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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,

Petitioners,

v.

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

Respondents.

No. 08-2-00181-2

PETITIONERS' OPENING BRIEF

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TABLE OF AUTHORITIES

Cases

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1       **I.       Introduction**

2               This case concerns whether Washington State University may lawfully use  
3 substantially more water than it has beneficially used in the past, based upon the Washington  
4 Department of Ecology's amendments to WSU's historical water rights. Ecology's  
5 amendments, and the Pollution Control Hearings Board's approval of those amendments on  
6 appeal, were based on interpretations of provisions of a 2003 Municipal Water Law that the  
7 Washington Supreme Court has since repudiated. Petitioners request that this Court find that  
8 the PCHB's interpretations of the law as applied to WSU's non-use of water and Ecology's  
9 amendments be found unconstitutional and in violation of statutes and law.  
10

11       **II.       Statement of Facts**

12               **A.       Procedural History**

13               This appeal arises out of a set of decisions issued by the Water Resources Program of  
14 the Department of Ecology (Ecology) amending the water rights owned by Washington State  
15 University (WSU). The Petitioners, Scott Cornelius, Palouse Water Conservation Network,  
16 and Sierra Club Palouse Group, appealed Ecology's decisions to the Pollution Control hearings  
17 Board (PCHB or Board), an administrative court located in the Washington State  
18 Environmental Hearings Office that hears appeals of all Ecology decisions.  
19  
20

21               A procedural history of this matter is set forth in the Pollution Control Hearings Board  
22 (PCHB or Board) Order on Summary Judgment (as amended on reconsideration) (Jan. 18,  
23 2008), CP<sup>1</sup> 85 at 4-7, (hereafter "SJA") (appended in App. 4) and the Board's Findings of Fact,  
24

25 \_\_\_\_\_  
26 <sup>1</sup> The abbreviation "CP" refers to Clerks Papers transmitted from the PCHB. The abbreviation  
"Ex." refers to exhibits submitted at hearing before the PCHB on January 22, 23 and 30, 2008.

1 Conclusions of Law, and Order (Apr. 17, 2008), CP 89 at 3-6 (hereafter “Final Order”)  
2 (appended in App. 5).

3 In summary, in 2004 WSU applied to the Department of Ecology’s Water Resources  
4 Program for amendments to its seven water rights that would allow the university to pump any  
5 authorized quantity from any of its seven wells (see Table 1 below for a summary of WSU  
6 water rights. Final Order, App. 4. Petitioners Scotty Cornelius and Palouse Water  
7 Conservation Network filed letters of objection with Ecology detailing their concerns. CP 15,  
8 Att. 4 (Williams Decl.; Osborn letter to Stoffel, DOE with Att. 5); Hearing Exhibit (Ex.) A-27.  
9 Ecology processed the WSU applications and issued decisions in 2006. CP 1 at 3-4 (Notice of  
10 Appeal). Environmental analysis was prepared by WSU. CP 22 (1<sup>st</sup> Wells Decl., Ex. 10).

11  
12 Petitioners timely appealed to the Pollution Control Hearings Board. (Final Order at 5).  
13  
14 In December 2007 the Board ruled on summary judgment (amending its order in January  
15 2008), resolving most of the issues against Petitioners. *SJA, passim*. Three issues were put  
16 over for hearing, which was held in late January 2008. *SJA* at 50. The Board issued a final  
17 order in April 2008 denying all of Petitioners’ claims, and an order denying reconsideration in  
18 June 2008. Final Order; CP 95. Petitioners timely appealed to this court in July 2008 and also  
19 sought direct review by the Court of Appeals, which was denied. CP 1.

20  
21 Meanwhile, in September 2006 a lawsuit was filed in King County Superior Court  
22 facially challenging the constitutionality of certain provisions of the Municipal Water Law,  
23 which figures prominently in the WSU water right decisions. Two of the petitioners, along  
24 with WSU and Ecology, were parties to that appeal, decided *sub nom Lummi Nation v. State of*  
25 *Washington*, 170 Wn.2d 247, 241 P.3d 1220 (hereafter *Lummi Nation*). In June 2008, King  
26 County Superior Court ruled that some of the challenged provisions were unconstitutional.

1 The parties sought and received direct review in the Supreme Court. Based on the status of  
2 that case, the instant appeal was stayed. (Scheduling Order, entered by this Court on Sept. 29,  
3 2009).

4 In October 2010, the Supreme Court ruled in *Lummi Nation* that the Municipal Water  
5 Law is facially constitutional. Pursuant to the stay order, the parties to this matter established a  
6 briefing schedule, now underway. Oral argument is set for June 6, 2011. (Stipulation and  
7 Order re Scheduling, Jan. 25, 2011).

9 Petitioners are lodging with this appeal a voluntary dismissal of Counts 14, 18 and 19  
10 of their Complaint and Petition for Review, which alleged constitutional violations. CP 96.  
11 This dismissal is not a waiver of future constitutional claims. However, pursuant to *Lummi*  
12 *Nation*, Petitioners contend that the PCHB decision violates separation of powers and due  
13 process requirements. These claims are retained and argued, as described below, pursuant to  
14 Administrative Procedure Act standards for judicial review of agency action. RCW  
15 34.05.570(3).  
16

## 17 **B. Facts Relevant to Case**

### 18 **1. WSU Water Rights**

19  
20 WSU holds six water rights, one of which, Claim No. 98524, was denied as invalid by  
21 Ecology in its processing of decisions in 2006. Petitioners appealed Ecology's approval of the  
22 other six rights. The table below provides basic information about each of WSU's rights.  
23  
24  
25  
26

| Water Right Document       | Source                 | Priority Date | Instantaneous Quantity (Q <sub>i</sub> ) Gallons per minute (gpm) | Annual Quantity (Q <sub>a</sub> ) Acre feet per year (afy) | Purpose stated on document              |
|----------------------------|------------------------|---------------|---|--|---|
| Ground Water Claim 098522  | Well - #1              | 1934          | 500 gpm   | 720 afy  | Municipal Supply, Irrigation and stock  |
| Ground Water Claim 098523  | Well - #2              | 1938          | 500 gpm   | 720 afy  | Municipal Supply, irrigation and stock  |
| Ground Water* Claim 098524 | Well - #3              | 1947          | 1000 gpm  | 1440 afy   | Municipal supply, irrigation and stock  |
| Certificate 5070-A         | Well - #4              | Aug. 1, 1962  | 1500 gpm  | 2260 afy   | Domestic supply for WSU                 |
| Certificate 5072-A         | Well - #5              | May 27, 1963  | 500 gpm   | 720 afy  | Community domestic supply & stock water |
| Certificate G3-22065C      | Well - #6<br>Well - #8 | Nov. 12, 1973 | 1500 gpm  | 1600 afy   | Municipal supply                        |
| Permit G3-28278P           | Well - #7              | Jan. 28, 1987 | 2500 gpm  | 2260 afy   | Municipal Supply                        |

Table 1. This table is modeled on a similar table found in each of the Department of Ecology’s Reports of Examination (ROEs or findings) for WSU’s consolidation applications (the decisions appealed) and was also utilized in the PCHB decisions. SJA at 5, See Exs. A-1, A-3, A-7, A-13 A-19, A-24.

Ecology relied on and applied the Municipal Water Law when it processed WSU’s applications for amendments. Ecology found that all of WSU’s water rights were for “municipal water supply purposes” and that because of this, “3,312 acre-feet of inchoate water [is] available for future use by WSU.” E.g., Ex. A-19 at 3, 6 (Report of Examination (ROE) for Water Cert. No. G3-22065C) (all of the approved ROEs contain identical language). Ecology also found that, although WSU had historically not used much of its water rights, “WSU has continued to exercise their right from other sources wells.” *Id.*

WSU holds four types of water rights: two claims, three certificates, and one permit which is also a “supplemental” right. The laws governing the creation, maintenance and amendment of each of these types of water rights are described in Section IV(A)(1), *infra*.

1                                   **2. The decline in Grande Ronde Aquifer water levels.**

2                   The status of the Grande Ronde Aquifer, source of supply for all of WSU’s water  
3 rights, provides important context for the issues in this case. The condition of the aquifer is not  
4 in dispute. As the Board found:

5                                   [A]ll parties concede the Grande Ronde Aquifer (GRA) is experiencing  
6 a long-term and troubling trend of declining water levels that, if not  
7 adequately addressed, will threaten all water users in the basin. The  
8 testimony and evidence were undisputed in this respect . . .

9 Final Order at 3. Specifically, as noted by the Board and set forth in exhibits, water levels in  
10 the Grande Ronde Aquifer have declined an average of 100 feet since the 1930’s when  
11 measurements began. Final Order at 21-22 (Finding of Fact (FF) 38). These declines have  
12 affected all wells across the basin, including the domestic well owned by Petitioner Scott  
13 Cornelius, who recorded a decline of 12.5 feet over fifteen years. Final Order at 18-19 (FF 30).  
14 Petitioners Sierra Club Palouse Group and Palouse Water Conservation Network also have  
15 many members who depend on the Grande Ronde Aquifer for drinking water, either  
16 individually or as customers of public water suppliers. Ex. A-27, Att. 5; Final Order at 17-19  
17 (FF 28-30).

18                   The Final Order set forth a physical description of the Grande Ronde Aquifer at pp. 19-  
19 22 (FF 32-40) where the Board further found that:

20                                   The extent and availability of groundwater resources in the GRA are  
21 poorly known, due in part to a lack of precise information about the  
22 aquifer’s rate of recharge. It is therefore impossible to predict with any  
23 degree of certainty how long the water in the GRA will last.

24 Final Order at 20 (FF 35). With respect to the causes of GRA declines, the PCHB found that:

25                                   The GRA is a declining aquifer because the pumpage from the GRA  
26 exceeds the amount of recharge into the GRA. . . . Increases in aggregate  
pumping from the GRA in the Pullman-Moscow region will necessarily  
cause water-level declines within the aquifer . . . .

Final Order at 21 (FF 36-37).

1 Water level declines are a very serious problem for Palouse Basin communities who are  
2 dependent on the Grande Ronde Aquifer as a “sole source aquifer.” Ex. A-27.

3  
4 At present, the only recognized method to slow or reverse GRA declines is to reduce  
5 pumpage. The increase in potential water usage created by the WSU water right amendments  
6 as approved by the PCHB represents a dramatic step in the wrong direction. As the Board  
7 noted, consolidation of WSU’s water rights will unquestionably increase WSU’s access to and  
8 ability to pump more water. SJA at 29. The fact of the over-appropriated water source at issue  
9 in this case demonstrates why it is critical that beneficial use provisions of water law apply to  
10 municipal water suppliers.  
11

12 **3. WSU’s historic non-use of its water rights.**

13 WSU’s non-use of water is substantial. As noted in the Reports of Examination  
14 (ROEs) issued by Ecology, WSU has historically used only approximately one-third of the  
15 rights it holds on paper, i.e., only 1977 acre-feet per year (afy) pumped, as compared to a total  
16 of 5300 afy authorized on paper. Ex. A-1 at 3. A key exhibit in this matter, CP 52, Ex. 2 (2nd  
17 Supp. Wells Decl.), sets forth tables showing WSU’s water usage from each well for each year  
18 the well has been utilized through 2006. See Appendix 1 (WSU Pullman Campus Water  
19 System – Annual Volumes Pumped in Acre-Feet).<sup>2</sup>  
20

21 All parties relied on this striking exhibit, which was produced by WSU’s water  
22 department staff. CP 52 at 2; Ex. 2. (2nd Supp. Wells Decl.) This chart demonstrates WSU’s  
23

24 \_\_\_\_\_  
25 <sup>2</sup> This table was derived from another table that tracked WSU’s pumpage in million gallons per  
26 year. CP 20, Ex. 1 (Ryan Decl.) The acre-feet/year table is utilized because of easier  
comparison with the quantities set forth in WSU’s water rights, which are also quantified using  
the acre-feet/year measurement. One acre-foot per year equals a total annual volume of  
325,851 gallons.

1 substantial non-use of its water rights, the factual predicate for Petitioner’s original appeal to  
2 the PCHB, and many of the claims of error alleged herein. The chart is particularly helpful  
3 when reviewed in tandem with the WSU water rights table set forth in the ROEs and Table 1  
4 above, *see* Section II(B)(1), which identifies the maximum quantity available to WSU for each  
5 right. For example, the chart confirms that WSU stopped pumping from Well No. 2 in 1978.  
6 See Section IV(E)(1), *infra* (argument re abandonment of Claim No. 98523). It confirms that  
7 WSU has pumped a maximum of 1,090 acre-feet in 1969 from Well No. 4, compared with a  
8 maximum authorization of 2,260 afy in Cert. No. 5070-A which is appurtenant to Well No. 4.  
9 See Sections IV(C)(1), (3), and (5), *infra* (arguments re relinquishment, non-perfection and  
10 enlargement of Cert. 5070-A). It confirms that WSU did not pump from Well No. 5 between  
11 1986 and 1996, and that annual pumpage never exceeded 228 afy, compared to an  
12 authorization of 720 afy in Cert. No. 5072-A, appurtenant to Well No. 5. Table 1, *supra*. *See*  
13 Sections IV(C)(1), (3), and (5), *infra* (arguments re relinquishment, non-perfection and  
14 enlargement of Cert. 5072-A).  
15

16  
17 The pumpage chart is also useful for considering the PCHB’s finding that WSU was  
18 simply pumping quantities authorized by one water right from other unauthorized wells. SJA  
19 at 37-38. The evidence of such a practice simply does not show up in the chart. For example,  
20 the pumping records do not indicate that, when WSU stopped pumping from Well No. 2, it  
21 then began to pump quantities authorized by Claim No. 98523 from Well No. 3. (Well No. 3,  
22 as it turns out, was illegal, *see* Ex. A-5 (ROE denying Claim No. 98524), and Section IV(E)(1).  
23

24 The PCHB acknowledged at various points that WSU had never used the full measure  
25 of its water rights. For example, the PCHB states that “[t]he historical pumping data relied  
26 upon by all parties in this proceeding also shows that the quantities authorized in the

1 certificates far exceeded the amount of water that had previously been put to actual beneficial  
2 use under the permits.” SJA at 20. WSU also acknowledged throughout the proceedings that  
3 its water use has declined over time and that it had never put its water to full use. CP 24 at 5  
4 (WSU PSJ); CP 27 at 3 (2nd Brown Decl.)

5  
6 WSU’s non-use of water is a key fact in this case that, along with the condition of the  
7 Grande Ronde aquifer, animates most of Petitioners’ claims of error in this appeal.

### 8 **III. Standard of Review**

#### 9 **A. Review of Agency Order**

10 This appeal, challenging a decision of the Washington State Pollution Control Hearings  
11 Board, is governed by the Washington Administrative Procedures Act (APA), Ch. 34.05 RCW.  
12 Whitman County Superior Court acts in an appellate capacity, basing its review on the record  
13 created before the agency below, i.e., the PCHB. RCW 34.05.558. Although the record may  
14 be augmented under certain circumstances, Petitioners do not seek to supplement the record.  
15

16 APA judicial review standards provide:

17 (3) Review of agency orders in adjudicative proceedings. The court  
18 shall grant relief from an agency order in an adjudicative proceeding only  
19 if it determines that:

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

22 (b) The order is outside the statutory authority or jurisdiction of the  
23 agency conferred by any provision of law;

24 (c) The agency has engaged in unlawful procedure or decision-making  
25 process, or has failed to follow a prescribed procedure;

26 (d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when  
viewed in light of the whole record before the court, which includes the  
agency record for judicial review, supplemented by any additional  
evidence received by the court under this chapter;

1 (f) The agency has not decided all issues requiring resolution by the  
2 agency;

3 (g) A motion for disqualification under RCW 34.05.425 or 34.12.050  
4 was made and was improperly denied or, if no motion was made, facts  
5 are shown to support the grant of such a motion that were not known and  
6 were not reasonably discoverable by the challenging party at the  
7 appropriate time for making such a motion;

8 (h) The order is inconsistent with a rule of the agency unless the  
9 agency explains the inconsistency by stating facts and reasons to  
10 demonstrate a rational basis for inconsistency; or

11 (i) The order is arbitrary or capricious.

12 RCW 34.05.570(3). Most of the claims brought in this Petition for Review will be decided  
13 pursuant to subsections (3)(a) (constitutionality), (3)(d) (error of law), (3)(e) (substantial  
14 evidence), and (3)(i) (arbitrary and capricious) or a combination thereof.

15 The PCHB was required to interpret and apply the Municipal Water Law to a number  
16 of issues in this appeal. Under the “error of law” standard, this court may substitute its  
17 judgment for that of the agency. *RD Merrill v. Pollution Control Hrgs. Bd.*, 137 Wn.2d 118,  
18 142-43, 969 P.2d 458 (1999). When the inquiry requires construction of a statute, review is de  
19 novo. *Port of Seattle v. Pollution Control Hrgs. Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004);  
20 *Motley-Motley v. Ecology*, 127 Wn. App. 62, 71-71, 110 P.3d 812 (2005). Absent ambiguity,  
21 the Court does not defer to an agency’s interpretation of a statute. *Friends of Columbia Gorge,*  
22 *Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005).

23 The PCHB also made some findings of fact, very few in dispute, particularly relating to  
24 the scope of WSU’s non-use of water. The APA substantial evidence standard applies to such  
25 facts. The Court reviews findings of fact for substantial evidence in light of the whole record.  
26 “A board’s order must be supported by substantial evidence,” and the evidence must be of a  
sufficient quantity “to persuade a fair-minded person of the truth or correctness of the order.”

1 *Suquamish Tribe v. Cent. Puget Sound Growth Mgt. Hrgs. Bd.*, 156 Wn. App. 743, 770, 235  
2 P.3d 812 (2010).

3 Division 3 recently discussed the relationship between the “substantial evidence” and  
4 “error of law” standards in the context of a case involving municipal supply water rights and  
5 relinquishment.  
6

7 [T]he substantial evidence standard applies only to an agency's findings  
8 of facts. *Lee's Drywall Co. v. Dep't of Labor & Indus.*, 141 Wash.App. 859,  
9 864, 173 P.3d 934 (2007). The Hearings Board's order here did not include  
10 findings. And findings are neither necessary nor helpful for our review of a  
11 summary judgment. *Concerned Coupeville Citizens v. Town of Coupeville*, 62  
12 Wash.App. 408, 413, 814 P.2d 243 (1991). There is no dispute over the material  
13 facts here, in any event. Instead, the question before us, specifically whether  
14 Ahtanum meets one of the statutory criteria to excuse nonuse, is a question of  
15 law. *Fort*, 133 Wash.App. at 95, 135 P.3d 515.

16 *City of Union Gap v. Dept. of Ecology*, 148 Wn. App. 519, 525-26, 195 P.3d 580 (2008).

17 The PCHB orders also present a few errors of mixed law and fact. In such  
18 circumstances, this Court determines the law independently, then applies it to the facts as  
19 found by the Board. *Suquamish Tribe, supra*.

## 18 **B. Review of SEPA claims.**

19 For SEPA claims, the standard of review differs from that employed under the APA to  
20 review appeals of agency orders. Agency action under SEPA is evaluated under the clearly  
21 erroneous standard. *Kettle Range Cons. Gr. v. WA Forest Prac. Hrgs. Bd.*, 120 Wn. App. 434,  
22 455, 85 P.3d 894 (2003). Review of the agency decisions on questions of law is de novo,  
23 based on the administrative record. *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning*  
24 *& Land Serv.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003); *City of Univ. Place v. McGuire*, 144  
25 Wn.2d 640, 647, 30 P.3d 453 (2001).  
26

1 The responsible agency, in this case the Department of Ecology, must show that it  
2 considered the relevant environmental factors and that its decision, in this case to not  
3 supplement WSU's mitigated determination of non-significance, was based on information  
4 sufficient to evaluate the proposal's environmental impact. *See Douglass v. City of Spokane*  
5 *Valley*, 154 Wash. App. 408, 422-23, 225 P.3d 448 (2010). Petitioners' SEPA claims are  
6 discussed in Section IV(D)(2), *infra*.  
7

#### 8 **IV. Argument**

##### 9 **A. Basic Elements of Washington Water Law.**

##### 10 **1. Creating and maintaining water rights.**

11 The Supreme Court in *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 7-  
12 8, 43 P.3d 4 (2002) described how water rights are created.

13 Chapter 90.44 RCW, the groundwater code, is supplemental to  
14 the surface water code, chapter 90.03 RCW, and was enacted in 1945 to  
15 extend surface water statutes to the appropriation and beneficial use of  
16 groundwater. RCW 90.44.020. Both the surface water code and the  
17 groundwater code are premised on the doctrine of prior appropriation,  
18 which applies when an applicant seeks to obtain a water right in this  
19 state. RCW 90.03.010; *Postema v. Pollution Control Hearings Bd.*, 142  
20 Wn.2d 68, 79, 11 P.3d 726 (2000); *Neubert v. Yakima-Tieton Irrigation*  
21 *Dist.*, 117 Wn.2d 232, 240-41, 814 P.2d 199 (1991). Under the prior  
22 appropriation doctrine, a water right may be acquired where available  
23 public water is appropriated for beneficial use, subject to existing rights.  
24 RCW 90.03.010. The same is true of groundwater. "Subject to existing  
25 rights, all natural ground waters of the state ... are hereby declared to be  
26 public ground waters and to belong to the public and to be subject to  
appropriation for beneficial use under the terms of this chapter and not  
otherwise." RCW 90.44.040; *see Hillis v. Dep't of Ecology*, 131 Wn.2d  
373, 383, 932 P.2d 139 (1997). RCW 90.44.060 provides that  
groundwater applications shall be made in the same way as provided in  
the surface water code in RCW 90.03.250-.340. Thus, before a  
groundwater permit may be issued to a private party seeking to  
appropriate groundwater, Ecology must investigate and affirmatively find  
(1) that water is available, (2) for a beneficial use, and that (3) an  
appropriation will not impair existing rights or (4) be detrimental to the  
public welfare. RCW 90.03.290.

1           When Ecology finds that a water right application meets the four-part test described  
2 above, the applicant receives a water permit that authorizes the user to commence use of water.  
3 RCW 90.03.290(3), 90.44.050, 90.44.070 (additional requirements for groundwater permits).  
4 The user must exercise diligence in constructing the water works and putting water to use.  
5 RCW 90.03.320. Once water is put to full use, i.e. “perfected,” the user informs Ecology,  
6 which confirms the use and issues a certificate in the amount of water actually appropriated  
7 (which may be less than what was permitted, depending on the user’s needs and project).  
8 RCW 90.44.080. Perfection of an appropriative right is a term of art, requiring that  
9 appropriation is complete only when the water is actually applied to a beneficial use. *RD*  
10 *Merrill* at 129.

12           Water use that commenced prior to adoption of the water codes (1917 for surface  
13 water, 1945 for groundwater) may be documented through a water right “claim” that serves as  
14 indicia of the right. Claims are filed with the Department of Ecology under the Water Right  
15 Claims Registration statute, RCW 90.14.041. Claims are to be (eventually) validated in a  
16 superior court general stream adjudication, and the perfected and continuously used portions of  
17 claims converted into a water right certificates. RCW 90.44.220, .230.

19           Once a water right is established by the above means, the water user maintains the right  
20 by beneficially using it. As noted above, for water permits, this means perfecting the right  
21 with reasonable diligence. RCW 90.03.320. For claims and certificates, this means utilizing  
22 the right continuously. Water rights may be lost for non-use under various mechanisms,  
23 including cancellation, RCW 90.03.320, rescission,<sup>3</sup> relinquishment, *see* RCW 90.14.130, and  
24

25 \_\_\_\_\_  
26 <sup>3</sup> Rescission is an administrative process whereby a water right is rescinded (revoked) because  
the water use was never protected. See, e.g., Dept. of Ecology, PRO 1000 Water Resources  
Program Procedure at Sect. XXIII(B) (rev. 10-23-90).

1 abandonment. *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 777-81, 947  
2 P.2d 732 (1997). The right is lost at the time the non-use occurs. *E.g.*, RCW 90.14.130 (when  
3 it appears a water right has reverted to the state for non-use, Ecology shall then issue an order  
4 of relinquishment).

5 Water users may seek amendments to their claims, permits, and certificates, as WSU  
6 did in this case. It is well settled law that, in determining whether to authorize an amendment  
7 or change to a water right, the Department of Ecology must conduct a tentative determination  
8 of the extent and validity of that right. RCW 90.44.100(2)(c); *RD Merrill v. Pollution Control*  
9 *Hrgs. Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999). If a water right has not been perfected, that  
10 is, put to full beneficial use, then it is not eligible for amendment. Moreover, if a water right  
11 has been extinguished through statutory forfeiture (relinquishment) or common law  
12 abandonment, it is also not eligible for amendment. *PUD No. 1 of Pend Oreille County v.*  
13 *Dep't of Ecology*, 146 Wn.2d 778, 798, 51 P.2d 744 (2002); *Twisp, supra*. If a water right has  
14 been used inefficiently or wasted, the right no longer belongs to the user. *Ecology v. Grimes*,  
15 121 Wn.2d 459, 478-79, 852 P.2d 1044 (1993). As such it also is not eligible for change.

16 When processing an application to amend or change a water right, Ecology's tentative  
17 determination requires evaluation of the history of use of the right. Ecology's own policies  
18 direct permit writers to evaluate year-by-year usage, particularly if there are indications of  
19 historic non-use. CP 23 (2d Brown Decl. in Support of WSU Motion for PSJ, Ex. 2 at 3-4  
20 (POL 1120 at §6)).

21 As is evident from the elaborate statutory procedures for water rights, along with  
22 abundant case law interpreting and augmenting the statutes, "[t]he beneficial and wise use of  
23

1 water has been a public concern since before we achieved statehood,” *Lummi Nation*, 241 P.3d  
2 at 1223, and continues to be so.

### 3 **2. Lummi Nation v. State of Washington**

4 Despite the hornbook requirement that water users actually use their rights in order to  
5 maintain them, the Water Resources Program and its predecessor agencies began a practice in  
6 the mid-20<sup>th</sup> century of issuing certificates to certain water suppliers on the basis of system  
7 capacity (also known as “pumps and pipes”). That practice has been the subject of and is  
8 described in two Supreme Court decisions, *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582,  
9 947 P.2d 1241 (1998) and last year’s *Lummi Nation* decision. In a nutshell, the *Theodoratus*  
10 Court held that Ecology's pumps and pipes policy was contrary to principles of beneficial use  
11 that govern water rights and thus *ultra vires*. That case involved a challenge to a permit by a  
12 non-municipal water supplier and disclaimed explicit application to municipal water  
13 purveyors.  
14  
15

16 In response to the case, the Washington State Legislature enacted the Municipal Water  
17 Law, LAWS OF 2003, 1<sup>st</sup> Spec. Sess., Ch. 5, sometimes known as House Bill 1338 which,  
18 *inter alia*, defined the term “municipal water supply purposes,” RCW 90.03.015(4) and stated  
19 that unperfected certificates held for municipal supply purposes pursuant to the pumps and  
20 pipes policy were water rights in good standing. RCW 90.03.330(3).  
21

22 In 2006, at about the same time the Department of Ecology issued the WSU water right  
23 amendments, the lawsuit that would eventually result in the *Lummi Nation* decision was filed,  
24 challenging the facial constitutionality of certain provisions of the Municipal Water Law. It  
25 worked its way through the courts and a final decision was issued last October. The Court  
26 rejected the facial constitutional claims, but in so doing, made clear that as-applied challenges

1 were not being decided. In order to avoid a finding of unconstitutionality, the Court made  
2 certain findings that serve as controlling precedent for this appeal. *Lummi Nation* was decided  
3 after the PCHB decisions appealed herein, and the decision represents new law that this Court  
4 must utilize in deciding this appeal.

5  
6 In denying the plaintiffs’ facial challenges, the *Lummi Nation* Court made two rulings  
7 that are integral in this case. First, the Court found that to avoid a separation of powers  
8 problem, the Legislature cannot usurp the judicial function by engaging in adjudication of  
9 facts. In other words, the Municipal Water Law cannot be used as a basis to change past  
10 actions relating to water rights, for example, loss for non-use. 170 Wn.2d at 263-65. Second,  
11 in order to avoid due process issues, the Court found that the beneficial use requirements  
12 applicable to water rights were not disturbed by the Municipal Water Law. Indeed, the Court  
13 ruled not only that the law did not alter the requirements of RCW 90.44.100 (the groundwater  
14 change statute) and *RD Merrill* (the seminal case interpreting RCW 90.44.100), but explicitly  
15 cites the change statute and the case as examples of how due process rights are protected. 170  
16 Wn.2d at 270-71.

17  
18 In this appeal, the *Lummi Nation* ruling controls the outcome. As discussed below, the  
19 PCHB relied on the definitions and “in good standing” provisions set forth in RCW  
20 90.03.015(4) and 90.03.330(3) to rule, erroneously, that WSU’s water rights were immunized  
21 from loss by virtue of adoption of the 2003 law. Like the Supreme Court, the PCHB presumed  
22 the Municipal Water Law provisions at issue to be constitutional, SJA at 9-10, but then applied  
23 those provisions in an unconstitutional manner, finding that the law effectively reached back in  
24 time and changed the legal consequences of WSU’s non-use of water.  
25  
26

1 The first pertinent holding of *Lummi Nation* arises from resolution of the separation of  
2 powers argument. To give the statute a constitutional construction, the Court noted that the  
3 Legislature could not adjudicate facts concerning the 'good standing' of particular water rights.  
4 *Id.* at 263. “The legislature made no attempt to apply the law to an existing set of facts, affect  
5 the rights of parties to the court’s judgment, or interfere with any judicial function.” *Id.* The  
6 Court further explained, in evaluating the argument that the Municipal Water Law effectively  
7 adjudicated facts in violation of separation of powers, that

9 [c]onfirming existing rights was a legislative policy decision, not a  
10 factual adjudication . . . Further, while it may be possible to construe  
11 ‘rights in good standing’ to mean that the legislature validated water  
12 rights that had been held invalid, the statute can all be construed to mean  
13 that such water rights will be treated like any other vested right  
14 represented by a water right certificate. We will give statutes  
15 constitutional constructions when possible.

16 170 Wn.2d at 264. In other words, while the Municipal Water Law might be viewed as  
17 prospectively changing the purpose of use of rights, or putting unperfected water rights into  
18 good standing, this broad policy action did not, and could not from a constitutional standpoint,  
19 alter past aspects of WSU’s water rights. If those rights were lost for non-use, the Legislature  
20 could not use the municipal water law to change that fact.

21 The Court explained its ruling by reference to decisions written by Justice  
22 Brachtenbach and Justice Holmes. Justice Brachtenbach evaluated the constitutionality of a  
23 legislative effort to invalidate existing contracts in *City of Tacoma v. O’Brien*, 85 Wn.2d 266,  
24 272, 534 P.2d 114 (1975):

25 A legislature can declare that economic impossibility shall constitute, in  
26 the future, a defense in actions involving contractual disputes. . . .  
Finding that existing contracts, entered into at least 6 months prior to the  
legislation, have become economically impossible to perform, however,  
is a legal conclusion, a result which follows from examination and  
consideration of circumstances in a particular case and interpretation and  
application of legal principles to those facts.

1 170 Wn.2d at 264. And so it is in this appeal. Regardless of the “good standing” of WSU’s  
2 inchoate water right certificates, the Legislature could not and did not make the legal  
3 determination that these existing rights were not lost by operation of law long before the  
4 Municipal Water Law was enacted. Putting a finer point on it, the Court quoted Justice  
5 Holmes:

6  
7           A judicial inquiry investigates, declares and enforces liabilities as they  
8           stand on present or past facts and under laws supposed already to exist.  
9           That is its purpose and end. Legislation on the other hand looks to the  
10           future and changes existing conditions by making a new rule to be  
11           applied thereafter. . .

12 *Id.* Determining whether a given right has been perfected, used beneficially and with  
13 reasonable diligence, or relinquished or abandoned, is a judicial inquiry. To find the Municipal  
14 Water Law constitutional, the *Lummi Nation* court had to find that Legislature did not intend to  
15 change past facts and their legal consequences relating to water rights.

16           In responding to the due process challenges to the Municipal Water Law, the Court  
17 found that “[n]or do the amendments by themselves resurrect any relinquished rights.” *Id.* at  
18 268. Instead, the Court cited RCW 90.03.330(2), enacted as part of the Municipal Water Law,  
19 which states:

20           (2) *Except as provided . . . for the issuance of certificates following the*  
21           *approval of a change, transfer, or amendment under RCW 90.03.380 or*  
22           *90.44.100, the department shall not revoke or diminish a certificate for a*  
23           *surface or ground water right for municipal water supply purposes as*  
24           *defined in RCW 90.03.015 unless the certificate was issued with*  
25           *ministerial errors or was obtained through misrepresentation. . . .*

26 170 Wn.2d at 268, n.12 (emphasis added). The “issuance of certificates” is discussed in the  
same statute, and requires that a water right appropriation be “perfected” before a certificate  
may issue.

1 (1) *Upon a showing* satisfactory to the department *that any appropriation*  
2 *has been perfected in accordance with the provisions of this chapter*, it  
3 shall be the duty of the department to issue to the applicant a certificate  
stating such facts in a form to be prescribed by the director, and such  
certificate shall thereupon be recorded with the department. . . .

4 RCW 90.03.330(1) (emphasis added). Hence, when water right applicants such as WSU apply  
5 to amend their water right certificates, Ecology is required, pursuant to the Municipal Water  
6 Law, to determine what quantities have been perfected, and to “revoke or diminish” those water  
7 rights that do not meet perfection criteria. The Municipal Water Law, according to the  
8 Washington Supreme Court, did not resurrect rights already lost.

9  
10 The Court concludes, in response to due process arguments, that Washington law  
11 provides “considerable process before any change can be made, and any impact on the rights of  
12 others will be at best collateral and indirect.” 170 Wn.2d at 270. The authority for this  
13 proposition? *RD Merrill* and RCW 90.44.100, which direct that the Department of Ecology  
14 “can approve changes to water rights only to the extent they are valid.” *Id.* at 270-271.

15  
16 The Supreme Court avoided an unconstitutional interpretation of the Municipal Water  
17 Law statute by finding that the Legislature could not adjudicate past facts relating to existing  
18 water rights, and that the fundamental rule of beneficial use continues to apply to the  
19 amendment of water rights for municipal water supply purposes. The reasoning and rulings of  
20 *Lummi Nation* are integral to the outcome of this case.

## 21 22 **B. Introduction to Appellate Issues**

23 This is a complicated case, primarily because seven water rights are involved and  
24 multiple issues are raised with respect to each right. This case is complex also because it  
25 involves application of the 2003 Municipal Water Law), a set of amendments to the state water  
26 code that added a fairly abstract layer of legal conditions relating to water rights held for

1 “municipal water supply purposes.” The PCHB relied heavily on its interpretation of the  
2 Municipal Water Law to decide most of the issues below.

3 Notwithstanding the size and legal complexities, the issues in this case arise out of a  
4 relatively simple set of facts involving one of the most fundamental elements of the western  
5 water law: use water rights or lose them. The law requiring actual and continuous beneficial  
6 use of water rights applies in Washington, and is invoked and implemented when a water right  
7 holder seeks to amend their rights, pursuant to RCW 90.44.100, precisely the administrative  
8 process that underlies this appeal. *RD Merrill*.

9  
10 The PCHB improperly applied the provisions of the Municipal Water Law to forgive,  
11 exempt, ignore, or otherwise fail to apply principles of non-use to WSU’s unused water rights.  
12 Petitioners contend that the PCHB interpretations of the Municipal Water Law are erroneous,  
13 based on a reading of statute itself and the recent Washington Supreme Court decision in  
14 *Lummi Nation*. For the sake of clarity, issues presented here are organized into three  
15 categories: primary Municipal Water Law, derivative Municipal Water Law, and water code  
16 claims.  
17

### 18 **C. Municipal Water Law Primary Claims.**

#### 19 **1. The PCHB erred in redefining WSU’s non-municipal certificates (5070- 20 A and 5072-A) as municipal, and then categorically exempting those 21 rights from relinquishment based on the Municipal Water Law.**

22 Two of WSU’s water right certificates, No. 5070-A (issued in 1962) and No. 5072-A  
23 (issued in 1963) were issued for domestic, community domestic, and stockwater purposes, but  
24 were never fully perfected or utilized. According to WSU pumpage records, App. 1, WSU  
25 used Cert. 5070-A (Well No. 4), to pump a maximum of 1,090 acre-feet per year (afy),  
26 compared to a total paper authorization of 2,260 acre-feet. Approximately 1,100 afy in

1 authorized quantities were never used. Cert. No. 5072-A (Well No. 5) was pumped at a  
2 maximum quantity of 228 afy, compared to a total paper authorization of 720 afy. Nearly 500  
3 acre-feet per year in authorized quantities were never used.

4 In PCHB Legal Issue No. 1, WSU moved for summary judgment on the question  
5 whether the university met the definition of a municipal water supplier. CP 24 at 3-4, 16-18  
6 (WSU Motion for PSJ). The Board found that it presently meets the definition, but declined to  
7 decide Petitioners’ contention that WSU was not in the past a municipal water supplier,  
8 holding that such argument would raise constitutional issues outside the jurisdiction of the  
9 Board. SJA at 10-11 and n.5.

11 In PCHB Legal Issue No. 2, WSU also moved for summary judgment on the question  
12 whether each of its water rights qualified as a municipal supply right pursuant to RCW  
13 90.03.015(4). CP 24 at 5-11, 18-19 (WSU Motion for PSJ). The Board examined each of  
14 WSU’s 6 rights and held that each is presently being utilized for municipal purposes as defined  
15 in the statute. SJA at 11-16. Again, the PCHB declined to determine whether retroactive  
16 application of the definitions was unconstitutional. SJA at 16.

18 In Legal Issue No. 3, the Department of Ecology moved for summary judgment on the  
19 question whether provisions of the Municipal Water Law “excuse consideration and  
20 application of applicable criteria for an application to change a groundwater right.” CP 29 at  
21 6-9. (Ecology Motion for PSJ). Here, the Board’s response is confusing. The Board granted  
22 summary judgment to Ecology, finding that the Municipal Water Law does not excuse  
23 consideration and application of legal factors, SJA at 17, but then added that these factors are  
24 “affected by the application of the MWL,” including “Ecology’s determination of the validity  
25  
26

1 and extent of the groundwater rights for municipal supply purposes based on past beneficial  
2 use.” SJA at 17-18.

3 Hence, although the PCHB said that it was ruling that the Municipal Water Law did not  
4 change the law, it actually ruled the opposite, and then applied that ruling to various claims  
5 regarding non-use.  
6

7 In Legal Issue No. 4, Ecology moved for summary judgment on the question whether  
8 the agency improperly applied RCW 90.03.330(3) to protect WSU’s inchoate certificates from  
9 non-use. CP 29 at 10-15. (Ecology Motion for PSJ). The Board categorized this issue as a  
10 re-hash of Legal Issue No 2, i.e., whether WSU’s water rights were properly re-defined as  
11 municipal supply water rights. SJA at 18-19. The Board did not address Petitioners’  
12 contention that the consequence of converting these rights to municipal water supply purposes  
13 and then exempting them from loss for past non-use was an improper interpretation of the  
14 statute. Presumably the Board considered this to be another constitutional challenge outside its  
15 jurisdiction, but that is not explicitly stated.  
16

17 Finally, in Legal Issue No. 8, the Board explicitly (if briefly) ruled that because all of  
18 WSU’s water rights qualified as municipal supply rights pursuant to RCW 90.03.015(4), they  
19 were therefore categorically exempt from relinquishment due to non-use or non-perfection,  
20 relying on RCW 90.14.140(2)(d). SJA at 33-34.  
21

22 The PCHB’s holdings on these issues are interconnected. First finding that all of the  
23 rights presently qualified as municipal supply rights – even those rights that historically were  
24 issued for other purposes – the Board then retroactively applied that definition to past non-use.  
25 This was error in light of the *Lummi Nation* decision, which held that, to avoid constitutional  
26 problems, the law could not be used to adjudicate past facts. 170 Wn.2d at 263-65.

1 The PCHB also erred in finding that WSU could change the purpose of use of its  
2 groundwater rights. See SJA at pp. 14-16, for three reasons. First, the decision violated rules  
3 set forth in *RD Merrill*, 137 Wn.2d at 130-31 and *West Richland v. Dept. of Ecology*, 124 Wn.  
4 App. 683, 692-93, 103 P.3d 818 (2003), prohibiting changes in purpose of use of groundwater  
5 rights. Second, the Board used incorrect logic regarding the change of purpose of use under  
6 the Municipal Water Law, RCW 90.03.560 and 90.03.015(4), when it found that a water right  
7 issued for several purposes can be assumed to be a water right for any single one of those  
8 purposes. Finally, the Board relied on insufficient evidence on the question of historic  
9 practices of the Department, based solely on the statement of counsel at oral argument. SJA at  
10 15.  
11

12 WSU has never fully used five of its six water rights. Petitioners sought summary  
13 judgment as to relinquishment of only one water right, Cert. 5072-A (Well No. 5), Ex. A-8.  
14 CP 19 at 3, 10-13 (Apps' Motion for SJ on Issues 7, 8, 9). WSU moved for summary  
15 judgment on this issue with respect to all of its water rights, raising various theories that were  
16 not addressed by the Board (although some were adopted elsewhere in the decision, most  
17 notably the theory that water rights are not subject to loss if they are pumped from  
18 unauthorized points of withdrawal). CP 24 at 21-24. (WSU PSJ Motion). This latter issue is  
19 addressed in Section IV(E)(1), *infra*.  
20  
21

22 Non-municipal supply rights are subject to relinquishment review, even when proposed  
23 for transfer to municipal supply purposes. *City of Union Gap v. Ecology*, 148 Wn. App. at  
24 531-33. If the original use of the non-municipal right has lapsed for more than five years, it is  
25 subject to statutory relinquishment and the water is returned to public ownership. RCW  
26 90.14.160. As is evident in WSU's water pumpage chart, App. 1, four of WSU's water rights

1 were issued in whole or part for non-municipal purposes, and were not used for more than five  
2 years. It is quite plausible that WSU has relinquished some or all of these rights.

3 The Washington Supreme Court held in *Lummi Nation* that RCW 90.03.015(4) and  
4 90.03.330(3) could not operate to adjudicate facts respecting the history of given water right.  
5 170 Wn.2d at 263-65. The Court further held that the Municipal Water Law could not operate  
6 to resuscitate water rights that were lost for non-use pursuant to the prohibition on enlargement  
7 set forth in RCW 90.44.100 and *RD Merrill*. *Lummi Nation* at 268, 270-71. Yet that is  
8 exactly how the PCHB interpreted the law, declining to consider that application of the  
9 present-day law to past facts would be an unlawful interpretation.  
10

11 The PCHB erred in finding that WSU’s water rights, though historically not used, are  
12 exempt from relinquishment because the Legislature effectively re-defined such rights to be for  
13 “municipal water supply purposes.” This constitutional and legal error is reviewed de novo by  
14 this Court, and must be reversed. RCW 34.05.570(3)(a), (d).  
15

16 **2. The PCHB erred in approving use of a simplified determination process**  
17 **for analysis of extent and validity of change applications.**

18 The Board erroneously approved Ecology’s use of a truncated analysis of WSU’s non-  
19 use of its water rights. See SJA at 16-18. The original issue posed by Petitioners questioned  
20 whether the Department of Ecology could rely upon the Municipal Water Law as a basis for  
21 less than complete evaluation of water rights. Ecology asserted at summary judgment that it  
22 could and in fact did use a truncated process (the so-called “simplified tentative  
23 determination”). CP 29 at 6-9. The Board ruled Ecology’s analysis proper. SJA at 18.  
24

25 The Board’s ruling presents errors of law. First, as explained in *Lummi Nation*, the  
26 Municipal Water Law does not excuse consideration of any of the pre-existing requirements

1 for water right amendments. *Lummi Nation* at 270-71. Second, Ecology’s agency policy  
2 authorizing “simplified tentative determinations” is contrary to fundamental requirements of  
3 the water code statutes, is *ultra vires*, and does not provide a valid basis for ignoring WSU’s  
4 historic non-use of its water rights.

5  
6 When processing applications for amendments to water rights, Ecology must conduct a  
7 tentative determination of the extent and validity of the original rights proposed for change.  
8 *PUD No. 1 of Pend Oreille County*, 146 Wn.2d at 793-94; *RD Merrill*, 137 Wn.2d at 127;  
9 *Twisp*, 133 Wn.2d at 778-79. This analysis requires a review of the historic use of the water  
10 right to determine how much water was actually beneficially used, which in turn governs the  
11 quantity available for transfer. *Id.*

12  
13 In 2004, Ecology promulgated a guidance document entitled “POL 1120 Water  
14 Resources Program Policy for Conducting Tentative Determinations of Water Rights,” (Aug.  
15 30, 2004). CP 23 (2d Brown Decl. in Support of WSU PSJ, Ex. 2), which is utilized by Water  
16 Resource Program staff to process water right amendments, discusses when tentative  
17 determinations are made and when not, and describes mechanisms for examining the historic  
18 validity of rights, including examination of actual, beneficial use. POL 1120 states:

19  
20 Generally, tentative determinations include examination of the record of  
21 historic use. Year-by-year demonstration of water use may not be  
22 required for the evaluation. However, yearly water use records may be  
appropriate if such records are available, if there are allegations of non-  
use, or if the proposed action prompts a closer examination of the water  
right record. . . .

23 CP 23, Ex. 2 at 3. The guidance document explains the importance of investigating “whether  
24 the materials support a pattern of consistent water use,” and that a “prolonged period of non-use  
25 should be a signal to the investigator” to obtain “a clearer picture of historic water use.” Permit  
26

1 writers are directed to “[e]valuate the instantaneous and annual quantities of water withdrawn  
2 and put to beneficial use.” *Id.* at 4.

3 All this is consistent with statutes and case law. However, the policy also creates an  
4 exception to the requirement to analyze historic use. Ecology staff may utilize a “simplified  
5 tentative determination” when the “existing right is for a municipal water supply in accordance  
6 with RCW 90.03.330(3).”<sup>4</sup> CP 23, Ex. 2 at 3 (§5(c)). For municipal rights, “an investigation of  
7 the complete history of the water right is not required.” *Id.* Elsewhere the policy notes that,  
8 “[f]or simplified tentative determinations (conducted on water rights where forfeiture is not an  
9 issue), year-by-year demonstration of water use is generally not required. . .” *Id.* (§6).  
10

11 Ecology’s permit writer testified at deposition that he conducted only a simplified  
12 determination and ignored WSU’s historic non-use of water, reviewing water use records only  
13 from 1989 through 2004.<sup>5</sup> CP 35 at 4-5 (Apps’ Response to Motions of Ecology and WSU for  
14 PSJ); CP 31, Att. 1 at 22-23 (2d Osborn Decl.) Ecology’s truncated review is also reported at  
15 page three of each Report of Examination under the heading “Water Use.” Exs. A-1, A-3, A-7,  
16 A-13 A-19, A-24. The permit writer believed the “in good standing” provision of RCW  
17 90.03.330(3) immunized WSU’s water rights from forfeiture and thus historic non-use was  
18

19 \_\_\_\_\_  
20 <sup>4</sup> RCW 90.03.330(3) states: “This subsection applies to the water right represented by a water  
21 right certificate issued prior to September 9, 2003, for municipal water supply purposes as  
22 defined in RCW 90.03.015 where the certificate was issued based on an administrative policy  
23 for issuing such certificates once works for diverting or withdrawing and distributing water for  
municipal supply purposes were constructed rather than after the water had been placed to  
actual beneficial use. Such a water right is a right in good standing.”

24 <sup>5</sup> Q: Do you remember how far back in time the records went?

A: The report of exam indicates I reviewed the records from 1989 through 2004.

25 Q: And do you have a recollection that you looked at time frames going any further  
26 back in time that that?

A: I don’t recall that I did review anything prior to that.

CP 31, Att. 1 at 22-23 (2d Osborn Decl.)

1 irrelevant to his investigation. Hence, through application of an informal policy, Ecology  
2 exempted from its usual detailed review not only inchoate “pumps and pipes” certificates, but  
3 all water rights held by WSU. Lack of perfection, lack of diligence, relinquishment and  
4 abandonment were not investigated as they would have been for non-municipal rights.  
5

6 In ruling that Ecology was correct in using the simplified determination process, SJA at  
7 16-18, the Board committed error that permeated the appeal. Virtually all of the Petitioners’  
8 issues arise out of the PCHB’s holding that WSU’s historic non-use of water was exempt from  
9 water code requirements for perfection and beneficial and continuous use of water. This error,  
10 compounded with the Board’s finding that all of WSU’s water rights were, retrospectively, *de*  
11 *facto* municipal water rights, was fundamental legal error, for two reasons.

12 First, although RCW 90.03.330(3) put inchoate municipal rights “in good standing,” it  
13 did not exempt them from the review of non-use required when a water user applies for an  
14 amendment. RCW 90.03.330(2) establishes that it is during the amendment process that  
15 Ecology is authorized to revoke or diminish the quantity of water right. This provision was  
16 critical to the *Lummi Nation* decision, where the challenged sections of the Municipal Water  
17 Law were found facially constitutional precisely because the law preserved the tentative  
18 determination process. *Lummi Nation* at 270-71.  
19

20 Second, Ecology’s guidance document was *ultra vires*. Ecology lacked authority to  
21 adopt a policy that contradicted statutory requirements. *Mills v. Western Wash. Univ.*, \_\_\_  
22 Wn.2d \_\_\_, 246 P.3d 1254, 1258-59 (2011). In *Mills*, the Court discussed the well-known rule  
23 that “agency rules must be promulgated in accordance with a legislative delegation.” This  
24 requirement applies not only to “rules with a capital ‘R,’” i.e., rules promulgated pursuant to  
25 APA requirements, but as well to all agency “regulations, orders, directives or policies.” *Mills*  
26

1 at 1258 (*Mills* involved a challenge to use of a faculty handbook that had not been promulgated  
2 as a rule); *State v. Brown*, 142 Wn.2d 57, 62-63, 11 P.3d 818 (2000) (Department of  
3 Corrections infraction rules, not adopted under the APA, held inconsistent with governing  
4 statute).

5 Ecology's POL 1120, which has not been promulgated as a formal rule, must  
6 nonetheless comport with the statutes that authorize the agency's actions. The offending  
7 section of this policy, Section 5(c), is on its face intended to implement the "in good standing"  
8 provision of the Municipal Water Law. The bulk of POL 1120 is consistent with RCW  
9 90.44.100(2), which prohibits enlargement of water rights during amendment and requires a  
10 close examination of the history of use of a water right to achieve that goal. Section 5(c) is,  
11 however, an *ultra vires* policy. *Theodoratus*, 135 Wn.2d at 587 (discussing Ecology's forty-  
12 year *ultra vires* policy of granting certificates based on system capacity). The exemption  
13 afforded to municipal rights by Ecology's POL 1120 is outside the legislative delegation of  
14 authority to the agency. .

15 The PCHB's acceptance of Ecology POL 1120 "simplified tentative determination"  
16 process as a basis for evaluating WSU's non-use was error of law and predicated on the  
17 constitutional error of retroactively re-defining all of WSU's water rights as being for  
18 "municipal water supply purposes." See Section IV(C)(1), *supra*. RCW 34.05.570(3)(a), (d).  
19 This Court applies de novo review to these issues, and must reverse.  
20  
21  
22

23 **3. The PCHB erred in finding that WSU had perfected and beneficially**  
24 **used all of its water rights.**

25 The PCHB erred in finding that the full quantity of WSU's unperfected groundwater  
26 certificates may be changed, including finding that there is no distinction between unperfected

1 permits and certificates. The PCHB further erred in finding that it need not determine actual  
2 perfection of WSU rights. Finally, the PCHB erred in finding that WSU’s water rights are  
3 “presently being put to beneficial use.”

4           Petitioners contended below that WSU Claim No. 98523 and Certificates 5070-A,  
5 5072-A, and G3-22065C were never fully perfected and therefore not eligible for change.<sup>6</sup>  
6 RCW 90.44.100(2); *RD Merrill*. WSU moved for summary judgment, arguing that perfection  
7 requirements do not apply to claims and certificates. CP 29 at 18-19 (WSU PSJ Motion).  
8

9           With respect to the issue of perfection, the PCHB made two erroneous rulings. First, it  
10 relied on its holding that the Municipal Water Law shielded WSU’s rights from loss for non-  
11 use. Second, it held that *RD Merrill*’s prohibition on transfer of unperfected rights does not  
12 apply to groundwater certificates and claims. SJA at 21-25.  
13

14           RCW 90.03.330(2), authorizes Ecology to “revoke or diminish” water rights when they  
15 are evaluated for change pursuant to RCW 90.44.100. Thus the requirement that a water user  
16 demonstrate perfection during the change process, as explicated in *RD Merrill*, continues to  
17 apply to inchoate municipal water rights. The Supreme Court confirmed this view in *Lummi*  
18 *Nation*, 170 Wn.2d at 270-71. Both the Legislature and the Courts recognize that municipal  
19 water suppliers must demonstrate perfection when they seek amendments to their water rights.  
20

21           The PCHB, however, interpreted this statute in a way that makes it effectively  
22 meaningless, employing the “in good standing” status of inchoate municipal rights to bar

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23 <sup>6</sup> The exception to this rule involves changes to groundwater permits, which are inherently  
24 inchoate. Hence, WSU Permit No. G3-28278P is the only one of the suite of rights that is not  
25 subject to showing perfection at the time of change, although the *RD Merrill* decision cautions  
26 that this rule may not be used by parties to speculate in water or lack diligence in putting water  
to use. *RD Merrill* at 130-31. See Section IV(C)(5), *infra*, re WSU’s diligence.

1 revocation of unused water in the change process. SJA at 23. Specifically, the Board ruled  
2 that “under the 2003 Municipal Water Law, the inchoate portion of these certificates need not  
3 have been put to beneficial use . . . . Accordingly, the Board holds that under the 2003 MWL,  
4 Ecology has the authority to change the point of withdrawal of the unperfected or inchoate  
5 portions of water rights documented by certificates.” SJA at 23. According to the PCHB,  
6 WSU’s rights are immunized from the *RD Merrill* requirement that water rights must be  
7 perfected before they can be amended. The PCHB’s interpretation is in error.  
8

9         The PCHB compounded its error by misinterpreting perfection requirements set forth in  
10 *RD Merrill*. The Board found that any type of inchoate water right – permit or certificate – can  
11 be changed. SJA at 22, 23-25. This stands the essence of the *RD Merrill* holding on its head.  
12 That decision carefully distinguishes between permits and certificates, calling out the  
13 groundwater permit as a specific exception. The case focuses on perfection as an essential  
14 element of a water right certification, 137 Wn.2d at 129, noting that “[i]nsofar as RCW  
15 90.44.100 allows amendment to a final certificate of groundwater right, as noted, a certificate  
16 only issues once the right has been perfected, i.e., water has been applied to beneficial use.”  
17 *Id.* at 133.  
18

19         Finally, as a corollary to its finding that unperfected water certificates are not subject to  
20 the *RD Merrill* prohibition on transfer, the Board held that it was “unnecessary for the Board to  
21 resolve the question whether any quantity of water authorized for change . . . is unperfected for  
22 purposes of being lawfully transferred.” SJA at 27. This was error. RCW 90.03.330(2)  
23 provides that the requirements of RCW 90.44.100 apply when municipal water rights are  
24 amended. The Supreme Court has held that RCW 90.44.100 requires that water rights must be  
25 perfected in order to be transferred pursuant to RCW 90.44.100. The PCHB’s faulty logic  
26

1 represents error of law and, compounded by its reliance on an unconstitutional application of  
2 the Municipal Water Law. Its rulings are subject to de novo review by this Court, and must be  
3 reversed. RCW 34.05.570(3)(a), (d).

4 **4. The PCHB erred in finding that amendment of WSU's unused rights**  
5 **would not result in enlargement.**

6 The problem of enlargement is similar to the problem of lack of perfection. The rule,  
7 as set forth in *RD Merrill*, is that the unused and unperfected quantities represented in water  
8 right claims and certificates may not be transferred. Ecology's authorization of the transfer of  
9 unused quantities enlarged WSU's rights, in violation of the prohibition on enlargement found  
10 in RCW 90.44.100(2).  
11

12 Interestingly, the Board acknowledges an important fact that "[i]t is undisputed that the  
13 change/consolidation of WSU's rights will enable WSU to pump more water than it currently  
14 withdraws." SJA at 29. Petitioners agree. Moreover, this fact supports a finding that  
15 enlargement will occur. The Board's approval of Ecology's decisions on this issue was error  
16 of law.  
17

18 As with all issues resolved on summary judgment, the Board assumed that WSU's  
19 water rights represent valid, authorized quantities of water. The Board erroneously described  
20 the governing law, stating that "enlargement prohibits Ecology from authorizing additional  
21 wells for a groundwater right if the combined total quantity withdrawn from the original well  
22 and any additional well(s) enlarges the right conveyed by the original permit or certificate,"  
23 citing RCW 90.44.100(2). What the Board does not cite or reference is the fundamental rule,  
24 explained in *RD Merrill*, that water rights (in whole or in part) may not be transferred if they  
25  
26

1 have been lost due to non-use (e.g., abandonment or relinquishment) or lack of beneficial use.<sup>7</sup>  
2 137 Wn.2d at 125-27. Having rejected Petitioners’ arguments regarding lack of perfection,  
3 lack of beneficial use, lack of diligence, relinquishment and abandonment – all on the basis  
4 that the Municipal Water Law operated to protect WSU’s past non-use from loss – the Board  
5 did not even consider that such non-use supported a finding of enlargement.  
6

7 Rather than apply *RD Merrill*, the Board looked to its own precedent to find that no  
8 enlargement had occurred.<sup>8</sup> SJA at 30. The Board also appears to have been swayed by the  
9 argument that, because the law allows WSU to deepen or drill replacement wells without  
10 seeking permission, Ecology is excused from its responsibility to evaluate enlargement. There  
11 is no authority for this proposition. SJA at 29-30.  
12

13 This Court should hold that the PCHB committed both constitutional and legal error in  
14 relying on the Municipal Water Law to find that the statutory prohibition on enlargement in  
15 transfers does not apply. RCW 34.05.570(3)(a), (d).

16 **5. The PCHB erred in finding that WSU exercised reasonable diligence in**  
17 **putting its water rights to beneficial use.**

18 The PCHB erred in finding that WSU has exercised reasonable diligence in putting its  
19 water to use. SJA at 25-27. This ruling presents a mixed question of fact and law, in which the  
20 Board misinterpreted legal requirements for reasonable diligence and substantially misstated  
21

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22 <sup>7</sup> The Court in *RD Merrill* did hold that an unperfected groundwater *permit* may be amended  
23 pursuant to RCW 90.44.100. Petitioners do not challenge amendments to WSU’s one permit  
based on a theory of enlargement.

24 <sup>8</sup> The decision cited by the Board, *Kile v. Ecology*, PCHB No. 96-131 (1997) is not apt. That  
25 case evaluated whether the transfer of a right that was not used because of drought was an  
26 unlawful enlargement of the right. Drought presents “sufficient cause” for non-use and is  
recognized as an exemption to relinquishment. RCW 90.14.140(1)(a). As a result, the unused  
quantities represented in the *Kile* water right were valid and available for transfer.

1 the evidence regarding WSU’s historic development of its water rights, including erroneously  
2 deferring to the Department of Ecology permit writer.

3 The PCHB found, as it must, that WSU had never used most of the water authorized by  
4 its six water rights, despite acquiring those rights between 1935 and 1983. SJA at 25; *see*  
5 App.1. The PCHB also noted that only one of the six rights has a development schedule  
6 establishing the deadline by which water must be put to use, as required by statute. RCW  
7 90.03.260 (requiring construction timelines for putting water to use); 90.03.320 (requiring  
8 reasonable diligence); RCW 90.03.460 (requiring reasonable diligence to protect inchoate  
9 rights).<sup>9</sup> SJA at 26, n.16. Nevertheless, relying on deposition testimony of the Ecology water  
10 permit writer, the Board “deferred” to Ecology in finding that WSU had exercised “reasonable  
11 diligence” in putting its water right to use. CP 28 (Reichman Decl. in Support of SJ, Ex. 3  
12 (Kevin Brown deposition transcript excerpts)).  
13  
14

15 WSU’s failure to put water rights to use over a course of 35 to 70 years does not  
16 constitute reasonable diligence. Washington’s water right construction statute provides:

17 Actual construction work shall be commenced on any project for which  
18 permit has been granted within such reasonable time as shall be  
19 prescribed by the department, and shall thereafter be prosecuted with  
20 diligence and completed within the time prescribed by the department.

21 RCW 90.03.320. If a water permit holder fails to put water to use with reasonable diligence,  
22 the permit must be cancelled. *Id.*  
23

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24 <sup>9</sup> “The Board notes that Ecology only established a date for putting water to full beneficial use  
25 for Permit G3-28278P [citing CP 22 (1st Wells Decl.)]. There is no similar timeline established  
26 for perfecting the substantial inchoate portion of WSU’s other water rights.” SJA at 26, n.16.  
The surprising lack of development schedules for WSU’s five water rights is proof of lack of  
reasonable diligence.

1 The Board’s rationale for finding that WSU had exercised reasonable diligence was  
2 two-fold. First, the Board reasoned that municipal water suppliers are entitled to flexibility.  
3 SJA at 26. Second, the Board deferred to the Department’s permit writer, who testified that he  
4 believed WSU had exercised reasonable diligence. *Id.* This latter finding is discussed below.  
5

6 The reasonable diligence statute sets forth special factors to be considered when  
7 Ecology fixes a construction (diligence) schedule for municipal water suppliers:

8 In fixing construction schedules and the time, or extension of time, for  
9 application of water to beneficial use for municipal water supply  
10 purposes, the department shall also take into consideration the term and  
11 amount of financing required to complete the project, delays that may  
12 result from planned and existing conservation and water use efficiency  
13 measures implemented by the public water system, and the supply needs  
14 of the public water system’s service area, consistent with an approved  
15 comprehensive plan under chapter 36.70A RCW, or in the absence of  
16 such a plan, a county-approved comprehensive plan under chapter  
17 36.70A RCW or a plan approved under chapter 35.63 RCW, and related  
18 water demand projections prepared by public water systems in  
19 accordance with state law.

20 RCW 90.03.320.<sup>10</sup> However, WSU did not allege, nor did the Board find that any of the  
21 above factors excused WSU’s failure to put water to use. Indeed WSU produced evidence  
22 showing that it is serving fewer campus dormitories than in the past. CP 53, Ex 1. (Decl. of  
23 Terry Boston). WSU offered no evidence to prove that it had a schedule for putting water to  
24 use and was exercising reasonable diligence. Indeed, evidence of non-use tended to prove  
25 otherwise.  
26

27 Washington cases contain little discussion of the “reasonable diligence” requirement.  
28 The 1924 case cited by the Board points out that diligence in putting water to use is an  
29 important element of Washington water law. *In Re Alpowa Creek*, 129 Wash. 9, 224 P. 29

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<sup>10</sup> RCW 90.03.460 also provides protection for inchoate water rights, so long as the water right is being applied to beneficial use with diligence.

1 (1924) (calling for “common sense” in determining reasonable diligence, *id.* at 15). A 1930  
2 case involving competing claimants to water in Icicle Creek awarded rights to a junior priority  
3 claimant on the basis of that party’s greater diligence in putting water to use.<sup>11</sup> *State v. Icicle*  
4 *Irr. Dist.*, 159 Wash. 524, 294 P. 245 (1930). The policies that underlie the diligence rule, i.e.,  
5 to prevent speculation in water rights, *RD Merrill*, 137 Wn.2d at 130-31, are especially critical  
6 in view of “concerns about the availability of water resources given ever increasing demands.”  
7 *Theodoratus*, 135 Wn.2d at 593 (citing *Ecology v. Grimes*, 121 Wn.2d at 468). Water users  
8 may seek extensions of time to put water to use and Ecology’s decision “must consider the  
9 ‘good faith’ of the appropriator and the public interests.”<sup>12</sup> *Theodoratus* at 597. Given the  
10 diminishing water levels in the Grande Ronde Aquifer, policies designed to protect the public  
11 interest seem particularly applicable.  
12

13  
14 A 1964 Attorney General opinion found that public utility districts wishing to make use  
15 of water for domestic water supply were subject to the diligence requirements of RCW  
16 90.03.320. AGO 63-64 No. 117. This opinion was issued shortly after the WSU 1962 and  
17 1963 permits (now Certificates 5070-A and 5072-A) were issued for domestic, community  
18

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19 <sup>11</sup> Prior to adoption of the 1917 water code, reasonable diligence was an element of the  
20 common law doctrine of prior appropriation. A party could establish their claim to water by  
21 posting notice of a claim. By diligently putting water to use, the priority date of one’s water  
22 right would “relate back” to the original claim. *RD Merrill, supra*, 131 Wn.2d at 136-37. Thus  
23 “reasonable diligence” was an essential component of establishing a common law water right  
24 and many early cases involved fact-intensive inquiries over exactly how much diligence had  
25 occurred. The statutory permit system eliminated the need for exercising diligence to establish  
the priority date, RCW 90.03.340, 90.44.060, but the reasonable diligence requirement was  
retained to prevent speculation and require that unused water be returned to the public domain  
for re-appropriation. See Tarlock, *Law of Water Rights and Resources*, § 5.64 (Intent to  
Appropriate – Administrative Determination) (July 2010), App. 3.

26 <sup>12</sup> WSU provided no evidence that it had ever sought an extension, nor even that it had ever  
had a construction schedule for its claims and certificates.

1 domestic and stockwater supply. Exs. A-8, A-10, A-14. The AG opinion reveals a  
2 contemporary understanding that public water suppliers were subject to reasonable diligence  
3 requirements.

4 Washington law does not support the PCHB’s legal conclusion that WSU exercised  
5 reasonable diligence in putting its water to use. The Board’s concern regarding the need for  
6 flexibility for municipal water suppliers is expressly contemplated in RCW 90.03.320. The  
7 Board was wrong to rule that WSU has been diligent in its use of water, particularly given the  
8 exceedingly long history of non-use of most of WSU’s water rights, the lack of construction  
9 schedule for all but one of the WSU rights, and the lack of evidence showing how and when  
10 WSU intended to put water to use.

11 The PCHB also improperly deferred to Ecology on the factual question of whether  
12 WSU had engaged in reasonable diligence. While the Supreme Court has stated that deference  
13 to Ecology’s implementation of water law is appropriate under certain circumstances, that  
14 deference disappears when Ecology’s interpretations conflict with the plain language of a  
15 statute. *Port of Seattle*, 151 Wn.2d at 612 (citing *Theodoratus*, 135 Wn.2d at 589). Moreover,  
16 as discussed in Section IV(C)(2), *supra*, the Ecology permit writer did not evaluate the history  
17 of WSU’s water usage prior to 1989. Here, Ecology’s basis for deciding that WSU exercised  
18 diligence in putting water to use does not comport with statutory intent that water be put to use  
19 in a reasonable timeframe.

20 The PCHB’s holding that WSU had diligently used its rights, relying on the Municipal  
21 Water Law and special interpretation of statutes to provide “flexibility” for municipal rights  
22 was legal error. The PCHB’s deference to Ecology on the question of whether WSU had  
23 exercised diligence was also legal error, insofar as deference was not warranted, and also not  
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26

1 supported by substantial evidence. Pursuant to RCW 34.05.570(3)(a), (d), and (e), this Court  
2 should reverse.

3 **D. Municipal Water Law Derivative Claims:**

4 **1. Introduction**

5 The PCHB's reliance on the Municipal Water Law as a reason to not apply non-use  
6 principles and to permit enlargement of WSU's rights led to erroneous outcomes for three  
7 additional legal issues. This second category of Petitioners' claims arises from the Board's  
8 approval of Ecology's failure to consider the physical impacts of WSU's ability to increase  
9 pumping from the Grande Ronde Aquifer as a result of the water right amendments. Holding  
10 as a matter of law that WSU was not required to perfect water rights before amendment and  
11 that there was neither enlargement nor loss for non-use, the Board then concluded that claims  
12 alleging Ecology's failure to consider adverse physical impacts could not be considered.  
13

14 As argued in Section IV(C)(4), *supra*, Petitioners contend that the amendments allowed  
15 WSU to enlarge its rights. WSU now has the legal and physical capability to increase its  
16 pumping, which is likely to cause further declines in the Grande Ronde Aquifer and adversely  
17 impact groundwater levels and pumping by other parties. CP 19 at 13-18 (Apps' PSJ re Issues  
18 7, 8D, 9B). Such adverse impacts, and the failure to consider them, violate several laws as set  
19 forth below.  
20

21 **2. The PCHB erred in ruling that Ecology was not required to supplement**  
22 **SEPA review based on its finding that enlargement of WSU's water**  
23 **rights was authorized by the Municipal Water Law, and further erred**  
24 **in finding that the "new information" mandate of WAC 197-11-600(3)**  
**did not apply.**

25 The Board erred in finding that SEPA review regarding impacts to groundwater was  
26 not required based on finding that the Municipal Water Law authorized enlargement of WSU

1 water rights. *See* Sections IV(C)(4), *supra*. The Board also erred in finding that Ecology was  
2 not required to consider “new information” (i.e., previously undisclosed information) about the  
3 mining of the Grande Ronde Aquifer as part of Ecology’s review of WSU’s water right  
4 amendment applications.

5  
6 WSU’s water right amendments, exceeding 2,250 gallons per minute, were subject to  
7 review under the State Environmental Policy Act, Ch. 43.21B RCW (SEPA). WSU, a state  
8 agency, appointed itself as “lead agency” for SEPA purposes and prepared the initial SEPA  
9 checklist in support of its water right transfers. The SEPA checklist did not discuss the  
10 declining groundwater levels in the Grande Ronde Aquifer, or how those water levels would be  
11 affected if WSU were allowed to consolidate its water rights and physically increase its  
12 pumping of groundwater.<sup>13</sup> SJA at 5; CP 22, Ex. 10 (1st Wells Decl.) WSU then issued a  
13 “determination of non-significance” for the transfers, finding there were no water resource  
14 impacts. SJA at 5; CP 22, Ex. 10 (1st Wells Decl.)

15  
16 The Department of Ecology, when processing WSU’s applications to amend its water  
17 rights, relied on WSU’s SEPA checklist and DNS. Ex. A-1 at 6-7. Although requested by  
18 Petitioners, Ecology did not undertake any evaluation of further declines in Grande Ronde  
19 Aquifer levels that would occur as a result of the approval of the WSU water right  
20 amendments. There was no discussion or analysis of the potential impact of exacerbated  
21 groundwater declines in any of the environmental documents. Ex A-1 at 6-7.  
22

23  
24  
25 <sup>13</sup> The PCHB stated that the DNS did not “specifically” discuss groundwater declines in the  
26 Grande Ronde Aquifer. In fact, the DNS did not discuss this topic at all. CP 22, Ex. 10 (1st  
Wells Decl.)

1 Both Petitioners and WSU moved for summary judgment on issues relating to the  
2 SEPA claims. CP 17 (Apps' Motion for SJ on Issue 17) and CP 24 at 27-28. (WSU's Motion  
3 for PSJ on Issue 17). The PCHB awarded judgment to WSU, holding that the "change itself  
4 does not allow any more water to be withdrawn on an instantaneous or annual basis than is  
5 allowed under the existing scheme of water rights." SJA at 48. The Board also held that there  
6 was no lack of material disclosure of environmental impacts because declining water levels in  
7 the Grande Ronde Aquifer have been known about and studied for years.<sup>14</sup> SJA at 49.

9 Because WSU did not disclose or discuss groundwater impacts associated with  
10 amending its water rights, Ecology should have supplemented the SEPA documents. State  
11 SEPA regulations not only authorize, but require agencies to conduct additional, independent  
12 environmental review when "new information" about a project becomes available. WAC 197-  
13 11-600(3)(b)(ii). Importantly, the term "new information" means "lack of material disclosure"  
14 of significant environmental impacts. Specifically, the regulation states:

16 When to use existing environmental documents.

17 (1) This section contains criteria for determining whether an  
18 environmental document must be used unchanged and describes when  
19 existing documents may be used to meet all or part of an agency's  
20 responsibilities under SEPA.

20 (3) Any agency acting on the same proposal shall use an  
environmental document unchanged, except in the following cases:

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

22 (b) For DNSs and EISs, preparation of a new threshold  
determination or supplemental EIS is required if there [is]:

23 (ii) New information indicating a proposal's probable significant  
24 adverse environmental impacts. (This includes discovery of

25 \_\_\_\_\_  
26 <sup>14</sup> The Board rejected WSU's argument that Petitioners had waived SEPA claims by not  
objecting to WSU's Determination of Non-Significance. SJA at 47. WSU did not appeal that  
decision.

1 misrepresentation or lack of material disclosure.) A new threshold  
2 determination or SEIS is not required if probable significant adverse  
3 environmental impacts are covered by the range of alternatives and impacts  
4 analyzed in the existing environmental documents.

5 WAC 197-11-600. Petitioners asked Ecology to invoke its authority to consider undisclosed  
6 information regarding probable significant adverse environmental impacts, i.e., that increased  
7 pumping caused by consolidation of WSU's water rights would exacerbate declines in Grande  
8 Ronde Aquifer water levels. Exs. A-27, A-28. Ecology declined to investigate, Ex. A-1 at 6-8,  
9 and the PCHB affirmed. SJA at 42-44.

10 The Board's committed error in two ways. First, the Board erred in finding that,  
11 because WSU was not enlarging its water rights through the amendments, there would be no  
12 impact on the aquifer. SJA at 49 ("this water right change does not authorize any increased  
13 pumping or total annual withdrawals beyond the amounts currently allowed by existing  
14 rights.") This ruling was wrong for two reasons.

15 First, as discussed throughout this brief, the amendments did unlawfully enlarge  
16 WSU's water rights. The Board's interpretation of the Municipal Water Law as a shield to  
17 prevent evaluation of enlargement was premised on an unconstitutional reading of the statute.  
18 *Lummi Nation, supra*.

19 Second, the question of lawfully authorized quantities was irrelevant to consideration of  
20 environmental impacts. Consolidation of WSU's rights would allow it to pump more water,  
21 Ex. A-27, at 1-2, an action with a probable and adverse physical impact. The purpose of SEPA  
22 is to evaluate impacts associated with actions taken or authorized by public agencies. When  
23 evaluating WSU's water right applications, Ecology should have considered how the  
24 environment would have been affected by its contemplated action. Simply because an activity  
25 is lawful (or because an agency believes it to be lawful) does not exempt it from SEPA review.  
26

1 Taken to its logical conclusion, this theory would mean that no action would ever receive  
2 environmental review.

3 The PCHB also ruled that the “new information” regulation did not apply because there  
4 was no “lack of material disclosure” in the WSU documents that Ecology utilized. The  
5 Board’s reasoning belies a fundamental misunderstanding of the purpose of the regulation.  
6 The Board stated that “[d]eclining water levels in the aquifer have been well-established for  
7 many years, and are the subject of multiple studies and action by Ecology.” SJA at 49. Hence,  
8 “[t]here was no new information sufficient to trigger any requirement to prepare additional  
9 environmental analysis.” *Id.* The problem was not, however, that the fact of water levels  
10 declines was not known. Rather, the problem alleged by Petitioners was that the impacts were  
11 not considered in the context of decisions that might exacerbate those declines. New  
12 information was needed. *Kiewit Const. Group, Inc. v. Clark Co.*, 83 Wn. App. 133, 920 P.2d  
13 1207 (1996).  
14  
15

16 The Board’s reliance on the Municipal Water Law to find that WSU would not enlarge  
17 its water rights was constitutional error. Its interpretation of the SEPA regulation regarding  
18 new information was error of law. This Court should reverse. RCW 34.05.570(3)(a), *H.J.*  
19 *Dev., Inc., supra; Douglass v. Spokane Valley, supra.*  
20

21 **3. The PCHB erred in finding that the impairment and public welfare**  
22 **inquiries required for groundwater right amendments were limited**  
23 **based on its finding that enlargement of WSU’s water rights was**  
24 **authorized by the Municipal Water Law.**

25 The Board erred in limiting the scope of evidentiary inquiry into impairment based on  
26 finding that the Municipal Water Law authorized enlargement of WSU water rights. Similarly,

1 the Board erred in finding that there was no detriment to the public welfare based on finding  
2 that the Municipal Water Law authorized enlargement of WSU water rights.

3 WSU moved for summary judgment on Petitioners' claims that the water right  
4 amendments would impair Mr. Cornelius' water rights and pose a detriment to the public  
5 welfare. CP 24 at 25-26 (WSU motions for PSJ). While the Board declined to order summary  
6 judgment on these issues, the summary judgment ruling substantially limited the scope of  
7 evidence that Petitioners would be allowed to submit at hearing. SJA at 39-42, 45.

8 Specifically, the Board prohibited Appellants from presenting evidence to show that "the  
9 consolidation of the rights may allow WSU to pump more of its authorized rights from a  
10 declining source aquifer than is presently possible from its existing wells," nor "whether an  
11 increase in the aggregate amount of WSU withdrawals will generally contribute to lowering  
12 the level of the Grande Ronde Aquifer." SJA at 42. Instead, the Board strictly limited  
13 Petitioners to submittal of evidence showing only that the change in location of WSU's  
14 pumping would cause interference with private wells, equating the public interest inquiry  
15 solely with impairment.  
16  
17

18 As with most of the claims in this appeal, the Board's interpretation of the Municipal  
19 Water Law to ignore the enlargement caused by amendment of WSU's water rights was  
20 contrary to the findings in *Lummi Nation*. This Court should find the PCHB's limitations on  
21 Petitioners' ability to submit evidence regarding impairment and public welfare to be  
22 constitutional and legal error, and reverse. RCW 34.05.570(3)(a), (d).  
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**4. The PCHB erred in finding that the “safe sustaining yield” mandate of RCW 90.44.130 did not apply based on its finding that enlargement of WSU’s water rights was authorized by the Municipal Water Law, and further erred in finding that the safe sustaining yield inquiry does not apply in the groundwater amendment process.**

The Board erred in finding that safe, sustaining yield analysis was not required based on finding that the Municipal Water Law authorized enlargement of WSU water rights. The Board further erred in finding that analysis of “safe, sustaining yield” occurs only when a water right is first issued, and not in the change process. SJA at 42-44. These errors were matters of constitutional and legal interpretation and this Court reviews them de novo. RCW 34.05.570(3)(d).

Petitioners alleged that consolidation of WSU’s water rights would allow WSU to expand its pumping and thereby contribute to depletion of groundwater in the Grande Ronde Aquifer, in violation of a state statute law that explicitly prohibits groundwater depletion. CP 17 at 3, 13-14 (Apps' Motion for SJ re Agreed Issues No. 17A, No. 17B and No. 17C); CP 45 at 3-4 (Apps' Reply Brief on SEPA Issues 17A, 17B, 17C); CP 15 (Decl. of M. Patrick Williams, Att. 1, Brackney Decl.)). Pursuant to RCW 90.44.130, Ecology is required to manage groundwater rights to prevent over-pumping of aquifers and maintain a “safe, sustaining yield” of groundwater. The Board made factual findings, and no party disputed, that groundwater levels in the Grande Ronde Aquifer were in serious decline. Final Order (FF 35-38). Nor did WSU or Ecology dispute that WSU’s pumping is contributing to that decline.

WSU moved for summary judgment, arguing that it had the right to pump the full measure of its paper rights and that the safe, sustaining yield statute did not apply to the

1 amendment process. CP 24 at 25-27 (WSU's Motion for Partial SJ); CP 23 at 7-8; Ex. 6 (1st  
2 Brown Decl. 8/27/07). The Board granted summary judgment on two grounds. SJA at 42-44.

3 First, the Board ruled that RCW 90.44.130's groundwater management mandate applies  
4 only when a new water right is issued and "does not apply to a change in a water right." SJA  
5 at 44. This ruling, interpreting the statute, is legal error. The statute gives Ecology broad  
6 authority and a mandate:  
7

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

21 RCW 90.44.130. The Board inferred the first sentence to limit Ecology's authority, but the  
22 statute nowhere states that it applies only when new water rights are issued. On the contrary,  
23 when carefully parsed, the statute establishes a standard that could apply only *after* water  
24 rights are issued. The prior user is protected "as against subsequent appropriators" and "any  
25 withdrawals by a subsequent appropriator." More importantly, the second sentence directly  
26 authorizes and even mandates Ecology to evaluate safe sustaining yield, describing two  
elements of Ecology's authority: (1) to protect prior appropriators and (2) to enforce the  
maintenance of a safe sustaining yield of groundwater.

27 The only authority cited by the Board in support of its interpretation that safe yield  
28 analysis applies only to new water right applications is to a short section of a water law  
29 treatise published by the Attorney General's Office. That document, however, fails to support

1 the Board’s reading. SJA at 44, fn. 24. See App. 3 (An Introduction to Washington Water  
2 Law, pp. V:12-13). Rather, it cites only the first sentence of RCW 90.44.130, and does not  
3 address the procedural timing of its application. The treatise does note that “[t]he policy  
4 behind this limitation is to prohibit overdraft or ‘mining’ of ground water resources – that is  
5 where the depletion of an aquifer occurs at a rate faster than the natural rate of recharge.” *Id.*  
6 Groundwater mining is of course precisely the problem being experienced with the Palouse  
7 Basin’s Grande Ronde Aquifer. RP 24, 40; Ex. A-27 at 1-3.

9 The Board’s ruling is also faulty as a matter of logic. If the safe, sustaining yield  
10 principle applies only at the time water rights are newly issued, it would never be employed.  
11 It is after water rights have been issued and groundwater levels are in decline that it becomes  
12 apparent that the safe yields are at risk and groundwater users must be limited. In order to  
13 protect prior appropriators (as well as the public interest), Ecology must be able to act after  
14 water rights have been issued. The point at which Ecology is processing water right  
15 amendments is a logical point at which safe yield analysis should be conducted.

17 Finally, the safe, sustaining yield analysis applies regardless of the disposition of the  
18 question of WSU’s immunity from non-use principles. As with the impairment and public  
19 welfare issues, the Board ruled that WSU was legally entitled to exercise all of its water rights  
20 as shown on paper, regardless of non-use, and therefore was not subject to safe, sustaining  
21 yield analysis and limitations. SJA at 11-18. This finding was in error because, as  
22 demonstrated above, a good portion of WSU’s water rights have been lost for non-use.

24 Regardless of WSU’s non-use, the safe yield requirement still applies. It is an  
25 undisputed fact that the Grande Ronde Aquifer is in serious decline. Ex. A-27 at 1-3. By the  
26 terms of statute, Ecology should have used the WSU amendment process as an opportunity to

1 “limit withdrawals . . . so as to enforce the maintenance of a safe sustaining yield.” RCW  
2 90.44.130. The Municipal Water Law was not written to allow its beneficiaries to mine  
3 aquifers, nor to exempt them from regulation when groundwater depletion is occurring.

4 The Board committed constitutional error in finding that the Municipal Water Law  
5 authorized enlargement of WSU’s water rights and therefore analysis of the condition of the  
6 aquifer could not apply. The Board committed legal error in its interpretation of the safe,  
7 sustaining yield standard. This Court should reverse. RCW 34.05.570(a), (d).

9  
10 **E. Water Code Claims**

11 **1. The PCHB erred in finding that WSU had not abandoned Claim No.  
12 98523.**

13 The PCHB erred, in both law and fact, in finding that WSU had not abandoned water  
14 right Claim No. 98523, associated with Well No. 2. SJA at 34-38. Abandonment of a water  
15 right is proven by a long period of non-use accompanied by a showing of intent to abandon.

16 The Washington Supreme Court explained abandonment at length in its 1997 decision in  
17 *Okanogan Wilderness League v. Town of Twisp*:

18 Abandonment is the intentional relinquishment of a water right.  
19 *Jensen*, 102 Wn.2d at 115, 685 P.2d 1068; *Miller v. Wheeler*, 54 Wash.  
20 429, 435, 103 P. 641 (1909). Intent is determined with reference to the  
21 conduct of the parties. *Id.* The burden of proof of abandonment is on the  
22 party alleging abandonment. *Department of Ecology v. Acquavella*, 131  
23 Wn.2d 746, 757, 935 P.2d 595 (1997); *Miller*, 54 Wash. at 436, 103 P.  
24 641; Tarlock, § 5.18[1], at 5-107. Nonuse is not per se abandonment.  
25 Tarlock, § 5.18[1], at 5-106. However, the general rule in western water  
26 law is that nonuse is evidence of intent to abandon, and long periods of  
nonuse raise a rebuttable presumption of intent to abandon, thus shifting  
the burden of proof to the holder of the water right to explain reasons for  
the nonuse. *Id.* at 5-107; *see City & County of Denver v. Snake River  
Water Dist.*, 788 P.2d 772, 776 (Colo.1990) (29 years). *In re Clark Fork  
River Drainage Area*, 254 Mont. 11, 833 P.2d 1120, 1123 (1992) (nonuse  
by city of two water right claims for over 23 years created rebuttable  
presumption of abandonment though city continued to carry claims as  
assets on its books during periods of nonuse); *State ex rel. Reynolds v.  
South Springs Co.*, 80 N.M. 144, 452 P.2d 478 (1969); *Moore v. United*

1            *Elkhorn Mines*, 64 Or. 342, 127 P. 964, 967-68 (1912) (nonuse for 10  
2            years raises rebuttable presumption of abandonment).

3            133 Wn.2d at 781.

4            Both Petitioners and WSU moved for summary judgment on the issue of abandonment  
5            with respect to Claim No. 98523. CP 19 at 2-9 (Apps' SJ Motion re Enlargement,  
6            Relinquishment, Abandonment); CP 24 at 5-8 (WSU Motion for Partial SJ); CP 20, Ex 1  
7            (Ryan 8/27/07 Decl.); CP 21, Ex. 1 (Matuszek 8/27/07 Decl.); CP 22, Ex. 2 (Wells 1st Decl.)  
8            Petitioners' motion was based on the fact that WSU stopped pumping from Well No. 2, to  
9            which Claim No. 98523 is appurtenant, in 1977, thus resulting in 30 years of non-use.  
10           Moreover, subsequent documents prepared by WSU, notably its water system plan, use the  
11           term "abandoned" to refer to the well and the water right. CP 18, Ex.4 at 2 (Osborn 8/27/07  
12           Decl.); CP 19 at 4-9 (Apps' SJ Motion re Issues 7, 8, 9); Exs. A-3 at 3, A-27 at 1, A-28 at 2.  
13           Evidence of a long period of non-use raises a rebuttable presumption that abandonment has  
14           occurred. *Twisp, supra*.

15           WSU also moved for summary judgment, arguing that various documents indicated a  
16           continuing claim of right. CP 24 at 5-11 (WSU Motion for Partial SJ); CP 23, Exs. 3-8 (1st  
17           Brown Decl); CP 22, Exs. 1-7 (1st Wells Decl.). WSU, joined by Ecology, argued that the  
18           university had been pumping the quantities of water authorized by Claim No. 98523 from other  
19           campus wells, notably, Well No. 3.<sup>15</sup> CP 41 at 2-5 (WSU Response re Issues 7, 8D, 9B).

20           WSU pointed to several historic documents, most of which were irrelevant or indicated the  
21           opposite of what WSU intended. For example, WSU's "rebuttal fact" that Permit G3-28278P,  
22           \_\_\_\_\_

23           <sup>15</sup> Well No. 3 was authorized by Claim No. 98524, which Ecology found to be invalid in 2006.  
24           Ex. A-5. Upon learning of the invalidity, WSU then argued that it actually had been pumping  
25           Claim No. 98523 from Well No. 3 throughout the years. CP 41 (WSU Response to Apps. SJ).  
26           This argument of convenience is not supported by the record.

1 appurtenant to Well No. 7, is a supplemental point of withdrawal for Wells 1, 3 and 4 (and  
2 Claims 98522 and 98524 and Cert. 5070-A) does not evince an intent to continue using Claim  
3 No. 98523 and/or Well No. 2. CP at 41.

4           The Board adopted WSU and Ecology arguments, finding “it is not necessary for us to  
5 evaluate in detail the precise quantities of withdrawals WSU exercised under each right via  
6 unauthorized points of withdrawal.” SJA at 37. This was not a supportable approach, given  
7 that there was no evidence in support of a finding that WSU was withdrawing water under  
8 Claim No. 98523 from any well, authorized or not.

9           As a matter of law, the Board erred in holding that illegal withdrawals may be used to  
10 demonstrate a water user’s intent to not abandon a water right. There is no Washington statute  
11 or case law supporting this rule. The Board cited Ecology’s POL 1120 (“Water Resources  
12 Program Policy for Conducting Tentative Determinations of Water Rights,” (August 30,  
13 2004)), CP 23 (Brown Decl. in Support of WSU PSJ, Ex. 2). That document, also discussed in  
14 Section IV(C)(2), *supra*, concludes with a section discussing when and how a permit writer  
15 might approve a “de facto” unauthorized change of water use and thus obviate a finding of  
16 abandonment. POL 1120 places no importance on the laws that require that groundwater  
17 rights are defined in part by their point of withdrawal.

18           RCW 90.44.060 provides that “each applicant to withdraw public groundwater by  
19 means of a well or wells shall set forth the following additional information: . . . (3) the  
20 location of the proposed well or wells or other works for the proposed withdrawal.” RCW  
21 90.44.100(1) and (2), the change statute at issue here, specifically calls out the process of re-  
22 locating wells “at a location outside the location of the original well or wells” as being an  
23 action that triggers the requirement for the user to file an application to amend their rights.  
24  
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1 Water right application forms require applicants to identify the specific point of withdrawal  
2 (i.e., the well location), and permits and certificates identify that point as an attribute of the  
3 right. When Ecology issues a groundwater certificate, it must include “the location of each  
4 well . . . both with respect to official land surveys and in terms of distance and direction to any  
5 preexisting well or wells or works . . . [within] a quarter of a mile. RCW 90.44.080. In  
6 evaluating a proposal to change the location of a point of withdrawal, Ecology must determine  
7 whether there is a change in source of water (which is prohibited), and whether the amendment  
8 would impair other users or the public interest. RCW 90.44.100(2). In other words, there are  
9 many good reasons that the statutes require water users to seek permission before engaging in  
10 self-help in relocating their water rights.  
11

12 Despite the law and reasons behind it, Ecology’s POL 1120 effectively eliminates the  
13 legal requirement that water users comply with the terms of their water rights regarding the  
14 location of their withdrawal. As discussed in Section IV(C)(2) *supra*, Ecology cannot adopt  
15 policies or rules that conflict with statutory requirements. *Mills v. Western Wash. Univ.*, 246  
16 P.3d at 1258-59, *State v. Brown*, 142 Wn.2d at 62-63. The Board’s reliance on Ecology’s  
17 policy of recognizing unauthorized pumping was legal error.  
18

19 Even if Section 6 of POL 1120 is not *ultra vires*, Ecology cannot change fundamental  
20 legal aspects of water rights by simply publishing an informal policy. Formal rulemaking  
21 under the Administrative Procedures Act is required. *Hillis v. Dept. of Ecology*, 131 Wn.2d  
22 373, 399-400, 932 P.2d 139 (1997). In *Hillis*, the Court determined that Ecology’s informal  
23 policy of prioritizing basins and batch processing decisions was a “new qualification or  
24 requirement” relating to a benefit conferred by law, i.e., the processing of water right  
25 applications. *Id.* As such, the Court ordered Ecology to engage in APA rulemaking to allow  
26

1 for public notice and comment “to ensure that members of the public can participate  
2 meaningfully in the development of agency policies which affect them.” *Id.* The Court further  
3 held that “[t]he remedy when an agency has made a decision which should have been made  
4 after engaging in rule-making procedures is invalidation of the action.” *Id.*

5  
6 As in *Hillis*, Ecology’s policy to allow groundwater users to evade loss of water rights  
7 for non-use by claiming withdrawal from unauthorized wells, as occurred with the WSU water  
8 rights, is most certainly a “new qualification or requirement” relating to water rights. If  
9 Ecology wishes to adopt and utilize such a policy, it must do so by formal rulemaking. *See*  
10 RCW 34.05.310-.395.

11 The Board also erred in its factual findings. First, the record does not contain  
12 substantial evidence to support the Board’s finding of “WSU’s undisputed shifting of a portion  
13 of its authorized quantities from its authorized wells to other interconnected but unauthorized  
14 wells . . .” SJA at 36. Indeed, the evidence weighs against this conclusion. App. 1, the table of  
15 WSU “annual volumes pumped in acre-feet” reveals that WSU’s pumping from Well No. 3  
16 (with a claim for 1440 acre-feet) ranged from a maximum of 1019 to a minimum of 83 acre-  
17 feet (before dropping to zero). Until Ecology’s decision in 2006, WSU assumed that pumping  
18 from Well No. 3 was authorized by Claim No. 98524. CP 52 (Supp. Wells Decl. in  
19 Opposition, ¶ 8). WSU never exceeded its claimed volume under Claim No. 98524, nor do the  
20 pumpage numbers reveal that in 1978 or any year thereafter, WSU increased its volume of  
21 pumping from Well No. 3 to compensate for loss of Well No. 2. The App. 1 table flatly  
22 contradicts the PCHB’s finding that WSU’s “continuous pumping from Well No. 3 is evidence  
23 of lack of intent to abandon this water right [Claim No. 98523].” CP 41 at 3-4 (WSU Response  
24 Memo). Similarly, the permit writer’s assertions that he evaluated WSU’s beneficial use and  
25  
26

1 found that Claim No. 98523 was fully perfected and being pumped at another, unauthorized  
2 point of withdrawal lacks foundation in evidence. CP 23 (Brown Decl. in Support of WSU  
3 Motion for PSJ at ¶ 18). The permit writer did not evaluate WSU’s usage, or lack thereof,  
4 prior to 1989.

5  
6 In the end WSU’s Facilities Project Manager, Gary Wells, took the fall, declaring that it  
7 was he, and not the University, who assumed Claim No. 98524 was abandoned. CP 51 (Supp.  
8 Wells Decl. in Opposition at ¶ 7). The analogy to the *Twisp* case is remarkable. *Twisp* didn’t  
9 know it had a lapsed water right until it was so informed by Ecology staff. *Twisp*, 133 Wn.2d  
10 at 784, n.4. As in *Twisp*, Mr. Wells, who represented WSU in the amendment process, did not  
11 know that Claim No. 98523 had not been abandoned until Ecology staff apprised him of the  
12 legal consequences. But, in abandonment analysis, it is the water user’s intent that matters, not  
13 Ecology’s. Similarly, Mr. Wells’ well-meaning but post-hoc declaration should not substitute  
14 for objective evidence showing that WSU had long since abandoned Claim No. 98523.

15  
16 The PCHB’s ruling that pumping from unauthorized wells is proof of beneficial use  
17 that overcomes abandonment is error of law that this Court reviews de novo and should  
18 overturn. The PCHB’s findings that WSU had in fact pumped water authorized by Claim No.  
19 98523 from Well No. 3 is not supported by substantial evidence and should also be overturned.  
20 The PCHB’s finding that WSU abandoned Well No. 2, but not Claim No. 98523, is also not  
21 supported by substantial evidence and should be overturned. RCW 34.05.570(3)(d), (e).

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2 **2. The PCHB applied the wrong summary judgment standard in dismissing**  
3 **Petitioners' claim regarding lack of beneficial use, and further erred in**  
4 **finding that it lacked jurisdiction over this claim.**

5 Petitioners' notice of appeal filed with the PCHB included a claim that Ecology should  
6 not have amended WSU's water rights because the University's use of water for a golf course  
7 was wasteful and therefore not a beneficial use. CP 1 at 4. WSU moved for summary  
8 judgment on this issue. CP 24 at 2, 20. Petitioners responded by submitting material facts,  
9 including the Declaration of Scott Cornelius attaching photographs, local climate information  
10 and other data in support of the alleging of wasteful use of water. CP 32 (Cornelius Decl.)

11 Mr. Cornelius averred that "even though the WSU golf course is under construction and  
12 irrigation has just commenced, it is apparent from photos and local climate information that  
13 WSU is over-watering and wasting water. Cornelius Decl., §§ 3.1-3.5, Att. 6 (photographs).  
14 Specifically, WSU operated its sprinklers in mid-day last summer, when temperatures  
15 exceeded 95 degrees (F), and more importantly, WSU's over-watering has caused run-off and  
16 erosion on the hillsides adjacent to the golf course. Photographs reveal rills and other erosive  
17 impacts that indicate water is running off the irrigated areas rather than soaking into the soil for  
18 uptake by seeded grass." CP 35 at 27-28 (Apps' Response Brief), citing CP 32 (Cornelius  
19 Decl.). Petitioners also submitted information about the condition of the Grande Ronde  
20 Aquifer. CP 15 (1<sup>st</sup> Williams Decl., Att. 1, Brackney Decl.).

21  
22 The PCHB dismissed the water waste claim on summary judgment, ruling that Mr.  
23 Cornelius' testimony was insufficient to establish a triable issue of fact, based on its finding  
24 that "the observations of Mr. Cornelius, who is admittedly not an expert in this area, along with  
25 the photographs and temperature data, fail to establish a genuine dispute about the reasonable  
26

1 efficiency of WSU’s water use.” SJA at 28. The Board acknowledged that water rights must  
2 be exercised with reasonable efficiency, *id.*, but erred in its evaluation of the type of evidence  
3 required to show efficient use (i.e., “water duty”, discussed *infra*). Nor did the Board explain  
4 why Petitioners’ evidence did not meet the summary judgment standard.

5  
6 The PCHB used the wrong standard for determining summary judgment. Procedures  
7 before the Board are governed by the Civil Rules for Superior Court, WAC 371-08-300, except  
8 insofar as the Board uses a relaxed standard for admissibility of evidence, WAC 371-08-500,  
9 which standard should favor the Petitioners evidentiary showing. The Civil Rules provide,  
10 with respect to summary judgment motions, that:

11  
12 Supporting and opposing affidavits shall be made on personal  
13 knowledge, shall set forth such facts as would be admissible in evidence,  
14 and shall show affirmatively that the affiant is competent to testify to the  
15 matters stated therein. . . . [A]n adverse party may not rest upon the mere  
16 allegations or denials of his pleading, but his response, by affidavits or as  
17 otherwise provided in this rule, must set forth specific facts showing that  
18 there is a genuine issue for trial.

19 CR 56(e). The Washington Supreme Court, in discussing this rule, has held:

20 It is apparent that the emphasis is upon *facts* to which the affiant could  
21 testify from personal knowledge and which would be *admissible in*  
22 *evidence*. Thus, there is a dual inquiry as to whether an affidavit sets  
23 forth “material facts creating a genuine issue for trial”: does the affidavit  
24 state material facts, and, if so, would those facts be admissible in  
25 evidence at trial? . . . A fact is an event, an occurrence, or something that  
26 exists in reality. *Webster's Third New Int'l Dictionary* 813 (1976). It is  
what took place, an act, an incident, a reality as distinguished from  
supposition or opinion. 35 C.J.S. *Fact* 489 (1960). The “facts” required  
by CR 56(e) to defeat a summary judgment motion are evidentiary in  
nature. Ultimate facts or conclusions of fact are insufficient.

27 *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (emphasis in  
28 original). Here, Mr. Cornelius’ declaration was based on personal knowledge and facts that  
29 showed waste of water at the WSU golf course. Photographs of water use, run-off and erosion,

1 data about ambient temperature, and the condition of the water source go to the very heart of  
2 water waste questions. In Washington’s seminal case on water right efficiency, *Ecology v.*  
3 *Grimes*, the Court discussed the concepts of reasonably efficiency and water duty, and  
4 analyzed what a water user must show to ensure that water is not being wasted:

5 [B]eneficial use determines the measure of a water right. The owner of a  
6 water right is entitled to the amount of water necessary for the purpose to  
7 which it has been put, provided that purpose constitutes a beneficial use.  
8 To determine the amount of water necessary for a beneficial use, courts  
9 have developed the principle of 'reasonable use'. Reasonable use of water  
10 is determined by analysis of the factors of water duty and waste.

11 . . .  
12 '[Water duty] [is] that measure of water, which, by careful management  
13 and use, without wastage, is reasonably required to be applied to any  
14 given tract of land for such period of time as may be adequate to produce  
15 therefrom a maximum amount of such crops as ordinarily are grown  
16 thereon. It is not a hard and fast unit of measurement, but is variable  
17 according to conditions.'

18 . . .  
19 In limiting the Grimeses vested water right, the referee balanced several  
20 factors, including the water duty for the geographical area and crop under  
21 irrigation, the claimants’ actual diversion, and sound irrigation practices.

22 121 Wn.2d 459, 468-79, 473 (footnotes and citations omitted).

23 In the context of response to a summary judgment motion, Mr. Cornelius’ declaration  
24 was sufficient to put genuine, material facts into issue. As is evident in *Grimwood, supra*,  
25 expert testimony is not required to establish facts sufficient to defeat summary judgment. The  
26 Board’s use of the wrong standard for summary judgment is legal error and must be reversed.

The Board also disclaimed jurisdiction over this issue, stating that “Appellants  
allegations may be more properly evaluated in the context of an enforcement action, which is  
beyond the purview of this appeal.” SJA at 28. Here again, the Board committed legal error.

The Department of Ecology has a duty to process groundwater change applications  
utilizing the same criteria as for new water right applications. RCW 90.44.100(2); *RD Merrill*.  
New applications require Ecology to determine that the water right is for a beneficial use.

1 RCW 90.03.290 (setting forth criteria for new permits); 90.44.060 (extending surface water  
2 permit criteria to groundwater).

3 It is well established that beneficial use governs the basis (purpose), measure (quantity)  
4 and limit (waste prohibition) of a water right. *Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d  
5 1044 (1993). Beneficial use requires that water rights be exercised with reasonable efficiency.  
6 *Id.* Because “[w]ater usage must be reasonably efficient and economical in light of other  
7 present and future demands upon the source of supply,” *id.* at 460, beneficial use is an evolving  
8 concept that is necessarily responsive to the condition of the water resource from which a  
9 water right withdraws. In other words, a water use considered reasonably efficient in the past,  
10 may no longer be so. While Ecology is empowered to bring enforcement actions against  
11 waste, the *Grimes* decision itself arose in a water right adjudication proceeding. There is no  
12 statute or provision in law that limits determination of efficiency to enforcement actions.  
13 Moreover, affirmative findings of beneficial use (including reasonable efficiency) are required  
14 for decisions on new and change applications. RCW 90.44.100(2).

15  
16  
17 The PCHB did not specifically explain why the requirements of RCW 90.44.100 and  
18 *Ecology v. Grimes* do not apply. They cited no authority for the proposition that beneficial use  
19 standards do not apply in a water right amendment proceeding, nor did WSU, in its summary  
20 judgment pleadings, cite any authority for that proposition. CP 24 at 19-21 (WSU Motion for  
21 SJ); CP 41 at 16 (WSU Response Brief). It was, effectively, a bald-faced assertion without  
22 support.  
23

24 Although this issue is set forth at the end of a long brief, Petitioners urge the Court to  
25 appreciate that this is not a throw-away issue. It is critical that the Department of Ecology,  
26 when processing applications to change or transfer water rights, affirmatively determine that

1 water is used with reasonable efficiency. As *Grimes* held, wasted water is not a part of the  
2 user's right. *Grimes* at 478-79. The Board's summary jurisdictional ruling that Ecology is not  
3 required to evaluate the reasonable efficiency prong of the beneficial use standard when it  
4 processed WSU's amendments is unsupported, contrary to specific legal requirements, and  
5 must be reversed. RCW 34.05.570(3)(d).  
6

7 **3. The PCHB Erred in Finding that WSU Permit No. G3-28278P was**  
8 **Supplemental to WSU's Invalid Claim (No. 98524).**

9 The PCHB erred in finding that WSU's Permit No. G3-28278P was supplemental to the  
10 water right claim that Ecology had found invalid. SJA. The Board initially found that the  
11 permit incorporated quantities of water associated with WSU's invalid claim (Claim No.  
12 098524) into the supplemental Permit No. G3-28278P, and that such constituted an unlawful  
13 enlargement of WSU's water rights. *RD Merrill, supra*. Upon reconsideration, the Board  
14 revoked its earlier ruling, directing that the issue proceed to hearing. SJA at 30-33. After  
15 hearing, the Board reversed its earlier ruling and held that "the invalidity of Claim No. 098524  
16 did not require Ecology to subtract the quantities associated with that claim from the quantities  
17 authorized under Permit No. G3-28278P." Final Order at 30.

18 The Board used the same language, found in Permit No. G3-28278P, to first justify its  
19 initial decision to prohibit inclusion of the invalid Claim No. 098524 and then to justify its  
20 subsequent decision that the claim was not related to the Permit. A supplemental right, which  
21 comes into use when a primary right is not available, cannot not be based on a primary right  
22 that is itself invalid. See CP 75 (Apps' Response to WSU Motion for Reconsideration).

23 The Board's finding that the quantities of water represented by WSU's invalid Claim  
24 No. 098524 were properly included in Supplemental Permit No. G3-28278P was legal error  
25 and should be reversed by the Court. RCW 34.05.570(3) (d).  
26

