

WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 38897-2

BURBANK IRRIGATION DISTRICT #4; CITY OF PASCO;
FRANKLIN COUNTY WATER CONSERVANCY BOARD; AND
COLUMBIA-SNAKE RIVER IRRIGATORS ASSOCIATION,

Respondents,

vs.

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

Appellant.

AMICUS CURIAE BRIEF OF
THE CENTER FOR ENVIRONMENTAL LAW & POLICY

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I. Introduction

The Center for Environmental Law & Policy (CELP) respectfully submits this amicus in support of the Appellant Department of Ecology's (Ecology's) decision to deny Burbank's sale of municipal water. This is an issue of statewide importance and Ecology acted properly in the underlying decision. Respondents Burbank Irrigation District #4; City of Pasco; Franklin County Water Conservancy Board; and Columbia-Snake River Irrigators Association (Burbank) misinterpret the rights granted to municipalities by the legislature, and undermines the prior appropriation system, by attempting to sell its unused water rights to the city of Pasco. Burbank's attempt to sell its inchoate water rights would allow municipalities to engage in water speculation, upset the priority system, and hamper Ecology's discretion to manage water to protect the public interest. Burbank's attempt to speculate in water rights should be rejected. Additionally, the process by which this case has arrived in front of this Court undermines Ecology's authority to review and overturn decisions made by the water conservation boards, as well as the Pollution Control Board's authority as fact finder in cases regarding water right applications, changes, and transfers.

CELP submits this amicus memorandum pursuant to RAP 10.6.

II. Identity and Interests of the Amicus Curiae

CELP is a membership-based, non-profit corporation with a mission to protect and restore the quantity of water flowing in

Washington’s freshwater resources, i.e., its rivers and aquifers, to ensure protection of public values in those waters, including drinking water supply, fish and wildlife habitat, water quality, recreational use, and aesthetic enjoyment. CELP accomplishes its mission by advocating for responsible allocation of water rights, either by permit or permit-exempt processes, and promoting adoption and protection of instream flow rules.

CELP incorporates their statements of interest as set forth in the Motion for Leave to File Brief of Amicus Curiae in Support of the Department of Ecology’s Appellant Brief, filed December 15, 2022.

III. Statement of the Case

Amicus concurs with and adopts and incorporates the statement of the case as set forth in the Department of Ecology’s Brief.

IV. Argument

A. Speculation in Water Rights Should Not Be Permitted

First, CELP agrees with Ecology that the water right in question is a “non-additive” right and therefore does not constitute any larger amount of water than what Burbank held under its original water right. As such, a finding that Burbank could sell this non-additive right is enlargement of the original right and therefore unlawful. However, beyond this clear finding, Ecology also has the vast discretion to deny this sale based on the harm to the public interest.

Washington’s water “belong to the public.” RCW 90.03.010. Therefore, any

entity holding a water right only has a right to use the water and does not own it outright. This is so the state can ensure “efficient administration of the state's waters, and to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use.” RCW 90.14.010.

The very nature of a water right is what makes it self-limiting and it does not carry the same inherent rights associated with real property. To allow an entity such as Burbank to hoard water and prevent its use until it finds someone to pay what they are asking, is contrary to the Water Code and the principles of state-owned water resources, i.e., the public interest. Speculation over increasingly scarce water in Washington state threatens to interfere with Ecology’s obligation to allocate water resources to protect the public interest. Speculation includes the sale of inchoate water rights by a municipality that does not need the water for future growth. *Cornelius v Dep’t of Ecology*, 182 Wn.2d 574, 584-85, 344 P.3d 199 (2015). Allowing municipalities to “sit on” water they do not need and then sell it at an opportune moment to the highest bidder allows municipalities to determine the future allocation and use of water that should revert to public ownership and be available for instream flows.

Unlike the Water Code, which requires Ecology to manage Washington’s water resources for the benefit of both instream and out of stream uses, a water speculator is interested only in the price of water and not its use. Allowing Burbank to utilize its water right as though it were a commodity

and not an essential human need would restrict Ecology's ability to meet its statutory requirements.

Generally, water right holders must put water to beneficial use or it is subject to relinquishment. RCW 90.03.005. This protects Washington's water resources from speculation. The 2003 Municipal Water Law (MWL) allows municipal water suppliers to obtain water rights for future growth -- even if the water is not immediately going to be put to beneficial use. *See* RCW 90.14.140. While this could potentially open the door for municipal water suppliers to use inchoate rights that are protected from relinquishment and then later transfer those rights for a profit, Ecology has the authority, and the obligation, to deny such attempts in order to protect the public interest. Water speculation harms the public interest because it encourages private hoarding of a public resource to make private profit in the future. It is in the public interest for water to be either put to beneficial use or to be dedicated to instream resource. RCW 90.03.005. Ecology acted appropriately to deny Burbank's attempted transfer.

1. Cornelius & the reasonable diligence doctrine show that Burbank is engaging in speculation

In *Cornelius*, the Washington Supreme Court makes it clear that speculation is to be avoided. *Cornelius*, 182 Wn.2d at 584-85. The Court held that if a municipal water supplier could show that it had used reasonable diligence to put inchoate water rights to beneficial use, even if the water hadn't actually been used in decades, then the water rights would

be in good standing. *Id.* Further the Court reasoned that if a municipal water supplier showed that it was exercising reasonable diligence to use the water then it was not speculating in water rights. *Id.* Therefore if a municipal water supplier fails to show that it has exercised reasonable diligence to put its water to beneficial use it has failed to show it isn't engaging in speculation.

In *Cornelius*, WSU was attempting to consolidate its water rights in response to the 2003 municipal water law in order to legitimize the integrated system WSU had been using to combine groundwater rights and pump the aggregate quantity of water of all its rights from two newer wells rather than continuing to use all the wells listed for its groundwater rights. *Id.* The Court used the reasonable diligence test laid out in RCW 90.03.460 to find that the water rights were in good standing. *Id.* The requirement to show reasonable diligence depends on the circumstances, including the type and magnitude of the project, public interests, and delays in water usage that may result from conservation and water use efficiency measures. *Id.* While, RCW 90.03.460 refers generally to the construction of water systems, the Court found that WSU was demonstrating reasonable diligence because it had a plan to put the water to use with future growth and was actively working toward that growth. *See id.* Reasonable diligence had been applied because the university had continued to build new facilities and increase enrollment. *Id.* WSU was also in a unique position because its budget and enrollment targets are regulated by the Legislature and therefore the ability to meet its growth projections was outside of the university's control, even

with reasonable diligence. *Id.*

In this case, Burbank has failed to show reasonable diligence in putting its water rights to beneficial use. Burbank does not have a plan to put the water to beneficial use with future growth, in fact the opposite is true. Burbank admits that it has no need for the water it is attempting to transfer to Pasco currently or in the future. Burbank has not built new facilities or increased its customer base. Nor is it at the whim of legislative actions, as was WSU, in managing its growth as a reasonable excuse for not pursuing growth to put its water to beneficial use. Burbank failed to show that it exercised reasonable diligence in putting its water to beneficial use and therefore failed to show that it isn't engaging in speculation.

Further, the Court in *Cornelius* notes that WSU was not speculating because its inchoate water was unused due to the school's water conservation measures, as required by the Municipal Water Law. *Id.* The Court also held that WSU was not engaging in speculation because it is only using the water on its own campus, its municipal supply area, and was not looking to expand the use of its water outside that area. *Id.*

In this case, Burbank's unused water is not due to conservation measures and Burbank is attempting to transfer the water out of its municipal service area. This discrepancy between the factors laid out in *Cornelius*, which the Court held was not speculation, and this case, demonstrates that Burbank is engaging in water speculation. Denial of the transfer was therefore in the public interest.

2. *Burbank's attempt to narrow the definition of speculation is irrelevant due to the nature of municipal water rights*

Rather than discussing why their actions should not be considered speculation, Burbank attempts to narrow the definition of speculation to only include those instances when a party intends to engage in speculation at the time the water right is acquired. Burbank argues that the Court in *Cornelius* holds that speculation is acquiring water rights for future profit and that in order for speculation to occur it must be the intent when acquiring the water right. However, the portion of *Cornelius* that Burbank quotes is dicta and was not part of the deciding factor in that case. Speculation can occur not only when a water right is obtained but also when the water right owner engages in trafficking water that is not needed and should revert back to the state. In this case, Burbank admitted that it does not need the water it is attempting to sell to Pasco now nor will it need it in the future. If the water right were not a municipal water right, it would be relinquished. Even though Burbank's water right is protected from relinquishment under the MWL, it is contrary to the public interest to allow Burbank to engage in commodification and speculation of its unused water.

The idea of a municipality trying to transfer its inchoate rights raises alarms regarding speculation. Since the Legislature intended to protect municipal water rights from relinquishment solely to allow for future growth, once a municipal water supplier concedes that it no longer needs the water for projected growth it should lose that protection and Ecology

should amend their water right certificate with the lower amounts. Why should a municipal water supplier keep water it knows it won't need in the future rather than reverting back to the state to be used to approve new water rights? Burbank's desire for additional revenue outside of its normal revenues from its customers should not be a basis for it retaining inchoate water rights it does not need. While its intent when it obtained the right might not have been speculative, its intent to hold on to a right that it does not believe it will ever use is well within the definition of speculation. Burbank's attempt to narrow the definition of speculation has no merit.

3. A right to realize revenues does not exist

Burbank argues that by focusing on speculation and denying the transfer that Ecology is denying them a right to "realize revenues from the sale of the water". However, under the Washington Water Code there is no right to realize revenues from the sale or transfer of water. Under the prior appropriation doctrine, upon which our water code is built, a water right is a use right. A water right owner has the ability to hold, use, and transfer their right so long as the water is being put to beneficial use. There is no inherent right to recognize revenues from those rights. *See RCW 90.03.*

As the prior appropriation doctrine and water code were originally intended, the right to transfer a water right between users was originally merely a way to streamline processes for the state. Rather than relinquishing a water right and having the state issue a new water right, the original water right could just be transferred to a new party. *Id.* This pertained mostly to water right

transfers that occurred when land was bought or sold that made use of a water right so that the land would still retain the current water and land use. *Id.* As water has become scarcer, transfers have become a way for parties to skip the line of people waiting for water rights or to obtain a senior water right even if that water is being used in a different location and for a different use as long as Ecology approves the transfer. This allows parties with the resources to do so to search for water right holders who might be willing to transfer their rights in exchange for money or something else of value.¹ See *Crown W. Realty, LLC v. Pollution Control Hr'gs Bd.*, 7 Wn. App. 2d 710, 435 P.3d 288 (2018). Regardless of the original intent of transfers and how they are used now there has never been a “right to recognize revenue” obtained from transferring the right to use water.

Burbank scoffs at the PCHB’s distinguishing between receiving revenues from its customers for the use of the water right and receiving revenues from another municipality for the transfer of the water right. However, this distinction properly separates a municipal water supplier properly using its water for the public good from a municipal water supplier selling water it doesn’t need. The second action is speculation.

Fabricating a right to realize revenues from the sale of an inchoate water right would be creating a “legitimate” way for municipal water suppliers to engage in speculation. The Court should find that such a right

¹ This is in part why speculation has become more of a concern as water becomes scarcer and why transfers should receive more scrutiny than new water right applications.

does not exist. and that Burbank's actions in trying to create such a right lean toward speculation.

B. The Process of Water Right Adjudication must be upheld.

The Court should find that the Superior Court acted improperly when it failed to remand the issues that the PCHB did not determine back to the PCHB. There is a well-defined process for adjudicating disputes regarding water right applications, changes, and transfers. If one of the water conservancy boards handles the transfers, then Ecology has the authority to review and either amend or reverse the water conservancy Board's decision. WAC 173-153-150. Once Ecology has made a final decision, with or without prior determination from the water conservancy board, the applicant or another affected party may appeal Ecology's decision to the PCHB. WAC 173-153-180.

The PCHB is the fact finder and is charged with building and reviewing the record. RCW 43.21B.100. If either the applicant or Ecology disagrees with the PCHB's decision, they may appeal that decision. RCW 43.21B.180. The appeal can go to the Superior Court, or the case can be certified by agreement of the parties to the Court of Appeals. *Id.*, see also RCW 34.05.518. In these types of cases, both the Superior Court and the Court of Appeals act solely in an appellate role. *Motley-Motley, Inc v Pollution Control Hr'gs Bd.*, 127 Wn. App, 62, 76 (stating "If the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate,

jurisdiction and the purpose behind the administrative hearing would be squandered.”). The Legislature allows cases to be certified directly from the PCHB to the Court of Appeals in order to avoid additional litigation delays at the Superior Court. RCW 34.05.518

In this case, following the PCHB’s decision Burbank appealed, and Ecology sought certification to the Court of Appeals. Certification was denied as Burbank opposed the certification. The superior court then found that the PCHB had erred in its determination that the transfer would unlawfully expand Burbank’s water right. Then rather than remanding the case to the PCHB, the superior court acted in a non-appellate role and examined the incomplete record from the PCHB regarding the other potential arguments in the case and used that record to determine the facts of the case. This action, while within the normal role of the superior court, was outside its role in the water right adjudication process. The superior court should have remanded the case to the PCHB so that the PCHB could fully build the record and determine the facts to examine the issues that they had not examined previously. The superior court should not have looked at an incomplete record and determined that there was no dispute of material fact.

Even if this court finds that the superior court was correct in determine that the PCHB had erred in its determination that the water right was unlawfully enlarged it should remand the case to the PCHB for a determination of fact regarding the other arguments. Failure to do so will result in a breakdown

of the adjudication process for water rights.

V. Conclusion

Water is a public resource in Washington and the State, through the Department of Ecology is authorized and obligated to protect the public interest when making water resource management decisions. Speculation in water directly harms the public interest. The courts have been clear that speculation should be avoided. This case is critical to protecting Washington's water resources from speculation in water by municipal water suppliers who have been granted inchoate rights protected from relinquishment due to non-use.

Municipal water suppliers should not be allowed to speculate in water. Burbank proposes to circumvent legislative intent and responsible water policy by abusing the protections afforded to it by the legislature to sell its unused rights. Such actions invite other municipal water suppliers to engage in speculation the same way all the while throwing the public interest to the wind. For the reasons stated here, CELP urges this Court to reverse the Superior Court's decision.

Respectfully submitted this 15th day of December, 2022.

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