



MUNICIPAL WATER LAW UPDATE

Transferring Water
Between Municipalities:
The Burbank Case;
The Cornelius Case

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Water Law in Eastern WA Conference
Spokane, WA



ATTORNEYS

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PRESENTATION OUTLINE

- Background
- Ecology Policy 2030
- Burbank
- Spokane Issues



BACKGROUND – BENEFICIAL USE AND *THEODORATUS*

- Western Water Law Fundamentals: A water right becomes perfected (vested) after water is put to a beneficial use.
- Municipal Water: The Washington State Department of Ecology (“Ecology”) issued many water right certificates for municipal uses based on system capacity (also referred to as pumps and pipes certificates) rather than beneficial use.
- *State v. Theodoratus*, 135 Wn. 2d 582 (1998): The Washington Supreme Court held that Washington’s surface and groundwater codes require actual beneficial use to perfect a right. Did not address—but raised concerns—over inchoate municipal water.

BACKGROUND – MUNICIPAL WATER LAW

The 2003 Municipal Water Law (“MWL”)

- Declared that existing municipal water rights based on system capacity (pumps and pipes certificates) are "right[s] in good standing" and prohibits Ecology from "revoking or diminishing" these certificates except in limited circumstances (RCW 90.03.330(2), (3))
- Limited Ecology’s issuance of future municipal water rights certificates based upon actual beneficial use (RCW 90.03.330(4))
- Defined “municipal water supplier” and “municipal water supply purposes” (RCW 90.03.015(3) and (4))

BACKGROUND – *LUMMI AND CORNELIUS*

- *Lummi Indian Nation v. State*, 170 Wn.2d 247 (2010) – The Washington Supreme Court affirmed the 2003 MWL, rejecting facial constitutional challenges.
- *Cornelius v. Ecology*, 182 Wn.2d 574 (2015) – As applied challenge to 2003 MWL. Reaffirmed validity of MWL.
 - The Washington Supreme Court upheld the “good standing” and “municipal” status of WSU’s water rights.
 - The decision affirmed applications to amend WSU’s water rights, including the “unperfected” portions that reflect as-yet unused quantities intended for future use, to enable a well relocation and consolidation project on campus.

ECOLOGY POLICY 2030

- Policy 2030 describes Ecology’s current implementation approach to the MWL and is “advisory only”
- Second draft updated policy out for comment; comments due **June 21**
- Legislative intent of MWL – flexibility and certainty
- Original intent issues
- Continued active compliance issues

BURBANK

- *Burbank Irrigation District #4, City of Pasco, et al. v. Dept. of Ecology*
- Case involved appeal of Ecology denial of a change application to a municipal-purpose certificate to enable a transfer to Pasco. Ecology reversed the Franklin County Water Conservancy Board on grounds that the change would unlawfully: (1) enlarge the right, (2) contradict original intent, and (3) be contrary to public interest as speculation.
- Several issues raised on appeal:
 - Alternate water rights issues
 - Original intent
 - Speculation
- Court of Appeals remanded case to PCHB. The parties filed a Stipulation and Agreed Order of Dismissal. The PCHB entered an Order of Dismissal bringing the case to a close on April 23, 2024.

MUNICIPAL WATER ISSUES IN WA

- Can unperfected (inchoate) municipal water rights be transferred from one municipal system to another?
- What happens to inchoate municipal water when there is a utility consolidation?
- What are the practical implications of the current uncertainty in municipal water law?

THE HISTORY OF SPOKANE VALLEY

- Incorporated in March 2003
- No Utilities Provided by the City
- Police Force Contracted With the County
- The secret about the City of Spokane Valley is

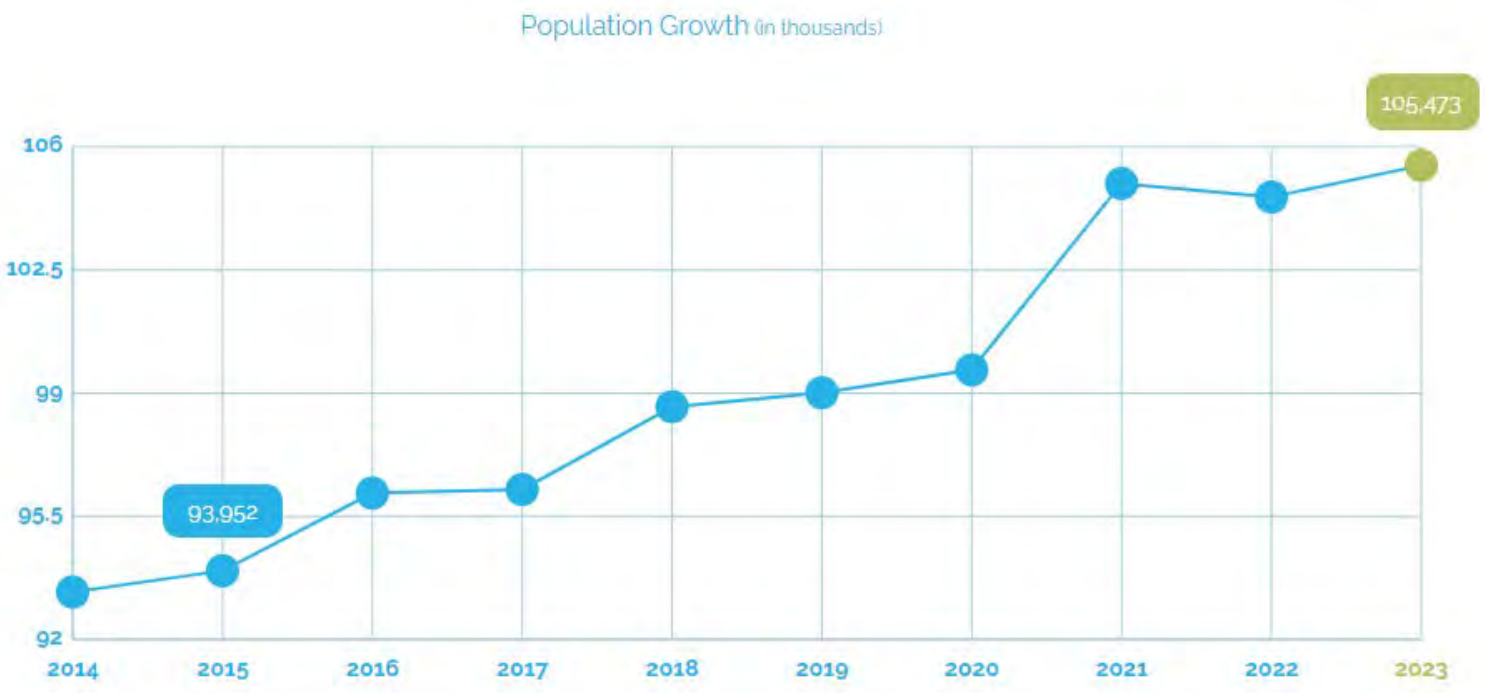


SPOKANE ISSUES

- Hesitancy in pursuing water rights transfers because of *Burbank* and Ecology's position that inchoate rights are not transferable.
- Active compliance concerns.
- Uncertainty regarding PFAS.
- Population growth tapping out Department of Health-approved connections. Infrastructure struggling to keep up with population growth.



SPOKANE ISSUES CONTINUED



Data Source: Applied Geographic Solutions and GIS Planning 2022, TaxFoundation.Org 2021 and GIS Planning research.

WHERE DO WE GO FROM HERE?

- Inchoate Water / Active Compliance
 - Merge Water Purveyors
 - Overlapping Boundaries
 - Just Force the Issue and Apply for a Transfer
- PFAS
 - Submit Claims in Class Actions & Lobby
- Department of Health Connections
 - Developer Construction

QUESTIONS?

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