

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' RESPONSE TO DEFENDANTS AND DEFENDANT-
INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES iii

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. SEPARATION OF POWERS VIOLATIONS3

 A. RCW 90.03.330(3) Violates the Separation of Powers3

 1. RCW 90.03.330(3) Contravenes the Supreme Court’s Construction
 of the Water Code’s Requirements for Perfecting a Water Right4

 2. The Constitutionality of RCW 90.03.330(3) Cannot Be Saved by the
 State’s Strained Reading of the Phrase “Right In Good Standing.”6

 3. RCW 90.03.330(3) Violates Separation of Powers Because It Results
 In Legislative Determination of Adjudicative Facts10

 B. RCW 90.03.015(4) Violates the Separation of Powers12

III. DUE PROCESS VIOLATIONS13

 A. The State’s Police Powers Must Be Exercised in Accordance with the
 Due Process Clause.13

 B. RCW 90.03.015(4) Violates Substantive Due Process.....15

 1. RCW 90.03.015(4) Is Susceptible to a Facial Challenge Even If It Is
 Constitutional When Prospectively Applied.....16

 2. RCW 90.03.015(4) Is Not Curative.....18

 3. The State’s “Active Compliance” Argument Cannot Save the
 Constitutionality of RCW 90.03.015(4)22

 4. The Intervenors’ “Precipitating Event” Arguments Are
 Without Merit23

 C. RCW 90.03.330(3) Violates Substantive Due Process.....25

 D. RCW 90.03.386(2) Violates Substantive Due Process.....27

 E. RCW 90.03.386(2) Violates Procedural Due Process32

 F. RCW 90.03.260(4) and (5) Violate Substantive Due Process.....38

TABLE OF CONTENTS

1

2 G. RCW 90.03.360(4) and (5) Violate Procedural Due Process42

3 CONCLUSION44

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

TABLE OF AUTHORITIES

CASES

Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 11 P.3d 762 (2000).....7

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006)33

Anderson v. City of Seattle, 78 Wn.2d 201, 471 P.2d 87 (1970)22

Armstrong v. Safeco Ins. Co., 111 Wn.2d 784, 765 P.2d 276 (1988) 18-19

Caritas Servs. v. Dept. of Social and Health Servs., 123 Wn.2d 391,
869 P.2d 28 (1994)33

Carlstrom v. State, 103 Wn.2d 391, 694 P.2d 1 (1985)15, 33

Cascade Sewer Dist. v. King Cy., 56 Wn. App. 446, 783 P.2d 1113 (1989)19

City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3 875 (2004)30, 32, 33, 34, 43

City of Tacoma v. O’Brien, 85 Wn.2d 266, 534 P.2d 114 (1975).....10

City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993)36

Connecticut Nat’l Bank v. Germain, 503 U.S. 249 (1992).....7, 27

Cornelius v. Dep’t of Ecology, PCHB No. 06-099 (Dec. 7, 2007)26

Cowiche Canyon Conserv. v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992)19

Danielson v. Krebs AG, Inc., 646 P.2d 363 (Colo. 1982)28

Dep’t of Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985)14, 15

Dep’t of Ecology v. Acquavella, 100 Wn.2d 651, 674 P.2d 160 (1983)13

Dep’t of Ecology v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997)5

Dep’t of Ecology v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985)14, 15

Dep’t of Ecology v. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992)39

Dep’t of Ecology v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993)39

Dep’t of Ecology v. Schuh, 100 Wn.2d 180, 667 P.2d 64 (1983)39

Dep’t of Ecology v. Theodoratus, 135 Wn.2d 582,
957 P.2d 1241 (1998) 1-3, 5-7, 9-10, 12-13, 19-21, 26, 39

El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962)24

TABLE OF AUTHORITIES

Cases Cont.

Ellis v. Pomeroy Imp. Co., 1 Wn. 572, 21 P. 27 (1889)5

Farmers Highline Canal & Reservoir Co. v. City of Golden,
129 Colo. 575, 272 P.2d 629 (1954)36

Fremont-Madison Irr. Dist. & Mitigation Group v. Idaho Ground Water Appropriators,
129 Idaho 454, 926 P.2d 1301 (1996)17, 26, 27

Georgia Manor Water Ass’n v. Dep’t of Ecology, PCHB 93-6820, 21

In re Detention of C.W., 147 Wn.2d 259, 53 P.3d 979 (2002)7

In re Det. of Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006)4

In re Pepperling, 65 Wn. App. 17, 827 P.2d 347 (1992)19

In re F.D. Processing Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992)18, 41

In re Riley, 122 Wn.2d 772, 863 P.2d 554 (1993) 18-19

In re Stewart, 115 Wn. App. 319, 75 P.3d 521 (2003)4

In re Water Rights in Alpowa Creek, 129 Wn. 9, 224 P. 29 (1924)39

Johnson v. Morris, 87 Wn.2d 922, 557 P.2d 1299 (1976)4

Laramie Rivers Co. v. Wheatland Irr. Dist., 708 P.2d 20 (Wyo. 1985)25

Lawrence v. Southard, 192 Wn. 287, 73 P.2d 722 (1937)13

Longmire v. Smith, 26 Wn. 439, 67 P. 246 (1901)13

Marine Power & Equip. Co. v. Washington State Human Rights Comm’n,
39 Wn. App. 609, 694 P.2d 697 (1985)4, 18

Mathews v. Eldridge, 424 U.S. 319 (1976)32, 33, 36, 37, 38, 43

Matthews v. Wenatchee Heights Water Co., 92 Wn. App. 541, 963 P.2d 958 (1998)19

Motley-Motley, Inc. v. Pollution Control Hearings Bd., 127 Wn. App. 62,
110 P.3d 812 (2005)24, 25, 36

Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991)5, 39

Nielson v. Sponer, 46 Wn. 14, 89 P. 155 (1907)13

Okanogan Wilderness League v. Town of Twisp, 133 Wn.2d 769,
947 P.2d 732 (1997)28, 36, 39

TABLE OF AUTHORITIES

Cases Cont.

Overton v. State Econ. Assistance Auth., 96 Wn.2d 552,
637 P.2d 652 (1981)4, 5, 6

R.D. Merrill Co. v. Pollution Control Hrg. Bd., 137 Wn.2d 118,
969 P.2d 458 (1999)39

Rettkowski v. Dep’t of Ecology, 122 Wn.2d 219, 858 P.2d 232 (1993)13

Rivett v. City of Tacoma, 123 Wn.2d 573, 870 P.2d 299 (1994)33

Robinson v. City of Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000)17

San Carlos Apache Tribe v. Superior Court, 193 Ariz. 195,
972 P.2d 179 (1999) 10, 11, 16-18, 21, 26, 27, 31, 32, 42

Schulthess v. Carollo, 832 P.2d 552 (Wyo. 1990)25

Schulz v. Natwick, 249 Wis.2d 317, 638 N.W.2d 319 (2001)17

Sheep Mountain Cattle Co. v. Dep’t of Ecology, 45 Wn. App. 427,
726 P.2d 55 (1986)13, 24, 36

Soundgarden v. Eikenberry, 123 Wn.2d 750, 871 P.2d 1050 (1994).....7

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987)4

State v. Icicle Irr. Dist. 159 Wn. 524, 294 P. 245 (1930).....5

State v. Jones, 110 Wn.2d 74, 750 P.2d 620 (1988)18

State v. Randle, 47 Wn. App. 232, 734 P.2d 5 (1987)22, 27, 31, 32, 41

State v. Sunich, 76 Wn. App. 202, 884 P.2d 1(1994)19

State v. T.K., 139 Wn.2d 320, 987 P.2d 63 (1999)41

State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2005).....22, 33

State v. Walter, 66 Wn.App. 862, 833 P.2d 440 (1992)8

State ex rel. Faulk v. CSG Job Center, 117 Wn.2d 493, 816 P.2d 725 (1991)7

United States v. Klein, 80 U.S. 128 (1871)10

United States v. Salerno, 481 U.S. 739 (1987) 16-17, 30, 34

Washington State Republican Party v. Washington State Public Disclosure Comm’n,
141 Wn.2d 245, 4 P.3d 808 (2000).....7

TABLE OF AUTHORITIES

1

2 **STATUTES**

3 RCW 43.21B.110(1)37

4 RCW 90.03.01014

5 RCW 90.03.0154

6 RCW 90.03.015(3)27

7 RCW 90.03.015(4)1, 2, 12, 13, 15, 16, 18, 21, 22, 23, 25

8 RCW 90.03.25023, 25

9 RCW 90.03.250-2906

10 RCW 90.03.26019, 42

11 RCW 90.03.260(4)3, 38-43

12 RCW 90.03.260(5)3, 38-43

13 RCW 90.03.28032, 37

14 RCW 90.03.290(3)42

15 RCW 90.03.3305, 26

16 RCW 90.03.330(2)8, 9, 26

17 RCW 90.03.330(3)1-12, 25-27

18 RCW 90.03.330(4)8, 9, 26

19 RCW 90.03.38028, 31

20 RCW 90.03.380(1)2, 28, 32, 34, 37

21 RCW 90.03.386(2)2, 27-36, 38, 42

22 RCW 90.03.39028, 31

23 RCW 90.14.13023, 25

24 RCW 90.14.140(2)(b)20

25 RCW 90.14.140(2)(d)1, 12, 13, 19, 21, 23

26 RCW 90.14.16022, 23, 25

TABLE OF AUTHORITIES

Statutes Cont.

RCW 90.44.02028, 31

REGULATIONS

WAC 173-153-070(1)37

WAC 173-153-080(1)37

WAC 173-153-130(5)37

WAC 173-153-130(6)37

WAC 173-153-140(1)37

WAC 197-11-340(2)(b)34

WAC 197-11-44034

WAC 197-11-510(1).....34

WAC 197-11-96034

MISCELLANEOUS

Gould, “Water Rights Transfers and Third-Party Effects,”
23 *Land & Water L. Rev.* 1 (1988) 29

A. Tarlock, *Law of Water Rights and Resources*, § 5:73 (2005)29

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

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
4 response to the motions for summary judgment filed by the Defendant State of Washington
5 (the “State”), Defendant-intervenor Washington Water Utility Council (WWUC), and
6 Defendant-intervenor Cascade Water Alliance (CWA). The Tribes’ January 18, 2008, motion
7 for summary judgment demonstrated that several sections of the Municipal Water Law (MWL)
8 were facially unconstitutional. In their motions for summary judgment, the State, WWUC and
9 CWA ask the Court to make the opposite holdings.

10 The Court should deny the State’s and Intervenors’ motions for summary judgment and
11 grant the Tribes’ motion for the following reasons:

12 • RCW 90.03.330(3) violates the separation of powers because it retroactively overrules
13 the holding in *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-90, 957 P.2d 1241
14 (1998), by declaring every “municipal” water right represented by an invalid, system-capacity
15 certificate issued before the MWL’s effective date to be “a right in good standing.”
16 Furthermore, the statute applies regardless of the applicable law and the facts of each case.
17 The *Theodoratus* holding is not limited to permits, as the State argues – the Court expressly
18 “conclude[d] that state statutory and common law does not allow for a final *certificate* of water
19 right to be issued based upon system capacity.” *Theodoratus*, 135 Wn.2d at 587 (emphasis
20 added). The State’s strained interpretation of RCW 90.03.330(3) does not save the statute as it
21 assumes that the Legislature did not mean what it said when it declared invalid pumps and
22 pipes certificates to be rights “in good standing.”

23 • RCW 90.03.015(4) violates the separation of powers by defining “municipal water
24 supply purposes” in a way that retroactively exempts private and other non-municipal water
25 suppliers from relinquishment. *Theodoratus*, 135 Wn.2d at 594-95, expressly held that private
26

1 water suppliers were *not* eligible for the “municipal water supply purposes” exemption to
2 relinquishment, RCW 90.14.140(2)(d).

3 • RCW 90.03.015(4) also violates substantive due process because it retroactively
4 extends the “municipal water supply purposes” relinquishment exemption to rights held by
5 private water purveyors. The statute is not “curative” because the term “municipal water
6 supply purposes” as previously used in the Water Code unambiguously excluded private water
7 systems. *Theodoratus*, 135 Wn.2d at 594. The State’s interpretation of RCW 90.03.015(4)
8 does not save the statute because it still exempts the entire right of a private water purveyor
9 from relinquishment even if the purveyor actively uses only a small portion of the right.
10 Finally, contrary to the intervenors’ position, the definition applies retroactively because the
11 “precipitating event” for relinquishment is nonuse of water, not the initiation of formal
12 relinquishment proceedings.

13 • RCW 90.03.330(3) violates substantive due process because it applies *only*
14 retroactively and treats the unused portion of every pumps and pipes certificate issued for so-
15 called “municipal” purposes as a valid right, regardless of its actual validity. The State’s
16 interpretation of RCW 90.03.330(3) does not save the statute, because the Court must assume
17 that the Legislature meant what it said when it declared every so-called “municipal” right
18 represented by a certificate issued based on system capacity to be “a right in good standing.”

19 • RCW 90.03.386(2) violates substantive due process because changes in the place of use
20 authorized by the statute affect other existing rights due to increases in consumptive use and
21 changes in return flows. The statute applies retroactively because it alters the legal
22 consequences of past events – namely the submission and processing of a water rights
23 application involving a designated place of use.

24 • RCW 90.03.386(2) violates procedural due process because Department of Health
25 procedures for approval of water system plans do not provide sufficient notice of changes to
26 the place of use of water rights or an opportunity for a hearing before such changes become

1 effective. There are readily available procedures, both in RCW 90.03.380(1) and the original
2 version of the MWL, which would provide water right holders with adequate notice and an
3 opportunity to be heard at minimal cost to the State.

4 • RCW 90.03.260(4) and (5) violate substantive and procedural due process because they
5 declare that population or service connection figures in water right documents are “not an
6 attribute limiting exercise of the water right” regardless of the law and facts existing at the time
7 the right was established or whether express language limiting exercise of the water right
8 appears in a particular permit or certificate. The statutes are not curative because many water
9 rights contain express population or service connection limits and because the statutes affect
10 vested water rights.

11 **II. SEPARATION OF POWERS VIOLATIONS.**

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

13 As discussed in the summary judgment motion of the *Burlingame* plaintiffs, RCW
14 90.03.330(3) violates the separation of powers because it applies retroactively and overrules
15 the holding in *Theodoratus*, 135 Wn.2d at 589-90, that a water right can only be perfected by
16 actual beneficial use and may not be perfected on the basis of system capacity.¹ RCW
17 90.03.330(3) directly overrules this holding by declaring every right held for “municipal water
18 supply purposes”² that is represented by a certificate issued on the basis of system capacity (a
19 “pumps and pipes” certificate) rather than actual beneficial use to be “a right in good
20 standing.” *See* *Burlingame* Mot. at 15-20.

21 In its summary judgment motion, the State argues that RCW 90.03.330(3) does not
22 violate separation of powers principles because: (1) *Theodoratus* only restricted the

23
24 ¹ The arguments on separation of powers were incorporated by reference in the Tribes’ summary
judgment motion at page 3, n.5 and page 20, n.23.

25 ² The benefits of RCW 90.03.330(3) are extended to private water developers that serve more than 15
26 residential connections through the MWL’s definition of “municipal water supply purposes.” As explained in
part II.B, below, this definition also retroactively overrules *Theodoratus*.

1 Department of Ecology’s (Ecology) authority to condition permits and did not expressly hold
2 that water rights documented by system capacity certificates are invalid; and (2) the legislature
3 did not mean what it said when it declared every pumps and pipes certificate issued before the
4 statute’s effective date to be “a right in good standing.” State’s Mot. at 18-19. Neither of
5 these arguments is meritorious.

6 **1. RCW 90.03.330(3) Contravenes the Supreme Court’s Construction**
7 **of the Water Code’s Requirements for Perfecting a Water Right.**

8 “The function of a Legislature is to make laws, not to construe them. *Marine Power &*
9 *Equip. Co. v. Washington State Human Rights Comm’n*, 39 Wn. App. 609, 615 n.2, 694 P.2d
10 697 (1985). A judicial interpretation of a statute by the highest court of the State “operates as
11 if it were originally written into it.” *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299
12 (1976); *accord; In re Det. of Halgren*, 156 Wn.2d 795, 803, 132 P.3d 714 (2006). When the
13 Legislature retroactively overrules a judicial interpretation of a statute, it invades the province
14 of the judiciary. Therefore, a legislative attempt to retroactively overrule a decision of the
15 Washington Supreme Court is unconstitutional as a violation of the separation of powers. *In re*
16 *Stewart*, 115 Wn. App. 319, 341-42, 75 P.3d 521 (2003); *see also State v. Dunaway*, 109
17 Wn.2d 207, 216 n.6, 743 P.2d 1237, 749 P.2d 160 (1987) (“[E]ven a clarifying enactment
18 cannot be applied retrospectively when it contravenes a construction placed on the original
19 statute by the judiciary.”). The State acknowledges that “separation of powers problems are
20 raised when a subsequent legislative enactment is viewed as a clarification and applied
21 retroactively, if the subsequent enactment contravenes the construction placed on the original
22 statute by [the Supreme Court].” State Mot. at 16 (quoting *Overton v. State Econ. Assistance*
23 *Auth.*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981)).

24 There is no debate about whether the legislature intended RCW 90.03.330(3) to apply
25 retroactively. By its terms, the amendment applies only to: (1) “a water right represented by a
26 water right certificate issued *prior to* September 9, 2003,” (2) “for municipal water supply
purposes as [now] defined by RCW 90.03.015,” and (3) “where the certificate was issued” on a

1 system capacity basis “rather than after the water had been placed to actual beneficial use.”
2 RCW 90.03.330(3) (emphasis added). This declaration of “good standing” applies to every
3 certificate that meets the three statutory criteria regardless of whether the water use under the
4 certificate in fact has been perfected, relinquished or abandoned under prior law.

5 Even assuming *arguendo* that Washington law was ambiguous on the standards for
6 perfecting a water right,³ RCW 90.03.330(3) violates the separation of powers because the
7 Supreme Court in *Theodoratus* “previously interpreted [the law] to mean something different”
8 from what the Legislature enacted. *Overton*, 96 Wn.2d at 558. The Supreme Court’s holding
9 in *Theodoratus* is summarized in the opening paragraph of the decision:

10 The primary issue in this case is whether a final certificate of water right, i.e., a
11 vested water right, may be issued based upon the capacity of a developer’s water
12 delivery system, or whether a vested water right may be obtained only in the
13 amount of water actually put to beneficial use. . . . *We conclude that state
14 statutory and common law does not allow for a final certificate of water right to
15 be issued based upon system capacity.*

16 *Theodoratus*, 135 Wn.2d at 586-87 (emphasis added). The Court went on to find that
17 Ecology’s prior policy of issuing certificates based on system capacity was *ultra vires* and a
18 clear violation of statutory requirements. *Id.* at 598. Therefore, a change in policy that brought
19 Ecology’s practices into compliance with the law was not arbitrary or capricious. Indeed, the
20 policy change was required by the unambiguous statute: “[U]nder this state’s water code and
21 this court’s decisions, a water right certificate may be issued only for the amount of water
22 actually put to beneficial use.” *Id.* at 600.

22 ³ Prior to the MWL, there was no ambiguity about whether a water right certificate could be issued on a
23 system capacity basis rather on the basis of actual beneficial use. RCW 90.03.330 historically provided for
24 issuance of a water right certificate *only* when the applicant has shown Ecology that its “appropriation *has been*
25 *perfected* in accordance with the provisions of this chapter.” (emphasis added). Strict compliance with the
26 requirements of actual beneficial use of: (1) a specific quantity of water (2) for a declared, intended purpose (3) in
a diligent manner (4) in a particular place of use has always been necessary to perfect a water right in Washington,
even before the enactment of the 1917 Water Code. *Theodoratus*, 135 Wn.2d at 593; *Dep’t of Ecology v.*
Acquavella, 131 Wn.2d 746, 756, 935 P.2d 595 (1997); *Neubert v. Yakima-Tieton Irr. Dist.*, 117 Wn.2d 232, 237,
814 P.2d 199 (1991); *State v. Icicle Irr. Dist.* 159 Wn. 524, 527, 294 P. 245 (1930); *Ellis v. Pomeroy Imp. Co.*, 1
Wn. 572, 578, 21 P. 27 (1889).

1 In its motion, the State attempts to separate the facts of *Theodoratus* from the Court’s
2 holding. Although the State concedes that the Supreme Court pronounced that “neither the
3 statutes nor the case law supports the use of system capacity as a basis for determining a water
4 right,” State Mot. at 17 (quoting *Theodoratus*, 135 Wn.2d at 593), the State maintains that
5 *Theodoratus* did not address the same subject matter as RCW 90.03.330(3) because the case
6 involved only a permit, not a certificate. This is a distinction without a difference. Under
7 RCW 90.03.250 through .290, a permit sets the terms on which a water right certificate will be
8 issued when the right has been perfected. The State does not explain how a certificate could
9 possibly be perfected on a basis other than actual beneficial use. More directly, it does not
10 explain how the Court’s explicit determination that a permittee cannot be lawfully promised a
11 perfected water right based on system capacity can possibly mean that a certificate issued on
12 that basis could be valid. As the Court held, “[h]ere, the original permit would have required
13 that a vested right be granted on a basis which is unlawful.” *Theodoratus*, 135 Wn.2d at 598.

14 In short, RCW 90.03.330(3) applies retroactively and overrules *Theodoratus*. The
15 Supreme Court’s definitive interpretation of the Water Code in that case “mean[s] something
16 different” than RCW 90.03.330(3), the so-called “clarifying” enactment. *Overton*, 96 Wn.2d at
17 558. Furthermore, the Water Code was not ambiguous in requiring that water right certificates
18 be based on actual beneficial use, not system capacity. Accordingly, RCW 90.03.330(3)
19 violates the separation of powers.

20 **2. The Constitutionality of RCW 90.03.330(3) Cannot Be Saved by the**
21 **State’s Strained Reading of the Phrase “Right In Good Standing.”**

22 To avoid the separation of powers problem, the State argues that the Legislature did not
23 mean what it said when it declared every right represented by a pumps and pipes certificate
24 held for so-called “municipal water supply purposes” and issued before the MWL’s effective
25 date to be “a right in good standing.” State’s Mot. at 18. Instead, the State contends that the
26 Legislature merely sought to clarify that the issuance of a pumps and pipes certificate did not
take otherwise valid rights “out of good standing.” *Id.* The State maintains that under RCW

1 90.03.330(3) the holder of a pumps and pipes certificate “would still have to meet other water
2 principles, such as due diligence in project development, to keep them in good standing.” *Id.*

3 Where a statute is susceptible to more than one interpretation, the court will adopt a
4 construction which sustains the statute’s constitutionality, if at all possible. *In re Detention of*
5 *C.W.*, 147 Wn.2d 259, 277, 53 P.3d 979 (2002); *State ex rel. Faulk v. CSG Job Center*, 117
6 Wn.2d 493, 500, 816 P.2d 725 (1991). However, “a court may not strain to interpret the
7 statute as constitutional: a plain reading must make the interpretation reasonable.”
8 *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 225, 11 P.3d 762 (2000);
9 *Washington State Republican Party v. Washington State Public Disclosure Comm’n*, 141
10 Wn.2d 245, 281, 4 P.3d 808 (2000); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 757, 871
11 P.2d 1050 (1994). “[I]n interpreting a statute a court should always turn to one cardinal canon
12 before all others. . . . [C]ourts must presume that a legislature says in a statute what it means
13 and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249,
14 253-54 (1992).

15 The State’s reading of RCW 90.03.330(3) is “strained” at best and is inconsistent with a
16 “plain reading” of the statute. In RCW 90.03.330(3), the Legislature flatly declared that every
17 water right held for “municipal water supply purposes” represented by a pumps and pipes
18 certificate issued before the statute’s effective date to be “a right in good standing.” The
19 State’s argument that the Legislature really meant that otherwise valid water rights were not
20 “taken out of good standing” by the erroneous issuance of a pumps and pipes certificate
21 ignores what the Legislature actually said in favor of an interpretation that is different than the
22 plain meaning of the phrase “a right in good standing.” If the Legislature did not intend to
23 declare that every right represented by pumps and pipes certificates was in fact “a right in good
24 standing,” it certainly could have explicitly said so.

25 The State’s reading of RCW 90.03.330(3) also violates the important principle that
26 “[s]tatutes should be construed as a whole, all language used should be given effect, and

1 related statutes should be considered in relation to each other and whenever possible
2 harmonized.” *State v. Walter*, 66 Wn.App. 862, 870, 833 P.2d 440 (1992). For example, the
3 State’s reading of RCW 90.03.330(3) ignores RCW 90.03.330(4), which sets a different
4 standard for perfection of municipal water right certificates issued *after* the effective date of
5 the MWL than for certificates issued before the statute’s effective date. While RCW
6 90.03.330(3) explicitly confers “good standing” on pre-MWL water rights “where the
7 certificate was issued” on a system capacity basis “*rather than* after the water had been placed
8 to actual beneficial use,” post-MWL certificates are limited to “only . . . the *perfected portion*
9 of a water right as demonstrated through actual beneficial use of the water.” RCW
10 90.03.330(4) (emphasis added). There was no reason for the Legislature to have enacted
11 RCW 90.03.330(4) unless it intended two different methods of perfection: one for pre-MWL
12 certificates and one for post-MWL certificates. Taking the MWL as a whole, as the Court
13 must, unperfected portions of pre-MWL certificates are automatically converted to perfected
14 water rights “in good standing” regardless of whether the facts and the law justify that
15 conclusion.

16 The State’s reading of RCW 90.03.330(3) is also inconsistent with RCW 90.03.330(2),
17 which forbids Ecology from “revoking, diminishing, or adjusting a certificate based on any
18 change in policy regarding the issuance of such certificate that has occurred since the
19 certificate was issued.” The “change in policy” referenced in RCW 90.03.330(2) is obviously
20 Ecology’s change from the unlawful policy of issuing certificates based on system capacity
21 (addressed in RCW 90.03.330(3)) to the current policy of issuing certificates based on actual
22 beneficial use (ratified in RCW 90.03.330(4)). If Ecology cannot “revoke, diminish or
23 adjust” a pumps and pipes certificate based on a finding that the water has not been put to
24 actual beneficial use, the State cannot legitimately claim that the Legislature intended to
25 subject invalid pumps and pipes certificates to an actual beneficial use requirement. It is far
26 more reasonable to assume that the Legislature meant what it said – that a pumps and pipes

1 certificate issued for municipal water supply purposes is “a right in good standing” that may
2 not be diminished by Ecology regardless of the holder’s actual beneficial use of the right prior
3 to the MWL. Or as Intervenor CWA forthrightly puts it – the Legislature required Ecology to
4 keep its “hands off” unlawfully issued pumps and pipes certificates. CWA Mot. at 10.

5 Finally, the State’s argument is contrary to the legislative history which suggests that
6 the intent of the “good standing” language was to remove otherwise applicable actual
7 beneficial use requirements for certificates issued “in the past” on a system capacity basis. The
8 Final Bill Report summarized *Theodoratus* as holding “that a final water right certificate may
9 not be issued for the developer’s right for a quantity of water that has not actually been put to
10 beneficial use.” Goho Declaration, Exh. U at 1 (Final Bill Report for SSHB 1338). The effect
11 of the bill was then summarized:

12 A water right represented by a water right certificate issued *in the past* for
13 municipal water supply purposes once works for diverting or withdrawing and
14 distributing water were constructed, rather than after the water had been placed
15 to actual beneficial use, *is declared to be a right in good standing*. However,
16 from now on, the DOE must issue a water right certificate only for the perfected
17 portion of the right as demonstrated through actual beneficial use of water.

18 *Id.* at 2 (emphasis added). The legislative history of the MWL is inconsistent with the State’s
19 theory that the Legislature did not intend to affirmatively declare that every right represented
20 by a pumps and pipes certificate issued for “municipal water supply purposes” prior to the
21 MWL’s effective date is “a right in good standing.”

22 3. RCW 90.03.330(3) Violates Separation of Powers Because It Results 23 In Legislative Determination of Adjudicative Facts.

24 In addition to the violation of separation of powers resulting from the retroactive
25 overruling of the holding of *Theodoratus*, RCW 90.03.330(3) violates the separation of powers
26 for a separate but equally important reason. The judicial branch of government exists to
determine facts that are specific to each case, and apply the law to those facts. If necessary, the
judicial branch interprets the laws the legislature has enacted. The legislative branch creates
laws that apply generally to the future conduct of all those subject to the laws. But the

1 legislative branch cannot determine whether the past conduct of any given individual is in
2 compliance with law. *See, e.g., United States v. Klein*, 80 U.S. 128, 133 (1871); *City of*
3 *Tacoma v. O'Brien*, 85 Wn.2d 266, 271, 534 P.2d 114 (1975); *San Carlos Apache Tribe v.*
4 *Superior Court*, 193 Ariz. 195, 972 P.2d 179, 194-95 (1999).

5 In *O'Brien*, 85 Wn.2d at 271, the Washington Supreme Court held unconstitutional a
6 legislative declaration that a substantial increase in the cost of petroleum products had rendered
7 the performance of certain existing public works contracts “economically impossible.” The
8 Court held that the legislation was effectively an adjudication as to the economic impossibility
9 of existing contracts and violated the separation of powers doctrine:

10 While a court will not controvert legislative findings of fact, the legislature is
11 precluded by the constitutional doctrine of separation of powers from making
12 judicial determinations. Courts have generally recognized the distinction
13 between legislative and judicial determinations and have carefully preserved
14 judicial functions from legislative encroachment.

15 *Id.* The Court held that the Legislature’s finding that “existing contracts, entered into at least 6
16 months prior to the legislation, have become economically impossible to perform” was “a legal
17 conclusion, a result which follows from examination and consideration of circumstances in a
18 particular case and interpretation and application of legal principles to those facts.” *Id.* at 272.

19 In *San Carlos Apache*, 972 P.2d at 197, the Arizona Supreme Court struck down a
20 retroactive enactment that purported to quantify an existing water right based on the
21 “maximum theoretical capacity of the diversion facility” rather than the water right holder’s
22 actual beneficial use of water. The Court reasoned that “the Legislature may not require a
23 court to reach and decree factual conclusions based on legislative determinations rather than
24 actual facts.” *Id.* The Court held that the separation of powers doctrine prohibits the
25 Legislature from adjudicating cases by defining existing law and applying it to the facts of
26 particular cases.⁴ *Id.* at 195.

⁴ The Court struck down on similar separation of powers grounds several other provisions that
purported to legislatively establish matters that are normally resolved in water rights adjudications, including *de*
minimis use standards and on-farm water duties. *San Carlos Apache*, 972 P.2d at 196-97.

1 Just as the Arizona Legislature attempted to direct the quantification of existing water
2 right based on “maximum theoretical capacity” rather than actual beneficial use, here the
3 Washington Legislature decreed that a water right erroneously perfected on the basis of system
4 capacity instead of actual beneficial use must be treated as “a right in good standing.” As in
5 *San Carlos Apache*, whether any given water right is in fact “a right in good standing” depends
6 on an adjudicative function involving case-by-case application of the law that existed at the
7 time the right was established to the facts. However, the legislative declaration in RCW
8 90.03.330(3) that *every* municipal water right represented by a certificate issued based on
9 system capacity is “a right in good standing” purports to determine the validity of each of those
10 rights irrespective of the prior law and the facts applicable to particular water rights.⁵ The
11 legislative determination that *every* municipal pumps and pipes certificate is “a right in good
12 standing,” despite the wide array of facts, effectively adjudicates the status of those certificates
13 and insulates them from proper judicial inquiry regarding their actual status. While the
14 legislature has the power to adjust water rights prospectively, it has no authority to determine
15 the legal effects of past conduct under the law in existence at the time. As held in *San Carlos*
16 *Apache*, 972 P.2d at 195, that role is reserved for the judiciary. By enacting RCW
17 90.03.330(3), the Legislature crossed the line between legislation and making a blanket,
18 retroactive determination of individual cases in violation of the separation of powers.

22
23 ⁵ As recognized in *Theodoratus*, 135 Wn.2d at 596, even an inchoate water right “remains in good
24 standing *so long as the requirements of law are being fulfilled.*” (Emphasis added). The Legislature was certainly
25 aware of *Theodoratus* and could have included the proviso “so long as the requirements of law are being fulfilled”
26 to RCW 90.03.330(3). The fact that this phrase does not appear in RCW 90.03.330(3) is powerful evidence that
the Legislature intended to confer “good standing” on all pumps and pipes certificates regardless of whether the
“requirements of law” had previously been fulfilled. For example, under RCW 90.03.330(3), a water right for
“municipal water supply purposes” represented by a pumps and pipes certificate is declared to be “in good
standing” even if substantial portions of the right are invalid due to the holder’s failure to exercise reasonable
diligence in developing the right.

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

2 As discussed in the *Burlingame* plaintiffs’ summary judgment motion, RCW
3 90.03.015(4) also violates the separation of powers because it purports to retroactively overrule
4 the holding of *Theodoratus* that a private water purveyor is not a “municipality” that is exempt
5 from relinquishment under RCW 90.14.140(2)(d).⁶ *Burlingame Mot.* at 18-20. In its motion,
6 the State argues that the new definitions of “municipal water supplier” and “municipal water
7 supply purposes” do not violate separation of powers because *Theodoratus* did not definitively
8 rule on whether a non-municipal entity could hold water rights for municipal purposes, and
9 there was no statutory definition of the terms at the time. *State Mot.* at 20. Therefore, the
10 State argues, the Legislature could define the terms and apply the definitions retroactively to
11 water rights issued prior to the adoption of the definitions. *Id.*

12 Contrary to the State’s argument, the definition of “municipal water supply purposes”
13 in RCW 90.03.015(4) is flatly contrary to the holding in *Theodoratus*. The new definition
14 clearly brings within the scope of the “municipal water supply purposes” exemption to the
15 State’s relinquishment statute, RCW 90.14.140(2)(d), the very type of privately operated water
16 system that *Theodoratus* held was not eligible for the distinctive treatment afforded to
17 municipal systems under that statutory exception.⁷ *Theodoratus*, 135 Wn.2d at 594-95. Indeed,
18 by citing RCW 90.14.140(2)(d) as an example of the type of “municipal” treatment for which
19 the development was ineligible, *Theodoratus* clearly and unambiguously ruled that privately
20 operated water systems were not eligible for the “municipal water supply purposes” exception
21 to the relinquishment statute. *Id.* The State’s myopic focus on which part of speech (noun or
22 adjective) was involved in *Theodoratus*, *State Mot.* at 21, ignores the fact that the term

23 _____
24 ⁶ The Tribes also adopted these arguments in their summary judgment motion. *See Tribes’ Mot.* at 3,
n.5.

25 ⁷ It is undisputed that the new definition of “municipal water supply purposes” includes a privately
26 operated water supply system such as the one involved in *Theodoratus* because that system supplied more than 15
residential connections. *See Theodoratus*, 135 Wn.2d at 587 (indicating that 93 of the planned 253 residential lots
had water service at the time of the litigation).

1 “municipal water supply purposes” is used in the very statute, RCW 90.14.140(2)(d), that was
2 held inapplicable to the water system at issue in *Theodoratus*. In short, because the definition
3 of “municipal water supply purposes” enacted in RCW 90.03.015(4) expressly contradicts the
4 holding in *Theodoratus*, it violates the separation of powers doctrine.

5 **III. DUE PROCESS VIOLATIONS.**

6 **A. The State’s Police Powers Must Be Exercised in Accordance with the Due 7 Process Clause.**

8 In introductory comments titled “Background On The Law of Water Rights In The
9 West And In Washington,” the State presents a remarkably expansive view of the
10 government’s power to modify or even extinguish private water rights without compensation.
11 *See State Mot.* at 7-10. In a nutshell, the State maintains that because water is a public
12 resource, private rights to use water “may be modified by the Legislature’s authority to pass
13 new laws that define the nature of the right, or the ‘bundle of sticks’ included in a water right.”
14 *Id.* at 9. The State’s view is unsupported by precedent and is not reflective of the constitutional
15 protections afforded to the holders of vested water rights.

16 It is well established that “[p]roperty owners have a vested interest in their water rights”
17 and that “water rights must receive due process protection.” *Dep’t of Ecology v. Acquavella*,
18 100 Wn.2d 651, 655-56, 674 P.2d 160 (1983); *Lawrence v. Southard*, 192 Wn. 287, 302, 73
19 P.2d 722 (1937); *Nielson v. Sponer*, 46 Wn. 14, 89 P. 155 (1907); *Longmire v. Smith*, 26 Wn.
20 439, 67 P. 246 (1901); *see also Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 228, 858 P.2d
21 232 (1993); *Sheep Mountain Cattle Co. v. Dep’t of Ecology*, 45 Wn. App. 427, 430-31, 726
22 P.2d 55 (1986). Thus, while the legislature has the power to enact laws regulating the exercise
23 of water rights, such laws must be consistent with the due process clauses of the State and
24 United States constitutions. *Rettkowski*, 122 Wn.2d at 228; *Sheep Mountain*, 45 Wn. App. at
25 430-31.

26 The State claims support for its expansive view of the State’s police powers in two
cases, *Dep’t of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985) and *Dep’t of Ecology*

1 v. *Adsit*, 103 Wn.2d 698, 694 P.2d 1065 (1985). *Abbott* concerned the status of unused
2 riparian rights after the enactment of the 1917 Water Code. Notably, the Water Code expressly
3 provides that it shall not be “construed to lessen, enlarge or modify the *existing* rights of any
4 riparian owner.” RCW 90.03.010 (emphasis added). The Court held that at the time the Water
5 Code was enacted, a riparian owner was required to exercise riparian rights within a reasonable
6 time or risk forfeiture, and that the Water Code’s protection of existing riparian rights did not
7 extend to unused rights that were not exercised within a reasonable time (15 years) of the
8 Code’s enactment. *Abbott*, 103 Wn.2d at 695. Addressing the question of due process, the
9 Court further held that the enactment of the 1917 Water Code and the cases following from it
10 “constituted sufficient notice and opportunity for exercise of unused riparian rights so that no
11 compensable taking occurred by reversion of unused riparian rights to the State.” *Id.* at 697.

12 *Adsit*, 103 Wn.2d at 700, concerned a 1967 statute, which extinguished all claims to
13 water not already certified by the State if such claims were not recorded by June 30, 1974.
14 (citing RCW 90.14.041, .071). The Court held that the claims registration legislation did not
15 violate due process. *Adsit*, 103 Wn.2d at 706. The Court reached that holding because the
16 statute could not “result in the diminution or extinction of water rights validly held,” and
17 because the legislature had the power to “condition the permanent retention” of a water right
18 “on the performance of reasonable conditions that indicate a present intention to retain that
19 interest.” *Id.* at 706-07. Because the loss of water rights was the result of the water right
20 holder’s “own neglect” in failing to register a claim with the State, the statute did not enact an
21 unconstitutional taking of property. *Id.* at 707.

22 Both *Abbott* and *Adsit* confirm that the constitutionality of legislation affecting water
23 rights cannot be resolved based on broad invocations of the Legislature’s “police powers.”
24 Rather, the constitutionality of the legislation must depend on a particularized inquiry into
25 whether the legislation meets judicially established due process requirements. *See also*
26 *Carlstrom v. State*, 103 Wn.2d 391, 396-97, 694 P.2d 1 (1985) (“the mere assertion of the

1 police power as the basis for enacting legislation is not sufficient to shield it from scrutiny
2 when constitutional considerations are at stake”).

3 Furthermore, although both cases held that the legislation at issue was consistent with
4 due process, in each case the legislation made only prospective changes in the law, there was
5 notice of the change, and the party faced with the change had the opportunity to take
6 reasonable action to avoid the loss or alteration of its rights. In *Abbott*, 103 Wn.2d at 697, the
7 riparian right holders had had notice that the State was shifting to the prior appropriation
8 system and were given fifteen years in which to exercise unused riparian rights before they
9 were lost. In *Adsit*, 103 Wn.2d at 707, the water right holders were put on notice that failure
10 to register uncertified claims within seven years of the enactment of the statute would result in
11 relinquishment and could preserve their rights by complying with “reasonable conditions that
12 indicate a present intention to retain” those rights.

13 Here, by contrast, the particular provisions of the MWL challenged in this case apply
14 retroactively and affect vested water rights by operation of law. The provisions provide no
15 opportunity for affected parties to take action necessary to retain their rights or even, in the
16 case of the place of use and service connection provisions, notice and opportunity for a hearing
17 to contest the actions of State agencies that will affect their vested rights. As we discuss
18 below, these statutes fail to meet the fundamental requirements of either substantive or
19 procedural due process.

20 **B. RCW 90.03.015(4) Violates Substantive Due Process.**

21 The Tribes’ motion for summary judgment explained that RCW 90.03.015(4) violates
22 substantive due process because the effect of the adoption of the new definition of “municipal
23 water supply purposes” is to retroactively extend to rights held by water purveyors for
24 community domestic or other non-municipal purposes the “municipal water supply purposes”
25 exemption to the relinquishment statute. Tribes’ Mot. at 17-20. Prior to the enactment of
26 RCW 90.03.015(4), such rights were not subject to the “municipal water supply purposes”

1 exemption. Applied retroactively, the definition excuses nonuse of water that occurred prior to
2 the definition’s enactment even though the same nonuse would not have been permitted by the
3 exemption at the time. By “reviv[ing] rights that have been lost or terminated under the law as
4 it existed at the time of an event,” RCW 90.03.015(4) violates the rights and priorities of others
5 sharing the same source of supply. *San Carlos Apache*, 972 P.2d at 189.

6 In its motion, the State maintains that the new definitions of “municipal water supply
7 purposes” and “municipal water supplier” survive a facial challenge because they can be
8 applied prospectively without violating due process. State’s Mot. at 25-27. The State also
9 argues that the new definitions may be applied retroactively because the definitions are
10 “curative” provisions that clarify ambiguity in the Water Code. *Id.* at 28-30. The State finally
11 argues that the challenged definitions do not violate substantive due process because they
12 require actual beneficial use of water in order to qualify for exemption from relinquishment.
13 *Id.* at 30-32. In their motions, intervenors vehemently disagree with the State’s position that
14 the definitions require actual beneficial use to be effective, but contend that the definitions
15 operate only prospectively because the “precipitating event” for relinquishment is a finding by
16 the Pollution Control Hearings Board or a court that the right has been relinquished. *See*
17 *WWUC Mot.* at 22-28. None of these arguments withstands analysis.

18 **1. RCW 90.03.015(4) Is Susceptible to a Facial Challenge Even If It Is**
19 **Constitutional When Prospectively Applied.**

20 As noted, the State maintains that the new definitions of “municipal water supply
21 purposes” and “municipal water supplier” survive a facial challenge because they can apply
22 prospectively without violating due process. State’s Mot. at 25-27. The State’s argument is
23 based on an unprecedented and extreme application of the controversial *United States v.*
24 *Salerno*, 481 U.S. 739 (1987), “no set of circumstances” test for facial challenges. As
25 discussed further in Part I of the *Burlingame* response brief (pages 3-11), the *Salerno* “no set
26 of circumstances” test simply does not apply to taxpayer standing cases, *Robinson v. City of*
Seattle, 102 Wn. App. 795, 808, 10 P.3d 452 (2000), and has not been applied by other State

1 courts in cases involving facial challenges to legislation that retroactively alters or affects
2 water rights.⁸ *San Carlos Apache*, 972 P.2d at 194; *Fremont-Madison Irr. Dist. & Mitigation*
3 *Group v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996).

4 Even if the *Salerno* test does apply here, the State’s argument that the Tribes cannot
5 bring a facial challenge to retroactive legislation if the legislation may constitutionally applied
6 prospectively stretches *Salerno* beyond its breaking point. The State cites no precedent for a
7 court declining to hear a challenge to retroactive legislation on the grounds that the statute may
8 be constitutionally applied prospectively. Indeed, in *San Carlos Apache*, 972 P.2d at 194, the
9 court *invalidated* many of the statutes at issue even though they were plainly intended to apply
10 both retrospectively and prospectively.⁹ Although the court considered whether to declare the
11 statutes valid if applied prospectively, the court ultimately decided that the statutes must be
12 invalidated in their entirety:

13 Ordinarily we interpret statutes in a manner that will enable us to uphold their
14 constitutionality. In this case, however, we believe the entire body of legislation
15 was intended to apply both retroactively and prospectively. Further, we find a
16 significant portion of HB 2276 unconstitutional under the separation of powers
17 doctrine of article III of the Arizona Constitution. Consequently, we have no
18 way of knowing if the Legislature would have enacted these substantial changes
had it known that the original, single body of law would be considerably
changed. That decision is for the Legislature. Assuming the statutes are
constitutional on other grounds, the Legislature may, if it so decides, reenact
those statutes we find to be retrospective so that they apply only to future
consequences of *future* events.

19 *Id.* (emphasis in original, citations omitted).

20 In short, regardless of whether RCW 90.03.015(4) is constitutional if applied
21 prospectively, the Court can and must determine whether the statute is constitutional when
22 applied retrospectively, as the State claims the Legislature intended. If the Court finds that the

24 ⁸ The Tribes adopt the discussion of the *Salerno* standard found in Part I of the *Burlingame* plaintiffs’
response to the motions for summary judgment.

25 ⁹ In other contexts, courts have determined that the constitutionality of the retroactive application of a
26 statute can be evaluated as part of a facial challenge. See *Schulz v. Natwick*, 249 Wis.2d 317, 638 N.W.2d 319,
323-24 (2001) (challenge to retroactive application of tort liability statute).

1 statute cannot be applied retrospectively, *San Carlos Apache* suggests that the Court must
2 invalidate the statute and leave it to the Legislature to decide whether to reenact the statute to
3 apply on a prospective basis.

4 2. **RCW 90.03.015(4) Is Not Curative.**

5 The State maintains that RCW 90.03.015(4) can be applied retroactively without
6 violating substantive due process because it is “curative.” State’s Mot. at 27-30. However, an
7 amendment of a statute is “curative” only if it “clarifies or technically corrects an ambiguous
8 statute.” *In re F.D. Processing Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992); *State v.*
9 *Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988). In general, “legislative amendments *change*
10 unambiguous statutes” while “legislative clarifications *interpret* ambiguous statutes.” *Marine*
11 *Power*, 39 Wn. App. at 615 (emphasis added). In other words, the Legislature can clarify the
12 definition of “apple” by later stating that it meant only the fruit commonly known as apples,
13 and not certain brands of computers, but it cannot say that it originally meant “oranges” if it
14 wants to have the new definition apply retroactively.¹⁰ In this case, RCW 90.03.015(4) is an
15 amendment, and it is not “curative” because there was no ambiguity in the Water Code’s prior
16 use of the term “municipal water supply purposes.” The statute does not “clarify” the use of
17 the term but instead amends it in a way that conflicts with its plain and ordinary meaning.

18 First, as used in the Water Code prior to the MWL, the term “municipal water supply
19 purposes” was not ambiguous. While a statute is ambiguous if it is subject to two or more
20 *reasonable* interpretations, a statute is not ambiguous merely because arguments regarding
21 distinct interpretations of it are conceivable. *See In re Riley*, 122 Wn.2d 772, 787, 863 P.2d
22 554 (1993); *Armstrong v. Safeco Ins. Co.*, 111 Wn.2d 784, 790-91, 765 P.2d 276 (1988).
23 Moreover, unambiguous statutory language is not subject to interpretation. *Cascade Sewer*
24 *Dist. v. King Cy.*, 56 Wn. App. 446, 448, 783 P.2d 1113 (1989). A term is not ambiguous

25 _____
26 ¹⁰ The Legislature can, of course, define “apple” to include “orange” in all future uses of the term, as
confusing as that definition might be.

1 merely because it is undefined. “[A]n undefined term should be given its plain and ordinary
2 meaning, absent evidence of a contrary legislative intent.” *State v. Sunich*, 76 Wn. App. 202,
3 207, 884 P.2d 1 (1994) (quoting *Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 813,
4 828 P.2d 549 (1992)). Where a term is undefined in the statute, courts turn to the term’s
5 ordinary dictionary meaning. *In re Pepperling*, 65 Wn. App. 17, 21, 827 P.2d 347 (1992).

6 Prior to the MWL, the term “municipal water supply purposes” was found in only two
7 places: (1) RCW 90.14.140(2)(d), which provided an exemption from relinquishment for water
8 rights claimed for “municipal water supply purposes;” and (2) RCW 90.03.260, which
9 provided that that an application “for municipal water supply purposes . . . shall give the
10 present population to be served and, as near as may be estimated, the future requirement of *the*
11 *municipality*.” (emphasis added). To the extent there is any ambiguity in the term “municipal
12 water supply purposes, RCW 90.03.260 resolved that ambiguity by making clear that the term
13 “municipal water supply purposes” was intended to apply *only* to a “municipality.”

14 The State does not contend that the phrase “water supply purposes” is ambiguous.
15 While its argument seems to relate to the word “municipal,” that term has a clear common
16 meaning. “Municipal” is universally defined to refer to a governmental unit, and exclude
17 private entities. For example: “municipal, adj. 1. Of or relating to a city, town, or local
18 governmental unit. 2. Of or relating to the internal government of a state or nation (as
19 contrasted with international).” *Black's Law Dictionary* (7th ed. 1999) at 1037. “Relating to a
20 town, city or region that has its own local government. [http://encarta.msn.com/dictionary/_](http://encarta.msn.com/dictionary/_municipal.html)
21 [municipal.html](http://encarta.msn.com/dictionary/_municipal.html). The courts agree: “A municipal corporation is a political arm of the state.”
22 *Matthews v. Wenatchee Heights Water Co.*, 92 Wn. App. 541, 548, 963 P.2d 958 (1998).
23 Indeed, in *Theodoratus*, 135 Wn.2d at 594, the Supreme Court refused to even consider an
24 argument that the “municipal water supply purposes” exemption applied to a “public water
25 supply” for a private development, on the grounds that a private development “is not a
26 municipality.”

1 The State has divined ambiguity in the term “municipal water supply purposes” only
2 after being charged with responsibility for defending the constitutionality of the statute. Prior
3 to that time, the State argued forcefully that the meaning of the term was clear and did not
4 include rights held by private entities. In *Georgia Manor*, the State argued that to “so broadly
5 interpret[] municipal supply purposes to include the purveyorship of domestic water for private
6 development . . . grossly misinterprets” the statute.¹¹ The Pollution Control Hearings Board
7 agreed that the term “municipal water supply purposes” found in the relinquishment statute,
8 RCW 90.14.140(2)(b) was “unambiguous,” and that Ecology was “without any authority to
9 alter or amend the act through its interpretation.”¹²

10 The State advances two justifications for its belated realization that the term “municipal
11 water supply purposes” is ambiguous: (1) “Ecology personnel construed the term . . .
12 differently at different points in time,” and (2) “in several instances prior to the MWL, Ecology
13 issued water right certificates to non-governmental entities for municipal supply purposes.”
14 State Mot. at 28. These arguments are simply irrelevant. Misunderstanding of the law by
15 Ecology personnel does not establish that the law was ambiguous. For example, it is
16 undisputed that for years Ecology unlawfully issued water rights certificates on a system
17 capacity basis rather than on the unambiguous statutory requirement of actual beneficial use.
18 The result in *Theodoratus* demonstrates that the fact that Ecology employees applied the law in
19 a way that is inconsistent with a statute does not *ipso facto* render the law ambiguous.

20 Far more relevant than the random acts of individual employees, is the official position
21 successfully taken by Ecology through the Attorney General in *Georgia Manor* and the
22 Board’s holding in that case. Indeed, the State concedes that the Board held that the *Georgia*
23 *Manor* water association was not a “municipal water supplier,” but that it *would* be considered

24 _____
25 ¹¹ Tribes’ Exh. 18 at 3 (*Georgia Manor Water Ass’n v. Dep’t of Ecology*, PCHB 93-68, Ecology’s
26 Memorandum in Support of Motion for Partial Summary Judgment (May 26, 1994)).

¹² Tribes’ Exh. 7 at 2-3 (*Georgia Manor Water Ass’n v. Dep’t of Ecology*, PCHB 93-68, Order
Granting Partial Summary Judgment (Jun. 29, 1994)).

1 a municipal water supplier today under the new MWL definition. State Mot. at 28-29. The
2 same applies to the developer in *Theodoratus*. See n. 7, *supra*. These facts succinctly
3 demonstrate why the new definition cannot be applied retroactively. As previously noted, the
4 *Georgia Manor* association was held not to be a municipal supplier precisely because the
5 statute unambiguously excluded it from that category.¹³ Moreover, the State vigorously and
6 officially argued for the same conclusion. Significantly, the State points to no judicial
7 consideration of the terms “municipal water supplier” or “municipal supply purposes” that
8 even hints these terms might be considered ambiguous.

9 Even if the State could establish ambiguity, it cannot establish that RCW 90.03.015(4)
10 merely “clarifies” the term “municipal water supply purposes” rather than amending it. No
11 judicial or administrative interpretation of the term “municipal water supply purposes” has ever
12 implied that it could be as broad as the new definition in RCW 90.03.015(4). A private entity,
13 serving as few as 15 homes was never considered to be using water for “municipal water
14 supply purposes” prior to the MWL, and this definition goes far beyond any reasonable
15 construction of the term. The State does not explain how a definition that goes beyond any
16 reasonable interpretation of the term could be a “clarification” rather than an entirely new
17 definition. It is therefore incorrect to say that the MWL did not change existing law when it
18 now includes those entities within the definitions of RCW 90.03.015(4).¹⁴

19 In short, because RCW 90.03.015(4) changes the definitions of “municipal water
20 supply purposes” to retroactively exempt certain water rights from the consequences of prior
21

22 ¹³ See Tribes’ Exh. 8 at 3.

23 ¹⁴ Also relevant to whether RCW 90.03.015(4) “clarifies” the “municipal water supply purposes”
24 exception in RCW 90.14.140(2)(d) is the fact that 36 years elapsed between the enactment of the relinquishment
25 statute and the 2003 MWL definition of “municipal water supply purposes.” In *San Carlos Apache*, 972 P.2d at
26 193-94, the court rejected the argument that the challenged statutes merely clarified earlier statutes, reasoning that
“when an amendment is enacted after a considerable length of time and constitutes a clear and distinct change of
the operative language, it is an indication of an intent to change, rather than clarify, the previous statute.” See also
Anderson v. City of Seattle, 78 Wn.2d 201, 205, 471 P.2d 87 (1970) (Finley, J. concurring).

1 nonuse, it changes the legal consequences of acts that occurred prior to enactment of the law
2 and violates substantive due process. *State v. Varga*, 151 Wn.2d 179, 194-95, 86 P.3d 139
3 (2005); *State v. Randle*, 47 Wn. App. 232, 240-41, 734 P.2d 5 (1987) (law is retrospective if it
4 “changes the legal consequences of acts completed before its effective date”).

5 **3. The State’s “Active Compliance” Argument Cannot Save the**
6 **Constitutionality of RCW 90.03.015(4).**

7 The State maintains that the new definition of “municipal water supply purposes”
8 cannot resurrect long used water rights because the definition requires “*actual beneficial use of*
9 *water in order to qualify for [the] exemption from relinquishment.*” State Mot. at 30 (emphasis
10 in original). Assuming, but without conceding, that the State’s interpretation of RCW
11 90.03.015(4) is correct, the State’s argument still fails to address the fundamental problem with
12 RCW 90.03.015(4) -- its retroactive excusal of prior nonuse of water.¹⁵

13 Prior to the MWL, relinquishment applied to “any portion” of the right that was not
14 beneficially used. RCW 90.14.160. Beneficial use of a portion of the right thus clearly did not
15 protect the unused portion. *Id.* But under the State’s interpretation, as long as a purveyor used
16 enough water to meet the new definition (*e.g.* served more than 15 residential service
17 connections), its prior nonuse of the rest of its right would be completely exempt from
18 relinquishment. For example, assume that a private water purveyor had a perfected right
19 sufficient to serve 300 service connections but for a five year period prior to the MWL used the
20 right to serve only 150 connections. In such an instance, even under the State’s interpretation,
21 the purveyor’s use would qualify as a “municipal water supply purpose” under the new
22 definition and its failure to beneficially use fully one-half of its right would be completely
23 exempt from relinquishment under RCW 90.14.140(2)(d). Because the State’s reading of
24 RCW 90.03.015(4), even if correct, would “change the legal consequences” of prior non-use of

25 _____
26 ¹⁵ Defendant-intervenors vigorously contest the State’s interpretation of RCW 90.03.015(4). *See*
WWUC Mot. at 32-34. The Tribes take no position on the controversy between the State and the intervenors, but
note that the statute is unconstitutional regardless of which construction is adopted.

1 a water right occurring before the effective date of the MWL, it violates substantive due
2 process.

3 **4. The Intervenors’ “Precipitating Event” Arguments Are Without
4 Merit.**

5 The Defendant-intervenors contend that RCW 90.03.015(4) does not operate
6 retroactively because the “precipitating event” for the statute’s application in the
7 relinquishment context is not the nonuse of water, but the initiation of a relinquishment
8 proceeding by Ecology or an adjudication in superior court. WWUC Mot. at 24-28. This
9 argument is contrary to the plain language of the relinquishment statute, which provides:

10 Any person entitled to divert or withdraw waters of the state . . . who voluntarily
11 fails, without sufficient cause, to beneficially use all or any part of said right to
12 divert or withdraw for any period of five successive years after July 1, 1967,
13 *shall relinquish* such right or portion thereof, and said right or portion thereof
14 *shall revert* to the state, and the waters affected by said right *shall become*
15 *available for appropriation* in accordance with RCW 90.03.250.

16 RCW 90.14.160 (emphasis added).

17 Under the relinquishment statute, reversion occurs as a matter of law when a water
18 right holder fails “without sufficient cause, to beneficially use a portion of a water right for five
19 successive years.” RCW 90.14.160. At that point, the water right holder “shall relinquish” the
20 unused portion of the right which “shall revert” to the State. *Id.* The hearing procedure of
21 RCW 90.14.130 provides an avenue for a water right holder to contest a determination that the
22 reversion has occurred, but it is the failure to use the water, not the adjudicative determination
23 that results in the reversion. The hearing statute itself confirms this: “When it appears . . .
24 that said right *has . . . reverted* to the state because of non-use as provided by RCW 90.14.160 .
25 . . . , the department of ecology shall notify such person by order” RCW 90.14.130
26 (emphasis added).

27 Thus, contrary to the intervenors’ argument, it is the nonuse of water for five
28 consecutive years that is the “precipitating event” for relinquishment, not an administrative or

1 judicial adjudication of whether relinquishment has occurred.¹⁶ This, in fact, has been the
2 long-standing position of Ecology and the Attorney General’s office. That policy is clearly set
3 forth in a September 13, 1983, Ecology policy memorandum:

4 The correct interpretation that we should all be using is that a right is to be
5 considered as relinquished, regardless of whether the relinquishment form has
6 been processed, as long as all the other conditions are met which are the basis
7 for the relinquishment. In other words, relinquishment of a water right is
8 dependent upon the factual situation – if a water right (or portion thereof) has
9 not been used for five successive years and does not qualify for exemption
10 under RCW 90.14.140, the right has reverted to the state “as a matter of law.”
11 *The fact that the Department of Ecology has not been aware of the reversion or
12 taken any formal action to make the reversion a matter of public record does
13 not keep the right alive.*¹⁷

14 Given Ecology’s long-standing policy position, it no coincidence that that the State has not
15 joined in the intervenors’ argument.

16 Intervenors’ argument depends almost entirely on *Motley-Motley, Inc. v. Pollution*
17 *Control Hearings Bd.*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005). However, *Motley* stands for
18 the proposition that, under the due process clause, the State may not issue a final order of
19 relinquishment before providing an affected water right holder with notice and an opportunity
20 for a hearing. 127 Wn. App. at 80-81; *see also Sheep Mountain*, 45 Wn. App. at 431. *Motley*
21 addresses only the question of procedural due process, not the “precipitating event” for the

22 ¹⁶ The operation of the relinquishment statute is analogous to adverse possession. It is the passage of
23 the statutory period, coupled with the required predicate acts (possession and use of the disputed area in the
24 manner typical of a true owner), that results in title changing from the record owner to the adverse possessor. *El*
25 *Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528 (1962). In order to obtain insurable title, the adverse
26 possessor may have to commence a quiet title action years later, but that proceeding merely confirms that the
predicate acts have occurred and continued for the required statutory period. Legal title vests with the acts,
regardless of when a court confirms title.

¹⁷ Tribes’ Exh. 29 (Memorandum from Cameron et al. to Regional Managers (Sept. 13, 1983)
(emphasis added). The Ecology memorandum attached an earlier memorandum authored by Senior Assistant
Attorney General Charles B. Roe which likewise concluded that under the relinquishment statute “five
consecutive years of non-use or non-exercise of a right operates as a matter of law as forfeiture” and characterized
the initiation of relinquishment proceedings under RCW 90.14.130 as the “formalization of loss of a right.” *Id.* at
122-23 (Memorandum from Roe to Spencer (Jan. 24, 1977).

1 relinquishment itself.¹⁸ Under RCW 90.14.160, the “precipitating event” for the
2 relinquishment of a water right is past nonuse of water, without sufficient cause. The due
3 process hearing provided for in RCW 90.14.130 serves merely as the procedural mechanism
4 whereby a water right holder can contest a State determination that the right had previously
5 been relinquished.¹⁹ Because, the “precipitating event” for relinquishment is five consecutive
6 years of nonuse without sufficient cause as defined at the time of the nonuse, RCW
7 90.03.015(4) applies retroactively and violates substantive due process.

8 **C. RCW 90.03.330(3) Violates Substantive Due Process.**

9 The Tribes’ summary judgment motion explains that notwithstanding the holding in
10 *Theodoratus* that water rights may only be perfected through actual beneficial use of water,
11 RCW 90.03.330(3) provides that a certificate issued by Ecology for “municipal water supply
12 purposes” (as defined in RCW 90.03.015(4)) on the basis of system capacity “is a right in good
13 standing.” By deeming erroneously issued “pumps and pipes” certificates to be rights “in
14 good standing,” RCW 90.03.330(3) converts unused water rights into vested, perfected rights
15 for the purposes of the Water Code. Even if the statute is not construed to treat pumps and
16 pipes certificates as fully perfected rights, the statute nevertheless declares all of these
17 certificates to be *inchoate* rights “in good standing” regardless of whether the unused portions
18 of the certificates are no longer valid due to past failures to exercise reasonable diligence or
19

20
21 ¹⁸ Ironically, intervenors ignore the fact that the MWL, which it is defending, denies to vested junior
22 water right holders the very procedural due process protections that the relinquishment statute provides to parties
23 whose rights are lost through relinquishment. See Parts III.E and G below.

24 ¹⁹ Intervenors also argue that because relinquished water reverts to the State, junior right holders are not
25 harmed if the reverted water is restored to the senior right by legislative fiat. WWUC Mot. at 31. This contention
26 again ignores the language of relinquishment statute. Although relinquished rights revert to the State, the statute
also makes clear that the “the waters affected by said right shall become *available for appropriation* in accordance
with RCW 90.03.250.” RCW 90.14.160 (emphasis added). Under the prior appropriation system, existing
holders of junior rights have first priority to appropriate unappropriated, relinquished water. See, e.g., *Schulthess*
v. Carollo, 832 P.2d 552, 557 (Wyo. 1990); *Laramie Rivers Co. v. Wheatland Irr. Dist.*, 708 P.2d 20, 30 (Wyo.
1985). RCW 90.03.015(4) takes away this unappropriated water from the juniors and gives it back to the senior
right holder. In doing so, it violates substantive due process.

1 otherwise meet legal requirements.²⁰ Because RCW 90.03.330(3) applies *only* retroactively
2 and treats the unused portion of a “pumps and pipes” certificate as a valid right, regardless of
3 its actual validity, it violates due process. *San Carlos Apache*, 972 P.2d at 189; *Fremont-*
4 *Madison*, 926 P.2d at 1307.

5 The State’s defense against the Tribes’ substantive due process claim rests on the same
6 basis as its defense to the separation of powers claim. State Mot. at 41-42. It argues, in
7 essence, that the Legislature did not mean what it said when it declared in RCW 90.03.330(3)
8 that every so-called “municipal” water right represented by a pumps and pipes certificate
9 issued before the MWL’s effective date is “a right in good standing.” Instead, the State argues
10 that the statute merely confirms that the issuance of a pumps and pipes certificate did not take
11 the right “out of good standing,” and that to be “in good standing” the water right holder must
12 still meet all of the requirements of the Water Code including the reasonable diligence
13 requirement of RCW 90.03.320. The State provides little support for this interpretation of
14 RCW 90.03.330, other than a recently minted interpretive policy enacted after this litigation
15 was filed.²¹ As discussed on pages 6-9, *supra*, the Court should reject the State’s strained
16 interpretation of RCW 90.03.330(3) because it is inconsistent with the Legislature’s clear
17 intent as reflected in the statute’s plain meaning, the interplay between RCW 90.03.330(3) and
18 related provisions of the MWL including RCW 90.03.330(2) and (4), and with the statute’s
19 legislative history.

20 Notably, the State does not argue that RCW 90.03.330(3) could be constitutionally
21 applied if either of the Tribes’ interpretations are correct, *i.e.* that the statute treats the rights
22 represented by improperly issued pumps and pipes certificates as either fully perfected rights,

23 ²⁰ An inchoate right is an “incomplete appropriative right in good standing so long as the requirements
24 of law are being fulfilled.” *Theodoratus*, 135 Wn.2d at 596.

25 ²¹ Other than the February 5, 2007, interpretive policy, the state cites only the PCHB decision in
26 *Cornelius v. Dep’t of Ecology*, PCHB No. 06-099 (Dec. 7, 2007), which merely noted Ecology’s position, while
concluding that the certificate in question there was being pursued with reasonable diligence, regardless of the
effects of the MWL.

1 or alternatively as inchoate rights “in good standing” without regard to prior failures to develop
2 the rights with reasonable diligence. The State thus appears to concede that if the Legislature
3 in fact meant what it said, RCW 90.03.330(3) would be facially unconstitutional. Because the
4 Court must assume that the Legislature’s intent is reflected in its statutory language, *Germain*,
5 503 U.S. at 253-54, the Court should hold that RCW 90.03.330(3) violates substantive due
6 process.

7 **D. RCW 90.03.386(2) Violates Substantive Due Process.**

8 As discussed in the Tribes’ motion for summary judgment (pages 22-24), RCW
9 90.03.386(2) violates substantive due process because the statute, by operation of law, expands
10 the place of use of water rights held by so-called “municipal water suppliers” (as defined by
11 RCW 90.03.015(3)) from their original place of use to the service area provided for in a water
12 system plan approved by the Department of Health. The expansion in the place of use
13 authorized by this statute is effective regardless of whether the change in the place of use will
14 impair existing rights. By redefining the place of use for rights held by “municipal water
15 suppliers” to be the service area in an approved water system plan, instead of the original place
16 of use approved by the State when the right was issued, RCW 90.03.386(2) retroactively alters
17 the “legal effect of acts that resulted in acquisition and priority of water rights.” *San Carlos*
18 *Apache*, 972 P.2d at 189; *see also Randle*, 47 Wn. App. at 240-41. Such retroactive expansion
19 of some rights, without statutory protection for the rights of others, facially violates the
20 Constitution. *Fremont-Madison*, 926 P.2d at 1307.

21 The State defends the constitutionality of RCW 90.03.386(2) on three grounds. State’s
22 Mot. at 38-41. First, the State maintains that the statute survives constitutional scrutiny
23 because it does not “authorize any municipal water supplier to use more water to the detriment
24 of existing water right holders.” *Id.* at 38-39. Second, the State argues that because the statute
25 has no effect on water rights where the place of use was originally defined as the purveyor’s
26 service area, it is not susceptible to a facial challenge. *Id.* at 39-40. Finally, the State argues

1 that the statute does not violate substantive due process because it does not apply retroactively.
2 *Id.* at 40-41. None of these arguments is sufficient to save RCW 90.03.386(2).

3 The State’s initial argument (page 38-39) that RCW 90.03.386(2) does not authorize
4 anybody to use more water to the detriment of others is demonstrably false. Washington
5 water law has always treated the place of use of a water right as an essential attribute of the
6 right that may only be changed based on a finding that other existing rights will not be
7 impaired. *See* RCW 90.03.380(1); *Okanogan Wilderness League v. Town of Twisp*, 133
8 Wn.2d 769, 777, 947 P.2d 732 (1997). Indeed, Ecology’s standard water right certificate form
9 has long provided: “The right to the use of water aforesaid hereby confirmed is *restricted to the*
10 *lands or place of use herein described*, except as provided in RCW 90.03.380, 90.03.390 and
11 90.44.020.”²² The rule limiting water rights to a specified place of use has evolved because
12 an expansion in the place of use of a water right can allow greater or more consumptive use of
13 the right and alter the pattern of return flows to the detriment of other appropriators.²³
14 *Okanogan Wilderness League*, 133 Wn.2d at 777 (changes in the place of use “could affect
15 natural and return flows and, thus, adversely affect [existing] rights”); *Danielson v. Krebs AG,*
16 *Inc.*, 646 P.2d 363, 374 (Colo. 1982) (“injurious changes of use may ensue from any use of the
17 land which results in a reduction of the amount of return flow of water into a designated
18 ground water basin or which allows the well owner to utilize more basin water simply through
19 increasing the amount of acreage irrigated”).

20 The issue presented here, thus, cannot be resolved by the simplistic notion that the
21 expansions in place of use authorized by RCW 90.03.386(2) do not “expressly authorize any
22 municipal water supplier to use more water to the detriment of existing water right holders.”
23 State. Mot. at 39-40. While there is no express authorization for increased use, the changes in
24

25 ²² *See* Tribes’ Exh. 20 at 2; Tribes’ Exh. 21 at 2.

26 ²³ Indeed, as applied to irrigation rights, RCW 90.03.380(1) flatly *prohibits* any expansion of the place
of use that would result in an “increase in the annual consumptive quantity of water used under the water right.”

1 the place of use authorized by operation of RCW 90.03.386(2) nevertheless will lead to very
2 real expansions in consumptive use of water rights and significant alterations the pattern of
3 return flows thereby resulting in adverse effects to existing rights. As one commentator has
4 observed:

5 Water rights created by the appropriation might be analogized to a jigsaw
6 puzzle in which each piece represents a water right. The area of a piece
7 represents a diversionary entitlement, and the shape represents other variables
8 which affect stream flows. . . .The task of the appropriation doctrine is to
9 prevent one piece from encroaching on another.

10 Gould, “Water Rights Transfers and Third-Party Effects,” 23 *Land & Water L. Rev.* 1, 12
11 (1988); *quoted in* A. Tarlock, *Law of Water Rights and Resources*, § 5:73 (2005). In this case,
12 while RCW 90.03.386(2) does not affect the “area” of the puzzle piece, it directly affects the
13 “shape” of the piece to the detriment of existing rights. In short, contrary to the State’s
14 argument, the statute will result in changes in use that will in turn have adverse effects on the
15 rights of third parties.

16 The State cannot legitimately dismiss the harms created by RCW 90.03.386(2) as
17 “speculative” or “hypothetical.” State’s Mot. at 39. The Tribes have pointed to specific,
18 concrete examples where expansions in the place of use authorized by the MWL are likely to
19 have adversely affected existing rights. In their summary judgment motion, the Tribes
20 discussed an example involving the place of use of numerous certificates held by the Kitsap
21 Public Utility District (KPUD) which were changed by operation of RCW 90.03.386(2) from
22 discrete, local areas within Kitsap County (*e.g.* the communities of Suquamish or Indianola) to
23 the KPUD’s entire service area, which includes virtually all of Kitsap County. *See* Tribes’
24 Mot. at 11-12, 27.²⁴ The KPUD example serves to demonstrate that the enactment of RCW
25 90.03.386(2) will serve to enlarge some rights at the expense of others.

26 The State next maintains RCW 90.03.386(2) survives a facial challenge because
adverse effects will not occur in all cases where the statute is applied. State Mot. at 39. For

²⁴ *See also* Massmann Dec., Exh. A at 14-15; Tribes’ Exhs. 10-14

1 example, the State argues that the statute can be constitutionally applied to water purveyors
2 whose water right certificates already define the purveyor’s place of use as its entire service
3 area. *Id.* at 39-40. The State’s argument is without merit because it rests on the inapplicable
4 “no set of circumstances” standard of *Salerno*, 481 U.S. at 745. *See* Response of *Burlingame*
5 plaintiffs at 3-11, and pages 16-17, *supra*. Furthermore, the State proves too much. If the
6 statute is only constitutional in situations where it does not apply or has *no* substantive effect,
7 the statute *cannot* survive a facial challenge. The relevant question, even under *Salerno*, is not
8 whether the statute is constitutional in cases where it is inapplicable or has no legal effect, but
9 rather whether the statute is constitutional in cases where it is applicable and effective. *See*
10 *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3 875 (2004) (a successful facial
11 challenge is one where “no set of circumstances exist in which the statute can be
12 constitutionally *applied*”). As the Tribes have shown, it is in these cases that the statute
13 retroactively expands the rights of so-called “municipal water suppliers” to the detriment of
14 other water right holders and violates substantive due process.

15 Finally, the State argues that the statute does not have retroactive effect because its
16 effectiveness depends on three factors that apply only prospectively: (1) Health’s approval of a
17 planning or engineering document describing the supplier’s service area; (2) the supplier’s
18 compliance with the terms of its water system plan; and (3) consistency of the change in the
19 place of use with other local planning documents. State’s Mot. at 40-41. While the State
20 correctly recites the requirements of RCW 90.03.386(2), the State has not shown that the
21 statute does not have retroactive effect.

22 Prior to the MWL, the place of use of a water right was based on the place of use
23 provided for in a water rights application, the public notice of that application, and the State’s
24 review and approval of the applicant’s desired place of use in the subsequent report of
25
26

1 examination, permit and water right certificate.²⁵ The place of use of a water right was thus
2 based on the facts and circumstances that applied at the time of the water rights application was
3 approved by the State and could only be changed based on procedures in the Water Code that
4 protect existing rights from impairment (and provide affected third parties with notice and an
5 opportunity for hearing).

6 Under the MWL, however, the place of use of a water right is no longer based on the
7 facts and circumstances that existed at the time the right was established but is now based on
8 the service area in a water system plan approved by the Department of Health years or decades
9 after the water right was established. Because RCW 90.03.386(2) “changes the legal
10 consequences” of acts which occurred before the statute’s effective date – namely the filing of
11 a water right application, the publication of public notice and the issuance of a water right
12 certificate based on that application and any protests received from the public, the statute is
13 retroactive and violates substantive due process. *San Carlos Apache*, 972 P.2d at 189; *Randle*,
14 47 Wn. App. at 240-41.

15 In addition to changing the legal consequences of prior water right approvals, RCW
16 90.03.386(2) changes the legal consequences of the Department of Health’s prior approvals of
17 water system plans. For example, a purveyor may have received approval of a water system
18 plan describing an expanded service area *before* the enactment of the MWL. If that plan is
19 consistent with local planning documents and the purveyor remains in compliance with that
20 plan, by operation of law, RCW 90.03.386(2) *automatically* changes the purveyor’s place of
21 use to the service area provided for in the water system plan. This would be so even though,
22

23 ²⁵ See, e.g., Tribes’ Exh. 30 (application, report of examination, permit and certificate for North
24 Bainbridge Island Water Co.). In the cited example, Ecology’s application form asked for “a legal description of
25 the property on which the water will be used.” *Id.* at ECY1-004691. The water company stated that the proposed
26 place of use was the “area served by the North Bainbridge Island Water Co.” within certain section numbers. *Id.*
The proposed place of use is reflected on all subsequent water right documents, including the water right
certificate, which expressly provides “The right to the use of water aforesaid hereby confirmed is *restricted to the*
lands or place of use herein described, except as provided in RCW 90.03.380, 90.03.390 and 90.44.020.” *Id.* at
ECY1-004694 (emphasis added).

1 before the enactment of the MWL, the approval of a water system plan would have had no
2 legal effect on the place of use of the purveyor’s water right.²⁶ Because RCW 90.03.386(2)
3 “changes the legal consequences” of water system plans approved before its effective date, it is
4 retroactive and violates substantive due process. *San Carlos Apache*, 972 P.2d at 189; *Randle*,
5 47 Wn. App. at 240-41.

6 **E. RCW 90.03.386(2) Violates Procedural Due Process.**

7 As discussed in the Tribes’ summary judgment motion, RCW 90.03.386(2) violates
8 procedural due process when analyzed under the applicable three-part *Mathews v. Eldridge*,
9 424 U.S. 319, 335 (1976) framework.²⁷ First, the statute affects the vested rights of other
10 water right holders. Second, the procedures established by RCW 90.03.386(2) create a high
11 risk that the water rights of third parties will be impaired, and additional or substitute
12 safeguards are available that would provide significant protections for existing rights in
13 proceedings to change the place of use of rights – namely the procedures already applicable
14 under RCW 90.03.380(1) or the alternative procedures proposed in the original version of the
15 bill proposed by Governor Locke.²⁸ Finally, only minimal fiscal and administrative burdens
16 would result from incorporation of these additional or substitute procedural requirements.

17
18 ²⁶ Indeed, this appears to be precisely what occurred in the KPUD example cited earlier. *See Tribes’*
19 *Mot.* at 11-12 and *Tribes’ Exhs.* 10-14.

20 ²⁷ Under the *Mathews* analysis, a court must consider: (1) the private interest that will be affected by the
21 official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the
22 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.

23 ²⁸ The original legislation provided that if a municipal water supplier wanted the place of use of a water
24 right to be equivalent to and coexistent with its approved service area, the supplier would have to publish notice
25 pursuant to RCW 90.03.280. *Tribes’ Exh.* 25 at 8-9 (House Bill 1338, Section 8(5) (Jan. 22, 2003)). A 30-day
26 period would ensue during which third parties could submit claims of impairment with Ecology. *Id.* at 9 (Section
8(5)(a)). Ecology would then have been required to investigate these claims and make findings which could be
appealed to the Pollution Control Hearings Board. *Id.* at 9 (Section 8(5)(c)). Any change in the place of use
effectuated by an amended water system plan would not become effective until the claims of impairment were
fully and finally resolved. *Id.* (Section 8(5)(d)).

1 The State’s summary judgment motion makes three arguments in response to the
2 Tribes’ procedural due process claim. First, the State maintains that the legislation is
3 permissible under the State’s general police power. State’s Mot. at 44. Second, the State
4 maintains that the statute is not susceptible to a facial challenge because it does not affect the
5 place of use of water rights that were previously defined as the purveyor’s entire service area.
6 *Id.* at 44-45. Finally, the State maintains that the process provided by the Department of
7 Health during and after water system planning provides adequate notice and the opportunity to
8 be heard. *Id.* at 45-46.

9 The State’s first argument is simply inapposite to the Tribes’ procedural due process
10 challenge. As the Supreme Court has observed, “the mere assertion of the police power as the
11 basis for enacting legislation is not sufficient to shield it from scrutiny when constitutional
12 considerations are at stake.” *Carlstrom*, 103 Wn.2d at 396-97. Furthermore, while substantive
13 due process challenges to statutes and regulations may sometimes be resolved with reference to
14 whether the statute or regulation constitutes a reasonable exercise of the State’s police powers,
15 the scope of the State’s police powers cannot resolve the question of *procedural* due process.²⁹
16 *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006) (applying police
17 power analysis only to substantive due process claim); *Rivett v. City of Tacoma*, 123 Wn.2d
18 573, 582-84, 870 P.2d 299 (1994). Instead, procedural due process questions are resolved with
19 reference to the three-part *Mathews* framework. *Amunrud*, 158 Wn.2d at 216; *Moore*, 151
20 Wn.2d at 670. Regardless of whether the MWL lies within the scope of the State’s police
21 powers, the issue before the court is whether RCW 90.03.386(2) violates procedural due
22 process because it expands the place of use of water rights without providing potentially
23 affected parties with adequate notice or an opportunity to be heard.

24
25 ²⁹ While some substantive due process issues can be resolved with respect to whether the challenged
26 legislation constitutes a reasonable exercise of the police power, this analysis has not typically been applied to
retroactive legislation. *State v. Varga*, 151 Wn.2d 179, 195, 86 P.3d 139 (2005); *Caritas Servs. v. Dept. of Social
and Health Servs.*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994).

1 The State's second argument is identical to the argument made in defense of the Tribes'
2 substantive due process challenge and fails for the same reasons. As discussed previously, a
3 facial challenge simply cannot be defeated by pointing to instances where the statute is
4 inapplicable or has no effect. See page 30, *supra*. Even under *Salerno*, 481 U.S. at 744, a
5 statute's constitutionality must depend on whether the statute is constitutional where it is
6 applicable and effective. *Moore*, 151 Wn.2d at 669. Thus, the fact that RCW 90.03.386(2) has
7 no effect on water right certificates where the place of use already is defined as the purveyor's
8 service area is irrelevant to whether the statute provides adequate procedural safeguards in
9 instances where it operates to change the place of use of a water right.

10 The State finally defends the constitutionality of RCW 90.03.386(2) on the basis that
11 sufficient procedural safeguards exist under *other* statutes applicable to the Department of
12 Health's approval of water system plans and other similar plans. State Mot. at 45-46. The
13 State first cites the public notice requirements of regulations adopted under the State
14 Environmental Policy Act (SEPA). *Id.* at 45 (citing Ch. 197-11 WAC). However, the public
15 notice afforded under the SEPA regulations is much less specific than the notice required under
16 RCW 90.03.380(1) and is insufficient to put other water right holders on notice that a water
17 system plan will result in a change in the place of use that could affect vested water rights.
18 SEPA is focused on environmental effects, not water rights, and the public notice required
19 under the SEPA regulations simply provides notice of the availability of environmental
20 documents, not specific information regarding the effects on the place of use of a water right.
21 See WAC 197-11-340(2)(b); WAC 197-11-510(1) ("agency must use reasonable methods to
22 inform the public and other agencies that *an environmental document is being prepared* or is
23 available"). Furthermore, nothing in the SEPA regulations requires that environmental
24 documents contain information regarding water rights or an analysis of the effects of the
25 proposed action on water rights. See, e.g., WAC 197-11-440 (content of environmental impact
26 statement); WAC 197-11-960 (content of environmental checklist). Thus, while the notice

1 required under SEPA might put water right holders on notice of the fact that a water system
2 plan will be approved, it is unlikely to provide any information regarding the potential for
3 changes in the place of use of the purveyor's water right or the likely effects of such changes
4 on other vested rights.

5 The State next argues that RCW 90.03.386(2) allows water right holders an adequate
6 opportunity to be heard in connection with the approval of a water system plan or coordinated
7 water system plan. State Mot. at 45. First, the State contends that water right holders may
8 *intervene* in an adjudicative proceeding challenging a plan. *Id.* What the State neglects to
9 mention is that existing law does not give water right holders any right to *initiate* an
10 administrative appeal of the approval of a water system plan or coordinated water system plan.
11 Only the affected water purveyor can file an appeal of an agency decision with respect to the
12 plan.³⁰ If a water purveyor does not file an appeal, a water right holder has no forum in which
13 to intervene. Since a water right holder's ability to be heard depends entirely on whether
14 *another* party chooses to file an appeal, the MWL does not afford water right holders an
15 adequate opportunity to be heard.

16 The State also argues that water right holders have the right to participate in
17 proceedings relating to local governmental planning, such as plans approved under the Growth
18 Management Act and other statutes. State Mot. at 45. Such proceedings, however, do not
19 provide a forum for a water right holder to assert that a change in the place of use effectuated
20 by the approval of a water system plan will result in impairment of water rights. At most,
21 participation in such proceedings will alter the conditions that a purveyor's water system plan
22 will have to meet in order to qualify for the benefits of RCW 90.03.386(2). Such proceedings
23 thus do not provide adequate forum for a water right holder to protect vested rights from
24 impairment as a result of the approval of a water system plan.

25 _____
26 ³⁰ See Tribes' Exh. 22 at 19-20 (State's Response to Interrogatory No. 11)

1 The State finally argues that there is no need for notice and opportunity for a pre-
2 deprivation hearing before a water system plan is approved because approval of the plan, by
3 itself, does not result in the deprivation of any legal rights. State Mot. at 46. The State’s
4 position is simply contrary to the case law which clearly provides a water right holder with the
5 right to contest changes in the place of use *before* they go into effect. *Okanogan Wilderness*
6 *League*, 133 Wn.2d at 777 (“Both upstream and downstream users can object to a change in
7 the . . . place of use, which could affect natural and return flows and, thus, adversely affect
8 their rights”); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272
9 P.2d 629, 631-32 (1954)) (holders of existing rights “may successfully resist all proposed
10 changes in points of diversion and use of water from that source which in any way materially
11 injures or adversely affects their rights”); *see also See City of Thornton v. Clear Creek Water*
12 *Users Alliance*, 859 P.2d 1348, 1360 (Colo. 1993) (rejecting argument that “injury can arise
13 only after changed right is exercised”). The courts have always required a due process
14 hearing *before* the State may take actions affecting vested water rights. *Motley*, 127 Wn. App.
15 at 81; *Sheep Mountain*, 45 Wn. App. at 431. Postponing the opportunity to challenge a change
16 in the place of use until after the change has occurred greatly increases both the likelihood that
17 injurious changes will be approved and the difficulty of obtaining a meaningful remedy
18 through a post-deprivation adjudication.³¹ In this case, due process delayed is due process
19 denied.

20 Significantly, while the State’s motion mentions *Mathews*, the State fails to evaluate
21 RCW 90.03.386(2) under the three-part *Mathews* framework. *See* State’s Mot. at 43, 46.
22 When properly analyzed under the *Mathews* framework, these procedures relied on by the
23 State do not withstand constitutional scrutiny. Under the first prong of *Mathews*, the State
24 does not contest that water rights are important property interests entitled to due process

25
26 ³¹ Short of a full water rights adjudication which may only be initiated by Ecology, the State does not suggest that any post-deprivation remedies even exist.

1 protection. Under the second *Mathews* prong, the procedures cited by the State pose a
2 substantial risk that vested rights will be affected by the approval of water system plans
3 involving changes to service area boundaries. The very general notice of the availability of
4 environmental documents required under SEPA is ineffective in informing water right holders
5 of potential changes to existing rights effectuated by Health’s approval of a water system plan.
6 Furthermore, the opportunities for a pre-deprivation hearing in which water right impairment
7 claims can be raised are very limited or non-existent.

8 Notably, and not addressed at all in the State’s motion, there are readily available
9 “additional or substitute procedural safeguards” that readily solve the problem – *i.e.* the
10 existing procedures for changes in the place of water rights under RCW 90.03.380(1). Under
11 RCW 90.03.380(1), a change in the place of use cannot be approved without a written
12 application and publication of notice of the application under RCW 90.03.280, which must
13 specify in detail both the existing and proposed place of use.³² Furthermore, a change
14 application may only be approved based on a written report of examination that includes an
15 analysis of whether the proposed change would impair existing rights and that report must be
16 made available to any member of the public who filed a protest or requested notice.³³ Finally,
17 a water right holder aggrieved by a change in the place of use approved by Ecology has a right
18 to a *de novo* hearing before the Pollution Control Hearings Board.³⁴ These essential
19 procedures were preserved in the version of the MWL proposed by the Governor, but were
20 stripped out of the legislation before final passage.³⁵

22 ³² See WAC 173-153-070(1) (content of application); WAC 173-153-080(1)(d) and (e) (content of
23 public notice); Tribes’ Exh. 31 (application form ECY 040-1-97 (Rev. 7/05); Tribes’ Exh. 32 at 3 (¶5) (*Changing
or Transferring an Existing Water Right*, Ecology Pub. 98-1802-WR).

24 ³³ WAC 173-153-130(5) and (6); 173-153-140(1); Tribes’ Exh. 32 at 3 (¶¶ 8, 9).

25 ³⁴ See RCW 43.21B.110(1); Tribes’ Exh. 32 at 3 (¶¶ 9, 10).

26 ³⁵ See n.28, *supra*.

1 Under the final *Mathews* prong, retaining these “additional or substitute procedural
2 safeguards,” which applied to all changes in the place of use of water rights prior to the MWL
3 and still apply to changes to all water rights not held for so-called “municipal water supply
4 purposes,” would not subject the State to undue fiscal and administrative burdens. Indeed, the
5 Governor proposed retaining these safeguards in his proposed bill and Ecology objected to the
6 Legislature’s decision to strip these safeguards from the final bill.³⁶ Therefore, under a proper
7 application of the *Mathews* analysis, insufficient procedural safeguards remain to save the
8 constitutionality of RCW 90.03.386(2).

9 **F. RCW 90.03.260(4) and (5) Violate Substantive Due Process.**

10 As discussed in the Tribes’ summary judgment motion, RCW 90.03.260(4) and (5)
11 retroactively expand the rights of “municipal water suppliers” by declaring that service
12 connection and population figures in a water right application are no longer “an attribute
13 limiting exercise of the water right,” provided that the number of connections or population
14 served is consistent with a water system plan approved by the Department of Health. A water
15 right is generally limited by the applicant’s intended use when the right was issued. If a water
16 right was originally sought to serve a specified number of connections and approved on that
17 basis, allowing a purveyor to add further connections constitutes an enlargement of the original
18 right. By decreeing such an enlargement by operation of law, RCW 90.03.260(4) and (5)
19 “change[] the legal consequences of acts completed before [their] effective date” and thereby
20 violate due process. *See Tribes’ Mot.* at 24-25.

21 In its motion, the State defends RCW 90.03.260(4) and (5) on three grounds. First, the
22 State argues that these provisions do not retroactively enlarge any water rights because, prior to
23 the MWL, no provision of the Water Code expressly provided that maximum populations or
24 service connections were attributes that limited exercise of water rights. *State Mot.* at 33-35.

25 _____
26 ³⁶ 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 Second, the State maintains that RCW 90.03.260(4) and (5) were “curative” because they
2 clarified the law and did not attach new consequences to past events that would deprive any
3 water right holder of any vested rights. *Id.* at 33, 35-36. Finally, the State maintains that these
4 sections survive a facial challenge because they may be applied prospectively. *Id.* at 33, 36-37.
5 These arguments provide an insufficient basis to uphold the constitutionality of RCW
6 90.03.260(4) and (5).

7 With respect to the State’s first point, the lack of an explicit statutory reference in the
8 Water Code to maximum population or service connection limits is not dispositive. Water law
9 in Washington and other parts of the West is an amalgam of statutory and common law and our
10 courts have often looked to the common law of Washington and other western states to fill
11 gaps in statutory law. *See e.g., Okanogan Wilderness League*, 133 Wn.2d at 783; *Dep’t of*
12 *Ecology v. Grimes*, 121 Wn.2d 459, 475, 852 P.2d 1044 (1993); *Dep’t of Ecology v. Bureau of*
13 *Reclamation*, 118 Wn.2d 761, 767-69, 827 P.2d 275 (1992). Indeed, in *Theodoratus*, the Court
14 looked not only to the Water Code but also to the common law to determine that a domestic
15 water right could not be validly perfected on the basis of system capacity. *Theodoratus*, 135
16 Wn.2d at 587 (“We conclude that state statutory *and common law* does not allow for a final
17 certificate of water right to be issued based upon system capacity”). And, in *Neubert*, 117
18 Wn.2d at 238, the Court held based on the common law that a water right is limited by the *time*
19 of the original beneficial use, even though the Water Code is silent on this point.

20 Here, it is well established in the common law that a water right is limited by the
21 applicant’s intended purpose of use when the right was originally established. *R.D. Merrill Co.*
22 *v. Pollution Control Hrg. Bd.*, 137 Wn.2d 118, 12, 969 P.2d 458 (1999) (water right limited by
23 the *original* season of use); *In re Water Rights in Alpowa Creek*, 129 Wn. 9, 15, 224 P. 29
24 (1924) (“appropriation of water consists in the intention, accompanied by reasonable diligence,
25 to use the water *for the purposes originally contemplated at the time of its diversion*”). For
26 example, in *Dep’t of Ecology v. Schuh*, 100 Wn.2d 180, 185, 667 P.2d 64 (1983), the Supreme

1 Court held that a water right certificate was implicitly limited by the applicant’s original intent
2 that water would be used only to supplement water from a federal project and that the place of
3 use of the right could not be changed to allow irrigation of lands that were not part of the
4 project. Prior to the MWL, Ecology applied the “original intent” rule to restrict the population
5 or connections served under a water right to the population or connection figures provided for
6 in the original application and subsequent water rights documents.³⁷ By overriding established
7 case law and agency policy to declare that the number of people or service connections
8 provided for in a water rights application does not limit the exercise of the rights for
9 “municipal water supply purposes,” RCW 90.03.260(4) and (5) effectively enlarge these rights.

10 Even if there were ambiguity about the binding effect of population and service
11 connection figures provided in a water rights *application*, there was no ambiguity about the
12 binding effect of population and service connection figures appearing in a water right *permit* or
13 *certificate*. The nature and scope of a water right is defined by the terms set forth in a water
14 right permit or certificate. Ecology’s standard water right certificate provides the holder with
15 “a right to the use of the public waters . . . as herein defined.”³⁸ A certificate also provides
16 that the water right is “specifically subject to the provisions in the Permit issued by the
17 Department of Ecology.” *Id.* Where a certificate or a permit *expressly* specifies a given
18 number of service connections or population in defining the quantity or purpose of use of a
19 right, the legislative declaration in RCW 90.03.260(4) and (5) that such limits are “not an
20 attribute limiting exercise of the water right” necessarily results in an expansion of the right.³⁹

21 _____
22 ³⁷ Tribes’ Exh. 15 (Letter, Barwin to Stump (Aug. 14, 2000)); *see also* Tribes’ Exh. 16 (Letter, Barwin
23 to Yakima County Public Works Department (Apr. 18, 2003)) (rejecting applications seeking to increase the
24 number of service connections because “approval of the requests represented by the change application would
25 result in enhancement or enlargement of the existing water rights”); Tribes’ Exh. 17 (Letter, Drury to Vazquez
26 (Jan. 10, 2000)) (increase in the number of service connections would require approval of a new water right).

³⁸ *See, e.g.*, Tribes’ Exh. 20 at 1 (Certificate No. G1-23483C).

³⁹ Numerous water right certificates include service connection limits in the space describing the
allowable quantity, type, and period of use. *See, e.g.*, Tribes’ Exh. 20 at 1 (“Community domestic supply –
continuously (33 services)); Tribes’ Exh. 33 at 1 (Certificate No. G1-23034) (“Community domestic supply –

1 In such cases, the legislation cannot legitimately be viewed as a “clarification” of the law.
2 Instead, by legislatively altering the terms of water right certificates, these statutes serve to
3 “change[] the legal consequences of acts completed before [their] effective date.” *Randle*, 47
4 Wn. App. at 240-41.

5 The State also contends that RCW 90.03.260(4) and (5) were “curative.” State Mot. at
6 36-37. Even assuming for the sake of argument that the pre-MWL law was ambiguous, this
7 does not end the inquiry because even a curative amendment may not apply retroactively if it
8 affects a vested right. *State v. T.K.*, 139 Wn.2d 320, 333, 987 P.2d 63 (1999); *F.D. Processing*
9 *Inc.*, 119 Wn.2d at 461. In this case, RCW 90.03.260(4) and (5) clearly affect vested rights.
10 As shown in Dr. Massmann’s declaration, unleashing domestic water rights from population
11 limits is likely to lead to substantial increases in consumptive use with negative effects on
12 existing water rights. Massmann Dec., Exh. A at 14-15. Furthermore, especially in cases
13 where population and service connection limits are included in express terms of a permit or
14 certificate, the statute retroactively removes express limits on the exercise of a water right that
15 were based on the law and the facts that existed at the time the right was established. Because
16 the statute cannot be applied retroactively without affecting vested rights, it violates
17 substantive due process.

18 Finally, the State argues that, whatever the constitutional flaws of RCW 90.03.260(4)
19 and (5), the statutes are not subject to a facial challenge because the statutes may be applied
20 prospectively as well as retrospectively. Once again, the State stretches *Salerno* beyond the
21 breaking point. As discussed on page 17, *supra*, if RCW 90.03.260(4) and (5) are
22 unconstitutional when applied retroactively, the issue is whether the Court may allow the
23 statutes to survive if applied prospectively, or whether the Court must invalidate the statutes
24

25 continuously (maximum of 50 services)); Tribes’ Exh. 34 at 1 (Permit No. G4-30274P) (“16 acre-feet per year
26 for continuous community in-house domestic supply to 16 homes”); 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 entirely. *See San Carlos Apache*, 972 P.2d at 194. In light of *San Carlos Apache*, and because
2 it is not clear whether the Legislature would have enacted the statutes if they applied only
3 prospectively, the Tribes believe that the Court should invalidate the statutes and allow the
4 *Legislature* to decide whether to reenact the statutes on a prospective basis only.

5 **G. 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 authorized to be
9 served under a water right without affording affected third parties with notice or an opportunity
10 for an 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. Indeed, such safeguards already
14 exist in State law – existing procedures for changing the purpose of use of a water right (RCW
15 90.03.380(1)) or authorizing new appropriations (RCW 90.03.290(3)) protect other water right
16 holders. *See Tribes’ Mot.* at 28-29.

17 The State argues that there is no procedural due process violation because “prior to the
18 MWL, neither RCW 90.03.260 nor any other section of the Water Code expressly provided
19 that maximum populations or numbers of service connections stated in water rights documents
20 were attributes that limited exercise of water rights. *State Mot.* at 46. From this premise, the
21 State argues that RCW 90.03.260(4) and (5) did not change any water rights or affect any
22 procedural due process rights.

23 The State’s argument misses the mark. As explained in the previous section, the Water
24 Code is not the only source of limits on the exercise of a water right. The common law
25 provides limits on the exercise of water rights as do the terms and conditions found in water
26 right permits and certificates. Indeed, the Tribes have put forward as evidence a number of

1 permits and certificates that provide *express* limits on the maximum number of service
2 connections.⁴⁰ Under Department of Health procedures, the holders of existing rights are not
3 afforded adequate notice or an opportunity for a hearing in proceedings relating to the approval
4 of a water system plan. *See* pages 34-38, *supra*. Because under RCW 90.03.260(4) and (5)
5 existing population and connection limits may be expanded through the Department of
6 Health’s approval of a water system plan, potentially affected third parties will not receive
7 specific notice that the State intends to approve increases in population or connection limits,
8 and will have no opportunity for a hearing to contest the State’s approval of such changes
9 before they become effective.

10 Thus, while RCW 90.03.260(4) and (5) may not affect vested water rights in *every*
11 case, there is little doubt that the approval of changes in population or connection limits
12 without adequate notice or an opportunity for a hearing presents a high “*risk* of an erroneous
13 deprivation” of vested rights, which is sufficient under the *Mathews* analysis to establish a
14 violation of procedural due process. *Moore*, 151 Wn.2d at 670. This Court need not resolve
15 exactly *which* water rights were subject to population and service connection limits prior to the
16 MWL to hold that a blanket legislative determination that *no* water rights are subject to such
17 limits (regardless of the language of permits or certifications, the prior law or the facts and
18 circumstances of particular cases) and that the Department of Health may authorize increases
19 in connections or populations served by approving a water system plan violates procedural due
20 process.

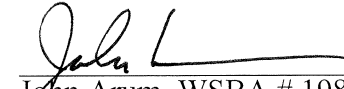
21
22
23
24
25
26

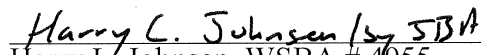
⁴⁰ *See* n.39, *supra*.


1 **CONCLUSION**

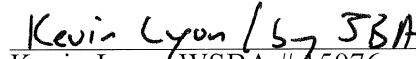
2 For the reasons stated herein, the motion for summary judgment filed by the State and
3 the Intervenor should be denied.

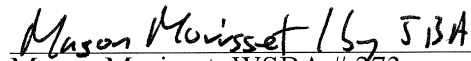
4 Dated this ~~24th~~ day of March, 2008.

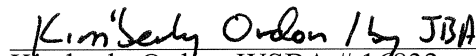
5 
6 John Arum, WSBA # 19813
7 Brian C. Gruber, WSBA # 32210
8 Counsel for the Makah Indian Tribe

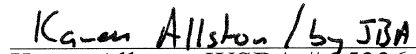
9 
10 Harry L. Johnsen, WSBA # 4955
11 Counsel for Lummi Nation

12 
13 Melody Allen, WSBA # 35084
14 Counsel for the Suquamish Tribe

15 
16 Kevin Lyon, WSBA # 15076
17 Counsel for the Squaxin Island Tribe

18 
19 Mason Morisset, WSBA # 273
20 Lead Counsel for the Tulalip Tribes

21 
22 Kimberly Ordon, WSBA # 16832
23 Michael E. Taylor, WSBA # 3664
24 Co-counsel for the Tulalip Tribes

25 
26 Karen Allston, WSBA # 25336
Joseph Caldwell, WSBA # 22201
Counsel for the Quinault Indian Nation