Washington's Municipal Water Rights Bill of 2003: Providing "Certainty and Flexibility" or Violating the Separation of Powers Doctrine?

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WASHINGTON'S MUNICIPAL WATER RIGHTS BILL OF 2003: PROVIDING "CERTAINTY AND FLEXIBILITY" OR VIOLATING THE SEPARATION OF POWERS DOCTRINE?

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Abstract: The separation of powers doctrine limits the ability of the legislature to retroactively overrule judicial constructions of existing statutes. It is the province of the judiciary to interpret the law. Once a court interprets a statute, the legislature can only amend that statute prospectively. In the 1998 case of Theodoratus v. State Department of Ecology, the Supreme Court of Washington interpreted the Water Code to require that the proper measure of a water right is the amount of water actually beneficially used, and not the capacity of a water delivery system. In 2003, the Washington Legislature responded to the court's holding by passing legislation that retroactively exempted certain municipal water suppliers from the requirement of beneficial use. This Comment argues that the 2003 legislation violates the separation of powers doctrine by retroactively exempting municipal suppliers from the requirements of beneficial use and mandating a result directly contrary to the court's holding in Theodoratus. Allowing the legislature to retroactively overrule the court's interpretation of the Water Code effectively turns the legislature into the court of last resort.

It is, emphatically, the province and duty of the judicial department, to say what the law is. — Chief Justice John Marshall, Marbury v. Madison.¹

Under Washington law, the legislature may pass laws with retroactive application only in limited circumstances.² Even in these circumstances, courts will not retroactively apply legislation where such application violates other constitutional protections.³ The Washington Constitution provides one such protection in the doctrine of separation of powers.⁴

1. 5 U.S. (1 Cranch) 137, 176 (1803).
3. See Gillis v. King County, 42 Wash. 2d 373, 376, 255 P.2d 546, 548 (1953) (noting that retroactivity is limited by obligation of contracts and due process); see also F.D. Processing, 119 Wash. 2d at 460, 832 P.2d at 1307 (finding no retroactive application where vested rights were implicated) (citing Gillis, 42 Wash. 2d at 376, 255 P.2d at 548); In re Pers. Restraint of Stewart, 115 Wash. App. 319, 335 n.55, 75 P.3d 521, 529 n.55 (2003) (noting that separation of powers is constitutional prohibition that cannot be violated by retroactive legislation).
4. Stewart, 115 Wash. App. at 335 n.55, 75 P.3d at 529 n.55 ("Although the separation of powers doctrine is not explicitly enunciated in either the state or federal constitutions, the doctrine is universally recognized as deriving from the tripartite system of government established in both
Although not expressly enumerated in Washington’s Constitution, the doctrine of separation of powers derives from the division of government into three branches, rather than from an explicit constitutional provision.5

Legislative acts that attempt to perform judicial functions raise separation of powers issues.6 The legislature runs the risk of violating the separation of powers doctrine when it passes retroactive legislation that contravenes prior judicial construction of a statute.7 It is the role of the courts to interpret the law;8 it is the role of the legislature to make the law.9 Washington courts are careful to keep the legislature from encroaching upon judicial functions.10

The recent passage of the Municipal Water Rights Bill11 (Water Rights Bill) raises separation of powers concerns.12 In enacting the Water Rights Bill, the legislature retroactively perfected certain water right certificates in apparent contravention of the Supreme Court of Washington’s holding13 in State Department of Ecology v. Theodoratus.14 In that case, the court interpreted the Water Code of 191715 (Water Code) in the context of a private developer’s water right.16

George Theodoratus applied for a water permit in 1973 to serve a...
housing subdivision of 253 homes.\textsuperscript{17} The Department of Ecology's (DOE) approval of the application contained language purporting to give Theodoratus a final water right based on his system capacity once the delivery system was in place.\textsuperscript{18} Known as the “pumps and pipes” policy, DOE used this delivery system capacity measure of a water right for more than forty years.\textsuperscript{19} In addressing Theodoratus’s water right claim, the court determined that neither the Water Code nor the common law supported the pumps and pipes policy, and that Theodoratus was entitled to only the amount of water placed to actual beneficial use.\textsuperscript{20}

In 2003, the Washington Legislature responded to \textit{Theodoratus} by passing the Water Rights Bill.\textsuperscript{21} The Water Rights Bill prospectively adopted the \textit{Theodoratus} court’s holding that actual beneficial use was the measure of a water right.\textsuperscript{22} However, the Water Rights Bill declared certificates previously issued under the pumps and pipes policy for “municipal supply purposes” to be rights in good standing.\textsuperscript{23} The Water Rights Bill extended this retroactive perfection of pumps and pipes certificates for municipal supply purposes to any entity that supplied water for residential purposes to more than fifteen homes.\textsuperscript{24} In passing the Water Rights Bill, the legislature effectively overturned \textit{Theodoratus}; a developer in the same position as Theodoratus, who serves more than fifteen homes and possesses a pumps and pipes certificate issued in the past, has a right in good standing under the Water Rights Bill.\textsuperscript{25}

This Comment argues that retroactive application of the Water Rights Bill violates the doctrine of separation of powers.\textsuperscript{26} Once the Supreme Court of Washington interpreted the Water Code in \textit{Theodoratus} to

\begin{footnotesize}
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\item \textit{Id.} at 587, 957 P.2d at 1244.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 590, 957 P.2d at 1245.
\item \textit{Id.} (codified at § 90.03.330(3)).
\item \textit{Id.} § 1, 2003 Wash. 1st Spec. Sess. Laws at 2341–42 (codified at § 90.03.015(3)–(4)).
\item \textit{Id.} § 6, 2003 Wash. 1st Spec. Sess. Laws at 2345 (codified at § 90.03.330(3)) (expressly cross-referencing § 90.03.015 when defining which certificates are affected).
\item See infra Part IV.
\end{enumerate}
\end{footnotesize}
require actual application of water to beneficial use, the legislature could only prospectively amend that interpretation.\textsuperscript{27} By retroactively overruling the court's holding in \textit{Theodoratus}, the Washington Legislature violated the doctrine of separation of powers and attempts to fashion itself as a court of last resort.\textsuperscript{28} Further, the legislature may not avoid separation of powers concerns by claiming that the Water Rights Bill is merely a curative clarification of the law.\textsuperscript{29} It may be appropriate for the Washington Legislature to provide municipal water suppliers with certainty and flexibility in order to promote growth in the state.\textsuperscript{30} However, the legislature may not do so in a way that aggrandizes its role at the expense of the courts.\textsuperscript{31}

Part I of this Comment addresses the circumstances under which the legislature may pass retroactive laws and the ways in which retroactive application is limited by the doctrine of separation of powers. Part II examines the Supreme Court of Washington's interpretation of the Water Code in \textit{Theodoratus}. Part III details the changes to municipal water rights introduced by the Water Rights Bill. Part IV argues that the Water Rights Bill violates the separation of powers doctrine under Washington law and cannot be retroactively applied regardless of legislative intent. Part V concludes that the legislature must seek certainty and flexibility for municipal water suppliers in a manner consistent with the Washington Constitution.

\textsuperscript{27} See \textit{infra} Part IV.B-.C.

\textsuperscript{28} The "court of last resort" is the court with the authority to hear a final appeal in a case. See \textit{BLACKS LAW DICTIONARY} 1556 (8th ed. 2004). The use of the term with respect to retroactive legislation in Washington Law derives from 1A C. SANDS, \textit{STATUTES AND STATUTORY CONSTRUCTION} § 27.04 (4th ed. 1972) (explaining proper purpose of statutes that interpret existing law, and determining that retroactive application of such laws would turn legislature into court of last resort); see, e.g., \textit{Johnson v. Morris}, 87 Wash. 2d 922, 926 n.3, 557 P.2d 1299, 1303 n.3 (1976) (citing SANDS, \textit{ supra}, and explaining that retroactive application of laws that contradict judicial constructions would allow legislature to overrule courts).


\textsuperscript{31} See \textit{State v. Williams}, 78 Wash. 2d 459, 469, 465 P.2d 100, 105-06 (outlining history of separation of powers doctrine).
I. THE LEGISLATURE MAY PASS RETROACTIVE LAWS ONLY IN LIMITED CIRCUMSTANCES

There is a presumption under Washington law that amendments to statutes only apply prospectively. Despite this general presumption, the legislature may pass retroactive amendments in certain circumstances. Even in these circumstances, courts will allow retroactive application of the law only if such a grant will not violate other constitutional protections, such as the doctrine of separation of powers. Retroactive laws that contradict previous constructions of a statute by a court may not avoid the doctrine of separation of powers by claiming to merely clarify the law.

A. Amendments to Statutes Are Presumed to Operate Prospectively Absent Express or Implied Intent for Retroactive Application

In general, an amendment to a statute only applies prospectively. Legislation in Washington may apply retroactively, however, if the legislature expresses such an intent. Legislative intent must generally be express, but can also be gleaned from legislative history. As a rule, courts do not favor retroactivity in the law and will not construe legislative enactments to require retroactivity unless the language of the legislation mandates this result.

For example, in City of Ferndale v. Friberg, the Supreme Court of Washington addressed whether there was legislative intent to retroactively apply a law exempting farmland from special assessments
by local governments. The court first determined that there was no express statement of retroactive application. However, the court inferred intent for retroactive application from the use of past tense in the statute. It further relied on evidence of legislative intent in the stated purpose of the act, which was to protect farms. Additionally, the court reasoned that retroactive application would favor this strongly stated public purpose. Based on this implied intent, and on the fact that retroactive application would not interfere with vested rights, the court upheld retroactive application of the law.

B. Despite Retroactive Intent, a Reviewing Court Will Not Retroactively Apply Legislation Where That Application Violates the Separation of Powers Doctrine

Even when a law overcomes the presumption of prospective application, retroactive laws may not violate the doctrine of separation of powers. Legislative attempts to substantively and retroactively amend an interpretation of the law given by the courts raise separation of powers concerns. Because it is the province of the judicial branch to say what the law is, if the legislature is dissatisfied with a court's interpretation, it can prospectively amend the law to provide a new

41. Id. at 604–05, 732 P.2d at 145.
42. Id. at 605, 732 P.2d at 146.
43. Id. (noting that statute used words "levied or capable of being levied") (emphasis in original).
44. Id. at 605–06, 732 P.2d at 146.
45. Id. at 606, 732 P.2d at 146.
46. Id.
47. In re Pers. Restraint of Stewart, 115 Wash. App. 319, 335, 75 P.3d 521, 529 (2003) ("Retroactive application of the amendments... would violate the constitutional separation of powers doctrine because the legislative branch of the government cannot retroactively overrule a judicial decision which authoritatively construes statutory language."). Retroactive legislation is also limited by the contracts and due process clauses. See Gillis v. King County, 42 Wash. 2d 373, 376, 255 P.2d 546, 548 (1953). Although both the contracts clause and the due process clause may be implicated in this situation, their application is likely limited to the short range of time between the court's decision in Theodoratus in 1998 and the passage of the Water Rights Bill in 2003 and is beyond the scope of this Comment.
interpretation. However, such amendments are given prospective effect only. Any attempt to retroactively amend the law would violate the separation of powers doctrine by allowing the legislature to overrule the court, and would turn the legislature into a court of last resort.

While the Supreme Court of Washington has suggested that amendments that retroactively overrule the courts violate Washington’s separation of powers doctrine, the court has not authoritatively decided the issue. In situations where litigants argued for retroactive application of civil legislation, the court has noted the separation of powers issue but has resolved the questions presented on other grounds. However, the Supreme Court of Washington consistently endorses the position that amendments that contravene judicial interpretations have prospective effect only—to allow any other result would make the legislature the court of last resort.

In *In re Personal Restraint of Stewart,* the Washington State Court of Appeals refused to give retroactive effect to legislation that substantively overruled a previous construction of a statute by the courts. The *Stewart* court looked at amendments to the Sentencing Reform Act (SRA) that expressly overruled the court’s previous construction of that statute. In the 2001 case of *In re Personal Restraint of Stewart,* the Washington State Court of Appeals refused to give retroactive effect to legislation that substantively overruled a previous construction of a statute by the courts.

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50. See 1A Singer, supra note 5, at § 27.04.
51. See id.
52. See Magula v. Benton Franklin Title Co., 131 Wash. 2d 171, 182, 930 P.2d 307, 313 (1997) (citing Johnson v. Morris, 87 Wash. 2d 922, 926, 557 P.2d 1299, 1303 (1976)). By contrast, the legislature may prospectively amend the law without implicating the separation of powers. See 1A Singer, supra note 5, at § 27.04.
55. See, e.g., *Johnson,* 87 Wash. 2d at 926, 557 P.2d at 1303 (noting separation of powers problem but basing decision on other grounds); *Magula,* 131 Wash. 2d at 182, 930 P.2d at 313 (avoiding constitutional issue by applying rule of prospective application).
56. See *Johnson,* 87 Wash. 2d at 926, 557 P.2d at 1303 (noting that such retroactive legislation is disturbing because it would effectively allow legislature to overrule court); accord *Magula,* 131 Wash. 2d at 182, 930 P.2d at 313 (endorsing separation of powers analysis raised in *Johnson*); see also Overton v. Econ. Assistance Auth., 96 Wash. 2d 552, 558, 637 P.2d 652, 656 (1981) (describing separation of powers issue flagged in *Johnson* as holding of case).
57. 115 Wash. App. 319, 75 P.3d 521 (2003). There was no motion for discretionary review filed in this case.
58. Id. at 335, 75 P.3d at 529.
59. Id. at 322, 75 P.3d at 523 (referring to amendment to WASH. REV. CODE § 9.94A.728 (2002)).
Restraint of Capello,\textsuperscript{60} the court determined that the Department of Corrections (DOC) lacked the authority to require an offender to submit a pre-approved residence and living arrangement before being released.\textsuperscript{61} The legislature responded to Capello by amending the SRA to clarify that the DOC had held the authority to impose such a condition since 1998 and retroactively applied the clarification.\textsuperscript{62} The Stewart court held that it could not apply the amendment to the SRA retroactively despite legislative intent, because to do so would violate the separation of powers doctrine by allowing the legislative branch to retroactively overrule a judicial decision that authoritatively construed a statute.\textsuperscript{63}

C. Curative Statutes Can Apply Retroactively Without Violating the Separation of Powers Doctrine

If a law is curative, constitutional protections like the separation of powers doctrine are not implicated because the underlying law has not been substantively changed.\textsuperscript{64} Rather, curative laws clarify ambiguities in the law to reflect the original legislative intent or to technically correct a statute.\textsuperscript{65} As a result, litigants often attempt to avoid separation of powers concerns, and argue in favor of retroactive application, by classifying legislation as curative.\textsuperscript{66} However, legislation that makes substantive changes to the law or contravenes previous constructions of a statute by the courts is, by definition, not curative.\textsuperscript{67} Consequently, the

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\item \textsuperscript{60} 106 Wash. App. 576, 24 P.3d 1074 (2001).
\item \textsuperscript{61} \textit{Id.} at 578, 24 P.3d at 1075.
\item \textsuperscript{62} Stewart, 115 Wash. App. at 322–23, 75 P.3d at 523.
\item \textsuperscript{63} \textit{Id.} at 335, 75 P.3d at 529.
\item \textsuperscript{64} \textit{See In re Santore}, 28 Wash. App. 319, 324, 623 P.2d 702, 706 (1981) ("Curative laws… which implement the original intentions of affected parties are constitutional because there is no injustice in retroactively depriving a person of a right that was created contrary to his expectations . . . ").
\item \textsuperscript{66} \textit{See, e.g.}, Johnson v. Morris, 87 Wash. 2d 922, 926, 557 P.2d 1299, 1303 (1976) (noting petitioner's attempts to avoid separation of powers concerns by claiming that legislation is curative); \textit{Stewart}, 115 Wash. App. at 332–33, 75 P.3d at 528 (describing DOC argument in the alternative that legislation could be retroactively applied because it was curative); \textit{Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal}, 39 Wash. App. 609, 614–15, 694 P.2d 697, 700 (1985) (rejecting Commission's argument that legislative enactments were clarifications).
\item \textsuperscript{67} \textit{See, e.g.}, \textit{F.D. Processing}, 119 Wash. 2d at 462, 832 P.2d at 1308 (presuming amendment to statute substantively changes law and therefore not retroactive); \textit{Magula v. Benton Franklin Title Co.}, 131 Wash. 2d 171, 182, 930 P.2d 307, 313 (1997) (noting that curative laws may not change prior case law or constructions of statute).
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legislature cannot avoid separation of powers concerns simply by labeling a piece of legislation curative where that legislation conflicts with a court’s prior interpretation of the statute, or fails to reflect the original intent of the legislature.

1. **Curative Laws Do Not Substantively Change Statutes or Contravene Previous Constructions by the Courts**

By definition, a curative law clarifies an existing law without making substantive changes. When the legislature only clarifies the law, prior Washington law is unaffected. Therefore, a law that substantively amends a law or retroactively contravenes a judicial construction of the statute is not curative. Washington courts presume that where a statute lacks ambiguity, an amendment to the statute substantively changes the law, creating a presumption against retroactive application. Additionally, if a court has previously interpreted a statutory provision, that provision is no longer ambiguous on that particular point of law.

The Supreme Court of Washington has allowed curative legislation responding to ambiguities created by trial court decisions, and responding to dicta in Supreme Court of Washington decisions. The court has not, however, allowed curative legislation to be retroactively applied where that legislation changes prior case law, or contradicts a construction of the statute by the judiciary.

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70. *See Magula*, 131 Wash. 2d at 182, 930 P.2d at 313 (providing that amendments are curative where they clarify or technically correct older statute and distinguishing amendments that substantively change law from clarification that leaves prior Washington law unaffected).
71. *Id.*
72. *Id.*
73. *See, e.g., F.D. Processing*, 119 Wash. 2d at 462, 832 P.2d at 1308 (detailing the presumption in favor of substantive change).
78. *See State v. Dunaway*, 109 Wash. 2d 207, 216 n.6, 743 P.2d 1237, 1241 n.6 (1987) ("Nevertheless, even a clarifying enactment cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary." (citing Overton v. Econ. Assistance
The Supreme Court of Washington in *Johnson v. Morris*\(^{79}\) determined that a law was not curative where it substantively amended an existing statute.\(^{80}\) Prior to *Johnson*, the court had interpreted Washington statutes in effect in 1971 to vest jurisdiction in juvenile courts over delinquents up to age eighteen.\(^{81}\) In 1975, the legislature changed the law to provide juvenile courts jurisdiction over delinquents up to age twenty-one.\(^{82}\) The *Johnson* court held that the 1975 legislative act was an amendment and not a clarification of the existing statute.\(^{83}\) The court based its determination on the fact that the court had previously interpreted the statute, and that by providing a specific exception to that interpretation the new enactment was necessarily a substantive amendment.\(^{84}\)

2. Curative Laws Clarify the Original Intent of the Legislature

In addition to responding to an ambiguity, a curative law must demonstrate an intent to clarify an existing statute to reflect the original intent of the legislature that enacted the law.\(^{85}\) Courts require that retroactively applied legislation meet the "clearly curative" standard.\(^{86}\) An amendment is clearly curative where circumstances indicate that the legislature intended to clarify an existing statute.\(^{87}\) The intent to clarify needs to be supported by legislative history indicating original legislative intent.\(^{88}\) The fact that legislation or its legislative history declares that an amendment clarifies rather than substantively changes the law is not dispositive.\(^{89}\)

In *In re F.D. Processing, Inc.*,\(^{90}\) the Supreme Court of Washington determined that a law was not curative where there was no legislative

Auth., 96 Wash. 2d 552, 558, 637 P.2d 652, 654 (1981)).

79. 87 Wash. 2d 922, 557 P.2d 1299 (1976).

80. *See id.* at 926, 557 P.2d at 1303.

81. *Id.* at 924–25, 557 P.2d at 1302.

82. *Id.* at 925, 557 P.2d at 1302.

83. *Id.* at 926, 557 P.2d at 1303.

84. *Id.* at 925–26, 557 P.2d at 1302–03.


86. *Id.* at 462, 832 P.2d at 1308.


history surrounding the original law to support the clarification. The court looked at whether a 1991 amendment defining “agricultural products” to include “milk and milk products” would have retroactive effect. In its analysis, the court first looked to whether milk and milk products were included in the original definition of agricultural products. Because no previous case law interpreting the statute existed, the court engaged in statutory analysis and concluded that the original definition did not include milk and milk products. The court then held that the amendment was not curative and could not be applied retroactively, despite the fact that some legislative history indicated a curative intent. The amendment failed to meet the clearly curative standard in part because no legislative history surrounding the original statute indicated an original intent to include milk and milk products in the definition of agricultural products.

In sum, a litigant may overcome the general presumption of prospective application by a showing of express or implied intent for retroactive application. Despite legislative intent to the contrary, a reviewing court will not retroactively apply legislation if retroactivity violates the doctrine of separation of powers. Legislation that seeks to retroactively change a court’s interpretation of a statute implicates the doctrine of separation of powers. The legislature may not avoid separation of powers concerns through curative legislation without demonstrating that the law is clearly curative.

II. UNDER THE WATER CODE, A WATER RIGHT IS MEASURED BY ACTUAL BENEFICIAL USE

In Theodoratus, the Supreme Court of Washington determined that a private developer was entitled to a water right based on the amount of water placed to actual beneficial use. The court based its determination

91. Id. at 462, 832 P.2d at 1308–09.
92. Id. at 459–60, 832 P.2d at 1307.
93. Id. at 456–59, 832 P.2d at 1305–07.
94. Id. at 459, 832 P.2d at 1307.
95. Id. at 461, 832 P.2d at 1308-09 (noting that legislative history at issue consisted of qualified statement by Senator Newhouse indicating that he believed exclusion of dairy products was inadvertent).
96. Id. at 462, 832 P.2d at 1308–09.
on an interpretation of the Water Code.\textsuperscript{98} In interpreting the Water Code, the \textit{Theodoratus} court held that the proper measure of an applicant’s water right under both the statute and the common law is the amount of water placed to actual beneficial use and not the applicant’s system capacity.\textsuperscript{99} This beneficial use requirement applies even in situations where an individual is supplying water for residential use.\textsuperscript{100}

\textit{A. Theodoratus Involved the Water Right of a Private Developer Supplying Water for Residential Use}

In \textit{Theodoratus}, the Washington State Supreme Court analyzed the water right of a developer seeking to use water for residential use.\textsuperscript{101} Theodoratus was developing a housing subdivision of 253 homes.\textsuperscript{102} He applied for a water permit in 1973 to serve those houses using water drawn from a well.\textsuperscript{103} The original terms of the permit called for completion by 1980.\textsuperscript{104} Department of Ecology’s approval of the application indicated that Theodoratus would receive a final water right once the delivery system was in place.\textsuperscript{105} This delivery system measurement, known as pumps and pipes, was commonly included in permits issued by DOE.\textsuperscript{106} Pumps and pipes certificates purported to base the measure of a water right on system capacity.\textsuperscript{107} In 1992, Theodoratus had not completed construction of all the homes and asked for an extension to finish the development.\textsuperscript{108} DOE agreed to the extension but indicated in the permit that Theodoratus would only be entitled to a water right based upon the actual application of water to beneficial use and not upon the capacity of his delivery system.\textsuperscript{109} Theodoratus claimed that he was entitled to a water right based on

\begin{footnotes}
\item[98] Id. at 590–92, 957 P.2d at 1245–46; see also WASH. REV. CODE §§ 90.03.005–.605 (2004).
\item[99] Id. at 590, 957 P.2d at 1245.
\item[100] Id. at 593, 957 P.2d at 1246–47.
\item[101] Id. at 586–87, 957 P.2d at 1243.
\item[102] Id. at 587, 957 P.2d at 1244.
\item[103] Id. at 587, 957 P.2d at 1243–44.
\item[104] Id. at 587, 957 P.2d at 1243.
\item[105] Id.
\item[106] Id.
\item[107] Id.
\item[108] Id. at 587–88, 957 P.2d at 1244.
\item[109] Id. at 588, 957 P.2d at 1244.
\end{footnotes}

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system capacity.\textsuperscript{110}

**B. The Court's Determination of Theodoratus's Water Right Required an Interpretation of the Water Code**

Theodoratus's water right is controlled by the Water Code.\textsuperscript{111} The Water Code provides the procedures with which any person or municipal corporation must comply in order to use waters of the state.\textsuperscript{112} Pursuant to the Water Code, any person or municipal corporation wishing to appropriate water for "beneficial use" must first apply to DOE for a permit.\textsuperscript{113} Each application must indicate the nature and amount of the proposed use.\textsuperscript{114} In issuing the permit, DOE may fix the time for commencement and completion of construction on diversion works and the placement of water to "beneficial use."\textsuperscript{115} Once that water right has been perfected according to the provisions of the Water Code, DOE issues a final water certificate.\textsuperscript{116}

**C. The Theodoratus Court Interpreted "Beneficial Use" and "Perfection" Under the Water Code to Require Actual Application of Water to Beneficial Use**

The Theodoratus court determined that the relevant statutes, case law, and legislative history left no doubt that the quantification of Theodoratus' water right must be based upon the actual application of water to beneficial use.\textsuperscript{117} Because "beneficial use" and "perfection" were not defined in the Water Code, the court looked to case law for definition.\textsuperscript{118} Beneficial use and perfection are terms of art with well-established meanings in Washington case law.\textsuperscript{119} A water right is perfected when water is actually applied to beneficial use.\textsuperscript{120} That water

\textsuperscript{110.} Id. at 592, 957 P.2d at 1246.

\textsuperscript{111.} Id.

\textsuperscript{112.} WASH. REV. CODE § 90.03.250 (2004); see also id. § 90.03.015(5) (including "individual" within definition of "person").

\textsuperscript{113.} Id. § 90.03.250.

\textsuperscript{114.} Id. § 90.03.260.

\textsuperscript{115.} Id. § 90.03.320.

\textsuperscript{116.} Id. § 90.03.330.

\textsuperscript{117.} State Dep't of Ecology v. Theodoratus, 135 Wash. 2d 582, 590, 957 P.2d 1241, 1245 (1998).

\textsuperscript{118.} Id. at 589--90, 957 P.2d at 1245--46.

\textsuperscript{119.} Id. at 589, 957 P.2d at 1245.

\textsuperscript{120.} Id. at 592, 957 P.2d at 1246 (citing Ellis v. Pomeroy Improvement Co., 1 Wash. 572,
right must be established and maintained by the purposeful application of a given quantity of water to a beneficial use.\textsuperscript{121} Based on case law, the \textit{Theodoratus} court concluded that the Water Code required actual application of water to beneficial use in order to perfect a water right.\textsuperscript{122} As such, Theodoratus was only entitled to a certificate for the amount of water actually placed to beneficial use.\textsuperscript{123}

In concluding that perfection required determination of actual beneficial use, the \textit{Theodoratus} court recognized that DOE’s previous pumps and pipes policy was ultra vires and not supported by statute or common law.\textsuperscript{124} Theodoratus’ original 1973 permit contained language purporting to give him a vested right to a final water certificate once his diversion and supply system was in place, even though some of the lots might be vacant.\textsuperscript{125} This pumps and pipes quantification was based on system capacity rather than actual beneficial use.\textsuperscript{126} Under the pumps and pipes policy, used for over 40 years, DOE issued final water certificates for water rights to hundreds of municipal water suppliers once their diversion and distribution works were in place.\textsuperscript{127} The \textit{Theodoratus} court determined that the pumps and pipes policy was an impermissible measure of a water right.\textsuperscript{128}

The court’s invalidation of the pumps and pipes measure was largely an expansion of a previous holding,\textsuperscript{129} rendered in \textit{State Department of Ecology v. Acquavella}.\textsuperscript{130} In \textit{Acquavella}, the Supreme Court of Washington looked at the measure of a water right held for irrigation purposes prior to the passage of the Water Code.\textsuperscript{131} In remanding the case to the trial court, the court held that “beneficial use is the sole

576-77, 21 P. 27, 29 (1889)).

121. \textit{Id.} (citing State Dep’t of Ecology v. Grimes, 121 Wash. 2d 459, 468, 852 P.2d 1044, 1049 (1993)).

122. \textit{Id.} at 592, 957 P.2d at 1246.

123. \textit{Id.} at 597, 957 P.2d at 1248.

124. \textit{Id.} at 598, 957 P.2d at 1249.

125. \textit{Id.} at 587, 957 P.2d at 1243.

126. \textit{Id.}


128. \textit{Id.} at 598, 957 P.2d at 1249.

129. \textit{Id.} at 593, 957 P.2d at 1246–47.


131. \textit{Id.} at 751, 935 P.2d at 597.
measure of a water right," and that beneficial use must be determined by a calculation of "diversion and actual use." The court rejected arguments that beneficial use could be based on the capacity of a delivery system, a prior consent decree, or water delivery contracts. Such agreements may create responsibilities among the respective parties, but they cannot "create a state-based water right to any of those parties absent such right being based on actual beneficial use."  

D. Beneficial Use Is the Measure of a Water Right for Individuals Supplying Water for Domestic Purposes

Theodoratus was not entitled to different treatment under the Water Code because he was supplying water for residential use. Theodoratus attempted to distinguish his water right from those at issue in previous court-holdings by claiming that beneficial use has a different meaning in the context of public water supply. The trial court concluded that in evaluating a public water system’s water right, beneficial use might include the capacity necessary to meet reasonable future growth needs. The court specifically refused to address whether system capacity was the measure for municipal water suppliers, deciding instead that "'beneficial use' and 'perfection' have the same meaning regardless of whether a private residential development or an irrigation use is involved." The court refused to draw a distinction between the beneficial uses in irrigation and public water supply, concluding instead that "'beneficial use' and 'perfection' have the same meaning regardless of whether a private residential development or an irrigation use is involved." The court specifically refused to address whether system capacity was the measure for municipal water suppliers, deciding instead that Theodoratus was a private developer and not a municipality. However, the court noted "strong evidence of intent" that existing statutes do not measure a municipality’s water rights by system capacity.

132. Id. at 756–57, 935 P.2d at 600.
133. Id.
134. Id. at 757, 935 P.2d at 600 (emphasis in original).
136. Id. at 593, 957 P.2d at 1246.
137. Id. at 596–97, 957 P.2d at 1248.
138. Id.
139. Id. at 593–94, 957 P.2d at 1246–47.
140. Id. at 594, 957 P.2d at 1247.
capacity.\textsuperscript{141}

In sum, the \textit{Theodoratus} court interpreted the perfection and beneficial use requirements under the Water Code to require actual application of water to beneficial use. In so holding, the court expressly recognized that DOE's former policy of issuing pumps and pipes certificates based on system capacity rather than the amount of water placed to actual beneficial use is not supported by either the statute or the common law. Additionally, the court concluded that Theodoratus was not a municipality, and that individuals supplying water to the public may not have their water right defined by system capacity.

III. THE WATER RIGHTS BILL SUBSTANTIVELY CHANGES THE WATER CODE

In response to the court's holding in \textit{Theodoratus}, the Washington Legislature substantively amended the Water Code by passing the Water Rights Bill.\textsuperscript{142} The Water Rights Bill legislatively perfected pumps and pipes certificates issued in the past to municipal water suppliers.\textsuperscript{143} In addition, the Water Rights Bill created a new definition of "municipal water supply purposes" and "municipal water supplier" under the Code.\textsuperscript{144}

\textbf{A. The Legislature Responded Directly to the Court's Holding in \textit{Theodoratus}}

One of the legislative purposes of the Water Rights Bill was to redress

\textsuperscript{141} Id.

\textsuperscript{142} Act of June 20, 2003, ch. 5, \S\ 6, 2003 Wash. 1st Spec. Sess. Laws 2341, 2341-54. The legislative history does not identify \textit{Theodoratus} by name; instead, it refers to "a recent case involving the water right of a private developer," where the court determined that "a final water right certificate cannot be issued for the developer's right for a quantity of water that has not actually been put to beneficial use." See H. 58-2E2SHB 1338, 2003 Leg., 1st Spec. Sess., at 3 (Wash. 2003), available at http://www.leg.wa.gov/pub/billinfo/2003-04/House/1325-1349/1338-s2_hbr.pdf. That same legislative history indicates that DOE circulated and subsequently withdrew a memorandum interpreting the holding of the case to extend to municipal water rights. Id. Although not expressly stated, the legislature may have been reacting to the strong dissent in \textit{Theodoratus} by Justice Sanders in which he asserted that the majority reached "an absurd result and destabilize[d] all certificates already issued under the pumps and pipes approach as well as impair[ed] the future of residential development in Washington." \textit{Theodoratus}, 135 Wash. 2d at 602, 957 P.2d at 1251 (Sanders, J., dissenting).

\textsuperscript{143} Act of June 20, 2003, ch. 5, \S\ 6, 2003 Wash. 1st Spec. Sess. Laws 2341, 2345 (codified at \textit{WASH. REV. CODE \S\ 90.03.330(3)-(4)} (2004)).

\textsuperscript{144} Id. \S\ 1, 2003 Wash. 1st Spec. Sess. Laws at 2341-42 (codified at \textit{\S\ 90.03.015(3)-(4)} (2004)).
the court’s holding in *Theodoratus*.145 The stated goals of the Water Rights Bill included providing certainty and flexibility to holders of municipal water rights and promoting more efficient water use.146 Legislative history indicates that one of the ways the legislature intended to provide such certainty and flexibility was to address concerns raised over the validity of municipal water rights.147 The legislative history does not mention *Theodoratus* by name, but does refer to “a recent case involving the water right of a private developer” and alludes to the court’s holding in *Theodoratus*.148 That same legislative history notes that DOE circulated and subsequently rescinded a draft policy statement concluding that the holding of *Theodoratus* applied to municipal water certificates issued under the pumps and pipes policy.149 Some legislative history indicates that the legislature intended a curative clarification that municipal water rights issued under the pumps and pipes policy are rights in good standing.150

B. *The Water Rights Bill Validated Pumps and Pipes Certificates Issued in the Past for Municipal Supply Purposes*

In amending RCW 90.03.330(3), the Water Rights Bill declared that pumps and pipes certificates issued in the past for municipal supply

147. H. 58-2E2SHB 1338, 2003 Leg., 1st Spec. Sess., at 8, available at http://www.leg.wa.gov/pub/billinfo/2003-04/House/1325-1349/1338-s2_hbr.pdf (outlining testimony for bill, including: “Water utilities have many responsibilities, but outmoded water laws make it almost impossible to meet them . . . Place of use flexibility and having rights that are considered to be in good standing are critical to the utilities.”).
148. See id. at 3.
149. Id.
purposes are rights in good standing.\textsuperscript{151} The legislature perfected the pumps and pipes certificates of municipal water rights only to certificates issued before the effective date of the Water Rights Bill.\textsuperscript{152} An amendment to RCW 90.03.030(4) states that all determinations of future water rights certificates will require a determination of actual beneficial use.\textsuperscript{153} Moreover, DOE is prohibited from altering such certificates unless they were issued under ministerial error or misrepresentation.\textsuperscript{154}

\textit{C. The Water Rights Bill Creates a New Definition of Municipal Water Use}

In addition to validating pumps and pipes certificates that were issued in the past, the Water Rights Bill also modifies the definition of municipal water supplier.\textsuperscript{155} Prior to the passage of the Water Rights Bill, the definition section of the Water Code made no distinction between an individual, a corporation, an irrigation district, or a municipal corporation, classifying each as a "person."\textsuperscript{156} The Water Rights Bill added definitions of "municipal water supplier" and

\textsuperscript{151} Act of June 20, 2003, ch. 5, § 6, 2003 Wash. 1st Spec. Sess. Laws 2341, 2345 (codified at WASH. REV. CODE § 90.03.330(3) (2004)). Subsection 3 states:

This subsection applies to the water right represented by a water right certificate issued prior to the effective date of this section for municipal water supply purposes as defined in [WASH. REV. CODE §] 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

\textit{Id.}

\textsuperscript{152} \textit{ld.; see also} H. 58-2E2SHB 1338, 2003 Leg., 1st Spec. Sess., at 4, available at http://www.leg.wa.gov/pub/billinfo/2003-04/House/1325-1349/1338-s2_hbr.pdf (stating in summary that "[a] water right represented by a water right certificate issued in the past for municipal water supply purposes once works for diverting or withdrawing and distributing water were constructed, rather than after the water had been placed to actual beneficial use, is declared to be in good standing").

\textsuperscript{153} Act of June 20, 2003, ch. 5, § 6, 2003 Wash. 1st Spec. Sess. Laws 2341, 2345 (codified at WASH. REV. CODE § 90.03.330(4)) ("After the effective date of this section, the department must issue a new certificate . . . only for the perfected portion of a water right as demonstrated through actual beneficial use of water.").

\textsuperscript{154} \textit{ld.} at 2344-45 (codified at § 90.03.330(2)).

\textsuperscript{155} \textit{ld.} § 1, 2003 Wash. 1st Spec. Sess. Laws at 2341 (codified at § 90.03.015(3)) ("'Municipal water supplier' means an entity that supplies water for municipal water supply purposes."). Section (4) further defines municipal supply purposes as meaning beneficial use of water for, inter alia, "residential purposes through fifteen or more residential service connections." \textit{Id.} (codified at § 90.03.015(4)).

\textsuperscript{156} \textit{ld.}, 2003 Wash. 1st Spec. Sess. Laws at 2342 (codified at § 90.03.015(5)).
"municipal water supply purposes" to the definition section.157 A municipal water supplier, under the amended Water Code, is an entity that supplies water for municipal water supply purposes.158 "Municipal water supply purposes" is further defined by the Water Rights Bill to include water for residential purposes through fifteen or more residential service connections.159 The definition is not limited to uses by cities, towns, or other public utilities, but includes any beneficial use of water to serve fifteen or more residential connections.160

The Water Rights Bill incorporates this new definition of municipal supply purposes into the section perfecting pumps and pipes certificates for municipal supply purposes issued in the past.161 The section of the Water Rights Bill defining pumps and pipes certificates in good standing cross-references the new section defining municipal supply purposes.162 As a result, the Water Rights Bill retroactively perfects the pumps and pipes certificates of those certificate holders who meet the new definition of municipal water supplier.163

In sum, the Water Rights Bill substantively amends the Water Code by declaring pumps and pipes certificates issued for municipal supply purposes in the past to be rights in good standing. Additionally, the Water Rights Bill substantively amends the Water Code by adding new definitions of municipal supplier and municipal supply purposes. As a result, the Water Rights Bill not only perfects pumps and pipes certificates issued in the past, it also retroactively applies the new definition of municipal supply purposes.

IV. RETROACTIVE APPLICATION OF THE WATER RIGHTS BILL VIOLATES SEPARATION OF POWERS

The Water Rights Bill’s retroactive perfection of pumps and pipes certificates previously issued for municipal supply purposes violates Washington’s doctrine of separation of powers by overturning the

157. Id., 2003 Wash. 1st Spec. Sess. Laws at 2341–42 (codified at § 90.03.015(3)–(4)).
158. Id., 2003 Wash. 1st Spec. Sess. Laws at 2341 (codified at § 90.03.015(3)).
159. Id., 2003 Wash. 1st Spec. Sess. Laws at 2341–42 (codified at § 90.03.015(4)).
160. Id.
161. Id. § 6, 2003 Wash. 1st Spec. Sess. Laws at 2345 (codified at § 90.03.330(3)) (specifically referencing § 90.03.015).
162. Id. (codified at § 90.03.330(4)).
163. See id. Because the definition of "municipal supply purposes" is new to § 90.03.015, the cross-reference in § 90.03.330 can only be referencing the new definition.
Washington State Supreme Court’s holding in *Theodoratus*. The Water Rights Bill’s perfection of these certificates applies retroactively by its express terms. Despite this clear intent, a reviewing court should not retroactively apply the Water Rights Bill because such application would violate Washington’s doctrine of separation of powers. The Water Rights Bill effectively overrules the Supreme Court of Washington by retroactively perfecting pumps and pipes certificates and extending the definition of municipal water supplier to include private developers like *Theodoratus*. Moreover, the Water Rights Bill cannot avoid separation of powers problems by claiming to be curative because it substantively changes the law and fails to clarify the original intent of the legislature.

A. **The Water Rights Bill Applies Retroactively**

By its express terms and legislative history, the Water Rights Bill applies retroactively. The statutory language provides that rights represented by certificates “issued prior to the effective date in this section” are rights in good standing. In addition, legislative history indicates that the legislature intended the Water Rights Bill to apply retroactively. The Legislative House Report summary indicates that the legislation applies to water right certificates issued in the past for municipal supply purposes. Because the amendment applies expressly to certificates issued in the past, and because legislative history indicates a desire to perfect only certificates issued in the past, the Water Rights Bill is retroactive in its application.

164. See infra Part IV.B.
165. See infra Part IV.A.
166. See infra Parts IV.B–C.
167. See infra Part IV.B.
168. See infra Part IV.C.
170. Id. (codified at § 90.03.330(3)).
172. Id.
173. See City of Ferndale v. Friberg, 107 Wash. 2d 602, 605, 732 P.2d 143, 146 (1987) (upholding retroactive application where there was evidence of legislative intent and no interference
B. The Water Rights Bill Violates the Separation of Powers Doctrine by Retroactively Overruling Theodoratus

Despite the legislature's intent to apply the law retroactively, the Water Rights Bill violates the doctrine of separation of powers because its retroactive application contravenes the Supreme Court of Washington's interpretation of the Water Code. The Theodoratus court held that a private developer's water right to supply water for residential purposes under the Water Code must be based on an actual beneficial use of the water and not system capacity. The court based its holding on statutory interpretation and relevant case law, determining that the pumps and pipes doctrine was ultra vires, and not supported by the statute. In passing the Water Rights Bill, the legislature retroactively overruled that decision. The legislature determined that pumps and pipes certificates issued in the past for municipal supply purposes were rights in good standing, contravening the court's holding. Rather than requiring a measure of actual beneficial use, as the court determined was required by the Water Code, the legislature retroactively perfected certain water rights by legislative act.

More directly, the Water Rights Bill contravenes the Supreme Court's interpretation of the code in Theodoratus by retroactively extending the definition of municipal water supplier. The retroactive provisions of the Water Rights Bill cross-reference a new definition of municipal water supplier. As a result, the Water Rights Bill validates pre-existing pumps and pipes certificates issued to private water developers serving more than fifteen residences. Theodoratus was a private water

with vested rights); In re F.D. Processing, Inc., 119 Wash. 2d 452, 460, 832 P.2d 1303, 1307 (1992) (amendments may be retroactively applied if legislature so intended). Additionally, the Water Rights Bill does not qualify as remedial and thereby retroactive because its perfection of pumps and pipes certificates affects substantive rights. Id., 119 Wash. 2d at 460, 463, 832 P.2d at 1307, 1309 (noting that remedial amendments do not affect substantive rights).

175. Id. at 590, 598, 957 P.2d at 1245, 1249.
176. See id. at 598, 957 P.2d at 1249 (determining that pumps and pipes doctrine was ultra vires).
177. Id. at 590, 957 P.2d at 1245.
179. See id. (perfecting pumps and pipes certificates issued in past and cross-referencing new definition of municipal water supplier in § 90.03.015).
180. Id.
181. Id. §§ 1, 6, 2003 Wash. 1st Spec. Sess. Laws at 2341–42, 2345 (codified at §§ 90.03.015(4),
The court in *Theodoratus* decided that it must determine a private water developer’s water right for serving more than fifteen residences by the amount of water actually beneficially used and that DOE’s use of pumps and pipes in this context was ultra vires. By contrast, the legislature determined that a certificate issued to the same developer in the same circumstances under a pumps and pipes policy was a right in good standing. Because the Water Rights Bill retroactively mandates a result directly contrary to the court’s holding on the same material facts, it violates the doctrine of separation of powers.

The legislature’s action in passing the Water Rights Bill is directly contrary to the appellate court’s holding in *Stewart*. The *Stewart* court held that it was a violation of the separation of powers doctrine to retroactively apply legislation that overruled a judicial decision authoritatively construing a statute. The legislative act involved in *Stewart* responded directly to the court’s previous holding that the DOC lacked the authority to require a release plan.

The legislature responded by determining that the statute did authorize the DOC to require a release plan. The legislature’s action in passing the Water Rights Bill is materially similar to the legislative action at issue in *Stewart*. As in *Stewart*, the legislature, in passing the Water Rights Bill, responded directly to the court’s holding in *Theodoratus*. Similarly, the legislative action in passing the Water

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183. *Id.* at 590, 598, 957 P.2d at 1245, 1249.
184. See *id.* §§ 1, 6, 2003 Wash. 1st Spec. Sess. Laws at 2341–42, 2345 (codified at §§ 90.03.015(3)–(4), .330(3)).
186. *Id.*
187. *Id.* at 322–23, 75 P.3d at 523.
188. *Id.*
Rights Bill directly contradicted a prior court holding.\textsuperscript{191} The Water Rights Bill’s retroactive perfection of pumps and pipes certificates for the newly defined municipal supply purposes\textsuperscript{192} directly contradicts the Theodoratus court’s holding that a determination of a water right for a private developer must be based on actual application of water to beneficial use.\textsuperscript{193} By overruling the court retroactively, the legislature crossed the separation of powers boundary by attempting to become the court of last resort.\textsuperscript{194}

\section*{C. The Water Rights Bill Cannot Avoid Separation of Powers Concerns by Claiming to Be Curative}

Because the Water Rights Bill is not curative legislation, it cannot avoid separation of powers concerns. First, the Water Rights Bill cannot be curative because it attempts to change the underlying law as interpreted by the Supreme Court of Washington in Theodoratus.\textsuperscript{195} Second, the Water Rights Bill fails to meet the clearly curative standard articulated in F.D. Processing.\textsuperscript{196}

\subsection*{1. The Water Rights Bill Is Not Curative Because It Substantively Amends the Law}

The Water Rights Bill is an amendment to the Water Code and not a curative clarification because it responds to the judicial interpretation in Theodoratus by providing a specific exception for municipal supply purposes.\textsuperscript{197} In \textit{Johnson v. Morris}, the Supreme Court of Washington


\textsuperscript{193} See State Dep’t of Ecology v. Theodoratus, 135 Wash. 2d 582, 597, 957 P.2d 1241, 1248 (1998) (holding that water right certificate must be measured by actual application of water to beneficial use).

\textsuperscript{194} See \textit{Stewart}, 115 Wash. App. at 335, 75 P.3d at 529 (2003) (holding that legislature cannot retroactively contravene courts’ construction of statute).

\textsuperscript{195} See infra Part IV.C.1.

\textsuperscript{196} See infra Part IV.C.2.

\textsuperscript{197} See \textit{Johnson v. Morris}, 87 Wash. 2d 922, 925–26, 557 P.2d 1299, 1302–03 (1976); \textit{Stewart}, 115 Wash. App. at 340, 75 P.3d at 531 ("[L]egislative enactments which respond to judicial
determined that a law that responds to a prior judicial interpretation of a statute by providing a specific exception is an amendment to the statute and not a clarification.\textsuperscript{198} Similar to the statute in \textit{Johnson}, the Water Rights Bill provides a specific exemption to the court’s interpretation of the Water Code in \textit{Theodoratus}.\textsuperscript{199} The \textit{Theodoratus} court held that a private water developer providing water for domestic use was entitled to a water right certificate only for the amount of water actually beneficially used.\textsuperscript{200} The legislature responded to the court’s ruling by providing a specific exemption to the holding in \textit{Theodoratus}.\textsuperscript{201} After the passage of the Water Rights Bill, any person holding a pumps and pipes certificate for municipal supply purposes remained entitled to the amount of water listed in that certificate.\textsuperscript{202} Because the Water Rights Bill responds to a judicial interpretation by substantively altering the law in the form of a specific exemption for municipal supply purposes, it is an amendment to the Water Code and cannot be a curative clarification.\textsuperscript{203}

The Water Rights Bill also substantively amends the law by creating new definitions of municipal water supplier and municipal supply purposes.\textsuperscript{204} The Supreme Court in \textit{Theodoratus} specifically declined to address issues related to municipal water suppliers because that issue

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\textsuperscript{198} \textit{Johnson}, 87 Wash. 2d at 925–26, 557 P.2d at 1302–03.
\textsuperscript{202} See ch. 5, § 6, 2003 Wash. 1st Spec. Sess. Laws at 2345 (codified at § 90.03.330(3)).
\textsuperscript{204} Ch. 5, § 1, 2003 Wash. 1st Spec. Sess. Laws at 2341–42 (codified at § 90.03.015(3)–(4)).
was not before the court. Arguably the Water Rights Bill was only attempting to clarify the law by explaining the rights of municipal water suppliers. However, such an argument ignores the rule that a curative amendment clarifies or technically corrects a statute and does not substantively change the law. The court in *Theodoratus* ruled that a private water developer like Theodoratus was not a municipality. Because the Water Rights Bill extends the definition of municipal water developer to include private water developers like Theodoratus, it substantively changes the law. Therefore, the Water Rights Bill is not curative because it substantively amends the law.

2. *The Water Rights Bill Is Not Curative Because It Does Not Meet the Clearly Curative Standard Under F.D. Processing*

The Water Rights Bill also fails to meet the clearly curative standard articulated by the Supreme Court of Washington in *F.D. Processing* because nothing in the legislative history indicates a desire to clarify the intent of the original legislature. While the legislative history of the Water Rights Bill indicates a desire to make a curative clarification in the law, this history is not enough to meet the clearly curative standard. In *F.D. Processing*, the court found that the legislature did not meet the clearly curative standard where there was no reference to legislative history in the original statute indicating that the current

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207. *Theodoratus*, 135 Wash. 2d at 594, 957 P.2d at 1247 (“Appellant is not a municipality . . . .”).

208. *See* ch. 5, § 1, 2003 Wash. 1st Spec. Sess. Laws at 2341–42 (codified at § 90.03.015(3)–(4)) (creating definitions of municipal water supplier and municipal supply purposes); *Id.* § 1, 2003 Wash. 1st Spec. Sess. Laws at 2345 (codified at § 90.03.330(3)) (exempting pumps and pipes certificates issued in past).

209. *See Magula*, 131 Wash. 2d at 182, 930 P.2d at 313 (distinguishing amendment that substantially changes law from clarification that leaves prior Washington law unaffected); In re *F.D. Processing*, Inc., 119 Wash. 2d 452, 462, 832 P.2d 1303, 1308 (1992) (amendments that substantially change law are not curative).


legislation was actually giving effect to the original legislative intent.\(^{213}\)

Similarly, the legislative history of the Water Rights Bill cites to no legislative history surrounding the original Water Code or its subsequent amendments that indicate that the original Water Code intended to allow for a pumps and pipes measurement of a water right for municipal supply purposes.\(^{214}\) Without such legislative history, the legislature could only speculate as to the original intent of the 1917 legislature. Consequently, like the amendment in \textit{F.D. Processing}, the Water Rights Bill fails to meet the clearly curative standard.

V. CONCLUSION

In passing the Water Rights Bill, the legislature was properly concerned with providing certainty and flexibility to municipal water suppliers. However, once the Supreme Court of Washington in \textit{Theodoratus} interpreted the Water Code to require actual application of water to beneficial use, the legislature was bound by that interpretation. It is the province of the court to say what the law is. Under the court's holding, the pumps and pipes policy was ultra vires and not supported by statute or the common law. In the wake of \textit{Theodoratus}, if the legislature wants to provide certainty and flexibility to municipal water suppliers, they may only do so prospectively. Any other result would violate the doctrine of separation of powers by turning the legislature into the court of last resort.

\(^{213}\) \textit{Id.} at 462, 832 P.2d at 1308–09.