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

Respondents/Cross-Appellants,

v.

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

Appellants/Cross-Respondents,

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

Intervenors-Appellants/Cross-Respondents.

**RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS
RESPONDENT STATE OF WASHINGTON**

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I. INTRODUCTION

The Municipal Water Law (MWL) has been law in Washington since September 2003. Respondents¹ have had several years to identify a single instance of retroactive revival of relinquished water rights, or retroactive expansion of municipal water rights to the detriment of junior water right holders. They have not, and even if they could, it would be insufficient to have the challenged statutes declared *facially* unconstitutional. Lacking concrete facts, the Respondents' claims rely entirely on speculation, and they ask the Court to apply a lesser standard of review than has been consistently applied by both this Court and the United States Supreme Court to facial challenges.

RCW 90.03.015(3) and (4) and RCW 90.03.330(3) do not violate the separation of powers. Under this Court's recent decision in *Hale v. Wellpinit School District No. 49*, __ Wn.2d __, 198 P.3d 1021 (2009), enactment of a retroactive statutory amendment by the Legislature violates separation of powers when it reverses a prior judicial decision. The MWL does not reverse any judicial decisions.

The Respondents fail to demonstrate that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) violate substantive due process. They cannot

¹ In this brief, Respondents/Cross-Appellants Burlingame, et al. are referred to as "Burlingame," and Respondents/Cross-Appellants Lummi Indian Nation, et al. are referred to as "the Tribes." Collectively, they are referred to as "Respondents."

satisfy their burden in a facial challenge to prove that these provisions violate substantive due process under all sets of circumstances.

The Respondents also fail to meet their burden to demonstrate that RCW 90.03.260(4) and (5), RCW 90.03.330(2), and RCW 90.03.386(2) violate substantive due process. Each of these statutes operates prospectively and does not change the consequences of past events to the detriment of other water right holders. Further, even if the Court determines that any of these provisions does operate retroactively, the Respondents cannot show that they will cause detriment to others' water rights under any scenarios, let alone in all sets of circumstances.

Finally, the superior court ruled correctly in rejecting Respondents' procedural due process claims. RCW 90.03.260(4) and (5) did not strip away any procedure relating to service connections or population limits that was available prior to the MWL, and RCW 90.03.330(2) and RCW 90.03.386(2) both provide adequate notice and opportunity to be heard.

This Court should reject Respondents' legally deficient challenges and refrain from taking the extraordinary measure of declaring the law facially unconstitutional.

II. RESTATEMENT OF ISSUES

1. Does RCW 90.03.386(2), which clarifies the place of use for water rights for municipal supply purposes, facially violate substantive due process? (Burlingame Issue No. 1; Tribes' Issue No. 1)

2. Do RCW 90.03.260(4) and (5), which address service connection and maximum population limits under approved water system plans, facially violate substantive due process? (Tribes' Issue No. 3)

3. Does RCW 90.03.386(2), which clarifies the place of use for water rights for municipal supply purposes, facially violate procedural due process? (Burlingame Issue No. 2; Tribes' Issue No. 2)

4. Do RCW 90.03.260(4) and (5), which address service connection and maximum population limits under approved water system plans, facially violate procedural due process? (Tribes' Issue No. 4)

5. Does RCW 90.03.330(2), which provides that water right certificates for municipal water supply purposes that were issued based on system capacity may only be revoked or diminished under certain circumstances, facially violate procedural due process? (Burlingame Issue No. 3; Tribes' Issue No. 5)

III. REPLY ARGUMENT

A. Standard Of Review

1. **The “no set of circumstances test” applies to facial challenges to Washington law.**

This Court has consistently recognized that to prevail in a facial challenge, the challenging party must show that “no set of circumstances” exists in which the statute can be constitutionally applied. *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).² For example, in *Hughes* the Court upheld the exceptional sentence provisions of the Sentencing Reform Act, stating: “[b]ecause there is *at least one way* in which RCW 9.94A.535 can be applied constitutionally, it cannot be declared facially unconstitutional.” *Id.* at 133 (emphasis added).³

Respondents sharply object to the “no set of circumstances” test. They ask the Court to ignore its longstanding precedent, and follow a wrongly decided Court of Appeals case. Opening Brief of Respondents/Cross-Appellants Joan Burlingame, et al. (Burlingame Br.) at 26 (citing *Robinson v. City of Seattle*, 102 Wn. App. 795, 808, 10 P.3d 452 (2000)). Respondents improperly rely on decisions in which the Court

² See also, *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004); *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000); *State Republican Party v. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000); *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999).

³ The Court of Appeals recently applied the no set of circumstances test in a case involving a facial and as applied challenge to the Highway Access Management Act. *Galvis v. Dep’t of Transp.*, 140 Wn. App. 693, 702, 167 P.3d 584 (2007).

was presented with an as applied challenge, and was therefore able to avoid the “strong medicine” of declaring a statute facially inoperative. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973) (Facial invalidation of a statute “is, manifestly, strong medicine” that “has been employed by the Court sparingly and only as a last resort.”). Because Respondents bring a purely facial challenge in this case, the Court does not have that option.

2. Respondents should not be afforded special treatment as taxpayer litigants.

Respondents are also wrong to suggest that the “no set of circumstances” test does not apply to facial challenges brought as taxpayers. Respondents hang their hats on one wrongly decided appellate decision that held that when *taxpayer* litigants bring a facial challenge, the Court applies the test “dictated by the nature of the challenge,”⁴ rather than the no set of circumstances test. *Burlingame Br.* at 16 (quoting *Robinson*, 102 Wn. App. 795 at 808). The superior court properly concluded that *Robinson* is not good law. The Respondents offer no

⁴ The *Robinson* Court never explained what this statement meant.

sound basis for treating taxpayer litigants differently from other litigants in facial constitutional litigation.⁵

As explained in the State's opening brief, when the Court of Appeals decided *Robinson*, it mistakenly believed that the no set of circumstances test had not been applied to facial challenges in Washington. Opening Brief of Appellant/Cross-Respondent State of Washington (State's Opening Br.) at 17. The *Robinson* Court was wrong, however, as this Court had already recognized the no set of circumstances test as the appropriate standard against which to weigh facial constitutional challenges on two occasions. *Tunstall ex rel. Tunstal*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000); *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999). Moreover, *Robinson* offers no sound basis for taxpayer litigants to be subject to a different, presumably lesser, standard than traditional litigants in facial challenges. The Court should thus clarify that the no set of circumstances test applies in all facial challenges, no matter the standing of the litigants.

⁵ Respondents' suggestion that taxpayer litigants be afforded deferential treatment would lead to absurd results in cases such as this, with multiple plaintiffs. If some plaintiffs rely on traditional standing, for example because they have suffered an injury in fact, while others rely simply on their taxpayer status, the court would have to apply multiple standards of review to plaintiffs' claims.

3. The no set of circumstances test applies to Respondents' separation of powers claims.

Respondents correctly assert that their separation of powers claims are not fact dependant, and, instead, are dependant on the text of the law as compared to the Court's decision in *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Respondents are wrong, however, that the no set of circumstances test does not apply to the Court's separation of powers analysis because the test is inherent in the analysis. In effect, a law that is alleged to violate the constitutional separation of powers will either violate separation of powers "in all circumstances," or in no circumstances at all. There can be no occasional violation of the separation of powers, whereas a law may in certain *factual scenarios* violate due process, when it will not do so in other factual scenarios.

4. The no set of circumstances test applies to Respondents' procedural due process claims.

On the procedural due process issues, Respondents advocate for application of the factors prescribed in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976),⁶ and suggest that these factors conflict with the no set of circumstances test. On the contrary, the no set of circumstances test is a *standard of review* that complements the

⁶ The *Mathews* factors are set forth on page 45 of this brief, below.

Mathews factors, and is appropriately applied with the *Mathews* factors in a facial procedural due process challenge, such as this.

For example, this Court has applied the *Mathews* factors in assessing procedural due process challenges and has applied the no set of circumstances test coupled with those factors to declare a statute facially unconstitutional. In *City of Redmond v. Moore*, 151 Wn.2d 664, 667, 91 P.3d 875 (2004) the Court held that statutes that provided for mandatory suspension of driver's licenses after drivers failed to resolve traffic infractions violated procedural due process because the drivers were not afforded an administrative hearing before or after the effective date of the suspension. *Moore*, 151 Wn.2d at 667. The Court concluded that the drivers had presented a facial challenge, and that the no set of circumstances test was the appropriate standard of review. *Id.* at 669. The Court then weighed the *Mathews* factors, and determined that the challenged statutes facially violated procedural due process *in all circumstances* because they failed to afford *any driver* facing a license suspension an opportunity for an administrative hearing.

In summary, the no set of circumstances test is not in conflict with the balancing analysis required under *Mathews*. To the contrary, the tests are complementary and function well together, as *Moore* demonstrates.

5. *Planned Parenthood v. Casey* is applicable only to first amendment claims.

Citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), Respondents argue that if the Court applies the no set of circumstances test to its substantive due process claims, it must focus the analysis on situations in which water rights are harmed by the MWL, rather than considering the impact on all water rights holders. Burlingame Br. at 28. In *Casey*, the United States Supreme Court addressed a First Amendment challenge to a law that required women to notify their spouses before obtaining an abortion. The Court held that in analyzing the impact on the women's rights under the First Amendment, "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 833. Applying this analysis, the Court's plurality decision held that in "a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." *Id.* at 894.

The *Casey* decision does not represent a wholesale departure from the no set of circumstances test applied in *Salerno*. *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). As the

United States Supreme Court has stated, analyzing a facial challenge by questioning whether a substantial number of applications of the law are unconstitutional is a second form of analysis when the facial challenge is based on a First Amendment claim. *Wash. State Grange v. Wash. State Republican Party*, __ U.S. __, 128 S. Ct. 1184, 1191, n.6, 170 L. Ed. 2d 151 (2008). The courts continue to universally apply the no set of circumstances standard outside the First Amendment context. *See, e.g., Planned Parenthood of S. Ariz. v. Lawall*, 193 F.3d 1042, 1046 (9th Cir. 1999) (“no decision of the Supreme Court has ever abrogated the explicit *Salerno* standard.”); *United States v. Dang*, 488 F.3d 1135, 1142 (9th Cir. 2007) (the *Salerno* “no set of circumstances” standard applies outside First Amendment facial challenges).

The subject case does not raise a First Amendment claim. Respondents offer no basis for this Court to depart from its established precedent of applying the no set of circumstances test to facial challenges. The Court should confirm what it has repeatedly acknowledged—that facial constitutional litigation in Washington is approached with judicial restraint and deference to the Legislature. In so doing, the Court should conclude that the Respondents bear a very heavy burden of demonstrating that the challenged sections of the MWL are unconstitutional beyond a reasonable doubt, and that they must also show that there can be no set of

circumstances where the challenged subsections can be constitutionally applied.

B. The Legislature Did Not Violate Separation Of Powers In Enacting The Municipal Water Law

Under this Court's recent decision in *Hale*, the superior court's ruling that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) violate the separation of powers was erroneous. *Hale* involved an employee claim of disability discrimination under the Washington Law Against Discrimination. The Court considered whether the Legislature's enactment of Substitute S.B. 5340, 60th Leg., Reg. Sess. (Wash. 2007) which provided a definition of the term "disability," violated the separation of powers. RCW 49.60.040(25)(a).

Before enactment of SSB 5340, the term "disability" was not statutorily defined. The term was construed by this Court in *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000). Subsequently, a more restrictive interpretation of the term was adopted in *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). The Legislature reacted by enacting SSB 5340, which provided a broader definition of the term "disability." The statutory definition was expressly retroactive to the decision in *McClarty* and prospective to the effective date of the statute, but was inapplicable to actions arising between the date of the *McClarty*

decision and the statute's effective date. *Hale*, 198 P.3d at 1024–1025. In *Hale*, this Court held SSB 5340 did not violate separation of powers because it did not change the result of the *McClarty* case. *Id.* at 1028–1029.

Respondents' arguments on separation of powers must be rejected for two reasons. First, they rely on an application of the separation of powers doctrine that is outdated and flawed. Under *Hale*, separation of powers is violated by the Legislature when it enacts a statute that operates retroactively to reverse an actual court decision in a manner that produces a different result for the litigants in the case. Contrary to Respondents' positions, separation of powers is not violated when the Legislature amends a statute retroactively in a manner that merely contravenes a judicial construction of a statute. By passing the amendments to the MWL, the Legislature did not change the result in *Theodoratus* and reverse this Court's decision in that case.

Second, even if the Court accepts Respondents' erroneous and overly restrictive application of separation of powers, their arguments also fail. Even though *Theodoratus* held that it was ultra vires for the Department of Ecology (Ecology) to prematurely issue water certificates based on system capacity rather than actual water use, this Court did not

invalidate any actual water rights that were documented by such certificates. As such, Respondents are mistaken that RCW 90.03.330(3) somehow reversed *Theodoratus* by resuscitating water rights that were invalidated by that decision. Further, although the Court in *Theodoratus* acknowledged that the decision did not extend to municipalities, the decision did not fully consider the broader question of whether private entities could hold municipal water rights. That question was not squarely before the Court so there could not be a holding that could cause violation of separation of powers when the terms “municipal water supply purposes” and “municipal water supplier” were later defined for the first time by the Legislature.

Contrary to Respondents’ arguments, in enacting the MWL, the Legislature acted wholly within its sphere of authority to make policy, to pass laws, and to amend laws already in effect. *See Hale*, 198 P.3d at 1028. In the interaction between *Theodoratus* and the enactment of the MWL, the judicial and legislative branches worked together “in harmony and in the spirit of reciprocal deference to the other’s important role and function in the art of governing.” *See Id.* at 1028–1029.

- 1. Respondents’ application of separation of powers is overly restrictive of the legislative branch’s lawmaking function.**

The Respondents argue that the Legislature's authority to enact retroactive amendments to laws that were previously construed by this Court is highly limited. They rely on several decisions of this Court to support the proposition that an amendment that operates retroactively to contravene an earlier judicial construction of a statute violates separation of powers. See Opening Brief of Respondents/Cross-Appellants Lummi Nation, et al. (Tribes' Br.) at 14; Burlingame Br. at 33. However, the *Hale* decision undercuts this argument. Their separation of powers claims fail because their position overly restricts the Legislature's function to set policy and make law so long as it does not intrude upon the judiciary's function to interpret the law and apply it to individual cases.

To determine whether a statute violates separation of powers, one must ascertain whether its enactment has "threatened the independence or integrity or invaded the prerogatives of the judicial branch." *Hale*, 198 P.3d at 1027. Contrary to Respondents' position, this determination does not hinge simply on whether a retroactive amendment "contravenes" or "overrules" an earlier judicial interpretation of the statute. Instead, separation of powers is violated when a retroactive statute actually reverses a prior decision of this Court, and a decision is reversed only when the actual outcome of the case for its parties is overruled.

Hale raises questions about the precedential value of several cases relied upon by the Respondents,⁷ and states that “this court has never specifically decided the question [on whether a retroactive amendment violates separation of powers] before us. We have hinted that a retroactive legislative amendment that rejects a judicial interpretation would give rise to separation of powers concerns.” *Hale*, 198 P.3d. at 127–128. But the opinion goes on to recognize that none of the earlier Supreme Court cases discussed in the opinion actually reached or decided separation of powers issues relating to retroactive statutory amendments. Thus, in *Hale*, this Court freshly considered the separation of powers doctrine in the context of retroactive legislation, moved away from the pronouncements in the earlier decisions relied on by Respondents,⁸ and adopted an approach which recognizes more flexibility for the Legislature to react to judicial decisions and exercise its prerogative to craft policy and make law, as it did with the MWL.

In *Hale*, this Court considered whether the retroactive amendment to the Washington Law Against Disabilities interfered with the judicial

⁷ Tribes’ Br. at 13 (citing *Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976)); Burlingame Br. at 33 (citing *In re Pers. Restraint of Stewart*, 115 Wn. App. 319, 75 P.2d 521 (2003), and *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 832 P.2d 1303 (1992)).

⁸ Respondents also rely on additional cases not discussed in *Hale*. However, these cases, *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997), and *State v. Dunaway*, 109 Wn.2d 207, 216 n.6, 743 P.2d 1237 (1987), reference and follow the *Johnson*, *F.D. Processing*, and *Stewart* decisions which were questioned in *Hale*.

sphere of power by reversing the earlier decision in *McClarty*, and concluded it did not. This approach is consistent with separation of powers jurisprudence in the federal courts. Retroactive legislation violates separation of powers when it sets aside a prior court judgment. *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 modify 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).

2. The Legislature acted within its sphere of power by enacting RCW 90.03.015(3) and (4).

Under *Hale*, even if the Court accepts Respondents' flawed arguments that the definitions of "municipal water supplier" and "municipal water supply purposes" contravene a statutory interpretation in *Theodoratus*, separation of powers is not violated because enactment of the definitions did not reverse *Theodoratus* and produce a different outcome for its parties.

Further, even if the Court applies Respondents' pre-*Hale* theory that separation of powers is violated when a retroactive amendment contravenes the construction of a statute, Respondents still cannot prove beyond a reasonable doubt that separation of powers is violated. They

mischaracterize pronouncements concerning the formerly undefined terms “municipal water supply purposes” and “municipal water supplier” in *Theodoratus* as clear holdings that were “overruled” by passage of the MWL.

- a. **Under *Hale*, RCW 90.03.015(3) and (4) do not violate separation of powers because they did not change the result in *Theodoratus*.**

In *Theodoratus*, this Court held that Ecology properly included a condition in Mr. Theodoratus’ permit requiring that a certificate would not be issued before water is beneficially used. In enacting statutory definitions for the terms “municipal water supplier” and “municipal water supply purposes” for the first time, the Legislature did not retroactively alter the result in *Theodoratus* and intrude upon the judicial sphere of power.

While the State argues that the Court’s pronouncements pertaining to the undefined terms in *Theodoratus* were dicta, and Respondents argue they were holdings, such a distinction is immaterial under *Hale* because the *Theodoratus* decision has not been altered by the MWL. Even if the MWL had been passed immediately before the issuance of this Court’s

decision, the new retroactive⁹ law would not have caused Mr. Theodoratus to receive a permit without the condition requiring beneficial use. RCW 90.03.330(4) provides that water certificates must only be issued based on actual use after the effective date of the MWL. Thus, even if Mr. Theodoratus' right had been deemed to be for municipal water supply purposes, it would not have changed the result of the case. He still would have a permit with a condition requiring that certification could not occur before he beneficially uses the water. As such, under *Hale*, enactment of the statutory definitions does not violate separation of powers because the definitions could not and did not precipitate reversal of *Theodoratus* by imposing a different result for the affected parties, Mr. Theodoratus and Ecology.

RCW 90.03.015(3) and (4) are analogous to SSB 5340, the definition for the term "disability" at issue in *Hale*. Like in *Hale*, in this case, the terms "municipal water supplier" and "municipal water supply purposes" were not defined. Analysis in the *Theodoratus* opinion relating to these terms cast uncertainty as to who could qualify to hold municipal water rights. *See* State's Opening Br. at 5, 22. The MWL was passed, in

⁹ The State agrees with Respondents that RCW 90.03.015(3) and (4) operate retroactively because they make the exception to relinquishment under RCW 90.14.140(2)(d) for water rights for municipal supply purposes applicable to excuse nonuse of water that occurred prior to the effective date of the MWL. The State concurs with Respondents that the precipitating event for relinquishment is the nonuse of water, and not a later administrative or judicial determination. *See* Tribes' Br. at 51-53.

part, as a legislative response to the *Theodoratus* decision. See State's Opening Br. at 5. Like in *Hale*, where the Legislature was careful to provide a window of time where the new definition of "disability" would not be effective so it would not set aside the result in *McClarty* or affect employers who had relied on that decision, the MWL was crafted to ensure that the law would not invade the prerogative of the judiciary by reversing and changing the result in *Theodoratus*.

Since the MWL did not reverse *Theodoratus*, the Legislature acted entirely within its bounds to retroactively provide definitions for two terms that were previously undefined within the Water Code. The Legislature responded to *Theodoratus* and set policy by defining terms that had sown confusion, but was careful not to upset this Court's decision.

b. Even under respondents' overly restrictive view of separation of powers, RCW 90.03.015(3) and (4) are constitutionally sound.

If the Respondents' pre-*Hale* view of separation of powers prevails, they still cannot meet their burden to prove that the definitions are unconstitutional beyond a reasonable doubt. The dispute centers on whether the following analysis in *Theodoratus* constitutes holdings that private entities could not hold water rights for municipal purposes which are exempt from relinquishment:

We are also not persuaded by Appellant's claim that a distinction is warranted because his is a public water supply

system. Initially, we note that Appellant is a private developer and his development is finite. Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case. . . .

Water rights may be relinquished. The failure “to beneficially use all or a part” of the right for five years, without sufficient cause, “shall relinquish the right in whole or in part. If system capacity defined the quantity of the right, i.e. system capacity equated to beneficial use as a measure and limit of the right, these statutory provisions would be meaningless.

Theodoratus, 135 Wn.2d at 594–595 (citations omitted). For the reasons explained in the State’s opening brief, these pronouncements are dicta. See State’s Opening Br. at 18–28.

From this language, Respondents attempt to produce “holdings” that “because Mr. Theodoratus was a ‘private developer,’ he was not a ‘municipality’ or a ‘municipal’ water supplier,” and that “Mr. Theodoratus, as a private developer, was not eligible for the ‘municipal water supply purposes’ exemption from relinquishment.” Tribes’ Br. at 37–38. In reality, the parties did not present an issue regarding whether private entities in general could qualify to hold water rights for municipal supply purposes.¹⁰ State’s Opening Br. at 24–25. The Court did not have to determine whether Mr. Theodoratus, or a

¹⁰ Respondents’ reliance on *State v. Goldberg*, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003), to support their contention that “while the court could have addressed the issues as framed by the parties, it was certainly not bound to do so” is misplaced. Tribes’ Brief at 44. *Goldberg* only supports the proposition that this Court can entertain issues that differ from those framed by the parties to a case. The case, however, does not involve a question of whether a separation of powers violation occurs in such a situation.

private entity, could qualify for the municipal exemption from relinquishment because Mr. Theodoratus's water right was unperfected and was not subject to relinquishment. *See Id.* at 25. Since the Court did not need to reach the question, the language cited by the Respondents was dicta.

Further, Respondents are incorrect in maintaining that RCW 90.03.015(3) and (4) are not curative based on their contention that the term "municipal water supply purposes" was "not ambiguous" prior to enactment of the MWL. Tribes' Br. at 45. They neglect to acknowledge that this term was not *defined* anywhere in the Water Code prior to the MWL. While Respondents rely on dictionary definitions to argue that the adjective "municipal" often relates to units of government, such broad definitions have limited application in a specialized area such as water law. As explained in the State's opening brief, ambiguity over the term is reflected, among other things, by the fact that numerous private entities were issued municipal water rights prior to the MWL. State's Opening Br. at 40–42. Further, Washington case law views entities such as cities, public utility districts, special purpose districts and private entities as performing the same proprietary functions (in contrast to "governmental" functions) when they provide utility services to customers, such as water services. *Id.* at 25–26.

As a result of a checkered history relating to Ecology's practices stemming from the lack of statutory definitions, the term was ambiguous, and the Legislature acted in curative fashion to remedy uncertainty by enacting RCW 90.03.015(3) and (4). In doing so, the Legislature did not usurp the role of the judiciary.

3. The Legislature acted within its sphere of power by enacting RCW 90.03.330(3).

Under *Hale*, even if the Court accepts Respondents' interpretation of the words "in good standing" in RCW 90.03.330(3), there is no violation of separation of powers because enactment of the statute did not reverse the decision in *Theodoratus*. And, even if Respondents' narrow pre-*Hale* view of the separation of powers doctrine is applied, they cannot prove beyond a reasonable doubt that separation of powers is violated.

a. Under *Hale*, RCW 90.03.330(3) does not violate separation of powers because the statute could not cause a different result in *Theodoratus*.

RCW 90.03.330(3) states that a water right certificate issued prior to September 9, 2003, based on system capacity, "is a right in good standing." After September 9, 2003, RCW 90.03.330(4) provides that certificates may only be issued based on "actual beneficial use of water."

Mr. Theodoratus held a permit, not a certificate. He appealed Ecology's decision approving a permit extension, under the condition that

a certificate would not be issued until the water was actually used. This Court upheld the condition. RCW 90.03.330(3) does not change the result of *Theodoratus*. Even if RCW 90.03.330(3) had become effective before the Court's decision, Mr. Theodoratus could only have qualified for a permit conditioned on a requirement that he put water to actual use. Indeed, RCW 90.03.330(4) implements the *Theodoratus* decision by requiring that future certificates be issued based on actual use of water, rather than system capacity. As such, under *Hale*, RCW 90.03.330(3) plainly does not violate separation of powers because its enactment did not produce a different outcome in *Theodoratus*.

b. Even under Respondents' restrictive pre-*Hale* application, RCW 90.03.330(3) does not violate separation of powers.

Respondents' challenge to RCW 90.03.330(3) is grounded on the mistaken notions that (1) the Legislature "overruled" *Theodoratus* by resuscitating water rights that were invalidated by this Court because they are documented by pumps and pipes certificates, and (2) "contravened" this Court's interpretation of the Water Code. Their arguments fail.

The Tribes assert that the "State erroneously contends that the *Theodoratus* Court did not hold that 'pumps and pipes' certificates that Ecology had issued prior to the decision were invalid." Tribes' Br. at 16.

The State acknowledges that *Theodoratus* held that issuance of certificates based on system capacity exceeded Ecology's authority. *Theodoratus* held that it was unlawful for Ecology to prematurely issue certificates to document water rights that were not fully perfected based on actual use of water. While *Theodoratus* did hold that pumps and pipes certificates were improperly issued, it did not hold that the water rights underlying such certificates held by individuals and entities that were not parties to the case were invalid and void. The dissenting opinion in *Theodoratus* aptly states that the decision "destabilizes all certificates already issued under the pumps and pipes approach." *Theodoratus*, 135 Wn.2d at 602 (Sanders, J. dissenting). "Destabilization," however, is a far cry from invalidation and elimination. To alleviate the uncertainty over such certificates that was cast by *Theodoratus*, the Legislature responded to the holding that certificates were issued ultra vires by deeming that they are "in good standing." The Legislature could do so without intruding into the judicial sphere of power because it did not "revive" water rights by overruling a court decision that had invalidated them and rendered them void.

Respondents' arguments that the Legislature contravened this Court's interpretation of the Water Code by enacting RCW 90.03.330(3) are also flawed because they misconstrue the phrase "in good standing."

The Respondents erroneously contend that, based on those words, the statute causes a “repeal of the beneficial use requirement,” and overrules the holding in *Theodoratus* that water rights will vest only when water is put to actual beneficial use. Burlingame Br. at 37; Tribes’ Br. at 19–20.

RCW 90.03.330(3) does not repeal the beneficial use requirement. A water right must still be put to use to become a “perfected” right. The term “in good standing” is a term of art in Washington water law regarding inchoate water rights, which have not been perfected through beneficial use. By including the term “in good standing” for water rights documented by certificates based on system capacity, the Legislature clarified that Ecology’s issuance of system capacity certificates did not take those water rights *out of* good standing, but that holders of such rights would still have to meet other water law principles, such as due diligence in project development, to keep them in good standing. *See* State’s Opening Br. at 31–32.

Nothing in RCW 90.03.330(3) exempts inchoate rights that are documented by pumps and pipes certificate from being subject to the requirements for maintenance of such rights. Any possible question on this point is firmly addressed by RCW 90.03.460, which provides that “[n]othing in this chapter . . . shall operate to effect an impairment of any inchoate right to divert and use water while the application of the water in

question to a beneficial use is being prosecuted with reasonable diligence having due regard to the circumstances surrounding the enterprise, including the magnitude of the project. . . .” The MWL did not repeal this provision, and RCW 90.03.330(3) does not exempt inchoate rights documented by pumps and pipes certificates from its requirements. The Respondents, in effect, are asking the Court to rewrite the law to create a conflict in the Water Code.

Contrary to Respondents’ contentions, the State is not “rewriting” the statute to add words imposing the requirements for maintenance of inchoate water rights to keep them in good standing, or conjuring a “litigation-driven interpretation.” Instead, the State is providing a plausible statutory interpretation—and where there are two plausible interpretations, the one that is constitutionally sound must prevail. *Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976).

Moreover, RCW 90.03.330(2), which specifies when pumps and pipes certificates may be revoked, does not “confirm” that the Legislature intended that a pumps and pipes certificate be treated as a fully perfected right or negate the requirements for maintaining the validity of inchoate water rights. *See Tribes Br.* at 22. As discussed in section IV.B.3, below, if an adjudication is filed in court, or a water right change application is submitted to Ecology, the validity of the water rights will be scrutinized to

determine whether they are valid and “in good standing.” Inclusion of the term “in good standing” does not automatically perfect inchoate water rights or insulate them from scrutiny.

c. RCW 90.03.330(3) does not impermissibly make judicial determinations.

The State adopts WWUC’s argument in section III.B.2 of its response/reply brief, and provides the following additional argument opposing Respondents’ theory that RCW 90.03.330(3) violates separation of powers because the statute “constitutes an unconstitutional ‘legal conclusion’ or ‘judicial determination’ regarding the validity of individual water rights.” *See Tribes’ Br. at 23-29.*

Respondents’ reliance on *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 973 P.2d 179 (1999), is misplaced. In *San Carlos Apache Tribe*, an Arizona statute operated retroactively to quantify water rights that were subject to an ongoing general adjudication. The Arizona Supreme Court held that “any attempt by the Arizona Legislature to adjudicate pending cases by defining existing law and applying it to fact” violates separation of powers. *San Carlos Apache Tribe*, 973 P.2d at 194-195.

In *San Carlos Apache Tribe*, the Arizona legislation violated separation of powers because it produced outcomes on specific water

rights by altering earlier determinations of the trial court. *Id.* at 197. In sharp contrast, by including the phrase “in good standing” in RCW 90.03.330(3), the Washington Legislature did not make any determinations with respect to the validity or extent of any certificated water rights, or alter the result of any court decision. Under RCW 90.03.330(2), courts can determine the validity of water rights in future adjudications. RCW 90.03.330(3) does not shield any particular water right from a judicial determination of its actual validity and extent. RCW 90.03.330(2) must be read together with RCW 90.03.330(3) to determine the Legislature’s intent, and the Legislature could not have intended to adjudicate facts in one section, and leave those same facts open for determination by the courts in the adjacent section.

Since the Legislature did not judicially determine the nature or validity of specific water rights, the superior court’s conclusion that RCW 90.03.330(3) violates separation of powers should be reversed.

C. The Municipal Water Law Satisfies Substantive Due Process

The crux of Respondents’ substantive due process claims is that the challenged subsections of the MWL resurrect or expand senior water rights at the expense of junior water rights. The State incorporates and adopts the WWUC argument that the substantive due process claims fail because they cannot identify any rights that are harmed or demonstrate

harm beyond mere speculation. Washington Water Utilities Council (WWUC) Response/Reply Br. Section. III. C.1. Simply put, Respondents' substantive due process claims fail because the MWL does not resurrect relinquished water rights.

1. RCW 90.03.015(3) and (4) do not resurrect relinquished water rights.

The Legislature clarified that municipal water suppliers include private purveyors who serve water for human and domestic needs. Because there is "at least one way" that the definitions can apply without violating the constitution—prospectively—Respondents' facial substantive due process challenge to the definitions fails.

Further, Respondents disregard prior ambiguity in the law and the fact that the Legislature chose to resolve this ambiguity by defining the subject terms for the first time. Legislation defining terms for the first time is evidence of the curative nature of a statute or amendment. *Harbor Steps Ltd. P'ship v. Seattle Technical Finishing, Inc.*, 93 Wn. App. 792, 800, 970 P.2d 979 (1999). The terms are curative and do not facially violate substantive due process because they do not retroactively change the law or deprive junior water right holders of their vested property interests. Ecology agrees with WWUC that the new definitions contained in RCW 90.03.015(3) and (4) resolved ambiguity in the water code and

therefore adopts the arguments in section III.C.3.a. of WWUC's response/reply brief.

Moreover, Respondents fail to rebut the State's argument that there can be no retroactive revival of long relinquished water rights. State's Opening Br. at 43–45. The definitions contained in RCW 90.03.015(3) and (4) require *actual beneficial use* for one of the stated purposes in RCW 90.03.015(4) before a water right will be considered a “municipal” water right that is exempt from relinquishment under RCW 90.14.140(2)(d).

An unused water right is subject to relinquishment under RCW 90.14.160–.180. Water rights claimed for “municipal water supply purposes” are exempt from relinquishment. RCW 90.14.140(2)(d). One must necessarily be a “municipal water supplier” serving water under a particular water right for “municipal water supply purposes” *as that term is expressly defined* before nonuse in whole or part can be considered excused under RCW 90.14.140(2)(d). Thus, even on a retroactive basis, there can be no revival of long unused water rights, regardless of the public or private nature of the purveyor. This is because a purveyor will lose a municipal water supply purposes water right if the purveyor allows five or more years to pass without using the water right. RCW 90.03.015(4).

The Tribes counter that the definitions still violate substantive due process notwithstanding the requirements of RCW 90.03.015(4). Tribes' Br. at 56–57. The Tribes offer a hypothetical in which a private purveyor has a right to serve 300 service connections but for over five years serves only 150 connections. They contend that prior to the MWL, the *private* purveyor's partial nonuse would be subject to relinquishment, whereas under the MWL, the purveyor's partial nonuse is excused if the purveyor holds a right for "municipal water supply purposes" by serving at least fifteen service connections.

The Court should reject the Tribes' hypothetical argument. Facial challenges are expressly disfavored because they raise the risk of premature interpretation of a statute on the basis of a factually barren record. As the United States Supreme Court has cautioned, "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 128 S. Ct. at 1190 (citing *United States v. Raines*, 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960)) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."))

Respondents have had since 2003 to identify a single instance of “retroactive revival” of water rights held by a private purveyor that would have relinquished absent the MWL. Instead, they request that the challenged definitions be declared facially unconstitutional based on their subjective notion of what a municipal water supplier should be, coupled with a speculative hypothetical, but no hard facts. A declaration of facial invalidity is improper under such circumstances. Because the State offers the Court a constitutional construction of the MWL, one that recognizes prior ambiguities in the law and does not result in the retroactive revival of relinquished water rights, Respondents’ facial substantive due process challenges to RCW 90.03.015(3) and (4) should be rejected.¹¹

2. RCW 90.03.330(3) does not retroactively enlarge water rights documented by pumps and pipes certificates to the detriment of other water rights.

RCW 90.03.330(3) states that water rights documented by pumps and pipes certificates are “in good standing.” The statute does not conflict with *Theodoratus*; rather, it implements *Theodoratus* while clarifying ambiguity created by the decision. As such, this provision does not violate substantive due process by retroactively changing the law or “enlarging” water rights documented by pumps and pipes certificates at the expense of

¹¹ If the Court concludes that retroactive application of RCW 90.03.015(3) and (4) violates the Constitution, the Court should rule that retroactive application is impermissible and that the statutes must only be applied prospectively. See WWUC’s Response/Reply Br., Section III.C.3.c.

other water right holders. Respondents fail to meet their burden to prove that RCW 90.03.330(3) facially violates substantive due process.

Ecology adopts and incorporates WWUC's arguments on this issue. WWUC Response/Reply Br., Section III.C.2. Ecology concurs with WWUC that Respondents' argument that RCW 90.03.330(3) is facially invalid relies on a fundamentally flawed reading of *Theodoratus*. *Theodoratus* did not invalidate thousands of pumps and pipes certificates, nor did RCW 90.03.330(3) automatically validate inchoate quantities of water associated with those certificates and relieve certificate holders from due diligence requirements of law. Respondents' reading of the law is subjective and should be rejected. Where, like here, the State and WWUC offer a reasonable, well-supported constitutional construction of the law, the Court should adopt the construction that preserves the statute.

IV. RESPONSE ARGUMENT

A. **The Sections of the Municipal Water Law Upheld by the Superior Court Satisfy Substantive Due Process.**

1. **RCW 90.03.386(2) does not facially violate substantive due process.**

The superior court's ruling that RCW 90.03.386(2) does not facially violate substantive due process under the state and federal constitutions should be affirmed for two reasons. First, it only operates prospectively. It does not retroactively change the law to the detriment of

others' vested rights. Second, even if it did operate retroactively, Respondents cannot show that there is no set of circumstances in which the statute can be applied without negatively impacting vested rights.

- a. **RCW 90.03.386(2) is not retroactive and cannot alter past events in violation of substantive due process.**

The Legislature amended RCW 90.03.386 as an integrated part of the 2003 MWL, adding two sections to the original law.¹² Under the “place of use” subsection, RCW 90.03.386(2), when the Department of Health (Health) approves a municipal water supplier’s water system plan, the places of use of the supplier’s water rights become part of the approved plan’s service area. The supplier would not need to obtain a change in place of use from Ecology for any affected water right that would be used in the approved service area but outside its original place of use. Before the municipal supplier may use its water rights throughout the service area, it must satisfy certain conditions related to its water system plan approval. These conditions require consistency with applicable local government plans and development regulations at the time of plan approval, and compliance with the plan during operations.

¹² RCW 90.03.386 was adopted in 1991, as part of a bill that also addressed the value of interconnections between public water systems. Laws of 1991, ch. 350, §§ 1–3. RCW 90.03.386 was originally a single sentence: “Within service areas established pursuant to chapters 43.20 and 70.116 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.” Laws of 1991, ch. 350, § 1.

This section's reference to "a municipal water supplier's service area under chapter 43.20 RCW" must be construed together with RCW 43.20.260, which was adopted as a new section under the MWL. The amended RCW 90.03.386 and the new section RCW 43.20.260 took effect on September 9, 2003, the effective date of the MWL. Beginning September 9, 2003, a water system plan or plan amendment submitted to Health by a municipal water supplier is reviewed under RCW 43.20.250, RCW 43.20.260 and related rules, including WAC 246-290-100. The "place of use" service area provisions of RCW 90.03.386(2) are integral to the new "duty to serve" added under RCW 43.20.260, subject to the conditions and limitations in that section and subject to the conditions and limitations for providing water outside a municipal water supplier's water original water right place of use under RCW 90.03.386(2).

Under RCW 90.03.386(2), three things must occur before a municipal water supplier's authorized place of use under its water rights is changed to coincide with the supplier's service area: (1) Health must approve a planning or engineering document describing the service area; (2) the municipal water supplier must be in compliance with the terms of its water system plan or small water system management program; and (3) the alteration of the place of use cannot be inconsistent with other local planning documents. These requirements, conditions, and the "duty to

serve” did not exist prior to September 9, 2003. Thus, although this provision might change the place of use of a municipal water right, it does so *prospectively only*.¹³

Under the plain language of RCW 90.03.386(2) and its companion MWL sections, the challenged “place of use” provisions can only be characterized as prospective in operation. Simply put, because RCW 90.03.386(2) does not operate retroactively, the facial substantive due process challenge is without merit.

b. Even if RCW 90.03.386(2) were retroactively applicable, it would comply with substantive due process.

If RCW 90.03.386(2) were retroactive, Respondents would have to prove that in *all circumstances* a retroactive application of the statute would deprive other water rights holders of their vested rights. They cannot meet this burden. It is undisputed that there are circumstances where a municipal water supplier’s water rights expressly describe the place of use as “the area served by” that municipal water supplier.¹⁴ When a municipal water supplier has a water right document describing the place

¹³ This prospective application is shown by Ecology and Health’s Joint Review Procedures for Planning and Engineering Documents, which states that a change of the place of use of a water right based on expansion of a water system’s service area “only applies to approvals after September 9, 2003.” CP 2407; CP 2411-2415.

¹⁴ For example, the Annapolis Water District in Port Orchard, the North Perry Avenue Water District in Bremerton, the Evergreen Water and Improvement District in Ravensdale, Black Diamond, Colfax, Manchester Water District in Manchester, and Public Utility District No. 1 of Kitsap County in Poulsbo. CP 1485-1486 (Slattery Decl.).

of use as the “area served,” RCW 90.03.386(2) cannot operate to unconstitutionally harm other water right holders by changing the pattern of return flows. RCW 90.03.386(2) confirms that a municipal water supplier can use any of its water rights throughout its approved service area. When a water right is already approved for use in the area served by a municipal water supplier, RCW 90.03.386(2) effects no change to pre-MWL law and cannot harm any water right holders.

Moreover, Respondents’ assertion that changing the place of use of a municipal water supplier’s service area by operation of law “necessarily affects and impairs competing or junior water rights in the process” is entirely speculative, without factual support, and inappropriate for a facial challenge.¹⁵ Respondents do not satisfy their burden in a facial challenge by demonstrating a particular instance, or even a hypothetical situation, where expansion of the place of use of a municipal water supplier’s water right into its approved service area under RCW 90.03.386(2) alters return flows and harms the vested rights of other water right holders.

To support a “return flow” argument, Burlingame mistakenly relies on a pre-MWL Pollution Control Hearings Board (PCHB) decision, *Big*

¹⁵ The place of use provision for qualifying municipal water suppliers’ plans reflects the infrastructure and service delivery reality of municipal systems, which integrate water treatment, transmission and wastewater infrastructure. *See* Kirner Decl. at CP 1540–1584 (summary of City of Tacoma system). The systems must integrate the supplier’s rights and the places of use as a function of complying with the federal Safe Drinking Water Act and Clean Water Act. *See, e.g.*, RCW 70.119A, RCW 90.48.

Creek Water Users Ass'n v. Dep't of Ecology, PCHB No. 02-113 (Dec. 2002), for the proposition that water right holders have a vested right in continuation of the stream conditions that existed at the time of their appropriations. *Burlingame Br.* at 60. However, the PCHB did not hold that all transfers or changes that may affect other water users are prohibited. The decision recognized that “[t]ransfers and changes are one of the ways recognized, and even encouraged, under Washington’s water code to more efficiently and effectively provide for beneficial uses, given the incredible population growth expected to occur in the future.” *Big Creek Water Users Ass'n*, PCHB No. 02-113, at 10.¹⁶

The MWL is one of many legislative acts passed in the last 90 years redefining or clarifying the private use of water to meet public goals, and impacting use of current and future water rights. *See State’s Opening Br.* at 12–14. As further explained in section IV.B.1.a., below, RCW 90.03.386(2) provides more effective methods of accommodating changes in place of use for municipal water suppliers, and adds planning consistency requirements to address potential harms or conflicts. The facial challenge to RCW 90.03.386(2) fails under the “beyond a

¹⁶ In support of their contention that, under RCW 90.03.386(2) changes to places of use affect return flows and facially violate the vested rights of other water right holders, Respondents cite *Danielson v. Kerbs Ag., Inc.*, 646 P.2d 363 (Colo. 1982). *Burlingame Br.* at 60. The State incorporates WWUC’s analysis that this decision is inapplicable to this case. WWUC Response/Reply Br., Section III .C.4.

reasonable doubt” burden of proof under which the Court affords deference to policies made by the legislative branch.

2. RCW 90.03.260(4) and (5) do not facially violate substantive due process.

Only the Tribes appeal the superior court’s ruling that “RCW 90.03.260(4) and (5) do not facially violate substantive due process under the state and federal constitutions.” The appeal is premised on an erroneous argument that the new subsections retroactively expand the rights of municipal water suppliers by removing population and service connection figures as attributes “limiting exercise of the water right.” Tribes’ Br. at 69. This argument should be rejected for two reasons. First, these sections cannot violate substantive due process because they operate prospectively. Second, even if they did operate retroactively, the sections would satisfy substantive due process because the change in the law acts as a curative amendment to correct prior ambiguity, without detrimentally impacting vested rights. Even if vested rights were impacted, the Tribes cannot show that these sections deprive other water rights holders of vested rights in all circumstances.

The Tribes’ argument rests on two false characterizations: (1) that population and service connection figures were or are limitations under the Water Code and (2) that either subsection operates retroactively. As

amended by the MWL, RCW 90.03.260(4) and (5) identify information to be provided to Ecology by applicants for water rights. Under subsection (4), applicants for community or multiple domestic water supply must state the number of connections they seek to serve. If the applicant is a municipal water supplier that has an approved water system plan under RCW 43.20, or has Health approval to serve a specific number of connections, the projected number of connections in the application or certificate will not limit the water right, so long as the number of connections served is consistent with the approved water system plan or Health approval. RCW 90.03.260(4). Subsection (5) states that municipal water supply applications must state the present population to be served, and estimate the municipality's future requirement. If the municipal water supplier has an approved water system plan under RCW 43.20, or has Health approval to serve a specific number of connections, the population figures will not limit the population that can be provided water, as long as the service is consistent with the approved system plan or Health approval. RCW 90.03.260(5).

Prior to the MWL, RCW 90.03.260 had remained relatively unchanged since the 1917 adoption of the Water Code.¹⁷ Before the 2003 MWL amendment, an applicant for a water right for a public water supply purpose was required to state the source of the water, the proposed use, when the water would be required each year, describe the water diversion, and state when construction would be complete and the water put to the proposed use. RCW 90.03.260(1). The sole provision of the pre-MWL statute that addressed “municipal water supply” stated: “(i)f for municipal water supply, it shall give the present population to be served and method of supplying and utilizing the water; also their location by legal subdivisions.” Former RCW 90.03.260 (1996). This population information provision was incorporated into RCW 90.03.260(5).

The Tribes fail to fit the plain language of RCW 90.03.260(4) and (5) into a retroactive time frame. As with the new provisions of RCW 90.03.386(2), the amended language of RCW 90.03.260(4) and (5)

¹⁷ Prior to enactment of the MWL, the statute, in relevant part, provided that:

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. . . . If for municipal water supply, it shall give the present population to be served, and, as near as may be, the future requirement of the municipality.

Former RCW 90.03.260 (1996).

is triggered by the precipitating events listed in the law. The precipitating events are (1) a permit application and (2) approval of a municipal water supplier's plan. Both are clearly prospective events.

Only a new application for a permit can be subject to these amended conditions. Subsection (4) is a completely new requirement for "the projected number of service connections" for a water right application for "community or multiple domestic water supply." Subsection (5) introduces a change to the population information for "municipal water supply" applications, including the conditional term "estimated" for the population to be served. Both subsections introduce, for the first time, the municipal water supplier exception for increasing population and service connections following approval of the supplier's plan by Health. These conditions did not exist before September 9, 2003 and therefore could not have applied to water rights applicants before that date. Only new applicants and post-September 9, 2003 approved municipal water supplier plans are affected. This prospective precipitating event time frame is tied to the referenced municipal water supplier plan approval condition, incorporating RCW 43.20. That reference necessarily incorporates the new plan review section, RCW 43.20.260, which only took effect with passage of the 2003 MWL. RCW 90.03.260(4) and (5) thus cannot violate substantive due process because they do not operate in retroactive fashion.

Even if RCW 90.03.260(4) and (5) did operate retroactively, the Tribes could not demonstrate that they facially violate substantive due process by depriving other water rights holders of vested rights in all circumstances. The attributes that limited (and continue to limit) the exercise of water rights were maximum annual and instantaneous quantity limits. There was no amendment that attached new legal consequences to events completed before enactment of the MWL. *See F.D. Processing*, 119 Wn.2d at 463–464. The Tribes cite several cases to support their argument that the population and service connection information required of applicants by RCW 90.03.260 are substantive limitations for any subsequent water right and that any use of water contrary to such population or service connection numbers is a change in law that must adversely affect the rights of other water rights holders. Tribes’ Br. at 70 (citing *Schuh v. Dep’t of Ecology*, 100 Wn.2d 180, 186–187, 667 P.2d 64 (1983); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 127–128, 969 P.2d 458 (1999); *In re Water Rights in Alpowwa Creek*, 129 Wash. 9, 16, 224 P. 29 (1924)). As explained by WWUC, however, *Schuh*, *R.D. Merrill* and *Alpowwa Creek*, are not applicable to this case and do not bolster the Tribe’s argument. WWUC Response/Reply Br., Section III.C.5.

Further, should the Court deem that RCW 90.03.260(4) and (5) do operate retroactively, the State adopts and incorporates WWUC's argument that they do not change the law to the detriment of anyone's rights because, prior to the MWL, there was ambiguity as to whether connections and population figures on water right documents were limiting attributes of water rights. WWUC Response/Reply Br, Section III.C.5.

B. Procedural Due Process Is Provided by RCW 90.03.386(2), 90.03.260(4) and (5), and 90.03.330(2)

The superior court properly rejected Respondents' claims that RCW 90.03.386(2), 90.03.260(4) and (5), and 90.03.330(2) violate the right to procedural due process. State's Opening Br., App. A at 6. Judge Rogers concluded "under the *Salerno* standard and under the *Mathews v. Eldridge* analysis," the Respondents did not carry their burden to prove unconstitutionality beyond a reasonable doubt. *Id.*, App. B at 15.

Procedural due process is a "flexible concept" Washington courts derive from *Mathews*, "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." *In re Det. of Stout*, 159

Wn.2d 357, 370, 150 P.3d 86 (2007) (citing *Mathews*, 424 U.S. 319 at 335). “In order for the *Mathews* test to apply, there must be a risk of erroneous deprivation of a known right.” *Taylor v. Enumclaw Sch. Dist. No. 216*, 132 Wn. App. 688, 698, 133 P.3d 492 (2006).

The three *Mathews* factors are tools for review of whether, when, and how much due process is required in any context: “due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 321. In *Mathews*, the U.S. Supreme Court held that recipients of Social Security benefits are not entitled to a pre-termination evidentiary hearing and recognized that a post-termination process adequately protects the property interests at issue.

In *Moore*, 151 Wn.2d 664 at 675, the State Supreme Court found such a protected property interest in a person’s driver’s license and held that a statute regarding license revocation was facially unconstitutional. As in *Mathews*, the statute at issue in *Moore* directly targeted private property interests. There was a direct nexus between the governmental actions and demonstrated potential deprivations of those property interests. In sharp contrast to the litigants in *Mathews* and *Moore*, the Respondents in this case are claiming the law could hypothetically have a collateral, indirect impact on other water rights holders.

1. RCW 90.03.386(2) does not facially violate the right to procedural due process.

The Respondents assert that RCW 90.03.386(2), which provides that the service area in a water system plan identifies the place of use for a water right for municipal purposes, violates procedural due process for *other* water rights holders. This claim must be rejected for three reasons. First, given the context of the statute and the rights that may be affected, this section provides due process under the factors prescribed in *Mathews*. Second, Respondents cannot meet their burden to prove that this section will violate the right to due process in all instances because many water rights have general place of use designations rather than places of use based on strict “metes and bounds.” Third, this section represents classic police power legislation that is within the Legislature’s prerogative to enact.

a. RCW 90.03.386(2) comports with due process under the *Mathews* test.

Under RCW 90.03.386(2), the *directly affected* property interest is the interest of the municipal water supplier subject to the provision’s terms and conditions. The property interest of the municipal water supplier whose plan is subject to RCW 90.03.386(2) receives due process under the Administrative Procedure Act (APA), which permits the supplier to challenge adverse agency decisions.

The Respondents' facial challenge must show, beyond a reasonable doubt, that the *indirect* interests that other water rights holders might have under RCW 90.03.386(2) are the type of constitutionally cognizable property interests that require notice and opportunity to be heard through a procedure different than the procedures available to water right holders under the MWL. The Respondents fail to establish the first *Mathews* factor—that the property interests of other water rights holders will be deprived by operation of RCW 90.03.386(2). Respondents' argument consists solely of unsupported allegations that property interests are at risk. Tribes' Br. at 66.

Under *Mathews*, procedural due process is a “flexible” process which “calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 321. In enacting RCW 90.03.386(2), the Legislature has established a functional exemption from the previous law's change of place of use application and notice requirements. This is a new model for addressing the place of use for a municipal water right. These changes operate prospectively only and do not allow a municipal water supplier to use water in excess of its quantitative rights.¹⁸

¹⁸ The new statutory scheme is implemented by Health through rules including WAC 246-290-100, -106, -107, and -108. These rules provide both substantive and procedural requirements for approval of the municipal water supplier's plan and service area and the uses of water that are allowed within the service area.

The Respondents fail to go beyond speculation about the property interests of other water rights holders and the nexus between RCW 90.03.386(2) and any conceivable deprivation of interests. The Respondents cannot establish the first *Mathews* factor simply by citing a pre-MWL statute as evidence of such an interest. Simply because other water rights holders had a pre-MWL process under RCW 90.03.380 or RCW 90.44.100 to challenge a proposed change does not establish a right to comparable notice and opportunity to comment post-MWL. Here, the nature of RCW 90.03.386(2) as police power legislation, discussed below, takes away any entitlement other water rights holders may have had prior to the MWL.

RCW 90.03.386(2) does not directly limit or affect the water rights of other entities upon the approval of any municipal water supply plan or small water system management program. If adverse impact is later claimed, an “as applied” challenge to the law would require a showing of actual and unlawful impact after the plan is implemented. Such impact cannot occur simply upon plan approval. Respondents’ reliance on *Moore*, 151 Wn.2d 664, is misplaced. The holding in *Moore* recognized that under *Mathews*, all drivers have a significant property interest in maintaining their drivers’ licenses and that such interest are adversely

affected by the duration it would take to bring a court action in the absence of any right to a prompt administrative hearing.

In contrast to the statutory and factual context in *Moore*, the operation of RCW 90.03.386(2) applies directly only to municipal water suppliers whose water rights' places of use are affected by the section, and not to other water right holders. The Respondents fail to show that all other water right holders will have vested property interests adversely affected by RCW 90.03.386(2). Given that all other water rights holders' private interests are mere expectancies in this context, the remaining two *Mathews* factors need not be reached.

Notwithstanding, the Respondents also fail to satisfy the second prong of *Mathews*, that there is a risk of erroneous deprivation of their vested water rights. The process provided by Health and under the APA during and after water system planning provides notice and the opportunity to be heard to third parties, such as Respondents. Interested third parties have a range of opportunities for notice, comment, hearing, and appeal of uses of water rights held by municipal suppliers under the law. Such opportunities occur at different stages in the application of the MWL to municipal water suppliers. For example, a municipal water supplier has its water system plan or plan amendment reviewed and approved by Health. RCW 43.20.250, .260; WAC 246-290-100. This

process includes environmental review of the plan under the State Environmental Policy Act (SEPA) as a non-project action. WAC 197-11. Notice and an opportunity to comment is provided to qualified parties under the SEPA process, including interested tribes.

When the municipal water supplier's plan is approved by Health, any affected entity meeting the requirements of the APA could participate as an intervener in an adjudicative proceeding challenging the municipal water supplier's water system plan. Objections to any SEPA determinations would be included in such a proceeding. A person may also seek intervention in such a proceeding under RCW 34.05.443. A person may seek an appeal by filing a petition for judicial review upon meeting the jurisdictional standing requirements under the APA, RCW 34.05, Part V. A person with standing as an "aggrieved party" may also appeal the superior court's ruling under RCW 34.05.526.¹⁹

For these reasons, under *Mathews*, Respondents cannot meet their burden to prove beyond a reasonable doubt in their facial challenge that RCW 90.03.386(2) violates procedural due process.

¹⁹ Persons or entities, including other water rights holders, are also entitled to participate in and receive notice required in procedures related to the adoption of local government planning, including plans approved under the Growth Management Act, RCW 36.70A, watershed plans approved under RCW 90.82 and RCW 90.54.040(1), and critical water supply service area plans under RCW 70.116. These opportunities are relevant because the MWL requires that Health's approval of municipal water supply plans consider the consistency of such plans with these local governmental plans.

b. Respondents cannot prove that RCW 90.03.386(2) fails to provide procedural due process in all sets of circumstances.

For the reasons discussed above, in the context of the substantive due process challenge to this section, Respondents cannot meet their burden of showing that RCW 90.03.386(2) will violate procedural due process in all sets of circumstances because numerous water rights have places of use based on general place of use descriptions, such as the “service area of [the name of the water supplier].” CP 1485–1486. In those instances, RCW 90.03.386(2) does not take away any notice and opportunity to be heard that Respondents allege was available through the Ecology-regulated water right change process in the past, because that process did not apply to such water rights prior to enactment of the MWL. Under the *Mathews* test, there is no risk of erroneous deprivation of Respondents’ interests resulting from this section because it has not affected the place of use of such water rights.

c. RCW 90.03.386(2) is a valid exercise of legislative police power.

The legislative police power purposes of the MWL are reflected and implemented in RCW 90.03.386(2). Under this section, the Legislature has integrated water system planning requirements, including the designation of service areas, with the places of use for water rights,

and with consistency requirements related to the applicable comprehensive plans, development regulations, and watershed plans. This alternative process is entitled to the deference afforded to legislative policy decisions under the police power and this Court should defer to the Legislature's policy choice.

RCW 90.03.386(2) is but one section of the MWL that demonstrates the Legislature's policy decision to amend the statutory scheme to address the unique requirements, obligations, duties, and planning considerations for municipal water suppliers. One element of the changes wrought by the MWL was the legislative decision in RCW 90.03.386(2) to treat multiple water rights for municipal purposes held by a municipal supplier under an approved plan as a integrated portfolio of rights to be used to serve customers within the supplier's approved service area. Under RCW 90.03.386(2), the place of use of any water right held by the municipal water supplier is based on an approved water system plan's service area. This enactment removed qualifying

municipal water suppliers from the previously applicable place of use change requirements under RCW 90.03.380 and RCW 90.44.100.²⁰

As classic police power legislation, RCW 90.03.386(2) is entitled to deference unless proven unconstitutional beyond a reasonable doubt. In a multitude of contexts, case law has upheld ordinances and statutes prospectively changing and sometimes significantly affecting property rights, even under the less rigorous standard of review used in as applied challenges to the constitutionality of such laws. For example, in *Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 360, 71 P.3d 233 (2003), the Court upheld an ordinance that banned card rooms on a prospective basis. The Court noted, even though the plaintiff characterized his claim as a “vested right,” that “[m]unicipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate police power goal.” *Edmonds Shopping Ctr. Assocs.*, 117 Wn. App. at 360.

To the extent that water rights holders are no longer availed of the procedure under RCW 90.03.380, and have a different procedure available

²⁰ In support of their argument on this issue, Respondents ask the Court to consider the legislative history of the bill, including the meaning or purpose of sections that were not included in the final adoption of the MWL. Case law does not support the use of legislative history where the meaning of the statute under consideration is not ambiguous. Absent any assertions by Respondents that RCW 90.03.386(2) is ambiguous, the Court should consider only the meaning of the adopted law, and not its legislative history. See, e.g., *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002).

under Health's water system planning process when municipal water suppliers seek to change their place of use, that change is a consequence of a valid police power enactment which is entitled to deference. The superior court's ruling that this section of the MWL comports with the right to procedural due process should be affirmed.

2. RCW 90.03.260(4) and (5) do not facially violate the right to procedural due process.

Only the Tribes challenge the superior court's conclusion that "RCW 90.03.260(4) and (5), do not facially violate procedural due process under the state and federal constitutions." This ruling should be affirmed.

The Tribes argue that RCW 90.03.260(4) and (5) are facially unconstitutional because these sections allow a municipal water supplier to increase the population or service connections served under its water system plan in excess of alleged population or service connections limits on its water rights—without providing other water rights holders any notice or an opportunity to be heard.

The Tribes misread the law. Prior to the MWL, neither RCW 90.03.260 nor any other section of Water Code expressly provided that maximum populations or numbers of service connections stated in water right documents were attributes that limited exercise of water rights. Therefore, RCW 90.03.260(4) and (5) did not change the law to authorize

Health to alter the maximum population or service connections that may be served under municipal purpose water rights. See Section IV.A.2., above.

The Tribes are wrong in arguing that these new subsections stripped away procedure that was available pre-MWL. There is nothing in the water right change statutes, RCW 90.03.380 and RCW 90.44.100, which requires one to go through the change application process to modify numbers of connections or population to be served. Those statutes allow for changes of point of diversion, purpose of use, and place of use (RCW 90.03.380), and changes of well location (point of withdrawal) and place of use (RCW 90.44.100). They had and still have nothing to do with service connections or populations to be served. Under *Mathews*, other water rights holders' rights cannot be adversely affected by population and service connection factors which were not and are not purposes of use posing any tangible impact on other water rights under the pre- and post MWL statutory scheme. For that reason, the Tribes' argument that RCW 90.03.380 provided a procedural "safeguard" prior to the MWL is without merit.

Prior to the MWL, under RCW 43.20.250, Health reviewed plans submitted by public water systems using the information listed in WAC 246-290-100 and in WAC 246-290-110 (for plan related projects).

Using this information, Health considered the number of service connections the purveyor could adequately supply. Upon approval of the water system plan or project engineering document, water system capacity, expressed as a number of approved connections, was approved by Health. In instances where the purveyor's planning or engineering document forecast population instead of connections, future population was converted to residential service connections according to values given for average household size, called an "equivalent residential unit." When a plan was approved, it included a "not to exceed" number of service connections. Subsequent to the MWL, Health continues to set service connection limits under its water system planning process, although its rules and process have been adjusted based on new requirements in the MWL, including the requirements of RCW 43.20.260.

Under the second prong of the *Mathews* test, contrary to the Tribes' position, there is not a "high risk of an erroneous deprivation of vested rights." In the limited number of situations where there are connection limit conditions contained in water certificates, Health's water system planning process provides ample notice and opportunity to be heard in the event that the holder of a water right with such a condition wants to serve a greater number of connections through amendment of its Health-authorized water system plan. Also, under the third prong of that

test, the “governmental interest” simply does not warrant requiring any additional procedure.

Even if one accepts the Tribes’ argument that Health’s water system approval process does not provide sufficient procedural safeguards (which the Court should not), the proper remedy to prevent the few situations where the number of connections might expand without proper notice and opportunity to be heard for other water right holders is not to completely invalidate RCW 90.03.260(4). Such a specific situation where that might occur may be grounds to bring an as applied constitutional challenge, but under the *Salerno* test or any other standard of review, it cannot be grounds to erase the statute in its entirety.

For these reasons, the Tribes’ claims that RCW 90.03.260(4) and (5) facially violate the right to procedural due process should be denied.

3. RCW 90.03.330(2) does not facially violate the right to procedural due process.

The superior court’s ruling that RCW 90.03.330(2) does not violate procedural due process should be affirmed. Contrary to Respondents’ argument, RCW 90.03.330(2) does not impose “absolute limitations on the revocation, diminishment, or adjustment of” pumps and pipes certificates “with no notice and no opportunity to be heard.” Burlingame Br. at 68.

This statute does not violate due process by depriving affected water right holders of notice and opportunity to be heard to contest the “good standing” of unperfected water rights, or the continued validity of perfected water rights, documented by pumps and pipes certificates. To the contrary, the Respondents fail to establish the first part of the *Mathews* test because they cannot show that the property interests of other water rights holders will be deprived by operation of RCW 90.03.330(2). Further, they cannot meet their burden to prove that this statute violates due process under the second and third factors under *Mathews* because RCW 90.03.330(2) allows other water right holders to challenge the validity of water rights documented by pumps and pipes certificates through two processes which allow public participation and can result in revocation or diminishment of a certificate: general adjudications of water rights in superior court, and applications for changes and transfers of water rights filed with Ecology.

RCW 90.03.330(2) provides, in relevant part:

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. . . .

RCW 90.03.240 relates to water right certificates that are issued “upon the final determination of the rights to the diversion of water” in a general

adjudication of water rights in superior court. In a water rights adjudication, a superior court has the authority to determine whether and to what extent a water right documented by a certificate based on system capacity is valid. The procedure for adjudication of water rights is set forth at RCW 90.03.110-.250. Under RCW 90.03.110, any water right holder can petition Ecology to commence an adjudication “in the superior court of the county in which said water is situated”

Accordingly, due process is afforded to water right holders who believe a water right documented by a pumps and pipes certificate should be revoked or diminished. Thus, the Respondents are mistaken in stating that “there is no ‘mechanism’ in the MWL or elsewhere in the water law for Ecology or any holder of a competing or junior right to challenge or raise the issue of failure of due diligence or beneficial use outside of the pumps and pipes certificate-holder opening up the process themselves.” *Burlingame Br.* at 69.

Moreover, under RCW 90.03.330(2), the water right change processes under RCW 90.44.100 and RCW 90.03.380 also provide the opportunity for review of the validity of water rights documented by system-capacity-based certificates. In evaluating an application for change, Ecology must tentatively determine of the validity and extent of the water right sought to be changed. Ecology can only approve change of the water right to the extent it is valid. *R.D. Merrill*, 137 Wn.2d at 127. Thus, if the holder of an inchoate water right documented by a certificate applies to Ecology for change of the water right pursuant to RCW 90.44.100 or

RCW 90.03.380, Ecology must perform a determination of the validity and extent of the water right to ascertain whether it is eligible for change. This includes a review of whether the requirements to maintain the “good standing” status of the right are met. CP 1494.

If other water right holders believe that approval of the water right change application would cause impairment of their rights, they can file a protest of the application with Ecology. WAC 508-12-170, -220. Further, if they are aggrieved with Ecology’s decision on the application for change because they believe that Ecology’s determination of the validity and extent of the water right is incorrect, they can file an appeal with the PCHB, and seek judicial review under the APA if they are not satisfied with the PCHB’s decision. RCW 43.21B.110(1)(c). Like the opportunity to petition for adjudication, this affords procedural due process to water right holders if they believe a certificated water right should be invalidated.

The State anticipates that Respondents may argue on reply that another statute, RCW 90.03.320, would provide adequate due process if inchoate water rights were documented by permits rather than certificates, and that the MWL has stripped away such process. *See* Burlingame Br. at 8. This argument would fail. That suggested process would provide little opportunity for involvement for third party water right holders because notice of requests for extensions of water rights development schedules

under permits are not even required to be published.²¹ See RCW 90.03.320. Further, this argument would rest on the thin reed that there is a possibility that unused rights documented by certificates that have lapsed because they have not been diligently developed could be resuscitated years later to the detriment of existing water right holders, and that such revival would not occur if they were documented instead by permits. In the event that such a situation *might* occur in the future, that could possibly be grounds for a party who alleges they are aggrieved to bring an “as applied” constitutional challenge. The mere speculative possibility that a water right would, absent RCW 90.03.330(2), be cancelled for lack of diligence, and that such cancellation would in turn benefit junior water right holders cannot carry the day in this facial challenge.

Accordingly, Respondents cannot demonstrate that there are significant property interests at stake under the first *Mathews* factor. They also cannot show that RCW 90.03.330(2) creates any “risk of an erroneous deprivation of interests” under the second part of the *Mathews* test, and, under the third part of the test, that the government should be burdened to provide additional procedure. This provision affords sufficient procedural safeguards and the Respondents cannot meet their burden to prove that it facially violates the right to procedural due process.

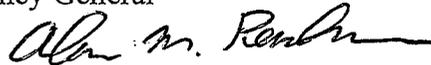
²¹ Ecology provides copies of permit extension requests to third parties only upon request. Some entities have standing requests to Ecology for such documents.

V. CONCLUSION

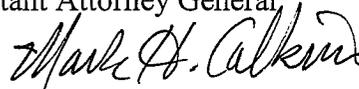
For the foregoing reasons, the State respectfully requests the Court to affirm the superior court's rulings that RCW 90.03.260(4) and (5) and RCW 90.03.386(2) do not facially violate substantive due process,²² and that those statutes and RCW 90.03.330(2) do not facially violate the right to procedural due process. Further, the State requests the Court to hold that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) do not facially violate the separation of powers or substantive due process.

RESPECTFULLY SUBMITTED this 23rd day of February, 2009.

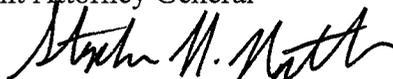
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²² In their briefing before this Court, the Tribes do not challenge the superior court's ruling that one section of the MWL challenged in their complaint, RCW 90.03.560, does not facially violate the right to substantive due process.