

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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

Appellants,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY and WASHINGTON STATE
UNIVERSITY,

Respondents.

PCHB No. 06-099

**ORDER ON SUMMARY JUDGMENT
(AS AMENDED ON RECONSIDERATION)¹**

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

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

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

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

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

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

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

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

9 **BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

Summary Judgment Standard

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

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

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

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

10 ***Legal Issues***

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

15 **Legal Issue No. 18: Constitutional Claims.**

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

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

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

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

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

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

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

4 **Legal Issue No. 1: Municipal Water Supplier.**

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

13 Respondents assert, and Appellants concede, that “[u]nder today’s law, WSU fits within
14 the definition of Municipal Water Supplier set forth in the amended RCW 90.03.015.”

15 *Appellants’ Response at 11*. Additionally, Appellants concede that Water Right Certificate G3-
16 22065C (associated with Well No. 6) “does appear to be a certificate issued for municipal water
17 supply purposes.” *Appellants’ Response at 20*. Thus, this right and various other water rights
18 identified as for municipal purposes, and which are used to supply a single integrated campus
19 water system that serves well over fifteen residential service connections, make WSU a
“municipal water supplier.” We conclude that WSU is a municipal water supplier under Ch.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21

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

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

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

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

⁸ This document also acknowledges that certain water rights held by a municipal water supplier, such as for agricultural irrigation and dairy purposes of use, are not generally for municipal purposes, and cannot be conformed to a municipal water supply purpose of use without an application for a change being filed and approved. *Id. at 2, 11* Agricultural irrigation, under certain circumstances, may constitute a municipal supply purpose for certain governmental entities. *Id. at 6*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 **Legal Issue No. 5: Perfection.**

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

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

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

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

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

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

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

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

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

1 limits changes of inchoate groundwater rights to only those documented by permits. The statute
2 itself draws no distinction between permits and certificates with respect to eligibility for change,
3 allowing amendment of both a *permit* and *certificate* of groundwater right. *RCW 90.44.100*.
4 Where the Supreme Court distinguishes permits from certificates in its decision, it does so only
5 to contrast the most common difference: perfection, noting that “a certificate of groundwater
6 right is issued when a water right is perfected.” *R.D. Merrill*, 137 Wn.2d at 129 (internal
7 citations omitted). The *R.D. Merrill* Court simply did not address, or contemplate, certificates
8 authorizing inchoate water quantities such as those at issue in this case and other municipal water
9 right contexts.

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

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

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

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

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

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

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

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

5
6 **Legal Issue No. 6: Beneficial Use.**

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

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

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

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

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

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

19 **Legal Issue No. 7: Enlargement of Rights.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Legal Issue No. 8: Relinquishment.

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

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

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

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

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

10 **Legal Issue No. 9: Abandonment.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 *Id.*

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

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

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

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

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

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

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

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

13 **Legal Issue No. 13: Aquifer Depletion**

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

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

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

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

7 RCW 90.44.130 provides, in relevant part:

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

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

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

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

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

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

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

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

1 **Legal Issue No. 14: Detriment to Public Welfare**

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

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

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

17 The parties have stipulated that the Grande Ronde Aquifer is not hydraulically connected
18 with any surface water body. We therefore conclude that no impairment of surface water rights
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21 ²⁵ This conclusion differs from that contained in the Board's November 1, 2007 letter apprising the parties of the Board's forthcoming opinion.

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

3
4 **Legal Issue No. 16: Improper Delegation.**

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

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

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

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

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

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

15 ²⁶ WAC 197-11-600(3) provides:

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

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

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

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

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

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

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

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

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

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

2 **ORDER**

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

17 DATED this 18th day of January 2008.

18 **POLLUTION CONTROL HEARINGS BOARD**

19 Andrea McNamara Doyle, Presiding

20 Kathleen D. Mix, Chair

21 See separate Concurrence and Dissent
William H. Lynch

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