

NO. 81809-06

SUPREME COURT OF THE STATE OF WASHINGTON

LUMMI NATION, MAKAH INDIAN TRIBE, QUINAULT INDIAN NATION, SQUAXIN ISLAND TRIBE, SUQUAMISH TRIBE, and the TULALIP TRIBES, federally-recognized Indian tribes, JOAN BURLINGAME, an individual; LEE BERNHEISEL, 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 SELECKY, 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
LUMMI NATION, ET AL.**

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I. INTRODUCTION.

This case involves a challenge brought by six federally recognized Indian tribes (the “Tribes”) to the constitutionality of certain aspects of the 2003 Municipal Water Law (MWL).¹ 2003 Wash. Laws, 1st Sp. Sess., Ch. 5. The challenged portions of the MWL are unconstitutional because they: (1) attempt to retroactively overrule this Court’s authoritative construction of the Water Code in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998); (2) expand the water rights of a favored class of so-called “municipal” water purveyors, defined to include private entities serving as few as 15 residential connections, to the detriment of all other water right holders in Washington; and (3) strip the Tribes and other affected water right holders of their procedural right to administratively contest changes to the place and purpose of use of so-called “municipal” water rights.

The Tribes have brought this challenge, not only because some of them hold water rights that will be impaired by the MWL, but also because of their interests in adequate stream flows to protect salmon and other anadromous fish. Although the State has set minimum flows for

¹ The Tribes are: the Lummi Nation, the Makah Indian Tribe, the Quinault Indian Nation, the Squaxin Island Tribe, the Suquamish Tribe and the Tulalip Tribes. In the order found in the Revised Code of Washington, the provisions of the MWL challenged by the Tribes are: RCW 90.03.015(3) and (4), RCW 90.03.260(4) and (5), RCW 90.03.330(2) and (3), and RCW 90.03.386(2). The full text of the challenged statutes is set out in Appendix A.

many river systems of concern to the Tribes, those flows are often not met and are junior to many other water rights, including water rights unconstitutionally expanded by the MWL. The MWL exacerbates existing water supply deficits in ways that impair the Tribes' rights and violate both the separation of powers and due process.

The King County Superior Court correctly determined that the legislature attempted to usurp the role of the judiciary when it 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 90.03.015(3) and (4), and when it declared that invalid "pumps and pipes" certificates issued before the MWL's effective date were rights "in good standing." RCW 90.03.330(3). Because these statutory provisions purport to make retroactive determinations regarding the validity of certain water rights in derogation of this Court's holdings in *Theodoratus*, this Court should affirm the Superior Court's decision that these provisions of the MWL are facially unconstitutional. *See San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 973 P.2d 179, 189 (1999).

However, the Superior Court erred in holding that four other provisions of the MWL – RCW 90.03.260(4) and (5), RCW 90.03.330(2), and RCW 90.03.386(2) – do not facially violate the due process clause of

the Washington Constitution. Each of these provisions allows expansion of substantive aspects of existing water rights, including express limits on the place of use and the number of connections or people that may be served, without regard to the adverse effects these changes will have on the vested water rights of others or the minimum stream flows so vital to the Tribes' interests. Indeed, under the MWL, changes to the rights of so-called "municipal water suppliers" can be approved by the State without affording the Tribes and other affected water right holders notice or an opportunity for an administrative hearing. This Court should reverse the lower court's decision because these provisions facially violate both substantive and procedural due process.

II. ASSIGNMENTS OF ERROR.

1. The King County Superior Court erred in holding that RCW 90.03.386(2) does not facially violate substantive and procedural due process under the Washington Constitution. CP 618 (Summary Judgment Order ¶¶ 5.b and c)

2. The superior court erred in holding that RCW 90.03.260(3) and (4) do not facially violate substantive and procedural due process under the Washington Constitution. *Id.* (Summary Judgment Order ¶¶ 5.a and d).

3. The superior court erred in holding that RCW 90.03.330(2) does not facially violate procedural due process under the Washington Constitution. *Id.* (Summary Judgment Order ¶ 5.e).

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. The Tribes 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 *Theodoratus* that a vested water right cannot be issued on the basis of system capacity, and (b) makes improper legal conclusions regarding the extent and validity of existing water rights?

2. Does RCW 90.03.330(3) violate substantive due process by retroactively expanding water rights represented by unlawful 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 by so-called “municipal water suppliers” occurring before the MWL’s effective date?

B. The following issues relate to the Tribes’ 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 so-called “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 for a hearing before the State approves changes in a “municipal water supplier’s” place of use?

3. Do RCW 90.03.260(4) and (5) violate substantive due process by retroactively eliminating population and connection limits in water rights held by “municipal water suppliers” to the detriment of other vested rights?

4. Do RCW 90.03.260(4) and (5) violate procedural due process by depriving affected water right holders of notice and an opportunity for a hearing before the State approves expansions in population or connection limits applicable to water rights held by “municipal water suppliers”?

5. Does RCW 90.03.330(2) violate procedural due process by depriving affected water right holders of notice and an opportunity for an

hearing to contest the “good standing” of unperfected water rights represented by system capacity certificates?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

For several decades, the Department of Ecology (“Ecology”) adhered to an unlawful policy of issuing water rights certificates to domestic water suppliers based on the supplier’s system capacity, or the “pumps and pipes” method, rather than on the actual beneficial use of water. *Theodoratus*, 135 Wn.2d at 587. In the early 1990s, Ecology recognized its error and began to comply with the law by issuing perfected water rights only on the basis of actual beneficial use. *Id.* Based on this legally necessary change in policy, Ecology amended a permit that had specified that a perfected water rights certificate would be issued based on system capacity to instead provide that a certificate would only be issued based on actual beneficial use. *Id.* at 598. The permittee, private developer George Theodoratus, challenged Ecology’s amendment of his permit. *Id.*

This Court upheld the permit amendment holding that Mr. Theodoratus’s original “pumps and pipes” permit was “*ultra vires*” because it utilized “an unlawful system capacity measure of a water right.” *Theodoratus*, 135 Wn.2d at 598. The Court held 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. Rather, a final water right certificate must be based on actual beneficial use. *Id.* at 590. Because the original permit was issued erroneously, the Court held that Ecology did not act improperly when it amended the permit to conform with the law. *Id.* at 598

In reaching this decision, this Court considered and rejected Mr. Theodoratus’ argument that his water rights were no different than those held by a city or town which, Mr. Theodoratus argued, could be perfected on the basis of system capacity. *Theodoratus*, 135 Wn.2d at 594. Although the Court did not decide whether a water right held by a municipality could be perfected based on system capacity, the Court held that Mr. Theodoratus was “not a municipality” and therefore not covered by special Water Code provisions applicable to water rights claimed for “municipal water supply purposes.” *Id.* at 594-95.

Theodoratus established that many certificates granted under Ecology’s unlawful “pump and pipes” policy had been unlawfully issued. In response, Ecology released a draft policy which proposed to rectify these errors by issuing a superseding certificate for “any portion of [a] pumps and pipes based certificate that [had] been previously put to actual beneficial use,” while reinstating the inchoate portion of the certificate as a

permit subject to the reasonable diligence requirement of RCW 90.03.460. See CP 835-36, 840. However, many water purveyors objected to Ecology's draft policy and sought the passage of legislation to overturn *Theodoratus*.

The Tribes objected to the purveyors' proposed legislation due to the adverse effects such legislation would have on their junior water rights and minimum instream flows. Nevertheless, in 2003 the legislature enacted legislation which attempted to reinstate pumps and pipes certificates that *Theodoratus* held had been unlawfully issued. Section 6(3) of the MWL (RCW 90.03.330(3)) declares that every water right represented by a pumps and pipes certificate issued for "municipal water supply purposes" *before* the statute's effective date is a "right in good standing."² In addition, Section 6(2) of the MWL (RCW 90.03.330(2)) blocks Ecology from implementing its draft policy by barring administrative action to revoke or diminish an invalid pumps and pipes certificate except pursuant to a general stream adjudication or a water right change proceeding.

In addition to retroactively reinstating invalid pumps and pipes certificates, the legislature retroactively conferred "municipal water

² By contrast, under Section 6(4) of the MWL (RCW 90.03.330(4)), certificates issued *after* the MWL's effective date must be based on actual beneficial use.

supplier” status upon private suppliers like Mr. Theodoratus. Sections 1(3) and (4) of the MWL (RCW 90.03.015(3) and (4)) define the terms “municipal water supplier” and “municipal water supply purposes” to include private water purveyors providing water to as few as 15 residential service connections. The new definitions overrule *Theodoratus* and effectively insulate private water suppliers from the legal consequences of past non-use of water under Washington’s relinquishment statute. See RCW 90.14.140(2)(d).

The legislature also provided all water purveyors meeting the new definition of “municipal water supplier” with special flexibility regarding the place of use of their water rights. Under Section 5(2) of the MWL (RCW 90.03.386(2)), the Department of Health’s (DOH) approval of a water system plan describing a “municipal water supplier’s” service area operates to expand the place of use of the supplier’s water rights to include the entire approved service area. Changes in place of use authorized under Section 5(2) of the MWL are effective regardless of adverse effects to other water rights.³ Unlike prior law, the MWL fails to afford other

³ The statute requires consistency with comprehensive plans, development regulations and other watershed plans, but not compatibility with other water rights. RCW 90.03.386(2).

right holders with notice and an opportunity for a hearing before approval of a change in the place of use.⁴

Finally, Sections 4(4) and (5) of the MWL (RCW 90.03.260(4) and (5)) provide that a limit on the number of people or connections that may be served under a water right, when found in a permit or certificate held by a “municipal water supplier” (as defined under RCW 90.03.015(3)), is no longer an “attribute limiting the exercise of the water right” as long as the number of connections or population served is consistent with a DOH-approved water system plan. As with Section 5(2) of the MWL (RCW 90.03.386(2)), these provisions apply regardless of any adverse effects on other existing rights. These provisions likewise fail to afford other water right holders with notice and an opportunity for a hearing prior to approval of changes to population or service connection limits.⁵

⁴ Changes in the place of use of a water right have the potential to adversely affect other existing rights, including minimum stream flows, by increasing consumptive use or altering return flows. *See Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 777, 947 P.2d 732 (1997). Accordingly, under prior law, the place of use of a water right could be expanded only if the change would not injure existing rights. *Id.*; *see also* RCW 90.03.380(1); RCW 90.44.100(2). Other water right holders had the right to notice and an opportunity for a hearing to contest decisions approving changes in the place of use. RCW 90.03.380(1); RCW 90.44.100(2).

⁵ In addition to the provisions challenged in this action, the MWL also contains a number of provisions defining the duties of municipal suppliers and providing for establishment of water use efficiency standards. Regardless of how the Court resolves the claims in this litigation, these other provision will be unaffected. *See* 2003 Wash. Laws, 1st Sp. Sess, Ch. 5, § 19 (if any provision of the act is held invalid, “the remainder of the act . . . is not affected”).

B. Proceedings Below.

On November 17, 2006, the Tribes filed this action seeking a declaratory judgment that the provisions of the MWL described above are facially unconstitutional. The Tribes' action was consolidated with a case previously filed by non-tribal water right holders and conservation organizations (the "*Burlingame*" plaintiffs). The Washington Water Utilities Council ("WWUC"), Cascade Water Alliance ("CWA") and Washington State University ("WSU") intervened as defendants in both cases. All parties filed cross-motions for summary judgment.

On June 11, 2008, the Superior Court issued a final order fully disposing of the case on the parties' motions. The Court held that RCW 90.03.330(3) and RCW 90.03.015(3) and (4) exceeded the legislature's constitutional authority because these statutes have "retroactive effect and attempt to overrule an interpretation of the Water Code in [*Theodoratus*]." CP 617. Alternatively, the Court ruled that RCW 90.03.330(3) "violates the separation of powers under the state constitution because it purports to make a legislative determination of adjudicative facts concerning the 'good standing' of particular water rights." CP 617-18. Given the separation of powers rulings, the Court found it unnecessary to rule on the Tribes' substantive due process challenge to these statutes. CP 618.

However, the Court held that the remaining provisions challenged in this action did not facially violate substantive or procedural due process. *Id.*

Defendants and Intervenors appealed the Superior Court's rulings invalidating RCW 90.03.015(3) and (4) and 90.03.330(3). The Tribes and the *Burlingame* plaintiffs filed cross appeals of the lower court's rulings that RCW 90.03.260(4) and (5), RCW 90.03.330(2), and RCW 90.03.386(2) were not facially unconstitutional. All parties have sought direct review.

V. STANDARD OF REVIEW

The Tribes adopt the standard of review discussion presented on pages 17-33 of the *Burlingame* plaintiffs' opening brief.

VI. RESPONSE ARGUMENT

A. RCW 90.03.330(3) Violates the Separation of Powers.

1. The Separation of Powers Doctrine.

The separation of powers doctrine arises out of the "constitutional distribution of the government's authority into three branches." *Port of Seattle v. PCHB*, 151 Wn.2d 568, 625, 90 P.3d 659 (2004) (quoting *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002)). "The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the 'fundamental functions' of another." *Moreno*, 147 Wn.2d at 505 (quoting *Carrick v. Locke*, 125 Wn.2d 129,

135, 882 P.2d 173 (1994)). A violation of the separation of powers occurs when one branch of government invades the province of another branch. *State v. Mann*, 146 Wn. App. 349, 358, 189 P.3d 843 (2008). The question to be asked is “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, 147 Wn.2d at 505-06 (quoting *Carrick*, 125 Wn.2d at 135).

Separation of powers issues arise when the legislature attempts to perform judicial functions. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 143, 744 P.2d 1032 (1987); *Mann*, 146 Wn. App. at 358. Put simply, it is the legislature’s function to make new laws, while it is the judiciary’s function to interpret the law and apply it to individual cases:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other had, looks to the future and changes existing conditions by making a new rule, to be applied thereafter.

City of Tacoma v. O’Brien, 85 Wn.2d 266, 272, 534 P.2d 114 (1975); *see also Marine Power & Equip. Co. v. Human Rights Comm’n Hearing Tribunal*, 39 Wn. App. 609, 615 n.2, 694 P.2d 697 (1985).

Because interpreting statutes is a judicial function, “the legislature does not have the power to overrule judicial interpretations of the law.”

State v. Pillatos, 159 Wn.2d 459, 473-74, 150 P.3d 1130 (2007) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). “Any attempt by the Legislature to contravene retroactively this Court’s construction of a statute ‘is disturbing in that it would effectively be giving license to the [L]egislature to overrule this [C]ourt, raising separation of powers problems.’” *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997) (quoting *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)). “Separation of powers problems are raised when a subsequent legislative enactment is viewed as a clarification and applied retroactively, if the subsequent enactment contravenes the construction placed on the original statute by this Court.” *Overton v. State Econ. Assistance Auth.*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981).

In general, statutory amendments apply prospectively only. *Magula*, 131 Wn.2d at 181; *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). An amendment may apply retroactively if it is “curative” and “clarifies or technically corrects an ambiguous statute.” *F.D. Processing*, 119 Wn.2d at 461; *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988). However, “curative” legislation that purports to “clarify” an ambiguous statute may be applied retroactively only if the clarification does not “contravene a construction placed on the original statute by the judiciary.” *State v. Dunaway*, 109 Wn.2d 207, 216 n.6, 743

P.2d 1237, 749 P.2d 160 (1987); *F.D. Processing*, 119 Wn.2d at 461.

“Any other result would make the legislature a court of last resort.”

Dunaway, 109 Wn.2d at 216 n.6.

2. RCW 90.03.330(3) Violates the Separation of Powers Doctrine.

RCW 90.03.330(3) violates the separation of powers because it retroactively overrules the holding of *Theodoratus* that a water right may only be perfected through beneficial use. Furthermore, the statute makes an improper judicial determination regarding the “good standing” of particular water rights.

a. *Theodoratus* Held that Water Right Certificates Issued Based on System Capacity Are Invalid.

As discussed in Part IV.A, *supra*, in *Theodoratus*, this Court rejected a challenge brought by George Theodoratus, a private developer, to a permit condition providing that he would be entitled to a water right certificate based on the amount of water applied to a beneficial use, rather than on the capacity of his water delivery system (as provided in his original permit). The Court held that 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 upon system capacity.” *Theodoratus*, 135 Wn.2d at 590. Because Ecology’s earlier

policy of issuing certificates based on system capacity was inconsistent with the beneficial use measure for perfecting a water right, the policy was “unlawful” and “ultra vires.” *Id.* at 598. Accordingly, the Court held, Ecology acted properly when it subjected Mr. Theodoratus’s permit to the condition that a water right certificate for a perfected right would be based on the amount of water put to actual beneficial use. *Id.*

The State erroneously maintains that the *Theodoratus* Court “did not hold that ‘pumps and pipes’ certificates that Ecology had issued prior to the decision were invalid.” State Brf. at 30. While the facts before the Court in *Theodoratus* involved Ecology’s conditional approval of a permit extension, the Court squarely held that Ecology lacked authority to issue a certificate based on system capacity. 135 Wn.2d at 587 (“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.”) (emphasis added). The Court further concluded that “a final certificate of water right *cannot be issued* to Appellant for a quantity of water not actually put to beneficial use.” *Id.* at 597 (emphasis added). In holding that Ecology lacked the authority to issue a certificate based on system capacity, the Court’s decision necessarily determined that all certificates previously issued on that basis were invalid. *Id.* at 602 (Court’s decision

“destabilizes all certificates already issued under the pumps and pipes approach”) (Sanders J. dissenting).

These holdings were necessary to the Court’s decision and were not *dicta*.⁶ To resolve Mr. Theodoratus’s permit challenge, the Court had to evaluate the permit conditions at issue against the legal standard for perfection of a water right. The Court explained that permit conditions “must be consistent with the requirements of the [Water Code]” and reasoned that “permit terms which are unlawful under the surface water code cannot be used to force issuance of a final certificate of groundwater right under RCW 90.44.080.” *Theodoratus*, 135 Wn.2d at 593. Based on this reasoning, the Court held that Ecology’s original permit condition, which promised the issuance of a final, perfected water right certificate based on construction of a delivery system, was “unlawful” and “*ultra vires*.” *Id.* at 598. Thus, while Mr. Theodoratus’s claim involved a challenge to a permit amendment, the Court could not resolve that claim without deciding whether a water right *certificate* could be validly issued based on system capacity, rather than actual beneficial use.

⁶ A court’s holding is a “determination of a matter of law pivotal to its decision”; while “dicta” is “a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” *See* State’s Brf. at 26-27 (citing *Black’s Law Dictionary* (8th ed. 2004)).

Appellants incorrectly claim that interpreting *Theodoratus* to invalidate previously issued pumps and pipes certificates would invalidate “thousands of previously issued water rights” and lead to the “catastrophic result” that water purveyors holding such certificates would be required to shut down water service or face penalties for illegal water use. State Brf. at 30; WWUC Brf. at 26. But the fact that a certificate was not validly issued does not mean the water right represented by such a certificate is necessarily invalid. The validity of water rights represented by pumps and pipes certificates depends not on the issuance of a certificate, but rather on whether the holder has exercised reasonable diligence in applying water to a beneficial use. *Theodoratus*, 135 Wn.2d at 600; RCW 90.03.320, 90.03.460. Indeed, Ecology recognized as much in its draft policy, which proposed to “implement” *Theodoratus* by issuing superseding certificates for those portions of pumps and pipes certificates that had been put to actual beneficial use, while reinstating the inchoate portion of the certificate as a permit subject to the reasonable diligence requirement. CP 835-36, 840. Indeed, following the Superior Court’s decision in this case, Ecology proposed to effectively reinstate its draft policy as an interim measure pending resolution of this appeal.⁷

⁷ See 2003 Municipal Water Law Interim Guidance Interpretive and Policy Statement (Dec. 1, 2008) at 4. www.ecy.wa.gov/programs/wr/wrac/images/pdf/MWLImplementationGuidanceDRAFT12308.pdf (last visited 12-18-08).

In short, although *Theodoratus* made no holding regarding the validity of any water rights, it did hold that water rights *certificates* issued based on system capacity were “ultra vires” and “unlawful.” As even Appellant WSU recognizes, the legislature cannot retroactively reinstate these “unlawful” certificates as perfected water rights without violating the separation of powers. *See* WSU Brf. at 16.

b. RCW 90.03.330(3) Retroactively Overrules *Theodoratus*.

RCW 90.03.330(3) declares that every water right represented by a pumps and pipes certificate issued for “municipal water supply purposes” (as defined by RCW 90.03.015(4)) prior to the MWL’s effective date is “a right in good standing.” RCW 90.03.330(3) *only* applies retroactively. The Superior Court correctly held that by treating rights represented by certificates issued based on system capacity as perfected rights “in good standing,” the legislation overrules the holding in *Theodoratus* that water rights will vest only when water is put to actual beneficial use. Verbatim Report of Proceedings (VRP) at 9.⁸

The Intervenors maintain that the good standing declaration in RCW 90.03.330(3) was not intended to convert the unused portions of pumps and pipes certificates into perfected rights, but merely to treat them

⁸ The VRP is attached to the State’s Brief as Appendix B.

as *inchoate* rights in good standing.⁹ See WWUC Brf. at 30-31; WSU Brf. at 17-18. This reading of RCW 90.03.330(3) is inconsistent with the role that issuance of a water right certificate plays under the Water Code. Under the Water Code, a “certificate” may be issued only upon a showing that an appropriation “has been perfected” in accordance with the requirements of the Water Code. RCW 90.03.330(1); *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 129, 969 P.2d 458 (1999) (“a certificate of groundwater right is issued when a water right is perfected”). Indeed, many water right certificates expressly certify that the “right to the use of said waters has been *perfected* in accordance with the laws of the State of Washington.” See, e.g., CP 906, 909. There is no precedent in the Water Code or the case law for an “inchoate certificate.”

Under the Water Code an *inchoate* right in good standing is represented by a water right *permit*. *R.D. Merrill*, 137 Wn.2d at 130 (“holder’s right under a permit to appropriate water is an inchoate right, which is ‘an incomplete appropriative right in good standing’”) (quoting *Theodoratus*, 135 Wn.2d at 596). If the legislature had intended that the unused portions of rights represented by pumps and pipes certificates

⁹ The State maintains that the legislative declaration of “good standing” does not confer actual good standing on any rights, but merely indicates that *Theodoratus* did not take these rights “*out of* good standing.” State Brf. at 31 (emphasis in original). The State’s interpretation of RCW 90.03.330(3) is inconsistent with its plain meaning and would render the statute entirely superfluous. See Part VI.A.2.c below.

should be treated as inchoate rights in good standing, it would have directed Ecology to issue new permits for the unused portions of those rights, just as Ecology had proposed to do under its post-*Theodoratus* draft policy. *See* CP 835-36, 840 (proposing to issue superseding certificates for portion of certificate put to beneficial use and reverting unused portions of certificate to permit status). But as the WWUC points out, the legislature adopted the MWL precisely to *prevent* Ecology from implementing that draft policy. *See* WWUC Brf. at 14-15, 28-29.

The Intervenors' reading of RCW 90.03.330(3) is inconsistent with RCW 90.03.330(2) (Section 6(2) of the MWL), which forbids Ecology from "revoking, diminishing, or adjusting a certificate based on any change in policy regarding the issuance of such certificate that has occurred since the certificate was issued." Read in context, the "change in policy" referenced in RCW 90.03.330(2) quite clearly refers to Ecology's change from the unlawful "pumps and pipes" policy to the lawful policy of issuing certificates based on actual beneficial use. It is thus clear that RCW 90.03.330(2) bars Ecology from revoking or modifying any certificate covered by RCW 90.03.330(3) based on the certificate holder's failure to put water to a beneficial use. By contrast, under RCW 90.03.320, Ecology retains the power to make adjustments to an *inchoate* right represented by a *permit* based on a failure to put water to beneficial

use with reasonable diligence. RCW 90.03.330(2) thus confirms that the legislature intended that a pumps and pipes certificate covered by RCW 90.03.330(3) would be treated as a fully perfected right, not as an inchoate permit.¹⁰

The notion that RCW 90.03.330(3) merely confirms pumps and pipes certificates as a form of inchoate water rights is also inconsistent with RCW 90.03.330(4) (Section 6(4) of the MWL). RCW 90.03.330(4) provides that Ecology may issue new water rights certificates after the MWL's effective date "only for the perfected portion of a water right as demonstrated through actual beneficial use of water." The MWL thus establishes different standards for perfection of water right certificates issued for "municipal water supply purposes" before and after its effective date. This is confirmed by the Final Bill Report which summarizes the effect of RCW 90.03.330(3) and (4) as follows:

A water right represented by a water right certificate issued *in the past* for municipal water supply purposes once works for diverting or withdrawing and distributing water were

¹⁰ The State points out that RCW 90.03.330(2) authorizes revocation or diminishment of pumps and pipes certificates in a general stream adjudication or in a water right change proceeding. State Brf. at 32. But this does not suggest that the legislature intended that certificates covered by the good standing declaration of RCW 90.03.330(3) would be treated any differently than other certificates. While a water rights certificate constitutes *prima facie* proof that a right has been validly perfected in an adjudication or change proceeding, it does not conclusively establish the continuing validity of the underlying right. See *Okanogan Wilderness League*, 133 Wn.2d at 779 (in change proceeding Ecology must tentatively determine "if a right has not been beneficially used to its full extent, or if the right has been abandoned").

constructed, rather than after the water had been placed to actual beneficial use, *is declared to be a right in good standing*. However, *from now on*, the DOE must issue a water right certificate only for the perfected portion of the right as demonstrated through actual beneficial use of water.

CP 479 (emphasis added).

As shown by both the plain language of the statute and its legislative history, the legislature intended to validate system capacity certificates issued before the MWL's effective date while requiring that certificates issued in the future would be based on actual beneficial use. Under the separation of powers doctrine, the legislature *could* have decided that certificates would be issued in the *future* based on system capacity, while preserving this Court's ruling in *Theodoratus* that certificates issued before the law's effective date had to be based on actual beneficial use. Instead, the legislature did exactly the opposite. By attempting to retroactively overrule this Court's holding that Ecology did not have authority to issue certificates for perfected water rights based on system capacity, the legislature infringed on the powers of the judiciary.

c. RCW 90.03.330(3) Impermissibly Makes Judicial Determinations.

Even assuming *arguendo* that the legislature intended to declare that every system capacity certificate subject to RCW 90.03.330(3) is merely an *inchoate* right "in good standing," the statute nevertheless

constitutes an unconstitutional “legal conclusion” or “judicial determination” regarding the validity of individual water rights.

It is the role of the legislature to make the law, while it is the role of the judiciary to interpret the law and apply it in particular cases. *Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 303-04, 174 P.3d 1142 (2007); *O’Brien*, 85 Wn.2d at 272; *Marine Power*, 39 Wn. App. at 615 n.2. Accordingly, “‘the legislature is precluded from making judicial determinations’ or ‘legal conclusions.’” *Port of Seattle*, 151 Wn.2d at 625 (quoting *O’Brien*, 85 Wn.2d at 271-72); *see also Gregoire*, 162 Wn.2d at 303-04. A “judicial determination” or a “legal conclusion” is “a result which follows from examination and consideration of circumstances in a particular case and interpretation and application of legal principles to those facts.” *Port of Seattle*, 151 Wn.2d at 625. In short, the legislature “cannot make case by case applications of the law to particular facts.” *Id.* (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711 (1989)).¹¹

For example, in *O’Brien*, 85 Wn.2d at 271, this Court held unconstitutional a legislative declaration that a substantial increase in the

¹¹ While the legislature may pass a retroactive, facially neutral law that directly affects a pending case, a retroactive amendment may not impede upon a court’s right and duty to apply the law to the facts of a case, dictate how the court should decide a factual issue, or affect a final judgment. *Port of Seattle*, 151 Wn.2d at 625-26 (quoting *Haberman*, 109 Wn.2d at 144).

cost of petroleum products had rendered “economically impossible” the performance of certain existing public works contracts. The Court held that the Legislature’s finding that “existing contracts, entered into at least six months prior to the legislation, have become economically impossible to perform” was “a legal conclusion, a result which follows from examination and consideration of circumstances in a particular case and interpretation and application of legal principles to those facts.” *Id.* at 272.

Applying these principles, in *San Carlos Apache*, 972 P.2d at 194-95, the Arizona Supreme Court struck down a retroactive statute that purported to quantify existing water rights based on the “maximum theoretical capacity of the diversion facility” rather than the water right holder’s actual beneficial use of water. The Court held that the separation of powers doctrine prohibited the legislature from adjudicating cases by defining existing law and applying it to the facts of particular cases. *Id.* at 195. The Court reasoned that “the Legislature may not require a court to reach and decree factual conclusions based on legislative determinations rather than actual facts.” *Id.*

The “good standing” declaration in RCW 90.03.330(3) constitutes an unconstitutional “legal conclusion” or “judicial determination.” As recognized in *Theodoratus*, an inchoate right “remains

in good standing so long as the requirements of law are being fulfilled.”

135 Wn.2d at 596 (quoting 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971)). The Court cited the “reasonable diligence” requirement as the principal example of legal requirements applicable to inchoate rights. *Id.* (quoting RCW 90.03.460). Thus, whether an inchoate water right is “in good standing” necessarily depends on application of the law (*e.g.* the reasonable diligence requirement of RCW 90.03.460) to the facts of individual cases. The legislature cannot resolve whether particular inchoate right holders have used reasonable diligence in putting water to beneficial use – the answer to that question clearly depends on the application of the law to the myriad facts unique to each water right. A legislative determination that *every* system-capacity certificate issued for municipal purposes prior to the MWL’s effective date is “a right in good standing,” despite the wide array of facts unique to each water right, effectively adjudicates the status of the rights underlying those certificates and insulates them from proper administrative and judicial inquiry regarding their actual validity. *See San Carlos Apache*, 972 P.2d at 194-95. By enacting RCW 90.03.330(3), the Legislature crossed the line between legislation and making a retroactive, judicial determination of individual cases.

The State maintains that RCW 90.03.330(3) does not “make any determinations with respect to the validity and extent of specific water rights.” State’s Brf. at 34. The State’s argument is premised on the theory that the legislature did not mean what it said when it declared all rights meeting the criteria set forth in RCW 90.03.330(3) to be “in good standing.” Instead, the State contends that the Legislature merely sought to clarify that the issuance of a pumps and pipes certificate did not take otherwise valid rights “out of good standing.” *Id.* at 31 (emphasis in original). The State provides little support for this interpretation of RCW 90.03.330, other than an Ecology interpretive policy enacted after this litigation was filed.¹² State Brf. at 31-32, 46 (citing CP 1494).

This Court “may not strain to interpret [a] statute as constitutional: a plain reading must make the interpretation reasonable.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 225, 11 P.3d 762 (2000); *Washington State Republican Party v. Washington State Public Disclosure Comm’n*, 141 Wn.2d 245, 281, 4 P.3d 808 (2000).

Furthermore, the Court “may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.”

¹² The state also cites the Pollution Control Hearings Board decision in *Cornelius v. Dep’t of Ecology*, PCHB No. 06-099 (Dec. 7, 2007), which merely noted Ecology’s position, while concluding that the certificate in question there was being pursued with reasonable diligence, regardless of the effects of the MWL. CP 112.

Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Nor may the Court interpret a statute so as to “render its plain language meaningless or superfluous.” *In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008); *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 610, 146 P.3d 914 (2006).

The State’s reading of RCW 90.03.330(3) is “strained” at best and is inconsistent with a “plain reading” of the statute. In RCW 90.03.330(3), the Legislature flatly declared that every water right represented by a pumps and pipes certificate issued for “municipal water supply purposes” before the MWL’s effective date was “a right in good standing.” The State’s argument that the Legislature really meant that otherwise valid water rights were not taken “*out of* good standing” by the erroneous issuance of a pumps and pipes certificate would render the plain language of the phrase “a right in good standing” entirely meaningless. *Detention of Martin*, 163 Wn.2d at 510. Indeed, if the Legislature did not intend to confer actual “good standing” on every right represented by a pumps and pipes certificate, it could have omitted RCW 90.03.330(3) entirely. Even without RCW 90.03.330(3), the MWL bars Ecology from revoking or diminishing pumps and pipes certificates except in very limited circumstances. *See* RCW 90.03.330(2). To have meaning, RCW

90.03.330(3) must be construed to confer “good standing” on the underlying rights themselves, as expressly set forth in the statute’s plain language.

The State’s interpretation of RCW 90.03.330(3) also impermissibly adds words to the statute’s plain statutory language. In *Theodoratus*, this Court explained that an inchoate right remains in good standing “so long as the requirements of law are being fulfilled.” 135 Wn.2d at 596 (quoting *Hutchens*, *supra*, at 226) (emphasis added). The State’s interpretation of RCW 90.03.330(3) would effectively add the words “so long as the requirements of law are being fulfilled” to statute’s “good standing” declaration for system-capacity certificates. But the statute says nothing that makes the declaration of “good standing” contingent on past compliance with the reasonable diligence and other applicable requirements.

In short, the State’s effort to save RCW 90.03.330(3) by rewriting the statute must fail. The plain language of RCW 90.03.330(3) declares all so-called “municipal” rights represented by pumps and pipes certificates issued before the statute’s effective date are rights “in good standing” regardless of the law and facts in individual cases. Because the “good standing” of an existing water right is a judicial, not a legislative, determination, RCW 90.03.330(3) violates the separation of powers.

B. RCW 90.03.330(3) Violates Substantive Due Process.

Even if the Court concludes that RCW 90.03.330(3) does not violate the separation of powers, the Court should hold that the statute violates the due process clause of the Washington Constitution. Although the Superior Court did not find it necessary to reach Plaintiffs' substantive due process challenge to RCW 90.03.330(3), this Court may affirm the Superior Court's decision invalidating the statute on any theory that is "established by the pleadings and supported by the proof." *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994); *see also* RAP 2.5(a) (party "may present a ground for affirming a trial court decision . . . if the record has been sufficiently developed to fairly consider the ground").

1. Retroactive Statutes that Adversely Affect Existing Water Rights Violate Substantive Due Process.

"Due process is violated if the retroactive application of a statute deprives an individual of a vested right." *Caritas Servs. v. Dep't of Social and Health Servs.*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994) (quoting *In re Marriage of MacDonald*, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985)); *see also State v. Varga*, 151 Wn.2d 179, 195, 86 P.3d 139 (2005). A law is retrospective if it "changes the legal consequences of acts completed

before its effective date.” *State v. Randle*, 47 Wn. App. 232, 240-41, 734 P.2d 5 (1987); *see also Varga*, 151 Wn.2d at 195.

A vested right is more than a “mere expectation based upon an anticipated continuance of the existing law,” but is “a right that has “become a title, legal or equitable, to the present or future enjoyment of property.” *State v. Shultz*, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999); *F.D. Processing*, 119 Wn.2d at 463. It is well established that “[p]roperty owners have a vested interest in their water rights” and that “water rights must receive due process protection.” *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993); *Dep’t of Ecology v. Acquavella*, 100 Wn.2d 651, 655-56, 674 P.2d 160 (1983). Thus, while the legislature has the power to enact laws regulating the exercise of water rights, such powers must be exercised in accordance with the due process clause of the State constitution.¹³ *Dep’t of Ecology v. Adsit*, 103 Wn.2d 698, 707, 694 P.2d 1065 (1985); *Dep’t of Ecology v. Abbott*, 103 Wn.2d 686, 697, 694 P.2d 1071 (1985); *Sheep Mountain Cattle Co. v. Dep’t of Ecology*, 45 Wn. App. 427, 430-31, 726 P.2d 55 (1986).

¹³ The State maintains that because water is a public resource, the legislature may “legitimately exercise[] its police power” to “redefine, clarify and change the private use of water to meet public goals.” State’s Brf. at 14. The State cites no authority in support of this remarkably expansive view of the legislature’s police powers. *See Carlstrom v. State*, 103 Wn.2d 391, 396-97, 694 P.2d 1 (1985) (“the mere assertion of the police power as the basis for enacting legislation is not sufficient to shield it from scrutiny when constitutional considerations are at stake”).

Under the prior appropriation system, junior right holders have a vested right to water that is not appropriated by a senior water right holder. *See R.D. Merrill*, 137 Wn.2d at 128. Due process is violated when a statute is retroactively applied to expand a senior water right at the expense of more junior rights. For example, in *San Carlos Apache*, 972 P.2d at 189, the court explained that because water rights are “vested substantive property rights” and there is “not enough water for all,” the “legal effect of acts that resulted in acquisition and priority of water rights cannot be changed by subsequent legislation” without violating substantive due process. Thus, the court held, “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.” *Id.* The court went on to invalidate on due process grounds a number of statutes that purported to retroactively revive or expand the rights of certain water right holders at the expense of others. *Id.* at 190-92.

By contrast, in *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996), the Idaho Supreme Court upheld retroactive statutes affecting vested water rights, but only because the legislature included provisions designed to expressly protect the vested rights of junior appropriators. For example, the Court

also upheld a statute retroactively validating unauthorized “enlargements” of water rights because “it provide[d] that an enlargement cannot be allowed that would injure a junior appropriator.” *Id.*, 926 P.2d at 1307-08. The court explained, however, that the statute would have been unconstitutional “if it allowed a party with a claim for an enlargement to unconditionally receive a priority date as of the date of enlargement regardless of injury to junior appropriators.”¹⁴ *Id.* at 1307; *see also A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78, 84 (2005) (“proposed enlargements create a per se injury to junior water rights”).

In short, the due process clause prohibits the legislature from enacting legislation that retroactively alters “legal effect of acts that resulted in acquisition and priority of water rights” in derogation of the water rights of others.

2. RCW 90.03.330(3) Retroactively Expands the Rights of Some Water Right Holders at the Expense of Others.

Notwithstanding the holding in *Theodoratus* that water rights may only be perfected through actual beneficial use of water, RCW 90.03.330(3) provides that a certificate issued by Ecology for so-called “municipal water supply purposes” on the basis of system capacity “is a

¹⁴ Indeed, earlier statutes that had not included provisions protecting junior appropriators had been held unconstitutional by the lower courts. *Fremont-Madison*, 926 P.2d at 1304.

right in good standing.” There is no question that RCW 90.03.330(3) applies retroactively; it expressly applies *only* to water right certificates issued “*prior to September 9, 2003*” (the statute’s effective date). Because RCW 90.03.330(3) applies *only* retroactively, it violates due process because it enlarges one class of water rights to the detriment of others. *San Carlos Apache*, 972 P.2d at 189; *Fremont-Madison*, 926 P.2d at 1307.

Under the Water Code, issuance of a certificate is the final step in establishing a vested water right and may only occur upon a showing that an appropriation “has been perfected” in accordance with the requirements of the Water Code. *R.D. Merrill*, 137 Wn.2d at 129; RCW 90.03.330(1). By deeming erroneously issued “pumps and pipes” certificates to be rights in good standing,” RCW 90.03.330(3) effectively converts unused water rights into vested, perfected rights for the purposes of the Water Code. By treating pumps and pipes certificates involving unused water rights as perfected rights, even though at the time the rights were established the law provided that a water right could only be perfected by actual beneficial use, RCW 90.03.330(3) expands the rights represented by these certificates to the detriment of other vested rights.¹⁵

¹⁵ An unused right, once deemed perfected, could then be held indefinitely for speculative purposes given the fact that under RCW 90.14.140(2)(d) water rights held for municipal water supply purposes are not subject to relinquishment for nonuse. *See*

Even if the statute is not construed to treat pumps and pipes certificates as perfected rights, the statute nevertheless treats all of these certificates as *inchoate* “rights in good standing” even if the unused portions of the certificates have not been developed with reasonable diligence. By reviving water rights that became invalid as a result of failure to exercise reasonable diligence occurring prior to the statute’s enactment, RCW 90.03.330(3) violates the due process rights of other water right holders using the same source of supply. *San Carlos Apache*, 972 P.2d at 189. Unlike the Idaho statutes at issue in *Fremont-Madison*, 926 P.2d at 1307-08, RCW 90.03.330(3) makes no provision protecting the rights of junior appropriators. Because RCW 90.03.330(3) applies retroactively and treats the unused portion of a “pumps and pipes” certificate as a valid right, regardless of its actual validity, it is facially unconstitutional.

The State maintains that the Tribes’ due process claims are based on a “subjective expectation” that rights represented by invalid pumps and pipes certificates will be canceled, rather than a legal entitlement to

Theodoratus, 135 Wn.2d at 594. When similar legislation was enacted in 1997, Governor Locke vetoed it because it “would have provided an unfair advantage to public water systems by creating great uncertainty in determining water availability for other water rights and new applicants as well as uncertainty in the protection of instream resources.” *Id.*

water.¹⁶ State Brf. at 47-48. The State offers no authority for its view that unused inchoate rights that are not developed with reasonable diligence remain valid until cancelled by Ecology. Indeed, the law is clear that inchoate rights fall out of good standing and title to the unused water vests in junior appropriators at the time that the reasonable diligence requirement is violated, not when Ecology or an adjudicating court makes a determination of invalidity. *See Abbott*, 103 Wn.2d at 695 (unused riparian rights not developed with reasonable diligence were “extinguished” or “forfeited” in 1932, 15 years after the enactment of the Water Code).

The State’s argument also fails to recognize that interrelationship between water rights in our prior appropriation system. As one commentator has observed:

Water rights created by the appropriation might be analogized to a jigsaw puzzle in which each piece represents a water right. The area of a piece represents a diversionary entitlement, and the shape represents other variables which affect stream flows. . . . *The task of the appropriation doctrine is to prevent one piece from encroaching on another.*

¹⁶ In response to Plaintiffs’ substantive due process challenge, the State again argues that RCW 90.03.330(3) merely confirms that the issuance of a pumps and pipes certificate did not take a water right “out of good standing,” and that to be “in good standing” the water right holder must still meet all of the requirements of the Water Code. State Brf. at 46. As discussed in Part VI.A.2.c, *supra*, the Court should reject the State’s strained interpretation of RCW 90.03.330(3) because it is inconsistent with the statute’s plain language and would render the statute entirely superfluous.

Gould, “Water Rights Transfers and Third-Party Effects,” 23 *Land & Water L. Rev.* 1, 12 (1988); *quoted in* A. Tarlock, *Law of Water Rights and Resources*, § 5:73 (2005) (emphasis added). In light of the interlocking nature of water rights, a legislative expansion of certain rights will necessarily affect the rights of all competing appropriators in the same basin whose rights enjoy a lesser priority. *See A & B Irrigation Dist.*, 118 P.3d at 84. This Court should act to protect the water rights of all Washington citizens and hold that RCW 90.03.330(3) violates substantive due process.

C. RCW 90.03.015(3) and (4) Violate the Separation of Powers.

The Superior Court correctly held that the definitions of “municipal water supplier” and “municipal water supply purposes” in RCW 90.03.015(3) and (4) violate the separation of powers because they attempt to retroactively overrule this Court’s holding in *Theodoratus* that a private water purveyor is not a “municipal water supplier” and cannot hold water rights for “municipal water supply purposes.” *Theodoratus*, 135 Wn.2d at 594-95. In *Theodoratus*, the Court made two key holdings with respect to the nature and status of Mr. Theodoratus’ water rights. First, the Court held that because Mr. Theodoratus was “a private developer,” he was not a “municipality” or a “municipal water supplier.” *Id.* at 594. Second, the Court held that Mr. Theodoratus, as a private developer, was

not eligible for the “municipal water supply purposes” exemption from relinquishment. *Id.* at 594-95 (citing RCW 90.14.140(2)(d) as an example of the type of “municipal” treatment for which Mr. Theodoratus was ineligible and explaining that if system capacity defined “the measure and limit” of Mr. Theodoratus’s water right, then the relinquishment provisions of the water code “would be meaningless”).

The MWL directly and retroactively overrules both of these holdings. First, it retroactively transforms, by operation of law, many water rights held by private developers like Mr. Theodoratus for community domestic supply into water rights held for “municipal water supply purposes.”¹⁷ Second, it brings these same rights within the scope of the “municipal water supply purposes” exemption to the State’s relinquishment statute. Because this Court has previously construed the terms “municipal water supplier” and “municipal water supply purposes” to exclude private developers, *Theodoratus*, 135 Wn.2d at 594-95, the new definitions violate the separation of powers. *See Dunaway*, 109 Wn.2d at 216 n.6.

¹⁷ It is undisputed that the new definition of “municipal water supply purposes” includes a privately operated water supply system such as the one involved in *Theodoratus* because that system supplied more than 15 residential connections. *See Theodoratus*, 135 Wn.2d at 587 (indicating that 93 of the planned 253 residential lots had water service at the time of the litigation).

The State acknowledges that the definitions in RCW 90.03.015(3) and (4) were intended to apply retroactively, but defends them as “curative provisions that defined previously undefined terms and filled in gaps to resolve prior uncertainty and ambiguity in the law.”¹⁸ See State Brf. at 23. As shown below, the definitions in RCW 90.03.015(3) and (4) cannot be sustained as “curative” legislation because: (1) the definitions “contravene a construction placed on the [Water Code] by the judiciary,” *Dunaway*, 109 Wn.2d at 216 n.6; and (2) there is no ambiguity in the Water Code that the definitions could “clarify or technically correct.” *F.D. Processing*, 119 Wn.2d at 461.

1. The Definitions Contravene this Court’s Holdings in *Theodoratus*.

Appellants’ argue that the rulings from *Theodoratus* relied on in the Superior Court’s decision were mere *dicta*. State Brf. at 24; WWUC Brf. at 42. However, a review of the record in *Theodoratus* demonstrates that this Court’s rulings that Mr. Theodoratus, as a private developer, was not a “municipal water supplier” and could not hold rights for “municipal water supply purposes” were pivotal to the Court’s decision.

¹⁸ WWUC and CWA argue that RCW 90.03.015(3) and (4) do not apply retroactively in the context of relinquishment. WWUC Brf. at 44; CWA Brf. at 31. We address this argument in Part VI.C.3, below.

The briefs filed in *Theodoratus* put Mr. Theodoratus's municipal status squarely at issue. Mr. Theodoratus' opening brief equated his private water system with a municipal system and relied on case law relating to cities and towns in support of the argument that his private domestic water supply right could be perfected based on the pumps and pipes method. See *Theodoratus*, Appellant's Opening Brf. (1996 WL 33689471) at 20, 35-38 (citing *Holt v. City of Cheyenne*, 137 Pac. 876, 880 (Wyo. 1914) and *City and County of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939)). In its response, Ecology argued that *all* water rights, both public and private, must be perfected through actual beneficial use. *Theodoratus*, Ecology's Brf. (1997 WL 34487427) at 27-28. In reply, Mr. Theodoratus continued to argue that "the 'pumps and pipes' approach should apply to all domestic water systems, whether publicly or privately owned." *Theodoratus*, Appellant's Reply Brf. (1997 WL 33834527) at 16.

In response to the briefs filed by the parties, the WWUC filed an amicus brief which argued that municipal water systems were materially different from private community domestic systems. The WWUC maintained that "this case does not involve municipal water suppliers and the Court should avoid statements with potential application to such municipalities." *Theodoratus*, WWUC Amicus Brf. (1997 WL 33834529) at 8. The WWUC argued:

Municipal suppliers are specially treated under Washington law and the Water Code, and the DOE has historically recognized such special treatment in the administration of its program. This case, however, involves a non-municipal “public water system” that is privately owned by Mr. Theodoratus. Although the PCHB discussed principles of law applicable to municipal water suppliers (PCHB Order at 12-15), no municipal supplier is a party to this case.

Id. at 8-9. WWUC expressly asked the Court to “limit the scope of its decision to those issues of law and fact which specifically relate to Mr. Theodoratus’ privately owned, developer-based water system.” *Id.* at 20.

Mr. Theodoratus responded to the WWUC’s brief by reiterating his view that there was no material difference between public and private domestic water systems that should affect the manner of perfection.

Theodoratus, Appellants’ Response to WWUC (1997 WL 33834533) at

10. By contrast, Ecology’s response to the WWUC agreed that Mr. Theodoratus’ private system was not a municipal water supply system.

Theodoratus, Ecology’s Response to WWUC (1997 WL 33834531) at 8.

Nevertheless, Ecology maintained that both public and private systems should be treated the same with respect to perfection. *Id.* at 10.

The Court’s decision rejected the argument that different methods of perfection apply to irrigation rights and rights held by private entities for domestic water supply. *Theodoratus*, 135 Wn.2d at 594 (noting that “‘beneficial use’ and ‘perfection’ have the same meaning regardless

whether a private residential development or an irrigation use is involved”). Importantly, however, the Court also rejected Mr. Theodoratus’ argument that his private development was no different from a municipal water system. The Court held:

Appellant is a private developer and his development is finite. *Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case.* We do note that the statutory scheme allows for differences between municipal and other water use.

Id. (emphasis added). Significantly, the Court cited RCW 90.14.140(2)(d), the “municipal water supply purposes exemption” from relinquishment, as an example of the different treatment of municipal and private water uses in the Water Code. *Id.* In the very next paragraph, the Court noted that private rights like those held by Mr. Theodoratus *were* subject to relinquishment. *Id.* at 595. According to the Court, this was another reason to reject Mr. Theodoratus’s claim that his water rights could be perfected based on system capacity: “If system capacity defined the quantity of the right, i.e., system capacity equated to beneficial use as a measure and limit of the right, these statutory provisions would be meaningless.” *Id.*

Justice Sanders’ dissenting opinion asserted that “a community may perfect a water right in the amount of water it reasonably anticipates

it will need to ensure water for future growth.” *Theodoratus*, 135 Wn.2d at 614. While agreeing with the majority that “the *Theodoratus* development is not a municipality,” the dissent maintained that the so-called “growing communities doctrine” should be “equally applicable to private developments.” *Id.* at 616.

It is evident that the Court’s rulings on Mr. *Theodoratus*’s “municipal” status were not *dicta*. While Mr. *Theodoratus* and Ecology each sought a broad ruling applicable to both public and private entities, the Court followed the approach advocated by the WWUC and expressly limited its ruling to private water systems. In order to limit its ruling in this fashion, the Court needed to address Mr. *Theodoratus*’ argument that his water right was no different from a water right held by a city or town. The majority did so by holding that Mr. *Theodoratus* was “not a municipality,” thereby leaving open the question of whether the so-called “growing communities doctrine” might apply to water rights held by true “municipalities.” The necessity of the Court’s ruling on Mr. *Theodoratus*’s non-municipal status is demonstrated by the dissenting opinion which maintained that the “growing communities doctrine” was “equally applicable to private developments” and should have controlled the outcome of the case.

The Court's determination that Mr. Theodoratus was not subject to the "municipal water supply purposes" exemption to relinquishment was likewise not *dicta*. The Court reasoned 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 595. Because rights claimed for "municipal water supply purposes" are statutorily *exempt* from relinquishment, Mr. Theodoratus's lack of eligibility for this exemption was necessary to the Court's decision that a system capacity measure of a private domestic water right is inconsistent with the Water Code. *Id.* at 594-95.

The State nevertheless argues that the Court's rulings on Mr. Theodoratus' non-municipal status were *dicta* because the parties' briefs did not state as an "issue" whether a private entity could be a municipal water supplier. State Brf. at 24-25. The State, however, ignores both WWUC's amicus brief, which argued that water rights held by public and private entities were legally distinct, and the parties' responses, which maintained that private and public entities should be treated in the same manner. While the Court *could* have addressed the issues as framed by the parties, it was certainly not bound to do so. *See State v. Goldberg*, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003).

The State further maintains that the “issue over who can qualify to hold a water right for municipal purposes was not presented in *Theodoratus* because Mr. Theodoratus did not even assert that he held a municipal water supply right.” State Brf. at 25. However, the State overlooks the fact that Mr. Theodoratus forcefully argued that “the ‘pumps and pipes’ approach should apply to all public water systems, whether publicly or privately owned.” *Theodoratus*, Appellant’s Reply Brf. (1997 WL 33834527) at 16. Because it was necessary for the Court to address this argument in order to decide the case the way it did, the ruling that Mr. Theodoratus’ was not a “municipality” and could not hold rights for “municipal water supply purposes” was not *dicta*. Because RCW 90.03.015(3) and (4) retroactively overrule this decision, the statutes are not curative and violate the separation of powers.

2. The Term “Municipal Water Supply Purposes” Is Not Ambiguous.

RCW 90.03.015(3) and (4) are also not “curative” because the term “municipal water supply purposes,” as used in the Water Code prior to the MWL, was not ambiguous.¹⁹ A statute is not ambiguous merely because arguments regarding distinct interpretations of it are conceivable. *See In*

¹⁹ The term “municipal water supplier” was not previously found in the Water Code. But because the term is defined in RCW 90.03.015(3) as “an entity that supplies water for municipal water supply purposes” as defined in RCW 90.03.015(4), RCW 90.03.015(3) cannot survive the invalidation of RCW 90.03.015(4).

re Riley, 122 Wn.2d 772, 787, 863 P.2d 554 (1993); *Armstrong v. Safeco Ins. Co.*, 111 Wn.2d 784, 790-91, 765 P.2d 276 (1988). Furthermore, a term is not ambiguous just because it is undefined; an undefined term should be given its plain and ordinary meaning absent evidence of a contrary legislative intent. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992).

Prior to the MWL, the term “municipal water supply purposes” was found in only two places in the code: (1) RCW 90.14.140(2)(d), which provided an exemption from relinquishment for water rights claimed for “municipal water supply purposes;” and (2) RCW 90.03.260, which provided that that an application “for municipal water supply purposes . . . shall give the present population to be served and, as near as may be estimated, the future requirement *of the municipality.*”²⁰ (emphasis added). To the extent there was any ambiguity in the term “municipal water supply purposes” as used in RCW 90.03.140(2)(d), RCW 90.03.260 resolved that ambiguity by making clear that the term “municipal water supply purposes” was intended to apply *only* to a “municipality.”

²⁰ RCW 90.03.260 was amended by Section 4 of the MWL. The cited language of RCW 90.03.260 was retained as part of RCW 90.03.260(5).

Furthermore, the term “municipal” has a clear common meaning. “Municipal” is universally defined to refer to a governmental unit, and exclude private entities. For example: “municipal, adj. 1. Of or relating to a city, town, or local governmental unit. 2. Of or relating to the internal government of a state or nation (as contrasted with international).” *Black’s Law Dictionary* (7th ed. 1999) at 1037. The courts agree: “A municipal corporation is a political arm of the state.” *Matthews v. Wenatchee Heights Water Co.*, 92 Wn. App. 541, 548, 963 P.2d 958 (1998).

Both the State and the WWUC maintain that the term “municipal water supply purposes” was ambiguous because it was not clear whether the applicability of the phrase turned on the legal status of the entity holding the right or on the function served by that entity. *See* State’s Brf. at 42; WWUC Brf. at 40. This argument is flatly contrary to the positions these same parties asserted in *Theodoratus*.

In *Theodoratus*, the WWUC vigorously argued that Mr. Theodoratus was *not* a “municipal supplier” who would be afforded special treatment under the Water Code. WWUC Amicus Brf. (1997 WL 33834529) at 8-9. The WWUC maintained that “this case does not involve municipal water suppliers and the Court should avoid statements with potential application to such *municipalities*.” *Id.* at 8 (emphasis added). The Court adopted the WWUC’s position. *Theodoratus*, 135

Wn.2d at 594. Having successfully argued in *Theodoratus* that private entities were not municipal water suppliers, the WWUC is estopped from arguing in this case that the law was ambiguous on this point. *Arikson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007).

The State likewise acknowledged in *Theodoratus* that Mr. Theodoratus' development was "not equivalent to a city or town." Ecology Response to WWUC (1997 WL 33834531) at 8. In support, the State relied on dictionary definitions of the terms "municipality" and "municipal purposes."²¹ *Id.* In prior cases, the State also argued forcefully that the meaning of the term "municipal water supply purposes" was clear and did not include rights held by private entities. In *Georgia Manor Water Ass'n v. Dep't of Ecology*, PCHB No. 93-68, the State argued that to "so broadly interpret[] municipal supply purposes to include the purveyorship of domestic water for private development . . . grossly misinterprets" the statute. CP 888. The Pollution Control Hearings Board agreed that the term "municipal water supply purposes" found in the relinquishment statute, RCW 90.14.140(2)(b) was "unambiguous," and

²¹ According to Ecology's brief in *Theodoratus*: "A municipality is defined as a political unit, such as a city or town, incorporated for a local self government. American Heritage Dictionary 822 (2d college ed. 1985). Municipal purposes is defined as public or governmental purposes as distinguished from private purposes; (cites omitted). It may comprehend all activities essential to the health, morals, protection, and welfare of the *municipality*. (Cites omitted.) Black's Law Dictionary 1170 (rev. 4th ed. 1968)." *Theodoratus*, Ecology's Response to WWUC (1997 WL 33834531) at 8 n.4 (emphasis added).

that Ecology was “without any authority to alter or amend the act through its interpretation.” CP 827. The Board reasoned:

RCW 90.03.260 requires that applications for municipal water supply, “give the present population to be served, and, as near as may be, the future requirement of the municipality.” We are unaware of any authority that equates a private water purveyor with a municipality. The fact that there are functions which can be carried out by both private and public entities, does not persuade us that the Legislature, in passing the Water Code, contemplated that private, non-profit corporations could obtain water rights for municipal water supply purposes. The Code draws a bright line between public and private entities.

CP 826 (emphasis in original).

The State argues that because municipalities can provide “proprietary” water services, the term “municipal water supply purposes” as used in the Water Code should be interpreted to include water services provided by private water systems. State Brf. at 25-26, 42 (citing *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.23d 1279 (2003)). However, prior law very specifically and logically limited “municipal water supply purposes” rights to “municipalities.” See RCW 90.03.260. As the Board persuasively reasoned in *Georgia Manor*, the fact that municipalities perform proprietary services does not mean that *all* entities that perform similar proprietary services are “municipalities.”

The State also argues that the term “municipal water supply purposes” is ambiguous because Ecology personnel construed the term

differently at different points in time, and in several instances issued water right certificates to non-governmental entities for municipal supply purposes.” State Brf. at 40-41; *see also* WWUC Brf. at 15-16, 40. But misunderstanding of the law by Ecology personnel does not establish that the law was ambiguous. *See Theodoratus*, 135 Wn.2d at 587. Far more relevant than the random acts of individual employees, is the official position successfully taken by the State in *Georgia Manor* and *Theodoratus*. Significantly, Appellants point to no judicial interpretation of the terms “municipal water supplier” or “municipal water supply purposes” that even hints these terms might be considered ambiguous.

Even if the State could establish ambiguity, it cannot establish that RCW 90.03.015(4) merely “clarifies” the term “municipal water supply purposes” rather than amending it. No judicial or administrative interpretation of the term “municipal water supply purposes” has ever implied that it could be as broad as the new definition in RCW 90.03.015(4), which includes a mobile home park or a private entity serving as few as 15 residential connections. It is therefore incorrect to say that the legislature did not change existing law when it included such entities within the definition of “municipal water supply purposes.”²²

²² Also relevant to whether RCW 90.03.015(4) “clarifies” the term “municipal water supply purposes” is the fact that 36 years elapsed between the enactment of RCW 90.14.140(2)(d) and the 2003 MWL definition of “municipal water supply purposes.”

Because RCW 90.03.015(3) and (4) retroactively change, rather than clarify, the law and do so in a manner that contravenes a decision of this Court, the statutes violate the separation of powers.

3. The Definitions Operate Retroactively.

The State concedes that the definitions in RCW 90.03.015(3) and (4) “operate retroactively.” State Brf. at 23. Intervenors WWUC and CWA, however, maintain that these definitions apply only prospectively. WWUC Brf. at 44; CWA Brf. at 31-32. Intervenors apparently overlook the fact that the definition of “municipal water supply purposes” in RCW 90.03.015(4) is expressly referenced in RCW 90.03.330(3), which *only* has retroactive application. Thus, it cannot be disputed that the MWL definitions have retroactive application.

Ignoring RCW 90.03.330(3), Intervenors focus on the interaction between RCW 90.03.015(4) and the “municipal water supply purposes” exception to the relinquishment statute, RCW 90.14.140(2)(d). Intervenors argue that RCW 90.03.015(4) does not apply retroactively in this context because the “triggering event” for relinquishment is a determination by a court or administrative agency that a right has been

See San Carlos Apache, 972 P.2d at 193-94 (rejecting argument that challenged statutes merely clarified earlier statutes when amendment enacted after a considerable length of time and constitutes a clear and distinct change of the operative language); *Anderson v. City of Seattle*, 78 Wn.2d 201, 205, 471 P.2d 87 (1970) (Finley, J. concurring).

relinquished, not the “antecedent facts” upon which that determination is based. *See* WWUC Brf. at 44.

Intervenors fundamentally misunderstand the relinquishment process. Under RCW 90.14.160, relinquishment occurs when a water right holder fails “without sufficient cause, to beneficially use a portion of a water right for five successive years.” At that point, the water right holder “shall relinquish” the unused portion of the right which “shall revert” to the State. *Id.* The hearing procedure of RCW 90.14.130 provides an avenue for a water right holder to contest an Ecology determination that the reversion has occurred, but it is the failure to use the water, not the administrative determination that results in the reversion. The hearing statute itself confirms this: “When it appears . . . that said right *has . . . reverted* to the state because of non-use as provided by RCW 90.14.160 . . . , the department of ecology shall notify such person by order”²³ RCW 90.14.130 (emphasis added).

Thus, contrary to Intervenors’ argument, nonuse of water for five consecutive years is the “precipitating event” for relinquishment, not an administrative or judicial determination that relinquishment has occurred.

²³ As the Superior Court reasoned (VRP at 12), the operation of the relinquishment statute is analogous to adverse possession. The passage of the statutory period, coupled with the required predicate acts meeting the elements of adverse possession, results in title changing from the record owner to the adverse possessor, not a final determination in a quiet title action. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962).

See Abbott, 103 Wn.2d at 695 (unused riparian rights “extinguished” or “forfeited” 15 years after the enactment of the Water Code). This, in fact, has been Ecology long-standing position:

The correct interpretation that we should all be using is that a right is to be considered as relinquished, regardless of whether the relinquishment form has been processed, as long as all the other conditions are met which are the basis for the relinquishment. In other words, relinquishment of a water right is dependent upon the factual situation – if a water right (or portion thereof) has not been used for five successive years and does not qualify for exemption under RCW 90.14.140, the right has reverted to the state “as a matter of law.” The fact that the Department of Ecology has not been aware of the reversion or taken any formal action to make the reversion a matter of public record does not keep the right alive.

CP 996. In short, because the triggering event for relinquishment is five consecutive years of nonuse, RCW 90.03.015(4) operates retroactively in the context of the relinquishment statute, as well as under RCW 90.03.330(3).²⁴

D. RCW 90.03.015(3) and (4) Violate Substantive Due Process.

Under the due process clause, a new definition of “municipal water supply purposes” cannot retroactively revive invalid water rights that were

²⁴ Intervenors’ “precipitating event” argument relies on *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005). However, *Motley* stands for the proposition that, under the due process clause, the State may not issue a final order of relinquishment without providing an affected water right holder with notice and an opportunity for a hearing. 127 Wn. App. at 80-81; *see also Sheep Mountain*, 45 Wn. App. at 431. *Motley* addresses the question of procedural due process, not the “precipitating event” for relinquishment itself.

lost as a result of nonuse occurring prior the statute's effective date. In *San Carlos Apache*, 972 P.2d at 190, the court invalidated a statute that purported to retroactively excuse prior nonuse of a water right that would have resulted in forfeiture under the law that existing at that time. The Court reasoned:

The consequences of failure to make use of appropriated water on all of the appropriator's land must be determined on the basis of the law existing at the time of the event, not on the basis of subsequently enacted legislation that may change the order of priority. . . . Forfeiture and resultant changes in priority must be determined under the law as it existed at the time of the event alleged to have caused the forfeiture.

Id.

Similarly here, RCW 90.03.015(4) changes the legal consequences of nonuse of water by private water purveyors that occurred prior to the effective date of the statute. One effect of the adoption of the new definition of "municipal water supply purposes" in RCW 90.03.015(4) is to retroactively extend the "municipal water supply purposes" exemption to rights held by private water purveyors for community domestic or other non-municipal purposes. Prior to the enactment of RCW 90.03.015(4), such rights were not subject to the "municipal water supply purposes" exemption. *Theodoratus*, 135 Wn.2d at 594-95. Applied retroactively, the definition excuses nonuse of water that occurred prior to the

definition's enactment even though such nonuse would not have been covered by the exemption at that time. By "reviv[ing] rights that have been lost or terminated under the law as it existed at the time of an event," RCW 90.03.015(4) violates the rights and priorities of others sharing the same source of supply. *San Carlos Apache*, 972 P.2d at 189. Such retroactive expansion of some rights, without statutory protections for the rights of others, facially violates the Constitution. *Fremont-Madison*, 926 P.2d at 1307.

Relying on the "no set of circumstances" test articulated in *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004), the State maintains that the new definitions of "municipal water supply purposes" and "municipal water supplier" survive a facial challenge because they can be applied prospectively without violating due process. State Brf. at 25-27 Assuming the "no set of circumstances" test applies to the Tribes' substantive due process claims in this taxpayer lawsuit, *but see* Burlingame Brf. at 23-28, the State cites no authority barring a facial due process challenge to a retroactive statute based on the possibility of permissible prospective applications. On the contrary, in *San Carlos Apache*, 972 P.2d at 194, the court *invalidated* many of the statutes at issue as impermissible retroactive legislation even though they were

plainly intended to apply both retrospectively and prospectively.²⁵ Furthermore, as WWUC points out, this Court has often struck down retroactive statutes while allowing the statute to remain in force prospectively. WWUC Brf. at 37-38 (citing *Magula*, 131 Wn.2d at 182; *American Discount Corp. v. Shepherd*, 129 Wn.App. 345, 356, 120 P.3d 96 (2005); and *In re Stewart*, 115 Wn. App. 319, 342, 75 P.3d 521 (2003)). In short, regardless of whether RCW 90.03.015(3) and (4) have possible prospective applications, the Court should not permit the statutes to operate in an unconstitutional, retroactive manner.

The State also maintains that the new definition of “municipal water supply purposes” cannot resurrect long used water rights because the definition requires “*actual beneficial use* of water in order to qualify for [the] exemption from relinquishment.” State Brf. at 43 (emphasis in original). Even assuming that the State’s interpretation of RCW 90.03.015(4) is correct, the statute still retroactively excuses prior nonuse of water in violation of substantive due process.

Prior to the MWL, relinquishment applied to “any portion” of the right that was not beneficially used. RCW 90.14.160. Beneficial use of a

²⁵ Other state courts of last resort have considered the constitutionality of the retroactive application of a statute as part of a facial challenge. See *Schulz v. Natwick*, 249 Wis.2d 317, 638 N.W.2d 319, 323-24 (2001) (challenge to retroactive application of tort liability statute).

portion of the right thus clearly did not protect the unused portion. *Id.* But under the State’s interpretation, as long as a purveyor used enough water to meet the new definition (*e.g.* served more than 15 residential service connections), its prior nonuse of the rest of its right would be completely exempt from relinquishment. For example, if a private water purveyor had a perfected right sufficient to serve 300 service connections but for a five year period prior to the MWL used the right to serve only 150 connections, even under the State’s interpretation, the purveyor’s unexcused failure to beneficially use one-half of its right would be completely exempt from relinquishment under RCW 90.14.140(2)(d). Because the State’s reading of RCW 90.03.015(4), even if correct, would “change the legal consequences” of prior non-use of a water right occurring before the effective date of the MWL, it does not change the conclusion that the statute violates substantive due process.²⁶

E. Conclusion.

For the foregoing reasons, the Superior Court’s decision that RCW 90.03.015(3) and (4) and RCW 90.03.330(3) are facially unconstitutional should be affirmed.

²⁶ The State maintains that the definitions are “curative” because they “clarify ambiguity in the Water Code surrounding municipal rights.” State Brf. at 40. This argument should be rejected for the reasons set forth in Part VI.C.2., *supra*.

VII. CROSS-APPEAL ARGUMENT

The Superior Court's erred in holding that RCW 90.03.386(2), RCW 90.03.260(4) and (5), and RCW 90.03.330(2) are not facially unconstitutional. As demonstrated below, these statutes violate the due process clause of the Washington Constitution for both procedural and substantive reasons.

A. RCW 90.03.386(2) Violates Substantive Due Process.

As discussed in part VI.B.1, *supra*, substantive due process is violated when a statute retroactively expands a senior water right at the expense of more junior rights. *San Carlos Apache*, 972 P.2d at 189. Under this standard, RCW 90.03.386(2) clearly violates substantive due process.

RCW 90.03.386(2) retroactively expands the place of use of water rights held by so-called "municipal water suppliers" (as defined by RCW 90.03.015(3)) from their original place of use to the service area provided for in a water system plan approved by the Department of Health (DOH). The expansion in the place of use authorized by this statute is effective regardless of whether the change in the place of use will impair existing rights. Indeed, DOH has no authority when evaluating a water system plan to even consider whether approval of the plan would adversely affect

the water rights of third parties.²⁷ By unleashing water rights from their original place of use without regard to adverse effects on vested rights of other appropriators, RCW 90.03.386(2) retroactively expands the rights of “municipal water suppliers” in violation of substantive due process.

Under the Water Code, a water right is appurtenant to the land upon which the right was first perfected, and the place of use of the right cannot be changed unless it can be demonstrated that the change will not injure the rights of others. RCW 90.03.380(1). Water right certificates thus provide: “The right to the use of water aforesaid hereby confirmed is *restricted to the lands or place of use herein described*, except as provided in RCW 90.03.380, 90.03.390 and 90.44.020.” *See* CP 907, 910 (emphasis added). The rule limiting water rights to a specified place of use exists because an expansion in the place of use of a water right can affect the rights of third parties, including minimum instream flow rights vital to the Tribes, by allowing greater consumptive use of the right or altering the pattern of return flows.²⁸ *Okanogan Wilderness League*, 133 Wn.2d at

²⁷ The Department of Health’s review of water rights in the water system plan approval process is limited to a determination of whether the *purveyor’s* water rights are sufficient to meet projected demand. CP 913-14 (State’s Response to Interrogatory No. 10)]; WAC 246-290-100(4)(f). A change to a public water system’s service area will normally be approved if it is consistent with local plans and development regulations. RCW 43.20.260.

²⁸ Indeed, as applied to irrigation rights, RCW 90.03.380(1) flatly *prohibits* any expansion of the place of use that would result in an “increase in the annual consumptive quantity of water used under the water right.”

777 (changes in the place of use “could affect natural and return flows and, thus, adversely affect [existing] rights”); *Danielson v. Krebs AG, Inc.*, 646 P.2d 363, 374 (Colo. 1982). (“injurious changes of use may ensue from any use of the land which results in a reduction of the amount of return flow of water into a designated ground water basin or which allows the well owner to utilize more basin water simply through increasing the amount of acreage irrigated”).

Accordingly, it has long been established that water right holders have a “vested right in the continuation of stream conditions as they existed at the time of their respective appropriations” and “may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights.” *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629, 631-32 (1954); *see also Okanogan Wilderness League*, 133 Wn.2d at 777 (“Both upstream and downstream water right holders can object to a change in the . . . place of use, which could affect natural and return flows and, thus, adversely affect their rights”); Beck, *Waters & Water Rights* § 16.02(b) at 278.

RCW 90.03.386(2) upsets these well-established principles, which are designed to protect the rights of *all* water users. By redefining the place of use for rights held by “municipal water suppliers” as the service

area in an approved water system plan, instead of the original place of use approved by the State when the right was issued, RCW 90.03.386(2) retroactively alters the “legal effect of acts that resulted in acquisition and priority of water rights” that occurred prior to the effective date of the MWL. *San Carlos Apache*, 972 P.2d at 189; *see also Randle*, 47 Wn. App. at 240-41 (law is retrospective if it “changes the legal consequences of acts completed before its effective date”). Such retroactive expansion of some rights, without statutory protection for the rights of others, facially violates the Washington Constitution. *Fremont-Madison*, 926 P.2d at 1307.

The Superior Court rejected Plaintiffs’ substantive due process challenge to RCW 90.03.386(2) on the grounds that the statute can be constitutionally applied to water right certificates that already define the supplier’s place of use as its service area. *See VRP* at 14. Essentially, the Superior Court rejected the Tribes’ due process claim because there are instances where the statute has no effect on anyone’s legal rights. But as this Court has observed, a successful facial challenge is one where “no set of circumstances exist in which the statute can be constitutionally *applied*.” *Moore*, 151 Wn.2d at 669 (emphasis added). The relevant question under this standard is whether the statute can be *applied* in a

constitutional manner, not whether the State can point to instances where the statute does not apply and has no legal effect.

For example, in *Planned Parenthood v. Casey*, 505 U.S. 833, 894 (1993), the United States Supreme Court rejected the argument that a spousal notification requirement should survive a facial challenge because the statute would have no effect on the majority of women who would voluntarily inform their husbands before having an abortion regardless of the law:

We disagree with respondents' basic method of analysis. The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Id. As Plaintiffs have shown, in all cases where RCW 90.03.386(2) actually applies to affect the place of use of an existing water right of a so-called "municipal water supplier," it retroactively expands the "municipal water supplier's" right. Accordingly, it is facially invalid.

The Superior Court also opined that the statute does not apply retroactively because certain conditions must be satisfied before the authorized place of use in a water right certificate is enlarged to coincide

with a supplier's service area. VRP at 14. While the Superior Court correctly observed that changes in the place of use allowed by RCW 90.03.386(2) are conditional, this does not mean the statute operates prospectively. Prior to the MWL, the place of use of a water right was based on the place of use described in a water rights application, the public notice of that application, and the State's review and approval of the applicant's desired place of use in the subsequent report of examination, permit and water right certificate. *See, e.g.*, CP 1002-11. The place of use of a water right was thus based on the facts and circumstances that applied at the time of the water rights application was approved by the State and could only be changed in accordance with Water Code procedures that protect existing rights from impairment (and provide affected third parties with notice and an opportunity for hearing). *See* CP 907, 910 (allowing change in place of use only "as provided in RCW 90.03.380, 90.03.390 and 90.44.020").

Under the MWL, however, the place of use of a water right is no longer based on the legal regime that applied at the time the right was established but on entirely different conditions set forth in RCW 90.03.386(2) (*e.g.* consistency with comprehensive plans approved under the Growth Management Act). Notably absent from RCW 90.03.386(2) is a condition similar to those found in the statutes referenced in the original

certificate, requiring a showing that other existing rights will not be impaired by a proposed change in the place of use. *Cf. Fremont-Madison*, 926 P.2d at 1305 (upholding statute retroactively changing water rights where existing rights expressly protected). Because RCW 90.03.386(2) “changes the legal consequences” of acts which occurred before the statute’s effective date – namely the filing of a water right application, the publication of public notice and the issuance of a water right certificate based on that application and any protests received from the public – the statute is retroactive and violates substantive due process. *San Carlos Apache*, 972 P.2d at 189. Accordingly, the Superior Court erred in dismissing Plaintiffs’ substantive due process challenge to RCW 90.03.386(2).

B. RCW 90.03.386(2) Violates Procedural Due Process.

In addition to violating substantive due process, RCW 90.03.386(2) violates procedural due process. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Nguyen v. State Department of Health Medical Quality Assurance Comm’n*, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001). “[T]he fundamental requirement of due process is the opportunity to heard ‘at a meaningful time and in a

meaningful manner.” *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006); *Moore*, 151 Wn.2d at 670. At its essence, procedural due process requires notice and an opportunity to be heard prior to final agency action. *State v. Rogers*, 127 Wn.2d 270, 275, 898 P.2d 294 (1995); *Motley-Motley*, 127 Wn.App. at 81.

Notice must be “reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Guardianship Estate of Keffeler v. State Department of Social and Health Servs.*, 151 Wn.2d 331, 342, 88 P.3d 949 (2004); *Sheep Mountain*, 45 Wn.App. at 431. To determine whether procedures are adequate to protect the interest at stake, Washington courts use the three-part analysis set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Nyugen*, 144 Wn.2d at 526. Under this analysis, a court must consider the following three factors:

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 requirement would entail.

Moore, 151 Wn.2d at 670 (quoting *Mathews*, 424 U.S. at 335).

Application of the three-part *Mathews* analysis demonstrates that

RCW 90.03.386(2) is facially unconstitutional. First, there is no doubt that RCW 90.03.386(2) affects vested property rights entitled to due process protection. *Rettkowski*, 122 Wn.2d at 228; *Sheep Mountain*, 45 Wn. App. at 430-31. More specifically, because RCW 90.03.386(2) involves changes in the place of use of water rights, it affects the “vested rights” of water right holders “in the continuation of stream conditions as they existed at the time of their respective appropriations.” *Farmers Highline Canal*, 272 P.2d at 631-32; Beck, *Waters & Water Rights* § 16.02(b) at 278. The deprivation of property rights allowed by RCW 90.03.386(2) is of long duration because, under the statute, changes to a municipal water supplier’s service area remain in effect as long the supplier remains in compliance with its water system plan. *Moore*, 151 Wn.2d at 671 (duration of potentially wrongful deprivation of a property interest is an important factor in procedural due process analysis).

Second, the procedures established by RCW 90.03.386(2) create a “significant risk” that the water rights of third parties will be impaired. *Moore*, 151 Wn.2d at 672-73. RCW 90.03.386(2) eliminates long-standing procedural protections and allows the place of use of rights held for “municipal water supply purposes” to be changed through DOH’s approval of service area boundaries in a water system plan. Under DOH regulations, existing water right holders receive no notice prior to the

approval of a water system plan, and have no opportunity to request an administrative hearing to present their objections. WAC 246-290-100(8) (notice of the approval of a water system plan limited to “system consumers”); WAC 246-10-107(1) (only the applicant has standing to seek administrative hearing to contest a DOH decision regarding a water system plan).²⁹ None of the procedures surviving the enactment of RCW 90.03.386(2) were designed to protect private water rights and these procedures are simply inadequate to serve a purpose for which they were not intended.

Furthermore, the adequacy of procedures surviving the MWL should not be analyzed in a vacuum, but should be evaluated in relation to the procedures that the MWL eliminated (*i.e.* those applicable under RCW 90.03.380(1) and RCW 90.44.100(2)). *See Moore*, 151 Wn.2d at 670 (under second prong of *Mathews* analysis, court should evaluate the “risk of an erroneous deprivation of [a property] interest through the procedures used, *and* the probable value, if any, of additional or substitute procedural safeguards”) (emphasis added). The Court need only look to the longstanding safeguards set out in RCW 90.03.380(1) and RCW

²⁹ While approval of water system plans is subject to review under the State Environmental Policy Act (SEPA), SEPA documents are not required to provide notice of the potential effects that approval of a water system plan may have on private water rights. *See* WAC 197-11-340(2)(b), -440, -510(1) and 960. Nor does SEPA provide affected water right holders with an opportunity for a hearing to raise an impairment claim. *See* WAC 246-10-107(5).

90.44.100(2) for procedures that better protect the vested rights of other water users in change of use proceedings. Furthermore, as originally proposed, the MWL itself would have provided an opportunity for the holders of existing rights to raise impairment claims in administrative proceedings involving changes in a “municipal water supplier’s” service area.³⁰ However, these proposed protections were stripped out of the final legislation signed by Governor Locke.³¹

Finally, under the third prong of the *Mathews* analysis, only minimal fiscal and administrative burdens would result from incorporation of these additional or substitute procedural requirements. *Moore*, 151 Wn.2d at 670; *Nguyen*, 144 Wn.2d at 532 (last factor examines “the government’s interest in the efficient and economic administration of its affairs”). Indeed, these procedures are retained for all other changes to water rights, including changes in the place of use for public water

³⁰ The original legislation proposed by the Governor provided that if a municipal water supplier wanted the place of use of a water right to be equivalent to and coexistent with its approved service area, the supplier would have to publish notice pursuant to RCW 90.03.280. CP 935-36 (House Bill 1338, § 8(5) (Jan. 22, 2003)). A 30-day period would ensue during which third parties could submit claims of impairment with Ecology. CP 936 (§ 8(5)(a)). Ecology would then have been required to investigate these claims and make findings which could be appealed to the Pollution Control Hearings Board. *Id.* (§ 8(5)(c)). Any change in the place of use effectuated by an amended water system plan would not become effective until the claims of impairment were fully and finally resolved. *Id.* (§ 8(5)(d)).

³¹ See CP 951-66 (Substitute House Bill 1338 (read Mar. 4, 2003); CP 969-88 (Second Engrossed Second Substitute House Bill 1338, Section 5(2) (read Mar. 10, 2003)).

systems that do not meet the legislature’s newly minted definition of “municipal water supplier,” RCW 90.03.015(3). Additionally, as discussed above, the original version of the MWL *did* provide administrative opportunities for third parties to assert claims of impairment. CP 935-36 (House Bill 1338, § 8(5) (Jan. 22, 2003)). While these procedures might have imposed some minimal burdens on State agencies, the same or similar procedures have been part of the Water Code for almost a century and are necessary to ensure that changes in the place of use do not affect existing rights. The legislature’s decision to dispense with these procedures facially violated the due process protections of the Washington Constitution.

C. RCW 90.03.260(4) and (5) Violate Substantive Due Process.

RCW 90.03.260(4) and (5) retroactively expand the rights of “municipal water suppliers” by declaring that service connection and population figures in a water right application, permit or certificate are no longer “an attribute limiting exercise of the water right,” provided that the number of connections or population served is consistent with a water system plan approved by DOH. The effect of this change in the law is to allow purveyors to serve more connections or greater populations than the number sought in a water right application and/or allowed in a water right permit or certificate. Increases in the number of connections or the

population served by a water purveyor, especially when coupled with expansions in the place of use authorized under RCW 90.03.386(2), will lead to increases in the consumptive use of water in derogation of the rights of third parties. *Schuh v. Dep't of Ecology*, 100 Wn.2d 180, 186-87, 667 P.2d 64 (1983).

It is well established that a water right is limited by the applicant's intended purpose of use when the right was originally established. *R.D. Merrill*, 137 Wn.2d at 128 (water right limited by the *original* season of use); *In re Water Rights in Alpowa Creek*, 129 Wn. 9, 15, 224 P. 29 (1924) (“appropriation of water consists in the intention, accompanied by reasonable diligence, to use the water *for the purposes originally contemplated at the time of its diversion*”).³² By overriding established case law to declare that the number of people or service connections provided for in a water rights application does not limit the exercise of rights for “municipal water supply purposes,” RCW 90.03.260(4) and (5) effectively enlarge these rights.

³² Prior to the MWL, Ecology applied the “original intent” rule to restrict the population or connections served under a water right to the population or connection figures provided for in the original application and subsequent water rights documents. CP 870; *see also* CP 874 (rejecting applications seeking to increase the number of service connections because “approval of the requests represented by the change application would result in enhancement or enlargement of the existing water rights”); CP 877 (increase in the number of service connections would require approval of a new water right).

Furthermore, it is clear that population and service connection limits expressly contained in a water right *permit* or *certificate* are binding on the water right holder. Ecology’s standard water right certificate provides the holder with a right to the use of the public waters that is “defined” by the terms and conditions of the certificate and any antecedent permit. *See, e.g.*, CP 906, 909. Where a certificate or a permit *expressly* specifies a given number of service connections or population in defining the purpose of use of a right, the legislative declaration in RCW 90.03.260(4) and (5) that such limits are “not an attribute limiting exercise of the water right” necessarily results in a retroactive expansion of the right.³³

In such cases, RCW 90.03.260(4) and (5) cannot legitimately be viewed as “curative” legislation that “clarifies or technically corrects an ambiguous statute.” *F.D. Processing*, 119 Wn.2d at 461; *Jones*, 110 Wn.2d at 82. There is certainly no ambiguity as to whether the law required a water right holder to comply with the terms and conditions included in a water right permit or certificate. *Schuh*, 100 Wn.2d at 185

³³ Numerous water right permits and certificates included in the record include service connection limits in the space describing the allowable quantity, type, and period of use. CP 906 (“Community domestic supply – continuously (33 services)"); CP 1020 (“Community domestic supply – continuously (maximum of 50 services)"); CP 1022 (“16 acre-feet per year for continuous community in-house domestic supply to 16 homes”); CP 1024 (“Community domestic supply – continuously (85 homes)"); CP 1026 (“Community domestic supply – continuously (90 homes)”).

(water right holder bound by permit condition that limited use of water to an amount additional to what was available from federal project); *see also Theodoratus*, 135 Wn.2d at 597-98 (upholding Ecology’s authority to issue conditional permits and certificates). By legislatively altering population or service connection limits contained in water right permits and certificates, RCW 90.03.260(4) and (5) do not clarify the law, but retroactively change it.

As with the statutes previously discussed, RCW 90.03.260(4) and (5) retroactively alter the “legal effect of acts that resulted in acquisition and priority of water rights.” *San Carlos Apache*, 972 P.2d at 189.

Because any new population and service connection limits are determined in a DOH water system planning process that provides no protections for existing rights, the legislation’s retroactive expansion of these rights facially violates due process. *Fremont-Madison*, 926 P.2d at 1307.

D. RCW 90.03.260(4) and (5) Violate Procedural Due Process.

RCW 90.03.260(4) and (5) violate procedural due process for many of the same reasons as RCW 90.03.386(2). First, the water rights affected by RCW 90.03.260(4) and (5) are important property interests and the deprivations of rights authorized by these provisions are likely to be of long duration. An increase in the number of connections or population served provided for in a water right permit or certificate poses

a significant risk of to an enlargement in consumptive use which will adversely affect the rights of third parties. CP 718.³⁴ Such enlargement was heretofore not permitted under statutes providing for changes in water rights. *Schuh*, 100 Wn.2d at 187; *R.D. Merrill*, 137 Wn.2d at 128-29. Yet RCW 90.03.260(4) and (5) allows such changes to be authorized by the DOH without notice to affected water right holders or opportunity for a hearing to raise water right impairment claims.

As with changes in the place of use authorized under RCW 90.03.386(2), additional safeguards are readily available that would reduce the risk that the rights of third parties will be impaired when a water purveyor is permitted to increase the number of connections or the population allowed to be served. *Moore*, 151 Wn.2d at 670. Indeed, such safeguards already exist in State law – existing procedures for changing the purpose of use of a water right (RCW 90.03.380(1)) or authorizing new appropriations (RCW 90.03.290(3)) serve to protect other water right holders. The legislature’s decision to dispense with such procedures

³⁴ The WWUC appeals the Superior Court’s denial of its motion to strike this and other documents offered as illustrative examples of how the MWL operates to create a “significant risk” that vested water rights will be impaired. WWUC Brf. at 48-50. In *Moore*, 151 Wn.2d at 672-73, the Court approved the consideration for such illustrative examples for this purpose in a facial procedural due process challenge. Accordingly, the Superior Court did not abuse its discretion in denying the WWUC’s motion to strike. *See* *Burlingame* Brf. at 73-75.

cannot be reconciled with fundamental requirements of procedural due process.

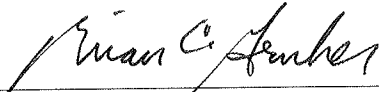
E. RCW 90.03.330(2) Violates Procedural Due Process.

The Tribes adopt the brief of the *Burlingame* plaintiffs on this issue. See *Burlingame* Brf. at 70-71.

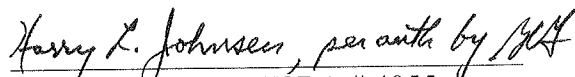
F. Conclusion.

For the reasons stated above, the Superior Court's decision rejecting the Tribes' due process challenge to RCW 90.03.386(2), RCW 90.03.260(3) and (4) and RCW 90.03.330(2) should be reversed.

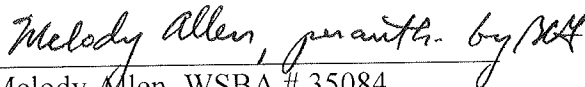
Dated this 24th day of December, 2008.



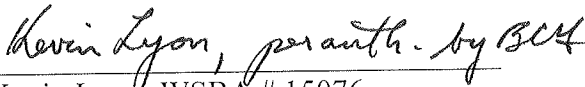
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Appendix A – Relevant Statutes

RCW 90.03.015

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

* * *

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

(4) "Municipal water supply purposes" means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes. If a governmental entity holds a water right that is for the purposes listed in (a), (b), or (c) of this subsection, its use of water or its delivery of water for any other beneficial use generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes.

* * *

RCW 90.03.260

Appropriation procedure — Application — Contents.

* * *

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

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

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RCW 90.03.330

Appropriation procedure — Water right certificate.

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

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

(3) This subsection applies to the water right represented by a water right certificate issued prior to 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.

(4) After September 9, 2003, the department must issue a new certificate under subsection (1) of this section for a water right represented by a water right permit only for the perfected portion of a water right as demonstrated through actual beneficial use of water.

RCW 90.03.386
Coordination of approval procedures for compliance and consistency with approved water system plan.

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(2) The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20 RCW, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 70.116 RCW, is that the place of use of a surface water right or groundwater 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, including those regarding water conservation, and the alteration of the place of use is not inconsistent, regarding an area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter 36.70A RCW; any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county; or any watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after September 9, 2003, if such a watershed plan has been approved for the area.

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