

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

No. 81809-6

2009 FEB 27 P 12: 03

BY RONALD R. CARPENTER
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

LUMMI INDIAN NATION; MAKAH INDIAN TRIBE; QUINAUT
INDIAN NATION; SQUAXIN ISLAND INDIAN TRIBE; SUQUAMISH
TRIBE, and the TULALIP TRIBES, federally recognized Indian tribes;
JOAN BURLINGAME, an individual; LEE BERNHEISEL, an individual;
SCOTT CORNELIUS, an individual; PETER KNUTSON, an individual;
PUGET SOUND HARVESTERS; WASHINGTON ENVIRONMENTAL
COUNCIL; SIERRA CLUB; and THE CENTER FOR
ENVIRONMENTAL LAW AND POLICY,
Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE, Governor of the
State of Washington; WASHINGTON STATE DEPARTMENT OF
ECOLOGY; JAY MANNING, Director of the Washington Department of
Ecology; WASHINGTON STATE DEPARTMENT OF HEALTH; and
MARY SELECKY, Secretary of Health for the State of Washington,
Appellants/Cross-Respondents, and

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER
ALLIANCE, and WASHINGTON STATE UNIVERSITY,
Appellants/Cross-Respondents

**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT
WASHINGTON STATE UNIVERSITY**

CASCADIA LAW GROUP PLLC
Thomas McDonald, WSBA #17549
Joseph A. Rehberger, WSBA #35556
606 Columbia Street NW, Suite 212
Olympia, WA 98501
(360) 786-5057

CASCADIA LAW GROUP PLLC
Mary E. McCrea, WSBA #20160
PO Box 850
Winthrop, WA 98862
(509) 996-4121

Attorneys for Appellant Washington State University

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF ISSUES	3
III.	RESPONSE/REPLY ARGUMENT	3
A.	Standard of Review and Burden of Proof	3
B.	The Municipal Law, and the Legislative Branch's Authority to Adopt It, is Consistent with Relevant Water Law Principles	4
1.	Washington water law is based on the evolution of the common law prior appropriation doctrine.	6
a.	Priority of Use	8
b.	Due Diligence	9
c.	Beneficial Use	10
d.	Establishment of the Priority; the Relationship Back Doctrine	13
e.	Loss of the Right to Use the Water; Abandonment and Statutory Forfeiture/Relinquishment	14
2.	The legislature has also provided for a statutory permit process to document water rights.	17
a.	Applications	19
b.	Permits	20
c.	Certificates	21
d.	System Capacity Certificates	22

C.	RCW 90.03.015(3) and .015(4) Are Constitutional Enactments Confirming the Historic Nature of WSU’s Water Rights	25
1.	<i>Hale v. Wellpinit School District No. 49</i> conclusively establishes that the legislative definitions in RCW 90.03.015(3) and .015(4) represent proper legislative enactments consistent with the separation of powers doctrine.....	25
2.	The municipal law did not contravene <i>Theodoratus</i> in defining “municipal water supply purposes”....	27
3.	WSU is and always has been a governmental non-municipal supplier that has claimed its water rights for “municipal water supply purposes.”	28
4.	The municipal law’s definitions do not violate substantive due process.....	34
D.	RCW 90.03.330(2) and .330(3) are Constitutional Enactments Consistent with <i>Theodoratus</i>	36
1.	The “in good standing” characterization in RCW 90.03.330(3) responded to, but is entirely consistent with, <i>Theodoratus</i>	37
2.	WSU has continued to use reasonable diligence to perfect the inchoate portions of its system capacity water rights.....	41
3.	The process dictates in RCW 90.03.330(2) do not alter the character of the underlying substantive rights confirmed by the municipal law.	44
4.	RCW 90.03.330(2) does not facially violate procedural due process protections.....	46
E.	RCW 90.03.386 Represents a Constitutional Exercise of the Legislature’s Police Power Authority and Does Not Facialy Violate Procedural or Substantive Due Process..	48

F. RCW 90.03.260 Represents a Constitutional Exercise of
the Legislature's Police Power Authority and Does Not
Facially Violate Procedural or Substantive Due Process.. 49

IV. CONCLUSION..... 50

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Amunrud v. Dep't of Soc. and Health Servs.</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	3
<i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 745 P.2d 1295 (1987).....	30
<i>Dep't of Ecology v. Abbott</i> , 103 Wn.2d 686, 694 P.2d 1071 (1985).....	7
<i>Dep't of Ecology v. Acquavella</i> , 131 Wn.2d 746, 935 P.2d 595 (1997).....	11, 12
<i>Dep't of Ecology v. Adsit</i> , 103 Wn.2d 698, 694 P.2d 1065 (1985).....	7
<i>Dep't of Ecology v. Grimes</i> , 121 Wn.2d 459, 852 P.2d 1044 (1993).....	11, 12, 38
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998).....	passim
<i>Edmonds Shopping Center Assocs. v. City of Edmonds</i> , 117 Wn. App. 344, 71 P.3d 233 (2003).....	5
<i>Ellis v. Pomeroy Improvement Co.</i> , 1 Wash. 572, 21 P. 27 (1889).....	12
<i>Green Mountain Sch. Dist. No. 103 v. Durkee</i> , 56 Wn.2d 154, 351 P.2d 525 (1960).....	39
<i>Hale v. Wellpinit Sch. Dist. No. 49</i> , __ Wn.2d __, 198 P.3d 1021 (Jan. 15, 2009).....	passim
<i>Hallauer v. Spectrum Properties, Inc.</i> , 143 Wn.2d 126, 18 P.3d 540 (2001).....	12, 18, 45
<i>Hass v. Kirkland</i> , 78 Wn.2d 929, P.2d 9 (1971).....	5

<i>Hillis v. Dep't of Ecology,</i> 131 Wn.2d 373, 932 P.2d 139 (1997).....	20
<i>Hunter Land Co. v. Laugenour,</i> 140 Wash. 558, 250 P. 41 (1926).....	13
<i>In re Alpowa Creek,</i> 129 Wash. 9, 224 P. 29 (1924).....	10
<i>In re Chumstick Creek Drainage Basin in Chelan County,</i> 103 Wn.2d 698, 694 P.2d 1065 (1985).....	18, 36, 45
<i>In re King County for Foreclosure of Liens for Delinquent Real Prop. Taxes for Years 1985 through 1988,</i> 117 Wn.2d 77, 811 P.2d 945 (1991).....	40
<i>In re Parentage of L.B.,</i> 155 Wn.2d 679, 122 P.3d 161 (2005).....	39
<i>Mack v. Eldorado Water Dist.,</i> 56 Wn.2d 584, 354 P.2d 917 (1960).....	45
<i>Madison v. McNeal,</i> 171 Wash. 669, 19 P.2d 97 (1933).....	45
<i>McLeary v. Dep't of Game,</i> 91 Wn.2d 647, P.2d 778 (1979).....	45
<i>Neubert v. Yakima-Tieton Irrigation Dist.,</i> 117 Wn.2d 232, 814 P.2d 199 (1991).....	12
<i>Okanogan Wilderness League, Inc. v. Town of Twisp,</i> 133 Wn.2d 769, 947 P.2d 732 (1997).....	14, 15
<i>Peterson v. Dep't of Ecology,</i> 92 Wn.2d 306, 596 P.2d 285 (1979).....	5
<i>Potter v. Wash. State Patrol,</i> 165 Wn.2d 67, 196 P.3d 691 (2008).....	39
<i>Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology,</i> 146 Wn.2d 778, 51 P.3d 744 (2002).....	14, 15, 16, 35

<i>R. D. Merrill v. Pollution Control Hearings Bd.</i> , 137 Wn.2d 118, 969 P.2d 458 (1999).....	15
<i>Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000).....	3
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	29

OTHER CASES

<i>Ickes v. Fox</i> , 85 F.2d 294 (D.C. Cir. 1936), <i>aff'd</i> , 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937)	22
<i>Isbrandtsen Co. v. Johnson</i> , 343 U.S. 779, 72 S. Ct. 1011, 96 L. Ed. 1294 (1952).....	39
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	47
<i>Nevada v. United States</i> , 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983).....	12
<i>San Carlos Apache Tribe v. Superior Court</i> , 193 Ariz. 195, 972 P.2d 179 (1999).....	41
<i>Texaco, Inc. v. Short</i> , 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982).....	36

ADMINISTRATIVE LAW DECISIONS

<i>Cornelius v. Dep't of Ecology and WSU</i> , PCHB Case No. 06-099, Order on Summary Judgment (As Amended on Reconsideration) (Jan. 18, 2008)	passim
<i>Cornelius v. Dep't of Ecology and WSU</i> , PCHB Case No. 06-099 (Findings of Fact, Conclusions of Law and Order) (Apr. 17, 2008).....	49

CONSTITUTIONAL PROVISIONS

CONST. art. II, § 1..... 4

STATUTES AND SESSION LAWS

LAWS OF 1891, ch. CXLII, § 1..... 9

LAWS OF 1917, ch. 117 5, 17

LAWS OF 1945, ch. 263 18

LAWS OF 1967, ch. 233 15

LAWS OF 2003, 1st spec. sess., chapter 5 2

RCW 23B.30.015..... 31

RCW 4.04.010 39

RCW 90.03 5, 7, 17, 21

RCW 90.03.005 10

RCW 90.03.010 5, 9, 10

RCW 90.03.015(3)..... 25, 35, 50

RCW 90.03.110 45

RCW 90.03.250 18, 19

RCW 90.03.250-340 18

RCW 90.03.260 19, 33, 49

RCW 90.03.260(4)..... 49, 50

RCW 90.03.260(5)..... 49, 50

RCW 90.03.290 20

RCW 90.03.290-320 18

RCW 90.03.320	passim
RCW 90.03.330	21
RCW 90.03.330(2).....	passim
RCW 90.03.330(3).....	passim
RCW 90.03.330-340	18
RCW 90.03.340	13, 21
RCW 90.03.386	48
RCW 90.03.386(2).....	48, 49, 50
RCW 90.03.460	10, 44
RCW 90.14.130-200	15
RCW 90.14.140	15
RCW 90.14.140(2).....	15
RCW 90.14.140(2)(d)	25, 29, 33, 34
RCW 90.14.160-180	15
RCW 90.44	18
RCW 90.44.060	18

OTHER AUTHORITIES

1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971).....	5, 38
2 WATERS AND WATER RIGHTS (Robert E. Beck ed., 1991)	14
4 WATERS AND WATER RIGHTS (Robert E. Beck, ed., 1991).....	6
BLACK'S LAW DICTIONARY (5th ed. 1979).....	27, 30

Charles Horowitz, <i>Riparian and Appropriation Rights to the Use of Water in Washington</i> , 7 WASH. L. REV. 197 (1932)	5
Office of the Attorney General, <i>An Introduction to Washington Water Law</i> (2000)	5, 7
WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1958)	30
WILLIAM N. ESKRIDGE, ET AL., LEGISLATION AND STATUTORY INTERPRETATION (2000)	39

I. INTRODUCTION

Washington State University (“WSU”) is a public water supplier that will be directly impacted by this Court’s decision in this case. WSU is required under both state and federal law to provide a potable and reliable water supply to a current and growing population. Key to maintaining the University’s educational purpose and mission is having a secure water supply. This water supply, as is necessary for all universities, is required to meet WSU’s current and future water demands. CP at 1189-91.

Respondent Burlingame has placed WSU in this dispute by alleging that WSU’s exercise of its existing water rights under the municipal law may be in violation of the law. *See* CP at 4. While WSU is itself not an incorporated city or town, long before the enactment of the municipal law, it has operated a public water system serving its Pullman campus. CP at 1189-91. The Respondents have filed this action, in part, to use the municipal law as a basis to specifically attack WSU’s water rights, *see* CP at 4, and thus undermine WSU’s ability to provide water for these quintessential municipal water supply purposes.

Analyzing this case in the context of the historical development of the fundamental principles of Washington water law, it is clear that the legislature’s amendments to the water code in the municipal water act of

2003¹ (“municipal law” or “Act”) is a lawful exercise of the legislature’s province to both make policy and enact laws to regulate a public resource following the decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). In *Theodoratus*, the court affirmed the fundamental common law principles of western water law and recognized these were adopted by the legislature in the water code in 1917. The municipal law did not change these principles. Despite Respondents’ disagreements with the municipal law, the legislature’s policy enactments represent a proper exercise of its authority to respond to issues left unanswered following this Court’s decision in *Theodoratus*.

Based on the Court’s holdings in *Theodoratus* and continuing fundamental common law notions of western water law, the legislature’s amendments to municipal law are entirely consistent with the separation of powers doctrine and do not facially violate either procedural or substantive due process protections. Furthermore, WSU has complied with all the principles of water law in maintaining and protecting its rights. The Respondents’ attacks on WSU show the fallacy in Respondents’ allegations that there are any constitutional violations in the enactment of the municipal water law.

¹ LAWS OF 2003, 1st spec. sess., chapter 5.

II. RESTATEMENT OF ISSUES

WSU adopts and incorporates the State's restatement of Respondents' issues as set forth in the Response and Reply Brief of the State of Washington at section II.

III. RESPONSE/REPLY ARGUMENT

A. Standard of Review and Burden of Proof

WSU adopts and incorporates the State's arguments regarding the standard of review and burden of proof related to facial constitutional challenges as set forth in the Response and Reply Brief of the State of Washington at section III.A.

WSU adds that a facial challenge to the constitutionality of a statute challenges whether a statute's language violates the Constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case. *Amunrud v. Dep't of Soc. and Health Servs.*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006); *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 224, 5 P.3d 691 (2000). Reviewing courts presume a statute is constitutional, and the party attempting to challenge the constitutionality of a statute bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt. *Tunstall*, 141 Wn.2d at 220. Respondents fail to meet this burden.

B. The Municipal Law, and the Legislative Branch's Authority to Adopt It, is Consistent with Relevant Water Law Principles

Respondents' arguments regarding separation of powers and constitutional due process fail to recognize and properly characterize the common law and statutory nature and development of water law in Washington.

WSU's rights to the use of water are premised on the principles of western water law. A review of these principles is helpful in understanding both the nature of WSU's underlying rights and the impact of the municipal law on those rights and on rights throughout the state. In this regard, the legislature's authority to pass the municipal law is based not only on its general police power authority to regulate the use of a public resource, *see* CONST. art. II, § 1, but is further supported by the historic development of western water law and its underlying principles.² This development is critical to the legislative branch's ongoing role in developing water policy as it evolves to meet the needs and changing policies of the state.

First, in 1917, the legislature enacted legislation providing that all waters within the state belonged to the public and, subject to existing rights, further appropriations for beneficial use are to be acquired only as

provided in the 1917 enactment. LAWS OF 1917, ch. 117, *codified at* ch. 90.03 RCW; *see also* RCW 90.03.010 (“[s]ubject to existing rights all waters within the state belong to the public”).

The legislative declaration that waters are a common public resource served “to lay the foundation for State control over the management and use of stream waters, and the principle of public or State ownership is more compatible with State control than would be that of ownership by no one.” Office of the Attorney General, *An Introduction to Washington Water Law* at I:6 (2000) (*quoting* 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 141 (1971)). Washington’s provisions established sovereign interests rather than creating proprietary ones. Vitally important to the issues in this case, this preserved the state’s ability to assert its police power authority to regulate and allocate water resources for the benefit of the public. *Id.*; RCW 90.03.010. This Court has consistently confirmed this central premise that management and regulation of waters are subject to the police powers of the state. *Peterson v. Dep’t of Ecology*, 92 Wn.2d 306, 596 P.2d 285 (1979).³ This basic principle of public ownership has guided

² *See, e.g.*, Charles Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 WASH. L. REV. 197, 207-211, 215 (1932).

³ *See also cf. Hass v. Kirkland*, 78 Wn.2d 929, 481 P.2d 9 (1971) and *Edmonds Shopping Center Assocs. v. City of Edmonds*, 117 Wn. App. 344, 359-60, 71 P.3d 233 (2003) (holding that the “vested rights doctrine does not allow a business to operate exempt from

both the common law development of water rights and the legislative enactments providing for governmental regulation over the management and allocation of water resources.

Second, Respondents continue to fail to recognize the distinction between the validity and character of underlying substantive water rights and the process the legislature established (and continues to modify) as to how Ecology processes and characterizes those underlying rights.⁴ Respondents conflate the two distinctive facets of water law and attach greater than deserved significance to the identifying term “certificate,” while failing to recognize that the legislature in enacting the municipal law did not alter the substantive law as it relates to “inchoate” versus “perfected” rights or the requirements of “due diligence.”

1. Washington water law is based on the evolution of the common law prior appropriation doctrine.

From the outset, the legislature has been actively involved in regulating in the arena of water law, and amending the process and rights attached thereto to conform to public policy considerations based on the

later-enacted police power regulations in furtherance of a legitimate public goal”). This authority has been well recognized in the water law context. *See cf.* 4 WATERS AND WATER RIGHTS (Robert E. Beck, ed., 1991), §§ 33.02 - .03 (noting theory that private water rights are inherently “encumbered under state law if the state retains an overriding interest in certain aspects of the private right”).

⁴ The Tribal Respondents agree, in significant part, with this characterization of *Theodoratus*' holding. *See* Respondent Tribes' Opening Brief at 18-19; *see also discussion infra* at 22-23.

nature of water as a shared public resource. The 1917 Water Resources Act adopted the doctrine of prior appropriation. *See Dep't of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985); *see also generally* ch. 90.03 RCW. The courts thereafter began to adopt this newly developed prior appropriation doctrine and abandon the riparian doctrine of water law created in the eastern United States.⁵

Significantly, since their first recognition, even appropriated rights remained subject to police power regulation and subject to the common law notion that one's right to property in water is not limited or protected by application of past doctrines, but develops and modifies based on local custom and conditions. *Abbott*, 103 Wn.2d at 696-97 (citations omitted); *see also Dep't of Ecology v. Adsit*, 103 Wn.2d 698, 694 P.2d 1065 (1985) (companion case) (confirming state, under its police powers, may take away a water right if holder of that right fails to register right as required by law).

⁵ Under the riparian doctrine, water rights are created based on sharing the water resource among the owners of property riparian to the water source, with no priority of right, and no requirements of maintaining a water right by due diligence and beneficial use. In 1985, this Court held that in passing the 1917 water resources act, the Washington legislature rejected the riparian doctrine and rather adopted the beneficial use and priority elements of the prior appropriation doctrine that, as the court held, had caused property owners to have lost their riparian water rights unless they used the water by 1932. *See Abbott*, 103 Wn.2d at 696-97; *see also* Office of the Attorney General, *An Introduction to Washington Water Law* at I:6 (2000).

In enacting the municipal law, the legislature did not take as bold a step as the 1917 legislature in redefining water rights. The enactment of the municipal law maintains the basic elements of the prior appropriation doctrine. To the extent the municipal law changes the process by which Ecology characterizes certain rights for municipal water supply purposes and attaches special rules as to how those rights are construed and managed, whether the rights are inchoate or perfected, these amendments are no more significant than the many water resource laws passed by the territorial and state legislature to clarify and modify the water law based on current conditions and conflict. With this in mind, the basic notions of western water law, as applied in Washington, are set forth and discussed below.

a. Priority of Use

An important element of any water right under the appropriation doctrine is the priority date of that right. A priority date sets in time the level of protection the right will have in relation to other appropriators from the same water source. A water right is superior or “senior” to all those rights that have later priority dates; and, likewise, a water right is subject to or “junior” to all those rights that have earlier priority dates. The basis of the priority date is therefore summarized in the maxim: “first in time is first in right.” This was first codified in Washington in 1891,

“as between appropriations the first in time is the first in right.” LAWS OF 1891, ch. CXLII, § 1, was repeated in the 1917 legislation, and remains the law of the state. *See* RCW 90.03.010.

The legislature’s enactment of the municipal law did not change the priority system. The first in time remains the first in right.

b. Due Diligence

An important element in this case is the legislature’s use of the term of art “in good standing” to describe the inchoate portions of those rights represented by system capacity certificates and whether the “due diligence” requirement remains a component of these rights. The diligence requirement is based in the common law and remains a fundamental component of the appropriation doctrine. Because the priority system was created to protect water right holders with “senior” priority to the exclusion of later or “junior” water holders, certain elements of the prior appropriation doctrine were developed in common law to ensure that once notice is given of the intent to appropriate water, there is no more delay than necessary in actually appropriating the water by application of the water to actual beneficial use. If the senior water right holder does not use the water but rather seeks to hold the right for speculative future uses, others such as junior right holders who are willing and able to use the water are unable to rely on the availability and use of

that water. The prior appropriation system therefore created the notion that there must be timely application of water for beneficial use by reasonable diligence in the development of the water right. See RCW 90.03.005. The common law development of the reasonable diligence standard was embodied in the 1917 water code as part of the water permit system, see, e.g., RCW 90.03.460, and this Court confirmed this common law requirement in *Theodoratus*. 135 Wn.2d at 590-93. Reasonable diligence does not amount to a set period of time; rather, it is determined on a case-by-case analysis. *In re Alpowa Creek*, 129 Wash. 9, 14-15, 224 P. 29 (1924) (noting that immediate use is not required, applying the “doctrine of common sense”).

Despite Respondents’ assertions to the contrary, the municipal law did not change the requirements that a water right be developed with due diligence. Rather, as discussed below, through its use of the term of art “in good standing,” the legislature incorporated this common law notion of diligence to describe inchoate rights represented by system capacity certificates, following the use of this term by this Court in *Theodoratus*.

c. Beneficial Use

Any right or use of water can only be acquired by appropriation for a “beneficial use.” RCW 90.03.010. “Beneficial use” is a term of art that

defines both the type of use and the quantity of water that is used in a reasonable and non-wasteful manner.

There is no one definition of the types of beneficial uses, but it has historically included, among other things, irrigation, mining, domestic, and municipal purposes. The beneficial use of water also defines the reasonable quantity of water actually applied to use. The actual beneficial use of water defines the basis, the measure, and the limit of a water right. *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997). Relevant here, Washington water law has always been interpreted as establishing a vested property right in water only to the extent the water is put to actual beneficial use. As this Court has summarized in this regard:

“Once appropriated, the right to use a given quantity of water becomes appurtenant to the land. The appropriated water right is perpetual and operates to the exclusion of subsequent claimants.

The key to determining the extent of plaintiffs' vested water rights is the concept of “beneficial use” An appropriated water right is established and maintained by the purposeful application of a given quantity of water to a beneficial use upon the land.

Dep't of Ecology v. Grimes, 121 Wn.2d 459, 467-468, 852 P.2d 1044 (1993) (quoting *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d

232, 237, 814 P.2d 199 (1991)). This is referred to as “perfection” of a water right. *Id.*; *Acquavella*, 100 Wn.2d at 655-56.⁶

The notion of beneficial use is important, among other reasons, because it identifies when the substantive underlying right vests into a perfected property interest. Significantly, until the water is put to beneficial use, the water does not ripen into an appropriative or perfected right. *Theodoratus*, 135 Wn.2d at 596. While not perfected, so long as the requirements of law continue to be met, the water right remains an inchoate right in good standing. *Id.* However, only after the right is put to beneficial use does it become formally perfected.

The legislative enactment of the municipal law did not change the requirements of beneficial use, nor contradict *Theodoratus*' holdings regarding the same.

⁶ The term “perfection” is a also term of art in western water law referring to the point at which a water right is fully created through the application of water to a beneficial use, also described as a completed appropriation. See *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 143, 18 P.3d 540 (2001) (“Perfection of an appropriative right requires that appropriation is complete only when the water is actually applied to a beneficial use.”) (citing *Ellis v. Pomeroy Improvement Co.*, 1 Wash. 572, 21 P. 27 (1889)); see also *Nevada v. United States*, 463 U.S. 110, 126, 103 S. Ct. 2906, 2916, 77 L. Ed. 2d 509 (1983) (“[t]he law of . . . most . . . Western States, requires for the perfection of a water right for . . . that the water must be beneficially used by actual application on the land”).

d. Establishment of the Priority; the Relationship Back Doctrine

As described above, the priority date is one of the most fundamental elements of the prior appropriation doctrine. The establishment of the priority date involves an analysis of the appropriator's actions from the beginning of development of the use of the water to the final steps in completing the appropriation and actual use of the water.

Under the code, the priority date is the date the application for a permit is filed. RCW 90.03.340. However, that priority date does not vest until the appropriation of the water occurs.

Washington's water code expressly incorporates the relation back doctrine. *See* RCW 90.03.340 ("The right acquired by appropriation shall relate back to the date of filing the original application with the department."). The ability to receive the early priority date depended on the appropriator's diligence in applying the water to use. Therefore, prior to the completed appropriation, the priority date is merely an expectation until such time that the water right was fully created as evidenced by a completed appropriation through the diligent application of water to beneficial use. Only then does the right relate back to the earlier priority date. RCW 90.03.340; *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 P. 41 (1926); *see also Theodoratus*, 135 Wn.2d at 590.

The municipal law did not change the establishment of priority dates or the relation back doctrine.

**e. Loss of the Right to Use the Water;
Abandonment and Statutory
Forfeiture/Relinquishment**

Unlike other property rights, a vested water right remains a valid property interest only if the holder of the right actively maintains the right by continuously putting the water to an actual beneficial use. 2 WATERS AND WATER RIGHTS, § 17.03 (Robert E. Beck ed., 1991). An otherwise perfected water right may be lost in whole or in part by nonuse under either the doctrine of common law abandonment or under the statutory forfeiture provisions.

Common law abandonment occurs when there is intentional nonuse of the water or voluntary relinquishment of a water right. *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 784-85, 947 P.2d 732 (1997). Because courts historically have required both intent and an act of voluntary relinquishment, it is difficult to prove abandonment. *See generally Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002).

In 1967, the legislature passed a *statutory* forfeiture act that provides for relinquishment of an otherwise perfected water right if the water authorized in the right is not used continuously. LAWS OF 1967,

ch. 233, *codified in part as amended at* RCW 90.14.130 - .200. Unlike abandonment, relinquishment is a purely statutory construct. In Washington, statutory forfeiture relinquishes a water right for the voluntary failure to continuously beneficially use water for five or more consecutive years unless sufficient cause is shown. RCW 90.14.160 - .180. The term “sufficient cause” is specifically defined in the code and essentially provides an exclusive list of affirmative defenses a water right holder can raise to excuse five or more years of nonuse. RCW 90.14.140.

Important in this case, the code also lists several uses of water that are simply not subject to the relinquishment law. These include water rights for power development purposes, for standby or reserve water supply for use in times of drought, for claims of a future determined development, and for vested rights “claimed for municipal water supply purposes.” RCW 90.14.140(2).⁷

Equally important to this case, statutory relinquishment only applies to perfected water rights that have already been put to beneficial use. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 146 Wn.2d at 803. Statutory relinquishment represents a policy decision that even vested

⁷ Only a few of these exemptions have been interpreted by this Court. *See R. D. Merrill v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999); *Twisp*, 133 Wn.2d at 733, 740.

rights are subject to the notion that water represents a shared public resource that should be put to its highest public beneficial use.

Significantly though, this statutory relinquishment does *not* apply to inchoate rights still being developed. *Id.* Rather these rights remain subject to the other requirements of law including the diligence requirement discussed above. This distinction is central to the arguments advanced in this case as, it should be noted, inchoate rights represented by system capacity certificates are never subject to relinquishment, only the requirements of diligence. Only following perfection does relinquishment become relevant.

The legislative enactment of the municipal law did not change the law of either common law abandonment or statutory relinquishment.

Respondents would have this Court believe that the municipal law unconstitutionally altered the relinquishment law by enacting a statutory definition for the previously undefined term, “municipal water supply purposes,” RCW 90.03.015(4). While Respondents’ claims represent a policy disagreement with the legislature, they do not form the basis of a constitutional infirmity with the Act. In fact, Respondents’ claims are based on the entirely faulty premise that statutory relinquishment is relevant to the inchoate water represented by system capacity certificates in good standing under the municipal law. Because, as stated above,

statutory relinquishment only applies to perfected rights, i.e., rights following the beneficial use of water, any discussion of relinquishment in this context is premature. It is simply not material to this challenge.⁸ As discussed below, the legislature's enactment of a statutory definition of an otherwise previously undefined term is likewise within its province, *see Hale v. Wellpinit Sch. Dist. No. 49*, ___ Wn.2d ___, 198 P.3d 1021, 1027-29 (Jan. 15, 2009), just as enactment of the original relinquishment law was within its authority.

2. The legislature has also provided for a statutory permit process to document water rights.

As set forth above, the Washington legislature adopted the prior appropriation doctrine that is based on the principles of western water law in the 1917 water code. *See LAWS OF 1917, ch. 117, codified as amended at ch. 90.03 RCW.* At that time, the legislature also created a permitting system that would be the process for allocation of the water under the prior appropriation principles. *Id.* As this Court has explained, in so doing, the legislature delegated to Ecology the authority to issue permits and certificates to document water rights in compliance with the relevant statutes. *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 143, 18

⁸ Respondents attempt to force their argument to be material by arguing for a strained interpretation of the municipal law that it perfected otherwise inchoate rights, an interpretation not argued by any other parties to this case and not supported by either *Theodoratus* or the text of the municipal law itself.

P.3d 540 (2001); *see also In re Chumstick Creek Drainage Basin in Chelan County*, 103 Wn.2d 698, 707, 694 P.2d 1065 (1985) (noting the enactment of the water code and delegation of authority to Ecology to catalog substantive water rights and further beneficial use constituted proper exercise of state's police power). The continuing common law elements of beneficial use, due diligence, priority date, and relation back all remained valid, were all codified in the code, and were implemented through the permit system. *See generally* RCW 90.03.250 - .340; *see also supra* at 8-14.⁹

In general, the permit process commences by the filing of an application. RCW 90.03.250. If an application is approved, Ecology issues a permit authorizing the person to develop the water right under certain terms and conditions, including a development ("due diligence") schedule. RCW 90.03.290 - .320. Finally, upon perfection of the water right by application of the water to actual beneficial use, Ecology will issue a water certificate and the underlying right's priority date is fixed. RCW 90.03.330 - .340. Each of these steps is discussed below.

⁹ In 1945, the permit system was created for groundwater withdrawals when the legislature passed the groundwater code, codified in chapter 90.44 RCW. *See* LAWS OF 1945, ch. 263. The groundwater code incorporates the permit process set forth in the 1917 act. *See* RCW 90.44.060.

WSU obtained each of its respective water rights through its compliance with the statutory permit process and prior to the legislature's passage of the municipal law. CP 1200-07. Each WSU application complied with the requirements for municipal water supply purposes as the intended beneficial use. See RCW 90.03.260. The rights were lawfully issued and are authorized for the assorted municipal supply purposes of the WSU Pullman campus. While *Theodoratus* held that Ecology's past practice of issuing system-capacity certificates based on system capacity rather than actual beneficial use was *ultra vires*, *Theodoratus*, 135 Wn.2d 598, Ecology's actions in the permit process did not change WSU's underlying rights as authorized in the permits.

When considering the process outlined below it is important to recognize the distinction between the validity of underlying substantive rights, and the laws attached thereto as discussed above, and the process delegated to Ecology to deal with these rights.

a. Applications

Any person or entity may apply for the right to appropriate water for beneficial use. RCW 90.03.250. Specific information on the proposed use of water must be provided in an application for a permit to appropriate water. See RCW 90.03.260. While a recognized beneficial use, prior to the municipal law, the term "municipal supply purposes" was undefined.

The core section of the code that provides the general standards and criteria for reviewing an application for a permit is RCW 90.03.290. This lengthy section generally sets forth four general criteria for reviewing an application for a water permit. *Id.* These criteria have been summarized as general permit requirements that the use be for a beneficial purpose, that water be available for the appropriation, that the proposed use not impair existing water rights, and that the use be in the public interest. These criteria are often referred to as the “four-part test.” *See Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

b. Permits

When Ecology determines that an application can be granted under the criteria stated above, it issues a permit for the beneficial use. A permit is issued with several conditions to the water use; it defines the type of beneficial use of water authorized, establishes the quantity of water that can be applied to the beneficial use, RCW 90.03.290, provides a development schedule (incorporating the common law due diligence standard) to apply the water to beneficial use, and prescribes the times for commencement of the work, the completion of the work, and the application of the water to beneficial use. RCW 90.03.320. The legislature granted Ecology wide discretion in setting the due diligence time table, which may be based on the conditions existing at the time and

“having due regard for the public welfare and the public interests affected.” *Id.* Even prior to the adoption of the municipal law, and based on the legislature’s role to modify water laws to respond to policy issues and the public benefit, the legislature established that Ecology should consider specific additional criteria when setting development schedules on permits for public water systems and “municipal water supply purposes” related to, among other things, financing, implementing conservation and efficiency measures, and supply needs of the public water system’s service area. RCW 90.03.320.¹⁰

c. Certificates

Finally, upon finding that the “appropriation has been perfected in accordance with the provisions of [chapter 90.03 RCW],” Ecology issues a water right certificate, documenting a “perfected” or “vested” water right. RCW 90.03.330. This right then relates back to the date of filing of the application. RCW 90.03.340. Significantly, this process codifies the common law principles that a final water right is created or “perfected” through the actual beneficial use of water and, once perfected, the right receives a priority date back to the date action to appropriate was first

¹⁰ Additionally, under the code, Ecology may extend a permit allowing for additional times to construct and apply the water to beneficial use. Good cause must be shown and any extension must be determined on the “good faith of the applicant and the public interest affected.” RCW 90.03.320.

taken. At this time, the appropriation is complete and the underlying right “vests.” *Theodoratus*, 135 Wn.2d at 589-590; *see also Ickes v. Fox*, 85 F.2d 294, 298 (D.C. Cir. 1936), *aff’d*, 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937). The *Theodoratus* court conclusively recognized that under the then-existing statutes actual beneficial use must occur before Ecology may issue a water right certificate. 135 Wn.2d at 595.

d. System Capacity Certificates

Prior to *Theodoratus*, for several decades, Ecology processed numerous water rights by issuing certificates based on “system capacity” and not actual beneficial use. *Theodoratus*, 135 Wn.2d at 587. *Theodoratus* confirmed that this process was not in compliance with the permit system, and certificates were prematurely issued and were not authorized under then-existing statutes prescribing Ecology’s permitting authority. *Id.* at 598. The Court thus concluded that Ecology acted *ultra vires* in utilizing the system capacity standard as the measure of a water right, rather than beneficial use. *Id.* The Court expressly “decline[d] to address issues concerning municipal water suppliers.” *Id.* at 594.

When examining *Theodoratus*’ holding in light of WSU’s rights (several of which continue to be represented by system capacity certificates), it is notable that the *Theodoratus* court did not invalidate the underlying water rights represented by the system capacity certificates.

Theodoratus, rather, properly held that Ecology's practice of measuring water rights and issuing permit conditions, and by implication, certificates, was not authorized by law. *Id.*

The Tribal Respondents agree that *Theodoratus* "made no holding regarding the validity of any water rights." Respondent Tribes' Opening Brief at 19. The characterization of system capacity certificates, and Ecology's lack of authority to issue the same, did not impact the validity of any underlying water rights (whether those rights are presently perfected or unperfected). Specifically, the Tribal Respondents recognize the distinction between the substantive elements of Washington water law and the statutory process provided in the water code, agreeing that "the fact that a certificate was not validly issued does not mean that the water right represented by such a certificate is necessarily invalid." *Id.* at 18.

As WSU argued in its opening brief, in providing that system capacity certificates represented rights "in good standing," RCW 90.03.330(3), the legislature created a distinct category of water right certificates, apart from the "certificates" discussed above. *See* WSU's Opening Br. at 17-18. The legislature created a new nomenclature for a category of certificates that represent, in part, inchoate water rights. Such legislation was both appropriate and necessary following this Court's

decision in *Theodoratus* and the following uncertainty as to how these rights were to be defined and managed.

By defining these “certificates ‘*in good standing*,’” RCW 90.03.330(3) (emphasis added) the legislature, did not alter the underlying substantive water law principles attached to those rights; rather, as described in section D.1. below, the legislature expressly incorporated those principles by using the common law term “in good standing.” Just as courts have confirmed the legislature’s authority to establish the permit system and provide for a system to catalog and manage the beneficial use of water rights, by extension the legislature acts within its authority when it amends that system.

Based on the substantive notions discussed above and in accord with both *Theodoratus* and the municipal law, the rights represented by those remaining system capacity certificates are, if beneficially used, considered perfected and, if not, remain properly classified as inchoate rights “in good standing” subject to the continuing requirements of law and due diligence. *Theodoratus*, 135 Wn.2d at 595-96.

With these principles in mind, and recognizing the distinction between the underlying substantive elements of water rights and Ecology’s authority to implement the permit, WSU responds to

Respondents challenges to its rights and the municipal law's impact on those rights below.

C. RCW 90.03.015(3) and .015(4) Are Constitutional Enactments Confirming the Historic Nature of WSU's Water Rights

Prior to the enactment of the municipal law, the terms "municipal water supplier" and "municipal water supply purposes" lacked a statutory definition. While not defined, the legislature used the term "municipal water supply purposes" in several places in the water code, most notably as an exemption to statutory relinquishment and in establishing special rules related to the diligence and development requirements attendant to said rights. *See, e.g.,* RCW 90.14.140(2)(d) *and* RCW 90.03.320. This Court's analysis in *Hale v. Wellpinit School District No. 49* and an analysis of WSU's own municipal supply rights separately demonstrate that RCW 90.03.015(3) and .015(4) do not facially violate either separation of powers or due process protections.

- 1. *Hale v. Wellpinit School District No. 49* conclusively establishes that the legislative definitions in RCW 90.03.015(3) and .015(4) represent proper legislative enactments consistent with the separation of powers doctrine.**

First, subsequent to the superior court decision, this court issued a definitive ruling addressing one of the central issues considered below, whether the legislature's retroactive amendment of a statute this Court has

previously construed violates separation of powers. *Hale*, 198 P.3d at 1027. Finding that it does not, the *Hale* decision directly calls into question the superior court's conclusion and Respondents' arguments to the contrary, which rely heavily on pre-*Hale* authority. Having neither reversed nor overruled the result in the *Theodoratus* case, the legislature's enactment of the municipal law represents the very type of judicial-legislative balance this Court approved of in *Hale*. WSU adopts and incorporates the State's arguments regarding application of *Hale* to this case as set forth in the Response and Reply Brief of the State of Washington at section III.B.

WSU further adds that, unlike the facts in *Hale*, the municipal law operated to fill gaps left unanswered following *Theodoratus*, and unlike *Hale*, did not purport to alter definitions expressly defined by this Court. While even the former, under most circumstances, would be held constitutional under the *Hale* analysis, this case presents an even clearer example of proper interplay between the separate branches, and the legislature's exercise of its authority to make and amend and clarify its laws.

2. The municipal law did not contravene *Theodoratus* in defining “municipal water supply purposes”.

Second, if any question remains following *Hale*, it is evident the municipal law definitions did not, in any event, overrule any portion of *Theodoratus*, but rather responded to define a term neither defined by statute nor by this Court. Respondents rely on this Court’s statement in *Theodoratus* that George Theodoratus, an individual, “[was] not a municipality,” 135 Wn.2d at 594, to argue here that the Court in *Theodoratus* narrowly restricted the category of entities and persons who could hold water rights for “municipal water supply purposes” and the legislature has now violated the separation of powers doctrine by now expanding that category. Respondent Tribes’ Opening Br. at 37-38; *see also* Respondent Burlingame’s Opening Br. at 36.

Respondents’ arguments are without support. This Court’s pronouncements in *Hale* aside, it is important to note exactly what *Theodoratus* stated and what it did not. In the context of the facts before it, *Theodoratus* incontrovertibly noted that Mr. Theodoratus “is not a municipality.”¹¹ 135 Wn.2d at 594. No party would disagree with this statement. However, the *Theodoratus* court did not define “municipal

¹¹ *Black’s* defines the term “municipality” as “[a] legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes.” BLACK’S LAW DICTIONARY 918 (5th ed. 1979).

water supply purposes” nor circumscribe who can hold rights for “municipal water supply purposes.” *See id.* at 594.¹² Following *Theodoratus*, that operative term remained undefined in the water code. The municipal law quite simply operated to fill this gap and provide a statutory definition of the same. This quintessential legislative action does not violate separation of powers based on either pre- or post-*Hale* analysis.

3. WSU is and always has been a governmental non-municipal supplier that has claimed its water rights for “municipal water supply purposes.”

Third, the municipal law only confirmed WSU’s rights as being for “municipal water supply purposes,” as, despite the historic lack of statutory definition, even prior to the enactment of the municipal law, WSU claimed its assorted water rights serving its Pullman campus for “municipal water supply purposes.” Thus, the municipal law’s provision of a statutory definition did not alter, but rather merely conclusively confirmed this characterization of WSU’s rights.¹³ In fact, even if this Court were to find that, prior to the municipal law, private developers

¹² In fact, the *Theodoratus* court expressly “decline[d] to address issues concerning municipal water suppliers” in the context of that decision. *Theodoratus*, 135 Wn.2d at 594. The legislature thus responded to address those very issues, and others that it deemed in furtherance of sound water policy.

¹³ In the *Cornelius* decision, the Pollution Control Hearings Board (“PCHB” or “Board”) confirmed that, based on application of the municipal law, WSU was a “municipal water supplier” and that it claimed its rights for “municipal water supply purposes.” *See Cornelius v. Dep’t of Ecology and WSU*, PCHB Case No. 06-099, Order on Summary Judgment (As Amended on Reconsideration) (Jan. 18, 2008) at 11-14, but declined to

operating public water systems could not hold water rights for “municipal water supply purposes,” it is evident that entities such as WSU could and did.

While Respondents argue for an extremely narrow historic interpretation of “municipal water supply purposes,” it is important to note that, in the relevant sections of the water code dealing with municipal water supply purposes, the legislature did not use the phrase “water rights held by municipalities,” or even water rights “claimed for municipal water supply,” but rather, rights “claimed for municipal water supply *purposes*.” RCW 90.14.140(2)(d) (emphasis added). The legislature used the same precise language when discussing both the exemption from relinquishment and the special rules for diligence and development attached to such rights. *See id. and* RCW 90.03.320. The legislature’s inclusion of all rights claimed for municipal water supply “purposes,” mandates that term be given effect. It is the courts’ goal to carry out the legislature’s intent, giving meaning to each word in the statute. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

rule on whether WSU held its rights for municipal water supply purposes prior to the enactment of the municipal law. *Id.* at 11.

Absent a statutory definition, statutory terms are generally accorded their plain and ordinary meaning unless a contrary legislative intent appears. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 479-80, 745 P.2d 1295 (1987). Giving effect to the legislature's use of the term "purposes" suggests that the analysis centers not solely on identification of the holder of the right in question, but on the aim to which it is being put, and whether that intent is quintessentially public in nature or akin to that typically provided by a city or town. BLACK'S LAW DICTIONARY 1112 (5th ed. 1979) (defining "purpose" as "[t]hat which one sets before him to accomplish, an end, intention, or aim, object, plan, project"). Historic common usage is consistent with this definition. *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1465 (2d ed. 1958).¹⁴ WSU's purposes certainly meet this definition. Even prior to the municipal law definitions, the legislature's use of the term "purposes"

¹⁴ Legal dictionaries recognize that even the term "municipal" itself is possessed of both narrow and more broadly contoured definitions, providing "[i]n narrower, more common, sense, it means pertaining to a local governmental unit, commonly, a city or town or other governmental unit," however, [i]n its broader sense, it means pertaining to the public . . . affairs of . . . a people." BLACK'S LAW DICTIONARY 917 (5th ed. 1979). Certainly, when the legislature employed the term municipal supply "purposes" it intended to invoke the broader definition and capture water rights held by entities that, strictly speaking, may not be municipal entities, i.e., cities and towns. Such a definition would not only be inconsistent with the language employed by the legislature, but arguably, exclude counties, special service districts, and other non-municipal entities. The Court should reject the Respondents' attempt to narrowly constrain the legislature's words in this regard.

indicated an intent to broadly define who could exercise and provide water for municipal supply.

WSU is a prime example of a non-municipal entity that has always claimed and exercised its rights for municipal water supply purposes. WSU is the state's land grant institution of higher education, established and governed by state statute. *See* ch. 23B.30 RCW; *see also* CP at 1189-91. In accordance with its statutory mandate, *see cf.* RCW 23B.30.015, WSU serves a defined public purpose, which necessitates, *inter alia*, providing water supply to its residential, operational, and other public ends. CP at 1194, 1198. While plainly not a municipality, and rather located within the city limits of the City of Pullman, WSU has and continues to operate an expansive public water system serving thousands of students and employees that study, live, and work on campus. CP 1193-94, 1198.

WSU assorted water rights date back to 1934 and the rights authorize the use of water for municipal supply, community domestic supply, irrigation, and stock water, and collectively serve municipal water supply purposes. *See* CP at 1200-07. The priority dates of all WSU's rights pre-date the municipal law. WSU's rights are detailed below:

Form	Number	Purpose Stated on Document	Priority Date
Groundwater Claim	No. 098522	Municipal Supply, Irrigation and stock water	1934
Groundwater Claim	No. 098523	Municipal Supply, Irrigation and stock water	1938
Groundwater Certificate	No. 5070-A-	Domestic supply (for Washington State University)	1962
Groundwater Certificate	No. 5072-A	Community domestic supply and stock water	1963
Groundwater Certificate	No. G3-22065C	Municipal supply	1973
Groundwater Permit	No. G302827P	Municipal supply	1987

See CP at 1200-07. WSU has historically used all of the above rights in conjunction with one another for municipal water supply “purposes” to supply the Pullman campus water system. *See* CP at 1196-97.

As the record below demonstrates, having a secure water supply is “[k]ey to maintaining the University’s educational purpose and mission,” involving both domestic supply and the University’s agricultural education. *Id.* at 1190. WSU’s development and growth are not finite, it must continue to evolve to meet and serve an ever growing and changing public population and educational needs. CP at 1189-91. WSU’s water supply must be able to meet the current and future demands for domestic supply and for maintaining its irrigation and stock water demands in order

to continue to fulfill its public educational purposes. *Id.* at 1189-91. Other institutions of higher education, based on their geographical location within larger metropolitan areas, may receive their water supply from the municipalities within which they are located. However, the origination of that water, and the entity that ultimately holds the underlying right, does not alter the “purpose” of the water supply, with both being for “municipal water supply purposes.” WSU’s water rights, and its public mission, should not be compromised merely because of its status as a public institution that manages its own water resources, as opposed to receiving the same from the City of Pullman, of which it is a part.¹⁵ Such a result would lead to absurd and drastic consequences for one of the state’s institutions of higher education.

WSU’s experience of having held and claimed water rights for municipal water supply purposes both prior to and following the enactment of the municipal law further demonstrates the constitutionality of the municipal law. Respondents’ arguments here that the legislature’s defining of a previously undefined statutory term somehow created an additional class of entities that could hold water rights for municipal

¹⁵ WSU’s circumstances and the quintessential public “purposes” to which it claims and exercises its rights serve as just one poignant example of why the legislature chose to rely on a broadly phrased term “municipal water supply purposes” throughout the water code. See RCW 90.14.140(2)(d) and RCW 90.03.260.

supply purposes is based on a strained and overly constrictive interpretation of both *Theodoratus* and the pre-existing statutory language. To the extent any ambiguity existed as to other entities, the municipal law was a proper and constitutional curative amendment.

4. The municipal law's definitions do not violate substantive due process.

Finally, in addition to their separation of powers argument, Respondents challenge the municipal law definitions alleging that their operative effect violates due process protections by “retroactively shielding private developers from relinquishment of their rights due to non-use or failure to exercise due diligence in the development of the right.” Respondent Burlingame’s Opening Br. at 58; *see also* Respondent Tribe’s Opening Br. at 53-57. Respondents’ arguments draw on the application of the municipal law definition of “municipal water supply purpose,” RCW 90.03.015(4), to the exemption to statutory relinquishment found in RCW 90.14.140(2)(d).

Respondents’ argument is ironically inconsistent with the holdings in *Theodoratus* that Respondents claim to so vehemently defend. First, as discussed above, common law diligence requirements remain a component of any inchoate portions of substantive rights. *See supra* at subsections

III.B.1.b *and* III.B.2.d.¹⁶ Further, to make this argument, Respondents have to convince this court that an inchoate water right is a perfected water right. Respondents cannot have it both ways, and the relinquishment issue is truly a red herring.

As discussed above, statutory relinquishment only applies to rights that are perfected by the actual beneficial use of the water. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 146 Wn.2d at 803 (“the Legislature has plainly made statutory forfeiture *inapplicable to unperfected* water rights” (emphasis added)). Because the inchoate portion of those rights represented by system capacity certificates, including WSU’s rights, are, by their very definition, not “perfected” rights, they quite simply have never been subject to statutory relinquishment. *Id.* In other words, Respondents’ arguments that the municipal law definitions “resurrect[ed]” inchoate rights that should have been relinquished, and then retroactively exempted them from the relinquishment statutes, is not supported by the statutory enactments in the water code or the above common law principles. Accordingly, RCW 90.03.015(3) and .015(4), to the extent they clarify which perfected rights are or are not subject to relinquishment in the future, such an application of the law is purely prospective in nature. Respondents’ arguments rely on a subjective expectation that the

¹⁶ See extended discussion *infra* at 37-41

legislature would never, and as they appear to argue here, may never, alter the statutory relinquishment law.

Just as the legislature's enactment of the original relinquishment laws have been held to be a constitutional exercise of its authority, *see cf. In re Chumstick Creek Drainage Basin in Chelan County*, 103 Wn.2d at 707 (citing *Texaco, Inc. v. Short*, 454 U.S. 516, 526, 530, 102 S. Ct. 781, 792, 70 L. Ed. 2d 738 (1982)), so too amendments, limitations, and reasonable expansions are constitutional. Respondents' arguments to the contrary rely on both a faulty premise regarding the perfection of inchoate rights and the mischaracterization of the application of the relinquishment law, which has no application to inchoate rights.

D. RCW 90.03.330(2) and .330(3) are Constitutional Enactments Consistent with *Theodoratus*

Generally speaking, Respondents premise their arguments on the faulty premise that the municipal law codified in RCW 90.03.330(2) and .330(3) "perfected" otherwise potentially unperfected rights by simply allowing them to remain categorized by the term "certificates." To support their arguments, the Burlingame Respondents require this Court first construe the municipal law as "perfecting" otherwise unperfected underlying inchoate water rights. The Burlingame Respondents ask this Court to construe RCW 90.03.330(3) as "transform[ing] the unused,

unperfected portion of a water right into a vested, perfected right without requiring actual beneficial use.” See Respondent Burlingame Opening Br. at 8, 50 (“the MWL treats these certificates as certificates in good standing - that is, as validly perfected water rights”). The Tribal Respondents similarly support their arguments by attempting to establish the predicate foundation that the municipal law “effectively converts unused water rights into vested, perfected rights.” Respondent Tribes Opening Br. at 34. Both Respondents are fundamentally incorrect.

1. The “in good standing” characterization in RCW 90.03.330(3) responded to, but is entirely consistent with, *Theodoratus*.

Unquestionably, following *Theodoratus*, Ecology was left with the difficult task of discerning the status of water rights represented by system capacity certificates. Those, like WSU, holding rights for municipal water supply purposes, were similarly left in doubt as to how Ecology now characterized their water rights.¹⁷

The legislature responded by adopting the very language used by the court in *Theodoratus*. See RCW 90.03.330(3). In considering

¹⁷ Recall that *Theodoratus* declared only that Ecology’s practice and process of issuing system capacity certificates was *ultra vires* under the then-existing statutes, it made no ruling as to the validity of the underlying rights or their proper characterization. See Respondent Tribes’ Opening Brief at 18-1 (agreeing with interpretation). Not having been invalidated, Respondent Burlingame’s assertion that the municipal law impermissibly “resurrect[s]” these rights mischaracterizes the legal effect of *Theodoratus* to support their arguments here. See Respondent Burlingame’s Opening Br. at 58.

Mr. Theodoratus' permitted right, the court noted that he had "at present an inchoate right to water which has not yet been applied to beneficial use," which it further described as "an incomplete appropriative right *in good standing*" and which remains in good standing "so long as the requirements of law are being fulfilled." *Theodoratus*, 135 Wn.2d at 596 (emphasis added) (quoting 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 226). The *Theodoratus* court noted the water codes recognition of the validity of inchoate "in good standing" rights and the "reasonable diligence" requirement attached thereto. *Id.* In enacting the municipal law, the legislature incorporated the very language used by the *Theodoratus* court when it provided that prior-issued system capacity certificates represented a water right "in good standing." RCW 90.03.330(3).¹⁸ The very use of the common law term "in good standing," as also previously used by the *Theodoratus* court, reinforces the legislature's adoption of the common law diligence requirements and refutes Respondents' strained interpretation that the municipal law "perfected" inchoate rights.

¹⁸ The State, in its briefing to the court in *Theodoratus* supported this very proposition, asserting that "[a] water right is complete and vests into a constitutionally protected right to the extent water has been beneficially used" Dep't of Ecology's Response to Amicus Curiae Brief of Washington Water Utility Council at 10 (emphasis added) (citing *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 474, 852 P.2d 1044 (1993)). "If a permit holder receives a certificate for a quantity of water that has not been put to beneficial use the water right is still subject to the laws of diligence and beneficial use." *Id.* at 15.

Washington law has strong roots and continues to employ the common law as the law of the State, *see* RCW 4.04.010, with water law being only one example of the same. In this regard, it is a well-established canon of statutory construction that the common law, and terms and concepts recognized by the common law, continue even following statutory enactment on a subject, unless the language of a statute clearly and explicitly seeks to deviate therefrom. *See cf. Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008). Similarly, in areas such as water law that originally developed in common law, and continue to evolve, there exists a presumption in favor of continuing to follow common law usage where the legislature employs words, terms, or concepts with well settled common law traditions. *Cf. Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 96 L. Ed. 1294 (1952) (“[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles”); *see also* WILLIAM N. ESKRIDGE, ET AL., LEGISLATION AND STATUTORY INTERPRETATION 382 (2000).¹⁹

¹⁹ Washington law is in accord with these common law canons. As this Court has consistently noted, recognized common law principles stand unaltered so far as they are consistent with reasonable interpretation of legislative enactments in the same area of the law, and it must not be presumed that the legislature intends to make any innovation on common law without clearly manifesting such intent. *In re Parentage of L.B.*, 155 Wn.2d 679, 695 n.11, 122 P.3d 161 (2005); *see also Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960)).

Despite the above canon, Respondents argue, as they must to support their facial challenge, that the legislature, in enacting the municipal law, intended to abrogate the above-described common law principles of “due diligence” and “perfection.” It did not. Rather, the legislature used the very common law term used by this Court in *Theodoratus* to describe the inchoate portion of those water rights represented by improperly issued system capacity certificates, describing them as “right[s] in good standing.” Compare RCW 90.03.330(3) with *Theodoratus*, 135 Wn.2d at 596. In so doing, the legislature confirmed the common law understanding of inchoate rights, adopted the very definition set forth in *Theodoratus*, and went on to describe the *process* by which Ecology was to deal with these rights. While Respondents obfuscate the issue by accusing Appellants of attempting to re-write the municipal law to add words omitted by the legislature, Respondents’ arguments fail to give due recognition to the legislature’s use of a common law term of art, already possessed of certain and special meaning. See *In re King County for Foreclosure of Liens for Delinquent Real Prop. Taxes for Years 1985 through 1988*, 117 Wn.2d 77, 86, 811 P.2d 945 (1991) (as legislature is presumed to know existing case law in areas in which it is legislating courts may look to the common law in ascertaining proper scope of statute).

Accordingly, by use of the common law term “in good standing” the legislature incorporated those common law principles discussed above attached to inchoate rights, including the requirement that they continue to meet the requirements of law and due diligence to remain valid.²⁰ Because the legislature did not revitalize invalid rights declared invalid nor perfect rights without regard to the common law requirements, Respondents’ arguments that the legislature unconstitutionally enlarges one category of right to the detriment of others is based on a faulty premise, and is unsupported.

2. WSU has continued to use reasonable diligence to perfect the inchoate portions of its system capacity water rights.

As confirmation of the above proffered interpretation, supported by well accepted common law principles of western water law, the recent separate challenge to WSU’s water rights, several of which are represented by system capacity certificates, *see Cornelius*, PCHB Case

²⁰ Contrary to Respondents’ arguments, by characterizing inchoate rights represented by system capacity certificates as rights “in good standing,” the legislature did not make any impermissible judicial determination of those rights. As with their other arguments, to support this argument Appellants argue, as they must, that the common law requirements of due diligence and beneficial use no longer apply to the underlying rights represented by these certificates. As this predicate basis fails, so does their entire argument. Further, Respondents attempts to analogize the municipal law to foreign factually distinguishable cases is unpersuasive and taken out of context. For example, the situation at issue in *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 202-203, 972 P.2d 179, 186-87 (1999) involved legislative enactments attempting to prescribe the nature of certain rights in dispute “in the midst of” a current ongoing judicial adjudication of substantive rights. *Id.* at 203, 972 P.2d at 187.

No. 06-099, *supra*, involved the application of the diligence standard to WSU's underlying inchoate rights represented therein. In this post-municipal law Pollution Control Hearings Board ("PCHB" or "Board") challenge to WSU's application to change and consolidate its assorted rights (including those rights represented by system capacity certificates) the continuing issue of due diligence was central the Board's decision. *Cornelius*, PCHB Case No. 06-099 (Order on Summary Judgment) at 25-27.

In that case the PCHB both considered and expressly confirmed that WSU has exercised and continues to exercise reasonable diligence with respect to the inchoate portions of its rights. *Id.* Appellants in that case expressly argued that WSU had not exercised reasonable diligence to perfect the inchoate portions of its underlying water rights, and specifically the inchoate portions of its rights represented by system capacity certificates. *Id.* at 25.

The PCHB considered this argument, applied the due diligence standard, and confirmed the continuing validity of WSU's rights based on its fulfillment of the diligence requirement. *Id.* The PCHB applied the following law regarding diligence in reaching its decision:

The Supreme Court has stated that reasonable diligence "must depend to a large extent upon the circumstances." The

“reasonable diligence” requirement is a flexible standard, and the Board believes that flexibility in interpreting it is particularly important with regard to water rights for municipal supply purposes. Jurisdictions grow at uneven rates and need to be able to serve their growing populations. . . .

Cornelius, PCHB Case No. 06-099 (Order on Summary Judgment) at 26 (internal citations omitted). The Board applying the reasonable diligence standard to WSU’s rights found:

The Board finds in the present case Ecology was within its discretion to determine that WSU is exercising due diligence in putting its water rights to full beneficial use and that WSU’s water rights remain *in good standing*.

Id. (emphasis added). The Board itself, noting WSU’s good faith and diligence in continuing to develop facilities and increasing the enrollment of students, likewise concluded, “WSU has exercised reasonable diligence in perfecting the inchoate portions of its water rights.” *Id.* at 25, 27.

Of note, two of those appellants, Scott Cornelius and the Sierra Club, are also Respondents in the facial challenge before this Court. While before the PCHB, those parties argued that WSU was required to exercise reasonable diligence in order to continue to maintain its rights “in good standing” and transfer those rights, *see id.* at 25, they alter their arguments here to argue that the municipal law eviscerates this standard

entirely. *See* Respondent Burlingame’s Opening Br. at 8 (arguing that the municipal law “transforms the unused, unperfected portion of a water right into a vested, perfected right, . . . exempt from the requirements of RCW 90.03.320 and RCW 90.03.460 that unperfected rights be developed with ‘diligence’”).

WSU’s experience, continued use of diligence in perfecting the inchoate portions of its rights, and the PCHB’s confirmation of the same, supports the notion that the legislature intended to encapsulate these common law requirements by adopting the common law term of art, “in good standing.” Respondents arguments to the contrary that the legislature intended to “perfect” otherwise unperfected rights is unavailing, and is a thinly veiled attempt to create a constitutional argument when none exists.

3. The process dictates in RCW 90.03.330(2) do not alter the character of the underlying substantive rights confirmed by the municipal law.

As an additional argument, the Tribal Respondents argue that WSU’s interpretation of the operative effect of the “in good standing language” is inconsistent with RCW 90.03.330(2), which prescribes that Ecology may not unilaterally revoke or diminish a certificate a certificated water right for municipal water supply purposes, including system

capacity certificates. *See* Respondent Tribes' Opening Br. at 21-23. The Tribal Respondents' arguments fail for three reasons.

First, RCW 90.03.330(2) addresses, first and foremost, the legislature's delegation to the executive branch, through Ecology, the extent of its authority to address the management and cataloging of water rights. Just as the legislature can grant this authority to Ecology, *see Hallauer*, 143 Wn.2d at 143; *see also In re Chumstick Creek Drainage Basin in Chelan County*, 103 Wn.2d at 707, it may also circumscribe it. This section reflects a policy decision by the legislature and a limitation on the authority it has delegated to Ecology, it does not address the substantive nature of the rights represented by system capacity certificates.

Second, the Tribal Respondents confuse the process mechanisms established by the code with the underlying substantive rights and principles. RCW 90.03.330(2) deals only with the former, and does not alter the substantive character of the underlying rights.²¹ For example, RCW 90.03.330(2) does not change, or purport to in any way limit, the

²¹ Additionally, it is well established in Washington that Ecology's issuance of a water permit or certificate is not an adjudication of private rights. *Mack v. Eldorado Water Dist.*, 56 Wn.2d 584, 587, 354 P.2d 917 (1960); *see also Madison v. McNeal*, 171 Wash. 669, 680, 19 P.2d 97 (1933). Whatever the description Ecology confers on or chooses to label a particular water right, that description remains always "subject to confirmation in the general adjudication procedure provided in RCW 90.03.110, *et seq.*" *McLeary v. Dep't of Game*, 91 Wn.2d 647, 651, 591 P.2d 778 (1979).

above-discussed substantive legal principles of impairment, due diligence, or beneficial use. Those principles remain intact.

Third, when holders of system capacity certificates seek to change, transfer, or amend their rights, at which point the interests of junior right holders may be implicated, the legislature ensured Ecology maintained the authority to address the relevant substantive water law principles and protections of junior water right holders. This process was played out in full in relation to WSU's rights, and were challenged by several of Respondents herein. *See, e.g., Cornelius*, PCHB Case No. 06-099, *supra*.

4. RCW 90.03.330(2) does not facially violate procedural due process protections.

Finally, the Burlingame Respondents further assert, with limited supporting authority or argument, that RCW 90.03.330(2), facially violates procedural due process by limiting the "revocation, diminishment or adjustment" of the alleged "resurrected pumps and pipes certificates" without providing notice and opportunity to be heard, to junior water right holders "whose rights had improved after *Theodoratus*." *See* Respondent Burlingame's Opening Br. at 68. This argument rests entirely on two faulty premises, discredited above, (1) that the municipal law "resurrected" and perfected water rights previously declared invalid,

and (2) that junior right holders' water rights had actually improved after *Theodoratus*.

First, *Theodoratus* did not declare any substantive water rights to be invalid, and as such, the municipal law did not resurrect any invalidated rights. As the Tribal Respondents agree, *Theodoratus* "made *no* holding regarding the validity of any water rights." Respondent Tribes' Opening Brief at 19 (emphasis added). Second, because *Theodoratus* did not diminish or even address the substantive nature of the rights represented by system capacity certificates, the Burlingame Respondents' arguments and premise that junior water right holders rights and position improved after *Theodoratus* is not supported by law or any facts in the record.

Additionally, to the extent Respondents are purporting to argue that junior water right holders will now lack notice and an opportunity to be heard regarding whether a holder of a system capacity certificate is meeting its diligence requirements, such a process does not even presently exist under the law.²² For example, pre-municipal law, the water code provided Ecology the ability to monitor diligence through the permit process and the establishment of development schedules. However, when

²² WSU further adopts and incorporates the State's arguments regarding the application of the *Mathews* test, as set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), as set forth in the Response and Reply Brief of the State of Washington at section IV.B.3.

permit holders sought to extend those schedules, the code does not mandate any publication or comment period. *See* RCW 90.03.320. Again, Ecology's limited authority under RCW 90.03.330(2) does not change the water right holder's requirement to act with due diligence and perfect the water right by applying the water to actual beneficial use. These principles remain.

E. RCW 90.03.386 Represents a Constitutional Exercise of the Legislature's Police Power Authority and Does Not Facially Violate Procedural or Substantive Due Process

WSU adopts and incorporates the State's arguments regarding the constitutionality of RCW 90.03.386(2) as set forth in the Response and Reply Brief of the State of Washington at section IV.A.1 and IV.B.2. WSU submits the following additional argument.

RCW 90.03.386(2) provides that following the enactment of the municipal law, and after the Department of Health approves the supplier's water system plan, the place of use of a municipal water supplier's water rights shall include the supplier's water system plan's water service area. As WSU's Pullman campus continues, as it always has, to expand through construction, and as the student, faculty, and employee populations continue to grow, *see* CP 1189-91; *see also Cornelius*, PCHB Case No. 06-999 (Order on Summary Judgment) at 20, the ability of WSU to plan for growth is paramount to its continued success and ability to meet its

statutory mandate. To address these needs, RCW 90.03.386(2) operates prospectively to permit integration of water rights to serve an ever growing and changing population base with greater and much needed certainty. WSU's recent consolidation of wells and system integration reveals just some of the sound policy reasons and practical realities supporting greater coordination of water rights for beneficial public use. *See generally Cornelius v. Dep't of Ecology and WSU*, PCHB Case No. 06-099 (Findings of Fact, Conclusions of Law and Order) at 8 (Apr. 17, 2008). WSU's case further reveals those distinct needs and issues related to municipal water supply purposes, including the need to ensure peak demand can be met, necessary redundancy, and system-wide fire suppression. *Id.*

In sum, the legislature's enactment of RCW 90.03.386(2) is consistent with the continuing development of the prior appropriation doctrine that is designed to evolve to allow for the modification and regulation of the right to beneficially use water to address changing societal and practical circumstances.

F. RCW 90.03.260 Represents a Constitutional Exercise of the Legislature's Police Power Authority and Does Not Facially Violate Procedural or Substantive Due Process

WSU adopts and incorporates the State's arguments regarding the constitutionality of RCW 90.03.260(4) and .260(5) as set forth in the

Response and Reply Brief of the State of Washington at section IV.A.2 and IV.B.2

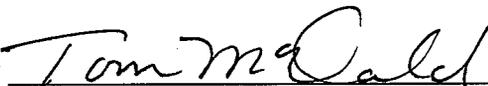
IV. CONCLUSION

WSU respectfully requests this Court reverse the trial court and hold that the definitions in the municipal law at RCW 90.03.015(3) and (4) and the municipal law's establishment of a process to deal with system capacity certificates in RCW 90.03.330(2) and .330(3) do not violate the separation of powers and are facially constitutional under the right to due process under the Washington State Constitution. WSU further respectfully requests this Court affirm the superior court's decision holding that RCW 90.03.260(4) and .260(5), RCW 90.03.330(2) and .330(3), and RCW 90.03.386(2) are facially constitutional under the right to due process under the federal and state constitutions.

Respectfully submitted this 23 day of February 2009.

CASCADIA LAW GROUP PLLC

By



Thomas McDonald, WSBA #17549

Joseph A. Rehberger, WSBA #35556

Mary E. McCrea, WSBA #20160

Attorneys for Washington State University