

NO. 81809-6

SUPREME COURT OF THE STATE OF WASHINGTON

LUMMI INDIAN NATION, MAKAH INDIAN TRIBE, QUINULT INDIAN NATION, SQUAXIN ISLAND INDIAN TRIBE, SUQUAMISH INDIAN 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; and MARY SELECK, Secretary of Health for the State of Washington,,

Appellants/Cross-Respondents,

and

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

Intervenors-Appellants/Cross-Respondents.

**OPENING BRIEF OF
RESPONDENTS/CROSS-APPELLANTS JOAN BURLINGAME, ET AL.**

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INTRODUCTION

This case involves constitutional challenges by a number of water rights holders, commercial fishing interests, environmental and water protection organizations, and Washington taxpayers¹ (the “Burlingame Plaintiffs”) to portions of the 2003 Municipal Water Law (“MWL”). 2003 Wash. Laws, 1st Sp. Sess., Ch. 5. The challenged provisions of the MWL violate the separation of powers and due process provisions of the Washington Constitution by attempting to retroactively overrule this Court’s decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). The MWL overrules *Theodoratus* by retroactively expanding the rights of a class of water rights holders to the detriment of all other water rights, and it limits or in some cases eliminates notice and right to administrative hearing for those vested water rights adversely affected by the expansion of rights for that favored class.

The King County Superior Court correctly decided the MWL violates the separation of powers provisions in the Washington Constitution because it (1) declared that all water right certificates issued prior to the MWL that were based on system capacity (known as “pumps

¹ The Burlingame Plaintiffs are Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget Sound Harvesters, Washington Environmental Council, Sierra Club, and Center for Environmental Law and Policy.

and pipes” certificates) as opposed to beneficial use were rights in good standing, and (2) retroactively defined the terms “municipal water supplier” and “municipal water supply purposes” to include private water suppliers with as few as 15 residential customers. RCW 90.03.330(2) and (3) and RCW 90.03.015(4). The King County Superior Court found these provisions of the MWL were in direct conflict with this Court’s determinations regarding the validity of pumps and pipes certificates and the nature of private versus municipal water suppliers in *Theodoratus*. The Burlingame Plaintiffs ask this Court to affirm the Superior Court’s decision that the validation of pumps and pipes certificates in RCW 90.03.330(2 and (3), and that the municipal water supplier definitions, RCW 90.03.015(3) and (4), are facially unconstitutional.

In the same decision, the Superior Court erred in holding that several other provisions of the MWL do not facially violate the due process clause of the Washington Constitution. Those provisions include the limitation on pumps and pipes certificate revocation or diminishment in RCW 90.03.330(2) and the automatic change or expansion in place of use provisions in RCW 90.03.386(2). RCW 90.03.386(2) allows water suppliers to expand or change water rights which normally include limitations on amount and place of use, without regard to, or process for, other water rights that will likely be adversely affected by such changes.

The Burlingame Plaintiffs ask this Court to reverse the Superior Court's decision and to find that the pumps and pipes provisions and the expansion in place of use provisions facially violate the substantive and procedural due process provisions of the Washington Constitution.

ASSIGNMENTS OF ERROR

1. The Superior Court erred in holding that RCW 90.03.386 does not facially violate substantive and procedural due process under the Washington Constitution. CP 617 (Summary Judgment Order ¶¶ 5.b and c).

2. The Superior Court erred in holding that RCW 90.03.330(2) does not facially violate procedural due process under the Washington Constitution. CP 617 (Summary Judgment Order ¶ 5.e).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. The Burlingame Plaintiffs restate the issues relating to the State's assignments of error as follows:

1. Does RCW 90.03.330(3) violate the separation of powers because it (a) applies retroactively and overrules this Court's determination in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) that a vested water right cannot be issued on the basis of system capacity, and (b) makes improper judicial determinations?

2. Does RCW 90.03.330(3) violate substantive due process by retroactively enlarging the water rights of the holders of system capacity certificates at the expense of other vested rights?

3. Do RCW 90.03.015(3) and (4) violate the separation of powers by retroactively overruling this Court's determination in *Theodoratus* that a private developer is not a "municipal water supplier" that may hold rights for "municipal water supply purposes"?

4. Do RCW 90.03.015(3) and (4) violate substantive due process because they retroactively change the legal consequences of nonuse of water occurring before the MWL's effective date?

B. The following issues relate to the Plaintiffs' assignments of error:

1. Does RCW 90.03.386(2) violate substantive due process by retroactively expanding the place of use of water rights held by "municipal water suppliers" at the expense of other vested rights?

2. Does RCW 90.03.386(2) violate procedural due process by depriving affected water right holders of notice and an opportunity to be heard before the State approves changes in place of use for "municipal water suppliers"?

3. Does RCW 90.03.330(2) violate procedural due process by depriving affected water right holders of notice and opportunity to be

heard to contest the “good standing” of unperfected water rights represented by system capacity (“pumps and pipes”) certificates?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

It is more than a cliché that water is the essence of life. Plaintiffs, like all Washington residents, need water to drink, wash, sustain their gardens, and support salmon fisheries. Yet water is a finite resource. In times of scarcity, water supplies throughout Washington State are insufficient to support urban needs, irrigated agriculture, and existing salmon runs. Many watersheds in Washington, including more than a dozen salmon-supporting watersheds, are already over-appropriated, meaning that more water is claimed than is available. To preserve available water for water rights holders and instream needs, the Department of Ecology (“Ecology”) has adopted regulations closing hundreds of streams to new water rights.

For several decades, Ecology issued water right certificates to developers, utilities, and municipalities that quantified a water right as the applicant’s system capacity rather than as the amount of water actually used. *Theodoratus*, 135 Wn.2d at 587. These certificates are commonly referred to as “pumps and pipes” certificates. *Id.* In the early 1990s, Ecology changed its policy to provide that a water right certificate would

only be issued on the basis of actual beneficial use. *Id.* at 588. As a result of this change in policy, Ecology began amending pumps and pipes permits, ultimately leading to a legal challenge by private developer, George Theodoratus.

This Court rejected the validity of these system capacity certificates in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), holding that “a water right certificate may be issued only for the amount of water actually put to beneficial use.” *Id.* at 600.² Ecology’s “pumps and pipes” policy was “ultra vires in utilizing an unlawful system capacity measure of a water right.” *Id.* at 598. Mr. Theodoratus therefore did not own a perfected water right, but only an inchoate right.³ *Id.* When Mr. Theodoratus requested additional time to develop this right, the Court found Ecology was free to add conditions “to satisfy any public interest concerns which arise.” *Id.* at 597.

² The Court had previously held that beneficial use, not system capacity, was the measure of a water right used for irrigation. *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997). *See also Department of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993). The Court in *Theodoratus* found no reason to distinguish “between what constitutes beneficial use for water for irrigation and water for other purposes.” *Theodoratus*, 135 Wn.2d at 593.

³ Mr. Theodoratus’s right was an “inchoate” right only because there was no issue about whether he had acted with reasonable diligence. *Id.* at 596. “An inchoate right . . . remains in good standing so long as the requirements of law are being fulfilled.” *Id.* (quoting 1 Wells A. Hutchins, *Water Rights Law in the Nineteen Western States* 226 (1971)). Contrary to the implications of Appellants’ arguments, an unused right that is not being developed with reasonable diligence is not an inchoate right in good standing.

In reaching this decision and in response to arguments by Mr. Theodoratus, the Court also held that private developers were not municipalities for purposes of the Water Code and did not benefit from the special rights accorded municipalities under the Code. *Id.* at 594. In particular, as a non-municipality, Mr. Theodoratus's water right was subject to statutory relinquishment, and basing his water right on system capacity would "render these provisions of the relinquishment statutes meaningless." *Id.* at 595.

As early as 1999, at the urging of various interested holders of water rights, the Legislature began consideration of the pumps and pipes and municipal exemptions issues, ultimately resulting in passage of the MWL.⁴ The MWL, effective on September 9, 2003, upset the traditional balance that gives priority to water rights based on application date and limits the quantity of each water right to the extent of beneficial use. The MWL singles out a class of water rights holders and gives them special treatment expanding their rights beyond actual, beneficial use. In all, the MWL makes three fundamental changes to Washington water law.

First, the MWL retroactively eliminates the beneficial use requirement for water rights used for "municipal water supply purposes,"

⁴ See CP 478-79 (Ex. U, Final Bill Report) noting *Theodoratus* decision's connection to MWL.

directly contradicting this Court's holding in *Theodoratus*. 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.

This provision transforms the unused, unperfected portion of a water right into a vested, perfected right, without requiring actual beneficial use.

RCW 90.03.330(2) emphasizes the transformation by prohibiting Ecology from revoking or diminishing a pumps and pipes certificate except during a change, transfer, or amendment or when "the certificate was obtained through misrepresentation." These retroactive rights are exempt from the requirements of RCW 90.03.320 and RCW 90.03.460 that unperfected rights be developed with "diligence" and subject to continued consistency with the public interest.

By its own terms, this elimination of the beneficial use requirement applies only retroactively to certificates issued prior to September 9, 2003.

RCW 90.03.330(4) makes this retroactivity even more explicit by providing that *after* the effective date of the MWL, Ecology may issue a

certificate “only for the perfected portion of a water right as demonstrated through actual beneficial use of water.”

Second, the MWL includes non-municipal entities in its new definition of “municipal water suppliers,” expanding the universe of entities eligible for the special privileges that attach to municipal status. It defines a “municipal water supplier” as “an entity that supplies water for municipal water supply purposes.” RCW 90.03.015(3). “Municipal water supply purposes” is in turn now defined to include a use of water:

[f]or 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.

RCW 90.03.015(4). This aspect of the new definition encompasses many private water systems, including those for private residential developments (such as the Theodoratus development), trailer parks, and mobile home parks. *See* CP 369-79 (Ex. A, 2003 Municipal Water Law Interpretive and Policy Statement).

By defining “municipal water suppliers” to include private entities, the MWL retroactively expands the water rights of these entities at the expense of other water right holders.⁵ These definitions allow private developers and other non-municipalities to benefit from the retroactive

⁵ The State has admitted that these definitions apply retroactively. *See* CP 804-23 (Ex. 6, *Cornelius v. Department of Ecology*, PCHB No. 06-099.)

expansions of municipal water rights described below. The definitions also allow private developers to take advantage of the exemption from relinquishment granted to traditional municipalities. *See* RCW 90.14.140(2)(d). In particular, the law protects a newly-defined municipal water supplier from losing its water right for non-use that occurred *before* the passage of the MWL, allowing these newly-created municipal entities to use water that otherwise would have been available for junior rights holders or instream flows.

Third, the MWL expands the place of use of a municipal water right from the area specified on the water right certificate to the service area described in a water system plan:

The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20 RCW, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 70.116 RCW, is that *the place of use of a surface water right or ground water right used by the supplier includes any portion of the approved service area that was not previously within the place of use for the water right* if the supplier is in compliance with the terms of the water system plan or small water system management program . . .

RCW 90.03.386(2) (emphasis added). Under this provision, a municipal water supplier is no longer required to obtain approval from Ecology to change the place of use of its water right, meaning Ecology will no longer

ensure that such changes will be consistent with, and avoid injuring, existing water rights. While the Department of Health (“Health”) must review and approve water system plans and amendments, this review does not include any notice to or protection for existing water rights or instream flows. *See* chapter 43.20 RCW; chapter 70.116 RCW.⁶ As a practical matter, allowing for expanded places of use coextensive with service area boundaries can result in greater use of water or the movement of water to different places in ways that reduce return flows or otherwise affect the amount of water available to junior appropriators, including instream uses. *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 777, 947 P.2d 732 (1997); *Colorado Water Conservation Bd. v. City of Central*, 125 P.3d 424, 439-40 (Colo. 2005).

Developers and municipalities quickly took advantage of this provision to change the place of use of their water rights without the previous-applicable safeguards and public oversight. Following the passage of the MWL, Ecology notified a number of water right holders that their pending change applications were unnecessary because the MWL had conferred the desired changes by operation of law. *See, e.g.*, CP 412-13, 416-17 (Ex. F, Letter from Department of Ecology, to Arcadia

⁶ In fact, Health’s review of water rights when reviewing a water system plan is limited to whether the applicant’s water rights are sufficient to meet projected demand. *See* CP 913-14 (State’s Response to Tribes’ Discovery, Ex. 22 at 18-19.)

Community Water Association; Ex. G, Letter from Department of Ecology, to Decatur Shores Water System, Inc.) The applicants subsequently withdrew their change applications. *See, e.g.*, CP 419, 421 (Ex. H, Letter from Colony Mountain Community Club to Department of Ecology; Ex. I, Voluntary Withdrawal Form for Emerald Water System.) Since September 9, 2003, municipal water suppliers intending to change their place of use no longer need inform Ecology of their intentions, much less other holders of water rights, or the public.

In this way, affected water right holders who would have protested the pending change applications lost their opportunity to be heard regarding the effects of the change. For example, Fircroft Waterworks, a water supplier on Orcas Island, filed an application to change the place of use of its water right before the passage of the MWL.⁷ The YMCA of Greater Seattle, which operates Camp Orkila on Orcas Island, opposed this change. CP 423 (Ex. J, Letter from YMCA to Department of Ecology.) In late 2003, Ecology informed Fircroft that its change application was moot because the MWL had accomplished the requested changes by

⁷ Washington Water Utilities Council (“WWUC”) claims error in the Superior Court’s admission of evidence. WWUC does not specify to which evidence it assigns error, claiming only that the court admitted “as applied” evidence. Many of the Declarations submitted by the Burlingame Plaintiffs are in support of their standing and are proper and required. To the extent WWUC’s claim of error goes to the Burlingame Plaintiffs’ standing declarations, it is without a basis in the law and should be rejected. Plaintiffs also submitted illustrative exhibits for the court see the process by which the MWL is implemented, which Plaintiffs maintain were properly admitted. *See* Part V, *infra*.

operation of law. CP 425-26 (Ex. K, Letter from Department of Ecology to Fircroft Waterworks.) Fircroft subsequently withdrew its change applications, and the YMCA lost its right to protest. CP 428 (Ex. L, Letter from Fircroft Waterworks, to Department of Ecology.)⁸ Going forward, affected water right holders will receive no notice of such changes, much less the opportunity to protest them.

II. PROCEEDINGS BELOW

On September 1, 2006, the Burlingame Plaintiffs filed this action seeking a declaratory judgment that the provisions of the MWL, set forth above, were facially unconstitutional. CP 1-18. King County Superior Court No. 06-2-28667 SEA. On November 17, 2006, six federally-recognized Indian tribes (the “Tribes”) filed a similar action seeking declaratory judgment that the same provisions of the MWL, as well as two additional subsections, were facially unconstitutional. CP 631-654, King County Superior Court No. 06-2-40103-4 SEA. The Washington Water Utilities Council (“WWUC”), Cascade Water Alliance (“CWA”), and Washington State University (“WSU”) intervened as defendants in both cases. King County Superior Court consolidated the two actions by order dated March 20, 2007. CP 19-23. Plaintiffs in the consolidated actions filed amended complaints in April of 2008. CP 593-612. In January and

⁸ See also examples submitted by the Tribes, CP 843 *et seq.* (Ex. 10 *et seq.*)

February of 2008, all parties in the consolidated actions filed cross motions for summary judgment, and the Superior Court heard the matter on May 23, 2008.

On June 11, 2008, the Superior Court issued a final order fully disposing of the case on cross motions for summary judgment, granting in part and denying in part consolidated plaintiffs' motions for summary judgment and granting in part and denying in part defendants' motions for summary judgment. CP 613-618. The Superior Court held:

RCW 90.03.015(3) and (4) violate the separation of powers under the state constitution because they have retroactive effect and attempt to overrule the decision in *Theodoratus*;

RCW 90.03.330(3) violates the separation of powers under the state constitution because it has retroactive effect and attempts to overrule the decision in *Theodoratus* and/or because it purports to make a legislative determination of adjudicative facts concerning the good standing of certain water rights;

RCW 90.03.260(4) and (5) and RCW 90.03.386(2) do not facially violate substantive due process under the state and federal constitutions;

RCW 90.03.260(4) and (5), RCW 90.03.330(2), and RCW 90.03.386(2) do not facially violate procedural due process under the state and federal constitutions.

CP 617-18, ¶¶ 3 and 5. Based upon its holding regarding separation of powers, the Superior Court declined to decide the substantive due process claims related to RCW 90.03.330(3), RCW 90.03.015(3) and (4), and RCW 90.03.560. CP 618, ¶ 4.

Defendants and intervenors appealed the Superior Court's decision invalidating RCW 90.03.015(3) and (4) and RCW 90.03.330 and requested review of the substantive due process claims the Superior Court declined to decide. The Burlingame Plaintiffs and Tribes cross-appealed the Superior Court's decision that RCW 90.03.260(4) and (5), RCW 90.03.330(2), and RCW 90.03.386(2) are not facially unconstitutional. CP 1053-62 and 620-30. All parties seek direct review by this Court.

ARGUMENT

I. STANDARD OF REVIEW

The Burlingame Plaintiffs challenge the constitutionality of various provisions of the MWL on three grounds: separation of powers, procedural due process, and substantive due process. Whether a statute violates a constitutional mandate or is outside the legislature's power to act is a question of law for the court. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). In challenging the constitutionality of a statute, a plaintiff must show the court that there is no reasonable doubt the statute is unconstitutional. *Id.* To resolve a facial challenge to the constitutionality of a statute, a court need consider only whether the language of the statute violates the Constitution, as opposed to determining whether a statute would or could be constitutional as applied to the facts of a particular case. *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1,

3-4, 891 P.2d 720 (1995). Depending on the specific claim raised, a court “appl[ies] the test dictated by the nature of the challenge.” *Robinson v. City of Seattle*, 102 Wn. App. 795, 808, 10 P.3d 452 (2000) (Div. 1).

A. A Facial Challenge Based Upon The Separation Of Powers In The Washington Constitution Is Subject To De Novo Review And Is Not Subject To The *Salerno* Test.

The Superior Court found that portions of the MWL violate the separation of powers under the Washington Constitution in that the MWL was an attempt by the legislature to overrule this Court’s decision in *Theodoratus*. A facial challenge to a statute based upon the separation of powers doctrine is a straight-forward legal question involving the assessment of only one set of facts or circumstances. *See*, RP at 7. A court must compare the language of the statute with the prior judicial determination. There are no factors or balancing or weighing of impacts that must (or even can) occur. There are no facts that must be developed or that remain hidden from the court.

Appellants argue for the application of the purported standard from *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987),⁹ that a plaintiff bringing a facial challenge must “show that no set of circumstances exist in which the statute, as currently written, can be

⁹ It is uncertain that even the U.S. Supreme Court considers *Salerno* a viable and inflexible standard applicable in all facial challenges. *See*, discussion in I.D. *infra*.

constitutionally applied.” *Salerno*, however, is clearly not applicable to the separation of powers analysis.

There is only one set of circumstances applicable—the language of the MWL as compared to the decision in *Theodoratus*. One of the reasons given by courts for disfavoring facial challenges with application of the “no set of circumstances” standard is the concern that weighty constitutional matters will come before the court prematurely, before a full factual record is developed. *Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 127 S.Ct. 1184, 1190-91, 120 L.Ed.2d 151 (2008). *See also Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (courts should avoid “premature interpret[ation] of statutes on the basis of factually barebones records”) (quoting *United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)). Because the analysis of a separation of powers claim is limited to one set of circumstances, this reason does not apply; there is no factual record that a court needs developed in order to review the claim.

The *Salerno* approach is also inappropriate with regard to Plaintiffs’ claims that the MWL, specifically RCW 90.03.330(3), is an improper adjudication by the legislature and in that way as well a violation of the constitutional separation of powers. Again, the question hinges only on whether the legislature made a broad determination of fact,

intruding into the realm of the judiciary. It is immaterial whether the fact determination could be proper in some cases. The salient point for this Court is whether the fact determination occurred at all. Again, application of a “no set of circumstances” test simply does not fit; there is never a set of circumstances where it is constitutionally permissible for the legislature to intrude on the judiciary’s functions simply because it may have reached the correct adjudicatory determination some of the time.

Further, Appellants’ argument that *Salerno* provides a proper test for separation of powers claims because the MWL can be constitutionally applied *prospectively* are simply wrong and fail to recognize the basic premises of the separation of powers requirements. The relevant analysis for this Court regarding separation of powers as to RCW 90.03.330 and RCW 90.03.015 is whether those provisions overrule this Court’s decision in *Theodoratus*. It does not matter whether certain portions of the MWL can be applied prospectively. It is never constitutional for the legislature to seek to be the court of last resort, whether in whole or in part.

The proper standard of review for this Court to apply to Plaintiffs’ separation of powers claims is de novo review of a legal question based entirely on the text of the statute and the *Theodoratus* decision.

B. Application Of The *Mathews v. Eldridge* Factors Is The Proper Standard For Review Of Procedural Due Process Claims, Not The *Salerno* Test.

In assessing procedural due process challenges to statutes, this Court has applied the factors set forth by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004), while citing (without discussion) to the “no set of circumstances” test, this Court actually analyzed a procedural due process challenge to the license revocation statute in question by considering (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail. *City of Redmond*, 151 Wn.2d at 670 (citing *Mathews*, 424 U.S. at 335 and *Tellevik v. Real Property*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992)). The *Salerno* approach of “no set of circumstances” does not fit the inquiry in a procedural due process challenge. The three-part *Mathews* test, applied by this Court in the *Redmond* case, involves weighing and balancing the risks of erroneous deprivations and alternative or additional processes that may address those risks without unduly burdening the

government interest or function involved. “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S., at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

It is inherent in the *Mathews* test that the statute in question may result in an erroneous deprivation of rights in some number of instances, but not necessarily all instances, and still be considered a violation of procedural due process, especially where there are reasonable procedural safeguards that could be applied. It does not matter that in some hypothetical circumstance the statutes could be applied without depriving an individual of a protected interest. Rather, the relevant inquiry is whether the statute creates too great a risk of such a deprivation.

City of Redmond deftly illustrates this crucial point. In that case, two individuals were charged with driving with licenses that had been suspended pursuant to a state law that automatically issued suspensions when a driver failed to respond to a notice or appear in court after a traffic violation. The individuals argued that the law violated procedural due process because it provided no administrative hearing to address any errors, including ministerial errors. *City of Redmond*, 151 Wn.2d at 669. This Court applied the *Mathews* test, looking generically at the interests of all drivers with suspended licenses and concluding that the statute violated

procedural due process because it did not “provide adequate procedural safeguards to ensure against the erroneous deprivation of a driver’s interest in the continued use and possession of his or her drivers’ license.” *Id.* at 677. The Court came to this conclusion even though in most cases license suspension was likely carried out with no ministerial errors.¹⁰ Rather, the proper focus of the inquiry was the risk, in all cases, that the errors would occur due to the lack of due process.

The *Mathews* test conflicts with the “no set of circumstances” test at its core, and *Salerno* cannot apply in the manner suggested by the Superior Court and Appellants without negating the balancing and weighing of risks and procedural safeguards intrinsic to the *Mathews* test.

C. Careful Review Of Washington Cases Demonstrates That The Salerno Approach Is Not Applied In Taxpayer Challenges Such As The One Here.

1. The Burlingame Plaintiffs bring this challenge as taxpayers in the State of Washington.

This Court has recognized standing for taxpayers to challenge governmental acts. *See e.g. State ex rel. Boyles v. Whatcom County Supr. Ct.*, 103 Wn.2d 610,614, 694 P.2d 27 (1985) (“The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state’s citizens contest the legality of official acts

¹⁰ Indeed, the *City of Redmond* plaintiffs themselves had not challenged the factual basis for their suspensions at issue in the case.

of their government.”). To demonstrate taxpayer standing, plaintiffs must prove they pay taxes, that they demanded the Attorney General institute an action challenging the illegal conduct, and that the demand was refused.

Dick Enterprises, Inc. v. Metropolitan/King County, 83 Wn. App. 566, 572-73, 922 P.2d 184 (1996). Appellants have agreed that plaintiffs have taxpayer standing in this case. *See*, CP 431-33 (Ex. M.)¹¹ Plaintiffs are not required to demonstrate a unique right or interest harmed by the MWL when challenging illegal government acts on behalf of all taxpayers.

Kightlinger v. PUD No. 1 of Clark County, 119 Wn. App. 501, 507-08, 81 P.3d 876 (2003) (Div. 2); *Robinson*, 102 Wn. App. at 804-05.¹²

2. *Washington courts have not consistently applied the Salerno standard, particularly in taxpayer standing cases.*

Only one Washington case has addressed the precise issue of the *Salerno* standard in taxpayer facial challenges to statutes, and in that case, the Washington Court of Appeals rejected the *Salerno* “no set of

¹¹ Plaintiffs meet all elements of taxpayer standing: they pay taxes that go to the state General Fund (used to implement the MWL), they requested and were refused Attorney General action to invalidate RCW 90.03.015(3) and (4), RCW 09.03.330(2) and (3), and RCW 90.03.386(2), and the State has admitted it is expending funds from the General Fund to implement the MWL and unless enjoined, will continue to do so. *See generally*, 197 et seq., 492 et seq., 42 et seq., 36 et seq., 24 et seq. and 32 et seq.. *See also* CP 435, 445, 448 et seq. (Exs. N, O, and P.)

¹² Even if plaintiffs were required to demonstrate a unique right or interest, plaintiffs would satisfy the requirement. Plaintiffs Burlingame, Cornelius, and Bernheisel are water rights holders harmed by the MWL, while Knutson and organizational plaintiffs are harmed by the MWL reducing water in streams. *Id.*

circumstances” standard as inappropriate for a taxpayer challenge under the Washington Constitution. *Robinson*, 102 Wn. App. at 806-07. The court found application of *Salerno* was highly inconsistent both in U.S. Supreme Court cases and among Washington courts and that no Washington court had applied it in the context of a taxpayer challenge to the constitutionality of a statute. *Id.* The *Robinson* court further noted that the *Salerno* standard had been rejected by a number of other states. *Id.* at 807. Finally, the *Robinson* court found *Salerno* too one-dimensional and rigid to make sense: simply because a challenged statute might be constitutional in one of its categories of application should not foreclose consideration of the constitutionality of the other categories of application. *Id.* Instead, the court applied the “test dictated by the nature of the challenge.” *Id.* at 808. *Accord*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894-95, 112 S.Ct. 2791, 2829, 120 L.Ed.2d 674 (1992), and *Crawford v. Marion County Election Bd.*, ___ U.S. ___, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

The State argues that the *Robinson* court’s decision was effectively nullified by this Court when, shortly after *Robinson*, this Court cited the *Salerno* approach and appeared to apply it in *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000). The *Tunstall* decision

does indeed cite to and discuss the “no set of circumstances” case, but *Tunstall* neither alters the holding in *Robinson*, nor is in conflict with it.

The *Tunstall* plaintiffs were inmates in Washington’s correctional system who raised both facial and as applied challenges to statutes regarding inmate education. Unlike in a taxpayer case, the plaintiffs in *Tunstall* were not claiming that the statute at issue was an illegal act by the government, but that it would lead, on its face, to an unconstitutional result. Conversely, in this case, plaintiffs bring a taxpayer challenge to the MWL as an illegal and unconstitutional retroactive action by the legislature. Moreover, while the *Tunstall* court cited to the *Salerno* test, it is unclear that it actually utilized the test in its decision. The *Tunstall* court’s discussion of the statute in question does not entail an analysis of whether the statute would be constitutional in some circumstances, but unconstitutional in others, a necessary assessment under the *Salerno* approach. Rather, the court simply finds no abridgement of the specific plaintiff’s rights and ends the inquiry there. *Id.* at 236-37.

Appellants list a number of cases where they claim the “no set of circumstances” approach was applied to facial challenges to the constitutionality of statutes. None of the cases dealt exclusively with a taxpayer challenge to the constitutionality of the statute in question. Indeed, some were not taxpayer challenges at all. Rather, in each case

save *Tunstall*, the plaintiff challenges a statute based primarily, or even exclusively upon harm suffered by the particular plaintiff and, in each case save *Tunstall*, the courts cite the *Salerno* test primarily in passing, failing to actually discuss its application to the case. See *City of Redmond*, 151 Wn.2d at 669; *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282, n. 14, 4 P.3d 808 (2000); *Galvis v. State Dep't of Transp'n*, 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).¹³ In most of the cases, the courts actually assess the challenged statute on an “as applied,” as opposed to facial, basis -- engaging in little to no comparison of circumstances where the statute would be constitutional or not. *Id.* Finally, in *State v. Clinkenbeard*, 130 Wn. App. 552, 560, 123 P.3d 872 (2005), again not a taxpayer case, the court addressed facial and as-applied constitutional challenges and rejected both. While the court cites *Salerno*, the court actually bases its decision on the fact that Mr. Clinkenbeard’s arguments are legally incorrect--the statute under review concerns sexual relations with non-adults whereas his arguments concern sexual relations

¹³ *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999), also cited by Appellants, has absolutely no application to the issues discussed here. The court in *Turay* addressed an as-applied challenge to a statute and mentioned, in a *footnote*, that successful as-applied challenges result in different outcomes for the statute in question than facial challenges whereupon the court cites to a *dissenting opinion* by Justice Scalia that mentions the “no set of circumstances” test.

between consenting adults. *Id.* at 560-61. His arguments for why the statute is unconstitutional on its face simply do not apply. *Id.* Further, the court does not analyze the issue as to whether it can be constitutionally applied sometimes and not others, making it unclear to what extent, if any, the *Salerno* approach actually dictated the court's review. *Id.*

Overall, the “no set of circumstances” citations given by the State and WWUC are largely “drive-by” standards of review similar to the “drive-by” jurisdictional citations dismissed as strikingly useless by the U.S. Supreme Court in *U.S. Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 Led.2d 210 (1998). The *Salerno* “no set of circumstances” approach for review of Plaintiffs’ claims is inappropriate in a taxpayer facial challenge case in Washington and as such should be rejected by this Court.

D. The *Salerno* Standard Is Not Consistently Applied To Facial Challenges By The United States Supreme Court.

It is worth noting that while Appellants urge this Court to apply the *Salerno* standard, it is not clear from the United States Supreme Court's own opinions that *Salerno* is a rigid standard that must be consistently used in assessing facial challenges to the constitutionality of statutes.

In some cases, the Supreme Court fails to mention the standard, while in others the Court applies it in a flexible manner or appears to

repudiate it altogether. See e.g., *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71, 82, 112 S.Ct. 2365, 120 L.Ed.2d 59 (1992) (involving a facial challenge on equal protection grounds where the Supreme Court does not mention the standard and does not appear to follow it); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S., at 894-95, 112 S.Ct. at 2832 (plurality opinion) (spousal notification statute unconstitutional on its face even though only affected 1% of women seeking abortions. "The analysis does not end with the one percent of women upon whom the statute operates; it begins there."); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22, 119 S.Ct. 1849, 1858 n.22, 144 L.Ed.2d 67 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges *it is not the Salerno formulation*, which has *never been the decisive factor* in any decision of this court.") (emphasis added). See also, *Marion County Election Bd.*, ___ U.S. ___, 128 S.Ct., at 1620-21, where while the Court notes that challengers of a law on its face must bear a heavy burden of persuasion, the Court nonetheless engages in a detailed balancing:

The burdens that are relevant to the [voting rights] issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [the voting law in question]. The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning....

Appellants' press for blind application of the *Salerno* approach to this case is inconsistent with the U.S. Supreme Court's own reluctance to apply the "no set of circumstances" test reflexively in all cases.

E. Even If The Court Applies The *Salerno* Standard To Plaintiffs' Substantive Due Process Claims, The Analysis Must Be Limited To Where The MWL Actually Applies.

In assessing a substantive due process challenge to a statute, the court must determine whether the statute, on its face, retroactively impairs vested property rights. *State v. Shultz*, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999). That is a legal question. Even if the court were to apply the *Salerno* approach to Plaintiffs' substantive due process claims, it should correct the manner in which it was applied by the Superior Court below.

The Superior Court erred in the manner in which it applied the *Salerno* standard to reject Plaintiffs' substantive due process claims. The Superior Court erred because the proper question under the *Salerno* standard is whether there is "no set of circumstances in which the statutes can be constitutionally applied," *City of Redmond*, 151 Wn.2d at 660, and the measure of whether a statute can be constitutionally applied must be only as to those whose conduct or rights the statute actually affects. This is best illustrated by the U.S. Supreme Court's rejection of an argument that a spousal notification statute regarding abortion would survive a facial

challenge simply because a majority of women's behavior would be unaffected by the operation of the statute in that they would choose to notify their spouses regardless of statutory requirements. According to the Supreme Court, the analysis and measure of "no set of circumstances" was of the impact on those *who would actually be affected* by the operation of the statute. *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 894, 112, S.Ct. at 2791. "[T]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* In all cases where a woman would not have notified her spouse before having an abortion, the statute operated to negatively affect her rights. *Id.*¹⁴ Similarly here, in all cases where the challenged provisions of the MWL expand one water right over junior water rights, those junior rights will be diminished.

Scarcity of water in the face of competing demands drives the issues in this case and water law in the west generally. Junior water rights have a vested right to water not appropriated by a senior rights holder. *R.D. Merrill, Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 128, 869 P.2d 458 (1999). Water rights are akin to a jigsaw puzzle where to change or expand one piece necessarily diminishes or changes another. *See* Gould, "Water Rights Transfers and Third-Party Effects," 23 *Land &*

¹⁴ *See also Marion County Election Bd.*, ___ U.S. ___, 128 S.Ct. at 1620-21.

Water L. Rev. 1, 12 (1988) (quoted in A. Tarlock, *Law of Water Rights and Resources*, § 5:73 (2005)). The MWL's expansion of a certain favored class of water rights will necessarily change and diminish junior water rights simply by operation of the statutes. This will happen in all instances regardless of the details of the expanded or junior water rights.

Additionally, based upon the Supreme Court's approach in *Casey*, simply because there may be instances where the statute has no effect on anyone's rights--where, for example, no junior rights exist that are affected (possible, although unlikely given the statutory protection of instream flows as junior rights, RCW 90.22.010 *et seq.*), or where a water right certificate defines a supplier's place of use as its service area, does not mean that the challenged MWL provisions are in some instances constitutional. Rather, the proper analysis is whether, in those instances where the application of the MWL will expand water rights and where there are also junior water rights, can the MWL be constitutionally applied? As discussed in this brief, the answer to that question is no.

Finally, application of the *Salerno* standard to Plaintiffs' substantive due process claims in the manner suggested by the Superior Court and the Appellants would leave Plaintiffs without judicial recourse. The expansion of water rights for a particular favored class will occur by operation of statutes, alone or in combination with other events, (e.g.

Health's approval of a planning or engineering document that describes a municipal water supplier's service area), that do not entail notice and public process. It is highly unlikely that junior water rights holders and entities interested in preserving instream uses (the most junior of all) will know when to file an "as applied" constitutional challenge to the statutes. An "as applied" challenge to the application of the challenged provisions of the MWL will be nearly impossible.¹⁵

This dilemma binds the substantive due process problems to the procedural failings of the MWL. The lack of notice and opportunity to be heard simply compounds the impossibility of an as-applied challenge on the substantive due process claims. The result of the Superior Court's decision regarding the *Salerno* approach and substantive due process should not be that Plaintiff taxpayers and water rights holders are left with no remedy to address their substantive due process claims.

Plaintiffs urge this Court to reject the *Salerno* test, particularly as applied by the Superior Court, in consideration of all Plaintiffs' claims.

¹⁵ WSU consistently points to the *Cornelius* matter as evidence that an as applied challenge has been brought and therefore this facial challenge is somehow improper. WSU mischaracterizes the relationship between facial and as-applied constitutional challenges. If a statute is facially unconstitutional, then it will also not survive as-applied challenges and either method is appropriate for obtaining redress. They are not mutually exclusive methods of challenging the constitutionality of a statute. Moreover, the *Cornelius* matter was the result of a unique set of facts where the case and opportunities to challenge WSU became available because WSU initiated the matter.

II. THE RETROACTIVE VALIDATION OF PUMPS AND PIPES CERTIFICATES AND THE NEW DEFINITIONS FOR MUNICIPAL WATER SUPPLIERS VIOLATE THE SEPARATION OF POWERS IN THE WASHINGTON CONSTITUTION.

The timing of the passage of the MWL was neither accidental nor irrelevant. The Legislature's efforts to respond to and retroactively overrule *Theodoratus*, begun when municipalities sought legislative redress in 1999, culminated in 2003 with adoption of the MWL. Make no mistake, had this Court reached the opposite conclusion in *Theodoratus*, there would be no arguments regarding the need for the MWL to "fix" the problem. The legislature's intent to overrule *Theodoratus* is clear both in the plain language of the MWL and in statements made about its passage. *See e.g.*, CP 478-79 (Ex. U, Final Bill Report). Simply put, the MWL violates the separation of powers under the Washington Constitution.

A. The Separation Of Powers Constitutionally Prohibits The Legislature From Overruling The Judiciary.

Separation of powers is implicit in the tripartite form of Washington government and has been recognized by the Washington Supreme Court. *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000); *State v. Blilie*. 132 Wn.2d 484, 489, 939 P.2d 691 (1997). The constitutional separation of powers exists to prevent one branch of government from encroaching upon the functions of another. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). "[T]he fundamental

functions of each branch [must] remain inviolate.” *Blilie*, 132 Wn.2d at 489.

In our system of separated powers, the legislature’s role is essentially forward-looking while the judiciary’s is backward-looking; in other words, the legislature makes the laws, and the judiciary interprets them. *See Marine Power & Equip. Co. v. Washington State Human Rights Comm’n*, 39 Wn. App. 609, 615 n.2, 694 P.2d 697 (1985) (“The function of a Legislature is to make laws, not to construe them. Nor can the Legislature construe the intent of other legislatures. The latter functions are primarily judicial.”). A judicial interpretation of a statute by the highest court of the state “operates as if it were originally written into it.” *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976); *accord In re Det. of Halgren*, 156 Wn.2d 795, 803, 132 P.3d 714 (2006). The legislature does not have the power to overrule a judicial interpretation, because “it is, emphatically, the province and duty of the judicial department, to say what the law is.” *State v. Pillatos*, 159 Wn.2d 459, 473-74, 150 P.2d 1130 (2007) (*quoting Marbury v. Madison*, 5 U.S. (1 *Cranch*) 137, 177, 2 L.Ed. 60 (1803)). Any legislative attempt to retroactively overrule a holding of this Court is unconstitutional. *State v. Dunaway*, 109 Wn.2d 207, 216 n.6, 743 P.2d 1237 (1987) and *In re Stewart*, 115 Wn. App. 319, 341-42, 75 P.3d 521 (2003).

B. This Court Has Definitely Held That The Amount Of A Vested Water Right Is Limited To Actual Beneficial Use And That Private Developers Are Not Municipalities.

This Court has consistently held that the quantity of a perfected water right must be measured by the actual, beneficial use of water, building on a foundation of such decisions when reaching the result in *Theodoratus*. In *Department of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.3d 1044 (1993), this Court held “beneficial use determines the measure of a water right,” and that the owner of a water right “is entitled to the amount of water necessary for the purpose to which it has been put, provided that purpose constitutes a beneficial use.” Later that same year, in *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993), the Court confirmed that permit holders have a vested property interest in a water right to the extent the water is actually beneficially used. In *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997), this Court held that an irrigation right award in an adjudication was incorrect because it was based on the water right holder’s irrigation system capacity, rather than on actual beneficial use. 131 Wn.2d at 755-56.¹⁶

¹⁶ While the State seeks to influence this Court by claiming, without support, that *Theodoratus* would lead to disastrous results, such hyperbole is simply not supported by the obvious primacy of the beneficial use doctrine in Washington water law for the last hundred years.

Based upon this solid foundation,¹⁷ in *Theodoratus*, the Court confirmed its prior decisions that a perfected water right is limited to actual beneficial use--the “[r]elevant statutes, case law and recent legislative history leave no doubt that quantification of a water right for purposes of issuing a final certificate of water right must be based upon actual application of water to beneficial use, not system capacity.” *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 590, 957 P.2d 1241 (1998).¹⁸ The Court explicitly rejected the validity of certificates that quantified a water right as the applicant’s system capacity rather than as the amount of water actually used. *Id.* In reaching this decision, the Court also held that developers like Mr. Theodoratus were not municipalities for purposes of the Water Code. *Id.* at 594.

Theodoratus involved a developer who applied for an extension of time to put a water claim to beneficial use. Ecology granted the extension, but imposed a condition specifying that the certificate, when issued, would be for only the quantity of water actually applied to beneficial use, not the developer’s system capacity. *Id.* at 588. In imposing this condition,

¹⁷ WWUC’s insistence (at 1) that Plaintiffs’ argument rests on a “single case” is true only in so far as it was *Theodoratus* that the legislature sought to overrule through the MWL. The implications of WWUC’s position--that *Theodoratus* was an anomalous decision – are clearly incorrect based on this Court’s water law precedent continually affirming the doctrine of beneficial use.

¹⁸ The Court also explained that it would not draw a “distinction between what constitutes beneficial use for water for irrigation and water for other purposes.” *Theodoratus*, 135 Wn.2d at 593.

Ecology reversed its previous “pumps and pipes” policy allowing such certificates, applied when the developer’s permit was first issued in 1973.

This Court pointedly rejected the developer’s challenge to the permit condition and held that “a water right certificate may be issued only for the amount of water actually put to beneficial use.” *Id.* at 600. In fact, this Court found that Ecology’s “pumps and pipes” policy had been “ultra vires in utilizing an unlawful system capacity measure of a water right.” *Id.* at 598. “We conclude that state statutory and common law does not allow for a final certificate of water right to be issued based upon system capacity.” *Id.* at 587. Because of this explicit rejection of system capacity as the measure of a developer’s water right, Mr. Theodoratus did not own a perfected water right in water that had not been put to beneficial use, but only an inchoate right.

Further, as a private entity, Mr. Theodoratus’s water right was subject to statutory relinquishment, and to base his water right on his system capacity (similar to what might be allowed for a municipality) would “render these provisions of the relinquishment statutes meaningless.” *Id.* at 595. In reaching this decision, this Court necessarily held that private developers were not municipalities for purposes of the Water Code, and that developers could not benefit from the special rights accorded municipalities under the Code. *Id.* at 594. (“We are also not

persuaded by [Mr. Theodoratus's] claim that a distinction is warranted because his is a public water supply system...Appellant is a private developer...not a municipality...”) *Id.*

C. The MWL Attempts To Retroactively Overrule Theodoratus.

The MWL directly contradicts this Court's holdings in *Theodoratus*. RCW 90.03.330(3) retroactively validates the very category of “pumps and pipes” certificates that *Theodoratus* found “ultra vires.” Additionally, RCW 90.03.015(3) and (4) retroactively elevate private developers to the status of municipalities, exempting them from the relinquishment of their water rights.

The retroactive intent in the provisions is unquestioned. First, the pumps and pipes provision explicitly states that its repeal of the beneficial use requirement for the water rights of municipal water suppliers applies to “the water right represented by a water right certificate issued prior to September 9, 2003.” RCW 90.03.330(3) (emphasis added). In contrast, RCW 90.03.330(4) requires that after the effective date of the legislation (*i.e.*, prospectively), Ecology may issue certificates only on the basis of actual beneficial use. As Judge Rogers found, “[t]his statute clearly reinstates pumps and pipes certificates issued prior to September 9, 2003, and this is an attempt to reverse the *Theodoratus* decision.” RP at 9.

Similarly, the definitions of “municipal water supplier” and “municipal water supply purposes” in RCW 90.03.015(3) and (4) also apply retroactively, because the definitions apply to all relevant provisions of the MWL. *See* RCW 90.03.015. RCW 90.03.330(3) expressly refers to “municipal water supply purposes as defined in RCW 90.03.015,” evincing the legislature’s plain intent that these definitions apply to the retroactive provisions of the MWL. Indeed, Ecology admits these sections are retroactive. State Br. at 23.

Again, Judge Rogers found that:

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

RP at 11.

The legislature simply cannot reverse these aspects of the law and retroactively rewrite the statute. This Court’s interpretation of a statute is final. An attempt by the legislature to reverse this Court’s interpretation of a statute threatens to make the legislature the court of last resort in violation of the separation of powers.

D. The Legislative Declaration of Pumps And Pipes As Water Rights In “Good Standing” Is An Improper Adjudication Of Fact In Violation Of Separation Of Powers.

The Burlingame Plaintiffs’ adopt the arguments of the Tribes for this portion of their brief.

E. Appellants’ Arguments To The Contrary Are Unavailing.

1. *The status of pumps and pipes certificates was at the center of the Theodoratus decision.*

In order to argue that RCW 90.03.330(3) and RCW 90.03.015(3)-(4) do not conflict with this Court’s decision in *Theodoratus*, Appellants offer a reading of that decision so narrow as to render it virtually meaningless. Appellants would make *Theodoratus* a case about only “the ministerial function of documenting water rights based upon system capacity.” State Br. at 30. According to the appellants, because the case involved conditions on an extension for Mr. Theodoratus’s permit, it says nothing about the law governing certificates. *Id.* at 30-31. This argument ignores the Court’s conclusion that “a final certificate of water right cannot be issued to [Mr. Theodoratus] for a quantity of water not actually put to beneficial use.” *Theodoratus*, 135 Wn.2d at 597. Nor do appellants grapple with the Court’s holding that Ecology’s prior practice of using

system capacity as a measure of a water right was “ultra vires.”¹⁹ Of course, they cannot, and their arguments attempting to undo the holdings and impact of *Theodoratus* are unconvincing.

i. Certificates versus permits

The State and WWUC contend that there is no conflict between RCW 90.03.330(3) and *Theodoratus*, because *Theodoratus* “involved an appeal of a permit decision and did not involve a water certificate.” State Br. at 30; WWUC Br. at 26. To the contrary, the validity of the pumps and pipes policy and certificates issued under that policy was central to the court’s reasoning in *Theodoratus*: in the very first sentence of the opinion, the Court stated that “[t]he primary issue in this case is whether a final certificate of water right, *i.e.*, a vested water right, may be issued based upon the capacity of a developer’s water delivery system, or whether a vested water right may be obtained only in the amount of water actually put to beneficial use.” 135 Wn.2d at 586. Appellants’ attempts to bury or undermine the centrality of this issue should not be countenanced.

In *Theodoratus*, this Court concluded that permit conditions “must be consistent with the requirements of the ... water code.” *Theodoratus*, 135 Wn.2d at 593. A permit condition promising a certificate based on

¹⁹ The *Theodoratus* dissent did, however, noting that the decision “destabilizes all certificates already issued under the pumps and pipes approach.” 135 Wn.2d at 602 (Sanders, J. dissenting).

system capacity rather than beneficial use would not be valid under the water code because “beneficial use must be calculated based upon diversion and actual use under this state’s law.” *Id.* Therefore, “actual beneficial use must occur before a water right certificate may be issued.” *Id.* at 595. The fact that it was inconsistent with the water code to issue a certificate based on system capacity was essential to the Court’s conclusion that the Department of Ecology was free to change the conditions on Mr. Theodoratus’s permit.

Moreover, Mr. Theodoratus argued that it was arbitrary and capricious of Ecology to reject its previous system capacity measure of a water right. *Id.* at 598. The court concluded that it was not, “because we have determined that the Department acted ultra vires in utilizing an unlawful system capacity measure of a water right, we conclude that the Department did not act arbitrarily and capriciously in switching to an actual application of water to beneficial use standard.” *Id.* Contrary to Ecology’s argument that “the Court did not rule that any particular certificate was invalid, or that “pumps and pipes” certificates generally throughout the state were invalid,” State Br. at 30, the Court directly held that the “pumps and pipes” policy was ultra vires and unlawful. “[A] deliberate expression of the court upon the meaning of [a] statute should not be disregarded.” *City of Redmond v. Central Puget Sound Growth*

Management Hearings Board, 136 Wn.2d 38, 53 n.7, 959 P.2d 1091 (1998) (quoting *State v. Nikolich*, 137 Wash. 62, 66, 241 P. 664 (1925)).

ii. Definitions

It is also misleading to argue that *Theodoratus* said nothing about the water rights of municipal water suppliers. Appellants assert that the MWL’s definitions of “municipal water supplier” and “municipal water supply purposes” do not violate the separation of powers because, in enacting them, “the Legislature did not retroactively overrule any *holding* in *Theodoratus*.” State Br. at 24 (emphasis in original). In particular, they assert that this Court “did not consider or decide any issue over whether a private entity could hold a water right for municipal water supply purposes.” *Id.*

This argument misses the point. The relevant holding of the Supreme Court was not that Mr. Theodoratus *could not* hold a municipal water supply right, but that he *did not*. The Court specifically held that Mr. Theodoratus, as a private developer holding a water right for “community domestic supply” purposes, was not a municipal water supplier for purposes of the Water Code. *Theodoratus*, 135 Wn.2d at 594-95. The MWL directly overrules this holding, for under the new definitions, Mr. Theodoratus himself and other similar private developers with “community domestic” or “group domestic” rights, are defined for

the first time to be municipal water suppliers making them exempt from relinquishment.

Appellants' cramped construction of *Theodoratus* is inconsistent with the language and logic of the Court's decision. It is undisputed that the Court found that Mr. Theodoratus, a private developer who held a water right for "community domestic supply" purposes and supplied water to more than 15 service connections, was not a municipal water supplier and was not exempt from relinquishment as the holder of a right "claimed for municipal water supply purposes." RCW 90.14.140(2)(d). First, the Court noted "that Appellant is a private developer" and therefore that "issues concerning municipal water suppliers" were not raised in the case. *Theodoratus*, 135 Wn.2d at 594.²⁰ Second, the Court held that if system capacity defined "the measure and limit" of Theodoratus's water right, then the relinquishment provisions of the water code "would be meaningless." *Id.* at 594-95. Implicit in this second holding is the fact that Mr. Theodoratus, as a private developer, was not eligible for the municipal exemption from relinquishment.

²⁰ Appellants take this statement in *Theodoratus* out of context when they suggest it means this Court did not determine whether Mr. Theodoratus was a municipality exempt from relinquishment. The Court clearly found he was not a municipality and therefore it was unnecessary to examine the extent of a municipality's rights.

The MWL directly and retroactively overrules both of these aspects of the *Theodoratus* decision. It transforms, by operation of law, water rights held for group or community domestic supply purposes by private developers such as Mr. Theodoratus, into water rights held for “municipal water supply” purposes. At the same time, it makes these same rights exempt from relinquishment. Because this Court had previously construed the term “municipal water supply purposes,” as used in the Water Code, to exclude the “community domestic supply” water rights of private developers such as Mr. Theodoratus, the legislature’s retroactive definition of this term to mean something inconsistent with the Court’s holding is a violation of the separation of powers. *See State v. Dunaway*, 109 Wn.2d, at 216 n.6; *In re Stewart*, 115 Wn. App., at 341-42.

iii. Dicta

The statements by this Court in *Theodoratus* discussed by all parties are not, as Ecology argues, merely dicta, State Br. at 21, for they were not “unnecessary to the decision in the case,” *Black’s Law Dictionary* (8th ed. 2004). To the contrary, a key component of the Court’s reasoning, in deciding that a system capacity measure of a water right was inconsistent with the Water Code, was its conclusion that if system capacity defined the “the measure and limit” of Mr. Theodoratus’s water right, then the relinquishment provisions of the Water Code “would

be meaningless.” *Theodoratus*, 135 Wn.2d at 594-95. The Supreme Court’s determination that Mr. Theodoratus, a private developer holding a water right for community domestic supply purposes, was not a municipal water supplier, was not dicta.

The Supreme Court did not raise these issues *sua sponte* without briefing from the parties. Instead, Mr. Theodoratus specifically identified as an issue for the court to resolve: “In issuing ... a water right certificate pursuant to ch. 90.44 RCW for a public water supply system, is it lawful for the Department of Ecology ... to issue the water right certificate for an amount of water based upon the capacity of the constructed system, rather than upon some prior year’s actual use?” CP 2395-2401 (Brief of Appellant, *State of Washington v. Theodoratus*). The court’s resolution of this question was a key part of its holding.

Indeed, the State admits that the “pre-*Theodoratus* certificates that were issued based on system capacity were prematurely issued.” State Br. at 31 (emphasis added); *see also* WWUC Br. at 18 (“The MWL confirms the validity of water rights represented by prematurely issued certificates.”). While this may be a more palatable description for Ecology than stating its actions were “*ultra vires*,” it does not change the

fact that this Court found pumps and pipes permits unlawful.²¹ The State also acknowledges that the Legislature acted to address the “uncertain status of already-existing ‘pumps and pipes’ certificates.” State Br. at 30. These statements cannot be squared with the argument that the holdings in *Theodoratus* were dicta.

Moreover, courts have recognized the essential and binding nature of *Theodoratus* on these points by citing it with approval. See *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn. App. 781, 802, 154 P.3d 959 (2007) (noting the Supreme Court’s subsequent reliance on a rule stated in a prior case as a reason why that rule was not dicta). The Supreme Court has cited *Theodoratus* for the proposition that “a system capacity measure of a water right ... was [an] unlawful method contravening statutes.” *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 92, 11 P.3d 726 (2000). Division Three of the Court of Appeals also cited *Theodoratus* as stating that beneficial use is required to perfect a water right. *City of West Richland v. Department of Ecology*, 124 Wn. App. 683, 690, 103 P.3d 818 (2004).

In fact, after *Theodoratus*, Ecology knew what its holding meant for Washington state law. In 2000, post-*Theodoratus*, Ecology published

²¹ WWUC’s assertion of ambiguity to the contrary (at 2), it is hard to imagine this Court stating more directly its holding that pumps and pipes certificates were invalid than by calling them “unlawful” and “ultra vires.” 135 Wn.2d at 598.

a draft policy statement for implementation of the *Theodoratus* decision. CP 1719-24. In that policy, Ecology followed the *Theodoratus* decision and proposed to issue superseding certificates for “any portion of the pumps and pipes based certificate that has been previously put to actual beneficial use.” Ecology abandoned the draft policy after the passage of the MWL. On December 1, 2008, Ecology issued a new draft policy for compliance with the Superior Court decision in this case:

<http://www.ecy.wa.gov/programs/wr/wrac/images/pdf/MWLImplementationGuidanceDRAFT12308.pdf>²² A comparison of the 2000 and 2008 draft policies shows that they are quite similar. In particular, both policies make clear that Ecology believes *Theodoratus* invalidated pumps and pipes certificate and dictated that private developers are not municipal water suppliers. Any argument now that the primary holdings in *Theodoratus* are mere dicta is a last ditch effort by counsel to defend an indefensible statutory provision. Courts generally accord such litigation-driven interpretations little or no deference. *See, e.g., Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L. Ed.2d 468 (1988).

²² The 2008 policy is published on Ecology’s website as an official draft policy. A copy of the December 1, 2008 draft policy is attached for the Court’s reference.

2. *The MWL provisions are not curative.*

Contrary to the assertions of Ecology (at 23), these MWL provisions are not curative amendments that would comport with the separation of powers. “An amendment is curative only if it clarifies or technically corrects an ambiguous statute.” *McGee Guest Home, Inc. v. Dep’t of Social & Health Servs.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (citation and internal quotation marks omitted). An amendment that overrides an interpretation by the Washington Supreme Court is not curative--once this Court has authoritatively interpreted a statute, there is no longer any ambiguity to be cured. *See Overton v. Washington State Economic Assistance Authority*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981); *see also 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006) (“A curative amendment will not be given retroactive application if it contravenes a judicial construction of the statute that is clarified or technically corrected because of separation of powers considerations.”). *Theodoratus* held that water must be put to beneficial use before it can become a vested right, but the MWL validates pumps and pipes certificates, without requiring that the water be put to beneficial use. Similarly, before the MWL, this Court had held that George Theodoratus and other private developers do not hold municipal water rights, but the MWL reverses that result, now identifying them as

municipal water suppliers. The holdings in *Theodoratus* and the MWL are polar opposites.

Moreover, the legislative history is inconsistent with the proposition that the definitions were intended to be curative amendments. A sponsor of the bill frankly acknowledged that the effect of the definitions would be to make some entities municipal water suppliers “who heretofore have not been included.” CP 589, (Ex. B, at 3, Representatives Rockefeller and Linville).

Finally, the Appellants’ arguments that the *Theodoratus* decision introduced an ambiguity regarding the definition of a municipal water supplier are not supported by the cases and reasoning they cite. Appellants claim that case law prior to *Theodoratus* recognized similarities between government and private suppliers of utility services, citing *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003) and *Stiefel v. Kent*, 132 Wn. App. 523, 530, 132 P.3d 1111 (2006), and apparently suggesting that *Theodoratus* was either wrong or confused about who is a municipal supplier of water. While these cases discuss the similarity of propriety functions whether they are performed by government or the private sector, they neither address nor change the salient issue in this case: whether Mr. Theodoratus was a municipal supplier of water and thus exempt from relinquishment of his unperfected

water rights. This Court was not confused on that point and clearly held that Mr. Theodoratus, a private developer, was *not* a municipal supplier of water and as such was *not* exempt from relinquishment of his water rights under Washington water law. The MWL seeks to change that result and in so doing violates the separation of powers

Given its plain language and its legislative history, the MWL could hardly be said merely to clarify ambiguities or correct technical errors.

3. *Ecology's interpretation of RCW 90.03.330(3) is inconsistent with its plain language.*

Under the plain meaning of RCW 90.03.330(3), the MWL treats these certificates as *certificates in good standing*--that is, as validly perfected water rights. RCW 90.03.330(3), by declaring all water rights represented by pumps and pipes certificates to be rights "in good standing," improperly insulates them from the due diligence requirements to which they were subject, as inchoate rights, after the *Theodoratus* decision. *Theodoratus* held that water rights can be perfected only through actual beneficial use; therefore, "pumps and pipes" certificates--standing alone--were not properly perfected water rights. To the extent that the water rights represented by pumps and pipes certificates had not fully been put to beneficial use, they remained valid inchoate rights, which are rights "in good standing *so long as the requirements of law are being*

fulfilled.” *Theodoratus*, 135 Wn.2d at 596 (quoting 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971) (emphasis added)). RCW 90.03.330(3) retroactively overrules *Theodoratus* by deleting the highlighted text from this quote: it declares all pumps and pipes certificates to be rights in good standing at the time the MWL became law, regardless of prior failures to exercise due diligence.

WSU admits that “[i]f, as Respondents argue, the legislature meant that such certificates were to be considered perfected water rights, then the statute overrules *Theodoratus* and violates the separation of powers doctrine.” WSU Br. at 16. To counter this logical result, Appellants insist that RCW 90.03.330(3) does not perfect the water rights represented by pumps-and-pipes certificates, but simply preserves their inchoate standing relative to ultimate perfection. However, this interpretation of the law is inconsistent with the plain text of the statute. While it might be a plausible interpretation of RCW 90.03.330(3) that holders of system capacity certificates must comply due diligence requirements *after* the effective date of the law, it is fundamentally inconsistent with the text of the statute to suggest that these water rights are not insulated from *prior* failures to exercise due diligence. RCW 90.03.330(3) clearly declares that, as of the date the MWL became effective, a water right represented by a pumps and pipes certificate “is a right in good standing.” If these

rights were in fact subject to the reasonable diligence requirement of RCW 90.03.460, then some of them might *not* have been in good standing at the time the MWL went into effect, as a result of prior failures to exercise due diligence. In effect, Ecology would read back into the statute the very words from *Theodoratus* that the Legislature omitted. The Legislature did not include those words, and it is not the role of the courts to rewrite a statute. Courts generally accord such litigation-driven interpretations little or no deference. *See, e.g., Bowen v. Georgetown University Hosp.*, 488 U.S. at 212, 109 S.Ct. at 473-74.

Moreover, RCW 90.03.330(2) is inconsistent with Appellants' interpretation of the law. That provision prohibits Ecology from "revoking, diminishing or adjusting a certificate based on any change in policy that has occurred since the certificate was issued." RCW 90.03.330(2). The "change in policy" is obviously Ecology's abandonment of its previous, unlawful policy of issuing certificates based on a water supplier's system capacity--the change in policy that Mr. Theodoratus challenged and this Court found was not only permissible, but required, under the Water Code. Under this policy and *Theodoratus*, the inchoate portions of these rights would have been returned to permit status and subject to the due diligence and beneficial use requirements. Because RCW 90.03.330(2) explicitly rejects those requirements, the State

cannot validly read RCW 90.03.330(3) to create the same requirement by implication.

Appellants' arguments that holders of pumps and pipes certificates will still have to take steps to perfect their certificates--that somehow the legislature simply "kept alive" the inchoate rights of the pumps and pipe certificates, makes no sense in light of the language of RCW 90.03.330(2) and (3). There would be no need for either of these provisions is the legislature was simply reiterating the holding in *Theodoratus*, especially the prohibition on Ecology taking any action on previously-issued certificates.

Finally, 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. Again, Ecology is prohibited from initiating such action. Appellants' arguments on this point are simply any effort to put an after-the-fact gloss on an unconstitutional statute.

In sum, this Court issued a very clear ruling in *Theodoratus* invalidating pumps and pipes certificates as ultra vires and finding that private developers such as Mr. Theodoratus are not entitled to claim the status of municipal water suppliers in trying to avoid the due diligence,

beneficial use, and relinquishment requirements and provisions in Washington water law. These determinations were central to the Court's decision in *Theodoratus*, and the MWL overrules them. As a result, the MWL, RCW 90.03.330 and 90.03.015, violates the separation of powers under the Washington Constitution.

III. THE MWL IMPAIRS VESTED WATER RIGHTS IN VIOLATION OF SUBSTANTIVE DUE PROCESS PROTECTIONS.

Western water law, including that applicable in Washington, grows out of a long history with water rights being claimed, held, bought, and sold like a prized piece of real estate or valued gem. With not enough water to meet ever-increasing demands, a sound water right can spell the difference between profit and loss, arable land or desert, enough water for a salmon to live and spawn or a dry, rocky streambed. As a result, vested water rights, both junior and senior, are property rights subject to due process protections. *Chumstick Creek Drainage Basin in Chelan County v. Dep't of Ecology*, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985). *See also, Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993). Junior water rights, including instream uses, have a vested right to water not appropriated by senior rights. *R.D. Merrill, Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 128, 869 P.2d 458 (1999).

A. A Retroactive Statutory Expansion Of Water Rights Is A Violation Of Substantive Due Process.

Article I, section 3 of the Washington State Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” The Fourteenth Amendment of the U.S. Constitution similarly forbids any state from “depriv[ing] any person of life, liberty, or property, without due process of law.” Any law that retroactively impairs a vested property rights, such as a water right, violates substantive due process. *State v. Shultz*, 138 Wn.2d, at 646; *Caritas Servs., Inc. v. Dep’t of Social & Health Servs.*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994). A law is retroactive if the law changes the legal consequences of actions before the law’s effective date. *State v. Varga*, 151 Wn.2d 179, 195. 86 P.3d 139 (2005).

In particular, it is a violation of due process to resurrect or expand senior water rights at the expense of junior rights. Junior rights, including instream rights for salmon and other wildlife, take a place in the line after senior rights. When two water users are withdrawing from the same body of water, the retroactive expansion of one (or resurrection of a senior right after it was relinquished or extinguished), necessarily injures the other. *See* Office of the Attorney General, *An Introduction to Washington Water Law* at VII: 6 (Jan. 2000) (“water rights have been described as ‘pieces of

a jigsaw puzzle,' and the purpose of the prior appropriation doctrine is to not allow any one piece to encroach on another piece by changes to the water right or otherwise.”) (quoting [George A.] Gould, *Water Right Transfers and Third Party Effects*, 23 Land & Water L. Rev. 1, 12 (1988)). See also *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 461, 926 P.2d 1301 (1996) (“[S]ome injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called junior appropriator. The junior appropriator will not receive the water that he/she would have received but for the enlargement if there is not enough water to serve all water users.”).

Courts in Arizona and Idaho have found that statutes that retroactively diminish the rights of junior water holders violate due process. The Arizona Supreme Court, in a case extremely similar to this, concluded that statutory provisions that retroactively altered vested water rights so long as the delivery system was maintained (*i.e.* Arizona’s version of pumps and pipes) violated the due process clause of the Arizona Constitution. *San Carlos Apache Tribe v. Superior Court of Arizona for the County of Maricopa*, 193 Ariz. 195, 205, 207, 972 P.2d 179 (1999) (“the Legislature cannot revive rights that have been lost or terminated under the law as it existed at the time of an event and that have vested in

otherwise junior appropriators.”). In Idaho, a set of water right amnesty and enlargement statutes narrowly escaped invalidation, only because the statutes in question included provisions that protected the rights of junior water rights holders through mitigation of the effects of the enlarged rights on the junior rights or by awarding a later priority date to the enlarged rights (effectively retaining the place in line of the junior rights).

Fremont-Madison, 129 Idaho at 460-61. The Idaho Supreme Court later clarified that *Fremont-Madison* stands for the proposition that “proposed enlargements create a per se injury to junior water rights holders.” *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.2d 78 (2005). The MWL affects junior rights holders in Washington in the same manner as the statutes considered by the courts in Arizona and Idaho.

B. The MWL’s Retroactive Resurrection Of Pumps And Pipes Certificates And Expanded Definition Of Municipalities Impairs The Vested Junior Rights.

RCW 90.03.330(3) retroactively expands the water rights of developers and municipalities by resurrecting old pumps and pipes certificates--those that existed prior to September 9, 2003--and declaring them to be perfected rights in good standing.²³ This retroactive

²³ There can be no question regarding the retroactivity of the MWL and RCW 90.03.330 in particular. By its own terms, RCW 90.03.330(3) applies *only* to events *prior* to its

declaration by the legislature applies to both used and unused portions of pumps and pipes certificates. RCW 90.03.015(3) and (4) grants private developers supplying 15 or more customers municipal water rights status, thereby retroactively shielding private developers from relinquishment of their rights due to non-use or failure to exercise due diligence in the development of the right. Resurrection of the unused portions of the pumps and pipes certificates and conferring of municipal status on non-municipal rights holders necessarily impairs junior rights.

The clear intent of the MWL was to alter the position of inchoate water rights as decided in *Theodoratus*. *Theodoratus* confirmed that pumps and pipes certificates had, at best, an unperfected inchoate right as to the quantities of water that had not been put to beneficial use. The now-inchoate water rights were further limited by the requirement that the water right holder diligently develop the right: they were subject to common-law abandonment, and, if held by private parties, statutory relinquishment. The *Theodoratus* decision affirmed that junior water rights necessarily “move up” in priority relative to relinquished rights or unused system capacity, becoming more valuable in the process.

effective date, September 9, 2003. After the effective date, the statute clearly provides that the principles set forth in *Theodoratus* will apply.

In seeking to overrule *Theodoratus* by designating pumps and pipes certificates issued prior to September 9, 2003 as valid, perfected, and in good standing, and by protecting private developers from relinquishment, the legislature transformed unperfected rights that may have lost their status to junior rights, into fully-perfected, vested rights with effectively senior status. The Legislature essentially jumped the pumps and pipes certificates invalidated by *Theodoratus* to the head of the water rights line. Such resurrection and expansion of rights necessarily affects the careful arrangement of the water “jigsaw puzzle,” encroaching upon and impairing the rights of junior interests. In fact, this is the very point of the MWL: the Legislature and developers affected by this Court’s *Theodoratus* decision feared for the seniority of unused water rights that were not being developed with diligence post-*Theodoratus*, knowing that other rights-holders would rise in the priority structure. In response, the Legislature sought to bestow full rights on developers and water rights holders that had not otherwise complied with the law regarding perfection in an attempt to maintain priority of unperfected rights against competing claims. Indeed, if there were no fear of junior interests gaining rights in unperfected, relinquished, or abandoned rights of pumps and pipes certificate holders, there would have been no need or push for the MWL. Developers and municipalities, as unperfected water rights holders, could

simply move forward at their own pace and perfect their rights without fear of losing any portion of their interest.

The Legislature underscored this position, stripping Ecology of its authority to revoke, diminish, or otherwise condition the unperfected portions of pumps and pipes certificates or to take any other action to protect junior rights or the public interest. RCW 90.03.330(3). Unlike the situation with the Idaho law in *Fremont-Madison*, RCW 90.03.330(3) resurrects and expands water rights with no protections for junior or competing rights and with a strict prohibition against Ecology rectifying that situation through administrative (or any) means.

C. The MWL's Expansion Of Place Of Use Provisions Injures The Vested Water Rights Of Junior Rights Holders.

This Court has recognized that Washington water law establishes that a water right is measured not just by quantity, but also by time and place of use. *See R.D. Merrill*, 137 Wn.2d at 127; *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 777, 947 P.2d 732 (1997). *See also Danielson v. Krebs AG, Inc.*, 646 P.2d 363, 374 (Colo. 1982) (changes in the place of use can and do affect return flows and diminish water available for junior or other competing interests.) Water right holders have a “vested right in the continuation of stream conditions as they existed at the time of their respective appropriations.” *Big Creek*

Water Users Ass'n v. Dep't of Ecology, PCHB No. 02-113, 2002 WL 31847634 (Dec. 15, 2002). A water right holder--municipal or private--who changes or expands its place of use can harm other rights holders--junior or with equal or senior priority--by increasing the amount of water used and by changing the pattern of return flows or aquifer recharge.

The MWL retroactively allows municipalities (which are now expanded to include private developers) to automatically change and/or expand their place of use for their water rights, without review by Ecology under RCW 90.03.380 or 90.44.100, whenever Health approves a water system plan. Prior to the MWL's passage, place of use was designated and primarily static; a water right holder was required to apply for and obtain authorization from Ecology for a change or expansion in place of use. In the process, Ecology was required to ensure that such change or expansion did not adversely affect other water rights holders. RCW 90.03.380. By operation of the MWL's place of use expansion, the water rights of municipal water suppliers now include a dynamic and potentially ever-expanding place of use, rather than the designated place of use in the original certificate and existing law. When the place of use of a municipal water right can change and expand by operation of law, it necessarily affects and impairs competing or junior water rights in the process.

The MWL's changes to the municipal definitions, for pumps and pipes certificates, and for changes in place of use, RCW 90.03.015(3) and (4), RCW 90.03.330(3), and RCW 90.03.386(3), cause a retroactive diminishment of junior water rights. That was its point. As such, it violates substantive due process and Plaintiffs request that this Court invalidate those provisions on this basis as well as separation of powers.

D. Appellants' Arguments In Support Of MWL's Retroactive Expansion Of Rights Are The Same As In Response To The Separation Of Powers Problem And Fail Here For The Same Reasons.

I. *Rigid application of the Salerno standard cannot alter the fact that the MWL's expansion of certain favored rights necessarily diminishes other rights.*

Even if the substantive due process claims are viewed through the "no set of circumstances" lens, proper application of the test to the statutes at issue demonstrates that there is no set of circumstances under which the statutes could be constitutional. "[T]he 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 894.

The MWL's retroactive expansion of a favored class of water rights will in all instances necessarily change and diminish junior water rights just by operation of the statute. Simply because there may be instances where the statute is irrelevant because no junior rights exist, (unlikely given the desire to protect instream flows as junior rights), or

where a water right certificate already defined a supplier's place of use as its service area, does not mean that the challenged MWL provisions are not unconstitutional on their face. Rather, in those instances where the application of the MWL will retroactively expand water rights, and where there are also junior or competing water rights, there are no circumstances where the MWL can be constitutionally applied.

Further, Appellants' arguments that the MWL survives constitutional challenge because it can be constitutionally applied prospectively fails in the face of common sense and the actual language and operation of the provisions in question. As is clear from the Superior Court's decision, the MWL runs afoul of the Washington Constitution precisely because of its retroactive application.²⁴ RCW 90.03.330(3) clearly provides that the Legislature is applying the subsection *only* to pumps and pipes certificates issued *before* September 9, 2003, and it resurrects such certificates and declares them to be "in good standing." RCW 90.03.330(4) simply provides that after September 9, 2003, the law as confirmed by *Theodoratus* shall control and no more pumps or pipes certificates will be issued. In every case where RCW 90.03.330(3) applies, it resurrects water rights and necessarily diminishes junior rights.

²⁴ In fact, the separation of powers problem is clearly only a problem because of the retroactive overruling of judicial determinations.

Subsection (4) does not change that result and is not part of the facial challenge in this case. There are no instances where the challenged provisions, RCW 90.03.330(2) and (3) apply prospectively.

Similarly, the provisions that redefine who is considered a municipal water supplier and therefore exempt from relinquishment, while applying both prospectively and retroactively, must fail in their retroactive operation. The exemption from relinquishment granted to pumps and pipes certificate holders prior to September 9, 2003, many of whom were private developers, necessarily, and in all instances, expands rights to the detriment of junior rights. It is the operation of RCW 90.03.015 in conjunction with RCW 90.03.330 that clearly operates retroactively and violates substantive due process. It is not saved by the fact that the Legislature decoupled those provisions after September 9, 2003.

Finally, Appellants also claim that the exemption from relinquishment granted to private developers occurs only prospectively because there must be some future event to determine that a right has been relinquished. As pointed out in the Tribes' brief on this issue, relinquishment occurs when a water right holder fails "without sufficient cause, to beneficially use a portion of a water right for five successive years." RCW 90.14.160. It is at that point the unused portion is relinquished. The hearing procedure allows the claim of relinquishment to

be contested, but does not change the operative timing of relinquishment. RCW 90.14.130 and 90.14.160. Appellants' arguments regarding prospective application are misplaced.

2. *The MWL was meant to have substantive effect, favoring certain rights to the detriment of others, not simply ministerial "clarifications."*

The challenged provisions of the MWL are not simply ministerial or curative, with no substantive effect. Amendment of a statute that overrides a prior interpretation by this Court is not curative. *Theodoratus* left no ambiguity. Pumps and pipes certificates were not valid, and could not be saved by an assertion that the water use was for public supply purposes. The MWL did not attempt to "cure" ambiguity left by that holding. Rather, the MWL sought to reverse invalidation of pumps and pipes certificates by declaring them in good standing and prohibiting Ecology from changing or diminishing the rights in those resurrected certificates. Sponsors of the bill frankly acknowledged such intent. CP 589 (Ex. B, at 3 (Representatives Rockefeller and Linville)).

Further, Appellants' arguments that the MWL did not change the ruling in *Theodoratus* and that holders of pumps and pipes certificates must still perfect those rights makes no sense in light of the language of the statute. The provisions regarding pumps and pipes certificates and

protection from relinquishment are meaningless if there was no intent to change the substance of pumps and pipes certificates post-*Theodoratus*.

Finally, Appellants cannot (and do not) argue that RCW 90.03.386 is curative of any ambiguity. RCW 90.03.386 is simply an expansion of place of use for all municipal suppliers, including private developers now swept under that definition.

Appellants arguments regarding the curative nature of the MWL must fail here as they fail with respect to separation of powers.

IV. THE MWL'S EXPANSION OF WATER RIGHTS WITH NO NOTICE AND HEARING FOR JUNIOR OR COMPETING RIGHTS VIOLATES PROCEDURAL DUE PROCESS.

In order to fully-effectuate the retroactive resuscitation and expansion of municipal and developers' rights post-*Theodoratus* with no fuss and bother to those revived and expanded rights, the MWL eliminates all notice and procedural protections for other affected water rights. Again, this was the point. The MWL wholly changed the way that a particular class of water rights is considered, prioritized, perfected, and maintained. The legislature realized that to subject that change to notice and hearing ran the risk of nullifying, at the hands of objecting junior and competing interests and administrative hearing boards, the gains the MWL intended to bestow on that particular class of water rights. The MWL

removed the risk by creating a bigger, constitutional problem--violation of the procedural due process rights of junior and competing water rights.

A. Procedural Due Process Protections Require Timely And Meaningful Notice and Opportunity For Hearing Relative To Deprivation Of Rights.

The due process clauses of the Washington Constitution requires the state to follow appropriate procedures before depriving an individual of a protected property interest. *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003). *See also Nguyen v. State Dep't. of Health Medical Quality Assurance Comm'n.*, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006); *City of Redmond v. Moore*, 151 Wn.2d at 670. *See also, Guardianship Estate of Keffleler v. State Dep't. of Social and Health Servs.*, 151 Wn.2d 331, 342, 88 P.3d 949 (2004) and *Sheep Mountain Cattle Co. v. Dep't. of Ecology*, 45 Wn. App. 427, 431, 726 P.3d 55 (1986) ("[N]otice must be given which is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

In assessing the adequacy of procedures protecting the interest at stake, Washington has applied the three-part test from *Mathews v. Eldridge. Nguyen*, 144 Wn.2d at 526; *Moore*, 151 Wn.2d at 670. The test requires a reviewing court to consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. Application of the *Mathews* test demonstrates that the MWL violates procedural due process.

B. Application of the Mathews Factors Demonstrates The MWL Violates Procedural Due Process.

The MWL affects fully vested property rights. *See* part V. A. 2. and 3 above. It does so with no notice or hearing provisions of any kind. Specifically, the resuscitation of the pumps and pipes certificates in RCW 90.03.330(2) and the absolute limitations on the revocation, diminishment, or adjustment of the resurrected pumps and pipes certificates, occurs with no notice and no opportunity to be heard for all junior water rights whose rights had improved after *Theodoratus*. Similarly, the change in place of use provisions in RCW 90.03.386(2) operate automatically upon Health approval of a municipal water service area. No notice or hearing is

provided to affected rights holders, and there is no notice or hearing process for Health review and approval of such plans.

Moreover, contrary to Appellants' arguments, 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. Appellants appear to think that a water rights adjudication may give that process, but an adjudication does not change the fact that the MWL prohibits Ecology from changing or diminishing the resurrected pumps and pipes certificates except where the pumps and pipes certificate-holder has asked for the change or amendment. There is no process applicable to the retroactive impairment of junior and competing water rights.

The risk of erroneous deprivation or diminishment of junior or competing water rights is high. The MWL will diminish and impair vested property rights in every instance where there are competing and/or junior water rights, and it will do so with no procedural protections.

In fact, RCW 90.03.386(2) affirmatively eliminated already existing procedural protections that could have served as additional or

substitute safeguards.²⁵ Under RCW 90.03.380(1), all changes in the place of use of a water right were permitted *only* upon application and approval by Ecology and *only* if the change could be made without detriment or injury to existing rights. *See also Okanogan Wilderness League*, 133 Wn.2d at 777 (“Both upstream and downstream water right holders can object to a change in the point of diversion or the place of use, which could affect natural and return flows, and thus, adversely affect their rights.”). The MWL removed these safeguards. Finally, the fiscal and administrative burdens of those additional or substitute safeguards is minimal in that these procedures have been in place for all holders of water rights, and they remain in place for all rights except the new favored class of municipal appropriators that includes private developers.

The MWL change in place of use provision allows municipal holders of water rights, which also now includes private developers, to change their place of use with no notice to affected rights, no application to Ecology, no obligation to demonstrate lack of detriment or injury to existing rights, and no opportunity for affected rights to argue or show detriment or injury. The MWL fails the three-part test under *Mathews v. Eldridge* and violates procedural due process.

²⁵ Comparison to the Idaho law that survived constitutional challenge is helpful, for the Idaho law survived because of the protections granted to junior rights through notice and mitigation or adjustments of priorities. *Fremont-Madison*, 129 Idaho at 460-61.

V. THE SUPERIOR COURT DID NOT ERR IN DENYING WWUC'S MOTION IN LIMINE.

Plaintiffs' declarations and exhibits are all proper as supportive of plaintiffs' standing to bring this matter or as proper illustrative examples for the court. WWUC claims error in the Superior Court's admission of evidence, but does not specify which evidence it objects to, claiming only that the court admitted some "as applied" evidence.²⁶ WWUC's claims are without a basis in the law and should be rejected.

A. Declarations Submitted In Support Of Plaintiffs' Standing Are Properly Included In The Record.

It is Plaintiffs' burden to show standing, and the declarations of Burlingame, Cornelius, and Bernheisel were all submitted in support of their standing. Because standing can be challenged at any time, even on appeal, *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186 (2006), it is proper and appropriate that Plaintiffs' standing declarations be submitted and included in the record for this case. The declarations submitted go to both Plaintiffs' standing as taxpayers and to their status as individual water rights holders affected by the MWL. *See generally* CP 197-362, 42-196, 492-564. The declarations demonstrate these Plaintiffs' status as

²⁶ Judging from WWUC's Motion in Limine, WWUC appears to object to declarations submitted by individual plaintiffs and exhibits included with Mr. Goho's declaration.

taxpayers, their unique rights and interests, and that they are junior rights harmed by the expansion of rights under various provisions of the MWL (should a court determine they do not qualify for taxpayer standing.) With only two exceptions, the Burlingame, Cornelius, and Bernheisel declarations were cited by Plaintiffs only for standing purposes. Offered for the purpose of supporting Plaintiffs' standing, the declarations are relevant and admissible and WWUC's claims should be rejected.

B. Plaintiffs' Illustrative Exhibits Are Proper Under Washington Law.

Washington courts are given wide latitude in determining whether to admit illustrative evidence, and this Court favors use of illustrative evidence that is relevant and material in character. *In re Woods*, 154 Wn.2d 400, 426-27, 114 P.3d 607 (2005); *State v. Lord*, 117 Wn.2d 829, 855, 822 P.2d 177 (1991); *State v. Gray*, 64 Wn.2d 979, 983, 395 P.2d 490 (1964). Further, many of the concerns with illustrative exhibits center on exposure of a jury to exhibits and ensuring that the jury understands proper weight and context, *see id.*, a concern not present with this case.

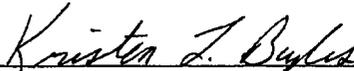
Here, Plaintiffs presented a number of illustrative exhibits to demonstrate the process by which Ecology now implements the MWL. The exhibits served a demonstrative purpose only, in order for the Superior Court to understand an admittedly somewhat abstract issue.

WWUC does not challenge the accuracy of any of the illustrative exhibits. The Superior Court did not abuse its discretion in allowing illustrative exhibits into the record, and WWUC's claim of error should be denied.

CONCLUSION

For the reasons discussed above and in the opening brief of the Tribes, the Burlingame Plaintiffs respectfully ask the Court to affirm the Superior Court's decision granting summary judgment with respect to the separation of powers violations of RCW 90.03.015(3) and (4) and RCW 90.03.330(3) and reverse the Superior Court's decision rejecting the due process challenges to RCW 90.03.386(2) and RCW 90.03.330(2).

Respectfully submitted this 23th day of December, 2008.



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APPENDIX

Washington State Department of Ecology
2003 Municipal Water Law
Interim Guidance
Interpretive and Policy Statement
Draft of December 1, 2008

The 2003 Municipal Water Law (SECOND ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1338; Chapter 5, Laws of 2003; 58th Legislature; 2003 1st Special Session; MUNICIPAL WATER SUPPLY--EFFICIENCY REQUIREMENTS) clarifies municipal water rights.
http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/2E2SHB_1338.pdf

On June 11, the King County Superior Court struck three sections of the 2003 Municipal Water Law, declaring three sections of the law unconstitutional. (The law, the legal challenges, related briefs, and the Court's decision are on the Municipal Water section of the Water Resources website: [Water Right Information - Municipal Water Law](#).) This interim guidance is to implement the 2003 Municipal Water Law (MWL) following the June 11, 2008 King County Superior Court decision.

This is interim guidance because the State filed an appeal to the state Supreme Court on July 7, 2008 seeking to overturn parts of the Superior Court's decision. This guidance may change based on the results of that appeal and the plaintiffs' cross appeals.

Ecology has chosen to develop this Interpretive and Policy Statement (IPS) for carrying out the Municipal Water Law under the authority of the Administrative Procedure Act (RCW 34.05.230). This IPS clarifies the Department of Ecology's position and management approach for carrying out that law during the interim between the King County Superior Court decision and the resolution of appeals.

This document's primary audience is Ecology staff and those interested in, and affected by, management of water rights for municipal supply purposes. It clarifies Ecology's approach in interpreting and implementing the law. It enables Ecology staff to have a common understanding and consistency of application.

Wherever possible, Ecology's goal is to be consistent in its review and decisions on municipal water supply issues. While the following statements address many situations, exceptions based on case-by-case review may arise that do not conform to these statements. This interpretive and policy statement interprets the June 11, 2008 King County Superior Court decision but is not a formal rule adopted through a rulemaking process. Thus, pursuant to RCW 34.05.230(1) this interpretive and policy statement is advisory only.

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GENERAL

1. We will administer the law as it exists, until and unless the King County Superior Court decision is modified. At this time, three sections of the MWL, RCW 90.03.015(3) (definition of "municipal water supplier") and (4) (definition of "municipal water supply purposes") and 90.03.330(3) (the "good standing" provision), are no longer valid and are in effect erased from the Water Code.
2. During the interim we will not amend decisions we made between September 9, 2003 and June 11, 2008 that were based on the sections of the MWL the Superior Court declared invalid.

We will proceed cautiously because of the uncertainty introduced by invalidation of the sections of the statute defining the terms "municipal water supplier" and "municipal water supply purposes," and the section of the statute providing that certificates for municipal water rights issued based on system capacity are in "good standing". An additional uncertainty is the possibility the King County Superior Court decision could be reversed or substantially changed on appeal. Until the final resolution of the case, we will not be reexamining previous assessments of municipal water rights or the prior associated decisions. We will continue to review water rights self-assessments in the water system planning process based on the law after the King County Superior Court decision.

3. Despite the decision being made in a single county Superior Court (*i.e.* King County), the decision is binding on Ecology throughout the state because Ecology is a defendant in the case and the plaintiffs brought a declaratory judgment action that challenged the facial constitutionality of the MWL.
4. For new water rights issued to private water systems we will describe the purpose of use on water right documents as being for "community domestic", "multiple domestic", or "group domestic" purposes. For changes to water rights held by private systems issued as municipal or previously conformed as municipal, the purpose of use will remain as "municipal."

WATER RIGHTS ADMINISTRATION

Tracking

Beginning June 11, 2008, Ecology Regional Offices will log all decisions with potential municipal water implications for both public and private entities.

If the Superior Court decision is reversed, water rights issued for multiple domestic, community domestic, or group domestic purposes may qualify as being rights for municipal purposes by operation of law, and the documents could be conformed to indicate the rights are for municipal purposes.

"Good Standing" Guidance

Prior to the June 11, 2008 King County Superior Court decision, water right certificates issued prior to September 9, 2003 for municipal water supply purposes based on system capacity (so-called "pumps and pipes" certificates) were in "good standing" under the MWL. Subsequent to

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the Superior Court decision, the "good standing" status of water rights held by both public municipal water suppliers and private water suppliers is in question.

The Superior Court ruled as unconstitutional the "in good standing" provision found in RCW 90.03.330(3) and the definitions for "municipal water supplier" and "municipal water supply purposes" (RCW 90.03.015 (3) and (4)). Under RCW 90.03.330(2) Ecology is prevented from revoking or diminishing water rights for municipal water supply purposes, as defined in RCW 90.03.015, except for when it processes water right change or transfer applications and in the context of general water rights adjudications, or if the certificate was issued with ministerial errors or obtained through misrepresentation. Although RCW 90.03.330(2) was not declared unconstitutional, its functionality is questionable and its viability currently suspect because it refers back to the definitions that were deemed unconstitutional. Therefore, the status of inchoate quantities associated with "pumps and pipes" certificates is in question pending final appellate resolution of this case.

Water Rights Changes

When a change to an existing municipal supply, multiple domestic, community domestic, or group domestic water right that is not completely put to beneficial use (documented by a so-called "pumps and pipes" certificate), is requested by either a public or private entity, we will provide the following options:

1. The applicant can **withdraw the application** and then reapply if they so choose when the law is finally clarified.

or

2. The entity can request that its **certificate be rescinded**. The certificate would be replaced with a superseding permit provided the entity has been perfecting the water right with reasonable diligence consistent with the original intent. The superseding permit would include a new development schedule.

or

3. The entity can request that we **divide the certificate**. The portion of water that has been put to beneficial use would be certificated, and a superseding permit would be issued for the inchoate portion. A new development schedule would be included.

or

4. The applicant could request that we **skip the application**. The applicant would step aside for a period of time or in a specific circumstance (or other specified condition) and let "juniors" pass them in the priority date line. The priority date would be preserved. This could enable the applicant to wait to see if RCW 90.03.330(3) is restored before their application is processed, while retaining their existing application.

Because the status of these water rights is uncertain and could change pending the outcome of the appeal, the following language should be inserted in decisions on change applications or

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conservancy board changes when dealing with "good standing" and rescinding a certificate to permit:

King County Superior Court Judge Jim Rogers provided an oral ruling on June 11, 2008 in Lummi Indian Nation, et al. v. State, the facial challenge to the constitutionality of the 2003 Municipal Water Law. The Court ruled that three MWL provisions violate separation of powers under the state Constitution: RCW 90.03.015(3) and (4), (definitions) and RCW 90.03.330(3) ("good standing"). Because this decision is under appeal, there is uncertainty as to the ultimate status of these statutory provisions and it is possible that they may be reinstated by the appellate court in the future.

In light of this decision, and given that a portion of Certificate (number) is inchoate at this time, and that (name of entity) has provided data demonstrating diligence in developing the inchoate portion of this right, (groundwater/surface water) [specify which] Certificate (number) shall be rescinded and concurrently replaced with Superseding Permit No. (number).

[NOTE: the language in the preceding paragraph would apply in situations where the applicant chooses to only receive a superseding permit. If they choose to also receive a superseding certificate, the language would state that it is also replaced with the superseding certificate to document the portion that has already been perfected through actual use.]

"Municipal Water Supplier" Definition

The following table describes those water suppliers we believe are municipal water suppliers currently, in accordance with the King County decision, and which are not. We have also noted with an asterisk and gray shading, entities where a generalization of their status is difficult and which might or might not be considered municipal water suppliers, depending on the specific situation.

Municipal Water Suppliers: PUBLIC ENTITIES	NOT Municipal Water Suppliers: PRIVATE ENTITIES
Cities and towns	Private developments
Counties	Privately owned water systems
Public utility districts	Water associations
Water and/or sewer districts	Home owner association
*Irrigation districts	Investor-owned water companies
*Port districts	
*Certain Institutions (<i>e.g.</i> prisons, public hospitals, public colleges and universities, etc.)	
*Whether the asterisked entities in the gray boxes are municipal water suppliers depends on the specific facts. If it is not clear if a particular water system is a "municipal water supplier", consult Don Davidson or Doug Rushton.	

The effect of the King County Superior Court's ruling excludes private entities from being municipal water suppliers. For example, a water right for a private development, issued for

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"community domestic" (or similar) purposes with 50 connections, would not be considered to be a water right for municipal purposes and the entity would not be considered to be a municipal water supplier. Therefore, under RCW 90.03.260(4), for private water systems, the maximum number of connections designated in the water rights documents are limiting attributes of those water rights.

If a private entity was issued a municipal water right or conformed as a municipal water right (*i.e.* designated as "municipal" on the water right document) such water right will still be considered to be a municipal water right pending the final outcome of the litigation.

Place of Use/Service Area

If an entity no longer qualifies as being a "municipal water supplier," they lose the service area benefit under RCW 90.03.386(2) that allowed them to change their water right place of use through water system planning, and must apply to Ecology to change their place of use. If an entity no longer qualifies as a municipal water supplier but prior to June 11, 2008 received approval for a service area change through an approved water system plan, the modified place of use will be honored by Ecology pending the final outcome of the litigation.

"Community Domestic", "Multiple Domestic", or "Group Domestic".

Some private entities would have been deemed municipal water suppliers by meeting the definition under the Municipal Water Law prior to the June 11, 2008 King County Superior Court decision. Water rights held by these entities will be regarded as being for "community domestic", "multiple domestic", or "group domestic" purposes (unless originally issued for "municipal" purposes). If the Supreme Court reverses or modifies the Superior Court decision, the community, multiple or group domestic suppliers will be municipal water suppliers by operation of law, and water rights that serve 15 or more connections, can then be conformed to indicate that they are for municipal purposes.

We will inform private water systems who receive the community/multiple/group domestic purpose of use designation, of the uncertainty surrounding these documents (pending the outcome of the appellate case). We will use the following language in these water rights documents:

Please be aware the definitions of "municipal water supplier", "municipal water supply purposes", and the inchoate water right "in good standing" provision in the Municipal Water Law of 2003 have been deemed unconstitutional by King County Superior Court. Ecology has appealed this decision to the Washington State Supreme Court. A final decision on the appeal to the Supreme Court may not be issued for some time. Therefore, your water rights purpose of use is considered to be "community domestic" pending the final outcome of the legislation. If the law is reinstated on appeal, your community domestic right will automatically be for municipal water supply again by operation of law. From that time forward, you would have the choice of requesting Ecology to conform your document by having the words "community domestic" changed to "municipal water supply".

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WATER SYSTEM PLANNING

We will continue review of water system plans (WSPs). Because no response from Ecology on WSP reviews results in the Department of Health not having information to use in their approval process, Ecology will continue review of WSPs.

When a water system is not a "municipal water supplier":

- Where a water system no longer meets the definition for "municipal water supplier", the plan review letter should include the above caveat language for "multiple domestic", "community domestic" or "group domestic" water right documents.
- Private entities can no longer meet the definition of being a municipal water supplier. The connection limit(s) in the water rights documents will be limitations on water use, and the Q_a should be reviewed in relation to the number of connections. The service area cannot exceed the place of use designated under the water right document(s). The private entities may be required to apply to change the place of use if they cannot wait until the final outcome of the litigation.
- If we identify a connections limit for non-municipal water suppliers, we will notify the Department of Health and expect them to honor the number pending the outcome of the litigation.
- If the number of connections exceeds the limitation on the water right document, Ecology will notify the Department of Health that further expansion should not occur pending the outcome of all appeals.

"Good standing" of pumps and pipes certificates in the context of water system plan review.

Based on the uncertainty over the status of water rights documented by certificates that include quantities of inchoate water, when submitting a plan review letter the following should be inserted as a comment:

According to our analysis of the self-assessment in the proposed (name) Water System Plan, your water system may have XXX gpm and XXX.X acre-feet per year of water that has not yet been perfected through actual use of the water. The status of the undeveloped, or inchoate, portion of the water right certificate(s) is uncertain based on the King County Superior Court decision in Lummi Indian Nation, et al. v. State of Washington. The court ruled that the section of the Municipal Water Law of 2003 that declared that pumps and pipes certificates are in good standing is unconstitutional because it violates separation of powers under the state Constitution.

The King County Superior Court decision has been appealed by all involved parties to the State Supreme Court, and it may be one or more years before final resolution of this uncertainty. The State is urging the Supreme Court to reverse the King County Court's ruling and find that all parts of the 2003 Municipal Water Law are constitutional. Meanwhile the King County decision is the current law.

If you decide to continue to grow into the undeveloped portion of your certificate(s) while this case is pending, be advised that you are assuming the

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risk that part of the water right documented by your certificate(s) could ultimately be determined to be invalid.

Please contact (name and phone number) if you have questions or if you wish to discuss options.

Water rights self-assessments.

Water rights self-assessments are important parts of the water system plan review process. There is uncertainty regarding "pumps and pipes certificates" and concerning which entities are "municipal water suppliers" and which are not. Because of that uncertainty, it is imperative the Departments of Health and Ecology coordinate during review of water system plans.

More information

Information and documents related to the 2003 Municipal Water law, including the statutory language, the legal challenges and the King County Superior Court decision are on the website.

For general questions about the Municipal Water Law, contact Don Davidson at (360) 407-6636 or ddav461@ecy.wa.gov.

For questions about the Municipal Water Law legal challenges, contact Doug Rushton at (360) 407-6513 or drus461@ecy.wa.gov.

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