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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 of the State of Washington,

Appellants/Cross-Respondents,

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

Appellants/Cross-Respondents.

**WASHINGTON WATER UTILITIES COUNCIL'S
OPENING BRIEF**

Attorneys for Appellant
Washington Water Utilities
Council:

Adam W. Gravley, WSBA #20343
Tadas Kisielius, WSBA #28734
GORDONDERR LLP
2025 First Avenue, Suite 500
Seattle, Washington 98121-3140
Telephone: (206) 382-9540
Facsimile: (206) 626-0675

**FILED AS
ATTACHMENT TO EMAIL**

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	3
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	4
IV.	STATEMENT OF THE CASE.....	5
	A. Types of Public Water Utilities in the State of Washington.....	6
	B. Public Water Utilities Have Distinct Needs.....	7
	C. Provisions of the Water Code That Are Key to Water Utilities.....	9
	1. Pumps and Pipes Certificates.....	10
	2. Relinquishment and Exemption for Water Rights Claimed for “Municipal Water Supply Purposes.”.....	12
	D. Uncertainty and Ambiguity.....	13
	1. Ecology Questions the Validity of “Pumps and Pipes” Certificates.....	13
	2. Competing Interpretations of “Municipal Water Supply Purposes.”.....	15
	E. The MWL Provides Reasonable Certainty.....	17
	F. Facial Constitutional Challenge in King County Superior Court.....	19
V.	ARGUMENT.....	21
	A. The Standard of Review Appropriately Places a Heavy Burden on Plaintiffs.....	21

B.	Separation of Powers: The Legislature Respected the Judiciary’s Sphere of Power in Enacting MWL Section 6(3), the “Pumps and Pipes” Provision.....	23
1.	<i>Theodoratus</i> Is Limited to the Case and Controversy Presented for Review and Did Not Determine the Validity of Thousands of Previously Issued Pumps and Pipes Certificates.....	26
2.	Section 6(3) of the MWL is consistent with <i>Theodoratus</i>	28
3.	Plaintiffs Incorrectly Interpret Section 6(3) to Invent a Conflict with <i>Theodoratus</i>	30
4.	Section 6(3) Is Not a “Legislative Determination of Adjudicative Facts.”.....	32
C.	The Legislature Acted Within Constitutional Bounds in Enacting the Definitions of Municipal Water Supplier and Municipal Water Supply Purposes.....	36
1.	The Superior Court Erred by Ignoring the Plainly Legitimate Sweep of Sections 1(3) and (4) When Applied Prospectively.	37
2.	The Definitions in Sections 1(3) and (4) Are Curative and Do Not Contravene <i>Theodoratus</i>	39
3.	The Definitions In Sections 1(3) and (4) Do Not Operate Retroactively, Even When Applied to Facts that Pre-Date the Adoption of the MWL.....	44
D.	The Superior Court Erred by Admitting Unsubstantiated “As Applied” Evidence in a Facial Constitutional Challenge.....	48

VI. CONCLUSION50

TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guaranty Assoc.,
83 Wn.2d 523, 520 P.2d 162 (1974).....44, 45

American Discount Corp. v. Shepherd, 129 Wn. App. 345, 120 P.3d
96 (2005).....38, 39

Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 56 S. Ct. 466, 80 L.
Ed. 688 (1936).....22

Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994).....23,24, 25

City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875
(2004).....21, 49, 50

City of Seattle v. Huff, 111 Wn.2d 923, 767 P.2d 572 (1989).....48

Dep't of Ecology v. Grimes, 121 Wn.2d 459, 852 P.2d 1044
(1993).....10

Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241
(1998).....passim

Dep't. of Ecology v. Acquavella, 131 Wn.2d 746, 935 P.2d 595
(1997).....12, 42, 47

Haberman v. Wash. Public Power Supply System, 109 Wn.2d 107,
744 P.2d 1032, 750 P.2d 254 (1987).....33

Heidgerken v. Dep't of Natural Res, 99 Wn. App. 380, 993 P.2d 934
(2000).....46

Hines v. Data Line Systems, 114 Wn.2d 127, 787 P.2d 8 (1990).....50

In re Pers. Restraint of Stewart, 115 Wn. App. 319, 75 P.3d 521
(2003).....38, 39

<i>In re Salary of Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976).....	24, 28
<i>JJR Inc. v. City of Seattle</i> , 126 Wn.2d 1, 891 P.2d 720 (1995).....	48
<i>Magula v. Benton Franklin Title Co.</i> , 131 Wn.2d 171, 930 P.2d 307 (1997).....	38, 40
<i>McGee Guest Home, Inc. v. Dep't of Social and Health Services</i> , 142 Wn.2d 316, 12 P.3d 144 (2000).....	24, 34, 39
<i>Molley-Molley, Inc. v. State</i> , 127 Wn. App. 62, 110 P.3d 812 (2005).....	46
<i>Nolte v. City of Olympia</i> , 96 Wn. App. 944, 982 P.2d 659 (1999).....	7
<i>Okanogan Wilderness League (OWL) v. Twisp</i> , 133 Wn.2d 769, 784, 947 P.2d 732 (1997).....	42
<i>Overton v. Washington State Economic Assistance Authority</i> , 96 Wn.2d 552, 637 P.2d 652 (1981).....	25
<i>Parmalee v. O'Neel</i> , 145 Wn. App. 223, 186 P.3d 1094 (2008).....	21
<i>Plaut v. Spendthrift Farm</i> , 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (2001).....	25
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	35
<i>Prentis v. Atlantic Coast Line Co.</i> , 211 U.S. 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908).....	34
<i>R.D. Merrill Co. v. Pollution Control Hearings Bd</i> , 137 Wn.2d 118, 969 P.2d 458 (1999).....	39, 42
<i>Rivers v. Roadway Express</i> , 511 U.S. 298, 114 S. Ct.1510, 128 L. Ed. 2d 274 (1994).....	25

<i>Robertson v. Seattle Audubon Society</i> , 503 U.S. 429, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992).....	33
<i>San Carlos Apache Tribe v. Superior Court</i> , 193 Ariz. 195, 973 P.2d 179 (1999).....	32
<i>Sheep Mountain Cattle Co. v. Dep't of Ecology</i> , 45 Wn. App. 427, 726 P.2d 55 (1986).....	42, 46
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	46
<i>State v. Belgarde</i> , 119 Wn.2d 711, 837 P.2d 599 (1992).....	46
<i>State v. Blile</i> , 132 Wn.2d 484, 939 P.2d 691 (1997).....	24
<i>State v. Browet</i> , 103 Wn.2d 215, 691 P.2d 571 (1984).....	21
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987).....	37
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	23
<i>State v. Osloond</i> , 60 Wn. App. 584, 805 P.2d 263 (1991).....	24
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	48
<i>State v. Reyes</i> , 104 Wn.2d 35, 700 P.2d 1155 (1985).....	21, 36, 38
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	21
<i>State v. Varga</i> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	37
<i>State v. Wadsworth</i> , 139 Wn.2d 724, 991 P.2d 80 (2000).....	24
<i>Tacoma v. O'Brien</i> , 85 Wn.2d 266, 534 P.2d 114 (1975).....	32, 33
<i>Tunstall ex rel. Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000).....	22
<i>U.S. v. Klein</i> , 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1872).....	32

<i>United States v. Freuhauf</i> , 365 U.S. 146, 81 S. Ct. 146, 5 L. Ed. 2d 476 (1961).....	28
<i>United States v. Raines</i> , 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).....	23
<i>United States v. Salerno</i> , 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).....	22
<i>Vashon Island Comm. For Self-Gov't v. Wash. State Boundary Review Bd.</i> , 127 Wn.2d 759, 903 P.2d 953 (1995).....	40
<i>Wash. Fed'n of State Employees v. State</i> , 127 Wn.2d 544, 901 P.2d 1028 (1995).....	21
<i>Wash. State Grange v. Wash State Republican Party</i> , 128 S. Ct. 118, 170 L. Ed. 2d 151 (2008).....	22, 23
<i>Wash. Waste Sys., Inc. v. Clark County</i> , 115 Wn.2d 74, 794 P.2d 508 (1990).....	40
<i>Yousoufian v. Office of King County Executive</i> , 152 Wn.2d 421, 98 P.3d 463 (2004).....	40
<i>Zylstra v. Piva</i> , 85 Wn.2d 743, 539 P.2d 823 (1975).....	24

WASHINGTON STATUTES

RCW 19.27.097.....	8
RCW 35.21.210.....	6
RCW 35.92.010.....	6, 7
RCW 35.92.025.....	6
RCW 36.70A.020.....	7, 8, 9
RCW 36.70A.110.....	8
RCW 54.04.020.....	6

RCW 57.04.020.....	6
RCW 70.116.050.....	8
RCW 70.119A.180.....	19
RCW 90.03.015.....	3
RCW 90.03.260.....	7, 36
RCW 90.03.320.....	7
RCW 90.03.330.....	passim
RCW 90.03.460.....	7
RCW 90.03.550.....	19
RCW 90.14.130.....	46
RCW 90.14.150.....	41
RCW 90.14.160.....	12
RCW 90.14.180.....	12
RCW 90.16.100.....	6
RCW 90.54.010.....	7
RCW 90.54.020.....	7
RCW 90.54.050.....	7

OTHER STATUTES

Idaho Code § 42-223.....	31
--------------------------	----

WASHINGTON REGULATIONS

WAC 246-290.....	9
WAC 246-290-100.....	8

OTHER AUTHORITIES

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW
284 (3d ed. 2000).....32

WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE
NINETEEN WESTERN STATES 226 (1971).....10, 31

I. INTRODUCTION

In this appeal, Appellant/Cross-Respondent Washington Water Utilities Council (“WWUC”) asks this Court to reverse the superior court’s determination that certain provisions of the 2003 Municipal Water Law (“MWL”) are unconstitutional on their face because they violate separation of powers. WWUC is an association of over 100 Washington water utilities including cities, water districts, public utility districts, mutual and cooperative water utilities, and investor-owned water utilities. CP 1075. WWUC members serve approximately 80 percent of the state’s population and hold water rights that are the subject of the MWL. *Id.* The superior court’s extraordinary remedy fundamentally impairs public water utilities’ capacity to provide safe and potable water to the majority of the residents of this state.

The superior court’s decision relies on Plaintiffs’¹ fundamentally flawed interpretation of a single case. In determining that the provisions of the MWL retroactively contravene *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), the superior court presumed that this Court in *Theodoratus*: (1) invalidated all water rights (including those for municipal water supply purposes) for which Ecology had previously

¹ We refer to Respondents/Cross-Appellants by their designation below.

issued certificates on the basis of system capacity (so-called “pumps and pipes certificates), despite the fact that there were no certificates before the Court in that case; and (2) resolved the question of which water rights qualify for the exemption from relinquishment for municipal water supply purposes, despite the fact that neither relinquishment nor the exemptions were an issue in that case.

While *Theodoratus* left uncertainty in its wake as to how it could be extrapolated in other contexts, the holding is much more narrow than Plaintiffs posit. The superior court’s broad interpretation of *Theodoratus* is based on inferences from the case and is inconsistent with the plain language used by this Court. Had the Court in *Theodoratus* intended the sweeping holding that the superior court inferred, the Court would have stated it directly. By striking a statute on the basis of inferences and implication, the superior court decision itself raises serious separation of powers concerns. It would inappropriately and unnecessarily restrict the Legislature’s police power.

The Plaintiffs’ theory of the instant case rests on forcing an irreconcilable conflict between the MWL and *Theodoratus*, between this Court and the Legislature. Plaintiffs ask this Court to cast aside reasonable, constitutional interpretations of the MWL, thereby rejecting jurisprudential principles and canons that govern facial challenges and

underlie contemporary separation of powers doctrine. The Court in *Theodoratus* did not directly address issues that are the subject of the MWL. The MWL is consistent with *Theodoratus*. The Legislature carefully tailored the MWL to observe the boundary between the legislative and judicial spheres of power. The challenged MWL provisions do not disturb any judicial decisions or direct the outcome of any future water rights adjudication or other case. Accordingly, the Court should reverse the superior court's decision and conclude that the provisions of the MWL are constitutional on their face.

II. ASSIGNMENTS OF ERROR

1. The superior court erred when it concluded that section 6(3) of the MWL, codified at RCW 90.03.330(3), violates separation of powers.
2. The superior court erred when it concluded that section 1(3) of the MWL, codified at RCW 90.03.015(3), violates separation of powers.
3. The superior court erred when it concluded that section 1(4) of the MWL, codified at RCW 90.03.015(4), violates separation of powers.
4. The superior court erred when it struck the challenged provisions in their entirety from the remaining provisions of the MWL as a remedy to the purported constitutional infirmities.
5. The Superior Court erred when it denied WWUC's motion *in limine* and admitted Plaintiffs' "as-applied" evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Legislature properly exercise its authority by enacting MWL section 6(3), codified at RCW 90.03.330(3), and clarifying the status of municipal water rights documented by certificates that were issued prior to September 9, 2003 and based on system capacity (“pumps and pipes”)? (Assignment of Error 1)
2. Did the Legislature properly exercise its authority by enacting MWL sections 1(3) and 1(4), codified at RCW 90.03.015(3) and (4), to provide statutory definitions of the terms “municipal water supplier” and “municipal water supply purposes?” (Assignments of Error 2, 3, and 4)
3. Did the Court in *Theodoratus* invalidate all water rights, including municipal purpose water rights, for which Ecology had previously issued certificates on the basis of system capacity? (Assignment of Error 1)
4. Did the Legislature, as the superior court ruled, intend “to overrule an interpretation of the Water Code in *Department of Ecology v. Theodoratus*” in enacting sections 1(3), 1(4), and 6(3)? (Assignments of Error 1, 2, and 3)
5. Did the Court in *Theodoratus* construe the term “municipal water supply purposes” as used in RCW 90.14.140(2)(d)? (Assignments of Error 2, 3)
6. Is section 6(3) a facially neutral law that preserves judicial power

because it does not mandate the factual findings or outcome in any litigation? (Assignment of Error 1)

7. When the retroactivity of a statute is unconstitutional, is the Court required to preserve a reasonable prospective constitutional application? (Assignments of Error 2, 3, and 4)

8. Are sections 1(3) and (4) prospective when they are used only in future proceedings, even when applied to facts predating enactment of the MWL? (Assignments of Error 2 and 3)

9. Is evidence of purported harm to the challengers' vested rights due to the alleged application of a statute relevant or material in the context of a purely facial challenge? (Assignment of Error 5)

IV. STATEMENT OF THE CASE

The Municipal Water Law, Laws of 2003, 1st Spec. Sess., ch. 5 ("MWL")², represents the culmination of years of the State of Washington's efforts to both regulate and facilitate the supply of water to the population of this state. The MWL had two purposes, reflected in its title, "an act relating to certainty and flexibility of municipal water rights and efficient use of water." First, the MWL provides certainty to municipal water suppliers by clarifying ambiguities and resolving

² A copy of the enacted session law is attached hereto as Appendix A. Throughout the brief we refer to the provisions of the MWL by their section number in the session law.

uncertainties in the Water Code thereby facilitating the capacity of those entities to serve the state's growing communities. Second, the MWL simultaneously subjects those entities to increased conservation and efficiency measures. A brief history of municipal water supply and the confusion and ambiguity in the State's prior law and regulation is necessary to this review of the MWL.

A. Types of Public Water Utilities in the State of Washington.

Since early statehood, a variety of legal entities have provided a safe and reliable water supply to the public. Many cities and towns act as water utilities and provide water to the large part of state's population residing in such urban centers as Seattle, Spokane, Tacoma, Everett, Olympia, the Tri-Cities, and Yakima.³ Other entities such as special districts (*e.g.*, public utility districts, water districts), non-profit water companies (*e.g.*, mutuals/cooperatives), and privately-owned systems provide water supply for public uses.⁴ Throughout this brief, all such

³ Cities have broad statutory authority to acquire and operate waterworks for the purpose of "furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private[.]" RCW 35.92.010. *See also* RCW 35.21.210; RCW 35.92.025; CP 1542-43, 1551, 1594-98, 1714.

⁴ The State has authorized the creation of these entities. Water Districts were authorized in 1913 to provide water supply and distribution in communities throughout the state. *See* RCW 57.04.020. Public Utility Districts ("PUD") were authorized in 1931 by legislative referendum to meet the needs of rural and urban communities. *See* RCW 54.04.020. Early statutory provisions recognize water companies that provided water to cities and towns. *See* RCW 90.16.100. In the mid-1940s and 1950s, non-profit mutual

entities are referred to as public water systems or public water utilities. All of these public water systems serve the same function: they provide safe and reliable water to residential, governmental and business properties in their service areas.

B. Public Water Utilities Have Distinct Needs.

Public water systems face challenges that are unique among holders of water rights. In Washington, public water systems shoulder the responsibility of providing water to the communities they serve. This responsibility is recognized in the common law “duty to serve.” *See, e.g., Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999).

As recognized by several statutes⁵ and regulations,⁶ public water

water companies were formed and later incorporated to provide public water service for residential, commercial, irrigation, and industrial needs. Examples of these entities are in the record at CP 1600, 1632-33, 1628, 1670.

⁵ *See, e.g.*, RCW 36.70A.020(12) (local jurisdictions must ensure that public water supply is available to accommodate growth); RCW 90.54.020(5) (adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs); RCW 90.54.020(8) (development of water supply systems that provide water to the public generally in regional areas shall be encouraged); RCW 90.54.050(1) (Ecology is authorized to adopt rules to reserve and set aside waters for beneficial utilization in the future); RCW 90.54.010(1)(a) (adequate water supplies are essential to meet the needs of the state’s growing population and economy); RCW 35.92.010, .170 (authorizing cities and towns to furnish water supply outside their boundaries and to sell surplus water to other entities); RCW 90.03.260 (2002), *amended by* RCW 90.03.260 (2003) (municipal water suppliers must set out in their applications the future requirement of the municipality); RCW 90.03.320 (requires Ecology, in fixing the time for development and use of municipal supply water rights, to take into consideration the cost and magnitude of projects and the public interests affected, financing requirements, delays resulting from conservation and efficiency measures, the needs of the approved service area, and related water-demand projections); RCW 90.03.460 (provides assurance that an “inchoate” water right will remain effective so long as it is being

utilities must plan to provide service for the fluctuating populations and long-term growth of those communities. Public water utilities often have to project the needs of those growing communities over several decades. CP 1550. Thus, unlike the future needs of other holders of water rights, which are typically predictable and static, the future demand of public water utilities is based on fluid and dynamic demand of the communities they serve and subject to growth pressures. CP 1550, 1156, 1558-59, 1632-33, 1601.

The Growth Management Act (“GMA”) increased the pressure on public water systems to serve growing communities. The Legislature premised land use planning requirements and prohibition of sprawl on the long-term capacity of public water systems to supply water to growing populations. *See* RCW 36.70A.020(1), (12), 36.70A.110. *See also* RCW 19.27.097 (building permit applicants must “provide evidence of an adequate water supply”). The GMA requires that local jurisdictions 1) ensure that services necessary to support future development, including water, are adequate at the time of development, RCW 36.70A.020(12),

developed with reasonable diligence, having due regard for the circumstances); RCW 70.116.050 (designated “critical water supply areas” require coordinated water system plans designed to ensure that utilities have effective processes for planning and coordinate their efforts with GMA land use planning).

⁶ WAC 246-290-100; CP 1548-49.

and 2) direct growth to areas where public services, including water, are sufficient to serve those populations. RCW 36.70A.020(1).

To serve current customers and prepare for long-term growth, public water systems require significant capital investments in infrastructure. CP 1545-46 (describing Tacoma's Second Supply Project improvements); CP 1556, 1588, 1592, 1794. Public water systems have to construct delivery systems to serve projected long-term growth, long before the entire capacity will be used. CP 1556.

Water utilities are required to assure that the supply of water for those communities is reliable and safe. *See* ch. 246-290 WAC; CP 1587-88, 1548-51. To meet this objective, it is common for public water utilities to have more than one water source and hold a portfolio of water rights that provide redundancy and flexibility of supply. CP 1589-94, 1546-47, 1635.

In sum, public water utilities are unique among holders of water rights because they must serve a fluctuating demand – both current and future – that they do not control. CP 1558-59. As a result, public water systems need reasonable security and certainty in their water rights. CP 1794, 1554, 1556, 1601.

C. Provisions of the Water Code That Are Key to Water Utilities.

Due to these unique needs, the Water Code and agency

implementation have treated water rights held by public water systems differently than other water rights. *See, e.g., Theodoratus*, 135 Wn.2d at 594 (noting that the “statutory scheme allows for differences between municipal and other water use”). Two examples are relevant to WWUC’s appeal: certificates issued on the basis of system capacity, known as pumps and pipes certificates; and the exemption from relinquishment for water rights claimed for “municipal water supply purposes” in RCW 90.14.140(2)(d).

1. Pumps and Pipes Certificates.

Water right permits typically are perfected upon the actual application of water to a beneficial use, at which point Ecology issues a certificate. *Theodoratus*, 135 Wn.2d at 590-592; *Dep’t of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993). Until that time, the unperfected quantity of a water right is inchoate. An inchoate right is:

an incomplete appropriative right in good standing. It comes into being as the first step provided by law for acquiring an appropriative right is taken. It remains in good standing so long as the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last step provided by law.

Theodoratus, 135 Wn.2d at 596 (quoting 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 226 (1971)).

The State Department of Conservation (the predecessor to the

Department of Ecology) implemented a policy in the 1930s, commonly referred to as the “pumps and pipes” policy, that created flexibility in the method of issuing water rights certificates to public water utilities. CP 1555-56, 1714. *See* CP 1836, 1719. This long-standing policy authorized the issuance of water right certificates based on the installed capacity of diversion works and evidence of a transmission and/or distribution system in place (“pumps and pipes certificates”). *Id.* Ecology issued certificates under the “pumps and pipes” policy to all types of public water systems, including cities, towns, PUDs, water districts, mutuals, and privately-held companies. CP 1555-56, 1633-35, 1637-43, 1601-02, 1606-14.

Pumps and pipes certificates provided stability for public water systems to plan, invest, and make commitments to serve future populations. According to the Superintendent of the Water Division of the City of Tacoma, for example, pumps and pipes certificates “provided certainty about future supply that is crucial to not only the utility’s ability to plan for future growth, but also the ability of the other communities served by Tacoma to plan for growth.” CP 1555-56. *See also* CP 1634, 1601. Public water systems have relied on the inchoate quantities stated in their pumps and pipes certificates when making water supply commitments and capital facilities investments. CP 1714-15 (Everett’s Engineering Superintendent indicates that public water systems rely on

pumps and pipes certificates to plan for future growth and meet bonding and debt retirement obligations); CP 1634 (capacity in pumps and pipes certificates is necessary to serve “existing connections, new construction and future expansions of existing water uses”); CP 1602, 1547, 1555-58, 1753. Cities and counties relied on the quantities in pumps and pipes certificates in their land use planning. CP 1602, 1556.

2. Relinquishment and Exemption for Water Rights Claimed for “Municipal Water Supply Purposes.”

All or part of a perfected water right is subject to relinquishment if it is not used, in whole or in part, for any period of five consecutive years. RCW 90.14.160-.180. The Legislature has provided many exemptions to relinquishment. RCW 90.14.140. This Court has identified relinquishment as a fact intensive and complex inquiry. *Dep't. of Ecology v. Acquavella*, 131 Wn.2d 746, 757, 935 P.2d 595 (1997).

If applied to public water systems, relinquishment would hinder the provision of drinking water to current and future populations. CP 1589-94, 1603-04, 1635. Accordingly, the relinquishment statute has always included an exemption from relinquishment for water rights that are “claimed for municipal water supply purposes.” RCW 90.14.140(2)(d). This exemption provides flexibility for public water systems to plan for future growth and react to changing water service

demands and other conditions over time, without fear of losing all or portions of water rights certificates. CP 1594, 1603-04, 1635.

D. Uncertainty and Ambiguity.

The lack of defined terms, historical ambiguity, and Ecology's inconsistent implementation cast a cloud of uncertainty over public water systems' plans to serve future growth.

1. Ecology Questions the Validity of "Pumps and Pipes" Certificates.

After decades of issuing pumps and pipes certificates, in the early 1990s Ecology began to question the legal validity of these certificated rights and public water systems' ability to rely on inchoate water authorized under the certificates. CP 1663, 1714, 1725-26. Given the importance of the certificates, Ecology's new policy created understandable concern. CP 1714-15, 1789-90, 1554-55.

The controversy reached a critical point with the Supreme Court's decision in *Theodoratus*. Though there were no pumps and pipes certificates before the Court in that case, the Court upheld Ecology's decision to impose a condition on a permit that would require actual beneficial use prior to perfection. *Theodoratus*, 135 Wn.2d at 590-96. The Court found Ecology's prior policy of issuing certificates on the basis of system capacity unlawful. *Id.* at 598. However, the Court expressly

declined to address issues pertaining to municipal water suppliers and did not reach any conclusions regarding previously issued pumps and pipes certificates in that case. *Id.* at 594.

Shortly thereafter, Ecology circulated a draft Policy 1250, in which Ecology sought to extrapolate *Theodoratus* to certificates held by public water systems. CP 1719-24. With the draft policy, Ecology opined that the thousands of pumps and pipe certificates issued to public water systems across the state were not valid and proposed a range of “corrective actions” including potential rescission or restriction on inchoate portions of those rights. CP 1789, 1714-15, 1719-24. Ecology’s policy initiative cast doubt on the legal, financial, and operational status of public water systems’ operations, plans for the future, and bonding and debt obligations that were all premised on their pumps and pipes certificates. CP 1714-15, 1555, 1789. In addition, draft Policy 1250 suggested that public water systems could be penalized, rather than rewarded, for investments in conservation and water use efficiency. CP 1742.

Though Ecology eventually abandoned draft Policy 1250, the uncertainty and controversy lingered, placing public water systems in a position of significant risk. CP 1714-15, 1789-90. Public water systems became reluctant to take on new connections, to expand service areas, to

assume failing systems at the behest of Department of Health, or to commit inchoate water supplies to meet the needs described in water system plans, comprehensive land use plans, and capital development plans. *Id.* These consequences frustrated the legislative purpose and objectives of the GMA. *Id.*

2. Competing Interpretations of “Municipal Water Supply Purposes.”

Before the MWL, the term “municipal water supply purposes” was undefined and Ecology interpreted the term inconsistently. *See CP 1484-85, 1653.* It was undisputed that cities could claim the exemption from relinquishment for water rights for “municipal water supply purposes,” but Ecology was not always clear whether the exemption applied to non-city water utilities who in many cases serve the citizens of cities and towns.

Ecology often interpreted “municipal water supply purposes” broadly, issuing certificates for municipal water supply purposes to all types of public water utilities, including:

- Cities and Towns. CP 1547, 1526-27.
- Public Utility Districts. CP 1621-24, 1532-33.
- Water districts. CP 1669, 1520-23, 1530-31.
- Non-profit mutual water systems. CP 1633-34, 1637-43.

- Cooperatives. CP 1498-99.
- Private companies. CP 1500-07.
- Private water associations. CP 1667-68.

Similarly, Ecology manuals provided to employees as well as letter opinions from department heads acknowledged that non-city utilities can provide water for municipal supply purposes. CP 1670, 1626, 1484-85, 1513-14. Under this interpretation of the term “municipal water supply purposes,” Ecology focused on substance – the function of the public water service – rather than the form of the entity.

At other times, Ecology interpreted the term “municipal water supply purposes” much more narrowly, applying the term only to cities and towns. For example, Ecology manuals and memos have suggested that PUDs and private water systems should not be issued water rights for municipal water supply purposes. CP 1822-23, 1840-41, 1664. Similarly, in some legal proceedings, the agency has taken a narrow view of the definition, focusing on the legal structure of the water utility, rather than the purpose for which the water is used. CP 1647-62.

Over the years, while different Ecology representatives embraced opposing views on this issue, those same representatives acknowledged the inconsistent agency positions and the resulting uncertainty. CP 1653-55, 1513. Until the MWL, there was no official Ecology position or

determinative legal decision that resolved the uncertainty.⁷

E. The MWL Provides Reasonable Certainty.

By the late 1990s, public water systems were increasingly faced with a problem. On the one hand, land use planning under the GMA had increased the responsibility of public water systems to serve the state's growing communities. *See supra* Part IV.B; CP 1789-90. Simultaneously, Ecology's aborted draft Policy 1250 and its inconsistent policies cast uncertainty on the very tools public water systems rely on to serve those communities. CP 1714-15, 1555.

From this operational uncertainty and policy conflict, the state and water utilities began efforts for clarification and resolution of these issues. Ecology and the Governor's office convened various negotiations among stakeholders groups to address municipal water rights. CP 1715-18, 1725-86. Beginning in 1999, the Legislature took up the matter each session until the efforts culminated with passage of the MWL in 2003. CP 1717-18, 1555, 1718.

The MWL was a compromise intended to provide certainty and flexibility while simultaneously requiring conservation and efficiency

⁷ Respondents suggest that *Theodoratus* resolved this uncertainty. To the contrary, the Court never interpreted the term "municipal water supply purposes" as used in RCW 90.14.140. As noted further in part V.C.2, *infra*, relinquishment was not at issue in that case.

measures. App. A; CP 2575. The MWL specifically resolved the uncertainty regarding pumps and pipes certificates created by draft Policy 1250. The MWL confirms the validity of water rights represented by prematurely issued certificates and prohibits Ecology from rescinding or revoking pumps and pipes certificates for municipal supply based on Ecology's changed policy. Specifically, §6(3), indicates that that pumps and pipes certificates are rights in "good standing." This section is expressly retroactive. Section 6(2) indicates that Ecology cannot diminish or revoke the rights, except under very limited circumstances. Section 6(4) codifies *Theodoratus* by requiring Ecology to issue certificates based only on actual beneficial use.

Sections 1(3) and 1(4) resolve the historical ambiguity and inconsistent interpretation in the term "municipal water supply purposes" by defining the term for the first time. The MWL definitions embrace the broader interpretation, looking beyond the legal form of the utility to the substance of the actual function performed.⁸ The certainty created by these provisions is crucial to utilities in their efforts to provide reliable and safe water supply to Washington's growing populations. CP 1601,

⁸ As demonstrated by statutes from other states using comparable terms, Washington is not alone in defining the phrase "municipal water supply purposes" more broadly than the ordinary definition of "municipal." CP 2695, 2695.

1633-34, 1556-57, 1594-98.

In addition to water rights certainty and flexibility, several provisions of the MWL advance environmental stewardship and require conservation and efficiency measures. Under the MWL, the term municipal water supply purposes includes certain environmental uses, such as uses that benefit fish and wildlife. MWL §2 (codified at RCW 90.03.550). The MWL also establishes for the first time in state history water use efficiency requirements and conservation standards for municipal water suppliers. MWL §7 (codified at RCW 70.119A.180). This section prescribes a comprehensive set of requirements with regard to the “water use efficiency” of municipal water suppliers, including conservation planning requirements, system leakage standards, and system reporting requirements.

F. Facial Constitutional Challenge in King County Superior Court.

Several years after its enactment, Plaintiffs challenged the constitutionality of several MWL provisions that pertain to certainty and flexibility of municipal water rights. They allege facial violations of the doctrines of separation of powers, substantive due process and procedural due process. WWUC joins in the Appellant/Cross Respondent State of Washington’s (“State”) summary of the superior court procedural history

in part III.B of its brief and adds the following facts regarding a motion denied by the superior court.

Despite the facial nature of their claims, Plaintiffs offered evidence of the alleged application of the MWL to specific fact patterns.⁹ Plaintiffs offered these fact patterns as evidence of the alleged harm from the adoption of the MWL. *See, e.g.*, CP 1366-71, 1381, 1384-85, 1400-03, 1422. WWUC moved to exclude plaintiffs' "as-applied" evidence because it is irrelevant and immaterial to a facial challenge. CP 2781-88. WWUC did not concede the veracity of the allegations of harm. WWUC and the State presented counter evidence demonstrating that Plaintiffs' "as-applied" evidence is speculative, inaccurate, unreliable, and based on flawed assumptions and incorrect data. CP 2137-2207. WWUC offered its counter evidence to rebut the Plaintiffs' evidence in the event the superior court allowed Plaintiffs' evidence.¹⁰ This evidence was uncontroverted. Plaintiffs below did not respond at all to the facts presented by WWUC. In its Order issued on June 11, 2008, the Court

⁹ WWUC set out a complete list of Plaintiffs' as-applied evidence in WWUC's motion in limine. CP 2782.

¹⁰ Should this Court reverse the superior court's order denying the motion, the Court may also exclude and strike the Declarations Joseph Becker, Robert Hunter, James W. Miller, and Bradley D. Lake. CP 2137-2207. WWUC has offered its remaining evidence to rebut Respondents' facial claims such that the testimony and exhibits are relevant and would stand, regardless of the outcome of the Court's review of Plaintiffs' as-applied evidence.

denied WWUC's motion in limine.

V. ARGUMENT

A. **The Standard of Review Appropriately Places a Heavy Burden on Plaintiffs.**

The Court reviews questions of law and constitutional questions *de novo*. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Generally, courts disfavor facial challenges, as is reflected in several exacting standards of review applied to facial challenges and rules of statutory construction. There is a strong presumption in favor of the constitutionality of a statute. *Wash. Fed'n of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995); *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985); *Parmalee v. O'Neel*, 145 Wn. App. 223, 235, 186 P.3d 1094 (2008). The party challenging a statute's constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996). Accordingly, whenever possible, "it is the duty of [the] court to construe a statute so as to uphold its constitutionality." *Reyes*, 104 Wn.2d at 41; *State v. Browet*, 103 Wn.2d 215, 219, 691 P.2d 571 (1984); *Parmalee*, 145, Wn. App at 235. A "facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d

151 (2008). The Court shall not “anticipate a question of constitutional law in advance of the necessity of deciding it.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J. concurring). Courts also require that Plaintiffs “must establish that no set of circumstances exists under which the [statute] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *Wash. State Grange*, 128 S. Ct. at 1190; *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000). WWUC joins in the State’s discussion of the *Salerno* “no set of circumstances test” in section IV.A.2 of its brief.

These exacting standards arise from the separation of powers doctrine. *See Ashwander*, 297 U.S. at 345-46. They ensure that the Court does not tread beyond its delineated powers and infringe on the fundamental function of the Legislature. *See id.*; *Wash. State Grange*, 128 S. Ct. at 1191.

As noted recently by the United States Supreme Court, these exacting standards of review are justified because facial challenges, by their very nature, have inherent shortcomings:

Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts

should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Wash. State Grange, 128 S. Ct. at 1191 (internal quotations and citations omitted). The U.S. Supreme Court observes that “[e]xercising judicial restraint in a facial challenge ‘frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy...’” *Id.* (citing *United States v. Raines*, 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960)). Therefore, the Court should review this facial challenge consistent with these standards.

B. Separation of Powers: The Legislature Respected the Judiciary’s Sphere of Power in Enacting MWL Section 6(3), the “Pumps and Pipes” Provision.

The separation of powers doctrine requires balance between the three branches of government and prohibits any of the three branches of government encroaching upon the “‘fundamental functions’ of another.” *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002) (citing *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994)). While the Constitution

does not expressly enumerate the doctrine, courts have derived the doctrine from the division of the government into the three branches. *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000); *In re Salary of Juvenile Director*, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976); *State v. Osloond*, 60 Wn. App. 584, 587, 805 P.2d 263 (1991). When considering separation of powers challenges courts look to the practical relationships among the three branches. *Carrick*, 125 Wn.2d at 135. The doctrine necessarily allows the government a certain amount of “flexibility and practicality” because the three branches are not “hermetically sealed.” *Id.* See also *State v. Blile*, 132 Wn.2d 484, 489-90, 939 P.2d 691 (1997); *Wadsworth*, 139 Wn.2d at 736; *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). The different branches of government “must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government.” *Carrick*, 125 Wn.2d at 135.

This Court has often recognized the Legislature’s authority to enact and apply clarifications retroactively even when the Legislature adopts the enactment during a controversy regarding the meaning of the law. See *McGee Guest Home, Inc. v. Dep’t of Social and Health Services*, 142 Wn.2d 316, 325-326, 12 P.3d 144 (2000). This Court has observed that attempts to “contravene” retroactively the Supreme Court’s

construction of a statute may give rise to separation of powers concerns. *See Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981) (citing *Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976)). Under federal cases addressing separation of powers (to which Washington courts look for guidance, *see Carrick*, 125 Wn.2d at 135 n1), retroactive legislation runs afoul of separation of powers when it sets aside a prior court decision. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 240, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (2001). However, Congress has clear authority to amend a statute retroactively to correct a court's prior interpretation of a statute. *Rivers v. Roadway Express*, 511 U.S. 298, 313, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994).

Section 6(3) of the MWL, codified at RCW 90.03.330(3), is a legitimate act of the Legislature designed to resolve the uncertainty created by Ecology's efforts to extrapolate *Theodoratus* to pumps and pipes certificates. The Court should reverse the superior court's determination that §6(3) violates separation of powers. First, the Court should reverse the determination that §6(3) retroactively contravenes *Theodoratus*. The holding is based on a fundamental misinterpretation of *Theodoratus* and misconstruction of the statutory provision itself. Second, the Court should reverse the superior court's alternative holding that §6(3) constitutes a legislative determination of adjudicative facts

because it is based on a misinterpretation of the provision and of case law. The superior court's preclusive interpretation of *Theodoratus* infringes on the fundamental function of the Legislature to adopt clarifying retroactive legislation.

1. *Theodoratus* Is Limited to the Case and Controversy Presented for Review and Did Not Determine the Validity of Thousands of Previously Issued Pumps and Pipes Certificates.

In this case, the superior court determined that §6(3) of the MWL contravenes this Court's decision in *Theodoratus*. The Court should reverse the superior court's decision because it is based on a fundamental misinterpretation of *Theodoratus*. Specifically, the superior court misinterpreted the extent to which this Court's decision in *Theodoratus* impacted existing pumps and pipes certificates. According to the superior court, *Theodoratus* invalidated thousands of previously issued water rights. *Theodoratus* is much more narrow than the superior court assumed.

Theodoratus addressed a condition that Ecology placed in a permit. 135 Wn.2d at 587-89. There were no certificates, let alone pumps and pipes certificates, at issue in the case. The Court held that water rights become perfected (from permit to certificate) upon actual beneficial use. *Id.* at 590. To the extent that the appellant in *Theodoratus*

claimed a right to perfection based on system capacity,¹¹ the Court held that Ecology could not issue a certificate based on system capacity alone. *Id.* The Court therefore upheld Ecology's proposed condition requiring actual beneficial use prior to perfection. However, the Court did not address the status of the thousands of existing pumps and pipes certificates that had already been issued to municipal water suppliers. In fact, the Court expressly declined to do so, noting that it did not address any issues pertaining to "municipal" water rights. *Theodoratus*, 135 Wn.2d at 594. The superior court's interpretation renders this statement meaningless. Had the Court intended the sweeping ruling the superior court inferred, it would have done so directly. The Court should reject the purported holding the superior court inferred from *Theodoratus*.

Plaintiffs' overly broad interpretation of *Theodoratus* raises its own separation of powers concerns by interpreting judicial decisions in a manner that restricts the fundamental function of the Legislature to legislate resolutions to controversies. The separation of powers doctrine requires courts to limit holdings to the case and controversy presented,

¹¹ The original conditions imposed on the permit indicated that perfection would be complete upon construction of a water distribution system sufficient to supply the allocated quantity of water. *Theodoratus*, 135 Wn.2d at 592. The permittee appealed Ecology's action to impose a new condition that perfection would depend on actual beneficial use and not upon system capacity. *Id.* at 588. The Court upheld that condition.

rather than issuing advisory opinions. *United States v. Freuhauf*, 365 U.S. 146, 157, 81 S. Ct. 146, 5 L. Ed. 2d 476 (1961). See also *Juvenile Director*, 87 Wn.2d at 245. The superior court inflated *Theodoratus* to an advisory opinion regarding the validity of thousands of water rights of a type that were not before the court (certificates) held by entities that were not before the court and over which the Court had no jurisdiction. This Court should therefore reject the conclusion the superior court inferred from *Theodoratus*.

2. Section 6(3) of the MWL is consistent with *Theodoratus*.

The provisions of the MWL addressing pumps and pipes certificates are consistent with this Court's decision in *Theodoratus*. Section 6(4), codified at RCW 90.03.330(4), confirms the Court's primary holding in *Theodoratus* that beneficial use is the only method of perfection of existing and future permits. Additionally, the Legislature addressed the very issue that the Court appropriately did not address – namely, the status of the thousands of previously issued pumps and pipes certificates. Prior to the MWL but in the wake of *Theodoratus*, Ecology had attempted to address this issue through the controversial draft Policy 1250 that cast a cloud of uncertainty that lingered even after Ecology abandoned it.

The Legislature resolved the controversy. Sections 6(2) and 6(3)

reject Ecology's reasoning and approach in draft Policy 1250. Section 6(2), codified at RCW 90.03.330(2), prevents Ecology from rescinding or diminishing previously issued pumps and pipes certificates (as was contemplated in draft Policy 1250) except in certain circumstances. Significantly, the Legislature restricted only Ecology's, and not the judiciary's, authority in §6(2). Similarly, §6(3) directly rejects Ecology's assumption in draft policy 1250 that *Theodoratus* changed the status of existing pumps and pipes certificates. Instead, §6(3) confirms that previously issued pumps and pipes certificates are unchanged by the decision in *Theodoratus* and remain rights in "good standing."

Notably, §6(3) does not change the outcome of the *Theodoratus* decision. Section 6(3), by its very terms, applies only to previously issued pumps and pipes certificates. The right at issue in *Theodoratus* was a permit. Consistent with the Court's decision, §6(4) would govern the permit and would require actual beneficial use for perfection. Even if §6(3) applied at the time of the Court's decision, it would not have changed the result for the *Theodoratus* water right permit.

The Supreme Court and the Legislature acted within their constitutionally assigned boundaries and carried out their roles with appropriate deference to the other. The Court first made a decision in *Theodoratus* that was limited to the case and controversy presented for

review. It did not offer an advisory opinion on the validity of pumps and pipes certificates. Subsequently, the Legislature acted within its boundaries by picking up the issues the Court properly did not address in the context of *Theodoratus*. Specifically, §6(3) provides direction to Ecology regarding the nature of previously issued pumps and pipes certificates. The superior court's decision below upsets this balanced exercise of constitutionally assigned powers.

3. Plaintiffs Incorrectly Interpret Section 6(3) to Invent a Conflict with *Theodoratus*.

Plaintiffs' theory of the case, which the superior court erroneously accepted, is based on a fundamental misinterpretation of §6(3). The superior court presumed that §6(3) "reinstates" or restores pumps and pipes certificates by eliminating the beneficial use requirement for those rights. RP 9. In fact, §6(3) does not have that effect. First, the interpretation of §6(3) is based on the assumption that *Theodoratus* invalidated, in whole or in part, existing pumps and pipes certificates. It did not.

Moreover, the plain language of §6(3) does not support the superior court's interpretation. The Legislature's description of previously issued pumps and pipes certificates as "rights in good standing" mirrors the definition of inchoate rights that the Supreme Court

cited in its decision. See *Theodoratus*, 135 Wn.2d at 596 (an inchoate right is “an incomplete appropriative right *in good standing*”) (quoting 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 226 (1971)) (emphasis added). Rather than resurrecting any lapsed rights or eliminating the beneficial use requirement, §6(3) simply provides that a water right documented by a pumps and pipes certificate remains valid and, in some cases, includes unperfected water. Specifically, the provision indicates that the as-yet-unused or inchoate portion remains unperfected until actual beneficial use occurs. Thus, the choice of the term “rights in good standing” reflects the inchoate nature of the rights, and does not, as the superior court concluded, automatically perfect those rights. Indeed, if the Legislature had intended the effect that the superior court and Plaintiffs’ ascribe to §6(3), it could have stated that pumps and pipes certificates are perfected or that system capacity constitutes actual beneficial use of water. It did not do so. The Court should give meaning to the specific and carefully chosen language used by the Legislature.¹²

¹² Had the Legislature intended to enact a pumps and pipes provision with the meaning that Respondents seek to impose on RCW 90.03.330(3), it would not have had to look far for an example. Idaho law provides that a water right held by a “municipal provider” to meet reasonably anticipated future needs “shall be deemed to constitute beneficial use.” Idaho Code § 42-223(2) (“A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and

4. Section 6(3) Is Not a “Legislative Determination of Adjudicative Facts.”

The Court should reverse the superior court’s holding in the alternative that §6(3) is a “legislative determination of adjudicative facts.” CP 2888-89. The superior court’s alternative holding is based on a line of cases that suggests the Legislature violates separation of powers when it enacts a law that directs courts how to apply pre-existing law to particular cases and infringes on the judicial function. *U.S. v. Klein*, 80 U.S. (13 Wall.) 128, 146, 20 L. Ed. 519 (1872); *Tacoma v. O’Brien*, 85 Wn.2d 266, 272, 534 P.2d 114 (1975); *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 210, 973 P.2d 179, 194 (1999).

These cases are fundamentally distinguishable. Except *O’Brien*, these cases address legislation that dictates conclusions in the outcome of pending litigation. *Klein*, 80 U.S. at 132-34; *San Carlos*, 973 P.2d at 194. *See also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 284 (3d ed. 2000) (Legislature cannot adopt laws that tell “judges how they are to apply pre-existing law to particular cases pending in their

such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.”). If the Washington Legislature had intended to declare all pumps and pipes certificates to be fully perfected, then it would have used express wording to that effect, like the Idaho Legislature did. The Washington Legislature did not do so.

courts.”)¹³ The perceived legislative interference in pending cases is key to the separation of powers claims in those cases. Here, in contrast, the Legislature enacted the MWL outside the context of any litigation, without attempt to control pending court cases.

Moreover, §6(3) is unlike the offending legislation that courts have stricken under this doctrine. Under this line of cases, the Legislature cannot adopt a legal conclusion that “follows from examination and consideration of circumstances in a particular case and interpretation and application of legal principles to those facts.” *O’Brien*, 85 Wn.2d at 272. While the legislature can adopt facially neutral laws for courts to apply to the facts before them, it cannot dictate how the court should decide a factual issue, or affect a final judgment. *See Haberman v. Wash. Public Power Supply System*, 109 Wn.2d 107, 144, 744 P.2d 254 (1987).

In *O’Brien*,¹⁴ the Legislature stepped into the shoes of a court and

¹³ Courts have softened this doctrine, acknowledging that the legislature may change the law applicable to an identifiable set of pending cases, even when that is the clear legislative purpose, provided it does so by altering the background law itself, rather than directing a particular outcome under existing law. *See Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992); *Haberman v. Wash. Public Power Supply System*, 109 Wn.2d 107, 143-44, 744 P.2d 1032, 750 P.2d 254 (1987). *See also* TRIBE, *supra*, at 284.

¹⁴ *O’Brien* reflects an arcane and overly rigid interpretation of the role of the Legislature and does not recognize the trend in modern separation of powers jurisprudence to soften the boundaries between the three branches. TRIBE, *supra*, at 122. *O’Brien’s* holding rests on the view that legislation (as distinguished from judicial actions) must be purely prospective. 85 Wn.2d at 272 (citing *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210,

adjudicated factual disputes regarding performance of contracts. The legislation in *O'Brien* was designed to excuse contractors from particular public contracts due to the dramatic increase in fuel costs in the early 1970s. 85 Wn.2d at 267-68. The Legislature adopted findings of increasing oil prices and declared the contracts “economically impossible,” thereby discharging the contractors from performance. *Id.* at 269-70. The Court struck the legislation because “making a determination of economic impossibility is a function exclusively judicial and a legislative attempt to make such an adjudication violates the separation of powers doctrine and is void.” *Id.* at 272.

Unlike the offending legislation in *O'Brien* that effectively excused performance of specific contracts, §6(3) makes no factual conclusions regarding any specific water rights. The Legislature’s identification of previously issued pumps and pipes certificates as rights “in good standing” does not excuse the rights from any requirements of law, including reasonable diligence. *See supra* Part V.B.3. While the offending legislation in *O'Brien* precluded any court from evaluating the

226, 29 S. Ct. 67, 53 L. Ed. 150 (1908)). However, the overwhelming majority of cases of this Court recognize the Legislature’s authority to adopt retroactive curative legislation in the face of controversies regarding the meaning of the law. *See McGee Guest Home*, 142 Wn.2d 325-326.

economic feasibility of the specific contracts at issue, §6(3) does not preclude a court from reviewing any individual certificate or inchoate quantities in the certificate in the context of an adjudication or other action, thereby preserving the judiciary's fundamental function.

Indeed, §6 of the MWL is a broad-based response to an administrative policy initiative. Section 6(3) addresses the issue that the Court in *Theodoratus* properly declined to address but reaches a different policy conclusion than Ecology's proposed draft Policy 1250. This response to correct or limit an administrative policy is clearly within the legislature's power. See *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004) (the legislature may clarify a law in response to an administrative adjudication). However, the Legislature demonstrated a concerted effort by the Legislature to avoid interference with the judicial function. For example, while §6(2) restricts Ecology's capacity to rescind or revoke pumps and pipes certificates, it does absolutely nothing to restrict courts from reaching factual conclusions in the context of an adjudication. Therefore, §6(3) is a facially neutral law that in no way interferes with the scope or exercise of judicial power.

C. The Legislature Acted Within Constitutional Bounds in Enacting the Definitions of Municipal Water Supplier and Municipal Water Supply Purposes.

Sections 1(3) and 1(4) of the MWL define – for the first time – the terms “municipal water supply purposes” and “municipal water supplier.” The MWL uses these defined terms nearly twenty times. MWL §§3-5, 7, 9, 14, 16. Prior to the MWL, the terms were not used in the Water Code except in RCW 90.14.140(2)(d) which included an exemption for relinquishment for rights claimed “for municipal water supply purposes.”¹⁵ Plaintiffs focus solely on the use of the definitions in the relinquishment context and suggest that §§1(3) and 1(4) operate retroactively and contravene *Theodoratus*.

The Court should reject their challenge. Whenever possible, it is “the duty of [the] court to construe a statute so as to uphold its constitutionality.” *Reyes*, 104 Wn.2d at 41. Here, the Court can sustain the constitutionality of §§1(3) and 1(4) on three different bases. First, Section 1(3) and 1(4) are clearly constitutional when applied to facts that occur after adoption of the MWL. The superior court erred by failing to preserve this purely prospective application. Second, the purported retroactive application of these sections to facts that predate the MWL

¹⁵ Prior the MWL, RCW 90.03.260 also used the phrase “municipal water supply” in establishing application requirements.

does not violate separation of powers because it does not contravene *Theodoratus*. Finally, Plaintiffs' fundamental characterization of these sections as retroactive in the relinquishment context is in error because these provisions of the MWL operate prospectively in the relinquishment context and apply only to future determinations of Ecology, courts, or the Pollution Control Hearings Board ("PCHB").

1. The Superior Court Erred by Ignoring the Plainly Legitimate Sweep of Sections 1(3) and (4) When Applied Prospectively.

Sections 1(3) and 1(4) clearly do not violate separation of powers when applied prospectively because the Legislature is always free to change the law going forward. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). ("It is well-established that the Legislature may effectively overrule our decisions interpreting statutory terms by prospectively amending a statute.") (citing *State v. Dunaway*, 109 Wn.2d 207, 215-16 & n.6, 743 P.2d 1237, 749 P.2d 160 (1987); *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 37-38, 323 P.2d 241 (1958)). The Burlingame Plaintiffs admitted as much below, stating "the Legislature is free to redefine statutory terms if the new definitions have only prospective effect." CP 2819-20.

Even if this Court agrees that retroactivity violates separation of powers, the appropriate remedy is to limit the definitions to prospective

operation because “it is the duty of [the] court to construe a statute so as to uphold its constitutionality.” *Reyes*, 104 Wn.2d at 41; *Parmalee*, 145, Wn. App. at 235. When Washington courts have held retroactive operation of a statutory amendment unconstitutional, the court imposes a remedy by which the statute continues in force but operates prospectively only. *E.g.*, *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997) (where statutory amendment defining “marital status” for purposes of discrimination claim presented separation of powers issues, amendment would be applied prospectively only); *American Discount Corp. v. Shepherd*, 129 Wn. App. 345, 356, 120 P.3d 96 (2005) (statutory amendment allowing judgment creditor assignees to obtain extension of judgments violated separation of powers and thus amendments “may only have prospective application”); *In re Pers. Restraint of Stewart*, 115 Wn. App. 319, 342, 75 P.3d 521 (2003) (where retroactive application of amendments to earned release statute violated separation of powers, “the amendments may . . . have prospective application only”). *See also Dunaway*, 109 Wn.2d at 216 (court declined to apply clarifying statutory amendment retroactively due to separation of powers concerns). In these cases the courts did not strike the statutory amendments, as the superior court did below. Rather, the courts ruled that the amendments must be applied prospectively only, even where the

Legislature expressly intended that the amendments have retroactive effect. *E.g. American Discount*, 129 Wn. App. at 353-54; *Stewart*, 115 Wn. App. at 334.

At a minimum, therefore, the Court should limit its holding to address the constitutional infirmity and preserve the constitutional prospective application of the definitions.

2. The Definitions in Sections 1(3) and (4) Are Curative and Do Not Contravene *Theodoratus*.

Plaintiffs have argued that the definitions in §§1(3) and (4) are retroactive because courts, Ecology and the PCHB may use the definitions in future proceedings when evaluating facts that predate the adoption of the MWL.¹⁶ Even if the Court accepts Plaintiffs characterization, §§1(3) and (4) can operate retroactively because they are curative and because they do not violate separation of powers.

While sections 1(3) and 1(4) are not expressly retroactive, they may be applied retroactively because they are curative. Although legislative enactments are presumed to apply prospectively only, a statutory amendment may be applied retroactively if the Legislature so intended, it is curative, or it is remedial. *McGee Guest Home*, 142 Wn.2d

¹⁶ In a relinquishment proceeding or an adjudication, a court or the PCHB will consider the entire use history of the water right. *See R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 126, 969 P.2d 458 (1999).

at 324-25. An enactment is curative when it is adopted to clarify or technically correct ambiguous statutory language. *Magula*, 131 Wn.2d at 182; *Washington Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990). A provision is ambiguous “ if it can be reasonably interpreted in more than one way.” *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004) (citing *Vashon Island Comm. For Self-Gov’t v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995)).

Prior to the adoption of §1(3), the term “municipal water supply purposes” was ambiguous on its face because, in the absence of a definition, the phrase can suggest one of two applications. Either the applicability of the phrase is limited to particular legal *entities* or the phrase focuses on the *function* served by the exercise of the water right, regardless of the legal structure, as is suggested by the second half of the phrase (municipal water supply *purposes*). Ecology’s inconsistent application of the term reflects this ambiguity. As described in Part IV.D.2., *supra*, there is significant evidence that Ecology at times assumed that the phrase is limited to certain legal entities, while at other times focused on the function served. Even the legislative history of the MWL acknowledges the historic ambiguity of the law preceding the MWL. *See* CP 2572 (fiscal note memorandum states that MWL would

clarify and resolve a number of ambiguities). Because §§1(3) and (4) were specifically intended to resolve existing ambiguities in the Water Code, they are curative and may be applied retroactively.

Second, retroactive application of §§1(3) and (4) does not contravene *Theodoratus*. In their challenge, Plaintiffs focus on this Court's statement that the privately-owned community water system was "not a municipality." *Theodoratus*, 135 Wn.2d at 594. On the basis of that statement, Plaintiffs argue that the Court determined that developers like Mr. Theodoratus cannot qualify for the exemption for municipal water supply purposes. However, Plaintiffs' argument stretches this Court's decision to illogical extremes.

First, issues related to relinquishment and exemptions from relinquishment were not before the Court in a case addressing a permit extension. *Id.* at 587-588. Relinquishment only applies to perfected water rights, not permits. RCW 90.14.150. *See also PUD No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 803, 57 P.3d 744 (2002) ("[T]he Legislature has plainly made statutory forfeiture [under ch. 90.14 RCW] inapplicable to unperfected water rights"). Accordingly, questions related to relinquishment and exemptions from relinquishment are well beyond the issues that were before the Court. Thus, the superior court was in error when it suggested that "Mr. Theodoratus, if he still has

water rights, has retroactively had his pumps and pipes certificates reinstated as a municipal water supplier.” RP 12. The MWL does not change the result in *Theodoratus* because the Supreme Court did not conclude that the permit had been relinquished, nor was it in danger of relinquishment. Second, the Plaintiffs’ interpretation renders meaningless the Court’s express decision to decline to “address issues concerning municipal water suppliers in the context of this case.” *Id.* at 594.

The Court’s statement that the *Theodoratus* water system is not a municipality is at best dicta because it is well beyond any of the issues presented to the Court and was completely unnecessary for the Court to reach its decision.¹⁷ See CP 2395-2404.

¹⁷ Prior water law decisions of this Court are persuasive precedent. For example, the Supreme Court in *R.D. Merrill Co.*, 137 Wn.2d at 145, disregarded as dicta the court of appeals’ discussion of the “determined future development” exemption in *Sheep Mountain Cattle Co. v. Dep’t of Ecology*, 45 Wn. App. 427, 726 P.2d 55 (1986), *rev. denied*, 107 Wn.2d 1036 (1987). *Sheep Mountain* presented the question of whether the challenging party had been afforded due process prior to relinquishment. The court in *Sheep Mountain* nevertheless discussed whether the determined future development exception was applicable. As noted by the Supreme Court, because it was beyond the scope of the issues presented to the court of appeals, the court of appeals’ “discussion of whether the determined future development exception might apply was dicta.” *Merrill*, 137 Wn.2d at 145.

Similarly, this Court in *Okanogan Wilderness League (OWL) v. Twisp*, 133 Wn.2d 769, 784, 947 P.2d 732 (1997) disregarded as dicta the Court’s discussion in *Acquavella* of the relationship between statutory relinquishment and common law abandonment. In *Acquavella*, the Court concluded that statutory relinquishment “codifies” common law abandonment. 131 Wn.2d at 757-58. In *OWL*, the Court determined that the discussion in *Acquavella* was dicta and concluded that the two doctrines are counterparts. 133 Wn.2d at 784. See also *PUD No. 1 of Pend Oreille*, 146 Wn.2d at 799.

The Court should also reject the Plaintiffs' separation of powers claims because they failed to demonstrate that there are no set of circumstances under which the definitions in §§1(3) and (4) can be applied constitutionally. Even if the Court accepts Plaintiffs' broad characterization of *Theodoratus*, there are many instances in which the definitions could apply without contravening that characterization. In the relinquishment context, the definitions could apply to water systems, including city-owned systems, that provide public water service to large expanding service areas and are distinct from Mr. Theodoratus' fixed single development. Additionally, the MWL uses the definitions in §§1(3) and (4) nearly twenty times throughout the statute. The constitutionality of the terms in these contexts is not at issue. Accordingly, the superior court should have applied the standard of review and upheld the definitions in this purely facial challenge. Instead, the superior court applied a "one-set of circumstances" test and struck down the entire provision.

Similarly, in this case, even if the Court accepts Respondents' characterization of the *Theodoratus* decision, the Court must nevertheless conclude that the discussion in the *Theodoratus* is, at most, dicta. This passage is therefore not binding on the Legislature.

3. The Definitions In Sections 1(3) and (4) Do Not Operate Retroactively, Even When Applied to Facts that Pre-Date the Adoption of the MWL.

The Court should not adopt Plaintiffs' retroactive characterization because courts, Ecology, and the PCHB can only use §§1(3) and (4) in future proceedings. The mere fact that Ecology, or an adjudicative body in future proceedings may consider facts of beneficial use or non-use that predate the adoption of the MWL is not sufficient to show that the definitions operate retroactively. Because the triggering event for relinquishment statute's application is the determination of relinquishment, §§1(3) and (4) are prospective.

A statute "is not retroactive merely because it draws upon antecedent facts for its operation." *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guaranty Assoc.*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974) (citing *Bates v. McLeod*, 11 Wn.2d 648, 654, 120 P.2d 472 (1941)). The consideration of "data or facts antedating the effective date of a statute in a prospective operation of that statute does not render the legislation retroactive." *Id.* Instead, a statutory provision operates prospectively "when the precipitating event for the application of the statute occurs after the effective date of the statute, even though the precipitating event has its origin in a situation existing prior to the enactment of the statute." *Id.* According to *Aetna* and its progeny, courts must identify the statute's

triggering event for its application to determine whether the statute is retroactive.

The statute under review in *Aetna* created an association of insurance companies that collected assessments from insurance companies. *Id.* at 525-26. These assessments would pay contractual obligations of insolvent insurance companies. *Id.* The act became law in May 1971. *Id.* at 526. Federal Old Line Insurance was declared insolvent in November 1971. *Id.* The association collected assessments in March 1972 for the purpose of honoring Federal Old Line Insurance's contractual obligations, many of which were due on premiums that were collected prior to the adoption of the act. *Id.*

Because Federal Old Line was factually insolvent as early as 1967, prior to the adoption of the challenged statute, several insurance companies alleged that the statute retroactively collected the funds and was therefore unconstitutional. *Id.* at 535. The Court disagreed, holding that the "precipitating event" for the operation of the statute was the November 1971 declaration of insolvency, even though the application of the statute drew on facts that predated the statute's adoption. *Id.* Washington courts have relied upon *Aetna* to find a variety of statutes constitutional because they operated prospectively, even when applied to

antecedent facts.¹⁸

Similarly, §§1(3) and 1(4) operate prospectively in the relinquishment context because Ecology, courts, and the PCHB apply them in future proceedings that determine the status of a water right. Even though a determination of relinquishment may be based on antecedent facts, relinquishment (or the determination that a right is exempt from relinquishment) only occurs upon review and action by Ecology, PCHB, or a court.

In the context of relinquishment proceedings pursuant to RCW 90.14.130, relinquishment does not occur until Ecology notice and opportunity for appeal before the PCHB.¹⁹ At the hearing, a party subject to a relinquishment order has the opportunity to show how its nonuse falls under one of the exceptions. RCW 90.14.130, 140. Similarly, in the

¹⁸ See, e.g., *State v. Blank*, 131 Wn.2d 230, 248-250, 930 P.2d 1213 (1997) (amendment to court cost statute requiring indigent defendants to pay appellate court costs operated prospectively because the precipitating event was the appeal and affirmance of the defendant's conviction); *State v. Belgarde*, 119 Wn.2d 711, 722-723, 837 P.2d 599 (1992) (upholding act authorizing a retired judge to preside over pending case operated prospectively because event triggering its application was judge's retirement); *Heidgerken v. Dep't of Natural Res.*, 99 Wn. App. 380, 387-389, 993 P.2d 934 (2000) (statute increasing penalty for violation of Forest Practices Act operated prospectively even though timber owner's violation of the act had its origins in failure to reforest the property prior to the effective date of the amendment).

¹⁹ See *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 78, 80-81, 110 P.3d 812 (2005) (water right relinquishment "did not become effective until PCHB held a hearing and then issued its findings, conclusions, and order."); *Sheep Mountain*, 45 Wn. App. at 429-32 (due process, including notice and an opportunity to be heard, is required prior to relinquishment).

context of an adjudication, the issue of whether an exception applies is “a question of fact that is relevant only at the time one asserts relinquishment.” *Acquavella*, 131 Wn.2d at 760-61 (analyzing whether “standby and reserve” exception applies). For purposes of determining retroactivity, the “precipitating event” is the determination of relinquishment.

The superior court incorrectly concluded that relinquishment occurs by operation of law, meaning that the “precipitating event” triggering the application of the statute would be the occurrence of not using water, regardless of when relinquishment is formally evaluated. RP 12. The superior court’s characterization of the relinquishment exemption for municipal water supply purposes is incorrect. If due process -- including notice and an opportunity to be heard -- is required prior to relinquishment, then a water right cannot “revert” to the state by operation of law. RCW 90.14.140 does not apply the Definitions adopted in §§1(3) and 1(4) of the MWL retroactively. The Court should reverse the superior court’s conclusion to the contrary.²⁰

²⁰ Because §§1(3) and (4) operate prospectively, even when applied to facts that predate the adoption of the MWL, the Respondents’ substantive due process challenges also fail. The Court therefore need not consider the State’s additional argument that proposes an “active compliance” interpretation of §§1(3) and (4) under which a water right holder must actively comply with the definitions in order to qualify for exemption from relinquishment under the definitions. WWUC set out its objections to the State’s active

D. The Superior Court Erred by Admitting Unsubstantiated “As Applied” Evidence in a Facial Constitutional Challenge.

The superior court erred when it admitted Plaintiffs’ evidence of the alleged application of the MWL to specific fact patterns. This Court will overturn a trial court’s ruling on the admissibility of evidence when “a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615, 624 (1995).

Plaintiffs offered the “as-applied” evidence as “proof” of alleged harm of the MWL. Plaintiffs’ evidence is irrelevant and immaterial in a purely facial challenge. In a facial challenge, as opposed to an as-applied challenge, the Court is asked to determine that the statute’s language is unconstitutional in *all* applications so as to render it “utterly inoperative.” *Tunstall*, 141 Wn.2d at 221. Accordingly, a court should consider only the language of the challenged statute. *City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989) (under facial analysis, factual setting of case is “*irrelevant*”) (emphasis added); *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 3-4, 891 P.2d 720 (1995).

compliance theory in great detail below. CP 2609-27. This interpretation nullifies the exemption for municipal water supply purposes and conflicts with the entire purpose of the MWL. Thus, rather than adopting the State’s “active compliance” interpretation, the Court should decide this issue based on the plain language of the statute and reject or ignore the State’s “active compliance” theory.

Plaintiffs argued below that a footnote in a *City of Redmond v. Moore*, 151 Wn.2d 664, 672 n. 2, 91 P.3d 875 (2004), justified admission of their “as-applied” evidence as “illustrative examples.” The footnote on which Plaintiffs rely is limited in its scope and does not support Plaintiffs’ use of evidence, nor does it overrule the cases describing judicial review of a purely facial challenge.

First, *Moore* did not directly address whether it is appropriate to consider as-applied evidence in the context of a facial challenge. In the cited footnote, the Court discussed the admissibility of documents and evidence pertaining to non-parties in the context of ER 901 and authentication. In other words, to the extent the Court addressed the issue of admissibility in that footnote, the Court was answering a *different* question than that presented to the superior court. The Court’s discussion of illustrative examples in *Moore* does not address directly the relevance and admissibility of as-applied evidence in the context of a facial challenge.

Second, the admissibility of evidence was not on appeal in *Moore* because the City did “not appeal the trial court’s order denying its objection to the exhibits.” *Id.* By not appealing the Court’s order on admissibility, the City waived any right to challenge such that the Court could not review the issue in its decision. *See Hines v. Data Line*

Systems, 114 Wn.2d 127, 152 n.9, 787 P.2d 8 (1990) (portion of trial court's ruling that is not appealed must be upheld on appeal). Finally, in contrast to Plaintiffs here, the litigants in *Moore* were not clear whether they were challenging the statute on its face or as-applied. *Moore*, 151 Wn.2d at 679 n.2 (Bridge, J., dissenting).

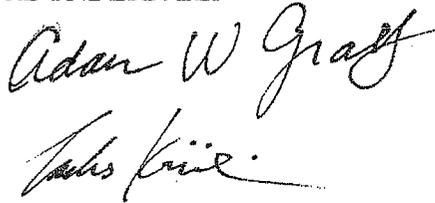
Here, Plaintiffs would like this Court to infer from the footnote in *Moore* the tacit approval of as-applied evidence in the context of a facial challenge. The footnote does not go that far. The superior court should have excluded the alleged evidence of purported constitutional infirmities that Plaintiffs offered to prove the alleged facial invalidity of the statute.

VI. CONCLUSION

For the foregoing reasons, WWUC asks this Court to reverse the superior court and find §§1(3), 1(4) and 6(3) constitutional on their face.

DATED this 24th day of October, 2008.

GORDONDERR LLP



By _____
Adam W. Gravley, WSBA #20343
Tadas Kisielius, WSBA #28734
Attorneys for Appellant, Washington
Water Utilities Council (WWUC)

Appendix A

legislative authority of each of the counties with territory in the management area shall provide public notice of and conduct at least one public hearing on the proposed watershed plan submitted under this section. After the public hearings, the legislative authorities of these counties shall convene in joint session to consider the proposal. The counties may approve or reject the proposed watershed plan for the management area, but may not amend it. Approval of such a proposal shall be made by a majority vote of the members of each of the counties with territory in the management area.

(b) If a proposed watershed plan is not approved, it shall be returned to the planning unit with recommendations for revisions. Approval of such a revised proposal by the planning unit and the counties shall be made in the same manner provided for the original watershed plan. If approval of the revised plan is not achieved, the process shall terminate.

(c) A county legislative authority may choose to opt out of watershed planning under this chapter and the public hearing processes under (a) and (b) of this subsection if the county's affected territory within a particular management area is: (i) less than five percent of the total territory within the management area; or (ii) five percent or more of the total territory within the management area and all other initiating governments within the management area consent. A county meeting these conditions and choosing to opt out shall notify the department and the other initiating governments of that choice prior to commencement of plan adoption under the provisions of (a) of this subsection. A county choosing to opt out under the provisions of this section shall not be bound by obligations contained in the watershed plan adopted for that management area under this chapter. Even if a county chooses to opt out under the provisions of this section, the other counties within a management area may adopt a proposed watershed plan as provided in this chapter.

(3) The planning unit shall not add an element to its watershed plan that creates an obligation unless each of the governments to be obligated has at least one representative on the planning unit and the respective members appointed to represent those governments agree to adding the element that creates the obligation. A member's agreeing to add an element shall be evidenced by a recorded vote of all members of the planning unit in which the members record support for adding the element. If the watershed plan is approved under subsections (1) and (2) of this section and the plan creates obligations: (a) For agencies of state government, the agencies shall adopt by rule the obligations of both state and county governments and rules implementing the state obligations, or, with the consent of the planning unit, may adopt policies, procedures, or agreements related to the obligations or implementation of the obligations in addition to or in lieu of rules. The obligations on state agencies are binding upon adoption of the obligations (whether), and the agencies shall take other actions to fulfill their obligations as soon as possible, and should annually review implementation needs with respect to budget and staffing; (b) for counties, the obligations are binding on the counties and the counties shall adopt any necessary implementing ordinances and take other actions to fulfill their obligations as soon as possible, and should annually review implementation needs with respect to budget and staffing; or (c) for an organization voluntarily accepting an obligation, the organization must adopt policies, procedures,

agencies, rules, or ordinances to implement the plan, and should annually review implementation needs with respect to budget and staffing.

(4) After a plan is adopted in accordance with subsection (3) of this section and if the department participated in the planning process, the plan shall be deemed to satisfy the watershed planning authority of the department with respect to the components included under the provisions of RCW 90.82.070 through 90.82.100 for the watershed or watersheds included in the plan. The department shall use the plan as the framework for making future water resource decisions for the planned watershed or watersheds. Additionally, the department shall rely upon the plan as a primary consideration in determining the public interest related to such decisions.

(5) Once a WRIA plan has been approved under subsection (2) of this section for a watershed, the department may develop and adopt modifications to the plan or obligations imposed by the plan only through a form of negotiated rule making that uses the same processes that applied in that watershed for developing the plan.

(6) As used in this section, "obligation" means any action required as a result of this chapter that imposes upon a tribal government, county government, or state government, either: A fiscal impact, a redeployment of resources, or a change of existing policy.

Passed by the House June 5, 2003.

Passed by the Senate June 10, 2003.

Approved by the Governor June 20, 2003.

Filed in Office of Secretary of State June 20, 2003.

CHAPTER 5

(Second Engrossed Second Substantive House Bill 1338)

AN ACT THAT WALTER SCHEPERS - 1114 RICHNEY BEYON (REVISED)

water, amending RCW 90.03.015, 90.03.020, 90.03.050, 90.03.060, 90.03.070, 90.03.080, 90.03.090, 90.03.100, 90.03.110, 90.03.120, 90.03.130, 90.03.140, 90.03.150, 90.03.160, 90.03.170, 90.03.180, 90.03.190, 90.03.200, 90.03.210, 90.03.220, 90.03.230, 90.03.240, 90.03.250, 90.03.260, 90.03.270, 90.03.280, 90.03.290, 90.03.300, 90.03.310, 90.03.320, 90.03.330, 90.03.340, 90.03.350, 90.03.360, 90.03.370, 90.03.380, 90.03.390, 90.03.400, 90.03.410, 90.03.420, 90.03.430, 90.03.440, 90.03.450, 90.03.460, 90.03.470, 90.03.480, 90.03.490, 90.03.500, 90.03.510, 90.03.520, 90.03.530, 90.03.540, 90.03.550, 90.03.560, 90.03.570, 90.03.580, 90.03.590, 90.03.600, 90.03.610, 90.03.620, 90.03.630, 90.03.640, 90.03.650, 90.03.660, 90.03.670, 90.03.680, 90.03.690, 90.03.700, 90.03.710, 90.03.720, 90.03.730, 90.03.740, 90.03.750, 90.03.760, 90.03.770, 90.03.780, 90.03.790, 90.03.800, 90.03.810, 90.03.820, 90.03.830, 90.03.840, 90.03.850, 90.03.860, 90.03.870, 90.03.880, 90.03.890, 90.03.900, 90.03.910, 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purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right generally associated with the use of water within a municipality is also for "municipal water supply purposes," including but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional landscaping, fire flow, water system maintenance and repair, or related purposes. If a governmental entity holds a water right that is for the purposes listed in (a), (b), or (c) of this subsection, its use of water or its delivery of water for any other beneficial use generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional landscaping, fire flow, water system maintenance and repair, or related purposes.

(5) "Person" means any firm, association, water users' association, corporation, irrigation district, or municipal corporation, as well as an individual.

NEW SECTION. Sec. 2. A new section is added to chapter 90.03 RCW to read as follows:

Beneficial uses of water under a municipal water supply purposes water right may include water withdrawn or diverted under such a right and used for:

(1) Uses that benefit fish and wildlife, water quality, or other instream resources or related habitat values; or

(2) Uses that are needed to implement environmental obligations called for by a watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after the effective date of this section, a federally approved habitat conservation plan prepared in response to the listing of a species as being endangered or threatened under the federal endangered species act, 16 U.S.C. Sec. 1531 et seq., a hydropower license of the federal energy regulatory commission, or a comprehensive irrigation district management plan.

NEW SECTION. Sec. 3. A new section is added to chapter 90.03 RCW to read as follows:

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 section authorizes a water right or portion of a water right held or acquired by a municipal water supplier that is for municipal water supply purposes as defined in RCW 90.03.015 to be identified as being a water right for municipal water supply purposes. However, it does not authorize any other water right or other portion of a right held or acquired by a municipal water supplier to be so identified without the approval of a change or transfer of the right or portion of the right for such a purpose.

Sec. 4. RCW 90.03.260 and 1987 c 109 s 84 are each amended to read as follows:

(1) Each application for permit to appropriate water shall set forth the name and post office address of the applicant, the source of water supply, the nature and amount of the proposed use, the time during which water will be required

each year, the location and description of the proposed ditch, canal, or other work, the time within which the completion of the construction and the time for the complete application of the water to the proposed use.

(2) If for agricultural purposes, (iii) the application shall give the legal subdivision of the land and the acreage to be irrigated as near as may be, and the amount of water expressed in acre feet to be supplied per season. If for power purposes, it shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied.

(3) If for construction of a reservoir, (iii) the application shall give the height of the dam, the capacity of the reservoir, and the uses to be made of the impounded waters.

(4) If for continuation of multiple domestic water supply, the application shall give the prescribed number of service connections sought to be served. However, for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the service connection figure in the application or any subsequent water right document is not an attribute limiting exercise of the water right as long as the number of service connections to be served under the right is consistent with the approved water system plan or specified number.

(5) If for municipal water supply, (iv) the application shall give the present population to be served, and as near as may be estimated, the future requirement of the municipality. However, for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the population figure in the application or any subsequent water right document are not an attribute limiting exercise of the water right as long as the population to be provided water under the right is consistent with the approved water system plan or specified number.

(6) If for mining purposes, (iii) the application shall give the nature of the mines to be served and the method of supplying and utilizing the water, also their location by legal subdivisions.

(7) All applications shall be accompanied by such maps and drawings, in duplicate, and such other data, as may be required by the department, and such accompanying data shall be considered as a part of the application.

Sec. 5. RCW 90.03.386 and 1901 c 350 s 2 are each amended to read as follows:

(1) Within service areas established pursuant to chapters 43.20 (iv) and 90.116 RCW, the department of ecology and the department of health shall coordinate approval procedures to ensure compliance and consistency with the approved water system plan or with a water system management program.

(2) The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20 RCW or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 90.116 RCW, is that the place of use of a surface water right or ground water right issued by the supplier includes any portion of the approved service area that was lawfully within the place of use for the water right of the supplier in

compliance with the terms of the water system plan or small water system management program, including those regarding water conservation, and the alteration of the place of use is not inconsistent regarding an area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter 36.70A RCW; any other applicable comprehensive plan, land use plan or development regulation adopted by a city, town, or county; or any watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after the effective date of this section, if such a watershed plan has been approved for the area.

(3) A municipal water supplier must implement cost-effective water conservation in accordance with the requirements of section 7 of this act as part of its approved water system plan or small water system management program. In preparing its regular water system plan update, a municipal water supplier with one thousand or more service connections must describe: (a) The projects, technologies, and other cost-effective measures that comprise its water conservation program; (b) Improvements in the efficiency of water system use resulting from implementation of its conservation program over the previous six years; and (c) Projected effects of delaying the use of existing inchoate rights over the next six years through the addition of further cost-effective water conservation measures before it may divert or withdraw further amounts of its inchoate right for beneficial use. When establishing or extending a surface or ground water right construction schedule under RCW 90.03.320, the department must take into consideration the public water system's use of conserved water.

Sec. 6. RCW 90.03.330 and 1987 c 109 s 89 are each amended to read as follows:

(1) Upon a showing satisfactory to the department that any appropriation has been perfected in accordance with the provisions of this chapter, it shall be the duty of the department to issue to the applicant a certificate stating such facts in a form to be prescribed by (b) the director, and such certificate shall thereupon be recorded by the department. Any original water right certificate issued, as provided by this chapter, shall be recorded with the department and thereafter, at the expense of the party receiving the same, be transmitted by the department (transmitted) to the county auditor of the county or counties where the distributing system or any part thereof is located, and be recorded in the office of such county auditor, and thereafter be transmitted to the over thereat.

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

subsection may not be construed as providing any authority to the department to revoke, diminish, or adjust any other water right.

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

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

NEW SECTION. Sec. 7. A new section is added to chapter 70.119A RCW to read as follows:

(1) It is the intent of the legislature that the department 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.

(2) The requirements of this section shall apply to all municipal water suppliers and shall be tailored to be appropriate to system size, forecasted system demand, and system supply characteristics.

(3) For the purposes of this section:

(a) Water use efficiency incentives, conservation planning requirements, water distribution system leakage standards, and water conservation performance reporting requirements; and

(b) "Municipal water supplier" and "municipal water supply purposes" have the meanings provided by RCW 90.03.015.

(4) To accomplish the purposes of this section, the department shall adopt rules necessary to implement this section by December 31, 2005. The department shall:

(a) Develop conservation planning requirements that ensure municipal water suppliers are: (i) Implementing programs to integrate conservation with water system operation and management; and (ii) Identifying how to appropriately fund and implement conservation activities. Requirements shall apply to the conservation element of water system plans and small water system management programs developed pursuant to chapter 43.20 RCW. In establishing the conservation planning requirements the department shall review the current department conservation planning guidelines and include those elements that are appropriate for rule. Conservation planning requirements shall include but not be limited to:

(A) Selection of cost-effective measures to achieve a system's water conservation objectives. Requirements shall allow the municipal water supplier to select and set the implementation of the best methods for achieving its conservation objectives.

(B) Evaluation of the feasibility of adapting and implementing water delivery rate structures that encourage water conservation.

(C) Evaluation of each system's water distribution system leakage and, if necessary, identification of steps necessary for achieving water distribution system leakage standards developed under (b) of this subsection;

(D) Collection and reporting of water consumption and source production and/or water purchase data. Data collection and reporting requirements shall be sufficient to identify water use patterns among utility customer classes, where applicable, and evaluate the effectiveness of each system's conservation program. Requirements, including reporting frequency, shall be appropriate to system size and complexity. Reports shall be available to the public; and

(E) Establishment of minimum requirements for water demand forecast methodologies such that demand forecasts prepared by municipal water suppliers are sufficient for use in determining reasonably anticipated future water needs;

(b) Develop water distribution system leakage standards to ensure that municipal water suppliers are taking appropriate steps to reduce water system leakage rates or are maintaining their water distribution systems in a condition that results in leakage rates in compliance with the standards. Limits shall be developed in terms of percentage of total water produced and/or purchased and shall not be lower than ten percent. The department may consider alternatives to the percentage of total water supplied where alternatives provide a better evaluation of the water system's leakage performance. The department shall institute a graduated system of requirements based on levels of water system leakage. A municipal water supplier shall select one or more control methods appropriate for addressing leakage in its water system;

(c) Establish minimum requirements for water conservation performance reporting to assure that municipal water suppliers are regularly evaluating and reporting their water conservation performance. The objective of setting conservation goals is to enhance the efficient use of water by the water system customers. Performance reporting shall include:

(i) Requirements that municipal water suppliers adopt and achieve water conservation goals. The elected governing board or governing body of the water system shall set water conservation goals for the system. In setting water conservation goals the water supplier may consider historic conservation performance and conservation investment, customer base demographics, regional climate variations, forecasted demand and system supply characteristics, system financial viability, system reliability, and affordability of water rates. Conservation goals shall be established by the municipal water supplier in an open public forum;

(ii) Requirements that the municipal water supplier adopt schedules for implementing conservation program elements and achieving conservation goals to ensure that progress is being made toward adopted conservation goals;

(iii) A reporting system for regular reviews of conservation performance against adopted goals. Performance reports shall be available to customers and the public. Requirements, including reporting frequency, shall be appropriate to system size and complexity;

(iv) Requirements that any system not meeting its water conservation goals shall develop a plan for modifying its conservation program to achieve its goals along with procedures for reporting performance to the department.

(v) If a municipal water supplier determines that further reductions in consumption are not reasonably achievable, it shall identify how current consumption levels will be maintained.

(4) Adopt rules that to the maximum extent practical, utilize existing mechanisms and simplified procedures in order to minimize the cost and complexity of implementation and to avoid placing unreasonable financial burden on smaller municipal systems.

(5) The department shall establish an advisory committee to assist the department in developing rules for water use efficiency. The advisory committee shall include representatives from public water system customers, environmental interest groups, business interest groups, a representative cross-section of municipal water suppliers, a water utility conservation professional, tribal governments, the department of ecology, and any other members determined necessary by the department. The department may use the water supply advisory committee created pursuant to RCW 70.119A.160 augmented with additional participants as necessary to comply with this subsection to assist the department in developing rules.

(6) The department shall provide technical assistance upon request to municipal water suppliers and local governments regarding water conservation, which may include development of best management practices for water conservation programs, conservation landscape ordinances, conservation rate structures for public water systems, and general public education programs on water conservation.

(7) To ensure compliance with this section, the department shall establish a compliance process that incorporates a graduated approach employing the full range of compliance mechanisms available to the department.

(8) Prior to completion of rule making required in subsection (4) of this section, municipal water suppliers shall continue to meet the existing conservation requirements of the department and shall continue to implement their current water conservation programs.

NEW SECTION, Sec. 8. A new section is added to chapter 43.20 RCW to read as follows:

In approving the water system plan of a public water system, the department shall ensure that water service to be provided by the system under the plan for any new industrial, commercial, or residential use is consistent with the requirements of any comprehensive plans or development regulations adopted under chapter 70A RCW or any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county. (1) Its service area. A municipal water supplier as defined in RCW 90.03.015, has a duty to provide retail water service within its retail service area. (2) Its service area. A municipal water supplier has sufficient capacity to provide the service. (3) The municipal water supplier has sufficient water rights to provide the service. (4) The municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the department of health, and (5) it is consistent with the requirements of any comprehensive plans or development regulations adopted under chapter 70A RCW or any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county for the service area and, for water service by the water utility of a city or town, with the utility service extension ordinances of the city or town.

NEW SECTION. Sec. 9. A new section is added to chapter 90.82 RCW to read as follows:

(1) The timelines and interim milestones in a detailed implementation plan required by section 3, chapter . . . (Engrossed Second Substitute House Bill No. 1336), Laws of 2003 must address the planned future use of existing water rights for municipal water supply purposes, as defined in RCW 90.03.015, that are in-house, including how these rights will be used to meet the projected future needs identified in the watershed plan, and how the use of these rights will be addressed when implementing instream flow strategies identified in the watershed plan.

(2) The watershed planning unit or other authorized local agency shall ensure that holders of water rights for municipal water supply purposes not currently in use are asked to participate in defining the timelines and interim milestones to be included in the detailed implementation plan.

(3) The department of health shall annually compile a list of water system plans and plan updates to be reviewed by the department during the coming year and shall consult with the departments of community, trade, and economic development, ecology, and fish and wildlife to: (a) Identify watersheds where further coordination is needed between water system planning and local watershed planning under this chapter; and (b) develop a work plan for conducting the necessary coordination.

NEW SECTION. Sec. 10. A new section is added to chapter 90.54 RCW to read as follows:

The department shall prioritize the expenditure of funds and other resources for programs related to streamflow restoration in watersheds where the exercise of inchoate water rights may have a larger effect on streamflows and other water uses.

Sec. 11. RCW 90.48.495 and 1989 c 348 s 10 are each amended to read as follows:

The department of ecology shall require sewer plans to include a discussion of water conservation measures considered or underway that would reduce flows to the sewerage system and an analysis of their anticipated impact on public sewer service and treatment capacity.

Sec. 12. RCW 90.48.112 and 1997 c 444 s 9 are each amended to read as follows:

The evaluation of any plans submitted under RCW 90.48.110 must include consideration of opportunities for the use of reclaimed water as defined in RCW 90.46.010. Wastewater plans submitted under RCW 90.48.110 must include a statement describing how applicable reclamation and reuse elements will be coordinated as required under RCW 90.46.120.

Sec. 13. RCW 90.46.120 and 1997 c 444 s 1 are each amended to read as follows:

(1) The owner of a wastewater treatment facility that is reclaiming water with a permit issued under this chapter has the exclusive right to any reclaimed water generated by the wastewater treatment facility. Use and distribution of the reclaimed water by the owner of the wastewater treatment facility is exempt from the permit requirements of RCW 90.03.250 and 90.44.060. Revenues derived from the reclaimed water facility shall be used only to offset the cost of

operation of the wastewater utility fund or other applicable source of system-wide funding.

(2) If the proposed use or uses of reclaimed water are intended to augment or replace potable water supplies or create the potential for the development of additional potable water supplies, such use or uses shall be considered in the development of the regional water supply plan or plans addressing potable water supply service by multiple water purveyors. The owner of a wastewater treatment facility that proposes to reclaim water shall be included as a participant in the development of such regional water supply plan or plans.

(3) Where opportunities for the use of reclaimed water exist within the period of time addressed by a water supply plan or coordinated water system plan developed under chapter 43.20 or 70.116 RCW, those plans must be developed and coordinated to ensure that opportunities for reclaimed water are evaluated. The requirements of this subsection do not apply to water system plans developed under chapter 43.20 RCW for utilities serving less than one thousand service connections.

NEW SECTION. Sec. 14. A new section is added to chapter 90.03 RCW to read as follows:

(1) An imperforated surface water right for municipal water supply purposes or a portion thereof held by a municipal water supplier may be changed or transferred in the same manner as provided by RCW 90.03.480 for any purpose if:

(a) The supplier is in compliance with the terms of an approved water system plan or smart water system management program under chapter 43.20 or 70.116 RCW that applies to the supplier, including those regarding water conservation;

(b) Instream flows have been established by rule for the water resource inventory area, as established in chapter 173.480 WAC as it exists on the effective date of this section, that is the source of the water for the transfer or change;

(c) A watershed plan has been approved for the water resource inventory area referred to in (b) of this subsection under chapter 90.82 RCW and a detailed implementation plan has been completed that satisfies the requirements of section 3, chapter . . . Laws of 2003 (section 3, Engrossed Second Substitute House Bill No. 1336) or a watershed plan has been adopted after the effective date of this section for that water resource inventory area under RCW 90.54.04(1) and a detailed implementation plan has been completed that satisfies the requirements of section 3, chapter . . . Laws of 2003 (section 3, Engrossed Second Substitute House Bill No. 1336); and

(d) Stream flows that satisfy the instream flows referred to in (b) of this subsection are met on the milestones for satisfying those instream flows required under (c) of this subsection are being met.

(2) If the criteria listed in subsection (1) are not met through (d) of this section are not satisfied, an imperforated surface water right for municipal water supply purposes or a portion thereof held by a municipal water supplier may nonetheless be changed or transferred in the same manner as provided by RCW 90.03.380 if the change or transfer is:

(a) To provide water for an instream flow requirement that has been established by the department by rule;

(b) Subject to stream flow protection or restoration requirements contained in: A federally approved habitat conservation plan under the federal endangered species act, 16 U.S.C. Sec. 1531 et seq., a hydropower license of the federal energy regulatory commission, or a watershed agreement established under section 16 of this act;

(c) For a water right that is subject to instream flow requirements or agreements with the department and the change or transfer is also subject to those instream flow requirements or agreements; or

(d) For resolving or alleviating a public health or safety emergency caused by a failing public water supply system currently providing potable water to existing users, as such a system is described in section 15 of this act, and if the change, transfer, or amendment is for correcting the actual or anticipated cause or causes of the public water system failure. Inadequate water rights for a public water system to serve existing hookups or to accommodate future population growth or other future uses do not constitute a public health or safety emergency.

(3) If the recipient of water under a change or transfer authorized by subsection (1) of this section is a water supply system, the receiving system must also be in compliance with the terms of an approved water system plan or small water system management program under chapter 43.20 or 70.116 RCW that applies to the system, including those regarding water conservation.

(4) The department must provide notice to affected tribes of any transfer or change proposed under this section.

NEW SECTION. Sec. 15. A new section is added to chapter 90.03 RCW to read as follows:

To be considered a failing public water system for the purposes of section 14 of this act, the department of health, in consultation with the department and the local health authority, must make a determination that the system meets one or more of the following conditions:

(1) A public water system has failed, or is in danger of failing within two years, to meet state board of health standards for the delivery of potable water to existing users in adequate quantity or quality to meet basic human drinking, cooking, and sanitation needs or to provide adequate fire protection flows;

(2) The current water source has failed or will fail so that the public water system is or will become incapable of exercising its existing water rights to meet existing needs for drinking, cooking, and sanitation purposes after all reasonable conservation efforts have been implemented; or

(3) A change in source is required to meet drinking water quality standards and avoid unreasonable treatment costs, or the state department of health determines that the existing source of supply is unacceptable for human use.

NEW SECTION. Sec. 16. A new section is added to chapter 90.03 RCW to read as follows:

(1) On a pilot project basis, the department may enter into a watershed agreement with one or more municipal water suppliers in water resource inventory area number one to meet the objectives established in a water resource management program approved or being developed under chapter 90.82 RCW with the consent of the initiating governments of the water resource inventory area. The term of an agreement may not exceed ten years, but the agreement may be renewed or amended upon agreement of the parties.

(2) A watershed agreement must be consistent with:

(a) Growth management plans developed under chapter 36.70A RCW where these plans are adopted and in effect;

(b) Water supply plans and small water system management programs approved under chapter 43.20 or 70.116 RCW;

(c) Coordinated water supply plans approved under chapter 70.116 RCW; and

(d) Water use efficiency and conservation requirements and standards established by the state department of health or such requirements and standards as are provided in an approved watershed plan, whichever are the more stringent.

(3) A watershed agreement must:

(a) Require the public water system operated by the participating municipal water supplier to meet obligations under the watershed plan;

(b) Establish performance measures and timelines for measures to be completed;

(c) Provide for monitoring of stream flows and metering of water use as needed to ensure that the terms of the agreement are met; and

(d) Require annual reports from the water users regarding performance under the agreement.

(4) As needed to implement watershed agreement activities, the department may provide or receive funding, in part, under its existing authorities.

(5) The department must provide opportunity for public review of a proposed agreement before it is executed. The department must make proposed and executed watershed agreements and annual reports available on the department's internet web site.

(6) The department must consult with affected local governments and the state departments of health and fish and wildlife before executing an agreement.

(7) Before executing a watershed agreement, the department must conduct a government-to-government consultation with affected tribal governments. The municipal water suppliers operating the public water systems that are proposing to enter into the agreements must be invited to participate in the consultations. During these consultations, the department and the municipal water suppliers shall explore the potential interests of the tribal governments or governments in participating in the agreement.

(8) Any person aggrieved by the department's failure to satisfy the requirements in subsection (3) of this section as embodied in the department's decision to enter into a watershed agreement under this section may, within thirty days of the execution of such an agreement, appeal the department's decision to the pollution control hearings board under chapter 43.21B RCW.

(9) Any projects implemented by a municipal water system under the terms of an agreement executed under this section may be continued and maintained by the municipal water system after the agreement expires or is terminated as long as the conditions of the agreement under which they were implemented continue to be met.

(10) Before December 31, 2004, and December 31, 2004, the department must report to the appropriate committees of the legislature the results of the pilot project provided for in this section. Based on the experience of the pilot project, the department must offer any suggested changes in law that would

improve, facilitate, and maximize the implementation of watershed plans adopted under this chapter.

NEW SECTION. Sec. 17. A new section is added to chapter 90.03 RCW to read as follows:

The department may not enter into new watershed agreements under section 16 of this act after July 1, 2008. This section does not apply to the renewal of agreements in effect prior to that date.

Sec. 18. RCW 70.119A.110 and 1991 c 304 s 5 are each amended to read as follows:

(1) No person may operate a group A public water system unless the person first submits an application to the department and receives an operating permit as provided in this section. A new application must be submitted upon any change in ownership of the system. Any person operating a public water system on July 28, 1991, may continue to operate the system until the department takes final action, including any time necessary for a hearing under subsection (3) of this section, on a permit application submitted by the person operating the system under the rules adopted by the department to implement this section.

(2) The department may require that each application include the information that is reasonable and necessary to determine that the system complies with applicable standards and requirements of the federal safe drinking water act, state law, and rules adopted by the department or by the state board of health.

(3) Following its review of the application, its supporting material, and any information received by the department in its investigation of the application, the department shall issue or deny the operating permit. The department shall act on initial permit applications as expeditiously as possible, and shall in all cases either grant or deny the application within one hundred twenty days of receipt of the application or of any supplemental information required to complete the application. The applicant for a permit shall be entitled to file an appeal in accordance with chapter 34.05 RCW if the department denies the initial or subsequent applications or imposes conditions or requirements upon the operator. Any operator of a public water system that requests a hearing may continue to operate the system until a decision is issued after the hearing.

(4) At the time of initial permit application or at the time of permit renewal the department may impose such permit conditions, requirements for system improvements, and compliance schedules as it determines are reasonable and necessary to ensure that the system will provide a safe and reliable water supply to its users.

(5) Operating permits shall be issued for a term of one year, and shall be renewed annually, unless the operator fails to apply for a new permit or the department finds good cause to deny the application for renewal.

(6) Each application shall be accompanied by an annual fee as follows:

(a) The annual fee for public water supply systems serving fifteen to forty-nine service connections shall be twenty-five dollars.

(b) The annual fee for public water supply systems serving fifty to three thousand three hundred thirty-three service connections shall be based on a uniform per service connection fee of one dollar and fifty cents per service connection.

(c) The annual fee for public water supply systems serving three thousand three hundred thirty-four to fifty-three thousand three hundred thirty-three service connections shall be based on a uniform per service connection fee of one dollar and fifty cents per service connection plus ten cents for each service connection in excess of three thousand three hundred thirty-three service connections.

(d) The annual fee for public water supply systems serving fifty-three thousand three hundred thirty-four or more service connections shall be ten thousand dollars.

(e) In addition to the fees under (a) through (d) of this subsection, the department may charge an additional one-time fee of five dollars for each service connection in a new water system.

On June 30, 2007, in addition to the fees under (a) through (e) of this subsection, the department may charge municipal water suppliers, as defined in RCW 90.03.015, an additional annual fee equivalent to twenty-five cents for each residential service connection for the purpose of funding the water conservation activities in section 7 of this act.

(7) The department may phase in the implementation for any group of systems provided the schedule for implementation is established by rule. Prior to implementing the operating permit requirement on water systems having less than five hundred service connections, the department shall form a committee composed of persons operating these systems. The committee shall be composed of the department or health, two operators of water systems having under one hundred connections, two operators of water systems having between one hundred and two hundred service connections, two operators of water systems having between two hundred and three hundred service connections, two operators of water systems having between three hundred and four hundred service connections, two operators of water systems having between four hundred and five hundred service connections, and two county public health officials. The members shall be chosen from different geographic regions of the state. This committee shall develop draft rules to implement this section. The draft rules will then be subject to the rule-making procedures in accordance with chapter 34.05 RCW.

(8) The department shall notify existing public water systems of the requirements of RCW 70.119A.030, 70.119A.040, and this section at least one hundred twenty days prior to the date that an application for a permit is required pursuant to RCW 70.119A.030, 70.119A.040, and this section.

(9) The department shall issue one operating permit to any approved satellite system management agency. Operating permit fees for approved satellite system management agencies shall be one dollar per connection per year for the total number of connections under the management of the approved satellite agency. The department shall define by rule the meaning of the term "satellite system management agency." If a statutory definition of this term exists, then the department shall adopt by rule a definition consistent with the statutory definition.

(10) For purposes of this section, "group A public water system" and "system" mean those water systems with fifteen or more service connections, regardless of the number of people, or a system serving an average of twenty-

five or more people per day for sixty or more days within a calendar year, regardless of the number of service connections.

NEW SECTION. Sec. 19. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed by the House June 5, 2003.

Passed by the Senate June 10, 2003.

Approved by the Governor June 20, 2003.

Filed in Office of Secretary of State June 20, 2003.

CHAPTER 6

(Substitute House Bill 1693)

DIRECT CARE COMPONENT RATE ALLOCATION

AN ACT Relating to direct care component rate allocation, and amending RCW 74.46.508.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 74.46.508 and 1999 c 181 s 2 are each amended to read as follows:

(1)(a) The department is authorized to increase the direct care component rate allocation calculated under RCW 74.46.506(5) for residents who have unmet exceptional care needs as determined by the department in rule. The department may, by rule, establish criteria, patient categories, and methods of exceptional care payment.

(b) The department shall submit a report to the health care and fiscal committees of the legislature by December 12, 2002, that addresses:

(i) The number of individuals on whose behalf exceptional care payments have been made under this section; their diagnosis; and the amount of the payments; and

(ii) An assessment as to whether the availability of exceptional care payments resulted in more expedient placement of residents into nursing homes and fewer and/or shorter hospitalizations.)

(2)(a) The department (shall) may by (January 1, 2000) July 1, 2003, adopt rules and implement a system of exceptional care payments for therapy care.

(b) Payments may be made on behalf of facility residents who are under age sixty-five, not eligible for medicare, and can achieve significant progress in their functional status if provided with intensive therapy care services.

(c) Payment under this subsection is limited to no more than twelve facilities that have demonstrated excellence in therapy care, based upon criteria defined by rule. A facility accredited by the commission for accreditation of rehabilitation facilities (CARF) shall be deemed to meet the criteria for demonstrated excellence in therapy care. However, CARF accreditation is not required for payment under this subsection.

(d) Payments may be made only after approval of a rehabilitation plan of care for each resident on whose behalf a payment is made under this subsection, and each resident's progress must be periodically monitored.

(1) The department shall submit a report to the health care and fiscal committees of the legislature by December 12, 2002, that addresses:

(i) The number of individuals on whose behalf therapy payments were made under this section; and the amount of the payments; and

(ii) An assessment as to whether the availability of exceptional care payments for therapy care resulted in substantial progress in residents' functional status; the extent of placement of residents into less expensive settings; or other long-term cost savings.

(2) This section expires June 30, 2005.

Passed by the House June 5, 2003.

Passed by the Senate June 4, 2003.

Approved by the Governor June 20, 2003.

Filed in Office of Secretary of State June 20, 2003.

CHAPTER 7

(Engrossed Substitute House Bill 1751)

CAPITAL PROJECTS FOR LOCAL NONPROFIT YOUTH ORGANIZATIONS

AN ACT Relating to capital projects for local nonprofit youth organizations, adding a new section to chapter 43.03A RCW, and creating a new section.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that nonprofit youth organizations provide a variety of services for the youth of Washington state, including many services that enable young people, especially those facing challenging and disadvantaged circumstances, to realize their full potential as productive, responsible, and caring citizens. The legislature also finds that the efficiency and quality of these services may be enhanced by the provision of safe, reliable, and sound facilities, and that, in certain cases, it may be appropriate for the state to assist in the development of these facilities.

NEW SECTION. Sec. 2. A new section is added to chapter 43.03A RCW to read as follows:

(1) The department of community, trade, and economic development must establish a competitive process to solicit proposals for and prioritize projects whose primary objective is to assist nonprofit youth organizations in acquiring, constructing, or rehabilitating facilities used for the delivery of nonresidential services, excluding athletic athletic fields.

(2) The department of community, trade, and economic development must establish a competitive process to prioritize applications for the assistance as follows:

(a) The department of community, trade, and economic development must conduct a statewide solicitation of project applications from local governments, nonprofit organizations, and other entities, as determined by the department of community, trade, and economic development. The department of community, trade, and economic development must evaluate and rank applications in consultation with a citizen advisory committee using objective criteria. Projects must have a major recreational component, and must have either an educational or social service component. At a minimum, applicants must demonstrate that the requested assistance will increase the efficiency or quality of the services it

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Subject: Consolidated cases, No. 81809-6: Lummi et al. v. State of Washington et al.

Re: Consolidated cases, No. 81809-6

Lummi et al. v. State of Washington et al.

Burlingame et al. v. State of Washington et al.

Dear Clerk of the Court:

Attached to this email please find Washington Water Utilities Council's Opening Brief and Certificate of Service. The original signed documents are retained in our files.

Please call with any questions.

<<Certificate of Service.102408.pdf>> <<Opening Brief.102408.pdf>>

Tadas Kisielius

WSBA #28734

GordonDerr LLP

2025 First Avenue, Suite 500,

Seattle, WA 98121-3140

Phone: 206-382-9540

Tadas Kisielius | GordonDerr LLP | 2025 First Avenue, Suite 500, Seattle, WA 98121-3140

tkisielius@GordonDerr.com | Phone: 206-382-9540 | Fax: 206-626-0675 | www.GordonDerr.com

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