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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	)	BURLINGAME PLAINTIFFS' REPLY IN
Indian tribes,	)	SUPPORT OF MOTION FOR SUMMARY
	)	JUDGMENT
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 )  
BERNHEISEL, an individual, SCOTT )  
2 CORNELIUS, an individual; PETER )  
KNUTSON, an individual; PUGET SOUND )  
3 HARVESTERS; WASHINGTON )  
4 ENVIRONMENTAL COUNCIL; SIERRA )  
CLUB; and THE CENTER FOR )  
5 ENVIRONMENTAL LAW AND POLICY, )

NO. 06-2-28667-7 SEA

6 Plaintiffs, )

7 vs. )

8 STATE OF WASHINGTON, )  
9 WASHINGTON STATE DEPARTMENT OF )  
ECOLOGY, and WASHINGTON STATE )  
10 DEPARTMENT OF HEALTH, )

11 Defendants, )

12 and )

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

15 Defendant-Intervenors. )  
16 )

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1 INTRODUCTION

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 reply brief in support of their motion  
5 for summary judgment. The Burlingame Plaintiffs challenge certain provisions of the 2003  
6 Municipal Water Law as unconstitutional because it unfairly favors a selected class of water  
7 users, diminishes the water rights of plaintiffs and other junior water right holders, and reduces  
8 the amount of water available in Washington’s rivers and streams for salmon, as well as  
9 recreational and aesthetic uses.

10 In particular, the Burlingame Plaintiffs challenge four sections of the Municipal Water  
11 Law.<sup>1</sup> The first, the “pumps and pipes” provision, RCW 90.03.330(3), violates the separation of  
12 powers and the due process rights of other water right holders. RCW 90.03.330(3) declares  
13 water rights documented by pumps and pipes certificates to be rights “in good standing.” For  
14 several decades, the Department of Ecology issued certificates for perfected water rights to water  
15 suppliers that quantified the water right as the capacity of the supplier’s water system rather than  
16 as the amount of water actually put to beneficial use. In Department of Ecology v. Theodoratus,  
17 135 Wn.2d 582, 957, P.2d 1241 (1998), the Washington Supreme Court declared that Ecology  
18 had “acted ultra vires in utilizing an unlawful system capacity measure of a water right,” id. at  
19 598, and that “under current statutes and this court’s recent water law decisions actual beneficial  
20 use must occur before a water right certificate may be issued,” id. at 595. The legislature, by  
21 declaring that the water rights certificates issued under this unlawful policy are rights in good  
22 standing, has attempted to retroactively overrule the Supreme Court’s decision in Theodoratus, in  
23 violation of the separation of powers. Moreover, by retroactively insulating these water rights  
24

25 <sup>1</sup> The Burlingame Plaintiffs discuss three of those sections in this brief; they will address their  
26 challenge to a fourth provision, RCW 90.03.330(2), in a separate brief, as provided in the  
27 scheduling order filed on April 18, 2008.

1 from any prior failures to exercise due diligence, the legislature has harmed the reciprocal rights  
2 of other vested water right holders, in violation of substantive due process.

3 Theodoratus is also at the center of the Burlingame Plaintiffs’ second challenge. The  
4 definitions of “municipal water supplier,” and “municipal water supply purposes,” RCW  
5 90.03.015(3)-(4), expand the number of entities who qualify for this status beyond any  
6 interpretation of prior law, violating the separation of powers and the due process rights of other  
7 water right holders. Under the Municipal Water Law, any entity that supplies water “[f]or  
8 residential purposes through fifteen or more residential service connections” or to a  
9 nonresidential population of, on average, twenty-five people for at least sixty days a year is a  
10 “municipal water supplier.” RCW 90.03.015(3)-(4). This definition, which encompasses private  
11 developers such as George Theodoratus, retroactively overrules the Supreme Court’s conclusion  
12 that Mr. Theodoratus was not a municipal water supplier and violates the separation of powers.  
13 It also retroactively expands the number of entities eligible for the “municipal water supply”  
14 exemption from relinquishment, in violation of the substantive due process rights of other water  
15 right holders.

16 Finally, the place of use provision, RCW 90.03.386(2), grants to any municipal water  
17 supplier a dynamic place of use. It therefore retroactively changes the legal consequences of the  
18 municipal water supplier’s initial water rights application and of the State’s review and approval  
19 of that application, in violation of other water rights holders’ vested rights to the continuation of  
20 stream conditions as they existed at the time their appropriation. Because RCW 90.03.386(2)  
21 eliminates the procedural protections under RCW 90.03.380(1) and RCW 90.44.100(2) that  
22 previously existed for these affected water rights holders, this provision also violates procedural  
23 due process.

24 The State and intervenors defend these provisions by advocating an improperly narrow  
25 interpretation of the standard of review and through strained and artificial readings of both  
26

1 Theodoratus and the effect of the Municipal Water Law. As explained below, none of these  
2 arguments are convincing.

3 It is easy, given the detailed and often technical arguments presented by both sides, to  
4 forget the big picture underlying this case. Burlingame Plaintiffs’ challenge to the Municipal  
5 Water Law arises from the need to promote water conservation, protect junior water rights  
6 holders (including junior instream rights for salmon and native fish protection), and ensure  
7 fundamental fairness in the Washington water rights system. The Municipal Water Law is a step  
8 in the wrong direction on all these counts, as it allows unchecked growth of inchoate rights,  
9 removes procedural protections for junior water right holders and the public interest, and grants  
10 special rights and privileges to a favored class of water right holders.

11 ARGUMENT

12 I. THE SALERNO TEST IS INAPPLICABLE TO THIS TAXPAYER CHALLENGE.

13 In its first line of defense, the State argues that this Court should ignore the constitutional  
14 defects of the challenged provisions of the Municipal Water Law if it can find any application of  
15 these provisions that does not violate the Constitution. The State is incorrect in asserting that the  
16 Court must apply this “no set of circumstances” test to plaintiffs’ facial challenge. This test is  
17 irrelevant to Plaintiffs’ separation of powers claims, which involve only the comparison of the  
18 relevant provisions of the Municipal Water Law with the Theodoratus decision, and thus  
19 implicate only one “set of circumstances.” Nor does it make sense for a procedural due process  
20 claim, which turns on the risk of harm, not the occurrence of harm in any particular instance.  
21 Finally, the test does not apply to a substantive due process claim in the context of a taxpayer  
22 challenge.

23 A. There is no Dispute Regarding the Standard of Review for Plaintiffs’ Separation  
24 of Powers Claims.

25 Though the parties disagree as to whether the “no set of circumstances” test applies to  
26 Plaintiffs’ substantive due process and procedural due process claims, there is no such

1 disagreement as to the standard of review for the separation of powers claims. See, e.g., State  
2 Response at 11-19 (not mentioning the “no set of circumstances” test in the State’s argument  
3 regarding the separation of powers claims). This is because either the challenged provisions of  
4 the Municipal Water Law retroactively overrule a decision of the Washington Supreme Court, or  
5 they do not. There is no question of isolating particular applications of the law and determining  
6 whether the law violates the Constitution in some or all of those applications. The resolution of  
7 these claims turns only on the meaning of the Theodoratus opinion and the interpretation of the  
8 Municipal Water Law. It does not matter whether the “no set of circumstances” test applies to  
9 these claims, because there is only one relevant set of circumstances: the Supreme Court’s  
10 Theodoratus decision and the text of the law.

11 B. The No Set of Circumstances Test is Also Inapplicable to Plaintiffs’ Procedural  
12 Due Process Claims.

13 The Salerno test also does not make sense for a procedural due process claim. Such a  
14 claim argues that the scheme created by the challenged statute provides insufficient procedural  
15 protections for affected parties, not that these parties will be deprived of a constitutionally  
16 protected property or liberty interest in a particular application of the scheme. Accordingly, the  
17 constitutional test in procedural due process cases, the three-part test from Mathews v. Eldredge,  
18 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), looks at, among other things, “the risk of an  
19 erroneous deprivation of such interest through the procedures used.” City of Redmond v. Moore,  
20 151 Wn.2d 664, 670, 91 P.3d 875 (2004) (quoting Mathews, 424 U.S. at 335) (emphasis added).  
21 The appropriate course for a court faced with a facial procedural due process challenge is simply  
22 to apply the Mathews test. It does not matter that in some hypothetical circumstance, the statute  
23 could be applied without depriving an individual of a protected interest; rather, the relevant  
24 question is whether the statutory scheme creates too great a risk of such a deprivation.

25 The Washington Supreme Court followed exactly this approach in City of Redmond. In  
26 that case, two individuals were charged with driving while their licenses were suspended. 151

1 Wn.2d at 677. Their licenses had been suspended, however, pursuant to a state law that  
2 automatically issued suspensions when a driver failed to respond to a notice or appear in court  
3 after a traffic infraction. The defendants argued that the law violated procedural due process  
4 because it did not provide for any administrative hearing, either before or after the license  
5 suspension. City of Redmond, 151 Wn.2d at 669. In particular, the defendants argued that a  
6 hearing was necessary to address any ministerial errors that might occur. Id. Although the  
7 Supreme Court cited the “no set of circumstances” test, it never referred to this test in its analysis  
8 of the constitutionality of the law at issue. Instead, it applied the Mathews test, looking  
9 generically at the interests of all drivers with suspended licenses, and concluding that the statute  
10 violated procedural due process because it did not “provide adequate procedural safeguards to  
11 ensure against the erroneous deprivation of a driver’s interest in the continued use and possession  
12 of his or her driver’s license.” Id. at 677.

13 Notably, the court did not uphold the statute as constitutional, even though in most cases,  
14 license suspensions were carried out without ministerial errors. Yet that result is precisely what  
15 the “no set of circumstances” test would seem to require. Accordingly, in the procedural due  
16 process context, the “no set of circumstances” test is not precedent in this state; the Court should  
17 instead, like the Washington Supreme Court, apply the Mathews test to the statute on its face.

18 C. The “No Set of Circumstances” Test is Inappropriate for a Taxpayer Challenge.

19 As the Burlingame Plaintiffs explained in their opening and response briefs, the Salerno  
20 test has never been adopted in a Washington taxpayer standing case and is inconsistent with the  
21 policies underlying taxpayer standing. Burlingame Plaintiffs’ Mot. at 14-15; Burlingame  
22 Plaintiffs’ Response at 3-6. Indeed, the Court of Appeals, in Robinson v. City of Seattle, 102  
23 Wn. App. 795, 10 P.3d 452 (2000), specifically rejected the “no set of circumstances” test for a  
24 taxpayer facial challenge. Moreover, the Washington Supreme Court has held that “taxpayer  
25 standing has been given freely in the interest of providing a judicial forum when this state’s  
26

1 citizens contest the legality of official acts of their government.” State ex rel. Boyles v.  
2 Whatcom County Superior Court, 103 Wn.2d 610, 614, 694 P.2d 27 (1985).

3 The State criticizes plaintiffs for not identifying a specific alternative standard of review  
4 that the Court can use in place of the “no set of circumstances” test. State Response at 9. This  
5 argument is a red herring. It is not necessary for the Court to identify a specific test here,  
6 because courts frequently address the merits of facial constitutional challenges without  
7 specifying what particular proportion of the applications must be illegal for the statute to be  
8 invalidated. See, e.g., San Carlos Apache Tribe v. Superior Court of Arizona for the County of  
9 Maricopa, 193 Ariz. 195, 972 P.2d 179 (1999); Fremont-Madison Irr. Dist. & Mitigation Group  
10 v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996). As the Court  
11 of Appeals held in Robinson, a court can simply apply “the test dictated by the nature of the  
12 challenge.” 102 Wn. App. at 808. If, however, the Court wishes to apply a specific standard, the  
13 Court could look for guidance to the “large fraction” test. See Planned Parenthood of  
14 Southeastern Pa. v. Casey, 505 U.S. 833, 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); State  
15 v. Jackson, 496 S.E.2d 912, 916 (Ga. 1998) (“[W]e conclude that a facial attack on a statute will  
16 be upheld if the statute operates unconstitutionally in a large fraction of the cases in which it  
17 applies.”). Under this test, the Court could find the challenged provisions unconstitutional if, as  
18 the Burlingame Plaintiffs argue, they were unconstitutional in all retroactive applications (the  
19 pumps and pipes provision, RCW 90.03.330(3) and the definitions, RCW 90.03.015(3)-(4)), or  
20 in all situations in which they have any effect (the place of use provision, RCW 90.03.386(2)).

21 D. The Cases That the State Cites do not Establish that the “No Set of  
22 Circumstances” is Binding Precedent in the Context of a Taxpayer Challenge.

23 As discussed in the Burlingame Plaintiffs’ previous briefs, the Court of Appeals held in  
24 Robinson that the “no set of circumstances” test is inapplicable to a taxpayer challenge. See  
25 Burlingame Plaintiffs’ Response at 5; Burlingame Plaintiffs’ Motion at 14; see Robinson, 102  
26 Wn. App. at 807-08. The State and intervenors attempt to avoid the clear holding of Robinson

1 by citing federal cases, which are not binding here, and Washington cases that have cited the  
2 Salerno standard, but which either do so only in dicta or are easily distinguishable. Most  
3 importantly, none of these cases were taxpayer challenges, and none of them implicated the  
4 policy favoring early judicial resolution of claims of potentially unlawful government action that  
5 underlies the Washington Supreme Court's approach to taxpayer standing.

6 *1. Federal Cases Are Not Relevant to the Standard of Review for a Taxpayer*  
7 *Challenge.*

8 As the Burlingame Plaintiffs demonstrated in their response brief, federal decisions  
9 adopting the Salerno test are not relevant here because the federal courts do not adopt  
10 Washington's liberal approach to taxpayer standing. See Burlingame Plaintiffs' Response at 3-5.  
11 The State cites the recent United States Supreme Court decision in Wash. State Grange v. Wash.  
12 State Republican Party, 522 U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, 2008 WL 704368 (2008). See State Response  
13 at 2. As the Burlingame Plaintiffs previously indicated in their Response, this decision only  
14 serves to highlight the different policies underlying the federal approach to facial challenges and  
15 Washington's approach to taxpayer challenges. Burlingame Plaintiffs' Response at 3-4.  
16 Moreover, on this issue, federal decisions are not binding on state courts. See Robinson v. City  
17 of Seattle, 102 Wash. App. 795, 807-08, 10 P.3d 452 (2000); City of Chicago v. Morales, 527  
18 U.S. 41, 55 n.22, 119 S. Ct. 1849, 144 L. Ed. 2d 1849 (1997) (plurality opinion); Commonwealth  
19 v. Ickes, 873 A.2d 698, 702 (Pa. 2005). Because the selection of the appropriate standard of  
20 review is a matter of state, not federal, law, this recent United States Supreme Court decision has  
21 no bearing on this case.

22 *2. State v. Hughes is Distinguishable Because the Statute at Issue Had no*  
23 *Effect Without Subsequent Executive or Judicial Action.*

24 The only case in which the Washington Supreme Court has actually applied the Salerno

1 test is State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).<sup>2</sup> In that case, criminal defendants  
2 challenged sentences imposed on them under the exceptional sentence provisions of the  
3 Sentencing Reform Act, which allowed a judge to impose a sentence “outside the standard range  
4 for an offense” based on the judge’s finding of aggravating factors. Id. at 133 n.3. A prior  
5 decision, Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403  
6 (2004) had held that the jury must find such aggravating facts. Applying Salerno, the Hughes  
7 court denied the facial challenge because Blakely held that a jury need not find such facts if a  
8 defendant stipulated them or waived his rights. Hughes, 154 Wn.2d at 133. However, the  
9 defendants in Hughes also challenged the Sentencing Reform Act as-applied to them, and they  
10 prevailed. Id. at 156.

11 Hughes is distinguishable from the present case because the challenged provisions of the  
12 Municipal Water Law violate the due process rights of other water right holders by operation of  
13 law. The exceptional sentencing provisions that were challenged in Hughes had no effect on  
14 anyone except when used in a particular sentencing decision; they could easily and appropriately  
15 be challenged as applied—and they were. By contrast, the challenged sections of the Municipal  
16 Water Law harm vested water rights by operation of law, without the necessity of any executive  
17 or judicial action. For example, RCW 90.03.330(3) declares all pumps and pipes certificates to  
18 be rights in good standing. Plaintiffs have no forum, other than this facial challenge, for  
19 challenging this change in the law, unless a municipal water supplier chooses to file a change  
20 application—something beyond Plaintiffs’ control and unrelated to the effect of RCW  
21 90.03.330(3). Similarly, the definitions have created new municipal water suppliers, who hold  
22 new “municipal water supply purposes” rights exempt from relinquishment, without any  
23 executive action. A facial challenge provides Plaintiffs with their only affirmative opportunity to  
24

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25 <sup>2</sup> In their response brief, the Burlingame Plaintiffs mistakenly cited State v. Hughes as a case in  
26 which the Salerno test did not affect the Court’s analysis. Burlingame Plaintiffs’ Response at 6.  
While that citation was incorrect, the case is nevertheless, as explained above, distinguishable.

1 challenge the effects of these changes in the law.

2 3. *The Washington Supreme Court’s Other References to the “No Set of*  
3 *Circumstances” Test Are Dicta.*

4 The Washington Supreme Court’s other references to the “no set of circumstances” test  
5 are dicta and are therefore not binding on this Court. Ironically, the State, in arguing that  
6 virtually every word of the Theodoratus decision is dicta, cites definitions of dicta that are far  
7 more applicable to the cases it cites in support of its proposed standard of review than to  
8 Theodoratus.

9 The State cites *Black’s Law Dictionary*, which defines dictum as “a judicial comment  
10 made while delivering a judicial opinion, but one that is unnecessary to the decision in the case  
11 and therefore not precedential.” Defendants’ Response at 17 (quoting Black’s Law Dictionary  
12 (8th ed. 2004)). In the Supreme Court cases cited by the State, other than Hughes, the “no set of  
13 circumstances” test had no impact on the outcome of the case and was dicta by this standard. In  
14 Tunstall v. Bergeson, 141 Wn.2d 201, 5 P.3d 691 (2000), the plaintiffs claimed that a section of  
15 the Basic Education Act that required the state to provide education programs for prisoners only  
16 up to 18 years of age violated their right to education Article IX of the Washington Constitution.  
17 The court cited the “no set of circumstances” test but then merely concluded across-the-board  
18 that the “statute makes ample provision for educational programs designed to address the special  
19 educational and rehabilitative needs of children incarcerated in adult prisons,” without  
20 identifying any particular circumstances in which its application was constitutional. Id. at 223.

21 Nor are City of Redmond, 151 Wn.2d 664, In re Detention of Turay, 139 Wn.2d 379, 417  
22 n.27, 986 P.2d 790 (1999), or Washington State Republican Party v. Washington State Public  
23 Disclosure Comm’n, 141 Wn.2d 245,282 n.14, 4 P.3d 808 (2000), helpful for the State. As  
24 discussed above, in City of Redmond, the court, despite using the words “no set of  
25 circumstances,” actually looked at the general effect of the challenged law under the Mathews v.  
26 Eldredge procedural due process test. Turay and Washington State Republican Party mention

1 the “no set of circumstances” test only in a footnote in cases that involved as-applied challenges.  
2 These passing references are clearly dicta by any standard.

3 There is no binding precedent that requires this Court to adopt the “no set of  
4 circumstances” test for plaintiffs’ facial challenge to the Municipal Water Law. This test makes  
5 no sense in the context of a taxpayer challenge, particularly when, as here, plaintiffs will no  
6 affirmative ability to raise as-applied challenges, because the law’s effects occur by operation of  
7 law.

8 II. THE DEFINITIONS AND THE PUMPS AND PIPES PROVISION VIOLATE THE  
9 SEPARATION OF POWERS.

10 The Burlingame Plaintiffs’ motion and response brief explain that the pumps and pipes  
11 provision, RCW 90.03.330(3), and the definitions, RCW 90.03.015(3)-(4), violate the separation  
12 of powers because they retroactively overrule the Supreme Court’s decision in Theodoratus.  
13 Burlingame Plaintiffs’ Motion at 16-20; Burlingame Plaintiffs’ Response at 11-15. RCW  
14 90.03.330(3) also violates the separation of powers because it involves the legislative  
15 determination of adjudicative law and facts. Plaintiff Tribes’ Response at 9-11. The State  
16 attempts to avoid the obvious conflict between Theodoratus and the Municipal Water Law by  
17 describing virtually every statement in the Theodoratus decision as dicta. A simple consideration  
18 of the reasoning of the Supreme Court’s opinion shows the fallacy of this argument.

19 A. The Pumps and Pipes Provision, RCW 90.03.330(3), Violates the Separation of  
20 Powers.

21 RCW 90.03.330(3) violates the separation of powers because it retroactively overrules  
22 the Supreme Court’s holding in Theodoratus that water rights documented by pumps and pipes  
23 certificates were not validly perfected water rights.<sup>3</sup> It is undisputed that “the legislature does

24 <sup>3</sup> It also violates the separation of powers because, as explained in the Tribes’ Reply Brief at 7-  
25 10, the legislature resolved questions of adjudicative fact and law by declaring that all pumps and  
26 pipes certificates were in good standing, despite any individual failures to exercise due diligence  
27 in developing those rights. The Burlingame Plaintiffs hereby incorporate section I.A.2 of the  
28 Tribes’ Reply by reference.

1 not have the power to overrule judicial interpretations of the law.” State v. Pillatos, 159 Wn.2d  
2 459, 473-74, 150 P.3d 1130 (2007). If RCW 90.03.330(3) did in fact overrule a holding of the  
3 court in Theodoratus, it must be struck down as a violation of the separation of powers. The  
4 State attempts to avoid the obvious conflict between this provision and Theodoratus by  
5 narrowing the court’s holding in Theodoratus almost to the vanishing point and by advancing an  
6 implausible interpretation of RCW 90.03.330(3) that is in obvious tension with the statutory text.  
7 Neither argument is convincing.

8 *1. The Status of Pumps and Pipes Certificates Was at the Center of the*  
9 *Theodoratus Decision.*

10 The State contends that there is no conflict between RCW 90.03.330(3) and Theodoratus  
11 because the court “did not consider or decide any issue over the validity of [pumps and pipes]  
12 certificates.” State’s Response at 12. Intervenor WWUC even claims that “[n]or was there any  
13 discussion in the case of the pumps and pipes policy.” WWUC Response at 15. To the contrary,  
14 the validity of the pumps and pipes policy and certificates issued under that policy was central to  
15 the court’s reasoning in Theodoratus. “[A] deliberate expression of the court upon the meaning  
16 of [a] statute’ should not be disregarded.” City of Redmond v. Central Puget Sound Growth  
17 Management Hearings Board, 136 Wn.2d 38, 53 n.7, 959 P.2d 1091 (1998) (quoting State v.  
18 Nikolich, 137 Wash. 62, 66, 241 P. 664 (1925)).

19 City of West Richland v. Department of Ecology, 124 Wn. App. 683, 103 P.3d 818  
20 (2004), is instructive in this regard. That case involved an attempted transfer of a water right  
21 permit from an individual to the City of Richland. Id. at 686-87. The permit was originally  
22 issued for irrigation and single domestic supply, but the transfer would have involved changing  
23 the purpose to municipal water supply. Id. The Department of Ecology denied the transfer, and  
24 the City appealed. The Court of Appeals upheld Ecology’s decision, holding that under RCW  
25 90.44.100 as construed in Supreme Court’s decision in R.D. Merrill Co. v. Pollution Control  
26 Hearings Bd., 137 Wn.2d 118, 129, 969 P.2d 458 (1999), a water right holder could not change

1 the purpose of use of an inchoate groundwater right. City of West Richland, 124 Wn. App. at  
2 693-94. The City argued that the Supreme Court’s construction of the phrase “manner of use” in  
3 RCW 90.44.100 was merely dicta, because the Court ultimately upheld the permits in that case.  
4 Id. at 692. The Court of Appeals rejected this argument, noting that “[t]he analysis of ‘manner of  
5 use’ and ‘purpose of use’ was essential to the Court’s decision.” Id. at 693.

6 In Theodoratus, the court concluded that permit conditions “must be consistent with the  
7 requirements of the ... water code.” Theodoratus, 135 Wn.2d at 593. A permit condition  
8 promising a certificate based on system capacity rather than beneficial use would not be valid  
9 under the water code because “beneficial use must be calculated based upon diversion and actual  
10 use under this state’s law.” Id. Therefore, “actual beneficial use must occur before a water right  
11 certificate may be issued.” Id. at 595. The fact that it was inconsistent with the water code to  
12 issue a certificate based on system capacity was essential to the court’s conclusion that the  
13 Department of Ecology was free to change the conditions on Mr. Theodoratus’s permit.

14 Moreover, Mr. Theodoratus had argued that it was arbitrary and capricious of Ecology to  
15 reject its previous system capacity measure of a water right. Id. at 598. The court concluded that  
16 it was not: “because we have determined that the Department acted ultra vires in utilizing an  
17 unlawful system capacity measure of a water right, we conclude that the Department did not act  
18 arbitrarily and capriciously in switching to an actual application of water to beneficial use  
19 standard.” Id. Contrary to WWUC’s suggestion, the court directly held that the “pumps and  
20 pipes” policy had been ultra vires and unlawful.

21 Finally, the Supreme Court did not raise these issues sua sponte without briefing from the  
22 parties. Instead, Mr. Theodoratus specifically identified as an issue for the court to resolve: “In  
23 issuing ... a water right certificate pursuant to ch. 90.44 RCW for a public water supply system,  
24 is it lawful for the Department of Ecology ... to issue the water right certificate for an amount of  
25 water based upon the capacity of the constructed system, rather than upon some prior year’s  
26

1 actual use?” Declaration of Alan Reichman, Exh. 1 at 1-2 (Brief of Appellant, State of  
2 Washington v. Theodoratus). The court’s resolution of this question was not dicta but was a key  
3 part of its holding.

4 Courts have recognized that this aspect of Theodoratus is not dicta by citing it with  
5 approval. See Thurston County v. Western Washington Growth Management Hearings Board,  
6 137 Wn. App. 781, 802, 154 P.3d 959 (2007) (noting the Supreme Court’s subsequent reliance  
7 on a rule stated in a prior case as a reason why that rule was not dicta). The Supreme Court has  
8 cited Theodoratus for the proposition that “a system capacity measure of a water right ... was  
9 [an] unlawful method contravening statutes.” Postema v. Pollution Control Hearings Board, 142  
10 Wn.2d 68, 92, 11 P.3d 726 (2000). Division Three of the Court of Appeals has also cited  
11 Theodoratus as stating that beneficial use is required to perfect a water right. City of West  
12 Richland, 124 Wn. App. at 690.

13 2. *The State’s Interpretation of RCW 90.03.330(3) is Inconsistent With the*  
14 *Statutory Text.*

15 In earlier briefs, the Burlingame Plaintiffs and the Tribes have explained that the plain  
16 meaning of RCW 90.03.330(3) is that it treats these certificates as certificates in good standing—  
17 that is, as validly perfected water rights. See Burlingame Plaintiffs’ Motion at 16-20;  
18 Burlingame Plaintiffs’ Response at 11-15; Tribes’ Response at 4-6. The Burlingame Plaintiffs  
19 do not return to that argument, here, but instead explain how RCW 90.03.330(3) violates the  
20 separation of powers even under a narrower interpretation of the law.<sup>4</sup>

21 RCW 90.03.330(3), by declaring all water rights represented by pumps and pipes  
22 certificates to be rights “in good standing,” improperly insulates them from the due diligence  
23 requirements to which they were subject, as inchoate rights, after the Theodoratus decision. As

24 \_\_\_\_\_  
25 <sup>4</sup> The State, however, should be held to its concession that RCW 90.03.330(3) does not perfect  
26 the water rights represented by pumps-and-pipes certificates. If the Court should uphold this  
27 provision, the Burlingame Plaintiffs request that such a decision explicitly state that RCW  
28 90.03.330(3) is constitutional only because that it does not have this effect.

1 explained above, Theodoratus held that water rights can be perfected only through actual  
2 beneficial use; therefore, “pumps and pipes” certificates—standing alone—were not properly  
3 perfected water rights. To the extent that the water rights represented by pumps and pipes  
4 certificates had not fully been put to beneficial use, they remained valid inchoate rights, which  
5 are rights “in good standing *so long as the requirements of law are being fulfilled.*” Theodoratus,  
6 135 Wn.2d at 596 (quoting 1 Wells A. Hutchins, Water Rights Laws in the Nineteen Western  
7 States 226 (1971) (emphasis added)). RCW 90.03.330(3) retroactively overrules Theodoratus by  
8 deleting the highlighted text from this quote: it declares all pumps and pipes certificates to be  
9 rights in good standing at the time the Municipal Water Law became law, regardless of prior  
10 failures to exercise due diligence.

11 The State’s interpretation of the law is inconsistent with the plain text of the statute. The  
12 State suggests that the holder of a system-capacity certificate “would still have to meet other  
13 water principles, such as due diligence in project development, to keep them in good standing.”  
14 State’s Motion at 18. While it might be a plausible interpretation of RCW 90.03.330(3) that  
15 holders of system capacity certificates must comply with these requirements *after* the effective  
16 date of the law, it is fundamentally inconsistent with the text of the statute to suggest that these  
17 water rights are not insulated from *prior* failures to exercise due diligence. RCW 90.03.330(3)  
18 clearly declares that, as of the date the Municipal Water Law became effective, a water right  
19 represented by a pumps and pipes certificate “is a right in good standing.” If these rights were in  
20 fact subject to the reasonable diligence requirement of RCW 90.03.460, then some of them might  
21 not have been in good standing at the time the Municipal Water Law went into effect, as a result  
22 of prior failures to exercise due diligence.<sup>5</sup> RCW 90.03.330(3), by declaring *all* of these rights to  
23 be in good standing as of the effective date of the Municipal Water Law, clearly does not require  
24

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25 <sup>5</sup> As intervenor WSU acknowledges, whether a water right holder has exercised reasonable  
26 diligence is a fact-specific question that “is determined on a case-by-case basis.” WSU  
27 Response at 9.

1 that these rights were developed with reasonable diligence. In effect, the State would read back  
2 into the statute the very words from Theodoratus that the legislature omitted. The legislature did  
3 not include those words, and it is not the role of the courts to rewrite a statute.

4 Moreover, RCW 90.03.330(2) is inconsistent with the State’s interpretation of the law.  
5 That provision prohibits Ecology from “revoking, diminishing or adjusting a certificate based on  
6 any change in policy that has occurred since the certificate was issued.” RCW 90.03.330(2).

7 This “change in policy” is obviously Ecology’s abandonment of its previous, unlawful policy of  
8 issuing certificates based on a water supplier’s system capacity—the change in policy that Mr.  
9 Theodoratus challenged and the court found was not only permissible, but required, under the  
10 Water Code. Under this policy and Theodoratus, the inchoate portions of these rights would  
11 have been returned to permit status and subject to the due diligence requirement. Even though  
12 RCW 90.03.330(2) explicitly rejects that requirement, the State reads RCW 90.03.330(3) to  
13 create the same requirement by implication.

14 The State reads Theodoratus far too narrowly and interprets RCW 90.03.330(3) to grant  
15 to Ecology by implication the very authority that RCW 90.03.330(2) explicitly withheld. The  
16 language in Theodoratus that it reads as dicta was in fact central to the court’s decision and has  
17 been recognized as precedent by subsequent decisions. RCW 90.03.330(3), by insulating pumps  
18 and pipes certificates from the legal effects of prior failures to be developed with due diligence,  
19 contravenes Theodoratus and violates the separation of powers.

20 B. The Definitions of “Municipal Water Supplier” and “Municipal Water Supply  
21 Purposes,” RCW 90.03.015(3)-(4), Violate the Separation of Powers.

22 Another essential element of the Supreme Court’s reasoning in Theodoratus was its  
23 conclusion that Mr. Theodoratus, a private developer holding a water right for community  
24 domestic supply purposes, was not a municipal water supplier. The definitions of “municipal  
25 water supplier” and “municipal water supply purposes” in RCW 90.03.015(3)-(4) retroactively  
26 overrule this holding by defining these terms so broadly that Mr. Theodoratus himself and



1 legislature is free to redefine statutory terms if the new definitions have only prospective effect.  
2 The new definitions may not apply retroactively, however, if they conflict with a Supreme Court  
3 construction of the original statutory terms, because the court’s construction “operates as if it  
4 were originally written into” the statute. Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299  
5 (1976). As the Plaintiff Tribes have explained, the definitions operate retroactively because they  
6 change the legal effects of prior nonuse of water rights by newly-defined municipal water  
7 suppliers. See Tribes’ Response at 23-25.

8           Intervenor WWUC argues that the definitions do not operate retroactively in the  
9 relinquishment context because the “precipitating event” for relinquishment is the Department of  
10 Ecology’s initiation of a relinquishment proceeding or an adjudication in a superior court. See  
11 WWUC Motion at 24-28. As the Burlingame Plaintiffs and Plaintiff Tribes have explained, this  
12 argument is incorrect. Relinquishment occurs automatically upon five consecutive years of  
13 unexcused nonuse of water. Burlingame Plaintiffs’ Response at 19-20; Plaintiff Tribes’  
14 Response at 23-25. It has been the long-standing policy of the Department of Ecology that  
15 relinquishment is self-executing and, notably, the State does not adopt WWUC’s argument here.

16           The Tribes’ analysis is consistent with State v. Pillatos, 159 Wn.2d 459, 150 P.2d 1130  
17 (2007), on which WWUC mistakenly relies. See WWUC Response at 13. Although the court  
18 found that the statutory amendment challenged in that case was not retroactive, the effect of that  
19 amendment was drastically different from the effect of the definitions here. Pillatos dealt with  
20 changes in the sentencing statutes that allowed upward departures from standard sentencing  
21 ranges. 159 Wn.2d at 465. In the sentencing context, the precipitating event is clearly the entry  
22 of the plea or the trial. Id. at 471. Moreover, the Court noted that the same sort of exceptional  
23 sentences were possible under the law at the time the offense was committed, and that the change  
24 in the law was therefore merely procedural. Id. at 471-73.

25           The situation would be different if a statute had changed the substance of the criminal  
26

1 law, for instance by criminalizing previously legal conduct. In that context, the precipitating  
2 event is the commission of the act that constitutes the crime. Accordingly, a defendant cannot be  
3 “punished for conduct that was first criminalized after the date of the conduct’s occurrence.”  
4 State v. Schmidt, 100 Wn. App. 297, 305, 996 P.2d 1119 (2000).<sup>6</sup> The precipitating event is the  
5 defendant’s act, even though the defendant is not convicted of that crime until a subsequent trial.  
6 Similarly, in the relinquishment context, the precipitating event is the water right holder’s nonuse  
7 of water. Even though the water right holder has a due process right to notice and a hearing to  
8 confirm the relinquishment, that subsequent hearing is no more the precipitating event than is the  
9 trial of the criminal defendant.

10 *3. The Definitions Are not Curative.*

11 The State claims that the definitions are curative and do not violate the separation of  
12 powers “because they clarified ambiguity in the Water Code.” State’s Response at 18. The only  
13 sources of ambiguity that the State identifies are changes in agency practice and policy. State’s  
14 Motion at 27-30. As the Tribes have established, these agency actions do not create genuine  
15 legal ambiguity when the statutory text is unambiguous. Tribes’ Response at 18-22. Even if  
16 they could, however, that ambiguity only went to whether entities such as water districts counted  
17 as municipal water suppliers. It was never suggested by any agency policy or practice that  
18 private developers serving only fifteen service connections were municipalities. As counsel for  
19 intervenor WSU candidly acknowledged after the Theodoratus decision, “[c]learly, public water  
20 systems for residential developments such as Theodoratus’s are not municipal water suppliers.”  
21 [Second] Goho Declaration, Exh. A (Tom McDonald, Municipal Water Supply After  
22 Theodoratus at 5A-10 n.8 (Dec. 1998)). Even if there was any ambiguity in prior law, the  
23 definitions in RCW 90.03.015(3)-(4) expanded the definition of “municipal water supplier”  
24

25 \_\_\_\_\_  
26 <sup>6</sup> In the criminal context, such a law is a violation of the ex post facto clause, rather than the due  
27 process clause, but the principles of retroactivity are the same.

1 beyond any interpretation of prior law, and could not be curative.

2 Moreover, as explained in the Burlingame Plaintiffs’ response, the legislative history is  
3 inconsistent with the proposition that the definitions were intended to be curative amendments.  
4 Burlingame Plaintiffs’ Response at 17-18. To the contrary, a sponsor of the bill frankly  
5 acknowledged that the effect of the definitions would be to make some entities municipal water  
6 suppliers “who heretofore have not been included.” [Second] Goho Declaration, Exh. B, at 3  
7 (statement of Representative Rockefeller during House Floor Debate); see id. at 3 (statement of  
8 Representative Linville).<sup>7</sup>

9 The effect of the definitions, as the legislature intended, was to expand the set of entities  
10 who counted as “municipal water suppliers.” Because this expansion is retroactive in effect and  
11 contradicts the Washington Supreme Court’s holding that George Theodoratus was not a  
12 municipal water supplier, it violates the separation of powers.

13 III. THE CHALLENGED PROVISIONS OF THE MUNICIPAL WATER LAW VIOLATE  
14 SUBSTANTIVE DUE PROCESS.

15 Each of the challenged provisions violates substantive due process because it  
16 retroactively impairs the vested property rights of junior water right holders. It is a violation of  
17 substantive due process to retroactively impair vested property rights. State v. Shultz, 138  
18 Wn.2d 638, 646, 980 P.2d 1265 (1999). When the pumps and pipes provision, RCW  
19 90.03.330(3), restores to “good standing” water rights that had previously been lost due to  
20 failures to develop them with due diligence, it harms the vested rights of other water rights  
21 holders. When the definitions, RCW 90.03.0015(3)-(4), restore water rights that had previously  
22 been lost through relinquishment, it harms the vested rights of other water rights holders. When

23 \_\_\_\_\_  
24 <sup>7</sup> It is appropriate to consider the legislative history of a statute if “the statute remains susceptible  
25 to more than one reasonable meaning.” State v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 12,  
26 43 P.3d 4 (2002). Although the Burlingame Plaintiffs believe that the meaning of the definitions  
is clear, the State and intervenors disagree and, to the extent the Court finds that the text alone is  
ambiguous, it may consider the legislative history in resolving this ambiguity.

1 the place of use provision, RCW 90.03.386(2), retroactively grants a dynamic place of use to  
2 municipal water suppliers, it harms the vested rights of other water rights holders by allowing  
3 alterations in the return flows.<sup>8</sup>

4 A. The Definitions Violate Substantive Due Process Because They Retroactively  
5 Exempt Certain Water Rights From Relinquishment.

6 As the Burlingame Plaintiffs have previously demonstrated, the definitions of “municipal  
7 water supplier” and “municipal water supply purposes” violate substantive due process because  
8 they protect municipal water suppliers from the effects of their prior non-use of water.

9 Burlingame Plaintiffs’ Motion at 21-22. This argument does not depend on Plaintiffs’ claim that  
10 the definitions violate the separation of powers. On the one hand, if the definitions violate the  
11 separation of powers, then they necessarily also violate substantive due process.<sup>9</sup> On the other,  
12 however, the definitions can still violate substantive due process even if the Court does not  
13 accept that Theodoratus addressed who counts as a municipal water supplier for purposes of  
14 relinquishment. In particular, any statute that retroactively changes prior law and in so doing  
15 harms vested rights violates substantive due process. Caritas Servs. v. Dep’t of Social & Health  
16 Servs., 123 Wn.2d 391, 413, 869 P.2d 28 (1994). If the amendment retroactively amends  
17 unambiguous prior law, it does not matter whether that prior law was the subject of a judicial  
18 interpretation. Here, the Water Code unambiguously limited rights for municipal water supply  
19 purposes to “municipalit[ies].” RCW 90.03.260 (providing that an application “for municipal  
20 water supply purposes ... shall give the present population to be served and, as near as may be  
21 estimated, the future requirement of the *municipality*”) (emphasis added). The State and  
22 intervenors, in arguing that the definitions are curative, do not even attempt to address RCW

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24 <sup>8</sup> The Burlingame Plaintiffs incorporate by reference the Tribes’ argument that RCW  
90.03.386(2) violates substantive due process, at section II.C of their reply brief.

25 <sup>9</sup> There can be no question that a retroactive exemption from relinquishment for an entire  
26 category of water right holders harms other water right holders who withdraw water from the  
same source of supply.

1 90.03.260. Moreover, no interpretation of prior law suggested that municipal water suppliers  
2 could include private developers with only fifteen service connections.

3         None of the State’s arguments in response to plaintiffs’ motion are convincing. The State  
4 first attempts to defend the definitions by arguing that under the “no set of circumstances” test,  
5 because they can legitimately apply prospectively, it does not matter that their retroactive  
6 applications may be unconstitutional. State’s Response at 22. This argument fails because, as  
7 explained above, the “no set of circumstances” test is not the appropriate standard of review.  
8 Instead, the Court can strike down the definitions if they are unconstitutional in a large fraction  
9 of their applications, such as all of their retroactive applications.

10         The State next argues that the definitions do not violate substantive due process because  
11 they are curative. As explained above in the context of the separation of powers claim, however,  
12 the definitions cannot be curative because they expand the category of municipal water suppliers  
13 beyond any interpretation of prior law.

14         Finally, the State argues that the definitions will not in fact lead to the resurrection of lost  
15 water rights because they require actual beneficial use of water to qualify for the exemption from  
16 relinquishment. State’s Response at 28-29. As explained by the Tribes, this argument ignores  
17 that the definitions nevertheless excuse the non-use of portions of water rights. See Tribes’  
18 Response at 22-23. Because the definitions resurrect the relinquished portions of these water  
19 rights and thereby harm the vested rights of junior water right holders, they violate substantive  
20 due process.

21         B.         The Pumps and Pipes Provision, RCW 90.03.330(3), Impermissibly Insulates  
22                    Municipal Water Rights From the Legal Effects of Prior Failures to Exercise Due  
23                    Diligence.

24         By declaring all water rights represented by pumps and pipes certificates to be “in good  
25 standing,” the legislature has retroactively expanded water rights that were previously  
26 diminished through failures to exercise due diligence. As intervenor WSU recognizes,

1 Theodoratus held that the inchoate portion of a water right represented by a pumps-and-pipes  
2 certificate remained in good standing only “to the extent appropriators continue to diligently and  
3 with good faith grow into and apply the water to beneficial use.” WSU Response at 16-17  
4 (citing Theodoratus, 135 Wn.2d at 591-92). RCW 90.03.330(3) eliminates these good faith and  
5 due diligence requirements, at least as to conduct pre-dating the enactment of the Municipal  
6 Water Law. If the holder of a pumps-and-pipes certificate had failed to exercise due diligence in  
7 developing its right, that right would no longer have been in good standing. RCW 90.03.330(3)  
8 nevertheless declares that *all* rights represented by pumps and pipes certificates are in good  
9 standing. Because the expansion of these rights necessarily harms other water rights holders,  
10 RCW 90.03.330(3) violates substantive due process.<sup>10</sup>

11 IV. THE PLACE OF USE PROVISION VIOLATES PROCEDURAL DUE PROCESS.

12 The Burlingame Plaintiffs incorporate by reference the argument in section II.D of the  
13 Tribes’ reply brief that RCW 90.03.386(2) violates procedural due process under the three-part  
14 Mathews v. Eldredge test because (1) it affects the vested rights of other water right holders; (2)  
15 the remaining procedures create a high risk that other water right holders’ rights will be impaired  
16 and additional or substitute safeguards are available; and (3) the fiscal and administrative  
17 burdens of these additional or substitute safeguards would be minimal.

18 CONCLUSION

19 For the foregoing reasons, the Burlingame Plaintiffs respectfully request that the Court  
20 grant their motion for summary judgment and deny the State’s and intervenors’ motions for  
21 summary judgment.

22  
23  
24 <sup>10</sup> WWUC misstates Plaintiffs’ claims when it argues that Plaintiffs seek “to augment their  
25 existing rights by obtaining water currently allocated to senior appropriators.” WWUC  
26 Response at 40 n.24. To the contrary, Plaintiffs seek to prevent newly-defined municipal water  
suppliers and the holders of pumps-and-pipes certificates from being granted what are in effect  
new rights to use additional water while preserving their older priority date.

1 Respectfully submitted this 24<sup>th</sup> day of April, 2008.

2  
3 

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