

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

LUMMI NATION et al.,

Plaintiffs,

No. 06-2-40103-4 SEA

v.

STATE OF WASHINGTON et al.

Defendants.

JOAN BURLINGAME, et al.,

Plaintiffs,

No. 06-2-28667-7 SEA

v.

STATE OF WASHINGTON et al.

Defendants.

**PLAINTIFF TRIBES' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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1 **INTRODUCTION**

2 Plaintiffs Lummi Nation, Makah Indian Tribe, Quinault Indian Nation, Squaxin Island
3 Indian Tribe, Suquamish Tribe and the Tulalip Tribes (collectively the “Tribes”) file this reply
4 brief in support of their motion for summary judgment. The Tribes’ motion seeks a declaration
5 that five provisions of the 2003 Municipal Water Law (MWL) constitute unconstitutional
6 retroactive legislation that violates the separation of powers and/or due process: (1) RCW
7 90.03.015(4), which defines the term “municipal water supply purposes” to retroactively
8 exempt water rights held by private entities for community domestic purposes from
9 relinquishment; (2) RCW 90.03.330(3), which declares rights represented by invalid system-
10 capacity certificates issued before the MWL’s effective date to be rights “in good standing”;
11 (3) RCW 90.03.330(2), which insulates system-capacity certificates from periodic review
12 under procedures applicable to all other inchoate rights; (4) RCW 90.03.386(2), which changes
13 the original place of use of so-called “municipal” water rights from the place described in a
14 certificate to the purveyor’s service area as defined in a water system plan approved by the
15 Department of Health without any protection for existing rights; and (5) RCW 90.03.260(4)
16 and (5), which declares that population and service connection limits appearing in water right
17 applications, permits and certificates are no longer “attribute[s] limiting exercise of the water
18 right.”¹

19 While the State and the intervenors generate a blizzard of technical arguments in
20 defense of these statutes, they fail to respond to the basic points that all of these statutes
21 overturn decades of established law, have retroactive effects on vested rights, and remove
22 long-standing procedural protections for the holders of existing water rights. For these and
23 other reasons discussed herein, the Court should grant the Tribes’ motion and declare the
24 statutes unconstitutional.

25 _____
26 ¹ As provided in a stipulated scheduling order filed on April 18, 2008, the Tribes’ claims regarding the
constitutionality of RCW 90.03.330(2) will be addressed in separate response and reply briefs to be filed on May
1 and May 12 respectively.

1 **ARGUMENT**

2 **I. SEPARATION OF POWERS CLAIMS.**

3 **A. RCW 90.03.330(3) Violates the Separation of Powers.**

4 The Tribes’ have previously demonstrated that the “good standing” declaration in RCW
5 90.03.330(3) violates the separation of powers under either of two plausible interpretations.
6 Under the first interpretation, RCW 90.03.330(3) declares that every right represented by a
7 system-capacity certificate issued for “municipal water supply purposes” before the effective
8 date of the MWL is a valid *perfected* right, regardless of whether water has been put to
9 beneficial use. Under this interpretation, RCW 90.03.330(3) violates the separation of powers
10 because it retroactively overrules the holding of *Theodoratus* that a water right may only be
11 perfected through beneficial use. *See* Burlingame Mot. at 16-20; Tribes’ Resp. to Defs’ Mot.
12 at 4-6.

13 Alternatively, RCW 90.03.330(3) can be construed to declare that all rights represented
14 by the relevant system capacity certificates are *inchoate* rights “in good standing,” regardless
15 of past failures to comply with the reasonable diligence requirement of RCW 90.03.460 and
16 other requirements applicable to inchoate rights. Under this alternative interpretation, RCW
17 90.03.330(3) still violates the separation of powers because it constitutes an improper
18 legislative determination that particular water right holders maintained their water rights in
19 good standing prior to the statute’s effective date by complying with RCW 90.03.460 and other
20 legal requirements. *See* Tribe’s Resp. to State’s Mot. at 9-11.

21 **1. The State’s Interpretation of RCW 90.03.330(3) Is Not Reasonable.**

22 The State principally defends the constitutionality of RCW 90.03.330(3) by proposing a
23 third interpretation of the statute. The State contends that by adopting RCW 90.03.330(3) the
24 Legislature merely sought to clarify that the issuance of a pumps and pipes certificate did not
25 take otherwise valid inchoate rights “out of good standing.” *See* State Resp. to Burlingame
26 Mot. at 14-15; State Mot. at 18. Under the State’s interpretation, the holder of a system-

1 capacity certificate “would still have to meet other water principles, such as due diligence in
2 project development, to keep them in good standing.” State’s Mot. at 18. While the legislation
3 described in the State’s briefs might pass constitutional muster, it bears little resemblance to
4 the statute that the Legislature actually enacted.

5 In *Theodoratus*, the Supreme Court clarified that an inchoate right “remains in good
6 standing *so long as the requirements of law are being fulfilled.*” 135 Wn.2d at 596 (quoting 1
7 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971)) (emphasis
8 added). The “requirements of law” referred to by the Court in the above passage include (but
9 are not limited to) the reasonable diligence requirement of RCW 90.03.460. *Id.* Essentially,
10 the State’s interpretation of RCW 90.03.330(3) posits that the statute’s “good standing”
11 declaration for system-capacity certificates includes an unwritten caveat that states: “so long as
12 the requirements of law are being fulfilled.” Notably, however, this qualifying language
13 appears nowhere in the statute.

14 To support its interpretation, the State relies on the principle that a court must “adopt a
15 construction [of a statute] which sustains the statute’s constitutionality, if at all possible.” State
16 Resp. to Burlingame Mot. at 36 (citing *Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155
17 (1976)). However, the State ignores the equally important principle that “a court may not
18 strain to interpret the statute as constitutional: a plain reading must make the interpretation
19 reasonable.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 225, 11 P.3d
20 762 (2000). Furthermore:

21 A statute is presumed constitutional and if the legislative enactment is
22 reasonably capable of a constitutional construction, it must be given that
23 construction. However, the drafting of a statute is a legislative, not a judicial,
24 function. Therefore, courts will not read into a statute matters which are not
there, nor modify a statute by construction. Further, courts may not read into a
statute things which it conceives the legislature has left out unintentionally.

25 *State v. Enloe*, 47 Wn. App. 165., 170, 734 P.2d 520 (1987) (citations omitted); *see also Rhoad*
26 *v. McLean Trucking Co.*, 102 Wn.2d 422, 426-27, 686 P.2d 483 (1984). In short, while the

1 court must adopt a construction of RCW 90.03.330(3) which saves its constitutionality, it may
2 not rewrite the statute or add language that is not there.

3 The State’s interpretation of RCW 90.03.330(3) violates this principle. The statute
4 states without qualification that *every* system capacity certificate issued for so-called
5 “municipal” purposes before the effective date of the MWL is a “right in good standing.” The
6 statute says nothing that makes the declaration of “good standing” contingent on past
7 compliance with additional requirements, such as the reasonable diligence requirement of
8 RCW 90.03.460. The State does not explain how this Court could lawfully “interpret” RCW
9 90.03.330(3) to mean something other than what it actually says.²

10 Furthermore, the State’s interpretation of RCW 90.03.330(3) is inconsistent with RCW
11 90.03.330(2), which bars Ecology from “revoking, diminishing or adjusting a certificate based
12 on any change in policy that has occurred since the certificate was issued.” The “change in
13 policy” referred to in Section 330(2) plainly includes the change from Ecology’s former
14 unlawful policy of issuing certificates on the basis of system capacity to the lawfully required
15 policy of issuing certificates only based on the applicant’s due diligence in putting water to
16 actual beneficial use. As intervenor CWA points out, the Legislature’s intent in enacting this
17 section was to prevent Ecology from formulating or implementing a policy of examining
18 system-capacity certificates, converting the unused quantity of the certificate to permit status,
19 and applying the reasonable diligence requirement to the unused portion under a development
20 schedule imposed pursuant to RCW 90.03.320. CWA Mot. at 10. It makes no sense to
21 suggest that the Legislature intended to *implicitly* preserve the due diligence requirement for
22 system-capacity certificates issued before the MWL’s effective date when the Legislature

23
24 ² The State argues that the good standing declaration is merely a recognition that valid inchoate rights
25 were not invalidated by *Theodoratus*. See State Resp. to Burlingame Mot. at 14. That is not a viable
26 interpretation because the good standing declaration expressly applies to *all* system-capacity certificates issued for
municipal purposes before the MWL’s effective date, not just to those that happen to represent valid inchoate
rights developed with reasonable diligence.

1 *expressly* barred Ecology from taking action to “revoke or diminish” these certificates if they
2 had not been diligently developed.³ In short, because the State’s proposed interpretation of
3 RCW 90.03.330(3) is contrary to the statute’s plain language, would add words to the statute
4 that are not there, and is contrary to the Legislature’s intent as expressed in other provisions of
5 the statute, it must be rejected.

6 **2. RCW 90.03.330(3) Violates the Separation of Powers Under Any**
7 **Reasonable Interpretation.**

8 Because the State’s interpretation of RCW 90.03.330(3) must be rejected for the
9 reasons discussed in the previous section, only two reasonable interpretations remain. Under
10 either interpretation, the statute violates the separation of powers.

11 (a) **If RCW 90.03.330(3) Is Construed to Treat Rights Represented by System-**
12 **Capacity Certificates As *Perfected* Rights in Good Standing, the Statute**
13 **Violates the Separation of Powers Because It Retroactively Overrules**
14 ***Theodoratus*.**

15 One reasonable interpretation of RCW 90.03.330(3) is that the Legislature intended to
16 declare all rights represented by system-capacity certificates issued for municipal purposes
17 before the MWL’s effective date to be *perfected* rights “in good standing,” even though the
18 holders of such rights may not have actually met the actual beneficial use requirements for
19 perfection. *See* Burlingame Mot. at 16-20. This interpretation is consistent with RCW
20 90.03.330(1) which allows issuance of a certificate *only* when the applicant has made “a
21 showing satisfactory to the department that an appropriation *has been perfected* in accordance
22 with the provisions of this chapter,” *i.e.* by diligent beneficial use of the full quantity stated in
23 the certificate. RCW 90.03.330(1) (emphasis added). If a certificate is “in good standing,”
24 logically the underlying right must have been perfected. This interpretation is also consistent

24 ³ The State argues that Ecology has the authority to revoke or diminish existing municipal water supply
25 certificates under RCW 90.03.330(2) in certain limited situations (change applications and system-wide general
26 adjudications of water rights). State Resp. to Burlingame Mot. at 14-15. But the fact that Ecology has authority
to revoke or diminish a certificate in those limited situations does not mean that Ecology has been granted the
authority to override the Legislature’s express declaration that rights represented by system-capacity certificates
are rights “in good standing.” RCW 90.03.330(3) binds Ecology to that finding, regardless of the facts.

1 with RCW 90.03.330(4), which allows issuance of a certificate *after* the effective date of the
2 MWL, “only for the perfected portion of a water right as demonstrated through actual
3 beneficial use of water.” There would have been no need for the legislature to enact RCW
4 90.03.330(4) if it had not intended for a different standard for perfection to be applied to
5 certificates issued prior to the MWL’s effective date.

6 Plaintiffs have previously explained that, so construed, RCW 90.03.330(3) directly
7 conflicts with the clear holding of *Theodoratus* that rights can only be perfected through actual
8 beneficial use. *See* Burlingame Mot. at 16-20; Tribes’ Resp. to Defs’ Mot. at 4-6. In
9 response, the State argues that *Theodoratus* did not “hold” that a water rights *certificate* based
10 on system capacity was invalid, because the case involved *permit* conditions, not a certificate.
11 State Resp. to Burlingame Mot. at 12-13. The State maintains that the pronouncements of the
12 Court regarding the validity of system-capacity certificates were “*obiter dictum*,” *i.e.* a judicial
13 comment “that is unnecessary to the decision in the case.” *Id.* at 11-12 (quoting *Black’s Law*
14 *Dictionary* (8th ed. 2004).

15 The State misconstrues *Theodoratus*. While the appeal before the Court in
16 *Theodoratus* involved Ecology’s modification of a water right permit, the Court made
17 important holdings regarding the validity of system-capacity certificates. Indeed, in the very
18 first paragraph, the Court summarized its decision as follows: “We conclude that state statutory
19 and common law *does not allow* for a final certificate of water right to be issued based upon
20 system capacity.” 135 Wn.2d at 587 (emphasis added). The Court further concluded that “a
21 final certificate of water right cannot be issued to Appellant for a quantity of water not actually
22 put to beneficial use.” 135 Wn.2d at 597.

23 These holdings were necessary to the Court’s decision. Indeed, the Court expressly
24 evaluated the reasonableness of the permit conditions at issue against the ultimate standard for
25 perfection of a water right. The Court explained that permit conditions “must be consistent
26 with the requirements of the [Water Code]” and reasoned that “permit terms which are

1 unlawful under the surface water code cannot be used to force issuance of a final certificate of
2 groundwater right under RCW 90.44.080.” *Theodoratus*, 135 Wn.2d at 593. Based on this
3 reasoning, the Court held that Ecology’s earlier actions in creating permit conditions that
4 appeared to allow perfection of a right through construction of a delivery system were unlawful
5 and *ultra vires*. *Id.* at 598. The Supreme Court could not have reached these conclusions
6 without holding that a water right certificate could not be validly issued based on system
7 capacity.

8 The State’s argument is not helped by a hyper-technical parsing of the briefs filed in
9 *Theodoratus* to determine what precise issue was raised. For the purpose of the separation of
10 powers, the issue is whether a question of law has been definitively decided by the courts.
11 *State v. Dunaway*, 109 Wn.2d 207, 216, n.6, 743 P.2d 1237(1987). *Theodoratus* reaffirmed
12 that prior to the enactment of the MWL, “relevant statutes, case law, and recent legislative
13 history” left “no doubt” that a final water rights certificate could not be issued based on system
14 capacity. 135 Wn.2d at 590. The fact that *Theodoratus* involved a permit is of no
15 consequence in the separation of powers analysis.

16 In short, *Theodoratus* ruled “neither the statutes nor the case law supports the use of
17 system capacity as a basis for determining a water right.” 135 Wn. 2d at 593. If RCW
18 90.03.330(3) is construed to declare that water rights represented by system-capacity
19 certificates are fully perfected rights “in good standing,” it retroactively overrules the explicit
20 holdings of the Supreme Court and violates the separation of powers.

21 **(b) If RCW 90.03.330(3) Is Construed to Treat Rights Represented by System-**
22 **Capacity Certificates As *Inchoate* Rights in Good Standing, the Statute**
23 **Violates the Separation of Powers Because It Constitutes a Legislative**
24 **Determination of Adjudicative Facts.**

25 Even if RCW 90.03.330(3) is not construed to declare that all system capacity
26 certificates issued for municipal purposes before September 9, 2003, are valid perfected rights,
the statute must still be construed to declare that such certificates are valid *inchoate* rights “in

1 good standing.” So construed, RCW 90.03.330(3) violates the separation of powers doctrine
2 because it represents an unconstitutional legislative determination of the facts that apply to
3 individual water permits or certificates.

4 As recognized in *Theodoratus*, an inchoate right (normally represented by a permit) is
5 in good standing if the water is being developed with due diligence and all other legal
6 requirements are being met. 135 Wn.2d at 596. As stated in *Theodoratus*, an inchoate right is:

7 an incomplete appropriative right *in good standing*. It comes into being as the
8 first step provided by law for acquiring an appropriative right is taken. *It*
9 *remains in good standing so long as the requirements of law are being fulfilled.*
And it matures into an appropriative right on completion of the last step
provided by law.

10 135 Wn.2d at 596 (quoting Hutchens, *supra*, at 226) (emphasis added). The Court emphasized
11 that in Washington an inchoate right remains in good standing only if the permit holder acts
12 with “reasonable diligence” to perfect the right by applying water to a beneficial use. *Id.*
13 (quoting RCW 90.03.460).

14 RCW 90.03.330(3) declares without qualification that every system-capacity
15 certificate issued for so-called “municipal” purposes prior to September 9, 2003, “is a right in
16 good standing.” Notably, the Legislature did not repeal RCW 90.03.460 (the reasonable
17 diligence requirement) or any other provision of substantive law applicable to inchoate rights.
18 It simply declared certain rights to be “in good standing” regardless of the law and the facts of
19 individual cases. The separation of powers problem here is that the statute directs the courts
20 and quasi-judicial administrative agencies to find that all system-capacity certificates issued for
21 municipal purposes prior to the MWL’s effective date are rights “in good standing,” even in
22 cases where the reasonable diligence requirement and other legal requirements applicable to
23 inchoate rights have not been met.

24 The Tribes do not dispute that the Legislature has the power to retroactively change the
25 substantive law even if it affects a pending case (so long as the change does not contravene a
26 holding of the Supreme Court). *See Port of Seattle v. Pollution Control Hearings Board*, 151

1 Wn.2d 568, 626, 90 P.3d 659 (2004). But the Legislature cannot, without changing the
2 substantive law, declare that the past conduct of any given individual is in compliance with the
3 law. See Tribe’s Resp. to State’s Mot. at 9-11; *City of Tacoma v. O’Brien*, 85 Wn.2d 266,
4 271, 534 P.2d 114 (1975); *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972
5 P.2d 179, 194-95 (1999). Or put another way, while the Legislature has the power to repeal
6 the reasonable diligence requirement of RCW 90.03.460, it cannot (without repealing the law)
7 direct the courts to find that inchoate water rights that may have not been developed with
8 reasonable diligence are “rights in good standing.” See *Port of Seattle*, 151 Wn.2d at 625
9 (“legislature cannot make case by case applications of the law to particular facts”).

10 Whether any given inchoate water right is “a right in good standing” depends on
11 application of the law that existed at the time prior the enactment of the MWL (*e.g.* RCW
12 90.03.460) to the facts of individual cases. The Legislature cannot resolve whether particular
13 inchoate right holders have used reasonable diligence in putting water to beneficial use – the
14 answer to that inherently factual question clearly varies from certificate to certificate.⁴ The
15 legislative determination that *every* system-capacity certificate issued for municipal purposes
16 prior to the MWL’s effective date is “a right in good standing,” despite the wide array of facts,
17 effectively adjudicates the status of those certificates and insulates them from proper
18 administrative and judicial inquiry regarding their actual status. While the legislature has the
19 power to adjust water rights prospectively, or to even to change the governing law retroactively
20 (if the change does not contravene a holding of the Supreme Court or violate due process), it
21 has no authority to determine the legal effects of past conduct under the law in existence at the
22 time.

23 In short, even if RCW 90.03.330(3) is construed to merely declare that system-capacity
24 certificates are valid *inchoate* rights “in good standing,” the Legislature still violated the
25

26 ⁴ In its brief, WSU points out that “[r]easonable diligence does not amount to a set period of time; rather it is determined on a case-by-case basis.” WSU Resp. at 9.

1 separation of powers by making a blanket, retroactive determination of individual cases
2 without changing the governing law.

3 **B. RCW 90.03.015(4) Violates the Separation of Powers.**

4 Plaintiffs have argued that RCW 90.03.015(4) violates the separation of powers
5 because it purports to retroactively overrule the holding of *Theodoratus* that a private water
6 purveyor is not a “municipality” that is exempt from relinquishment under RCW
7 90.14.140(2)(d). Burlingame Mot. at 18-20. As in its motion for summary judgment, the State
8 argues that there is no holding in *Theodoratus* that a private water purveyor cannot retain
9 “municipal” purpose water rights and that the Court’s statements regarding Mr. Theodoratus’
10 status as a municipality were mere *dictum*. State’s Resp. to Burlingame Mot. at 16-17.

11 The Tribes’ incorporate their response to the State’s motion for summary judgment (12-
12 13) and adopt Part II.B of the reply brief of the Burlingame plaintiffs on this issue. In addition,
13 the Tribes note that while the *Theodoratus* Court declined to address in what ways municipal
14 rights differ from those of private purveyors, the Court did not avoid the question of whether a
15 private system could assert municipal purpose rights. The court unambiguously declared that
16 Mr. Theodoratus could not assert municipal purpose rights because he was “not a
17 municipality.” *Theodoratus*, 135 Wn.2d at 594. RCW 90.03.015(4) unambiguously declares
18 that a private developer such as Mr. Theodoratus *can* assert municipal purpose rights. In doing
19 so, the statute violates the separation of powers.⁵

20 **II. DUE PROCESS CLAIMS.**

21 **A. RCW 90.03.015(4) Violates Substantive Due Process.**

22 As the Tribes have previously explained, RCW 90.03.015(4) violates substantive due
23 process because the effect of the adoption of the new definition of “municipal water supply

24 ⁵ The State also argues that RCW 90.03.015(4) does not violate separation of powers because it is
25 “curative.” State Resp. to Burlingame Mot. at 18. This argument is not relevant to the separation of powers issue
26 because a statute cannot be curative if it violates a holding of the Supreme Court. *Overton v. Washington State
Economic Assistance Authority*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981).

1 purposes” is to retroactively extend the “municipal water supply purposes” relinquishment
2 exemption, RCW 90.14.140(2)(d), to rights held by private purveyors for community domestic
3 or other non-municipal purposes. Tribes’ Mot. at 17-20. By “reviv[ing] rights that have been
4 lost or terminated under the law as it existed at the time of an event,” RCW 90.03.015(4)
5 violates the rights and priorities of others sharing the same source of supply. *Id.* at 19 (quoting
6 *San Carlos Apache*, 972 P.2d at 189).

7 The State’s response adds little to the arguments presented in its motion for summary
8 judgment. *See* State’s Mot. at 23-32. The Tribes have provided an in-depth response to each
9 of the State’s contentions in their response brief and incorporates that response herein. *See*
10 Tribes’ Resp. to Defs’ Mot. at 16-23. The Tribes also incorporate Parts I, II.B.2 and 3 and
11 III.B of the Burlingame reply brief. In addition, the Tribes make the following points:

12 The State argues that the term “municipal water supply purposes” as used in the Water
13 Code prior to the MWL could have included private entities because the term is directed to
14 how water is used (“for people, homes, businesses, institutions and parks”) rather than the type
15 of entity (municipal or private) using the water. State Resp. to Burlingame Mot. at 21. This
16 argument ignores the fact that private use of water for the purposes cited by the State was
17 already accommodated under the Water Code’s separate category of “community or multiple
18 domestic supply.” *See* RCW 90.03.260(4). It further ignores the fact that the prior law
19 specifically required applications for “municipal water supply” to estimate the future needs “of
20 the municipality.” *See* RCW 90.03.260(5). Thus, prior law very specifically and logically
21 limited municipal rights to “municipalities.” Far from clarifying the term “municipal water
22 supply purposes,” the statute effectively eliminates the “community and multiple domestic”
23 purpose category, not only from the statute, but also from the thousands of water right
24 certificates Ecology has issued to private purveyors over the years.⁶ This is a change, not a

25 ⁶ The only community water systems that would not be “municipal” would be those serving fewer than
26 15 residences.

1 clarification, of existing law.

2 The State also attempts to distinguish *San Carlos Apache*, 972 P.2d at 189, on the
3 grounds that it dealt with the express attempts of the Arizona legislature to overturn the results
4 of a water rights adjudication. State Resp. to Burlingame Mot. at 24-26. However, water
5 rights are established and lost by the acts and omissions of water users, not by water rights
6 adjudications. An adjudication merely confirms that those acts or omissions have occurred,
7 but is not necessary for a right to be created or relinquished. See *Rettkowski v. Department of*
8 *Ecology*, 122 Wn.2d 219, 228-29, 858 P.2d 232 (1993). Accordingly, legislation that alters the
9 legal consequence of nonuse of water violates substantive due process regardless of whether
10 the facts are ever confirmed by an adjudication.

11 **B. RCW 90.03.330(3) Violates Substantive Due Process.**

12 As the Tribes' have previously explained, under any reasonable interpretation, RCW
13 90.03.330(3) violates substantive due process. If construed to treat all system-capacity
14 certificates issued for so-called "municipal" purposes before the MWL's effective date as valid
15 perfected rights, RCW 90.03.330(3) violates substantive due process because it retroactively
16 alters the "legal effect of acts that resulted in acquisition and priority of water rights." Tribes'
17 Mot. at 20-21. Even if RCW 90.03.330(3) is construed to merely declare that such system-
18 capacity certificates are *inchoate* rights "in good standing," the statute violates substantive due
19 process because it applies retroactively and treats the unused portion of a system-capacity
20 certificate as a valid right, regardless of its actual validity under the Water Code. *Id.* at 21-22.

21 Notably, the State makes no argument on the substantive due process issue if either of
22 the Tribes' alternative interpretations of RCW 90.03.330(3) is correct.⁷ Instead, the State's
23 defense of the substantive due process claim regarding RCW 90.03.330(3) rests entirely on its
24 erroneous interpretation of the statute. As discussed previously, this interpretation would have

25 _____
26 ⁷ The State dismisses the first interpretation of RCW 90.03.330(3) in its response to the Burlingame
Motion (at 32-37) and completely ignores the Tribes' alternative construction of the statute.

1 the Court amend RCW 90.03.330(3) to add the caveat “so long as the requirements of law are
2 being fulfilled” to the “good standing” declaration for system-capacity certificates. While such
3 an amendment of the statute might well save its constitutionality, it is an amendment that the
4 Court is powerless to make. The Court must construe RCW 90.03.330(3) as it is written, and
5 as written the statute violates substantive due process.

6 **C. RCW 90.03.386(2) Violates Substantive Due Process.**

7 The Tribes’ motion for summary judgment explains that RCW 90.03.386(2) allows so-
8 called “municipal water suppliers” to expand the place of use of their water rights from the
9 location designated in a water right certificate to the service area provided for in a water
10 system plan approved years later by the Department of Health without consideration of the
11 effect of the change on other existing rights. Tribe’s Mot. at 22-24. RCW 90.03.386(2)
12 violates substantive due process because it retroactively alters the “legal effect of acts that
13 resulted in acquisition and priority of water rights” without providing statutory protection for
14 the correlative rights of others sharing the same source of supply. *Id.* at 23 (citing *San Carlos*
15 *Apache*, 972 P.2d at 189; *Fremont-Madison Irr. Dist. & Mitigation Group v. Idaho Ground*
16 *Water Appropriators*, 129 Idaho 454, 926 P.2d 1301, 1307 (1996)).

17 In response, the State first maintains that RCW 90.03.386(2) is constitutional because it
18 applies only prospectively. State Resp. to Tribes’ Mot. at 13-14. In support, the State points to
19 Ecology and Department of Health review procedures which provide that a change in the place
20 of use of a water right based on expansion of a water system’s service area “only applies to
21 approvals [of water system plans occurring] after September 9, 2003.” *Id.* at 14 (citing Slattery
22 Decl. ¶6 , Ex. 2).

23 Even assuming that RCW 90.03.386(2) applies only to approvals of water system plans
24 occurring after the effective date of the MWL, this does not mean that the statute only has
25 prospective effect. A statute has retroactive effect when it “changes the legal consequences of
26 acts completed before its effective date.” *State v. Randle*, 47 Wn. App. 232, 240-41, 734 P.2d 5

1 (1987); *see also State v. Varga*, 151 Wn.2d 179, 195, 86 P.3d 139 (2005). Prior to the MWL,
2 the place of use of a water right was based on the legal consequences of acts that included the
3 filing of a water rights application, publication of public notice of that application, and the
4 State’s review and approval of the application in the subsequent report of examination, permit
5 and water right certificate.⁸ The final water right certificate issued by the State at the end of
6 that process *expressly* provided that: “The right to the use of water aforesaid hereby confirmed
7 is restricted to the lands or place of use herein described, *except as provided in RCW*
8 *90.03.380, 90.03.390 and 90.44.020.*”⁹ The place of use of a water right was thus based on the
9 facts and circumstances that applied at the time the water rights application was approved by
10 the State and could only be changed based on Water Code provisions enacted to protect other
11 existing water rights.

12 Under the MWL, however, the place of use of a water right is no longer based on the
13 “legal consequences” of the acts completed in the water right application process but is now
14 determined by the service area in a water system plan approved by the Department of Health
15 based on procedures that offer no protection for other existing rights. Because RCW
16 90.03.386(2) “changes the legal consequences” of acts which occurred before the statute’s
17 effective date – namely the requirement stated on the face of a water right certificate that the
18 water right “is restricted to the lands or place of use” described on the face of the certificate
19 “except as provided in RCW 90.03.380, 90.03.390 and 90.44.020” – the statute alters the
20 “legal effect of acts that resulted in acquisition and priority of water rights” and violates
21 substantive due process. *San Carlos Apache*, 972 P.2d at 189; *Randle*, 47 Wn. App. at 240-41.

22 The State next argues that RCW 90.03.386(2) is not susceptible to a facial challenge
23 because, for water rights that are already defined as a purveyor’s service area, RCW

24 ⁸ *See, e.g.*, Tribes’ Exh. 30 (application, report of examination, permit and certificate for North
25 Bainbridge Island Water Co.).

26 ⁹ *See* Tribes’ Exh. 20 at 2; Tribes’ Exh. 21 at 2.

1 90.03.386(2) does not change anything, and thus causes no alteration of the “legal effect of acts
2 that resulted in acquisition and priority of water rights.”¹⁰ As discussed in the Tribes’ response
3 (pages 16-17, 30), this argument fails because it is based on a misapplication of the standard
4 articulated in *United States v. Salerno*, 481 U.S. 739 (1987), which does not apply to taxpayer
5 standing cases in any event. *See Robinson v. City of Seattle*, 102 Wn. App. 795, 808, 10 P.3d
6 452 (2000); *see also* Burlingame Resp. to State’s Mot. at 3-11 and Part I of Burlingame Reply.
7 Even under *Salerno*, however, the issue is whether a “set of circumstances exist[s] in which the
8 statute can be constitutionally applied,” not whether the State can point to circumstances where
9 the statute doesn’t apply or has no legal effect. *See City of Redmond v. Moore*, 151 Wn.2d
10 664, 669, 91 P.3d 875 (2004).

11 The State also maintains that the Tribes’ motion does not “point to any case law or
12 authority under which any comparable water rights legislation has been found to violate
13 substantive due process.” State Resp. to Tribes’ Mot. at 15. But the State fails to distinguish
14 the two leading cases cited by the Tribes, *San Carlos Apache*, 972 P.2d at 189 and *Fremont-*
15 *Madison*, 926 P.2d at 1307. The State maintains that these cases are distinguishable because
16 they concerned retroactive legislation. However, as demonstrated above, RCW 90.03.386(2)
17 likewise has retroactive effect, even if it is construed to only apply to approvals of water
18 system plans occurring after the MWL’s effective date.

19 Finally, the State argues that the provisions of the Water Code which disallow changes
20 in the place of use that impair other existing rights do not “represent a vested right of all other
21 water rights holders which the Legislature could not amend under its broad police power
22 authority.” State Resp. to Tribes’ Mot. at 17. Instead, the State characterizes the protection
23 from impairment provided by the Water Code as a “mere expectation based upon an

24 ¹⁰ The State’s factual premise is not correct in instances where a water right with a place of use defined
25 as a small service area, such as the “Community of Suquamish,” is acquired by a purveyor like the Kitsap Public
26 Utility District with a service area that includes an entire county. Massmann Decl., Exh. A at 14-15. In that
instance, RCW 90.03.386(2) allows the place of use of the right to be expanded to include the acquiring
purveyor’s larger service area.

1 anticipated continuation of existing law.” *Id.* (citing *State Farm Bur. Fed'n v. Gregoire*, 162
2 Wn.2d 284, 305, 174 P.2d 1142 (2007)).

3 The State’s argument is contrary to the bedrock principle of western water law that
4 water right holders have a “*vested right* in the continuation of stream conditions as they existed
5 at the time of their respective appropriations” and “may successfully resist all proposed
6 changes in points of diversion and use of water from that source which in any way materially
7 injures or adversely affects their rights.” *Farmers Highline Canal & Reservoir Co. v. City of*
8 *Golden*, 129 Colo. 575, 272 P.2d 629, 631-32 (1954) (emphasis added) *quoted in Big Creek*
9 *Water Users Ass’n v. Department of Ecology*, PCHB No. 02-113, 2002 WL 31847634 *8 (Dec.
10 16, 2002); *see also* Beck, *Waters & Water Rights* § 16.02(b), p. 278.¹¹ Even prior to the Water
11 Code, upstream and downstream water right holders had a right to “object to a change in the . .
12 . place of use, which could affect natural and return flows and, thus, adversely affect their
13 rights.” *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 777, 947 P.2d 732
14 (1997) (citing *Haberman v. Sander*, 166 Wn. 453, 7 P.2d 563 (1932); *Farmers Highline Canal*,
15 272 P.2d at 631-32). Because the protections of RCW 90.03.380(1) reflect fundamental water
16 law principles that underpin the entire prior appropriation system, the Legislature cannot
17 eliminate these protections without violating substantive due process.¹²

18 _____
19 ¹¹ According to the State, this principle is not “an unqualified, immutable principle embedded in state
20 water law.” State’s Resp. to Burlingame Mot. at 31. The State provides no support for this assertion except to
21 note that the PCHB decision in *Big Creek*, did not construe this principle to prohibit all transfers or changes that
22 may affect other water users. *Big Creek*, however, clearly reaffirmed the principle that water rights holders “have
23 a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation” and
24 that a water right may not be changed if the change would result in “detriment or injury” to other existing rights.
25 2002 WL 31847634 at *8. *Big Creek* merely clarified that “detriment or injury” must be measured at the point of
26 diversion and does not guarantee that a particular diversion and ditch system will be sufficient to transport water
from the point of diversion to the place of use. *Id.* at *9-10.

27 ¹² Intervenor’s argue extensively that municipal water rights are different from irrigation rights and
28 consequently that changes in the place of use of municipal rights will not affect return flows or increase
29 consumptive use of a right. WWUC Response to Plfs.’ Mot. at 25-29. However, just as allowing irrigation of
30 more land can allow greater consumptive use of a water right, allowing a water purveyor to expand its place of
31 use in order to serve additional customers can similarly allow greater consumptive use of water. Furthermore,
32 return flows will be affected if the new users are connected to septic or sewer systems that discharge in a different
33 groundwater basin than the point of withdrawal. Prior to the MWL, fact-dependent issues relating to

1 Water rights do not exist in isolation but are defined in relation to the correlative rights
2 of others sharing the same source of supply. Gould, “Water Rights Transfers and Third-Party
3 Effects,” 23 *Land & Water L. Rev.* 1, 12 (1988). The place of use of a water right is an
4 essential attribute that may only be changed if other existing rights are not be impaired.
5 *Okanogan Wilderness League*, 133 Wn.2d at 777. By allowing the place of use of so-called
6 “municipal” water rights to be changed without meeting the requirements of statutes that
7 operate to protect other existing rights – statutes that are expressly cited in water right
8 certificates themselves – RCW 90.03.386(2) retroactively expands the place of use
9 “municipal” water rights in violation of basic requirements of substantive due process.

10 **D. RCW 90.03.386(2) Violates Procedural Due Process.**

11 The Tribes have previously demonstrated that under the applicable three-part *Mathews*
12 *v. Eldridge*, 424 U.S. 319, 335 (1976) framework, RCW 90.03.386(2) violates procedural due
13 process because: (1) the statute affects the vested rights of other water right holders; (2) the
14 procedures that survive the MWL create a high risk that the water rights of third parties will be
15 impaired, and additional or substitute safeguards are available (in RCW 90.03.380(1) and
16 90.44.100(2)) that would provide significant protections for existing rights in proceedings to
17 change the place of use of “municipal” rights; and (3) only minimal fiscal and administrative
18 burdens would result from incorporation of these additional or substitute procedural
19 requirements.¹³ Tribes’ Mot. at 26-28; Tribes’ Resp. to Defs.’ Mot. at 32-38.

20 The State’s response admits that under RCW 90.03.386(2) “modification of a
21 municipal water supplier’s place of use can be accomplished through amendment of its water

22 _____
23 consumptive use and return flows were addressed in change of use proceedings. Because RCW 90.03.386(2)
24 eliminates such proceedings, junior water right holders no longer have an adequate forum to raise these concerns.

24 ¹³ Under the *Mathews* analysis, a court must consider: (1) the private interest that will be affected by the
25 official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the
26 probable value, if any, of additional or substitute procedural safeguards; and (3) the Government’s interest,
including the function involved and the fiscal and administrative burdens that the additional or substitute
procedural requirement would entail. *Moore*, 151 Wn.2d at 670.

1 system plan’s service area, without having to show under RCW 90.03.380 or RCW 90.44.100
2 that the change in place of use can be made without injury to other existing water rights.”
3 State’s Resp. to Tribes’ Mot. at 20. The State also agrees that the three factors of the *Mathews*
4 analysis apply in determining whether RCW 90.03.386(2) satisfies procedural due process. *Id.*
5 at 21. However, the State maintains that the first prong of the *Mathews* test is not satisfied
6 because “the Plaintiffs fail to show that *all* other water right holders will have vested property
7 interests adversely affected by RCW 90.03.386(2).” *Id.* (emphasis added).

8 The State’s argument is wholly without merit. The Tribes need not show that *all* water
9 rights will be affected by RCW 90.03.386(2) to satisfy the first prong of the *Mathews* analysis.
10 Rather, the Tribes need only show that all persons whose rights *may* be affected are deprived
11 of a hearing to determine *whether* those rights are affected. For example, in *Moore*, 151
12 Wn.2d at 677, the Court held that a statute facially violated due process because it allowed
13 drivers’ licenses to be suspended without an administrative hearing where the license holder
14 failed to appear in court or otherwise resolve a traffic infraction. Although the Court purported
15 to apply the *Salerno* “no set of circumstances” test for facial challenges, *id.* at 669, the Court’s
16 analysis did not, as the State erroneously contends, turn on whether the statute had an adverse
17 effect on *all* license holders. Rather, the question was whether the statute was constitutional
18 as it affected the very small subset of license holders who failed to appear in court or otherwise
19 resolve their traffic citations. Or, as the Court put it, the essence of the defendants’ argument
20 was that the statute governing suspension for failure to respond to traffic citations violated due
21 process because “it fails to afford *any* driver *facing a suspension of his or her license under*
22 *that statute* an opportunity for an administrative hearing with DOL prior to or after such
23 suspension.” *Id.* at 669 (emphasis added). Similarly here, the essence of the Tribes’ argument
24 is not that every water right holder will be affected by RCW 90.03.386(2), but that the statute
25 fails to afford *any* water right holder with notice and an opportunity for a hearing before the
26

1 State approves a change in the place of use of a so-called “municipal” water right that may
2 impair the holder’s water rights.

3 Contrary to the State’s argument, the first prong of the *Mathews* analysis turns not on
4 whether every right holder will be affected by the statute, but on the importance of the right at
5 issue. *See Moore*, 151 Wn.2d at 670 (first prong of the *Mathews* analysis was satisfied because
6 the “private interest in this case is the driver’s interest in the continued use and possession of a
7 driver’s license” and “depriving a person of the use of his or her vehicle can significantly
8 impact that person’s ability to earn a living”). Here, it is clear that water rights constitute a
9 form of property that is entitled to due process protection. *Rettkowski*, 122 Wn.2d at 228;
10 *Sheep Mountain Cattle Co. v. Dep’t of Ecology*, 45 Wn. App. 427, 430-31, 726 P.2d 55 (1986).
11 More specifically, because RCW 90.03.386(2) involves changes in the place of use of water
12 rights, it affects the “vested rights” of other water right holders “in the continuation of stream
13 conditions as they existed at the time of their respective appropriations.” *Big Creek*, 2002 WL
14 31847634 at *8; Beck, *Waters & Water Rights* § 16.02(b), p. 278; *Farmers Highline Canal*,
15 272 P.2d at 631-32. Furthermore, the deprivation of property rights allowed by RCW
16 90.03.386(2) is of long duration because under the statute, changes to a municipal water
17 supplier’s service area remain in effect as long the supplier remains in compliance with its
18 water system plan. *Moore*, 151 Wn.2d at 671 (duration of potentially wrongful deprivation of
19 a property interest is an important factor in procedural due process analysis). Accordingly, the
20 first prong of the *Mathews* analysis is satisfied.

21 As with the State’s summary judgment motion, the State’s response to the Tribes’
22 motion does not meaningfully address the second and third prongs of the *Mathews* analysis. In
23 essence, the State seems to argue that existing procedures that survived the enactment of the
24 MWL, namely the procedures required under the State Environmental Policy Act (SEPA) and
25 water system planning statutes, provide adequate notice and opportunity for a hearing to satisfy
26 procedural due process requirements. State’s Response to Tribes’ Mot. at 22; State’s Response

1 to Burlingame Mot. at 38-40. As discussed in the Tribes' response brief, none of these
2 procedures were designed to protect water rights from impairment and they are simply
3 inadequate to serve a purpose for which they were not intended. *See* Tribe's Resp. to State's
4 Mot. at 34-35. Indeed, it is highly uncertain whether SEPA even requires consideration of the
5 effects on private water rights in an environmental document.

6 The State's arguments also fail because they discuss the procedures surviving the MWL
7 in a vacuum, rather than in relation to the procedures that the MWL eliminated (*i.e.* those
8 applicable under RCW 90.03.380(1) and RCW 90.44.100(2)). Under the second prong of the
9 *Mathews* analysis, however, the Court must evaluate the "risk of an erroneous deprivation of [a
10 property] interest through the procedures used, *and* the probable value, if any, of additional or
11 substitute procedural safeguards." *Moore*, 151 Wn.2d at 670 (emphasis added). The State
12 simply fails to address the obvious point that by eliminating the special, long-established
13 procedures of RCW 90.03.380(1) that were specifically *designed* to afford existing water right
14 holders with notice and an opportunity for a hearing to contest potentially injurious changes in
15 the place of use, the Legislature substantially increased the risk that future State approvals of
16 changes in the place of use of so-called "municipal" rights will impair other vested water
17 rights.

18 Nor does the State identify any interest, "including the function involved and the fiscal
19 and administrative burdens that the additional or substitute procedural requirement would
20 entail," as required under the third prong of the *Mathews* analysis. *Moore*, 151 Wn.2d at 670.
21 In particular, the State fails to respond to the Tribes' point that retention of the "additional or
22 substitute procedural safeguards" already embodied in RCW 90.03.380(1) would impose little
23 if any fiscal or administrative burden upon State agencies given that these procedures have
24 been employed for decades and remain applicable to water right holders that do not meet the
25 MWL's definition of "municipal water supplier." The State offers no argument that the
26 reinstatement of such procedures would, for example "increase its workload and mandate the

1 hiring of additional staff to process the hearings.” *Cf. Moore*, 151 Wn.2d at 677. Indeed, such
2 a position would be inconsistent with the support expressed by Ecology’s Director for retention
3 of these procedural safeguards.¹⁴ In sum, because the Tribes’ have shown that the three-part
4 *Mathews* analysis has been satisfied, the Court should hold that RCW 90.03.386(2) violates
5 procedural due process.

6 **E. RCW 90.03.260(4) and (5) Violate Substantive Due Process.**

7 The Tribes’ summary judgment motion explains that RCW 90.03.260(4) and (5)
8 retroactively expand the rights of “municipal water suppliers” by declaring that service
9 connection and population figures in a water right application are no longer “an attribute
10 limiting exercise of the water right,” provided that the number of connections or population
11 served is consistent with a water system plan approved by the Department of Health. By
12 decreeing such an enlargement by operation of law, RCW 90.03.260(4) and (5) “change[] the
13 legal consequences of acts completed before [their] effective date” and thereby violate due
14 process. *See Tribes’ Mot.* at 24-25.

15 The State continues to defend RCW 90.03.260(4) and (5) on the same grounds asserted
16 in its summary judgment motion. First, the State asserts that argues that these provisions do
17 not retroactively enlarge any water rights because, prior to the MWL, no provision of the
18 Water Code “expressly provided that maximum populations or service connections were
19 attributes that limited exercise of water rights.” *State Resp. to Tribes’ Mot.* at 9. As before,
20 however, the State ignores the fact that water law is an amalgam of statutory and common law
21 and that it was well established under the common law that a water right is limited by the
22 applicant’s intended purpose of use when the right was originally established. *R.D. Merrill Co.*
23 *v. Pollution Control Hrg. Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999) (water right limited
24 by the *original* season of use); *In re Water Rights in Alpowwa Creek*, 129 Wn. 9, 15, 224 P. 29
25

26 ¹⁴ Exh. Tribes’ 23 at 2 (Letter, Fitzsimmons to Honeyford (Jan. 23, 2003)); Tribes’ Exh. 25 at 8-9
(House Bill 1338, Section 8(5) (Jan. 22, 2003).

1 (1924) (“appropriation of water consists in the intention, accompanied by reasonable diligence,
2 to use the water *for the purposes originally contemplated at the time of its diversion*”); *Dep’t of*
3 *Ecology v. Schuh*, 100 Wn.2d 180, 185, 667 P.2d 64 (1983) (water right certificate implicitly
4 limited by the applicant’s original intent that water would be used only to supplement water
5 from a federal project). Indeed, prior to the MWL, Ecology itself applied these authorities to
6 restrict the population or connections served under a water right to the population or
7 connection figures provided for in the original application and subsequent water rights
8 documents.¹⁵

9 The State fails to adequately address this case law. For example, the State attempts to
10 distinguish *Schuh* on the basis that the right in that case was subject to express conditions that
11 precluded its use if water from a federal project was available. However, the State ignores the
12 fact that water right permits and certificates also contain express limits on the number of
13 homes or connections that may be served.¹⁶ Clearly, the Legislature’s declaration in RCW
14 90.03.260(4) that such express limits, if found in a certificate held by a so-called “municipal
15 water supplier,” no longer constitute “an attribute limiting exercise of the water right” expands
16 such rights to the detriment of others.

17 The State also attempts to distinguish *Alpowa*, 129 Wn. at 15, on the basis that the case
18 involved “historical common law principles rather than statutory requirements,” and *R.D.*
19 *Merrill*, 137 Wn.2d at 127, on the basis that the case involved “irrigation rights which by their
20 nature, are limited to the irrigation season.” These distinctions are inapposite. To begin with,

21 ¹⁵ Tribes’ Exh. 15 (Letter, Barwin to Stump (Aug. 14, 2000)); *see also* Tribes’ Exh. 16 (Letter, Barwin
22 to Yakima County Public Works Department (Apr. 18, 2003)) (rejecting applications seeking to increase the
23 number of service connections because “approval of the requests represented by the change application would
24 result in enhancement or enlargement of the existing water rights”); Tribes’ Exh. 17 (Letter, Drury to Vazquez
(Jan. 10, 2000)) (increase in the number of service connections would require approval of a new water right).

25 ¹⁶ *See, e.g.*, Tribes’ Exh. 20 at 1 (“Community domestic supply – continuously (33 services)); Tribes’
26 Exh. 33 at 1 (Certificate No. G1-23034) (“Community domestic supply – continuously (maximum of 50
services)); Tribes’ Exh. 36 at 1 (Certificate No. G1-23937) (“Community domestic supply – continuously (85
homes)”; Tribes’ Exh. 37 at 1 (Certificate No. S2-20446C) (“Community domestic supply – continuously (90
homes)”).

1 *R.D. Merrill* did not involve common law irrigation rights, but involved a water right
2 *certificate* issued for *domestic* use to serve a “cabin continuously used except in the winter.”
3 137 Wn.2d at 127. Furthermore, the State ignores the fact that common law principles remain
4 applicable in defining the nature and scope of water rights. For example, even though the
5 Water Code is silent on whether a water right is limited by the time or season of use, such
6 limits have been upheld based on “well-established principles of western water law.” *R.D.*
7 *Merrill*, 137 Wn.2d at 128.

8 Despite the fact that seasonal limits are not expressly provided for in the Water Code,
9 the Legislature plainly could not, consistent with due process, retroactively declare that a limit
10 on the season of use in a water right certificate is “not an attribute limiting exercise of a water
11 right,” regardless of the common law and the language of water right permits and certificates.
12 The same is true with population and service connection limits. Such limits must be
13 determined according to the common law principles as well as the actual language of the water
14 right permit or certificate in question.

15 The State next maintains that RCW 90.03.260(4) and (5) are “curative” because they
16 clarified the law. State Resp. to Tribes’ Mot. at 13. Even assuming for the sake of argument
17 that the pre-MWL law was ambiguous, this does not end the inquiry because even a curative
18 amendment may not apply retroactively if it affects a vested right. *State v. T.K.*, 139 Wn.2d
19 320, 333, 987 P.2d 63 (1999); *In re F.D. Processing Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303
20 (1992). In this case, RCW 90.03.260(4) and (5) clearly affect vested rights – not only the
21 rights of the so-called “municipal water suppliers” that are expanded, but also the rights of all
22 others sharing the same source of supply whose rights are necessarily diminished. Because
23 the legal effect of population and connection limits found in water right applications, permits
24 and certificates is a matter affecting vested rights, any ambiguities in water right documents
25 must be clarified by the courts in an adjudicative process, not by the Legislature though
26 retroactive legislation. *O’Brien*, 85 Wn.2d at 272 (Legislature may not direct the courts to

1 reach “a result which follows from examination and consideration of circumstances in a
2 particular case and interpretation and application of legal principles to those facts”); *San*
3 *Carlos Apache*, 972 P.2d at 195. Because RCW 90.03.260(4) and (5) cannot be applied
4 retroactively without affecting vested rights, the statutes violate substantive due process.

5 **F. RCW 90.03.360(4) and (5) Violate Procedural Due Process.**

6 As discussed in the Tribe’s summary judgment motion, RCW 90.03.260(4) and (5)
7 violate procedural due process for many of the same reasons as RCW 90.03.386(2). RCW
8 90.03.260(4) and (5) authorize increases in population and service connections served under a
9 water right without affording affected third parties with notice or an opportunity for an
10 administrative hearing. As with changes in the place of use authorized under RCW
11 90.03.386(2), additional safeguards are readily available that would reduce the risk that the
12 rights of third parties will be impaired when a water purveyor is permitted to increase the
13 number of connections or population allowed to be served. *See Tribes’ Mot.* at 28-29.

14 The State continues to argue that there is no procedural due process violation on the
15 same basis that it maintains that there was no violation of substantive due process – *i.e.* that
16 population and service connection limits were not attributes limiting the exercise of a water
17 right prior to the MWL. As explained in the previous section, State water law was at best
18 ambiguous on whether a population or connection figure provided for in a water right
19 application would limit the exercise of a subsequent water right. Furthermore, many water
20 right permits and certificates contain express service connection limits.¹⁷ Prior to the MWL,
21 the effect of such limits would be determined in a water right adjudication or change of use
22 proceeding.

23 The MWL provides that population and connection limits found in water right
24 applications, permits or certificates are “not attribute[s] limiting the exercise of a water right”

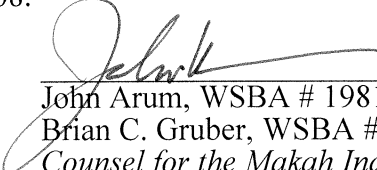
25 _____
26 ¹⁷ *See* n.16, *supra*.

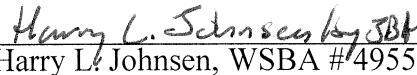
1 (regardless of the language of permits or certificates) as long as the number of connections or
2 population to be served under the right is consistent with a water system plan approved by the
3 Department of Health. RCW 90.03.260(4) and (5). As with the place of use provisions of
4 RCW 90.03.386(2), Department of Health procedures do not afford a water right holder
5 seeking to protect its water rights with notice or an opportunity for a hearing sufficient to
6 satisfy the three-prong *Mathews* test. *See Tribes' Response to State's Mot.* at 34-38, and Part
7 II.E *supra*. Because under RCW 90.03.260(4) and (5) existing population and connection
8 limits may be expanded through the Department of Health's approval of a water system plan,
9 potentially affected third parties will not receive specific notice that the State intends to
10 approve increases in population or connection limits, and will have no opportunity for a
11 hearing to contest the State's approval of such changes before they become effective. Because
12 Department of Health procedures for approving water system plans do not provide due process
13 to the affected holders of other water rights, allowing the Department of Health to authorize
14 increases in connections or populations served through approval of a water system plan
15 violates procedural due process.

16 **CONCLUSION**

17 For the reasons set forth above, the Tribes' summary judgment motion should be
18 granted and the Court should declare that RCW 90.03.015(4), 90.03.260(4) and (5),
19 90.03.330(2) and (3) and 90.03.386(2) are facially unconstitutional.

20 Dated this 24th day of April, 2008.

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