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CLERK SUPREME COURT OF THE STATE OF WASHINGTON

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LUMMI INDIAN NATION; MAKAH INDIAN TRIBE; QUINAULT INDIAN NATION; SQUAXIN ISLAND INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; TULALIP TRIBES, federally recognized Indian tribes, JOAN BURLINGAME; LEE BERNHEISEL; SCOTT CORNELIUS; PETER KNUTSON; 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; and MARY SELECKY, Secretary of Health for the State of Washington,

Appellants/Cross-Respondents,

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER ALLIANCE and WASHINGTON STATE UNIVERSITY,

Appellants/Cross-Respondents.

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**OPENING BRIEF OF APPELLANT/CROSS-RESPONDENT STATE OF WASHINGTON**

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## I. INTRODUCTION

This case challenges the facial constitutionality of limited provisions of the Municipal Water Law of 2003 (MWL), a landmark law that governs Washington's public water systems and their water rights.<sup>1</sup> This law governs the supply of water to most of Washington's citizens. The superior court order<sup>2</sup> calls into question the validity of water rights held by cities, special purpose districts, water associations, and other purveyors throughout the state. The ruling has severely reduced the number of public water suppliers who qualify as "municipal water suppliers" under state water law, and has limited the ability of water purveyors to serve Washington's homes and businesses.

In part, the Legislature enacted the MWL to resolve uncertainties concerning water *certificates* that became apparent through this Court's decision involving a water *permit* in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). The MWL is a comprehensive law that strikes a delicate legislative compromise. It assists water suppliers by clarifying who can qualify as a municipal water supplier that can hold a water right for municipal purposes, and the status of water certificates issued prior to the *Theodoratus* decision. In exchange, it requires municipal suppliers to conserve water and increase

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<sup>1</sup> Act of June 20, 2003, ch. 5, § 6, 2003 Wash. 1<sup>st</sup> Spec. Sess. Laws 2341-54. Clerk's Papers (CP) 969-988.

<sup>2</sup> Order Granting in Part and Denying in Part Plaintiffs' Motions for Summary Judgment; Granting in Part and Denying in Part Defendants' Motions for Summary Judgment, June 11, 2008. This order will be referred to as the "Summary Judgment Order." CP 613-618 (attached as Appendix A).

efficiency in serving water to the public. The Respondents selectively attack only the provisions they believe will increase use of water, but do not challenge the other provisions intended to reduce the use of water throughout the state through water efficiency measures.

The superior court misread the *Theodoratus* case and incorrectly concluded that through enactment of RCW 90.03.015(3), (4), and .330(3), the Legislature attempted to overrule this Court's decision and violated the separation of powers. CP 617 (Summary Judgment Order at 5). In reality, the *Theodoratus* case addressed a permit, not a water certificate, and did not invalidate water rights that were documented by certificates that had been issued based on system capacity rather than actual use of water. Also, there was no issue presented in *Theodoratus* involving the ability of a non-governmental entity to hold a water right for municipal water supply purposes. In enacting the MWL, the Legislature properly exercised its authority to make critical state policy decisions regarding municipal water suppliers and conservation of a vital public resource.

## **II. ASSIGNMENTS OF ERROR**

1. The King County Superior Court erred in ruling that RCW 90.03.015(3) and (4) violate the separation of powers under the Washington Constitution. CP 617 (Summary Judgment Order ¶ 3.a).

2. The superior court erred in ruling that RCW 90.03.330(3) violates the separation of powers under the Washington Constitution. CP 617 (Summary Judgment Order ¶ 3.b-c).

3. The superior court erred in failing to reach the substantive due process issues relating to RCW 90.03.015(3) and (4), RCW 90.03.330(3), and RCW 90.03.560, and in failing to rule that those statutory provisions do not facially violate substantive due process under the Washington and United States Constitutions. CP 617 (Summary Judgment Order ¶ 4).

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

In *Theodoratus*, 135 Wn.2d 582, this Court held that it was lawful for the Department of Ecology (Ecology) to include a condition in a water permit requiring that a water certificate for a private developer would not be issued until he completes his project and puts the water to beneficial use. The Court stated that its decision did not apply to municipal water suppliers.

1. Did the Legislature properly exercise its authority by enacting RCW 90.03.015(3) and (4), and providing statutory definitions of the terms “municipal water supplier” and “municipal water supply purposes?”

2. Did the Legislature properly exercise its authority by enacting RCW 90.03.330(3), and clarifying the status of municipal water rights documented by certificates issued prior to September 9, 2003 based on system capacity (“pumps and pipes”) rather than actual use of water?

3. Do RCW 90.03.015(3) and (4) facially violate substantive due process under the Washington and United States Constitutions?

4. Does RCW 90.03.330(3) facially violate substantive due process under the Washington and United States Constitutions?

5. Does RCW 90.03.560 facially violate substantive due process under the Washington and United States Constitutions?

#### **IV. STATEMENT OF THE CASE**

##### **A. Statement Of Facts**

The process to obtain a water right in Washington begins with the filing of an application for a water right permit. RCW 90.03.260. A permit is then issued if it is determined that the proposed water use meets the applicable statutory criteria. RCW 90.03.290. Permits include schedules for construction and development of the water use, which may be extended upon a request by the permit holder. RCW 90.03.320. After the water use authorized by the permit is perfected, a water right certificate may be issued. RCW 90.03.330; RCW 90.44.080. This

process applies for both ground water and surface water rights. RCW 90.44.060.

On July 2, 1998, this Court issued its decision in *Theodoratus*. *Theodoratus* involved a water right permit held by a private developer, George Theodoratus. In *Theodoratus*, this Court upheld the issuance of a water permit extension that included a condition requiring that a water certificate would not be issued to Mr. Theodoratus until after he completed his project and put the water to actual beneficial use. *Theodoratus*, 135 Wn.2d at 590-592. The Court held that it was improper to issue a certificate to a private developer based on system capacity (“pumps and pipes”) rather than actual use of water. *Id.* This decision resulted in uncertainty over who could qualify to hold water rights for municipal purposes, and over the status of numerous water certificates that had issued over the years to cities and other water right holders based on system capacity rather than actual water use.

Partially in response to the uncertainty resulting from *Theodoratus*, on June 10, 2003, the Legislature enacted the Municipal Water Law. Governor Locke signed the MWL into law on June 20, 2003, and the law became effective on September 9, 2003. The MWL is titled as “An Act relating to certainty and flexibility of municipal water rights and efficient use of water.” CP 969.

The MWL is a comprehensive landmark law which included several amendments to the water resources laws and the public water system laws. This nineteen-section law not only clarifies the nature of water rights for municipal supply purposes, but also, among other things, addresses water conservation, water utility service obligations, water rights transfers, and consistency with local government comprehensive plans and development regulations.

In this case, the Respondents have challenged eight provisions of the MWL. However, the Respondents do not challenge several other key sections of the MWL. By way of example, RCW 90.03.550 provides that uses of water for municipal supply purposes include certain environmental uses, such as uses that benefit fish and wildlife. Significantly, the MWL requires that public water purveyors take active steps to conserve water.

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The Respondents do not challenge these provisions. They do not challenge RCW 70.119A.180, which establishes new water conservation standards for municipal water suppliers, and provides that “[i]t is the intent of the legislature that the department [of health] establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability.” This section prescribes a comprehensive set of requirements with regard to “water use efficiency,”

including conservation planning requirements, system leakage standards, and system reporting requirements. RCW 70.119A.180. The Department of Health (Health) has adopted rules in accordance with this section to effectuate its purpose to increase water conservation by municipal suppliers, and the MWL has resulted in enhanced water planning and conservation.<sup>3</sup> CP 1534-1539 (Declaration of Michael Dixel, Water Resources Policy Lead for Health).

**B. Procedure Below**

Almost three years after the MWL went into effect, in September 2006, in the *Burlingame* case, King County Superior Court No. 06-2-28667-7 SEA, several individuals and environmental organizations filed a declaratory judgment action against Ecology and Health challenging the validity of five sections of the MWL. CP 1-18.

The superior court subsequently allowed the Washington Water Utilities

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<sup>3</sup> Further, Respondents have not challenged sections of the MWL that require planning to coordinate water availability with land use planning as a means to accomplish growth management objectives. Under RCW 43.20.260, when it approves a water system plan, Health is required to ensure that water service to be provided under the plan for any new industrial, commercial, or residential use is consistent with any comprehensive or land use plan or development regulation adopted by a city, town, or county that covers the service area. Moreover, three other unchallenged sections of the MWL include measures that intend to promote water conservation practices. RCW 90.48.495 requires sewer plans to consider water conservation measures that would reduce flows to sewerage systems. RCW 90.48.112 and RCW 90.46.120(3) require wastewater plans and water supply plans to include consideration of opportunities for water reclamation and reuse. The use of reclaimed water (treated waste water) by municipal suppliers reduces demand for new water.

Council (WWUC), Cascade Water Alliance, and Washington State University to intervene. CP 1128-1130; CP 1148-1150; CP 1299-1301.

In December 2006, in the *Lummi Indian Nation* case, King County Superior Court No. 06-2-40103-4 SEA, six Indian Tribes filed a separate declaratory judgment action against the Governor, Ecology, and Health challenging the same subsections of the MWL along with three additional sections. CP 631-654. In March 2007, the two cases were consolidated. In April 2008, both groups of plaintiffs filed amended complaints CP 593-612; CP 1028-1052.

Both amended complaints alleged that three sections of the MWL, RCW 90.03.015(3), (4), and .330(3), violate separation of powers and substantive due process. CP 606-608; CP 1043-1046.

RCW 90.03.015(3) and (4) provide definitions for the terms “municipal water supplier” and “municipal water supply purposes,” which were not defined under Washington law prior to the MWL. Under RCW 90.03.015(4), a privately owned (i.e., non-governmental) water system can qualify to hold a water right for municipal water supply purposes. RCW 90.03.330(3) provides that certificates that were issued for municipal supply rights are “rights in good standing” if they were issued by Ecology on the basis of system capacity, a concept explained below. This section clarified the status of municipal water rights

documented by certificates specifying maximum water quantities based on system capacity rather than actual beneficial use of water (“pumps and pipes certificates”), which include quantities of inchoate water.<sup>4</sup>

Further, both amended complaints alleged that RCW 90.03.386(2) violates substantive and procedural due process, and that RCW 90.03.330(2) violates procedural due process. CP 608–611; CP 1044–1048. RCW 90.03.386(2) provides that the “place of use” of a water right for municipal supply purposes is specified as the service area under a Health approved water system plan or other planning document provided that the water supplier remains in compliance with its plan and the service area is consistent with certain land use and watershed plans and regulations. RCW 90.03.330(2) precludes Ecology from “revoking or diminishing” water rights documented by certificates that qualify as rights “in good standing” under RCW 90.03.330(3), except in limited circumstances, and provides that such rights may be revoked or diminished during an adjudication of water rights in superior court.

In addition, the *Lummi Indian Nation* amended complaint alleged that RCW 90.03.560 violates substantive due process, and that RCW 90.03.260(4) and (5) violate substantive and procedural due process.

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<sup>4</sup> An inchoate water right authorizes the future use of water “which has not yet been applied to a beneficial use.” *Theodoratus*, 135 Wn.2d at 596.

CP 1046, 1048–1050. RCW 90.03.560 requires Ecology to amend water right documents and related records to reflect that certain water rights are for municipal water supply purposes. RCW 90.03.260(4) and RCW 90.03.260(5) provide that a water right for municipal supply purposes is not limited to maximum service connection or population figures specified in a water right application or any subsequent water right documents if the municipal water supplier has an approved water system plan or other approval from Health authorizing service to a specified number of service connections.

The parties filed cross-motions for summary judgment. On June 11, 2008, Judge Jim Rogers issued the Summary Judgment Order and granted the plaintiffs' motions with respect to three of the eight sections of the MWL that they challenged, and granted the State's, WWUC's, and CWA's motions on the other five sections.<sup>5</sup> CP 613–618.

Judge Rogers ruled that “RCW 90.03.015(3) and (4) violate the separation of powers under the state constitution because they have retroactive effect and attempt to overrule an interpretation of the Water Code in [*Theodoratus*].” CP 617 (Summary Judgment Order at 5). In ruling that RCW 90.03.015(3) and (4) are unconstitutional on their face,

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<sup>5</sup> Judge Rogers did not issue a written memorandum opinion. He provided an oral decision. The Verbatim Report of the Proceedings (VRP) for the oral decision is attached as Appendix B.

Judge Rogers concluded that the definitions of the terms “municipal water supplier” and “municipal water supply purposes,” which allow non-governmental entities to hold water rights for municipal purposes, that among other things, are exempt from statutory relinquishment,<sup>6</sup> contravene what he viewed as a holding in *Theodoratus* that private developers are ineligible to hold municipal rights because they are not municipalities. Verbatim Report of Proceedings (VRP) at 10–12.

Further, Judge Rogers ruled that:

b. RCW 90.03.330(3) violates the separation of powers under the state constitution because it has retroactive effect and attempts to overrule an interpretation of the Water Code in [*Theodoratus*].

c. Alternatively, even if one were to accept the State’s interpretation of the statute that it addresses only valid inchoate water rights (or rights “in good standing”) (which this Court does not), then RCW 90.03.330(3) violates the separation of powers under the state constitution because it purports to make a legislative determination of adjudicative facts concerning the “good standing” of particular water rights.

CP 617–618 (Summary Judgment Order at 5-6). Judge Rogers concluded that the provision of the MWL that provides that water rights documented

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<sup>6</sup> Water rights in Washington that go unused, in whole or in part, for five or more consecutive years, are subject to full or partial relinquishment absent “sufficient cause.” RCW 90.14.160-180; *See R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999); *Public Utility Dist. No. 1 of Pend Oreille Cy. v. Dep’t of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002). A sufficient cause exception to relinquishment is provided for water rights “claimed for municipal water supply purposes.” RCW 90.14.140(2)(d).

by certificates based on system capacity are “rights in good standing” contravened a holding in *Theodoratus* because it “reinstated” such rights after they were purportedly invalidated by that decision. VRP at 8–10.

Having ruled RCW 90.03.015(3), (4), and .330(3) facially unconstitutional on the basis of separation of powers, Judge Rogers did not reach the substantive due process claims challenging those provisions. However, Judge Rogers rejected the Plaintiffs’ substantive and procedural due process claims challenging RCW 90.03.260(4), (5), .330(2), .386(2), and .560, and ruled that those provisions of the MWL do not facially violate the constitution. CP 618 (Summary Judgment Order at 6).

Appeals and cross appeals seeking direct review in this Court were filed by all the parties. The Appellants and Respondents filed statements of grounds for direct review, and the Court’s decision on whether to accept this case for direct review remains pending.

**C. Background On The Law Of Water Rights In Washington**

Respondents’ facial constitutional claims rest on alleged harm to water rights due to certain sections of the MWL. It is thus important to understand the nature of water rights as property interests. Although a water right is a real property interest protected by the due process and takings clauses of the Constitution, unlike a right in land, the property right in water is one of use of a shared public resource. Rights to the use of water have evolved and been redefined over the years. The state

legislatures, Congress, and the courts have authorized and regulated this public resource as necessary to conform to changing needs and policies. Western water law has been described as a continuous development of policy as social and economical values evolve. *In Search of the Headwaters, Change and Discovery in Western Water Policy*, Bates, Getches, MacDonnell and Wilkinson (University of Colorado School of Law, Island Press, 1993). Thus, a water right is not stagnant in its definition and application.

In Washington, water is a public resource. The Washington Constitution provides that “[t]he use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.” Const. art. XXI, § 1. This notion is reflected in RCW 90.03.010, which reads, in part, “all waters within the state belong to the public.” Because water is a limited resource in Washington, the right to use water is granted and regulated through a system of claims, permits and certificates. See RCW 90.03; RCW 90.44. Uses of water are also governed through the regulation of public water systems and approval of public water system plans. See RCW 43.20.250 and RCW 43.20.260. When a person obtains a state water right, that person does not obtain a tangible good or a piece of real estate, but a right to *use* the water, i.e. a usufructuary right. See James K. Pharris, *An Introduction to Washington Water Law*, at I:2 (2000).

Beginning with the enactment of the Water Code, RCW 90.03, in 1917, the Legislature has continued to enact laws that define the nature of

a water right, or the “bundle of sticks” included in a water right, to address the ever changing and evolving policies of water use and regulation. The granting and regulation of water rights is thus a valid exercise of state police power, and the MWL is only one of many legislative acts that have been passed over the last 90 years that redefine, clarify and change the private use of water to meet public goals, and affect the use of current and future water rights.

“All water rights are subject to adjustment to meet the changing demands of competing users.” A. Dan Tarlock, *Law of Water Rights Resources*, § 9:23 at 9-37. The MWL is but another instance in which the Legislature has legitimately exercised its police power to regulate water rights in Washington in a manner to best meet evolving public needs and interests.

## V. ARGUMENT

### ~~A. Standard Of Review And Burden Of Proof~~

Under CR 56(c), a party moving for summary judgment must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. An appellate court reviews summary judgment de novo. *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007). Here, because Respondents challenge the

facial constitutionality of several sections of the MWL, this is a case involving purely legal issues and no facts are in dispute.<sup>7</sup>

Facial constitutional challenges involve questions of law that are reviewed de novo. *Amunrud v. State Dep't of Soc. & Health Servs.*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). The court's focus is on whether the statute's language violates the Constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000). The court's duty "is not to be exercised in reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524, (1960).

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**1. Respondents Bear The Burden Of Demonstrating That The Challenged Sections Of The Municipal Water Law Are Unconstitutional Beyond A Reasonable Doubt**

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It is a well-established general rule "that where the constitutionality of a statute is challenged, that the statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt." *Tunstall*, 141 Wn.2d at 220. This demanding standard is justified because "as a co-equal branch of government that is sworn to uphold the constitution, [the

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<sup>7</sup> While facts in this case are not in dispute, the State does dispute Respondents' inappropriate use of factual examples in this facial challenge. The State concurs with Appellant WWUC that it was error for the superior court to deny WWUC's motion in limine regarding the Respondents' factual examples.

courts] assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment.” *Id.* The practical effect of holding a statute unconstitutional on its face is to render it “utterly inoperative.” *Id.* at 221 (quoting *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)).

**2. Respondents Must Prove There Is No Set Of Circumstances Under Which The Challenged Sections Of The Municipal Water Law Can Be Constitutionally Applied**

Because this is a facial challenge, the burden is on the Respondents to show that “no set of circumstances” exists in which the statute, as currently written, can be constitutionally applied. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). The genesis of the “no set of circumstances” test for facial challenges is the United States Supreme Court decision in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). This standard makes perfect sense. If a law is facially unconstitutional, there can literally be “no set of circumstances” under which the law can be constitutionally applied, whereas a law cannot be facially unconstitutional if there is even one circumstance where the law can be constitutionally applied.

The Washington Supreme Court has consistently recognized that the “no set of circumstances test” applies in challenges to the facial

constitutionality of a statute. *See, e.g., State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005); *Tunstall*, 141 Wn.2d at 221; *State Republican Party v. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000); *Turay*, 139 Wn.2d at 417 n.27. In addition, each division of the Court of Appeals has recognized that this standard applies for facial challenges. *See, e.g., Galvis v. State Dep't of Transportation*, 140 Wn. App. 693, 702, 167 P.3d 584 (2007); *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 797, 158 P.3d 1251 (2007); *State v. Clinkenbeard*, 130 Wn. App. 552, 560, 123 P.3d 872 (2005).

However, in *Robinson v. City of Seattle*, 102 Wn. App. 795, 806, 10 P.3d 452 (2000), the Court of Appeals departed from the “no set of circumstances” test established by the United States and Washington Supreme Courts because the test had not been applied in a Washington taxpayer suit, and because the court mistakenly believed that Washington courts had yet to apply the test in a facial challenge. *Robinson*, 102 Wn. App. at 806 n.15. In fact, when *Robinson* was decided, the Washington Supreme Court had already acknowledged that the “no set of circumstances” test applied in facial challenges. *See Tunstall*, 141 Wn.2d at 221 (citing *Turay*, 139 Wn.2d at 417 n.27). Thus, *Robinson* was wrongly decided, as the superior court properly concluded in this case. VRP at 5–6.

**B. The Legislature Properly Exercised Its Authority By Enacting The Municipal Water Law**

A fundamental principle of our constitutional system is that governmental powers are divided among three branches and each is separate from the others. Like the United States Constitution, the Washington Constitution does not contain a formal separation of powers clause, but the very division of our government has been deemed to give rise to a vital separation of powers doctrine. *City of Spokane v. Cy. of Spokane*, 158 Wn.2d 661, 678-679, 146 P.3d 893 (2006).

The doctrine of separation of powers comes from the constitutional distribution of government's authority into three branches: the legislative authority, executive power, and judicial power. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Separation of powers issues arise when the Legislature attempts to perform judicial functions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 143, 744 P.2d 1032 (1987), 750 P.2d 254 (1988).

However, the separation of powers doctrine does not require that the branches of government be hermetically sealed. *City of Spokane*, 158 Wn.2d at 678-679. The doctrine serves mainly to ensure that the fundamental function of each branch remains inviolate. Otherwise, the doctrine contemplates flexibility and practicality. *Id.* at 679. "The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of

another.” *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006).

The superior court ruled that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) violate the separation of powers doctrine on grounds that they operate retroactively and overrule holdings relating to interpretation of the Water Code in *Theodoratus*. CP 617 (Summary Judgment Order at 5). Thus, the Court must consider whether the Legislature threatened the independence or integrity or invaded the prerogative of the judiciary by enacting these statutory sections.

As a general rule, an amendment is like any other statute and applies prospectively only. Nevertheless, an amendment may be retroactively applied if the Legislature so intended, it is curative, or it is remedial, provided that it does not run afoul of any constitutional prohibition. *In re Det. of Brooks*, 145 Wn.2d 275, 284–285, 36 P.3d 1034 (2001). The Supreme Court has pronounced that:

In the past we have held that separation of powers problems are raised when a subsequent legislative enactment is viewed as a clarification and applied retroactively, if the subsequent enactment contravenes the construction placed on the original statute by this court. But where this court has not previously interpreted the statute to mean something different and where the original enactment was ambiguous such to generate dispute as to what the legislature intended, the subsequent amendment shall be effective from the date of the original act, even in the absence of a provision for retroactivity.

*Overton v. State Econ. Assistance Auth.*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981) (citations omitted).

A “holding” is defined as “[a] court’s determination of a matter of law pivotal to its decision; a principle drawn from such a decision. Cf. OBITER DICTUM.” *Black’s Law Dictionary* (8<sup>th</sup> ed. 2004). “Obiter Dictum” is defined as:

A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). -- Often shortened to *dictum* or, less commonly, *obiter*.

*Id.*

Where a statement in a judicial opinion relates to an issue that was not presented to the court, that statement does not constitute a holding of the court. *See State ex rel. Johnson v. Funkhouser*, 52 Wn.2d 370, 374, 325 P.2d 297 (1958); *ETCO, Inc. v. Dep’t of Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992).

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### **1. The Washington Supreme Court’s Decision In *Theodoratus* Did Not Address Municipal Water Suppliers**

*Theodoratus* involved an appeal of a decision by Ecology to approve a water right permit extension to George Theodoratus, who had originally been granted a permit<sup>8</sup> to withdraw ground water to supply a residential development in Skagit County. The permit included a

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<sup>8</sup> As discussed in Section III.A., above, the issuance of a water permit precedes the issuance of a certificate, which is issued after the water right is perfected through beneficial use of water. RCW 90.03.290; RCW 90.03.330; RCW 90.44.080. The issuance of a permit does not guarantee that a certificate will ultimately be issued, or that the full quantity of water allocated under a permit will ultimately be authorized under a certificate. RCW 90.03.320; RCW 90.03.330(1).

condition under which the water right certificate would be issued for the capacity of facilities to deliver the water to a distribution system. *Theodoratus*, 135 Wn.2d at 586–587. This is commonly known as the “system capacity” or “pumps and pipes” measure for perfection of a water right. Mr. Theodoratus requested an extension of the development schedule under his permit. Ecology granted Mr. Theodoratus’ request for an extension but included a new condition in the permit under which the quantity of the perfected water right would be based on meter data showing actual beneficial use of water. *Id.* at 588. Mr. Theodoratus appealed this new permit extension condition.

The case ultimately went to this Court, which upheld the “actual beneficial use of water” condition that Ecology included in the permit extension. *Id.* at 589–593. The issue in *Theodoratus*, therefore, was over the measure to be used for perfecting a water right and obtaining a water right certificate. The Court determined that measure to be beneficial use. *Id.* at 595. But the Court did not invalidate any preexisting certificate.

The Court clarified that the holding did not extend to municipal water rights:

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.

*Id.* at 594. However, even though the *Theodoratus* decision did not apply to municipalities or municipal water rights, it cast uncertainty over whether the holding might be extended subsequently, in other cases, to municipalities or municipal water rights.

Further, while the Court recognized in its opinion that Mr. Theodoratus was not a municipality, there was no analysis as to whether a non-governmental person or entity could hold rights for “municipal water supply purposes,” and there was no statutory definition of that term at that time. This cast uncertainty over what persons or entities could hold water rights for municipal water supply purposes in Washington.

**2. RCW 90.03.015(3) And (4), Which Define “Municipal Water Supplier” And “Municipal Water Supply Purposes,” Do Not Contravene Any Holding In Theodoratus**

~~The superior court erred in concluding that the statutory definitions~~  
of the terms “municipal water supplier” and “municipal water supply purposes” violate separation of powers by retroactively contravening a holding in *Theodoratus*. The doctrine of separation of powers is violated when one branch of government usurps the power of another branch. Such usurpation occurs only if the law either overrules or contravenes a decision of this Court. *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). The MWL does not disturb any holding stated in *Theodoratus*.

RCW 90.03.015(3) defines the term “municipal water supplier” as “an entity that supplies water for municipal water supply purposes.” RCW 90.03.015(4) defines “municipal water supply purposes” as “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 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; . . . .

These subsections operate retroactively, i.e. before September 9, 2003 when the MWL went into effect, because they are curative provisions that define previously undefined terms and filled in gaps to resolve prior uncertainty and ambiguity in the law.

~~In ruling that these statutory definitions violate separation of powers, Judge Rogers reasoned that:~~

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 system under state statutory and common law. This court decided that he was not [a municipal water supplier] . . . .

VRP at 11.

To declare RCW 90.03.015(3) and (4) unconstitutional, Judge Rogers stretched the obiter dictum statement in *Theodoratus* that “Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case” into a holding that private entities legally could not hold water rights for municipal purposes prior to the MWL. *Theodoratus*, 135 Wn.2d at 594.

To the contrary, in enacting RCW 90.03.015(3) and (4), the Legislature did not retroactively overrule any *holding* in *Theodoratus* that private persons or entities could not be “municipal water suppliers” that may hold water rights for “municipal water supply purposes,” a term which, at that time, was undefined and was only included in two water statutes, RCW 90.14.140(2)(d) (providing an exemption from relinquishment for municipal water rights) and RCW 90.03.260 (relating to water right applications).

*Theodoratus* did not consider or decide any issue over whether a private entity could hold a water right for municipal water supply purposes. Indeed, the statements of issues in the briefs of Ecology and Mr. Theodoratus filed with the Supreme Court in that case do not state any such issue. CP 2398–2404. The issues presented in *Theodoratus* were over whether a permit condition could require that a certificate would be issued in the future based on actual use, and related issues over whether

Ecology violated Administrative Procedure Act rulemaking requirements in including the condition, or should be equitably estopped from including the condition. *Id.*

The issue over who can qualify to hold a water right for municipal purposes was not presented in *Theodoratus* because Mr. Theodoratus did not even assert that he held a municipal water supply right. This is not surprising because the case had nothing to do with the exemption from relinquishment for municipal water rights under RCW 90.14.140(2)(d). Mr. Theodoratus was not concerned about relinquishment, which only applies to water rights that have previously been perfected through actual use of water (typically documented by certificates). Rather, he wanted more time to develop (perfect) his inchoate water right (documented by a permit) in the first place, a matter for which the municipal exemption from relinquishment would be of no use to him because the relinquishment provisions of RCW 90.14 cannot apply to permits. RCW 90.14.150.

Moreover, case law before and after the MWL provides authority for recognizing the functional and legal similarity between a utility service provided by a governmental entity and the same service provided by a private entity. For example, in *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003), this Court cited case law going back to 1909 recognizing that services provided by a governmental entity could be for

the common good, in which case the service is a governmental function, or for the “special benefit or profit of the corporate entity,” in which case it is a proprietary function. This distinction was addressed in *Steifel v. City of Kent*, 132 Wn. App. 523, 530, 132 P.3d 1111 (2006), in the context of a public duty doctrine issue, where the Court of Appeals distinguished a city utility’s service to water customers – a proprietary function and service – from its provision of water through hydrants for fire protection – a governmental function and service.

The Legislature’s definitions of “municipal water supplier” and “municipal water supply purposes” includes both governmental and private systems and this inclusion is compatible with the line of case law, before and after *Theodoratus*, which recognizes that these systems are providing a similar “proprietary” service. Thus, before the MWL was enacted, the adjective “municipal” could be construed to equate a private system with a governmental entity in this regard.

This Court’s statement that “Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case” (*Theodoratus*, 135 Wn.2d at 594) did not constitute a “holding” that was a “determination of a matter of law pivotal to its decision” in *Theodoratus*. *Black’s Law Dictionary* (8<sup>th</sup> ed. 2004). At most, the statement is dictum because it is “a judicial comment made

while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” *Id.*

The statement cannot be construed as a holding that private entities could not qualify to hold water rights for municipal supply purposes prior to enactment of the MWL because an issue over their qualification for such status was not presented by the parties, and was not squarely considered or addressed by the Court. *See Johnson*, 52 Wn.2d at 374; *ETCO, Inc.*, 66 Wn. App. at 307.

Because there was no holding in *Theodoratus* that a private entity could not hold a water right for municipal purposes, the Legislature could address whether and which non-government water systems could be “municipal water suppliers” without invading the province of the judiciary. The Legislature’s enactment of definitions of “municipal water supplier” and “municipal water supply purposes” remedied uncertainty in the law. Further, the Legislature’s definitions of these two terms is consistent with the long line of Washington case law treating such services as similar “proprietary” services whether they are performed by a governmental or a private entity.

A violation of separation of powers cannot be proved where an alleged “holding” of this Court that was purportedly contravened by the Legislature was merely dicta. The superior court’s decision should be

reversed because RCW 90.03.015(3) and (4) do not violate separation of powers.

**3. RCW 90.03.330(3), Which Relates To Water Right Certificates Based On System Capacity, Does Not Contravene *Theodoratus* And Does Not Adjudicate Any Individual Water Rights**

The superior court erred in ruling that RCW 90.03.330(3), which provides that water rights documented by system capacity-based certificates that were issued prior to 2003 are rights “in good standing,” violates separation of powers by retroactively contravening a holding in *Theodoratus*. As demonstrated here, the Legislature did not contravene the Court’s holding in *Theodoratus*, and addressed the uncertainty that followed the Court’s decision. RCW 90.03.330(3) addresses the status of preexisting “pumps and pipes” certificates that were not at issue in *Theodoratus*.

RCW 90.03.330(3) provides that:

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.

This statute operates retroactively because it states that it applies to water certificates issued prior to the date it became effective. It provides that

water right certificates that were issued prior to September 9, 2003, specifying maximum quantities based on system capacity (“pumps and pipes”), rather than on actual use of water, are “rights in good standing.” In contrast, RCW 90.03.330(4) provides that “[a]fter September 9, 2003, the department must issue a new certificate . . . 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.”

Based on the inclusion of the words “in good standing” in the statute, Judge Rodgers declared RCW 90.03.330(3) unconstitutional on the ground that “[t]his statute clearly reinstates pumps and pipes certificates issued prior to September 9, 2003, and this is an attempt to reverse the *Theodoratus* decision.” VRP at 9.

The superior court erred because this analysis misconstrues the scope of the *Theodoratus* decision and the effect of the Legislature’s declaration that water rights documented by certificates that were issued based upon system capacity are “in good standing” under RCW 90.03.330(3). Contrary to the superior court’s analysis, in enacting RCW 90.03.330(3), the Legislature did not “reinstate” water rights that were somehow “invalidated” by the *Theodoratus* decision and thereby overrule this Court’s holding in *Theodoratus* that it was improper for water right certificates to be issued based on system capacity.

The Legislature did not retroactively overrule a judicial construction of the Water Code and validate water right certificates that the Court invalidated in the *Theodoratus* decision. *Theodoratus* involved

an appeal of a permit extension decision and did not involve a water certificate. Further, the Court did not rule that any particular certificate was invalid, or that “pumps and pipes” certificates generally throughout the state were invalid. It held rather that Ecology could impose a condition in a permit to require that *future* issuance of a certificate be based on actual use of water, and not system capacity.

The Court’s decision did not require Ecology to go back and invalidate or do anything with respect to previously issued system capacity-based certificates. Through RCW 90.03.330(3), the Legislature properly exercised its police power to clarify the uncertain status of already-existing “pumps and pipes” certificates after *Theodoratus*. Such clarification does not violate the separation of powers.

In *Theodoratus*, this Court did not hold that “pumps and pipes” certificates that Ecology had issued prior to the decision were invalid. That would have lead to the catastrophic result that water right certificates authorizing purveyors to serve water to the vast majority of Washington’s population would be invalid, requiring such purveyors, including numerous Washington cities, to shut down water service to homes and businesses or face penalties under the Water Code for illegal water use. The case held only that the ministerial function of documenting water rights based upon system capacity was improper, and that actual beneficial use should be the measure of water rights. This holding is effectuated through RCW 90.03.330(4), which requires that after the effective date of the MWL, September 9, 2003, water right certificates may only be issued

that document maximum quantities based on actual beneficial use of water, rather than system capacity.

*Theodoratus* did not involve any issue regarding the validity of preexisting “pumps and pipes” certificates, or the administration of them. This Court could not have pronounced a holding in that case concerning the validity of preexisting “pumps and pipes” certificates because there was no issue relating to such certificates before the Court. *See Johnson*, 52 Wn.2d at 374; *ETCO, Inc.*, 66 Wn. App. at 307.

Further, RCW 90.03.330(3) does not “overrule” the *Theodoratus* decision by eliminating the beneficial use requirement for municipal purpose water rights. Any unused (inchoate) water right documented by a “pumps and pipes” certificate must still be put to beneficial use in the future through actual use to become a vested right. Inchoate water rights are water rights that have not been perfected and vested through actual use, and the mere certification of rights based on system capacity did not result in the automatic perfection of those rights. While pre-*Theodoratus* certificates that were issued based on system capacity were prematurely issued, neither *Theodoratus* nor RCW 90.03.330(3) altered the water rights underlying those documents.

By including in RCW 90.03.330(3) the term “in good standing” for water rights documented by certificates based on system capacity, the Legislature clarified that Ecology’s issuance of system capacity certificates did not take those water rights *out of* good standing, but that holders of such rights would still have to meet other water law principles,

such as due diligence in project development, to keep them in good standing. CP 112 (*Cornelius v. Dep't of Ecology*, PCHB No. 06-099, Order on Summary Judgment (Dec. 7, 2007)); CP 1494 (POL-2030, Department of Ecology Water Resources Program Policy, *2003 Municipal Water Law Interpretive and Policy Statement*).

Further, RCW 90.03.330(2) authorizes the revocation or diminishment of water rights for municipal supply purposes under certain circumstances. CP 1492-1493. Under RCW 90.03.330(2), due diligence and other qualities needed to maintain an inchoate right “in good standing” will have to be shown in the event of general adjudications of water rights, or when applications for changes of points of diversion or withdrawal are evaluated. CP 112; CP 1492-1494. Thus, RCW 90.03.330(3) does not reinstate previously invalidated certificates and automatically perfect and vest inchoate water rights.

Through RCW 90.03.330(3), the Legislature properly exercised its police power to clarify the uncertain status of already-existing “pumps and pipes” certificates after *Theodoratus*. It did not contravene the Supreme Court’s narrow holding that it was proper to condition Mr. Theodoratus’ water permit such that a certificate could only be later issued based on actual beneficial use after completion of his development. Such clarification does not violate the separation of powers.

The superior court also erred in ruling that RCW 90.03.330(3) violates the separation of powers on alternative grounds “because it purports to make a legislative determination of adjudicative facts

concerning the ‘good standing’ of particular water rights.” CP 617–618 (Summary Judgment Order at 5–6). Judge Rogers based his ruling on his rationale that if the State’s view of the operation of the statute is accepted:

[I]t still cannot reinstate water rights that may have been relinquished in whole or in part in the past because to do that would be to make a legislative determination of the due diligence of the parties in the past, and thus the creation of adjudicative facts concerning the good standing of particular water rights.

VRP at 9–10.

This analysis is flawed because, as discussed above, through enactment of RCW 90.03.330(3) the Legislature did not “reinstate” water rights that were earlier “invalidated” as a result of the *Theodoratus* decision.

In *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975), this Court held that a statute violated separation of powers because it involved a legislative determination of adjudicative facts. *O’Brien* involved specific public works contracts that the Legislature retroactively determined were economically impossible to perform through passage of a statute which relieved the contractors from carrying them out. *O’Brien*, 85 Wn.2d at 267–268. In *O’Brien*, the Court held that the statute violated separation of powers because the Legislature, in effect, made determinations that certain existing contracts were impossible to perform because of increases in the cost of petroleum. *O’Brien*, 85 Wn.2d at 269–270.

In contrast, in this case, the Legislature did not make any determinations on specific water rights through passage of RCW 90.03.330(3). By including the phrase “in good standing” in the statute, the Legislature did not make any determinations with respect to the validity and extent of specific water rights documented by certificates that were issued based on system capacity. Holders of such water rights must still put any inchoate quantities of water documented by such “pumps and pipes” certificates to actual beneficial use in order for them to become perfected vested rights, and such inchoate quantities must be developed with reasonable diligence in order to be maintained.

Contrary to the superior court’s ruling here, the Legislature did not cross the line between legislation and making a blanket, retroactive determination of individual cases in violation of separation of powers. While the Legislature deemed water rights documented by certificates based on system capacity to be “rights in good standing,” such rights had not previously been taken out of good standing simply because they had been prematurely documented by certificates. Moreover, holders of such water rights, still have to meet legal requirements to maintain their status “in good standing,” and, under RCW 90.03.330(2), which references RCW 90.03.240 (which relates to general adjudications of water rights), courts can determine the validity of such water rights in future adjudications. By passing RCW 90.03.330(3), the Legislature did not make any final “adjudication” of any particular water right to shield it from a judicial or adjudicative determination of its actual validity and

extent in the future. RCW 90.03.330(2) must be read together with RCW 90.03.330(3) to determine the Legislature's intent, and the Legislature could not have intended to adjudicate facts in one section, and leave those same facts open for determination by an administrative agency and the courts in the adjacent section.

Since the Legislature did not make any "judicial determinations" on the nature or validity of specific water rights through its enactment of RCW 90.03.330(3), the Court should reverse the superior court's conclusion that the statute violates separation of powers. This Court should conclude that enactment of RCW 90.03.330(3) was a proper exercise of legislative authority.

**C. The Municipal Water Law Satisfies Substantive Due Process**

The superior court failed to reach Respondents' substantive due process claims regarding the facial constitutionality of RCW 90.03.330(3), RCW 90.03.015(3) and (4), and RCW 90.03.560, having concluded that RCW 90.03.330(3), and RCW 90.03.015(3) and (4) violate the separation of powers. The superior court erred in failing to reach the merits of Respondents' substantive due process claims on these provisions. This Court's review is de novo on these purely legal issues. To fully resolve the issues in this case, the Court should reach these claims and conclude that Respondents have failed to meet their burden to demonstrate beyond a reasonable doubt that the provisions violate substantive due process.

## 1. Substantive Due Process Principles

Respondents' substantive due process claims hinge on their assertions that the challenged sections of the MWL violate substantive due process because the sections operate retroactively to deprive others of their vested interests in water rights. A retroactive law "violates due process when it deprives an individual of a vested right." *State v. Shultz*, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999).

A statute or amendment to a statute may operate retroactively, (1) if the Legislature so intended; (2) if it is clearly curative; or (3) if it is remedial, provided that retroactive application does not run afoul of the constitution. *1000 Va. Ltd. P'ship*, 158 Wn.2d at 584. An amendment is curative "if it clarifies or technically corrects an ambiguous statute." *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). "Ambiguity exists when a law 'can be reasonably interpreted in more than one way.'" *McGee Guest Homes v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

Here, the challenged provisions are retroactive in effect because they are curative of prior uncertainty and ambiguity. The provisions do not, however, violate substantive due process, because they do not retroactively infringe upon the vested property rights of others, including Respondents.

## 2. RCW 90.03.015(3) And (4) And RCW 90.03.560 Satisfy Substantive Due Process

RCW 90.03.015(3) defines the term "municipal water supplier" as "an entity that supplies water for municipal water supply purposes."

RCW 90.03.015(4) defines “municipal water supply purposes” as “*a beneficial use of water*” for, among other things, “residential purposes through fifteen or more residential service connections.” (Emphasis added.)

The Respondents assert that RCW 90.03.015(3) and (4) violate substantive due process because the sections retroactively exempt certain private water right holders from relinquishment, thereby “resurrecting” water rights that had previously been relinquished to the detriment of other water right holders, including Respondents. *See* CP 607–608; CP 1044–1045. The *Lummi Indian Nation* Respondents make the same assertion with respect to RCW 90.03.560.<sup>9</sup> Respondents’ entire claim on this issue is grounded in their subjective belief that only public entities qualified for exemption from relinquishment under RCW 90.14.140(2)(d) prior to enactment of the MWL, even though the terms “municipal water supplier” and “municipal water supply purposes” were never previously defined.

The Respondents ignore ambiguity surrounding municipal water rights preceding the adoption of the MWL, and cannot demonstrate that there can be no set of circumstances under which each of the challenged sections of the MWL can be constitutionally applied. Moreover, each of

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<sup>9</sup> RCW 90.03.560, provides in part: “When requested by a municipal water supplier or when processing a change or amendment to the right, the department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in RCW 90.03.015, are correctly identified as being for municipal water supply purposes. . . .” This ministerial section simply allows for water rights that fit within the definition of “municipal water supply purposes” to be so identified in water rights documents.

the challenged sections of the MWL is capable of constitutional construction.

**a. Respondents' Facial Challenge Fails Because RCW 90.03.015(3) And (4) And RCW 90.03.560 Can Apply Prospectively Without Violating The Constitution**

It is Respondents' burden in this facial challenge to demonstrate that there can be "no set of circumstances" under which these challenged provisions of the MWL can be constitutionally applied. *City of Redmond*, 151 Wn.2d at 669. Here, Respondents' facial challenge fails because RCW 90.03.015(3) and (4) and RCW 90.03.560 can apply prospectively under *all circumstances* without violating the Constitution.

For example, subsequent to adoption of the MWL, a water purveyor serving water under a "community domestic purpose" water right<sup>10</sup> for 12 service connections would not qualify as a "municipal water supplier" serving water for "municipal supply purposes" as those terms are defined in RCW 90.03.015(3) and (4). However, if through conservation efforts, that purveyor was able to take the same amount of water and serve more than 15 service connections, the purveyor would be deemed a municipal water supplier serving water for municipal supply purposes. The purveyor's water use would be exempt from relinquishment under RCW 90.14.140(2)(d), and the purveyor could have its water right documents updated to reflect that it is a municipal water supplier under

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<sup>10</sup> Water rights issued for fewer than 15 service connections are frequently designated on water rights documents as water rights for "community domestic" purposes.

RCW 90.03.560. If the Court rules that these three sections of the MWL *facially* violate substantive due process, then even this perfectly constitutional *prospective* application of the MWL will be unavailable to water right holders.

It is notable that in the five years the MWL has been law in Washington, Respondents have not identified one single unconstitutional application of the MWL, yet they are here asking the Court to declare the law *facially* invalid based upon speculative allegations of retroactive harm. Because Respondents must demonstrate that there can be no set of circumstances under which the statutes can be constitutionally applied, their facial challenge fails because there can unquestionably be constitutional prospective application of the challenged provisions.

**b. RCW 90.03.015(3) And (4) And RCW 90.03.560 Do Not Violate Substantive Due Process Because The Provisions Are Capable Of Constitutional Construction When They Are Applied Retroactively.**

Respondents assert that by defining municipal water suppliers to include non-governmental entities, the Legislature has retroactively “revived” water rights held by non-governmental entities that otherwise would have been subject to statutory relinquishment for full or partial nonuse. While the speculative nature of this argument should be sufficient to defeat Respondents’ facial challenge, the Court should also reject it because the provisions can be constitutionally construed even on a retroactive basis. Respondents’ arguments are flawed because they

disregard prior ambiguity in the law and the fact that the terms “municipal water supplier” and “municipal water supply purposes” were not defined prior to enactment of the MWL.

A statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial. *1000 Va. Ltd. P'ship*, 158 Wn.2d at 584. An amendment is curative if it clarifies or technically corrects an ambiguous statute. *F.D. Processing Inc.*, 119 Wn.2d at 461. As outlined below, RCW 90.03.015(3) and (4) are clearly curative statutory sections that clarify ambiguity in the Water Code surrounding municipal water rights, and RCW 90.03.560 is a ministerial section that allows for the correction of water right documents to conform to the new definitions.

Prior to enactment of the MWL, Ecology personnel inconsistently construed the term “municipal water supply purposes” in the context of RCW 90.14.140(2)(d) and other sections of Washington water law to include community domestic uses served by a non-governmental entity, while in other instances construing the term to not include group domestic uses served by a non-governmental entity. In addition, prior to adoption of the MWL, no Ecology rules, policy statements, or interpretive statements ever provided any definition of the term “municipal water supply purposes”.

For example, in several instances prior to the MWL, Ecology issued water right certificates to non-governmental entities that designated

the purpose of use for the rights as being for municipal supply purposes.<sup>11</sup> CP 1484. In contrast, in a 1994 Pollution Control Hearings Board case, Ecology took the position that a private water association could not hold a water right for municipal water supply purposes that would be exempt from relinquishment under RCW 90.14.140(2)(d). CP 825–831 (*Ga. Manor Water Ass'n v. Dep't of Ecology*, PCHB No. 93-68 (Order Granting Partial Summary Judgment, (Nov. 9, 1994))).

To further illustrate the agency's inconsistent approach to municipal water suppliers due to prior ambiguity in the law, a 1994 Ecology Draft Municipal Water Right Issue Paper suggested that "municipal purposes" should be defined through various criteria, including that the purveyor be a public entity obliged to accept all customers for multiple purposes (domestic, commercial, industry, public) through a system with long-term growth expectation. CP 1508–1510. A subsequent version of this paper in 1995 omitted the proposed criteria to determine whether a water right is for municipal supply purposes. CP 1511–1512. Moreover, at one point, an Ecology official suggested that a definition should be adopted as follows: "Type of use – Municipal use generally includes domestic supply, industrial supply, irrigation of lawns, parks, cemeteries, and commercial uses." CP 1513-1514.

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<sup>11</sup> These entities include, but are not necessarily limited to, the Maple Cooperative Water Company, Burlington Northern, Inc., Sherman Combs, W.C. Reeder, Spring Hill Water Works, Sidney H. Ducken and Karl J. Ducken, and Tatoosh Company. CP 1498–1507.

As is thus evident, whether the term “municipal supply purposes” focused on *who* supplied the water, e.g., a public versus a private entity, as opposed to the *type* of use under a water right, was unclear prior to the MWL. Respondents’ subjective belief that only governmental entities could hold water rights for municipal supply purposes prior to enactment of the MWL that would be exempt from relinquishment is thus misplaced. The state issued water rights for municipal purposes to private water purveyors before the effective date of the MWL. A consequence of accepting Respondents’ position that only public entities can serve water for municipal water supply purposes is that a private purveyor that serves water for the very same human and public needs would not have its nonuse of water excused, whereas a public purveyor would. There is no basis in the law for this awkward distinction, and no support in Washington case law which characterizes these functions as being “proprietary” when they are carried out by both government and private entities.

The Legislature resolved ambiguity in the law by providing the first statutory definitions for these terms in the MWL. Legislation defining terms for the first time is evidence of the curative nature of a statute or amendment. *Harbor Steps Ltd. P’ship v. Seattle Technical*, 93 Wn. App 792, 800, 970 P.2d 797 (1999). Clarification of these ambiguities demonstrates that RCW 90.03.015(3) and (4) are to be applied retroactively, and that when they are, Respondents’ substantive due process rights are not violated. The Legislature’s clarification of prior

ambiguity surrounding these terms cannot retroactively affect vested rights of Respondents or any other water right holders, as it did not change previously existing law and attach new consequences to past events and deprive Respondents or any other similarly situated water right holder of any vested rights.

Respondents' facial substantive due process challenge also fails because the definitional sections require *actual beneficial use* of water in order to qualify for exemption from relinquishment. Thus, the definitions cannot retroactively "revive" relinquished water rights because municipal water rights can still be relinquished if the holder of the right fails to put the water to beneficial use for the purposes stated in the definitions.

Under RCW 90.03.015(4) "[m]unicipal water supply purposes' means a beneficial use of water . . . [f]or residential purposes through fifteen or more residential service . . . ." RCW 90.03.015(4) (emphasis added). As a result of the inclusion of the words "means a beneficial use of water," the MWL requires that water actually be beneficially used for one of the stated purposes in RCW 90.03.015(4) for water rights to qualify as being for municipal supply purposes.<sup>12</sup> In other words, a purveyor cannot hold a water right for "municipal water supply purposes" if one does not satisfy the definitional criteria, and if a purveyor does not satisfy

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<sup>12</sup> See *Cornelius*, PCHB No. 06-099 ("Because the Legislature defined 'municipal water supply purposes' in the present tense (i.e., it 'means a beneficial use of water . . .'), we interpret this as requiring present, active compliance with the definition through actual beneficial use of the water at the time a right is being characterized . . ."). CP 98.

the definitional criteria for a period of five or more years under a particular water right, nonuse of that right, in whole or part, is subject to statutory relinquishment. Consequently, there can be no revival of long-relinquished water rights, as Respondents assert.

To illustrate, there could be no “resurrection” of a water right once used by an old “ghost town” that at one point in time served more than fifteen service connections if, for a period of five or more consecutive years, that town served fewer than 15 service connections. This is because the town would not be beneficially using water for “municipal water supply purposes” as that term is defined in RCW 90.03.015(4) for a period of 5 or more years. The town would therefore not be considered a “municipal water supplier” under RCW 90.03.015(4). The water right would not be protected from relinquishment under RCW 90.14.140(2)(d), and would only be valid to the extent it was beneficially used during this period.<sup>13</sup>

When the Court is faced with multiple interpretations of the law, it must adopt the construction that sustains the constitutionality of that law. *Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976). Here, the State offers a constitutional construction of RCW 90.03.015(3) and (4) and RCW 90.03.560—one that recognizes ambiguity surrounding municipal water rights prior to enactment of the MWL, and one that cannot result in the “retroactive revival” of long unused municipal water rights, regardless

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<sup>13</sup> The State’s position in this context is articulated in Ecology Policy 2030, the 2003 Municipal Water Law Interpretive and Policy Statement. CP 1488–1489.

of the public or private nature of the purveyor, because one simply cannot be a “municipal water supplier” holding water rights for “municipal water supply purposes” unless one actually uses water for the stated purposes in the definition. The State’s construction of the challenged provisions is supported by the plain language of the statute, and while Respondents may disagree with the State’s constitutional construction, the Court should not adopt the Respondents’ alternative construction and then declare the law facially unconstitutional. The Court should respect the role of the Legislature and adopt the construction that saves the provisions’ constitutionality.

3. **RCW 90.03.330(3) Does Not Retroactively Infringe Upon Respondents’ Water Rights**

RCW 90.03.330(3) declares water rights issued prior to 2003, based upon Ecology’s erroneous policy of issuing water certificates based upon system capacity rather than actual beneficial use, to be “rights in good standing.” The superior court erred by not reaching Respondents’ substantive due process claim regarding this provision. Through de novo review of this purely legal issue, the Court should conclude that RCW 90.03.330(3) does not facially violate substantive due process.

Respondents argue that RCW 90.03.330(3) violates substantive due process because the subsection “retroactively expands the water rights of ‘municipal water suppliers’ by eliminating the beneficial use

requirement for such rights and therefore perfecting the unused portions of such paper rights.” See CP 608. In other words, Respondents take the “in good standing” language to mean that the Legislature “automatically perfected” all water rights that were documented based on system capacity rather than actual use.

Nothing in RCW 90.03.330(3) suggests that the Legislature intended to automatically perfect system capacity water rights by declaring those rights to be in good standing. Instead, as explained above with regard to the separation of powers issue, the Legislature recognized the uncertainty that was created for holders of these rights as a result of the *Theodoratus* decision, and properly exercised its police power to keep all existing “pumps and pipes” certificates in place to create stability and avoid ambiguity and disorder.

The Legislature did not deprive the Respondents or others of vested rights through passage of this section. Under RCW 90.03.330(3), an inchoate water right documented by a system capacity-based certificate must still be perfected in the future through actual use to become vested. Due diligence and other attributes needed to maintain an inchoate right “in good standing” will remain a condition of all such inchoate rights. CP 112; CP 1494. Thus, because RCW 90.03.330(3) did not create “automatic perfection” of water right certificates that were issued based on

system capacity or remove the beneficial use requirement, the Respondents, who cannot demonstrate automatic perfection of a water right under even a single “pumps and pipes” certificate, cannot show that this statute violates substantive due process by retroactively expanding all such rights.

Respondents seem to be merely asserting a subjective expectation that *if* a municipal water supplier with inchoate quantities failed to exercise reasonable diligence in perfection of the water right, that the inchoate quantities would be subject to cancellation, and that in such situations junior water right holders would benefit. This speculative expectation simply does not rise to the level of a facial due process violation, and again demonstrates why facial substantive due process challenges should be difficult to maintain. Absent a concrete set of facts, i.e., an as applied challenge, Respondents leave the Court to speculate that certain system capacity-based water certificates might not be developed according to Respondents’ subjective notion of reasonable diligence, and that if those water rights are not cancelled because they have been declared to be “in good standing” by virtue of RCW 90.03.330(3), that junior water right holders are somehow injured across the board. A vested right, entitled to protection from legislation, however, must be something more than a mere expectation; it must have become a title, legal or

equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another. *See Farm Bureau v. Gregoire*, 162 Wn.2d 284, 305, 174 P.3d 1142 (2007).

Moreover, where a statute is susceptible to more than one interpretation, the Court's duty is "to adopt a construction sustaining its constitutionality if at all possible." *Anderson v. Morris*, 87 Wn.2d at 716. Respondents offer what they perceive to be an unconstitutional interpretation of RCW 90.03.330(3) all the while disregarding the State's constitutional interpretation of this provision that does not result in "automatic perfection" of water rights documented by system capacity-based certificates that have inchoate water remaining.

In sum, RCW 90.03.330(3) has not created any "retroactive expansion" of municipal water rights documented by "pumps and pipes" certificates that, in all circumstances, has deprived the Respondents and all those who are similarly situated of their water rights. Consequently, the Respondents fail to meet their burden to prove beyond a reasonable doubt that RCW 90.03.330(3) violates substantive due process.

## VI. CONCLUSION

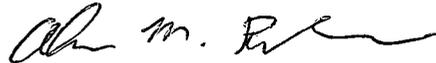
For the foregoing reasons, under the doctrine of the separation of powers, the Legislature properly exercised its authority to enact the Municipal

Water Law, RCW 90.03.015(3) and (4) and RCW 90.03.330(3). Further, these statutory provisions, and RCW 90.03.560, satisfy the right to substantive due process.

The State respectfully requests the Court to reverse the superior court's rulings that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) are unconstitutional under the separation of powers doctrine, and further declare that these three sections and RCW 90.03.560 facially comport with substantive due process.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of October, 2008.

ROBERT M. MCKENNA  
Attorney General



ALAN M. REICHMAN, WSBA #23874  
Assistant Attorney General



MARK H. CALKINS, WSBA #18230  
Assistant Attorney General



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P.O. Box 40117  
Olympia, WA 98504-0117  
(360) 586-6770

# **APPENDIX A**

JUDGE JIM ROGERS

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

LUMMI INDIAN NATION, MAKAH )  
INDIAN TRIBE, QUILEUTE INDIAN )  
TRIBE, QUINULT INDIAN NATION, )  
SQUAXIN ISLAND INDIAN TRIBE, )  
SUQUAMISH INDIAN TRIBE, and the )  
TULALIP TRIBES, federally recognized )  
Indian tribes, )

Plaintiffs,

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; and MARY )  
SELECKY, Secretary of Health for the State )  
of Washington, )

Defendants.

NO. 06-2-40103-4 SEA  
ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTIONS FOR SUMMARY JUDGMENT;  
GRANTING IN PART AND DENYING IN  
PART DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT

1 JOAN BURLINGAME, an individual; LEE )  
2 BERNHEISEL, an individual, SCOTT )  
3 CORNELIUS, an individual; PETER )  
4 KNUTSON, an individual; PUGET SOUND )  
5 HARVESTERS; WASHINGTON )  
6 ENVIRONMENTAL COUNCIL; SIERRA )  
7 CLUB; and THE CENTER FOR )  
8 ENVIRONMENTAL LAW AND POLICY, )

NO. 06-2-28667-7 SEA

Plaintiffs,

vs.

9 STATE OF WASHINGTON, )  
10 WASHINGTON STATE DEPARTMENT OF )  
11 ECOLOGY, and WASHINGTON STATE )  
12 DEPARTMENT OF HEALTH, )

Defendants,

and

13 WASHINGTON WATER UTILITIES )  
14 COUNCIL, CASCADE WATER ALLIANCE )  
15 and WASHINGTON STATE UNIVERSITY, )

Defendant-Intervenors.

28 ORDER ON CROSS MOTIONS  
FOR SUMMARY JUDGMENT - 2 -

1 This matter came before the Court on motions for summary judgment filed by all parties.  
2 The Court heard the oral arguments of counsel and considered the pleadings filed in this action  
3 and the following evidence:

- 4 1. Burlingame Plaintiffs' Motion for Summary Judgment.
- 5 2. The declarations of Joan Burlingame, Scott Cornelius, Joan Crooks, Shaun  
6 Goho, Peter Knutson, Michael O'Brien, and John Osborn, and the exhibits  
7 attached thereto.
- 8 3. Plaintiff Tribes' Motion for Summary Judgment.
- 9 4. The declarations of Joel Massman, Terry R. Williams, Leonard Forsman, Merle  
10 Jefferson, John B. Arum, and Crystal Sampson, and the exhibits attached thereto.
- 11 5. Defendant State of Washington's Motion for Summary Judgment.
- 12 6. The declarations of Ken Slattery and Michael Dixel and the exhibits attached  
13 thereto.
- 14 7. Defendant-Intervenor Washington Water Utilities Council's Motion for  
15 Summary Judgment.
- 16 8. The declarations of Tadas Kisielius, Jim, Miller, Thomas D. Mortimer, John C.  
17 Kirner, Nancy Davidson, Michael Ireland, John Kounts, and Jeffrey N. Johnson,  
18 and the exhibits attached thereto.
- 19 9. Defendant-Intervenor Cascade Water Alliance's Motion for Summary Judgment.
- 20 10. Burlingame Plaintiffs' Response to Defendants' Motions for Summary  
21 Judgment.
- 22 11. The declarations of Shaun Goho and Lee Bernheisel and the exhibits attached  
23 thereto.
- 24 12. Plaintiff Tribes' Response to Defendants and Defendant-Intervenors' Motions  
25 for Summary Judgment.
- 26 13. The Second Declaration of John B. Arum and the exhibits attached thereto.
- 27 14. Defendant State of Washington's Memorandum in Opposition to Burlingame  
28 Plaintiffs' Motion for Summary Judgment.
15. Defendant State of Washington's Memorandum in Opposition to Plaintiff Tribes'  
Motion for Summary Judgment.

- 1           16.    The declarations of Alan M. Reichman, Ken Slattery, and Jay Cook, and the
- 2                    exhibits attached thereto.
- 3           17.    Defendant State of Washington's Memorandum in Response to WWUC's
- 4                    Motion for Summary Judgment.
- 5           18.    Defendant-Intervenor Washington Water Utilities Council's Response to
- 6                    Plaintiffs' Motions for Summary Judgment.
- 7           19.    The declarations of Tadas Kisielius, Joseph Becker, Bradley D. Lake, Robert D.
- 8                    Hunter, and James W. Miller, and the exhibits attached thereto.
- 9           20.    Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' Motions
- 10                   for Summary Judgment.
- 11           21.    Defendant-Intervenor Washington State University's Response to Plaintiffs'
- 12                    Motions for Summary Judgment.
- 13           22.    Burlingame Plaintiffs' Reply in Support of Motion for Summary Judgment.
- 14           23.    Plaintiff Tribes' Reply in Support of Motion for Summary Judgment.
- 15           24.    State's Memorandum in Rebuttal to Burlingame Plaintiffs' Response to State's
- 16                    Motion for Summary Judgment.
- 17           25.    State's Memorandum in Rebuttal to Plaintiff Tribes' Response to State's Motion
- 18                    for Summary Judgment.
- 19           26.    Defendant-Intervenor Washington Water Utility Council's Reply to Plaintiff
- 20                    Tribes' and Burlingame Plaintiffs' Memoranda in Response To WWUC's
- 21                    Motion for Summary Judgment.
- 22           27.    Defendant-Intervenor Washington Water Utilities Council's Reply to State's
- 23                    Memorandum in Response to WWUC's Motion for Summary Judgment.
- 24           28.    The declarations of Bill Clarke and Tom McDonald and the exhibits attached
- 25                    thereto.
- 26           29.    Defendant-Intervenor Cascade Water Alliance's Reply to Plaintiffs' Responses
- 27                    to Motions for Summary Judgment.
- 28           30.    Defendant State of Washington's Memorandum in Response to Plaintiffs' New
- Claims Pertaining to RCW 90.03.330(2).
- 31.    Defendant-Intervenor Washington Water Utilities Council's Memorandum in
- Response to Plaintiffs' New Claim Regarding RCW 90.03.330(2).
- 32.    Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' New
- Claims Pertaining to RCW 90.03.330(2).

ORDER ON CROSS MOTIONS  
FOR SUMMARY JUDGMENT - 4 -

1 33. Burlingame Plaintiffs' Reply as to Procedural Due Process Challenge to RCW  
2 90.03.330(2).

3 34. Plaintiff Tribes' Reply in Support of Motion for Summary Judgment re: RCW  
4 90.03.330(2).

5 The Court also considered the argument of counsel, and hereby incorporates its oral  
6 ruling made on June 11, 2008.

7 **THEREFORE, IT IS HEREBY ORDERED:**

8 1. Plaintiffs Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget  
9 Sound Harvesters, Washington Environmental Council, and the Center for Environmental Law  
10 and Policy (collectively the "Burlingame Plaintiffs") and plaintiffs Lummi Nation, Makah Indian  
11 Tribe, Quinault Indian Nation, Squaxin Island Indian Tribe, Suquamish Tribe and the Tulalip  
12 Tribes (collectively the "Tribes") have standing as taxpayers to bring this action;

13 2. The Motion in Limine of Washington Water Utilities Council is Denied;

14 3. The Motions of the Plaintiffs are GRANTED IN PART and the Motions of the  
15 Defendants and Defendant -Intervenors are DENIED IN PART as follows:

16 a. RCW 90.03.015(3) and (4) violate the separation of powers under the state  
17 constitution because they have retroactive effect and attempt to overrule an interpretation of the  
18 Water Code in Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

19 b. RCW 90.03.330(3) violates the separation of powers under the state constitution  
20 because it has retroactive effect and attempts to overrule an interpretation of the Water Code in  
21 Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

22 c. Alternatively, even if one were to accept the State's interpretation of the statute that it  
23 addresses only valid inchoate water rights (or rights "in good standing") (which this Court does  
24 not), then RCW 90.03.330(3) violates the separation of powers under the state constitution  
25 because it purports to make a legislative determination of adjudicative facts concerning the  
26

1 "good standing" of particular water rights.

2 4. Having found certain provisions unconstitutional, the Court declines to decide the  
3 substantive due process claims related to RCW 09.03.300(3), 90.03.015(3) and (4) and RCW  
4 90.03.560;

5 5. The Motions of the Defendants and Defendant -Intervenors are GRANTED IN  
6 PART and the Motions of the Plaintiffs are DENIED IN PART as follows:

7 a. RCW 90.03.260(4) and (5) do not facially violate substantive due process under the  
8 state and federal constitutions.

9 b. RCW 90.03.386(2), does not facially violate substantive due process under the state  
10 and federal constitutions.

11 c. RCW 90.03.386(2), does not facially violate procedural due process under the state  
12 and federal constitutions.

13 d. RCW 90.03.260(4) and (5), do not facially violate procedural due process under the  
14 state and federal constitutions.

15 e. RCW 90.03.330(2), does not facially violate procedural due process under the state  
16 and federal constitutions.

17  
18 June 11, 2008

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21 THE HONORABLE JIM ROGERS  
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28 ORDER ON CROSS MOTIONS  
FOR SUMMARY JUDGMENT - 6 -

# **APPENDIX B**

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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LUMMI NATION, et al., ) VERBATIM REPORT OF  
 Plaintiffs, ) THE PROCEEDINGS  
 vs. ) Cause No. 06-2-40103-4SEA  
 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.)

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COPY

TRANSCRIPT

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

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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.

4

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(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

SUPREME COURT OF THE STATE OF WASHINGTON

LUMMI INDIAN NATION, MAKAH INDIAN TRIBE, QUINULT INDIAN NATION, SQUAXIN ISLAND INDIAN TRIBE, SUQUAMISH INDIAN TRIBE, TULALIP TRIBES, federally recognized Indian tribes; JOAN BURLINGAME; LEE BERNHEISEL; SCOTT CORNELIUS; PETER KNUTSON; 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; and MARY SELECKY, Secretary of Health for the State of Washington,

Appellants/Cross-Respondents,

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER ALLIANCE and WASHINGTON STATE UNIVERSITY,

Intervenors-Appellants/Cross-Respondents.

CERTIFICATE OF SERVICE

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the foregoing being the last known addresses.

Pursuant to RCW 9A.72.085, I certify that on the 24<sup>th</sup> day of October, 2008, I caused to be served Opening Brief of Appellant/Cross Respondent State of Washington in the above-captioned matter upon the parties herein as indicated below:

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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 24<sup>th</sup> day of October, 2008, in Olympia, Washington.

  
LIZ SMITH, Legal Assistant