

NO. 81809-6

SUPREME COURT OF THE STATE OF WASHINGTON

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

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
JOAN BURLINGAME, ET AL.**

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INTRODUCTION

This Reply Brief is filed on behalf of the “Burlingame Plaintiffs,” a group of water rights holders, commercial fishing interests, and environmental and water protection organizations.¹ This Reply Brief will first address, as limited “sur-reply,” this Court’s recent decision regarding the separation of powers doctrine, *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009).² The remainder of this brief will reply to the three themes in Appellants/Cross-Respondents’ and Intervenors’³ responses to the due process issues surrounding RCW 90.03.330(2) and RCW 90.03.386(2).

ARGUMENT

I. THE MUNICIPAL WATER LAW VIOLATES SEPARATION OF POWERS UNDER THIS COURT’S RECENT *HALE* DECISION.

In their reply, the State relies extensively on this Court’s recent decision in *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). As this Court in *Hale* directly addressed separation of

¹ The Burlingame Plaintiffs are Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget Sound Harvesters, Washington Environmental Council, Sierra Club, and Center for Environmental Law and Policy.

² The *Hale* case was decided on January 15, 2009 after the filing of the Burlingame Plaintiffs’ original brief.

³ The Appellants/Cross-Respondents and Intervenors are collectively referred to as the “State” unless otherwise specifically noted.

powers, a core issue in this appeal, such reliance is appropriate. However, *Hale* does not provide the solace they seek; indeed, this Court’s opinion in *Hale* shows why the Municipal Water Law (“MWL”) violates the separation of powers.⁴

A. Washington State Disability Law

To understand the decision in *Hale*, it is useful to understand the background of the controversy over the definition of “disability” under Washington state law. Washington first enacted the Washington Law Against Discrimination (“WLAD”), chapter 49.60 RCW, in 1949 to eliminate racial discrimination in employment. *See* LAWS OF 1949, ch. 183; REM. REV. STAT. § 7614 (Supp.1949). In 1973, the law was extended to prohibit discrimination against “handicapped” people. *See* LAWS OF 1973, 1st ex. Sess., ch. 214. In 1993, the legislature amended the statute again, replacing the term “handicap” with “disability.” *See* LAWS OF 1993, ch. 510. No version of the statute explicitly defined the terms “handicap” or “disability.”

⁴ There is no disagreement as to the standard of review for the separation of powers claims because there is only one set of circumstances applicable to this Court’s analysis: this Court’s *Theodoratus* decision and the text of the law. *See, e.g.*, Response/Reply Brief of State of Washington at 7 (“There can be no occasional violation of the separation of powers....”). The resolution of these claims turns only on the meaning of the *Theodoratus* opinion and the interpretation of the Municipal Water Law.

This definitional void was not left long unfilled. In 1975, the Washington State Human Rights Commission (“HRC”) adopted a regulation defining “handicap,” but this Court chose not to use that definition in a subsequent case, instead creating a judicial definition based on the plain meaning of the word. *Chic., Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Right Comm’n*, 87 Wn.2d 802, 805-06, 557 P.2d 307 (1976). Over 20 years later, in *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000), a case concerning discrimination in accommodation, the Court again rejected the HRC regulation and created a judicial definition of “disability,” the term then employed by the WLAD. The legislature took no action in response to the judicially-created definition in *Pulcino*.

In 2006, this Court addressed the question of which definition of “disability”—that from the HRC or that from the *Pulcino* case—should govern disparate treatment claims under the WLAD. In a sharply-divided decision, this Court relied on neither the HRC nor the *Pulcino* definition and instead defined “disability” under the WLAD to be the same as the definition of “disability” set forth in the federal Americans with Disabilities Act of 1990. *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006). Justice Owens, in a dissent joined by Justices Fairhurst and Chambers, as well as Justice Alexander dissenting separately, argued

that the Court had “usurped the authority of the legislature and enacted a new law.” *Id.* at 236.

B. The *Hale* Decision

The legislature’s response to *McClarty* was swift. In its next session, the legislature rejected the *McClarty* definition and amended the WALD to provide a statutory definition of “disability.” “Being careful not to reverse *McClarty*, the legislature explicitly declared the new statutory definition applied retroactively to causes of action occurring the day before the *McClarty* opinion was filed and to causes of action occurring on or after the effective date of the amendment.” *Hale*, 165 Wn.2d at 498. “The effect of this provision was to carefully carve out a window of time during which claims would still be controlled by the definition of “disability” we announced in *McClarty*.” *Id.* at 502.

In *Hale*, this Court addressed the question of whether “under the facts of case,” *id.* at 498,⁵ the retroactive application of the new legislative statutory definition violated the separation of powers.⁶ After a detailed

⁵ The facts in *Hale* differ significantly from those here. In *Hale*, this Court wrestled with for several decades to define “disability,” changing definitions and searching for legislative intent in the process. Here, the Court has constantly and consistently required water rights to be put to beneficial use prior to obtaining a certificate.

⁶ The *Hale* court noted that additional constitutional limits could apply to retroactive legislation, including the due process clause, but those issues had not been raised in the case. *Hale*, 165 Wn.2d at 503, fn. 3.

discussion of the history of the separation of powers doctrine, *see Hale*, 165 Wn.2d at 503-506, and after noting that since the legislature had expressly made the statute retroactive there was no need to characterize the nature of the amendment, *id.* at 508, the Court held that the statute did not violate the separation of powers doctrine. A key fact for this Court was the legislative “carve-out” for the time that *McClarty* was the governing law in the state. “The legislature was careful not to reverse our decision in *McClarty* nor did the legislature interfere with any judicial function. The legislature has not threatened the independence or integrity or invaded the prerogatives of the judicial branch.” *Id.* at 510. While the decision was unanimous, Justice Madsen concurred in the result only.

C. The Municipal Water Law Fails To Respect The *Theodoratus* Opinion Of This Court And Invades The Prerogatives Of The Judicial Branch.

Hale is an important precedent for separation of powers claims in Washington, but not for the reasons argued by the State. In *Hale*, the legislature was careful to avoid retroactively overruling this Court’s decision in *McClarty*, specifically limiting the new law to prospective application and retroactive application only prior to the Court’s decision in *McClarty*. This Court did not throw out years of prior precedent to reach the result in *Hale*; indeed, this Court explicitly noted it had previously “hinted that a retroactive legislative amendment that rejects a judicial

interpretation would give rise to separation of powers concerns.”

Hale, 165 Wn.2d at 508.

1. *The MWL affirmatively rejects judicial interpretations that were based upon well-settled principles of water law.*

There is no question that in accordance with the reasoning and holding in *Hale*, the MWL’s new definitions reverse the decision in *Dep’t. of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) and “threaten[] the independence or integrity or invade[] the prerogatives of the judicial branch.” *Hale*, 165 Wn.2d at 510. Unlike the situation in *McClarty*, *Theodoratus* followed and applied well-established law from this Court holding that beneficial use, not system capacity, is the hallmark of water right perfection. *See, e.g., Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997); *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993); *Dept. of Ecology v. Grimes*, 121 Wn.2d 459, 471-72, 852 P.2d 1044 (1993).

Now, the provisions at RCW 90.03.330(2) provide that the same rights the Court said could not be perfected based on system capacity—those for which certificates were issued prior to September 2003—are

rights in “good standing.”⁷ As a result, today, under the MWL, this Court would not hold, as it did in *Theodoratus*, that it was ultra vires for Ecology to issue water certificates based on system capacity rather than actual

⁷ The Final Bill Report leaves no doubt as to the legislature’s intent to retroactively overrule the beneficial use requirements confirmed in *Theodoratus* for previously-issued pumps and pipes certificates:

Under this “pumps and pipes” philosophy, a municipality could develop its actual use over time, without affecting its certificated water right. *In 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 (emphasis added).

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. However, from now on, the DOE must issue a water right certificate *for a new water right* only for the perfected portion of the right as demonstrated through the actual beneficial use of water.

CP 479 (emphasis added).

beneficial use.⁸ Unlike the legislative action between *McClarty* and *Hale*, the MWL retroactively changed the law of *Theodoratus*.⁹

2. *Unlike the statute at issue in Hale, the MWL fails to “carve out” or otherwise preserve the Theodoratus holding.*

When the legislature enacted the new, retroactive definition of disability post-*McClarty*, it applied the new definition to the period of time prior to the *McClarty* decision and from the date of the legislation forward, but carved out and kept the *McClarty* definition of disability during the period between this Court's decision and the new legislation, carefully tiptoeing around a direct contravention of a decision of the Supreme Court. This Court found this fact to be vital to its decision in *Hale*. Here, the MWL has no such legislative carve-out for its retroactive application. Rather, the legislature expressly provided that the provisions

⁸ This Court also held that Mr. Theodoratus, as a private developer holding a water right for “community domestic supply” purposes, was not a municipal water supplier for purposes of the Water Code. *Theodoratus*, 135 Wn.2d at 594-95. The MWL directly overrules this holding. Under the new definitions in the MWL, Mr. Theodoratus himself and other private developers with “community domestic” or “group domestic” rights are now defined to be municipal water suppliers.

⁹ The State overstates the *Hale* holding: “separation of powers is violated by the Legislature when it enacts a statute that operates retroactively to reverse an actual court decision in a manner that produces a different result for the litigants in the case.” State Response Br. at 12. Nowhere can support for this statement be found in *Hale*. The Court is clear that *Hale* is limited to the facts of the case. The Court does not discuss the need to “reverse an actual court decision.”

in RCW 90.03.330 would apply *only* retroactively to those pumps and pipes certificates invalidated by the court in the *Theodoratus* decision. The effort by the legislature post-*McClarty* to save the definition of disability from a separation of powers problem is noticeably absent in this case, prescribing a result here different from that in *Hale*.¹⁰

3. *The MWL, in contrast to the statute in Hale, exhibits no “harmony” or “spirit of reciprocal deference,” but only a blunt effort to overrule this Court.*

In *Hale*, the legislature responded to the Court’s departure in *McClarty* from a longstanding, established definition: *McClarty* was the outlier, and the legislature pulled the Court back. When the Court provided the definition of disability in the *McClarty* case, the Court tried to glean legislative intent as best it could. As acknowledged in the *Hale* decision, this created a particularly unique set of facts where the legislature could step in and correct the court’s efforts without the Court fearing that the legislature was inserting itself as the court of last resort. That unique set of circumstances driving this Court’s decision in *Hale* is noticeably absent in this case. In *Theodoratus*, this Court engaged in a

¹⁰ Nor does the MWL contain a savings clause requiring mitigation for rights adversely affected by MWL, the kind of provision which ultimately saved a similar statute in Idaho from constitutional challenge. See, *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators*, 129 Idaho 454, 460-61, 926 P.2d 1301 (1996).

plain language interpretation of the statutes and Ecology practice in question, based upon long-established principles of water law, without having to glean or imply legislative intent. There is no “harmony” or “spirit of reciprocal deference” in the legislature’s actions in enacting the MWL. *Theodoratus* decisively reaffirmed the longstanding law of the State, and in response, the legislature acted to override and overturn that law, acting (improperly) as a court of last resort.

The circumstances leading to the *Hale* decision are markedly different than those before the Court in this case. The MWL falls squarely on the opposite side of the lines drawn by the court in *Hale* in that the legislature explicitly sought to overturn this Court’s application of well-established precedent in the *Theodoratus* case, and it did so with no regard to the Court’s prerogatives or independence and with no effort to carve out and respect the Court’s *Theodoratus* decision. Those differences dictate a different result in this case.

II. THE STATE ATTEMPTS TO LIMIT THIS COURT’S REVIEW BY IMPROPERLY NARROWING THE STANDARD OF REVIEW.

A. Application Of The *Salerno* Approach Must At A Minimum Be Integrated With The *Mathews* Test For Assessing Procedural Due Process .

As set forth in the Burlingame Plaintiffs’ Opening Brief, the standard from *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct.

2095, 95 L.Ed.2d 697 (1987), to the extent that it is applied at all in the procedural due process context, must be applied in concert with and reference to the *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) test and must assess only those circumstances where the MWL actually applies. In their zeal to conceal the constitutional infirmities of the MWL, the State's use of the *Salerno* "no set of circumstances" approach omits the full statement of the standard of review: that there is no set of circumstances in which the statute can be *constitutionally applied*. *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004) [citing *Salerno*] (emphasis added.). Setting up straw man circumstances where the MWL is irrelevant cannot save it from being found unconstitutional.

As this Court generally recognized in *Moore*, when assessing whether a statute violates procedural due process, the analysis is not as to all persons with driver's licenses, but rather, drivers whose licenses are suspended under the subject law, the circumstances in which the statute actually applied. *Id.* at 669-70. Further, the analysis is not whether some drivers' licenses are properly suspended, but whether in all instances where a driver's license is suspended under the subject statute (including those where the suspension turned out to be proper), there is a risk that the license suspension will be subject to an error which cannot be corrected

due to lack of notice and opportunity to be heard for the driver whose license is suspended. *Id.* As this Court found, the lack of notice and opportunity to be heard on the license suspension occurred in all license suspension circumstances, and therefore, in all circumstances where the statute was applied there was a significant risk of improper deprivation of property without due process. The court further found that in every driver's license revocation (all circumstances), there is a protectible private interest in the license; there is a risk of erroneous deprivation; and it is not burdensome for the government to initiate safeguards. Both tests applied to give the same result. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

Contrary to the State's contention, the "no set of circumstances" inquiry is not whether the retroactive application of declaring pumps and pipes certificates in "good standing," or the change in place of use provisions for municipal water rights, may in some instances not affect other water rights. Rather, the proper inquiry is whether, in each instance where there *are* other water rights, there is a *risk* that those water rights will be wrongly adversely affected with no meaningful notice and no

meaningful opportunity to be heard. The answer is yes in all circumstances.

B. The Standard Of Review For Assessing Substantive Due Process Violations Is Applied Only Where The Statute Is Relevant And Has Effect.

The State similarly argues that because application of the MWL may not affect water rights in all instances, there is no violation of substantive due process. As set forth in the Burlingame Plaintiffs' Opening Brief, application of the "no set of circumstances" test that sweeps in persons not affected by operation of the statute under scrutiny has been rejected by the U.S. Supreme Court in a number of cases. *See, Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894-95, 112 S.Ct. 2791, 2829, 120 L.Ed.2d 674 (1992); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22, 119 S.Ct. 1849, 1858 n.22, 144 L.Ed.2d 67 (1999) (plurality opinion). "[T]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Southeastern Pa*, 505 U.S. at 894, 112, S.Ct. at 2791.

The State's argument that the principle articulated in *Planned Parenthood v. Casey* and subsequent cases is limited to First Amendment cases is simply wrong. The *Planned Parenthood* case was about a woman's right to choose an abortion and improper constraints on that

right, not the First Amendment. The only support the State cites for its incorrect assertion about First Amendment cases is a case that cites to *Salerno* itself as having carved out the First Amendment exception to the “no set of circumstances” approach—an obviously circular argument on the State’s part—and a *dissenting opinion* in a circuit court opinion, *Planned Parenthood of S. Ariz. v. Lawall*, 193 F.3d 1042, 1046 (9th Cir. 1999) where the dissent complained that the majority was in fact repudiating the *Salerno* “no set of circumstances” approach to constitutional challenges. The current state of the law, as articulated by the U.S. Supreme Court, is that a court should apply the “no set of circumstances” approach only to those circumstances where the statute applies and is relevant.

II. THE STATE’S EFFORTS TO SAVE THE MWL FROM VIOLATIONS OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS REST ON REWRITING WASHINGTON WATER LAW, TORTURED INTERPRETATIONS OF THE MWL, AND APPLICATION OF UNRELATED CONSTITUTIONAL CONCEPTS.

The MWL’s violation of substantive and procedural due process protections for water rights goes to the very basics of Washington water law and its application. The Appellants/Cross-Respondents’ and Intervenors’ responses repeat three basic arguments in an attempt to save the MWL: that the water rights adversely affected by the MWL are not

vested rights entitled to either substantive or procedural due process protections; that the MWL's provisions operate only prospectively; and finally, that the MWL generally provides whatever minimal process the State thinks is due to any adversely-affected rights there may be. These arguments fail as they are contrary to established water law; they mischaracterize the provisions and operation of the MWL; and they rely upon misapplications of various constitutional concepts.

A. The Water Rights Adversely Affected By the MWL Are Vested Property Rights Entitled To Due Process Protections.

I. *Washington water law protects junior and senior rights, including continuation of stream conditions existing at the time of the appropriation.*

Contrary to the State's characterization of the very real rights at issue in this case as "mere expectations" or "collateral indirect interests," it is well-settled Washington law that vested water rights, both junior and senior, are property rights entitled to due process protections. *Chumstick Creek Drainage Basin in Chelan County v. Dep't of Ecology*, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985); *see also Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993). Junior water rights, including instream flow rights, have a vested right to water not appropriated and perfected by senior rights. *R.D. Merrill, Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 128-29, 969 P.2d 458 (1999); *see also*

RCW 90.03.345. For example, a vested junior right may get more or less water in any given year depending upon drought conditions and depending upon the magnitude of the use of a senior appropriator or appropriators, but that variance in actual water received due to changing natural conditions does not convert or diminish the junior right to a “mere expectation” in dry years; the junior right continues to exist for the amount originally appropriated. *See, e.g.* RCW 90.14.140(1).¹¹ This Court has also recognized that a water right is measured not just by quantity, but also by time, place, and manner of use. *See R.D. Merrill*, 137 Wn.2d at 127; *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 777, 947 P.2d 732 (1997). Water right holders have a “vested right in the continuation of stream conditions as they existed at the time of their respective appropriations.” *Big Creek Water Users Ass’n v. Dep’t of Ecology*, PCHB No. 02-113, 2002 WL 31847634 (Dec. 15, 2002) (emphasis added); *see also Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629, 631 (1957).

When two water users are withdrawing from the same body of water, the retroactive expansion of one (or resurrection of a senior right

¹¹ As the Arizona Supreme Court recognized in *San Carlos Apache Tribe v. Superior Court of Arizona for the County of Maricopa*, 193 Ariz. 195, 972 P.2d 179, 191 (1999), junior appropriators advance in priority when senior rights are forfeited through relinquishment or abandonment.

after it was relinquished or extinguished), necessarily injures the other. See Office of the Attorney General, *An Introduction to Washington Water Law* at VII: 6 (Jan. 2000) and *San Carlos Apache Tribe v. Superior Court of Arizona for the County of Maricopa*, 193 Ariz. 195, 205, 207, 972 P.2d 179 (1999) (“the Legislature cannot revive rights that have been lost or terminated under the law as it existed at the time of an event and that have vested in otherwise junior appropriators.”); see also Gould, *Water Right Transfers and Third Party Effects*, 23 Land & Water L. Rev. 1, 12 (1988).

Professor Gould’s comprehensive discussion of the impact of transfers of water rights on third party rights amply demonstrates how rights accrue and how they are affected by a statute such as the MWL. Gould uses the puzzle analogy to illustrate that a water right is not just the size of the puzzle piece, but also its shape, and junior puzzle pieces have just as much to protect as senior ones. *Id.* He notes that in addition to the rate of diversion of water, the full right (i.e. both the size and shape of the puzzle piece) includes the point of diversion, the amount of water diverted, the times of diversion, the return flows (including return flows from lawn irrigation, septic, and treated wastewater), the place and time at which a return flow enters the stream, and “other factors.” *Id.* at 10. “A change in any of these factors may interfere with junior uses.” *Id.* “The principal mechanism for protecting juniors is the diversionary entitlement.

A senior appropriator cannot increase his diversionary entitlement to the detriment of junior appropriators” and, as Gould points out, changes in return flows and other variables such as time and place of use, represented by the “shape of the puzzle piece” are also subject to control in order to protect junior appropriators. *Id.* at 12-19. Importantly, as Gould makes clear, this carefully-balanced relationship among rights is true in all cases at all times where there are multiple water rights.

A water right holder, municipal or private, whose rights are resurrected or expanded, or who changes or expands its place of use can harm other rights holders—junior or with equal or senior priority—by increasing the amount of water used and/or by changing the pattern of flows (in-stream or return flows) or aquifer recharge. It is these changes, fostered by the MWL without process, that are at issue in this case

2. *The State’s narrow characterization of the application of the MWL is unrealistic.*

Vested rights, not simply “expectations, are affected by the MWL.

a. RCW 90.03.330—(“pumps and pipes”).

The State tries to diminish or negate the MWL’s due process violations by claiming that resurrection of pumps and pipes certificates, RCW 90.03.330, affects only the “expectation” of water, negating any possibility of substantive or procedural due process violations. As set forth in the Burlingame Plaintiffs’ Opening Brief and in the cases cited

above, junior rights in water not taken by senior rights are real and protected. Junior rights holders may see their rights diminished, for example when their move up in seniority is negated, or their existing rights are devalued where dry conditions with reduced or no flow to the junior rights occur more frequently or are more lengthy.

Washington State University (“WSU”) argues that no procedural process is due as to RCW 90.03.330, because this provision of the MWL does not, as claimed by the Tribes and the Burlingame Plaintiffs, resurrect pumps and pipes certificates invalidated by *Theodoratus* and therefore no rights are adversely affected by the statute. This argument is inconsistent with statement of the legislature in the Final Bill Report (*see* footnote 7 *supra*) and basic canons of statutory construction which provide that the legislature is presumed to be aware of prior judicial interpretations of law and that courts presume that the legislature does not engage in unnecessary or meaningless acts. *See In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (citing *John H. Sellen Constr. Co. v. State Dep’t. of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)); *see also Knowles v. Holly*, 82 Wn.2d 694, 513 P.2d 18 (1973).¹²

¹² If the Court ultimately agrees with the argument that RCW 90.03.330 does not change the long-standing requirements of beneficial use prior to receipt of a final certificate in water law, the Burlingame Plaintiffs request

b. RCW 90.03.386—(change in place of use).

The State similarly minimizes affected rights' entitlement to procedural due process protections in arguing that junior rights' concerns for continuing stream conditions under the change in use provisions of RCW 90.03.386(2) are also only "expectations" or "indirect"¹³ or are only about return flows and return flows are not at issue with municipal water suppliers. As set forth above, the rights at issue are real and entitled to protection. And, under the change in use provisions of the MWL, those rights will be adversely affected.

The State conveniently dances around the topic of place of use without acknowledging that it can lead to more water use or even allow and encourage transfers between basins with significant effects on natural water courses and aquifers and attendant significant effects on vested water rights. If a municipality or development begins to draw from basin A, but uses and discharges (whether through septic systems, wastewater, or domestic, i.e. lawn, irrigation runoff—all of which are types of "return

that this interpretation be made clear in the Court's decision, and the State strictly held to this interpretation in the future.

¹³ The State gives absolutely no support in constitutional law for this assertion that "indirect effects" to vested rights are not entitled to due process protections. Rather, the law is clear: when a person's property or liberty rights are negatively impacted by statute, that person is entitled to notice and opportunity to be heard. *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006); *City of Redmond v. Moore*, 151 Wn.2d at 670.

flow”) in basin B where the municipality is actually located, other water rights in both basins will experience very real changes in the condition of the basins and waterbodies.

The report in the record regarding Kitsap County’s municipal service area and changes to water rights within the County’s service area is just one example of how changes in municipal place of use will actually affect existing conditions. *See generally* CP 705 *et seq.* A number of water rights in Kitsap County are currently underutilized. CP 708 and 718. The approved service area of the Kitsap Public Utility District (“KPUD”) now includes virtually the entire county and a number of small community water systems that have been acquired by KPUD and have become part of the KPUD system. CP 718. The MWL will allow change in place of use for these and other rights in the county, which change will “likely result in a net increase in groundwater extraction from existing wells,” CP 718-19, an expansion in use. Additional groundwater extraction in a number of the basins will “likely result in impacts on stream flows, particularly during drought years with below average precipitation.” CP 713. And, on the point regarding transfers from one basin to another:

[t]ransferring water out of a sub-basin may also result in reduced groundwater recharge and a corresponding reduction in streamflow. This reduction in recharge would

result if water that would otherwise be discharged to on-site septic systems within a basin is transferred to a different sub-basin.

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Standing declarations in the record from some of the Burlingame Plaintiffs further illustrate the threats to existing rights from growing municipalities and their acquisition of rights and changing places of use. *See e.g.* Burlingame and Bernheisel declarations, CP 192 *et seq.* and 492 *et seq.* Similarly, documents produced by the State warn that in a number of basins, further development will significantly injure in-streams flows (a junior water right). *See e.g.* CP 385-86 and 400-11.¹⁴

Finally, WSU's response/reply brief illustrates the expansive intent and effect behind the provisions of RCW 90.03.386(2) in noting that the change in use provisions are needed "to serve an ever growing and changing population base," and noting that the WSU Pullman campus "continues to grow and expand," increasing WSU's need for water and the reason behind its support of RCW 90.03.386(2). WSU Reply Brief at 48-49.

¹⁴ While WWUC continues to voice nonspecific objections to the inclusion of these and other fact statements in standing declarations and illustrative exhibits in the record, its objections are without merit. WWUC cannot simultaneously argue that the Tribes and the Burlingame Plaintiffs must show what injuries may be entitled to due process protections and at the same time object to examples that in fact demonstrate the way that damage to water rights occurs under the MWL.

The State's attempt to paint changes in municipal use as innocuous is simply unsupportable.

B. The MWL Retroactively Impairs Vested Water Rights By Changing The Legal Status Or Consequences Of Actions Taken Prior To The Law's Passage In Violation Of Substantive Due Process Protections.

The MWL retroactively alters the status of existing water rights to the detriment of many of those rights; in doing so, it violates substantive due process. *See State v. Shultz*, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999); *Caritas Servs., Inc. v. Dep't of Social & Health Servs.*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994). A law is retroactive if the law changes the legal consequences of actions before the law's effective date. *State v. Varga*, 151 Wn.2d 179, 195, 86 P.3d 139 (2004); *see also San Carlos Apache Tribe*, 972 P.2d at 188 and 189 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229 (1994)) (“[a] statute may not...attach new legal consequences to events completed before its enactment.”) (internal quotes omitted).¹⁵

¹⁵ WWUC tries to distinguish the *San Carlos Apache Tribe* case by claiming that Arizona water rights were unique in that they “vested” as a result of commencement of an adjudication. Even if true, this point is irrelevant. There was a pending adjudication in the *San Carlos* case, but it is clear that the Arizona Supreme Court found the pending adjudication relevant not for determining whether affected rights were valid and entitled to due process protections, but rather relevant to the separation of powers portion of the case and whether the legislature had tried to usurp the adjudication of established facts by a court.

The State would have this Court believe that the MWL's provisions regarding change of place of use, RCW 90.03.386(2), apply only from the date of the MWL's passage forward and therefore cannot violate substantive due process. Contrary to the State's claim, substantive due process analysis requires not merely a perfunctory chronological calculus of the date of a law's passage, but a more in-depth assessment of the manner in which established rights are affected by the statute at issue.

In effect, the change in use provisions will allow a puzzle piece to now, or a year from now, change its shape and size and encroach on a piece with a size and shape that was established years before the passage of the MWL. For example, in Kitsap County, the KPUD will be allowed to fold small municipal or community domestic water rights that were being used in a particular place, at a particular level, into the larger KPUD service area, changing the "size and shape" of those small municipal or community domestic rights. *See* CP 718-20. As provided in the report, the resulting increased use and/or changes in return flows will alter stream flows and will affect and change the relationship between those rights and already-established rights. *Id.* The MWL will have a similar result in the kinds of circumstances described in the Burlingame declaration. CP 197 *et seq.* In short, if the law is applied next week (i.e. nominally

prospectively), but it changes what was established under water law ten years ago, the law violates substantive due process.

The State's current position regarding the retroactive application of the change in place of use provisions also appears somewhat inconsistent with its application of the MWL change in place of use provisions immediately following the MWL's passage. As set forth in illustrative examples in the record, pending applications for approval of change in place of use were, upon the advice and consent of the Department of Ecology regarding the new law, withdrawn, even though objections to the applications had been filed by water rights potentially affected by the change in place of use. *See, e.g.*, CP 412-13, 416-17, 419, and 421. Those objecting water rights are now, after passage of the MWL, in a different legal relationship with different legal consequences relative to the changed municipal rights.

Finally, the State argues RCW 90.03.386(2) is not invalid because some pre-MWL certificates describe place of use as the "area served by" a water supplier and therefore there is no retroactive change to established rights. State Reply Brief at 36-37. The Court measures whether RCW 90.03.386(2) violates substantive due process not in the situations where the statute will have no effect, but rather the circumstances where the application of the statute is relevant. In the situation described by the

State, if there will never be a change necessary under RCW 90.03.386(2) and no water rights will be affected, then, as in *Planned Parenthood of Southeastern Pa. v. Casey*, the statute is not relevant, and the circumstance is not considered. Claiming that the statute does not apply to all municipal water suppliers does not save it from being a violation of substantive due process in those situations where it *does* apply and water rights *are* impacted. “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.” *Casey*, 505 U.S. at 894. *See also* Tribes’ Reply Brief at 7-9 (Part II.A.2).

Application of the MWL will have a retroactive effect on established stream and aquifer conditions, reordering relationships between water users, expanding use in some basins, transferring water in other basins, and affecting return flows and time of use. As such, the statute violates substantive due process.

C. The MWL Violates Procedural Due Process In Its Failure To Provide Timely Notice And Meaningful Opportunity To Be Heard For Affected Rights And Such Failure Is Not Excused By An Exercise Of “Police Power.”

The fundamental requirement of due process is the opportunity to be heard “at a *meaningful time* and in a *meaningful manner*” appropriate to the case. *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006)

(emphasis added); *City of Redmond v. Moore*, 151 Wn.2d at 670; *see also Guardianship Estate of Keffleler v. State Dep't. of Social and Health Servs.*, 151 Wn.2d 331, 342, 88 P.3d 949 (2004); *Chumstick Creek*, 103 Wn.2d at 705 (“[N]otice must be given which is ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The MWL violates the procedural due process clause of the Washington Constitution by eliminating all notice and procedural protections for water rights affected by the MWL’s elevation and re-prioritization of certain favored classes of rights.

1. *The proper analysis of a violation of procedural due process is not whether water rights are adversely affected all the time in all cases, but whether the risk of an adverse effect is present in all cases.*

The State continues to argue that the MWL does not violate procedural due process requirements because the Tribes and the Burlingame Plaintiffs cannot show a vested right that is adversely affected every time the MWL is applied. As set forth above, each time a water right is resurrected or expanded, or there is a change in the amount, condition, or time of use, other water rights will be affected. In all instances where a pumps and pipes certificate is resurrected or where there

is a change in use for a municipal supplier, there is a *risk* that competing or junior water rights will be adversely impacted due to the absence of procedural protections. As with the driver’s license situation in *City of Redmond*, it is not relevant that in some instances a water right may not be adversely affected. Rather, the proper focus is on the risk of adverse impact in the absence of procedural protections. The State is simply wrong in its application of the law.

2. *The “process” proffered by the State is essentially nonexistent and wholly inadequate under the Mathews test.*

In a stretch to meet the requirements under the second and third prongs of the *Mathews v. Eldridge* test,¹⁶ the State outlines an attenuated series of steps within the Health Department and possible environmental review under the State Environmental Policy Act, as all the process that is due water rights affected by the change in place of use provisions. The State’s “process” fails to provide timely and meaningful notice and

¹⁶ As set forth in the Burlingame Plaintiffs’ Opening Brief, the three-part test from *Mathews v. Eldridge* provides that a court shall assess whether there has been a violation of procedural due process by considering (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

opportunity to be heard, and the Burlingame Plaintiffs adopt the Tribes' arguments on this point. Tribes' Reply Brief at 17-20 (Part II.B.2)

Meaningful process is also absent under the provisions of RCW 90.03.330. The State argues that when certificates are reopened under a transfer or amendment application, or when final orders from an adjudication are implemented, water rights that have been adversely affected by RCW 90.03.330 will get all the process those rights are due. Unfortunately, the State's position fails to acknowledge some important realities about the functioning of those processes.

First, the changes to RCW 90.03.386 now mean that far fewer resurrected pumps and pipes certificates, held by newly-defined municipal suppliers, will need to return to Ecology and go through any process for changes to their certificates. This avenue for procedural due process is severely truncated at best and will not protect water rights adversely affected in cases where the pumps and pipes certificate never returns for a change.

Second, relying on transfers and amendments forces adversely-affected water rights to wait until the offending water right itself opens the process, a tenuous situation and far from meaningful notice and opportunity to be heard. Those pumps and pipes certificates that desire to

amend or transfer their rights may now avoid doing so in order to prevent their pumps and pipes certificates being put to the beneficial use test.

Waiting for an adjudicative process to both commence and conclude is also far from meaningful notice and opportunity to be heard. As this Court is aware, water right adjudications take years to conclude. And presumably, judges in these proceedings will give some credence to a legislative designation of certain pumps and pipes certifications being in “good standing,” meaning there is good chance that the persons most harmed by the MWL will never have a meaningful opportunity to be heard on the MWL’s adverse impacts on their water rights.

And finally, all of the processes in RCW 90.03.330 upon which the State relies will be provided or occur long after the damage is done. September 2003 is the operative date for the damage to affected water rights. As set forth in the case law, notice and opportunity to be heard must occur at a *meaningful* time which suggests at least at the time of the impact to the property right, and preferably before the deprivation occurs. *Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 430, 511 P.2d 1002 (1973) (citing *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972)); *see also Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (the “root requirement” of the due process clause is “that an

individual be given an opportunity for hearing *before* he is deprived of a significant protected interest.”) (emphasis in original.) The State’s arguments that RCW 90.03.330(2) provides junior and other adversely affected water rights all the process they are due fails the *Mathews* test.

3. *The State’s “police power” argument is a complete misapplication of the concept and cannot excuse a violation of procedural due process.*

The State, WWUC, and WSU assert for the first time in their response/replies that the “police power” gives the State authority to resurrect pumps and pipes and unfettered authority to change municipal place of use with no notice and opportunity for hearing for rights that are affected. The Burlingame Plaintiffs adopt the Tribes Reply argument. Tribes’ Reply Brief at 11-14 (Part II.A.3.)

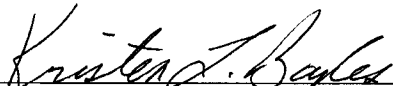
Moreover, the authority the State cites for its assertion that the police power allows it to run roughshod over due process rights is not on point. For example, *Edmonds Shopping Center Associates v. City of Edmonds*, 117 Wn. App. 344, 71 P.3d 233 (2003) addresses the regulatory authority of the State and the clause in the Washington State Constitution specific to such authority. *Edmonds Shopping Center Assoc.*, 117 Wn. App. at 351-52. The case is not about due process and says nothing that

supports the State's claims that procedural due process rights take a back seat to regulatory police power.¹⁷

CONCLUSION

The Burlingame Plaintiffs respectfully ask the Court to affirm the Superior Court's decision granting summary judgment with respect to the separation of powers violations of RCW 90.03.015(3) and (4) and RCW 90.03.330(3) and reverse the Superior Court's decision rejecting the due process challenges to RCW 90.03.386(2) and RCW 90.03.330(2).

Respectfully submitted this 8th day of April, 2009.



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¹⁷ The State's position makes even less sense when the bulk of procedural due process cases are considered, many of which arise in the criminal context, an area where the State would arguably have even more concerns regarding the public "health, welfare, and safety" than in the administration of water rights.