

1 **POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 CROWN COLUMBIA WATER
4 RESOURCES, LLC,

5 Appellant,

6 v.

7 STATE OF WASHINGTON,
8 DEPARTMENT OF ECOLOGY,

9 Respondent.

PCHB No. 18-038

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

10 **INTRODUCTION**

11 Crown Columbia Water Resources, LLC (Crown Columbia) appealed the Department of
12 Ecology's (Ecology) reversal of conditional decisions by the Walla Walla County Water
13 Conservancy Board (Conservancy Board) approving Crown Columbia's two water right change
14 applications. Both parties move for summary judgment.

15 The Pollution Control Hearings Board (Board) considering the motions was comprised of
16 Board Chair Joan M. Marchioro, and Members Kay M. Brown and Neil L. Wise. Administrative
17 Appeals Judge Carolina Sun-Widrow presided for the Board. Attorney Mark Peterson
18 represented Crown Columbia. Assistant Attorney General Julian Beattie represented Ecology.

19 In ruling on the motion, the Board considered the following:

- 20 1. [Crown Columbia's] Motion for Summary Judgment;
- 21 2. Memorandum in Support of Summary Judgment;
3. Declaration of Mark Peterson, with attachments;

- 1 4. Department of Ecology's Cross Motion for Summary Judgment and Dismissal with
2 Prejudice and Response to Crown Columbia's Motion for Summary Judgment;
- 3 5. [Crown Columbia's] Memorandum in Support of Summary Judgment, Response to
4 [Ecology's] Motion;
- 5 6. Second Declaration of Mark Peterson, with attachments;
- 6 7. Department of Ecology's Reply in Support of Cross Motion for Summary Judgment
7 and Dismissal with Prejudice;
- 8 8. [Crown Columbia's] Memorandum in Support of Summary Judgment, [Reply] [] to
9 [Ecology's] Response; and
- 10 9. Board's case file for *Crown Columbia Water Resources, LLC v. Dep't of Ecology*,
11 PCHB No. 18-038.

12 Based on the record and evidence before the Board on the motion, the Board enters the
13 following decision.

14 **BACKGROUND**

15 This case concerns two companion water right certificates that Ecology issued in 1997
16 and 1998, respectively. Water right certificate S3-28849(A) authorized surface water withdrawal
17 from the Tucannon River of 1.11 cubic feet per second, 779 acre feet per year (AFY) to irrigate
18 200 acres of crops. Water right certificate G3-28850(A) authorized ground water withdrawal for
19 1,500 gallons per minute, 779 AFY to irrigate the same 200 acres. Peterson Decl., Report of
20 Examination S3-288849, p. 3.

21 In 1990, an irrigation efficiency project reduced the amount of water needed and resulted
in 96.25 AFY of water conserved, which was placed into the State Trust Water Rights Program.

1 *Id.* The water right certificates are non-additive¹ and together authorize withdrawal of 1,171.5
2 gallons per minute, 608.4 AFY to irrigate 156.2 acres. Peterson Decl., Report of Examination
3 S3-28849, p. 1; Report of Examination G3-28850, p. 1. Relevant here, both certificates are
4 classified as family farm certificates under the Family Farm Water Act, ch. 90.66 RCW. By law,
5 land irrigated by family farm certificates must remain a “family farm.”²

6 Crown Columbia obtained the water right certificates from Tucannon Ag Partnership,
7 LLC. In July 2017, Crown Columbia filed applications with the Conservancy Board, seeking to
8 temporarily transfer nearly all of the water to the State Trust Water Rights Program for instream
9 flow enhancement of the Tucannon River, and to temporarily change the place of use for 0.0022
10 cubic feet per second, 0.011 AFY of water from its existing place of use in Columbia County in
11 Water Resource Inventory Area (WRIA) 35 to land owned by Crown Columbia in Walla Walla
12 County in WRIA 33. Peterson Decl., Report of Examination S3-28849, pp. 1-2; Report of
13 Examination G3-28850, pp. 1-2. The purpose of the proposed change of place of use was to
14 irrigate 0.0025 acres, or approximately 109 square feet. *Id.*, p. 2. The parties do not dispute that
15 neither the existing place of use in WRIA 35 nor the proposed new place of use in WRIA 33 is
16 within an urban growth area.

17 The Conservancy Board processed the change application for Surface Water Certificate
18 No. S3-28849 as WALL-17-08, and the change application for Ground Water Certificate No.

19 ¹ A non-additive water right for either annual or instantaneous quantities of water does not increase the water
20 available in existing water rights. *Cornelius v. Dep’t of Ecology*, PCHB No. 06-099, FF 19 (Apr. 17, 2008).

21 ² “Family farm” is defined as “a geographic area including not more than six thousand acres of irrigated agricultural
lands, whether contiguous or noncontiguous, the controlling interest in which is held by a person having a
controlling interest in no more than six thousand acres of irrigated agricultural lands in the state of Washington
which are irrigated under rights acquired after December 8, 1977.” RCW 90.66.040(1).

1 G3-28850 as WALL-17-10. *Id.*, p. 1; Peterson Decl., Report of Examination G3-28850. The
2 Conservancy Board conditionally approved Crown Columbia’s change applications subject to
3 Ecology’s final review.³ On May 11, 2018, Ecology issued letter decisions reversing the
4 approvals and denying the applications. Ecology listed several grounds for the reversal,
5 including that the proposed transfer of the water right from WRIA 35 to WRIA 33 would violate
6 the Family Farm Water Act’s prohibition against transferring the place of use of the water right
7 to a different WRIA. *See* Ecology’s May 11, 2018, letter decisions attached to Crown
8 Columbia’s Notice of Appeal in Board’s case file.

9 Crown Columbia timely appealed Ecology’s reversal decisions to the Board. A
10 prehearing conference was held on July 16, 2018, at which time seven legal issues were
11 established. Prehearing Order at 2-7. Relevant to the present motions, Issue 3 asks:

12 Should the Walla Walla County Water Conservancy Board (Board) have declined
13 to act on the water right change applications because the proposed temporary
14 transfer of some of the water to a different WRIA was prohibited by RCW
15 90.66.065, thus denying the Board jurisdiction over the applications under RCW
16 90.80.070(2)?

15 *Id.* at 3.

16 Crown Columbia moved to summarily dismiss all issues. In its motion, Crown Columbia
17 “stipulates” to the removal of the temporary irrigation transfer of 0.011 AFY of water from
18 Columbia County to Walla Walla County that was approved by the Conservancy Board.

19 Ecology filed a Cross Motion for Summary Judgment and Dismissal with Prejudice and
20

21 ³ The Conservancy Board’s decision is conditional because a water conservancy board’s decision on a water right
change application is subject to review by Ecology to determine whether the decision complies with applicable state
water law. RCW 90.80.080(2).

1 Response to Crown Columbia’s Summary Judgment Motion. Ecology’s response specifically
2 rejected Crown Columbia’s stipulation.

3 ANALYSIS

4 A. Summary Judgment Standard

5 Summary judgment is a procedure available to avoid unnecessary trials where there is no
6 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667,
7 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if
8 only questions of law remain for resolution, and neither party contests the facts relevant to a
9 legal determination. *Rainier Nat’l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
10 443 (1990), *review denied*, 117 Wn.2d 1004 (1991). A party is entitled to summary judgment “if
11 the pleadings, depositions, answers to interrogatories, and admissions on file, together with the
12 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
13 party is entitled to a judgment as a matter of law.” CR 56(c); *Magula v. Benton Franklin Title*
14 *Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment
15 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
16 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the nonmoving
17 party must present evidence demonstrating that material facts are in dispute. *Atherton Condo*
18 *Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare assertions concerning
19 alleged genuine material issues do not constitute facts sufficient to defeat a summary judgment
20 motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). When determining

1 whether an issue of material fact exists, all facts and inferences are construed in favor of the
2 nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

3 **B. Authority of Water Conservancy Board**

4 Crown Columbia moves for summary judgment on all issues, arguing that the
5 Conservancy Board correctly determined that the statutory criteria for approval of water right
6 transfers were met. Specifically, Crown Columbia contends that its unilateral stipulation to
7 remove from the applications the small amount of proposed water transfer from Columbia
8 County to Walla Walla County would moot Issues 1 and 3. Crown Columbia further argues that
9 there are no disputed issues of fact as to the rest of the legal issues, and that it is entitled to
10 judgment as a matter of law. Ecology rejects Crown Columbia's unilateral stipulation, and
11 moves for summary judgment on Issue 3, arguing that the Conservancy Board lacked jurisdiction
12 to process Crown Columbia's water right change applications. The Board addresses Issue 3 first
13 since an affirmative answer to the issue would be dispositive of all other issues.

14 Chapter 90.80 RCW authorizes counties to establish water conservancy boards to
15 expedite the administrative process for water right transfers within a county. RCW 90.80.005;
16 .020(1); *Loyal Pig, LLC v. Dep't of Ecology*, PCHB No. 17-071 (Order Granting Summ. J. to
17 Ecology, Feb. 27, 2018). A conservancy board may act upon applications for water right
18 transfers that would otherwise be processed by Ecology, including the establishment of trust
19 water rights. RCW 90.80.055(1)(a). When a conservancy board determines that a water right
20 may be changed, the conservancy board prepares a record of decision and transmits it to Ecology
21 for review. RCW 90.80.070(4). Ecology must review the conservancy board decision for

1 compliance with applicable state water law, and may affirm, reverse, or modify the conservancy
2 board’s decision. RCW 90.80.080(4).

3 As creatures of statute, conservancy boards possess only those powers expressly granted
4 to them by statute or necessarily implied from the statutory grant of jurisdiction. *Skagit*
5 *Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962
6 (1998); *Bd. Of Dirs. Of Riverside Irrig. Dist. V. Cummings*, 131 Wash. 532, 533, 230 P. 649
7 (1924); *Orondo Fruit Co. v. Dep’t of Ecology*, PCHB Nos. 10-164 & 165, COL 24 (Sept. 20,
8 2011) (conservancy board acting outside its authority a basis for Ecology’s reversal of
9 conservancy board decisions).

10 Water right change/transfer applications are authorized by RCW 90.03.380, which states
11 in relevant part that “[t]he point of diversion of water for beneficial use or the purpose of use
12 may be changed, if such change can be made without detriment or injury to existing rights.”
13 RCW 90.03.380(1). A person proposing a water right transfer may apply to a water conservancy
14 board for conditional approval of the transfer “if the water proposed to be transferred is currently
15 diverted, withdrawn, or used within the geographic area in which the board has jurisdiction, or
16 would be diverted, withdrawn, or used within the geographic area in which the board has
17 jurisdiction if the transfer is approved.” RCW 90.80.070(2).

18 Crown Columbia sought to transfer water from the current place of use in Columbia
19 County (WRIA 35) into Walla Walla County (WRIA 33), and submitted change/transfer
20 applications with the Conservancy Board. However, because its water right certificates are both
21 classified as family farm certificates, the Family Farm Water Act prohibits the proposed transfer.

1 One of the purposes of the Family Farm Act was to preserve family farms “by ensuring that the
2 quantity of water needed to grow the crops historically grown remains with the farm.” Laws of
3 2001, ch. 237, § 23; *see also* RCW 99.66.030. The act specifically requires that the place of use
4 for a water right subject to a family farm permit

5 shall remain within . . . [t]he water resource inventory area containing the place of
6 use for the water right before the transfer; or the urban growth area or contiguous
7 urban growth areas of the place of use for the water right before the transfer if the
8 urban growth area or contiguous urban growth areas cross boundaries of water
9 resource inventory areas.

8 RCW 90.66.065(5).

9 Crown Columbia’s proposed family farm water transfer is prohibited by RCW
10 90.66.065(5) since it seeks transfer from WRIA 35 to WRIA 33, and none of the exceptions to
11 the prohibition apply here because Crown Columbia does not dispute that the place of use for the
12 water Crown Columbia seeks to transfer is not located within an urban growth area.

13 Because the Family Farm Water Act prohibits the proposed transfer to Walla Walla
14 County, the Conservancy Board lacked statutory authority to process Crown Columbia’s
15 applications. The conclusion is supported by *High Dunes Vineyard v. Dep’t of Ecology*, PCHB
16 No. 01-189 (Order Granting Summ. J., Oct. 31, 2002). In that case, a vineyard filed a water right
17 change application with the Grant County Water Conservancy Board to change the place of use.
18 A portion of the new place of use was located in a different WRIA. *High Dunes*, PCHB No. 01-
19 189, p. 4. The Grant County Water Conservancy Board denied the application because the
20 vineyard sought to transfer the place of use to a different WRIA, contrary to RCW 90.66.065(5).

1 Ecology affirmed the water conservancy board’s denial, and this Board affirmed Ecology’s
2 decision. *Id.*, at p. 12.

3 Crown Columbia responds that under RCW 90.80.070(1) and (2), the Conservancy Board
4 had authority to process the water change/transfer applications because the statutes authorize
5 conservancy boards to consider “proposed” transfers. The statutory provisions at issue state in
6 relevant part that:

7 (1) A person proposing a transfer of a water right may elect to file an application
8 with a water conservancy board, if a board has been established for the
geographic area where the water is or would be diverted, withdrawn, or used . . .

9 (2) The applicant for any proposed water right transfer may apply to a board for a
10 record of decision on a transfer if the water proposed to be transferred is currently
diverted, withdrawn, or used within the geographic area in which the board has
11 jurisdiction, or would be diverted, withdrawn, or used within the geographic area
in which the board has jurisdiction if the transfer is approved. In the case of a
12 proposed water right transfer in which the water is currently diverted or
withdrawn or would be diverted or withdrawn outside the geographic boundaries
13 of the county or the water resource inventory area where the use is proposed to be
made, the board shall hold a public hearing in the county of the diversion or
14 withdrawal or proposed diversion or withdrawal. The board shall provide for
prominent publication of notice of the hearing in a newspaper of general
15 circulation published in the county in which the hearing is to be held for the
purpose of affording an opportunity for interested persons to comment upon the
16 application. If an application is for a transfer of water out of the water resource
inventory area that is the source of the water, the board shall consult with the
17 department regarding the application.

18 RCW 90.80.070(1)-(2). According to Crown Columbia, RCW 90.80.070(1) allows the applicant
19 to elect from conservancy boards where the water right is or is proposed to be used, while RCW
20 90.80.070(2) supports that election by granting conservancy boards jurisdiction that mirrors the
21 particular election.

1 The Board disagrees with Crown Columbia’s interpretation of RCW 90.80.070(1)-(2) as
2 it is devoid of citation to supporting authority. Moreover, it is contrary to the Board’s decision in
3 *High Dunes*. The applicant in *High Dunes* similarly argued that RCW 90.66.065 does not
4 modify other authorities under which its change application should have been approved. *High*
5 *Dunes*, PCHB No. 01-189, p. 8. In rejecting the argument, the Board analyzed RCW
6 90.66.065(1)⁴ and concluded that the plain terms of that statutory provision “indicate[] that the
7 limitations in RCW 90.66.065 are in addition to any limitations imposed by . . . chapter 90.80
8 RCW.” *Id.* The Board explained that including the term “and” in RCW 90.66.065(1) indicated
9 that the Legislature intended to require an applicant seeking to transfer a family farm water right
10 to meet the requirements of “both this section of the law and the other listed provisions of the
11 water code.” *Id.* Thus, even accepting Crown Columbia’s claim that another section of the
12 water code, RCW 90.80.070(1)-(2), authorizes the out-of-WRIA transfer here, Crown Columbia
13 must still meet the requirements of the Family Farm Water Act in RCW 90.66.065(5). As stated,
14 Crown Columbia cannot meet these requirements because the act prohibits the proposed transfer
15 of water to Walla Walla County.

16 Crown Columbia also argues that interpreting RCW 90.66.065(5) to prohibit the transfers
17 here “would operate to preclude trust transfers for nearly any family farm right” as “[n]early all
18 trust transfers create instream flow water that does not simply stop at the WRIA boundary.”

19 Response at 1. The Board is not persuaded that this claimed effect alters the conclusion that the

20 _____
21 ⁴ RCW 90.66.065(1) provides that “[t]ransfers of water rights established as family farm permits under this chapter
may be approved as authorized under this section *and* under RCW 90.03.380, 90.03.390, or 90.44.100 or chapter
90.80 RCW as appropriate.” (Emphasis added).

1 Family Farm Water Act prohibits the proposed water transfers here. Crown Columbia cites no
2 relevant legal authority to support its argument, and the argument would contravene the Family
3 Farm Water Act's clear legislative intent.

4 Finally, the Board does not accept Crown Columbia's unilateral stipulation to remove the
5 proposed out-of-WRIA transfer. The Board agrees with Ecology that the stipulation, presented
6 for the first time in Crown Columbia's motion for summary judgment, is untimely and thwarts an
7 orderly resolution of the issues agreed in the Prehearing Order. *See, Puyallup Tribe of Indians v.*
8 *Dep't of Ecology*, PCHB Nos. 03-105 – 03-107, 03-109, 03-118, pp. 13-14 (Order Remanding
9 Case, Aug. 12, 2004) (rejecting consideration of new arguments and evidence developed during
10 litigation where it would substantially change the project or decision under review and would
11 prevent Ecology, as the agency administering the Water Code, from issuing a meaningful and
12 accurate decision for the Board to review and parties to litigate). Even if the Board were to
13 accept the unilateral stipulation, it would not change the analysis discussed above. If the
14 proposed out-of-WRIA transfer is removed from Crown Columbia's applications by stipulation,
15 there would be no water that would be diverted, withdrawn, or used within the geographic area in
16 which the Conservancy Board has jurisdiction under RCW 90.80.070(2). The lack of
17 geographical nexus to Walla Walla County would render the Conservancy Board without
18 authority to process such water transfer applications.

19 In sum, the Family Farm Water Act prohibits the proposed water transfer to Walla Walla
20 County. The Conservancy Board therefore lacked statutory authority to process Crown
21

1 Columbia's applications. The Board grants summary judgment to Ecology on Issue 3. As this
2 decision is dispositive of the case, the Board does not reach the remaining issues.

3 Based on the foregoing, the Board enters the following:

4 **ORDER**

5 The Department of Ecology's Cross Motion for Summary Judgment and Dismissal with
6 Prejudice is **GRANTED**, Crown Columbia's Motion for Summary Judgment is **DENIED**, and
7 PCHB No. 18-038 is **DISMISSED**.

8 SO ORDERED this 3rd day of December, 2018.

9 **POLLUTION CONTROL HEARINGS BOARD**

10
11 JOAN M. MARCHIORO, Board Chair

12
13 KAY M. BROWN, Member

14
15 NEIL L. WISE, Member

16
17 CAROLINA SUN-WIDROW, Presiding
18 Administrative Appeals Judge