deems will most effectively accomplish the purposes of this chapter.

Designation of, or modification of the boundaries of such a groundwater area, sub-area, or zone may be proposed by the department on its own motion or by petition to the department signed by at least fifty or one-fourth, whichever is the lesser number, of the users of groundwater in a proposed groundwater area, sub-area, or zone. Before any proposed groundwater area, sub-area, or zone shall be designated, or before the boundaries or any existing groundwater area, sub-area, or zone shall be modified the department shall publish a notice setting forth: (1) In terms of the appropriate legal subdivisions a description of all lands enclosed within the proposed area, sub-area, or zone, or within the area, sub-area, or zone whose boundaries are proposed to be modified; (2) the object of the proposed designation or modification of

boundaries; and (3) the day and hour, and the place where written objections may be submitted and heard. Such notice shall be published in three consecutive weekly issues of a newspaper of general circulation in the county or counties containing all or the greater portion of the lands involved, and the newspaper of publication shall be selected by the department. Publication as just prescribed shall be construed as sufficient notice to the landowners and water users concerned.

Objections having been heard as herein provided, the department shall make and file in its office written findings of fact with respect to the proposed designation or modification and, if the findings are in the affirmative, shall also enter a written order designating the groundwater area, or sub-area, or zone or modifying the boundaries of the existing area, sub-area, or zone. Such findings and order shall also be published substantially in the manner herein prescribed for notice of hearing, and when so published shall be final and conclusive unless an appeal therefrom is taken within the period and in the manner prescribed by RCW 43.21B.310. Publication of such findings and order shall give force and effect to the remaining provisions of this section and to the provisions of RCW 90.44.180, with respect to the particular area, sub-area, or zone.

Priorities of right to withdraw public groundwater shall be established separately for each groundwater area, sub-area, or zone and, as between such rights, the first in time shall be the superior in right. The priority of the right acquired under a certificate of groundwater right shall be the date of filing of the original application for a withdrawal with the department, or the date or approximate date of the earliest beneficial use of water as set forth in a certificate of a vested groundwater right, under the provisions of RCW 90.44.090.

Within ninety days after the designation of a groundwater area, sub-area or zone as herein provided, any person, firm or corporation then claiming to be the owner of artificially stored groundwater within such area, sub-area, or zone shall file a certified declaration to that effect with the department on a form prescribed by the department. Such declaration shall cover: (1) The location and description of the works by whose operation such artificial groundwater storage is purported to have been created, and the name or names of the owner or owners thereof; (2) a description of the lands purported to be underlain by such artificially stored groundwater, and the name or names of the owner or owners thereof; (3) the amount of such water claimed; (4) the date or approximate date of the earliest artificial storage; (5) evidence competent to show that the water claimed is in fact water that would have been dissipated naturally except for artificial improvements by the claimant; and (6) such

additional factual information as reasonably may be required by the department. If any of the purported artificially stored groundwater has been or then is being withdrawn, the claimant also shall file (1) the declarations which this chapter requires of claimants to a vested right to withdraw public groundwaters, and (2) evidence competent to show that none of the water withdrawn under those declarations is in fact public groundwater from the area, sub-area, or zone concerned: PROVIDED, HOWEVER, That in case of failure to file a declaration within the ninety-day period herein provided, the claimant may apply to the department for a reasonable extension of time, which shall not exceed two additional years and which shall be granted only upon a showing of good cause for such failure.

Following publication of the declaration and findings -- as in the case of an original application, permit, or certificate of right to appropriate public groundwaters -- the department shall accept or reject such declaration or declarations with respect to ownership or withdrawal of artificially stored groundwater. Acceptance of such declaration or declarations by the department shall convey to the declarant no right to withdraw public groundwaters from the particular area, sub-area, or zone, nor to impair existing or subsequent rights to such public waters.

Any person, firm or corporation hereafter claiming to be the owner of groundwater within a designated groundwater area, sub-area, or zone by virtue of its artificial storage subsequent to such designation shall, within three years following the earliest artificial storage file a declaration of claim with the department, as herein prescribed for claims based on artificial storage prior to such designation: PROVIDED, HOWEVER, That in case of such failure the claimant may apply to the department for a reasonable extension of time, which shall not exceed two additional years and which shall be granted upon a showing of good cause for such failure.

Any person, firm or corporation hereafter withdrawing groundwater claimed to be owned by virtue of artificial storage subsequent to designation of the relevant groundwater area, sub-area, or zone shall, within ninety days following the earliest such withdrawal, file with the department the declarations required by this chapter with respect to withdrawals of public groundwater.

[1987 c 109 § 116; 1947 c 122 § 4; 1945 c 263 § 12; Rem. Supp. 1947 § 7400-12. Formerly RCW 90.44.130 through 90.44.170.]

CERTIFICATE OF SERVICE

I certify that on November 8, 2012, copies of the foregoing

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Dated this 8<sup>th</sup> day of November, 2012.

A handwritten signature in black ink, appearing to read "Sarah E. Mack", written over a horizontal line.

Sarah E. Mack, WSBA No. 12731  
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