

STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT

LUMMI INDIAN NATION, MAKAH  
INDIAN TRIBE, QUINAULT  
INDIAN NATION, SQUAXIN  
ISLAND INDIAN TRIBE,  
SUQUAMISH INDIAN TRIBE, and  
the TULALIP TRIBES, federally  
recognized Indian tribes,

Plaintiffs,

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,

Defendants.

NO. 06-2-40103-4SEA

JOAN BURLINGAME, an individual;  
LEE BERNHEISEL, an individual;  
SCOTT CORNELIUS, an individual;  
PETER KNUTSON, an individual;  
PUGET SOUND HARVESTERS;  
WASHINGTON ENVIRONMENTAL  
COUNCIL; SIERRA CLUB; and THE  
CENTER FOR ENVIRONMENTAL  
LAW AND POLICY,

Plaintiffs,

NO. 06-2-28667-7SEA

1 v.

2 STATE OF WASHINGTON,  
3 WASHINGTON STATE  
4 DEPARTMENT OF ECOLOGY, and  
5 WASHINGTON STATE  
6 DEPARTMENT OF HEALTH,

7 Defendants,

8 WASHINGTON WATER UTILITIES  
9 COUNCIL, CASCADE WATER  
10 ALLIANCE, and WASHINGTON  
11 STATE UNIVERSITY,

12 Defendant-Intervenors.

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14 **DEFENDANT STATE OF WASHINGTON'S MEMORANDUM IN OPPOSITION TO**  
15 **BURLINGAME PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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STATE OF WASHINGTON'S  
MEMORANDUM IN OPPOSITION TO  
BURLINGAME PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT

ATTORNEY GENERAL OF  
WASHINGTON  
Agriculture & Health Division  
7141 Cleanwater Drive SW  
PO Box 40109  
Olympia, WA 98504-0109  
(360) 586-6500

ATTORNEY GENERAL OF  
WASHINGTON  
Ecology Division  
PO Box 40117  
Olympia, WA 98504-0117  
(360) 586-6770

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DEFENDANT STATE OF  
WASHINGTON'S MOTION FOR  
SUMMARY JUDGMENT

v

ATTORNEY GENERAL OF  
WASHINGTON  
Agriculture & Health Division  
7141 Cleanwater Drive SW  
PO Box 40109  
Olympia, WA 98504-0109  
(360) 586-6500

ATTORNEY GENERAL OF  
WASHINGTON  
Ecology Division  
PO Box 40117  
Olympia, WA 98504-0117  
(360) 586-6770

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**I. RELIEF REQUESTED AND SUMMARY OF ARGUMENT**

**A. Relief Requested**

Defendants State of Washington, Governor Christine Gregoire, Department of Ecology (Ecology), Department of Health (Health), Ecology Director Jay Manning, and Health Secretary Mary Selecky (collectively referred to as “the State”), by and through their counsel, Alan M. Reichman, Mark H. Calkins, and Stephen H. North, Assistant Attorneys General, submit this memorandum in opposition to the Burlingame Plaintiffs’<sup>1</sup> Motion for Summary Judgment. The State is entitled to judgment as a matter of law that the four<sup>2</sup> sections of the Municipal Water Law (MWL) challenged by the Burlingame Plaintiffs do not facially violate the United States and Washington Constitutions.

The State agrees with the Plaintiffs that this case wholly involves questions of law and that summary judgment is appropriate. However, for the reasons fully articulated below, as well as those in the State’s Motion for Summary Judgment submitted on January 22, 2008 (hereinafter referred to as the “State’s Motion for Summary Judgment”), it is the State to whom the Court should grant summary judgment in this taxpayer action. Accordingly, the State respectfully requests the Court to grant the State’s cross-motion, and deny the Burlingame Plaintiffs’ motion and dismiss with prejudice all causes of action asserted in their complaint.

**B. Summary of Argument**

The Burlingame Plaintiffs challenge the facial constitutionality of several sections of the MWL, asking the Court to completely erase these laws from Washington’s code. On

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<sup>1</sup> In the State’s Motion for Summary Judgment, the state referred to the plaintiffs in the *Burlingame, et al.* action as the “Environmental Plaintiffs.” For the sake of consistency with Plaintiffs’ motion, the State will refer to this set of plaintiffs as the “Burlingame Plaintiffs” in this response memorandum.

<sup>2</sup> In their summary judgment motion, the Burlingame Plaintiffs attempt to raise a new cause of action by asserting that Section 6(2) of the MWL, RCW 90.03.330(2), violates procedural due process. On or about March 19, 2008, the Court entered its Order Granting in Part and Denying in Part Defendant-Intervenor Washington Water Utilities Council’s Motion to Strike Plaintiffs’ New Claims. This order requires Plaintiffs to file proposed amended complaints in order to pursue this new claim. If such an amended complaint is filed, and accepted by the Court, the State reserves the right to oppose the new claim and counter the arguments in the Burlingame Plaintiffs’ motion that pertain to RCW 90.03.330(2).

1 March 18, 2008, the United States Supreme Court issued a decision rejecting a facial challenge  
2 to Washington's primary election law. *Wash. State Grange v. Wash. State Republican Party*,  
3 552 U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, WL 704368 (2008). This decision explains the "several reasons"  
4 why facial challenges to statutes are disfavored:

5 Facial challenges are disfavored for several reasons. Claims of facial  
6 invalidity often rest on speculation. As a consequence, they raise the risk of  
7 "premature interpretation of statutes on the basis of factually barebones  
8 records." *Sabri v. United States*, 541 U. S. 600, 609 (2004) (internal quotation  
9 marks and brackets omitted). Facial challenges also run contrary to the  
10 fundamental principle of judicial restraint that courts should neither "anticipate  
11 a question of constitutional law in advance of the necessity of deciding it" nor  
12 "'formulate a rule of constitutional law broader than is required by the precise  
13 facts to which it is to be applied.'" *Ashwander v. TVA*, 297 U. S. 288, 347  
14 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia*  
15 *S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). Finally,  
16 facial challenges threaten to short circuit the democratic process by preventing  
17 laws embodying the will of the people from being implemented in a manner  
18 consistent with the Constitution. We must keep in mind that "'[a] ruling of  
19 unconstitutionality frustrates the intent of the elected representatives of the  
20 people.'" *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320,  
21 329 (2006) (quoting *Regan v. Time, Inc.*, 468 U. S. 641, 652 (1984) (plurality  
22 opinion)).

23 *Id.* at \*5.

24 With these principles in view, the Court must turn to the facial challenge at hand. The  
25 Burlingame Plaintiffs' claims essentially rest on speculation. If Plaintiffs believe that  
26 implementation of the MWL is actually causing constitutional injury to them, then their proper  
avenue to seek redress would be to bring "as applied" challenges based on specific factual  
scenarios. However, Plaintiffs have instead opted to bring a facial challenge, and now seek  
summary judgment on all issues.

Summary judgment is inappropriate for Burlingame Plaintiffs for two reasons.  
Foremost, Plaintiffs simply cannot satisfy their heavy burden of proof in a facial constitutional  
challenge. While Burlingame Plaintiffs' brief contains examples and hypotheticals that they  
maintain demonstrate unconstitutional *application* of the challenged sections of the MWL,  
such examples and hypotheticals are meaningless in a *facial challenge* where it is Plaintiffs'

1 | burden to demonstrate that the challenged sections on their face are unconstitutional beyond a  
2 | reasonable doubt, and that there is *no set of circumstances* under which they can be  
3 | constitutionally applied. Summary judgment is also inappropriate because the Plaintiffs  
4 | fundamentally misunderstand and mischaracterize the Supreme Court's narrow holding in  
5 | *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). The Legislature has  
6 | not overruled or contravened this decision in violation of the constitutional separation of  
7 | powers.

8 | Burlingame Plaintiffs' primary misconception is that in *Theodoratus* the Supreme  
9 | Court "held that private developers were not municipal water suppliers and that their water  
10 | rights were therefore subject to statutory relinquishment,"<sup>3</sup> and that the MWL contravened  
11 | *Theodoratus* by retroactively eliminating the beneficial use requirement for "pumps and pipes"  
12 | water certificates issued prior to the MWL.<sup>4</sup> This fundamental misunderstanding of  
13 | *Theodoratus* is the basis for Burlingame Plaintiffs' claim that RCW 90.03.015(3) and (4) and  
14 | RCW 90.03.330(3) violate the constitutional separation of powers by retroactively  
15 | contravening *Theodoratus*, and violate due process by infringing on the vested water rights of  
16 | junior water rights holders.

17 | The Legislature did not contravene the State Supreme Court's decision in *Theodoratus*  
18 | by enacting RCW 90.03.015(3) and (4) and RCW 90.03.330(3). Burlingame Plaintiffs' facial  
19 | separation of powers challenges to these statutes therefore fail. The *Theodoratus* decision did  
20 | not hold that private entities cannot qualify to hold water rights for municipal supply purposes  
21 | for purposes of exemption from statutory relinquishment, or that water right certificates issued  
22 | prior to the MWL based on "system capacity" rather than actual beneficial use were invalid.  
23 | *Theodoratus* expressly declined to address issues pertaining to municipalities, and all the Court  
24 |

25 | <sup>3</sup> See Burlingame Plaintiffs' Motion for Summary Judgment at 1.

26 | <sup>4</sup> See Burlingame Plaintiffs' Motion for Summary Judgment at 1-2.

