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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 304701

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

Appellants,

vs.

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

Respondents.

APPELLANTS' OPENING BRIEF

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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 than 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 Alpowia 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



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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:

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



Rachael Paschal Osborn

**Cornelius v. Dept. of Ecology
Court of Appeals No. 304701**

Appendix No. 1

Permit G3-28278P

Priority Date: January 28, 1987
 Instantaneous Quantity (Qi): 2500 gallons per minute
 Annual Quantity (Qa): 2260 acre-feet per year
 Purpose: municipal supply
 Source: A well - #7

An application for change has been filed on each of the above described water right documents. Each right will have its own determination.

Three claims, three certificates, and one permit are appurtenant to the WSU campus. Seven wells have been used since 1938. One of the wells, No. 2, was decommissioned and is no longer in use. The remaining wells and water use were integrated into two systems over the years to meet the delivery, fire control and design needs of the campus. Well No. 8 was recently drilled and is ready for use. The campus water system is divided into high distribution and low distribution systems to meet pressure control and operational needs. Wells 5, 6, and 8 serve the high system and wells 1, 3, 4 and 7 serve the low system. The goal of the subject application(s) is to integrate all of the wells of the individual rights to operate as the system is currently designed. Two emergency interties are designed into the City of Pullman, but the university has not had to exercise the intertie system. The high distribution system has 2 old wells and one new well (#8). The low distribution system has 3 old wells and one new well (#7). The proposal is to have one new well on each system become the primary service well for that system. At this time if one of the old wells were out of service the system may not be able to meet the demand on the system.

Well No.	Instantaneous Capacity	System	Pump HP
1	500 GPM	Low	60
2	Decommissioned	Low	N/A
3	1000 GPM	Low	150
4	1000 GPM	Low	225
5	500 GPM	High	75
6	1500 GPM	High	250
7	2500 GPM	Low	450
8	2500 GPM	High	700

Water Use

A review of the water use data for the source wells on campus for the period of 1989 through 2004 indicated an annual use ranging between 1711 acre-feet per year to 1988 acre-feet per year. The maximum annual water use occurring in 1994. WSU provided a graph of the annual water use between 1989 and 2004 and indicated a decline in water use of 0.3 % during this period.

Water Rights

Seven water right documents are appurtenant to the campus. There are additional rights held by the school for isolated locations that are not addressed in this review. The campus rights are as follows:

Water Right	Qi	Qa	Priority Date	Type	Source
Claim 098522	500	720	1934	Primary*	1
Claim 098523	500	720	1938	Primary	2
Claim 098524	(1000)	(1440)	1946 (not valid)	Not valid*	3
Cert 5070-A	1500	2260	1962	Primary*	4
Cert 5072-A	500	720	1963	Primary	5
G3-22065C	1500	1600	1973	Primary	6, 8
G3-28278P	2500*	2260*	1987	Supplemental*	7
Totals	5000 GPM	5300 AFY			

*Permit issued with a provision: "less those amounts appropriated underground Water Cert. 5070-A, and Ground Water Claims 98522 and 98524. Total combined quantity shall not exceed 2500 gallons per minute, 2260 acre-feet per year."

The above water analysis totals are consistent with the 2001 comprehensive water plan.

Evaluation of the Water Right Permit

Ground Water Permit G3-28278P authorized a use of 2500 gallons per minute, 2260 acre-feet per year for municipal supply. WSU has filed a Proof of Appropriation claiming the right has been put to beneficial use.

The existing water system for WSU is defined as a Group A Water System by Department of Health (DOH). The system qualifies as a "municipal water supplier" and serves water for "municipal water supply purposes" as defined under RCW 90.03.015. A new section was added to Chapter 90.03 RCW. The new section states the following: "When requested by a municipal water supplier or when processing a change or amendment to the right, the Department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in Chapter 90.03.015 RCW, are correctly identified as being for municipal water supply purposes." All WSU campus water rights are for "municipal supply" and for "domestic supply" purposes which meet the criteria under RCW 90.03.015(4).

WSU qualifies for municipal supply under RCW 90.03.015. WSU is not using its full allocation of water. Water use data for WSU was provided by Gary Wells. In 1994 WSU used approximately 1988 acre-feet. WSU currently has water rights (including the claims) totaling 5300 acre-feet. Therefore, this leaves 3312 acre-feet of inchoate water available for future use by WSU. The inchoate water available is consistent with the municipal legislation (SHB 1338) passed that allows for certainty for growth into these inchoate quantities by municipal providers.

Well 7 is the authorized well for this permit. The total annual quantity under all rights authorized for WSU is 5300 acre-feet. At this time it appears a large portion of this authorization is unperfected.

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Appendix No. 2

WSU PULLMAN CAMPUS WATER SYSTEM – ANNUAL VOLUMES PUMPED
IN ACRE-FEET

Year	Well 1	Well 2	Well 3	Well 4	Well 5	Well 6	Well 7	Well 8	Total
1937									472
1938									499
1939									550
1940									
1941									473
1942									541
1943									576
1944									570
1945									530
1946									666
1947									784
1948									873
1949	718	347							1065
1950	763	264							1027
1951	895	275							1170
1952									
1953									
1954									
1955									
1956									
1957									
1958	41	146	1019						1206
1959	36	336	888						1260
1960	57	469	808						1324
1961	95	586	754						1434
1962	122	566	842						1530
1963	214	443	977	55					1689
1964	101	113	864	535					1613
1965	94	97	1004	592					1787
1966	180	183	606	867					1835
1967	156	157	582	1028					1924
1968	87	85	623	1033					1828
1969	168	135	858	1090					2251
1970	83	155	680	958					1876
1971	237	154	648	693	107				1838
1972	137	105	644	960	188				2034
1973	161	130	628	1042	166				2116
1974	146	118	631	949	213				2057
1975	206	171	688	659	184				1908
1976	136	113	618	938	228				2033
1977	125	18	378	735	138	713			2106
1978	116	0	367	672	34	878			2067
1979	121	0	377	874	20	855			2247
1980	124	0	344	829	16	662			1976
1981	163	0	564	790	20	536			2073
1982	120	0	431	876	13	703			2142
1983	180	0	451	808	16	607			2062
1984	236	0	493	802	0	746			2277
1985	222	0	377	1058	1	558			2215
1986	191	0	249	1085	0	565			2090
1987	275	0	263	916	0	623			2077
1988	293	0	392	818	0	458			1961
1989	260	0	448	639	0	503			1850
1990	234	0	263	644	0	726			1866

Year	Well 1	Well 2	Well 3	Well 4	Well 5	Well 6	Well 7	Well 8	Total
1991	328	0	491	730	0	296			1846
1992	192	0	193	395	0	332	742		1855
1993	275	0	386	728	0	339	129		1857
1994	292	0	340	740	0	618			1989
1995	357	0	463	694	0	279			1793
1996	277	0	311	529	46	655			1818
1997	261	0	308	616	90	445			1720
1998	181	0	243	495	18	789	29		1756
1999	0	0	179	184	0	1102	295		1760
2000	2	0	83	141	0	1073	470		1769
2001	0	0	0	88	0	545	1295		1927
2002	0	0	0	129	0	389	1280		1798
2003	0	0	0	0	0	473	1394		1866
2004	0	0	0	0	0	187	1525		1711
2005	0	0	0	0	0	84	1497		1581
2006	0	0	0	0	0	44	1401	20	1466

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Appendix No. 3

Table 4.5

DOE Table 4 Forecasted Water Rights Status

Permit Certificate or Claim #	Name of Right holder or Claimant	Priority Date	Source Name/ Number	Primary or Supplemental	Existing Water Rights		Forecasted 20 Year Demand		Forecasted Water Right Status, 20 Year (Excess/Deficiency)	
					Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)
Permits/ Certificates					gpm	acre-feet	gpm	acre-feet	gpm	acre-feet
1. 5070-A	WSU	1962	Well #4	supplemental	1500	2260	1500	94	0	2166
2. 5072-A	WSU	1963	Well #5	inactive	500	720	0	0	500	720
3. G3-22065C	WSU	1973	Well #6	supplemental	1500	1600	1500	119	0	1481
4. G3-28278P	WSU	1987	Well #7	primary	2500*	2260*	2500	835	0	1425
5. Future		2002?	Well #8	primary	2500^	3040^	2500	1062	0	1978
Claims										
1. 098522	WSU	1934	Well #1	inactive	500	720	0	0	500	720
2. 098523	WSU	1938	Well #2	abandoned	500	720	0	0	500	720
3. 098524	WSU	1946	Well #3	inactive	1000	1440	0	0	1000	1440
TOTAL	-	-	-	-	5000**	5300**	5000**	2110†	0**	3190†**
Intertie Name /Identifier		Name of Purveyor Providing Water			Existing Limits on Intertie Water Use		Forecasted Consumption Through Intertie		Forecasted Intertie Supply Status (Excess/Deficiency)	
					Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)
69880V/Pullman		City of Pullman			Emergency					
TOTAL										
Pending Water Right Application	Name On Permit	Date Submitted	Primary or Supplemental	Pending Water Rights						
				Maximum Instantaneous Flow Rate (Qi) Requested			Maximum Instantaneous Volume (Qa) Requested			
none										

^The amounts to be granted under Well #8 are less those amounts used in 2,5,& 6

*The amounts granted under G3-28278P are less those amounts used in Wells 1,3& 4.

† based on conservative estimate of 1% increase per year

Table 4.4

DOE Table 3 Existing Water Rights Status

Permit Certificate or Claim #	Name of Right holder or Claimant	Priority Date	Source Name/ Number	Primary or Supplemental	Existing Water Rights		Existing Consumption		Current Water Right Status (Excess/Deficiency)	
					Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)
Permits/ Certificates					gpm	acre-feet	gpm	acre-feet	gpm	acre-feet
1. 5070-A	WSU	1962	Well #4	supplemental	1500	2260	1500	132†	0	2128†
2. 5072-A	WSU	1963	Well #5	supplemental	500	720	450	0	50	720
3. G3-22065C	WSU	1973	Well #6	primary	1500	1600	1500	1060†	0	540†
4. G3-28278P	WSU	1987	Well #7	primary	2500	2260	2500	452†	0	1808†
Claims										
1. 098522	WSU	1934	Well #1	inactive	500	720	0	0	500	720
2. 098523	WSU	1938	Well #2	abandoned	500	720	0	0	500	720
3. 098524	WSU	1946	Well #3	inactive	1000	1440	0	84†	1000	1356†
TOTAL					5000*	5300*	4450	1728†	550*	3572†*
Intertie Name /Identifier		Name of Purveyor Providing Water		Existing Limits on Intertie Water Use		Existing Consumption Through Intertie		Current Intertie Supply Status (Excess/Deficiency)		
				Maximum Instantaneous Flow Rate (Qi)		Maximum Instantaneous Flow Rate (Qi)		Maximum Instantaneous Flow Rate (Qi)		
				Maximum Annual Volume (Qa)		Maximum Annual Volume (Qa)		Maximum Annual Volume (Qa)		
69880V/Pullman		City of Pullman		Emergency						
TOTAL										
Pending Water Right Application	Name On Permit	Date Submitted	Primary or Supplemental	Pending Water Rights						
				Maximum Instantaneous Flow Rate (Qi) Requested		Maximum Instantaneous Volume (Qa) Requested				
none										

* The amounts granted under G3-28278P † based on data from year 2000 are less those amounts used in Wells 1,3,4.

AR 18, EX. 4

Cornelius v. Dept. of Ecology
Court of Appeals No. 304701

Appendix No. 4

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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

Appellants,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY and WASHINGTON STATE
UNIVERSITY,

Respondents.

PCHB No. 06-099

ORDER ON SUMMARY JUDGMENT
(AS AMENDED ON RECONSIDERATION)¹

This matter comes before the Pollution Control Hearings Board (Board) as part of the above-captioned appeal contesting the approval by the Department of Ecology (Ecology) of changes to six groundwater rights at Washington State University (WSU). This order addresses all of the parties' motions and cross motions for partial summary judgment, which collectively involves all of the legal issues identified by the parties in this appeal.

The parties submitted these motions to the Board for its consideration on the written record. The Board requested oral argument, which was held on October 29, 2007, at the Board's offices in Lacey, Washington. Attorneys Rachael Paschal Osborn, M. Patrick Williams of the Center for Environmental Law & Policy, and Harold Magistrale, represented Appellants Scott Cornelius, *et. al.* on the briefs, and Ms. Osborn and Mr. Williams presented Appellants' oral argument. Alan M. Reichman and Sarah M. Bendersky, Assistant Attorneys General, represented Respondent Ecology on the briefs and at oral argument. Respondent WSU was

¹ By the Board's Order on Reconsideration, issued January 18, 2008.

1 represented by Sarah E. Mack and James A. Tupper, of Tupper Mack Brower, PLLC, and Frank
2 M. Hruban, Assistant Attorney General, on the briefs, and Mr. Hruban and Ms. Mack presented
3 oral argument on behalf of WSU.

4 Board members Andrea McNamara Doyle, Presiding, Kathleen D. Mix, Chair, and
5 William H. Lynch, Member, heard oral arguments, and reviewed and considered the pleadings
6 and record pertinent to the motion in this case, including the following:

- 7 1. Appellants' Motion for Partial Summary Judgment on the Issues of Enlargement (Issue
8 No. 7), Relinquishment (Issue No. 8D), and Abandonment (Issue No. 9B).
- 9 2. Declaration of Rachael Osborn, dated August 27, 2007 (*hereinafter "First Osborn
10 Decl."*), with attachments 1-10.
- 11 3. Appellants' Motion for Summary Judgment re: Agreed Issues No. 17A, No. 17B, and No.
12 17C, Regarding SEPA.
- 13 4. Declaration of Patrick Williams, dated August 27, 2007 (*hereinafter "First Williams
14 Decl."*), including Attachment 1 (Declaration of Kevin Brackney, with Attachments 1A
15 & 1B), and Attachments 2-10.
- 16 5. Appellants' Motion for Summary Judgment Re: Agreed Issue No. 18A Regarding
17 Jurisdiction Over Constitutional Issues.
- 18 6. WSU's Motion for Partial Summary Judgment [re: Issues 1, 2, 5-9, 12-15, and 17].
- 19 7. Declaration of Patrick Kevin Brown, dated August 27, 2007 (*hereinafter "First Brown
20 Decl."*), including attached Exhibits 1-10.
- 21 8. Declaration of Ann Fulkerson, dated August 27, 2007.
9. Declaration of Thomas Matuszek, dated August 24, 2007, including attached Exhibit 1.
10. Declaration of Terry A. Ryan, dated August 24, 2007, including attached Exhibit 1.
11. Declaration of Sarah E. Mack, dated August 28, 2007, including attached Exhibits 1-6.
12. Declaration of Gary Wells, dated August 28, 2007 (*hereinafter "First Wells Decl"*),
including attached Exhibits 1-11.
13. Respondent Department of Ecology's Motion for and Memorandum in Support of Partial
Summary Judgment [re: Issues No. 4, 6, 11, 16 and 18A], (as amended by Errata Sheet
dated September 11, 2007).
14. Declaration of Alan M. Reichman in Support of Ecology's Motion for Partial Summary
Judgment, dated August 27, 2007, including Attached Exhibits 1-4.

- 1 15. Declaration of Patrick Kevin Brown in Support of Ecology's Motion for Partial Summary
2 Judgment, dated August 27, 2007 (*hereinafter "Second Brown Decl."*).
- 3 16. Declaration of Guy J. Gregory in Support of Ecology's Motion for Partial Summary
4 Judgment, dated August 27, 2007.
- 5 17. Declaration of Keith L. Stoffel in Support of Ecology's Motion for Partial Summary
6 Judgment, dated August 27, 2007.
- 7 18. Appellants' Response to Motions of Ecology and WSU for Partial Summary Judgment on
8 Issues 1-18A.
- 9 19. Declaration of M. Patrick Williams, dated September 10, 2007 (*hereinafter "Second
10 Williams Decl."*), including Attachments 1-5.
- 11 20. Declaration of M. Patrick Williams, dated September 11, 2007 (*hereinafter "Third
12 Williams Decl."*), including Attachment 1.
- 13 21. Declaration of Kent Keller, dated September 10, 2007, including Attachments 1-2.
- 14 22. Declaration of Rachael Osborn, dated September 10, 2007 (*hereinafter "Second Osborn
15 Decl."*), including Attachments 1-12.
- 16 23. Declaration of Scott Cornelius, dated September 10, 2007, including Attachments 1-5.
- 17 24. WSU's Partial Joinder in Ecology's Motion for Partial Summary Judgment.
- 18 25. WSU's Memorandum in Response to Appellants' Motion for Summary Judgment re:
19 Issues 7, 8D and 9B.
- 20 26. WSU's Memorandum in Response to Appellants' Motion for Summary Judgment re:
21 Issue 17 (SEPA).
27. WSU's Memorandum in Opposition to Summary Judgment re: Issue 18.
28. Supplemental Declaration of Gary Wells in Opposition to Appellant's Motion for
Summary Judgment, dated September 11, 2007 (*hereinafter "Second Wells Decl."*),
including attached Exhibits 1-2.
29. Ecology's Response to Appellants' Motions for Partial Summary Judgment.
30. Ecology's Notice of Joinder in WSU's Motions for Partial Summary Judgment.
31. Response Declaration of Patrick Kevin Brown, dated September 11, 2007 (*hereinafter
"Third Brown Decl."*), including attached Exhibit 1.
32. Response Declaration of Victoria Leuba, dated September 11, 2007.
33. Appellants' Reply Brief on Issues of Enlargement, Relinquishment & Abandonment, and
Reply to Ecology's Joinder Notice.
34. Appellants' Reply Brief on SEPA Issues 17A, 17B, 17C, dated September 21, 2007.
35. Appellants' Reply Brief on Constitutional Issue 18A.
36. Declaration of M. Patrick Williams in Support of Appellants' Reply to Issue 18A, dated
September 21, 2007, (*hereinafter "Fourth Williams Decl."*), including Attachment 1.

- 1 37. Ecology's Corrected Reply to WSU's Memorandum in Opposition to Summary
Judgment re: Issue 18, dated October 2, 2007 (superceding September 24 brief).
- 2 38. Ecology's Reply to Appellants' Response Memorandum.
- 3 39. WSU's Reply Memorandum in Support of Summary Judgment.
- 4 40. Declaration of Steven Russell in Support of WSU's Motion for Partial Summary
Judgment, dated September 24, 2007.
- 5 41. Declaration of Terry Boston in Support of WSU's Motion for Partial Summary
Judgment, dated September 24, 2007, including attached Exhibits 1-2.
- 6 42. Second Supplemental Declaration of Gary Wells in Support of WSU's Motion for Partial
Summary Judgment, dated September 21, 2007 (*hereinafter "Third Wells Decl."*),
including attached Exhibits 1-2.
- 7 43. Appellants' Notice of Additional Legal Authority.

8 9 BACKGROUND

10 In October 2004, WSU submitted applications to Ecology proposing to change/transfer
11 all of its existing groundwater rights currently used to serve its Pullman campus. WSU proposes
12 to integrate the water rights associated with its existing campus well system, by adding seven (7)
13 of its existing wells as authorized points of withdrawal for each of its existing groundwater rights
14 in the area, and changing the place of use for each right to be consistent with its approved water
15 service area. In other words, WSU wished to be able to withdraw water under each of its
groundwater rights from any or all of its existing wells. *First Brown Decl.*

16 The required notice of application was published in the Pullman Daily News on January
17 14 and 25, 2005, and a subsequent amended notice was published on May 5 and 12, 2005, to
18 correct errors in the first notice. Two protests and one letter of concern were received during the
19 protest period, including one protest on behalf of Appellant Scott Cornelius and one on behalf of
20 Appellant Palouse Water Conservation Network.
21

1 Because the cumulative quantities of water for the integration proposal consist of more
 2 than 2,250 gallons per minute (gpm), a State Environmental Policy Act (SEPA) analysis was
 3 conducted. After review of a completed environmental checklist and other information, WSU
 4 issued a final Determination of Non-Significance (DNS) on June 7, 2004. WSU determined the
 5 proposal would not have a significant adverse impact on the environment, although the checklist
 6 did not specifically discuss the declining water level of the Grande Ronde Aquifer. In reviewing
 7 the change applications, Ecology relied on the DNS issued by WSU and did not conduct a new
 8 threshold determination or perform supplemental SEPA analysis.

9 The essential information contained in each of the WSU water right documents at issue in
 10 this appeal is summarized as follows:

Water Right Document	Source	Priority Date	Instantaneous Quantity (Qi) Gallons per minute	Annual Quantity (Qa) Acre feet per year	Purpose stated on document
Ground Water Claim 098522	Well - #1	1934	500 gpm	720 afy	Municipal supply, irrigation and stock
Ground Water Claim 098523	Well - #2	1938	500 gpm	720 afy	Municipal supply, irrigation and stock
Ground Water Claim 098524	Well - #3	1946	1000 gpm	1440 afy	Municipal supply, irrigation and stock
Certificate 5070-A	Well - #4	Aug 1, 1962	1500 gpm	2260 afy	Domestic supply for WSU
Certificate 5072-A	Well - #5	May 27, 1963	500 gpm	720 afy	Community domestic supply & stock water
Certificate G3-22065C	Well - #6 Well - #8	Nov 12, 1973	1500 gpm	1600 afy	Municipal supply
Permit G3-28278P	Well - #7	Jan 28, 1987	2500 gpm	2260 afy	Municipal supply

18 Over the years, the WSU Pullman campus water system has been integrated into two
 19 systems, a "low distribution system" served by Wells 1, 3, 4, and 7, and a "high distribution
 20 system" served by Wells 5, 6, and 8. *Third Wells Decl., Exh. 1*. As presently operated, the WSU
 21 campus water system is integrated or consolidated, in that all the water for the system is

1 withdrawn primarily from two wells. Water withdrawals from individual wells have not
2 historically matched and do not presently match the quantities authorized under the water rights
3 identified with those wells. In some instances, water has been withdrawn from wells other than
4 the wells with which particular water rights are identified. The system integration has occurred
5 without specific authorization from Ecology or its predecessor agencies. *First Brown Decl. at ¶8.*

6 As part of its review of the change applications, Ecology applied a number of provisions
7 from the recently enacted Municipal Water Supply Act, commonly referred to as the 2003
8 Municipal Water Law (2003 MWL).² Most notably, Ecology determined that WSU is a
9 “municipal water supplier” under the terms of the 2003 MWL, and that the rights it holds for the
10 Pullman campus qualify as rights for “municipal supply purposes” as that term is defined by the
11 2003 MWL. In September 2006, Ecology issued Reports of Examination (ROE) for each of the
12 change applications at issue in this appeal, approving, in large part, WSU’s change/consolidation
13 requests. Ecology denied integration of Claim No. 098524 (associated with Well No. 3) upon
14 Ecology’s tentative determination that this claim is invalid. Appellants timely appealed
15 Ecology’s decisions to this Board. WSU does not challenge Ecology’s decision regarding the
16 validity of Claim No. 098524. The parties subsequently filed a Statement of Agreed Legal
17 Issues consisting of forty (40) issues, comprising eighteen (18) general topics, presented by
18 Ecology’s interpretation of the 2003 MWL and its application to WSU’s rights.

19 These motions and cross motions for partial summary judgment addressing all the issues
20 followed. More specifically, Appellants have moved for summary judgment regarding Issues 7

21 _____
² 2E2SHB 1338, Chapter 5, Laws of 2003 (58th Leg, 1st Spec Session).

1 (Enlargement), 8D (Relinquishment), 9B (Abandonment), 17A-C (SEPA), and 18A
2 (Constitutional Claims). Respondent WSU has moved for summary judgment in favor of
3 Respondents as to Issues 1 (Municipal Water Supplier), 2A-F (Municipal Water Supply
4 Purposes), 5 (Perfection), 6 (Beneficial Use), 7 (Enlargement), 8A-E (Relinquishment), 9A-F
5 (Abandonment), 12A-F (Impairment to Existing Rights), 13 (Aquifer Depletion), 14 (Public
6 Welfare), 15 (Impairment to Surface Water), and 17A-C (SEPA).³ Ecology has moved for
7 summary judgment in its favor as to Issues 2 (Municipal Water Supply Purposes), 3 (Reliance on
8 2003 MWL), 6 (Beneficial Use), 10 (Same Body of Public Ground Water), 11 (Expansion of
9 Place of Use), 16 (Improper Delegation), and 18A (Constitutional Claims).⁴

10 ANALYSIS

11 *Summary Judgment Standard*

12 Summary judgment is a procedure available to avoid unnecessary trials on formal issues that
13 cannot be factually supported and could not lead to, or result in, a favorable outcome to the
14 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary
15 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
16 The party moving for summary judgment must show there are no genuine issues of material fact
17 and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title*
18 *Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment
19 proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118
20 Wn.2d 451, 456, 824 P.2d 1207 (1992).

21 ³ Ecology joined WSU's motion for summary judgment on each of these issues.

⁴ WSU joined Ecology's motion for summary judgment as to issues 2, 3, 6, 10, 11, and 16, but not 18A.

1 If a moving party meets the initial burden of showing the absence of a material fact, the
2 inquiry shifts to the party with the burden of proof at hearing. The party then must make a
3 showing sufficient to establish that a triable issue exists. *Young v. Key Pharmaceuticals, Inc.*,
4 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989). In making its responsive showing, the
5 nonmoving party cannot rely on mere allegations, unsubstantiated opinions, or conclusory
6 statements, but must set forth specific facts showing that there is a genuine issue for trial.
7 *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). At that point, we consider
8 the evidence and all reasonable inferences therefrom in the light most favorable to the non-
9 moving party. *Id.*

10 *Legal Issues*

11 We address Issue No. 18 first, because arguments concerning the interpretation and
12 constitutionality of certain provisions of the 2003 Municipal Water Law permeate many of the
13 Appellants' legal theories and specific legal issues raised in this appeal. We then address each of
14 the remaining issues in the order presented by the parties' Statement of Agreed Legal Issues.

15 Legal Issue No. 18: Constitutional Claims.

16 Two constitutional issues are raised in connection with this appeal; first, whether the
17 Board has jurisdiction to consider the constitutional claims raised in this appeal; and second,
18 whether the application of the 2003 MWL in the water right decisions is contrary to the
19 Washington State and United States Constitutions.

20 None of the parties suggest this Board is the proper forum to resolve a facial challenge to
21 the constitutionality of the 2003 Municipal Water Law. We agree. However, WSU contends
that the Board has jurisdiction to consider the constitutional claims raised in this appeal,
including whether application of the 2003 MWL in this case is contrary to the Washington State

1 or United States Constitutions. Appellants and Respondent Ecology, on the other hand, argue
2 that the Board is without jurisdiction to decide “as applied” constitutional questions raised by
3 application of the 2003 MWL to the facts of this case.

4 The Board has jurisdiction to hear and decide appeals of Ecology water right change
5 decisions. *RCW 43.21B.110(1)*. This jurisdiction necessarily includes the authority to determine
6 whether Ecology’s water right change decision complied with applicable laws, including the
7 2003 MWL. *Weyerhaeuser v. Tacoma-Pierce County Health Dep’t.*, PCHB 99-067, 069, 097,
8 102, COL XXI (Order on Motions to Dismiss, September 23, 1999) (holding that, while the
9 Board did not have jurisdiction to determine the facial constitutionality of a state statute, it did
10 have jurisdiction over whether the challenged permit decision complied with the applicable laws,
11 including the challenged statute).

12 To the extent that we must interpret the meaning of the 2003 MWL in order to apply it to
13 the facts of this case, we have jurisdiction to do so. In so doing, we start with the presumption
14 that it is constitutional. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).
15 From that presumption, we attempt to construe it in such a way as to avoid unconstitutionality.
16 *World Wide Web Video v. Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991), quoting *State v.*
17 *Browet, Inc.* as follows: “[w]herever possible, it is the duty of this court to construe a statute so
18 as to uphold its constitutionality.” 103 Wn.2d 215, 219, 691 P.2d 571 (1984).

19 Regardless of how they are labeled by the parties, the constitutional questions raised by
20 the Appellants in this appeal are tantamount to a facial challenge of the statute. The Board
21 would necessarily have to consider the validity of the Legislature’s decision to make portions of
the 2003 MWL retroactive. The Board does not have jurisdiction over such a facial challenge to
the statute. *Methow Valley Irrigation District v. Ecology*, PCHB Nos. 02-071, 074, XLI (Order
on Partial Summary Judgment, February 27, 2003); *Tario v. Ecology*, PCHB No. 05-091, COL V

1 (Order Granting Summary Judgment, March 2, 2006). To that end, Appellants' and Ecology's
2 motions for summary judgment on Issue No. 18A should be granted with respect to any claims
3 amounting to a facial challenge to the constitutionality of the 2003 Municipal Water Law.

4 Legal Issue No. 1: Municipal Water Supplier.

5 Legal Issue No. 1 asks whether WSU is a municipal water supplier under chapter 90.03
6 RCW. A "municipal water supplier" means "an entity that supplies water for municipal water
7 supply purposes." *RCW 90.03.015(3)*. Thus, the question of whether WSU is a municipal water
8 supplier turns on whether WSU holds any water rights that qualify for "municipal water supply
9 purposes" as that term is defined in *RCW 90.03.015(4)*. That section defines "municipal water
10 supply purposes" in part, as "a beneficial use of water: (a) For residential purposes through
11 fifteen or more residential service connections or for providing residential use of water for a
12 nonresidential population that is, on average, at least twenty-five people for at least sixty days a
year...."

13 Respondents assert, and Appellants concede, that "[u]nder today's law, WSU fits within
14 the definition of Municipal Water Supplier set forth in the amended *RCW 90.03.015*."
15 *Appellants' Response at 11*. Additionally, Appellants concede that Water Right Certificate G3-
16 22065C (associated with Well No. 6) "does appear to be a certificate issued for municipal water
17 supply purposes." *Appellants' Response at 20*. Thus, this right and various other water rights
18 identified as for municipal purposes, and which are used to supply a single integrated campus
19 water system that serves well over fifteen residential service connections, make WSU a
20 "municipal water supplier." We conclude that WSU is a municipal water supplier under Ch.
21

1 90.03 RCW and that, as a matter of law, WSU and Ecology are entitled to summary judgment on
2 Legal Issue No. 1.⁵

3
4 Legal Issue No. 2: Municipal Water Supply Purposes.

5 Issue No. 2 pertains to whether the water rights associated with Wells No. 1, 2, 4, 5, 6,
6 and 7 are rights for municipal water supply purposes under chapter 90.03 RCW.

7 The Legislature has defined “municipal water supply purposes” as follows:

8 (4) “Municipal water supply purposes” means a beneficial use of water:
9 (a) for residential purposes though fifteen or more residential service connections
10 or for providing residential use of water for a nonresidential population that is, on
11 average, at least twenty-five people for at least sixty days a year; (b) for
12 governmental or governmental proprietary purposes by a city, town, public utility
13 district, county, sewer district, or water district; or (c) indirectly for the purposes
14 in (a) or (b) of this subsection through the delivery of treated or raw water to a
15 public water system for such use. If water is beneficially used under a water right
16 for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use
17 of water under the right generally associated with the use of water within a
18 municipality is also for “municipal water supply purposes,” including, but not
19 limited to, beneficial use for commercial, industrial, irrigation of parks and open
20 spaces, institutional, landscaping, fire flow, water system maintenance and repair,
21 or related purposes. *RCW 90.03.015(4)*.

Because the Legislature defined “municipal water supply purposes” in the present tense
(*i.e.*, it “means a beneficial use of water...”), we interpret this as requiring present, active
compliance with the definition through actual beneficial use of the water at the time a right is
being characterized. Thus, we must examine WSU’s actual use of water under each right, and
whether each right is presently being put to beneficial use for municipal purposes. Application
of this test to the rights at issue, used in conjunction with the application of the statutory

⁵ The question raised by Appellants regarding whether WSU *was* a municipal water supplier prior to adoption of the 2003 MWL amendments to the Water Code is not squarely before us because it calls into question the retroactive application of the MWL. The Board has declined to address the constitutional claims in this appeal.

1 definitions, leads to the conclusion that each of the rights at issue is for a municipal water supply
2 purpose.

3 As we have concluded above, it is undisputed that the WSU campus water system
4 presently includes the requisite number of residential service connections required by RCW
5 90.03.015(4)(a) for WSU's rights to be eligible to qualify for "municipal water supply purposes"
6 under that statute. WSU contends that by virtue of the integrated nature of the campus water
7 system (in which water from each of its rights and wells enters a unified distribution system
8 serving the campus' residential connections), all the rights are therefore being beneficially used
9 for municipal supply purposes. Ecology asserts that a water right qualifies as being for
10 municipal purposes if it meets the statutory definition under RCW 90.03.015, regardless of the
11 purpose stated on the water right document. *Ecology's Joinder in WSU' Motion for Partial
Summary Judgment at 2.*

12 In analyzing whether each of WSU's water rights constitutes a right for municipal water
13 supply purposes in this appeal, it is necessary to examine not only the language in RCW
14 90.03.015 but also the language in RCW 90.03.560.⁶ As previously noted, RCW 90.03.015(4)
15 specifically sets forth three separate beneficial uses that qualify as municipal water supply
16 purposes. The key portion of this subsection for purposes of this analysis, however, is the
17 language that also includes "any other beneficial use generally associated with the use of water
18 within a municipality" within the meaning of "municipal water supply purposes."

19 RCW 90.03.560 addresses how Ecology processes changes or amendments to water
20 rights held by a municipal water supplier to ensure that water rights held for municipal water
21 supply purposes are correctly identified. It states, in part:

⁶ RCW 90.03.550 also lists beneficial purposes of use generally associated with a municipality, but none of those listed uses are at issue in this appeal.

1 This section authorizes a water right or portion of a water right held or acquired
2 by a municipal water supplier that is for municipal water supply purposes as
3 defined in RCW 90.03.015 to be identified as being a water right for municipal
4 water supply purposes. *However, it does not authorize any other water right or
5 other portion of a right held or acquired by a municipal water supplier to be so
6 identified without the approval of a change or transfer of the right or portion of
7 the right for such a purpose. RCW 90.03.560 (emphasis added).*

8 Under this statute, the ability of Ecology to characterize a water right held by a municipal water
9 supplier as being for municipal supply purposes is not without limitation. The fact that a
10 municipal water supplier may hold a water right for municipal supply purposes does not
11 automatically convert all water rights held by the municipal water supplier into municipal water
12 rights or water rights for municipal supply purposes. Even if the municipal water supplier
13 subsequently used other water rights for a municipal water supply purpose, RCW 90.03.560
14 requires a municipal water supplier to use the change process to change the purpose of use for
15 other non-municipal water rights. RCW 90.44.100, which was not amended by the 2003 MWL,
16 also prohibits changes in the purpose of use for groundwater.⁷ *R.D. Merrill Co. v. PCHB*, 137
17 Wn.2d 118, 130, 969 P.2d 458 (1999); *City of West Richland v. Ecology*, 124 Wn. App. 683,
18 692-93, 103 P.3d 818 (2004). Therefore, if a portion of WSU's groundwater rights cannot be
19 characterized under RCW 90.03.330 as being for municipal supply purposes, WSU is unable to
20 change the purpose of use of these groundwater rights to municipal supply purposes. However,
21 based on the analysis below, the Board concludes that each of the rights before us in this case
qualify as a right for municipal water supply purposes, and there has not been a change in
purpose of use of all or any portion of such rights.

⁷ The Legislature chose to allow unperfected surface water rights for municipal water supply purposes to be changed for any purpose under certain circumstances when it enacted the MWL, but did not provide such broader authority for changes of groundwater rights. *See* RCW 90.03.570.

1 The Board analyzes each of WSU's water rights to determine if they meet the definition
2 of "municipal supply purposes" contained in RCW 90.03.015(4), either as specifically listed for
3 that purpose, or as a "right generally associated with the use of water within a municipality." In
4 doing so, the Board also looks for guidance to the 2003 Municipal Water Law Interpretive and
5 Policy Statement adopted by Ecology on February 5, 2007 (POL-2030).⁸ *Reichman Decl. Exh.*
6 2. We conclude each of WSU's water rights individually discloses its intended and actual
7 purpose for municipal water supply under the statutory definition.

8 As previously noted, Appellants concede that Water Right Certificate G3-22065C
9 (associated with Well No. 6) was issued for and is presently being used for municipal water
10 supply purposes, so as a matter of law, WSU and Ecology are entitled to summary judgment on
11 Legal Issue No. 2E.

12 It is also undisputed that Certificate 5070-A (associated with Well No. 4) was issued
13 solely for domestic supply of the WSU campus. *First Wells Decl., Exh. 4*. Appellants argue that
14 domestic supply and municipal water supply have historically been treated as separate purposes
15 of use by Ecology. *Second Osborn Decl., Attachments 3, 4*. The Board, however, applies the
16 MWL as written by the Legislature. The Legislature expressly listed residential use of water
17 through 15 or more residential service connections as a municipal supply purpose. The
18 Legislature further recognized domestic supply as a municipal supply purpose for purposes of
19 the MWL by stating that community or multiple domestic water supply provided by a municipal
20 water supplier is limited by the maximum instantaneous quantity and annual quantity rather than
21 the specific number of connections or population. *RCW 90.03.260(4) and (5)*. We conclude this

⁸ This document also acknowledges that certain water rights held by a municipal water supplier, such as for agricultural irrigation and dairy purposes of use, are not generally for municipal purposes, and cannot be conformed to a municipal water supply purpose of use without an application for a change being filed and approved. *Id. at 2, 17* Agricultural irrigation, under certain circumstances, may constitute a municipal supply purpose for certain governmental entities. *Id. at 6*.

1 certificate falls squarely within the definition of “municipal water supply purposes” and that its
2 present beneficial use by WSU entitles Respondents to summary judgment as to Legal Issue No.
3 2C.

4 When a purpose of use is not generally associated with the use of water within a
5 municipality, such as irrigation or dairy use, Ecology policy recognizes that the purpose of use of
6 these water rights must be evaluated on a case-by-case basis. *Reichman Decl., Exh. 2 (POL-*
7 *2030) at 2.* In doing so, Ecology considers the entity that was originally issued the water right as
8 well as the current holder of the water right in determining whether a water right qualifies for a
9 governmental purpose. *Id. at 5.*

10 Four of WSU’s water rights documents each list multiple purposes, including municipal
11 or community domestic supply, combined with irrigation and/or stock water (WSU’s Claims
12 098522, 098523, 098524, and Certificate 5072-A). *Wells Decl., Exhibits 1, 2, 3, and 5.* Where a
13 water right includes multiple purposes of use, without apportioning the authorized quantity
14 between/among the different purposes, Ecology at times has concluded that the entire right may
15 properly be characterized as being for any of the listed purposes. *Reichman response to Board*
16 *question at oral argument.* The Board notes that WSU has always been the holder of the water
17 rights in question and did not acquire them from some other entity. The Board concludes that in
18 this case where a water right includes multiple purposes of use without apportioning the
19 authorized quantity between/among the different purposes, and when one of the listed purposes
20 of use is for either municipal or domestic supply, that the entire right may properly be
21 characterized as being for municipal supply purposes. Each of these four rights identifies a
municipal purpose (either “municipal supply” or “community domestic supply”), without
apportioning the quantities between/among the other identified purposes. *Id.* Each is presently

1 being put to beneficial use in support of WSU's institutional activities. Respondents are
2 therefore entitled to summary judgment as to Legal Issues No. 2A, 2B, & 2D.⁹

3 Finally, Permit G3-28278P (associated with Well No. 7) was issued in 1988 for
4 "continuous municipal supply." *First Williams Decl., Attachment 5 (Original ROE for G3-*
5 *28278P)*. To the extent it was also issued as a "supplemental" alternative source for Claims
6 098523, 098524 and Certificate 5070-A, which we have concluded are for municipal supply
7 purposes, Respondents are entitled to summary judgment on Issue No. 2F.

8 Appellants argue that finding WSU's rights to be for municipal supply purposes requires
9 a "retroactive" application of the 2003 MWL, which they object to on constitutional grounds.
10 The Board is required to apply the presumably constitutional language of the statute to the water
11 rights before us. To the extent that using definitions enacted in 2003 to characterize WSU's pre-
12 existing water rights as part of the 2006 change decisions may be viewed as a "retroactive"
13 application of the statute, we note only that we believe use of the definitions under these
14 circumstances was intended. We leave to the Courts the related questions raised by Appellants
15 regarding whether such use constitutes an impermissible retroactive application in violation of
16 the Washington or United States Constitutions.

17 Legal Issue No. 3: Reliance on Municipal Water Bill.

18 Legal Issue No. 3 asks whether the MWL excuses consideration and application of any
19 applicable criteria for an application to change a groundwater right. Appellants, who initially
20 raised this issue, questioned Ecology's position that the MWL "affects" but does not excuse
21 consideration of the applicable criteria for groundwater changes. Ecology maintains that the

⁹ Claim No. 098524 (associated with Well No. 3) was not included within Issue No. 2.

1 provisions regarding evaluation of a change or transfer application for a water right must still be
2 met, but the tentative determination of the validity and extent of the water right is affected by
3 RCW 90.03.330.

4 Appellants specifically question whether Ecology is allowed to disregard a long history
5 of non-use of a water right in assessing whether a water right has been abandoned when making
6 its tentative determination of the validity of a water right. Ecology adopted a policy (POL 1120)
7 on August 30, 2004, which allows for a simplified tentative determination of the validity of a
8 water right when the existing water right is for a municipal water supply purpose, in accordance
9 with RCW 90.03.330(3). *Second Brown Decl., Exh.2* (Policy 1120, "Water Resources Program
10 Policy for Conducting Tentative Determinations of Water Rights"). Under POL 1120, an
11 investigation of the complete history of the water right is not required under a simplified
12 tentative determination. *Id. at 3*. Appellants also urge the Board to recognize that different cases
13 involving transfers may require the consideration of other laws such as SEPA. *Appellants'*
Response at 22.

14 We conclude that the 2003 MWL does not, as a matter of law, excuse consideration and
15 application of any applicable criteria for WSU's change application to its groundwater rights,
16 and that summary judgment should be granted to Respondents on Legal Issue No. 3. The Board
17 also does not find anything in the MWL to indicate that the Legislature intended to change the
18 law regarding abandonment of municipal water supply rights. Abandonment is discussed in
19 more detail later in this opinion. In order to approve a groundwater right change application
20 under RCW 90.44.100, Ecology must make the following conclusions: (1) that the water right is
21 valid for change; (2) that the proposed additional points of withdrawal (groundwater wells)
must tap the same body of public groundwater; (3) that there is no enlargement of the water
right; (4) that the change will not impair other water rights; and (5) that the change must not be

1 detrimental to the public welfare.¹⁰ This is the case because Ecology can only approve a change
2 of the water right to the extent it is valid, and because RCW 90.44.100(2) states that groundwater
3 change approvals require “findings as prescribed in the case of an original application.”¹¹ *R.D.*
4 *Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 131, 969 P.2d 458 (1999).
5 Ecology’s determination of whether a right is valid for change may be affected by the application
6 of the MWL, as it was in this case, and as discussed elsewhere in this opinion (Ecology
7 determination of the validity and extent of the groundwater rights for municipal supply purposes
8 based on past beneficial use). The Board also recognizes that depending on the facts and legal
9 issues in a case, other provisions of law may be applicable regarding whether Ecology properly
10 approved a change or transfer of a groundwater right.

11 Legal Issue No. 4: Application of Municipal Water Bill.

12 Legal Issue No. 4 asks the Board to decide: “Whether, if Washington State University is
13 deemed a “municipal water supplier” and its water rights are for municipal water supply
14 purposes, Ecology improperly applied the provisions of RCW 90.03.330(3) and (4).”

15 Appellants allege Ecology misapplied the provisions of the 2003 Municipal Water Law.
16 In response to the summary judgment motion on this issue, however, Appellants now argue the
17 misapplication based on their belief that some of WSU’s rights do not qualify as municipal water
18 rights. Appellants contend: “The problem presented in this appeal is not that Ecology
19 improperly applied this provision to a municipal water right, but that Ecology applied it to two
20 certificates [Certificates 5070-A and 5072-A] that do not qualify as municipal water rights.”

21 ¹⁰ The availability of water is not reevaluated for a groundwater change application because the availability of water
subject to appropriation is determined at the time application is made for the permit. *R.D. Merrill Co, v. PCHB*, 137
Wn.2d 118, 132 (1999).

¹¹ Findings required for an original application are specified in RCW 90.03.290.

1 *Appellants' Response at 23.* Appellants also assert that only one of WSU's water rights,
2 Certificate No. G3-22065C (associated with Well No. 6), appears to facially qualify as a water
3 right certificate issued for municipal purposes based upon system capacity. Appellants contend
4 that none of the other water rights, including WSU's water right claims, are therefore entitled to
5 have their inchoate portion protected under the "right in good standing" language in RCW
6 90.03.330(3) because that subsection only applies to "pumps and pipes" certificates. Appellants
7 argue that Ecology's finding the other two certificates qualified as rights for municipal water
8 supply purposes thereby improperly validated the unused portions of those rights for future use
9 (per RCW 90.03.330(3)) and wrongly immunized the certificates from past relinquishment and
abandonment.

10 As argued by Appellants, much of Issue No. 4 is really a restatement of Issue No. 2, that
11 is, whether Ecology properly characterized Certificates 5070-A and 5072-A as municipal water
12 supply rights for purposes of applying RCW 90.03.330. Appellants do not challenge Ecology's
13 interpretation of RCW 90.03.330,¹² nor do they present any legal argument to counter Ecology's
14 analysis of how RCW 90.03.330(3) and (4) are to be applied when evaluating changes to
15 municipal water supply rights documented by certificates that authorize inchoate water
16 quantities. Indeed, Appellants concede Ecology properly applied and carried out the provisions
of RCW 90.03.330(3) and (4) with respect to Certificate No. G3-22065C.

17 We have previously concluded in Legal Issue No. 2 that Certificates 5070-A and 5072-A
18 are properly characterized as rights for municipal supply purposes. It is undisputed that
19 Certificates 5070-A and 5072-A were issued prior to September 9, 2003, the date required for

20 ¹² Except to the extent they have not waived their separate claim that RCW 90.03.330 violates the constitution
21 because of its alleged "retroactive" effect on previously issued water rights. Appellants contend that neither the
Legislature or Ecology, nor this Board, can rely on a 2003 change in the law to determine that WSU's pre-2003
water rights were immunized from loss for non-use. *Appellants' Response at 11-13, Reply at 14-15.*

1 RCW 90.03.330(3) to apply to a right. It is also undisputed that a portion of the annual
2 quantities authorized under each certificate remains inchoate.

3 Appellants dispute Ecology's determination that these two certificates were issued under
4 Ecology's former administrative practice of issuing certificates based on system capacity or
5 "pumps and pipes" because there is no documentation to that effect. The Board finds that there
6 is evidence, however, to support this finding. First, the declaration of Ecology's permit manager
7 for Eastern Washington states that these certificates were issued based upon the policy of system
8 capacity. *First Brown Decl., at 5-6*. In addition, the Permit Applications related to Certificate
9 No. 5070-A (associated with Well No. 4) and Certificate No. 5072-A (associated with Well No.
10 5) state the current enrollment at WSU as well as the estimated enrollment for WSU in 1970 and
11 1980. *First Brown Decl., Exh. 3 & 4*. The ROE issued in response to the Permit Application for
12 Certificate No. 5070-A specifically states that the recommended quantity is based on "the
13 anticipated amount required for 15,000 students." *Second Osborn Decl., Attachment 3*. The
14 historical pumping data relied upon by all parties in this proceeding also shows that the
15 quantities authorized in the certificates far exceeded the amount of water that had previously
16 been put to actual beneficial use under the permits.¹³ The fact that Ecology considered the
17 current and future enrollment of students at WSU when reviewing the water right applications,
18 and issued the certificates for quantities in excess of what had previously been put to actual
19 beneficial use under the permits, is clearly a capacity-based determination. Having determined
20 that Certificates No. 5070-A and 5072-A were issued for municipal supply purposes pursuant to
21 Ecology's administrative policy of issuing certificates on the basis of system capacity rather than

¹³ *E.g.*, The annual volume pumped from Well No. 4 in the year prior to issuance of Certificate 5070-A was 535 acre feet, while the certificate was issued for 2260 acre feet per year. *Ryan Decl., Exh. 1, Matuszek Decl., Exh. 1, Third Wells Decl., Exh. 2*. Similarly, pumping from Well No. 5 never exceeded 228 afy, while the certificate was issued for 720 acy. *Id.*

1 actual beneficial use, the Board finds that the water rights represented by these certificates are
2 rights in good standing as described in RCW 90.03.330(3). For these reasons, we conclude
3 Ecology's application of RCW 90.03.330 to those certificates was proper. With respect to
4 Claims No. 098522 and 098523, Ecology agrees that RCW 90.03.330(3) does not apply to them
5 because these water rights are not documented by "pumps and pipes" certificates. However,
6 Ecology notes that there is no inchoate water associated with these claims because they have
7 been fully perfected. *First Brown Decl. at ¶18.*¹⁴ Summary judgment should be granted to
8 Respondents with respect to Legal Issue No. 4.

9 Legal Issue No. 5: Perfection.

10 Legal Issue No. 5 asks whether any quantity of water authorized for change with regard
11 to Wells No. 1, 2, 4, 5, 6, and 7 is unperfected, and if so, whether Ecology lacks authority to
12 change any of the water rights. The Appellants dispute Ecology's legal authority to change the
13 point of withdrawal of unperfected or inchoate water rights that are documented by certificates or
14 claims. Like Issue No. 4, above, this issue is a challenge to Ecology's application of the 2003
15 MWL to WSU's various water rights. This argument pertains specifically to Water Right
16 Certificates No. 5070A, 5072-A, G3-22065C, and Water Right Permit No. G3-28278,¹⁵ which
17 have not been put to full beneficial use in the entire annual quantities authorized. See, *ROEs;*
18 *Matuszek Decl. and Ryan Decl.*

19
20 ¹⁴ The Board notes that while Ecology has determined that WSU "fully perfected the water rights claimed under
Water Right Claim Nos. 098522 and 098523," it has failed to indicate the instantaneous quantity (Qi) that has been
perfected by WSU for these claims and the other rights under appeal.

21 ¹⁵ The Board has previously recognized that the water rights associated with Claim 098522 (Well No. 1) and Claim
No. 098523 (Well No. 2) are fully perfected.

1 Both sides cite *R.D. Merrill* in support of their positions. *R.D. Merrill Co. v. Pollution*
2 *Control Hearings Board*, 137 Wn.2d 118, 969 P.2d 459 (1999). Appellants contend that the
3 Supreme Court's decision in *R.D. Merrill* upholding Ecology's authority to change the point of
4 withdrawal of an unperfected *permit* should be read as a rejection of Ecology's authority to
5 change the point of withdrawal of an unperfected *certificate*.

6 Ecology and WSU counter that the Supreme Court's holding in *R.D. Merrill* should be
7 read to authorize changes in places of use and points of withdrawal (but not purposes of use) of
8 inchoate groundwater *rights*, irrespective of whether they are represented by a permit or
9 certificate. Respondents argue that Appellants misconstrue *R.D. Merrill* when they contend that
10 the Court held such authority is limited to permits. Instead, Ecology argues that the Court's
11 focus on the statute's inclusion of "permits" was simply to highlight the legislature's intent that
12 *unperfected* rights may be changed to the same degree as *perfected* rights.

13 First, we note that water rights documented by certificates were not at issue in the *R.D.*
14 *Merrill* case, nor were water rights for municipal water supply purposes documented by the so-
15 called system capacity or "pumps and pipes" certificates, which is the status of three of the WSU
16 water rights. Clearly, RCW 90.44.100 authorizes changes of points of withdrawal and places of
17 use for inchoate groundwater rights. *R.D. Merrill Co.*, 137 Wn.2d at 129-130. However, in this
18 case we are presented with certificates that have inchoate rights associated with them, an issue
19 not before the Court in *R.D. Merrill*. Western water law normally requires actual application of
20 water to beneficial use in order to perfect the right, at which time a certificate issues. System
21 capacity has been rejected as inconsistent with these beneficial use requirements and as a basis

1 for perfecting a water right. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 592, 957 P.2d
2 1241 (1998).

3 However, in the context of municipal water supply rights, RCW 90.03.330(2) now
4 protects certain municipal water supply rights documented by system capacity certificates from
5 diminishment except in specified situations. This was not the case when the Court decided
6 *Theodoratus*. *Theodoratus*, 135 Wn.2d at 594. Ecology must now assess whether any of the
7 inchoate quantity specified in a water right certificate that was issued based on system capacity
8 remains valid. This assessment arises out of application of RCW 90.03.330(3), which provides
9 that water rights for municipal water supply purposes documented by certificates issued prior to
10 September 9, 2003, with maximum quantities based on system capacity (*i.e.* "pumps and pipes"
11 certificates), are rights in good standing. Thus, under the 2003 MWL, the inchoate portion of
12 these certificates need not have been put to beneficial use, and can continue to be exercised to
13 serve new growth. These inchoate rights are subject to application of the change criteria of
14 RCW 90.44.100, and Ecology is not authorized to revoke or diminish those municipal water
15 supply rights documented by certificates except through the application of those change criteria.
16 Accordingly, the Board holds that under the 2003 MWL, Ecology has the authority to change the
17 point of withdrawal of the unperfected or inchoate portions of water rights documented by
18 certificates. Ecology did so with respect to Certificates No. 5070A, 5072 A and G3-22065C.

19 Moreover, in *R.D. Merrill*, the Supreme Court addressed a change to an unperfected
20 groundwater right permit, but its decision includes no language expressly limiting its analysis to
21 permits. We find nothing in the decision to support an interpretation of RCW 90.44.100 that

1 limits changes of inchoate groundwater rights to only those documented by permits. The statute
2 itself draws no distinction between permits and certificates with respect to eligibility for change,
3 allowing amendment of both a *permit* and *certificate* of groundwater right. *RCW 90.44.100*.

4 Where the Supreme Court distinguishes permits from certificates in its decision, it does so only
5 to contrast the most common difference: perfection, noting that “a certificate of groundwater
6 right is issued when a water right is perfected.” *R.D. Merrill*, 137 Wn.2d at 129 (internal
7 citations omitted). The *R.D. Merrill* Court simply did not address, or contemplate, certificates
8 authorizing inchoate water quantities such as those at issue in this case and other municipal water
9 right contexts.

10 That said, we find the Court’s reasoning in *R.D. Merrill* applies equally to a valid
11 inchoate water right issued for municipal supply purposes, regardless of whether the right is
12 represented by an unperfected permit, or a claim, or a certificate issued prior to enactment of the
13 2003 MWL under Ecology’s prior system capacity approach. The groundwater change statute
14 allows flexibility in the physical location and means of withdrawal so permit holders can
15 beneficially use the groundwater they are entitled to appropriate, subject to some limitations.
16 *R.D. Merrill*, 137 Wn.2d at 131. The same reasoning applies to facilitating use of the inchoate
17 portions of a groundwater certificate issued for municipal supply purposes. The applicability of
18 the *R.D. Merrill* holding to municipal water supply certificates with inchoate water quantities is
19 further supported by the Court of Appeals’ decision in *City of West Richland v. Dep’t of Ecology*,
20 124 Wn.App. 683, 103 P.3d 818 (2004) (holding that RCW 90.44.100 does not authorize
21 changes in purpose of use of inchoate *water rights*, without limitation to permits). The Court has

1 also subsequently noted that the Legislature has plainly provided that the groundwater change
2 statute (RCW 90.44.100) *does* authorize a change in the place of withdrawal under an
3 *unperfected right*, not distinguishing how that right is expressed, whether by permit, certificate or
4 claim. *Pub. Util. Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 791-792, 51
5 P.3d 744 (2002) (Sullivan Creek).

6 Appellants also argue that WSU has not exercised reasonable diligence to perfect the
7 inchoate portion of its water rights. Appellants point to language in *R.D. Merrill*, in which the
8 Supreme Court cautions that even where unperfected permits are transferable, reasonable
9 diligence still applies and that RCW 90.44.100 cannot be used to speculate in water rights. *R.D.*
10 *Merrill*, 137 Wn.2d at 130-31. Ecology acknowledges that the Legislature intended through the
11 enactment of the MWL that Ecology's issuance of certificates based on system capacity did not
12 take these water rights out of good standing, but that these water right holders would still have to
13 meet such principles as due diligence in project development to keep these rights in good
14 standing. *Ecology's Memorandum in Support of Motion for Partial Summary Judgment at 12.*

15 Appellants point to the long period of time that has passed since some of WSU's water
16 rights have been issued and their subsequent lack of perfection. Well No. 4, for example, was
17 drilled in 1963, but Certificate No. 5070-A has yet to be put to full use. Ecology's judgment that
18 WSU is exercising good faith and due diligence in exercising its inchoate water rights by
19 developing facilities and increasing the enrollment of students is entitled to deference. *Port of*
20 *Seattle v. PCHB*, 151 Wn.2d 568, 90 P.3d 659 (2004). Furthermore, WSU has not engaged in
21 marketing of these water rights. *Second Brown Decl. at 3.*

1 The Supreme Court has stated that reasonable diligence “must depend to a large extent
2 upon the circumstances.” *In re Water Rights in Alpowa Creek*, 129 Wash. 9, 14, 224 P. 29
3 (1924). The “reasonable diligence” requirement is a flexible standard, and the Board believes
4 that flexibility in interpreting it is particularly important with regard to water rights for municipal
5 supply purposes. Jurisdictions grow at uneven rates and need to be able to serve their growing
6 populations. In addition, water conservation by governmental entities might be discouraged by
7 the imposition of rigid timelines for putting water to beneficial use. At the same time, the
8 government entity must be able to grow into the water right at some time in the foreseeable
9 future.¹⁶ *City of Ellensburg v. Ecology*, PCHB No. 96-194 (1996). The Board finds in the
10 present case Ecology was within its discretion to determine that WSU is exercising due diligence
11 in putting its water rights to full beneficial use and that WSU’s water rights remain in good
12 standing.

13 We conclude that Respondents’ motion for summary judgment on Legal Issue No. 5
14 should be granted insofar as certificates and claims representing water rights for municipal
15 supply purposes are eligible for change in point of withdrawal to the same extent as water right
16

17 ¹⁶ The Board notes that Ecology only established a date for putting water to full beneficial use for Permit G3-
18 28278P. *First Wells Decl. Exh. 7*. There is no similar timeline established for perfecting the substantial inchoate
19 portion of WSU’s other water rights. RCW 90.03.260, made applicable to groundwater withdrawals by RCW
20 90.44.060, requires an application for a water right to contain the time for completely putting the water to the
21 proposed use. In *Lake Entiat Lodge, Associated v. Ecology*, PCHB No. 01-025 (Decision by Board Member Jensen,
November 27, 2001). Ecology’s responsibility to establish a construction schedule for the inchoate portion of the
certificate was emphasized. The Board has also recognized that the imposition of a construction schedule is a
critical tool to ensure that limited water resources are not delayed from being put to beneficial use for years on end.
Petersen v. Ecology, PCHB No. 94-265, COL V (1995). The Legislature has provided additional flexibility in
fixing construction schedules for municipal supply purposes in RCW 90.03.320. The 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.

1 permits. The Board finds that WSU has exercised reasonable diligence in perfecting the inchoate
2 portions of its water rights. Having so concluded, it is therefore unnecessary for the Board to
3 resolve the question of whether any quantity of water authorized for change under the challenged
4 claims and certificates is unperfected for purposes of being lawfully transferred.

5
6 Legal Issue No. 6: Beneficial Use.

7 Legal Issue No. 6 asks whether the water rights decisions are contrary to beneficial use
8 requirements. No disputed issues of material fact have been raised regarding the *types* of uses to
9 which WSU is putting its water, which include irrigation water for a golf course. Appellants
10 contend irrigation of the golf course, facilitated by approval of the change applications, fails to
11 satisfy beneficial use requirements.

12 The Water Code explicitly declares several types of uses as beneficial, including uses for
13 domestic, irrigation, and recreational purposes. *RCW 90.54.020(1)*. The Legislature has also
14 specifically defined “beneficial use” of water to include, among other things “uses for *domestic*
15 *water, irrigation, fish, shellfish, game and other aquatic life, municipal, recreation, industrial*
16 *water, generation of electric power, and navigation.” RCW 90.14.031(2)* (emphasis added). We
17 conclude as a matter of law, without commenting on the relative merits of golf as a recreational
18 endeavor, that WSU’s use of water for golf course irrigation constitutes a beneficial use of water.

19 Appellants further contend that WSU’s irrigation of its golf course occurs in a wasteful
20 manner contrary to the beneficial use doctrine requirement that an appropriator’s use of water
21 must be reasonably efficient. They allege that WSU is currently overwatering and wasting water
at the golf course, relying on personal observations, photographs and local climate information to

1 support their claim. Respondents counter that this evidence is inadequate to defeat summary
2 judgment.

3 Beneficial use requires that an appropriator's use of water must be reasonably efficient,
4 although absolute efficiency is not required. *Ecology v. Grimes*, 121 Wn.2d 459, 472, 852 P.2d
5 1044 (1993). In *Grimes*, several factors were relevant to determining the reasonable efficiency
6 of the water systems: local custom, the relative efficiency of water systems in common use, and
7 the costs and benefits of improvements to the water systems, including use of public and private
8 funds to facilitate any improvements. *Id.* at 474.

9 The facts material to deciding this issue are those related to the "reasonable efficiency" of
10 WSU's water use. By virtue of Respondent's motion for summary judgment, Appellants have
11 the burden to show that a triable issue exists regarding whether WSU's water use is reasonably
12 efficient. Without more, the observations of Mr. Cornelius, who is admittedly not an expert in
13 this area, along with the photographs and temperature data, fail to establish a genuine dispute
14 about the reasonable efficiency of WSU's water use. We agree with Respondents that
15 Appellants' allegations may be more properly evaluated in the context of an enforcement action,
16 which is beyond the purview of this appeal. We conclude summary judgment should be granted
17 to Respondents on Legal Issue No. 6 because the change decisions are not contrary to beneficial
18 use requirements.

19 Legal Issue No. 7: Enlargement of Rights.

20 Legal Issue No. 7 asks whether the water right decisions will unlawfully "enlarge" the
21 rights under Claims 098522 and 098523, Certificates 5070-A, 5072-A, and G3-22065C, and
Permit G3-28278P.

1 As a legal principal in water rights law, enlargement prohibits Ecology from authorizing
2 additional wells for a groundwater right if the combined total quantity withdrawn from the
3 original well and any additional well(s) enlarges the right conveyed by the original permit or
4 certificate. *RCW 90.44.100 (2)*. Appellants' motion for summary judgment on this issue is
5 based on two separate theories: the first assumes WSU will increase the quantity of water
6 withdrawals beyond those amounts previously put to beneficial use (*i.e.*, perfected) as a result of
7 approval of the change application; and the second assumes use of water based on the transfer of
8 quantities associated with an invalidated claim. We address each in turn, rejecting Appellants'
9 first theory and finding material facts in dispute that prevent us from reaching summary
10 judgment on their second.

11 Appellants' seek a ruling from this Board that enlargement of a water right occurs, as a
12 matter of law, whenever a change in the point of withdrawal enables a water right holder to
13 exercise a greater quantity of an existing right than is being exercised at the original point of
14 withdrawal. Appellants argue the approval of WSU's change applications will allow WSU to
15 pump a greater amount of water than it is physically capable of pumping from its existing well
16 locations and configurations, and that this change therefore amounts to an unlawful
17 "enlargement" of WSU's water rights.

18 It is undisputed that the change/consolidation of WSU's rights will enable WSU to pump
19 more water than it currently withdraws. However, WSU asserts that it could fully exercise its
20 authorized quantities through its current configuration of wells, either by deepening its existing
21 wells or by drilling replacement wells at the original locations as authorized by *RCW*
90.44.100(3) (which all parties agree can occur without Ecology's approval). Appellants
contend it is irrelevant what WSU *could* do under its existing rights because WSU indisputably

1 will be withdrawing larger quantities of water after approval of the change application.

2 Appellants assert this is sufficient to constitute enlargement of the existing rights.

3 We conclude, as a matter of law, that enlargement of a water right does not occur by
4 virtue of a change in the point of withdrawal merely because it may result in a water right holder
5 exercising more of a previously, and validly, authorized quantity of water. This is in accord with
6 previous Board decisions. See *Kile v. Ecology*, PCHB No. 96-131, COL V (1997) (holding that
7 where an amendment of a groundwater certificate for second well is authorized for appropriation
8 of no more water than the original well, which had limited production due to drought, “there is
9 no enlargement of the right conveyed by the original certificate.”)

10 In so concluding, we specifically overrule this Board’s earlier conclusory statement in
11 *Jellison v. Ecology*, PCHB No. 88-124 (1989) to the contrary (that granting a change in a surface
12 water point of diversion that would allow a water right holder to exercise a greater amount of a
13 previously authorized quantity of water would be to “enlarge” the right). *Jellison v. Ecology*,
14 PCHB No. 88-124, COL V (1989).

15 Appellants’ second theory of enlargement raises the question of whether an *invalid* claim
16 may be used as a basis to award additional quantities at an alternative location. It is undisputed
17 that Ecology tentatively found Claim No. 098524 (associated with Well No. 3) to be invalid and
18 denied its integration with the other rights at the same time it approved the rest of the changes at
19 issue in this appeal. *First Osborn Decl., Attachment 3 (2006 ROE for Claim No. 098524)*. It is
20 also undisputed that WSU did not appeal Ecology’s denial of the claim.

21 Permit No. G3-28278 was issued as a “supplemental” water right. The permit was
originally issued with language specifying that its quantities were issued “less those amounts
appropriated under ground water Cert. 5070-A, and Ground Water Claims 98522 and 98524.
Total combined quantity shall not exceed 2500 gallons per minute, 2260 acre-feet per year.”

1 *Brackney Decl., Attachment 5 (1988 ROE for Permit No. G3-28278)* at 3. The 2006 Report of
2 Examination approving the change application for Permit No. G3-28278 notes this limitation and
3 also indicates Ecology's tentative determination that the quantities associated with Claim No.
4 098524 are invalid. *First Osborn Decl., Attachment 1 (2006 ROE for Permit No. G3-28278)* at 3.

5 Appellants interpret the ROE as excluding the annual quantities associated with Claim
6 No. 098524 from the annual quantities authorized under Permit No. G3-28278P and approved as
7 part of the change applications. They also interpret the Permit as incorporating the instantaneous
8 quantities from Claim No. 098524 and argue that inclusion of such quantities constitutes an
9 unlawful enlargement of WSU's water rights. To allow the transfer of any quantity that is based
10 on an invalid claim, Appellants argue, would improperly validate illegal water use.

11 WSU argues that Appellants mischaracterize the nature of Permit No. G3-28278,
12 misconstrue the legal effect of Ecology's determination that Claim No. 098524 is not a valid
13 water right, and are barred from making a collateral attack on the permit.

14 This Board has jurisdiction to consider the extent and validity of water rights claims, and
15 to reach tentative determinations regarding the same, when such evaluations are necessary to
16 render a decision implicating those rights. *Madrona Community, Inc., and Kidder v. Ecology and*
17 *Burkum*, PCHB No. 86-55 (1987) (reviewing Ecology's tentative determination as to the extent
18 and probable validity of an Appellant's claim in evaluating the impact of a water right
19 applicant's proposed diversion on the claimed rights).¹⁷ In this case, it may be necessary to

20 ¹⁷See also *MacKenzie v. Ecology, PCHB No. 77-70, COL III (1977)* (holding that the details set forth in a statement
21 of claim regarding quantity, acreage, and priority, are not controlling in the Board's de novo proceedings or in
court), *PUD No. 1 of Pend Oreille County v. Ecology, PCHB No. 97-177, 98-043, 98-044, Finding XXII (Amended*
Summary Judgment, October 15, 1998) ("Ecology, and, by imputation, the PCHB, does have jurisdiction to reach a
tentative determination as to the validity of the water rights in order to render a decision under RCW 90.03.380
[regarding the propriety of the change of the surface water right]"), *aff'd 146 Wn.2d 778, 794 (2002)* ("Ecology has
authority to tentatively determine whether a water right has been abandoned or relinquished when acting on an
application for a change...and the Board may also do so when reviewing action on a change application.")

1 consider the validity of Claim No. 098524 in order to decide whether Ecology's approval of the
2 change to Permit No. G3-28278 is lawful. In any event, it is necessary to understand the
3 relationship between the two rights, including facts related to overlapping characteristics of the
4 rights, the amount of water embodied in each right and the basis for those amounts, and the
5 original intent of Permit No. G3-28278P with respect to Claim No. 098524.

6 The language of Permit No. G3-28278 uses the term "supplemental," which Ecology's
7 own policy statement concedes is disfavored due to its "historic ambiguity" and inconsistent use.
8 *Third Brown Decl., Exh. 1 (POL 1040)*. The Permit also states that it was issued "less those
9 amounts appropriated under groundwater claims...98524."

10 Respondents ask us to find that the use of the term "supplemental" in Permit No. G3-
11 28278 was intended to indicate that Well No. 7 provided an "alternate" source of water for WSU,
12 up to 2500 gpm, less instantaneous quantities withdrawn under other water rights, including
13 Claim No. 098524. They assert that a permit which has been explicitly made "supplemental" to
14 (*i.e.*, an alternate source for) existing quantities of claimed water survives intact, even if the
15 "primary" rights upon which the quantities are based are later determined to be invalid.

16 While WSU concedes the permit was clearly intended to limit WSU's pumping from
17 Well No. 7, it argues there is no evidence Ecology intended a conditional authorization of the
18 water right only to the extent the underlying "primary" rights remain valid. Similarly, Ecology
19 argues "the permit includes no provision stating that any portion of the quantities it authorizes
20 will become unavailable should a later determination be made that the rights documented by
21 Certificate No. 5070-A, Claim No. 098522, or Claim No. 098524 become invalid." *Ecology's
Response at 4*. WSU contends the intent and purpose of the permit was to include the quantity of
water that WSU and Ecology believed WSU could pump from Well No. 3 (as well as Wells No.

1 1 and 4), irrespective of the fact that no independent right for Well No. 3 existed apart from the
2 claims for Wells No. 1 and 2.¹⁸

3 The Board finds that material facts remain in dispute regarding the relationship between
4 the rights at issue, including facts related to overlapping characteristics of the rights, the amount
5 of water embodied in each right and the basis for those amounts, and the original intent of Permit
6 No. G3-28278P. These factual disputes make a legal conclusion on the issue of enlargement of
7 Permit No. G3-28278P premature. The Board believes, because there are disputed facts,
8 conflicting interpretations of the law, and potentially significant implications for the regulatory
9 scheme involving supplemental water rights, it is appropriate to reserve judgment at this time.
10 Summary judgment should be denied on Legal Issue No. 7 with respect to enlargement of Permit
11 No. G3-28278P. Respondents' motion for summary judgment on Legal Issue No. 7 should be
12 granted with respect to Water Right Claims 098522 and 098523, and Water Right Certificates
13 5070-A, 5072-A, and G3-22065C.

14 Legal Issue No. 8: Relinquishment.

15 To the extent that each of WSU's rights are claimed for, and meet the definition of,
16 "municipal water supply purposes" under Ch. 90.03 RCW, we conclude as a matter of law that
17 they are categorically exempt from relinquishment without respect to non-use or perfection.
18 State law provides the following specific exemption from relinquishment for municipal water
19 supply rights:

20 ¹⁸ It is undisputed Well No. 3 was constructed in 1946. The parties also agree that Well No. 3 was used, after 1945,
21 as an unauthorized point of withdrawal, which allowed WSU to pump at least some (disputed) quantity of water
associated with Claims No. 098522 and 098523. The claimed use of Well No. 3 was not prior to 1945 as required
by the Claims Registration Act, and therefore Ecology concluded "It does not appear that Claim 98524 represents a
valid water right." *First Brown Decl., Exh. 1.*

1 (2) Notwithstanding any other provision of RCW 90.14.130 through
2 90.14.180, there shall be no relinquishment of any water right:

3 ...
4 (d) If such right is claimed for municipal water supply purposes under
5 chapter 90.03 RCW.... *RCW 90.14.140(2)(d)*.

6 For the reasons explained in Legal Issue No. 2, each of WSU's rights qualifies as a right
7 for municipal water supply purposes and, therefore, is exempt from relinquishment by operation
8 of law. We reach this conclusion by interpreting and applying the statutes as they are written,
9 without reaching Appellants' facial challenge to the constitutionality of the 2003 MWL.

10 Legal Issue No. 9: Abandonment.

11 Respondents seek judgment as a matter of law that WSU has not abandoned any of its
12 water rights. They point to the fact that, beginning in the 1930's, WSU continued to construct
13 wells capable of supplying the needs of its Pullman campus, expanded its water use, and sought
14 alternative ways to exercise its rights including withdrawal of water associated with certain
15 rights from wells not authorized for those rights.

16 Appellants also seek summary judgment on Issue 9B with respect to abandonment of
17 Claim No. 098523 (associated with Well No. 2). As to this claim, they argue evidence shows
18 WSU intended to abandon not just Well No. 2 but also the claim associated with the well. As to
19 WSU's other rights, Appellants contend that exercise of the rights via unauthorized points of
20 withdrawal cannot overcome WSU's non-use of its rights from their authorized points of
21 withdrawal. Alternatively, Appellants argue that disputed material facts prevent summary
judgment on the remaining rights.

1 The issue of abandonment of WSU's rights is amendable to summary judgment.
2 Although the parties vigorously contest the legal implications of the facts, the material facts
3 themselves are not in dispute.

4 Abandonment is a common law doctrine that occurs when there is intentional
5 relinquishment of a water right. *Okanogan Wilderness League, Inc. v. Twisp*, 133 Wn.2d 769,
6 781, 947 P.2d 732 (1997); *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 115, 685 P.2d 1068
7 (1984); *Miller v. Wheeler*, 54 Wash. 429, 435, 103 P. 641 (1909). The burden of proving
8 abandonment rests with the party alleging abandonment. *Okanogan Wilderness League*, 133
9 Wn.2d at 781. Courts have historically required both intent and an act of voluntary
10 relinquishment, making proof of abandonment difficult. The Washington Supreme Court has
11 indicated a high standard of proof is necessary and "will not lightly decree an abandonment of a
12 property so valuable as that of water in an irrigated region." *Jensen, supra* (quoting *Miller*, 54
13 Wash. at 435). The intent to abandon is determined with reference to the conduct of the parties.
Jensen, Id.

14 Appellants argue that WSU's long period of non-use of Well No. 2 (associated with
15 Claim No. 098523), when combined with statements in WSU's water service plan and made by
16 its primary water system employee, constitute evidence of abandonment of Claim No. 098523.
We disagree, both with respect to WSU's intent and its exercise of the right.

17 Initially we note the important distinction between abandoning a *well* and abandoning a
18 water *right*. While it is undisputed that WSU, in fact, stopped pumping from Well No. 2 by
19 1977, that alone is not dispositive of any intent to abandon the right associated with the well.¹⁹

20 ¹⁹ We disagree with Appellants' interpretation of the tables in WSU's 2002 water system plan as an admission by
21 WSU that it had abandoned *Claim* 098523. *First Osborn Decl., Attachment 4, Tables 4.3 and 4.4*. These tables
identify Well No. 2 as abandoned but also identify "Existing Water Rights" and "Current Water Right Status" as
including Claim No. 098523 in the amounts of 500 gpm Maximum Instantaneous Flow Rate and 720 acre-feet
Maximum Annual Volume.

1 Similarly, WSU's undisputed shifting of a portion of its authorized quantities from its authorized
2 wells to other interconnected but unauthorized wells is not evidence of an intent to abandon the
3 rights associated with the original wells. WSU's relevant conduct consists of more than its
4 abandonment of Well No. 2 or any periods of nonuse of other wells. Its intentions are further
5 evidenced by the steps it took after abandoning Well No. 2 and reducing withdrawals from other
6 source wells.

7 Nonuse alone does not constitute abandonment *per se*, although long periods of nonuse
8 may create a rebuttable presumption of intent to abandon a water right and shift the burden to the
9 holder of the water right to explain reasons of nonuse. *Pend Oreille County PUD*, 146 Wn.2d at
10 799. *Okanogan Wilderness League*, 133 Wn.2d at 783.

11 Even where some question may exist about the extent to which quantities exercised under
12 the authorized locations were, in fact, exercised at alternative locations, we find no intent to
13 abandon to the rights. Notably different than the Town of Twisp in the *Okanogan Wilderness*
14 *League* case, here WSU does not rely solely on its continued existence as a municipality to rebut
15 any presumption of intent to abandon or non-use of its water rights arising from its non-use of
16 certain wells, including Well 2. Unlike the Town of Twisp, which failed to mention or list its
17 prior appurtenant water rights when seeking groundwater certificates several years after ceasing
18 to divert surface water from previously authorized surface water rights, WSU has continuously
19 identified and claimed the rights now challenged by this appeal.

20 It is undisputed that in 1962, when WSU applied for the right which subsequently
21 became Certificate No. 5070-A, WSU reported each of the three wells (Nos. 1, 2, and 3) used to
withdraw water under its pre-Water Code groundwater rights. *First Brown Decl, Exh. 3*. In
1973, when it applied for the right which subsequently became Certificate No. G3-22065C,
WSU again reported its pre-1945 groundwater rights together with its permitted rights to Wells

1 No. 4 and 5. *First Brown Decl., Exh. 4*. In 1974, WSU filed claims identifying the water it was
2 withdrawing from Wells No. 1, 2, and 3. *First Wells Decl., Exh. 1–3*. In 1987, WSU applied
3 for a right for Well No. 7, “as a supplemental source of water for the university campus.” *First*
4 *Brown Decl., Exh. 6*. Ecology’s Protested ROE for Well No. 7 stated: “Three existing wells,
5 presently on-line, are considered to have a very limited future. It is the expressed intent of WSU
6 to bring the proposed well on-line as a direct substitute for these wells as they eventually
7 decrease in productivity, or fail.” *Id.* The Protested ROE issued in 1988 identified each existing
8 groundwater right and claim appurtenant to the WSU campus, and the permit for Well No. 7 was
9 issued “to replace, as necessary, those waters originally authorized or claimed for appropriation
10 from Wells No. 1, 3 and 4.” *Id.*

11 These undisputed actions alone are sufficient to defeat an allegation of abandonment of
12 Claim No. 098523 or any of WSU’s other rights. In this respect, we find the facts more similar
13 to those in *Pend Oreille County PUD*, where the Supreme Court concluded, even if it agreed
14 there had been a long period of nonuse, the PUD’s continuous and undisputed actions in search
15 of new ways to exercise its rights from 1956 onward “established that it did not intend to
16 abandon its 1907 water right.” *Pend Oreille County PUD, 146 Wn.2d at 799-800.*

17 Having found no intent to abandon its right, it is not necessary for us to evaluate in detail
18 the precise quantities of withdrawals WSU exercised under each right via unauthorized points of
19 withdrawal. It is enough to recognize that taking steps to continue exercising one’s water right,
20 whether such actions are authorized or unauthorized, successful or unsuccessful, may be
21 evidence of intent to not abandon a right. To that end, we conclude that, without more, an
appropriation is not abandoned by reason of changing a point of withdrawal.

We also note, without condoning unlawful self-help, that WSU’s actions changing to
unauthorized points of withdrawal allowed WSU to put its water rights to continuous beneficial

1 use.²⁰ Since 1962, WSU's total pumpage has never been less than 469,226,064 gallons per year,
2 or 1,440 acre-feet (the maximum amount claimed under its perfected Water Right Claims No.
3 098522 and 098523). *See Matuszek and Ryan Decl., Exh. 1 at 6-16.* Water Right Certificate No.
4 5070-A has, to the extent it was partially perfected, been exercised by withdrawal from other
5 University wells in addition to Well No. 4, including Well No. 7. *See Matuszek and Ryan Decl.,*
6 *Exh. 1.* Water Right Certificate No. 5072-A has, to the extent it was partially perfected, been
7 exercised by withdrawal from other wells, including Wells No. 6 and 8. *First Wells Decl. at 3-4.*
8 Water Right Certificate No. G3-22065C has, to the extent it was partially perfected, been
9 exercised by withdrawal from other wells, including Wells No. 7 and 8. *See Matuszek and Ryan*
10 *Decl., Exh. 1; First Wells Decl.* We find these rights have been exercised continuously, and the
11 water put to beneficial use serving the water supply needs of the WSU Pullman campus.

12 Legal Issue No. 10: Same Body of Public Groundwater.

13 In response to Respondents' motion for summary judgment on this issue, Appellants
14 concede they "have no information to suggest the WSU Wells do not tap the same body of
15 groundwater." *Appellant's Response at 37.* In the absence of any genuine dispute regarding the
16 source of groundwater for any of the WSU wells, Respondents' are entitled to summary
17 judgment on Legal Issue No. 10.

18 Legal Issue No. 11: Expansion of Place of Use.

19
20
21 ²⁰ Ecology Policy recognizes that "in some situations, historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes..." and allows for consideration of the beneficial use to be the measure of the right. *First Brown Decl., Exh. 2 (POL 1120) at §7.*

1 Based on stipulated facts, the now parties agree the water right decisions in this case do
2 not improperly expand the place of use of the WSU water rights. Respondents' are therefore
3 entitled to summary judgment on this issue.
4

5 Legal Issues No. 12: Impairment of Existing Rights.

6 Issue 12 asks the Board to decide whether Ecology's decision approving changes to each
7 of WSU's contested water rights will impair existing uses. WSU and Ecology have moved for
8 summary judgment, arguing that consolidation of WSU's water rights does not authorize any
9 increase in the quantity of water previously authorized under the separate rights. Withdrawals
10 under the change, they allege, will not affect existing rights, the aquifer, or the public welfare
11 any differently than authorized withdrawals under WSU's existing rights.²¹ WSU supports
12 Respondents' position with the Declaration of Patrick Devin Brown, the Ecology Environmental
13 Specialist who reviewed the change applications. Mr. Brown concluded that there would be no
14 impairment because the continuous pumping of WSU water rights for many years had resulted in
15 no reported well interference problems. Even with the integration of WSU well operations that
16 has occurred over time, and the resulting concentration of pumping to fewer wells, there have
17 been no reported well interference problems. *First Brown Decl. at ¶31.* Mr. Brown found "no
18 evidence that pumping those [currently authorized] quantities from any one of the wells, as
19 opposed to pumping those quantities from multiple wells, would cause different or greater

20 ²¹ WSU proposes to consolidate its water use from its original six wells into two wells, No. 7 and the new Well No.
21 8 which is located some distance from WSU's existing wells. *Second Williams Decl., Attachment 4 (Map of WSU Well Locations).* WSU is projecting Well No. 8 to account for half of its production, based on the fact that Well No. 8 can produce 2,500 gpm and WSU's claimed right is 5,000 gpm. *First Osborne Decl., Attachment 1 (ROE for G3-28278P, p. 3).*

1 impacts to water users or to ground water or surface water resources in the Palouse Basin Area.”

2 *Id.*

3 Appellants argue that, in fact, withdrawals under the consolidation will have adverse
4 impacts that are different and greater than withdrawals under existing rights. They offer
5 declarations that assert increased pumping of WSU wells will affect the Cornelius well, and raise
6 factual questions about the results of pump tests by WSU of test wells. They assert that they can
7 show a detrimental effect on the Cornelius well from the consolidation of the WSU wells, and
8 presumed increased pumping of these wells. *Declarations of Keller, Cornelius.* Appellants have
9 presented evidence in this summary judgment proceeding that Well No. 8 is approximately 2.8
miles from Mr. Cornelius’ well, and Well No. 7 is approximately 2.9 miles from his well.

10 *Cornelius Decl.* They have also submitted evidence of a strong correlation suggesting that the
11 Cornelius well and the WSU and Ecology test wells are hydraulically connected. *Keller Decl.,*
12 *Attachment 2.* To some extent, Appellants’ impairment arguments are based more generally on
13 the declining state of the Grand Rhonde aquifer, and the potential for future exercise of WSU’s
14 water rights. They do not assert an immediate effect on the Cornelius well, but suggest it will
occur over some unknown period of time.

15 Changes in points of withdrawals must be analyzed under the same standards as an
16 original application for a new right, which includes an analysis of whether the change will impair
17 existing rights. *RCW 90.44.100, RCW 90.03.290.* Appellants correctly note the Board has held
18 that an approval cannot be granted where there is incomplete information to determine whether
19 the existing rights of others would be impaired. *Andrews v. Ecology*, PCHB No. 97-20 (1997).
20 However, the Board also concluded in *Andrews*, that “impairment does not arise where the effect
of the changed right upon other rights is the same as the original right.” *Id.* at COL V.

1 In this case, while the change/consolidation of the subject rights does not *authorize* any
2 greater quantity of withdrawals than is currently available under existing valid rights (with the
3 exception of Claim 098524 addressed in Legal Issue No. 7), we are not persuaded that is the end
4 of the necessary impairment inquiry. Even accepting the conclusion urged by Respondents from
5 *Kile v. Ecology & James* (that “a change in the point of diversion which would affect other rights
6 no differently than if the diversion were made in the certificated amount at the original point of
7 diversion is not impairment”),²² we must answer the predicate question of whether the change, in
8 fact, will affect existing rights to the same degree or in the same manner as no consolidation of
9 the rights.

10 We conclude that Appellants have put material facts into dispute on the question of
11 impairment, sufficient to defeat summary judgment. Even assuming the wells all tap the same
12 body of groundwater (as all parties agree and we have concluded in Issue No. 10), and even
13 assuming WSU could withdraw the full amount of its rights from each right’s existing authorized
14 point of withdrawal, the physical shifting of the withdrawals from one location to another has the
15 potential to affect existing right holders. It is premature to make a conclusion on this question at
16 summary judgment. Our decision on whether Ecology has properly concluded there is no
17 impairment of existing rights must be informed by the parties putting forward evidence that
18 Ecology either needed more information to make the impairment decision, or that the actual
19 effect of pumping the integrated WSU wells will impair existing rights. The burden is on the
20 Appellants in this regard.²³

21 ²² *Kile v. Ecology & James*, PCHB 96-131, COL VI (1997).

²³ If the evidence at hearing supports Appellants’ allegation that the proposed change will, beyond speculation, have a detrimental effect upon a lawful existing well, or a substantial cumulative increase in pumping lift, then a remand to Ecology would be appropriate for its determination of the reasonable or feasible pumping lift that it will protect in existing lawful wells. This would then become the new starting point for determining whether or not the change impairs existing rights. *Pair v. Ecology & Lehn Ranches, Inc.*, PCHB No. 77-189, COL III (1978) (“If however, neither threshold condition is found to exist, there can be no impairment. The burden of proof is on the appellant

1 That being said, we specifically reject Appellants' theory that impairment results simply
2 because consolidation of the rights may allow WSU to pump more of its authorized rights from a
3 declining source aquifer than is presently possible from its existing wells. Having defeated
4 summary judgment on the impairment issue, Appellants now have the burden at hearing to
5 demonstrate that Ecology's "no impairment" conclusion was in error. To meet this burden, they
6 must demonstrate that existing water right holders such as Mr. Cornelius will be impaired as a
7 result of changing the *location* of the total authorized amount of withdrawals, from the locations
8 authorized in the existing rights to the newly authorized points of withdrawal. This is not the
9 same inquiry as that suggested by the Appellants, either as to whether the change will allow
10 WSU to exercise a greater amount of its authorized quantities from a declining source than it is
11 currently able to, or whether an increase in the aggregate amount of WSU withdrawals will
12 generally contribute to lowering the level of the Grande Ronde Aquifer.

13 Legal Issue No. 13: Aquifer Depletion

14 This issue asks the Board to decide whether consolidation of WSU's rights will
15 unlawfully deplete the source aquifer (the Grande Ronde). Respondent WSU moves for
16 summary judgment on this issue, contending that because consolidation of its water rights does
17 not authorize withdrawal of any additional quantities of water, the change affects the source
18 aquifer no differently than the lawful exercise of WSU's existing rights. Appellants assert the

19 who has failed to show either of the threshold conditions, thereby failing to prove that issuance of the present permit
20 will impair an existing water right. The permit must therefore issue.") At this point in the proceeding, we conclude
21 Appellants have brought forward sufficient information to put the impairment issue in dispute but have failed to
establish, beyond speculation, the threshold conditions that would have required Ecology to determine the
reasonable or feasible pumping lift prior to issuing the change approvals.

1 consolidation will result in an increase in the total quantity of water withdrawn from the Grande
2 Ronde, exceeding the amount WSU exercises under its current configuration of rights/wells.

3 Withdrawals in the Grande Ronde Aquifer are currently exceeding the recharge rate.
4 *Second Osborn Decl., Attachment 10.* This aggregate increase in pumping, Appellants further
5 argue, will accelerate depletion of the aquifer contrary to the safe sustaining yield requirements
6 of RCW 90.44.130.

7 RCW 90.44.130 provides, in relevant part:

8 As between appropriators of public ground water, the prior appropriator
9 shall as against subsequent appropriators from the same ground water body be
10 entitled to the preferred use of such ground water to the extent of his
11 appropriation and beneficial use, and shall enjoy the right to have any
12 withdrawals by a subsequent appropriator of ground water limited to an amount
13 that will maintain and provide a safe sustaining yield in the amount of the prior
14 appropriation. The department shall have jurisdiction over the withdrawals of
15 ground water and shall administer the ground water rights under the principle just
16 set forth, and it shall have the jurisdiction to limit withdrawals by appropriators of
17 ground water so as to enforce the maintenance of a safe sustaining yield from the
18 ground water body. *RCW 90.44.130.*

19 Appellants contend this requirement imposes a continuing duty on Ecology to administer
20 groundwater rights to maintain a self sustaining yield, including during evaluation of change
21 applications. Such an evaluation, Appellants suggest, would require Ecology to deny the WSU
change applications "to address the problems of overdraft and water mining in aquifers where
withdrawals exceed recharge, as is occurring in the Grande Ronde Aquifer." *Appellants'*
Response at 49-50.

Ecology interprets this statute to reflect one aspect of the determination it makes as to the
availability of water when a water right permit is first issued by the agency. The principle of

1 “safe sustaining yield” in this statute protects vested groundwater rights against later
2 appropriations, to prohibit “mining” of groundwater resources.²⁴

3 Ecology interprets the requirement to maintain a “safe sustaining yield” as applying only
4 to the evaluation of new water rights and not to changes in existing water rights. RCW
5 90.44.130 refers to prior appropriators being preferred over subsequent appropriators, and that
6 Ecology has jurisdiction and shall administer groundwater rights under this principle. The Board
7 agrees with Ecology’s interpretation of this statute and finds that the “safe sustaining yield”
8 requirement does not apply to a change in a water right. Summary Judgment is granted to
9 Respondent WSU on this issue.

10 Finally, we note that Appellants concede, legally and practically, WSU could modify or
11 reconstruct its existing wells or construct replacement wells to enable greater withdrawals from
12 the aquifer and full utilization of its existing water rights. *Appellants’ Response at 7.*
13 Appellants’ arguments regarding aquifer depletion fundamentally challenge the *exercise* of
14 WSU’s water rights, not the change or consolidation of them.

15 Unlike the impairment arguments advanced by Appellants, which necessarily require
16 consideration of the change in the point of withdrawal relative to the location of other right
17 holders, the aquifer depletion argument goes to the heart of the prior appropriation system. Here
18 there is no allegation that exercise of WSU’s rights via any configuration authorized by the
19 change would affect the aquifer any differently than full exercise of WSU’s rights from its
20 currently authorized well configuration. Again, Appellants’ arguments must be rejected on this
21 issue.

²⁴ See generally, *An Introduction to Washington Water Law*, V:12-13 (Jan. 2000).

1 Legal Issue No. 14: Detriment to Public Welfare

2 This issue addresses whether approval of WSU's change applications will harm the
3 public welfare. Under RCW 90.44.100, changes in points of withdrawal must be analyzed under
4 the same standards as an original application, which include the public interest review set out in
5 RCW 90.03.290 (made applicable to groundwater via RCW 90.44.060). Evaluation of the public
6 interest involves a wide range of considerations, and the exercise of discretion by Ecology.
7 Ecology's public interest determinations are accorded due deference and will not be set aside
8 unless shown to be manifestly unreasonable or exercised on untenable grounds or for untenable
9 reasons. *Schuh v. Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983).

10 Nevertheless, this Board has recognized that public interest and impairment
11 determinations are related, and inadequate impairment analysis may bring into play the public
12 interest criterion. *Black Star Ranch v. Ecology*, PCHB No. 87-19 (1988). In this case, our
13 conclusion that the impairment issue should proceed to hearing necessarily prevents summary
14 judgment on the issue of the public welfare. The issue will be addressed at the completion of
15 hearing.²⁵

16 Legal Issue No. 15: Impairment to Surface Water Right.

17 The parties have stipulated that the Grande Ronde Aquifer is not hydraulically connected
18 with any surface water body. We therefore conclude that no impairment of surface water rights
19

20
21 ²⁵ This conclusion differs from that contained in the Board's November 1, 2007 letter apprising the parties of the Board's forthcoming opinion.

1 will occur as a result of the consolidation of WSU's water rights, and Respondents' motion for
2 summary judgment on this issue should be granted.

3
4 Legal Issue No. 16: Improper Delegation.

5 Based on stipulated facts, we conclude that Ecology did not improperly delegate water
6 allocations and management authority to the Palouse Basin Aquifer Committee. Respondents'
7 motion for summary judgment on this issue should be granted.

8 Legal Issue No. 17: Adequacy of SEPA DNS for Water Right Consolidation.

9 Issue No. 17 involves three questions related to the State Environmental Policy Act
10 (SEPA), Ch. 43.21C RCW; first, whether Ecology violated SEPA requirements when processing
11 and issuing the water right decisions (17A); second, whether Appellants are time-barred from
12 objecting to the environmental analysis in WSU's Determination of Nonsignificance (DNS)
13 (17B); and third, whether Ecology's reliance on WSU's DNS was sufficient to constitute prima
14 facie compliance with the procedural requirements of SEPA (17C).

15 Appellants argue that Ecology violated the requirements of the SEPA by relying on the
16 DNS prepared by WSU. Appellants do not challenge the adequacy of the DNS for WSU's
17 decision making purposes, but assert that Ecology should have supplemented the DNS, or
18 prepared a new environmental analysis, when it considered the water right change applications.
19 Appellants assert that the original DNS failed to disclose material, significant, and adverse
20 impacts of increased pumping by WSU on the declining water levels in the Grande Ronde
21 Aquifer. The Appellants' arguments are based on the assumption that but for the well
consolidation, WSU would not have been able to pump enough water from existing wells to
serve campus needs, including recreational activities.

1 Appellants rely on WAC 197-11-600(3)(b), which addresses the circumstances under
2 which an agency may not rely on existing SEPA documents. The regulation allows an agency to
3 assume lead agency status when dissatisfied with a DNS, or to prepare new environmental
4 documents when new information (including discovery of misrepresentation or lack of material
5 disclosure) indicates a proposal's probable significant adverse environmental impacts.²⁶
6 Appellants note that while the decision to assume lead agency status is discretionary, the
7 decision to prepare a new threshold determination or supplemental EIS is not, if the standard of
8 the SEPA rule is met. Although Appellants admittedly did not object to the original WSU
9 prepared DNS, they assert they are not precluded from challenging Ecology's decision to utilize
10 that DNS, based on these independent SEPA procedural requirements. While a substantial
11 question is presented as to whether or not the Appellants have waived objection to the DNS by
12 their admitted failure to comment on it, the Board will address the merits of the argument on this
13 issue. See, *WAC 197-11-545*.

13 The governmental agency's determination that an EIS is adequate is entitled to
14 substantial weight. *Citizens v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 3990 (1993). The

15 ²⁶ WAC 197-11-600(3) provides:

16 Any agency acting on the same proposal shall use an environmental document unchanged, except
17 in the following cases:

18 (a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may
19 assume lead agency status (WAC 197-11-340(2)(e) and 197-11-948).

20 (b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is
21 required if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse
environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental
impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new
threshold determination or SEIS is not required if probable significant adverse environmental
impacts are covered by the range of alternatives and impacts analyzed in the existing
environmental documents.

(c) For EISs, the agency concludes that its written comments on the DEIS warrant additional
discussion for purposes of its action than that found in the lead agency's FEIS (in which case the
agency may prepare a supplemental EIS at its own expense).

1 adequacy of an EIS is tested under the “rule of reason.” *Id.*, 122 Wn.2d at 633; *Cheney v.*
2 *Mountlake Terrace*, 87 Wn.2d 338, 552 P.2d 184 (1976). Under this rule, the EIS must present
3 decisionmakers with a “reasonably thorough discussion of the significant aspects of the probable
4 environmental consequences of the agency’s decision.” *Id.* When reviewing a claim that a
5 supplemental EIS is required, a reviewing court, including the PCHB, applies a clearly erroneous
6 standard of review, and will reverse the SEPA determination only if left with a definite and firm
7 conviction that the agency has made a mistake. *Preserve Our Islands v. Hearings Board*, 133
8 Wn.App. 503, 539, 137 P.3d 31 (2006). Here, we cannot conclude that Ecology’s decision to
9 rely on the existing DNS is clearly erroneous.

10 The Board concludes that SEPA does not require Ecology to analyze the effects of
11 pumping the consolidated water rights on the Grande Ronde Aquifer through a new threshold
12 determination or supplemental EIS. The change itself does not allow any more water to be
13 withdrawn on an instantaneous or annual basis than is allowed under the existing scheme of
14 water rights. Thus, we can find no need for additional environmental analysis. Appellants are
15 concerned that the consolidation of the water rights to a limited number of more efficient wells
16 will result in development of the inchoate portion of the water rights, and result, in fact, in more
17 water use by WSU, with resulting harm to the aquifer. Even if this were true, it does not
18 translate into the need for supplemental environmental review, when the existing water rights
19 authorize withdrawal of the same amount of water from the aquifer. WSU presently has the right
20 to use an amount of water defined by existing water rights, whether through retrofitting or
21 replacement of existing wells, or through the water rights change process. In either case, the
source of the water is the same body of public groundwater, and the affect on the aquifer is
unchanged in this regard.

1 Moreover, we are unpersuaded that there was any misrepresentation or lack of material
2 disclosure at the point Ecology accepted the DNS prepared by WSU. Declining water levels in
3 the aquifer have been well-established for many years, and are the subject of multiple studies and
4 action by Ecology. *See Brackney Decl., Gregory Decl., Mack Decl., Exh. 1 & 2.* There was no
5 “new information” sufficient to trigger any requirement to prepare additional environmental
6 analysis under these facts. Respondents are also correct that even if there were “new”
7 information about the status of the Grande Ronde Aquifer, this water right change does not
8 authorize any increased pumping or total annual withdrawals beyond the amounts currently
9 allowed by existing rights. The Board holds that it was not clearly erroneous for Ecology to
10 conclude that there is not a probable significant adverse environmental impact from the water
11 rights change application. Ecology correctly relied on the DNS prepared by WSU under these
12 circumstances.

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1 Based on the foregoing analysis, the Board hereby enters the following:

2 ORDER

- 3 1. Summary judgment is GRANTED IN FAVOR OF RESPONDENTS on Legal Issues No.
4 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, and 17.²⁷
- 5 2. Respondents' motion for summary judgment on Legal Issue No. 7 is GRANTED with
6 respect to Water Right Claims 098522 and 098523, and Water Right Certificates 5070-A,
7 5072-A, and G3-22065C. Both sides' motions for summary judgment are DENIED with
8 respect to enlargement of Water Right Permit G3-28278P, and this issue is set over for
9 hearing.
- 10 3. Respondents' motion for summary judgment on Issues No. 12 (Impairment of existing
11 rights) and 14 (Detriment to Public Welfare) is DENIED. The question of whether
12 approval of the water right changes will impair existing rights or be detrimental to the
13 public welfare will proceed to hearing for further development of the record.
- 14 4. Appellants' and Ecology's motions for summary judgment on Issue No. 18A are
15 GRANTED with respect to any claims amounting to a facial challenge to the
16 constitutionality of the 2003 Municipal Water Law.

17 DATED this 18th day of January 2008.

18 POLLUTION CONTROL HEARINGS BOARD

19 Andrea McNamara Doyle, Presiding

20 Kathleen D. Mix, Chair

21 See separate Concurrence and Dissent
William H. Lynch

²⁷ Appellants' motions for summary judgment on Legal Issues No. 7, 8D, 9B and 17A-C are DENIED.

Cornelius v. Dept. of Ecology
Court of Appeals No. 304701

Appendix No. 5

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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

Appellants,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY and WASHINGTON STATE
UNIVERSITY,

Respondents.

PCHB No. 06-099

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter comes before the Pollution Control Hearings Board (Board) as part of the above-captioned appeal contesting the approval by the Department of Ecology (Ecology) of changes to six groundwater rights at Washington State University (WSU). Appellants challenged the consolidation of WSU's groundwater rights on several bases related to Ecology's interpretation of the recently enacted Municipal Water Supply Act, commonly referred to as the 2003 Municipal Water Law (2003 MWL)¹ and its application to WSU's rights. Most of the issues in this matter have been resolved prior to hearing on summary judgment.² The Board conducted a hearing on the three remaining legal issues in the appeal, related to questions of impairment, public welfare, and enlargement.

Attorneys Rachael Paschal Osborn, M. Patrick Williams of the Center for Environmental Law & Policy, and Harold Magistrale, represented Appellants Scott Cornelius, *et. al.* at hearing.

¹ Chapter 5, Laws of 2003 (58th Leg, 1st Spec Session) [2E2SHB 1338].

² See the Board's Amended Order on Summary Judgment, issued January 18, 2008.

1 Alan M. Reichman and Sarah M. Bendersky, Assistant Attorneys General, represented
2 Respondent Ecology. Frank M. Hruban, Assistant Attorney General, and Sarah E. Mack, of
3 Tupper Mack Brower, PLLC, represented Respondent WSU. The first two days of hearing were
4 held on January 22-23, 2008 in Pullman, Washington. The final half-day of hearing was held on
5 January 31, 2008, in Lacey, Washington, with some counsel and witnesses participating via
6 video and teleconference.³

7 The Board was comprised of Andrea McNamara Doyle, Presiding, Kathleen D. Mix,
8 Chair, and William H. Lynch, Member. Court reporting services were provided by William
9 Bridges of Bridges & Associates, and Kim Otis of Olympia Court Reporters.

10 SUMMARY OF DECISION

11 After consideration of the competing legal theories and review of the expert
12 hydrogeologic testimony in this matter, we conclude Appellants have failed to meet their burden
13 of proof to establish that Ecology erred when it determined the subject water rights changes will
14 not impair other existing water rights. We conclude a preponderance of the evidence
15 demonstrates that consolidation of WSU's existing water rights will not impair Mr. Cornelius'
16 well or other existing water right holders. In the absence of impairment, we also therefore
17 conclude that the public welfare will not be harmed by Ecology's approval of these water right
18 changes. Finally, we conclude Ecology's approval of the application for change of Permit No.
19 G3-28278P did not unlawfully "enlarge" the water right represented by that permit. We reach

20 _____
21 ³ Participating via videoconference from Pullman were Ms. Osborn, Mr. Cornelius, and Dr. Keller (witness) for the
Appellants, and Mr. Hruban for Respondents. Participating via telephone was Mr. Magistrale for Appellants and
Mr. Gregory (witness) for Respondents.

1 this conclusion based on our finding that the quantities authorized by Permit No. G3-28278P
2 were not derived from or based on the instantaneous and annual quantities associated with Claim
3 No. 098524 (Well No. 3), the claim that Ecology had tentatively determined to be invalid.

4 In reaching these conclusions, the Board is mindful that all parties concede the Grande
5 Ronde aquifer (GRA) is experiencing a long-term and troubling trend of declining water levels
6 that, if not adequately addressed, will eventually threaten all water users in the basin. The
7 testimony and evidence were undisputed in this respect, and also revealed a flavor of the on-
8 going scientific, regulatory, public policy, and personal efforts that are underway to address this
9 complicated problem. That being said, the Board has previously made clear the legal issues in
10 this hearing were not about the declining aquifer or how Ecology should manage groundwater in
11 the Pullman area. Nor was it about whether WSU should be allowed to withdraw more water
12 than it presently does from the aquifer, or about the uses to which WSU chooses to apply the
13 water it is currently authorized to withdraw. Instead, this case was focused on the much
14 narrower question of whether WSU is legally entitled to consolidate its existing water rights in
15 order to be able to pump its currently authorized quantities from a different configuration of
16 wells within its integrated campus water system.

17 PROCEDURAL BACKGROUND

18 Although previously detailed in the Board's summary judgment ruling, we briefly review
19 the procedural history of the water right change applications at issue in this appeal.
20
21

1 In October 2004, WSU applied to Ecology to change/consolidate all of the existing
2 groundwater rights currently used to serve the Pullman campus. WSU proposed to integrate the
3 water rights associated with the existing campus well system, by adding seven (7) of its existing
4 wells as authorized points of withdrawal for each of the existing groundwater rights in the area,
5 and changing the place of use for each right to be consistent with the approved water service
6 area. In other words, WSU wished to be able to withdraw water under each of its groundwater
7 rights from any or all of the existing wells that serve the campus. The required notice of
8 application was published and three letters of protest or concern were received, including ones
9 on behalf of Appellants Scott Cornelius and Palouse Water Conservation Network.

10 The university conducted a State Environmental Policy Act (SEPA) analysis and issued a
11 final Determination of Non-Significance (DNS) on June 7, 2004. The university determined the
12 proposal would not have a significant adverse impact on the environment. In reviewing the
13 change applications, Ecology relied on the DNS issued by WSU and did not conduct a new
14 threshold determination or perform supplemental SEPA analysis.

15 As part of its review of the change applications, Ecology applied a number of provisions
16 from the 2003 MWL. Most notably, Ecology determined that WSU is a "municipal water
17 supplier" under the terms of the new law, and that the rights it holds for the Pullman campus
18 qualify as rights for "municipal supply purposes" as that term is now defined. In September
19 2006, Ecology issued Reports of Examination (ROEs) for each of the change applications at
20 issue in this appeal, approving, in large part, WSU's change/consolidation requests. Ecology
21

1 denied integration of Claim No. 098524 (associated with Well No. 3) upon Ecology's tentative
2 determination that this claim is invalid.

3 Appellants timely appealed Ecology's decisions to this Board. The parties' joint
4 Statement of Agreed Legal Issues originally identified forty (40) issues, comprising eighteen
5 (18) general topics, presented by Ecology's interpretation of the 2003 MWL and its application
6 to WSU's rights. As previously noted, the Board resolved all but three of the legal issues
7 through the parties' cross motions for summary judgment.⁴ The issues remaining for hearing at
8 the Board level included whether Ecology's decision approving the change of WSU's water
9 rights will impair existing rights (Legal Issue No. 12), harm the public welfare (Legal Issue No.
10 13), or enlarge Water Right Permit No. G3-28278P to the extent it may include quantities from
11 an invalid claim (Legal Issue No. 7).

12 The Board hereby incorporates by reference those facts concerning the WSU water
13 rights and campus water system contained in the Board's Amended Order on Summary
14 Judgment and makes the following additional:

15 FINDINGS OF FACT

16 [1]

17 *WSU Campus Water System*

18 The WSU Pullman campus water system is comprised of an integrated network of source
19 wells (each historically associated with its own individual water right), storage reservoirs, and
20

21 ⁴ See Amended Order on Summary Judgment, issued January 18, 2008, rejecting several of Appellants' challenges to the changes and declining to address those based on constitutional claims. The Order reserved the latter for the parties to litigate in a court with jurisdiction to hear claims related to the constitutionality of the 2003 MWL.

1 distribution pipelines. The system is divided into two zones, the "low pressure" zone which
2 includes Wells No. 1, 2 (decommissioned), 3, 4, and 7, and the "high pressure" zone which
3 includes Wells No. 5, 6, and 8. The system was developed to fit the needs of the topography of
4 the campus and integrated without specific authorization from Ecology or its predecessor
5 agencies. As presently operated, all the water for the system is withdrawn primarily from one
6 well in each zone, Wells No. 7 and 8. *Testimony of Wells,⁵ Exh. R-1.*

7 [2]

8 The system includes a small area of overlap, and a number of emergency crossover
9 connection points, between the two zones. *Testimony of Wells, Exh. R-59, Exh. R-63A.* From an
10 operational standpoint, it is most desirable to supply approximately two-thirds of the campus
11 water needs from the low zone and approximately one-third from the high zone, although the
12 present ratio is closer to 60:40 or 50:50. No single well on campus can pump more than 2,500
13 gallons per minute (gpm). *Testimony of Wells.*

14 [3]

15 In the low pressure zone, Wells No. 1, 3, and 4, are clustered closely together and
16 completed to similar depths. All three of their well house buildings are located within
17 approximately 80 feet of one another. They are drilled to depths of 247, 223, and 275 feet,
18 respectively, and the pumps for each are located at nearly the same elevations. Collectively,

19
20 ⁵ Gary Wells is a licensed civil engineer with a master's degree in sanitary engineering. Presently he is the manager
21 of facilities and operations for WSU, where he has been employed for nearly 23 years. In that capacity, Mr. Wells is
responsible for managing the preparation and construction of campus public works projects and rights of way and
providing technical assistance and support to other engineers and construction workers related to the campus water,
sewer and steam systems. *Testimony of Wells.*

1 their pumping capacity is just over 3,000 gpm, although Wells No. 1 and 3 are inactive, leaving
2 Well No. 4 with a current pump capacity of 1,500 gpm. The primary active well in the low zone
3 is Well No. 7, which is also located in the same general area of the campus, to the southeast. It is
4 drilled to a depth of 1,814 feet, with a pump location approximately 150 feet lower than Well
5 No. 4, and has a current pump capacity of 2,500 gpm. *Testimony of Wells, Exh. R-58, Exh. R-60,*
6 *Exh. R-63A.*

7 [4]

8 In the high zone, Wells No. 5 and 6 are located in the north central and north eastern
9 portions of the campus. Well No. 5 is completed to a depth of 394 feet and has a pump capacity
10 of 450 gpm, although the pump has been removed and it presently inactive (other than for use as
11 a monitoring point). Well No. 6 is 702 feet deep, with its pump located at an elevation nearly
12 100 feet above the elevation of the pump for Well No. 7. *Testimony of Wells, Exh. R-58, Exh. R-*
13 *60, Exh. R-63A.*

14 [5]

15 WSU's newest well, Well No. 8, is located in the overlap area between the low and high
16 zones. It is drilled to a depth of 812 feet, with a pump located at an elevation approximately 100
17 feet deeper than Well No. 7. It has a current pump capacity of 2,500 gpm. *Testimony of Wells,*
18 *Exh. R-58, Exh. R-60, Exh. R-63A.* Well No. 8 was drilled in 2003, first pumped in 2006, and
19 started producing at 2,500 gpm in 2007. *Testimony of Wells.*

20 [6]

1 *Exh. R-41, Exh. A-25.* As part of its investigation into the 1987 application, Ecology noted at the
2 time:

3 WSU proposes to develop a new well, Well No. 7, as a supplemental source of
4 water for the university campus. Three existing wells, presently on-line, are
5 considered to have a very limited future. It is the expressed intent of WSU to
6 bring the proposed well on-line as a direct substitute for these wells as they
7 eventually decrease in productivity, or fail. *Exh. A-26.*

8 Ecology then issued Permit No. G3-28278P (for Well No. 7) with a priority date of 1987 and
9 included the following proviso:

10 The quantities granted under this permit are issued less those amounts
11 appropriated under Ground Water Certificate No. 5070-A and Ground Water
12 Claims No. 098522 and No. 098524. The total combined withdrawal under this
13 permit and Ground Water Certificate No. 5070-A shall not exceed 2500 gallons
14 per minute, 2260 acre feet per year. *Exh. A-25.*

15 [9]

16 Well No. 8 was also developed in response to concerns about the need for greater
17 capacity and redundancy in the system. The largest pump in the high zone has an instantaneous
18 capacity of 1,500 gpm, and the water right historically associated with that well (Well No. 6) was
19 limited to an instantaneous quantity of 1,500 gpm. *Testimony of Wells, Exh. A-20 (Cert. No. G3-*
20 *22065C).* A design was developed in 1998 for the new well with a capacity of 2,500 gpm to
21 serve the high zone and provide back-up to the entire system. Well No. 8 was constructed as an
additional point of withdrawal under the right previously associated with Well No. 6 (G3-
22065C), and a showing of compliance was submitted to and accepted by Ecology in January
2005. The university chose to apply for an additional point of withdrawal, rather than simply

1 replacing Well No. 6, so that it could keep both wells. *Testimony of Wells, Exh. A-19, R-43 and*
2 *44.*⁶

3 [10]

4 In 2007, WSU's Well No. 7 broke down due to failure of a control transformer. During
5 the three to four weeks it took for Well No. 7 to get back on line, the university relied on Well
6 No. 8 to provide water to the campus. Well No. 4 was also activated during this time, but it took
7 a couple of weeks before Well No. 4 was operational. *Testimony of Wells.*

8 [11]

9 *WSU Water Right Change Applications & Decisions*

10 During the same time period WSU was preparing the change request to add Well No. 8 as
11 an additional point of withdrawal under Certificate No. G3-22065C, it decided to seek regulatory
12 approval for the operational flexibility offered by integrating and consolidating its historic water
13 rights, which it did in October 2004. *Exhs. R-45, R-8, R-10, R-13, R-16, R-23, R-30, R-37.*

14 [12]

15 Ecology processed the WSU change applications in the typical manner, by assigning a
16 permit writer to investigate and prepare findings and recommendations in consultation with
17 technical staff. In this case, Kevin Brown, an Ecology environmental specialist, prepared the
18 Reports of Examination with technical assistance from senior hydrogeologist, Guy Gregory. Mr.

19
20
21 ⁶ The reference in Exh. 44 to a "replacement well" appears to be a ministerial error and not a decision or
determination by Ecology that Well No. 8 is a replacement well rather than an additional point of withdrawal.
Testimony of Brown.

1 Brown's supervisor, Keith Stoffel, gave final approval to the ROE decisions. *Testimony of*
2 *Stoffel.*

3 [13]

4 Kevin Brown is a senior permit writer for the eastern regional office Water Resources
5 Program. His educational background is in civil engineering technology, and he has been
6 employed by Ecology since 1991. *Testimony of Brown, Exh. R-82.*

7 [14]

8 Keith Stoffel is the Section Manager of the Water Resources Program in Ecology's
9 eastern regional office. He is a geologist by training and previously worked for more than ten
10 years as a hydrogeologist with Ecology. Currently his responsibilities include directing the
11 regional administration of Ecology's water resources permitting, compliance, well construction,
12 technical assistance, watershed management, adjudications, and data management. In that
13 capacity, he had review and approval authority over the agency's decisions on the water right
14 change applications at issue in this appeal. *Testimony of Stoffel, Exh. R-83.*

15 [15]

16 Guy Gregory is a Washington licensed hydrogeologist and Oregon registered geologist.
17 He has been a senior hydrogeologist with Ecology since 1991, and presently is the Technical
18 Unit Supervisor for the Water Resources Program in Ecology's eastern regional office. In that
19 capacity, he has served as the agency or unit lead for significant aquifer investigations involving
20 the Spokane Valley – Rathdrum Prairie Aquifer, the Odessa Subarea, and the Walla Walla basin.
21 His experience includes coordinating hydrogeologic investigations and field studies related to

1 measurements of groundwater levels and surface water flows, and supervising regional well
2 drilling regulatory programs. *Testimony of Gregory, Exh. R-84.*

3 [16]

4 Enlargement

5 Ecology approved each of WSU's change applications except for the one associated with
6 Well No. 3. Ecology denied WSU's request to integrate the quantities from Claim No. 098524
7 into its campus water system, and to add additional points of withdrawal to Claim No. 098524.
8 The denial was based on Ecology's tentative determination that the original claim was invalid
9 because the first use of water represented by the claim had occurred in 1946 when Well No. 3
10 was constructed, which was after adoption of the state's Ground Water Code in 1945. *Exh. A-5,*
11 *Testimony of Stoffel.* Appellants have asserted that the annual and instantaneous quantities
12 associated with this invalid claim were wrongfully credited to WSU as a result of the
13 consolidation decision.

14 [17]

15 In 1988, Ecology issued a ROE, recommending approval of WSU's application for a new
16 municipal supply water right to be associated with a proposed Well No. 7 (Permit No. G3-
17 28278). Ecology approved this new water right in the amount of 2,500 gallons per minute and
18 2,260 acre feet per year for continuous municipal supply. The ROE includes the following
19 provisions relevant to quantities:

20 The quantities granted under this permit are issued less those amounts
21 appropriated under Ground Water Certificate 5070-A, and Ground Water Claims

1 98522, 98524. The total combined withdrawal under this permit and Ground
2 Water Certificate No. 5070-A shall not exceed 2500 gallons per minute 2260
3 acre-feet per year.
4 The amount of water granted is a maximum limit that shall not be exceeded...
5 *Exh. A-26.*

6 [18]

7 When Ecology acted on WSU's consolidation request, it allowed WSU the total
8 quantities previously authorized by Permit No. G3-28278P, and neither included nor subtracted
9 the 1,000 gpm of instantaneous quantity (Qi) or the 1,440 afy of annual quantity (Qa)
10 represented by Claim No. 098524. Ecology determined that Permit No. G3-28278P, associated
11 with Well No. 7, was a new water right, with a new priority date, not tied to the validity or
12 invalidity of other rights. This new water right was intended to be a non-additive, alternative
13 source of up to 2,500 gpm, to be used as other wells associated with other water rights failed.

14 *Testimony of Brown, Exhibits A-25, A-26.*

15 [19]

16 In reaching this conclusion with respect to Permit No. G3-28278P, Mr. Brown applied
17 the guidance contained in Ecology's Policy No. 1040, "Use of Terms that Clarify Relationships
18 between Water Rights." *Testimony of Brown, Exh. R-85.* He also examined the original intent
19 behind Well No. 7 and the associated water right (G3-28278), by examining all the related water
20 rights documents mentioned in the 1988 ROE and the amounts authorized by each one. Mr.
21 Brown concluded that the intent behind these rights was to allow a total maximum pumping of
2,500 gpm/2,260 afy from the combination of four wells, so long as the total combined pumping
amount never exceeded 2,500 gpm/2,260 afy from any combination of the wells. He concluded

1 that Permit No. G3-28278P was “non-additive” in the sense that it did not increase the water
2 available through existing rights, and “alternate” in the sense that it could be used either instead
3 of, or simultaneously with, other water rights, up to the 2,500 gpm/2,260 afy maximum.
4 *Testimony of Brown, Exh. R-85.* Accordingly, Ecology concluded it should not subtract the
5 quantities represented by the invalid Claim No. 098524 from the 2,500 gpm or 2,260 afy
6 authorized in Permit No. G3-28278P.⁷ Based on that conclusion, Ecology approved the
7 consolidation action because the permit represented a new right for a non-additive, alternative
8 source of water to replace water from older sources as needed, and a change or transfer of that
9 right was not legally dependent on those prior rights for its authorized quantities. *Testimony of*
10 *Stoffel, Testimony of Brown.*

11 [20]

12 Impairment

13 Ecology’s analysis of the change applications included a qualitative assessment of
14 whether integration of WSU’s water rights would impair existing water right holders. Ecology
15 considered a number of factors in its qualitative assessment, including that: (1) despite the
16 historically declining water levels in the aquifer, existing domestic water right holders in the area
17 had not previously experienced any interruptions or difficulties withdrawing water from their
18 wells; (2) no new additional instantaneous or annual quantities of water were authorized by the

19 _____
20 ⁷ As part of its analysis of the water rights appurtenant to the WSU campus, Ecology recognized that these claimed
21 quantities from Claim No. 098524 were tentatively determined to be invalid. Ecology then attempted to graphically
depict this tentative determination by listing the Qi and Qa for Claim No. 098524 in parenthesis in the water rights
summary table included in the ROE for Permit No. G3-28278P. *Exh. A-24 (p. 3), Testimony of Stoffel, Testimony of*
Brown.

1 change applications beyond those WSU already had rights to withdraw; (3) the distance between
2 the originally authorized point of withdrawal for each existing right and the additional points of
3 withdrawal being sought was relatively small compared to the distance between the WSU
4 campus wells and the domestic wells in the nearby area; and (4) a review of Ecology's database
5 revealed the majority of the neighboring domestic wells penetrated fairly deep into the aquifer,
6 as they were completed to a depth in the range of 250 feet, with a few between 300-400 feet
7 deep, and one at approximately 450 feet. *Testimony of Gregory.*

8 [21]

9 Prior to approving WSU's change applications, Ecology did not make a "reasonable or
10 feasible pump lift" determination for the Cornelius well, or any other well. Based on its analysis
11 of the change applications, Ecology concluded there was no reason to expect that integration of
12 WSU's water rights would interfere with any nearby wells to a level where any other water right
13 holders might have trouble withdrawing water from their wells. Based on that conclusion, as
14 well as the general qualitative assessment, Ecology determined the change applications would
15 not impair existing rights and there was no reason to undertake a reasonable or feasible pump lift
16 determination. *Testimony of Stoffel, Testimony of Gregory.*

17 [22]

18 Since the approval of WSU's change applications in 2006, and the resulting consolidation
19 of pumping from Wells No. 7 and 8, Ecology has received no complaints of well interference
20 and has no data indicating water levels in surrounding observation or test wells have declined
21 more rapidly than before the consolidation. *Testimony of Stoffel.*

1 [23]

2 Reasonable or Feasible Pump Lift

3 Although referenced in state law, the term "reasonable or feasible pump lift" is not
4 defined in the Ground Water Code, and neither is the process for when or how a reasonable and
5 feasible pump lift should be determined. The term is generally used to describe the depth a water
6 right holder can reasonably and feasibly be expected to pump water from in order to get
7 groundwater to the surface. *Testimony of Stoffel.*

8 [24]

9 The concept of a reasonable or feasible pump lift is typically applied to a specific well or
10 to a sub-area within a basin, rather than to an entire aquifer or basin, because it is usually
11 dependent on site-specific variables such as the thickness of an aquifer at a particular location
12 relative to well construction. It may be possible to make a pumping lift determination on an
13 aquifer-wide basis if the conditions are known to be sufficiently uniform throughout the area.
14 *Testimony of Stoffel.*

15 [25]

16 Ecology normally works through the process of making reasonable or feasible pump lift
17 determinations on a case-by-case basis, depending on the aquifer system and what is known
18 about specific wells in the system. The agency does not undertake a formal pump lift
19 determination unless it has reason to believe water levels in a particular well are in peril or it has
20 an indication that a water right holder is having trouble exercising its water right. *Testimony of*
21 *Stoffel.*

1 [26]

2 While aware of the declining water levels of the GRA, Ecology has not made any
3 determination of a reasonable or feasible pump lift for the aquifer as a whole or any sub-area in
4 the Pullman-Moscow region because it has no indication that any water right holders are
5 presently at risk of not being able to pump water from their wells. *Testimony of Stoffel.* The
6 Board was provided with no evidence that any water right holders in the area have been unable
7 to exercise water rights from existing wells as a result of WSU's pumping regime.

8 [27]

9 Ecology recognizes it may need to do an analysis of what constitutes a reasonable and
10 feasible pumping lift in the GRA at some point in future. Presently it is working collaboratively
11 through the Palouse Basin Aquifer Committee (PBAC) to address the declining aquifer levels.
12 The PBAC is considering strategies that may result in new regulations for groundwater
13 management in the basin, or one or more sub-areas. Such regulations could include reasonable
14 and feasible pump lifts or could set maximum annual rates of decline. *Testimony of Stoffel.*

15 [28]

16 Objections to Change Decisions

17 The Sierra Club Palouse Group is a regional branch of the Northern Rockies Chapter of
18 the Sierra Club. The Group's mission is to preserve, protect, and enjoy the natural world,
19 including water resources such as the Palouse Aquifer. A large majority of the group's 467
20 members live in the area above the aquifer and depend on it for drinking water and all aspects of
21 life. They are troubled about its declining condition and have appealed the consolidation of

1 WSU's water rights because they are concerned that re-arranging the water rights will lead to
2 greater exploitation of the aquifer. *Testimony of Coombs.*

3 [29]

4 The Palouse Water Conservation Network (PWCN) is a group of concerned citizens
5 whose goal is to promote awareness and action to preserve water resources in the Pullman-
6 Moscow area. They are generally concerned about water mining of the aquifer and are
7 particularly concerned that WSU's consolidation of its water rights will cause greater pumping
8 of water from the aquifer. *Testimony of French.* PWCN submitted a letter to Ecology in
9 February, 2005, protesting WSU's application for change of its groundwater rights, and also filed
10 a formal Protestant Questionnaire the following month. *Exh. A-28, R-51.* At that time, no
11 members knew of any specific personal wells that had been affected by WSU's pumping or
12 withdrawals. *Testimony of French, Exh. R-51.* PWCN was aware that the City of Pullman's
13 change applications were approved by Ecology at the same time WSU's were approved. PWCN
14 chose not to appeal the city's consolidation because it has been working cooperatively with the
15 city as a municipality. *Testimony of French.*

16 [30]

17 Scott Cornelius lives outside the city limits of Pullman, approximately three to three and
18 one half miles south of the WSU campus. He has long had concerns about the condition of the
19 Grande Ronde aquifer and the rate at which it has been declining throughout the basin. He
20 generally follows the trends in water usage by the Pullman area's largest water users, including
21 the City of Pullman and WSU. He is concerned with both the decline of the aquifer system

1 generally, as well as potential impacts to his personal water supply, which comes from a
2 domestic well drilled to a depth of approximately 250 feet. The water level in Mr. Cornelius'
3 well has dropped an average of approximately 10 inches per year over the fifteen years he has
4 lived there. Mr. Cornelius is unsure whether the rate of decline in his well has accelerated since
5 WSU Well No. 8 came on line in 2006. *Testimony of Cornelius, Exh. A-34.*

6 [31]

7 *Grande Ronde Aquifer Background*

8 At the request of Appellants, Dr. Kent Keller prepared a report on the hydrogeology of
9 the Grande Ronde aquifer for the purpose of providing background information on the aquifer's
10 hydrogeology. *Testimony of Keller, Exh. A-31.* Dr. Keller is a professor in the School of Earth
11 and Environmental Sciences at WSU. He has a Ph.D. in Earth Sciences with a specialty in
12 hydrogeology and has spent fifteen years researching the Palouse Basin and the Grande Ronde
13 aquifer at the University of Idaho and WSU. *Testimony of Keller, Exh. A-30.* Dr. Keller has
14 also directed the research of numerous graduate students related to the hydrology and
15 geochemistry of the Palouse Basin. He has authored, and co-authored with Dr. James Osiensky
16 and others, a number of articles and reports concerning the Palouse Basin Aquifer System,
17 including publications on the hydrostratigraphy of the basin, and groundwater recharge and
18 residence times in the Pullman-Moscow Basin. *Exh. A-30.*

19 [32]

20 The Grande Ronde aquifer is a subregion of the Columbia River Basalts and associated
21 sediments. It is comprised of that portion of the Grande Ronde basalt in the Palouse Basin

1 containing groundwater that can be exploited by pumping in the Pullman-Moscow region. *Exh.*

2 *A-31.*

3 [33]

4 The Grande Ronde aquifer lies within the Grande Ronde Formation, which is comprised
5 of millions of years of episodic flood-basalt flows and interstratified rubble and sediments, piled
6 onto an irregular topography which now lies beneath the present-day Pullman-Moscow region.

7 Far from being a simple, uniform "layer-cake," the numerous strata are irregular and
8 interconnected, resulting in a complex system with substantial groundwater transmissivity
9 (horizontal movement of water) and irregular but relatively small vertical hydraulic conductivity.

10 *Exh. A-31.*

11 [34]

12 The GRA contains water that is distinct from waters in overlying basalts and sediments,
13 based on isotope-geochemical characterization. It also exhibits distinct water levels and water-
14 level time trends relative to surrounding areas and overlying basalts and sediments. Using
15 isotope-geochemical age-dating, the mean residence time of water in the system is estimated at
16 approximately 20,000 years. *Testimony of Keller, Exh. A-31.*

17 [35]

18 The extent and availability of groundwater resources in the GRA are poorly known, due
19 in part to lack of precise information about the aquifer's rate of recharge. It is therefore
20 impossible to predict with any degree of certainty how long the water in the GRA will last. This
21 is also due in part to the fact that when drawdowns get large enough, important aquifer properties

1 (such as the relative thickness of the aquifer) change, causing the magnitude and direction of
2 water movement to change. Sub-basins begin to isolate themselves and interconnections
3 between various parts of the system decrease. *Testimony of Keller.*

4 [36]

5 Despite this uncertainty, known reductions in pore pressure currently indicate that the
6 amount of groundwater stored is declining relative to amount of groundwater pumped. Although
7 the precise recharge rate in the Palouse Basin and GRA is not known, it is very low. Generous
8 estimates of the natural flow rate into the GRA are substantially smaller than pumpage rates for
9 Pullman-Moscow area (approximately one-tenth to one-quarter). The GRA is a declining
10 aquifer because the pumpage from the GRA exceeds the amount of recharge into the GRA.

11 *Testimony of Keller, Exh. A-31.*

12 [37]

13 The present, aggregate withdrawal rate from the GRA is approximately 2.7 – 2.8 billion
14 gallons per year. *Testimony of Keller.* Increases in aggregate pumpage from the GRA in the
15 Pullman-Moscow region will necessarily cause water-level declines within the aquifer, because
16 increased flows to wells can only occur under increased hydraulic gradients, which are generated
17 by lowering water levels in pumping wells. *Testimony of Keller, Exh. A-31.*

18 [38]

19 Wells completed in the GRA show hydrographs that trend downward. Water levels have
20 typically declined, on average, more than 100 feet over the period of record. Research has
21 shown that wells distributed across the entire Pullman-Moscow basin all behave similarly; that

1 is, they are all declining at approximately the same rate, when measured over the course of
2 weeks, months, or years. A consistent finding of the research into the Grande Ronde shows that
3 the aquifer system is well interconnected laterally at the basin scale. *Testimony of Keller.*

4 [39]

5 It is Dr. Keller's opinion that water level trends in the aquifer are affected primarily by
6 aggregate pumping, and that changes in the position or point of withdrawals from the aquifer
7 would have only minor effects on the water levels of any given well in the system. *Testimony of*
8 *Keller.*

9 [40]

10 Due to wide variations in the hydraulic properties that are distributed laterally throughout
11 basalt aquifer systems such as the GRA, drawdowns at different radial distances cannot be
12 reliably predicted through 3-10 day pumping tests. It is possible for a well farther from the point
13 of withdrawal to show levels of decline before a different well closer to the point of withdrawal
14 exhibits impacts from pumping. *Testimony of Keller.*

15 [41]

16 *Interference/Impairment*

17 At the request of Appellants, Kevin Brackney reviewed data and information related to
18 the water rights at issue in this appeal in order to formulate an opinion about how consolidation
19 of WSU's water rights might impact the GRA. Kevin Brackney is a professional geologist and
20 certified groundwater professional, with a master's degree in hydrology from the University of
21 Idaho. Mr. Brackney is currently employed as a hydrogeologist and water planner for the Nez

1 Perce Tribe and previously worked for ten years as a research support scientist at the University
2 of Idaho's Environmental Biotechnology Institute. Mr. Brackney's knowledge of the Grande
3 Ronde aquifer is based on his education and work experience. He has been working in the
4 Palouse Aquifer Basin since 1992. *Testimony of Brackney, Exh. A-29.*

5 [42]

6 Although Mr. Brackney did not specifically analyze or attempt to calculate the possible
7 impact of WSU's pre-consolidation or post-consolidation withdrawals on the Cornelius or other
8 neighboring wells, he is of the opinion that pumping more water from WSU's newer, deeper
9 wells will cause a greater impact on nearby wells than pumping from WSU's older and shallower
10 wells. His opinion is based on his understanding of changes in the aquifer's hydraulic properties
11 with respect to vertical conductivity and transmissivity between layers of the basalt flows, and
12 his understanding of the depths of the existing wells at issue. *Testimony of Brackney.*

13 [43]

14 The most porous portion of each basalt layer is the flow top, which consists of rubble and
15 ranges from one-two feet up to 15-20 feet thick in this aquifer system. Due to the many layers of
16 basalt flows that collectively comprise the GRA system, Mr. Brackney opines that well
17 construction can play a significant role in the effects experienced by neighboring wells. He
18 reasons that because Well No. 7 fully penetrates the aquifer to a depth of 2,225 feet, it draws
19 water from the entire thickness of the aquifer, and pumping more water from it will have a
20 greater impact than WSU's previous withdrawals from shallower wells that tap only a portion of
21

1 the aquifer thickness.⁸ In Mr. Brackney's opinion, steep slopes associated with the drawdowns
2 from the WSU well suggest that a shallower well like Mr. Cornelius' will respond much later to
3 the withdrawals. *Testimony of Brackney; Exh. A-39.*

4 [44]

5 At the request of WSU, Dr. James Osiensky analyzed potential interference drawdown at
6 the Cornelius well that may result from WSU's pumping its full authorized quantities of
7 groundwater.⁹ Dr. Osiensky is a professor of hydrogeology in the Geological Sciences
8 Department at the University of Idaho, where some of his areas of specialization include
9 hydrogeology site characterization, hydrogeologic property testing, hydrogeophysical
10 applications in hydrogeology, and groundwater hydraulics. Since 1981, he has held various
11 appointments as an associate professor of hydrogeology and geology, and as a research associate
12 and research scientist, all with the University of Idaho and WSU. *Exh. R-67.*

13 [45]

14 Dr. Osiensky has published numerous refereed and peer-reviewed articles and research
15 papers on a range of hydrogeologic topics, and has conducted and supervised many

16 ⁸ Mr. Brackney testified that the general rule of thumb is for a well to be considered fully penetrating if it penetrates
17 60 percent of the aquifer.

18 ⁹ The Presiding Officer allowed the testimony of Dr. Osiensky over the objection of Appellants regarding his
19 predictions of the relative interference drawdown resulting from different pre and post-consolidation pumping
20 scenarios of WSU's wells. Appellants' motion to strike the testimony was denied after considering the arguments of
21 counsel. The Board found that while it appeared the substance of Dr. Osiensky's testimony had not been seasonably
supplemented to the Appellants in a timely fashion as required by CR 26E, the subject matter about which he
testified had previously been known and available to Appellants through discovery of another of Respondents'
expert witnesses, Dr. Banton. Given the highly relevant nature of the testimony, the Board determined the
preferable remedy was to allow Appellants additional time to prepare cross examination and expert rebuttal
testimony. Appellants' expert, Dr. Keller, provided his rebuttal testimony to the Board one week later, on January
31, 2008.

1 investigations into various aspects of the Palouse Basin and Grande Ronde aquifer. Dr. Osiensky
2 has also worked as a consultant on various hydrogeologic and groundwater issues for the U.S.
3 Nuclear Regulatory Commission and other entities in Idaho over the past two and one-half
4 decades. *Exh. R-67.*

5 [46]

6 Since 1999, Dr. Osiensky and Dr. Keller have collaborated on at least four occasions as
7 co-principal investigators of the hydrostratigraphic conditions in the Palouse Basin for the
8 Palouse Basin Aquifer Committee (PBAC). They have also collaborated under contract with
9 PBAC on investigations of groundwater age dating in the Palouse Basin. *Exh. R-67.*

10 [47]

11 Dr. Osiensky's analysis was intended to quantify the interference drawdown that can be
12 expected to occur both with and without consolidation of WSU's existing groundwater rights,
13 and to compare the relative effects of various consolidation scenarios with pre-consolidation
14 conditions. Interference drawdown occurs when the pumping of one causes the groundwater
15 level to decline in another well. The amount of interference drawdown varies depending on a
16 number of factors, including the distance between the wells, aquifer properties, pumping rates,
17 and duration of pumping. *Testimony of Osiensky.*

18 [48]

19 WSU's campus well system is about three to three and one-half miles north of the well on
20 Mr. Cornelius' property. *Exh. R-64A.* More specifically, the cluster of WSU Wells No. 1, 2, 3,
21 and 4 are approximately 15,887 feet from the Cornelius Well, and WSU Wells No. 6 and 7 are

1 approximately 15,937 and 15,335 feet away, respectively. WSU Well No. 5 is the farthest from
2 the Cornelius Well at approximately 17,923 feet; and WSU Well No. 8 is the closest, at
3 approximately 14,800 feet. *Testimony of Osiensky, Exh. R-63A, Exh. R-64A.*

4 [49]

5 Dr. Osiensky calculated the projected drawdown effects of various well configurations
6 and pumping scenarios using the Cooper-Jacobs approximation method, which is a modified and
7 simplified form of a more complicated theoretical approach known as the Theis Equation. The
8 Theis Equation estimates drawdown using inputs, based on data or assumptions, of static water
9 levels, pumping rates, time, storativity and transmissivity of the aquifer, and the distance
10 between the wells in question. The Cooper-Jacobs method allows investigators to evaluate the
11 impacts of multiple wells by using the principle of super-position and, like the Theis Equation,
12 uses data or assumptions about several variables such as pumping rates, aquifer transmissivity
13 and storativity, and time. *Testimony of Osiensky.*

14 [50]

15 Dr. Osiensky's calculations indicate that if WSU were to pump its entire authorized
16 quantities continuously for ten years, the maximum drawdown that would be experienced at the
17 Cornelius well is no more than 1.9 feet by the end of the decade, with the greatest portion of that
18 being experienced in the first year. Additionally, Dr. Osiensky's calculations indicate that the
19 relative difference in the drawdowns that would be caused by withdrawing water from different
20 configurations of pumping wells is approximately one-half inch after 10 years. The scenarios he
21 used compared the relative differences between pumping under the pre-consolidation well

1 configuration with a variety of post-consolidation scenarios, including pumping WSU's entire
2 authorized quantities from any single well or from only Wells No. 7 and 8. *Testimony of*
3 *Osiensky.*

4 [51]

5 The Cooper-Jacobs method has notable limitations, in that it uses a number of
6 assumptions about aquifer properties, some of which are known not to be true in the Grande
7 Ronde aquifer system. These include the assumptions that the area influenced by the test has a
8 uniform thickness, and that all wells fully penetrate the aquifer. *Testimony of Osiensky,*
9 *Testimony of Keller.* To compensate for these known limitations, Dr. Osiensky used
10 conservative estimates for each of the different assumptions in order to produce the greatest
11 potential impact. Other, more complicated, methods are available for calculating interference
12 drawdown, but all are based on the Theis Equation and use more complicated methods with more
13 variables and assumptions. In Dr. Osiensky's opinion, no better tool is available for evaluating
14 the anticipated drawdown effects of different pumping scenarios for the WSU Pullman campus
15 well system. *Testimony of Osiensky.*

16 [52]

17 In Dr. Keller's opinion, the calculations employing the Cooper-Jacobs method are not
18 reliable in this situation. Dr. Keller notes that Dr. Osiensky assumed the GRA is infinite in size,
19 when in fact, boundaries for the GRA exist. Without the inclusion of boundary assumptions, the
20 resulting calculations will show much smaller drawdown impacts. Additionally, Dr. Osiensky's
21 calculations do not realistically depict what is actually occurring. Data regarding the observed

1 rate static level drawdown is approximately one foot per year, whereas Dr. Osiensky's
2 calculations show drops in the static water level that are one-twentieth or less than what is
3 normally observed. *Testimony of Keller.*

4 [53]

5 Dr. Keller supports the use of both theoretical (Cooper Jacobs method) and observation
6 approaches (use of data from observation wells) as available methods to analyze potential
7 impacts to the GRA from a change in the pumping regime. However, Dr. Keller believes it
8 makes more sense to place a priority on known and existing data from observation wells.
9 Available observation data shows that drawdowns in the GRA are not related to the radial
10 distance between the point of withdrawal and the observation location, nor to the relative depths
11 of the wells, but instead are driven much more by the aggregate rate of pumping from the aquifer
12 system. Given the complexity of the GRA system, additional pump tests involving the WSU
13 wells could not add much to what is already known about the potential drawdowns effects of
14 consolidating WSU's water rights. This is because typical pump tests, lasting from a few hours
15 to as long as two weeks, will not reliably predict affects that might occur over the longer term.

16 *Testimony of Keller.*

17 [54]

18 Although the Cooper-Jacobs method is not a perfect theoretical tool because it is unlikely
19 to give accurate *quantitative* results, Dr. Keller agrees that the method is a reasonable tool to
20 evaluate the *relative* changes that can be expected from different pumping scenarios and well
21 configurations. This is because even if the underlying assumptions are changed to reflect

1 different views of various aquifer parameters, which would result in different quantitative
2 drawdown results, the Cooper-Jacobs method still reliably calculates the relative changes
3 between various pumping scenarios. *Testimony of Keller.*

4 [55]

5 Based on the weight of expert testimony (Keller, Osiensky), the Board finds that it is the
6 aggregate pumping of the aquifer that most directly affects water levels in the aquifer. A change
7 in the point of withdrawal within this particular basalt system will have only minor effects on the
8 water table. The Board also finds that the method used by Dr. Osiensky was sufficient to show
9 that the relative changes to the aquifer would be slight if the WSU wells were consolidated.
10 Furthermore, the Board finds that the use of this method is appropriate because additional pump
11 tests involving the WSU wells could not add much additional information on drawdown impacts.

12 [56]

13 The Board also finds, consistent with the weight of expert opinion, that consolidation of
14 WSU's existing water rights will have no appreciable effect on the Cornelius well, or other
15 surrounding wells, and will not change the manner in which Cornelius is able to withdraw water
16 from his well.

17 [57]

18 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

19 //

20 //

21 //

1 CONCLUSIONS OF LAW

2 [1]

3 *Enlargement*

4 Appellants contend Ecology improperly used the quantities from an invalid claim (Claim
5 No. 098524) as a basis to award additional quantities at an alternative location. To allow the
6 transfer of any quantity that is based on an invalid claim, Appellants argue, would improperly
7 validate illegal water use and unlawfully enlarge the subsequent right. They seek a reduction in
8 the instantaneous quantity authorized by Permit No. G3-28278P (historically associated with
9 Well No. 7) because they believe the instantaneous quantity contained in that permit is based, in
10 part, on the 500 gpm instantaneous quantity represented by Claim No. 098524.

11 [2]

12 The statutory prohibition on enlargement provides: "...where an additional well or wells
13 is constructed, the original well or wells may continue to be used, but the combined total
14 withdrawal from the original and additional well or wells shall not enlarge the right conveyed by
15 the original permit or certificate..." *RCW 90.44.100(2)*.

16 [3]

17 We conclude that the invalidity of Claim No. 098524 did not require Ecology to subtract
18 the quantities associated with that claim from the quantities authorized under Permit No. G3-
19 28278P. We denied summary judgment on this issue because it involves mixed questions of law
20 and fact; specifically what, in fact, was intended by the "supplemental" nature of the permit, and
21 what is the legal effect of such characterization. The parties disputed the factual relationship
between the quantities in the two related water rights, and disagree on the legal effect of
Ecology's determination that Claim No. 098524 is not a valid water right.

[4]

1 We conclude that the language in Permit No. G3-28278P was intended to indicate that
2 Well No. 7 was non-additive to other rights, meaning that the permit did not increase the water
3 available to WSU, and would provide an alternate source of water for WSU. This intent was
4 reflected in the permit condition limiting the maximum instantaneous quantity (Qi) of
5 withdrawal to 2,500 gpm, "*less those amounts appropriated under Ground Water Certificate No.*
6 *5070-A and Ground Water Claims No. 098522 and 098524.*" See, Exh. A-25. Importantly, this
7 interconnection or interrelationship between the rights is not the same as finding the 2,500 gpm
8 Qi authorized by Permit No. G3-28278P was somehow *calculated from, or legally dependent on,*
9 WSU's other pre-existing water rights or claims. Instead, Ecology determined the amounts of Qi
10 and Qa authorized in Permit No. G3-28378P were based on WSU's water system capacity,
11 limitations, and long-range operational plans. This determination, although in some ways related
12 to the quantities of WSU's existing water rights, was not derived or calculated from the specific
quantities contained in the invalid claim and the other WSU water rights.

13 [5]

14 Additionally, we recognize that Permit G3-28278P is a separate water right, with its own
15 priority date. By seeking a new water right through the Permit, rather than re-drilling existing
16 wells, WSU was aware that this water right would be perfected at a much later time than the
17 priority date established for its other water rights. It was important to WSU that it have a reliable
18 source of water to meet the needs of the entire campus. The Permit is limited only to the extent
19 that the maximum quantity of the permit is dependent on how much water is being withdrawn
20 pursuant to the water rights mentioned in the permit itself (Claims No. 098522, 098524, and
21 Certificate No. 5070-A). Based on the analysis above, we conclude Ecology's approval of the
change application for Permit No. G3-28278P did not unlawfully enlarge the right represented by
that permit.

1 [6]

2 *Impairment*

3 The Ground Water Code allows the approval of a change application only on the
4 condition that “other rights shall not be impaired.” *RCW 90.44.100(2)*. The impairment analysis
5 involved in a change application is the same as an original application for a new right. *Id.*, *RCW*
6 *90.03.290(3)*.¹⁰ In the absence of a statutory definition of “impairment,” Ecology has
7 established, by rule, a two-part test for determining impairment in the groundwater context. The
8 impairment test is set forth at WAC 173-150-060 as follows:

9 For the purposes of this chapter, a ground water right which pertains to qualifying
10 withdrawal facilities, shall be deemed to be impaired whenever:

- 11 (1) There is an *interruption or an interference in the availability of water*
12 to said facilities, or a contamination of such water, caused by the
13 withdrawal of ground water by a junior water right holder or holders;
14 *and*
15 (2) *Significant modification is required* to be made to said facilities in
16 order to allow the senior ground water right to be exercised. *WAC 173-*
17 *150-060* (emphasis added).¹¹

18 [7]

19 This two-part rule reflects the Ground Water Code’s correlative objectives of protecting
20 prior rights and at the same time promoting full utilization of the public resource. Like the code
21 it implements, the rule seeks to harmonize the priority system established by RCW 90.44.130
and the “reasonable or feasible pump lift” concept of RCW 90.44.070 which qualifies that

¹⁰ RCW 90.03.290(3) directs Ecology to issue the permit “if it shall find ... the proposed application will not impair existing rights or be detrimental to the public welfare...”

¹¹ Although the test is stated in terms of analyzing the impact of new, junior rights on senior rights, Ecology applies the same standard to its evaluation of change applications in which all existing rights (both junior and senior) must be protected. See *WAC 173-150-120*.

1 system.¹² Thus, “impairment” will not be found to require denial of a new or amended water
2 right application unless any identified interference or interruption cannot be remedied by
3 withdrawing from a deeper level that is within the “reasonable or feasible pump lift” standard.
4 See *Graves v. Ecology and City of Okanogan*, PCHB Nos. 88-140, 141 & 144, at COL III-IV
5 (1989) (citing *Shinn v. Ecology*, PCHB Nos. 75-613 (1975)).

6 [8]

7 This Board previously explained in its Amended Order on Summary Judgment in this
8 case, that where a proposed change will, beyond speculation, have a detrimental effect upon a
9 lawful existing well or a substantial cumulative increase in pumping lift, then a remand to
10 Ecology would be appropriate for determination of the reasonable or feasible pumping lift that it
11 will protect in existing lawful wells. *Amended Order on Summary Judgment*, (January 18,
12 2008), at fn 23 (citing *Paír v. Ecology & Lehn Ranches*, PCHB 77-189 (1978)). Where the
13 evidence does not establish a realistic probability of interference or interruption in the
14 availability of water that is attributable to the requested change application, however, Ecology is
15 not required to undertake a reasonable or feasible pump lift determination. *Id.*

16 [9]

17 Where interference or interruption may be expected to occur as a result of approving an
18 application for a new or amended water right, a further evaluation is then required of what sort of
19 modifications to the existing facilities may remedy the expected interference or interruption.
20 *WAC 173-150-060(2)*. *Heer Brothers v. Ecology & Schell*, PCHB Nos. 894 & 894A (1976), at 8.

21 ¹² RCW 90.44.070 provides, in part: “No permit shall be granted for the development or withdrawal of public
ground waters beyond the capacity of the underground bed or formation in the given basin, district, or locality to
yield such water within a reasonable or feasible pumping lift in case of pumping developments...”

1
2 [10]

3 The first prong of the impairment test requires some analysis of the probability and extent
4 of any potential interference or interruption, as well as consideration of causation. In an ideal
5 world, Ecology and the interested parties would have a full and complete picture of whether,
6 how, and to what extent the proposed right would impact the exercise of existing rights. But in
7 the context of a complicated or poorly understood aquifer system such as the GRA, where there
8 continues to be imperfect information about how the system works despite considerable
9 scientific investigations, a qualitative analysis may suffice. In such situations, relevant factors
10 include the amount of water involved in the proposed change, the relative distances among the
11 original and proposed changes in points of withdrawal and the facilities of the existing right
12 holders, and the available information about aquifer properties.

13 [11]

14 We conclude the Appellants did not meet their burden to establish impairment or any
15 realistic probability of interference or interruption based on changing the location of WSU's
16 pumping. At the time Ecology issued the ROEs in this case, it had as much information as
17 reasonably could be expected under the circumstances to consider the impairment issue and
18 reach a correct "no impairment" conclusion. Our de novo review of the additional information
19 and expert analysis developed for the hearing confirms that approval of the change applications
20 will not cause impairment of exiting water rights. In the absence of impairment, we also
21 therefore conclude that the public welfare will not be harmed by Ecology's approval of these
water right changes.

[12]

Appellants' case focused primarily the declining trend of the aquifer and how WSU's
withdrawal of more of its authorized quantity of water will contribute to, or further accelerate,

1 that decline to the detriment of all water users in the area. However, Appellants failed to show
2 that changing the points of withdrawal for WSU's existing water rights or re-configuring the
3 withdrawals among its existing wells would have any appreciably different impact on Mr.
4 Cornelius or other water right holders than if WSU continued to exercise its rights as it has in the
5 past. In a case involving whether a change in the place of use of a surface water right would
6 adversely impact existing rights, this Board has previously recognized that, to the extent existing
7 valid rights were at issue, the fact water was over-appropriated in the Methow River system was
8 not in and of itself relevant to the impairment question. *Knight, et al. v. Ecology and R.D. Merrill*
9 *Co.*, PCHB Nos. 94-61, 94-77, & 94-80, (Final Findings of Fact, Conclusions of Law and Order)
10 (1995), at 13. The Board stated: "[t]he issue is whether the specific transfer and, in this case,
11 consolidation of rights, will have an increased impact on the river." *Id.*

12 Neither of Appellants' expert witnesses in this case performed their own analysis of the
13 changes in spatial distribution of the WSU wells relative to Mr. Cornelius' well. Appellant's
14 expert, Dr. Brackney, who opined that well construction had an effect on drawdowns, was
15 effectively contradicted by Appellant's second expert, Dr. Keller, who opined that well depths do
16 not appreciably affect aggregate drawdown rates, and that drawdown rates in the GRA do not
17 differ horizontally versus vertically. The experts of both sides agreed that the Cooper-Jacobs
18 approximation method used by Dr. Osiensky is a reasonable tool to evaluate the relative changes
19 between pumping configurations. We conclude this method was appropriately applied in the
20 Grande Ronde aquifer under these circumstances, and when combined with observation data,
21 identifies no material differences between WSU's pre-consolidation and post-consolidation
pumping authorized by the water right changes. Accordingly, we conclude that the Appellants
failed to meet their burden of demonstrating impairment such that RCW 90.44.100(2) would
preclude approval of the change applications.

1
2 [13]

3 The second prong of the impairment test involves analysis of what modifications to
4 existing facilities, such as deepening a well or otherwise increasing its pumping ability, might be
5 necessary to remedy any expected interference or interruption. Appellants urge the Board to
6 conclude that Ecology erred by not establishing a “reasonable or feasible pump lift” in this case.
7 They contend determination of a reasonable or feasible pump lift is necessary to protect Mr.
8 Cornelius and other existing water right holders from the declining water levels in the Grande
9 Ronde aquifer. What they failed to do, however, is establish that consolidation of WSU’s water
10 rights will cause any interference or interruption in the availability of water in the domestic well
11 of Mr. Cornelius or other existing water right holders. In the absence of any realistic probability
12 of interference, or a causal connection with the change in location of WSU’s withdrawals, we
13 conclude Ecology is not required to establish a reasonable or feasible pump lift.

14 [14]

15 Appellants urge the Board to direct Ecology to establish a reasonable or feasible pumping
16 lift in the GRA, even in the absence of finding impairment. They point to a previous Board
17 decision to argue Ecology has a statutory duty to set a reasonable and feasible pumping lift in
18 order to protect existing water right holders even if a change/transfer is found lawful. *Graves v.*
19 *Ecology and City of Okanogan*, PCHB Nos. 88-140, 141 & 144 (1989). In *Graves*, the Board
20 conditioned the approval of a water right transfer by requiring the permittee to submit evidence
21 sufficient for Ecology to determine reasonable or feasible pumping lifts for existing domestic
and irrigation rights. It did so even though it concluded the transfer did not impair existing water
rights. *Id.*, at COL V. Of significance to the Board in that case was that, although the Board
could not conclude the transfer would impair existing water rights, it found the transfer of the
City’s water rights had, in fact, caused other nearby wells to go dry (by drawing water levels

1 down in the range of 2-4 feet), and that modest measures to deepen the existing wells had, in
2 fact, restored existing appropriators' access to water. *Id.*, at FOF VIII. The significant
3 interference caused by approval of the City's water rights justified the further investigation into
4 establishing "with necessary clarity the line between the rights of senior and junior appropriators
5 in the locality in question." *Id.*, at COL VI. We find *Graves* distinguishable because the present
6 case offers no similar evidence of interference.

7 [15]

8 Finally, we note that Ecology is working within its existing authorities to manage
9 groundwater resources in the area. Many others, including Appellants and WSU, are
10 participating in those efforts. In the event water levels continue to decline as a result of
11 aggregate withdrawals from the GRA, to the point of interfering with appropriators' exercise of
12 their water rights, both Ecology and existing water right holders have a variety of tools available
13 to them, including procedures for filing and responding to notifications of claims of impairment
14 such as those provided in WAC 173-150-070 and 080.

15 [16]

16 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

17 //

18 //

19 //

20 //

21 //

1 Based on the foregoing analysis, the Board hereby enters the following:

2 ORDER

3 Ecology's decisions approving changes to six groundwater rights held by WSU to serve
4 its Pullman campus are each AFFIRMED.¹³

5
6 DATED this 17th day of April, 2008.

7
8 POLLUTION CONTROL HEARINGS BOARD

9 ANDREA MCNAMARA DOYLE, Presiding

10 KATHLEEN D. MIX, Chair

11
12 see separate concurrence and dissent
13 WILLIAM H. LYNCH, Member

14
15
16
17
18
19
20
21 ¹³ The change decisions are those related to the following six water rights: Permit No. G3-28278P, Claims No. 098522 and 098523, and Certificates No. 5070-A, 5072-A, and G3-22065C.