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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,

Defendants-

Respondents.

No. 08-2-00181-2

REPLY BRIEF OF PETITIONERS

TABLE OF CONTENTS

1

2 **Table of Authorities iii**

3 **I. Introduction.....1**

4 **II. Facts in Issue1**

5 **III. Standard of Review.....2**

6 **A. APA Review of Agency Order2**

7 **B. SEPA Standard of Review2**

8 **IV. Argument in Reply.....2**

9 **A. Basic elements of Washington water law.....2**

10 **B. Per *Lummi Nation*, the PCHB decision violates separation of powers3**

11 **1. Introduction.....3**

12 **2. Petitioners’ claims are reviewable.....4**

13 **3. This appeal presents an “as applied” challenge to the Municipal Water Law 8**

14 **4. Application of *Lummi Nation*.....9**

15 **a. Separation of powers violation9**

16 **i. Introduction.....9**

17 **ii. WSU relinquished its rights prior to the 2003 enactment of the**

18 **Municipal Water Law10**

19 **iii. Ecology’s tentative determination process does not obviate the**

20 **PCHB’s separation of powers error.....12**

21 **iv. WSU’s *Theodoratus* argument13**

22 **b. Substantive Due Process.....14**

23 **5. Municipal Water Law Mechanics15**

24 **C. Municipal Water Law Primary Claims19**

25 **1. WSU’s non-municipal certificates (5070-A and 5072-A) were partially**

26 **relinquished19**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

2. The PCHB erred in approving Ecology’s simplified extent & validity analysis, including reliance on the “simplified determination” policy24

3. Diminishment is the consequence of WSU’s failure to perfect its water rights27

 a. RCW 90.44.100 and transfer of unperfected water rights27

 b. RCW 90.03.330(2) does not alter application of RCW 90.44.100.....31

4. WSU water rights were improperly enlarged33

5. WSU has not exercised reasonable diligence in putting its rights to use35

D. Municipal Water Law Derivative Claims.....37

 1. Introduction.....37

 2. State Environmental Policy Act (SEPA) claims.....37

 3. Impairment & Public Welfare.....41

 4. Safe Sustaining Yield claim.....42

E. Water Code Claims.....46

 1. Abandonment issue.....46

 2. The PCHB utilized the wrong summary judgment standard for golf course water waste issue.....51

 3. The supplemental permit cannot substitute for WSU’s invalid claim.....54

V. Relief Requested.....55

VI. Conclusion56

1 **TABLE OF AUTHORITES**

2 **Cases**

3 **Federal Cases**

4 *Flint v. U.S.*, 906 F.2d 471, 473 (1990).....43

6 **Washington State Cases**

7 *Campbell & Gwinn v. Ecology*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).....27, 28, 43

8 *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 271-72, 534 P.2d 114 (1975).....6, 7

9 *City of Union Gap v. Ecology*, 148 Wn. App. 519, 195 P.3d 580 (2008)20

10 *City of West Richland v. Dept. of Ecology*, 124 Wn. App. 683, 103 P.3d 818 (2004)31

11 *Diehl v. Mason County*, 94 Wn. App. 645, 662-63, 972 P.2d 543 (1999)7

12 *Den Beste v. PCHB*, 81 Wn. App. 330, 340-41, 914 P.2d 144 (1996)7

13 *Department of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993).....20, 28, 51, 52

14 *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 596,
15 957 P.2d 1241 (1998).....13, 15, 16, 20, 26, 27, 28, 29, 36

16 *Dioxin/Organochlorine Center v. PCHB*, 131 Wn.2d 345, 352, 932 P.2d 158 (1997).....38

17 *Ellis v. Pomeroy Improvement Co.* 1 Wash. 572, 21 P. 27 (1889).....29

18 *Gendler v. Batiste*, 158 Wn. App. 661, 673, 242 P.3d 947 (2010), rev. granted, 171 Wn.2d 1001,
19 249 P.3d 181 (2011).....39

20 *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 753 P.2d 515 (1988)51

21 *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009)7, 8, 13

22 *Hallauer v. Spectrum Properties*, 143 Wn.2d 126, 142-43, 18 P.3d 540 (2001)27, 36

23 *Hertzke v. Dep’t of Ret. Sys.*, 104 Wn. App. 920, 928, 18 P.3d 588 (2001)6

24 *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 399-400, 932 P.2d 139 (1997).....47

25 *Jensen v. Dept. of Ecology*, 102 Wn.2d 109, 112, 114, 685 P.2d 1068 (1984).....43

26 *Kim v. PCHB*, 115 Wn. App. 157, 163, 61 P.3d 1211 (2003).....7

King County v. Cent. Puget Sound Gr. Mgt. Hrgs. Bd., 142 Wn.2d 543, 560, 14 P.3d 133 (2000)
.....20

1	<i>Lang v. Wash. Dept. of Health</i> , 138 Wn. App. 235, 247-48, 156 P.3d 919 (2007).....	6
2	<i>Lummi Nation v. Washington</i> , 170 Wn.2d 247, 241 P.3d 1220 (2010)	
3	6, 8, 12, 13, 14, 15, 16, 19, 23, 25, 26, 32
4	<i>Mills v. Western Wash. Univ.</i> , 170 Wn.2d 903, 911-12, 246 P.3d 1254 (2011).....	26
5	<i>Motlev-Motlev v. State of Washington</i> 127 Wn. App. 62, 110 P.3d 812 (2005). rev. den., 156	
6	Wn.2d 1004, 128 P.3d 1239 (2006)	11
7	<i>Okanogan Wilderness League v. Town of Twisp</i> , 133 Wn.2d 769, 947 P.2d 732 (1997)	
8	3, 2, 11, 28, 46, 48, 50, 54
9	<i>Peste v. Mason County</i> , 133 Wn. App. 456, 469-70, 136 P.3d 140 (2006), rev. den., 159 Wn.2d	
10	1013, 154 P.3d 919 (2007)	5, 6
11	<i>Port of Seattle v. PCHB</i> , 151 Wn.2d 568, 624-27, 90 P.3d 659 (2004)	7, 35
12	<i>Postema v. Pollution Control Hearings Board</i> , 142 Wn.2d 68, 11 P.3d 726 (2000)	21
13	<i>PUD No. 1 of Pend Oreille County v. Dept. of Ecology</i> , 146 Wn.2d 778, 784-85, 51 P.3d 744	
14	(2002).....	30, 31
15	<i>RD Merrill v. PCHB</i> , 137 Wn.2d 118, 969 P.2d 458 (1999)	
16	3, 11, 12, 17, 20, 26, 28, 29, 30, 31, 33, 36, 44, 46
17	<i>Schuh v. Ecology</i> , 100 Wn.2d 180, 667 P.2d 64 (1983)	54
18	<i>Thorp v. McBride</i> , 75 Wash. 466, 469, 135 P. 228 (1913).....	36
19	<i>Wash. St. Coal. for the Homeless v. DSHS</i> , 133 Wn.2d 894, 913, 949 P.2d 1291 (1997)	39
20	<u>Oregon Cases</u>	
21	<i>Russell-Smith v. Water Resources Dept</i> , 152 Or. App. 88, 952 P. 2d 104 (1998).....	47, 48
22	<u>Environmental Hearings Office Cases</u>	
23	<i>Georgia Manor Waster Assn v. Dept. of Ecology</i> , PCHB No. 93-68 (1994)	21
24	<i>Olga Water Users, Inc. v. Dept. of Ecology</i> , PCHB No. 08-123, Order Granting Motion for	
25	Summary Judgment (7/10/09)	21
26	<u>Statutes</u>	
	RCW 34.05 Administrative Procedures Act (APA)	2
	RCW 34.05.230(1).....	26

1	RCW 34.05.554	6
2	RCW 34.05.570(3)(a)	5, 23, 35, 40, 46
3	RCW 34.05.570(3)(d)	1, 6, 23, 33, 35, 37, 40, 42, 46, 50, 53, 55
4	RCW 43.21C (SEPA)	2, 14, 37, 40
5	RCW 90.03	17
6	RCW 90.03.010	27
7	RCW 90.03.015	9
8	RCW 90.03.015(3).....	2, 4, 8, 9, 23
9	RCW 90.03.015(4).....	2,4, 8, 9, 17, 23
10	RCW 90.03.130	11
11	RCW 90.03.250	43
12	RCW 90.03.290(1).....	53
13	RCW 90.03.290(3).....	43, 53
14	RCW 90.03.320	35
15	RCW 90.03.330(2).....	2, 9, 10, 16, 18, 25, 31, 32
16	RCW 90.03.330(3).....	4, 8, 9, 13, 16, 18, 25, 31
17	RCW 90.03.380	28, 29, 44
18	RCW 90.14.031	20
19	RCW 90.14.041	55
20	RCW 90.14.140	17
21	RCW 90.14.140(2)(d)	20, 22, 24
22	RCW 90.14.160	11
23	RCW 90.14.170	11
24	RCW 90.14.180	11
25	RCW 90.44.020	27
26	RCW 90.44.040	27

1	RCW 90.44.050	28, 29
2	RCW 90.44.060	29, 44, 48, 53
3	RCW 90.44.080	29, 48
4	RCW 90.44.100	2, 3, 4, 10, 18, 22, 24, 25, 27, 28, 29, 31, 32, 42, 44
5	RCW 90.44.100(2).....	33, 34, 40, 48, 53
6	RCW 90.44.100(3).....	34, 40
7	RCW 90.44.100(3)(c)	40
8	RCW 90.44.130	33, 42, 43, 44, 45
9		
10	<u>Washington Administrative Code</u>	
11	WAC 197-11-030(2)(g)	38
12	WAC 197-11-350	38
13	WAC 197-11-600(3)(b)(ii)	38
14	WAC 197-11-660	38
15	<u>Rules</u>	
16	RAP 2.5(a)	6
17		
18	<u>Treatises</u>	
19	Arval A. Morris, <i>Washington Water Rights--A Sketch</i> , 31 Wash. L.Rev. 243, 252, 258 (1956).....	29
20	Wells A. Hutchins, <i>Water Rights Laws in the Nineteen Western States</i> (1971).....	3, 29
21	2 Waters and Water Rights § 14.03(d) (Robert E. Becker ed., 1991)	29
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1 **I. Introduction**

2 Petitioners respectfully submit this Reply Brief to address arguments set forth in the
3 Response Brief of Washington State University (WSU Response) and Respondent Department
4 of Ecology’s Response Brief (ECY Response). Several themes are evident. First, Ecology
5 repeatedly reads into the statutes and cases provisions that simply are not there. Second,
6 Ecology's reliance on its own interpretations and policy statements is misplaced, particularly in
7 view of its habit of adopting *ultra vires* practices for administrative convenience. Third, WSU
8 offers no plausible explanation for its historic non-use of its water rights, nor does it explain
9 any basis for a need to triple the amount of water it is presently pumping. Finally, the *Lummi*
10 *Nation* decision provides an important springboard for understanding how Petitioners’ “as
11 applied” challenges to the Municipal Water Law differ from facial challenges.
12

13 Most of the issues in this case may be resolved by finding that the PCHB erroneously
14 interpreted and applied water code statutes. RCW 34.05.570(3)(d). The constitutional error is
15 limited to the problem of retroactive re-definition of WSU’s two certificates that were issued
16 for domestic, community domestic, and stockwater purposes. Petitioners specifically identify
17 the error committed by the Board with respect to each argument set forth below.
18

19 **II. Facts in Issue**

20 Very few facts are disputed in this case, and most of those involve mixed questions of
21 law and fact. There is disagreement over whether WSU was pumping its rights from
22 unauthorized wells. The parties also disagree about actions taken by WSU that indicate it
23 abandoned Water Claim No. 98523, although the dispute centers more on the significance of
24 acts, more than whether they actually occurred.
25
26

1 **III. Standard of Review**

2
3 **A. APA Review of Agency Order**

4 Petitioners generally agree with Ecology’s statement of the standard of review for
5 Administrative Procedures Act (APA) decision making. ECY Response at 4-5. However,
6 given Ecology’s limited administrative experience with application of the Municipal Water
7 Law, this is a case where the Court should exercise full de novo review and not defer to
8 Ecology’s legal interpretations of the statute.

9 **B. SEPA Standard of Review**

10 Ecology argues that SEPA standard of review is “clearly erroneous.” ECY Response at
11 4 and n.3. Legal conclusions are, however, reviewed de novo. As discussed in Section IV.D.2,
12 *infra*, the PCHB’s SEPA conclusions were legal in nature and the Court must exercise de novo
13 review in evaluating those conclusions.

14
15 **IV. Argument in Reply**

16 **A. Basic elements of Washington water law.**

17 Like Petitioners, Ecology and WSU provided information and views on Washington
18 water law “basics.” ECY Response at 6-8, WSU Response at 2-18. The parties generally
19 agree on many of the general principles. However, Petitioners have identified five over-
20 arching legal questions which are in dispute and are not, as Respondents assert, matters of
21 settled law. These questions must be answered in order to resolve this case.

- 22
23 (1) Did the definitions section of the Municipal Water law, RCW 90.03.015(3) and (4),
24 operate to retroactively re-define WSU’s non-municipal water rights?
- 25 (2) Does the “revoke and diminish” provision of the Municipal Water Law, RCW
26 90.03.330(2), require full implementation of the requirements of RCW 90.44.100?

- 1 (3) Does RCW 90.44.100 prohibit the transfer of unperfected quantities of water
2 contained in groundwater certificates?
- 3 (4) May the pumping of water from an unauthorized point of withdrawal excuse non-use
4 of a water right?
- 5 (5) Does the fact that a groundwater user may reconstruct or deepen its wells excuse
6 Ecology from exercising statutory duties to evaluate non-use of a water right?

7 Several other questions, some subsidiary, are also in dispute and identified in the
8 briefing below. The five set forth above represent points of substantial disagreement between
9 Petitioners and Respondents. All issues are discussed in detail in this reply brief.

10 WSU's extensive quotation from and reliance on the Hutchins water law treatise, Wells
11 A. Hutchins, *Water Rights Laws in the Nineteen Western States* (1971), requires a note of
12 caution. Hutchins is a reliable source of general information about water law, and has been
13 cited in several Washington water law decisions. However, the Hutchins treatise was
14 published in the early 1970s and has not been updated. The treatise does not include or discuss
15 many of the recent and important water law decisions issued by the Washington courts and
16 which are relevant to this appeal, most notably *OWL v. Twisp* and *RD Merrill*. The Court may
17 not rely on Hutchins as a source of authority where Washington cases have decided the law.

18 **B. Per Lummi Nation, the PCHB decision violates separation of powers.**

19 **1. Introduction**

20 Petitioners do not seek a holding that the statutes at issue are facially unconstitutional.
21 Rather, Petitioners allege that PCHB's interpretation of the relevant provisions of the
22 Municipal Water Law – which decision simply accepted and approved Ecology's
23 interpretations set forth in the WSU water right decisions – altered the legal consequences of
24 events that occurred before 2003. This action encroaches on the constitutional separation of
25
26

1 powers between the legislature and judiciary because it interprets statutes in a manner that
2 adjudicates past facts.

3 Petitioners’ claim of constitutional error arises from the question whether the PCHB
4 should have found that WSU Certificates 5070-A and 5072-A had partially relinquished due to
5 lapsed usage for a period greater than five years. Petitioners contend that, because WSU was
6 not a municipal water supplier and its two certificates were not issued for “municipal water
7 supply purpose” prior to 2003, its rights were therefore subject to the relinquishment law, and
8 could not be revived. In order to find that WSU’s water was not relinquished, the PCHB
9 applied the Municipal Water Law’s definitions set forth at RCW 90.03.015(3) and (4) and the
10 “in good standing” provision set forth at RCW 90.03.330(3). This error permeates several
11 other claims and issues, most of which are based on statutory misinterpretations.¹
12

13
14 **2. Petitioners’ claims are reviewable.**

15 WSU suggests that Petitioners have waived their opportunity to bring an “as applied”
16 challenge to the PCHB decision by “acquiescing” in the Board’s refusal to hear constitutional
17 claims. WSU Response at 41, ll. 4-12. This is an incorrect history of the case.

18 Although the PCHB characterized Petitioners’ claims and defenses as facial challenges,
19 the text of the Board’s Summary Judgment order clearly describes a refusal to decide the
20 specific issues for which Petitioners seek resolution here. For example, in addressing the
21

22 _____
23 ¹ As explained in Petitioners’ Opening Brief, the PCHB’s error in failing to find that
24 Certificates 5070-A and 5072-A had relinquished is a basis, in part, for its error in finding there
25 is no enlargement of WSU’s water rights. Finding no enlargement led the PCHB to
26 erroneously determine that there was no change in WSU’s rights that would require review
under the State Environmental Protection Act, the RCW 90.44.100 prohibition on impairment
of water rights and the public welfare, and the requirement that groundwater be managed to
achieve “safe, sustaining yield.” The PCHB’s errors on these points also derive from
misinterpretation of statutes. See Section IV.D below.

1 question whether WSU’s two non-municipal certificates were retroactive and improperly
2 converted to municipal purposes, the Board said:

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

8 CP 85 at 11, n.5 (PCHB Summary Judgment Order (as Amended on Reconsideration) (Jan. 18,
9 2008) (SJA)) (emphasis in original); see also SJA at 16, 34. Anticipating that WSU would
10 raise a waiver argument, Petitioners sought clarification regarding the amended summary
11 judgment order. In response, the Board clarified that all constitutional issues, whether deemed
12 facial or as-applied, would not be heard. CP 79 (Order of Clarification re: Summary Judgment
13 (Jan. 10, 2008). WSU opposed the motion (brought both by Ecology and Petitioners) that the
14 Board lacked jurisdiction. CP 40. WSU did not appeal the Board’s ruling. In sum, the
15 constitutional questions raised herein are not waived.

16 The question whether the Board’s interpretation of the Municipal Water Law violates
17 separation of powers doctrine is properly before this Court. The Washington APA expressly
18 authorizes courts to review claims of constitutional error in administrative appeals:

19 The court shall grant relief from an agency order in an adjudicative proceeding
20 only if it determines that:

21 (a) The order, or the statute or rule on which the order is based, is in
22 violation of constitutional provisions on its face or as applied.

23 RCW 35.04.570(3)(a). In *Peste v. Mason County*, 133 Wn. App. 456, 469-70, 136 P.3d 140
24 (2006), the Court relied on the above-quoted APA delegation of review authority to find that it
25 could decide constitutional challenges to administrative orders, even when those issues were
26 not raised before the administrative tribunal.

1 Because of the Board’s disclaimer over the constitutional issues, this Court will provide
2 the first substantive review of the Petitioners’ claim that Ecology’s retroactive conversion of
3 WSU’s two non-municipal certificates violates separation of powers doctrine. Such first
4 review does not offend principles of administrative law, *Peste, supra*, particularly given that
5 the Court’s review of legal questions is conducted pursuant to a de novo standard.² RCW
6 34.05.570(3)(d).
7

8 It is also appropriate for this Court to evaluate and apply the intervening precedent
9 raised by *Lummi Nation*. In *Lang v. Wash. Dept. of Health*, 138 Wn. App. 235, 247-48, 156
10 P.3d 919 (2007), the Court evaluated whether the administrative tribunal’s use of a particular
11 standard of review was a violation of due process rights. After the administrative hearing was
12 held, but before resolution of the appeal, the Supreme Court issued a decision in another matter
13 deciding the appropriate standard for the *Lang* case. The *Lang* court had no trouble in
14 applying the newly announced rule to the tribunal’s original findings. As in *Lang*, the
15 questions of law presented here, which are informed by the intervening *Lummi Nation*
16 decision, are reviewable.
17

18 WSU’s argument that Petitioners have failed to prove a substantive due process
19 violation misconceives Petitioners’ claims. WSU Response at 40. The separation of powers
20 violation at issue here is independent of, and not reliant on, due process claims. *City of*
21 *Tacoma v. O’Brien* invalidated a statute based solely on a separation of powers claim, the
22 Court finding legislative encroachment on judicial function in a statute that retroactively
23

24 ² The *Peste* Court also cited RAP 2.5(a), which allows parties to raise manifest errors affecting
25 constitutional rights for the first time on appeal, and *Hertzke v. Dep’t of Ret. Sys.*, 104 Wn.
26 App. 920, 928, 18 P.3d 588 (2001), which discusses the inherent authority of the Courts to
consider all issues necessary to reach a proper decision. RCW 34.05.554 also allows review of
new issues if there is a “change in controlling law occurring after the agency action.”

1 determined that contracts were impossible to perform. 85 Wn.2d 266, 271-72, 534 P.2d 114
2 (1975). No other rights were at issue in that case.³

3 It is the function of the judiciary to enforce separation of powers rules.⁴ *Hale v.*
4 *Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Washington courts
5 routinely address separation of powers issues in administrative appeals. E.g., *Diehl v. Mason*
6 *County*, 94 Wn. App. 645, 662-63, 972 P.2d 543 (1999) (finding delegation of authority to
7 state administrative hearings board to review local government decisions does not violate
8 separation of powers); *Port of Seattle v. PCHB*, 151 Wn.2d 568, 624-27, 90 P.3d 659 (2004)
9 (rejecting separation of powers challenge to new law enacted while litigation was pending),
10 *Kim v. PCHB*, 115 Wn. App. 157, 163, 61 P.3d 1211 (2003) (finding PCHB’s effective
11 amendment of water code statute encroaches on legislative function); *Den Beste v. PCHB*, 81
12 Wn. App. 330, 340-41, 914 P.2d 144 (1996) (finding that court could not encroach on
13 legislative function by extending statute of limitations).
14
15

16 The interests and harms giving rise to Petitioners’ appeal are sufficient to support this
17 Court’s review of separation of powers claims. The PCHB’s re-definition of WSU’s non-
18 municipal rights will allow WSU to pump more water than it is legally entitled to, which will
19 exacerbate declines in Grande Ronde Aquifer water levels. This result undermines the efforts
20 of the Petitioners to achieve sustainable water levels for the benefit of the community, and will
21 eventually cause water levels to drop beneath the reach of Mr. Cornelius’ well. In *Tacoma v.*
22

23 _____
24 ³ *City of Tacoma* involved a facial challenge to the statute at issue, but did not preclude
25 independent as applied legal claims regarding separation of powers.

26 ⁴ “Unlike many other constitutional violations, which directly damage rights retained by the
people, the damage caused by a separation of powers violation accrues directly to the branch
invaded” *Hale*, 165 Wn.2d at 506.

1 *O'Brien, supra*, the animus of the case involved “substantial expenditure of public funds.”
2 Here the interest is even more important than public funds, and will be much harder to replace:
3 the primary source of drinking water for 50,000 people in the Pullman-Moscow region.

4 In sum, WSU is wrong to suggest that this Court may not review Petitioners’
5 constitutional claims. Courts may review the constitutionality of statutes, including for
6 separation of powers violations. *Hale, supra*, 165 Wn.2d at 505-06. The separation of powers
7 issue is properly before this Court, is justiciable, and should be decided in this appeal. *Id.*

8
9 **3. This appeal presents an “as applied” challenge to the Municipal Water
10 Law.**

11 WSU next argues that Petitioners’ constitutional claims are a “rehash” of the *Lummi*
12 *Nation* arguments on facial validity of the statute. WSU Response at 41-43. In making this
13 remarkable statement, WSU fails to note that *Lummi Nation* five times announced that it was
14 not deciding an “as applied” appeal. *Lummi Nation*, 170 Wn.2d at 258, 263, 265, 272. Indeed,
15 *Lummi Nation* refers to this very appeal as an example of an “as applied” case working its way
16 through the courts.⁵ While *Lummi Nation* did hold that the Municipal Water Law does not
17 interfere with the judicial function, that holding was limited to “a facial challenge to an
18 exercise of general legislative authority.” *Lummi Nation* at 265 (“In this challenge, we are
19 only considering unchallenged water rights. There is no encroachment on the judicial role that
20 would offend separation of powers principles.”)

21
22 More importantly, Petitioners do not ask this Court to invalidate the Municipal Water
23 Law provisions in RCW 90.03.015(3) or (4) or RCW 90.03.330(3). Here, the challenge is to
24

25 ⁵ The parties “inform us that there is at least one “as applied” challenge currently pending
26 before the Pollution Control Hearings Board . . . (citing *Cornelius v. Dep’t of Ecology*, No. 06-
099 (Wash. Pollution Control Hr’gs Bd. Dec. 7, 2007).” *Lummi Nation*, 170 Wn.2d at n.4.

1 the PCHB’s interpretation of the Municipal Water Law as specifically applied to WSU’s non-
2 municipal water right certificates. Petitioners do ask the Court to overturn an administrative
3 interpretation of the law that revived lost water rights, limited the evidence at hearing, harms
4 the public welfare, and undermines the ability of Petitioners to protect public and private
5 interests.

6
7 **4. Application of *Lummi Nation***

8 Petitioners opening brief demonstrated that the *Lummi Nation* finding of facial validity
9 of the statutes at issue, RCW 90.03.015 (definitions of municipal water supplier and purposes)
10 and RCW 90.03.330(3) (“in good standing”), rested on an explicit finding that the statutes did
11 not and could not change existing facts of legal consequence. Pet. Op. Br. at IV.A.2 at 16-18.
12 Ecology does not refute that the Court said this, but instead argues that (1) past facts were not
13 adjudicated and (2) Cornelius is not harmed. ECY Response at 32-38.

14
15 **a. Separation of powers violation**

16 **i. Introduction**

17 Ecology defends the WSU decisions against separation of powers claims in two
18 different sections of its brief, addressing first RCW 90.03.015(3) and (4) (definitions) and then
19 RCW 90.03.330(2) and (3) (the revoke/diminish and “in good standing” provisos). ECY
20 Response at 33-34, 37-38. Ecology’s defenses with respect to both statutes are the same. First,
21 Ecology asserts the timing of the appeals came after the Municipal Water Law was enacted and
22 therefore the Legislature could not have interfered with judicial function. Second, Ecology
23 argues that the Municipal Water Law did not change Ecology’s duty to tentatively determine
24 the validity of WSU’s water rights. Ecology further argues that this duty includes ascertaining
25 whether inchoate pumps and pipes rights remain “in good standing,” and that this
26

1 annual pumpage occurred in 1969). For Certificate 5072-A, relinquishment occurred after
2 1975, the year of highest use of Well No. 5.

3 When a court reviews the validity of a water right, it looks back in time at the history of
4 use. But the actual loss of a water right occurs at the time the non-use occurs, although the
5 formal action to amend the documents may not occur until many years later. The
6 relinquishment statute is clear that the loss occurs at the time of non-use:
7

8 When it appears to the department of ecology that a person entitled to the use of
9 water has not beneficially used his water right or some portion thereof, and it
10 appears that said right has or may have reverted to the state because of such
nonuse, as provided by RCW 90.14.160, 90.14.170, or 90.14.180, the
department of ecology shall notify such person by order.

11 RCW 90.03.130 (emphasis added). In *Motley-Motley v. State of Washington*, Ecology brought
12 a relinquishment action based on evidence of non-use that occurred between 1972 and 1985
13 (reviewing aerial photos, anecdotal information from neighbors, and power records). 127 Wn.
14 App. 62, 110 P.3d 812 (2005). The state argued, successfully, that “the water right had
15 reverted to the State of Washington because the right had not been put to beneficial use since
16 the early 1970s.” *Id.* at 69.

17 In *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732
18 (1997), the Court examined Twisp’s non-use dating from 1948 to the time of the proposed
19 amendment to its water rights to assess the potential for abandonment. The abandonment had
20 occurred in the past, not at the time that the Court decreed it. (“ . . . OWL argues, and the
21 Department of Ecology agrees, that a municipality may abandon a water right through years of
22 nonuse,” *id.* at 784). In *RD Merrill*, the Court conducted detailed review of the history of
23 several water rights to determine whether and when loss for non-use had occurred. 137 Wn.2d
24 at 127 (“ . . . whether the right has been relinquished or abandoned in whole or in part are
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1 matters the Department must address in deciding whether to approve a transfer or change
2 application” (emphasis added)).

3 WSU’s past non-use resulted in loss of water rights for failure to perfect,
4 relinquishment and abandonment. Ecology should have administratively acknowledged this
5 loss when it reviewed the amendments WSU sought in 2006. *RD Merrill*, 137 Wn.2d at 127.
6 Instead the PCHB determined that the Municipal Water Law reached back in time to change
7 the legal consequences of the fact of past non-use that occurred between the 1960s and 2003.
8 This past adjudication of facts is expressly forbidden. *Lummi Nation*.

9
10 Ecology is correct to say that “the Legislature did not make any determinations on
11 WSU’s specific water rights through passage of the MWL.” ECY Response at 34. In an “as
12 applied” case, the question is how the agency uses the governing law to make decisions. Here,
13 Ecology and the PCHB utilized the Municipal Water Law to rearrange history. This Court
14 reviews de novo the PCHB’s conclusion and must find, to preserve the constitutionality of the
15 Municipal Water Law as applied here, that the agency wrongly decided this case.
16

17 **iii. Ecology’s tentative determination process does not obviate the**
18 **PCHB’s separation of powers error.**

19 Ecology argues that the doctrine of separation of powers is not violated because
20 Ecology conducted a tentative determination of WSU’s water rights. ECY Response at 34.
21 But the PCHB’s used the Municipal Water Law as a shield to expressly decline to assess the
22 extent and consequences of WSU’s non-use of water. Likewise, Ecology’s argument that
23 Petitioners’ recourse is with the PCHB and this appeal must fail. ECY Response at 38, 11.1-6.
24 As discussed above, separation of powers issues routinely arise in administrative appeals. This
25 argument is also problematic insofar as it suggests that, if an aggrieved party can go to court,
26

1 then a separation of powers violation cannot occur. Ecology cites no authority for this
2 proposition, and there is none – there would be no separation of powers doctrine were
3 appellants unable to raise such claims in the courts. *Hale, supra*.

4 **iv. WSU’s *Theodoratus* argument.**

5 WSU contends that only junior water users whose rights were created between 1998
6 (*Theodoratus*) and 2003 are protected by the *Lummi Nation* decision. Because Cornelius did
7 not establish his water right in reliance on *Theodoratus*, WSU argues that he therefore cannot
8 claim harm that WSU’s three certificates are “in good standing.”⁶ WSU Response at 40-41.
9 WSU misconstrues the Court’s holding in *Lummi Nation*.

10
11 First, the PCHB’s ruling on WSU’s two non-municipal certificates illustrates the
12 mistaken view that the Legislature was correct to retroactively re-define non-municipal water
13 rights. This case is concerned with the resuscitation of WSU’s long-lapsed rights (especially in
14 a negative-sum water supply situation, i.e., the diminishing waters of the Grande Ronde
15 Aquifer). WSU’s argument is not germane to *Lummi Nation*’s alternative separation of powers
16 holding regarding adjudication of past facts.
17

18 Moreover, WSU makes the blanket assertion that *Lummi Nation* determined that the
19 Municipal Water Law does not interfere with judicial function. *Lummi Nation* did not say this.
20 In its discussion of “adjudication of past facts,” the Court found the statute facially valid, but
21 reserved for future decision whether the law could offend separation of powers in an “as
22 applied” case. This appeal is such a case.
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⁶ Petitioners dispute that RCW 90.03.330(3) applies to WSU’s two non-municipal certificates.

1 **b. Substantive Due Process.**

2
3 Ecology and WSU argue that the PCHB decision does not violate substantive due
4 process because the decision does not harm Scott Cornelius’ water right. ECY Response at 34-
5 37, 38; WSU Response at 40, 43.

6 Scott Cornelius has a place in line in the overall scheme of water rights that withdraw
7 from the Grande Ronde Aquifer. As a junior holder, that place in line is properly subject to
8 impact by senior rights. However, the junior right does enjoy protection from illegal use and
9 revival of rights lost for non-use. The PCHB’s reliance on the Municipal Water Law to revive
10 WSU’s relinquished water rights effectively shoved the Cornelius right further down the line,
11 detrimentally affecting a valuable element of his property right. *Lummi Nation* acknowledged
12 the constitutional validity of the Municipal Water Law because the law did not change the
13 legal status of junior water rights. ECY Response at 15, citing 170 Wn.2d at 266-67. Yet that
14 is exactly what has happened here. Priority of right has changed for the Cornelius right, and
15 priority makes a big difference in a water system where water supply is diminishing.
16 Moreover, the PCHB relied on the Municipal Water Law not only to approve the revival of
17 WSU’s lost rights, but to limit Petitioners’ ability to submit evidence regarding the scope of the
18 impact of the amendments to WSU’s rights. Pet. Op. Br. at Section IV.D, Section IV. D.3,
19 below. This affected Petitioners’ ability to prove a variety of claims relating to SEPA,
20 impairment, public welfare, and safe sustaining yield requirements.
21
22

23 Ecology argues that WSU has continued to exercise its water rights over time. ECY
24 Response at 35. This assertion is contradicted by the undisputed evidence of WSU’s non-use.
25 Pet. Op. Br., App. 1. Ecology also argues that WSU’s rights qualified for municipal supply
26

1 purposes prior to enactment of the Municipal Water Law. But the terms “domestic” and
2 “community domestic” had meanings separate from “municipal supply” at the time that
3 Ecology created those rights and conferred those definitions. See Section IV.C.1, below.

4 Ecology also contends that the Municipal Water Law merely cleared up ambiguity
5 about definitions. ECY Response at 35-36. But there was no ambiguity in *Theodoratus*, the
6 case that triggered the quest for superiority of municipal water supply rights, regarding the
7 status of the water rights held by a non-municipal public water supplier. *Ecology v.*
8 *Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). As discussed in Section IV.C.1, below,
9 the differences between domestic and community domestic and municipal supply purposes has
10 long been understood.
11

12 *Lummi Nation* makes clear that the Municipal Water Law is judicially acceptable
13 because it looks forward, not backward. The Court should find that the PCHB decision
14 interpreting the application of the Municipal Water Law to WSU’s water rights violates
15 separation of powers and due process.
16

17 **5. Municipal Water Law Mechanics.**

18 Ecology describes at length its view of the administrative operation of the Municipal
19 Water Law. ECY Response at 9-14. Petitioners here identify the differences in the parties’
20 positions regarding the mechanics of the Municipal Water Law. These issues are more fully
21 explained in the sections referenced below. Ecology begins by explaining that the MWL
22 provides three exceptions to the bedrock principle that water rights must be actually and
23 continuously used in order to achieve and retain validity. ECY Response at 9, citing Pet. Op.
24 Br. at 13. Whether the Municipal Water Law shields WSU’s rights from loss for past non-use
25 is at the heart of this appeal.
26

1 First, Ecology argues that the “in good standing” provision of RCW 90.03.330(3)
2 protects the inchoate portion of municipal water supply certificates. ECY Response at 9, ll. 14-
3 16. This assertion begs several questions. First, the “in good standing” proviso does not apply
4 to WSU’s water right claims, nor does it apply to WSU’s non-municipal supply certificates. In
5 fact, the “in good standing” proviso applies to only one of WSU’s rights, Certificate G3-
6 22065C. Moreover, the “in good standing” proviso does not obviate or even affect Ecology’s
7 duty to fully evaluate the extent of non-use and “revoke or diminish” the unused portions of
8 qualified rights. RCW 90.03.330(2); *Lummi Nation*, 170 Wn.2d at 270-71. “In good standing”
9 means “not void,” nothing more. The Legislature conferred an exceptional benefit on a small,
10 carefully defined class of water rights.⁷ The Court should not expand the definition beyond the
11 plain words of the statute.
12

13
14 Second, Ecology asserts that “inchoate water rights are not subject to relinquishment.”
15 ECY Response at 9, ll. 16-17. Petitioners agree that never-perfected water rights are not
16 subject to relinquishment. Rather, unperfected rights are subject to revocation or diminishment
17 via rescission, a legal mechanism that eliminates never-used quantities represented in water
18 right documents at the time of administrative review, albeit with the same result as
19 relinquishment. Pet. Op. Br. at IV.C.3 (pp. 28-31). Petitioners have contended from the outset
20 that WSU’s three certificates are subject to loss because of failure to perfect and use those
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24 ⁷ As the *Theodoratus* Court noted, “using system capacity as a measure of a water right would
25 allow speculation in water rights and lead to uncertainty in management of this fixed resource
26 at a time when availability of water is a significant concern and management of limited water
resources is of utmost importance.” 135 Wn.2d at 595.

1 rights. The legal consequence of WSU’s failure to perfect is a point of major disagreement
2 between the parties.⁸ See Section IV.C.3, *infra*.

3 Third, Ecology points out that the relinquishment statute, RCW 90.14.140, contains an
4 exemption for rights claimed for municipal water supply purposes. At the risk of stating the
5 obvious, the exemption does not apply to non-municipal supply purposes (“there shall be no
6 relinquishment of any water right . . . if such right is claimed for municipal water supply
7 purposes under chapter 90.03 RCW”). This exemption, as with all of the exemptions set forth
8 in RCW 90.14.140, must be read narrowly. *RD Merrill*, 137 Wn.2d at 140. The real question
9 here is whether any reasonable interpretation of the statutory exemption could operate to
10 exempt non-municipal rights held by WSU. Petitioners urge the Court to decline the invitation
11 to expand the reading of this statute to cover rights that were issued for non-municipal
12 purposes, i.e., domestic, community domestic, and stockwater. To the extent Ecology suggests
13 revival of the already relinquished portion of WSU’s non-municipal certificates is supported
14 because of their re-definition under RCW 90.03.015(4), Petitioners disagree. See Section
15 IV.C.1, below.

18 Ecology’s discussion of the present status of municipal water rights is largely
19 irrelevant. ECY Response at 11, ll. 2-18 and n.4. Petitioners do not disagree that the
20 Legislature could prospectively re-define the purpose of WSU’s water rights. Active
21 compliance and future non-use are not at issue. Rather, this case is about the PCHB’s
22 interpretation of the Municipal Water Law to retroactively amend WSU’s water rights, as well
23

25 ⁸ While Petitioners support Ecology’s quest for the use of proper terminology, in the end the
26 result is the same—rights that were not used are no longer valid, and are subject to formal state
action to terminate them.

1 as refusal to properly apply a plethora of other rules regarding loss for non-use and requiring
2 protection of private and public interests in water resources.

3 Petitioners do not dispute Ecology’s statement that RCW 90.03.330(2) authorizes the
4 agency to revoke or diminish a water right based on tentative determination of the validity and
5 extent in an amendment proceeding under RCW 90.44.100. ECY Response at 12-14.

6
7 Interestingly, Ecology’s example of a water right suitable for revocation or diminishment, ECY
8 Response at 14, n.5, exactly describes WSU’s Certificate G3-22065C, i.e., a pumps and pipes
9 certificate issued for municipal supply purposes that documents a very large amount of water
10 WSU never intended to use and which is not needed to complete water service for the
11 university. However, Ecology’s discussion omits an important point. When Ecology conducts
12 a tentative determination of a groundwater certificate, regardless of purpose, it must reduce the
13 quantity by the amounts never perfected. To the extent Ecology argues that “good faith and
14 diligence” are the only factors to consider, it reads limitations into the statute that do not exist,
15 and that contradict judicial interpretation of the statute.
16

17 Finally, Ecology is incorrect to assert that it must engage “in assessments to determine
18 if inchoate quantities remain in good standing.” ECY Response at 14, ll. 3-13. The “in good
19 standing” proviso set forth in RCW 90.03.330(3) was a legislative policy decision that does not
20 reference or authorize administrative action. Ecology conflates this proviso with its duty to
21 conduct a tentative determination of water rights submitted for amendment. The two are not
22 related. Once the holder of an “in good standing” municipal certificate applies to amend that
23 certificate, all of the pre-existing requirements of RCW 90.44.100 apply. RCW 90.03.330(2).
24 Ecology’s statement that “inchoate portions of water rights for municipal supply purposes
25 found to be in good standing are valid and eligible for change or transfer” is incorrect. ECY
26

1 Response at 14, ll. 11-13. The Municipal Water Law did not alter Ecology’s duties to
2 tentatively determine the validity of water rights when processing amendments, to diminish
3 rights for non-use, and to prevent enlargement. As *Lummi Nation* aptly noted, it is this
4 continuing duty that saves the Municipal Water Law from constitutional infirmity. 170 Wn.2d
5 at 270-71.
6

7 **C. Municipal Water Law Primary Claims**

8 **1. WSU’s non-municipal certificates (5070-A and 5072-A) were partially
9 relinquished.**

10 The PCHB incorrectly relied on the Municipal Water Law to retroactively convert
11 WSU’s certificates held for domestic, community domestic and stockwater purposes into
12 municipal supply purposes, thus extending to those rights protection from loss for
13 relinquishment. SJA at 14-18, 33-34; Pet. Op. Br. at IV.C.1 (pp. 20-24). Ecology agrees that
14 the PCHB did effectively change the purpose of WSU’s two non-municipal certificates, and
15 further argues that such change retroactively insulated the two certificates from evaluation for
16 relinquishment. ECY Response Br. at 17-18. WSU, on the other hand, contends that these
17 rights “were always claimed for municipal water supply purposes” and therefore
18 relinquishment never applied. WSU Response at 43-44.
19

20 WSU’s assertions are directly contradicted by the documents.⁹ As a matter of common
21 sense, domestic, community domestic, and stockwater purposes are different purposes of use
22 than “municipal water supply”. If the purposes were the same, different terms would be un-
23 needed and Ecology would have issued the rights for municipal purposes in 1962-63. More
24

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⁹ Hearing Exhibits A-10, A-11, A-12, A-14, A-16, A-17 (Applications, Reports of Examination and Permits for Certificates 5070-A and 5072-A).

1 importantly, the legislature, the courts, and Ecology have treated domestic and community
2 domestic purposes different than municipal supply purposes.

3 The definitions section of the relinquishment chapter defines the term “beneficial use”
4 to include both domestic and municipal uses. RCW 90.14.031. A few sections later, the
5 chapter sets forth the “municipal water supply purposes” exemption to relinquishment. RCW
6 90.14.140(2)(d). To find that these two different definitions of purposes of use are actually the
7 same would nullify a statutory distinction, contrary to the rule that courts must give effect to
8 each part of a statute, and consider provisions in relation to each other. *King County v. Cent.*
9 *Puget Sound Gr. Mgt. Hrgs. Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000). Such a
10 construction would also violate the rule that exemptions to the “use it or lose it” rule are to be
11 applied narrowly. *RD Merrill*, 137 Wn.2d at 140.

12 The Washington Supreme Court has also recognized the difference between community
13 domestic and municipal rights. George Theodoratus was a “community domestic” water
14 supplier and expressly judged not to be a municipal supplier. *Theodoratus* at 135 Wn.2d at
15 606 (Sanders, dissenting) and at 594 (“Appellant is not a municipality”). Like *Theodoratus*,
16 WSU’s 1960s-era certificates were issued for community domestic supply, not municipal
17 supply. Non-municipal water rights are subject to relinquishment, even when proposed for
18 transfer to municipal supply purposes. *City of Union Gap v. Ecology*, 148 Wn. App. at 531-
19 33.¹⁰

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24 ¹⁰ The PCHB also erred in finding that a water right issued for multiple purposes may be
25 characterized as being for one purpose. Ecology responds that Petitioners’ argument lacks
26 merit, but they don’t say why. ECY Response at 18-19. The only authority for the PCHB’s
decision was Ecology’s counsel’s response to a question made at argument on the summary
judgment motions. SJA at 15. Yet the PCHB has now created a new rule of water law. Water
rights are defined by specific quantities, which in turn are based on water duties. *Grimes*, 121
Wn.2d 459, 469-71, 852 P.2d 1044 (1993) (“The owner of a water right is entitled to the

1 It is, or was, Ecology’s administrative practice to use the term “community domestic”
2 to describe a specific type of water use that is not municipal in purpose. PCHB decisions
3 describe community domestic water rights and the applicability of relinquishment (or forfeiture
4 for failure to perfect, see Section IV.C.3, *infra*). See, e.g., *Olga Water Users, Inc. v. Dept. of*
5 *Ecology*, PCHB No. 08-123, Order Granting Motion for Summary Judgment (7/10/09)
6 (approving transfer of a community domestic right and analyzing whether such right has been
7 relinquished for five years of non-use); *Georgia Manor Water Assn. v. Dept. of Ecology*,
8 PCHB No. 93-68, Final Findings of Fact, Conclusions of Law and Order (11/9/94) (affirming
9 Ecology order forfeiting that portion of community domestic right that was never put to use).¹¹
10 In sum, statutes, court decisions, PCHB decisions, and the Department of Ecology’s own
11 practices all reveal that domestic and community domestic water supply purposes are not the
12 same as municipal purposes.
13

14
15 WSU is simply wrong to assert that “the result reached by the PCHB would have been
16 the same with the municipal water law.” WSU Response at 44. Had WSU applied to amend
17 its rights prior to 2003, those rights would have been examined for non-use and partially
18 relinquished. Ecology’s permit writer guidance requires “year by year” analysis of actual and
19 continuous use of water rights at the time of transfer. CP 23 at Exhibit 2, p. 3 (POL 1120).

20 Ecology should have reviewed the full history of WSU’s use and non-use, and relinquished

21
22 amount of water necessary for the purpose to which it has been put.”) Each portion of a multi-
23 purpose right must be quantified according to the user’s needs and appropriate duties. It is
24 Ecology’s obligation to investigate the quantities associated with each purpose – something not
25 even attempted for WSU’s rights.

26 ¹¹ Decisions of the PCHB do not bind the courts, *Postema v. PCHB*, 142 Wn.2d 68, 90, 11 P.3d 726 (2000) but these cases do illustrate Ecology’s administrative practices, including that a community domestic purpose differs from a municipal supply purpose. PCHB decisions may be obtained at www.eho.wa.gov.

1 those portions of Certificates 5070-A and 5072-A that were perfected but lapsed for five
2 years.¹²

3 Ecology also recognized that WSU was not a municipal water supplier at the time it
4 issued the two certificates. WSU Response at 44. Ecology was in charge of determining
5 whether an applicant qualified as a municipal supplier, and in 1962 and 1963, determined that
6 WSU did not. Ecology declined to assign a “municipal supply” purpose to these two
7 certificates, despite WSU’s inclusion of information in the “municipal supply” section of their
8 application. See n. 9, *supra*.

10 Nor is the fact that WSU’s other rights were claimed for municipal purposes dispositive
11 of the purpose of use of Certificates 5070-A and 5072-A.¹³ In 1974, when WSU filed its water
12 right claims, the legislature had recently enacted the “municipal water supply” exemption to
13 relinquishment. RCW 90.14.140(2)(d). WSU, along with thousands of other water users,
14 knew that by claiming such a purpose, they obtained some measure of insurance against
15 relinquishment.¹⁴ But WSU’s argument that all of its water rights were at all times being used

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18 ¹² Argument regarding WSU’s failure to perfect portions of these two rights, thus making them
subject to loss via rescission, is discussed in Section IV.C.3, *infra*.

19 ¹³ Ecology and WSU disagree about the authority of Ecology to determine whether WSU is in
20 active compliance with the definition of municipal water supplier when it evaluates a water
21 right for relinquishment. ECY Response at 11, n.4, which appears to respond to WSU’s
22 statement that “WSU’s water rights were and are exempt from relinquishment because they
23 were always claimed for municipal water supply purposes, and water rights claimed for
24 municipal water supply purposes have always been exempt from relinquishment . . .” WSU
Response at 43. It seems obvious that Ecology must actively review whether water rights meet
the exemption language when the agency is required to perform a statutory duty;, such as
review proposed amendments under RCW 90.44.100. Petitioners wish only that Ecology had
done so here.

25
26 ¹⁴ Hence, WSU’s longstanding lapsed use of its municipal purpose claims must be corrected
under the theory of abandonment. See Sections IV.E.1 below.

1 for municipal purposes because its post-1967 claims list that purpose simply does not fly.
2 WSU’s statement that “the specific purpose of use identified on Certificate Nos. 5070-A and
3 5072-A is not determinative” is incorrect. WSU Response at 44, ll. 16-18. Those purposes
4 were determinative of the fact that they were not exempt from relinquishment in the 1967
5 statute. That all of WSU’s water was pumped into the same system also is not dispositive.
6 WSU Response at 44.

8 Finally, Ecology argues that WSU continued to use Certificates 5070-A and 5072-A by
9 withdrawing water from unauthorized wells. Petitioners dispute this contention because (1)
10 Washington law does not allow withdrawal from an illegal well to save an otherwise
11 relinquished right and (2) there is no credible evidence that WSU was in fact pumping these
12 rights from other wells. See Pet. Op. Br., App. 1. This argument surfaces at several points in
13 the Respondents’ briefs, and is addressed in Section IV.E.1 (abandonment).
14

15 **Relief Requested.** The PCHB’s reliance on the Municipal Water Law to retroactively
16 re-define the two certificates and validate the relinquished portions of those rights adjudicated
17 past facts in violation of separation of powers, *Lummi Nation* at 263-65, and must be reversed.
18 RCW 34.05.570(3)(a). See Pet. Op. Br. at IV.A.2 (pp. 15-19) and Section IV.B.4.a, *supra*,
19 regarding separation of powers.
20

21 The PCHB also committed error of law in misinterpreting various statutes. RCW
22 34.05.570(3)(d). As an alternative to ruling on a constitutional basis, the Court may find that
23 the PCHB erred by (1) misinterpreting RCW 90.03.015(3) and (4) as authorizing retroactive
24 re-definition of WSU as a municipal supplier and its non-municipal certificates as municipal
25 purpose rights (Legal Issues No. 1 and 2 before the PCHB), (2) finding that the Municipal
26 Water Law “affects” (excuses) consideration of relinquishment of non-municipal rights

1 pursuant to the RCW 90.44.100 requirement to evaluate the extent and validity of water rights
2 during the amendment process (Legal Issue No. 3 before the PCHB), and (3) finding that
3 WSU’s non-municipal certificates were categorically exempt from relinquishment pursuant to
4 RCW 90.14.140(2)(d) (Legal Issue No. 8 before the PCHB).

5
6 **2. The PCHB erred in approving Ecology’s simplified extent & validity
analysis, including reliance on the “simplified determination” policy.**

7 The PCHB erred in failing to tentatively determine the extent and validity of WSU’s
8 water rights, and in its reliance on the “simplified determination” procedure contained in
9 Ecology guidance document, POL 1120. SJA at 16-18; Pet. Op. Br. at Section IV.C.2 (pp. 24-
10 28). Ecology acknowledges that review of WSU’s applications was in fact “streamlined.”
11 ECY Response at 21. Ecology also does not refute that its permit writer looked only at the
12 1989-2004 history of WSU’s water use. The water right decisions (Reports of Examination or
13 ROEs) also document this “streamlined” review. Pet. Op. Br. at 26-27 at n.5, citing CP 31,
14 Att. 1 at 22-23 and Exs. A-1, A-3, A-7, A-13, A-19, and A-24 (at p. 3 for each ROE). Ecology
15 cannot and does not deny that POL 1120 expressly authorizes a short form approach to
16 evaluating municipal supply rights. CP 23, Ex. 2 at Section 5(c), p. 3. Instead, Ecology makes
17 several arguments. ECY Response at 21-23. WSU adopts Ecology’s arguments. WSU
18 Response at 45-46.

19
20
21 Ecology first asserts that there is a difference between relinquishment (lapsed use) and
22 complete failure to perfect a water right.¹⁵ ECY Response at 22, 23. Petitioners agree.

23
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25 ¹⁵ The “relinquishment versus unperfected” argument derives from the parties’ disagreement
26 over the meaning of RCW 90.44.100. Petitioners’ reply on this important point is set forth in
Sections IV.C.1 and IV.C.3, below.

1 However, this distinction is irrelevant to this issue, because the PCHB concluded that the
2 Municipal Water Law altered the requirements for evaluating both types of non-use.

3 Ecology next argues that all of WSU’s unused water rights qualify as municipal, thus
4 year-by-year analysis of beneficial use would be a “wasted effort.” ECY Response at 22,
5 WSU Response at 45. This is incorrect for several reasons. First, the Municipal Water Law
6 does not protect any of WSU’s rights from review for extent and validity. Only Certificate G3-
7 22065C qualifies as a right “in good standing” as defined in RCW 90.03.330(3). Even so, once
8 WSU applied to amend its water rights, Cert. G3-22065C was subject to diminishment for
9 failure to actually use (“perfect”) substantial quantities. RCW 90.03.330(2). See Section
10 IV.C.3, below. Certificates 5070-A and 5072-A, which do not fall within the definition of
11 RCW 90.03.330(3) and were not municipal purpose rights at relevant times, should have
12 received year-by-year review, and should have been diminished for both relinquishment and
13 failure to perfect. See Section IV.C.1, *supra* and IV.C.3, below. WSU’s Claim No. 98523
14 should have received full historic review to assess abandonment. See Section IV.E.1, below.
15 The whole package of rights should have been reviewed to avoid enlargement. See Section
16 IV.C.4, below.

17 To the extent the PCHB held that the Municipal Water Law re-defined WSU’s rights in
18 a manner that obviates full review, that constituted an adjudication of past facts that *Lummi*
19 *Nation* identifies as an unacceptable approach to interpreting the Municipal Water Law. See
20 Section IV.B.4.a, *supra*. This ruling is also error of law. The RCW 90.44.100 extent and
21 validity review was not amended in any way by the Municipal Water Law. Rather, the
22 Legislature expressly called out RCW 90.44.100 as a basis for revocation and diminishment of
23 rights. RCW 90.03.330(2). *Lummi Nation* also cited the RCW 90.44.100 tentative
24
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1 determination process as an important mechanism to avoid constitutional problems with the
2 Municipal Water Law. *Lummi Nation* at 270-71, citing *RD Merrill*, 137 Wn.2d at 127
3 (“department can approve changes to water rights only to the extent they are valid”).

4 Ecology finally contends that Petitioners are barred from challenging the PCHB’s
5 reliance on POL 1120. ECY Response at 22, n.9. Petitioners obviously are not bringing a rule
6 challenge. However, Ecology’s permit writer relied on the “simplified determination” policy
7 and the PCHB explicitly cited and endorsed the use of the policy in approving Ecology’s
8 “streamlined” analysis. Given that Ecology and WSU argue that POL 1120 serves as authority
9 for the PCHB’s decision, then its *ultra vires* nature is ripe for review in this appeal. Ecology’s
10 policy is advisory only, and not binding. RCW 34.05.230(1). Ecology could not utilize a
11 policy, especially an informal one, to contravene statutory requirements. *Mills v. Western*
12 *Wash. Univ.*, 170 Wn.2d 903, 911-12, 246 P.3d 1254 (2011); *Theodoratus*, 135 Wn.2d at 587.
13
14

15 **Relief Requested.** Petitioners ask the Court to find that PCHB’s simplified
16 determination of validity of WSU’s rights, including reliance on the “simplified
17 determination” guidance in POL 1120 violates the requirements of RCW 90.44.100, as
18 incorporated into RCW 90.03.330(2), to assess the full extent and validity of all groundwater
19 rights proposed for amendment. Petitioners further ask the Court to find that the PCHB’s
20 simplified approach to evaluating extent and validity, based on Municipal Water Law
21 provisions, effectively revived relinquished rights in violation of separation of powers and due
22 process requirements.
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1 **3. Diminishment is the consequence of WSU’s failure to perfect its water**
2 **rights.**

3 The PCHB erred in holding that inchoate water right certificates may be amended
4 without loss of unperfected quantities. SJA at 21-25; Pet. Op. Br. at IV.C.3 (pp. 28-31). This
5 issue implicates the never-used quantities contained in WSU’s three certificates, 5070-A,
6 5072-A and G3-22065C. Ecology responded at ECY Response at 23-27. WSU adopted
7 Ecology’s arguments. WSU Response at 46.

8 **a. RCW 90.44.100 and transfer of unperfected water rights.**

9 All parties agree that RCW 90.44.100 authorizes amendments to both permits and
10 certificates. However, the statute is silent as to whether unused water documented in
11 groundwater certificates may be transferred. Ecology and WSU read this silence to mean that
12 such unperfected quantities are eligible for change or transfer, a reading that contradicts
13 hornbook water law and is unsupported in the cases.
14

15 The doctrine of beneficial use is key to understanding why inchoate water certificates
16 may not be transferred. It is bedrock principle that water users must actually and continuously
17 use their rights in order to maintain their validity. The statutes say it. RCW 90.03.010;
18 90.44.020; 90.44.040. Many, many Washington cases also say it. *Campbell & Gwinn v.*
19 *Ecology*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002) (permit-exempt groundwater rights treated like
20 other rights, “once the appropriator perfects the right by actual application of the water to
21 beneficial use); *Hallauer v. Spectrum Properties*, 143 Wash.2d 126, 142-43, 18 P.3d 540
22 (2001) (“Perfection of an appropriative right requires that appropriation is complete only when
23 the water is actually applied to a beneficial use”); *Ecology v. Theodoratus*, 135 Wn.2d at 589
24 (“Water must actually be put to a beneficial use before a water right vests”); *Ecology v.*
25
26

1 *Grimes*, 121 Wn.2d at 468 (“The underlying reason for all this constitutional, legislative and
2 judicial emphasis on beneficial use of water lies in the relation of available water resources to
3 the ever-increasing demands made upon them.”) Indeed, the lawsuit leading to enactment of
4 the Municipal Water Law arose out of Ecology’s *ultra vires* practice of issuing water right
5 certificates based on system capacity rather than actual use. *Theodoratus, supra*. It confounds
6 logic to say that it was illegal for Ecology to issue certificates for unperfected water, but
7 acceptable to transfer or amend such certificates.
8

9 The Surface Water Code prohibits transfer of any unperfected quantities, whether in
10 permit or certificate. RCW 90.03.380; *RD Merrill*, 137 Wn.2d at 129, 138; *OWL v. Twisp*, 133
11 Wn.2d at 777. The Groundwater Code differs, but only because it expressly authorizes permit
12 amendments. RCW 90.44.100. Permits are inherently inchoate – a permit authorizes the water
13 user to commence using water and complete the water project. RCW 90.44.050; *Campbell &*
14 *Gwinn*, 146 Wn.2d at 11. Once complete, the water user obtains a certificate for the amount
15 actually put to use. Thus, RCW 90.44.100, by very mention of the term “permits,” necessarily
16 authorizes transfer of inchoate quantities.
17

18 Ecology argues that *RD Merrill* also authorizes amendment of unperfected certificates.
19 ECY Response at 23-25. Once again, Ecology reads into the statute provisions that simply are
20 not there. The transferability of a water right permit was the focus of one of the issues
21 presented in *RD Merrill*. In a few places the Court used the term “water right,” but at all times
22 in this part of the decision, the water right at issue is a permit. More importantly, the Court
23 expressly distinguished groundwater permits from groundwater certificates:
24

25 In contrast to RCW 90.03.380, which requires beneficial use of water before a
26 change may be approved, RCW 90.44.100 clearly allows for amendment of a
groundwater permit where water has not actually been applied to beneficial use.

...

1 A certificate of groundwater right is issued when a water right is perfected. See
2 RCW 90.44.080. Perfection of an appropriative right is a term of art, requiring
3 that appropriation is complete only when the water is actually applied to a
4 beneficial use. See, e.g., *Ellis v. Pomeroy Improvement Co.*, 1 Wash. 572, 21
5 P. 27 (1889); Arval A. Morris, *Washington Water Rights--A Sketch*, 31 Wash.
6 L.Rev. 243, 252, 258 (1956); 2 *Waters and Water Rights* § 14.03(d) (Robert E.
7 Becker ed., 1991).

8 However, a permit to appropriate groundwater is not the same thing as a final
9 groundwater certificate. A water right under a permit to appropriate water is
10 not a perfected water right. A permit to withdraw public groundwaters
11 authorizes the holder to appropriate public waters. RCW 90.44.050.

12 Applications for permits and permits issued pursuant to such applications are
13 governed by provisions in the surface water code. RCW 90.44.060. A holder's
14 right under a permit to appropriate water is an inchoate right, which is "an
15 incomplete appropriative right in good standing" which "remains in good
16 standing so long as the requirements of law are being fulfilled." *Department of
17 Ecology v. Theodoratus*, 135 Wash.2d 582, 596, 957 P.2d 1241 (1998) (quoting
18 1 Wells A.Hutchins, *Water Rights Laws in the Nineteen Western States* 226
19 (1971)). Appropriations of groundwater must comply with surface water code
20 provisions expressly incorporated into the groundwater code. RCW 90.44.060.
21 Inchoate rights are expressly recognized in the surface water code, which
22 provides that nothing in the chapter "shall operate to effect an impairment of
23 any inchoate right to divert and use water while the application of the water in
24 question to a beneficial use is being prosecuted with reasonable diligence."
25 RCW 90.03.460.

26 By expressly allowing amendment of a permit, RCW 90.44.100 plainly
contemplates that an unperfected water right may be involved. It follows that
water may not actually have been beneficially used. Thus, unlike RCW
90.03.380, which requires beneficial use of water before a change may be
approved, RCW 90.44.100 expressly allows for amendment where water has
not actually been applied to beneficial use. Beneficial use is not a prerequisite
to an amendment under RCW 90.44.100 where unperfected rights under a
groundwater permit are concerned.

RD Merrill at 129-30 (emphasis added). *RD Merrill* addressed permits, not certificates.

The perceived conflict arises because RCW 90.03.380 requires that water be
applied to beneficial use before a transfer or change can be approved while
RCW 90.44.100 does not mention beneficial use. As explained, beneficial use
is not a prerequisite to amendment where a permit is concerned, because an
unperfected water right is by definition involved. There is no conflict, because
RCW 90.03.380's beneficial use requirement means that unperfected rights are
not encompassed within RCW 90.03.380. Insofar 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.

1 *Id.* at 133 (emphasis added, footnote omitted). Ecology contends that *RD Merrill* authorizes
2 amendment of unperfected groundwater certificates. ECY Response at 25, ll.20-22. This
3 assertion is flatly contradicted by the language of the decision, quoted above. The Court does
4 use the term “water right” in its analysis, but the context indicates that this term equates to
5 “water permit” – not “certificate.”¹⁶ Ecology’s assertion that it may revoke or diminish a
6 groundwater certificate only if the user exercises “good faith and reasonable diligence,” ECY
7 Response at 24, ll. 14-17, is an incorrect reading of the statute. Ecology must also diminish
8 certificates for failure to perfect.
9

10 *PUD No. 1 of Pend Oreille County* does not support Ecology’s theory that unperfected
11 groundwater certificates may be amended. ECY Response at 25-26. Even a cursory reading of
12 that case reveals that the Court was not ruling on applications to amend groundwater
13 certificates. *PUD No. 1* addressed whether a dam owner could transfer inchoate surface water
14 certificates. *PUD No. 1 of Pend Oreille County v. Dept. of Ecology*, 146 Wn.2d 778, 784-85,
15 51 P.3d 744 (2002). The Court discussed *RD Merrill*, citing to the page that states “a permit to
16 appropriate groundwater is not the same thing as a final groundwater certificate,” and that
17 “[b]eneficial use is not a prerequisite to an amendment under RCW 90.44.100 where
18 unperfected rights under a groundwater permit are concerned,” citing *RD Merrill* at 130. *PUD*
19 *No. 1* made no holding regarding groundwater rights (permits or certificates) nor did it even
20 offer commentary that might alter what *RD Merrill* plainly holds. Indeed, to have done so
21
22

23
24 ¹⁶ “Water right” is a general term that refers to a variety of different instruments, including
25 adjudicated and unadjudicated claims, surface water and groundwater permits, preliminary and
26 temporary permits, certificates, permit-exempt domestic wells, supplemental permits and
certificates, etc. Caution must be exercised in the application of legal rules relating to the term
“water rights,” particularly given that there are several different types of water rights at issue in
this appeal (i.e., claims, permits, certificates and supplemental rights).

1 would have been *dicta* given the facts of *PUD No. 1*. Ecology’s assertion that *PUD No. 1*
2 authorizes change of unperfected groundwater certificates is incorrect.

3 *City of West Richland* reviewed unperfected “family farm” groundwater permits. ECY
4 Response at 26. There, the Court held that this special type of permit, unlike most
5 groundwater permits, could not be amended to serve non-family farm purposes. *City of West*
6 *Richland v. Dept. of Ecology*, 124 Wn. App. 683, 103 P.3d 818 (2004). At places the decision
7 refers to the permits at issue as “water rights.” A close reading reveals that the Court is
8 discussing groundwater permits, not certificates. Ecology misreads the case to equate “water
9 rights” with water certificates. ECY Response at 26, ll. 4-5.

10
11 The Court must reject Ecology’s attempt to create a new exception to beneficial use
12 requirements. Ecology’s assertion that *RD Merrill*, *PUD No. 1 of Pend Oreille County*, or *City*
13 *of West Richland* authorize amendments to unperfected groundwater certificates is an incorrect
14 reading of those cases. In applying RCW 90.44.100 to WSU’s water rights, the PCHB should
15 have found that none of the inchoate portion of those rights was transferable.

16
17 **b. RCW 90.03.330(2) does not alter application of RCW 90.44.100.**

18 Ecology asserts that RCW 90.03.330(2) and (3) must be read together to allow
19 amendments to unperfected groundwater certificates. ECY Response at 26-27. Petitioners
20 disagree. RCW 90.03.330(2) identifies RCW 90.44.100 as specific authority for revocation or
21 diminishment of a water right certificate. The “in good standing” provision in RCW
22 90.03.330(3), on the other hand, is a legislative determination, not a directive for
23 administrative action.
24

25 Moreover, RCW 90.03.330(3) did not put Certificates 5070-A and 5072-A “in good
26 standing” because, by definition, RCW 90.03.330(3) does not apply to these rights. These two

1 certificates are, on their face, not issued for “municipal water supply purposes,” a prerequisite
2 qualification of the statute.¹⁷ See Section IV.C.1, *supra* (regarding inapplicability of municipal
3 supply definitions to these two certificates).

4 Ecology argues that it is “nonsensical” that RCW 90.03.330(2) would limit WSU’s
5 ability to transfer its inchoate municipal supply certificate. ECY Response at 26-27. Yet that
6 is exactly what the Legislature stated and certainly what *Lummi Nation* held: RCW 90.44.100,
7 and its requirement that water certificates be perfected before transfer, does apply. *Lummi*
8 *Nation* at 270-71. Certificate G3-22065C may have been a right in good standing as it ripened
9 into use, but once WSU voluntarily applied for an amendment, the right was subject to
10 tentative determination of extent and validity, including scrutiny for perfection. RCW
11 90.03.330(2) directs Ecology to “revoke and diminish” WSU’s water rights in the RCW
12 90.44.100 amendment process.
13
14

15 The unperfected quantities in WSU’s certificates were not eligible for change and
16 should have been omitted from the transferred quantities. Relying on its misinterpretation of
17 RCW 90.44.100, the PCHB held that WSU could amend its inchoate certificate and that it need
18 not determine what quantities of certificated water had not been perfected. SJA at 26-27.

19 **Relief Requested.** The Court should rule that RCW 90.44.100 does not authorize
20 amendments to unperfected water certificates, and that the PCHB misinterpreted the statute in
21 authorizing transfer of the inchoate portions of WSU’s one municipal certificate and in
22 refusing to determine to what extent WSU had perfected its water rights. Petitioners also
23 request that the Court find that RCW 90.03.330(3) is not applicable to WSU’s domestic,
24

25 ¹⁷ Even if the Court finds that the “in good standing” provision applies, it does not excuse
26 Ecology’s failure to properly apply RCW 90.44.100 and diminish the lapsed portions of
WSU’s non-municipal certificates for relinquishment and non-perfection.

1 community domestic, and stockwater water certificates (5070-A and 5072-A). These errors of
2 law and misinterpretations of statutes are subject to de novo review by this Court. RCW
3 34.05.570(3)(d).

4 **4. WSU water rights were improperly enlarged.**

5 The PCHB erred in finding that WSU's water rights were not enlarged in the
6 amendment process.¹⁸ SJA at 28-30; Pet. Op. Br at 31-32, citing RCW 90.44.100(2)(c); *RD*
7 *Merrill* at 125-27. The revival of WSU's relinquished, abandoned, unperfected and wasted
8 water rights are all contrary to principles of beneficial use and comprise an overarching
9 problem of enlargement, in contradiction of statutory requirements.

10 Ecology asserts that, because the amendments did not increase quantities over the
11 original documents, there could be no enlargement.¹⁹ ECY Response at 28, ll.15-18. While it
12 is true that Ecology may not increase authorized quantities over what is authorized in the
13 original water right, the enlargement prohibition goes further. WSU cannot pump and
14 withdraw a greater amount of water under its amended rights than was actually withdrawn
15 under its original rights. A water right is defined by beneficial use, i.e., actual, continuous use
16 of water, not the quantity stated on the water right document. This principle animates the prior
17 appropriation doctrine and is a corollary not only to many of the issues raised in this appeal,
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22 _____
23 ¹⁸ Petitioners' claims regarding enlargement of WSU's supplemental permit based on use of
quantities contained in its invalid claim are discussed in Section IV.E.3, below.

24 ¹⁹ Ecology also argues that RCW 90.44.100 authorizes transfer of unperfected quantities
25 contained in certificates and claims. ECY Response at 28. Petitioners reply on this issue is set
26 forth in Section IV.C.3 above. Ecology further argues that WSU's perfected quantities are
shielded from relinquishment because they are municipal supply rights and therefore are not
enlarged. ECY Response at 28. Petitioners' reply to this argument is set forth in Sections
IV.C.1 above.

1 but to most Washington court decisions discussing water rights. See discussion of beneficial
2 use in Section IV.C.3.a, above.

3 WSU takes a “flat earth” approach, denying the existence of the rule against
4 enlargement (and associated beneficial use requirements) and mischaracterizing Petitioners’
5 claims. WSU Response at 47-48. Petitioners merely seek enforcement of the fundamental rule
6 of beneficial use, i.e., that WSU cannot revive and thereby enlarge water rights that were lost
7 as a result of the University’s own mismanagement. WSU created its own problems by
8 seeking water rights in excess of its needs, failing to perfect, lapsed use, not keeping current on
9 its rights, etc. WSU must be held responsible for the illegal condition of its water rights
10 portfolio.
11

12 WSU argues that the Municipal Water Law is not relevant to this issue. WSU
13 Response at Section IV.D.6. However, the PCHB did interpret the Municipal Water Law to
14 find that WSU’s Certificates 5070-A and 5072-A are protected from relinquishment, so it does
15 have relevance. Petitioners do agree that many of the PCHB’s errors derive from
16 misinterpretation of existing statutes.
17

18 Ecology and WSU finally contend that WSU could have, by law (i.e., RCW
19 90.44.100(3)), deepened or replaced its wells in order to physically access more water under its
20 rights. Petitioners’ response to this argument is set forth in Section IV.D.2, below (discussing
21 SEPA issues). In a nutshell, Ecology’s statutory duties to process water right amendments
22 pursuant to RCW 90.44.100(2) are not alleviated or excused based on what WSU “might have
23 done” under a separate statute.
24

25 **Relief Requested.** The Court should rule that the PCHB committed error in approving
26 WSU’s water right amendments to allow it to withdraw more water than it had actually used in

1 the past. This was error of law. RCW 34.05.570(3)(d). Insofar as the PCHB relied on the
2 Municipal Water Law to find that WSU's lapsed non-use was insulated from loss, that
3 represents misapplication of the Municipal Water Law. RCW 34.05.570(3)(a), (d).

4 **5. WSU has not exercised reasonable diligence in putting its rights to use.**

5 The PCHB erred in finding that WSU has exercised reasonable diligence in putting its
6 water to use. SJA at 25-27. Petitioners contend that WSU's decades-long failure to perfect or
7 use water do not meet statutory or common law standards, and that the PCHB should not have
8 deferred to Ecology's permit writer on the question of whether WSU has exercised diligence.
9 Pet. Op. Br. at 32-37.

10 Ecology first responds that WSU's 1962 and 1963 community and domestic supply
11 certificates are protected as municipal water rights, that they have never been fully exercised,
12 and that they are subject to review for diligence. ECY Response at 29. As discussed above,
13 Petitioners disagree that these certificates were municipal rights during the 40 year period from
14 1962/63 to 2003, when the Municipal Water Law was enacted. See Section IV.C.1, above.
15 Petitioners do agree that these certificates were never fully perfected and that all water rights
16 (municipal or otherwise) are subject to reasonable diligence requirements. RCW 90.03.320.

17 Ecology next argues that it is entitled to deference in finding that WSU has exercised
18 diligence in the past, citing *Port of Seattle*. ECY Response at 30-31. But, the proffered reason,
19 that "unique circumstances facing an educational institution" justify WSU's extraordinary
20 delay in developing its water rights is unexplained. Nor does Ecology explain its failure to
21 place a new construction schedule on all but one of WSU's rights, nor how WSU's enrollment
22 or other institutional needs justify a lengthy (seemingly unending) span of time for perfection,
23 nor how WSU's conservation efforts would fit into a schedule to perfect its rights. For
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1 Ecology, reasonable diligence is nothing more than a throw-away concept used to excuse
2 WSU’s failure to put its rights to use. The PCHB should not have deferred to Ecology’s
3 conclusory and unsupported statements and this Court should reverse.

4 Ecology concludes by arguing something new, that WSU “wants to retain its remaining
5 inchoate water quantities” to serve future enrollment or campus programs, citing WSU’s
6 response brief regarding “the nature of WSU as an institution.” ECY Response at 31. But
7 there I no evidence to show how WSU might be able to reasonably triple its pumping in the
8 future. Moreover, it is odd that Ecology is informing the Court of WSU’s intent, while WSU is
9 silent, except to adopt Ecology’s argument. WSU Response at 46.

11 Even if the Court considers WSU’s unexplained “intent” to use all of its paper water
12 rights for unspecified future use, this represents classic water rights speculation. WSU has no
13 water system plan showing a need for three times the amount of its current use. Only one of its
14 six water rights has a development schedule and even that is not premised on information
15 demonstrating WSU’s need to triple its current use. Speculation in water rights is not allowed
16 under Washington water law. *Hallauer*, 143 Wn.2d at 140 (law of prior appropriation evolved,
17 given limited nature of resource, to encourage beneficial use and reject speculation); *RD*
18 *Merrill*, 137 Wn.2d at 131 (“RCW 90.44.100 cannot be used to speculate in water rights”);
19 *Theodoratus*, 135 Wn.2d at 595; *Thorp v. McBride*, 75 Wash. 466, 469, 135 P. 228 (1913)
20 (preservation of water for unknown future use is speculation which the law will not justify).

23 To the extent that Ecology argues for a special “university” exception to the reasonable
24 diligence rule, that exception does not exist in the law. This fallacy is particularly evident in
25 the context of this case. WSU is one of four major pumpers in a groundwater system that is
26 “experiencing a long-term and troubling trend of declining water levels that, if not adequately

1 addressed, will eventually threaten all water users in the basin.” CP 89 at 3 (Findings of Fact,
2 Conclusions of Law and Order). WSU is no more important than any other user in the Palouse
3 Basin, i.e., the University of Idaho, the cities of Pullman and Moscow, and small residential
4 and irrigation users. In this context, WSU should not and cannot be afforded special status to
5 ignore the reasonable diligence requirements of water law.
6

7 **Relief Requested.** The Court should find that there is not substantial evidence to
8 support the PCHB conclusion that WSU has exercised reasonable diligence in putting its rights
9 to use. The Court should further find that WSU’s rights are not protected from diligence
10 requirements by virtue of the Municipal Water Law and that WSU has not met legal
11 requirements for diligence. RCW 34.05.570(3)(d).
12

13 **D. Municipal Water Law Derivative Claims**

14 **1. Introduction**

15 In finding that WSU could utilize its full quantity of paper water rights, the PCHB
16 effectively ruled that laws designed to analyze the impacts of physical enlargement were not
17 applicable. The issues in this section address the consequences of the PCHB’s reliance on the
18 Municipal Water Law (as well as failure to implement other non-use laws) to allow
19 enlargement of WSU’s rights.
20

21 **2. State Environmental Policy Act (SEPA) claims.**

22 The Board ruled that a new environmental threshold analysis was not necessary
23 because the Municipal Water Law authorized WSU to exercise the full quantity of its water
24 rights and therefore no new impacts (such as exacerbated aquifer declines) would occur as a
25 result of the water right amendments. The Board also ruled that there was no “new
26

1 information” to trigger SEPA review by Ecology. SJA at 46-49; Pet. Op. Br. at IV.D.2 (pp.
2 37-41). See ECY Response at 39-40, 44-45, WSU Response at 53.

3 The standard of review for these questions is de novo. While the adequacy of a
4 threshold determination is reviewed under a clearly erroneous standard, that was not the
5 question before the PCHB. Here, Petitioners raise two issues: whether application of the
6 Municipal Water Law to shield environmental review of impacts resulting from WSU’s
7 increased water usage was appropriate, and whether the PCHB misinterpreted the “new
8 information” regulation. These are questions of law. A court’s determination of questions of
9 law under SEPA is de novo. *Dioxin/Organochlorine Center v. PCHB*, 131 Wn.2d 345, 352,
10 932 P.2d 158 (1997).

11
12 ECY first argues that “nothing had changed factually between the time that the DNS
13 was issued by WSU and Ecology prepared” the water right approvals, and therefore there was
14 no “new information” to consider.²⁰ ECY Response at 42. This argument mirrors the PCHB’s
15 conclusion that “[d]eclining water levels in the aquifer have been well-established for many
16 years,” and are known to Ecology. This legally erroneous conclusion completely misstates the
17 regulatory requirement to consider information that is material and not disclosed in the original
18 threshold determination. WAC 197-11-600(3)(b)(ii). It matters not that Ecology was already
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21 ²⁰ Ecology mischaracterizes SEPA by asserting that the statute “does not demand a particular
22 substantive result in government decision making.” ECY Response at 40, ll. 8-9. While
23 Petitioners agree that the statute does not dictate the precise outcome of environmental review,
24 SEPA does require mitigation for adverse impacts identified through its processes. WAC 197-
25 11-030(2)(g), 197-11-660. Hence, Ecology’s failure to study adverse impacts associated with
26 increased pumping from the Grande Ronde Aquifer is not simply procedural error – it means
that negative impacts will not be mitigated. Ecology describes the process for issuance of a
“determination of non-significance” (DNS), ECY Response at 40, ll. 16-18, but omits
description of the intermediate decision that often occurs when adverse impacts are found – the
“mitigated determination of significance” or MDNS that requires the actor to offset the harms
its action will cause. WAC 197-11-350.

1 aware of the fact of the declines in the Grande Ronde Aquifer. What matters is whether
2 Ecology considered how the WSU water right approvals would exacerbate aquifer declines, a
3 significant impact that should have been studied.

4 Ecology argues next that its approvals would not cause enlargement of WSU's water
5 rights, because the decisions would not enable WSU to use any more water than it could have
6 prior to the changes (and therefore there was no impact to the environment). ECY Response at
7 42. This argument derives from various issues discussed Sections IV.C.1 (relinquishment),
8 IV.C.2 (extent and validity), and IV.C.3 (perfection) above. Petitioners incorporate those
9 arguments here.

10 Ecology finally contends that WSU could pump its full rights by means other than
11 seeking Ecology's approval of amendments, i.e., reconstruction or deepening of its wells.
12 ECY Response at 42-44. This defense is not germane. Petitioners' appeal derives from the
13 PCHB's review of decisions made by Ecology, and the errors and omissions therein. What
14 WSU could have done or might have done does not relieve Ecology of its legal obligations to
15 correctly administer the statutes governing amendments to water rights. *Gendler v. Batiste*,
16 158 Wn. App. 661, 673, 242 P.3d 947 (2010); *Wash. St. Coal. for the Homeless v. DSHS*, 133
17 Wn.2d 894, 913, 949 P.2d 1291 (1997). Both Respondents repeatedly raise this argument, but
18 it is nothing more than a hypothetical alternative that never came to pass.

19 In addition, this argument is legally incorrect. WSU cannot reconstruct its wells to
20 pump water that it has relinquished, abandoned or failed to perfect. The well reconstruction
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1 statute, RCW 90.44.100(3), does not operate to revive lost water rights.²¹ Just like the
2 applicable transfer statute, RCW 90.44.100(2), the well reconstruction statute requires that:

3 The construction of a replacement or new additional well or wells at the
4 location of the original well or wells shall be allowed without application to the
5 department for an amendment. However, the following apply to such a
6 replacement or new additional well:

7 . . .

8 (c) if a new additional well is constructed, the original well or wells may
9 continue to be used, but the combined total withdrawal from the original and
10 additional well or wells shall not enlarge the right conveyed by the original
11 water use permit or certificate

12 . . .

13 RCW 90.44.100(3)(c) (emphasis added). As discussed above, water right holders are not
14 allowed to enlarge their rights. Section IV.C.4, *supra*, is incorporated by reference. The
15 enlargement prohibition applies even when the user is deepening an existing well.

16 Finally, WSU asserts that it is “entitled to judgment” based on its argument that
17 Petitioners did not comment on WSU’s SEPA determination. WSU Response Brief at 53.
18 WSU made this argument to the PCHB in its summary judgment motion, CP 24 at 27, and the
19 PCHB expressly stated that it was not resolving this issue. SJA at 47. WSU did not appeal the
20 PCHB’s refusal to resolve the question and WSU may not now interject it into this appeal.

21 **Relief Requested.** The Court should hold that the PCHB misinterpreted the SEPA
22 regulation requiring consideration of new information. To the extent the PCHB relied on the
23 Municipal Water Law to authorize enlargement of WSU’s rights, the Court should find error.
24 The Court should also reject the argument that Ecology’s duties were excused because of
25 WSU’s potential ability to reconstruct its wells. RCW 34.05.570(3)(a), (d).

26 ²¹ Had WSU chosen that route, there might have been litigation in that arena as well. But that
is a road not taken.

1 **3. Impairment & Public Welfare**

2 The PCHB erred in limiting the scope of inquiry into impairment based on a finding
3 that the Municipal Water Law authorized WSU’s full use of its rights. Specifically, the Board
4 stated that it would only “accept evidence that is relevant to whether or not pumping of the
5 quantities authorized by the change from any of the authorized well locations will have a
6 detrimental effect on a lawful existing well or show a substantial cumulative increase in
7 pumping lift . . .” CP 79 at 2 (Order of Clarification Re: Summary Judgment (Jan. 10, 2008)).

8 Ecology responds that this limitation was appropriate because WSU’s water rights were
9 not enlarged by the Municipal Water Law. ECY Response at 46-47. WSU adopts Ecology’s
10 arguments, noting that the Municipal Water Law has nothing to do with the enlargement
11 question. WSU Response at 53-54. If WSU’s rights were improperly enlarged by failure to
12 reduce them due to the Municipal Water Law, failure to perfect, abandonment, or any other
13 reason, then the calculations used to consider the aggregate impact on the Cornelius well and
14 the aquifer as a whole would be incorrect. As noted by the Board, “[t]he Cooper-Jacobs
15 method has notable limitations.” CP 89 at 27 (Final Order at CL 51). Petitioners’ expert, Dr.
16 Kent Keller, did not agree with use of the Cooper-Jacobs method because it is not a reliable
17 indicator of overall impacts of pumping. *Id.* at 27-28. The PCHB accepted the Cooper-Jacobs
18 model results as representing the “relative impact” of WSU pumping on the Cornelius well.
19 The question of the totality of the impact was not considered by the PCHB because it assumed
20 that all of WSU’s water rights were valid and not enlarged.
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24 **Relief Requested.** The Court should find that the PCHB improperly relied on the
25 Municipal Water Law to find that WSU was entitled to pump the full measure of its paper
26

1 water rights and hence the potential impairment to water rights and the public welfare could
2 not be considered. RCW 34.05.570(3)(a), (d).

3 **4. Safe Sustaining Yield claim.**

4 The PCHB erred in ruling that the safe, sustaining yield requirement of RCW 90.44.130
5 is not applicable in the water right amendment process, and that there was no change in the
6 quantity of water that WSU was authorized to pump and thus not basis to conduct a safe,
7 sustaining yield analysis. SJA at 42-44; Pet. Op. Br. at 43-46.

8 Ecology makes four arguments in support of the PCHB decision: (1) that the language
9 of RCW 90.44.130 “obviously” applies only to applications for new water rights; (2) that the
10 safe, sustaining yield test is a restatement of the requirement to conduct a water availability
11 determination that occurs for new water rights, but not amendments; (3) that the groundwater
12 amendment statute, RCW 90.44.100, does not explicitly include or imply a requirement to
13 consider safe sustaining yield; (4) that WSU could pump all of its water without Ecology
14 approval and therefore Ecology was not required to consider safe, sustaining yield. ECY
15 Response at 48-52. WSU adopts Ecology’s arguments. WSU Response at 54.

16 The first sentence of RCW 90.44.130 embodies the rule of priority, which applies not
17 only when a new water right is issued, but throughout the life of a water right. The statute
18 states a continuing obligation to protect priority. There is no reference to “would-be” or
19 “proposed” or “applied for” appropriators and withdrawals that would limit implementation
20 solely to processing of new water right applications.

21 As between appropriators of public groundwater, the prior appropriator shall as
22 against subsequent appropriators from the same groundwater body be entitled to
23 the preferred use of such groundwater to the extent of his appropriation and
24 beneficial use, and shall enjoy the right to have any withdrawals by a
25 subsequent appropriator of groundwater limited to an amount that will maintain
26 and provide a safe sustaining yield in the amount of the prior appropriation.

1 RCW 90.44.130. Ecology argues that this statement “obviously” applies only to new water
2 right decisions. ECY Response at 49, ll. 20-23. There is nothing obvious about it. The first
3 sentence makes more sense if interpreted as applying to existing appropriators. A “subsequent
4 appropriator,” logically, is a party engaged in appropriation. An applicant cannot appropriate
5 water until a permit is issued. RCW 90.03.250 (an applicant “shall not use or divert such
6 waters until he has received a permit from the department”); RCW 90.03.290(3) (water permit
7 application process requires findings in order to issue permit for “proposed” appropriation).
8 An applicant is not a “subsequent appropriator” until the application is approved.
9

10
11 The second sentence of RCW 90.44.130 even more clearly establishes that the statute
12 addresses existing water rights:

13 The department shall have jurisdiction over the withdrawals of groundwater and
14 shall administer the groundwater rights under the principle just set forth, and it
15 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.

16 (Emphasis added.) Again, Ecology is authorized to limit withdrawals by existing
17 “appropriators,” not future or proposed appropriators (aka applicants). The statute does not
18 limit its ambit to new water right applications. One case is relevant.²² RCW 90.44.130 is
19 discussed in *Campbell & Gwinn v. Ecology*, 146 Wn.2d at 18. There, the statute is mentioned
20 as a mechanism for protection of water rights after a groundwater right is created. While safe,
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25 ²² Two cases discuss the requirements of RCW 90.44.130 relating to groundwater management
26 areas, a section of the statute which is not at issue in this case. See *Jensen v. Dept. of Ecology*,
102 Wn.2d 109, 112, 114, 685 P.2d 1068 (1984) and *Flint v. U.S.*, 906 F.2d 471, 473 (1990).

1 sustaining yield was not at issue in that case, the Court notes that RCW 90.44.130 serves as a
2 basis for Ecology to enforce as between existing water rights.²³ *Id.*

3 Ecology next argues that applying the safe, sustaining yield requirement during RCW
4 90.44.100 review would be illogical since safe, sustaining yield analysis is nothing more than a
5 water availability determination, and RCW 90.44.100 review does not require a new analysis
6 of water availability. ECY Response at 49-50. This precisely confirms Petitioners' point. Per
7 *RD Merrill*, Ecology normally does not re-evaluate water availability when it approves
8 changes or transfers of groundwater rights. 137 Wn.2d at 132. But, in the serious
9 circumstance where groundwater levels are declining, RCW 90.44.130 requires a re-evaluation
10 of the status of the diminishing resource in order to protect existing rights and the public
11 interest. RCW 90.44.130 adds on to the limited review required by the RCW 90.44.100
12 amendment process.
13
14

15 Ecology responds that RCW 90.44.100 does not explicitly reference RCW 90.44.130.
16 ECY Response at 51, ll. 3-5. However, that argument also holds true for the new application
17 processing statutes that Ecology asserts do incorporate the safe, sustaining yield requirement,
18 e.g., RCW 90.03.380 and 90.44.060. The failure to reference RCW 90.44.130 in the
19 amendment statute is not legally meaningful.
20
21

22 ²³ Ecology argues that the Washington Water Law treatise excerpt, set forth in App. 3 to
23 Petitioners' Opening Brief, states that RCW 90.44.130 applies only to the evaluation of
24 applications for new water rights. ECY Response at n.21. As with the statute itself, Ecology
25 reads into the text information that is not there. The treatise's statement that "[t]he principles
26 of 'safe sustaining yield' in the code further protects vested ground water rights against later
appropriations" does not express a limitation as to conflicts between existing and proposed
new rights. The term "later appropriations" could refer to proposed applications, but more
logically refers to actual, existing rights.

1 Important policies that inform the statute also support a finding that it must be
2 implemented in the water right amendment process. The purpose of the safe, sustaining yield
3 limitation is to prohibit overdraft or mining of groundwater resources, which occurs when
4 depletion of groundwater is greater than the rate of recharge. Pet. Op. Br., App. 3 (An
5 Introduction to Washington Water Law, pp. V:13 (2000)). Groundwater mining in the Palouse
6 Basin’s Grande Ronde Aquifer is precisely the issue which prompts this appeal. State law
7 directs that Ecology not sit idly by when groundwater resources are at risk. Ecology could use
8 RCW 90.44.130 to directly regulate users within the Grande Ronde system, a more radical
9 approach than what Petitioners seek here, i.e., enforcement of the safe sustaining yield
10 requirement when a water user voluntarily seeks an adjustment of their water rights.
11

12 Ecology finally argues that WSU could exercise the full quantity of its paper water
13 rights and further deplete the Grande Ronde Aquifer without obtaining a consolidation of its
14 rights, and therefore Ecology is not required to intervene. ECY Response at 51, ll. 8-15. This
15 argument is addressed in Section IV.D.2 above (SEPA). In a nutshell, Ecology’s duties under
16 the Groundwater Code are not alleviated based on third party actions that have never occurred.
17 What WSU “might have done” is not relevant to the question of what Ecology was required to
18 do. That is especially true with respect to the obligation to address the problem of groundwater
19 declines in order to protect other water users and the public interest in maintaining longevity of
20 the community water supply.
21

22 **Relief Requested.** The Court should rule that the PCHB committed legal error in its
23 interpretation of safe, sustaining yield requirements, including both the timing of
24 implementation, that the Municipal Water Law authorized enlargement of WSU’s water rights,
25
26

1 and that Ecology was excused from implementation because WSU might have utilized other
2 options. RCW 34.05.570(3)(a), (d).

3 **E. Water Code Claims**

4 **1. Abandonment issue.**

5 Ecology and WSU offer three defenses to abandonment of Water Claim No. 98523.
6 ECY Response at 52-54, WSU Response at 48-51. First, they assert that Petitioners failed to
7 show a long period of non-use of the claim. Second, and related, they assert that the reason
8 Petitioners failed to show a long period of non-use is because WSU was actually pumping the
9 right associated with Claim No. 98523 from an “alternative” well, i.e. Well No. 3, and that this
10 pumping, although unauthorized, demonstrates use of the right. Ecology and WSU also argue
11 that Petitioners failed to prove that WSU intended to abandon the claim.
12

13 Ecology is wrong with respect to the argument that unauthorized changes in the point
14 of withdrawal do not lead to loss of the right for non-use. First, Ecology’s position has been
15 rejected by the Supreme Court. In *OWL v. Twisp*, Ecology made the same argument that “an
16 unauthorized, unprotested change in point of diversion is not evidence of abandonment but
17 instead is evidence of nonabandonment.” *Twisp* at 785. The Court rejected the out-of-state
18 case argued by Ecology, and found that “the town illegally began to draw water from a new
19 source without regard to the 1912 right” and therefore abandoned its original rights. *Id.* at 785-
20 86. In *RD Merrill* the Court reviewed whether a surface water claim had been perfected by
21 diversion from an unauthorized ditch. 137 Wn.2d at 134-38. The Court ruled that such
22 diversion did not perfect the claim and it was therefore ineligible for transfer. *Id.* Unable to
23 obtain judicial approval of its theory of unauthorized transfers, Ecology then wrote it into an
24 informal policy and has continued to apply it in the administrative process. The Court should
25
26

1 reject Ecology’s argument that WSU could preserve its abandoned claim by pumping from an
2 unauthorized well.

3 Second, as Ecology admits, this rule does not exist in Washington law. The only
4 authority the PCHB cited was Ecology’s guidance document, POL 1120, CP 23 at Ex. 2, pp. 5-
5 6, an administrative policy that is fully inconsistent with specific statutory requirements
6 relating to place of use.²⁴ Petitioners’ Opening Brief describes these inconsistencies, including
7 statutes that require water users to incorporate the point of withdrawal as an attribute of a water
8 right, and to apply for changes to their points of withdrawal. Pet. Op. Br. at 48-49. Petitioners
9 also assert that a policy to create a “new qualification or requirement” relating to water rights –
10 which a policy to ignore point of withdrawal requirements certainly does – cannot be adopted
11 without formal rulemaking. *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 399-400, 932 P.2d 139
12 (1997). Neither Ecology nor WSU addressed this argument.
13
14

15 Ecology and WSU ask the Court to rely on out-of-state cases as support for the legal
16 proposition that pumping from an unauthorized point of diversion is a viable defense to
17 abandonment. ECY Response at 53, citing *Russell-Smith v. Water Resources Dept.*, 152 Or.
18 App. 88, 952 P.2d 104 (1998), WSU Response at 13-14 (citing several cases), 50.

19 This approach is problematic for several reasons. There is no Washington authority for
20 this “substantial compliance” approach to water code requirements. Beneficial use is not the
21 only factor that determines how a water right is created and maintained. As set forth in
22 Petitioners’ Opening Brief, the point of withdrawal is an essential component of a water right.
23
24

25 _____
26 ²⁴ Petitioners are not bringing a rule challenge, but do assert that the “unauthorized change”
provision described in POL 1120 is *ultra vires* insofar as the PCHB relied on it to find that
WSU’s purported illegal withdrawals were acceptable indicia of use.

1 Pet. Op. Br. at 48-49, citing RCW 90.44.060, 90.44.080, 90.44.100(2). Respondents do not
2 refute this.

3 Also, *Russell-Smith* is distinguishable. *Russell-Smith* involved a question of statutory
4 forfeiture, not abandonment. After close evaluation, *Twisp* rejected Ecology’s assertion that
5 *Twisp* had merely (illegally) changed its point of withdrawal from the river to wells, rather
6 than abandoning the river diversion. *Twisp* at 785-86. The Court also ruled that statutory
7 relinquishment and common law abandonment are two different concepts. *Id.* at 784. This
8 Court must reject proposals to import laws relating to out-of-state statutory forfeiture into
9 Washington’s common law of abandonment.
10

11 WSU cites *Hutchins*, which was published long before the 1997 decision in *OWL v.*
12 *Twisp*. *Twisp* is the controlling law in this state.
13

14 Third, and importantly, the evidence does not support a finding that WSU was actually
15 pumping Claim No. 98523 from an unauthorized well. While not stated explicitly, WSU
16 implies that Well No. 3 was an alternate point of withdrawal, supplemental to Claim No.
17 98523. WSU Response at 49 and n.37-38. Again, similarities with *Twisp* are uncanny. There
18 is nothing in WSU’s form for (invalid) Claim No. 98524 to indicate that it was supplemental to
19 or in any way connected to Claim No. 98523 and Well No. 2. WSU had full control over the
20 content of its claim form, but did not connect Claims 98523 and 98524. Hrg. Ex. A-6. As in
21 *Twisp*, “[t]here is no explanation of why the annual limitations were determined to be
22 supplemental . . .” 133 Wn.2d at 774. A review of WSU’s water pumpage chronology shows
23 no correlation between Wells 2 and 3, and certainly no proof that Well No. 3 was a substitute
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25
26

1 for any other well.²⁵ Pet. Op. Br., App. 1. As pumping from Well No. 2 fell to zero, pumping
2 in Well No. 3 also declined. WSU also makes the odd argument that Well No. 3 had no
3 independent water right (i.e., it was invalid) and hence pumping from that well had to be
4 pursuant to another right. Yet at the relevant dates, WSU was unaware that its claim was
5 invalid. WSU’s pumping from Well No. 3 cannot demonstrate intent not to abandon Claim
6 No. 98523. The evidence connects neither the two water claims nor the two wells.
7

8 Ecology’s argument regarding unauthorized changes is also bad policy. Washington is
9 no longer the wild, wild West. The grant of a right to use public waters is a privilege, not an
10 absolute right. Compliance with basic water code requirements is essential to orderly
11 management of the public resource. Washington statutes require water users to obtain
12 permission to move points of withdrawal, before the fact, in order to ensure protection of other
13 water users and the source of water itself. RCW 90.44.100; see Pet. Op. Br. at 48-49. This
14 Court should not condone WSU’s illegal acts.
15

16 Ecology also argues that statements made by WSU’s water rights manager, a
17 “layperson,” were not reliable evidence of intent to abandon. ECY Response at 54. First, Mr.
18 Wells was not a layperson, but the 22-year facilities project manager of WSU’s water system
19 who handled complex document. CP at 22, 51. Second, if a finding of intent required an
20 affirmative act by the water right holder, abandonment would never be found. WSU also
21 discusses Mr. Wells’ “brief misunderstanding.” WSU Response at 50. But, as in *Twisp*,
22 implications may be inferred from the evidence. Mr. Wells was authorized to maintain the
23 system, enter into contracts, conduct SEPA review, write water system
24

25
26 ²⁵ Ironically, Permit G3-28278P, which was intended to be supplemental to invalid Claim
98524, actually contains a cross-reference to the claim, something not present in Claim 98524.

1 plans, correspond with Ecology, prepare water right applications, and most importantly, served
2 as the single most knowledgeable person about WSU’s water rights.

3 WSU cites to state policy regarding “incremental increases in enrollment.” WSU
4 Response at 50. Petitioners do not disparage the importance of WSU as an educational
5 institution, but WSU has never connected its institutional goals and a specific projection of
6 future water needs. Nothing of record shows WSU need for more water than it currently uses,
7 or that the change to its water rights was occasioned by an anticipated increase in its
8 enrollment.²⁶ Finally, the enrollment statute cited by Ecology and WSU was adopted in 1993
9 and does not correlate with WSU’s longstanding non-use of Claim No. 98523, which
10 commenced after 1963 and completely ended in 1977.

11 **Relief Requested.** The Court should reject the PCHB’s conclusion that WSU salvaged
12 Claim No. 98523 by pumping from an unauthorized well. Washington law does not allow for
13 it, and there is no evidence whatsoever that WSU was pumping Claim 98523 from Well No. 3.
14 The Court should further find that the evidence shows a long period of non-use of the claim –
15 starting in 1978. That fact raises a rebuttable presumption of abandonment. *Twisp*, 133 Wn.2d
16 at 783. WSU’s present status as a municipal water supplier does not rebut the presumption.
17 *Id.* at 784-85. The Court should also find that WSU intended to abandon the claim through
18 various statements and acts of its employees. A conclusion that the water right was abandoned
19 would result in denial of the change in point of withdrawal. *Id.* at 779. RCW 34.05.570(3)(d).
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²⁶ As WSU reminds the Court, its water usage is actually declining.

1 **2. The PCHB utilized the wrong summary judgment standard for golf course**
2 **water waste issue.**

3 The PCHB erred in finding that Ecology could amend water rights without evaluating
4 WSU’s potential waste of water. SJA at 27-28; Pet. Op. Br. at IV.E.2 (pp. 52-56). The PCHB
5 held first that “the observations of Mr. Cornelius, who is admittedly not an expert in this area,
6 along with the photographs and the temperature data, fail to establish a genuine dispute about
7 the reasonable efficiency of WSU’s water use.” SJA at 28. Second, the PCHB held that
8 “Appellants’ allegations may be more properly evaluated in the context of an enforcement
9 action, which is beyond the purview of this appeal.” *Id.* Both holdings are in error.
10

11 As an initial problem, Ecology misrepresents the PCHB’s holding when it states that
12 the PCHB ruled that “the golf course irrigation is performed in a reasonably efficient manner,”
13 ECY Response at 54, ll. 24-25, “that the change decisions were not contrary to the beneficial
14 use requirement engrained in RCW 90.44.100,” Ecology Response at 55, ll.5-7, and “that the
15 two prongs of the beneficial use requirement were satisfied.” ECY Response at 58, ll. 23-24.
16 In fact, the PCHB’s dismissal on summary judgment precluded Petitioners from obtaining a
17 ruling on precisely this issue, i.e., a claim of wasteful water use by WSU.²⁷
18

19 With respect to Petitioners’ appeal issue, Ecology does not respond. Ecology argues
20 that Scott Cornelius was not an expert. ECY Response at 56-57. However, expert testimony is
21 not needed. Ecology does not cite any authority contrary to *Grimwood*, 110 Wn.2d 355, cited
22

23 ²⁷ Ecology states that the PCHB ruled that WSU’s golf course irrigation constitutes a beneficial
24 use. Ecology Response at 54, ll. 22-24. The PCHB did conclude that irrigation of a golf
25 course could qualify as a beneficial purpose. And Petitioners do not disagree that, in theory,
26 golf course irrigation may be beneficial – and even efficient. Cultivating hay is a beneficial
27 purpose, but that did not prevent the Supreme Court from finding that Clarence Grimes’
28 particular method of irrigating his hay crop was wasteful. *Ecology v. Grimes, supra*. It is not
29 about the purpose. It is about the quantity and manner of use.

1 in Petitioners' Opening Brief. Nor does Ecology offer authority for its assertion that expert
2 testimony is affirmatively required. Instead, Ecology argues that Mr. Cornelius' observations
3 were uncertain. If Scott Cornelius offered opinions on complex algorithms or computer
4 models, that might be a legitimate concern. Here, however, he simply read a thermometer.
5 Indeed, the data offered in the Cornelius declaration can be verified by reference to historic
6 temperature records. It is unreasonable to suggest that expertise is required to report on daily
7 temperatures.
8

9 Ecology argues that Petitioners did not provide expert testimony regarding customary
10 practices for other golf courses. Petitioners submit that this is not the level of evidence
11 required to defeat a summary judgment motion. *Grimes* provides guidance on the types of
12 information needed to determine whether waste of water is occurring. 121 Wn.2d at 468-79.
13 For summary judgment purposes, temperature data and photographs of water use showing
14 erosion and waste speak directly to the *Grimes* factors. Petitioners would have submitted
15 evidence about customary practices had the issue been preserved for trial, but that opportunity
16 was denied.
17

18 Ecology argues that WSU has improved its water use over time and that Petitioners did
19 not demonstrate any issue of material fact as to the campus water system as a whole. ECY
20 Response at 57-58. But this argument is not germane to whether waste was occurring on the
21 golf course. Ecology next argues that Petitioners' arguments relate to golf course construction,
22 not post-construction irrigation. ECY Response at 56-57. The golf course was not constructed
23 at the time Ecology and WSU moved for summary judgment. However, Petitioners contend
24 that waste was occurring at the time of construction and that was contrary to water code
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26

1 requirements. Ecology cites no authority for the proposition that waste of water during
2 construction is legal.

3 Finally, Ecology argues that the PCHB's disclaimer of jurisdiction was not really a
4 disclaimer, and that Petitioners did not cite authority that Ecology must engage in analysis of
5 waste when evaluating change applications. ECY Response at 58, ll. 7-18. Interestingly,
6 Ecology also admits that it is required to analyze whether water rights would be used with
7 reasonable efficiency if the proposed changes in points of withdrawal were approved. ECY
8 Response at 58, ll. 19-20. Reasonable efficiency and waste are two sides of the same coin. A
9 water use that is not reasonably efficient is *per se* wasteful. Ecology is required to investigate
10 a proposed groundwater amendment in the same manner as the original application. RCW
11 90.44.100(2). Investigation of a proposed new water use requires evaluation of the beneficial
12 use of the right, including appropriate quantities for the proposed new purpose. RCW
13 90.03.290(1), (3) (incorporated into the Groundwater Code via RCW 90.44.060). Ecology
14 should have ensured, but did not, that WSU would not waste the public groundwater that is
15 critical to public water supply for Palouse Basin communities.
16
17

18 **Relief Requested.** The Court should rule that the PCHB utilized the wrong standard in
19 finding that Petitioners failed, in not presenting expert testimony, to raise genuine issues of
20 material fact in support of their claim that WSU was wasting water. The Court should further
21 rule that the PCHB erred in concluding that it lacked jurisdiction to consider waste of water in
22 an appeal of RCW 90.44.100 water right amendments. These issues are questions of law
23 reviewed de novo by this Court. RCW 34.05.570(3)(d).
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1 **3. The supplemental permit cannot substitute for WSU’s invalid claim.**

2
3 The PCHB erred in finding that Permit G3-28278P, a supplemental water right, should
4 not be reduced as a result of the finding of invalidity of one of its primary water rights, Claim
5 No. 98524. Findings of Fact, Conclusions of Law and Order at Conclusions of Law (CL) 1-5.
6 See ECY Response at 59-62, WSU Response at 28-29 (describing permit) and 52 (adopting
7 Ecology’s arguments).

8 A supplemental water right is a right that is utilized when the primary right is not
9 available. *Twisp*, 133 Wn.2d at 733 (“supplemental water rights can be used only when the
10 primary right goes unfulfilled”); *Schuh v. Ecology*, 100 Wn.2d 180, 667 P.2d 64 (1983) (to
11 prevent enlargement, change in point of withdrawal limited to what is not already used under
12 federal irrigation right). Ecology contends that (1) the language of the permit supports a
13 finding that that Permit G3-28278P is an independent right and (2) an Ecology guidance
14 document defines the supplemental right to be an alternative source.
15

16 Ecology argues that the permit does not contain disclaimer language to the effect that,
17 if the primary rights to which the permit is supplemental are deemed invalid, therefore the
18 supplemental right is also invalid. Of course, if Ecology thought the primary rights might be
19 invalid, it probably would not have, and certainly should not have, issued the supplemental
20 permit in the first place. As Ecology notes, supplemental rights have been notoriously difficult
21 to interpret. The lack of a disclaimer should not be dispositive of the relationship between G3-
22 28278P and Claim No. 98524.
23

24 It is clear from the face of the permit that it was “legally dependent on” the existence of
25 the claims and certificate to which it was supplemental. Ecology’s guidance document POL-
26

1 1040 defines supplemental rights in a manner that does not effectively distinguish Permit G3-
2 28278P from the primary rights which inform its existence. The policy describing
3 “alternative” water rights, which the PCHB accepted, states that “the water right holder always
4 had the option of full utilization” of the primary right. Here, WSU did not have the option of
5 full utilization because one of the primary rights, Claim No. 98524, was invalid. In addition,
6 Certificate 5070-A is invalid with respect to relinquished and never-perfected quantities.
7 Further, contrary to the assumption set forth in POL-1040, there never was an evaluation of
8 impairment of other users associated with (invalid) Claim No. 98524 –because it is a claim
9 (i.e., a right claimed by WSU under the Claims Registration Act, RCW 90.14.041). The
10 PCHB’s vague conclusion that the permit is “in some ways related to the quantities of WSU’s
11 existing water rights,” Final Order at CL 4, simply sidesteps the fundamental problem– that the
12 permit was issued based on an assumption that the pre-existing claim was valid.
13
14

15 **Relief Requested.** The Court should hold that the PCHB misinterpreted law in finding
16 quantities of water authorized in Permit G3-28278P must be reduced by the amounts set forth
17 in invalid primary rights, including Claim No. 98524. RCW 34.05.570(3)(d).

18 **V. Relief Requested**

19 Petitioners have identified the specific relief sought and the legal basis for relief with
20 respect to each of the issues discussed above. Petitioners also request an award of costs and
21 attorneys fees, should they prevail in this matter. Such award may be made pursuant to RCW
22 4.84.350. Neither Ecology nor WSU opposed this request.
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1
2 **VI. Conclusion**

3 For the foregoing reasons, Petitioners respectfully request this Court find that the
4 PCHB's summary judgment and final orders set forth incorrect interpretations of Washington's
5 water laws as applied to the WSU water right amendments, and that the WSU water right
6 decisions must be vacated and remanded to Ecology with direction to re-issue in accordance
7 with the findings of the Court.

8
9 Respectfully submitted this 20th day of May, 2011.

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