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July 3, 2008

Clerk of the Court  
King County Superior Court  
516 Third Avenue, Room E-609  
Seattle, WA 98104-2386

RE: ***Lummi Indian Nation, et al. v. State, Dep't of Ecology & Dep't of Health  
Burlingame, et al. v. State, Dep't of Ecology & Dep't of Health  
King County Superior Court Cause Nos. 06-2-40103-4SEA & 06-2-28667-7SEA  
(consolidated)***

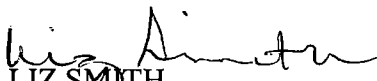
Dear Clerk:

Enclosed for filing in the above referenced case are Defendant State of Washington's Notice of Appeal to Washington Supreme Court and a Certificate of Service. Pursuant to RCW 2.32.070, which provides that "[n]o fee shall be required to be advanced by the state . . . prosecuting or defending on behalf of the state," the filing fee is waived. Pursuant to RAP 5.4(a), please file a copy of the Notice of Appeal with the Washington Supreme Court.

Also enclosed is a copy of each document to conform and return in the self-addressed, postage-paid envelope provided.

Thank you for your assistance.

Sincerely,

  
LIZ SMITH  
Legal Assistant to  
ALAN M. REICHMAN  
STEPHEN H. NORTH  
Assistant Attorneys General  
(360) 586-6770

:ls  
Enclosures  
By FedEx  
cc: Service List



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**STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT**

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

Plaintiffs,

v.

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

Defendants.

NO. 06-2-40103-4SEA

**NOTICE OF APPEAL TO  
WASHINGTON SUPREME COURT**

JOAN BURLINGAME, an individual;  
LEE BERNHEISEL, an individual;  
SCOTT CORNELIUS, an individual;  
PETER KNUTSON, an individual;  
PUGET SOUND HARVESTERS;  
WASHINGTON ENVIRONMENTAL  
COUNCIL; SIERRA CLUB; and THE

NO. 06-2-28667-7SEA

1 CENTER FOR ENVIRONMENTAL  
LAW AND POLICY,

2 Plaintiffs,

3 v.

4 STATE OF WASHINGTON;  
5 WASHINGTON STATE  
6 DEPARTMENT OF ECOLOGY; and  
7 WASHINGTON STATE  
8 DEPARTMENT OF HEALTH,

9 Defendants,

10 WASHINGTON WATER UTILITIES  
11 COUNCIL; CASCADE WATER  
12 ALLIANCE; and WASHINGTON  
13 STATE UNIVERSITY,

14 Defendant-Intervenors.

15 Defendants State of Washington et al. seek direct review by the Washington Supreme  
16 Court of sections 3.a., 3.b., and 3.c. of the Order Granting in Part and Denying in Part  
17 Plaintiffs' Motions for Summary Judgment; Granting in Part and Denying in Part Defendants'  
18 Motions for Summary Judgment, entered on June 11, 2008.

19 A copy of the Order is attached to this notice.

20 Counsel for the Plaintiffs and Defendant-Intervenors in these consolidated cases are:

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**NOTICE OF APPEAL TO  
WASHINGTON SUPREME COURT**

2

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16 KRISTEN BOYLES  
17 SHAUN GOHO  
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19 *Counsel for Burlingame Plaintiffs*

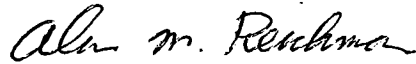
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5 OLYMPIA WA 98501-1093  
6 *Counsel for Intervenor Washington State University*

7 DATED this 3rd day of July 2008.

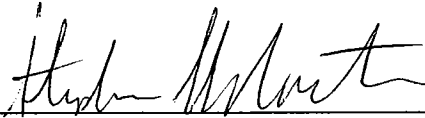
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Attorneys for State of Washington, Department of  
Ecology, Department of Health, Governor  
Christine Gregoire, Jay Manning, and Mary  
Selecky

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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, QUINALT INDIAN NATION, )  
SQUAXIN ISLAND INDIAN TRIBE, )  
SUQUAMISH INDIAN TRIBE, and the )  
TULALIP TRIBES, federally recognized )  
Indian tribes, )

Plaintiffs,

v.

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

Defendants. )

NO. 06-2-40103-4 SEA

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTIONS FOR SUMMARY JUDGMENT;  
GRANTING IN PART AND DENYING IN  
PART DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT

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 )

1 This matter came before the Court on motions for summary judgment filed by all parties.  
2 The Court heard the oral arguments of counsel and considered the pleadings filed in this action  
3 and the following evidence:

- 4 1. Burlingame Plaintiffs' Motion for Summary Judgment.
- 5 2. The declarations of Joan Burlingame, Scott Cornelius, Joan Crooks, Shaun  
6 Goho, Peter Knutson, Michael O'Brien, and John Osborn, and the exhibits  
7 attached thereto.
- 8 3. Plaintiff Tribes' Motion for Summary Judgment.
- 9 4. The declarations of Joel Massman, Terry R. Williams, Leonard Forsman, Merle  
10 Jefferson, John B. Arum, and Crystal Sampson, and the exhibits attached thereto.
- 11 5. Defendant State of Washington's Motion for Summary Judgment.
- 12 6. The declarations of Ken Slattery and Michael Dexel and the exhibits attached  
13 thereto.
- 14 7. Defendant-Intervenor Washington Water Utilities Council's Motion for  
15 Summary Judgment.
- 16 8. The declarations of Tadas Kisielius, Jim, Miller, Thomas D. Mortimer, John C.  
17 Kirner, Nancy Davidson, Michael Ireland, John Kounts, and Jeffrey N. Johnson,  
18 and the exhibits attached thereto.
- 19 9. Defendant-Intervenor Cascade Water Alliance's Motion for Summary Judgment.
- 20 10. Burlingame Plaintiffs' Response to Defendants' Motions for Summary  
21 Judgment.
- 22 11. The declarations of Shaun Goho and Lee Bernheisel and the exhibits attached  
23 thereto.
- 24 12. Plaintiff Tribes' Response to Defendants and Defendant-Intervenors' Motions  
25 for Summary Judgment.
- 26 13. The Second Declaration of John B. Arum and the exhibits attached thereto.
- 27 14. Defendant State of Washington's Memorandum in Opposition to Burlingame  
28 Plaintiffs' Motion for Summary Judgment.
15. Defendant State of Washington's Memorandum in Opposition to Plaintiff Tribes'  
Motion for Summary Judgment.

- 1 16. The declarations of Alan M. Reichman, Ken Slattery, and Jay Cook, and the  
2 exhibits attached thereto.
- 3 17. Defendant State of Washington's Memorandum in Response to WWUC's  
4 Motion for Summary Judgment.
- 5 18. Defendant-Intervenor Washington Water Utilities Council's Response to  
6 Plaintiffs' Motions for Summary Judgment.
- 7 19. The declarations of Tadas Kisielius, Joseph Becker, Bradley D. Lake, Robert D.  
8 Hunter, and James W. Miller, and the exhibits attached thereto.
- 9 20. Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' Motions  
10 for Summary Judgment.
- 11 21. Defendant-Intervenor Washington State University's Response to Plaintiffs'  
12 Motions for Summary Judgment.
- 13 22. Burlingame Plaintiffs' Reply in Support of Motion for Summary Judgment.
- 14 23. Plaintiff Tribes' Reply in Support of Motion for Summary Judgment.
- 15 24. State's Memorandum in Rebuttal to Burlingame Plaintiffs' Response to State's  
16 Motion for Summary Judgment.
- 17 25. State's Memorandum in Rebuttal to Plaintiff Tribes' Response to State's Motion  
18 for Summary Judgment.
- 19 26. Defendant-Intervenor Washington Water Utility Council's Reply to Plaintiff  
20 Tribes' and Burlingame Plaintiffs' Memoranda in Response To WWUC's  
21 Motion for Summary Judgment.
- 22 27. Defendant-Intervenor Washington Water Utilities Council's Reply to State's  
23 Memorandum in Response to WWUC's Motion for Summary Judgment.
- 24 28. The declarations of Bill Clarke and Tom McDonald and the exhibits attached  
25 thereto.
- 26 29. Defendant-Intervenor Cascade Water Alliance's Reply to Plaintiffs' Responses  
27 to Motions for Summary Judgment.
- 28 30. Defendant State of Washington's Memorandum in Response to Plaintiffs' New  
Claims Pertaining to RCW 90.03.330(2).
- 31 31. Defendant-Intervenor Washington Water Utilities Council's Memorandum in  
Response to Plaintiffs' New Claim Regarding RCW 90.03.330(2).
- 32 32. Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' New  
Claims Pertaining to RCW 90.03.330(2).

1 33. Burlingame Plaintiffs' Reply as to Procedural Due Process Challenge to RCW  
2 90.03.330(2).

3 34. Plaintiff Tribes' Reply in Support of Motion for Summary Judgment re: RCW  
4 90.03.330(2).

5 The Court also considered the argument of counsel, and hereby incorporates its oral  
6 ruling made on June 11, 2008.

7 THEREFORE, IT IS HEREBY ORDERED:

8 1. Plaintiffs Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget  
9 Sound Harvesters, Washington Environmental Council, and the Center for Environmental Law  
10 and Policy (collectively the "Burlingame Plaintiffs") and plaintiffs Lummi Nation, Makah Indian  
11 Tribe, Quinault Indian Nation, Squaxin Island Indian Tribe, Suquamish Tribe and the Tulalip  
12 Tribes (collectively the "Tribes") have standing as taxpayers to bring this action;

13 2. The Motion in Limine of Washington Water Utilities Council is Denied;

14 3. The Motions of the Plaintiffs are GRANTED IN PART and the Motions of the  
15 Defendants and Defendant -Intervenors are DENIED IN PART as follows:

16 a. RCW 90.03.015(3) and (4) violate the separation of powers under the state  
17 constitution because they have retroactive effect and attempt to overrule an interpretation of the  
18 Water Code in Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

19 b. RCW 90.03.330(3) violates the separation of powers under the state constitution  
20 because it has retroactive effect and attempts to overrule an interpretation of the Water Code in  
21 Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

22 c. Alternatively, even if one were to accept the State's interpretation of the statute that it  
23 addresses only valid inchoate water rights (or rights "in good standing") (which this Court does  
24 not), then RCW 90.03.330(3) violates the separation of powers under the state constitution  
25 because it purports to make a legislative determination of adjudicative facts concerning the  
26

1 "good standing" of particular water rights.

2 4. Having found certain provisions unconstitutional, the Court declines to decide the  
3 substantive due process claims related to RCW 09.03.300(3), 90.03.015(3) and (4) and RCW  
4 90.03.560;

5 5. The Motions of the Defendants and Defendant -Intervenors are GRANTED IN  
6 PART and the Motions of the Plaintiffs are DENIED IN PART as follows:

7 a. RCW 90.03.260(4) and (5) do not facially violate substantive due process under the  
8 state and federal constitutions.

9 b. RCW 90.03.386(2), does not facially violate substantive due process under the state  
10 and federal constitutions.

11 c. RCW 90.03.386(2), does not facially violate procedural due process under the state  
12 and federal constitutions.

13 d. RCW 90.03.260(4) and (5), do not facially violate procedural due process under the  
14 state and federal constitutions.

15 e. RCW 90.03.330(2), does not facially violate procedural due process under the state  
16 and federal constitutions.

17  
18 June 11, 2008

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21 THE HONORABLE JIM ROGERS  
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**STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT**

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

Plaintiffs,

v.

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

Defendants.

NO. 06-2-40103-4SEA

CERTIFICATE OF SERVICE

NO. 06-2-28667-7SEA

JOAN BURLINGAME, an individual;  
LEE BERNHEISEL, an individual;  
SCOTT CORNELIUS, an individual;  
PETER KNUTSON, an individual;  
PUGET SOUND HARVESTERS;  
WASHINGTON ENVIRONMENTAL  
COUNCIL; SIERRA CLUB; and THE  
CENTER OF ENVIRONMENTAL  
LAW AND POLICY,

Plaintiffs,

v.

1 STATE OF WASHINGTON,  
2 WASHINGTON STATE  
3 DEPARTMENT OF ECOLOGY, and  
4 WASHINGTON STATE  
5 DEPARTMENT OF HEALTH,

6 Defendants,

7 WASHINGTON WATER UTILITIES  
8 COUNCIL, CASCADE WATER  
9 ALLIANCE and WASHINGTON  
10 STATE UNIVERSITY,

11 Defendant-Intervenors.

12 Pursuant to RCW 9A.72.085, I certify that on the 3<sup>rd</sup> day of July, 2008, I caused to be  
13 served Defendant State of Washington's Notice of Appeal to Washington Supreme Court in  
14 the above-captioned matter upon the parties herein as indicated below:

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23		
24	the foregoing being the last known addresses.	
25		
26		

1 I certify under penalty of perjury under the laws of the State of Washington that the  
2 foregoing is true and correct.

3 DATED this 3<sup>rd</sup> day of July, 2008, in Olympia, Washington.

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5   
6 LIZ SMITH, Legal Assistant