

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

**DEFENDANT STATE OF
WASHINGTON'S MEMORANDUM
IN RESPONSE TO DEFENDANT-
INTERVENOR WASHINGTON
WATER UTILITIES COUNCIL'S
MOTION FOR SUMMARY
JUDGMENT**

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.

13 Defendants State of Washington, Governor Christine Gregoire, Department of
14 Ecology (Ecology), Department of Health (Health), Ecology Director Jay Manning, and
15 Health Secretary Mary Selecky (collectively referred to as “the State”), by and through their
16 counsel, Alan M. Reichman, Mark H. Calkins, and Stephen H. North, Assistant Attorneys
17 General, submit this memorandum in response to the motion for summary judgment filed by
18 Defendant-Intervenor Washington Water Utilities Council (WWUC).

19 The State and WWUC share the same position in opposing Plaintiffs’ motions for
20 summary judgment and requesting dismissal of all of Plaintiffs’ claims challenging the
21 constitutionality of the Municipal Water Law (MWL). Indeed, the State and WWUC
22 essentially concur in all their arguments, with one lone exception relating to the interpretation
23 of the statute defining the term “municipal water supply purposes,” RCW 90.03.015(4). In
24 this response, the State will elaborate on its position with respect to this provision and explain
25 why the Court should rule that RCW 90.03.015(4) comports with substantive due process
26 based on the State’s interpretation.¹

¹ This memorandum also responds to Cascade Water Alliance’s motion for summary judgment, which adopts WWUC’s position on interpretation of RCW 90.03.015(4). See Defendant-Intervenor Cascade Water Alliance’s Motion for Summary Judgment at 13.

1 In its motion for summary judgment, the State presents its argument that RCW
2 90.03.015(4) does not violate substantive due process based on the language stating that

3 '[m]unicipal water supply purposes' means a beneficial use of water . . . [f]or
4 residential purposes through fifteen or more residential service connections or
5 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

6 RCW 90.03.015(4) (emphasis added). The State explains that as a result of the inclusion of
7 the words "means a beneficial use of water," the MWL requires *active compliance* with the
8 definitions in RCW 90.03.015(4) through actual beneficial use of water for water rights to
9 qualify as being for municipal supply purposes. Plaintiffs allege, among other things, that
10 substantive due process will be violated because the MWL will allow previously relinquished
11 water rights to be "revived" to the detriment of holders of other water rights.² If this active
12 compliance approach is maintained, however, there will not be scenarios where there would
13 be "resurrection" of water rights once used by old "ghost towns" that served more than
14 fifteen service connections in the past if, for a period of five or more consecutive years, those
15 towns served fewer than fifteen service connections. Such water rights would not be shielded
16 from relinquishment under the municipal exemption provided under RCW 90.14.140(2)(d),
17 and would only be valid, if at all, to the extent they were beneficially used during the periods
18 of reduced use. This would prevent the revival of water rights that were previously unused for
19 lengthy time periods. State's Motion for Summary Judgment at 30-32.

20 WWUC does not concur with the State's position. See WWUC's Motion for
21 Summary Judgment at 32-34. In contrast, WWUC asserts that the phrase "means a beneficial
22 use of water" does not require actual use of water for a purpose specified in RCW
23
24

25 ² For several reasons, the State fundamentally disagrees with this characterization of the MWL. See
26 State's Memorandum in Opposition to Burlingame Plaintiffs' Motion for Summary Judgment at 27-32.

1 90.03.015(4), but, rather, that it “simply recognizes that municipal water supply purposes is a
2 type of beneficial use,” and that it “is merely a benign descriptive term.” *Id.*

3 WWUC’s suggested interpretation is incorrect because “beneficial use” of water is a
4 term of art in Washington water law that is understood to mean “actual use” of water. Indeed,
5 *Theodoratus*, the State Supreme Court decision that is front and center in this case, stands for
6 the proposition that beneficial use of water for vesting of a water right requires actual use.
7 *Theodoratus* pronounced that “beneficial use must be calculated based upon diversion and
8 actual use under this state’s law.” *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 593, 957
9 P.2d 1241 (1998) (emphasis added). The Supreme Court also held that there must be “actual
10 use” of water in order for “beneficial use” to occur in *Dep’t of Ecology v. Acquavella*, 131
11 Wn.2d 746, 756, 935 P.2d 595 (1997).

12 In its motion, WWUC makes some good points based on policy concerns to support its
13 suggested interpretation. However, a key rule of statutory construction is that statutes must be
14 read based on their plain meaning. If a “statute’s meaning is plain on its face, then the court
15 must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of*
16 *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The express
17 words “means a beneficial use of water” are unambiguous and require that there must be
18 “actual use of water” under one of the criteria prescribed in RCW 90.03.015(4) in order for a
19 water right to qualify as being for municipal supply purposes. The Pollution Control Hearings
20 Board (PCHB), the quasi-judicial tribunal that hears appeals of Ecology’s administrative
21 decisions, recently interpreted the statute in this way based on its plain meaning:

22 Because the Legislature defined “municipal water supply purposes” in the present
23 tense (*i.e.*, it “means a beneficial use of water...”), we interpret this as requiring
24 present, active compliance with the definition through actual beneficial use of the
water at the time a right is being characterized.

25 *Cornelius v. Dep’t of Ecology*, PCHB No. 06-099, at 11 (Order on Summary Judgment, Dec.
26 7, 2007). This recent PCHB decision upheld the State’s interpretation of RCW 90.03.015(4).

1 Even if the Court determines that the phrase “means a beneficial use of water” in
2 RCW 90.03.015(4) is ambiguous, another rule of statutory construction is that where a statute
3 can be interpreted in more than one way, it should be construed in the way that preserves its
4 constitutionality. Where a statute is susceptible to more than one interpretation, the Court’s
5 duty is “to adopt a construction sustaining its constitutionality if at all possible.” *Anderson v.*
6 *Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976). “[A]n interpretation which holds a statute
7 constitutional is to be preferred over one which renders it invalid.” *Woodson v. State Bd. of*
8 *Pharmacy*, 95 Wn.2d 257, 261, 623 P.2d 683 (1980) (citing *Anderson*, 87 Wn.2d at 716). The
9 State’s motion explains how construction of RCW 90.03.010(4) to require actual use of water
10 under the listed criteria leads to the conclusion that the statute does not facially violate
11 substantive due process. State’s Motion for Summary Judgment at 30-32.

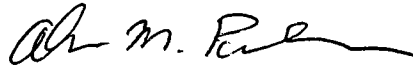
12 In conclusion, the State wholeheartedly agrees with WWUC that RCW 90.03.015(4)
13 comports with the constitutional right to substantive due process. However, for the reasons

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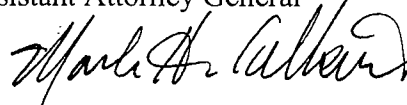
1 stated above, the State respectfully requests the Court to adopt the State's reading of the
2 statute to support denial of Plaintiffs' claims that RCW 90.03.015(4) violates substantive due
3 process.

4 DATED this 2/15 day of March, 2008.

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