

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.

13
14 **DEFENDANT STATE OF WASHINGTON'S MEMORANDUM IN REBUTTAL TO**
15 **PLAINTIFF TRIBES' RESPONSE TO STATE'S MOTION FOR SUMMARY**
16 **JUDGMENT**

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STATE'S MEMORANDUM IN
REBUTTAL TO PLAINTIFF TRIBES'
RESPONSE TO STATE'S MOTION FOR
SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants State of Washington, Governor Christine Gregoire, Department of Ecology (Ecology), Department of Health (Health), Ecology Director Jay Manning, and Health Secretary Mary Selecky (“the State”) submit this memorandum in rebuttal to the Plaintiff Tribes’ Response to Defendants and Defendant-Intervenors’ Motions for Summary Judgment (“Tribes’ Response”).¹

The Plaintiff Tribes’ response does not satisfy the burden of proof in their facial constitutional challenge that seeks to invalidate several sections of the Municipal Water Law (MWL). The MWL constitutes classic police power legislation under the Legislature’s authority to redefine, clarify, and change the private use of water resources to meet evolving public objectives. The Plaintiff Tribes are challenging only 7 sections out of a comprehensive 19 section act, and their response brief fails to successfully counter the State’s motion for summary judgment.

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

The State argues that the appropriate standard of review for facial constitutional claims is the “no set of circumstances” test, and the Plaintiffs argue to the contrary without providing a clear alternative standard. Under the “no set of circumstances” test, the State is entitled to

¹ The State incorporates by reference the arguments from its Motion for Summary Judgment, and Memorandum in Opposition to Plaintiffs Tribes’ Motion for Summary Judgment.

1 summary dismissal of Plaintiffs' claims because each of the challenged sections of the MWL is
2 capable of constitutional *application*, something which the Plaintiffs even appear to
3 acknowledge in their response.

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

9 Accordingly, the State is entitled to judgment as a matter of law that the seven² sections
10 of the MWL challenged by the Plaintiff Tribes in their initial complaint do not facially violate
11 the United States and Washington Constitutions.

12 II. AUTHORITY

13 A. Standard of Review

14 The State incorporates by reference its argument on the standard of review in its reply
15 to the Burlingame Plaintiffs. *See* State's Memorandum in Rebuttal to Burlingame Plaintiffs'
16 Response to State's Motion for Summary Judgment ("State's Rebuttal to Burlingame
17 Plaintiffs") at 2-10.

18 B. The Municipal Water Law Does Not Violate the Separation of Powers Doctrine

19 The Plaintiff Tribes counter the State's position that the MWL does not violate
20 separation of powers by asserting that the Legislature "overruled" the Supreme Court's
21 decision in *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), by
22 enacting RCW 90.03.330 and 90.03.015(3) and (4). *See* Tribes' Response at 3, 12. Their
23

24 ² In its summary judgment motion, the Plaintiff Tribes raised a new cause of action by asserting that
25 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 Plaintiff Tribes' Motion for Leave to File Amended Complaint. The State will
respond to the new claim relating to RCW 90.03.330(2), and request its dismissal on the ground that that the
section comports with procedural due process, in a separate memorandum.

1 arguments fail because they misconstrue the State's reading of *Theodoratus* and find
2 "holdings" in *Theodoratus* on issues that were not even squarely before the Court in that case.

3 **1. RCW 90.03.330(3), Relating to Water Right Certificates Based on System**
4 **Capacity, Does Not Violate the Separation of Powers**

5 The Plaintiff Tribes' arguments on this issue are similar to those of the Burlingame
6 Plaintiffs' and should be rejected for the same reasons. Therefore, the State incorporates its
7 reply to the Burlingame Plaintiffs. See State's Rebuttal to Burlingame Plaintiffs at 11-15. In
8 addition, the State provides the following in reply to points made in the Tribes' Response.

9 Contrary to the Plaintiff Tribes' argument, *Theodoratus* did not "previously interpret
10 the law to mean something different from what the Legislature enacted." Tribes' Response at
11 5. As explained in the State's Rebuttal to Burlingame Plaintiffs, the Legislature did not declare
12 that all the inchoate water documented by certificates that were issued based on system
13 capacity was automatically perfected, because the term "right in good standing" relates to
14 inchoate, and not perfected, water rights. *Theodoratus*, 135 Wn.2d at 596 (an inchoate right is
15 an incomplete appropriative right "in good standing").

16 Also, the State does not separate "the facts of *Theodoratus* from the Court's holding" in
17 that case, as the Tribes contend. Tribes' Response at 6. As explained in the State's Rebuttal to
18 Burlingame Plaintiffs, the State recognizes that, prior to the time *Theodoratus* was decided,
19 Ecology improperly issued certificates to document water rights that were still fully or partially
20 inchoate. However, the Plaintiff Tribes completely miss the mark with their contention that *the*
21 *underlying water rights* documented by such certificates were declared invalid in *Theodoratus*.
22 That would have created an absurd result where the water rights documented by certificates
23 that serve most of the State's citizens are void. The Court made no such ruling for that to
24 happen in *Theodoratus*, and neither should this Court.

25 Also contrary to the Plaintiff Tribes' argument, the State is not asking the Court to
26 "strain" to adopt its interpretation of the statute, which is one which upholds its

1 constitutionality. *Id.* at 7–8. The State’s interpretation, that by making the inchoate portion of
2 a certificate an inchoate “right in good standing,” holders of such rights will have to exercise
3 reasonable diligence and other legal requirements to maintain the rights in such status, is
4 plainly plausible and must be adopted by this Court.³ While the State’s interpretation differs
5 from that of the Tribes, the State’s sound and plausible reading should be adopted by the Court
6 because when multiple statutory interpretations are plausible, a court must adopt the
7 interpretation that upholds the statute’s constitutionality. *Anderson v. Morris*, 87 Wn.2d 706,
8 716, 558 P.2d 155 (1976).

9 The Plaintiff Tribes also erroneously contend that the State’s interpretation is
10 inconsistent with RCW 90.03.330(2) based on their misunderstanding that Ecology “cannot
11 ‘revoke, diminish or adjust’ a pumps and pipes certificate based on a finding that the water has
12 not been put to beneficial use” Tribes’ Response at 8. They err on this point because
13 RCW 90.03.330(2) provides opportunities for such rights to be revoked or diminished if they
14 are not maintained as inchoate rights in good standing in the context of water right change
15 applications and general adjudications, and in instances where there have been
16 misrepresentations or ministerial errors.

17 The Plaintiff Tribes’ new theory, first articulated in their response brief, that
18 RCW 90.03.330(3) violates separation of powers because it precipitates the “legislative
19 determination of adjudicative facts,” also lacks merit. *See* Plaintiff Tribes’ Response at 9–11.

20 The first case they cite, *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 534 P.2d 114
21 (1975), is not analogous to the scenario in this case because it involved specific public works
22 contracts that the Legislature retroactively determined were economically impossible to
23 perform through passage of a statute which relieved the contractors from carrying them out.

24 ³ In supporting this argument, the Tribes err in contending that the Legislature created two different
25 methods of perfection through the MWL (one standard for certificates issued pre-MWL based on system capacity,
26 and the other for post-MWL certificates based on actual use) because *perfection* is based on actual beneficial use
for water rights documented by certificates issued both prior and subsequent to the MWL.

1 To the contrary, in this case, the Legislature did not make any determinations on specific water
2 rights through passage of RCW 90.03.330(3). In *O'Brien*, the Supreme Court held that the
3 statute violated separation of powers because the Legislature, in effect, made determinations
4 that certain existing contracts were impossible to perform because of increases in the cost of
5 petroleum. *O'Brien*, 85 Wn.2d at 269-270. In contrast, in this case, by including the phrase
6 “in good standing” in RCW 90.03.330(3), the Legislature did not make any determinations
7 with respect to the validity and extent of specific water rights documented by certificates that
8 were issued based on system capacity. Holders of such water rights must still put any inchoate
9 quantities of water documented by such “pumps and pipes certificates” to actual beneficial use
10 in order for them to become perfected vested rights, and such inchoate quantities must be
11 developed with reasonable diligence in order to be maintained.

12 The Tribes’ reliance on the Arizona Supreme Court’s decision in *San Carlos Apache* to
13 support this theory is also misplaced because the trial court in that case had already actually
14 determined the validity of specific water rights in the context of a general adjudication of water
15 rights. In contrast, in the present case, the Legislature has not, in effect, imposed its own
16 determinations relating to the validity of specific water rights that have been considered, or are
17 being considered, by any court. In this facial challenge, no specific water rights are even at
18 issue.

19 Contrary to the Plaintiff Tribes’ argument, the Legislature did not “cross the line
20 between legislation and making a blanket, retroactive determination of individual cases in
21 violation of separation of powers.” Tribes’ Response at 11. While the Legislature deemed
22 water rights documented by certificates based on system capacity to be “rights in good
23 standing,” such rights had not previously been taken out of good standing simply because they
24 had been prematurely documented by certificates. Moreover, holders of such water rights, still
25 have to meet legal requirements to maintain their status “in good standing,” and, under
26 RCW 90.03.330(2), courts can determine the validity of such water rights in future

1 adjudications, and Ecology can do so in the context of future water right change applications.
2 See State’s Motion for Summary Judgment at 18–19. By passing RCW 90.03.330(3), the
3 Legislature did not make any final “adjudication” of any particular water right to shield it from
4 a determination of its actual validity and extent by a court or Ecology in the future.

5 Since the Legislature did not make any “judicial determinations” on the nature or
6 validity of specific water rights through its enactment of RCW 90.03.330(3), the Court should
7 reject the Plaintiff Tribes’ new argument that the statute violates separation of powers because
8 it results in “the legislative determination of adjudicative facts.”

9 **2. RCW 90.03.015(3) and (4), Which Define “Municipal Water Supplier” and**
10 **“Municipal Water Supply Purposes,” Do Not Violate the Separation of**
11 **Powers**

12 The State incorporates its reply to the Burlingame Plaintiffs with regard to this issue
13 (*See* State’s Rebuttal to Burlingame Plaintiffs at 15-16), and provides the following additional
14 reply. The Plaintiff Tribes err in their argument that RCW 90.03.015(4) “violates the
15 separation of powers because it purports to retroactively overrule the holding of *Theodoratus*
16 that a private water purveyor is not a ‘municipality’ that is exempt from relinquishment under
17 RCW 90.14.140(2)(d).” Tribes’ Response at 12. There was no such “holding” in
18 *Theodoratus*. Indeed, as explained in the State’s response to the Burlingame Plaintiffs’ motion
19 for summary judgment, the parties to that case did not even identify an issue over whether
20 private entities could hold municipal rights in their issues statements. State’s Memorandum in
21 Opposition to Burlingame Plaintiffs’ Motion for Summary Judgment at 16. Plaintiffs fail in
22 their attempt to tie together pronouncements in the *Theodoratus* decision at pages 594-595 in a
23 manner to create a holding on an issue that was not even before the Court in that case because
24 Mr. Theodoratus was not looking for relief from relinquishment.

25 One pronouncement in the *Theodoratus* decision is that “Appellant is not a
26 municipality, and we decline to address issues concerning municipal water suppliers in the
context of this case.” *Theodoratus*, 135 Wn.2d at 594. Then, the opinion proceeds to discuss