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NO. 304701

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

SCOTT CORNELIUS, an individual, 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.

**DEPARTMENT OF ECOLOGY'S ANSWER
TO AMICUS CURIAE BRIEFS**

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Department of Ecology

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I. INTRODUCTION

This case involves a challenge to decisions of the Department of Ecology (Ecology) approving changes of six water rights held by Washington State University (WSU) to enable the reliable and efficient operation of the public water system that serves its main campus, in Pullman. The Department of Ecology's Response Brief (Ecology Response Br.) provides the background, authority, and argument explaining why the decisions of the Pollution Control Hearings Board (PCHB) and Whitman County Superior Court upholding the water right changes should be affirmed by this Court. Several organizations (Aqua Permanente)¹ and four tribes (Amici Tribes)² have filed amicus curiae briefs which make additional arguments requesting the Court to reverse the decisions below.

Aqua Permanente and the Amici Tribes offer erroneous arguments which, if adopted by the Court, would limit WSU's water rights and hamper its ability to meet its responsibilities under state law as an institution of higher education. Each amicus brief focuses on a single

¹ The amici organizations are Aqua Permanente, Center for Environmental Law and Policy, Five Corners Family Farmers, Friends of the San Juans, Methow Valley Citizens Council, Okanogan Highlands Alliance, Okanogan Wilderness League, Protect Our Peninsula's Future, Protect Our Whidbey Water, RIDGE, and the Sequatchew Creek Watershed Council. For ease of reference, these organizations will be referred to collectively as "Aqua Permanente."

² The Amici Tribes are the Tulalip Tribes, Suquamish Tribe, Jamestown S'Klallam Tribe, and Port Gamble S'Klallam Tribe.

issue in this case: Aqua Permanente's brief concerns the "safe sustaining yield" issue, while the Amici Tribes' brief addresses the issue of whether WSU has exercised "reasonable diligence" to maintain the validity of certain water rights.

Aqua Permanente adds nothing to the arguments by the Appellants (collectively referred to as "Cornelius") that were properly rejected by the PCHB. Aqua Permanente focuses exclusively on the issue of whether Ecology was required to perform a "safe sustaining yield" analysis relating to the Grande Ronde Aquifer when it processed WSU's water right change applications. On this issue, the PCHB correctly ruled that the groundwater change statute, RCW 90.44.100, includes no mandate that Ecology must apply the "safe sustaining yield" statute, RCW 90.44.130, when the agency evaluates applications for amendments to groundwater rights.

The Amici Tribes take aim at the PCHB's correct ruling that WSU has exercised reasonable diligence to maintain the validity of the unused, inchoate portions of its water rights by continuing to expand its campus facilities and programs over time, as authorized by the legislature's choices with respect to expanding educational opportunities at the University. Like Cornelius, the Amici Tribes would punish WSU for its successful efforts to conserve water. They ask the Court either to deny WSU's change applications or to require that WSU's remaining inchoate

water rights be stripped away in order for changes in well locations to be approved. The PCHB's ruling on this issue should be affirmed so that WSU can continue its water conservation efforts, operate its campus water system in a cost-effective manner that ensures reliable service to its students, staff, and faculty, and put its inchoate water rights to use in the future as the legislature authorizes expansion of the University.

Ecology respectfully requests the Court to reject the arguments of amici on the "safe sustaining yield" and "reasonable diligence" issues, and to affirm the PCHB's Order on Summary Judgment, issued on January 18, 2008 (SJO),³ and Findings of Facts, Conclusions of Law and Order, issued on April 17, 2008 (Final Order).⁴

II. ARGUMENT

A. Answer To Aqua Permanente's Amicus Brief

In its brief, Aqua Permanente addresses one issue, which is enumerated as Issue No. 8 in Ecology's response brief and stated as "[d]id the PCHB correctly rule that the 'safe sustaining yield' provisions of RCW 90.44.130 do not apply in evaluation of applications for changes of groundwater rights under RCW 90.44.100?" Ecology Response Br. at 4. The PCHB ruled in favor of WSU on summary judgment on this issue

³ The PCHB's SJO (As Amended on Reconsideration), is listed as document 85 in the PCHB's Index of Record and is attached as an appendix to Cornelius's Opening Brief as Appendix No. 4.

⁴ The PCHB's Final Order is listed as document 89 in the PCHB's Index of Record and is attached as an appendix to Cornelius's Opening Brief as Appendix No. 5.

based on its correct determination that Ecology was not required to perform an analysis to ascertain the “safe sustaining yield” of the aquifer under RCW 90.44.130 when it evaluated WSU’s groundwater right change applications. SJO at 42-44. Additionally, Aqua Permanente contends that the common law public trust doctrine compels Ecology to apply the “safe sustaining yield” provisions when the agency evaluates groundwater right change applications. This argument also fails. As the Washington Supreme Court has held on several occasions, the public trust doctrine does not impose any water management requirements on Ecology in its role as the state’s water management agency beyond those that are set forth within the water resources statutes themselves. Accordingly, the public trust doctrine did not require Ecology to conduct “safe sustaining yield” analysis under RCW 90.44.130 when it evaluated WSU’s applications.

1. The PCHB Correctly Interpreted The “Safe Sustaining Yield” Provisions Of RCW 90.44.130

Like Cornelius, Aqua Permanente argues that, under the terms of RCW 90.44.130, Ecology was required to use the opportunity created by the review of WSU’s change applications to limit WSU’s withdrawals from the Grande Ronde Aquifer in order to enforce the maintenance of a “safe sustaining yield” of groundwater. Aqua Permanente and Cornelius

allege that the aquifer is being “over drafted,” and that RCW 90.44.130 requires Ecology to determine a “safe sustaining yield” for the entire aquifer—which they hope will result in the stripping away of WSU’s water rights and requiring the University to drastically reduce its water use. Many of Aqua Permanente’s contentions mirror Cornelius’s contentions that the PCHB misinterpreted RCW 90.44.130. Statutory interpretation of RCW 90.44.130 is addressed by Ecology in its response brief and will not be repeated here. *See* Ecology Response Br. at 37-41; *see also* WSU Response Br. at 17-18.

Aqua Permanente attempts to graft the requirements of RCW 90.44.130 onto the specific statute which sets the parameters for applications to change groundwater rights, RCW 90.44.100. This argument fails because “safe sustaining yield” analysis is not expressly required under RCW 90.44.100, and no such mandate can be implied based on the other statutory provisions discussed by Aqua Permanente.

RCW 90.44.100 does not contain any “safe sustaining yield” requirement. It does include the requirement that “other existing rights shall not be impaired.” RCW 90.44.100(2). Here, with respect to analysis determining whether the amendments to WSU’s water rights would impair other water rights, Ecology and the PCHB appropriately compared pumping from the original well locations to pumping from the proposed

changed locations to ascertain whether the changes would impair Mr. Cornelius's water right or other similarly situated rights to water from the Grande Ronde Aquifer. SJO at 39-42;⁵ Final Order at 32-36.⁶

The PCHB correctly held that a "safe sustaining yield" analysis under RCW 90.44.130 could be conducted when Ecology processes an application for a new groundwater right permit, but that "the 'safe sustaining yield' requirement does not apply to a change in a water right." SJO at 42-44. Additionally, the legislature conferred 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." RCW 90.44.130; *see also Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 4 n.8, 43 P.3d 4 (2002). However, the legislature provided a clear process for accomplishing this purpose. Ecology can

⁵ In denying summary judgment on the impairment issue, the PCHB states that "we specifically reject Appellants' theory that impairment results simply because consolidation of the rights may allow WSU to pump more of its authorized rights from a declining source aquifer. Having defeated summary judgment on the impairment issue, Appellants now have the burden at hearing to demonstrate that Ecology's 'no impairment' conclusion was in error. To meet this burden, they must demonstrate that existing water right holders such as Mr. Cornelius will be impaired as a result of changing the *location* of the total authorized amount of withdrawals, from the locations authorized in the existing rights to the newly authorized points of withdrawal." SJO at 42 (emphasis in original).

⁶ After the trial on the impairment issue, which included expert testimony by hydrogeologists, the PCHB concluded that the changes in well locations would not cause impairment of other groundwater rights: "Appellants failed to show that changing the points of withdrawal for WSU's existing water rights or re-configuring the withdrawals among its existing rights would have any appreciably different impact on Mr. Cornelius or other water right holders than if WSU continued to exercise its rights as it has in the past." Final Order at 35.

“designate groundwater areas or subareas, . . . 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 as far as feasible.” RCW 90.44.130; RCW 90.44.180 (Ecology may hold a hearing in a designated groundwater area, and if the hearing indicates that groundwater supply is inadequate, “the department shall order the aggregate withdrawal from such area decreased so that it shall not exceed such available supply.”).⁷ But such a rulemaking exercise is plainly not required when Ecology evaluates a groundwater change application under RCW 90.44.100.⁸

Aqua Permanente’s attempt to graft RCW 90.44.130 onto RCW 90.44.100 as part of that statute’s prohibition on approving groundwater right changes if they would be “detrimental to the public interest” is also unpersuasive. *See* Aqua Permanente Br. at 13-15. Ecology recognizes that the “public interest test” must be applied when it

⁷ Through adoption of rules by Ecology, WAC 173-128A and 173-130A, such an area was established for the Odessa groundwater subarea. WAC 173-130A-040 (“The purpose of this regulation is to provide a procedure for managing groundwater within the Odessa groundwater subarea to insure the maintenance of a safe sustaining yield from the groundwater body within a reasonable and feasible pumping lift.”).

⁸ In the course of evaluating a groundwater right change application, Ecology may obtain information about groundwater levels and trends that could influence the agency to exercise its discretion to go through a separate process under RCW 90.44.130 to create a groundwater subarea and regulate water use by users throughout that area pursuant to RCW 90.44.180 or other statutory authority. However, contrary to Aqua Permanente’s arguments, engaging in such regulation is not required when Ecology processes applications for changes of groundwater rights under RCW 90.44.100.

evaluates groundwater change applications under RCW 90.44.100. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 131-32, 969 P.2d 458 (1999). But, for the same reasons discussed immediately above, this does not mean that Ecology is specifically mandated to apply the provisions of RCW 90.44.130 when it considers whether approval of a change application would be detrimental to the public welfare. To the contrary, Ecology may consider a wide range of factors in its public interest analysis. *See* RCW 90.54.020 (utilization and management of the waters of the state shall be guided by eleven fundamentals relating to a variety of factors). And Ecology's public welfare determinations are accorded due deference. *Schuh v. Dep't of Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983). Ecology plainly was not required to apply the "safe sustaining yield" provisions of RCW 90.44.130 as part of its analysis on whether WSU's proposed amendments would be detrimental to the public welfare under RCW 90.44.100.⁹ Ecology acted lawfully in approving changes in the well locations for WSU's water rights without establishing a designated groundwater area under RCW 90.44.130 and 90.44.180.

⁹ Aqua Permanente's reliance on RCW 90.54.010(1)(e) in support of its position that the public interest requirement necessitated a safe sustaining yield assessment is misplaced. RCW 90.54.010(1)(e)'s statement that "the long-term needs of the state require ongoing assessment of water availability, use, and demand" supports the legislature's finding in that provision that "a state water resource data program is needed to support an effective water resource management program." Thus, this provision does not relate the water right application process, but, rather relates to establishment of a water resources data system.

2. Aqua Permanente's Public Trust Doctrine Argument Is Contrary To Supreme Court Precedent

Aqua Permanente erroneously asserts that “[t]he state’s public trust duty, coupled with Ecology’s authority under RCW 90.44.100, means Ecology should have acted to protect the aquifer when processing the WSU change applications.” Aqua Permanente Br. at 15-18. In essence, Aqua Permanente contends that Ecology was compelled by the common law public trust doctrine to apply the “safe sustaining yield” provisions of RCW 90.44.130 and therefore to deny WSU’s applications and/or reduce the quantities of water authorized under WSU’s water rights. This argument fails. The Washington Supreme Court has held in three decisions that the public trust doctrine does not impose any requirements on Ecology in managing water resources beyond those contained in the water codes.

The Washington Supreme Court has repeatedly established that the public trust doctrine does not provide any independent water resources management authority to Ecology or impose any requirements on the agency in its management of water beyond the authority and requirements provided in the relevant water statutes. To the extent the public trust doctrine applies in the context of water resources management, it is embodied in the state’s water resources laws, which include

RCW 90.44.130. As explained above, Ecology is not required to apply RCW 90.44.130 when it processes groundwater right amendment applications—and settled precedent establishes that the public trust doctrine cannot impose any additional requirement by being “coupled” with that statute.

The Washington Supreme Court has considered the role of the public trust doctrine in the context of water resources management in three cases. In *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993), the Court held that the public trust doctrine did not authorize Ecology to regulate between different classes of water users in a manner that the Court determined was not expressly authorized by the water code. The Court held that Ecology has no common law authority under the public trust doctrine that is independent of the statutory authority conferred on the agency by the legislature:

[T]he duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof. Nowhere in Ecology’s enabling statute is it given the statutory authority to assume the State’s public trust duties and regulate in order to protect the public trust.

Rettkowski, 122 Wn.2d at 232.

In *R.D. Merrill Co.*, the Supreme Court considered whether decisions by Ecology to approve certain applications for changes of water

rights violated the public trust doctrine. The Court followed its earlier holding in *Rettkowski*:

Without question, the state water codes contain numerous provisions intended to protect public interests. However, the public trust doctrine does not serve as an independent source of authority for [Ecology] to use in its decision-making apart from the provisions in the water codes.

R.D. Merrill Co., 137 Wn.2d at 134. In *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 98-99, 11 P.3d 726 (2000), the Court again held that the public trust doctrine “does not serve as an independent source of authority for Ecology to use in its decision-making apart from code provisions intended to protect the public interest.”

Aqua Permanente’s argument that the public trust doctrine imposes requirements on Ecology beyond those contained in the water statutes has already been rejected by the Supreme Court on three occasions.¹⁰ In applying the groundwater amendment statute, RCW 90.44.100, but not applying RCW 90.44.130, Ecology did not run afoul of any “extra” requirement to apply a “safe sustaining yield” analysis imposed by the public trust doctrine.¹¹

¹⁰ The Hawaii Supreme Court decision relied on by Aqua Permanente, *In re Water Use Permit Applications for the Waiahole Ditch*, 94 Haw. 97, 9 P.3d 409, 443-44 (2000), is inapposite to this case because, unlike in the Washington cases, the Hawaii Supreme Court determined that provisions in that state’s constitution invoke the public trust doctrine for management of water resources.

¹¹ Also, Aqua Permanente’s contention that “[b]y failing to implement the safe, sustaining yield mandate, Ecology is ceding the public trust to private interests – namely a golf course” is not well taken. Even assuming *arguendo* that the public trust doctrine

Lastly, Aqua Permanente also contends that “the [Municipal Water Law] does not serve as a shield against Ecology’s obligation to assess safe sustaining yield.” Aqua Permanente Br. at 18-19. Ecology does not maintain that the Municipal Water Law imposes any such “shield.” By the same token, no provision of the Municipal Water Law expressly requires that RCW 90.44.130 must be applied during evaluation of applications to change water rights that are for municipal supply. Applications for changes of municipal groundwater rights are subject to the requirements of RCW 90.44.100, just like all other groundwater right change applications, and RCW 90.44.100 does not include any requirement that Ecology must apply RCW 90.44.130 when evaluating change applications.

B. Answer To Brief Of Amici Tribes

In their brief, the Amici Tribes address one issue, which is enumerated as Issue No. 9 in Ecology’s response brief and stated as: “[d]id the PCHB correctly rule that WSU’s inchoate water rights for its Pullman campus are valid because WSU has exercised reasonable

applies to impose water management requirements beyond those provided under the water code, which it does not, maintaining that a golf course does not advance any public interests reflects a value judgment. While Aqua Permanente may not see a golf course as providing any value to the public, there are others who believe that golf courses provide important recreational and economic benefits to the public—and that intercollegiate athletics programs at a state university, such as WSU’s men’s and women’s golf teams, also benefit the public.

diligence in developing its campus facilities and putting its rights to beneficial use?” Ecology Response Br. at 4.

In evaluating WSU’s water right change applications, Ecology was required to determine whether the unused, inchoate portions of WSU’s water rights are valid and remain “in good standing” through WSU’s exercise of “reasonable diligence” to put water to beneficial use. The Amici Tribes contend that “the evidence supporting Ecology’s finding of diligence by WSU is entirely insufficient.” Amici Tribes Br. at 3-6. This contention fails because the PCHB’s ruling in favor of Ecology and WSU on this issue is soundly based on undisputed facts relating to the unique nature of WSU as a state educational institution. The PCHB correctly ruled that WSU must have flexibility in exercising its inchoate water rights, and, therefore demonstrated reasonable diligence through the continuing growth of its campus and its educational programs. SJO at 21-27 (“Ecology’s judgment that WSU is exercising good faith and due diligence in exercising its inchoate water rights by developing facilities and increasing the enrollment of students is entitled to deference.”); Ecology Response Br. at 42-46.

1. WSU's Inchoate Water Rights Are Valid Because WSU Has Exercised Reasonable Diligence In Developing Its Campus Facilities And Putting Its Rights To Beneficial Use

Ecology agrees with the Amici Tribes that RCW 90.03.320 and RCW 90.03.460 provide factors that should be considered when determining whether the inchoate portion of a water right documented by a certificate remains valid and in good standing. *See* Amici Tribes Br. at 9; Ecology Response Br. at 43-44. While RCW 90.03.320 relates to water permits, it is appropriate to apply the factors in that statute to "pumps and pipes certificates," such as those held by WSU, because such certificates were prematurely issued based on system capacity rather than the actual use of water. Ecology Response Br. at 42.

But the Amici Tribes' argument on WSU's reasonable diligence fails because the Amici Tribes downplay or sidestep certain factors in those statutes. RCW 90.03.460 provides that reasonable diligence must be considered by "having due regard to the circumstances surrounding the enterprise, including the magnitude of the project for putting the water to beneficial use" RCW 90.03.320 provides that Ecology shall take into consideration "the cost and magnitude of the project and the engineering and physical features to be encountered, and shall allow such

time as shall be reasonable and just under the conditions then existing, having due regard for the public welfare and public interests affected.”

The Amici Tribes’ argument that WSU has failed to exercise reasonable diligence in the perfection of its water rights disregards the “circumstances surrounding the enterprise” and the “magnitude of the project” involving WSU’s campus water system. The Amici Tribes disregard WSU’s unique situation as the operator of a campus water system for a state university, which is subject to legislative control.

With respect to the period of time that should govern WSU’s perfection of its inchoate water rights, WSU faces totally unique circumstances as a state institution of higher education. WSU cannot precisely plan what water it will need in the future and when the water will be needed because future enrollment targets must be determined by the legislature through the state budget process. *See e.g.*, 2011-2013 Capital Budget, Laws of 2011, ch. 48, §§ 5015-5019 (providing WSU’s capital projects biennial budget appropriation);¹² 2011-2013 Operating Budget, Laws of 2011, ch. 50, § 602 (establishing WSU’s biennial enrollment targets); and Laws of 2011, ch. 50, § 607 (establishing WSU’s biennial operating budget appropriation). As a state university, WSU is subject to

¹² The 2011-2013 capital budget bill can be accessed on the internet at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/House/1497-S.SL.pdf>

the state's policy that higher enrollments be increased in increments each biennium. *See* RCW 28B.10.782 (describing the application of state policy regarding increased student enrollment target levels). Thus, it would be difficult to set an explicit development schedule for a state university like WSU because the legislature must decide every two years whether to fund any new facilities or increase the student enrollment target.¹³

RCW 90.03.320 also provides that conservation efforts by a municipal water supplier can be a factor demonstrating reasonable diligence:

In fixing construction schedules and the time, or extension of time, for application of water to beneficial use for municipal water supply purposes, the department shall also take into consideration . . . delays that may result from planned and existing conservation and water use efficiency measures implemented by the public water system

The Amici Tribes fail to recognize RCW 90.03.320's inclusion of water efficiency measures as a factor that can demonstrate reasonable diligence, and that WSU has successfully carried out water conservation efforts.

While WSU has continued to grow over time by increasing the number of

¹³ Ecology does not disagree with the Amici Tribes' points on the importance of development schedules in ensuring that reasonable diligence is exercised to maintain inchoate water rights. *See* Amici Tribes Br. at 16-17, 19-20. However, in this case, the PCHB noted: "Appellants have not raised, and the Board does not decide, the issue of whether Ecology must establish a construction schedule for the inchoate portion of WSU's certificated water rights." SJO at 26 n.16. In any event, even if Cornelius had raised this issue below, WSU's unique situation does not lend itself to a specific development schedule.

students it serves and developing additional campus facilities, WSU's water use has actually declined over the recent past because it has successfully employed water conservation measures. AR 27 at 3; Reports of Examination.¹⁴ WSU should not be punished for its conservation efforts by eliminating its right to grow into its water rights in the future when the legislature directs it to provide educational opportunities for more students.¹⁵ This would create a disincentive for water conservation and fail to have "due regard for the public welfare and public interests affected," including state higher education objectives. RCW 90.03.320.

The Amici Tribes' assertion that the only evidence supporting the PCHB's conclusion that WSU acted with reasonable diligence is a "conclusory statement" by an Ecology examiner (Amici Tribes' Br. at 8) is contradicted by the record in this case. The uncontroverted summary judgment record demonstrates that WSU has steadily increased its facilities and student enrollment over time, and has employed water efficiency measures to serve a growing number of students without increasing water consumption. Between 1966 and 1969, WSU built 4 new residence halls with a total capacity (in 2007) of 975 students. AR 53

¹⁴ The Reports of Examination document Ecology's decisions on WSU's water right change applications. They are attached to the Notice of Appeal, which is listed as document 1 in the PCHB's Index of Record.

¹⁵ Moreover, water right flexibility for an institution like WSU is warranted because future advances in water conservation technology cannot be predicted.

(Declaration of Terry Boston), Ex. 1. Between 1971 and 1976, WSU built one new residence hall with a capacity (in 2007) of 291 students, and apartment buildings with a total of 1,332 bedrooms. *Id.*, Exs. 1, 2. Between 1996 and 2001, WSU built 15 new apartment buildings with a total of 212 bedrooms, and a new residence hall with a total capacity of 117 students. *Id.* The number of students residing on campus increased from 5,508 in 1997 to 5,709 in 2006. AR 49 at 2 (Declaration of Ann Fulkerson). The number of total water service connections (including residence halls, apartments, classrooms, labs, study facilities, administrative and maintenance buildings, and recreational facilities) in the WSU Pullman Campus water system increased from 4,149 in 2002 to 4,215 in 2007. AR 22 at 2-4 (Declaration of Gary Wells). In 1962, WSU identified its “present enrollment of 7800.” AR 23 (Declaration of Patrick Kevin Brown), Ex. 3. In 1973, WSU identified the WSU Pullman Campus as “having a present population of 15,000.” *Id.*, Ex. 5. During the Fall 2006 semester, WSU’s Pullman Campus had 16,292 full-time students and 3,950 full-time faculty and staff. AR 49 at 2. The Amici Tribes ignore all this evidence, as well as the fact that Cornelius did not dispute any of it during the summary judgment proceedings before the PCHB. *See also* AR 27 at 3; AR 28, Ex. 3; CP 473; CP 474 (PBAC 2002-2005 Report). Moreover, as explained above, WSU faces unique

circumstances because it cannot fix precisely the maximum amount of water it will need in the future because future enrollment targets are determined by the legislature.

The cases relied on by Amici Tribes are all inapposite to the situation in this case and do not buttress their position. *Concerned Neighbors of Lake Samish v. Department of Ecology*, PCHB No. 11-126 (2012) is distinguishable from WSU's scenario because, in that case, the PCHB concluded that a water permit should be cancelled when the permit holder, the developer of a residential project, failed to even *begin* construction of its residential development project for a period of approximately 25 years after the permit was issued:

The Project has not been diligently pursued with steady, constant and deliberate level of effort. Activity near the time that the date the *beginning of construction* was to expire does not absolve one's lack of overall diligence prior to that time.

Concerned Neighbors of Lake Samish, PCHB No. 11-126 at 12 (emphasis in original). In contrast, WSU is an established institution that began development many decades ago and has continued to expand since its founding in 1890.

Department of Ecology v. Abbott, 103 Wn.2d 686, 694, 694 P.2d 1071 (1985) is not on point with this case because it involved the determination of the period of reasonable diligence to perfect a riparian

water right that had been established prior to the enactment of the water code in 1917. Through enactment of the water code, the legislature effectively eliminated the riparian water rights doctrine, fully adopted the prior appropriation doctrine, and created a permitting system for the establishment of water rights. The Court considered what time was reasonably needed to perfect a pre-code water right for irrigation purposes and held that 15 years was a reasonable period of time to perfect a right through the irrigation of farmland. However, ascertaining how much time was reasonable to complete a project involving irrigation of private farmland is not parallel to the question of how much time is reasonably needed for development of a state university.

A scenario involving perfection of an irrigation water right was also at play in *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (1985). In *Colville Confederated Tribes*, the Ninth Circuit determined how much time was reasonably needed for a farmer to perfect a water right for irrigation purposes on an Indian reservation. The Court held that the water claimant failed to show “an intent to appropriate an increasing amount of water from over two decades of relatively static irrigation practices” and that his water right, therefore, was limited to the amount used for irrigation during that period. *Colville Confederated Tribes*, 752 F.2d at 403. This case involving reasonable diligence to irrigate

private farmland is also distinguishable from WSU's scenario. Thus, these cases do not support Amici Tribes' contention that "15-20 years" is a reasonable period of time to put water to beneficial use in all circumstances.

The Amici Tribes conclude their brief by unpersuasively arguing that the PCHB erred in recognizing that two of the reasons why WSU demonstrated reasonable diligence were that WSU is further developing facilities and increasing student enrollments, and is not intending to speculate by marketing its water rights to others who would use the water for non-university projects. *See* Amici Tribes' Br. at 19; SJO at 25. Speculation is recognized as a factor that can evidence a lack of reasonable diligence. *See R.D. Merrill Co.*, 137 Wn.2d at 130-31. The Amici Tribes appear to assert that WSU's intention to only use its inchoate water rights on its own campus, and not to market them for use elsewhere, fails to support the notion that WSU is not engaging in speculation because "Ecology failed to address the issue of hoarding itself." *See* Amici Tribes Br. at 19. This point is not well taken. The record shows that WSU is not "hoarding" water rights. Instead, it is being responsible in collaborating with other entities to conserve the water of the Palouse Basin Aquifer, carrying out water efficiency measures on the campus, and in prudently managing its inchoate water rights so that it will be able to

meet directives from the legislature with regard to future development of the campus and its educational offerings.

In sum, the Amici Tribes' arguments fail to show any error in the PCHB's ruling that "Ecology was within its discretion to determine that WSU is exercising due diligence in putting its water rights to full beneficial use and that WSU's water rights remain in good standing." SJO at 26.

III. CONCLUSION

Based on the foregoing, Ecology respectfully requests the Court to uphold the approvals of WSU's water right change applications by affirming the PCHB's Order on Summary Judgment, and Findings of Facts, Conclusions of Law and Order.

RESPECTFULLY SUBMITTED this 7th day of November, 2012.

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