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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LUMMI INDIAN NATION, MAKAH)
INDIAN TRIBE, QUILEUTE INDIAN)
TRIBE, QUINAULT INDIAN NATION,) NO. 06-2-40103-4 SEA
SQUAXIN ISLAND INDIAN TRIBE,)
SUQUAMISH INDIAN TRIBE, and the)
TULALIP TRIBES, federally recognized)
Indian tribes,)

Plaintiffs,)

v.)

STATE OF WASHINGTON; CHRISTINE)
GREGOIRE, Governor of the State of)
Washington; WASHINGTON)
DEPARTMENT OF ECOLOGY; JAY)
MANNING, Director of the Washington)
Department of Ecology; WASHINGTON)
DEPARTMENT OF HEALTH; and MARY)
SELECKY, Secretary of Health for the State)
of Washington,)

Defendants.)

1 JOAN BURLINGAME, an individual; LEE)
2 BERNHEISEL, an individual, SCOTT)
3 CORNELIUS, an individual; PETER)
4 KNUTSON, an individual; PUGET SOUND)
5 HARVESTERS; WASHINGTON)
6 ENVIRONMENTAL COUNCIL; SIERRA)
7 CLUB; and THE CENTER FOR)
8 ENVIRONMENTAL LAW AND POLICY,)

NO. 06-2-28667-7 SEA

BURLINGAME PLAINTIFFS' RESPONSE
TO DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT

Plaintiffs,

vs.

9 STATE OF WASHINGTON,)
10 WASHINGTON STATE DEPARTMENT OF)
11 ECOLOGY, and WASHINGTON STATE)
12 DEPARTMENT OF HEALTH,)

Defendants,

and

13 WASHINGTON WATER UTILITIES)
14 COUNCIL, CASCADE WATER ALLIANCE)
15 and WASHINGTON STATE UNIVERSITY,)

Defendant-Intervenors.)

27 BURLINGAME PLAINTIFFS' RESPONSE
28 TO DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

Earthjustice
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Seattle, WA 98104
(206) 343-7340

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INTRODUCTION

1
2 Plaintiffs Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget Sound
3 Harvesters, Washington Environmental Council, and the Center for Environmental Law and
4 Policy (collectively the “Burlingame Plaintiffs”) file this response in opposition to the motions
5 for summary judgment filed by the Defendant State of Washington (“the State”), Defendant-
6 Intervenor Washington Water Utility Council (“WWUC”), and Defendant-Intervenor Cascade
7 Water Alliance (“CWA”). The Court should deny the Defendant’s and Defendant-Intervenors’
8 motions for the following reasons:

- 9 • The definitions of “municipal water supply purposes” and “municipal water supplier,”
10 RCW 90.03.015(3)-(4), violate the separation of powers because they retroactively
11 overrule a holding of the Washington Supreme Court in Department of Ecology v.
12 Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998). The new definitions exempt an
13 expanded set of water suppliers from relinquishment—a set that includes water suppliers
14 whom the Supreme Court held were not eligible for this exemption.
- 15 • The declaration that “pumps and pipes” certificates are rights “in good standing,” RCW
16 90.03.330(3), also violates the separation of powers by retroactively overruling
17 Theodoratus. The State reads Theodoratus too narrowly, ignoring the court’s holdings
18 that Ecology’s pumps and pipes policy was ultra vires and that a certificate could not be
19 issued based upon system capacity. Theodoratus, 135 Wn.2d at 587.
- 20 • The definitions of “municipal water supplier” and “municipal water supply purposes,”
21 RCW 90.03.015(3)-(4), violate substantive due process because they extend the
22 municipal exemption from relinquishment to water suppliers who were not eligible for
23 this exemption under prior law. Contrary to defendants’ arguments, these provisions are
24 not curative because (1) the term “municipal water supply purposes” was not ambiguous
25 under prior law; (2) even if it was ambiguous, the MWL expands it beyond all previous
26

1 definitions; and (3) the legislative history demonstrates an intent to change the definition.

- 2 • The pumps and pipes provision, RCW 90.03.330(3), violates substantive due process
3 because it perfects improperly issued pumps and pipes certificates and/or excuses prior
4 failures to develop water rights with reasonable diligence, thereby retroactively
5 expanding these rights to the detriment of junior water right holders.
- 6 • The place of use provision, RCW 90.03.386(2), violates substantive due process by
7 retroactively amending municipal water rights to incorporate a dynamic place of use.
8 The provision therefore changes the legal effect of prior acts to the detriment of junior
9 water rights holders.
- 10 • The place of use provision, RCW 90.03.386(2), violates procedural due process because
11 it eliminates all procedures that provided junior water right holders meaningful notice and
12 an opportunity to comment on proposed changes in the place of use of a municipal water
13 right.¹

14 ARGUMENT

15 I. STANDARD OF REVIEW

16 A. The Salerno Standard Does Not Apply in Taxpayer Standing Challenges.

17 The defendants rely heavily on their argument that this Court should strike down a
18 provision of the Municipal Water Law as unconstitutional only if there exists “no set of
19 circumstances under which the sections can be constitutionally applied.” Defendants’ Br. at 2;
20 see WWUC Br. at 18; CWA Br. at 6. This test, which was created by the United States Supreme
21

22 ¹ Plaintiffs note in addition that many of Defendants’ arguments are based on narrow
23 interpretations of the effect of the MWL. These apparently litigation-driven positions, as
24 Plaintiffs argue below, are not correct. If, however, the Court concludes that the challenged
25 provisions of the MWL may be upheld as a result of the State’s narrow construction of their
26 effect, Plaintiffs request that the Court specifically hold that the provisions are constitutional
only when interpreted in this narrow fashion. Such a ruling would prevent Defendants from
abandoning these definitions, none of which are embodied in legally binding regulations, after
the conclusion of the litigation.

1 Court in United States v. Salerno, 481 U.S. 739, 107 S Ct. 2095, 95 L. Ed. 2d 697 (1987), does
2 not apply to cases brought pursuant to taxpayer standing in Washington. To adopt the Salerno
3 standard would undermine the policy behind this form of standing. Indeed, no Washington case
4 has ever applied that test to a taxpayer challenge. Even in those Washington decisions that have
5 cited the test, it almost never has any obvious effect on their analysis. Moreover, the supreme
6 courts of some other western states that have addressed similar challenges to water laws have not
7 applied the Salerno test. Finally, at least as to Plaintiffs' separation of powers claims, all parties
8 agree that the test is inapplicable.

9 *I. The Salerno Standard is in Conflict with the Policy Underlying Taxpayer*
10 *Standing.*

11 The Salerno standard reflects the decision of the United States Supreme Court, at least in
12 some circumstances,² to disfavor facial challenges. See, e.g., Washington State Grange v.
13 Washington State Republican Party, Nos. 06-713, 06-730, ___ S. Ct. ___, 2008 WL 704368, at *5
14 (Mar. 18, 2008) (“Facial challenges are disfavored for several reasons.”); FW/PBS, Inc. v.
15 Dallas, 493 U.S. 215, 223, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (stating that “facial
16 challenges to legislation are generally disfavored”) (plurality opinion). This approach reflects a
17 concern that the reviewing court might not have the necessary facts before it in the context of a

18 ² Even the United States Supreme Court has been far from consistent in adopting the Salerno test
19 in facial challenges to the constitutionality of statutes. For example, in Chandler v. Miller, 520
20 U.S. 305, 308-09, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997), the Court struck down, on a facial
21 challenge, a Georgia statute that required candidates for certain state offices to certify that they
22 had taken a drug test and that the result was negative. The Court did not mention the Salerno test
23 even though there were presumably some circumstances in which a pre-employment drug test
24 would not violate the Fourth Amendment. Other cases in which the Supreme Court has ignored
25 Salerno include Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 895, 112 S. Ct.
26 2791, 120 L. Ed. 2d 674 (1992) (finding statute facially invalid as a “substantial obstacle” to the
exercise of a right in a “large fraction” of cases); Kraft Gen. Foods, Inc. v. Iowa Dep’t of
Revenue & Finance, 505 U.S. 71, 82, 112 S. Ct. 2365, 120 L. Ed. 2d 59 (1992) (Rehnquist, C.J.,
dissenting) (arguing that the majority should not have held a tax statute facially invalid because it
could be constitutionally applied in some situations); and Bowen v. Kendrick, 487 U.S. 589, 602,
108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

1 facial challenge and a policy of only deciding those constitutional questions necessary to resolve
2 the dispute among the parties before the Court. Washington State Grange, 2008 WL 704368 at
3 *5. The latter policy, as the United States Supreme Court has recognized, is really a
4 consequence of third-party standing doctrine. City of Chicago v. Morales, 527 U.S. 41, 55 n.22,
5 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (stating that “the threshold for facial challenges is a
6 species of third party (jus tertii) standing, which we have recognized as a prudential doctrine and
7 not one mandated by Article III of the Constitution”) (plurality opinion). Because the Supreme
8 Court generally opposes third-party standing, where a litigant raises a claim that a government
9 act harms someone else, Kowalski v. Tesmer, 543 U.S. 125, 129-30, 125 S. Ct. 564, 160 L.Ed.2d
10 519 (2004), it also disfavors facial challenges, which also allow litigants to bring claims based at
11 least in part on the harm to others.

12 The limited form of standing that is the foundation for the “no set of circumstances” test
13 is inconsistent with the doctrine of taxpayer standing as developed by the Washington Supreme
14 Court.³ In Washington, taxpayer standing is meant to foster and encourage the judicial review of
15 potentially unconstitutional statutes. “The recognition of taxpayer standing has been given freely
16 in the interest of providing a judicial forum when this state’s citizens contest the legality of
17 official acts of their government.” State ex rel. Boyles v. Whatcom County Superior Court, 103
18 Wn.2d 610, 614, 694 P.2d 27 (1985). The whole point of allowing taxpayer standing, without
19 requiring that plaintiffs allege a direct or special interest in the outcome, is to allow plaintiffs to
20 challenge government acts that may harm only others. Cf. Kightlinger v. Pub. Util. Dist. No. 1,
21 119 Wn. App. 501, 506-07, 81 P.3d 876 (2003) (rejecting the argument that plaintiffs alleging
22 taxpayer standing must allege a special interest in the outcome); Robinson v. City of Seattle, 102

23
24 ³ As for the concern about “factually barebones records,” Sabri v. United States, 541 U.S. 600,
25 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004): this Court has before it all of the facts necessary
26 to rule on Plaintiffs’ claims, as the Burlingame Plaintiffs will explain below in the context of
each claim.

1 Wn. App. 795, 805, 10 P.3d 452 (2000) (same). This interest is also served by allowing facial
2 challenges as early as possible, so that invalid statutes remain on the books for the shortest
3 period of time.

4 Adopting the “no set of circumstances” test would eviscerate Washington’s doctrine of
5 taxpayer standing, and Defendants’ request that the Court adopt this novel doctrine should be
6 denied.

7 2. *No Washington Case Has Adopted the Salerno Standard in a Taxpayer*
8 *Standing Case.*

9 In an unbroken line of cases stretching back for decades, the Washington courts have
10 never required a plaintiff in a taxpayer challenge to the constitutionality of a statute to prove that
11 there is no set of circumstances in which it can be applied constitutionally. Most recently, in
12 Robinson v. City of Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000), Division One of the Court
13 of Appeals, after a careful and reasoned analysis, explicitly rejected the Salerno standard for a
14 taxpayer challenge. In Robinson, the plaintiffs challenged the City of Seattle’s pre-employment
15 drug testing program, arguing that it violated the right to privacy under Article I, section 7 of the
16 state constitution. The Court declined to adopt the Salerno standard, instead applying “the test
17 dictated by the nature of the challenge.” Id. at 808. The Court emphasized that the ordinance
18 created five categories of applicants; therefore, even if the ordinance could operate
19 constitutionally as to one or more of these categories, the Court could still strike it down as to the
20 others. Id. at 807. In the end, the court found that the program was an unconstitutional
21 infringement of applicants’ right to privacy, except for “applicants whose duties will genuinely
22 implicate public safety.” Id. at 828. As this exception shows, the court concluded that the
23 ordinance was constitutional in some circumstances, but still enjoined its operation in those
24 circumstances in which it was unconstitutional.

25 This approach—allowing plaintiffs to bring facial constitutional challenges pursuant to
26 taxpayer standing without meeting a standard as onerous as the “no set of circumstances” test—

1 has been the law of the state for decades. See, e.g., Farris v. Munro, 99 Wn.2d 326, 662 P.2d
2 821 (1983) (deciding plaintiff’s facial constitutional challenge on its merits, without requiring
3 that the plaintiff show that there was no set of circumstances in which it could be applied
4 constitutionally); State ex rel. Tattersall v. Yelle, 52 Wn.2d 856, 329 P.2d 841 (1958) (same).
5 These cases demonstrate that the Salerno standard is inapplicable in a case, like this one, brought
6 pursuant to taxpayer standing.

7 3. *The Decisions Cited by Defendants Provide No Basis for Adopting the*
8 *Test in This Context.*

9 Defendants cite many decisions that quote the “no set of circumstances” test. In virtually
10 all of the cases they cite, however, the test had no actual impact on the court’s analysis.
11 Moreover, they ignore many other Washington cases that have not applied this test to facial
12 challenges. These isolated citations of the Salerno standard should not affect the Court’s
13 analysis in this case.⁴

14 i. Even in Cases That Mention the Salerno Test, it Usually Has no
15 Obvious Impact on the Analysis.

16 In seven of the eight Washington cases that Defendants cite as adopting the Salerno
17 standard, Defendants’ Br. at 13 n.6, that standard had no apparent impact on the analysis of the
18 constitutional issues at stake. Instead, the courts, after citing the standard, moved on to a general
19 analysis of the constitutionality of the relevant statutory provision, without ever identifying
20 whether there might be some limited set of circumstances in which the statute was constitutional.
21 See City of Redmond v. Moore, 151 Wn.2d 664, 669, 91 P.3d 875 (2004); State v. Hughes, 154
22 Wn.2d 118, 110 P.3d 192 (2005); Tunstall v. Bergeson, 141 Wn.2d 201, 221, 5 P.3d 691 (2000);

23 ⁴ Rejection of the Salerno test does not, as defendants claim, require them “to show that the
24 challenged subsections are *valid* in all applications.” Defendants’ Br. at 15. Instead, to reject
25 Salerno means only that the court should apply the relevant constitutional test to the facts
26 properly before the court in the context of the facial challenge. Such an approach obviously
would not shift the burden to the defendants, for a statute is presumed to be constitutional. It
would, however, require that Defendants rebut Plaintiffs’ specific arguments about the
substantial set of circumstances in which the challenged provisions operate unconstitutionally.

1 Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wn.2d 245, 282 n.
2 14, 4 P.3d 808 (2000); Galvis v. State Dep't of Transp'n, 140 Wn. App. 693, 702, 167 P.3d 584
3 (2007); In re Dependency of T.C.C.B., 138 Wn. App. 791, 797, 158 P.3d 1251 (2007); State v.
4 Foster, 128 Wn. App. 932, 939, 117 P.3d 1175 (2005). For example, in Galvis, the plaintiffs
5 brought a facial challenge to the Highway Access Management Act, arguing that it took abutting
6 property owners' right of unlimited access to existing highways without just compensation. 140
7 Wn. App. at 703. The court of appeals mentioned the "no set of circumstances" test, id. at 702,
8 but then proceeded to analyze the constitutional question without any reference at all to whether
9 the statute might operate constitutionally in some cases but not in others. Instead, the court
10 concluded that abutting property owners actually had a right only to "reasonable access" and that
11 the statute did not infringe this right. Id. at 703-04. In other words, the court concluded that the
12 law, on its face, violated nobody's rights, not merely that some set of circumstances could be
13 found in which someone's rights would not be violated.

14 The one exception is State v. Clinkenbeard, 130 Wn. App. 552, 560, 123 P.3d 872
15 (2005). In that case, a school bus driver who had sexual intercourse with one of the students on
16 his bus challenged the constitutionality of a statute that made it a class C felony for any school
17 employee to have sexual intercourse with a student who was at least 16 years of age. Id. at 559-
18 60. He argued that the statute violated the right of consenting adults to engage in private sexual
19 behavior under Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
20 The court rejected both his facial and as-applied challenges. As to the former, the court noted
21 that the statute applied to sexual intercourse between employees and students who were not yet
22 eighteen, and that such cases did not implicate the right recognized in Lawrence. Clinkenbeard,
23 130 Wn. App. at 561. The court went on to find that there was also no violation when the statute
24 was applied to the defendant, even though the student in that case was eighteen. Id. at 561-68.

25 Clinkenbeard is distinguishable from the present case. Plaintiffs allege here that the
26

1 challenged provisions are unconstitutional in large, clearly defined categories of their
2 applications. By contrast, in Clinkenbeard, the court found that the statute was constitutional
3 even when applied to the defendant’s case, in which the student was eighteen. It therefore was
4 not clear when, if ever, the statute would be unconstitutional. Moreover, Clinkenbeard was a
5 criminal case, rather than a taxpayer challenge. In any event, Clinkenbeard, from Division
6 Three, is not binding on this court. Eriksen v. Mobay Corp., 110 Wn. App. 332, 346, 41 P.3d
7 488 (2002).

8 ii. Several Post-Salerno Washington Cases Have Allowed Facial
9 Challenges Without Adopting the Salerno Test.

10 As stated above, Division One of the Court of Appeals concluded in Robinson that the
11 “no set of circumstances” test was not the appropriate standard of review in a taxpayer challenge.
12 Contrary to Defendants’ claims, see Defendants’ Br. at 13, it is not true that Robinson is the only
13 post-Salerno Washington decision that did not apply the “no set of circumstances” test to a facial
14 challenge. In Weden v. San Juan County, 135 Wn.2d 678, 958 P.2d 273 (1998), a group of
15 motorized personal watercraft users, sellers, and an industry group filed a declaratory judgment
16 action against a county ordinance that banned motorized personal watercraft use in certain
17 waters. The Washington Supreme Court, without ever mentioning Salerno, conducted what was
18 in effect a facial analysis of whether the ordinance violated Article XI, section 11 of the state
19 constitution (1) because it conflicted with the state vessel registration and safety laws, or (2)
20 because it was not a “reasonable” exercise of the county’s police power. Id. at 690-704.
21 Similarly, in Biggers v. City of Bainbridge Island, __ Wn.2d __, 169 P.3d 14 (2007), the Court
22 invalidated municipal ordinances that imposed moratoria on shoreline property development
23 because they violated Article XI, section 11. Again, the case involved what was in effect a facial
24 challenge because the Court did not analyze a specific application of the ordinance.
25 Nevertheless, the Court moved straight to the substantive constitutional analysis without
26 mentioning the Salerno standard.

1 Also, in Washington Water Jet Workers Ass’n v. Yarbrough, 151 Wn.2d 470, 90 P.3d 42
2 (2004), the Court struck down a state statute that created a prison labor program as a violation of
3 Article II, section 29 of the Constitution on a facial challenge, despite the dissent’s argument that
4 the majority had improperly confused the standards for facial and as-applied challenges. See id.
5 at 511 (Chambers, J., dissenting); see also 98 P.3d 788 (Ireland, J., dissenting to denial of motion
6 for reconsideration) (“The majority has conflated an ‘as applied’ challenge with a ‘facial
7 challenge.’”). The majority never mentioned the “no set of circumstances” test.

8 4. *The courts of other western states have not applied the Salerno standard*
9 *when facing challenges to similar laws.*

10 In the two cases in which the Supreme Courts of other western states have addressed
11 facial challenges to water laws very similar to the MWL, they did so without applying the
12 Salerno test. The Arizona Supreme Court, considering a facial challenge in San Carlos Apache
13 Tribe v. Superior Court of Arizona for the County of Maricopa, 193 Ariz. 195, 972 P.2d 179
14 (1999), struck down portions of a law that had impermissible retroactive effects, even though
15 that law also applied prospectively. The Arizona law in question specifically applied both to
16 water rights “initiated or perfected on or before the effective date of this act and any rights
17 subsequently initiated or perfected” as well as both pending and future general stream
18 adjudications. Id. at 204 (emphasis added). In particular, one section of the law “prohibit[ed] a
19 finding of forfeiture or abandonment when water has been used on less than all the land to which
20 the right was appurtenant.” Id. at 206. The court struck down this provision on its face, even
21 though it applied both to past and future conduct. Id. Similarly, another provision allowed water
22 from sources on federal land to be used at any location, eliminating previous restrictions on the
23 place of use of the right. Id. Again, the court found the provision facially invalid. Id. Yet
24 another provision exempted rights initiated before June 12, 1919, from forfeiture. Id. at 207.
25 The court also struck down this provision because “[t]he forfeited senior rights cannot be revived
26 by legislation passed in 1995,” even though it could conceivably apply prospectively without

1 violating the constitution. Id.

2 The Idaho Supreme Court’s decision in Fremont-Madison Irr. Dist. & Mitigation Group
3 v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996) is also
4 instructive. In that case, the court faced facial challenges to a pair of water right “amnesty
5 statutes.” One of these statutes allowed the recognition of prior enlargements in water use that
6 had occurred in violation of the water permitting process, as long the enlargement did not
7 increase the rate of diversion or injure existing water rights. See id. at 458-60. The court
8 reached the merits of the plaintiffs’ facial constitutional challenge even though it observed that
9 “[t]his litigation deals with the abstract and the hypothetical,” and that “there is at least the
10 possibility” that, even in the absence of the mitigation provisions in the law, “the enlargement of
11 one water right will not reduce the total volume available to the junior appropriator.” Id. at 461.
12 In other words, the court, despite recognizing that there might be some set of circumstances in
13 which the statute could operate without harming junior water right holders, still held that the
14 statute would have been unconstitutional if not for its mitigation provision.

15 In these cases from other states that have involved facts closest to those presented here,
16 the courts have reviewed constitutional challenges without reference to the “no set of
17 circumstances” test. Of particular relevance, the courts struck down statutes that had
18 unconstitutional retroactive effects, as Plaintiffs have argued the MWL does, even though the
19 statutes might be able to operate constitutionally in their prospective applications. The Court
20 should adopt the same approach here.

21 B. The “No Set of Circumstances” Test Makes No Sense For a Separation of Powers
22 Claim.

23 As the Defendants apparently agree, the “no set of circumstances” test cannot apply to
24 Plaintiffs’ separation of powers claims. One of the main rationales for the “no set of
25 circumstances” test is that it will avoid the “premature interpretatio[n] of statutes’ on the basis
26 of factually barebones records.” Sabri v. United States, 541 U.S. 600, 124 S. Ct. 1941, 158 L.

1 Ed. 2d 891 (2004) (quoting United States v. Raines, 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d
2 524 (1960)). The reasoning is that courts will better understand the actual operation of a statute
3 when presented with a concrete example of its application. In the separation of powers context,
4 however, there is nothing to be gained by requiring an as-applied challenge. The relevant facts in
5 the context of Plaintiffs' separation of powers claims are the text of the law and the prior
6 decisions of the Washington courts. Whatever the details of a particular application of the
7 MWL, it will not affect these facts. It was perhaps with this distinction in mind that the
8 Defendants did not argue that the Court should apply the "no set circumstances" test to
9 Plaintiffs' separation of powers claims. See Defendants' Br. at 15-22.

10 II. THE DEFINITION OF "MUNICIPAL WATER SUPPLIER" AND THE "PUMPS AND
11 PIPES" PROVISIONS OF THE MWL VIOLATE THE SEPARATION OF POWERS.

12 An attempt by the legislature to overrule retroactively a decision of the Washington
13 Supreme Court violates the separation of powers. The function of the legislature is to make laws
14 and the function of the judiciary is to construe them. Marine Power & Equip. Co. v. Washington
15 State Human Rights Comm'n, 39 Wn. App. 609, 615 n.2, 694 P.2d 697 (1985). A judicial
16 interpretation of a statute by the Washington Supreme Court "operates as if it were originally
17 written into it." Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976). Therefore, "the
18 legislature does not have the power to overrule judicial interpretations of the law." State v.
19 Pillatos, 159 Wn.2d 459, 473-74, 150 P.3d 1130 (2007).

20 All parties apparently agree that if the Legislature retroactively amends a statute in a way
21 that contradicts a previous Supreme Court construction of that statute, it violates the separation
22 of powers. See, e.g., Defendants' Br. at 16. Defendants nevertheless argue that RCW
23 90.03.330(3) (the "pumps and pipes" provision) and RCW 90.03.015(3)-(4) (the definitions of
24 "municipal water supplier" and "municipal water supply purposes") do not violate this
25 prohibition. The disagreement among the parties is the result of differing interpretation of the
26 meaning of the Supreme Court's decision in Theodoratus and of the effect of RCW 90.03.330(3)

1 and RCW 90.03.015(3)-(4). In each case, defendants' interpretation is incorrect.

2 A. The Defendants Read *Theodoratus* Too Narrowly.

3 Defendants offer a strained and artificial reading of the Supreme Court's decision in
4 Department of Ecology v. Theodoratus, 135 Wn.2d 698, 694 P.2d 1241 (1998). Only by
5 offering a reading of the Court's holding so narrow as to render it virtually meaningless are the
6 Defendants able to claim that RCW 90.03.330(3) and RCW 90.03.015(3)-(4) do not conflict with
7 the Court's decision.

8 Defendants would make Theodoratus a case about only "the ministerial function of
9 documenting water rights based upon system capacity." Defendants' Br. at 19. According to the
10 Defendants, because the case involved conditions on an extension for Mr. Theodoratus's permit,
11 it says nothing about the law governing certificates. Id. Defendants also argue that Theodoratus
12 is not in conflict with the MWL because "the decision did not involve a water right that was
13 deemed to be for municipal purposes." Id. at 17. This interpretation strains credulity.

14 First, as to whether Theodoratus dealt only with permits or also with certificates: the
15 Theodoratus Court held that water rights are perfected only by the application of water to a
16 beneficial use and not merely by the construction of a water delivery system. 135 Wn.2d at 590.
17 Moreover, the Court held that a permittee cannot lawfully be promised a perfected water right
18 based on system capacity and that Ecology's policy of issuing certificates on that basis was ultra
19 vires. Id. at 598. It is impossible to reconcile these holdings with the conclusion, set forth in the
20 MWL, that a certificate issued on the basis of the "pumps and pipes" policy is valid.

21 It is also misleading to argue that Theodoratus said nothing about the water rights of
22 municipal water suppliers. Defendants assert that the MWL's definitions of "municipal water
23 supplier" and "municipal water supply purposes" do not violate the separation of powers
24 because, in enacting them, "the Legislature did not retroactively overrule any holding in
25 Theodoratus." Defendants' Br. at 20. In particular, they assert that the Theodoratus Court

1 “never determined any issue over *who* holds or can hold municipal water rights” and that “the
2 Theodoratus decision merely contributed to longstanding ambiguity surrounding these terms.”
3 Id. at 21. Defendants’ cramped construction of Theodoratus is inconsistent with the language
4 and logic of the Court’s decision.

5 It is undisputed that the Court found that Mr. Theodoratus, a private developer who held
6 a water right for “community domestic supply” purposes and supplied water to more than 15
7 service connections,⁵ was not a municipal water supplier and was not exempt from
8 relinquishment as the holder of a right “claimed for municipal water supply purposes.” RCW
9 90.14.140(2)(d). First, the Court noted “that Appellant is a private developer” and therefore that
10 “issues concerning municipal water suppliers” were not raised in the case. Theodoratus, 135
11 Wn.2d at 594. Second, the Court held that if system capacity defined “the measure and limit” of
12 Theodoratus’s water right, then the relinquishment provisions of the water code “would be
13 meaningless.” Id. at 594-95. Implicit in this second holding is that Mr. Theodoratus, as a private
14 developer, was not eligible for the municipal exemption from relinquishment.

15 The Municipal Water Law directly and retroactively overrules both of these aspects of
16 the Theodoratus decision. First, it transforms, by operation of law, water rights held for group or
17 community domestic supply purposes by private developers such as Mr. Theodoratus into water
18 rights held for “municipal water supply” purposes. Second, it makes these same rights exempt
19 from relinquishment. Because the Washington Supreme Court had previously construed the
20 term “municipal water supply purposes,” as used in the Water Code, to exclude the “community
21 domestic supply” water rights of private developers such as Mr. Theodoratus, the legislature’s
22 retroactive definition of this term to mean something inconsistent with the Court’s holding is a
23 violation of the separation of powers. See State v. Dunaway, 109 Wn.2d 207, 216 n.6, 743 P.2d
24 1237, 749 P.2d 160 (1987); In re Stewart, 115 Wn. App. 319, 341-42, 75 P.3d 521 (2003).

25 ⁵ The Court’s opinion notes that 93 of the planned 253 residential lots in Theodoratus’s
26 development had water service at the time of the litigation. Theodoratus, 135 Wn.2d at 588.

1 B. Defendants’ Interpretation of RCW 90.03.330(3) Is Inconsistent With the Plain
2 Meaning of the Statute.

3 As described above, Theodoratus clearly held that “pumps and pipes” certificates were
4 invalid to the extent they purported to represent perfected rights when the quantity of water
5 indicated on the certificates had not actually been put to beneficial use. The Municipal Water
6 Law, by declaring these rights to be “in good standing,” is plainly inconsistent with this holding.
7 On this point, the Burlingame Plaintiffs incorporate by reference section II.A.2 (pp. 6-9) of
8 Plaintiff Tribes’ Response to State’s Motion for Summary Judgment, and add only the following
9 brief discussion.⁶

10 Under Theodoratus, the holders of rights represented by pumps and pipes certificates had
11 at most the right to a certificate for the perfected portion of the right and right to have the unused
12 portion of the certificate returned to permit status to the extent other requirements of law were
13 being fulfilled. Cf. Theodoratus, 135 Wn.2d at 596 (“An inchoate right is ‘an incomplete
14 appropriative right in good standing.... It remains in good standing so long as the requirements
15 of law are being fulfilled.’”) (quoting 1 Wells A. Hutchins, Water Rights Laws in the Nineteen
16 Western States 226 (1971)). These rights were therefore subject to the requirement that they be
17 developed with due diligence. RCW 90.03.460. If the water rights holders had not exercised due
18 diligence in developing their rights, they might not have been entitled to a permit for the unused
19 portion. RCW 90.03.330(3) reinstates whatever water rights were lost through the failure to
20 exercise due diligence. The phrase “in good standing” represents the legislature’s declaration
21 that all of these rights were in good standing as of September 2003, and is therefore inconsistent
22 with the Washington Supreme Court’s holding in Theodoratus.

23 Finally, Defendants’ interpretation is apparently inconsistent with their early application

24 ⁶ The Burlingame Plaintiffs also incorporate by reference section II.A.3 (pp. 9-11) of Plaintiff
25 Tribes’ Response to State’s Motion for Summary Judgment, which explains that RCW
26 90.03.330(3) also violates the separation of powers because it involves the legislative
determination of adjudicative law and facts.

1 of RCW 90.03.330(3), which suggests that the interpretation was developed only in response to
2 litigation. Courts generally accord such litigation-driven interpretations little or no deference.
3 See, e.g., Bowen v. Georgetown University Hosp., 488 U.S. 204, 212, 109 S. Ct. 468, 102 L. Ed.
4 2d 468 (1988). Before Ecology developed its new interpretation of RCW 90.03.330(3), it treated
5 rights represented by pumps and pipes certificates as valid rights in Reports of Examination for
6 change applications, without providing any analysis as to whether the applicant had exercised
7 due diligence in developing the rights. See, e.g., Cornelius Declaration, Exh. V (ROE for City of
8 Pullman Change Application) (filed with Burlingame Plaintiffs’ Motion for Summary
9 Judgment). Ecology did not mention due diligence in its ROE for defendant-intervenor
10 Washington State University’s change applications, but instead raised it for the first time before
11 the PCHB. See Exhibit B to Declaration of Gary C. Wells in Support of Washington State
12 University’s Motion to Intervene (ROEs for WSU Change Applications).

13 III. THE DEFINITIONS, THE “PUMPS AND PIPES” PROVISION, AND THE PLACE OF 14 USE PROVISION VIOLATE SUBSTANTIVE DUE PROCESS

15 If the Court concludes that the pumps and pipes provision, RCW 90.03.330(3), and the
16 definitions, RCW 90.03.015(3)-(4), violate the separation of powers, then that conclusion alone
17 is sufficient for Plaintiffs to prevail in their challenges to these sections. This Part and the next
18 set forth independent reasons for the Court to deny Defendants’ motions for summary judgment
19 and to grant Plaintiffs’ motions.

20 As explained in the Burlingame Plaintiffs’ opening brief, a law violates substantive due
21 process when it retroactively impairs vested property rights. See State v. Shultz, 138 Wn.2d 638,
22 646, 980 P.2d 1265 (1999); Burlingame Plaintiffs’ Mot. at 20-21. There is no dispute that the
23 perfected water rights of junior water right holders are perfected property rights subject to this
24 protection. Instead, the Defendants argue either that the challenged provisions of the MWL do
25 not infringe on junior water rights, or that the challenged provisions are not susceptible to a
26 facial challenge because not every application of these provisions is unconstitutional. Neither

1 argument is correct.

2 A. The Definitions of “Municipal Water Supplier” and “Municipal Water Supply
3 Purposes” Violate Substantive Due Process.

4 As explained in the Burlingame Plaintiffs’ opening brief, the definitions in RCW
5 90.03.015(3)-(4) violate substantive due process because they retroactively extend the
6 “municipal water supply purposes” exemption from relinquishment under 90.14.140(2)(d) to the
7 holders of rights for “community domestic” or other non-municipal purposes. Burlingame
8 Plaintiffs’ Mot. at 21-22. When applied retroactively, these definitions excuse non-use of water
9 that occurred before the statute was enacted, even though such non-use would not have been
10 excused under currently-enacted law at that time. As such, these definitions change the legal
11 consequences of acts that occurred prior to their enactment. Because these changed legal
12 consequences include harm to other vested rights, RCW 90.03.015(3)-(4) violate substantive due
13 process.

14 The State argues, first, that these definitions can survive a facial challenge under the “no
15 set of circumstances” test because they can be applied prospectively without violating due
16 process. Defendants’ Br. at 25-27. This argument fails because, as explained above, this
17 standard of review is not applicable in this case. Instead, this Court, like the Arizona Supreme
18 Court in San Carlos Apache, 972 P.2d at 189, should find that, by “reviv[ing] rights that have
19 been lost or terminated under the law as it existed at the time of an event,” RCW 90.03.015(3)-
20 (4) violate substantive due process.

21 The State next argues that the definitions are “curative” provisions that therefore can be
22 applied retroactively without violating due process. Defendants’ Br. at 28-30. The definitions
23 are not curative because, whatever range of uncertainty there was in prior law, these definitions
24 are well outside the range of possible interpretations of that law. “An amendment is curative
25 only if it clarifies or technically corrects an ambiguous statute.” McGee Guest Home, Inc. v.
26 Dep’t of Social & Health Servs., 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (citation and internal

1 quotation marks omitted). The Burlingame Plaintiffs incorporate by reference section III.B.2
2 (pp. 18-22) of the Plaintiff Tribes' Response to State's Motion for Summary Judgment, which
3 argues that there was no ambiguity in the meaning of "municipal water supply purposes" before
4 the passage of the MWL.

5 In addition, the Burlingame Plaintiffs note that, even if there had been some ambiguity in
6 the meaning of this phrase, the MWL encompasses far more water purveyors in the definition
7 than did any previously proposed definition. Because RCW 90.03.015(3)-(4) expand the
8 universe of "municipal water suppliers" beyond any possible interpretations of pre-2003 law,
9 they cannot be curative. Whatever range of uncertainty there was in prior law, the MWL is well
10 outside the range of possible interpretations of that law. Nobody ever claimed that private
11 developers serving only 15 connections were municipalities. Even counsel for defendant-
12 intervenor WSU recognized as much, in a paper written shortly after the Theodoratus decision, in
13 which he stated that "[c]learly, public water systems for residential developments such as
14 Theodoratus's are not municipal water suppliers." Goho Declaration, Exh. A (Tom McDonald,
15 Municipal Water Supply After Theodoratus 5A-10 n.8 (Dec. 1998)). WWUC's declarants
16 address the status only of PUDs, mutual water companies, and public service companies that
17 serve thousands of customers. See Declarations of John Kounts, Jeffrey N. Johnson, and
18 Michael Ireland (filed with WWUC's Motion for Summary Judgment). Defendants do not
19 suggest that private developers holding rights for group or community domestic supply purposes
20 were ever considered to be municipal water suppliers. Moreover, Mr. Theodoratus himself was
21 explicitly held not to be a municipality in the Theodoratus case and any definition of "municipal
22 water supply purposes" that encompasses his right cannot be curative as a matter of law, because
23 it contradicts a holding of the Supreme Court.

24 The legislative history of the MWL is also inconsistent with the idea that these were
25 curative amendments. In the debate on the House floor on June 5, 2003, Representative Linville,
26

1 one of the architects of the MWL, explained that “[r]ight now there are certain utilities that are
2 considered municipal suppliers, and they have some certain rights that others don’t have.... And
3 this puts them all on a equal playing field so that they can all participate, and it also puts the
4 same requirements on everybody.” Goho Declaration, Exh. B, at 3 (Transcript of House Floor
5 Debate). Similarly, Representative Rockefeller, also speaking in support of the bill, stated that
6 “the definition of municipalities is broad enough now to embrace a variety of vendors and
7 suppliers *who heretofore have not been included.*” *Id.* at 2 (emphasis added). As these
8 statements make clear, the MWL’s supporters in the legislature understood that they were
9 expanding the definition of “municipal water suppliers” to cover water suppliers who had not
10 been so defined under prior law. Moreover, on June 10, 2003, the Senate rejected an amendment
11 proposed by Senator Fraser that would have provided: “Nothing in this act may be interpreted or
12 administered in a manner that impairs or diminishes a water right.” Goho Declaration, Exh. C
13 (Senate Amendment 486). The rejection of this amendment casts doubt on the argument that the
14 MWL was not intended to alter the substantive rights of water rights holders.

15 The State’s final argument is that the definitions do not violate due process because any
16 water supplier that does not actively comply with the definitions through continued beneficial
17 use of water does not qualify for the exemption from relinquishment. Defendants’ Br. at 30-32.
18 The Burlingame Plaintiffs hereby incorporate by reference the argument in section III.B.3 (pp.
19 22-23) of the Plaintiff Tribes’ Response to State’s Motion for Summary Judgment, that the
20 statute is nevertheless unconstitutional because it excuses the prior non-use of portions of rights
21 that are newly eligible for the exemption.⁷

22 Defendant-intervenors argue that RCW 90.03.015(3)-(4) do not operate retroactively
23 because the “precipitating event” for the statute’s operation in the context of relinquishment is

24
25 ⁷ If the Court upholds this provision based on the State’s narrow interpretation, the Burlingame
26 Plaintiffs request that the Court explicitly rule that the statute is constitutional only if applied in a
manner consistent with the State’s interpretation. *Cf.* fn. 1, *supra*.

1 Ecology’s initiation of a relinquishment proceeding or an adjudication in a superior court, and
2 not the non-use of the water. WWUC Br. at 24-28; CWA Br. at 13 (adopting WWUC’s
3 arguments). This argument is incorrect because relinquishment occurs automatically upon five
4 consecutive years of unexcused nonuse of water. The Burlingame Plaintiffs incorporate by
5 reference the argument of the Plaintiff Tribes at section III.B.4 (pp. 23-25), which demonstrates
6 why this view is contrary to the plain language of RCW 90.14.160 and the long-standing policies
7 of the Department of Ecology.

8 In addition, the Burlingame Plaintiffs note that decisions of the Supreme Court and
9 PCHB support Plaintiffs’ conclusion that the “precipitating event” in the relinquishment context
10 is the non-use of the water, not a subsequent proceeding. For example, the Supreme Court has
11 held that Ecology, when reviewing a requested change to a surface water right, must consider
12 “whether the right has been relinquished or abandoned in whole or in part.” R.D. Merrill Co. v.
13 Pollution Control Hearings Bd., 137 Wn.2d 118, 127, 969 P.2d 458 (1999).⁸ Yet this duty
14 coexists with the fact that Ecology is not empowered to make a final determination as to the
15 validity of the right undergoing review. See, e.g., Okanogan Wilderness League v. Town of
16 Twisp, 133 Wn.2d 769, 779, 947 P.2d 732 (1997) (“The Department’s determination could not,
17 however, be a final determination of the validity of the water right.”). Ecology instead makes a
18 “tentative” determination in order to gauge the impact of the potential change. Id. In other
19 words, although Ecology lacks the authority to establish conclusively the contours of a water
20 right, the Court’s decisions require Ecology to determine independently whether an underlying
21 right has already been extinguished by applying the standard expressed in RCW 90.14.160 to the
22
23

24 ⁸ The caselaw addresses the standards for a change to a surface water right, applying RCW
25 90.03.380. Notably, however, the statute governing changes to groundwater rights includes a
26 similar requirement. RCW 90.44.100(2) (change to a groundwater right shall not enlarge the
right at issue if additional wells are constructed and shall not impair other rights).

1 specific facts of the water right at issue.⁹

2 Another decision that is inconsistent with defendant-intervenors' interpretation of
3 relinquishment is Merritt v. Ecology, PCHB No. 98-140, 1999 WL 160235 (Mar. 16, 1999). In
4 that case, the owner of a water right argued that he should not lose his right to relinquishment if
5 the nonuse of water had occurred when a previous owner held the right. Id. at *5. The Board
6 rejected this argument, stating that the owner

7 would ask the state to confirm the resurrection of a water right simply because he
8 had the good fortune of purchasing an interest in the water right before the
9 Department of Ecology had an opportunity to initiate relinquishment. This result
is not consistent with the language or purpose of the relinquishment statute.

10 Id. Similarly, here, defendants would have the Court interpret the MWL to resurrect water rights
11 simply because the owners had the good fortune to be redefined as municipal water suppliers
12 before Ecology could initiate relinquishment.

13 Finally, defendant-intervenor CWA argues that the MWL definition of "municipal water
14 supplier" does not violate substantive due process because both before and after the passage of
15 this law, whether a right is eligible for the exemption from relinquishment depends "not [on]
16 who is making the claim, but whether the water right was claimed for municipal water supply
17 purposes." CWA Br. at 15. This argument ignores the method of operation of the MWL. It is
18 true that the relinquishment statute, both before and after the passage of the MWL, exempts
19 rights "claimed for municipal water supply purposes." RCW 90.14.140(2)(d). The MWL,
20 however, has retroactively changed the purpose of use of certain water rights from "group
21 domestic" or "community domestic" purposes to "municipal water supply purposes." The law

22 ⁹ The Court's holdings similarly expose the fallacy of defendant-intervenors' assertion that there
23 can be no harm to property interests because the language in RCW 90.14.160 indicates that
24 relinquished water "shall revert" to the state. WWUC Br. at 31. Were this true, Ecology could
25 safely disregard prior relinquishment when processing change applications. Yet the Supreme
26 Court has forcefully stated that, in order to protect existing rights, a change request is "precluded
where a perfected right has been abandoned or otherwise extinguished." R.D. Merrill, 137
Wn.2d at 126.

1 was clear, prior to the passage of the MWL, that rights held for group or community domestic
2 supply were not eligible for the exemption from relinquishment. For example, the water right
3 held by George Theodoratus that was at issue in the Theodoratus case was held for “community
4 domestic supply” purposes. Theodoratus, 135 Wn.2d at 606 (Sanders, J., dissenting). The
5 Washington Supreme Court found that this right was not eligible for the exemption from
6 relinquishment. Id. at 594-95. Under the MWL, however, this right would qualify as a right for
7 “municipal water supply purposes” and hence be exempt from relinquishment. Contrary to
8 CWA’s claims, the MWL in fact does make some rights exempt from relinquishment that were
9 not exempt before that law’s adoption.

10 The water right at issue in Georgia Manor was also held for “community domestic
11 supply” purposes. State of Washington Department of Ecology’s Rebuttal Memorandum in
12 Support of Motion for Summary Judgment, Georgia Manor Water Ass’n v. Ecology, PCHB No.
13 93-68, at 3 (June 16, 1994). Yet this right would also count as a right for “municipal water
14 supply purposes” under the MWL. Again, contrary to CWA’s claim, the definitions provisions
15 of the MWL does change the basis on which certain water suppliers are defined as municipal
16 water suppliers, and in fact changes the purpose of many water rights from “community
17 domestic supply” to “municipal water supply.” If an entity relinquished its water right before
18 September 9, 2003, its subsequent redesignation under the MWL as a municipal water supplier
19 cannot resurrect that right without violating substantive due process.¹⁰

22 ¹⁰ WWUC’s argument that Plaintiffs should have challenged “the sections of the Water Code that
23 utilize those definitions,” WWUC Br. at 22 n.8, overlooks that it is only the change in the
24 definitions that renders the operation of any other section (such as the relinquishment provisions)
25 problematic. To the extent that WWUC believes that these other provisions have actually been
26 amended by the MWL, then it would follow that the MWL violates Article II, section 37 of the
Washington Constitution, which forbids the amendment of a statute without setting forth its full
text.

1 B. The Pumps and Pipes Provision, RCW 90.03.330(3), Violates Substantive Due
2 Process.

3 As explained in the Burlingame Plaintiffs’ opening brief and above in the discussion of
4 Plaintiffs’ separation of powers claims, the pumps and pipes provision, RCW 90.03.330(3),
5 retroactively overrules the Supreme Court’s decision in Theodoratus. As such, it converts
6 unused water rights that were at most equivalent to permitted or “inchoate” rights into fully
7 vested, perfected rights. The retroactive expansion of these water rights violates substantive due
8 process because it diminishes the rights of junior water right holders. See A & B Irrigation
9 District v. Aberdeen-American Falls Ground Water District, 141 Idaho 746, 752, 118 P.3d 78
10 (2005) (“[P]roposed enlargements create a per se injury to junior water rights holders.”); San
11 Carlos Apache, 193 Ariz. at 205 (“[T]he legal effect of acts that resulted in acquisition and
12 priority of water rights cannot be changed by subsequent legislation.”).

13 The State disagrees with this interpretation of RCW 90.03.330(3) and argues, in effect,
14 that the MWL had no effect whatsoever on the substantive validity of rights represented by
15 “pumps and pipes” certificates. According to Defendants, the legislature, by declaring that these
16 rights were “in good standing,” did not intend them to be treated, like other rights represented by
17 certificates, as perfected rights. Instead, under this theory, the unused portion of rights
18 documented by pumps and pipes certificates have the same status as the inchoate portion of
19 rights documented by permits. This is the same status that rights documented by pumps and
20 pipes certificates had after Theodoratus. As discussed above and in Plaintiff Tribes’ Response,
21 this interpretation is inconsistent with the plain language of the statute.

22 Even if it is correct, however, RCW 90.03.330(3) still violates the substantive and
23 procedural due process rights of junior water right holders. First, by declaring all such rights to
24 be “in good standing,” the legislature validates even rights that were previously diminished
25 through the failure to exercise due diligence. Second, even if the substantive status of these
26 rights is unchanged under the state’s interpretation, affected junior water rights holders have lost

1 their opportunity to receive notice and an opportunity to be heard on any extensions in the time
2 available for the holders of pumps and pipes certificates to develop their rights.

3 The Defendants apparently do not contest the conclusion that, if Plaintiffs' interpretation
4 of RCW 90.03.330(3) is correct, then Plaintiffs' claims prevail. The State does not argue that
5 RCW 90.03.330(3) could be applied in a constitutional manner if it either perfected improperly
6 issued pumps and pipes certificates or excused prior failures to develop water rights with
7 reasonable diligence. Moreover, defendants do not argue that the Salerno test saves this
8 provision, apparently recognizing that because RCW 90.03.330(3) applies only retroactively, it is
9 unconstitutional in every application if Plaintiffs' interpretation is correct. Therefore, if the
10 Court agrees that the effect of this provision is to perfect improperly issued pumps and pipes
11 certificates or excuse prior failures to develop water rights with reasonable diligence, then RCW
12 90.03.330(3) must be declared unconstitutional.

13 C. The Place of Use Provision, RCW 90.03.386(2), Violates Substantive Due
14 Process.

15 As discussed in the Burlingame Plaintiffs' Motion for Summary Judgment, the place of
16 use provision, RCW 90.03.386(2), violates substantive due process because it retroactively
17 amends water rights held for municipal water supply purposes to incorporate a dynamic place of
18 use. Burlingame Plaintiffs' Mot. at 26-27. It therefore changes the "legal effect of acts that
19 resulted in acquisition and prior of water rights," San Carlos Apache, 972 P.2d at 189, to the
20 detriment of junior water right holders. The Burlingame Plaintiffs incorporate by reference the
21 argument in section III.D (pp. 27-32) of the Plaintiff Tribes' Response to State's Motion for
22 Summary Judgment, that RCW 90.03.386(2) violates substantive due process. The Burlingame
23 Plaintiffs also make the following additional observations.

24 The Defendants first argue that this provision cannot harm the rights of junior water right
25 holders because it does not "authorize any municipal water supplier to use more water to the
26 detriment of existing water right holders." Defendants' Br. at 38-39. This argument is incorrect

1 because, as discussed in the Burlingame Plaintiffs’ Motion for Summary Judgment and the
2 Plaintiff Tribes’ Response, the place of use of a water right is an essential attribute of the right
3 that may only be changed based on the conclusion that the change will not impair other existing
4 rights. Indeed, the Arizona Supreme Court struck down a similar provision that allowed water
5 from sources on federal land to be used at any location, eliminating previous restrictions on the
6 place of use of the right. San Carlos, 193 Ariz. at 206. The court held that this new enactment
7 “cannot be retroactively applied to affect rights vested under the interpretation of statutes or
8 common law existing at the time of the events.” Id.

9 The Defendants’ second argument is that RCW 90.03.386(2) survives a facial challenge
10 because it will have no adverse effects when applied to water suppliers who already have water
11 rights with places of use defined as their service areas. Defendants’ Br. at 39-40. This argument
12 is insufficient for two reasons. First, it relies on the Salerno “no set of circumstances” test and,
13 as described above, that test is inapplicable in this case. Second, Defendants’ argument is
14 illogical even under the Salerno standard. They assert that the place of use provision does not
15 have an unconstitutional effect in all circumstances, but the only circumstances they can identify
16 in which it is not unconstitutional are precisely those where it has no effect at all. Every water
17 right that qualifies as a municipal water right under this statute and had a place of use defined as
18 the water supplier’s service area is unaffected by RCW 90.03.386(2). By contrast, in every case
19 in which the place of use of a water right is affected by RCW 90.03.386(2), that effect is
20 unconstitutional. Moreover, because no additional factual development is needed to determine
21 that RCW 90.03.386(2) is unconstitutional in every application where it has any effect, it would
22 not further the rationales for the Salerno standard to apply that test in the fashion advocated by
23 the Defendants.

24 IV. THE PLACE OF USE PROVISION, RCW 90.03.386(2), VIOLATES PROCEDURAL
25 DUE PROCESS.

26 The Burlingame Plaintiffs incorporate by reference the argument in section III.E (pp. 32-

1 38) of the Plaintiff Tribes' Response to State's Motion for Summary Judgment, that RCW
2 90.03.386(2) violates procedural due process because it deprives junior water rights holders of
3 notice and an opportunity to be heard before senior water rights holders may change the place of
4 use of their water rights.

5 CONCLUSION

6 For the foregoing reasons, the Court should deny the motions for summary judgment of
7 the Defendants and Defendant-Intervenors and should grant the Burlingame Plaintiffs' motion
8 for summary judgment.

9 Respectfully submitted this 24th day of March, 2008.

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