

June 8, 2006

Via Federal Express

Rob McKenna
Attorney General of Washington
1125 Washington Street S.E.
P.O. Box 40100
Olympia, WA 98504-0100

RE: Request for Action Regarding the Constitutionality of the Municipal Water Law

Dear Mr. McKenna:

In accordance with the Washington Supreme Court's procedures for taxpayer actions, Joan Burlingame and Scott Cornelius, (the "Junior Water Right Holders"), Pete Knutson and the Puget Sound Harvesters (the "Fishers"), and the Washington Environmental Council, Sierra Club, and Center for Environmental Law and Policy (the "Conservation Organizations") (collectively, the "Petitioners"), on their own behalf and on behalf of all taxpayers of the State of Washington, hereby request that you take action to invalidate certain unconstitutional provisions of SESSHB 1338 (2003), the Municipal Water Law ("MWL"). This letter echoes many of the issues raised in a previous request for action sent to you on May 22, 2006, by the Hoh Tribe, Jamestown S'Klallam Tribe, Lummi Nation, Makah Indian Nation, Squaxin Island Tribe, Suquamish Tribe, Swinomish Tribe, Tulalip Tribes, Quinault Indian Nation, and Yakama Indian Nation.

The unconstitutional provisions of the MWL retroactively expand some water rights to the detriment of all others. The Petitioners assert that these provisions violate the Due Process Clauses of the U.S. and Washington Constitutions and the doctrine of the separation of powers. We describe below the Petitioners' interests, the MWL, and the constitutional violations that warrant legal action. The Petitioners believe that there are solutions to water management in Washington that do not jeopardize existing rights and existing flows and would welcome the opportunity to discuss the issues raised by this letter.

INTERESTS OF PETITIONERS

The Junior Water Right Holders hold water rights that are junior to some of the water rights retroactively expanded by the MWL. Therefore, their water rights will be impaired by the expansion of those senior water rights. For example, Joan Burlingame is a rural property owner and farmer near Ravensdale in King County. She raises horses, sheep, and chickens. She has

lived there for 25 years and during that time, as development has encroached upon her property, she has seen a drastic decline in the water available in her well. Sometimes, her well goes dry. She can no longer irrigate her vegetable garden or fruit trees with well water, and she often has insufficient water for cooking, laundry, and bathing. Creeks near her property have suffered from diminished flows, impairing fish habitat and instream values. Scott Cornelius has a well in Pullman. His well draws from the same aquifer as at least two wells that belong to Washington State University. WSU is attempting to consolidate several of its water rights. This will allow the university to pump more water than it was entitled to before the passage of the MWL. Among the projects that WSU has planned for its water is a new golf course. The aquifer shared by Mr. Cornelius and WSU has been declining for years. WSU's expanded water use will only accelerate this decline, harming Mr. Cornelius and all other users of the aquifer.

The Fishers rely on adequate instream flows to support the healthy salmon runs on which they rely for their livelihoods. Pete Knutson is a commercial fisherman who works out of Fishermen's Terminal in Seattle. He has been a fisherman for more than 30 years and currently fishes in Puget Sound and off the coast of Alaska. He is an elected commissioner of the Puget Sound Salmon Commission, representing 210 family fishing businesses. Mr. Knutson is also President of the Puget Sound Harvesters, a non-profit organization that represents the interests of gillnet fishermen who work in the waters of Puget Sound. The retroactive expansion of water rights by the MWL threatens instream flows, wild salmon populations, and the livelihoods of the fishermen who depend on them.

The Conservation Organizations and their members have aesthetic, recreational, fishing, and wildlife protection interests in the surface waters of the State of Washington and, in particular, in instream flows that have been established by rule by the Department of Ecology. See RCW 90.22.010; RCW 90.54.040. These instream flows are junior to many of the water rights that have been retroactively expanded by the MWL and thus the public's interest and the Conservation Organizations' interests in these instream flows have been impaired by the MWL.

WATER LAW BACKGROUND

Fresh water in Washington is a precious and limited resource. This fact may be easy to forget, particularly in the western part of the state and after one of the wettest winters on record. Yet many of the state's surface- and ground-waters are stretched to their limits. Indeed, in many years, some streams and even major rivers, such as the Walla Walla River, run dry. In many other rivers, there is so little water during the summer months that established instream flows are not met, harming fish, wildlife, and recreational opportunities. Many fish species that depend on our streams and rivers are on the brink of extinction. The MWL will only exacerbate these problems.

Washington, like other western states, has based its Water Law primarily on the doctrine of "prior appropriation." The prior appropriation system depends primarily on when someone

stakes a claim to the use of a given quantity of water. Starting in the nineteenth century, anyone in Washington could claim a right to take water from a river or stream by merely posting a notice on a tree. In fact, one could divert the water without even posting a notice. When a person diverted water from a stream, this physical appropriation established a claim to that portion of the stream's flow.

In case of conflicts, the person who first appropriated the water has priority, a scheme often dubbed "first in time, first in right." In the terminology of water law, the person who earlier gains a right to water has the "senior" right while the person who later acquires a right has the "junior" right. The date that one began to use the water is the "priority date" of one's water right. The state legislature's first comprehensive Water Code, adopted in 1917, codified this approach, confirming all existing rights but providing that future rights would be appropriated only through a state permit system.

One limit on the rights of prior appropriators is the doctrine of "beneficial use." This doctrine means that a water right is only as extensive as the legitimate use of water. In other words, a water right is not an absolute right of ownership to a specific amount of water. Rather it is the limited right to use only that water which is necessary to accomplish a constructive end associated with a specific parcel of land. Recognized "beneficial" uses include irrigation, domestic water supply, industry, and power generation. If water is wasted, then the water right excludes that portion of the water that is wasted. Also, if a water right holder wants to use more water, then a new right, with a later priority date, must be acquired.

Two other limits on water rights are embodied in the related doctrines of "relinquishment" and "abandonment." These doctrines reflect a corollary of the requirement of beneficial use: when water is no longer used for a beneficial purpose, the water right is lost. "Abandonment" is a common-law doctrine under which a water right is lost when a water right holder intentionally fails to use the water for an extended period of time. "Relinquishment" is a related statutory doctrine under which a water right is lost upon the voluntary failure to use a water right for five years, even if there is no intent to abandon the right. Municipal water rights are exempt from relinquishment, but not from abandonment.

Traditionally, a "beneficial use" of water entailed extracting water from a river or stream. Over time, however, recognition of the importance of ensuring that sufficient water remains within a stream has grown. In 1949, the legislature amended the Fisheries Code to allow water rights to be conditioned or denied if the extraction of water from the stream would harm fish. Then, in the 1960s and 1970s, the legislature recognized that instream uses could be "beneficial" uses under the Water Code. The Water Resources Act of 1971 gave the Department of Ecology the authority to establish minimum instream flow levels before issuing new water rights in a given basin. These "instream flows" are considered water rights with a priority date of the date as of Ecology's adoption of the rule. Instream flow minimums have been established for just

one-third of the state's watersheds, and even then, are often unmet because of their junior status to existing water rights.

The Municipal Water Law carries out a dramatic and unjust transformation of this system, which has gradually evolved over a century and a half. It turns the two fundamental premises of Washington water law—that water rights are based on priority in time and are limited by the extent of beneficial use—on their heads. Instead, it singles out a class of water rights holders and gives them a form of super-priority over other holders and also expands their rights beyond the extent of their actual, beneficial use. These expanded water rights also harm the fish, wildlife, recreational, and cultural benefits of instream flows and unfairly shift the burden of protecting instream flows onto other water rights holders. Moreover, in blatant disregard for the basic constitutional principle of the separation of powers, it attempts to retroactively overrule a holding of the Washington Supreme Court.

To ensure the fair and equitable treatment of all water rights holders in the State of Washington and to protect the precious natural heritage of our streams and rivers, the Petitioners request that you file suit to invalidate the following provisions of the MWL.

I. INCLUSION OF PRIVATE ENTITIES IN THE DEFINITION OF “MUNICIPAL WATER SUPPLIER” AND THE RESULTING EXEMPTION FROM RELINQUISHMENT (SECTION 1(3)-(4)).

The Municipal Water Law includes non-municipal entities in its definition of “municipal water suppliers,” thus greatly expanding the universe of entities eligible for the special privileges that attach to this status. The statute defines a “municipal water supplier” as “an entity that supplies water for municipal water supply purposes.” MWL § 1(3), codified at RCW 90.03.015(3). “Municipal water supply purposes” is defined to include a beneficial use of water “[f]or residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year.” MWL § 1(4), codified at RCW 90.03.015(4). This aspect of the definition encompasses private water systems, including those for private residential developments, hotels, trailer parks, and mobile home parks.

By defining “municipal water suppliers” to include private entities, the MWL retroactively expands the water rights of these entities at the expense of other water right holders. The definitions in the MWL allow private developers and other non-municipalities to benefit from the retroactive expansions of municipal water rights described below. They also allow private developers to take advantage of the pre-existing exemption from relinquishment granted to traditional municipalities. See RCW 90.14.140(2)(d). Before passage of this law, such entities who failed, without sufficient cause, to put a water right to beneficial use for a period of five successive years, were deemed to have relinquished the unused portion of the right to the

state, thus making the water available for junior appropriators or instream flows.
RCW 90.14.130-180.

The retroactive exemption from relinquishment of a particular class of private water right holders violates the separation of powers. In Department of Ecology v. Theodoratus, 135 Wash.2d 582, 957 P.2d 1241 (1998), the Washington Supreme Court refused to treat a private water supplier as a municipal water supplier with water rights that would be exempt from statutory relinquishment. Id. at 594. By retroactively providing private developers with an exemption from relinquishment that the court rejected in Theodoratus, the legislature is attempting to overrule that court's decision. The expanded definition of municipal water supplier violates the separation of powers, because a statute "cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary. Any other result would make the legislature a court of last resort." In re Detention of Brooks, 145 Wash.2d 275, 284, 36 P.3d 1034 (2001) (citations and internal quotation marks omitted); see also Magula v. Benton Franklin Title Co., Inc., 131 Wash.2d 171, 182, 930 P.2d 307 (1997) ("Any attempt by the Legislature to contravene retroactively this Court's construction of a statute is 'disturbing in that it would effectively be giving license to the [L]egislature to overrule this [C]ourt, raising separation of powers problems.'" (citation omitted).

The retroactivity of this provision of the MWL also violates the substantive due process rights of other water right holders. A law that retroactively impairs vested property rights violates due process. See State v. Shultz, 138 Wash.2d 638, 646, 980 P.2d 1265 (1999) ("A retroactive law violates due process when it deprives an individual of a vested right.") (citing State v. Hennings, 129 Wash.2d 512, 528, 919 P.2d 580 (1996)); Caritas Services, Inc. v. Department of Social and Health Services, 123 Wash.2d 391, 413, 869 P.2d 28 (1994) ("Due process is violated if the retroactive application of a statute deprives an individual of a vested right.") (citation and internal quotation marks omitted). A vested water right is private property subject to due process protections. Chumstick Creek Drainage Basin in Chelan County v. Department of Ecology, 103 Wash.2d 698, 705, 694 P.2d 1065 (1985); Nielsen v. Sponer, 46 Wash. 14, 15, 89 P. 155 (1907). By exempting certain private water right holders from relinquishment, the effect of the statute is to resurrect water rights that have already been relinquished to the state for nonuse and that would otherwise be available for junior appropriators or instream flows. The statute is unconstitutional because it retroactively impairs the vested rights of junior right holders.

II. ELIMINATION OF THE BENEFICIAL USE REQUIREMENT FOR MUNICIPAL WATER SUPPLIERS (SECTION 6(3)).

The MWL's elimination of the beneficial use requirement for certain water rights violates both due process and the separation of powers. Section 6(3) retroactively eliminates the beneficial use requirement for municipal water suppliers. MWL § 6(3), codified at RCW 90.03.330(3). It is a fundamental precept of western water law that water rights acquired

by prior appropriation are valid only to the extent that the appropriated water is put to beneficial use. Department of Ecology v. Acquavella, 131 Wash.2d 746, 755, 935 P.2d 595 (1997). Moreover, in Theodoratus, 135 Wash.2d at 590, the Washington Supreme Court specifically held that a private water purveyor's "water right must be based upon actual application of water to beneficial use, not upon system capacity." This ruling rejected the Department of Ecology's previous practice of treating inchoate rights as perfected rights based on the capacity of the water system before the water had been put to beneficial use—an approach known as the "pumps and pipes" method.

Section 6(3) retroactively eliminates the beneficial use requirement for water rights used for "municipal water supply purposes," including those held by private entities:

This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

RCW 90.03.330(3). The elimination of the beneficial use requirement thus explicitly applies only retroactively. Section 6(4) makes this retroactivity even more explicit by requiring that after the effective date of the legislation the Department of Ecology may issue certificates only on the basis of actual beneficial use. MWL § 6(4), codified at RCW 90.03.330(4).

The potential impacts of this change are enormous. For example:

- Although it has never used this amount, the City of Everett can now claim 250 million gallons per day (mgd) of water from the Sultan River. Such withdrawals are more than enough to dewater the river for much of the year.
- The City of Spokane can expand its water usage from 185 mgd to 348 mgd. Even at current usage levels the Spokane River frequently fails to meet recommended minimum flow levels during the summer, harming fish habitat, water quality and recreational and aesthetic use of the river.
- In 2003, the Department of Ecology determined that the MWL would create water availability problems in at least three basins in the Puget Sound area that support salmon populations.

Private entities are already taking advantage of the MWL's extension of this exemption to the newly expanded class of "municipal water suppliers." For example, the Deer Creek Water

Association has acquired the large unused portion of a private water right in Whatcom County. In the 1940s, a private developer, C. V. Wilder, acquired a paper water right in Whatcom County that entitled him to 450 gallons per minute (gpm) and 375 acre-feet per year (afy). The right was for both domestic and irrigation uses. He later transferred this water right to a private water association, the Belden Acres Water Association. The Belden Acres system used only about 32 gpm and 7 afy. Thus very little of Wilder's paper water right was ever put to beneficial use—the unused portion of the right could be as large as 418 gpm and 368 afy. More recently, the Deer Creek Water Association, a private water association in Whatcom County, purchased the Wilder water right from Belden Acres.

The transfer of the unused portion of this water right would not have been possible without the Municipal Water Law. Neither Belden Acres nor Deer Creek would have been considered a municipal water supplier before the passage of the MWL. Therefore, under governing Washington Supreme Court precedent, Belden Acres did not have a valid water right in the unused portion of the paper right. Its water right was limited to that portion of its certificate that was actually put to beneficial use. Moreover, Belden Acres would not have been able to transfer its unused rights to Deer Creek. Now, however, Deer Creek has been able to acquire this water right in a closed basin, to the detriment of all junior water right holders and instream resources in the basin. Deer Creek has also been able to change its place of use to include the Belden Acres service area without filing a change application, again through the operation of the MWL.

This retroactive expansion of water rights, as applied to private entities through the expansive definition of “municipal water supply purposes,” violates the separation of powers by attempting to overrule retroactively a decision of the Washington Supreme Court. More specifically, Section 6(3) retroactively resurrects and validates the pumps and pipes certificates invalidated by Theodoratus. Therefore, these provisions violate the separation of powers. See In re Detention of Brooks, 145 Wash.2d at 284.

The retroactive elimination of the beneficial use requirement also violates substantive due process. This provision retroactively expands the water rights of certain senior holders by perfecting the unused portions of their paper rights. It therefore correspondingly decreases the rights of junior holders. The junior holders' water rights are vested usufructuary property rights. The MWL, by retroactively impairing those rights, violates due process. See State v. Shultz, 138 Wash.2d at 646.

III. CHANGES IN THE PLACE OF USE (SECTION 5(2)).

The place of use provision of the MWL deprives property owners of vested rights without due process of law. Section 5(2) expands the place of use of a municipal water right from the area specified on the water right certificate to the service area described in a water system plan. MWL § 5(2), codified at RCW 90.03.386(2). Moreover, unlike RCW 90.03.380(1) and

90.44.100(2)(d), the previously applicable provisions, the MWL does not require that a change in the place of use be consistent with, and avoid impairing, existing water rights. As a practical matter, making the place of use coextensive with the service area boundary will result in greater use of water, which will, in turn, reduce the amount of water available to junior appropriators. By impairing vested water rights, this aspect of the 2003 Bill makes substantive changes that cannot be retroactively applied consistent with due process protections.

Developers are already taking advantage of this provision to change the place of use of their water rights without public oversight. Following the passage of the MWL, the Department of Ecology notified a number of water right holders that their pending change applications were unnecessary because the MWL had conferred the desired changes by operation of law. Those applicants, including PUD No. 1 Whatcom County, the Rochester Water Association, the Old Settlers Water Association, Arnold's Water Company, Arcadia Community Water Association, Skagit County Water District No. 1, and the Kitsap PUD, subsequently withdrew their change applications. Since then, Ecology has informed dozens of other potential applicants for changes to their water rights that they need not go through the legal process. They are now able to change the place of use of their water right without any public review.

For example, the Fircroft Water Works, a water supplier on Orcas Island, originally filed an application to change the place of use of its water right in 2001, before the passage of the MWL. In 1981, Fircroft was granted a ground water certificate for "community supply" for the three developments on Orcas Island. Fircroft applied to change the place of use of its water right and add additional purposes, in order to supply water to additional developments and truck water to other parts of the island.

The YMCA of Greater Seattle, which operates Camp Orkila on Orcas Island, protested this change. The YMCA has a ground water right that is senior to the Fircroft right as well as two surface water rights that are junior to Fircroft's right. The YMCA was and is concerned that approval of the change would allow Fircroft to expand its water use beyond its historical beneficial use level, and that the removal of water to other parts of the island will lower the water table.

In the autumn of 2003, however, the Department of Ecology informed Fircroft that its change application was moot because the MWL had accomplished the requested changes by operation of law. Fircroft subsequently withdrew its change applications and the YMCA lost its right to protest.

In its application to both past and future water system plans and plan amendments, the change-of-use provision violates procedural due process. The MWL permits municipalities and developers to change the place of use of their water rights without following the application procedures provided for under the Washington Water Code. These procedures protect the

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interests of other water right holders, implementing the principle that changes in the place of use of a water right are permitted only if “such change can be made without detriment or injury to existing rights.” RCW 90.03.380(1); see Okanogan Wilderness League v. Town of Twisp, 133 Wash.2d 769, 777, 947 P.2d 732 (1997) (“Both upstream and downstream water right holders can object to a change in the point of diversion or the place of use, which could affect natural and return flows and, thus, adversely affect their rights.”). Procedural due process requires that an individual be provided with some form of a notice and hearing before being deprived of a protected property interest. City of Redmond v. Arroyo-Murillo, 149 Wash.2d 607, 612, 70 P.3d 947 (2003). Yet the MWL expansions occur by operation of law, bypassing entirely the Water Code’s processes for protecting junior water rights and instream flows. Therefore, these provisions of the MWL violate the procedural due process rights of junior water right holders. See Sheep Mountain Cattle Co. v. Dep’t of Ecology, 45 Wash.App. 427, 431, 726 P.2d 55 (1986).

This provision also violates substantive due process. A municipality or developer’s expansion or change of its place of use can harm other water rights holders both by increasing the amount of water used to by changing the pattern of return flows. Moving the water far from the point of diversion can reduce the amount of water available for junior users. As discussed above, the retroactive expansion of certain water right to the detriment of others violates due process.

REQUEST FOR ACTION

The Petitioners request that you investigate the constitutional violations outlined above and take action to invalidate those provisions of the MWL that facially violate the Washington and United States Constitutions. We would like to work with you to address these problems. However, if no other option is available to us to resolve the issues raised in this letter, then we may take further legal action. If you have any questions or otherwise wish to discuss this matter further, please contact undersigned counsel.

Sincerely,

Patti Goldman
Shaun Goho
Attorneys for Petitioners