

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

DEFENDANT STATE OF  
WASHINGTON'S MEMORANDUM  
IN RESPONSE TO PLAINTIFFS'  
NEW CLAIMS PERTAINING TO  
RCW 90.03.330(2)

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

Plaintiffs,

NO. 06-2-28667-7SEA

1 v.

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

7 Defendants,

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

12 Defendant-Intervenors.

### 13 I. INTRODUCTION

14 Defendants State of Washington, Governor Christine Gregoire, Department of  
15 Ecology (Ecology), Department of Health (Health), Ecology Director Jay Manning, and  
16 Health Secretary Mary Selecky (the State), submit this memorandum in response to the  
17 arguments of the Plaintiff Tribes and Burlingame Plaintiffs in support of their new claims that  
18 RCW 90.03.330(2) violates procedural due process.

19 The Plaintiff Tribes' new claim challenging the constitutionality of RCW 90.03.330(2)  
20 is contained in their First Amended Complaint for Declaratory and Injunctive Relief, and is  
21 addressed in the Plaintiff Tribes' Motion for Summary Judgment (Tribes' Motion) at 29-31.  
22 The Burlingame Plaintiffs raise the same new claim in their First Amended Complaint for  
23 Declaratory and Injunctive Relief, and incorporate by reference the Plaintiff Tribes' argument  
24 on the issue into their motion for summary judgment. Burlingame Plaintiffs' Motion for  
25 Summary Judgment at 28 n.14. This response is filed pursuant to the Stipulation and Order  
26 for Schedule Relating to Plaintiffs' Amended Complaints, dated April 22, 2008.

Perhaps recognizing weakness in their challenges to Section 6(3) of the Municipal  
Water Law (MWL), RCW 90.03.330(3), both sets of Plaintiffs now contend in their amended  
complaints that Section 6(2), RCW 90.03.330(2), facially violates procedural due process.

1 RCW 90.03.330(2) precludes Ecology from revoking or diminishing a water right for  
2 municipal water supply purposes documented by a certificate which was issued based on  
3 system-capacity, except in certain circumstances. These new claims should be rejected  
4 because not only can RCW 90.03.330(2) be constitutionally applied, but Plaintiffs' allegations  
5 of harm from this statute are purely speculative and based on nothing more than an expectation  
6 that holders of junior water rights could somehow benefit from the cancellation of quantities of  
7 inchoate water authorized under system-capacity-based certificates if they are documented in  
8 the form of permits, rather than certificates.

9 Accordingly, the State respectfully requests the Court to deny Plaintiffs' motions for  
10 summary judgment respecting these new claims pertaining to RCW 90.03.330(2).

## 11 II. STATEMENT OF ISSUE

12 Whether RCW 90.03.330(2), which provides that water right certificates for municipal  
13 water supply purposes that were issued based on system-capacity may only be revoked or  
14 diminished under certain circumstances, facially violates procedural due process.

## 15 III. AUTHORITY

### 16 A. RCW 90.03.330(2) Does Not Facially Violate the Right to Procedural Due Process

17 The State incorporates by reference its earlier arguments relating to the proper standard  
18 of review that the Court should apply in this facial constitutional challenge. *See, e.g.,* State's  
19 Memorandum in Opposition to Burlingame Plaintiffs' Response to State's Motion for  
20 Summary Judgment at 2-10. The Plaintiffs must prove that application of RCW 90.03.330(2)  
21 will violate the Due Process Clause under "all sets of circumstances." Further, should the  
22 Court not apply the *Salerno* standard in this case, the Plaintiffs still face the burden to prove  
23 beyond a reasonable doubt that this section violates the constitution, and it must be upheld if it  
24 is capable of constitutional construction.

25 Under the three-part *Mathews* test for procedural due process, courts must consider:  
26 first, the private interest that will be affected by the official action; second, the risk of an

1 erroneous deprivation of such interest through the procedures used, and the probable value, if  
2 any, of additional or substitute procedural safeguards; and third, the Government's interest,  
3 including the function involved and the fiscal and administrative burdens that the additional or  
4 substitute procedural requirement would entail. *City of Redmond v. Moore*, 151 Wn.2d 664,  
5 670, 91 P.3d 875 (2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47  
6 L.Ed.2d 18 (1976)).

7 The Plaintiff Tribes' argument that "RCW 90.03.330(2) violates procedural due process  
8 because it allows unused rights represented by 'pumps and pipes' certificates to be exercised  
9 without compliance with the procedural requirements of RCW 90.03.320" should be rejected.  
10 See Plaintiff Tribes' Motion for Summary Judgment at 29. The Plaintiffs plainly cannot meet  
11 the second part of the *Mathews* test because RCW 90.03.330(2) affords procedural due process  
12 by allowing other water right holders to challenge the validity of inchoate water rights  
13 documented by certificates based on system capacity through two processes which allow  
14 public participation and can result in revocation or diminishment of a certificate: general  
15 adjudications of water rights in superior court, and applications for changes and transfers of  
16 water rights filed with Ecology.<sup>1</sup>

17 RCW 90.03.330(2), which precludes the revocation or diminishment of water right  
18 certificates deemed to be "in good standing" under RCW 90.03.330(3) except under certain  
19 circumstances, provides, in relevant part:

20 Except as provided for the issuance of certificates under RCW 90.03.240 and  
21 for the issuance of certificates following the approval of a change, transfer, or  
22 amendment under RCW 90.03.380 or 90.44.100, the department shall not  
23 revoke or diminish a certificate for a surface or ground water right for municipal  
water supply purposes as defined in RCW 90.03.015 unless the certificate was  
issued with ministerial errors or was obtained through misrepresentation. . . .

24 <sup>1</sup> Additionally, Ecology is authorized to revoke or diminish a water right "in good standing" documented  
25 by system-capacity-based certificates when such a certificate was issued with ministerial errors or was obtained  
26 through misrepresentation. RCW 90.03.330(2). Thus, any water right holder who believes that such a certificate  
was issued based on a ministerial error or through misrepresentation could request Ecology to take action to  
revoke the water right, or diminish the maximum quantity of water it authorizes for use.

1 (Emphasis added.)

2 RCW 90.03.240 relates to water right certificates that are issued “upon the final  
3 determination of the rights to the diversion of water” in a general adjudication of water rights  
4 in superior court. Thus, in an adjudication for the determination of water rights, a superior  
5 court has the authority to determine whether and to what extent a water right documented by a  
6 certificate based on system capacity is valid through either actual beneficial use, or reasonable  
7 diligence and other requirements to maintain the validity of the unperfected, inchoate portion  
8 of the right.<sup>2</sup> The procedures for general adjudications for the determination of water rights  
9 are set forth at RCW 90.03.110—250. Under RCW 90.03.110, any water right holder can  
10 petition Ecology to commence an adjudication for the determination of water rights “in the  
11 superior court of the county in which said water is situated, or, in case such water flows or is  
12 situated in more than one county, the county to which the department shall determine to be the  
13 most convenient to the parties interested therein.” Accordingly, due process is afforded to  
14 water right holders who believe an inchoate right documented by a system capacity-based  
15 certificate should be revoked or diminished because it no longer remains “in good standing”  
16 through the opportunity to petition Ecology for commencement of an adjudication of water  
17 rights in superior court pursuant to RCW 90.03.110.

18 Moreover, under RCW 90.03.330(2), the water right change processes under  
19 RCW 90.44.100 and RCW 90.03.380<sup>3</sup> also provide the opportunity for review of the validity of  
20 inchoate rights documented by system-capacity-based certificates. Change applications are

21 <sup>2</sup> The requirements that apply to inchoate municipal water rights that are “in good standing” under  
22 RCW 90.03.330(3) to maintain their validity are discussed in the State’s Motion for Summary Judgment at 18-19  
and 42-43.

23 <sup>3</sup> RCW 90.44.100, the ground water right change statute, authorizes changes of points of withdrawal and  
24 places of use for inchoate ground water rights. In contrast, the general water right change statute, RCW 90.03.380  
25 generally does not authorize changes of inchoate water rights. *R.D. Merrill Co. v. Pollution Control Hearings  
26 Board*, 137 Wn.2d 118, 129-130, 969 P.2d 458 (1999). The exceptions to the general rule precluding changes of  
inchoate surface water rights are found in RCW 90.03.395 and .397 (allowing downstream changes of point of  
diversion) and RCW 90.03.570 (allowing change or transfer of inchoate surface water rights for municipal supply  
purposes under limited circumstances).

1 required, for example, in instances where a water right holder wants to transfer their water  
2 right to another entity or change the point where they divert or withdraw their water. In  
3 evaluating an application for change of a water right, Ecology must perform a tentative  
4 determination of the validity and extent of the water right sought to be changed. Ecology can only  
5 approve change of the water right to the extent it is valid. *R.D. Merrill Co. v. Pollution Control*  
6 *Hearings Board*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999); *Public Utility Dist. 1 of Pend Oreille*  
7 *Co. v. Dep't of Ecology*, 146 Wn.2d 778, 794, 51 P.3d 744 (2002). Thus, if the holder of an  
8 inchoate water right documented by a certificate applies to Ecology for change of the water  
9 right pursuant to RCW 90.44.100 or RCW 90.03.380, Ecology must perform a determination  
10 of the validity and extent of the water right to ascertain whether it is eligible for change. This  
11 includes a review of whether the requirements to maintain the "good standing" status of the  
12 right are met. Declaration of Ken Slattery in Support of Defendant State of Washington's  
13 Motion for Summary Judgment ¶ 5, Ex. 1 (POL-2030, Department of Ecology Water  
14 Resources Program Policy, 2003 Municipal Water Law Interpretive and Policy Statement,  
15 February 5, 2007 at 8).

16 If other water right holders believe that approval of the water right change application  
17 would cause impairment of their rights, they have the opportunity to file a protest of the  
18 application with Ecology. WAC 508-12-170 and 508-12-220. Further, if they are aggrieved  
19 with Ecology's decision on the application for change because they believe that Ecology's  
20 determination of the validity and extent of the water right is incorrect, they can file an appeal  
21 with the Pollution Control Hearings Board (PCHB), which also includes the right to judicial  
22 review under the Administrative Procedure Act if they are not satisfied with the PCHB's  
23 decision. RCW 43.21B.110(1)(c). Like the opportunity to petition for adjudication, this affords  
24 procedural due process to the Plaintiffs and other water right holders in the event they believe a  
25 certificated water right should be invalidated because it has not been perfected through actual  
26 use and no longer remains as an inchoate right "in good standing." They receive notice of the

1 application for change through publication of the application,<sup>4</sup> and an opportunity to protest the  
2 application, with rights for appeal if they ultimately are dissatisfied with Ecology's decision.

3 Plaintiffs argue that RCW 90.03.320 would provide adequate due process if the  
4 inchoate water rights were documented by permits rather than certificates, and that the MWL  
5 has stripped away such process. Their argument lacks merit. That suggested process would  
6 provide little opportunity for involvement for third party water right holders because notice of  
7 requests for extensions of water rights development schedules under permits are not even  
8 required to be published.<sup>5</sup> See RCW 90.03.320.

9 Plaintiffs' argument rests on the thin reed that "there is a high likelihood that unused  
10 rights that have lapsed because they have not been diligently developed could be resuscitated  
11 years later to the detriment of existing rights and fisheries resources." Tribes' Motion at 30. In  
12 the event that such a situation might occur in the future -- and one can only speculate that it  
13 might ever happen -- that could possibly be grounds for a party who alleges they are aggrieved  
14 to bring an "as applied" constitutional challenge to this section. The mere speculative  
15 possibility that a water right would, absent RCW 90.03.330(2), be cancelled for lack of  
16 diligence, and that such cancellation would in turn benefit junior water right holders does not  
17 carry the day in Plaintiffs' facial challenge to RCW 90.03.330(2). Accordingly, Plaintiffs  
18 cannot show that RCW 90.03.330(2) creates any "risk of an erroneous deprivation of interests"  
19 under the *Mathews* test.<sup>6</sup>

20  
21  
22 <sup>4</sup> Notice by publication is required under RCW 90.03.280, which applies to water right change  
applications through RCW 90.03.380 and RCW 90.44.020.

23 <sup>5</sup> Ecology provides copies of permit extension requests to third parties only upon request. Some entities  
have standing requests to Ecology for such documents.

24 <sup>6</sup> If Plaintiffs believe that there are outstanding inchoate water rights documented by system-capacity-  
25 based certificates that should have been cancelled due to lack of reasonable diligence in development, Plaintiffs  
should identify those rights and challenge them on an as-applied basis rather than ask that a statute be facially  
26 struck based upon speculative notions that junior water right holders *might* benefit from the opportunity to  
challenge whether such an unperfected right is being developed with due diligence.

1 Under the “no set of circumstances test,” because the water rights adjudication and  
2 change application processes afford notice and the opportunity to be heard, and because there  
3 will undoubtedly be situations where holders of inchoate water rights that are documented by  
4 system-capacity-based certificates will not increase their use of water even without  
5 applicability of RCW 90.03.320, Plaintiffs cannot meet their burden to prove in their facial  
6 challenge that application of RCW 90.03.330(2) would violate procedural due process in all  
7 circumstances. Further, even if the Court does not apply the *Salerno* standard of review,  
8 Plaintiffs cannot meet their burden to prove that this section of the MWL violates procedural  
9 due process because the water right change and superior court adjudication processes provide  
10 sufficient procedural safeguards to ensure against deprivations of other water right holders’  
11 interests due to possible increased exercise of inchoate water rights documented by system  
12 capacity-based certificates in situations where such rights may not have been maintained “in  
13 good standing.”

#### 14 IV. CONCLUSION

15 For the reasons stated above, RCW 90.03.330(2) comports with the constitutional right  
16 to procedural due process, and Plaintiffs’ new claims pertaining to that section of the MWL  
17 should be rejected. The State respectfully requests the Court to deny both the Burlingame  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 Plaintiffs' and Plaintiff Tribes' motions for summary judgment on their new claims pertaining  
2 to RCW 90.03.330(2).

3 DATED this 30<sup>th</sup> day of April, 2008.

4 ROBERT M. MCKENNA  
5 Attorney General

6 *Alan M. Reichman*

7 ALAN M. REICHMAN, WSBA No. 23874  
8 Assistant Attorney General  
9 MARK H. CALKINS, WSBA No. 18230  
10 Assistant Attorney General  
11 STEPHEN H. NORTH, WSBA No. 31545  
12 Assistant Attorney General

13 Attorneys for the State of Washington  
14 PO Box 40117  
15 Olympia, WA 98504-0117

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,

