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4 **THE HONORABLE JIM ROGERS**  
5 **HEARING DATE: May 23, 2008, 1:30 P.M.**  
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9 **STATE OF WASHINGTON**  
10 **KING COUNTY SUPERIOR COURT**

11 LUMMI INDIAN NATION, MAKAH  
12 INDIAN TRIBE, QUINAULT  
13 INDIAN NATION, SQUAXIN  
14 ISLAND INDIAN TRIBE,  
15 SUQUAMISH INDIAN TRIBE, and  
16 the TULALIP TRIBES, federally  
17 recognized Indian tribes,

18 Plaintiffs,

19 v.

20 STATE OF WASHINGTON;  
21 CHRISTINE GREGOIRE, Governor of  
22 the State of Washington;  
23 WASHINGTON DEPARTMENT OF  
24 ECOLOGY; JAY MANNING, Director  
25 of the Washington Department of  
26 Ecology; WASHINGTON  
DEPARTMENT OF HEALTH; and  
MARY SELECKY, Secretary of Health  
for the State of Washington,

Defendants.

NO. 06-2-40103-4SEA

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NO. 06-2-28667-7SEA

JOAN BURLINGAME, an individual;  
LEE BERNHEISEL, an individual;  
SCOTT CORNELIUS, an individual;  
PETER KNUTSON, an individual;  
PUGET SOUND HARVESTERS;  
WASHINGTON ENVIRONMENTAL

STATE'S MEMORANDUM IN  
REBUTTAL TO BURLINGAME  
PLAINTIFFS' RESPONSE TO STATE'S  
MOTION FOR SUMMARY JUDGMENT

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1 COUNCIL; SIERRA CLUB; and THE  
2 CENTER FOR ENVIRONMENTAL  
LAW AND POLICY,

3 Plaintiffs,

4 v.

5 STATE OF WASHINGTON,  
6 WASHINGTON STATE  
DEPARTMENT OF ECOLOGY, and  
7 WASHINGTON STATE  
DEPARTMENT OF HEALTH,

8 Defendants,

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

11 Defendant-Intervenors.

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17 **DEFENDANT STATE OF WASHINGTON'S MEMORANDUM IN REBUTTAL TO**  
18 **BURLINGAME PLAINTIFFS' RESPONSE TO STATE'S MOTION FOR SUMMARY**  
19 **JUDGMENT**

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1 I. INTRODUCTION

2 Defendants State of Washington, Governor Christine Gregoire, Department of Ecology  
3 (Ecology), Department of Health (Health), Ecology Director Jay Manning, and Health  
4 Secretary Mary Selecky (“the State”) submit this memorandum in rebuttal to the Burlingame  
5 Plaintiffs’ Response to Defendants’ Motions for Summary Judgment (“Burlingame  
6 Response”).<sup>1</sup>

7 The Burlingame Plaintiffs’ response does not satisfy the burden of proof in their facial  
8 constitutional challenge that seeks to invalidate several sections of the Municipal Water Law  
9 (MWL). The MWL constitutes classic police power legislation under the Legislature’s  
10 authority to redefine, clarify, and change the private use of water resources to meet evolving  
11 public objectives. The Burlingame Plaintiffs are challenging only four sections out of a  
12 comprehensive nineteen section act, and their response brief fails to successfully counter the  
13 State’s motion for summary judgment.

14 The MWL has been effective for almost five years, since September 2003, and there  
15 has been no successful “as applied” challenge to its application, so the Plaintiffs are now  
16 attempting in one fell swoop to erase the challenged sections entirely through a facial  
17 challenge. This case exemplifies why facial challenges are disfavored by the courts: this  
18 Court is being asked to erase several sections of a landmark law based upon claims that rest  
19 largely on speculation, rather than a concrete set of facts. The Court should reject this  
20 meritless attack and not render the MWL inoperative.

21 The State argues that the appropriate standard of review for facial constitutional claims  
22 is the “no set of circumstances” test, and the Burlingame Plaintiffs argue to the contrary  
23 without providing a clear alternative standard. Under the “no set of circumstances” test, the  
24 State is entitled to summary dismissal of Plaintiffs’ claims because each of the challenged

25 <sup>1</sup> The State incorporates by reference the arguments from its Motion for Summary Judgment, and  
26 Memorandum in Opposition to Burlingame Plaintiffs’ Motion for Summary Judgment.

1 sections of the MWL is capable of constitutional *application*, something which the Plaintiffs  
2 even appear to acknowledge in their response.

3 Nonetheless, the Plaintiffs cannot satisfy their burden to prove beyond a reasonable  
4 doubt that the subject statutes are unconstitutional in this case even if the Court chooses not to  
5 apply the “no set of circumstances” test because they fail to demonstrate how any of the  
6 challenged sections of the MWL results in the deprivation of any vested rights, and all of the  
7 sections are subject to statutory construction in a fashion which comports with the constitution.

8 Accordingly, the State is entitled to judgment as a matter of law that the four<sup>2</sup> sections  
9 of the MWL challenged by the Burlingame Plaintiffs in their initial complaint do not facially  
10 violate the United States and Washington Constitutions.

## 11 II. AUTHORITY

### 12 A. Standard of Review

13 The Burlingame Plaintiffs’ response to the State’s motion for summary judgment  
14 acknowledges the difficulty of success in facial challenges to the constitutionality of statutes,  
15 yet neglects to suggest just what the actual standard of review for this case should be. Instead,  
16 Plaintiffs argue that because they are taxpayer litigants they should be relieved of having to  
17 show in a facial challenge that there can be “no set of circumstances” under which the  
18 challenged sections of the MWL can be constitutionally applied despite the fact that  
19 Washington courts have now, for years, applied this standard in facial challenges. For the  
20 reasons discussed below, the Court should reject the Burlingame Plaintiffs’ near ten page  
21 argument that the “no set of circumstances” test does not apply to taxpayer litigants in facial  
22 challenges. Further, the Plaintiffs must prove that each of the challenged sections of the MWL

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23  
24 <sup>2</sup> In its summary judgment motion, the Burlingame Plaintiffs raised a new cause of action by asserting  
25 that Section 6(2) of the MWL, RCW 90.03.330(2), violates procedural due process. On April 3, 2008, the Court  
26 entered the Order Granting Burlingame Plaintiffs’ Motion to File Amended Complaint. Pursuant to that order, the  
parties have agreed on a briefing schedule to address the new claim. The State will respond to the new claim  
relating to RCW 90.03.330(2), and request its dismissal on the ground that the section comports with procedural  
due process, in a separate memorandum.

1 cannot be capable of constitutional *construction*, i.e., an interpretation that does not violate the  
2 Constitution.

3 **1. The “No Set Of Circumstances” Test Applies To Taxpayers**

4 In *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000), the  
5 Supreme Court stated that a facial challenge must be rejected “unless there exists *no set of*  
6 *circumstances* in which the statute can constitutionally be applied.” (Citing *In re: Detention of*  
7 *Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999).) The Supreme Court later reaffirmed  
8 that the no set of circumstances test is the appropriate test in facial challenges in *City of*  
9 *Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). The basis of this test is the  
10 United States Supreme Court’s decision in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct.  
11 2095, 95 L. Ed. 2d 697 (1987). The United States Supreme Court has never expressly  
12 abrogated the *Salerno* standard in facial challenges, and, as outlined in the State’s response to  
13 Burlingame Plaintiffs’ summary judgment motion, federal courts continue to universally apply  
14 this standard in facial challenges.

15 Beyond the *Tunstall* and *City of Redmond* Supreme Court decisions, this standard has  
16 been followed by Washington courts in numerous other facial challenges.<sup>3</sup> It is a standard that  
17 makes perfect sense because the presumption of constitutionality afforded to the other branches  
18 of government requires that courts not hold a statute unconstitutional if there is any reasonable  
19 construction that is constitutional. Thus, if a law is facially unconstitutional, there can literally  
20 be “no set of circumstances” under which the challenged law can be constitutionally applied,  
21 whereas a law cannot be *facially* unconstitutional if there is even one circumstance where the  
22 law can be constitutionally applied. If a law is unconstitutional in only limited sets of  
23 circumstances, as Plaintiffs seem to allege about the several challenged sections of the MWL,  
24 then the proper course would be to bring an as applied challenge in a particular factual context

25 \_\_\_\_\_  
26 <sup>3</sup> See State’s Motion for Summary Judgment at 13 n.6, for citations to these cases.

1 where they allege a violation of the constitution.<sup>4</sup> Here, even though the MWL was adopted in  
2 September 2003 and Plaintiffs have had nearly five years to identify even one specific  
3 unconstitutional application of the challenged provisions, rather than bring an as applied  
4 challenge, they instead seek to have the challenged sections of the MWL declared facially  
5 invalid, which would render them “utterly inoperative.”<sup>5</sup> *Tunstall*, 141 Wn.2d at 221. This  
6 approach, resting entirely upon speculative hypotheticals, amounts to overkill and should not  
7 be condoned by this Court.

8 Plaintiffs vehemently object to the “no set of circumstances” test for the simple reason  
9 that their facial constitutional claims fail under this standard. Recognizing this weakness in  
10 their case, Plaintiffs suggest that because they have sought access to the Court as taxpayers  
11 rather than as traditional litigants (presumably those who, unlike any of the Plaintiffs, have  
12 suffered an actual injury in fact), they should be afforded special treatment not available to  
13 other litigants in facial challenges and relieved of having to satisfy the “no set of  
14 circumstances” test. The Court should reject this flawed policy-based argument.

15 While Plaintiffs acknowledge just how disfavored facial challenges are, they argue that  
16 the “no set of circumstances test” is in conflict with policies underlying taxpayer standing.  
17 Burlingame Response at 3-4. Plaintiffs then cite to two United States Supreme Court decisions  
18 for the proposition that the “no set of circumstances test” is founded in third party standing,  
19 which is disfavored by the United States Supreme Court. *Id.* Plaintiffs reason that because the  
20 United States Supreme Court disfavors third party standing in facial challenges, the Court  
21 holds litigants in those cases to a more rigorous standard of review, whereas taxpayer standing

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22 <sup>4</sup> In providing argument on the appropriate standard of review in this facial challenge here, and with  
23 respect to the argument related to Plaintiffs’ facial constitutional claims below, the State does not concede that the  
24 challenged sections of the MWL would violate the state or federal constitutions under *any* factual scenario.

25 <sup>5</sup> While Plaintiff Scott Cornelius asserted that the MWL violates the constitution as applied to a specific  
26 factual scenario in an appeal of several water right change decisions issued by Ecology, the Pollution Control  
Hearings Board declined jurisdiction over those constitutional claims based on its determination that they were  
actually facial, rather than as applied, constitutional claims. *Cornelius v. Dep’t of Ecology*, PCHB No. 06-099  
(Dec. 7, 2007).

1 is “given freely” in Washington, so taxpayer litigants should be held to a lesser standard of  
2 review. This argument should be rejected because it ignores the fact that Washington courts  
3 have never established a “two-tier” standard of review in facial challenges, one for taxpayer  
4 litigants and one for all others. It also ignores the repeated application of the “no set of  
5 circumstances” test by our appellate courts in facial challenges.

6 Moreover, Plaintiffs’ argument that the “no set of circumstances” test should not apply  
7 to them as taxpayer litigants makes no sense when one considers that the doctrine of taxpayer  
8 standing is about nothing more than *access* to the courts. The doctrine has nothing to do with  
9 what must be *proven* by a litigant in court once the courthouse doors have been opened. Thus,  
10 Plaintiffs’ dramatic assertion that “adopting the ‘no set of circumstances’ test would eviscerate  
11 Washington’s doctrine of taxpayer standing” reveals weakness in their argument because the  
12 “no set of circumstances” standard of review has nothing to do with the doctrine of taxpayer  
13 standing. *See* Burlingame Response at 5. If a party chooses to access the courts as a taxpayer  
14 litigant, that party should be held to the same standard as any other litigant in a particular case.<sup>6</sup>

15 In their effort to avoid the onerous “no set of circumstances” test, Plaintiffs also assert  
16 that no Washington case has adopted this test in a taxpayer standing case. This argument  
17 should be rejected for the simple reason that there has not been a facial challenge based on  
18 taxpayer standing since the anomalous Court of Appeals decision in *Robinson v. City of*  
19 *Seattle*, 102 Wn. App. 795, 805, 10 P.3d 452 (2000). *Robinson* rejected the “no set of  
20 circumstances” test because, according to the court, no Washington case, taxpayer or  
21 otherwise, had applied the “no set of circumstances” standard in a facial challenge at the time.  
22 *Id.* at 806. The *Robinson* decision is actually incorrect on this point. The *Robinson* decision

23  
24 <sup>6</sup> Plaintiffs’ suggestion that taxpayer litigants should be afforded special treatment also disregards the  
25 potential for absurd results in facial challenge cases involving multiple sets of plaintiffs where not all plaintiffs are  
26 relying on taxpayer status to support their standing, for example, in the case of a plaintiff who accesses the court  
asserting injury-in-fact. Under Plaintiffs’ arguments, such plaintiffs would have a higher standard of review in the  
same case than those plaintiffs who were able to demonstrate taxpayer standing.

