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No. 35610-8

**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

CROWN WEST REALTY, LLC,

Appellant,

v.

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

Respondents.

**BRIEF OF AMICUS CURIAE
REGIONAL COOPERATIVE OF PIERCE COUNTY
AND
SPOKANE AQUIFER JOINT BOARD**

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I. INTRODUCTION

Statutory protection of municipal water rights from relinquishment due to nonuse of water did not happen overnight or in a vacuum. As set forth herein, there are fundamentally sound policy reasons behind the municipal water supply purposes definition in the Water Code and the municipal exemption from relinquishment. Respondent Department of Ecology's "active compliance" interpretation, which is contrary to these fundamental policies, should not be reviewed in the factual vacuum of one case, but should be illuminated by the larger perspective of how most municipal water systems operate and how they are encouraged to operate by the legislature for the benefit of the public. The parties to this amicus brief hope to demonstrate to the Court of Appeals, Div. III, that "active compliance" is an outlier interpretation that is contrary to the compromises written into the Municipal Water Law by the legislature and upheld twice by the Supreme Court. "Active compliance" would thwart achievement of multiple legislative goals including conservation and encouragement of regional water supplies; it is contrary to public health and safety practices; and it should be rejected as a legal basis for a decision in this case.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

A. Identity of Amicus Curiae

The Regional Cooperative of Pierce County (“Co-op”) is an association of 25 ground water utilities serving the public in Pierce County, Washington. It is comprised of cities, water districts, a public utility district, investor-owned water companies, mutual associations, and cooperatives that operate 213 Group A municipal public water systems serving over 309,000 residential, business, and governmental customers. The watersheds in Pierce County are essentially closed to the issuance of new municipal water rights under current law. *See* WAC chapters 173-510 (Puyallup), 173-511(Nisqually), 173-512 (Chambers-Clover), and 173-515 (Kitsap). Each of the Co-op’s members meet the statutory definition of “municipal water supplier” and hold portfolios of water rights for “municipal water supply purposes” that authorize hundreds of wells, supplying drinking water to more than 789,000 people in Pierce, Kitsap and Thurston counties.

The Spokane Aquifer Joint Board (“SAJB”) is an association of 21 water purveyors throughout the Spokane area dedicated to providing safe, clean drinking water to homes, offices and industries. Collectively, it operates 122 wells supplying drinking water to more than 500,000 people

in the Spokane area. All of the SAJB purveyors draw their water from the Spokane Valley-Rathdrum Prairie Aquifer, a sole source aquifer that is closed to the granting of any additional water rights in Washington State. *See* WAC Chapter 173-557. The members of SAJB consist of two cities, one sewer-water district, four water districts, ten irrigation districts, one non-profit corporation, and three private companies. The irrigation districts who are members of SAJB serve urban and suburban areas of Spokane County with piped potable water.

All Co-op and SAJB members are participating members in the Pierce County Coordinated Water System Plan and the Spokane County Coordinated Water System Plan, respectively, which require public water suppliers to serve available water to customers within their designated service areas. RCW Chapter 70.116. This duty to serve is also an obligation under the Municipal Water Law, at RCW 43.20.260.

B. Interest of Amicus Curiae in the Case

Of great concern to the Co-op/SAJB and their members is the Pollution Control Hearings Board (“PCHB”) decision in this case upholding Respondent Ecology’s “active compliance” interpretation as a basis for its final decision upholding Ecology’s rejection of Appellant Crown West Realty, LLC’s water right change applications. A decision in

this appeal could have precedential impact, imposing “active compliance” on municipal water suppliers statewide without any consideration of their facts, and without a firm basis in the Water Code or related statutes. In particular, the Co-op/SAJB and their members are concerned with the PCHB’s reliance on Ecology’s Policy 2030, which is not a statute or rule and is inconsistent with the Municipal Water Law. The PCHB’s decision provides no enforceable assurances to municipal water suppliers that their water rights will not be subject to relinquishment due to water conservation or temporary nonuse of water for legitimate utility purposes.

If the concept of “active compliance” is affirmed by this court, it has the potential of seriously disrupting the ability of the Co-op and SAJB members to fulfill their obligations as water purveyors under the Municipal Water Law; the Growth Management Act, chapter 36.70A RCW; and the coordinated water system plans for Pierce and Spokane Counties. These coordinated water plans are for two of the most critical water supply areas in the state, and are relied upon by numerous communities to address growth and business development for the future implementation of land use plans and development regulations, all of which are dependent upon the certainty of water from the amicus parties.

III. STATEMENT OF THE CASE

This amicus curiae brief addresses only the interpretation of statutes, regulations, and public policy, and does not rely upon or analyze the facts of the case.

IV. STANDARD OF REVIEW

The interpretation of the statutory definition of “municipal water supply purposes” is a pure question of law. As such, the error of law standard applies, under which the court determines the meaning and purpose of the statute *de novo*. RCW 34.05.570(3)(d); *Pub. Util. District No. 1 of Pend Oreille Cty. v. Dep’t of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002).

V. ARGUMENT

A. Overview

1. Relinquishment of Water Rights – 1967 Act

Prior to 1967, the Water Code did not have a relinquishment provision. When the Legislature enacted relinquishment provisions for water rights in 1967, it expressly exempted municipal purpose water rights from its “use it or lose it” requirement. RCW 90.14.140(2)(d). Enactment of the exemption in and of itself affirms that (1) municipal water rights serve broad public interests tied to the future growth and development of

the state, and (2) that this broader public interest outweighs the policy of returning unused water rights to the state. The Legislature, however, did not define the phrase “municipal water supply purposes” (MWSP) in RCW 90.14.140(2)(d). It was not until the passage of the Municipal Water Law in 2003, codified at RCW 90.03.015(4), that the first definition appeared. Subsequently Ecology, without legislative authority to do so, has been tweaking the statutory definition through its interpretive policy, adding new requirements such as “active compliance” to its approval process.

2. Theodoratus Decision – 1998

The leading case which precipitated statewide discussion of the need for enactment of the Municipal Water Law and its MWSP definition is *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). In this case, the appellant, a private developer, received a water right permit from Ecology for a multi-phased subdivision development. For decades Ecology had granted water right certificates for municipal and group domestic water systems based on the capacity of the system rather than upon actual beneficial use of water. The applicant expected the quantity of his water right (eventually) to be based upon the same “pumps and pipes” capacity of his water system, however Ecology changed its

method for issuing water right certificates. The developer appealed Ecology's new certification condition that was based on beneficial use. The Washington Supreme Court agreed with Ecology and upheld the condition, but in its decision noted:

Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case. We do note that the statutory scheme allows for differences between municipal and other water use. E.g., RCW 90.03.260; 90.14.140(2)(d). (Emphasis added.)

135 Wn.2d at 594.

3. Municipal Water Law of 2003

After the *Theodoratus* decision, and despite the Court's cautionary language, Ecology took the position that it applied to municipal water suppliers and took steps to rescind several "pumps and pipes" certificates. The legislature responded to these uncertainties in 2003 by significantly amending state water laws. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 256, 241 P.3d 1220 (2010). The Municipal Water Law ("MWL")¹ amended the Water Code relating to municipal water rights to, among other things, protect inchoate pumps and pipes certificates, define which water suppliers qualified as municipal, and make that definition

¹ SECOND ENGROSSED SECOND SUBSTITUTE H.B. 1338, 58th Leg., 1st Spec. Sess. (Wash. 2003) (SESSHB 1338).

retroactive. *Id.* The MWL clarified several other special features of municipal purpose water rights, and imposed new duties on municipal water suppliers. It created a duty to use water efficiently,² to serve all properties within their service areas (“duty to serve”),³ and to make their water system plans consistent with comprehensive plans or development regulations adopted under the Growth Management Act, chapter 36.70A RCW or any other comprehensive land use plan or development regulation adopted by a city, town or county for its service area.⁴

The MWL was challenged by several native American tribes and environmental organizations as violating constitutional standards, including separation of powers and procedural and substantive due process. Twice the Supreme Court rejected these claims and found the MWL, including the MWSP definition, to be constitutional without reference to or need for Ecology’s “active compliance” interpretation. In *Lummi*, the Court held that the MWL did not facially violate the constitution. 170 Wn.2d at 272-73. In *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 609, 344 P.3d 199 (2015), the Court held that the MWL did

² Section 5 of SESSHB 1338 amended RCW 90.03.386 to require municipal water suppliers to implement WA State Dep’t of Health. water use efficiency rules.

³ RCW 43.20.260.

⁴ *Id.*

not violate constitutional standards as applied to the facts of that case. Significantly, Ecology’s briefing in both cases argued the same “active compliance” interpretation that it argues in this appeal, but the Court on both occasions based its decision on other grounds, ignoring or rejecting “active compliance” while upholding the constitutionality of the MWL without it.

The Supreme Court in *Lummi* and *Cornelius* recognized the legislature’s authority to clarify uncertainties in water law relating to municipal water rights, including the MWSP definitions, and upheld the MWL against constitutional challenges as a remedial measure that applied retroactively. The title of the MWL states, “[a]n ACT relating to certainty and flexibility of municipal water rights and efficient use of water...” (SESSHB 1338, Laws of 2003, 1st Spec. Sess., Ch. 5 §1) The title of a legislative act is a source of legislative intent. *Covell v. City of Seattle*, 127 Wn.2d 874, 887-88, 905 P.2d 324 (1995). *See also, Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 151, 839 P.2d 324 (1992); *Timber v. State*, 37 Wn.2d 467, 474-475, 224 P.2d 635 (1950). Municipal purveyors of water cannot have certainty and flexibility with their municipal water rights if Ecology’s “active compliance” interpretation is applied to them.

Because the MWL is remedial, it is entitled to liberal construction to accomplish its purposes of protecting rights and clarifying municipal water rights. The liberal construction of remedial legislation has long been established under Washington law. *State ex rel. Winston v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 493 (1902), 68 P. 946; *Sebastian v. Dep't of Labor & Indus.*, 142 Wn.2d 280, 284-285, 12 P.3d 594 (2000).⁵ Ecology's subsequent "active compliance" interpretation threatens to undo this legislative clarification and remedial purpose, defeating both the purpose of the MWL and the purpose of the municipal exemption from relinquishment.

B. "Active Compliance" is Inconsistent with Municipal Water Law, Related Statutes, and Fundamental State Water Policy Favoring the Preservation of Municipal Water Rights.

Section 8 of SESSHB 1338, codified at RCW 43.20.260, provides that municipal water suppliers, as defined in RCW 90.03.015, have a duty to provide retail water service within their retail service areas. Department of Health rules for water system planning reinforce the duty to provide service. WAC 246-290-106. This "duty to serve" the public is mirrored

⁵ Both the PCHB Order in this case and Ecology's Response Brief improperly apply the opposite canon of statutory construction, that exceptions to statutes should be construed strictly; and they apply this canon to the wrong statute, the relinquishment exemption in RCW 90.14.140(2)(d). The MWSP definitions are codified in the Water Code, at RCW 90.03.015(4), and were part of the legislature's remedial action in 2003, not in the 1967 relinquishment law at chapter 90.14 RCW.

in RCW 80.28.010(2), and the Public Water System Coordination Act of 1977, at RCW 70.116.060(3).

The clear legislative intent of the Municipal Water Law is to provide certainty and flexibility for municipal water rights, which is necessary for municipal water systems to comply with the duty to serve the public. Certainty of water availability is also closely linked to land use planning and economic development. GMA requires counties and cities to have evidence of an adequate water supply before issuing building permits or authorizing subdivisions. RCW 19.27.097; RCW 58.17.110.

Several of the state's fundamental water resources policies favor the preservation of municipal water rights and the conservation of water. RCW 90.54.020 provides:

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

...

(5) Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.

...

(7) Federal, state, and local governments, individuals, corporations, groups and other entities shall be encouraged to carry out practices of conservation as they relate to the use of the waters of the state. In addition to traditional development approaches, improved water use efficiency, conservation, and use of reclaimed water shall be emphasized in the management of the state's water resources and in some cases will be a potential new source of water with which to meet future needs throughout the state.

(8) Development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public.

Ecology's "active compliance" interpretation violates these fundamental policies by: (1) expanding the number of municipal water rights that are subject to relinquishment, thus failing to preserve and protect water supplies needed to satisfy human domestic needs; (2) risking waters saved through conservation measures to relinquishment, thus preventing saved water from becoming a new source of water to meet future needs throughout the state; and (3) forcing municipal water suppliers to utilize all their water sources on threat of relinquishment, which fails to encourage the development of regional water supplies.

"Ecology interprets the relinquishment exemption for municipal water rights as requiring 'active compliance' by conformance with the beneficial use definitions in RCW 90.03.015(4). This means that if a water right holder fails to use water in a manner that satisfies one of the statutory 'municipal water supply purposes' for five consecutive years, and fails to qualify for a different relinquishment exemption, then the right remains valid only to the extent that it has been used." *Ecology's Response Brief at p. 21, citing AR 416-417.*

The PCHB incorrectly upheld Ecology's "active compliance" interpretation, stating that it requires the "actual use of water." *AR 595.* Using this interpretation, any municipal water right that is wholly or

partially unused for five consecutive years, regardless of whether it is being rested for legitimate utility purposes, or if consumption is reduced through conservation, or if it is rested to make possible the development of a regional water supply, would be relinquished and forever unavailable to satisfy the fundamental state policies cited above. This interpretation is especially dangerous and improper given the rapidly growing population of the state and the obvious need to preserve municipal water rights to serve those populations.

C. “Active Compliance” is Inconsistent with Customary Utility Practices

Sound utility practice encourages alternative and redundant water sources to provide security, reliability, and emergency response to water systems and their customers. *See* WAC 246-290-200; 246-290-420(6). Preservation of water sources is important to maintaining reliability and overall security and public welfare for the people served. Public water systems cannot use any supply source that does not comply with water quality treatment standards, WAC 246-290-130(3)(g) and WAC 246-290-310. Thus public water systems will rest wells for a period of five or more years due to mechanical issues or water quality problems until they can afford to fix them. For example, Co-op member Lakewood Water District’s Hipkins Well (source I-3) is not being used due to water quality

problems and the high cost of treatment, but new technology is bringing these costs down. Allowing Lakewood to wait until treatment is affordable allows lower rates to their customers, but this would not be possible if this municipal water right was subject to relinquishment for nonuse. Requiring “active compliance” or full usage of every water source one year out of every five would require investments in well repairs or water quality treatment plants whose only purpose is to preserve a water right rather than comply with sound water system engineering and financial planning.⁶

Water system planning under rules developed by the Washington State Department of Health (DOH) does not require municipal water suppliers to use or rehabilitate problematic water sources every five years only to keep the water rights from relinquishing. In fact, forcing municipal water suppliers to do so runs afoul of the entire concept of providing safe and reliable drinking water to the public. Instead, DOH water system planning rules require sound investments in utility infrastructure consistent with engineering principles and the duty to

⁶ Ecology’s briefing implies that an entire year of usage is required to avoid partial relinquishment. “The unused portion of the water right is subject to relinquishment.” Ecology Response Brief at 21, citing AR 416-17.

provide safe and adequate water supply to meet current and projected customer demands. WAC 246-290-100, et seq.

The MWL was intended to clarify and preserve municipal water rights, not to require them to be used even when it is inconsistent with sound utility practice, drinking water regulations, and customer needs.

D. “Active Compliance” Improperly Creates Disincentives for Amicus Parties Developing Regional Water Supplies and Conserving Water

The MWL created both expanding service areas (consistent with drinking water planning regulations and comprehensive plans) and water use efficiency requirements cited in Section IV.A.3 above. Most Co-op water systems, for example, have created common water service areas to enable shared water supplies and interties to deliver wholesale water supplies to neighboring water systems. This practice is consistent with the Water Code as amended by the MWL. RCW 90.03.383, 90.03.386(2).

(1) The legislature recognizes the value of interties for improving the reliability of public water systems, enhancing their management, and more efficiently utilizing the increasingly limited resource. Given the continued growth in the most populous areas of the state, the increased complexity of public water supply management, and the trend toward regional planning and regional solutions to resource issues, interconnections of public water systems through interties provide a valuable tool to ensure reliable public water supplies for the citizens of the state. Public water systems have been encouraged in the past to utilize interties to achieve public health and resource management objectives. The legislature

finds that it is in the public interest to recognize interties existing and in use as of January 1, 1991, and to have associated water rights modified by the department of ecology to reflect current use of water through those interties, pursuant to subsection (3) of this section. The legislature further finds it in the public interest to develop a coordinated process to review proposals for interties commencing use after January 1, 1991.

RCW 90.03.383(1). Wholesale distributors like Lakewood Water District have financed expensive water right acquisitions and transfers for the purpose of supplying neighboring water systems with reliable and affordable water supplies that they could not obtain on their own due to the closure of local watersheds to new appropriations. It has also constructed interties and other infrastructure to deliver wholesale water supplies to neighboring systems. Several SAJB members have also used interties to efficiently provide water in areas where additional supplies are needed.

The feasibility of regional water supplies depends upon wholesale customers using those supplies in lieu of their existing sources. Summit Water Company, Firgrove Mutual Water Company, and Rainier View Water Company, which are wholesale customers of Lakewood Water District, are expected to rest some of their own wells in favor of purchased wholesale supplies. In so doing, they will avoid the cost of expensive upgrades to their water sources and treatment systems as their well

capacity or water quality diminishes. Their rested wells and water rights are still needed to serve future growth, however, and these municipal water suppliers should not be put in the position of risking the loss of their future capacity for growth (via Ecology's "active compliance" interpretation) when they are complying with legislative policy and good utility practice in their support of regional water supplies.

Ecology's "active compliance" interpretation is also inconsistent with legislatively required municipal water conservation rules and state policy encouraging the use of saved water to serve future growth demands. RCW 90.54.020(7). The members of the Co-op and SAJB are required to comply with the water use efficiency requirements of the MWL, codified at RCW 70.119A.180; WAC 246-290-800 et seq. WAC 246-290-810(4) lists the mandatory elements of water use efficiency programs for municipal water suppliers, including estimates of water saved, a schedule and budget for water efficiency measures, consumer education, evaluation of effectiveness, and evaluation of water distribution system leakage. There is no exception to the efficiency requirements for "active compliance" in either the DOH regulations or the RCWs. Because Ecology's "active compliance" interpretation does not create any logical water use efficiency exception to its application to all municipal water

rights,⁷ it is inherently inconsistent with the water use efficiency requirement of the MWL and DOH's water use efficiency rules. If the entire quantity of every municipal water right must be used at least one year out of every five in order to avoid relinquishment, then municipal water suppliers would have a disincentive to reduce their water usage by conservation. That is simply and obviously contrary to multiple statutory requirements, policy declarations, and drinking water regulations that are intended to conserve water and use that saved water to serve future customers. RCW 90.54.020(7); RCW 90.03.386(2); RCW 70.119A.180; WAC 246-290-800 et seq.

E. The Public Interest Requires Scrutiny and Rejection of “Active Compliance”

Municipal water suppliers serve the public with an essential service: safe, adequate, and affordable drinking water. The availability of drinking water sources and water rights is essential for the development of land and to accommodate growing populations and a healthy environment and economy.

⁷ “Active compliance” categorically requires actual use of the full quantity of every water right at least once every five years to avoid full or partial relinquishment. AR 00144-145.

Washington State expects substantial growth in the coming decades, on both sides of the Cascade Mountains.⁸ This expected growth means that the Co-op and SAJB member water systems need to preserve their water rights to serve more connections and higher densities in the future. They, and the public, cannot risk losing their existing water rights to relinquishment as a result of conservation, sharing of regional water supplies, or resting of water sources due to water quality or mechanical issues, all of which are normal functions of municipal water systems. Future populations and business development depend upon these municipal water systems and their water rights.

Ecology's "active compliance" interpretation puts the public interest at considerable risk, unnecessarily, by adding new requirements to preserve municipal water rights from relinquishment by forcing them to be used continuously. It is ludicrous to the extreme to make public water suppliers use all of their water rights in order to qualify for an exemption to relinquishment for not using all their water rights. This isn't just a non sequitur, it is the current holding of the PCHB in this case.

⁸ The Washington State Office of Financial Management in its November 2017 update estimated that the Spokane County population in 2017 was 499,800 and by 2040 would be 517,585 people. Pierce County's population is estimated for 2017 at 859,400 and projected for 2040 at 1,086,201. King County's population is estimated for 2017 at 2,153,700 and projected for 2040 at 2,439,025.

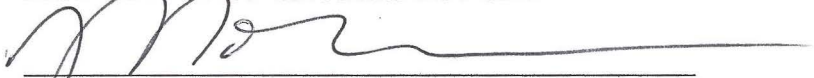
VI. CONCLUSION

The future cost to the public of losing municipal water rights is incredibly high, including the inability to serve future populations and business development and the loss of water system security and flexibility. “Active compliance” creates disincentives to conservation, to resting water sources with mechanical or water quality issues, and to developing and maintaining regional water supplies. All of these consequences of the “active compliance” interpretation are contrary to the public interest.

The Co-op and SAJB urge the Court to reverse on Issue 1; to remand to the PCHB for further proceedings on Appellant’s application; and to direct the PCHB to apply the plain text of the MWSP definition in the context of the entire statutory scheme relating to municipal water rights without “active compliance.”

Respectfully submitted this 3rd day of May, 2018.

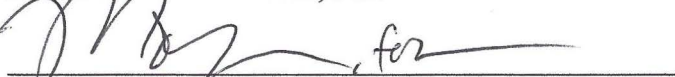
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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington that on May 3rd, 2018, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter upon the parties herein via the Appellate Courts' Portal filing system, which will send electronic notifications of such filing to the following:

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