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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHITMAN COUNTY**

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

Plaintiffs-Appellants,

v.

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

Defendant-Respondents.

No. 08-2-00181-2

PETITION FOR APA REVIEW AND
COMPLAINT FOR DECLARATORY
& INJUNCTIVE RELIEF

I. INTRODUCTION

1. This lawsuit is a petition for judicial review brought by Plaintiff-Appellants (hereafter “Plaintiffs”) Scott Cornelius, an individual, Palouse Water Conservation Network, and Sierra Club Palouse Group, pursuant to the Washington Administrative Procedure Act, Chapter 34.05 RCW, and the State Environmental Policy Act, Chapter 43.21C RCW, seeking judicial review of the validity of the summary judgment and final orders of the Pollution Control Hearings Board resolving the matter of *Cornelius, et al. v. Department of Ecology and Washington State University*, PCHB No. 06-099.

1 Grande Ronde Aquifer, drawing down the Cornelius well and harming Mr. Cornelius. Mr.
2 Cornelius has also been an active participant in various agency and university processes,
3 decisions and events relating to the Grande Ronde Aquifer.

4 5. Palouse Water Conservation Network (PWCN) is a grass roots organization
5 dedicated to the protection of water resources in the Moscow-Pullman area. PWCN's address
6 is 202 E. 7th Street, Moscow, ID 83843. PWCN's mission is to promote community
7 awareness, education and action to preserve our underground water resources. PWCN is active
8 in educating the public about the on-going depletion of the Grande Ronde Aquifer, and has
9 participated in numerous agency and political processes to protect and restore the Aquifer. In
10 2005, PWCN filed protest of WSU's applications to consolidate its water rights.

11 6. Sierra Club Palouse Group has approximately 400 members throughout eastern
12 Washington and north Idaho, and is located at P.O. Box 9932, Moscow, ID, 83843. The
13 Palouse Group is a chapter of the National Sierra Club, America's oldest and largest grassroots
14 environmental organization with a mission to preserve, protect, and enjoy the natural world,
15 including water resources such as the Grand Ronde Aquifer. A large majority of the group's
16 members live above the aquifer and depend on it for water. Sierra Club Palouse Group has
17 longstanding concerns about declining water levels in the Grande Ronde Aquifer and has been
18 active in efforts to protect and preserve the Aquifer.

19 Defendants

20 7. Defendant Washington Department of Ecology (hereafter "Ecology") is an agency of
21 the State that is charged with implementing and administering the Washington Water Code,
22 including the Municipal Water Law and the processing of water right change applications.
23 Headquarters for the Department of Ecology are located at 300 Desmond Drive SE, Lacey,
24 Washington 98503 and the mailing address is Post Office Box 47600, Olympia, Washington
25 98504-7600.

1 8. Washington State University (hereafter “WSU” or “University”) is a state university
2 located in Pullman, Washington with a mailing address of Post Office Box 641048, French
3 Administration Building, Washington State University 99164-1048. WSU holds six
4 groundwater rights that serve the Pullman campus, and which are the subject of the petition for
5 review and complaint filed herein.

6 9. Washington Pollution Control Hearings Board (Board) is an administrative agency
7 authorized under WAC 371-08, located at 4224 Sixth Avenue SE, Rowe Six, Building Two,
8 Lacey, Washington, 98504-0903 and a mailing address of Post Office Box 40903, Olympia,
9 Washington, 98504-0903. The Board hears appeals from orders of, among other agencies, the
10 Washington Department of Ecology. The Board decided Plaintiffs’ appeal of the approval of
11 WSU’s water right transfer and issued a final order on June 6, 2008. The Board ruled it did not
12 have jurisdiction to consider any of the constitutional claims.

13
14 **III. JURISDICTION, VENUE, AND STANDING**

15 10. With respect to the Complaint for Declaratory Action, this Court has jurisdiction
16 over this action under RCW 4.92.010 (actions against the state), RCW 7.24.010 (declaratory
17 judgment), and RCW 7.40.010 (injunctive relief).

18 11. With respect to the Petition for APA Review, this Court has jurisdiction over this
19 action under RCW 34.05.514(1) and (2) (Administrative Procedure Act), and RCW
20 43.21C.075 (appeal of SEPA determination).

21 12. Venue is proper in this Court pursuant to RCW 4.92.010(1) because plaintiff Scott
22 Cornelius resides in Whitman County. Venue is also proper pursuant to RCW 34.05.514(2)
23 because proceedings involving institutions of higher education must be filed in the county of
24 the institution’s principal office, which is located in Pullman, Washington.

25 13. Plaintiffs have standing to bring this complaint under RCW 34.05.530(1)-(3).
26 Pursuant to RCW 34.05.530, a party has standing to obtain judicial review of an agency action

1 if they are aggrieved or adversely affected by the action of the agency and three criteria are
2 met. First, the action has prejudiced or will likely prejudice the party; second, the agency was
3 required to consider the interests of the aggrieved party when taking action; and third,
4 judgment in favor of the party would redress the prejudice caused by the agency action.

5 14. Furthermore, Mr. Cornelius has standing under the U.S. and Washington
6 Constitutions regarding violations of his procedural and substantive due process rights.
7 Ecology's application, and the Board's approval, of certain unconstitutional sections of the
8 MWL to WSU and its water rights violate the separation of powers doctrine and Mr.
9 Cornelius's substantive and procedural due process rights.

10 Scott Cornelius: APA Standing

11 15. Mr. Cornelius has standing to sue under the Washington Administrative Procedures
12 Act (APA), RCW 35.05.530(1)-(3) because he was prejudiced, or will likely be prejudiced, by
13 Ecology and the Board's actions regarding 1) the failure to protect the GRA, 2) the reliance on
14 an inadequate SEPA checklist and failure to supplement thereof, and 3) the failure to
15 adequately consider aspects of the water right transfer process, including; changing of
16 unperfected certificates, whether WSU perfected its water rights, whether WSU exercised due
17 diligence in perfecting its water rights, whether the change will enlarge WSU's water rights,
18 whether any of WSU's water rights have been relinquished, whether WSU abandoned any of
19 its water rights, and whether approval of the change applications will impair Mr. Cornelius's
20 water right.

21 16. Ecology and the Board were required to consider Mr. Cornelius's rights when
22 processing and approving WSU's transfer and change applications. As an existing water right
23 holder in the area of the proposed change applications, Ecology and the Board are required
24 under RCW 90.44.100 to consider Mr. Cornelius's interests.

25 17. A judgment in favor of Mr. Cornelius would require Ecology and the Board to
26 consider the extent and validity of WSU's water rights and would require Ecology to relinquish

1 any portion of a water right not used for five consecutive years, thereby decreasing the amount
2 of water available for withdraw from the Aquifer. A favorable judgment would also require
3 Ecology to consider the declining water level of the GRA when making its SEPA
4 determination and require methods to mitigate for the adverse environmental impact

5 Scott Cornelius: Constitutional Standing

6 18. Article I, section 3, of the Washington State Constitution provides that “[n]o
7 person shall be deprived of life, liberty, or property, without due process of law.” The
8 Fourteenth Amendment of the U.S. Constitution states: “nor shall any State deprive any person
9 of life, liberty, or property, without due process of law.” A law that retroactively impairs
10 vested property rights violates due process.

11 It is undisputed that “Ecology applied a number of provisions from the recently enacted
12 Municipal Water Supply Act...” when processing WSU’s change applications. SJ Order at 6.
13 Some of the provisions that Ecology relied upon have been found unconstitutional in King
14 County Superior Court because they retroactively attempt to reinstate a type of water right
15 previously found to be invalid by the Washington Supreme Court in *Department of Ecology v.*
16 *Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Order on Cross-Motions at 5. These
17 actions violate the Washington and U.S. Constitutions, thereby adversely affecting Mr.
18 Cornelius’s constitutionally protected rights. Mr. Cornelius has standing to bring due process
19 claims.

20 Palouse Water Conservation Network and Sierra Club Palouse Group

21 19. PWCN and Sierra Club Palouse Group, and their members, were prejudiced by
22 Ecology’s action regarding its reliance on the SEPA checklist, its failure to protect the GRA,
23 its application of the MWL to WSU’s water rights, and the approval of WSU’s water right
24 change applications. Ecology’s actions will lead to a further decline of the GRA directly
25 impacting PWCN and Sierra Club Palouse Group’s mission to promote water conservation and
26 long-term protection of the GRA.

1 24. Wells that withdraw water from the GRA show similar downward trends in their
2 hydrographs. These wells all behave similarly because the GRA is “interconnected laterally at
3 the basin scale.” *Id.* at 22.

4 25. WSU holds six water rights to pump water from the Grande Ronde Aquifer to
5 serve the Pullman campus: two claims, three certificates, and one permit. As originally
6 granted, each of the water rights authorizes withdrawal from a single well. The consolidation
7 of WSU’s water rights authorizes the University to pump the quantities associated with each of
8 its water rights from any combination of wells. The table at p. 5 of the SJ Order synthesizes
9 information about each well.

10 26. The WSU water system is an integrated network of wells “(each historically
11 associated with its own individual water right)” and pumping infrastructure. *Id.* at 5. As a
12 practical matter, WSU now withdraws most of its water from Wells 7 and 8.

13 27. Of the 5,300 acre-feet per year (AFY) held by in WSU’s combined rights, WSU
14 has never pumped 3,312 acre-feet, or approximately two-thirds of the water authorized in its
15 water rights. Hearing Exhibit No. R-2, (Report of Examination, Claim No. 098523 (9/18/06))
16 at 3. A spreadsheet prepared by WSU and utilized by all parties at indicates that WSU pumped
17 only a maximum of 895 acre-feet from Well No. 1 and this occurred in 1951. No water has
18 been pumped from Well No. 1 since 1998. Hearing Exhibit R-62 (Pullman Campus Annual
19 Volumes Pumped in Acre-Feet (n.d.)). Well No. 2 was last used in 1977 and the maximum
20 water ever produced was 586 acre-feet in 1961. *Id.* Well No. 3 was last used in 2000 when it
21 pumped 83 acre-feet and its maximum production was 1,019 acre-feet in 1958. *Id.* Well No. 4
22 pumped its highest output in 1969 when it produced 1,090 acre-feet. It has not been used since
23 2002 when it pumped 129 acre-feet. *Id.* Well No. 5 pumped a maximum of 228 acre-feet in
24 1976 and has not been used since 1998. *Id.* Well No. 6 pumped 1,102 acre-feet in 1999 but its
25 use has declined since then and it only pumped 44 acre-feet in 2006. *Id.* Well No. 7 pumped
26 1,525 acre-feet in 2004 and Well No. 8, which began producing in 2007. Final Order at 7.

1 **WSU Change Applications and Department of Ecology Decisions**

2 28. In October 2004, Washington State University submitted applications to
3 consolidate the seven water rights that serve the Pullman campus. The change applications
4 sought to integrate WSU’s water rights to allow the quantities authorized under each water
5 right to be pumped from any of the campus wells. The applications also sought to have all the
6 water rights classified as rights for “municipal water supply,” as defined in RCW 90.03.015(3)
7 and (4).

8 29. The cumulative quantity of water requested under the change applications totaled
9 more than 2,250 gallons per minute and therefore required a State Environmental Policy Act
10 (SEPA) analysis. WSU, a state agency, completed its own environmental checklist and issued
11 itself a Determination of Non-Significance (DNS) on June 7, 2004. The checklist did not
12 specifically discuss the declining water level of the Grande Ronde Aquifer. Order on Summary
13 Judgment (as Amended on Reconsideration) (hereafter “SJ Order”) at 5 (See Attachment 2).
14 Plaintiffs did not comment on or appeal WSU’s DNS. WSU subsequently filed its water right
15 change applications. When processing the change applications, the Department of Ecology did
16 not conduct its own environmental analysis, and instead relied on WSU’s DNS. Ecology did
17 not conduct or require any additional investigation or environmental review. *Id.*

18 30. Petitioners Scott Cornelius and Palouse Water Conservation Network timely filed
19 letters protesting the change applications. The letters raised a number of issues, including that
20 Ecology should conduct an independent SEPA analysis because of material omissions in the
21 WSU DNS.

22 31. In processing the change applications, the Department of Ecology applied several
23 provisions of the Municipal Water Law to WSU’s water rights. Ecology determined that WSU
24 is a “municipal water supplier” under the newly created definition and that WSU’s water rights
25 are issued for “municipal supply purposes.” Ecology issued a Report of Examination (ROE)
26 for each of the change applications.

1 32. All but one of WSU's change applications were approved. The exception was
2 Claim No. 098524, which WSU registered as being first put to use in 1946, after enactment of
3 the 1945 Groundwater Code, Ch. 90.44 RCW. That statute requires that all new groundwater
4 uses must be authorized by water permit, RCW 90.44.050, thereby disallowing post-1945
5 claims to water use. Ecology denied the consolidation of this water right claim, finding that it
6 was likely invalid. WSU did not appeal this determination.

7 **PCHB Appeals**

8 33. Plaintiffs appealed Ecology's approvals to the Pollution Control Hearings Board
9 (hereafter "Board" or "PCHB"). Plaintiffs and Defendants Department of Ecology and
10 Washington State University developed an agreed list of eighteen issues. In September 2007,
11 Plaintiffs and Defendants moved for summary judgment on each of the agreed legal issues.

12 34. On December 7, 2007, the Board issued an Order on Summary Judgment. Motions
13 for clarification and reconsideration were filed, and on January 18, 2008, the Board issued an
14 Amended Order on Summary Judgment (SJ Order).

15 35. The Board ruled that it lacks authority to decide constitutional claims, concluding
16 that the "as applied" constitutional claims presented in this case were equivalent to a facial
17 challenge and therefore outside the scope of its jurisdiction. SJ Order at 9.

18 36. Based on these orders, three issues were set for hearing: (1) whether WSU's
19 supplemental permit was enlarged because it was based on an invalid claim, (2) whether the
20 new points of withdrawal established by the consolidation of WSU's water rights would impair
21 Mr. Cornelius's right, and (3) whether the change approval harmed the public welfare.

22 37. The hearing was conducted on January 22-23, 2008, in Pullman, Washington and
23 on January 31, 2008 in Lacey, Washington, with some counsel and witnesses participating via
24 video conference and teleconference.

25 38. On April 17, 2008, the Board issued Findings of Fact, Conclusions of Law and
26 Order (Final Order) (Attachment 4), ruling against Plaintiffs on the three issues held over for

1 hearing. Plaintiffs moved for reconsideration of the Final Order, arguing that a reasonable and
2 feasible pump lift determination is required because of declining groundwater levels in the
3 Grande Ronde Aquifer, regardless of causation. The Board ruled against Plaintiffs on June 6,
4 2008. Order Denying Reconsideration Re: Final Decision (June 6, 2008) (Attachment 5).

5 Municipal Water Law

6 39. In 2003, the Washington State Legislature enacted Second Engrossed Second
7 Substituted House Bill (2E2SHB) 1338, commonly referred to as the Municipal Water Law,
8 now codified at various parts of the state Surface Water Code, Ch. 90.03 RCW, and other state
9 statutes. The legislation defined, *inter alia*, what constitutes a “municipal water supplier” and
10 “municipal water supply purposes.” RCW 90.03.015 (3) and (4). The legislation also declared
11 that water right certificates issued prior to September 2003 for water quantities based on
12 system capacity rather than actual use were “rights in good standing.” RCW 90.03.330(3).

13 40. In September 2006, a coalition of environmental and fishing groups and
14 individuals filed suit in King County Superior Court, challenging certain provisions of the
15 Municipal Water Law as facially unconstitutional. A similar complaint was filed by six
16 western Washington Indian Tribes and the two cases were consolidated for hearing. *Lummi*
17 *Nation, et al., v. State of Washington*, King County Superior Court No. 06-2-40103-4 SEA
18 (hereafter “*Lummi Nation*”). Plaintiffs Scott Cornelius and Sierra Club are plaintiffs in the
19 *Lummi Nation* lawsuit. The Washington Department of Ecology is a defendant in the *Lummi*
20 *Nation* suit, and Washington State University is a defendant-intervenor.

21 41. On June 11, 2008, King County Superior Court Judge Jim Rogers issued an Order
22 on Cross-Motions for Summary Judgment, resolving the *Lummi Nation* lawsuit. The Court
23 held that the definitions section of the Municipal Water Law, RCW 90.03.015(3) and (4), and
24 the “rights in good standing” provision of the MWL, RCW 90.03.330(3), violate separation of
25 powers under the state constitution because these laws have retroactive effect and attempt to
26 overrule an interpretation of the Water Code set forth in *Department of Ecology v.*

1 *Theodoratus, supra. Lummi Nation*, Order on Cross-Motions for Summary Judgment (6-11-
2 08) (hereafter “Order on Cross-Motions”) at 5 (See Attachment 1A and 1B (*Lummi Nation*,
3 Verbatim Report of Proceedings (6/11/08)). The Court noted that the Legislature’s attempt to
4 rehabilitate water rights issued for system capacity purposes could also be held invalid as a
5 legislative determination of adjudicative facts concerning the “good standing” of particular
6 water rights. Order on Cross-Motions at 5-6. The Court declined to resolve certain substantive
7 due process claims of the Plaintiffs relating to the challenged statutes, and found that certain
8 other provisions of the Municipal Water law do not facially violate substantive and procedural
9 due process requirements under the state and federal constitutions. Order on Cross-Motions at
10 5-6.

11 42. WSU holds three water right certificates, Nos. 5070-A, 5072-A and G3-22065C,
12 identified by the Board as being for “municipal water supply purposes,” based on system
13 capacity and representing substantial unused quantities of water. Certificate No. 5070-A has a
14 priority date of August 1, 1962, an annual quantity (Qa) of 2,260 acre-feet per year and an
15 instantaneous limit (Qi) of 1,500 gallons per minute. Its original purpose of use was “domestic
16 supply for WSU.” ROE at 2. The source for this right is Well No. 4. Certificate No. 5072-A
17 has a priority date of May 27, 1963, a Qa of 720 acre-feet per year, and a Qi of 500 gallons per
18 minute. Its original purpose of use was “community domestic supply and stock water.” *Id.*
19 The source for this right is Well No. 5. Certificate G3-22065C has a priority date of November
20 12, 1973, a Qa of 1,600 acre-feet per year, and a Qi of 1,500 gallons per minute. Its original
21 purpose of use was “municipal supply.” *Id.* The source for this right is Well No. 6. As
22 alleged above, most of the water associated with these rights have never been used.

23 43. In approving the consolidation of WSU’s six valid water rights, Ecology re-defined
24 five of the rights to be for “municipal water supply purposes” and found that the cumulative
25 unused and relinquished quantities of all the rights were valid and usable on the basis of the
26

1 application of the Municipal Water Law. Hearing Exhibit No. R-2 (Report of Examination
2 (ROE) for Claim No. 098523) at 3.¹

3 44. With respect to virtually every issue raised in this appeal, the Pollution Control
4 Hearings Board either directly or indirectly applied the provisions of the Municipal Water Law
5 that have been found unconstitutional. The Board re-defined a number of WSU's non-
6 municipal water rights as municipal pursuant to the definitions found in 90.03.015(3) and (4).
7 The Board relied on the "system capacity" provisions of RCW 90.03.330(3) to excuse WSU's
8 substantial non-use of water authorized in its water right certificates. With respect to several
9 other issues, the Board found that, because the these provisions of the Municipal Water Law
10 rendered lawful WSU's unperfected water rights, the enlarged use that would occur as a result
11 of consolidation was an impact that would not be considered in determining, *inter alia*,
12 impairment to other water users, detriment to the public welfare, and the propriety of not
13 conducting environmental analysis.

14 V. CAUSES OF ACTION

15 45. Based on the foregoing allegations, Plaintiff-Petitioners assert the following causes
16 of action against Defendant-Respondents.

17 18 COUNT 1 19 **Petition for APA Review Municipal Water Law Application**

20 46. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 45.

21 47. The Board held that WSU Water Certificates Nos. 5070-A and 5072-A, although
22 originally issued for purposes other than municipal water supply, qualified as water rights
23 issued for municipal water supply purposes as defined in RCW 90.03.015(3). SJ Order at 20.
24 The Board further found that these rights were issued based on "system capacity" and "in good
25 standing" pursuant to RCW 90.03.330(3), and therefore protected from loss for non-use. *Id.* at

26 ¹ The Reports of Examination for the six water rights contain almost identical language.

1 20-21. Even though there is substantial non-use of the quantities of water authorized by these
2 rights, the Board held them protected from loss based on the provisions of the Municipal Water
3 Law.

4 48. The Board held that WSU Water Certificate No. G3-22065C is a municipal water
5 supply right as authorized in the original water right documents (a fact not in dispute), SJ
6 Order at 14, and that the unused quantities of water authorized in this certificate are rights in
7 good standing pursuant to RCW 90.03.330(3). SJ Order at 23.

8 49. The Board further held that “under the 2003 MWL [RCW 90.03.330(3)], Ecology
9 has the authority to change the point of withdrawal of the unperfected or inchoate portions of
10 water rights documented by certificates.” SJ Order at 23.

11 50. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
12 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments
13 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
14 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

15 51. The Board’s finding that Water Right Certificates 5070-A, 5072-A and G3-22065C
16 are valid for change, based on RCW 90.03.015(3) and (4) and RCW 90.03.330(3), violates
17 constitutional provisions both facially and as applied in this matter. RCW 34.05.570(3)(a).

18
19 **COUNT 2**
20 **Petition for APA Review**
21 **Municipal Water Law & Water Right Change Process**

22 52. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 51.

23 53. Changes to groundwater rights are governed by RCW 90.44.100, which requires
24 the Department of Ecology to analyze the extent and validity of the right proposed for change,
25 a process known as “tentative determination.” Unused quantities in water rights are not
26 eligible for change, because to allow change would enlarge the right, causing impairment to

1 other water right holders and/or detriment to the public welfare. *RD Merrill v. PCHB*, 137
2 Wn.2d 118, 969 P.2d 458 (1999).

3 54. Following enactment of the Municipal Water Law, the Department issued an
4 informal policy, known as “Water Resources Program Policy for Conducting Tentative
5 Determinations of Water Rights” or “POL 1120.” POL 1120 has never been adopted by rule.
6 The policy purports to alter the requirements for evaluating applications to change water rights,
7 including a new “simplified determination” of the quantity of water in municipal water supply
8 rights that is eligible for change. According to the Department, this new, simplified process is
9 authorized by RCW 90.03.330(3). SJ Order at 17.

10 55. In processing the consolidation of WSU’s water rights, the Department of Ecology
11 utilized the “simplified tentative determination” of water rights as a basis to disregard the long
12 history of non-use by WSU of its water rights, and to authorize consolidation of the WSU
13 rights, notwithstanding the enlargement of quantities that would occur as a result of the change.

14 56. On appeal, the Board held that “Ecology’s determination of whether a water right
15 is valid for change may be affected by the application of the [Municipal Water Law], as it was
16 in this case,” and approved utilization of the “simplified tentative determination” process. SJ
17 Order at 18.

18 57. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
19 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter based on
20 separation of powers. See Attachments 1A and 1B. Plaintiffs Scott Cornelius and Sierra
21 Club, and Defendants Department of Ecology and Washington State University are parties to
22 the *Lummi Nation* lawsuit.

23 58. The Board’s conclusion that, based on RCW 90.03.330(3), WSU’s unused water
24 rights are not subject to reduction for non-use violates constitutional provisions, both facially
25 and as applied herein. RCW 34.05.570(3)(a).

1 59. The Board’s approval of the use of a “simplified tentative determination” process
2 to alter statutory requirements governing groundwater changes, as set forth in RCW 90.44.100,
3 is outside the statutory authority of the agency, is an erroneous interpretation and application of
4 the law, involves unlawful procedure, is not supported by substantial evidence, and is arbitrary
5 or capricious. RCW 34.05.570(3)(b), (c), (d), (e) and (i).

6 **COUNT 3**
7 **Petition for APA Review**
8 **Lack of Perfection of WSU Water Rights**

9 60. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 59.

10 61. WSU has used and perfected only one-third of its water rights. As noted in the
11 Reports of Examination approving the consolidation of WSU’s water rights, the maximum
12 annual quantity used by WSU is 1988 acre-feet, out of a total of 5,300 acre-feet authorized.
13 Hearing Exhibit No. R-2 at 3. Despite this non-use, the Department of Ecology approved the
14 consolidation of the WSU water rights, finding that “this leaves 3312 acre-feet of inchoate
15 water available for future use by WSU.” *Id.*

16 62. WSU has maintained records of pumpage from each of its wells since the mid-
17 1930s (with some gaps in early years). The Board reviewed this evidence and concluded that
18 “[t]he historical pumping data relied upon by all parties in this proceeding also shows that the
19 quantities authorized in the certificates far exceeded the amount of water that had previously
20 been put to actual beneficial use under the permits.” SJ Order at 20 (emphasis added).

21 63. The Board held that each of WSU’s water rights is “presently being put to
22 beneficial use.” SJA at 14-16.

23 64. The finding of the Board that WSU’s water rights are presently being put to
24 beneficial use is outside the statutory authority of the agency, is an erroneous interpretation and
25 application of the law, involves unlawful procedures, is not supported by substantial evidence,
26 and is arbitrary or capricious. RCW 34.05.570(3)(b), (c), (d), (e) and (i).

COUNT 4

1 example, the Board found, “Well No. 4 . . . was drilled in 1963, but Certificate No. 5070-A has
2 yet to be put to full use.” Nonetheless, the Board found that WSU has exercised reasonable
3 diligence in putting its rights to use. SJ Order at 25-26.

4 73. In finding that WSU had exercised reasonable diligence, the Board deferred to
5 Ecology rather than making its own, de novo, finding. For example, the Board found that
6 “Ecology’s judgment that WSU is exercising good faith and due diligence . . . is entitled to
7 deference” and that “[t]he Board finds in the present case Ecology was within it [sic] discretion
8 to determine that WSU is exercising due diligence in putting its water rights to full beneficial
9 use . . .” SJ Order at 25-27.

10 74. The Board also based its finding of reasonable diligence on RCW 90.03.330(3),
11 finding the need for “flexibility” for water rights for municipal water supply purposes.

12 75. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
13 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments
14 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
15 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

16 76. The Board’s finding that WSU has exercised reasonable diligence in putting its
17 unperfected water rights to use violates constitutional provisions, both facial and as applied, is
18 outside the statutory authority of the agency, involves unlawful procedure, is an erroneous
19 interpretation and application of the law, is unsupported by substantial evidence, and is
20 arbitrary or capricious. RCW 34.05.570(3)(a), (b), (c), (d), (e) and (i).

21 **COUNT 6**
22 **Petition for APA Review**
23 **Failure to Decide Perfection of WSU Water Rights**

24 77. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 76.

25 78. The Board, relying on its erroneous interpretations of the law governing
26 groundwater changes with respect to the change of unperfected certificates and reasonable
diligence requirements, refused to determine whether WSU’s water rights were unperfected

1 and therefore not eligible for transfer. The Board ruled “it is therefore unnecessary for the
2 Board to resolve the question of whether any quantity of water authorized for change under the
3 challenged claims and certificates is unperfected for purposes of being lawfully transferred.”
4 SJ Order at 27.

5 79. The Board’s conclusion that it need not determine whether WSU’s water rights
6 were unperfected and therefore not eligible for transfer violates constitutional provisions, both
7 facial and as applied, is outside the statutory authority of the agency, involves unlawful
8 procedure, is an erroneous interpretation and application of the law, is unsupported by
9 substantial evidence, and is arbitrary or capricious, RCW 34.05.570(3)(a), (b), (c), (d), (e) and
10 (i), and is erroneous insofar as the Board has not decided all issues requiring resolution. RCW
11 34.05.570(3)(f).

12 **COUNT 7**
13 **Petition for APA Review**
14 **Misapplication of Purpose of Use**

15 80. Plaintiff re-allege and incorporate by reference paragraphs 1 through 79.

16 81. The quantity of water allocated to water rights in Washington is based on the needs
17 of the water user, delimited by reasonable efficiency requirements. *Ecology v. Grimes, supra*.
18 Needs are quantified according to the type of use.

19 82. Groundwater rights may not be changed to a new purpose of use. *R.D. Merrill v.*
20 *PCHB*, 137 Wn.2d at 130; *City of West Richland v. Ecology*, 124 Wn.App. 683, 592-93, 103
21 P.3d. 818 (2004). SJ Order at 13.

22 83. The Board held that each of WSU’s water rights issued for multiple purposes,
23 including municipal purposes, either explicitly or as re-defined under the Municipal Water
24 Law, was quantified as a municipal water right, because the “entire right may properly be
25 characterized as being for municipal supply purposes” . . . “without apportioning the quantities
26

1 between/among the other identified purposes.” SJ Order at 15. The Board based this finding
2 on a response from counsel for Defendant Department of Ecology. *Id.*

3 84. The Board’s conclusions, that the change in purpose of use of WSU’s water rights
4 was proper and properly quantified, violates constitutional provisions, both facial and as
5 applied, is outside the statutory authority of the agency, involves unlawful procedure, is an
6 erroneous interpretation and application of the law, is unsupported by substantial evidence, and
7 is arbitrary or capricious, RCW 34.05.570(3)(a), (b), (c), (d), (e) and (i).

8 **COUNT 8**
9 **Petition for APA Review**
10 **Finding of Beneficial Use and Reasonable Efficiency**

11 85. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 84.

12 86. Washington water rights must be exercised with reasonable efficiency and without
13 waste. What constitutes reasonable efficiency is to be made on a case-by-case determination.
14 *Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993).

15 87. The Grande Ronde Aquifer is a declining aquifer with little known recharge. It is
16 also a sole source aquifer for 50,000 people in the Pullman-Moscow region. The water
17 pumped from the GRA is estimated to be 10-20,000 years old.

18 88. WSU consolidated its water rights in part to irrigate a new golf course, which will
19 increase WSU’s pumpage of GRA water.

20 89. The Board concluded as a matter of law that irrigation of a golf course is a
21 beneficial use. SJ Order at 27.

22 90. The Board further concluded that Plaintiffs failed to establish a “genuine dispute”
23 about the reasonable efficiency of WSU’s water use, rejecting evidence provided by Plaintiff
24 Scott Cornelius. The Board concluded that Mr. Cornelius is “not an expert” and therefore
25 disregarded factual evidence regarding WSU water use, including photographs of irrigation
26 practices on the golf course and reliable temperature data. However, the Board did note that

1 “Appellants’ allegations may be more properly evaluated in the context of an enforcement
2 action.” SJ Order at 28.

3 91. Mr. Cornelius’ declaration set forth specific facts (“personal observations,
4 photographs, and local climate information”), and not opinions, regarding genuine issues of
5 material fact relating to the claim of unreasonable and inefficient water use by WSU. SJ Order
6 at 27-28.

7 92. The Board’s conclusions, that WSU’s use of water to irrigate a golf course is
8 beneficial and that Plaintiffs failed to establish a “genuine dispute,” are outside the statutory
9 authority of the agency, involve unlawful procedure, are an erroneous interpretation and
10 application of the law, are unsupported by substantial evidence, and are arbitrary or capricious,
11 RCW 34.05.570(3)(b), (c), (d), (e) and (i).

12
13 **COUNT 9**
14 **Petition for APA Review**
15 **Failure to Consider Enlargement of WSU Water Rights**

16 93. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 92.

17 94. The water right decisions on Claims 098522 and 098523, and Certificates 5070-A,
18 5072-A, and G3-22065C made by Ecology and approved by the Board, authorize change of
19 unperfected and relinquished quantities of water for the above listed water rights. These
20 quantities could not be physically accessed under the original configuration of water rights and
21 wells. SJ Order at 29.

22 95. The Board held that WSU was entitled to change unused quantities of water.
23 Specifically the Board held that “as a matter of law . . . enlargement of a water right does not
24 occur by virtue of a change in the point of withdrawal merely because it may result in a water
25 right holder exercising more of a previously, and validly, authorized quantity of water.” SJ
26 Order at 30. In so ruling, the Board assumed that the unused quantities of WSU’s water rights

1 were valid under RCW 90.03.015(3) and (4) and 90.03.330(3), even though relinquished and
2 unperfected.

3 96. The Washington Supreme Court has held that, when evaluating a water right
4 change application, the Department of Ecology must tentatively determine the quantity of
5 water available for transfer and transfer only those quantities that have been beneficially used.
6 *RD Merrill, supra.*

7 97. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
8 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments
9 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
10 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

11 98. The Board's conclusion that WSU's water rights were not enlarged via the change
12 approval contradicts the requirements of RCW 90.44.100(2), and violates constitutional
13 provisions, both facial and as applied, is outside the statutory authority of the agency, involves
14 unlawful procedure, is an erroneous interpretation and application of the law, is unsupported
15 by substantial evidence, and is arbitrary or capricious. RCW 34.05.570(3)(a), (b), (c), (d), (e)
16 and (i).

17 **COUNT 10**
18 **Petition for APA Review**
19 **Finding of No Enlargement of Supplemental Permit**

20 99. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 98.

21 100. The Board initially found that incorporation of quantities of water associated with
22 WSU's invalid claim (Claim No. 098524) into the supplemental Permit No. G3-28278P,
23 constituted an unlawful enlargement of WSU's water rights.

24 101. Upon reconsideration, the Board revoked its earlier ruling and decided that the
25 issue should proceed to hearing. After hearing, the Board reversed its earlier ruling and held
26 that "the invalidity of Claim No. 098524 did not require Ecology to subtract the quantities

1 associated with that claim from the quantities authorized under Permit No. G3-28278P.” Final
2 Order at 30.

3 102. In ruling on the supplemental water right, the Board relied upon an informal
4 policy of the Department of Ecology, POL-1040, titled “Use of Terms that Clarify
5 Relationships between Water Rights.”

6 103. The Board used the same language, found in Permit No. G3-28278P, to first
7 justify its initial decision to prohibit inclusion of the invalid Claim No. 098524 and then to
8 justify its subsequent decision that the claim was not related to the Permit.

9 104. The Board’s finding that the quantities of water represented by WSU’s invalid
10 Claim No. 098524 were properly included in Supplemental Permit No. G3-28278P, is outside
11 the statutory authority of the agency, involves unlawful procedure, is an erroneous
12 interpretation and application of the law, is unsupported by substantial evidence, and is
13 arbitrary or capricious. RCW 34.05.570(3)(b), (c), (d), (e) and (i).

14 **COUNT 11**
15 **Petition for APA Review**
16 **Failure to Consider Relinquishment**

17 105. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 104.

18 106. A water user who fails to use water for a five-year period relinquishes its water
19 rights, RCW 90.14.160, unless a statutory exemption applies. One statutory exemption is for
20 water rights claimed for municipal supply purposes. RCW 90.14.140(2)(d). Relinquished water
21 rights may not be transferred in a change process.

22 107. The Board relied on RCW 90.03.015(3) and (4) to re-define several of WSU’s
23 non-municipal water rights as being for municipal supply purposes. Having re-defined WSU’s
24 water rights, the Board held “as a matter of law [] they are categorically exempt from
25 relinquishment with respect to non-use or perfection.” SJ Order at 33-34.

26 108. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments

1 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
2 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

3 109. The Board's finding that WSU's water rights are exempt from relinquishment by
4 operation of RCW 90.03.015(3) and (4) violates constitutional provisions, both facially and as
5 applied, is outside the statutory authority of the agency, involves unlawful procedure, is an
6 erroneous interpretation and application of the law, is unsupported by substantial evidence, and
7 is arbitrary or capricious. RCW 34.05.570(3)(a), (b), (c), (d), (e) and (i).

8
9 **COUNT 12**
10 **Petition for APA Review**
11 **Finding of No Abandonment**

12 110. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 109.

13 111. Municipal purpose water rights are exempt from relinquishment, but may be
14 subject to loss for abandonment. *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 947
15 P.2d 732 (1997). Abandonment of a water right may be found if there is a long history of non-
16 use combined with intent to abandon. *Id.* at 781.

17 112. WSU stopped pumping water from Well No. 2 in 1977. Water use from Well No.
18 2 was authorized by WSU Water Right Claim No. 098523, which was claimed for "municipal
19 purposes."

20 113. The Board concluded that WSU did not abandon Claim No. 098523, finding that
21 WSU had pumped the quantities associated with this claim from other wells. SJ Order at 36-
22 38. The Board declined to identify which of WSU's wells served as the source of water for
23 this particular water right claim. *Id.* at 37-38.

24 114. In concluding that WSU was lawfully pumping from unlawful points of
25 withdrawal, the Board relied upon Ecology's informal policy governing changes to water
26 rights, "Water Resources Program Policy for Conducting Tentative Determinations of Water
Rights" or POL 1120, which purports to excuse water users who withdraw water from
unlawful points of withdrawal. SJ Order at 38, n.20.

1 115. The Board’s conclusion that WSU Claim No. 098523 was not abandoned is
2 outside the statutory authority of the agency, involves unlawful procedure, is an erroneous
3 interpretation and application of the law, is unsupported by substantial evidence, and is
4 arbitrary or capricious. RCW 34.05.570(3)(b), (c), (d), (e) and (i).

5 **COUNT 13**
6 **Petition for APA Review**
7 **Failure to Consider Impairment**

8 116. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 115.

9 117. Transfer of water rights requires a finding that the transfer will not impair other
10 water users. RCW 90.44.100(2).

11 118. Prior to hearing, the Board ruled that WSU was lawfully entitled to use all of the
12 quantities available under its water rights, disregarding whether WSU’s water rights were
13 unperfected or relinquished. Hence, the Board prohibited Plaintiffs from submitting evidence
14 to show that the consolidation would enlarge WSU’s rights, facilitate increased pumping from
15 WSU’s wells, accelerate decline in groundwater levels, and cause impairment to Plaintiff Scott
16 Cornelius’s well.

17 119. At hearing Plaintiffs were allowed only to attempt to prove that moving the
18 location of pumping from multiple wells to one or two wells would cause interference with,
19 and therefore impairment of, the Cornelius well. Order of Clarification Re: Summary
20 Judgment (Attachment 3).

21 120. Following hearing, the Board ruled that Plaintiffs failed to “establish impairment
22 or any realistic probability of interference or interruption based on changing the location of
23 WSU’s pumping.” Final Order at 34.

24 121. The statutory impairment analysis protects existing water users, including junior
25 water users, from impairment when a water right is transferred or changed. This is
26 accomplished by the prohibition of enlargement of the water right seeking the change. RCW
90.44.100(2).

1 122. The Board’s conclusion, that all of WSU’s water rights are lawful, depended upon
2 provisions of the Municipal Water Law, i.e., a finding that the WSU rights were municipal
3 supply purpose rights and therefore exempt from perfection or relinquishment requirements,
4 and that no enlargement would occur as a result of consolidation.

5 123. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
6 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments
7 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
8 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

9 124. The Board erred in limiting the scope of the evidentiary inquiry regarding
10 impairment of the Cornelius well.

11 125. The Board’s finding that consolidation of WSU’s water rights would not cause
12 impairment violates constitutional provisions, both facially and as applied, is outside the
13 statutory authority of the agency, involves unlawful procedure, is an erroneous interpretation
14 and application of the law, is unsupported by substantial evidence, and is arbitrary or
15 capricious. RCW 34.05.570(3)(a), (b), (c), (d), (e) and (i).

16 **COUNT 14**
17 **Petition for APA Review**
18 **Failure to Conduct Reasonable or Feasible Pump Lift Analysis**

19 126. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 125.

20 127. When a groundwater body is experiencing declining groundwater levels, the
21 Department of Ecology may be required to determine a “reasonable or feasible pump lift,” that
22 is, identify the level below which falling groundwater levels will harm existing water users.
23 RCW 90.40.070.

24 128. The pump lift determination may be part of an impairment analysis, see RCW
25 90.44.070, *Pair v. DOE & Lehn Ranches*, PCHB No. 11-189 (1978) and *Graves v. DOE &*
26 *City of Okanogan*, PCHB Nos. 88-140, 141, & 144 (1989), or may be done independently to
address local groundwater conditions. Final Order at 16.

1 129. The Board held that WSU’s unperfected and unused water rights represented
2 lawful quantities and that the consolidation of those rights would not lead to an increase in
3 pumping nor cause declines in the Grande Ronde Aquifer. SJ Order at 42.

4 130. In finding that WSU’s water rights are lawful, the Board relied on RCW
5 90.03.015(3) and (4) and RCW 90.03.330(3) to exempt those rights from perfection and
6 relinquishment requirements, and to conclude that no enlargement, and therefore no reasonable
7 or feasible pump lift determination was required.

8 131. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
9 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments
10 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
11 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

12 132. The Board’s conclusion that that Ecology was not required to conduct a
13 reasonable or feasible pump lift pursuant to RCW 90.44.070 violates constitutional provisions,
14 both facially and as applied herein, is outside the statutory authority of the agency, involves
15 unlawful procedure, is an erroneous interpretation and application of the law, is unsupported
16 by substantial evidence, and is arbitrary or capricious. RCW 34.05.570(3)(a), (b), (c), (d), (e)
17 and (i).

18 **COUNT 15**
19 **Petition for APA Review**
20 **Failure to Conduct Safe, Sustaining Yield Analysis**

21 133. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 132.

22 134. The safe sustaining yield provision of the state Groundwater Code states that the
23 Department of Ecology has the jurisdiction “to limit withdrawals by appropriators of ground
24 water so as to enforce the maintenance of a safe sustaining yield from the ground water body.”
25 RCW 90.44.130.
26

1 135. The Board held that WSU’s unperfected water rights represented lawful quantities
2 and that the consolidation of those rights would not result in enlargement of WSU water rights
3 nor cause WSU to contribute to declines in the Grande Ronde Aquifer. SJ Order at 42.

4 136. In finding that WSU’s water rights were lawful, the Board relied on RCW
5 90.03.015(3) and (4) and RCW 90.03.330(3) to exempt those rights from perfection and
6 relinquishment requirements, and to conclude that no enlargement, and therefore no “safe,
7 sustaining yield” analysis was required.

8 137. The Board concluded that the “safe, sustaining yield” analysis applies only at the
9 time a water right is originally issued, and is not applicable to the water right change process.
10 SJ Order at 44.

11 138. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
12 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments
13 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
14 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

15 139. The Board’s conclusion that the “safe sustaining yield” requirements of the water
16 code apply only to applications for new water rights and was not required for the WSU change
17 applications violates constitutional provisions, both facially and as applied herein, is outside
18 the statutory authority of the agency, involves unlawful procedure, is an erroneous
19 interpretation and application of the law, is unsupported by substantial evidence, and is
20 arbitrary or capricious. RCW 34.05.570(3)(a), (b), (c), (d), (e) and (i).

21 **COUNT 16**
22 **Petition for APA Review**
23 **Failure to Consider Detriment to the Public Welfare**

24 140. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 139.

25 141. Changes in points of withdrawal must be analyzed under the same standards as
26 the original application, which includes public welfare review. RCW 90.03.290 (made
applicable to groundwater via RCW 90.44.060). Public welfare and impairment

1 determinations are related. An inadequate impairment analysis, one based on insufficient
2 information, “brings into play the public interest criterion...” *Black Star Ranch v. DOE*,
3 PCHB No. 87-19 (1988).

4 142. Except with respect to one aspect of the law (discussed below), the Board did not
5 make an independent, public interest determination, instead deferring to Ecology’s decision.
6 SJ Order at 45.

7 143. With respect to the relationship between public welfare and impairment, the
8 Board put the issue over for hearing. After hearing, the Board held that, because there was no
9 impairment and no need for a reasonable or feasible pump lift determination, therefore the
10 WSU consolidation did not pose a detriment to the public welfare. Final Order at 45; Order
11 Denying Reconsideration Re: Final Decision at 5 (Attachment 5).

12 144. The Board later determined that information was sufficient to make a
13 determination regarding the public welfare. SJ Order at 45.

14 145. The Board held that WSU’s unperfected and unused water rights represented
15 lawful quantities and that the consolidation of those rights would not cause legally cognizable
16 declines in the Grande Ronde Aquifer. SJ Order at 42. Hence the Board refused to find that
17 WSU’s contribution to the declining aquifer resulting from consolidation would cause a
18 detriment to the public welfare.

19 146. In finding that WSU’s water rights were lawful, the Board relied on RCW
20 90.03.015(3) and (4) and RCW 90.03.330(3) to exempt those rights from perfection and
21 relinquishment requirements.

22 147. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
23 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments
24 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
25 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

1 148. The Board's conclusion that there was no detriment to the public welfare as a
2 result of the consolidation of WSU's water rights violates constitutional provisions, both
3 facially and as applied herein, is outside the statutory authority of the agency, involves
4 unlawful procedure, is an erroneous interpretation and application of the law, is unsupported
5 by substantial evidence, and is arbitrary or capricious. RCW 34.05.570(3)(a), (b), (c), (d), (e)
6 and (i).

7 **COUNT 17**
8 **Petition for APA Review**
9 **Failure to Conduct SEPA Analysis of Declining Aquifer**

10 149. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 148.

11 150. When processing the WSU water rights, the Department was required to conduct
12 environmental analysis pursuant to the requirements of SEPA. The Department relied on a
13 SEPA analysis prepared by WSU, but that analysis did not acknowledge the historic and
14 present decline in GRA groundwater levels nor that increased pumping by WSU, as facilitated
15 by the consolidation of water rights, would accelerate the decline in GRA groundwater levels.

16 151. The Department was required to supplement the WSU environmental analysis to
17 include new information, including material but undisclosed information, regarding decline in
18 GRA groundwater levels. WAC 197-11-600(3)(b).

19 152. The Board concluded that WSU's unperfected and unused water rights
20 represented lawful quantities and that the consolidation of those rights would not cause
21 enlargement and therefore not cause declines in the Grande Ronde Aquifer. SJ Order at 42.

22 153. In finding that WSU's water rights were lawful, the Board relied on RCW
23 90.03.015(3) and (4) and RCW 90.03.330(3) to exempt those rights from perfection and
24 relinquishment requirements.

25 154. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
26 and 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter. See Attachments

1 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants Department of
2 Ecology and Washington State University are parties to the *Lummi Nation* lawsuit.

3 155. The Board’s conclusion, that the Department of Ecology was not required to
4 supplement the environmental analysis to include material but undisclosed information as
5 required by WAC 197.11.600(3)(b), is outside the statutory authority of the agency, involves
6 unlawful procedure, is an erroneous interpretation and application of the law, is unsupported
7 by substantial evidence, and is arbitrary or capricious. RCW 34.05.570(3)(b), (c), (d), (e) and
8 (i).

9
10 **COUNT 18**
11 **Complaint for Declaratory Judgment**
12 **Substantive Due Process**

13 156. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 155.

14 157. Article I, Section 3 of the Washington State Constitution provides that “[n]o
15 person shall be deprived of life, liberty, or property, without due process of law.” The
16 Fourteenth Amendment of the United States constitution states: “nor shall any State deprive
17 any person of life, liberty, or property, without due process of law.”

18 158. Plaintiff Scott Cornelius holds a water right that is a vested private property right
19 subject to due process protections.

20 159. A law that retroactively impairs vested property rights violates due process.

21 160. RCW 90.03.015(3) and (4) have the effect of retroactively exempting WSU, a
22 non-municipal water right holder, from relinquishment for non-use as required pursuant to
23 RCW 90.14.160, by making the exemption contained in RCW 90.14.140(2)(d) for “water
24 rights claimed for municipal supply purposes” available to WSU’s non-municipal rights.
25 These definitions unlawfully resurrect water rights that have been relinquished to the state for
26 non-use and that utilize water that would otherwise be available for water right holders,
including Mr. Cornelius, who withdraw from the same, diminishing source of water.

1 . 161. RCW 90.03.330(3) retroactively expands the certificated water rights of WSU by
2 eliminating the beneficial use requirement for such rights, thereby allowing utilization of
3 unperfected portions of WSU's certificates to the detriment of water right holders, including
4 Mr. Cornelius, who withdraw from the same, diminishing source of water.

5 162. Plaintiff Scott Cornelius holds a vested water right for a domestic well that draws
6 water from the same groundwater body, the Grande Ronde Aquifer, which serves WSU's
7 wells. Groundwater levels are declining in the Grande Ronde Aquifer. Water levels are also
8 declining in Mr. Cornelius's well. Increased pumping by WSU will accelerate declines in
9 Grande Ronde Aquifer water levels and in Mr. Cornelius' well.

10 163. Defendant Washington State University holds six water rights, all of which have
11 been partially or fully unused for very long periods of time. Three of WSU's water rights are
12 certificates that were issued based on system capacity and which have never been fully
13 perfected.

14 164. When processing the applications to consolidate WSU's water rights, the
15 Department of Ecology was required to ensure that the change would not enlarge the existing
16 right by allowing future use of unperfected or relinquished portions of the water rights, thereby
17 impairing the vested rights of other water users, including Plaintiff Scott Cornelius. RCW
18 90.44.100(2). In applying RCW 90.03.015(3) and (4) and RCW 90.03.330(3), the Department
19 of Ecology approved the transfer of unperfected and unused portions of WSU's water rights,
20 enlarging those rights and thereby impairing Plaintiff Scott Cornelius' rights.

21 165. In an appeal of the Department of Ecology decisions on the WSU consolidation,
22 the Pollution Control Hearings Board relied on RCW 90.03.015(3) and (4) and RCW
23 90.03.330(3) to confirm the Department's approval of the transfer of WSU's unperfected and
24 relinquished water rights.

25 166. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
26 to be facially unconstitutional in the *Lummi Nation* matter on the basis of separation of powers.

1 See Attachments 1A and 1B. Plaintiffs Scott Cornelius and Sierra Club, and Defendants
2 Department of Ecology and Washington State University are parties to the *Lummi Nation*
3 lawsuit.

4 167. By applying RCW 90.03.015(3) and (4) and RCW 90.03.330(3) to approve
5 consolidation of WSU’s water rights without preventing impairment of Plaintiff Scott
6 Cornelius’s vested rights, the decisions of the Department of Ecology and the Pollution Control
7 Hearings Board are unconstitutional as a violation of substantive due process provisions of the
8 Washington State and United States Constitutions.

9
10 **COUNT 19**
Complaint for Declaratory Judgment
Procedural Due Process

11 168. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 167.

12 169. Article I, Section 3 of the Washington State Constitution provides that “[n]o
13 person shall be deprived of life, liberty, or property, without due process of law.” The
14 Fourteenth Amendment of the United States constitution states: “nor shall any State deprive
15 any person of life, liberty, or property, without due process of law.”

16 170. Plaintiff Scott Cornelius’s water right is vested private property interest that is
17 subject to due process protections.

18 171. Procedural due process requires that Plaintiff Scott Cornelius be provided with
19 notice and opportunity for a hearing prior to deprivation of his protected property interests.

20 172. By applying RCW 90.03.015(3) and (4) and RCW 90.03.330(3) to retroactively
21 validate unperfected and relinquished portions of WSU’s water right certificates, the
22 Department of Ecology and the Pollution Control Hearings Board infringed on the vested
23 property rights of Plaintiff Scott Cornelius.

24 173. In approving the consolidation of WSU’s six water rights, the Department of
25 Ecology presumed that RCW 90.03.015(3) and (4) and RCW 90.03.330(3), by operation of
26 law, required the agency to approve the change or transfer of unperfected and unused

1 quantities, without considering whether “such change can be made without detriment or injury
2 to existing rights,” as required by RCW 90.44.100. In making this determination, the agency
3 failed to protect the vested rights of Plaintiff Scott Cornelius.

4 174. On June 11, 2008, King County Superior Court held RCW 90.03.015(3) and (4)
5 and RCW 90.03.330(3) to be facially unconstitutional in the *Lummi Nation* matter on the basis
6 of separation of powers. Plaintiffs Scott Cornelius and Sierra Club, and Defendants
7 Department of Ecology and Washington State University are parties to the *Lummi Nation*
8 lawsuit.

9 175. The analysis of WSU’s change application utilized by the Department of Ecology
10 and the Pollution Control Hearings Board, relying on RCW 90.03.015(3) and (4) and RCW
11 90.03.330(3), deprived Plaintiff Scott Cornelius of his right to statutory procedural safeguards
12 designed to ensure that his private property rights are protected from unlawful deprivation, in
13 violation of the Washington State Constitution, Article 1, Section 3, and the Fourteenth
14 Amendment of the United States Constitution.

15 VI. REQUEST FOR RELIEF

16 175. Based on the foregoing, Plaintiff-Petitioners request the following relief from this
17 Court:

- 18 1. A declaration that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) violate
19 the separation of powers as applied to the facts set forth herein and are therefore
20 invalid.
- 21 2. A declaration that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) violate
22 substantive and procedural due process as applied to the facts set forth herein
23 and are therefore invalid.
- 24 3. An injunction requiring the Washington Department of Ecology and the
25 Washington Pollution Control Hearings board to cease implementing and
26

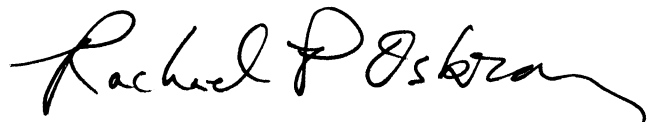
1 enforcing the provisions of the RCW 90.03.015(3) and (4) and RCW
2 90.03.330(3) as applied to the facts set forth herein.

- 3 4. An injunction requiring Washington State University to cease utilization of
4 water rights identified herein as invalid pursuant to constitutional and statutory
5 provisions.
- 6 5. Pursuant to RCW 34.05.574, enter an order setting aside the decision of the
7 Pollution Control Hearings Board, enjoining Washington State University from
8 exercising invalid water rights, and remanding the matter to the Pollution
9 Control Hearings Board with a directive to remand the matter to the Department
10 of Ecology to implement the terms of this Court's findings and orders.
- 11 6. An award of reasonable costs and other expenses associated with bringing this
12 action, including an award of attorney fees as authorized by RCW 4.84.350.
- 13 7. Such other and further relief that this Court deems to be just and appropriate.

14 DATED this 2nd day of July, 2008.

15 Respectfully submitted,

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