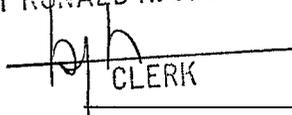


RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 FEB 23 P 2:58

BY RONALD R. CARPENTER

No. 81809-6

  
CLERK

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

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

*Respondents/Cross-Appellants,*

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE; Governor of  
the State of Washington; WASHINGTON DEPARTMENT OF  
ECOLOGY; JAY MANNING, Director of the Washington Department  
of Ecology; WASHINGTON DEPARTMENT OF HEALTH; MARY  
SELECKY, Secretary of Health for the State of Washington;  
WASHINGTON WATER UTILITIES COUNCIL; CASCADE WATER  
ALLIANCE; and WASHINGTON STATE UNIVERSITY,

*Appellants/Cross-Respondents.*

---

**CASCADE WATER ALLIANCE'S BRIEF  
IN RESPONSE AND IN REPLY**

---

INSLEE, BEST, DOEZIE & RYDER, P.S.  
Michael P. Ruark, WSBA #2220  
Attorneys for Appellant Cascade Water Alliance  
777 - 108th Avenue N.E., Suite 1900  
P.O. Box 90016  
Bellevue, Washington 98009-9016  
Telephone: (425) 455-1234

**ORIGINAL - FILED BY E-MAIL ATTACHMENT**

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT ..... 1

    A. Standard of Review and Burden of Proof. .... 1

    B. Argument in Response ..... 1

        1. Plaintiffs must prove that there is No Set of  
           Circumstances Under Which the Challenged  
           Subsections of the Municipal Water Law  
           Can Be Applied Constitutionally ..... 1

        2. The Municipal Water Law Does Not  
           Violate Substantive Due Process ..... 8

        3. Appellants Cannot Prove Beyond a  
           Reasonable Doubt That RCW 90.03.015(3)  
           and (4) Violate Substantive Due Process..... 10

        4. Appellants Cannot Prove Beyond a  
           Reasonable Doubt That RCW 90.03.330(3)  
           and (4) Violate Substantive Due Process..... 16

        5. RCW 90.03.386(2) Does Dot Violate  
           Substantive Due Process ..... 19

        6. Appellants Cannot Establish that RCW  
           90.03.386(2) Violates Substantive Due  
           Process in Every Instance and therefore  
           they Cannot Satisfy the Required Burden of  
           Proof..... 19

        7. Appellants' Claim of Substantive Due  
           Process Violation Must Also Fail Because  
           RCW 90.03.386(2) is Prospective and  
           Passes the Two-Part Test Under Which  
           Police Power Legislation is Reviewed..... 22

8.	Appellants cannot prove that RCW 90.03.260(4)-(5), which provide that population estimates or service connection estimates in water rights documents do not constitute an attribute limiting the exercise of the water right, facially violates substantive due process.....	25
9.	The Municipal Water Law Does Not Violate Procedural Due Process .....	29
a.	Procedural Due Process Principles.....	29
b.	RCW 90.03.386(2) Does Not Violate Procedural Due Process .....	30
c.	RCW 90.03.260(4) and (5) Do Not Violate Procedural Due Process .....	32
C.	Reply to Respondents' Separation of Powers Argument. ....	33
IV.	CONCLUSION.....	33

TABLE OF AUTHORITIES

CASES

*1000 Va. Ltd. P'ship*, 158 Wn.2d 566, 584,  
146 P.3d 423 (2006)..... 14

*Biggers v. City of Bainbridge*, 162 Wn.2d 683,  
169 P.3d 14 (2007) .....4

*Caritas Services v. DSHS*, 123 Wn.2d 391;  
869 P.2d 28 (1994) .....9

*City of Redmond v. Moore*, 151 Wn.2d 664,  
669, 91 P.3d 875 (2004) .....2, 3, 5

*City of Union Gap, et al. v. State of Washington, et al.*,  
No. 26555-2-3 (2008) ..... 12

*Demore v. Kim*, 538 U.S. 510, 551,  
123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) ..... 30

*Department of Ecology v. Theodoratus*,  
135 Wn.2d 582, 957 P.2d 1241 (1998)..... 9, 18, 29, 33, 34

*Department of Ecology v. Grimes*,  
121 Wn.2d 459, 852 P.2d 1044 (1993) ..... 28

*Edmonds Shopping Center Associates v. City of Edmonds*,  
117 Wn. App. 344, 360, 71 P.3d 233 (2003) ..... 23

*Farm Bureau v. Gregoire*, 162 Wn.2d 284, 305,  
174 P.3d 1142 (2007) .....9

*Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983) .....4

*Galvis v. Dep't of Transp.*, 140 Wn. App. 693, 702,  
167 P.3d 584 (2007).....5

<i>Godfrey v. State</i> , 84 Wn.2d 959, 963, 530 P.2d 630 (1975) .....	9
<i>Harbor Steps v. Seattle Technical</i> , 93 Wn. App. 792, 799, 920 P.2d 797 (1999).....	13
<i>Heidgerken v. Dep't of Nat. Resources</i> , 99 Wn. App. 380, 388, 993 P.2d 934 (2000).....	23
<i>In re Dependency of T.C.C.B.</i> , 138 Wn. App. 791, 797, 158 P.3d 1251 (2007) .....	5
<i>In re Detention of Stout</i> , 159 Wn.2d 357, 370, 150 P.3d 86 (2007) .....	30
<i>In re F.D. Processing, Inc.</i> , 119 Wn.2d 452, 463, 832 P.2d 1303 .....	14, 27, 28, 32
<i>In re Marriage of MacDonald</i> , 104 Wn.2d 745, 750, 709 P.2d 1196 (1985) .....	8, 9
<i>Macumber v. Shafer</i> , 96 Wn.2d 568, 570, 637 P.2d 645 (1981).....	22
<i>Magula v. Benton Franklin Title Company, Inc.</i> , 131 Wash.2d 171, 930 P.2d 307 (1997) .....	14
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) .....	30
<i>McGee Guest Homes v. Dep't of Soc. &amp; Health Service</i> , 142 Wn.2d 316, 325, 12 P.3d 144 (2000).....	13, 14, 22, 29
<i>Motley-Motley, Inc. v. State</i> , 127 Wn. App. 62, 110 P.3d 812 (2005).....	11
<i>R.D. Merrill Co. v. Pollution Control Hearings Bd.</i> , 137 Wn.2d 118, 139, 969 P.2d 458 (1999) .....	12

<i>Robinson v. City of Seattle</i> , 102 Wn. App. 795, 10 P.3d 452 (2000) .....	2, 3, 4, 5, 6,
<i>Sheep Mountain Cattle Co. v. State</i> , 45 Wn. App. 427, 726 P.2d 55 (1986) .....	11
<i>State v. Browett</i> , 103 Wn.2d 125, 691 P.2d 571 (1984) .....	15
<i>State v. Clinkenbeard</i> , 130 Wn. App. 552, 560, 123 P.3d 872 (2005).....	5
<i>State v. Foster</i> , 128 Wn. App. 932, 939, 117 P.3d 1175 (2005) .....	5
<i>State v. Hughes</i> , 154 Wn.2d 118, 132, 110 P.3d 192 (2005) .....	5
<i>State v. Shultz</i> , 138 Wn.2d 638, 646, 980 P.2d 1265 (1999) .....	9, 27
<i>State v. T.K.</i> , 139 Wn.2d 320, 329, 987 P.2d 63 (1999) .....	22
<i>State ex rel A.N.C. v. Grenley</i> , 91 Wn. App 919, 927, 959 P.2d 1159 (1998).....	23
<i>State ex rel Tattersall v. Yelle</i> , 52 Wn.2 856, 329 P.2d 841 (1958).....	4
<i>State Republican Party v. State Pub. Disclosure Comm'n</i> , 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000) .....	5
<i>Taylor v. Enumclaw School Dist. No. 216</i> , 132 Wn. App. 688, 698, 133 P.3d 492 (2006) .....	30
<i>Tunstall v. Bergeson</i> , 141 Wn.2d 201, 221, 5 P.3d 691 (2000).....	1, 2, 5, 8
<i>Washington Waste Sys., Inc. v. Clark County</i> , 115 Wn.2d 74, 78, 794 P.2d 508 (1990) .....	14

<i>Washington Water Jet Workers Ass'n v. Yarbrough</i> , 151 Wn.2d 470, 90 P.3d 42 (2004) .....	4
<i>Weden v. San Juan County</i> , 135 Wn.2d 678, 700 958 P.2d 273 (1998).....	4, 24
<i>West Main Assocs. v. City of Bellevue</i> , 106 Wn.2d 47, 53, 720 P.2d 782 (1986).....	23

**STATUTES & CODES**

Chapter 43.20 RCW .....	26
RCW 43.20.260 .....	25
Chapter 90.03 RCW .....	15
RCW 90.03.015 .....	10, 16
RCW 90.03.015(3).....	10, 35
RCW 90.03.015(4).....	10, 35
RCW 90.03.260 .....	10, 26
RCW 90.03.260(4).....	25, 32
RCW 90.03.260 (5).....	25, 32
RCW 90.03.330 .....	35
RCW 90.03.330(2).....	17
RCW 90.03.330(3).....	16, 17
RCW 90.03.330(4).....	16
RCW 90.03.386(2).....	19, 22, 23, 24, 25, 30, 31
RCW 90.03.386(3).....	24
RCW 90.14.010 .....	12
RCW 90.14.130 .....	12
RCW 90.14.140(2).....	11, 14
RCW 90.14.140(2)(d) .....	10

## I. ASSIGNMENTS OF ERROR

The Cascade Water Alliance (“Cascade”) adopts as its assignments of error those set forth by the State of Washington (the “State”) and the Washington Water Utilities Council (the “WWUC”) and incorporates them herein

## II. STATEMENT OF THE CASE

Cascade’s Statement of the Case is set forth in its opening brief.

## III. ARGUMENT

### A. Standard of Review and Burden of Proof.

The standard of review and burden of proof is set forth in Section IV, A of Cascade’s opening brief.

### B. Argument in Response.

1. **Plaintiffs must prove that there is No Set of Circumstances Under Which the Challenged Subsections of the Municipal Water Law Can Be Applied Constitutionally.**

Cascade incorporates the argument of the State as set forth in Section III, A of the State’ brief and adds the following argument.

Appellants challenge to sections of the MWL is a facial challenge; therefore, the court must decide whether the *statute’s language* violates the constitution. *Tunstall v. Bergeson*, 141 Wn.2d

201, 221, 5 P.3d 691 (2000). A successful challenge renders the statute “inoperative.” *Tunstall, supra* at 221. Therefore, Appellants must prove beyond a reasonable doubt that “no set of circumstances exists” in which [the MWL], as currently written, can be constitutionally applied.” *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004).

Appellants, citing, vigorously attack the “no set of circumstances” test because application of that test defeats all of their claims. They cannot show that in every case that a retroactive reinstatement of pumps and pipes certificates would impair all junior water rights; they cannot show that in every case retroactive application of the MWL definitions would impair all junior water rights; and they cannot show in every case expansion of place of use or changes in population or connections will impair all junior water rights. In each instance the effect of the MWL would be fact dependent and varied. That is true with respect to most laws, and that is why facial challenges are disfavored.

Appellants rely in part upon *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000). However, *Robinson* is not precedent with respect to the challenges raised here. That case was decided before

*City of Redmond v. Moore*, supra. Since *Redmond* every facial challenge has been reviewed under the “no set of circumstances” test. Given this court’s subsequent decision in *Redmond*, *Robinson* cannot be the law. Appellants attempt to resuscitate *Robinson* by stressing that the court rejected the test as inappropriate for taxpayer cases; however, the court reached that result because of a lack of Washington authority for that test,<sup>1</sup> a state of the law that was remedied by *Redmond*.

*Robinson* neither analyzes the merits of the “no set of circumstances” test nor identifies policies favoring taxpayer cases over cases brought by other litigants who pursue a facial constitutional challenge. And Appellants offer no basis for a principled distinction between taxpayer litigants and other litigants.

There is no doubt that *Robinson* is an “outlier” in Washington, standing alone in its rejection of the “no set of circumstances” test in favor of an unexplained, subjective test dependent upon the “nature of the challenge.” The standard of review for every legal question is intimately associated with the “nature of the challenge,” which in

---

<sup>1</sup> “...the City cites no case in which our court has applied the ‘no set of circumstances’ test, and we find none” *Robinson*, at 808.

*Robinson* was a facial challenge.<sup>2</sup> That court simply side-stepped the issue and addressed the merits, offering nothing of precedential value with respect to standard of review in facial challenges.

Because a successful facial challenge to a statute renders the work of a co-equal branch of government void, the “no set of circumstances” test affords appropriate deference to the legislative branch. Nevertheless, Appellants rely upon *Robinson* to attack the only principled standard of review<sup>3</sup> developed by the courts, but substitute nothing in its place. Even they fail to urge the illusory standard proffered by *Robinson*, “the test dictated by the nature of the challenge.” Regardless, of their attack, Washington cases after *Robinson* have

---

<sup>2</sup> To bolster their argument, Plaintiffs cite a number of cases involving facial challenges that do not discuss standard of review at all. In each of those cases, the standard of review was not at issue because the law at issue could not be defended by showing it could be applied constitutionally in some, if not all, cases. The law was either unconstitutional or it was not. See, *Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983) (Action to enjoin operation of lottery); *State ex rel Tattersall v. Yelle*, 52 Wn.2d 856, 329 P.2d 841 (1958) (Challenging authority to enter into interstate compact); *Washington Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 90 P.3d 42 (2004) (Challenge to statute authorizing convict labor program). In *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998) the court reviewed a police power ordinance under the unreasonable, arbitrary or capricious and the unduly oppressive standards of review historically applied to those ordinances. Given the nature of that ordinance, it, too, could not be defended “under the no set of circumstances” standard. In *Biggers v. City of Bainbridge*, 162 Wn.2d 683, 169 P.3d 14 (2007), a police power ordinance was challenged for conflicting with a general state law. A local police power ordinance that conflicts with state law is unconstitutional in all circumstances.

<sup>3</sup> Appellants’ suggest the “no set of circumstances” standard of review would “eviscerate” the doctrine of taxpayer standing. Hardly. A standard of review makes it more or less difficult for a party to prevail, but it has no bearing upon a party’s right to be in court.

uniformly applied the “no set of circumstances” test in constitutional facial challenges<sup>4</sup> and that test should be retained.

Furthermore, the court in *Robinson* was reviewing a city ordinance; therefore, legislation by a co-equal branch of government was not at issue. Consequently, the court in *Robinson* did not have to consider the judiciary’s relationship to the legislature and the affect of the judicial deference required of the court in a facial challenge would have upon selecting an appropriate standard of review.

A significant distinction between the ordinance reviewed in *Robinson* and the statute under review here is that in *Robinson* the court was measuring a drug testing ordinance that authorized warrantless searches, including the most intrusive invasions of privacy, against the greater protections afforded under our state constitution. In *Robinson* that greater protection would have been undermined by application of the

---

<sup>4</sup> See, e.g., *State Republican Party v. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000); *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005); *Tunstall*, 141 Wn.2d at 221; *State v. Foster*, 128 Wn. App. 932, 939, 117 P.3d 1175 (2005); *Galvis v. Dep’t of Transp.*, 140 Wn. App. 693, 702, 167 P.3d 584 (2007); *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 797, 158 P.3d 1251 (2007); *State v. Clinkenbeard*, 130 Wn. App. 552, 560, 123 P.3d 872 (2005). It is also interesting to note that Judge Ellington the author of *Robinson* and Judge Baker, a panel member, were also on the panel in *State v. Foster*, supra. Neither dissented from the application of the “no set of circumstances” test in *Foster* nor cited or distinguished *Robinson*. Apparently, they agree that *City of Redmond*, supra, did establish the no set of circumstances test in Washington.

“no set of circumstances” test because the ordinance could lawfully regulate police and fire personnel while denying civilian employees the greater protection afforded by the constitution. That greater protection is not at issue here.

Because the *Robinson* court applied search and seizure jurisprudence to invalidate a city ordinance<sup>5</sup> two reasons prevented the court from using the “no set of circumstances” test. First, in search and seizure jurisprudence, the burden of proof is reversed. Unlike a facial constitutional challenge, the burden of proof is not on the challenger; rather, it is on the defense. *Robinson*, at 813. Second, in *Robinson*, the challenge to the ordinance implicated a “fundamental” right. *Robinson* at 822. Therefore, the usual presumption favoring constitutionality of the ordinance was reversed and the ordinance was presumed unconstitutional. *Robinson* at 804. Appellants’ challenges to the MWL do not involve “fundamental” rights, the ordinary presumption of constitutionality does apply, the Appellants have the burden of proof,

---

<sup>5</sup> *Robinson* was reviewing a city ordinance and legislation by a co-equal branch of government was not at issue. Consequently, the court in *Robinson* did not have to consider the judiciary’s relationship to the legislature and the affect of the judicial deference required of the court in a facial challenge would have upon selecting an appropriate standard of review.

and they must prove beyond a reasonable doubt that the statute cannot applied constitutionally in any set of circumstances.

Appellants' attack on the "no set of circumstances" test is simply an invitation to the court, under the guise of constitutional jurisprudence, to concur in plaintiffs' policy choices – choices rejected by the legislature. And their invitation ignores the principle they strive mightily, if unsuccessfully, to apply elsewhere in their argument: the doctrine of separation of powers. The courts, too, can improperly intrude into the sphere of a co-equal branch of government, and, unlike the other branches, the only control on the courts is the courts.

The constitution empowers the legislature to adopt the laws of the state, including laws that are not constitutional in all applications. The courts are empowered to review legislation for constitutional compliance, but the judicial power does not extend to voiding laws that are constitutional in some applications but not others. If a law is constitutional in some applications, the choice to adopt that law rest with the legislature. A court is not empowered to overturn that choice under the guise of constitutional jurisprudence.

These plaintiffs brought a facial challenge, asking the court to rule that the statute is unconstitutional and void<sup>6</sup> without requiring them to bear the burden of proving that it should be inoperative in all cases. Such a ruling would be a violation of the separation of powers doctrine, unless constitutional law holds that legislation is unconstitutional and void whenever it cannot be constitutionally applied in all cases. Manifestly, that is not so as evidenced by two hundred years of “as applied” case law.

**2. The Municipal Water Law Does Not Violate Substantive Due Process.**

Cascade incorporates the argument of the State as set forth in Section III, C and IV, A<sup>7</sup> of the State’ brief and as set forth in Section III, D of the WWUC’s brief, and adds the following argument.

Appellants’ argue that various sections of the MWL retroactively deprive others of their vested interests in water rights, and therefore those sections violate substantive due process. “Due process is violated if the retroactive application of a statute deprives an individual of a vested right.” *In re Marriage of MacDonald*, 104 Wn.2d 745, 750, 709

---

<sup>6</sup> A successful challenge renders the statute “inoperative.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000).

<sup>7</sup> Cascade does not concur with or incorporate the State’s argument concerning actual beneficial use as it relates the new definitions adopted by the MWL.

P.2d 1196 (1985); *Caritas Services v. DSHS*, 123 Wn.2d 391; 869 P.2d 28 (1994). *See, also, State v. Shultz*, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999) (A retroactive law “violates due process when it deprives an individual of a vested right”). A vested right entitled to protection under the due process clause:

must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.

*MacDonald*, 104 Wn.2d at 750 (quoting *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975)). *See also, Farm Bureau v. Gregoire*, 162 Wn.2d 284, 305, 174 P.3d 1142 (2007).

Appellants have not and cannot identify a vested right that needs the protection of the due process clause because they are confusing expectations with title to the present or future enjoyment of property. According to Appellants, *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) liberated some quantity of unperfected water. If so, junior water rights have no title to the current or future use of that water. They have what they had before, the right to use whatever water is available to them according to the terms of their

water right, including priority and quantity. Their expectations about the availability of additional water are not protectable rights.

**3. Appellants Cannot Prove Beyond a Reasonable Doubt That RCW 90.03.015(3) and (4) Violate Substantive Due Process.**

Appellants' argue that RCW 90.03.015(3) and (4) are facially unconstitutional because they retroactively and detrimentally affect junior water right holders. These provisions read:

RCW 90.03.015.

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

(4) "Municipal water supply purposes" means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use....<sup>8</sup>

---

<sup>8</sup> Before the MWL, the term "Municipal water supplier" could not be found in the water code and "municipal water supply purposes" could be found in RCW 90.14.140(2)(d) (exempting water rights claimed for "municipal water supply purposes" from statutory relinquishment). RCW 90.03.260 contained a similar phrase "if for municipal water supply". However, these terms were not defined by statute and they had not been defined by the courts.

According to Appellants the new definitions are detrimental to junior water rights because they resurrect water rights of formerly private purveyors relinquished under RCW 90.14.140(2) by retroactively affording to them the statutory exemption for water rights claimed for municipal supply purposes.

This argument is speculative, unsupported by evidence of such circumstances, and utterly fails to meet the “no set of circumstances” standard of review. The argument assumes that in every case there will be junior water rights, or that in every case junior rights will be impaired. But Appellants cannot prove beyond a reasonable doubt that in every case junior water rights will be impaired and therefore they fail the “no set of circumstances” test.

Compounding their burden of proof problem, their resurrection argument also assumes that relinquishment occurs by operation of law, when case law to date is to the contrary. *See Sheep Mountain Cattle Co. v. State*, 45 Wn. App. 427, 726 P.2d 55 (1986) (relinquishment requires Ecology notice and hearing); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 110 P.3d 812 (2005) (relinquishment is effective only after decision by PCHB). Under these cases only water relinquished after

notice and hearing could possibly be resurrected; therefore, all junior rights could not be adversely affected in all circumstances and Appellants cannot sustain the burden of proof. But even if relinquishment occurred by operation of law, there is no language in the MWL or the water code that reinstates "lost water" to water rights claimed for municipal water supply purposes. Reclassifying a water right into a municipal water right does not in logic or law return water lost from nonuse to the new municipal water right. When water is relinquished it reverts to the state for reallocation as the law permits. See RCW 90.14.010 and 130. The MWL does not change that statutory principle.

Further Appellants position ignores current law: Regardless of how relinquishment occurs, a claim of exception from relinquishment is recognized in Washington only if made before the period of nonuse passes. *City of Union Gap, et al v. State of Washington, et al*, No. 26555-2-3 (2008) (Request for review pending); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 139, 969 P.2d 458 (1999).

A claim for municipal supply by a municipal supplier newly minted by the MWL must have been made before the expiration of the

period of five-years of nonuse to be recognized. To hold that the MWL changes this requirement of law not only strains credulity, but also ignores the principle that statutes should be construed so as to be constitutional when possible. Moreover, if there is a situation where a private party (now a municipal supplier) had claimed the exception [and none has been identified], junior water rights have not been adversely affected in a constitutional sense. As before adoption of the MWL, the claim must be adjudicated, they can participate, and the issues are the same. The MWL is curative in that it clarifies<sup>9</sup> the meaning of municipal supply purposes for purposes of making the decision.

Appellants' argument also assumes that pre-MWL a private supplier could not claim the municipal supply purposes exemption from relinquishment. However, at best, they can show the law was not settled, and that Ecology arrived at different conclusions at different times because of differing interpretations of the relinquishment statute. A statute is ambiguous if it can be reasonably interpreted in more than one way. "Ambiguity exists when a law 'can be reasonably interpreted in more than one way.'" *McGee Guest Homes v. Dep't of Soc. &*

---

<sup>9</sup> Defining terms for the first time is evidence of the curative nature of a statute or amendment. *Harbor Steps v. Seattle Technical*, 93 Wn. App. 792, 799, 970 P.2d 797 (1999).

*Health Service*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000). Thus, the law, even if read retroactively, has not been changed, it has been clarified by defining what are municipal supply purposes and who are municipal suppliers. An enactment is curative when it is adopted to clarify or technically correct ambiguous statutory language. *Magula v. Benton Franklin Title Company, Inc.*, 131 Wash.2d 171, 930 P.2d 307 (1997); *Washington Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990). A statute or amendment to a statute may operate retroactively if the Legislature so intended, if it is clearly curative, or if it is remedial, provided that retroactive application does not run afoul of the Constitution. *1000 Va. Ltd. P'ship*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). An amendment is curative "if it clarifies or technically corrects an ambiguous statute." *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992).

Moreover, the language of the relinquishment statute does not support their assumption that a private supplier could not claim the municipal supply purpose exemption. Despite Ecology's wavering over who could make the claim, the relinquishment statute is not ambiguous. RCW 90.14.140(2) provides "... there shall be no relinquishment of any

water right: ... (d) If such right is claimed for municipal water supply purposes under Chapter 90.03 RCW....” The statute protects water rights according to their claimed purpose, not according to whether the holder making the claim is a private party or a municipality. Therefore, the MWL does not retroactively grant to private suppliers a right they did not have before. In fact, the MWL placed a limitation on who could make the claim that did not exist before (systems serving less than 15 residential customers).

Finally, the statute can be read prospectively and therefore constitutionally. As of 2003 and going forward certain private parties could hold a right for municipal supply purposes and, after that date, claim an exception from relinquishment; provided, that the claim was made before the five-year period of nonuse expired. Any water not used for a five year period before 2003 and not claimed for municipal purpose during that period has been lost and remains lost. This legislation can be read prospectively; therefore, under the “no set of circumstances” it can be read constitutionally, and, under this court’s decisions, that is the required reading, if necessary to hold it constitutional. *See, e.g., State v. Browet*, 103 Wn.2d 215, 691 P.2d 571 (1984) (the duty of the

Supreme Court is to construe a statute so as to uphold its constitutionality wherever possible).

**4. Appellants Cannot Prove Beyond a Reasonable Doubt That RCW 90.03.330(3) and (4) Violate Substantive Due Process.**

RCW 90.03.330(3) provides

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

Appellants' argue that the subsection retroactively expands water rights for 'municipal water supply purposes' because it perfects any unused water authorized by those certificates by eliminating the requirement that the water actually be put to beneficial use. That is, according to Appellants the "in good standing" language automatically perfected all water rights documented by pumps and pipes certificates to the detriment of junior water rights.<sup>10</sup>

---

<sup>10</sup> Appellants express concern that the legislation reinstates "unperfected water" certificate holders that fail to perfect their water with reasonable diligence. However, once a municipality has constructed its system, there is no further diligence to exercise.

RCW 90.03.330(3) did not perfect water authorized by pumps and pipes certificates that had not been put to beneficial use. That subsection did deny to Ecology the authority to revise or reduce certificates by adopting a policy. The authority previously granted by statute to quantify water rights in a general adjudication or during an application for a change was retained. Nothing in the language of the MWL supports a reading of Legislative intent to automatically perfect unperfected water authorized by pumps and pipes certificates. Rather, to maintain stability and to minimize uncertainty, the Legislature provided that the certificates remained in good standing and denied to Ecology the authority to revoke or diminish these certificates, except in an application for a change under the water code. See, RCW 90.03.330(2). Because Ecology can modify the amount of perfected water only in an application for a change in the water right, continuing its authority as provided in subsection 2 (and the

---

The municipal system is a supplier of water, not a user of water. Whether water is actually appropriated is not within the supplier's control. Municipalities can plan for growth, establish land uses to accommodate growth, and construct water systems and other infrastructure to provide for growth, but whether growth (demand for water) occurs and when it occurs is not within the control of municipal suppliers. The MWL recognizes that fact. It protects a certificate holder – a party that obtained a permit, satisfied the state with reasonable growth projections that water would be used at sometime in the future, undertook the investment and the risk of constructing a system, and after following the rules, obtained a certificate based on a policy established by the state- from adoption of an administrative policy that could adversely affect the holder's ability to provide supply and the integrity of the holder's bonds.

authority of general adjudications) can mean only that the legislature did not intend to and did not perfect unused water authorized by pumps and pipes certificates by operation of law.

Appellants' argument is based upon their assertion that *Theodratus* ruled that all previously issued pumps and pipes certificates were invalid or unenforceable. They are incorrect. In *Theodoratus* the issue was whether Ecology could revise a condition of a previously issued permit. The court ruled Ecology had that authority. Because there was no case or controversy before the court concerning the validity or enforceability of previously issued pumps and pipes certificates, the court could not decide the validity of one, much less all, such certificate. Therefore, the legislature had nothing to resurrect; but it did recognize the uncertainty and possibly instability concerning the standing of pumps and pipes certificates engendered by *Theodoratus* and it acted to afford those certificates certainty and regularity.

Consequently, the Legislature did not affect junior water rights at all. They have the same legal rights today that they had in 2002. They can participate in the administrative process governing applications for a change that will determine how much water has been perfected, and they

can institute or participate in general adjudications that will quantify water rights.

**5. RCW 90.03.386(2) Does Not Violate Substantive Due Process.**

Cascade incorporates the argument of the State as set forth in Sections III, C and IV, A of the State' brief and as set forth in Section III, D, 4 of the WWUC's brief and adds the following argument.

RCW 90.03.386(2) provides that the approval by DOH or a local legislative authority of a planning or engineering document that describes a municipal water supplier's service area

... includes any portion of the approved service area that was not previously within the place of use for the [municipal water supplier's] water right[s] if the supplier is 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: [certain identified planning documents].

**6. Appellants Cannot Establish that RCW 90.03.386(2) Violates Substantive Due Process in Every Instance and therefore they Cannot Satisfy the Required Burden of Proof.**

This section resolves any conflicts between DOH designations of service areas the place of use described on the municipal supplier's water right. It does not allow the supplier to use more water than authorized by the water right.

Appellants' contention that expansions of place of use will harmfully affect other right holders by changing return flows is incorrect because such expansions will rarely if ever the use of water currently supplied by a municipal system. A municipal water supply system is a capital intensive, fixed-in-place system composed of underground mains and above-ground reservoirs and pumps that serve a place of use housing fixed-in-place residential, commercial and industrial development.

An expansion of place of use for a municipal supplier does not cause that supplier to abandon its investment in infrastructure or its customer base by moving the water supplied to those customers to a new place of use. The water currently put to municipal uses will continue to be applied to that use through the same infrastructure to the same customers, and any water supplied by that infrastructure that does return to the environment will continue to do so. Water supplied to the expanded place of use will be new water, supplied through new

infrastructure, to new customers that will add to (not subtracting from) return flows. As a practical matter, expansion of a municipality's place of use cannot affect the rights of junior right holders, unless there is also a change in place of diversion or withdrawal, in which case the administrative procedure, with its attendant procedural rights, must be followed.

Water infrastructure is expensive and immobile; therefore, municipal water is not a flexible commodity. Infrastructure is designed to and does provide water for existing or planned for commercial and residential uses and water supplied by that infrastructure would not be shifted from those uses because an expanded place of use is granted to a municipality. Once water is put to use for municipal supply it continues to be used where it was put to use.

An expansion of place of use does not change the current demand for water or eliminate the constraints (engineering and financial) of existing infrastructure. It will not affect return flows or aquifer recharge associated with water already put to use under a specific place of use because that water will continue to be put to use to the same extent and under the same conditions at the same place. Expansion of place of use

may allow the use of water previously unused but lawfully available under permit, but that is water to which junior right holders have no right. Appellants have not and cannot identify one instance where an expanded place of use necessarily injures other water right holders. They cannot, even through speculation, establish that in every case those water right holders will be harmed.

**7. Appellants' Claim of Substantive Due Process Violation Must Also Fail Because RCW 90.03.386(2) is Prospective and Passes the Two-Part Test Under Which Police Power Legislation is Reviewed.**

Appellants' argument that this section retroactively expands the place of use for water rights held for municipal water supply purposes should be rejected. Appellants' arguments ignore basic rules of constitutional construction: the presumption that legislation operates prospectively, *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981); *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999), and that legislation is construed to operate prospectively unless either the statutory language or clear legislative intent compels the opposite conclusion. *McGee Guest Homes v. DSHS*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000). The statutory language does not either suggest such a

legislative intent or compel retroactive application; rather, the language compels prospective application. An expansion of place of use only occurs only after DOH or the legislative authority determines that the municipal water supplier is in compliance with the conditions of the statute and the planning or engineering document has been approved. A statute operates prospectively when the precipitating event for its operation occurs after the effective date of the statute. *State ex rel A.N.C. v. Grenley*, 91 Wn. App. 919, 927, 959 P.2d 1159 (1998). *Heidgerken v. Dep't of Nat. Resources*, 99 Wn. App. 380, 388, 993 P.2d 934 (2000).

The adoption of RCW 90.03.386(2) was an exercise of the state's police power by the legislature. Laws prospectively changing and significantly affecting property rights have passed constitutional muster.

<sup>11</sup> The police power, reasonably exercised in the furtherance of a legitimate goal, can regulate or even extinguish vested rights. See, *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986); *Edmonds Shopping Center Associates v. City of Edmonds*, 117 Wn. App. 344, 360, 71 P.3d 233 (2003) (prospective elimination of a

---

<sup>11</sup> For the reasons noted above, junior right holders will not suffer from the expansion of place of use of a municipal system.

business owner's right to operate card rooms upheld.) These cases and many others analyze police power legislation under a two-part test: The statute's purpose must be to promote health, safety, peace, education, or welfare, and it must bear some reasonable relationship to accomplishing the statutory purpose. *Weden v. San Juan County*, 135 Wn.2d 678, 700, 958 P.2d 273 (1998). And a reviewing court "must presume that if a conceivable set of facts exists to justify the legislation, then those facts do exist and the legislation was passed with reference to those facts." *Id.* at 705

RCW 90.03.386(2) passes the test. The MWL is the most recent of a series of legislative acts intended to promote the beneficial use of the people's water by regularizing municipal water rights, promoting water use efficiency, and imposing new duties on municipal suppliers for the benefit of the public. RCW 90.03.386(2) furthers several goals of the MWL. Under RCW 90.03.386(2), approval of a municipal water supplier's plan can expand the supplier's service areas to be coextensive with the place(s) of use of its water right(s). This change operates prospectively to promote "certainty and flexibility" and is tied directly to the promotion of water use efficiency, see, RCW 90.03.386(3), and the

new duty imposed by RCW 43.20.260 upon municipal water suppliers to provide service in their approved service areas. In practice, the beneficial use of water is promoted because the ability of municipal suppliers to meet the due diligence requirement is increased by removal of the constraints on place of use. By making the place of use of multiple water rights the same, the legislation also promotes the economic and efficient use of water within municipal supplier's service areas.

Adoption of RCW 90.03.386(2) is an exercise of the police power that passes the two-part test developed by the courts; therefore, it does not violate the substantive due process rights of all other water right holders and it is not facially unconstitutional.

- 8. Appellants cannot prove that RCW 90.03.260(4)-(5), which provide that population estimates or service connection estimates in water rights documents do not constitute an attribute limiting the exercise of the water right, facially violates substantive due process.**

Appellants argue that RCW 90.03.260(4) and (5) violate substantive due process because they infringe upon the vested rights of others by retroactively expanding the number of service connections authorized by Health in water rights certificate held for community water

supply or the population to be served in water rights held for municipal water supply purposes.

RCW 90.03.260 provides with respect to water right applications:

(4) If for community or multiple domestic water supply, the application shall give the projected 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, 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 figures 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.

Section (4) requires an applicant for a water right for community or multiple domestic water supply to project the number of service connections to be supplied with water, while section (5) requires an

applicant for a water right for municipal water supply to project the population to be served in the future. However, in each instance, the statute provides that the projections are not attributes of the water right that limit water use if they are consistent with approved plans.

Contrary to Appellants argument, however, the sanctity of due process is unaffected by these sections of the MWL. They did not change the law that preceded the enactment of the MWL, nor did they “retroactively expand” population or service connections authorized to be served under municipal purpose water rights because, before the MWL, neither projected population nor projected service connections were attributes of a water right and they did not limit the exercise of water rights. A retroactive law violates due process when it deprives an individual of a vested right. *State v. Shultz*, 138 Wn.2d 638, 646-648, 980 P.2d 1265 (1999). A vested right is a right that has become “a title, legal or equitable, to the present or future enjoyment of property.” *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992).

Appellants argue that junior rights are impaired by allowing service to increased population or service connections through amendment of water system plans. But pre-MWL a junior water right

could not rely on projections of population or service connection as attributes of a water right that limited the use of water. Before passage of the MWL there was no requirement to project service connections on a water right application; before passage of the MWL there was a requirement to project population in applications for water rights for municipal supply, but that requirement was not an attribute of a water right. The attributes of water rights were the same before and after adoption of the MWL: priority date, actual, diligent beneficial use of water, and place of use. *Department of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993). Projections served to assure that water would be put to beneficial use (anti-speculation) and to inform decisions concerning development schedules (due diligence); they did not limit the users right to make full beneficial use of water allowed under a permit. Therefore, these sections did not attach new legal consequences to events completed before enactment of the MWL. See, *In re F.D. Processing, Inc.*, supra.

A junior water right had no legally recognized expectation that a senior right would not or will not put to beneficial use the quantity of water authorized by its permit, or that a senior's right to make full

beneficial use of water authorized was limited by population or service connection estimates. A perfected senior municipal right can supply water anywhere within the place of use regardless of population or service connection projections, including service to population or service connections in excess of projections if conservation, water use efficiency or error in projection allow.

Moreover, to the extent that Ecology on occasion may have attempted to limit water rights<sup>12</sup> according to these projections, adoption of these sections is curative because they clarify the law. Clarification, if needed, did not change the law to attach new legal consequences to past events and it does not violate substantive due process by depriving Appellants of any vested property rights. See, *McGee Guest Homes v. DSHS*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

**9. The Municipal Water Law Does Not Violate Procedural Due Process.**

Cascade incorporates the argument of the State as set forth in Section IV, B of the State' brief and adds the following argument.

**a. Procedural Due Process Principles.**

---

<sup>12</sup> If Ecology had included such limitations, it exceeded its authority. Ecology administers the law, it has no authority to impose new attributes on water rights and thereby re-write the law. This is the lesson of *Theodoratus*.

The constitutional right to procedural due process

...is a flexible concept. At its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Demore v. Kim*, 538 U.S. 510, 551, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) (Souter, J., concurring) ("Due process calls for an individual determination before someone is locked away."). In determining what procedural due process requires in a given context, we employ the *Mathews* test, which balances: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Mathews*, 424 U.S. at 335, 96 S.Ct. 893; *Young*, 122 Wash.2d at 43-44, 857 P.2d 989.

*In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007).

The *Mathews* test is applied if there is a risk of erroneous deprivation of a known right. *Taylor v. Enumclaw School Dist. No. 216*, 132 Wn. App. 688, 698, 133 P.3d 492 (2006).

**b. RCW 90.03.386(2) Does Not Violate Procedural Due Process.**

RCW 90.03.386(2) provides that the approval by DOH or a local legislative authority of a planning or engineering document that describes a municipal water supplier's service area

... includes any portion of the approved service area that was not previously within the place of use for the [municipal water supplier's] water right[s] if the supplier is 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: [certain identified planning documents].

Appellants argue that RCW 90.03.386(2) facially violates procedural due process because junior rights are not given notice of a change in place of use and an opportunity to be heard. But expansion of place of use does not jeopardize return flows or a junior right's permitted or perfected right to use water according to its priority. The risk of erroneous deprivation is slight and certainly not a risk for all junior rights. If a senior right is fully perfected, expansion of place of use does not affect the junior right because the senior already had a vested right to use all of the perfected water. If the senior right was inchoate or partially inchoate, expansion of place of use does not affect the junior's vested right because it's vested right never included a right to impede the senior's full development of its permitted right. At most the legislation might enhance the senior's ability to perfect its right. It has no effect on the junior, which retains its priority and the right to use any water

available, subject to the prior right of the senior. A junior's hope, expectation or prayer that a senior may not be able to perfect its right may be undercut by an expansion of place of use, but hope is not "a title, legal or equitable, to the present or future enjoyment of property." *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992). Consequently, the junior's right is not at risk of deprivation, and there is no violation of procedural due process.

**c. RCW 90.03.260(4) and (5) Do Not Violate Procedural Due Process.**

Appellants argue that RCW 90.03.260(4) and (5) procedural due process because they authorize future expansions of population to be served or service connection allowed without adequate notice to those affected by the change and giving them an opportunity to be heard.

However, once again, the rights of junior right holders are not affected, because they never had a right to rely on population or service connection projections to limit the right of a senior right holder to use perfected water or to fully perfect its permit. As noted above, the senior right is limited by the quantities claimed or authorized by permit, subject to the due diligence requirement. Once again there is no deprivation of a right and therefore, there is no violation of procedural due process.

C. Reply to Respondents' Separation of Powers Argument.

Cascade relies on the arguments submitted in its opening brief and also incorporates the argument concerning separation of powers made by the State as set forth in Section III, B of the State' brief and as set forth in Section III, B of the WWUC's brief.

IV. CONCLUSION

The *Theodoratus* decision reverberated through the community of municipal water suppliers raising concerns about certificates issued to them under the pumps and pipes policy and consternation over the affect that decision might have on their ability to meet supply obligations, their ability to finance necessary facilities, and the integrity of outstanding bonds. In response, many years of effort, negotiation, and compromise produced legislation offering resolution to issues resulting from rejection of Ecology's authority to issue pumps and pipes certificates as well as other issues arising from ambiguity of prior water law, such as duty serve, conservation, and the definition of municipal water supply and supplier.

Appellants/Respondents, who are dissatisfied with some aspects of that legislation, turn to the judiciary to achieve their legislative goals by advancing spurious facial constitutional challenges to the legislature's

policy choices of 2003. They mischaracterize prior law, misinterpret the MWL, and find certainty in concepts that were undefined, all to persuade this Court to disregard its constitutional role and overrule the Legislature's policy choices, despite the reasonable and constitutional interpretations offered by the State, the WWUC and Cascade.

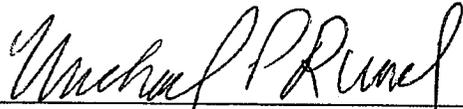
Their argument is an invitation to the court to join in their mischaracterization of *Theodoratus* and the MWL and to abandon judicial principles that require decided cases to be narrowly read and limited to their facts. Asserting concern for the substantive and due process rights of some, they are willing to see countless municipal suppliers and those they supply deprived of their water rights without any opportunity to be heard.

It is no accident that they bring a facial challenge. In the years since the law's adoption they have not been able to identify one instance where application of the law has affected one right holder adversely. The legislature acted within its constitutional authority in resolving the uncertainty surrounding municipal water law and curing ambiguity in that law through its exercise of the State's police power. Cascade requests this court to reverse the trial court's decision that the legislature

violated the separation of powers doctrine by adopting RCW 90.03.330 and RCW 90.03.015(3) and (4); and that this court affirm the trial court's decisions rejecting those challenges based upon substantive and procedural due process.

RESPECTFULLY SUBMITTED this 23rd day of February, 2009.

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

By   
Michael P. Ruark, WSBA #2220  
Attorneys for Cascade Water Alliance

No. 81809-6

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

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

*Respondents/Cross-Appellants,*

v.

STATE OF WASHINGTON; CHRISTINE GREGOIRE; Governor of  
the State of Washington; WASHINGTON DEPARTMENT OF  
ECOLOGY; JAY MANNING, Director of the Washington Department  
of Ecology; WASHINGTON DEPARTMENT OF HEALTH; MARY  
SELECKY, Secretary of Health for the State of Washington;  
WASHINGTON WATER UTILITIES COUNCIL; CASCADE WATER  
ALLIANCE; and WASHINGTON STATE UNIVERSITY,

*Appellants/Cross-Respondents.*

---

**CERTIFICATE OF SERVICE**

---

INSLEE, BEST, DOEZIE & RYDER, P.S.  
Michael P. Ruark, WSBA #2220  
Attorneys for Appellant Cascade Water Alliance  
777 - 108th Avenue N.E., Suite 1900  
P.O. Box 90016  
Bellevue, Washington 98009-9016  
Telephone: (425) 455-1234

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 FEB 23 P 2:59

BY RONALD R. CARPENTER CERTIFICATE OF SERVICE

I, Michelle L. Phommahaxay, hereby certify that on this 23rd  
CLERK  
day of February, 2009, I caused to be served a true and correct copy of  
the following document(s):

1. Cascade Water Alliance's Brief in Response and in Reply; and
2. Certificate of Service

on the individual(s) named below in the specific manner indicated:

**1. Counsel for Makah Indian Tribe:**

John Arum  
Brian C. Gruber  
Ziontz, Chestnut, Varnell, Berley &  
Slonim  
2101 Fourth Avenue, Suite 1230  
Seattle, WA 98121

- Legal Messenger  
 U.S. Mail  
 Fax #: 206-448-0962  
 E-mail: jarum@zcvbs.com  
bgruber@zcvbs.com

**2. Counsel for Lummi Indian Nation:**

Harry L. Johnsen  
Raas Johnsen & Stuen, P.S.  
1503 E Street  
P.O. Box 5746  
Bellingham, WA 98227-5746

- Legal Messenger  
 U.S. Mail  
 Fax #: 360-733-1851  
 E-mail:  
harryjohnsen@comcast.net

**3. Counsel for Suquamish Tribe:**

Melody Allen  
Office of the Tribal Attorney  
for Suquamish Tribe  
P.O. Box 489  
15838 Sandy Hook Road  
Suquamish, WA 98392-0498

- Legal Messenger  
 U.S. Mail  
 Fax #: 360-394-6295  
 E-mail:  
mallen@suquamish.nsn.us

**4. Counsel for Squaxin Island Tribe:**

Kevin Lyon  
Squaxin Island Tribe Legal Dept.  
3711 SE Old Olympic Hwy.  
Shelton, WA 98584

Legal Messenger  
 U.S. Mail  
 Fax #: 360-432-3699  
 E-mail:  
klyon@squaxin.nsn.us

**5. Counsel for Tulalip Tribes:**

Mason Morisset  
Morisset, Schlosser, Jozwiak & McGaw  
801 - 2nd Avenue, Suite 1115  
Seattle, WA 98104

Legal Messenger  
 U.S. Mail  
 Fax #: 206-386-7322  
 E-mail:  
m.morisset@msaj.com

**6. Counsel for Tulalip Tribes:**

Kimberly Ordon  
P.O. Box 1407  
Duvall, WA 98019-1407

Legal Messenger  
 U.S. Mail  
 Fax #: 425-844-9940  
 E-mail:  
kimberlyordon@comcast.net

**7. Counsel for Tulalip Tribes:**

A. Reid Allison III  
Office of Reservation Attorney  
6700 Totem Beach Rd  
Marysville, WA 98271-9714

Legal Messenger  
 U.S. Mail  
 Fax #: 360-651-3438  
 E-mail:  
rallison@tulaliptribes-nsn.gov

**8. Counsel for Quinault Indian Nation:**

Karen Allston  
Naomi Stacy  
Office of Reservation Attorney  
Quinault Indian Nation  
P.O. Box 189  
Taholah, WA 98587-0189

Legal Messenger  
 U.S. Mail  
 Fax #: 360-276-4191  
 E-mail:  
kallston@quinault.org  
nstacy@quinault.org

**9. Attorney for Burlingame, et al.:**

Kristen L. Boyles  
Earthjustice  
705 Second Avenue, Suite 203  
Seattle, WA 98104

Legal Messenger  
 U.S. Mail  
 Fax #: 206-343-1566  
 E-mail:  
kboyles@earthjustice.org

10. Attorneys for WA State Dept. of Ecology:

Alan Reichman  
Stephen H. North  
Assistant Attorneys General  
Ecology Division  
2425 Bristol Court SW, 2nd Floor  
P.O. Box 40117  
Olympia, WA 98504-0117

- Legal Messenger  
 U.S. Mail  
 Fax #: 360-586-6760  
 E-mail: alanr@atg.wa.gov  
stephenn@atg.wa.gov

11. Attorneys for WA State Dept. of Health:

Mark Calkins  
Assistant Attorneys General  
Agriculture & Health Division  
7141 Cleanwater Drive, 1st Floor  
P.O. Box 40109  
Olympia, WA 98504-0109

- Legal Messenger  
 U.S. Mail  
 Fax #: 360-586-3564  
 E-mail: markc@atg.wa.gov

12. Attorneys for Washington Water Utility Council:

Adam W. Gravley  
Tadas Kisielius  
Gordon Derr, LLP  
2025 First Avenue, Suite 500  
Seattle, WA 98121

- Legal Messenger  
 U.S. Mail  
 Fax #: 206-626-0675  
 E-mail:  
agravley@gordonderr.com  
tkisielius@gordonderr.com

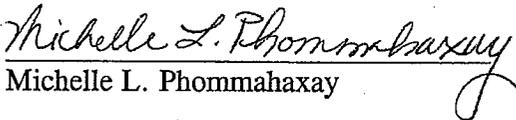
13. Attorneys for Appellant/Intervenor Washington State University:

Tom McDonald  
Cascadia Law Group PLLC  
606 Columbia Street NW, Suite 212  
Olympia, WA 98501

- Legal Messenger  
 U.S. Mail  
 Fax #: 360-786-1835  
 E-mail:  
tmcdonald@cascadialaw.com

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

DATED this 23rd day of February, 2009.

  
Michelle L. Phommahaxay  
Michelle L. Phommahaxay