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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**

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9 **IN AND FOR THE COUNTY OF WHITMAN**

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| <p>10 11 SCOTT CORNELIUS, an individual; PALOUSE 12 WATER CONSERVATION NETWORK; and 13 SIERRA CLUB PALOUSE GROUP, 14 Petitioners, 15 16 vs. 17 18 WASHINGTON DEPARTMENT OF ECOLOGY; 19 WASHINGTON STATE UNIVERSITY; and 20 WASHINGTON POLLUTION CONTROL 21 HEARINGS BOARD, 22 Respondents.</p> | <p>No. 08-2-00181-2 DECISION ON PETITON FOR REVIEW OF ADMINISTRATIVE DECISION</p> |
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24 THIS MATTER came before the court as an Administrative Procedures Act appeal from
25 orders entered by the Pollution Control Hearings Board (PCHB) that affirmed decisions issued
26 by the Water Resources Program of the Department of Ecology (Ecology) amending the water
27 rights owned by Washington State University (WSU). Substantial briefing was presented to the
28 court by the parties, and oral argument was presented on June 6, 2011. The appellants, Scott
29 Cornelius, the Palouse Water Conservation Network, and the Sierra Club Palouse Group
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FILED
NOV 03 2011
SHIRLEY BAFUS
WHITMAN COUNTY CLERK

WHITMAN COUNTY SUPERIOR COURT
N. 400 MAIN STREET + P.O. Box 679
COLFAX, WA 99111
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1 (Cornelius) were represented by attorney Rachael Paschal Osborn; Ecology was represented by
2 Assistant Attorney General Alan M. Reichman; and WSU was represented by Assistant Attorney
3 General Frank M. Hruban. At the conclusion of argument, the court took its decision under
4 advisement for further review and consideration. Based on that review, the court hereby
5 enters the following decision.
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8 **BACKGROUND**

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10 In 2004, WSU filed an application with Ecology to amend seven of WSU's water rights.
11 The requested amendment did not seek to increase the total amount of water allocated or the
12 maximum pumping rate allowed under the University's existing rights. Rather, WSU sought to
13 integrate and consolidate its groundwater rights so as to allow the University to draw any
14 authorized quantity of water from any of its seven wells.
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17 Ecology processed WSU's application for amendments, and issued a decision in 2006
18 permitting the requested changes to six of WSU's seven water rights. Central to this decision
19 was Ecology's application of Chapter 90.03 RCW, the Municipal Water Law, which was enacted
20 by the Washington legislature in 2003. Cornelius timely appealed to the PCHB, and in
21 December of 2007, the PCHB issued a lengthy summary judgment order resolving most of the
22 issues in favor of Ecology and WSU, and against Cornelius. Genuine issues of material fact were
23 found to exist with respect to three remaining issues, impairment, public welfare, and
24 enlargement, and these were the subject of an evidentiary hearing held in January of 2008.
25 Detailed findings of fact and conclusions of law were entered by the PCHB based on this
26 evidentiary hearing on April 17, 2008, denying Cornelius' appeal and affirming Ecology's
27 decisions approving the changes to six of WSU's groundwater rights. An Order Denying
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1 Reconsideration was entered in June of 2008, and Cornelius petitioned for judicial review of the
2 various administrative orders with this court in July of 2008.

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4 In September of 2006, a lawsuit was filed in King County Superior Court challenging the
5 facial constitutionality of the Municipal Water Law. Two of the appellants here, along with
6 WSU and Ecology, were parties to that case. In June of 2008, the King County Superior Court
7 ruled that some of the challenged provisions of the Municipal Water Law were facially
8 unconstitutional. This court granted a stay of the present appeal after the Washington
9 Supreme Court granted direct review of the King County decision. The stay was lifted after the
10 Supreme Court issued its decision in *Lummi Nation v. State of Washington*, 170 Wn.2d 247
11 (2010), wherein the court found the Municipal Water Law facially constitutional.

12 13 14 15 16 **STANDARD OF REVIEW**

17 PCHB orders are reviewed under the Administrative Procedures Act, Chapter 34.05
18 RCW. *Public Utility District No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 790 (2002).
19 The court can grant relief under the APA where, among other reasons not applicable here, the
20 order, or statute on which it is based, is in violation of constitutional provisions on its face or as
21 applied; the PCHB's interpretation or application of the law is erroneous; or the PCHB's order is
22 not supported by substantial evidence. RCW 34.05.570(3)(a), (d), and (e). The burden of
23 establishing the invalidity of agency action is on the party asserting invalidity. *Postema v. PCHB*,
24 142 Wn.2d 68 (2000); RCW 34.05.570(1)(a).

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29 In reviewing a summary judgment order, the court engages in the same inquiry as the
30 PCHB. *Bowers v. Pollution Control Hearings Board*, 103 Wn.App. 587 (2000). Summary
31 judgment is appropriate where the pleadings and records on file show that there are no
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1 genuine issues of material fact, and that the moving party is entitled to judgment as a matter of
2 law. CR 56(a). The proper construction or the constitutionality of a statute is a legal question
3 that is reviewed by the court de novo on appeal. *Pend Oreille PUD, supra*, at 790.

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5 With respect to issues decided by the PCHB after a hearing on the merits, the court
6 reviews the PCHB findings of fact for substantial evidence. *Motley-Motley, Inc. v. State*, 127
7 Wn.App. 62 (2005). This standard is highly deferential to the administrative fact finder. *Id.*

10 DECISION

11 On appeal, Cornelius challenges some 18 legal conclusions of the PCHB. A number of
12 these claims are intertwined, and are based on the argument that the Municipal Water Law is
13 unconstitutional as it was applied to the facts of this case by Ecology and the PCHB. The parties
14 have presented comprehensive briefing on the complex issues presented. After carefully
15 reviewing these briefs and the arguments submitted, the court finds that the application of
16 provisions of the Municipal Water Law by Ecology and the PCHB did not violate constitutional
17 principles relating to separation of powers and substantive due process of law. The court finds
18 the reasoning set forth on pages 32-38 of Ecology's Response Brief, and on pages 39-43 of
19 WSU's response brief on this "as applied" question persuasive, and it adopts the same as its
20 rationale for rejecting Cornelius' constitutional challenge. Cornelius simply failed to meet his
21 burden of proving beyond a reasonable doubt that application of the Municipal Water Law in
22 this case violated these constitutional provisions. See, *Sch. Dist. Alliance for Adequate Funding*
23 *of Special Educ. V. State*, 170 Wn.2d 599 (2010).

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25 In its Order on Summary Judgment and in the Findings of Fact, Conclusions of Law and
26 Order that are the subject of this appeal, the PCHB set forth a thorough and detailed analysis of
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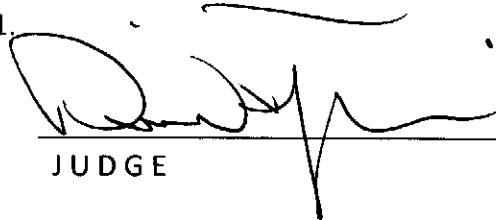
1 the factual issues and the legal principles applicable in determining WSU's amendment
2 application. The factual findings entered as a result of the hearing are supported by substantial
3 evidence in the record, and the Board's legal interpretation, reasoning, and application of the
4 law to the facts is logical and correct. The court is persuaded after reviewing the briefing and
5 argument submitted on appeal that the PCHB did not erroneously interpret or apply the law to
6 the numerous legal issues that were presented. To expedite resolution of this matter at this
7 level, the court will again adopt the reasoning set forth in the Response Briefs of Ecology and
8 WSU as to these various questions, without further discussion or elaboration.
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13 Cornelius did not carry his burden of establishing the invalidity of the agency action of
14 Ecology and the PCHB. The administrative decisions approving WSU's groundwater right
15 change applications to allow the University to consolidate the wells in its campus water system
16 are therefore found to be lawful and correct.
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18 **ORDER**

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20 BASED on the foregoing, it is hereby ORDERED that the PCHB's Order on Summary
21 Judgment, Findings of Fact, Conclusions of Law and Order, and Order on Reconsideration are
22 affirmed.
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24 DATED this 3rd day of November, 2011.

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JUDGE