

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.

**REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS
LUMMI NATION, ET AL.**

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I. INTRODUCTION.

This reply addresses the Tribes' substantive and procedural due process challenges to RCW 90.03.260(4) and (5) and RCW 90.03.386(2).¹ These provisions, enacted as part of the 2003 Municipal Water Law (MWL), authorize a favored class of so-called "municipal water suppliers" to expand their water rights at the expense of the vested water rights of the Tribes and other third parties. Moreover, the legislation fails to afford affected water right holders adequate notice and an opportunity to be heard when the State approves expansions in these "municipal" water rights.

The constitution prohibits the legislature from enhancing the property rights of some to the detriment of the rights of others. Under the constitution, legislation authorizing water purveyors to change the place or purpose of use of their water rights must protect the vested rights of third parties. Such legislation must also afford other water right holders adequate notice and an opportunity to assert claims that a proposed change would affect their rights. For many decades, our Water Code has provided water right holders with these elemental due process protections. *See* RCW 90.03.380(1); RCW 90.44.100(2). The legislature's attempt to

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.

dispense with these protections in order to provide water suppliers with greater flexibility, no matter how well intentioned, exceeded its constitutional authority and cannot survive scrutiny under the due process clause.

The Tribes' reply brief also address the effect of *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009), on their separation of powers claims. Unlike the situation in *Hale*, RCW 90.03.015 and RCW 90.03.330(3) expressly apply to water right certificates issued between the Court's decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), and September 9, 2003, the MWL's effective date. These provisions, when taken together, reverse the result in *Theodoratus* and violate the separation of powers.

II. ARGUMENT.

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

RCW 90.03.386(2) authorizes "municipal water suppliers" (as defined in RCW 90.03.015) to change the place of use of their water rights from the location designated in a water right permit or certificate to the service area provided for in a water system plan approved by the Department of Health (DOH). Such changes in the place of use may proceed regardless of whether other existing rights are impaired. By statutorily altering the terms and conditions of pre-MWL water rights to

the detriment of the vested rights of third parties, RCW 90.03.386(2) violates substantive due process. *See Tribes' Brf.* at 58-64.

1. RCW 90.03.386(2) Has Retroactive Effect.

The State first argues that RCW 90.03.386(2) is not unconstitutional retroactive legislation because three new conditions must be met before the place of use of a municipal water supplier's water rights may be changed to coincide with the supplier's service area.² *Id.* at 35. However, because these conditions do not protect the vested water rights of third parties, they do not save the constitutionality of the statute.

Even where a statute appears to operate prospectively, it is retroactive if it "changes the legal consequences of acts completed before its effective date." *State v. Randle*, 47 Wn. App. 232, 241, 734 P.2d 51 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)); *accord: State v. Varga*, 151 Wn.2d 179, 195, 86 P.3d 139 (2004) (critical inquiry is whether the "prospective 2002 [Sentencing Reform Act] amendments . . . alter the legal consequences of [the defendant's] previously 'washed out' conviction"). In the water law context, a statute is retroactive if it alters the "legal effect of acts that resulted in acquisition and priority of water rights." *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 973

² These conditions are: (1) DOH's approval of a planning or engineering document describing the service area; (2) compliance with a water system plan; and (3) consistency with local land use planning documents. RCW 90.03.386(2).

P.2d 179, 189 (1999) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).

RCW 90.03.386(2) has retroactive effect because it changes the legal effect of the terms and conditions included in pre-MWL water rights at the expense of the vested rights of third parties. Every appropriator has a vested right to the continuation of source conditions existing at the time of its original appropriation. *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 579, 272 P.2d 629, 631-32 (1954). To protect this vested right, water right holders are afforded the power to object to and prevent changes in the use of other water rights that affect natural and return flows. *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 777, 947 P.2d 732 (1997), (“[b]oth 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”); *Haberman v. Sander*, 166 Wn. 453, 464, 7 P.2d 563 (1932) (“senior appropriator may change his point of diversion, provided that such change does not infringe upon existing vested rights”); *Farmers Highline Canal*, 272 P.2d at 631-32 (appropriators “may successfully resist all proposed changes in points of diversion and use of water from [the] source which in any way materially injures or adversely affects their

rights”); *see also*, Gould, “Water Rights Transfers and Third-Party Effects,” 23 *Land & Water L. Rev.* 1, 13 (1988).

These property interests are not mere expectancies created by statute but are fundamental attributes of every water right that existed long before the Water Code.³ As such, they are not interests that may be eliminated by legislative fiat. *Haberman*, 166 Wn. at 464 (State’s approval of a change in the point of diversion under a temporary transfer statute was “ineffective” because it was “issued without notice” and infringed upon a junior appropriator’s “vested and adjudicated rights”); *see also Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 460, 926 P.2d 1301, 1307 (1996) (statute that allows one party to enlarge its water rights violates due process if the rights of third parties are not protected); *Last Chance Mining Co. v. Bunker Hill & S. Mining & Concentrating Co.*, 49 F. 430, 435 (D. Id. 1892) (amendment of a statute to permit changes in the place of use of a water right did not allow such changes to proceed where existing rights would be impaired).

³ *See Handy Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 515, 518, 62 P. 847, 848 (1900); *Hague v. Nephi Irr. Co.*, 16 Utah 421, 52 P. 765, 769 (1898); *Cole v. Logan*, 24 Or. 304, 313, 33 P. 568, 571 (1893); *Junkans v. Bergin*, 67 Cal. 267, 270, 7 P. 684, 686 (1885); *Columbia Min. Co. v. Holter*, 1 Mont. 296 (1871); *Kidd v. Laird*, 15 Cal. 162, 179 (1860).

In recognition of these principles, water right certificates issued by the State include an express limitation that serves to protect the vested property rights of third parties. *See, e.g.*, CP 907, 910 (“The right to the use of water . . . is restricted to the lands or place of use herein described, except as provided in RCW 90.03.380 . . .”). RCW 90.03.380, expressly referenced in water right certificates, provides that a water right held by a municipal water supplier “shall be and remain appurtenant to the land or place upon which the same is used,” and may be transferred to another place of use only “if such change can be made without detriment or injury to existing rights.” RCW 90.03.380(1).

In enacting RCW 90.03.386(2), the legislature attempted to remove these fundamental restrictions, thereby changing the legal consequences of the acts that led to the issuance of water rights and stripping other water right holders of their vested right to the continuation of existing source conditions and the power to object to changes that would impair this vested right. Under RCW 90.03.386(2), a “municipal water supplier’s” ability to change the place of use of its water right is no longer contingent on a showing that the change “can be made without detriment or injury to existing rights” as provided on its certificate, but upon wholly different conditions adopted by the legislature in 2003 that do not serve to protect existing water rights. Indeed, in enacting the MWL,

the legislature expressly rejected an amendment that would have protected other existing rights from impairment or diminishment. CP 592. The MWL thus stands in stark contrast with both the 1917 Water Code and the Water Resources Act of 1971, both of which expressly protect all existing rights. RCW 90.03.010; RCW 90.54.900, 920(1). By purporting to statutorily expand the contours of long established property rights at the expense of other vested rights, RCW 90.03.386(2) constitutes retroactive legislation that violates substantive due process.

2. RCW 90.03.386(2) Violates Substantive Due Process In All Circumstances Where It Actually Affects Water Rights.

The State next argues that RCW 90.03.386(2) is not facially invalid because there are circumstances where it would not deprive other water right holders of their vested rights. State Resp. at 36. The State maintains that in situations where a pre-MWL certificate described the place of use of the water right as the “area served by” a water supplier, “RCW 90.03.386(2) effects no change to pre-existing MWL law and cannot harm any water right holders.” *Id.* at 37.

The State’s argument rests on faulty logic. The question is not whether the State can identify situations where the statute has no legal effect, but whether the statute can constitutionally be applied in any circumstances where it *does have* legal effect. This is the essential lesson

of *Planned Parenthood v. Casey*, 505 U.S. 833, 894 (1992). In *Casey*, plaintiffs brought a substantive due process challenge to several abortion-related statutes, including a statute requiring a married woman to notify her husband before obtaining an abortion. *Id.* at 845-47, 887. The defendants maintained that a facial challenge to this statute was improper under the *United States v. Salerno*, 481 U.S. 739 (1987), “no set of circumstances” test because the statute would have no burden on the vast majority of women seeking abortions. *Casey*, 505 U.S. at 894; *see also id.* at 972-93 & n.2 (Rehnquist, C.J. dissenting). The Court rejected this view and held that 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.”⁴ *Id.* at 894.

Thus, even under the “no set of circumstances” test, the Court’s sole focus should be on the class of people affected by the statute, not “the group for whom the law is irrelevant.”⁵ *Casey*, 505 U.S. at 894; *see also*

⁴ The State wrongly maintains that *Casey* addressed a First Amendment claim. State Resp. at 9. The claims in *Casey* turned not on the First Amendment, but on a woman’s right to an abortion which has its roots in substantive due process. *See* 505 U.S. at 846-47.

⁵ The State cites to a *dissenting* opinion from a Ninth Circuit order denying rehearing for the proposition that *Casey* did not alter the application of the *Salerno* standard to facial substantive due process challenges. *See* State Resp. at 10 (citing *Planned Parenthood v. Lawall*, 193 F.3d 1042, 1046 (9th Cir. 1999)). The State fails to disclose that the Ninth Circuit majority squarely held that *Salerno* did *not* apply to the facial substantive due process challenge at issue. *Planned Parenthood v. Lawall*, 180 F.3d 1022, 1026-27 (9th Cir.) (citing non-First Amendment cases where the “large fraction” test was applied), *rehearing denied*, 193 F.3d 1042 (9th Cir. 1999).

Sundstrom v. Frank, 2007 WL 3046240 (E.D. Wis. 2007) (“case law indicates that the controlling class is determined by whom the Act applies to”). For example, in *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004), this Court held that a statute allowing drivers licenses to be suspended without an administrative hearing where the license holder failed to appear in court or otherwise resolve a traffic infraction facially violated due process. The Court’s holding did not turn on whether the statute had an adverse effect on *all* license holders, but rather on whether the statute failed to “afford any driver *facing a suspension of his or her license under that statute* an opportunity for an administrative hearing with [the Department of Licensing] prior to or after such suspension.” *Id.* (emphasis added).

Similarly here, the relevant inquiry is not whether the MWL affects all water rights, but whether the MWL can be applied in a constitutional manner in those situations where it actually affects a water right. The State cannot defend the constitutionality of RCW 90.03.386(2) by pointing to situations where the statute is legally irrelevant.

The State also maintains that the Tribes’ facial challenge fails because the Tribes have not demonstrated “a particular instance” where expansion of the place of use of a municipal water supplier’s water right

would harm the vested rights of other water right holders.⁶ State Resp. at 37. This argument misapprehends the nature of a facial substantive due process challenge which turns not on particular facts, but on whether the language of a statute operates retroactively to impair vested rights.⁷ *City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989).

As discussed in the previous section, RCW 90.03.386(2) purports to eliminate a “stick” from the bundle of sticks held by every water right holder – the vested right in the continuation of existing source conditions and the related power to prevent changes that would affect this vested right. The taking of this “stick” operates in *all circumstances* to enlarge the water rights of municipal water suppliers and diminish the legal rights of other appropriators. Thus, while the ability of water users to obtain and use water will likely be affected in myriad ways by enactment of RCW

⁶ Contrary to the State’s assertion, the Tribes did point to “particular instances” where RCW 90.03.386(2) has had a practical effect on vested water rights. For example, prior to the MWL, the Kitsap Public Utility District (KPUD) held water rights whose place of use was expressly limited to discrete local communities. See CP 718-19. In the mid-1990s, KPUD applied to expand the place of use of these rights to its entire service area which includes virtually all of Kitsap County. CP 833 (Exh. 10), 837 (Exh. 11). The Suquamish Tribe protested these applications due to adverse effects on return flows that sustain aquifer levels on the Tribe’s Reservation. CP 718-20, 741-46 (Exh. 12), 749-54 (Exh.13). After passage of the MWL, the KPUD withdrew the protested change applications because they were rendered unnecessary by RCW 90.03.386(2). CP 755 (Exh. 14).

⁷ While the State argues that the Tribes’ facial attack on RCW 90.03.386(2) should be rejected for lack of evidence that rights would be affected in individual cases, the WWUC inconsistently seeks to exclude as irrelevant the evidence put forward by the Tribes to provide examples of such effects. See WWUC Brf. at 48-50; WWUC Resp. at 57-60.

90.03.386(2), the statute nevertheless operates to diminish all users' vested legal rights.

3. The "Police Power" Does Not Authorize the Legislature to Deprive Citizens of Property Without Due Process.

In a final effort to salvage the constitutionality of RCW 90.03.386(2), the State maintains that the legislature's "police powers" allow legislation that has adverse effects on vested water rights. State Resp. at 38-39, 51-54. This argument is without merit because RCW 90.03.386(2) does not constitute a valid exercise of the police power. Even if it did, the Court's analysis would not change because the legislature's police powers must be exercised in accordance with the due process clause.

The police power has been defined as "an inherent power in the state, which permits it to prevent all things harmful to the comfort, welfare, and safety of society." *Conger v. Pierce County*, 116 Wn. 27, 36, 198 P. 377 (1921). It is permissible for the legislature to wield police power where necessary to "prevent activities which are similar to public nuisances." *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 15, 829 P.2d 765 (1992). It is important, however, to recognize the difference between police power and eminent domain authority:

Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or,

if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.

Eggleston v. Pierce County, 148 Wn.2d 760, 768, 64 P.3d 618 (2003) (quoting *Conger*, 116 Wn. at 36); *Manufactured Housing Communities v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000).

Unlike the exercise of eminent domain, police power regulation of property rights may not “go beyond preventing harmful activity” and take or damage property to “enhance public interests.” *Sintra*, 119 Wn.2d at 15; *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 333, 787 P.2d 907 (1992). A regulation likewise does not constitute a valid exercise of the police power if it destroys a fundamental attribute of property ownership or statutorily transfers property rights from one party to another for an alleged public use. *Manufactured Housing*, 142 Wn.2d at 364, 369; *Sintra*, 119 Wn.2d at 14 n.6. For example, in *Manufactured Housing*, 142 Wn.2d at 364-70, the Court held that a statute providing a right of first refusal to the tenants of a mobile home park was not a valid exercise of the police power because it deprived park owners of a fundamental attribute of ownership and statutorily transferred this property right to the tenants.

In this case, RCW 90.03.386(2) is not valid police power legislation. RCW 90.03.386(2) does not operate to prevent any use of water rights that would constitute a nuisance or otherwise harm the public.

Rather, RCW 90.03.386(2) is based on the notion that the public would be better off if “municipal water suppliers” had the flexibility to change the place of use of their water rights and serve new areas without being burdened by restrictions needed to protect the vested water rights of third parties. Furthermore, RCW 90.03.386(2) destroys one of the fundamental attributes of a water right – the vested right to object to changes in the place of use that affect existing source conditions – and effectively transfers this vested right to “municipal water suppliers.” See Part II.A.2, above. Just as the statute in *Manufactured Housing* statutorily transferred a landowner’s “right of first refusal” to the tenants, RCW 90.03.386(2) strips an appropriator’s “right to object” to harmful changes in the place of use and transfers this right to a favored class of so-called “municipal” water suppliers. For these reasons, RCW 90.03.386(2) is not a valid exercise of the legislature’s police powers.

Even if RCW 90.03.386(2) were a valid exercise of the police power, it would not affect the Court’s analysis of the Tribes’ due process claims. Because the legislature’s exercise of the police power may not “violate any direct or positive mandate of the constitution,” police power laws remain fully subject to the restrictions of the due process clause. *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 102, 178 P.3d 960 (2008); *Presbytery*, 114 Wn.2d at 330; see also *Orion Corp. v. State*, 109 Wn.2d

621, 654-55, 747 P.2d 1062 (1987) (police power regulations must “withstand the due process test of reasonableness”). There is simply no authority for the State’s argument that constitutional due process requirements are somehow relaxed for statutes that fall into the category of “police power” legislation.⁸ 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”). Thus, the State’s characterization of RCW 90.03.386(2) as “classic police power” legislation, State Resp. at 53, is not only inaccurate, it is entirely irrelevant. Accordingly, the Superior Court erred in dismissing the Tribes’ substantive due process challenge to RCW 90.03.386(2).

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

Under the applicable three-part *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), analysis, RCW 90.03.386(2) violates procedural due process. *Mathews* requires that the Court consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous

⁸ The State cites *Edmonds Shopping Center Assocs. v. City of Edmonds*, 117 Wn. App. 344, 360, 71 P.3d 233 (2003) for the proposition that a municipality may “extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate police power goal.” The *Edmonds* court made clear, however, that the authority of a city to regulate vested rights under the police power is “limited . . . by constitutional safeguards.” *Id.* (citing *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 16, 959 P.2d 1024 (1998)).

deprivation of the interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) 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. Each of these factors supports the Tribes' challenge to RCW 90.03.386(2). Tribes' Brf. at 64-69.

1. Water Rights Are Important Property Interests Entitled to Due Process Protection.

The first prong of *Mathews* is satisfied because a water right is an important property interest that is entitled to due process protection. Tribes' Brf. at 66 (citing *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993); *Department of Ecology v. Acquavella*, 100 Wn.2d 651, 655-56, 674 P.2d 160 (1983)). Nevertheless, the State argues that because other water right holders allegedly have only an "indirect" interest in the place of use of a so-called "municipal" water right, it is not enough to show that RCW 90.03.386(2) puts these property interests at risk. The State insists that the Tribes must show "the property interests of other water rights holders will be deprived by operation of RCW 90.03.386(2)." State Resp. at 47.

The State misapplies *Mathews*. The first *Mathews* prong simply “requires identification of the nature and weight of the private interest” affected by the statute. *Moore*, 151 Wn.2d at 670. It is not necessary for the Tribes to prove that the operation of the challenged statute will result in the actual deprivation of any particular water right. Indeed, under the second prong of the *Mathews* analysis, the Tribes need only show that the procedures surviving RCW 90.03.386(2) would create a “*risk* of an erroneous deprivation of the interest at stake.” *Id.* at 671 (emphasis added). For example, in *Moore*, the Court held that there was a violation of due process where the “*possibility exists* that error in a conviction record could result in the revocation of the license of an innocent motorist,” and the Department of Licensing failed to provide motorists with an opportunity to raise those errors in an administrative hearing. *Id.* at 672-73 (emphasis added).

The State’s attempt to distinguish *Moore* on the basis that RCW 90.03.386(2) affects other water right holders “indirectly” is without merit. State Resp. at 49. The State offers no authority for the view that a statute that has a so-called “indirect” effect on property rights should be subject to any less intense constitutional scrutiny than a statute that impairs property rights directly. Such a proposition certainly makes no sense in the case of water rights, which have been likened to a jigsaw puzzle where expansion

of one appropriator's rights will diminish the rights of all other appropriators sharing the same water supply. *See A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005); Gould, *supra*, 23 *Land & Water L. Rev.* at 12.

Moreover, the State concedes that, in enacting RCW 90.03.386(2), the legislature "established a functional exemption" from the Water Code's prior notice and hearing requirements for water right changes and transfers. State Resp. at 47. As explained in the previous sections, this "functional exemption" *directly* affects the power of an appropriator to "object to a change in the . . . place of use, which could affect natural and return flows," *Okanogan Wilderness League*, 133 Wn.2d at 777, which serves to protect "vested rights" in the continuation of existing source conditions. *Farmers Highline Canal*, 272 P.2d at 631-32. Because RCW 90.03.386(2) directly affects these important property rights, the first prong of *Mathews* is satisfied.

2. Risk of Erroneous Deprivation and Probable Value of Substitute Procedural Safeguards.

Under the second *Mathews* prong, the procedures surviving RCW 90.03.386(2) create a substantial risk that water rights of third parties will be impaired in DOH proceedings to amend the boundaries of a "municipal water supplier's" service area. Furthermore, additional or substitute

safeguards would better protect existing rights, including the procedures found in RCW 90.03.380 and those called for in the version of the MWL proposed by Governor Locke.⁹ Tribes' Brf. at 66-68.

The State denies that the procedures surviving the enactment of the MWL create a significant risk that water right holders will be deprived of vested rights. State Resp. at 49-50. The State points first to DOH procedures for reviewing and approving water system plans or plan amendments. *Id.* at 49 (citing RCW 43.20.250 and .260; WAC 246-290-100). Yet under the cited provisions, water right holders are not entitled to notice of an impending change in a “municipal water supplier’s” service area. *See* WAC 246-290-100(8) (notice of the approval of a water system plan limited to “system consumers”). Furthermore, these provisions afford DOH no statutory authority to even *consider* a third party’s water right impairment claim when approving a water system plan. *See* RCW

⁹ As proposed by the governor, the MWL would have provided that if a municipal water supplier wanted the place of use of a water right to be equivalent to and coextensive 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 have become effective until the claims of impairment were fully and finally resolved. *Id.* (§ 8(5)(d)).

90.20.260 (limiting consideration to consistency with comprehensive plans and other planning requirements).

The State next cites the State Environmental Policy Act (SEPA), Ch. 43.21C RCW. State Resp. at 50. Yet, like the water system planning laws, SEPA does not ensure that water right holders will be notified of proposed changes in the place of use of municipal water rights.¹⁰ Furthermore, SEPA fails to provide a meaningful forum for a water right holder to assert a water right impairment claim. Unless there are significant *environmental* impacts, water right holders lack standing under SEPA to complain that their rights will be impaired by DOH's approval of a water system plan. *Kucera v. State Dep't of Transp.*, 140 Wn.2d 200, 212-13, 995 P.2d 63 (2000) ("purely economic interests are not within the zone of interests protected by SEPA"); *Snohomish Cty. Property Rights Alliance v. Snohomish Cty.*, 76 Wn. App. 44, 52-53, 882 P.2d 807 (1994). SEPA likewise provides no authority for DOH to disapprove of a proposed water system plan due to adverse effects on private water rights. See RCW 43.21C.060 (allowing denial based only on significant *environmental* impacts).

¹⁰ Under SEPA regulations, an agency must simply provide notice of the availability of environmental documents. See WAC 197-11-510(1) ("agency must use reasonable methods to inform the public and other agencies that *an environmental document is being prepared* or is available"). A SEPA notice need not disclose the effect that approval of a water system plan would have on the place of use of the purveyor's water right.

The State finally argues that water right holders may *intervene* in an adjudicative proceeding challenging a municipal water supplier's plan. State Resp. at 50 (citing RCW 34.05.443). However, the State neglects to mention that only water purveyors have standing to *initiate* such a proceeding. See WAC 246-10-107(1); CP 914 (State's Response to Interrogatory No. 11). If a water purveyor does not file an administrative appeal, there will be no proceeding in which a water right holder may intervene. Since a water right holder's ability to be heard depends entirely on whether *another* party chooses to file an appeal, the intervention process does not afford water right holders with procedural due process.¹¹

The State's arguments with respect to the second *Mathews* prong also fail because they address the procedures surviving RCW 90.03.386(2) in a vacuum, rather than comparing them to "the probable value, if any, of additional or substitute procedural safeguards." *Moore*, 151 Wn.2d at 670 (emphasis added). The State simply fails to address the obvious point that by eliminating the unique procedures of RCW 90.03.380, which are specifically *designed* to afford existing water right holders notice and an

¹¹ The State also argues that water right holders have the right to participate in proceedings relating to local governmental planning, such as plans approved under the Growth Management Act and other statutes. State Resp. at 50, n.19. Such proceedings, however, do not provide a forum for a water right holder to assert a claim that the approval of a water system plan will result in impairment of water rights. At most, participation in such proceedings will alter the land use planning criteria conditions that a water system plan will have to meet in order to qualify for the benefits of RCW 90.03.386(2).

opportunity to raise water right impairment claims, the legislature substantially increased the risk that future State approvals of changes in the place of use of rights held by “municipal water suppliers” would impair vested water rights.

3. The Government’s Interest.

Finally, contrary to the third *Mathews* factor, the State fails to identify any legitimate “governmental interest” that would be served by eliminating the protections of RCW 90.03.380 in proceedings involving changes in the place of use of “municipal” water rights. *Moore*, 151 Wn.2d at 670. In particular, the State fails to respond to the Tribes’ point that retention of the “additional or substitute procedural safeguards” already employed under RCW 90.03.380 would impose few if any fiscal or administrative burdens upon State agencies.¹² These procedures have been employed for decades and remain applicable to water right holders that do not meet the MWL’s definition of “municipal water supplier.” The State’s failure to identify a legitimate governmental interest that would be advanced by eliminating procedural protections for existing

¹² Such a position would be inconsistent with Ecology’s request that the legislature retain these procedural safeguards in the MWL. CP 918.

water right holders serves to drive home the point that RCW 90.03.386(2) is special-interest legislation that violates procedural due process.¹³

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

RCW 90.03.260(4) and (5) declare 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. These provisions facially violate substantive due process because they operate retroactively to remove limitations on consumptive use that appear in pre-MWL water right documents to the detriment of other existing rights. *See Tribes’ Brf.* at 69-72.

¹³ The State again argues that a facial due process challenge to RCW 90.03.386(2) is inappropriate because the statute does not deprive water right holders of rights in every circumstance. *State Resp.* at 51. As discussed in Part II.A.2, above, the facial constitutionality of RCW 90.03.386(2) does not depend on whether the MWL affects all water rights, but whether the MWL can be applied in a constitutional manner in those situations where it does affect a water right. *Casey*, 505 U.S. at 894. RCW 90.03.386(2) facially violates procedural due process because it allows changes in the place of use of municipal rights to go forward without affording third parties adequate notice or an opportunity to raise an impairment claim and because there is a substantial *risk* of adverse effects to all vested rights from the changes allowed by the legislation. *Moore*, 151 Wn.2d at 672-73.

The State’s argument that the “police power” justifies the elimination of procedural protections for existing right holders, *State’s Resp.* at 51-54, should be rejected because RCW 90.03.386(2) is not a valid exercise of the police power and because the police power does not trump constitutional rights. *See Part II.A.3* above.

The State argues that these statutes are not facially unconstitutional even if they operate retroactively because population and service connection limits have never been attributes that limited exercise of a water right. State Resp. at 43. The State contends that prior to the MWL the only binding limits on a water right were those that involved the quantity of water. *Id.* But this has never been the law. This Court has squarely held that the exercise of water rights is *not* limited solely by the annual and instantaneous quantities on the face of a permit or certificate, but can also be subject to limits, both express and implied, on the time, place and manner of use. *R.D. Merrill Corp. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 128, 969 P.2d 458 (1999) (appropriated water right implicitly limited by the time of the original beneficial use); *Id.* at 131 (discussing changes in “manner and place of use”); *Schuh v. Dep’t of Ecology*, 100 Wn.2d 180, 185, 667 P.2d 64 (1983) (upholding permit condition allowing only supplemental use of water right). Indeed, RCW 90.03.290(3) provides that water right permits must contain limits, not only on the amount of water to which the applicant is entitled, but also on “the beneficial use or uses to which [the water] may be applied.” There is no principled basis for distinguishing service connection or population limitations from any other condition imposed by Ecology on the time, place and manner of use of water rights.

The State maintains that RCW 90.03.260(4) and (5) do not violate substantive due process because there was ambiguity as to whether connections and population figures in water right documents were limiting attributes of water rights. State Resp. at 44; *see also* WWUC Resp. at 55-56. But there has never been ambiguity about the legal effect of conditions expressly included in a water right permit or certificate.¹⁴ A water right certificate expressly provides that the holder's right to use water is "defined" by the terms and conditions of the certificate and any antecedent permit. *See, e.g.*, CP 906, 909. Similarly, water right permits grant a right to appropriate water "subject to the limitations and provisions set out herein." *E.g.* CP 1022.

Water right permits and certificates issued prior to the MWL often contained *express* conditions limiting the number of people or connections that may be served.¹⁵ The MWL purports to remove these express limitations, retroactively expanding the rights of so-called "municipal

¹⁴ Ecology's authority to condition water rights has been repeatedly upheld. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 90-91, 11 P.3d 726 (2000); *Theodoratus*, 135 Wn.2d at 597-98; *Schuh*, 100 Wn.2d at 185.

¹⁵ For example, under the heading "Quantity, Type of Use, Period of Use," a water right certificate issued in 1980 to Crown Properties Inc. provides: "Community domestic supply – continuously (*maximum of 50 services*)." CP 1020 (emphasis added). Similar limitations are found in other certificates included in the record. CP 906 ("Community domestic supply – continuously (33 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 suppliers” at the expense of other right holders. By changing the legal consequences of express limits in pre-MWL water right documents, RCW 90.03.260(4) and (5) facially violate substantive due process. *Varga*, 151 Wn.2d at 195. Furthermore, even if ambiguities exist in pre-MWL water rights documents, such ambiguities must be resolved based on the law and the facts that existed at the time the documents were filed, not on the basis of retroactive legislation. *See San Carlos Apache*, 972 P.2d at 189 (“statute may not . . . ‘attach[] new legal consequences to events completed before its enactment’”) (quoting *Landgraf*, 511 U.S. at 270).

Apparently recognizing the due process problems associated with retroactively altering the legal effect of express limitations found in pre-MWL water right permits and certificates, the State now contends for the first time that the legislative declarations in RCW 90.03.260(4) and (5) concerning connection or population limits *only* affect *new* water right applications.¹⁶ State Brf. at 42 (“*Only* a new application for a permit can be subject to [the] amended conditions” in RCW 90.03.260(4) and (5)).

¹⁶ The position expressed in the State’s response is inconsistent with Ecology’s February 2007 policy statement which took the position that RCW 90.03.260(4) and (5) applied without limitation to a “water right for community or multiple domestic supply.” CP 1492. In cases where DOH approved a water system plan specifying the number of allowable service connections, Ecology opined that “*any* population or connection limitations that may appear in water right documents are not limiting.” *Id.* (emphasis added).

The Tribes agree that RCW 90.03.260(4) and (5) can be applied to new water right applications filed after the MWL's effective date.¹⁷ However, because the State continues to assert that the retroactive operation of RCW 90.03.260(4) and (5) does not facially violate substantive due process, the Tribes emphasize that the Court can *only* preserve the constitutionality of RCW 90.03.260(4) and (5) if it strictly limits their operation to water right applications filed after September 9, 2003, and any subsequent water right documents relating to such applications. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997); *see also* WWUC Brf. at 38 (where retroactive operation of statute would be unconstitutional, appropriate remedy is to limit the statute to prospective operation).

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). Removal of limits on the maximum number of connections in a water right permit or certificate poses a significant risk of increased consumptive use and resulting harm to the rights of third parties. *See* CP 718-19. Nevertheless, RCW

¹⁷ The first sentence of RCW 90.03.260(4) sets out new requirements for water rights applications for "community or multiple domestic supply." The next sentence provides that where a "municipal water supplier" has DOH approval 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" (emphasis added). The words "the application" in the second sentence of RCW 90.03.260(4) could be read to reference only those new applications submitted pursuant to the first sentence.

90.03.260(4) and (5) allows such changes to be authorized without notice to affected water right holders or an opportunity to raise water right impairment claims. Additional safeguards already exist in State law that would reduce these risks – the procedures employed under RCW 90.03.380 and RCW 90.03.290 serve to protect the vested rights of third parties when water rights are changed or expanded. The legislature’s decision to dispense with such procedures when a “municipal water supplier” seeks to expand the number of connections or the population that may be served under a water right violates procedural due process. *See Tribes’ Brf. at 72-74.*

The State argues that there is no violation of due process because the water right change statutes never applied to population or service connection limits. The State is wrong. Population or service connection limits directly relate to the purpose of use of a water right and are subject to change under RCW 90.03.380 only where there is no injury or detriment to existing rights.¹⁸ *See R.D. Merrill*, 137 Wn.2d at 128 (because season of use relates to the purpose of use, change in the season of use is “implicitly covered by” RCW 90.03.380). But even if changes in population or service connection limits were not allowed by RCW

¹⁸ Water right certificates include population and connection limits under the heading “Quantity, Type of Use, Period of Use.” *See* n. 15, *supra*.

90.03.380, this would hardly mean that such changes could have gone ahead without affording other right holders notice and an opportunity for a hearing. To the contrary, it would mean that *new* rights would have been needed, providing existing right holders with even stronger due process protections. *See* RCW 90.03.290(3).

The State also maintains that increases in population or service connection limits will have no tangible impact on other water rights. But it is easy to see how an increase in the population or connections served could result an expansion in consumptive use, especially where a purveyor has unused quantities of water available under its certificate and the connection or population limits impose constraints on the purveyor's ability to put the unused quantities to beneficial use. *See* CP 718-19. Clearly, there is a significant risk that water rights will be impaired when limitations that constrain the consumptive use of water are relaxed.¹⁹ *See R.D. Merrill*, 137 Wn.2d at 128 (seasonal use restriction); *Schuh*, 100 Wn.2d at 185 (supplemental use restriction). Under *Mathews*, it is sufficient to show that the challenged statute poses a significant *risk* of

¹⁹ The State argues in conclusory fashion that the second prong of the *Mathews* analysis is met because the DOH water system planning process provides ample notice and opportunity to be heard. State Resp. at 56. As explained in Part II.B.2, these planning procedures provide little notice or opportunity for hearing and are patently inadequate to satisfy procedural due process requirements. The State also argues that the third prong of the *Mathews* analysis is met but again fails to identify the "governmental interest" that warrants dispensing with notice and hearings in situations where a water supplier seeks permission to increase a connection or population limit. State Resp. at 57.

erroneous deprivation of an important property right or interest. *See Moore*, 151 P.3d at 671-72.

Finally, the State argues that even if RCW 90.03.260(4) and (5) do not provide adequate procedural safeguards to meet due process standards, the Court should await an “as applied” challenge to decide whether the statutes are invalid. State Resp. at 57. But because water right holders receive inadequate notice and have no opportunity to seek a hearing under RCW 90.03.260(4) and (5), it is unclear exactly how an “as applied” challenge to RCW 90.03.260(4) and (5) would arise. In the meantime, it is likely that vested rights will continue to be impaired without water right holders’ knowledge, consent or right to be heard.

Accordingly, the Court should not accept the State’s invitation to postpone its ruling on the constitutionality of these statutes. The Court should instead hold that RCW 90.03.260(4) and (5) are effective only with respect to water right applications filed *after* the effective date of the MWL. The legislature is free to reenact legislation authorizing water purveyors to change the connection or population limits in pre-MWL applications, permits or certificates, as long as it provides statutory protection for existing rights and incorporates procedures that provide right holders with adequate notice and an opportunity to assert impairment claims.

E. Hale Does Not Affect the Tribes' Separation of Powers Claims.

After the Tribes filed their opening brief, this Court decided *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009).

The Tribes take this opportunity to address the effect of *Hale* on their claims that RCW 90.03.015 and RCW 90.03.330(3) retroactively overruled *Theodoratus* in violation of the separation of powers.²⁰

In *Hale*, 165 Wn.2d at 498, the Court considered whether a retroactive amendment to the Washington Law Against Discrimination (WLAD) violated the separation of powers. In *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000), this Court established a definition of “disability” for accommodation cases that required a claimant to show an abnormality that has a “substantially limiting effect upon the [claimant’s] ability to perform his or her job.” Six years later, in *McClarty v. Totem Elec.*, 157 Wn.2d 214, 127 P.3d 844 (2006), a closely divided Court overruled *Pulcino* and adopted the more restrictive definition of disability used in the Americans with Disabilities Act, which requires a claimant to show a “physical or mental impairment that substantially limits one or more major . . . life activities.” Then, in 2007, the

²⁰ *Hale* has no bearing on the Tribes’ contention that RCW 90.03.330(3) violates the separation of powers because the statute impermissibly makes judicial determinations or that RCW 90.03.015 and RCW 90.03.330(3) violate substantive due process. See *Hale*, 165 Wn.2d at 503 n.3.

legislature specifically rejected the definition of “disability” adopted in *McClarty* and adopted a statutory definition that was consistent in many respects to the definition approved in *Pulcino. Hale*, 165 Wn.2d at 501-502. The legislation explicitly applied the new definition retroactively to causes of action accruing the day before *McClarty* and to those occurring on or after the amendment’s effective date. *Id.* at 498, 502.

The Court held that under these facts, the amendment did not violate the separation of powers. *Hale*, 165 Wn.2d at 498. The Court emphasized the legislature’s need to respond to the conflicting decisions in *Pulcino* and *McClarty* and the fact that the legislation “carefully carve[d] out a window of time” during which disability claims would still be controlled by *McClarty*. *Id.* at 502. Because the legislature was “careful not to reverse the decision in *McClarty*,” the retroactive amendment of the WLAD did not threaten the independence or integrity of the judicial branch. *Id.* at 510.

These unique circumstances distinguish *Hale* from this case. Unlike *Hale* where the Court had issued two conflicting interpretations of the WLAD over a six year period, the legislature did not enact RCW 90.03.015 and RCW 90.03.330(3) to clear up any conflicting judicial interpretations of the Water Code. To the contrary, in 1998 this Court had unequivocally held in *Theodoratus* that a water right could not be

perfected and a certificate issued based on system capacity. *Theodoratus*, 135 Wn.2d at 590 (“Relevant statutes, case law, and recent legislative history *leave no doubt* that quantification of Appellant’s 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.”). Unlike the *McClarty* decision, the Court’s rulings in *Theodoratus* were firmly rooted in the Court’s prior precedents. *See id.* at 589-90 (citing *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997); *Department of Ecology v. Grimes*, 121 Wn.2d 459, 471-72, 852 P.2d 1044 (1993); and *Neubert v. Yakima-Tieton Irr. Dist.*, 117 Wn.2d 232, 237, 814 P.2d 199 (1991)). The legislature’s attempt to overturn the Court’s unequivocal and consistent rulings does not reflect the same “spirit of reciprocal deference” evident in *Hale*, 165 Wn.2d at 510.

Also unlike *Hale*, the MWL does not “carefully carve out a window of time” during which water right decisions would still be controlled by *Theodoratus*. Instead, RCW 90.03.015 and RCW 90.03.330(3) expressly apply to all certificates issued before the MWL’s effective date, *including* the five-year period between the 1998 *Theodoratus* decision and September 9, 2003. Unlike *Hale*, where the legislature was “careful not to reverse the decision in *McClarty*, both the

intent and effect of RCW 90.03.015 and 90.03.330(3) were to reverse the Court's holding in *Theodoratus*.²¹

Contrary to the State's assertions, had the MWL been effective at the time of *Theodoratus*, it would have changed the result in that case. *See* State Resp. at 17-18. Mr. Theodoratus claimed that he was entitled to a certificate based on the capacity of his delivery system and that Ecology did not have the power to condition his permit to provide that a certificate only would be issued based on his actual beneficial use. *Theodoratus*, 135 Wn.2d at 588. If RCW 90.03.015 and RCW 90.03.330(3) had been effective in 1998, Ecology would have had the statutory authority to issue Mr. Theodoratus a system-capacity certificate, at least until September 9, 2003. Likewise, if these statutes had been effective in 1998, Ecology would have had no legal basis to amend Mr. Theodoratus's permit to specify that a certificate would only be issued based on actual beneficial use. *See Theodoratus*, 135 Wn.2d at 598 (Ecology had authority to amend Mr. Theodoratus's permit because the original "pumps and pipes" permit condition was "ultra vires" and "unlawful"). In short, if RCW

²¹ The Final Bill Report for the MWL recognized that "[i]n a recent case involving the water right of a private developer, the State's Supreme Court stated that a final water right certificate may not be issued for the developer's right for a quantity of water that has not actually been put to beneficial use." CP 478. The report went on to explain that 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 constructed, rather than after the water had been placed to actual beneficial use, is declared to be in good standing." CP 479 (emphasis added).

90.03.015 and RCW 90.03.330(3) had been the law at the time of the *Theodoratus* decision, the result would have been very different.

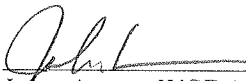
The State maintains that the MWL would not have changed the result in *Theodoratus* because RCW 90.03.330(4) specifies that going forward all certificates must be issued based on actual use. State Resp. at 18. But, by its terms, RCW 90.03.330(4) only applies to certificates issued *after* September 9, 2003, and would have had no application to the permit decision at issue in *Theodoratus* which was made well before that date. If the MWL had been effective before *Theodoratus*, the case would have been governed by RCW 90.03.330(3), not RCW 90.03.330(4). Because RCW 90.03.330(3) applies to all certificates issued for “municipal water supply purposes” prior to September 9, 2003, and specifies that such certificates *could* be validly issued based on system capacity, it plainly would have affected the outcome in *Theodoratus*.

In short, in enacting RCW 90.03.015 and RCW 90.03.330(3), the legislature intended to overrule this Court’s unequivocal rulings in *Theodoratus*. Because the MWL reversed *Theodoratus* and left no “window in time” where *Theodoratus* would be effective, it impermissibly invaded the prerogatives of the judicial branch and violated the separation of powers.


III. CONCLUSION.

The Court should affirm the Superior Court's decision that RCW 90.03.015 and RCW 90.03.330(3) violate the separation of powers, but should reverse the decision below that RCW 90.03.260(4) and (5) and RCW 90.03.386(2) do not facially violate substantive or procedural due process.


Dated this 8th day of April, 2009.



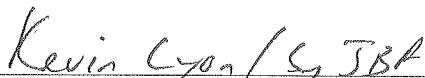
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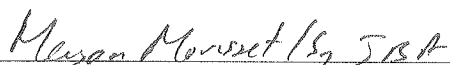
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