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6 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **FOR KING COUNTY**

8 LUMMI INDIAN NATION, MAKAH
9 INDIAN TRIBE, QUILEUTE INDIAN
10 TRIBE, QUINAULT INDIAN
11 NATION, SQUAXIN ISLAND
12 INDIAN TRIBE, SUQUAMISH
13 INDIAN TRIBE, and the TULALIP
14 TRIBES, federally recognized Indian
15 tribes,

16 Plaintiffs,

17 vs.

18 STATE OF WASHINGTON;
19 CHRISTINE GREGOIRE, Governor of
20 the State of Washington;
21 WASHINGTON DEPARTMENT OF
22 ECOLOGY; JAY MANNING, Director
23 of the Washington Department of
24 Ecology; WASHINGTON
25 DEPARTMENT OF HEALTH; and
26 MARY SELECKY, Secretary of Health
for the State of Washington,

Defendants.

No: **06-2-40103-4 SEA**

SUMMONS ON COMPLAINT

[20 days; CR 4(b)(2)]

TO THE DEFENDANTS: A lawsuit has been started against you in the King County Superior Court by plaintiffs. Plaintiffs' claims are stated in the written complaint, which is served upon you with this summons.

RECEIVED

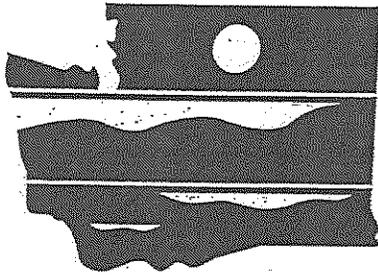
DEC 27 2006

SUMMONS ON COMPLAINT

--1--

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR
ZIONTZ, CHESTNUT, VARNELL
BERLEY & SLONIM
2101 Fourth Avenue, Suite 1230
Seattle, Washington 98121
(206) 448-1230

(copy of) ORIGINAL



WASHINGTON STATE
DEPARTMENT OF
E C O L O G Y

Washington State
Department of Ecology

P.O. Box 47600

Olympia, WA 98504-7600

360-407-7000 Executive Reception

Fax 360-407-6989

www.ecy.wa.gov

Headquarters Executive Offices Fax

TO: Sharon Nelson

FAX NUMBER: 360-586-6760 DATE: 12/27/06

PHONE: # OF PAGES: 30

FROM: Bernadette Taucer FAX #: 360-407-6989

PHONE: 407-7010

NOTES: Faxing complete docs
for summons
06-2-40103-YSEM

Lummi, Makah, Quileute, Quinault,
Squamish, & Tulalip Tribes

vs.

WA, Ecy, & Doh

I am sending you original in today's
courier mail

1 In order to defend against this lawsuit, you must respond to the complaint by stating
2 your defense in writing, and by serving a copy upon the person signing this summons within
3 20 days after the service of this summons, excluding the day of service, or a default judgment
4 may be entered against you without notice. A default judgment is one where plaintiff is
5 entitled to what she asks for because you have not responded. If you serve a notice of
6 appearance on the undersigned person, you are entitled to notice before a judgment may be
7 entered.
8

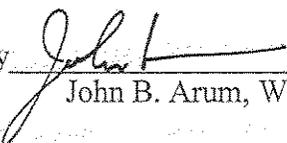
9 You may demand that the plaintiff file this lawsuit with the court. If you do so, the
10 demand must be in writing and must be served upon the person signing this summons. Within
11 14 days after you serve the demand, the plaintiff must file this lawsuit with the court, or the
12 service on you of this summons and complaint will be void.
13

14 If you wish to seek the advice of an attorney in this matter, you should do so promptly
15 so that your written response, if any, may be served on time.

16 This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the
17 State of Washington.

18 Dated: December 26, 2006.
19

20
21 ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM

22
23 By 
24 John B. Arum, WSBA # 19813
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for the State of Washington,

Defendants.

No:

06-2-40103-4 SEA

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

RECEIVED

DEC 27 2006

STATEMENT OF THE CASE

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

1. In this action, the Lummi Indian Nation, Makah Indian Tribe, Quileute Indian
Tribe, Quinault Indian Nation, Squaxin Island Tribe, Suquamish Indian Tribe, and the Tulalip

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

COPY

ZIONTZ, CHESTNUT, VARNELL
BERLEY & SLONIM
2101 Fourth Avenue, Suite 1230
Seattle, Washington 98121
(206) 448-1230

1 Tribes (the "Tribes") on their own behalf and as taxpayers on behalf of all taxpayers of the
2 State of Washington ask the Court to declare unconstitutional and enjoin the operation of
3 certain provisions of 2003 Wash. Laws, 1st Sp. Sess., Ch. 5 (referred to herein as "SSHB
4 1338"). The provisions of SSBH 1338 challenged in this action:

- 5 • retroactively reverse the Supreme Court's authoritative construction of the State
6 Water Code in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-90,
7 957 P.2d 1241 (1998), by retroactively validating water right certificates issued
8 by the State to various types of non-municipal water purveyors on the basis of
9 system capacity rather than actual beneficial use (Section 6(2) and (3)) ;
- 10 • retroactively revitalize water rights previously relinquished, in whole or in part,
11 by non-municipal water purveyors, such as private water systems, developers,
12 resorts, and mobile home parks, due to five consecutive years of nonuse, by
13 defining such entities as "municipal water suppliers" (Section 1(3) and (4));
- 14 • without procedural or substantive protections for existing water rights,
15 retroactively and automatically change the legal place of use of certain water
16 rights from the place of use provided for in a water right certificate issued by
17 the Department of Ecology to the service area boundaries contained in a water
18 system plan approved by the Department of Health or a local legislative body
19 (Section 5(2)); and
- 20 • without procedural or substantive protections for existing water rights,
21 retroactively and automatically eliminate restrictions on the population allowed
22 to be served and the permissible number of service connections set forth in a
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1 water rights certificate issued by the Department of Ecology to the number of
2 service connections specified in a water system plan approved by the
3 Department of Health (Section 4(4) and (5)).

4 The Tribes contend that these provisions constitute retroactive legislation that infringes on
5 vested rights in violation of the Due Process Clauses of the Washington and United States
6 Constitutions. The Tribes also contend that the Legislature's attempt to retroactively overrule
7 the Supreme Court's authoritative construction of the Water Code in *Theodoratus* infringes on
8 the judicial power of the courts in violation of the Washington Constitution's separation of
9 powers.
10

11 JURISDICTION

12 2. This Court has subject matter jurisdiction over this action pursuant to
13 RCW 7.24.010 and .030 because this action presents a justiciable controversy between parties
14 with direct, substantial and genuinely opposing interests in the constitutionality of a legislative
15 enactment. Venue for this action properly lies in this Court pursuant to RCW 4.92.010.
16

17 PARTIES

18 3. Each of the plaintiffs is a federally Indian tribe recognized by the Secretary of
19 the Interior. Each of the Tribes holds a treaty right of taking fish at all usual and accustomed
20 grounds and stations in common with other Washington citizens. The Tribes have an interest
21 in instream flows necessary to support their Treaty fisheries.¹
22

23 4. Some of the Tribes hold state water right permits and certificates issued by the
24 State of Washington that will be impaired by the retroactive expansion of more senior water
25 rights under SSHB 1338.
26

1 5. The Tribes are taxpayers of the State of Washington and will be adversely
2 affected by the fiscal impact of SSHB 1338 with respect to State expenditures for watershed
3 planning, water system planning, water rights administration, and water rights adjudications.
4 By letter dated May 22, 2006, the Tribes requested Attorney General Rob McKenna to bring
5 an action on behalf of Washington's taxpayers to challenge the constitutionality of SSHB
6 1338. By letter of June 29, 2006, the Office of the Attorney General declined to bring such an
7 action.
8

9 6. Defendant State of Washington was established by Congress in 1889 and
10 enacted SSHB 1338.

11 7. Defendant Christine Gregoire is the Governor of the State of Washington.
12 Governor Gregoire is the State's chief executive official and is charged with execution of the
13 State's laws, including SSHB 1338. Governor Gregoire is sued in her official capacity.
14

15 8. Defendant Washington Department of Ecology is the agency charged by State
16 law with implementation of the State's Water Code and other laws relating to water rights and
17 water resources, including SSHB 1338.

18 9. Defendant Jay Manning is the Director of the Washington Department of
19 Ecology and is sued in his official capacity.
20

21 10. Defendant Washington Department of Health is the agency charged by law with
22 implementation of State laws relating to public water supply systems, including SSHB 1338.

23 11. Defendant Mary Selecky is the Washington Secretary of Health. Defendant
24 Selecky administers the Washington Department of Health and is sued in her official capacity.
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¹ The Tribes' federal reserved water rights are not at issue in this matter.

1 STATEMENT OF FACTS

2 I. Washington Water Law Principles.

3 12. Except for water rights established under federal law, the use and appropriation
4 of water in Washington is governed by the Water Code, Ch. 90.03 RCW, and other chapters in
5 Title 90. The Water Code codifies the common law prior appropriation doctrine, in which
6 water rights are accorded priority based on the first-in-time, first-in-right principle. RCW
7 90.03.010. In addition, the Water Code requires an applicant for a new water right to obtain a
8 permit from the Department of Ecology to appropriate water. RCW 90.03.290.

9 13. Although an Ecology permit is a prerequisite for obtaining a new state-based
10 water right, a water right is perfected and maintained by applying water to a beneficial use.
11 Once a water right permit holder demonstrates perfection through beneficial use, Ecology must
12 issue a water right certificate. RCW 90.03.330(1). The priority date on the certificate relates
13 back to the date of the permit application. RCW 90.03.340.

14 14. In *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-90, 957 P.2d
15 1241 (1998), the Supreme Court held that a State-issued water right certificate must be based
16 on actual beneficial use and may not be issued on the basis of system capacity.

17 15. Consistent with the beneficial use principle, RCW 90.14.160 provides that a
18 water right holder who “voluntarily fails, without sufficient cause, to beneficially use all or any
19 part of [a] right to divert or withdraw for any period of five successive years after July 1, 1967,
20 shall relinquish such right or portion thereof, and said right or portion thereof shall revert to the
21 state.” The term “sufficient cause” is defined in RCW 90.14.140, which provides that a water
22 right “claimed for municipal water supply purposes” is not subject to relinquishment. RCW
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1 90.14.140(2)(d). The Supreme Court has held that the statutory exceptions to relinquishment
2 must be "narrowly construed in order to give effect to the legislative intent underlying the
3 general provisions." *R.D. Merrill Corp. v. Pollution Control Hearings Board*, 137 Wn.2d 118,
4 139, 969 P.2d 458 (1999). In *Theodoratus*, 135 Wn.2d at 594, the Supreme Court held that a
5 private water purveyor is not a municipality or municipal water supplier.
6

7 16. The Water Code provides the Department of Ecology with the authority to
8 establish, by rule, minimum instream flows necessary to sustain fish, wildlife and other
9 environmental values. RCW 90.03.247; *see also* RCW 90.22.010; RCW 90.54.040. Once
10 established by rule, minimum instream flows constitute water rights with the priority date
11 being the rule's effective date. RCW 90.03.345. The Supreme Court has held that "a minimum
12 flow set by rule is an existing right which may not be impaired by subsequent
13 [appropriations]." *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 81, 11 P.3d
14 726 (2000).
15

16 17. The Water Code provides that a water right "shall be and remain appurtenant to
17 the land or place upon which the same is used." RCW 90.03.380(1). However, the place of
18 use and other attributes of a water right may be changed if the Department of Ecology
19 determines that "such change can be made without detriment or injury to existing rights." *Id.*;
20 RCW 90.44.100(2) (authorizing changes to ground water rights: "other existing rights shall not
21 be impaired"). Washington water law incorporates procedures designed to protect existing
22 rights and interests from impairment by water right changes, including publication of notice, a
23 protest period, a Department of Ecology investigation into the effects of the proposed change,
24 and a right of appeal to the Pollution Control Hearings Board. *See* RCW 43.21B.110(1),
25
26

1 90.03.280; 90.03.380(1); 90.44.100(2). These procedures provide a forum and means to
2 determine if proposed transfers of state-based water rights will impair other parties' water
3 rights.

4 18. Impairment of existing rights prohibited by RCW 90.03.380(1) and
5 90.44.100(2) may include transfers that affect the pattern of return flows that others rely upon
6 for the exercise of their water rights. Water diversions for public water supply purposes
7 generally return a substantial portion of the diversion to the stream as return flow, for example
8 through wastewater treatment facilities. These return flows are relied upon as water supply for
9 other water users, both instream and out of stream. Expansion of a public water supplier's
10 service area or the number of authorized connections also can reduce return flows to the
11 detriment of existing rights and uses.

12
13
14 **II. Changes to Washington Water Law Made By SSHB 1338.**

15 19. The Washington State legislature approved SSHB 1338 on June 10, 2003.
16 Governor Gary Locke signed SSHB 1338 into law on June 20, 2003, and it became effective
17 September 9, 2003. SSHB 1338 made several important changes to Washington water law that
18 affect the Tribes' existing water rights and interests.

19 **A. Elimination of Beneficial Use Requirement.**

20 20. The first major change made by SSHB 1338 is to reverse the holding in
21 *Theodoratus* and retroactively validate water right certificates previously issued by the State to
22 various types of water purveyors, including private developers, on the basis of system capacity.
23 Section 6(3) of SSHB 1338, now codified as RCW 90.03.330(3), provides that a water right
24 certificate issued prior to the effective date of the legislation is a "right in good standing" if it
25
26

1 was issued "for municipal water supply purposes as defined in RCW 90.03.015 . . . based on an
2 administrative policy for issuing such certificates once works for diverting or withdrawing and
3 distributing water for municipal supply purposes were constructed rather than after the water
4 had been placed to actual beneficial use."

5
6 21. Section 1(4) of the legislation, now codified as RCW 90.03.015(4), defines
7 "municipal water supply purposes" to include "a beneficial use of water . . . for residential
8 purposes through fifteen or more residential service connections or for providing residential
9 use of water for a nonresidential population that is, on average, at least twenty-five people for
10 at least sixty days a year." The new definition of "municipal water supply purposes" includes
11 non-governmental developers and other entities held not to be municipalities in *Theodoratus*.

12
13 22. The net effect of these two provisions is to redefine water systems for private
14 residential developments, hotels, trailer parks and mobile home parks, as "municipal water
15 supply" systems and to retroactively validate water right certificates previously issued on the
16 basis of system capacity instead of actual beneficial use.

17 **B. Retroactive Exemptions from Relinquishment.**

18
19 23. A second major change made by SSHB 1338 is to retroactively exempt from the
20 operation of the State's relinquishment statute, RCW 90.14.160, water rights held by non-
21 municipal public water systems, including residential developments, resorts and mobile home
22 parks, by including them in a new definition of "municipal water supply purposes."

23
24 24. Under Section 1(4) of SSHB 1338, now codified as RCW 90.03.015(4), the
25 beneficial use of water by a *private* or other non-municipal entity is deemed by operation of
26 law to be for "municipal water supply purposes" if it is "for residential purposes through

1 fifteen or more residential service connections or for providing residential use of water for a
2 nonresidential population that is, on average, at least twenty-five people for at least sixty days
3 a year.”

4
5 25. Section 1(3) of the legislation, now codified as RCW 90.03.015(3), defines a
6 “municipal water supplier” as an entity that supplies water for municipal water supply
7 purposes under Section 1(4), RCW 90.03.015(4).

8 26. Section 3 of the legislation, now codified as RCW 90.03.560, requires the
9 Department of Ecology to amend existing water rights certificates held by a “municipal water
10 supplier” to state that the supplier’s water rights are held for “municipal water supply
11 purposes.”

12 27. The effect of these provisions is to convert private and other non-municipal
13 entities that the Supreme Court held in *Theodoratus* were not municipalities into “municipal
14 water suppliers” and exempt past, present and future non-use of water rights held by such
15 entities for “municipal water supply purposes,” as defined in Section 1(4) of the legislation,
16 RCW 90.03.015, from the State’s relinquishment statute.

17
18 **C. Changes in the Place of Use.**

19 28. A third major change effectuated by SSHB 1338 is to change, by operation of
20 law, the place of use of certain water rights held for what the legislation defines to be
21 “municipal water supply purposes.”

22 29. Section 5(2) of SESSH 1338, now codified as RCW 90.03.386(2), decrees that
23 the “effect of the department of health’s approval of a planning or engineering document that
24 describes a municipal water supplier’s service area under chapter 43.20 RCW, or the local
25

1 legislative authority's approval of service area boundaries in accordance with procedures
2 adopted pursuant to chapter 70.116 RCW, is that the place of use of a surface water right or
3 ground water right used by the supplier includes any portion of the approved service area that
4 was not previously within the place of use for the water right if the supplier is in compliance
5 with the terms of the water system plan or small water system management program."

6
7 30. The changes to the place of use of existing water rights certificates effectuated
8 by Section 5(2) occur by operation of law and do not require approval of a change of use
9 application by the Department of Ecology under RCW 90.03.380(1). The changes in the place
10 of use decreed by SSHB 1338 occur without any of the procedural protections Washington law
11 affords to existing rights and interests in water rights change proceedings. Neither chapter
12 43.20 RCW nor chapter 70.116 RCW requires that existing water rights and interests be
13 considered or protected when the Department of Health approves a water system plan or a
14 local legislative authority approves changes in service area boundaries.

15
16 31. Section 5(2) of SSHB 1338 applies not only to municipalities, but through
17 application of the definitions in Sections 1(3) and 1(4) of the legislation, RCW 90.03.015(3)
18 and (4), to private and other non-municipal entities as well.

19
20 32. Section 5(2) of SSHB 1338 requires that service area boundaries be consistent
21 with land use requirements and watershed plans but, unlike RCW 90.03.380(1), it does not
22 require that the automatic changes in the place of use to reflect service area boundaries be
23 consistent with and not impair existing water rights.

1 **D. Changes in Population Served and Number of Service Connections.**

2 33. A fourth major change made by SSHB 1338 is to expand the limits on the
3 population served and the number of service connections provided in water rights certificates
4 held by what the legislation defines to be "municipal water suppliers." Like the changes in
5 place of use decreed in Section 5(2) of the legislation, these changes to population and service
6 connection limits occur by operation of law and without substantive or procedural protections
7 for existing water rights.
8

9 34. Sections 4(4) and 4(5) of SSHB 1338, now codified as RCW 90.03.260(4) and
10 (5), provide that if a "municipal water supplier" has a Department of Health-approved water
11 system plan or another Department of Health approval to serve a specified number of service
12 connections, the population to be served and service limits in a water rights certificate "is not
13 an attribute limiting exercise of the water right as long as the number of service connections to
14 be served under the right is consistent with the approved water system plan or specified
15 number." These changes to existing water rights certificates effectuated by Sections 4(4) and
16 4(5) of SSHB 1338 occur by operation of law and do not require approval of a change of use
17 application by the Department of Ecology under RCW 90.03.380(1).
18

19 35. Sections 4(4) and 4(5) of SSHB 1338 apply not only to municipalities, but
20 through application of the definitions in Sections 1(3) and 1(4) of the legislation, RCW
21 90.03.015(3) and (4), to private and other non-municipal entities as well.
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1 **III. The Changes to Washington Water Law Made by SSHB 1338 Will Impair the**
2 **Tribes' Rights and Interests.**

3 36. Since time immemorial, salmon and other anadromous fish have sustained the
4 Tribes' culture, economy and way of life. Salmon fishing continues to be essential to the
5 economic welfare of the Tribes and the preservation of their culture.

6 37. Each of the Tribes has a treaty right to fish at their usual and accustomed
7 grounds and stations in common with other Washington citizens.

8 38. Salmon and other anadromous fish are born in freshwater, migrate to the sea,
9 and return to their native streams to spawn. While in freshwater, salmon require flows of cool,
10 clean water for migration, spawning and rearing. The productivity of wild salmon runs
11 depends in large measure on the quantity and quality of water available to provide freshwater
12 habitat.

13 39. Washington streams within the Tribes' usual and accustomed fishing areas
14 experience natural periods of low flows due to drought, especially during the summer and fall.
15 Artificial reductions in flows during drought periods harm salmon and other anadromous fish,
16 by reducing available spawning and rearing habitat, creating barriers to migration, elevating
17 water temperatures, and impairing water quality.

18 40. State statutes authorize the Department of Ecology to establish, by regulation,
19 minimum instream flows for the purpose of protecting salmon and other anadromous fish
20 stocks. *See* RCW 90.03.247, 90.22.010. Pursuant to this authority, Ecology has promulgated
21 regulations establishing minimum instream flows for many of the major river basins in
22 Washington, including many river systems that lie within the Tribes' usual and accustomed
23 fishing areas. Under RCW 90.03.345, these minimum instream flows are water rights with
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1 priority dates as of the effective date of the regulations. Because minimum instream flows
2 have been set over the most recent 30 years, they are junior in priority to many other water
3 rights in the same watersheds.

4 41. In many watersheds within the Tribes' usual and accustomed fishing areas,
5 stream flows during dry periods are insufficient to both satisfy existing water rights and meet
6 the habitat needs of anadromous fish. In at least 16 watersheds where salmon are found
7 (representing about a quarter of the state's basins), waters are "over-appropriated," meaning
8 that stream flows are inadequate to satisfy both existing out-of-stream rights and minimum
9 instream flows. These basins also contain 65% of the state's population.

10 42. Wild runs of salmon and other anadromous fish within the Tribes' usual and
11 accustomed fishing areas Washington are highly depressed in relation to their historic
12 abundance. Several populations of anadromous fish have been listed or proposed for listing
13 under the federal Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* Artificial reductions in
14 natural flows resulting from surface water diversions and groundwater withdrawals are a
15 contributing cause of the decline of many wild runs of anadromous fish in Washington. The
16 Washington Legislature has found that "many of the salmon stocks of Washington state are
17 critically reduced from their sustainable level," that "immediate action is required to restore its
18 fishery" and that "habitat restoration is a vital component of salmon recovery efforts." RCW
19 77.85.005, 77.95.010, 77.110.010.

20 43. Population growth in Washington is resulting in ever increasing demand for
21 water. Increases in appropriations during dry periods will further degrade habitat for wild
22

1 salmon and other anadromous fish and lead to further declines in the abundance of wild stocks
2 of anadromous fish within the Tribes' usual and accustomed fishing areas.

3 44. Whether by retroactively validating or expanding water rights certificates based
4 on system capacity instead of actual beneficial use, retroactively exempting non-municipal
5 water rights from the operation of the relinquishment statute, retroactively decreeing the
6 expansion of the place of use of water rights, or retroactively authorizing water purveyors to
7 exceed the population limits and service connections provided for in their water right
8 certificates, SSHB 1338 authorizes increases in appropriations for out-of-stream uses in
9 already overappropriated watersheds within the Tribes' usual and accustomed fishing areas
10 where minimum instream flows are not presently being met. The new or expanded
11 appropriations retroactively authorized by SSHB 1338, individually as well as cumulatively,
12 will lead to further reductions in stream flows during drought periods throughout the Tribes'
13 usual and accustomed fishing areas and reduce the capacity of streams within the Tribe's usual
14 and accustomed fishing areas to sustain the healthy wild stocks of salmon and other
15 anadromous fish.

16 45. Whether by retroactively validating or expanding water rights certificates based
17 on system capacity instead of actual beneficial use, retroactively exempting non-municipal
18 water rights from the operation of the relinquishment statute, retroactively decreeing the
19 expansion of the place of use of water rights, or retroactively authorizing water purveyors to
20 exceed the population limits and service connections provided for in their water right
21 certificates, SSHB 1338 directly impairs all water rights that are less senior than the water
22 rights expanded by the legislation, including junior water rights held by the Tribes.
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1 46. Prior to the enactment of SSHB 1338, the Tribes regularly availed themselves
2 of the administrative remedies provided for in the State's water rights change statutes to protect
3 their rights and interests in administrative proceedings involving changes to water rights. But
4 for the enactment of SSHB 1338, the Tribes would continue to participate in water rights
5 change proceedings in cases where proposed changes in the place of use or limitations on
6 population served or service connections threaten to impair Tribal rights and interests.
7

8 47. By decreeing that the place of use for rights held for "municipal water supply
9 purposes" is coextensive with the service area provided for in a planning or engineering
10 document approved by the Department of Health or the service area boundaries approved by a
11 local legislative authority, SSHB 1338 eliminates or sharply curtails the protections normally
12 afforded to existing rights holders in proceedings involving changes in the place of use of a
13 water right. SSHB 1338 also eliminates or sharply curtails the Tribes' rights to receive notice,
14 provide comment, and administratively appeal proposed changes in the place of use that may
15 affect Tribal rights and interests.
16

17 48. By authorizing water purveyors to exceed the population limits and service
18 connections provided for in their water right certificates on the basis of Department of Health
19 decisions approving water system plans and service connection numbers, SSHB 1338
20 eliminates or sharply curtails the protections normally afforded to existing rights holders in
21 proceedings involving such changes to water rights. SSHB 1338 also eliminates or sharply
22 curtails the Tribes' rights to receive notice, provide comment, and administratively appeal
23 proposed changes in the population allowed to be served or permitted number of service
24 connections that may affect Tribal rights and interests.
25
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1 CAUSES OF ACTION

2 First Cause of Action
3 (Elimination of Beneficial Use Requirement)

4 49. The allegations set forth in the previous paragraphs are incorporated by
5 reference.

6 50. A retroactive law violates due process clauses of the Washington and United
7 States Constitutions when it deprives an entity of a vested right. While retroactive legislation
8 may be permissible if it is curative or remedial, even a curative or remedial statute may not
9 apply retroactively if it affects a substantive or vested right.

10 51. A water right is a form of property that may not be diminished without due
11 process of law.

12 52. In *Theodoratus*, 135 Wn.2d at 592, the Supreme Court held that, under the
13 Water Code, a water right certificate may be issued by the State only in the amount of water
14 actually put to beneficial use and cannot be based upon system capacity. The Court also held
15 that a private developer is not a "municipality" for the purposes of the Water Code. *Id.* at 594.

16 53. Section 6(3) SSHB 1338, now codified as RCW 90.03.330(3), retroactively
17 validates water certificates that were issued by the State based on system capacity if they are
18 held for "municipal water supply purposes." Section 1(4) of SSHB 1338, now codified as
19 RCW 90.03.15(4), defines "municipal water supply purposes" to include clearly non-municipal
20 water uses, such as private developments.

21 54. By retroactively validating and/or expanding water right certificates issued on
22 the basis of system capacity that were held by the Washington Supreme Court in *Theodoratus*
23 to be invalid or diminished, Sections 1(4) and 6(3) of SSHB 1338, RCW 90.03.15(4) and
24
25
26

1 90.03.330(3), infringes upon the vested rights of other entities, including the Tribes, to the
2 same, finite water resources. In doing so, these provisions violate the Due Process Clauses of
3 the Washington and United States Constitutions.

4 55. Under Article IV, Section 1 of the Washington Constitution,
5 the "judicial power of the state" is vested in the courts. Under the separation of powers
6 doctrine, the legislature may not interfere with the judicial power of the courts by retroactively
7 overruling a judicial decision that authoritatively construes statutory language. By
8 retroactively overruling the Washington Supreme Court's authoritative construction of the
9 Water Code in *Theodoratus*, Sections 1(4) and 6(3) of SSHB 1338, RCW 90.03.15(4) and
10 90.03.330(3), infringe on the judicial power entrusted to the courts by Article IV, Section 1 of
11 the Washington Constitution and violate the Constitution's separation of powers.
12

13
14 **Second Cause of Action**
(Retroactive Exemptions from Relinquishment)

15 56. The allegations set forth in the previous paragraphs are incorporated by
16 reference.

17
18 57. RCW 90.14.160 provides that water rights that are not beneficially used, either
19 in whole or in part, for any period of five successive years after July 1, 1967 are relinquished
20 and revert to the State unless there is "sufficient cause" for their non-use or are otherwise
21 exempt from relinquishment. RCW 90.14.140 defines "sufficient cause" and exempts water
22 rights "claimed for municipal water supply purposes" from relinquishment. RCW
23 90.14.140(2)(d).

24 58. By including heretofore non-municipal entities, such as private developments,
25 resorts, and mobile home parks, in a new definition of "municipal water supply purposes,"
26

1 Sections 1(3), 1(4) and 3 of SSHB 1338, RCW 90.03.015(3) and(4) and RCW 90.03.560,
2 purport to retroactively exempt water rights held for non-municipal purposes, from
3 relinquishment. In doing so, the statute brings back to life or expands water rights that had
4 previously reverted to the State in whole or in part due to five consecutive years of non-use
5 without sufficient cause.

6
7 59. By retroactively validating and expanding water rights that have previously
8 been relinquished in whole or in part under RCW 90.14.160, Sections 1(3) , 1(4) and 3 of
9 SSHB 1338, RCW 90.03.015(3) and (4) and RCW 90.03.560, infringe on the vested rights of
10 other water right holders, including the Tribes, to the same, finite water resources. In doing
11 so, that provision violates the Due Process Clauses of the Washington and United States
12 Constitutions.

13
14 **Third Cause of Action**
15 **(Changes in the Place of Use)**

16 60. The allegations set forth in the previous paragraphs are incorporated by
17 reference.

18 61. The Water Code allows a change in the place of use of a water right only if the
19 Department of Ecology determines that "such change can be made without detriment or injury
20 to existing rights." RCW 90.03.380(1); RCW 90.44.100(2). State law affords persons with an
21 interest in a proposed change in place of use the right to notice of the proposed change, the
22 right to submit a protest or other comments, and the right to administratively appeal a final
23 decision approving such a change. See RCW 43.21B.110(1), 90.03.280; 90.03.380(1);
24 90.44.100(2).
25
26

1 62. By operation of law, Section 5(2) of SSHB 1338, RCW 90.03.386(2), expands
2 the place of use of all water rights held for "municipal water supply purposes" to encompass
3 the boundaries set forth in a "planning or engineering document" approved by the Department
4 of Health that describes the purveyor's service area, or the service area boundaries approved by
5 a local legislative authority. The Department of Health is not required under chapter 43.20
6 RCW to consider and protect existing water rights when it approves water system plans. Local
7 legislative bodies are similarly not required by chapter 70.116 RCW to consider and protect
8 existing water rights when approving changes to service area boundaries.
9

10 63. An expansion of the place of use of a water purveyor's certificate can have
11 adverse effects on other existing water rights both by increasing the overall use of a water right
12 through expansion of the purveyor's customer base or by affecting the pattern of return flows
13 that others rely upon for the exercise of their water rights.
14

15 64. By retrospectively expanding the place of use of water rights defined by the
16 legislation to be held for "municipal water supply purposes" on the basis of water system plans
17 previously approved by the Department of Health or system area boundaries previously
18 approved by a local legislative body, Section 5(2) of SSHB 1338, codified as RCW
19 90.03.386(2), infringes on the vested rights of other existing water right holders, including the
20 Tribes, to the same, finite water resources. In doing so, the provision violates the Due Process
21 Clauses of the Washington and United States Constitutions.
22

23 65. By authorizing future expansions of the place of use of water rights defined to
24 be held for "municipal water supply purposes" on the basis of water system plans to be
25 approved in the future by the Department of Health or service area boundaries approved by a
26

1 local legislative body, Section 5(2) of SSHB 1338, codified as RCW 90.03.386(2), allows the
2 Department of Health and local legislative bodies to effectively approve changes in the place
3 of use of a water right without: (1) adequate notice to those with existing rights and interests
4 affected by the proposed change, (2) the opportunity for such entities to protest such changes,
5 or (3) any requirement that the decision maker consider and protect existing water rights and
6 interests when approving a change. By stripping the holders of existing rights and interests of
7 these procedural protections, the provision violates the Due Process Clauses of the Washington
8 and United States Constitutions.
9

10 **Fourth Cause of Action**
11 **(Changes in Population Served and Number of Service Connections)**

12 66. The allegations set forth in the previous paragraphs are incorporated by
13 reference.

14 67. By operation of law, Sections 4(4) and 4(5) of SSHB 1338, codified as RCW
15 90.03.260(4) and (5), expand the population allowed to be served and the number of permitted
16 service connections set forth in a water rights certificate held for "municipal water supply
17 purposes" to the limits provided for in a water system plan approved by the Department of
18 Health or other Department of Health approval of a specified number of service connections.
19 The Department of Health is not required to consider the effects on existing water rights when
20 it approves water system plans or numbers of service connections under chapter 43.20 RCW.
21

22 68. An expansion of the population to be served or number of service connections
23 set forth in a water rights certificate can have adverse effects on other existing water rights by
24 increasing the overall use of a water right through expansion of the purveyor's customer base.
25
26

1 90.03.386(2) and RCW 90.03.560, to be unconstitutional and invalid because they violate the
2 Due Process Clauses of the Washington and United States Constitutions and/or the separation
3 of powers established by Article IV, Section 1 of the Washington Constitution.

4 B. Enjoin the defendants from implementing or enforcing those provisions of
5 SSHB 1338 held to be unconstitutional when carrying out their responsibilities to administer
6 the Water Code and other statutes relating to water resources and public water supplies

7 C. Award the Tribes their costs and attorneys fees.

8 D. Grant the Tribes any other relief the Court deems just and appropriate.

9 Respectfully submitted this 26th day of December, 2006

10
11
12 

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KING COUNTY SUPERIOR COURT
CASE ASSIGNMENT DESIGNATION
and
CASE INFORMATION COVER SHEET
(cics)

In accordance with LR82(e), a faulty document fee of \$15 will be assessed to new case filings missing this sheet pursuant to King County Code 4.71.100.

CASE NUMBER: 06-2-40103-4 SEA

CASE CAPTION: Lummi Indian Nation, et al., v. State of Washington et al.

I certify that this case meets the case assignment criteria, described in King County LR 82(e), for the:

X Seattle Area, defined as:

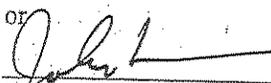
All of King County north of Interstate 90 and including all of the Interstate 90 right-of-way; all the cities of Seattle, Mercer Island, Bellevue, Issaquah and North Bend; and all of Vashon and Maury Islands.

 Kent Area, defined as:

All of King County south of Interstate 90 except those areas included in the Seattle Case Assignment Area.

Signature of Petitioner/Plaintiff

Date

or


Signature of Attorney for
Petitioner/Plaintiff

26 December 2006
Date

No. 19813

WSBA Number

RECEIVED

DEC 27 2006

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

**KING COUNTY SUPERIOR COURT
CASE ASSIGNMENT DESIGNATION
and
CASE INFORMATION COVER SHEET**

Please check one category that best describes this case for indexing purposes. Accurate case indexing not only saves time but helps in forecasting judicial resources. A faulty document fee of \$15 will be assessed to new case filings missing this sheet pursuant to Administrative Rule 2 and King County Code 4.71.100.

APPEAL/REVIEW

- Administrative Law Review (ALR 2)*
- DOL Implied Consent—Test Refusal —only RCW 46.20.308 (DOL 2)*
- DOL- all other appeals (ALR 2) *

CONTRACT/COMMERCIAL

- Breach of Contract (COM 2)*
- Commercial Contract (COM 2)*
- Commercial Non-Contract (COL 2)*
- Meretricious Relationship (MER 2)*
- Third Party Collection (COL 2)*

DOMESTIC RELATIONS

- Annulment/Invalidity (INV3)*
with dependent children? Y / N; wife pregnant? Y / N
- Child Custody (CUS 3)*
- Nonparental Custody (CUS 3)*
- Dissolution With Children (DIC 3)*
- Dissolution With No Children (DIN 3)*
wife pregnant? Y / N
- Enforcement/Show Cause- Out of County (MSC 3)
- Establish Residential Sched/Parenting Plan(PPS 3)* ££
- Establish Supprt Only (PPS 3)* ££
- Legal Separation (SEP 3)*
with dependent children? Y / N; wife pregnant? Y / N
- Mandatory Wage Assignment (MWA 3)
- Modification (MOD 3)*
- Modification - Support Only (MDS 3)*
- Out-of-state Custody Order Registration (FJU 3)
- Out-of-State Support Court Order Registration (FJU 3)
- Reciprocal, Respondent Out of County (ROC 3)
- Reciprocal, Respondent in County (RIC 3)
- Relocation Objection/Modification (MOD 3)*

ADOPTION/PATERNITY

- Adoption (ADP 5)
- Challenge to Acknowledgment of Paternity (PAT 5)*
- Challenge to Denial of Paternity (PAT 5)*
- Confidential Intermediary (MSC 5)
- Establish Parenting Plan-Existing King County Paternity (MSC 5)*
- Initial Pre-Placement Report (PPR 5)
- Modification (MOD 5)*
- Modification-Support Only (MDS 5)*
- Paternity, Establish/Disestablish (PAT 5)*
- Paternity/UIFSA (PUR 5)*
- Out-of-State Custody Order Registration (FJU 5)
- Out-of-State Support Order Registration (FJU5)
- Relinquishment (REL 5)
- Relocation Objection/Modification (MOD 5)*
- Rescission of Acknowledgment of Paternity (PAT 5)*
- Rescission of Denial of Paternity (PAT 5)*
- Termination of Parent-Child Relationship (TER 5)

DOMESTIC VIOLENCE/ANTIHARASSMENT

- Civil Harassment (HAR 2)
- Confidential Name Change (CHN 5)
- Domestic Violence (DVP 2)
- Domestic Violence with Children (DVC 2)
- Foreign Protection Order (FPO 2)
- Vulnerable Adult Protection (VAP 2)

££ Paternity Affidavit or Existing/Paternity is not an issue and NO other case exists in King County* The filing party will be given an appropriate case schedule. ** Case schedule will be issued after hearing and findings.

**KING COUNTY SUPERIOR COURT
CASE ASSIGNMENT DESIGNATION**

and

CASE INFORMATION COVER SHEET

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PROPERTY RIGHTS

- Condemnation/Eminent Domain (CON 2)*
- Foreclosure (FOR 2)*
- Land Use Petition (LUP 2)*
- Property Fairness (PFA 2)*
- Quiet Title (QTI 2)*
- Unlawful Detainer (UND 2)

JUDGMENT

- Confession of Judgment (MSC 2)*
- Judgment, Another County, Abstract (ABJ 2)
- Judgment, Another State or Country (FJU 2)
- Tax Warrant (TAX 2)
- Transcript of Judgment (TRJ 2)

OTHER COMPLAINT/PETITION

- Action to Compel/Confirm Private Binding Arbitration (MSC 2)
- Certificate of Rehabilitation (MSC 2)
- Change of Name (CHN 2)
- Deposit of Surplus Funds (MSC 2)
- Emancipation of Minor (EOM 2)
- Frivolous Claim of Lien (MSC 2)
- Injunction (INJ 2)*
- Interpleader (MSC 2)
- Malicious Harassment (MHA 2)*
- Non-Judicial Filing (MSC 2)
- Other Complaint/Petition(MSC 2)*
- Seizure of Property from the Commission of a Crime (SPC 2)*
- Seizure of Property Resulting from a Crime (SPR 2)*
- Structured Settlements (MSC 2)*
- Subpoena (MSC 2)

PROBATE/GUARDIANSHIP

- Absentee (ABS 4)
- Disclaimer (DSC4)
- Estate (EST 4)
- Foreign Will (FNW 4)
- Guardian (GDN4)
- Limited Guardianship (LGD 4)
- Minor Settlement (MST 4)
- Notice to Creditors - Only (NNC 4)
- Trust (TRS 4)
- Trust Estate Dispute Resolution Act/POA (TDR 4)
- Will Only—Deceased (WLL4)

TORT, MEDICAL MALPRACTICE

- Hospital (MED 2)*
- Medical Doctor (MED 2)*
- Other Health Care Professional (MED 2)*

TORT, MOTOR VEHICLE

- Death (TMV 2)*
- Non-Death Injuries (TMV 2)*
- Property Damage Only (TMV 2)*

TORT, NON-MOTOR VEHICLE

- Asbestos (PIN 2)**
- Implants (PIN 2)
- Other Malpractice (MAL 2)*
- Personal Injury (PIN 2)*
- Products Liability (TTO 2)*
- Property Damage (PRP 2)*
- Wrongful Death (WDE 2)*
- Tort, Other (TTO 2)*

WRIT

- Habeas Corpus (WHC 2)
- Mandamus (WRM 2)**

* * * Immediate TX Result Report (Dec. 27. 2006 11:03AM) * * *

1)
2)

Date	Time	Destination	Mode	TXtime	Page	Result	User Name	File No.
Dec. 27.	10:59AM	3605866760	G3TES>	4'05"	P.	30 OK		2302

QY03# : Batch
 : Memory
 : Standard
 : Reduction
 : RX Notice Req.

C : Confidential
 L : Send later
 D : Detail
 H : Stored/D. Server
 A : RX Notice

S : Transfer
 @ : Forwarding
 F : Fine
 * : LAN-Fax

P : Polling
 E : ECM
 U : Super Fine
 + : Delivery

