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SUPREME COURT
STATE OF WASHINGTON

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No. 81809-6

BY RONALD R. CARPENTER

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LUMMI INDIAN NATION; MAKAH INDIAN TRIBE; QUINAULT
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 DEPARTMENT OF
ECOLOGY; JAY MANNING, Director of the Washington Department
of Ecology; WASHINGTON DEPARTMENT OF HEALTH; MARY
SELECKY, Secretary of Health for the State of Washington;
WASHINGTON WATER UTILITIES COUNCIL; CASCADE WATER
ALLIANCE; and WASHINGTON STATE UNIVERSITY,

Appellants/Cross-Respondents.

**BRIEF OF APPELLANT/CROSS RESPONDENT
CASCADE WATER ALLIANCE**

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CONSTITUTIONAL PROVISIONS

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I. ASSIGNMENT OF ERROR

1. The trial court erred when it ruled that Washington State Legislature violated the Constitutional doctrine of separation of powers by overruling *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) (hereafter "*Theodoratus*"), when it amended RCW 90.03.330 by adding section (3).

2. The trial court erred when it ruled that Washington State Legislature violated the Constitutional doctrine of separation of powers by overruling *Theodoratus*, when it amended RCW 90.03.015 by adding section (3) & (4).

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A claim that legislative action retroactively overruled a decision of the Washington State Supreme Court and violated separation of powers by threatening the independence or integrity of the court or invading the prerogative of that court turns upon the holding of the case, and the effect on that holding of the subsequent legislation; and, further, if the case has been overturned can the legislation be saved by applying prospectively.

In this appeal, the case is *Theodoratus* and there are two issues. First, did that case decide that all water right certificates issued on the basis of system capacity (“pumps and pipes”) are invalid? Second, did that case decide that only “municipalities” could be municipal water suppliers or hold water rights for municipal water supply purposes? If either question is answered no, the legislature did not violate the separation of powers doctrine as to that question. If either question is answered yes, the issue becomes the legal effect of the legislation. Did it overrule *Theodoratus* and validate certificates invalidated by that case, or create municipal water suppliers contrary to the court’s ruling, and in the latter case, if so, whether the legislation be applied prospectively to save it.

III. STATEMENT OF THE CASE

A. **Introduction.** The Cascade Water Alliance is a non-profit Washington corporation that was formed in April, 1999, by Interlocal Agreement (Chapter 39.34 RCW). Cascade is a separate legal entity, whose membership includes municipal corporations and special purpose municipal corporations¹, each of which is authorized to provide water

¹ Cascade’s members are the City of Bellevue, Covington Water District, City of Issaquah, City of Kirkland, City of Redmond, Sammamish Plateau Water and Sewer

supply to a designated service area. Among Cascade's purposes is providing water supply to meet the current and projected demand of Cascade's members, net of their independent supplies. Those independent supplies are water right based and any diminution of its members' water rights affects Cascade's supply obligations to its members.

B. Proceedings Below. In the trial court, Plaintiffs challenged the constitutionality of certain sections of the Municipal Water Law ("MWL")² On September 1, 2006, the Burlingame Plaintiffs filed their Complaint for Declaratory and Injunctive Relief asserting that certain sections of the MWL were facially unconstitutional. CP 1. On November 30, 2006, an order granting intervention to the Washington Water Utility Council was entered, CP 22, and on December 15, 2006 an order granting intervention to the Cascade Water Alliance was entered. CP 29. On December 26, 2006, the Tribal Plaintiffs filed their Complaint for Declaratory and Injunctive Relief alleging the same facial

District, Skyway Water and Sewer District, and City of Tukwila. Cascade's members represent approximately 300,000 water users. Declaration of Michael A Gagliardo.

² On June 10, 2003, the Washington Legislature enacted Second Engrossed Second Substitute House Bill (SESSHB) 1338, "Municipal Water Supply--Efficiency Requirements." Act of June 20, 2003, Ch. 5, § 6, 2003 Wash. 1st Spec. Sess. Laws 2341-54. SESSHB 1338 is titled as "An Act Relating to certainty and flexibility of municipal water rights and efficient use of water," This Act is referred to herein as the "Municipal Water Law" or the "MWL."

constitutional challenges.³ CP 1. On March 9, 2007, Washington State University was granted intervention in the *Burlingame, et al.* action. CP 51. On March 20, 2007, the two cases were consolidated through entry of the Order on Joint Motion to Consolidate cases. CP 58. The Defendants and each Intervenor filed answers. CP's 10, 12, 30, 34, 36, 39.

The Plaintiffs, Defendants, and each intervenor filed cross-motions for summary judgment, CP's 66, 78, 82, 96,102, and the trial court disposed of the case by entering an order of summary judgment declaring that the legislature had violated the constitutional doctrine of separation of powers when it adopted RCW 90.03.015(4) & (5) and RCW 90.03.330(3). The trial court rejected all of the Plaintiffs claims for violation of substantive and procedural due process. CP 201. Cross appeals were file by all parties below⁴. CP's 203, 204, 207, 210, 212, 213. This court was asked to accept discretionary review and a decision on that request is pending.

³ Subsequently, the Tribal Plaintiffs filed an amended complaint adding a cause of action also alleging a facial constitutional challenge to a section of the MWL. See, CP 156.

⁴ In this appeal, defendants below are "Appellant-Respondents" and plaintiffs below are "Respondent-Appellants." Throughout this brief the former will be referred to as "Appellants" and the later as "Respondents."

C. **Statement of Facts.** In the 1930s, the Department of Conservation implemented a policy (the “pumps and pipes” policy) that recognized that water was appropriated and a water right was perfected according to the installed capacity of the applicant’s water works and issued water right certificates on that basis. CP 90, 98, 99. Following this policy, Ecology and its predecessor have issued certificates to various public water systems, including cities, towns, public utility districts, water districts, private water companies, and mutual associations. CP 90, 92, 94,

After decades of issuing such certificates, Ecology began to reconsider issuing “pumps and pipes” certificated rights. CP 90, 95, 98. That reconsideration resulted in public statements and memos questioning not only the legality of “pumps and pipes” certificates, but also the availability water authorized by the certificates - but not yet used - to supply future public water needs and obligations. Id.

Ecology’s apparent shifting position raised concerns among “pumps and pipes” certificate holders, business, and industry and forced them to question the reliability of public water systems’ planning for current and future needs. Those concerns were exacerbated by

Ecology's interpretation of this court's decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) that Ecology could not condition a water right permit to allow pumps and pipes perfection, and by Ecology's preparation of a draft policy⁵ documenting its new position that "pumps and pipe" certificates were not valid, and proposing "corrective actions" to implement during its review of water system plans and of applications for water right changes. *Id.* Ecology's draft policy was of concern to public water systems because of its uncertain effects on their legal, financial, and operational status, including their ability to plan for future needs and their ability to meet bond and debt obligations premised on "pumps and pipes" certificates. Further, they feared they would be penalized, rather than rewarded, for their investments in conservation and water use efficiency by the loss of water authorized by certificates, but unused, and upon which they had relied for planning purposes. *Id.*

Another issue percolating in the world of public water supply centered upon the exemption of "water rights claimed for municipal water supply purposes" from the relinquishment provisions of Chapter 90.14 RCW. Because the term "municipal water supply purposes" was

⁵ Ecology's Draft Policy 1250, see CP 90, 98.

undefined the availability of the exemption to some public water suppliers was in question. Ecology has consistently maintained that cities could claim the exemption, but it has not always agreed that the exemption applies to other public water supply systems. CP 83, 93, 95

Ecology has recognized that special districts, non-profit water companies, and privately-owned systems provided municipal supply and issued them water rights for municipal water supply purposes. CP 83, 93, 95. Ecology manuals and letter opinions from department heads have suggested that non-municipal utilities could provide water for municipal supply purposes. CP 83, 95. But Ecology also developed a competing interpretation of "municipal water supply purposes" that limited the term to municipalities. For example, Ecology manuals have suggested that Public utility districts and private water systems should not be issued water rights for municipal water supply purposes; and, in some legal proceedings, Ecology has defined the term narrowly, focusing on the legal structure of the utility, rather than the purpose of use for the water. CP 95, 99.

Ultimately, Ecology's shifting positions helped lead to passage of the MWL. Among many other things, the MWL spoke to the issues

implicit in, but not decided by, *Theodoratus*. *Theodoratus* had upheld Ecology's authority to impose new *permit* conditions or to correct prior *permit* conditions when acting on a request for a water right *permit* extension. It also decided that Ecology had not acted arbitrarily or capriciously when it corrected a *permit* condition to provide for perfection of the water right and issuance of a certificate of water right according to actual beneficial use, instead of on the basis of "pumps and pipes." That correction was appropriate because Washington law had always required perfection of a water right by actual beneficial use and a certificate of water right could be issued only for actual beneficial use; therefore, Ecology was only correcting an unlawful – *ultra vires* – *permit* condition.

Even though *Theodoratus* did not involve a "pumps and pipes" certificate, the Court's analysis had unsettling implications for such outstanding certificates. The decision caused immediate consternation among the many holders of pumps and pipes certificates. To settle the status of pumps and pipes certificates – something *Theodoratus* did not do – the MWL amended RCW 90.03.330, which governs the issuance of

water right certificates. CP 98. The new sections of RCW 90.03.330

provide, in pertinent part, as follows:

(2) Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015 unless the certificate was issued with ministerial errors or was obtained through misrepresentation. The department may adjust such a certificate under this subsection if ministerial errors are discovered, but only to the extent necessary to correct the ministerial errors. The department may diminish the right represented by such a certificate if the certificate was obtained through a misrepresentation on the part of the applicant or permit holder, but only to the extent of the misrepresentation. The authority provided by this subsection does not include revoking, diminishing, or adjusting a certificate based on any change in policy regarding the issuance of such certificates that has occurred since the certificate was issued. This subsection may not be construed as providing any authority to the department to revoke, diminish, or adjust any other water right.

(3) This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

(4) After September 9, 2003, the department must issue a new certificate under subsection (1) of this section for a water right represented by a water right permit only for the perfected portion of a water right as demonstrated through actual beneficial use of water.

RCW 90.03.330(2)-(4).

Respondent-Appellants argued that by adopting section (3) the legislature overruled *Theodoratus* retroactively by validating certificates invalidated by that case. The trial court agreed:

I conclude after reviewing those statutes and the *Theodoratus* decision that 330 ... [is a] retroactive statute[] that unconstitutionally attempt[s] to reinstate water rights that were invalidated by the Washington State Supreme Court in *Department of Ecology versus George Theodoratus*, 135 Wn.2d 682.

Appendix A at 7, lines 12-18⁶

This statute clearly reinstates pumps and pipe certificates issued prior to September 9th, 2003, and this is an attempt to reverse the *Theodoratus* decision.

Appendix A at 9, lines 7-9.

The MWL also, for the first time, defined “municipal water supply purposes” and “municipal water supplier,” by adding the following new subsections to RCW 90.03.015:

RCW 90.03.015.

(3) "Municipal water supplier" means an entity that supplies water for municipal water supply purposes.

(4) "Municipal water supply purposes" means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for

⁶ The court's oral ruling is attached as Appendix A.

at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use....

Although adoption of these definitions was not particularly driven by *Theodoratus*, the court in that case did say:

We are also not persuaded by Appellant's claim that a distinction is warranted because his is a public water supply system. Initially, we note that Appellant is a private developer and his development is finite. Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case.

Theodoratus at 594.

Respondent argued that in *Theodoratus* this court decided that Mr. Theodoratus was not a municipality and that by adopting these sections the legislature overruled *Theodoratus* retroactively by recognizing that his system provided water for "municipal water supply purposes" thereby making him a "municipal water supplier".

The trial court agreed.

Despite not reaching issues concerning municipal water suppliers, the *Theodoratus* court reached a decision that decided an issue with respect to Mr. Theodoratus' water rights. In other words, because of the very arguments made by Mr. Theodoratus that court was forced to address whether or not Theodoratus was or was not in the situation of a party holding the water rights of a public water supply system under state

statutory and common law. This court decided he was not, and that his rights vested only through beneficial use.

Appendix A at 11, Lines 2-13.

IV. ARGUMENT

A. Standard of Review and Burden of Proof.

1. Review of Constitutional Ruling.

The court reviews questions of law and constitutional rulings de novo. *City of Redmond v. Moore*, 131 Wn.2d 664, 668, 91 P.3d 875 (2004).

2. Review of Summary Judgment.

A summary judgment order is reviewed de novo, and the appellate court performs the same inquiry as the trial court. *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 169, 736 P.2d 249 (1987). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Coluccio v. King County*, 82 Wn. App. 45, 48-49, 917 P.2d 145 (1996), *rev. den.*, 130 Wn.2d 1015 (1996). By filing cross motions for summary judgment, the parties concede that there are no material issues of fact. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 930, 946 P.2d 1235 (1997).

3. The Challenged Provisions of the Municipal Water Law Must be Proved Unconstitutional Beyond a Reasonable Doubt.

This statute is “presumed constitutional” and Plaintiffs’ bear the burden of proving that the statute is unconstitutional “beyond a reasonable doubt.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000). The court’s duty is to interpret this statute so as to up hold, rather than find against, its constitutionality. *State v. Browet*, 103 Wn.2d 215, 691 P.2d 571 (1984) (the duty of the Supreme Court is to construe a statute so as to uphold its constitutionality wherever possible). Therefore, in a challenge based on separation of powers, Respondents must prove to this court beyond a reasonable doubt that the questioned legislation threatens the independence, integrity or prerogative of the Washington State Supreme Court, because there is no possible constitutional interpretation of the legislation. See, *City of Fircrest v. Jensen, infra*.

B. The Legislature did not violate the separation of powers doctrine by overruling *Theodoratus* when it adopted RCW 90.03.330(2), (3) & (4) or when it adopted RCW 90.03.015(3) & (4)

1. Separation of Powers Doctrine.

The Washington State Constitution allocates the power of government

among three branches and that allocation gives rise to the separation of powers doctrine. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 678, 146 P.3d 893 (2006). The doctrine ensures that the fundamental functions of each branch of government remain inviolate. *Id.* One branch of government runs afoul of the doctrine when it threatens the independence or integrity or invades the prerogatives of another. *City of Fircrest v. Jensen*, 143 P.2d 776 (2006).

The judiciary's independence or integrity are threatened or its prerogatives invaded when it is assigned or allowed tasks properly assigned to another branch, or when its institutional integrity is impermissibly threatened by provision of law. *Carrick v. Locke*, 125 Wn.2d 129, 138-9, 882 P.2d 173 (1994). Did the legislature threaten the independence or integrity of the judiciary or invade its prerogative by adopting the amendments to RCW 90.03.015 and RCW 90.03.330? The answer is no.

Respondents' separation of powers claims derive from erroneous contentions that the legislature "contravened" or "overruled" *Theodoratus*, because RCW 90.03.330(2), (3) & (4) "validates" certificates that *Theodoratus* "invalidated;" and that by adopting RCW

90.03.015(3) & (4) defining “municipal water supplier” and “municipal water supply purposes” the legislature retroactively overruled *Theodoratus*’ conclusion that Mr. Theodoratus was not a “municipality.” Respondents’ argument ignores accepted common law principles governing interpretation of case law causing them to misread the case in two ways:

1. They argue that a decision concerning Ecology’s authority with respect to water rights permits decided the validity of numerous outstanding water right certificates, even though not one outstanding certificate was represented in the case and the status of outstanding certificates was not litigated; and

2. They argue that a decision concerning Ecology’s authority with respect to water right permits decided that under pre MWL law Mr. Theodoratus could not hold a water right for municipal water supply purposed because he was not a “municipality,” even though the court stated that it was not addressing issues of municipal water supply.

Those undisputed principles of common law are: (1) a ruling containing language which appears to control an issue not actually addressed or considered by the court is not determinative on that issue,

ETCO, Inc. v. Department of Labor and Industries, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992); and (2) the statement of a rule in a Supreme Court's opinion related to an issue that was not before the Court does not and cannot announce the Supreme Court's adherence to that rule on that issue. *Johnson v. Funkhouser*, 52 Wn.2d 370, 374, 325 P.2d 297 (1958). According to these common law principles, the Supreme Court did not rule in *Theodoratus* with respect to either water right certificates or who could hold a water right for municipal supply purposes, leaving the legislature free to adopt legislative answers to questions implicit in, but not decided by, *Theodoratus*.

Finally, the Respondents misread the new legislation. The legislation does not change the law with respect to certificates - it reaffirms and re-enforces that law. Amendments related to certificates do two things: they regulate Ecology by prohibiting it from diminishing certificates solely because of a change in Ecology's policy, and they bar collateral attacks on certificates. Ecology and the courts retain their authority to quantify all certificates in appropriate proceeding according to principles of water law laid down by this court and the legislature.

The legislation does, for the first time, define “municipal water supplier” and “municipal water supply purposes” and those definitions do apply to Chapter 90.14 RCW, the relinquishment statute. But they do not reactivate previously relinquished water rights, as argued by Respondents, because relinquishment does not occur by operation of law; it occurs only after required proceedings, notice and proof. Newly minted holders of water rights claimed for municipal purposes are exempt from relinquishment effective September 9, 2003 and thereafter. The exemption applies to the water right held on that day as may be quantified in some future general adjudication or change proceeding.

2. **Adoption of RCW 90.03.330(2), (3) & (4) did not threaten judicial independence ors judicial integrity or invade the judiciary’s prerogative.**
 - a. ***Theodoratus* did not invalidate pumps and pipes certificates.**

Respondents argued and the Superior Court concluded that the amendments to RCW 90.03.330 retroactively validated pumps and pipes certificates invalidated by *Theodoratus*. The Superior Court reached this conclusion because “...the primary issue in this case is whether a final certificate of water right, i.e., a vested water right may be issued based upon the capacity of the developers water delivery system or whether a

vested water right may be obtained only in the amount of water actually put to beneficial use[.]" Appendix A, at 7, lines 21-25 and 8, lines 1-2, and the Supreme Court decided that beneficial use was required.

While this court did affirm in *Theodoratus* that perfection of a water right could occur only through beneficial use and a certificate could be issued only on the basis of beneficial use, it did so in a case involving water right permits, not certificates. There is not one word in *Theodoratus* about previously issued pumps and pipes certificate; the opinion does not even reflect knowledge that such certificates exist, much less decide the validity of those certificates.

The common law develops through cases and controversies, involving real adverse parties with concrete interests, who develop evidence and present arguments, who advocate to inform the court on law and policy, hopefully to receive a reasoned decision based on the law and facts. There was no case or controversy involving pumps and pipes certificates in *Theodoratus*. There were no real adversaries advocating for and against their validity. The court did not receive the benefit of argument on issue such as the finality or lack of finality of decisions made in a lawful administrative process, or the application of the

doctrine of estoppel, or the effect of long standing, though erroneous, legal interpretation affecting the property rights of many.

The Superior Court was wrong: there was no decision invalidating pumps and pipes certificates and under our common law there could not be such a decision. Furthermore, the amendments to 330 do not validate pumps and pipes certificates.⁷ They primarily regulate Ecology by prohibiting it from claiming policy error as a basis for reducing certificate amounts. They do not prohibit Ecology or the courts from quantifying any pumps and pipes certificate in a general adjudication change or a transfer proceeding according to actual beneficial use.

- b. The amendments to RCW 90.03.330 regulate Ecology, bar collateral attacks on pumps and pipes certificates, and re-affirm principles of water law.**

⁷ Given the analysis submitted here, Cascade disagrees with the court that RCW 90.03.330(3) is retroactive. The language of the statute is not language of retroactivity. It reads, "[t]his subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015" as pumps and pipes certificates. This language defines what the subsection applies to, not whether it is retroactive. Sections (2) & (4) govern Ecology's future administration of certificates; section (3) affords prospective protection to the water rights represented by these certificates from collateral attack.

RCW 90.03.330(2) prohibits Ecology from revoking or diminishing certificates held for municipal water supply purposes, with certain exceptions.⁸

The first exception is for certificates issued under RCW 90.03.240 after general water rights adjudications. Ecology is limited to confirming by certificate a court's ruling in a general adjudication; that is, the legislation affirms the judiciaries' authority to determine the scope, priority and perfection of a water right. The second exception is for certificates issued after a change, transfer or amendment under RCW 90.03.380 or 90.44.100. Ecology can reduce water authorized under a pumps and pipes certificate according to the principle of actual beneficial use. Ecology is granted the authority to reduce certificate quantities for error or misrepresentation, but Ecology cannot use that authority to claim that a prior, disavowed policy was an error that allowed it to reduce a certificate.

A reasonable interpretation of the foregoing is that Ecology has not been stripped of its authority to quantify a water right in a change

⁸ The other exception applies when Ecology determines that a certificate was issued with ministerial errors or obtained through misrepresentation, and the reduction is limited to the extent necessary to correct any error.

proceeding, and the court has not been stripped of its authority to adjudicate water rights, even though in both cases the water right is represented by “pumps and pipes” certificate. Such certificates are afforded protection from the change in Ecology’s policy, but they remain subject to the same statutory and common law of water rights that they were subject to before and after *Theodoratus*.

RCW 90.03.330(3)⁹ provides that water rights held for municipal water supply purposes under “pumps and pipes” certificates issued before September 9, 2003 are “rights in good standing.” After *Theodoratus* it was certain that for decades Ecology (or its predecessors) granted certificates erroneously, but the meaning of *Theodoratus* for those erroneously issued certificates was uncertain. Therefore, the legislature acted to answer questions raised, but not answered, by *Theodoratus*. Projecting into the future, the legislature could reasonably envision years of unsettling litigation implicating many public systems, the legitimacy of their water rights, and, therefore, their ability to serve

⁹ This amendment is unusually worded: “This subsection applies to the water right” represented by a pumps and pipes certificate. “Such a right is a right in good standing.” The amendment seems to draw a distinction between the water right (a term of art) and the certificate. It could be read to mean that regardless of the erroneous certificate, any use of water put to actual beneficial use with due diligence is a water right.

existing customers and finance improvements for future demand. To avoid that, the legislature adopted a general rule that the water rights represented by certificates that had been issued as final decisions through a statutory process that afforded notice and the right to appeal remained water rights in good standing. The rule effectively precludes litigation, such as a declaratory judgment action, by Ecology or others attempting to use *Theodoratus* as a basis to mount a collateral challenge to these certificates.

c. The legislature did not undo *Theodoratus*.

As previously noted, these amendments are primarily a regulation of Ecology. A water right certificate is Ecology's administrative determination, but it is not the final word. Only the court can finally determine the nature, priority, place of use and quantity of a water right. And that determination occurs only in a general adjudication. The amendments do not interfere with the courts' ability to hear and decide general adjudications according to accepted principles of water law. Moreover, the declaration that the certificates remain in good standing has no effect on the courts' ability to make a final determination. All

certificates in a general adjudication are in good standing until the court rules otherwise.

And RCW 90.03.330(4) requires that certificates issued after September 9, 2003 must be based on actual beneficial use of water. The legislature concurred with the court's conclusion that actual beneficial use should be the basis of perfecting a water right.

In so proceeding, the legislature did not threaten judicial independence or judicial integrity, or invade judicial prerogative. It did not reverse *Theodoratus* (independence); it did not adjudicate individual certificates (prerogative); but it did act within its own sphere (integrity) by adopting a rule affording some protection for those certificates and limiting review of those certificates to general adjudications or established administrative procedures for change and transfers.

Respondents' theory is that the legislature intruded upon this court's exercise of the judicial power – the authority to decide cases and controversies¹⁰ - by attempting to undo a decision of this court. *In re Det of Brooks*, 145 Wn.2d 275, 284, 36 P.3d 1034 (2001)¹¹. But the

¹⁰ United States Constitution, Article III, Section 2; e.g., *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 145 Wn.2d 207, 45 P.3d 186 (2002).

¹¹ Overruled on other ground, see, *In re Det of Brooks*, 149 Wn.2d 724, 72 P.3d 708 (2003).

decision in *Theodoratus* has not been affected by the amendments to RCW 90.03.330. The decision in *Theodoratus* (1) affirmed Ecology's authority to amend a condition of a permit when deciding upon a request for an extension of that permit; and (2) upheld Ecology's proposed change of a condition over an objection that Ecology had acted arbitrarily and capriciously. The adoption of RCW 90.03.330(2), (3) & (4) did not affect either decision: Ecology retains its authority to condition permit extensions, and Mr. Theodoratus retains his permit with its modified condition. The legislature did not reverse *Theodoratus*; the parties remain where the court left them.

But Respondents argue that *Theodoratus* went further and invalidated all pumps and pipes certificates. In *Theodoratus*, after reaffirming prior law that perfection of a water right required actual beneficial use of water, the court responded to an arbitrary and capricious challenge to the new permit condition by reasoning that Ecology could not lawfully condition *Theodoratus*' permit (as it had done) to allow "pumps and pipes" perfection. Therefore, Ecology's correction of the prior unlawful condition could not be arbitrary. Respondents' distort reasoning concerning a permit into a decision that

all previously issued “pumps and pipes” certificates had been invalidated and that RCW 90.03.330(3) reversed that decision.

This astounding argument runs counter to fundamental principles of American jurisprudence. *Theodoratus* did not involve a “pumps and pipes” certificate; this court did not hear from anyone who held a “pumps and pipes” certificate; and the status of previously issued “pumps and pipes” certificates was neither briefed nor argued. Even so, we are told that this court decided that all “pumps and pipes” certificates were invalid, without hearing from one certificate holder, in a proceeding where certificate holders were not represented by similarly situated parties, and where the status of a pre-existing “pumps and pipes” certificate (or certificates) was not litigated.

3. Adoption of RCW 90.03.015(3), & (4) did not threaten judicial independence or judicial integrity or invade the judiciary’s prerogative.

a. Theodoratus did not decide issues related to municipal water supply.

Respondents position is that the definition of “Municipal Water Supplier” and “Municipal Water Supply Purposes” act retroactively to overrule the “decision” in *Theodoratus* that Mr. Theodoratus was not a “municipality,” and who, according to Respondents, could not hold a

water right for municipal supply purposes before *Theodoratus*; therefore, the legislature violated the separation of powers doctrine.

However, *Theodoratus* was concerned with the perfection of water rights, not the question of relinquishment. And in the context of deciding issues related to a permit, it explained that Mr. Theodoratus was not entitled to a special rule for perfection of a water right because his was a public water system, as he had argued. All *Theodoratus* said was that Mr. Theodoratus was not a municipality (surprising no one, probably including Mr. Theodoratus). The court explicitly declined to address issues of municipal water supply in the context of that case: that is, a private developer seeking a special rule of perfection for a private, finite system. The court did note that the “statutory scheme allows for differences between municipal and other water use.” *Theodoratus*, at 594. But it did not decide anything about that different treatment. All issues concerning municipal water supply were read out the case by the court – thereby leaving open for future decision undecided issues concerning municipal water supply, including what is municipal water supply and who could be a municipal water supplier.

The court having excluded those issues from the decision, the legislature could properly exercise its legislative police powers and decide for the future what municipal water supply should be and who would be a municipal water supplier. See, e.g., *Dep't of Ecology v. Adsit*, 103 Wn.2d 698, 707, 694 P.2d 1065 (1985).

Furthermore, a necessary premise of Respondents' argument is incorrect. They contend that private parties were not "municipal water suppliers" under prior law, that the municipal exemption from relinquishment was available only to municipalities, and that the new definitions grant Mr. Theodoratus the exemption denied to him by *Theodoratus* because that case held he was not a municipality.¹² They are wrong about prior law. The exemption is given to the purpose of use, not the corporate character of the user. Before and after *Theodoratus* certain water rights are exempt from relinquishment:

Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right ... (d) If such right is claimed for

¹² It is also not clear that Mr. Theodoratus is a municipal water supplier today. The definition applies to "entities," not to persons (the former is not defined in RCW 90.03.015; the latter is). From the opinion it appears that Mr. Theodoratus appealed as an individual. If that is so, a finding that he is not a municipality has nothing to do with the system he was going to install, and Respondents' argument that *Theodoratus* found that private systems could not hold water rights for municipal purposes becomes even weaker.

municipal water supply purposes under Chapter 90.03
RCW;...

RCW 90.14.140(2)(d). The exemption is available to any water right (regardless of who holds it) claimed for municipal water supply purposes under Chapter 90.03 RCW. On that point, the statute is unambiguous: the exemption benefits the water right claimed for municipal supply purposes and is not dependent upon who holds it. Plain words do not require construction, the courts assume the legislature means exactly what it says, and the courts will not add language to an unambiguous statute. *Certification of Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

Consequently, a water right holder that was not a municipality could benefit from the exemption and the fact that Mr. Theodoratus is not a "municipality" does not disqualify him from claiming the exemption if he otherwise qualifies.

b. RCW 90.03.015(3) & (4) operate prospectively.

Putting aside the obvious, that defining a private entity as a municipal water supplier does not make that entity a municipality¹³, and

¹³ The term has an accepted meaning at law. See, e.g., RCW 42.23.020(1), "municipality" includes all counties, cities, towns, districts, and other municipal corporations and quasi municipal corporations organized under the laws of the State of
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putting aside the court's explicit statement that it was not addressing issues related to municipal water suppliers, and assuming that Respondents are correct and *Theodoratus* has been overruled, even then the separation of powers doctrine is not violated when the overruling legislation is prospective. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

RCW 90.03.015(3) and (4) define "Municipal Water Supply Purposes" and "Municipal Water Supplier." As defined, these terms have no prescriptive or regulatory effect on their own. They are given effect when and as they are used in Chapter 90.03 RCW or in Chapter 90.14 RCW, the relinquishment statute.¹⁴ Respondents argue the new definitions in conjunction with the exemption from relinquishment of a

Washington. See, also *Hubbard v. Spokane County*, 146 Wn.2d 699,712 (2002). In *Theodoratus*, the court did not undertake to define municipal water supplier or municipal water supply (or for that matter "municipality"). The terms are not necessarily synonymous. Many municipalities, for example, school districts and hospital districts, do not provide water supply. However, many private entities provide retail water service that is identical to retail water service provided by cities and districts and they are regulated as are cities and districts and in some cases more so; e.g., private for profit water companies are under the jurisdiction of the Utilities and Transportation Commission.

¹⁴ A water right that is not used, in whole or in part, for five consecutive years, is subject to relinquishment, absent either "sufficient cause" or a statutory exemption. RCW 90.14.160-180; See *Public Utility Dist. No. 1 of Pend Oreille Cy. v. Dep't of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999).

water right claimed for municipal supply purposes reactivate the right to water previously lost by newly defined municipal suppliers because of nonuse.

By defining those terms, the legislature was acting within its proper sphere. It did not violate the separation of powers doctrine because Respondents are not correct about the interplay of those statutes. On its face, the MWL is not about relinquishment and it certainly does not provide that previously relinquished water rights are reactivated or resurrected. Furthermore, the interplay of the new definitions and the exemption from relinquishment does not reactivate lost water rights; instead, the law operates prospectively: effective September 9, 2003 and thereafter the water rights held for municipal supply purpose as defined by RCW 90.03.015(4) are exempt from relinquishment.

Respondents' apparent contention is that previously non-exempt water rights or some portion thereof may have been relinquished by operation of law, and that the new exemption defeats that operation of law by reactivating or resurrecting the water right in whole or in part. However, relinquishment does not occur automatically after five years of nonuse. Some formal proceeding is required to establish both the fact of

relinquishment and the quantity lost: a relinquishment proceeding under Chapter 90.14 RCW, a change or transfer proceeding under Chapter 90.03 RCW, or a general adjudication. A water right holder is entitled to notice of a claim of relinquishment and notice that unless "sufficient cause" is shown "the water right will be declared relinquished." RCW 90.14.130. Even an undisputed five year or greater period of nonuse is not sufficient to relinquish a water right. Numerous defenses to relinquishment are established by Chapter 90.14 RCW.¹⁵ Other exemptions might also apply; e.g., water claimed for determined future development. RCW 90.14.140(2)(c). Relinquishment of a water right is a creature of a statute that requires notice and an opportunity to defend before a tribunal can deprive a party of this property right. Until a tribunal decides that nonuse is a fact, and that sufficient cause for nonuse did not exist, or that the water right was not exempt, relinquishment does not occur. *See Motley-Motley, Inc. v. State of Washington*, 127 Wn. App. 62, 78, 80-81, 110 P.3d 812 (2005) 80-81; *Sheep Mountain Cattle*

¹⁵ RCW 90.14.140 establishes eleven such defenses, among them: (a) drought, or other unavailability of water; (b) military service (c) the operation of legal proceedings; (d) weather related reductions in the need for irrigation.

Co. v. State, 45 Wn. App. 427, 729-732 (1986). Therefore, relinquished water rights cannot be resurrected as Respondents argue, and *Theodoratus* has not been overruled retroactively.

4. Cascade associates with and incorporates arguments presented by the Washington Water Utilities Council's opening brief.

In accordance with RAP 10.1(g), Cascade Water Alliance incorporates sections IV C and D of the brief filed by the Washington Water Utilities Council into this brief as if fully set forth.

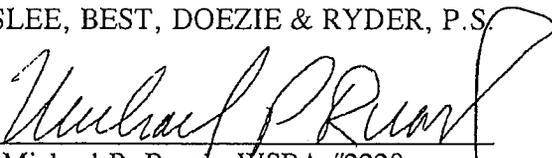
V. CONCLUSION

Given the foregoing, the Cascade Water Alliance request this court to reverse the decision of the Superior Court that the legislature violated the separation of powers doctrine when it added section (3) and (4) to RCW 90.03.015 and sections (2), (3) & (4) to RCW 90.03.330 and remand this case with directions to dismiss those claims.

RESPECTFULLY SUBMITTED this 24th day of October, 2008.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By



Michael P. Ruark, WSBA #2220
Attorneys for Appellant/Respondent
Cascade Water Alliance

Appendix A

1

1 SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----

4 LUMMI NATION, et al.,)	VERBATIM REPORT OF
Plaintiffs,)	THE PROCEEDINGS
5 vs.)	Cause No. 06-2-40103-4SEA
STATE OF WASHINGTON,)	
6 et al.,)	
Defendants,)	
7 -----)	
JOAN BURLINGAME, et al.,)	
8 Plaintiffs,)	
vs.)	
9 STATE OF WASHINGTON,)	
10 et al.,)	
Defendants,)	
and)	
11 WASHINGTON WATER)	
12 UTILITIES COUNCIL,)	
et al.,)	
Intervenors.))	

13 -----

COPY

14 TRANSCRIPT

15 of the proceedings had in the above-entitled cause
16 before the HONORABLE JIM ROGERS, Superior Court
17 Judge, on the 11th day of June, 2008, reported by
18 Kimberly H. Girgus, Certified Court Reporter.

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Appendix A

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APPEARANCES:

FOR THE PLAINTIFF, JOAN BURLINGAME:

SHAUN GOHO
ATTORNEY AT LAW

FOR THE MAKAH TRIBE:

JOHN ARAM
ATTORNEY AT LAW

FOR THE DEFENDANT, STATE OF WASHINGTON:

ALAN REICHMAN
PROSECUTING ATTORNEY

FOR THE INTERVENORS, WASHINGTON WATER UTILITIES:

ADAM GRAVELY
ATTORNEY AT LAW

FOR CASCADE WATER ALLIANCE:

MICHAEL RUARK
ATTORNEY AT LAW

PROCEEDINGS

JUNE 11, 2008

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4 THE COURT: Good afternoon. This is
5 Judge Rogers. Is everyone, all the many of you,
6 present?

7 MR. REICHMAN: Good afternoon, your Honor.
8 This is Alan Reichman with the Attorney General's
9 Office. And I believe we have counsel for all the
10 parties present, and even some media
11 representatives as well, but everybody on the
12 bridge to join you is here that needs to be here
13 to my knowledge, your Honor.

14 THE COURT: Thank you. I'm going to then
15 give my oral decision. You still there?

16 MR. REICHMAN: Yes. I think somebody might
17 have just joined us.

18 MR. MACLEARY: It's Robert MacCleary. I
19 keep getting knocked off the phone. I apologize.

20 THE COURT: It's all right. This is my
21 oral decision in Lummi Indian Nation, et al.
22 versus State, 06-2-40103-4, SEA, and Joan
23 Burlingame, et al. versus State, 06-2-28667-7,
24 SEA.

25 I'm giving this oral ruling, and today I am

1 signing a separate written order which
2 incorporates my oral decision based on that
3 proposed orders of the parties. The parties do
4 not need to submit any further proposed orders or
5 pleadings following this oral ruling.

6 And initially let me note the obvious, and
7 that is the great importance of this case to all
8 of the water right holders who's in this case, the
9 plaintiffs, the defendants, the defendant
10 intervenors, and those not joined in the case.

11 And I note that I ruled at the time of the
12 argument that the motion in limine of Washington
13 Water Utilities counsel was denied.

14 This decision addresses the claims in the
15 order raised. The challenges to sections that
16 Municipal Water Law 2003 under claims of violation
17 of separation of powers, substantive due process,
18 and procedural due process. On their facial
19 challenges to these statutes, the Burlingame and
20 Tribes, plaintiffs, bear the burden of proving
21 that these portions of the laws are
22 unconstitutional beyond a reasonable doubt,
23 including 90.03.330(2), 015 (3, 4), 386(2), 260
24 (4, 5).

25 As a preliminary matter, this Court must

1 decide what standard to apply in reviewing the
2 claims.

3 Plaintiffs have urged this Court not to
4 adopt a standard noting that certain courts like
5 the court in San Carlos Apache have ruled without
6 citing a specific standard. I acknowledge that
7 some courts have done this, but declined to
8 analyze the claims in this matter. The standard
9 defines in certain respects the relationships
10 between the branches of government, and the heated
11 debate over what standard should be applied
12 nationwide highlights its importance. And while I
13 note there are disagreements over the continuing
14 vitality of the various standards, for example,
15 the Washington State Grange case, it continues to
16 be hotly debated.

17 This Court has concluded that the Salerno
18 set of circumstances test is the appropriate
19 standard to apply to the facial challenges raised
20 by the plaintiffs. The Court reached this
21 decision in spite of the decision of the Court of
22 Appeals in Robinson versus City of Seattle at 102
23 Wn.App. 795. The court in Robinson disapproved
24 the Salerno standard in taxpayer challenges like
25 this one, and part of the Robinson court's

1 reasoning was, one of the main reasoning not to
2 adopt Salerno was that it was not used in
3 Washington, and it was disapproved in a large
4 majority of cases nationwide.

5 But in a reading of Washington state cases
6 since Robinson, Salerno is now consistently cited
7 by our State Supreme Court, and Divisions II and
8 III of the Court of Appeals as that the standard
9 to be applied in facial challenges to statutes.

10 The parties have cited many cases. I have
11 read them all, and I'm not going to recite them
12 here. And I agree that in some of the Washington
13 cases the standard is simply cited without
14 actually being used often because the challenge
15 was an as applied challenge.

16 But as I noted, the standard is either
17 cited or consistently used and discussed by all of
18 our courts except Division I, I acknowledge that,
19 and I conclude its vitality in this state
20 undermine the basic reasoning that was used in the
21 Robinson decision, and I therefore conclude
22 Robinson is no longer good law on this issue.

23 This Court applied Salerno to all the
24 challenges in the statute, including procedural
25 due process, and I disagreed that Salerno is not

1 considered in Matthew versus Eldridge analysis,
2 and I would cite to City of Redmond versus Moore,
3 151 Wn.2d for both Justice Sanders in the
4 majority, and Justice Bridge in the dissent, both
5 cited the standard.

6 I now address the separation of powers
7 claims as to 330 and 015 (3, 4). As counsel for
8 the Burlingame plaintiffs noted there is only one
9 set of circumstances that really I am to look at
10 in separation of powers arguments, and that is the
11 review of these statutes with the Theodoratus
12 decision, and I conclude after reviewing those
13 statutes and the Theodoratus decision that 330 and
14 015 (3, 4) are retroactive statutes that
15 unconstitutionally attempt to reinstate water
16 rights that were invalidated by the Washington
17 State Supreme Court in Department of Ecology
18 versus George Theodoratus, 135 Wn.2d 682.

19 In that case the majority and the dissent
20 stated the issue as, and I will quote the
21 majority, "the primary issue in this case is
22 whether a final certificate of water right, i.e.,
23 a vested water right may be issued based upon the
24 capacity of the developers water delivery system
25 or whether a vested water right may be obtained

1 only in the amount of water actually put to
2 beneficial use." Close quote.

3 Justice Sanders in dissent agreed, quote,
4 "the majority correctly frames the question as to
5 whether a final certificate of water right may be
6 issued based upon the capacity of a public water
7 system under the pumps and pipes approach, but
8 incorrectly says no, based upon its interpretation
9 of RCW 90.03.290," end quote.

10 And there is other language in Theodoratus,
11 including the language, "the vested water right
12 for appellant's development will depend upon the
13 actual application of water to beneficial use, and
14 a final certificate of water right cannot be
15 issued to appellant for a quantity of water not
16 actually put to beneficial use. Close quote.

17 In Theodoratus our Supreme Court in the
18 context of a specific factual situation announced
19 a general principle of law of how water rights
20 vest, and decided that it was through beneficial
21 use, not the capacity of a public water system.

22 I now turn to the statute 330. The State
23 concedes and rightly so that the statute is
24 retroactive by its terms. The statutory language
25 is careful to define the type of water right that

1 is being held, quote, "in good standing," close
 2 quote. The contrast is drawn by using words,
 3 quote, "rather than," close quote, in describing
 4 certificates for water rights issued once, quote,
 5 "works," close quote, were constructed, rather
 6 than after water have been placed by actual
 7 beneficial use. This statute clearly reinstates
 8 pumps and pipe certificates issued prior to
 9 September 9th, 2003, and this is an attempt to
 10 reverse the Theodoratus decision.

11 The State argues that the phrase in good
 12 standing means only that the legislature did not
 13 intend to take these certificates issued out of
 14 good standing. It is also argued that good
 15 standing has a specific meaning that must be
 16 employed within the context of the statute, and
 17 that meaning is not necessarily a vested water
 18 right.

19 But if the legislature took this view in
 20 adopting this legislature, and I see no evidence
 21 that it did, and frankly find this a strained
 22 interpretation at best, it still cannot reinstate
 23 water rights that may have been relinquished in
 24 part or whole through lack of beneficial use
 25 because to do that would be to make a legislative

1 determination of the due diligence of the parties
2 in the past, and thus the creation of adjudicative
3 facts considering the good standing of particular
4 water rights.

5 The next question is posed by the parties
6 is whether the Theodoratus court addressed the
7 issue of municipal water suppliers in any respect.
8 It is true that the Theodoratus court expressly
9 declined to address the issues of beneficial
10 versus pumps and pipe certificates as applied to
11 municipalities. There's been arguments that they
12 impliedly decided those issues, but I'm not even
13 going to address that.

14 In that case, however, George Theodoratus
15 specifically argued that, quote, "a distinction is
16 warranted because his is a public water supply
17 system. Initially we note that appellant is a
18 private developer and his development is finite.
19 The appellant is not a municipality, and we
20 decline to address issues concerning municipal
21 water suppliers in the context of this case,"
22 close quote.

23 I would also note that in Theodoratus'
24 earlier arguments in the case to distinguish his
25 situation from the Acquavella case he also argued

1 that his was a public water supply system.

2 Despite not reaching issues concerning
3 municipal water suppliers, the Theodoratus court
4 reached a decision that decided an issue with
5 respect to Mr. Theodoratus' water rights. In
6 other words, because of the very arguments made by
7 Mr. Theodoratus that court was forced to address
8 whether or not Theodoratus was or was not in the
9 situation of a party holding the water rights of a
10 public water supply system under state statutory
11 and common law. This court decided he was not,
12 and that his rights vested only through beneficial
13 use.

14 The Theodoratus court noted no reason such
15 as ambiguity of state law, lack of definitions, or
16 interpretations or practices by Ecology, to avoid
17 reaching a decision in Mr. Theodoratus' status,
18 and thus the issue in this case.

19 So while the definition of the water
20 supplier now exists and point 015 did not exist at
21 the time the claimed ambiguity, according to that
22 Court, did not exist as to Mr. Theodoratus. For
23 this reason the definition is not curative.

24 90.03.015 (3, 4) now defines municipal
25 water supplier. Under this definition George

1 Theodoratus, if he still has water rights, has
2 retroactively had his pumps and pipe certificates
3 reinstated as a municipal water supplier. He was
4 not a municipal water supplier before but he is
5 now. This broad definition of municipal water
6 supplier violated separation of powers, and does
7 so by creating new municipal water suppliers who
8 through operation of subsection have had their
9 water rights changed retroactively.

10 I do not accept Washington Water Utilities
11 counsel's argument that the precipitating event
12 for relinquishment is an adjudication. I agree
13 with the Tribe's analysis of adjudication is more
14 analogous to an adverse possession cause of action
15 where the court actually "finds" facts that
16 already existed. And I also note this was not the
17 prior interpretation of the law by the regulating
18 agency Department of Ecology, and even apart from
19 that in an adjudication as, I guess I'm repeating
20 myself here, but even in an adjudication, facts
21 that would need to be established. This
22 legislature essentially established those facts
23 retroactively through this legislation.

24 This Court is aware of the heavy burden any
25 party has when arguing the facial and validity of

1 the statute. The legislature is to be accorded
2 great deference, and indeed I have decided to use
3 the strictest standard in scrutinizing these
4 challenges. However, it appears to this Court
5 that in significantly recasting the substantive
6 and procedural rights and roles of those who hold
7 water rights in this state in 2003, the
8 legislature overreached unconstitutionally by
9 attempting to retroactively restore water rights
10 to certain parties holding pumps and pipes
11 certificates and expanding the number of parties
12 holding such rights to include Mr. Theodoratus.

13 I grant the summary judgment of the
14 Burlingame and Lummi plaintiffs as to these
15 claims, and the defendants and defendant
16 intervenors motions for summary judgment as to
17 these claims are denied.

18 Now I move to substantive due process. I
19 declined to decide the motions for substantive due
20 process under 330 and 015, having decided these
21 provisions that are unconstitutional under the
22 separation of powers. And I specifically do not
23 decide the apparent disagreement between the State
24 and Washington Water Utilities counsel, whether
25 the definitions do not violate substantive due

1 process because they do or do not require active
2 compliance for a water right to qualify for the
3 new municipal water supplier exception.

4 As for the remaining subsections 386(2)
5 place of use, and 260 (4, 5) service and
6 connection limitations under substantive due
7 process, I conclude for 386(2) that the plaintiffs
8 have not proved beyond a reasonable doubt that
9 there is no set of circumstances under which the
10 statute can be constitutionally applied. The
11 statute can be constitutionally applied to water
12 suppliers whose water right certificates already
13 defined the place of use to its area without metes
14 and bounds as the State quoted in its argument and
15 its brief.

16 Also conditions must be satisfied before
17 the authorized place of use is enlarged to
18 coincide with a suppliers service area, and if
19 complied prospectively renders the statute
20 constitutional.

21 For 260 (4, 5) service and connection
22 limitation, while I acknowledge that there have
23 been conditions of permits that have included such
24 limitations there is no prior statutory law
25 providing that service connections or populations

1 were an attribute limiting the exercise of the
2 water right.

3 And I conclude that if the statute is
4 interpreted in a prospective manner, then this
5 portion of the 2003 municipal water law is also
6 facially constitutional.

7 Finally, this Court concludes under the
8 Salerno standard and under the Matthews versus
9 Eldridge analysis that the plaintiffs have not
10 carried their burden to prove beyond a reasonable
11 doubt the unconstitutionality of 386(2) place of
12 use, 260 (4, 5) service connection limits, and 330
13 the revocation limitation.

14 Matthews versus Eldridge has three parts,
15 and the question is whether there's been an
16 erroneous deprivation and important right. I have
17 noted earlier that Salerno, I do believe, applies
18 to the analysis. I initially note that these
19 sections clearly contain different and more
20 limited procedural due process than was allowed
21 under earlier statutory law and regulation, and I
22 think that's obvious to everyone.

23 The legislature has drastically limited the
24 role of ecology and limited other rights, and
25 decided not to include certain procedures that,

1 for example, were suggested by the tribes could be
2 or could have been included, for example, under
3 380(1).

4 But my inquiry is simply whether the
5 statutes are unconstitutional beyond a reasonable
6 doubt under the Matthews versus Eldridge test,
7 keeping in mind that the plaintiffs must prove
8 there is no set of circumstances under which the
9 statutes may be found to be constitutionally
10 applied.

11 And while I, again, I may be repeating
12 myself, water rights are unquestionably an
13 important right. The legislature does have some
14 power to alter the due process available to
15 classes of possessors of rights, and I conclude
16 there is not a substantial risk of deprivation
17 with the procedural safeguards that remain in
18 place, albeit far more limited under SEPA on
19 section 386, Department of Health 260.

20 And I note under 260 (4, 5) that it's far
21 from established that many water rights would even
22 be affected under these changes, and under other
23 respects I have agreed with the arguments by the
24 State in this regard under the Matthews versus
25 Eldridge challenges.

1 On these issues therefore the Court
2 declined to decide the claims of substantive due
3 process under 330 and 015 (3, 4), and grant
4 summary judgment motions of the defendants and
5 defendant intervenors as to 386(2), and 260 (4, 5)
6 on substantive due process, and procedural due
7 process claims, and 330(2) on procedural due
8 process claims under the State and Federal
9 Constitutions, and under those claims I deny the
10 Burlingame and Tribes plaintiff's motions for
11 summary judgment.

12 That concludes my oral decision, and the
13 order that I enter will simply be limited to the
14 legal conclusions that I reached and to what I
15 considered. It will incorporate this oral
16 decision, which, in any case, as the parties well
17 know, will be reviewed de novo by the Court of
18 Appeals and ultimately the Supreme Court.

19 Thank you all for the comprehensive, and
20 argument, and briefing, which I greatly
21 appreciate. And if you wish to speak to
22 Ms. Girgus, who is present, and is the court
23 reporter I can put her on the telephone right now.

24 MR. REICHMAN: Thank you, your Honor.

25 THE COURT: Counsel, do you wish to speak

1 to Ms. Girgus?

2 MR. REICHMAN: Yes. I would like to do so.

3 Thank you.

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5 (Court adjourned.)

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C E R T I F I C A T E

STATE OF WASHINGTON)

) SS.

COUNTY OF KING)

I, Kimberly H. Girgus, Certified Court Reporter, in and for the State of Washington, do hereby certify:

That to the best of my ability, the foregoing is a true and correct transcription of my shorthand notes as taken in the cause of LUMMI NATION, et al., Plaintiffs vs. STATE OF

WASHINGTON, et al., Defendants; JOAN BURLINGAME,

et al., Plaintiffs, vs. STATE OF WASHINGTON,

et al., Defendants and WASHINGTON WATER UTILITIES

COUNCIL, et al., Intervenors, on the date and at the time and place as shown on page one hereto;

That I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney of counsel, and that I am not financially interested in said action or the outcome thereof;

Dated this 14th day of June, 2008.

Kimberly H. Girgus
Certified Court Reporter

No. 81809-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LUMMI INDIAN NATION; MAKAH INDIAN TRIBE; QUINAULT
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 DEPARTMENT OF
ECOLOGY; JAY MANNING, Director of the Washington Department
of Ecology; WASHINGTON DEPARTMENT OF HEALTH; MARY
SELECKY, Secretary of Health for the State of Washington;
WASHINGTON WATER UTILITIES COUNCIL; CASCADE WATER
ALLIANCE; and WASHINGTON STATE UNIVERSITY,

Appellants/Cross-Respondents.

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

2008 OCT 24 P 1: 12

I, Michelle L. Phommahaxay, hereby certify that on this 24th day ^{BY RONALD D. W. PENTER}

of October, 2008, I caused to be served a true and correct copy of the ~~copy~~

following document(s):

1. Brief of Appellant Cascade Water Alliance; and
2. Certificate of Service

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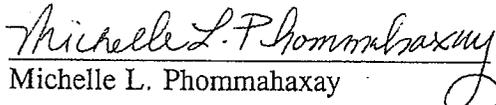
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I certify under penalty of perjury, under the laws of the State of
Washington, that the foregoing is true and correct.

DATED this 24th day of October, 2008.


Michelle L. Phommahaxay