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7 * *Pro hac vice* motion to be filed

8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF WASHINGTON**

10 JAMES COURTNEY and CLIFFORD
COURTNEY,

11 Plaintiffs,

12 v.

13 JEFFREY GOLTZ, chairman and
commissioner; PATRICK OSHIE,
14 commissioner; and PHILIP JONES,
commissioner, in their official capacities
15 as officers and members of the
Washington Utilities and Transportation
16 Commission; and DAVID DANNER, in
his official capacity as executive director
17 of the Washington Utilities and
Transportation Commission,

18 Defendants.

No. CV-11-401-LRS

CIVIL RIGHTS COMPLAINT OF
PLAINTIFFS JAMES AND
CLIFFORD COURTNEY FOR
DECLARATORY AND
INJUNCTIVE RELIEF

19
**CIVIL RIGHTS COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF - 1**

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1 **INTRODUCTION**

2 1. This case is a challenge to Washington statutes and regulations
3 requiring a certificate of “public convenience and necessity” to operate a ferry on
4 Lake Chelan. For fourteen years, Jim and Cliff Courtney have tried to launch a
5 boat transportation service to bring economic opportunity to their remote
6 community of Stehekin, located at the northwest end of the lake. Their boat would
7 be insured, inspected, and certified, and their crew members would be licensed
8 with extensive safety training. But Jim and Cliff’s efforts have been repeatedly
9 blocked by the public convenience and necessity requirement—a nearly century-
10 old state law designed to protect existing ferry providers from competition. In
11 fact, since the requirement was imposed in 1927, the state has issued only *one*
12 certificate for ferry service on Lake Chelan. Thus, one company has the exclusive
13 right to provide service on the lake. Washington’s public convenience and
14 necessity requirement violates the Privileges or Immunities Clause of the
15 Fourteenth Amendment to the United States Constitution because it prevents Jim
16 and Cliff Courtney from using Lake Chelan—a navigable water of the United
17 States—to provide boat transportation services.

18 **JURISDICTION AND VENUE**

19 2. Plaintiffs—brothers Jim and Cliff Courtney—bring this civil rights

1 lawsuit pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the
2 Declaratory Judgments Act, 28 U.S.C. §§ 2201–2202, for violations of the
3 Privileges or Immunities Clause of the Fourteenth Amendment to the United
4 States Constitution.

5 3. Plaintiffs seek declaratory and injunctive relief against Washington’s
6 “certificate of public convenience and necessity” requirement as it applies to boat
7 transportation services on Lake Chelan, and against the provisions governing the
8 application process for a certificate of public convenience and necessity as they
9 apply on Lake Chelan.

10 4. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3),
11 (4).

12 5. Pursuant to 28 U.S.C. § 1391(b)(2), venue is proper in this District
13 because a substantial part of the events giving rise to Plaintiffs’ claims occurred in
14 this District.

15 **PARTIES**

16 6. Plaintiff James (Jim) Courtney is a resident of Stehekin, Washington,
17 and a brother of Plaintiff Cliff Courtney. For nearly fifteen years, Jim has tried to
18 provide boat transportation service on Lake Chelan, ranging from a ferry open to
19 the general public to an on-call boat service. Because of the public convenience

1 and necessity regulations at issue in this case, however, Jim has been, and
2 continues to be, prevented from using the lake's navigable waters to provide such
3 services.

4 7. Plaintiff Clifford (Cliff) Courtney is a resident of Stehekin,
5 Washington, and a brother of Plaintiff Jim Courtney. Like Jim, Cliff has also tried
6 to provide boat transportation services on Lake Chelan, including transportation of
7 customers or patrons of his own and other Stehekin-based businesses. Because of
8 the public convenience and necessity regulations at issue in this case, however,
9 Cliff has been, and continues to be, prevented from using the lake's navigable
10 waters to provide such services.

11 8. Defendant Jeffrey Goltz is a commissioner and chairman of the
12 Washington Utilities and Transportation Commission (WUTC). The WUTC is an
13 agency of the State of Washington, created and empowered under Wash. Rev.
14 Code §§ 80.01.010 and .040, and headquartered in Olympia, Washington. It is
15 charged with, among other things, regulating commercial ferry operations.
16 Commissioner Goltz is sued in his official capacity.

17 9. Defendant Patrick Oshie is a commissioner of the WUTC.
18 Commissioner Oshie is sued in his official capacity.

19 10. Defendant Philip Jones is a commissioner of the WUTC.

1 Commissioner Jones is sued in his official capacity.

2 11. Defendant David Danner is executive director and secretary of the
3 WUTC. Mr. Danner is sued in his official capacity.

4 12. Defendants have direct authority over WUTC personnel and the
5 responsibility and practical ability to ensure that the WUTC's regulations, policies,
6 and powers are implemented in accordance with the United States Constitution.

7 **STATEMENT OF FACTS**

8 **LAKE CHELAN**

9 13. Lake Chelan is a narrow, roughly 55-mile long lake nestled in the
10 North Cascade Mountain Range in Chelan County, Washington.

11 14. The city of Chelan is located at the southeast end of the lake.

12 15. The small, unincorporated community of Stehekin is located at Lake
13 Chelan's northwest end. Stehekin has long been a popular summer destination,
14 albeit one with no road access. The community is accessible only by boat, plane,
15 or foot. Its year-round population is roughly 75.

16 16. Stehekin and much of the northwest end of the lake are located in the
17 Lake Chelan National Recreation Area, which is managed by the United States
18 National Park Service as part of the North Cascades National Park Service
19 Complex.

1 17. Lake Chelan is a navigable water of the United States and has been
2 designated as such by the United States Army Corps of Engineers.

3 18. Lake Chelan provides a continuously navigable waterway between
4 Chelan, Washington, and the Lake Chelan National Recreation Area, a federal
5 enclave.

6 19. Lake Chelan is presently, has been in the past, and may in the future
7 be used for purposes of interstate commerce.

8 20. Lake Chelan is the source of the Chelan River, which, in turn, is a
9 tributary of the Columbia River. The Columbia River flows through Canada and
10 Washington and borders Oregon on its way to the Pacific Ocean.

11 **HISTORY OF FERRY REGULATION ON LAKE CHELAN**

12 21. Regulation of passenger and freight ferry service on Lake Chelan
13 began in 1911, when the Washington legislature enacted a law addressing certain
14 safety issues related to ferries and requiring that fares be reasonable. The law did
15 not impose significant barriers to entry and, by the early 1920s, there were at least
16 four competing ferry companies operating on the lake.

17 22. In 1927, however, the Washington legislature effectively eliminated
18 competition on the lake by passing a law prohibiting ferry companies from
19 offering ferry service without first obtaining a certificate declaring that “public

1 convenience and necessity” required the ferry.

2 23. On or about October 4, 1927, the Department of Public Works—a
3 predecessor of the WUTC—issued a certificate of public convenience and
4 necessity for passenger/freight ferry service on Lake Chelan. The certificate was
5 transferred to Lake Chelan Boat Company in 1929 and, in 1983, was again
6 transferred to Lake Chelan Recreation, Inc., which continues to do business as
7 Lake Chelan Boat Company.

8 24. No other certificate has been issued for ferry service on Lake Chelan.
9 At least four other applications for a certificate have been filed, including one in
10 1997 by Plaintiff Jim Courtney, but in each instance the Lake Chelan Boat
11 Company protested the application and the government denied a certificate.

12 **CURRENT REGULATION OF FERRY SERVICE ON LAKE CHELAN**

13 25. Under current regulations, a certificate of public convenience and
14 necessity is required to “operate any vessel or ferry for the public use for hire
15 between fixed termini or over a regular route upon the waters within this state.”
16 Wash. Rev. Code § 81.84.010(1); *see also* Wash. Admin. Code § 480-51-025(2).

17 26. The process for obtaining a certificate of public convenience and
18 necessity is lengthy, burdensome, prohibitively expensive, and almost certain to
19 end in denial.

1 27. To apply for a certificate, the applicant must pay a \$200 application
2 fee, prepare an application form, and submit, among other things, the following
3 materials to the WUTC:

- 4 ● “Pro forma financial statement of operations”;
- 5 ● “Ridership and revenue forecasts”;
- 6 ● “The cost of service for the proposed operation”;
- 7 ● “An estimate of the cost of the assets to be used in providing
8 service”;
- 9 ● “A statement of the total assets on hand of the applicant that
10 will be expended on the proposed operation”; and
- 11 ● “A statement of prior experience, if any, in providing
12 commercial ferry service.”

13 Wash. Admin. Code § 480-51-030(1), (3).

14 28. The WUTC must provide notice of the application, and of the time
15 and place of the hearing at which the WUTC will consider the application, to the
16 would-be ferry provider’s competitors—that is, “all persons presently certificated
17 to provide service” and “any common carrier which might be adversely affected.”

18 Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code § 81.84.020(1). The
19 WUTC must also provide notice to: “all present applicants for certificates to

1 provide service”; the Department of Transportation; “affected cities, counties, and
2 public transportation benefit areas”; and “any other person who has requested . . .
3 to receive such notices.” Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code
4 § 81.84.020(1).

5 29. Any such persons, including existing certificate holders, “may file a
6 protest with the commission within thirty days after service of the notice,” stating
7 “the interest of the protestant” and “the specific grounds for opposing the
8 application.” Wash. Admin. Code § 480-51-040(1); *see also id.* § 480-07-370(f).

9 30. Applications for a certificate and protests to applications trigger an
10 adjudicative proceeding. *See* Wash Admin. Code § 480-07-300(2)(c); *id.* § 480-
11 07-305(3)(e), (g).

12 31. The applicant and any protesting persons or entities are made parties
13 to the adjudicative proceeding. *See* Wash Admin. Code § 480-07-340(3). The
14 WUTC may allow any other person claiming a “substantial interest in the subject
15 matter of the hearing,” or whose “participation is in the public interest,” to
16 intervene in the proceeding. *Id.* § 480-07-355(3); *see also id.* § 480-07-340(1)(b),
17 (3).

18 32. The adjudicative proceeding resembles a civil lawsuit and involves,
19 among other things, motion practice, Wash Admin. Code §§ 480-07-375 to -385;

1 discovery, including data requests, record requisitions, bench requests, and
2 depositions, *id.* §§ 480-07-400 to -425; a prehearing conference, *id.* § 480-07-430;
3 a live hearing that includes both the presentation of evidence and the live
4 testimony of witnesses, who are subject to direct, cross, and redirect examination,
5 *id.* §§ 480-07-440 to -495; a public comment hearing, *id.* § 480-07-498; post-
6 hearing initial briefs and reply briefs (twelve copies of each); *id.* §§ 480-07-390 to
7 -395; and oral argument, *id.* § 480-07-390.

8 33. Protesting certificate holders and any intervening parties may subject
9 the applicant to discovery requests, depose the applicant, cross-examine the
10 applicant's witnesses, and present their own evidence and witnesses, among other
11 things. Their participation drastically increases the costs of the certificate process
12 for the applicant and causes lengthy delays in the WUTC's processing of an
13 application.

14 34. Applicable statutes require the applicant to prove three elements in
15 order to obtain a certificate. First, the applicant must prove that the proposed ferry
16 service is required by the "public convenience and necessity." Wash. Rev. Code §
17 81.84.010(1).

18 35. Second, if the applicant seeks to provide ferry service in a territory
19 already served by a certificate holder, it must prove that the existing certificate

1 holder:

- 2 ● “has not objected to the issuance of the certificate as prayed
- 3 for”;
- 4 ● “has failed or refused to furnish reasonable and adequate
- 5 service”; or
- 6 ● “has failed to provide the service described in its certificate
- 7 or tariffs after the time allowed to initiate service has
- 8 elapsed.”

9 Wash. Rev. Code § 81.84.020(1). Thus, by withholding consent, an incumbent
10 ferry provider can veto the applicant’s ability to enter the market—a veto that can
11 only be overridden if the applicant can prove that the incumbent’s service is not
12 reasonable, adequate, or in accord with its certificate and tariffs.

13 36. Third, the applicant must prove that it “has the financial resources to
14 operate the proposed service for at least twelve months.” Wash. Rev. Code §
15 81.84.020(2).

16 37. The applicant carries the burden of proof on each of these elements.

17 38. The applicable statutes and regulations provide no definition of the
18 terms “public convenience and necessity” and “reasonable and adequate service,”
19 and no objective criteria exist for the WUTC to use in applying those terms or in

1 determining whether an applicant has the financial resources to operate the
2 proposed service for at least twelve months.

3 39. The process for seeking a certificate of public convenience and
4 necessity is prohibitively expensive. Because of the complexity of the application
5 process and its adjudicative nature, an applicant for a certificate effectively must
6 hire an attorney or other professional representative, such as a transportation
7 consultant. *Cf.* Wash. Admin. Code § 480-07-345(1)(c) (stating that although “an
8 officer or employee of a party” may appear in an adjudicative proceeding “if
9 granted permission by the presiding officer to represent the party,” the presiding
10 officer may nevertheless “refuse to allow a person who does not have the requisite
11 degree of legal training, experience, or skill to appear in a representative
12 capacity”). Moreover, because of the economic nature of many of the inquiries
13 involved in the process, an applicant may have to hire one or more experts to
14 testify.

15 40. The certificate of public convenience and necessity requirement and
16 the WUTC’s policies and practices in processing certificate applications create an
17 effectively insurmountable barrier to entry into the Lake Chelan ferry market,
18 make it virtually impossible for applicants to obtain a certificate, and constitute a
19 *de facto* ban on new ferry services.

1 41. In a 2010 legislatively-commissioned report, the WUTC identified
2 “protection from competition” as the “[r]ationale” for the public convenience and
3 necessity requirement.

4 **CONSEQUENCE OF THE PUBLIC CONVENIENCE AND NECESSITY REQUIREMENT**

5 42. Since the public convenience and necessity requirement was imposed
6 in 1927, Washington has issued only one certificate for ferry service on Lake
7 Chelan.

8 43. At least four would-be competitors have applied for certificates—in
9 1953, 1972, 1976, and 1997—but in each instance Lake Chelan Boat Company
10 protested the application and the government denied a certificate. Thus, Lake
11 Chelan Boat Company has the exclusive right to operate a ferry on the lake.

12 44. Lake Chelan Boat Company’s schedule is impractical and
13 inconvenient. During peak months—June through September—it operates two
14 boats, but each makes only one trip per day and both boats depart Chelan at the
15 same time—8:30 a.m.—and head in the same direction.

16 45. The impractical schedule means vacationers, especially those arriving
17 from out of town, such as Seattle or Spokane, must often arrive a day early and
18 stay overnight on the lake’s southeast end in order to catch one of the early
19 morning ferries that depart for Stehekin.

1 46. Because both boats depart at the same time and in the same direction,
2 three hours is the most a summer tourist can spend in Stehekin without staying
3 overnight. Thus, a visitor must either forego the many activities—sightseeing,
4 horseback trips, bicycle rentals, rafting, kayaking, *etc.*—that Stehekin has to offer
5 or stay an extra night and catch one of the two ferries returning the next afternoon.
6 Daytrips to Stehekin from Chelan are therefore impracticable.

7 47. Similarly, Stehekin residents who need to make the trip to Chelan for
8 medical appointments, business meetings, *etc.*, are forced to spend at least one and
9 likely two nights in Chelan. Boarding an afternoon ferry from Stehekin puts them
10 into Chelan mid- to late-afternoon. Assuming their appointment or meeting is
11 scheduled for the same afternoon or evening, they must spend the night in Chelan
12 and board the 8:30 a.m. return ferry the next day. If, however, their appointment
13 or meeting is not until the next day, they must spend yet another night in Chelan
14 and catch the 8:30 a.m. return ferry two days after they began their travels.

15 48. The inconvenience of the ferry schedule is even worse during non-
16 summer months. For example, during the winter, Lake Chelan Boat Company
17 operates only one boat, which makes only one trip per day, three days per week:
18 Monday, Wednesday, and Friday.

19 49. The impracticality and inconvenience of the ferry schedule, as well as

1 the significant cost of the fare, impose hardships on Stehekin residents, discourage
2 tourists from visiting the community, and deprive the area's businesses of
3 economic opportunity.

4 **ATTEMPTS TO PROVIDE AN ALTERNATIVE, STEHEKIN-BASED SERVICE**

5 50. Plaintiffs—brothers and business partners Jim and Cliff Courtney—
6 have long suffered the Lake Chelan ferry monopoly. They are fourth-generation
7 residents of Stehekin, which their great-grandparents helped settle. They and their
8 siblings have several businesses in and around the community.

9 51. Cliff owns Stehekin Valley Ranch, a rustic ranch with cabins and a
10 lodge house, and Stehekin Outfitters, a recreation company that offers white water
11 river outings and horseback riding.

12 52. Jim is a Stehekin-based contractor. He is the former owner of
13 Stehekin Air Services and former part-owner of Chelan Airways, both float plane
14 companies.

15 53. Jim and Cliff's brother Cragg and Cragg's wife Roberta own the
16 Stehekin Pastry Company and Stehekin Log Cabins.

17 54. For years, Jim and Cliff listened as their and their siblings' customers
18 complained about the inconvenience and less-than-satisfactory service of Lake
19 Chelan's lone ferry operator. They began exploring the possibility of offering

1 Stehekin’s visitors and residents another choice: a Stehekin-based service that
2 runs at more convenient times and that has all the modern amenities of a first-class
3 vessel. Their boat would not only benefit Courtney family businesses and
4 patrons—it would provide a boon to other Stehekin-based business and the wider
5 community.

6 55. Jim and Cliff’s boat would be insured, inspected, and certified, and
7 their crew members would be licensed with extensive safety training.

8 56. Since 1997, Jim and Cliff have initiated four significant efforts to
9 provide such service on Lake Chelan, only to be thwarted by the public
10 convenience and necessity requirement on each occasion.

11 *Application for a Certificate (1997-1998)*

12 57. On July 3, 1997, Jim applied for a certificate of public convenience
13 and necessity to provide a Stehekin-based ferry service between points on Lake
14 Chelan. The ensuing process—which ended in denial—lasted thirteen months.

15 58. The incumbent ferry provider, Lake Chelan Boat Company, protested
16 Jim’s application on July 28, 1997.

17 59. Lake Chelan Boat Company was represented by an attorney from a
18 major Seattle law firm.

19 60. Jim had to retain a transportation consultant to represent him before

1 the WUTC because he did not feel capable of undergoing the application process
2 without professional representation.

3 61. The WUTC held a prehearing conference in Olympia on February 17,
4 1998.

5 62. The WUTC held a two-day evidentiary hearing on March 24 and 25,
6 1998. Eighteen witnesses testified at the hearing, including Jim, who was
7 subjected to cross-examination by the Lake Chelan Boat Company's attorney.
8 The hearing yielded a 515-page transcript, and some 37 exhibits were admitted
9 into evidence.

10 63. In order to try to prove that he had "the financial resources to operate
11 the proposed service for at least twelve months," Wash. Rev. Code § 81.84.020(2),
12 Jim was forced to disclose sensitive financial and business data that he was not
13 comfortable disclosing—for example, assets on hand, ridership and revenue
14 forecasts, and estimates of costs related to the service he was proposing.

15 64. Following the evidentiary hearing, Jim had to submit a post-hearing
16 brief, as well as a reply brief responding to Lake Chelan Boat Company's post-
17 hearing brief. Lake Chelan Boat Company also filed a reply brief responding to
18 Jim's post-hearing brief.

19 65. On June 22, 1998, an administrative law judge (ALJ) entered an

1 initial order denying the application. The initial order concluded that Jim had not
2 carried his burden of proving: that Lake Chelan Boat Company was not
3 furnishing reasonable and adequate service; that the public convenience and
4 necessity required the service Jim was proposing; and that Jim had the financial
5 ability to provide at least twelve months of service.

6 66. Jim filed a petition for administrative review of the ALJ's initial
7 order on July 13, 1998.

8 67. On August 3, 1998—a year and a month after Jim filed his
9 application—the WUTC issued an order affirming the ALJ's order and denying
10 Jim a certificate of public convenience and necessity. The WUTC rested its
11 decision primarily on Jim's failure to prove by “substantial and competent
12 evidence” that Lake Chelan Boat Company had failed to furnish “reasonable and
13 adequate service.” The WUTC also found it problematic that Jim's “financial
14 analysis and general business plan depend on taking business from Lake Chelan
15 Boat Company.”

16 68. Jim incurred approximately \$20,000 in expenses for the failed
17 certificate application process, including fees for the transportation consultant he
18 hired to represent him, travel expenses for himself and the consultant, and
19 administrative expenses, such as costs for reproduction of briefs, exhibits, and the

1 petition for administrative review. This was money Jim otherwise could have
2 invested in his proposed ferry business, existing business, and family. The money
3 was wasted, as it became apparent that the application would never succeed as
4 long as Lake Chelan Boat Company opposed it.

5 69. Jim also spent countless hours of his own time on the failed
6 application process—time he otherwise could have spent on his proposed ferry
7 business, existing business, and family. The time was wasted, as it became
8 apparent that the application would never succeed as long as Lake Chelan Boat
9 Company opposed it.

10 ***Proposed On-Call Boat Service (2006-2009)***

11 70. Several years later, Jim tried to provide another service: a Stehekin-
12 based, on-call boat transportation service. Jim believed the service fell within a
13 “charter service” exemption to the WUTC’s public convenience and necessity
14 requirement. *See* Wash. Admin Code § 480-51-022(1).

15 71. Because much of the northern end of Lake Chelan is in a national
16 recreation area and some of the docking sites on the lake are federal facilities, Jim
17 applied to the United States Forest Service in November 2006 for a special use
18 permit to use the docking sites in conjunction with his planned on-call service.

19 72. In September 2007, the Forest Service informed Jim that because

1 special use permits require that the holder comply with all applicable state laws, it
2 would have to confirm with the WUTC that his proposed boat service was exempt
3 from the certificate requirement before issuing a special use permit.

4 73. In an email dated October 10, 2007, WUTC staff opined that Jim's
5 proposed service would be exempt from the certificate requirement.

6 74. After WUTC staff rendered that opinion, however, Lake Chelan Boat
7 Company contacted the WUTC and Forest Service to object to Jim's proposed
8 service. WUTC staff then abruptly "changed its opinion" and informed Jim, by
9 email dated March 31, 2008, that he would need a certificate of public
10 convenience and necessity.

11 75. In that light, on May 5, 2008, the Forest Service's district ranger sent
12 Jim a letter informing him that the Forest Service had "put a hold" on his special
13 use permit application until he obtained a certificate of public convenience and
14 necessity.

15 76. WUTC staff changed its mind yet again in an email dated July 18,
16 2008, opining anew that Jim's proposed boat service would be exempt from the
17 certificate requirement.

18 77. On August 25, 2009, the Forest Service's district ranger sent a letter
19 to Defendant David Danner, the WUTC's executive director, requesting a formal

1 opinion as to whether Jim required a certificate of public convenience and
2 necessity. He took the step because of the conflicting opinions from WUTC staff
3 and because “the current passenger ferry operation, [t]he Lake Chelan Boat
4 Company, [wa]s concerned over a second ferry service on the Lake.”

5 78. Forest Service staff informed Jim by email that “[o]nce [the district
6 ranger] has [the WUTC’s] formal decision that no cert[ificate] is needed, . . . he
7 will sign your permit.”

8 79. The WUTC interpreted the district ranger’s inquiry as a petition for a
9 declaratory order and, on September 9, 2009, issued a “notice of receipt of petition
10 for declaratory order.”

11 80. Surprised at the WUTC’s action, the district ranger sent a letter to Mr.
12 Danner on September 14, 2009, explaining that “my intent in sending the request
13 was not for a hearing or a Petition for a Declaratory Order because I am not
14 interested in presenting any argument concerning how the Commission should
15 classify Mr. Courtney’s service.” Rather, he explained, “an advisory opinion letter
16 . . . would satisfy my inquiry.”

17 81. In response to the district ranger’s letter, the WUTC dismissed the
18 “petition for declaratory order” on September 25, 2009. Mr. Danner, however,
19 then declined to provide the requested advisory opinion.

1 82. Because it could not obtain an advisory opinion from the WUTC, the
2 Forest Service did not issue a special use permit for Jim to use the federal facilities
3 on Lake Chelan, and Jim was therefore unable to launch his on-call boat service.

4 ***Proposed Service for Patrons of Courtney Family and Other Stehekin***
5 ***Businesses (2008-2009)***

6 83. In 2008, Cliff Courtney contacted Defendant and WUTC Executive
7 Director David Danner to describe various boat transportation services he might
8 offer—services distinct from Jim’s proposed on-call service—and to determine
9 whether such services would require a certificate. Specifically, Cliff sent a letter
10 to Mr. Danner on September 9, 2008, presenting “several scenarios” and asking
11 for “help . . . to understand what leeway we have without applying for another
12 certificate.”

13 84. The first scenario Cliff described was one in which “I have chartered
14 . . . [a] vessel for my guests”—for example, persons who “want[] to stay at the
15 ranch [and] go river rafting”—and offer a package with transportation on the
16 chartered boat as one of the guests’ options.

17 85. The second scenario Cliff proposed was one in which “I buy the . . .
18 boat and carry my own clients . . . [who] are booked on to one of my packages or
19 in to one of the facilities I manage.”

1 86. Mr. Danner responded by letter on November 7, 2008, opining that
2 the services Cliff described would require a certificate and that “the Commission
3 would provide you a certificate to operate a commercial ferry service on Lake
4 Chelan (assuming you provide appropriate financial and other information) *only* if
5 it determined that Lake Chelan Boat Company was not providing reasonable or
6 adequate service, or if Lake Chelan Boat Company did not object to you operating
7 a competing service. Whether Lake Chelan Boat Company’s Service is not
8 ‘reasonable and adequate’ would be a factual determination for the commission
9 based on an evidentiary record developed in accordance with the Administrative
10 Procedure Act.”

11 87. Cliff sent a follow-up letter to Mr. Danner on November 19, 2008,
12 clarifying and emphasizing that his proposed boat transportation service “will be
13 incidental to a former and much larger engagement of services with our
14 companies.” Explaining that “a vessel is a substantial investment”; that “I would
15 like to nail down how you will rule if a complaint is issued against me when I start
16 service”; and that “I will not be able to obtain dock permits until agencies are
17 satisfied I am complying with WUTC regulations or [am] exempt from them,”
18 Cliff requested “a timely response.”

19 88. Mr. Danner responded by letter some two-and-a-half months later, on

1 February 2, 2009. He reiterated his earlier conclusion that the services Cliff
2 described would require a certificate, stating that it “does not matter whether the
3 transportation you would provide is ‘incidental to’” other businesses because the
4 service would still be “for the public use for hire.” Mr. Danner explained that
5 WUTC staff interprets the term “for the public use for hire” to include “all boat
6 transportation that is offered to the public—even if use of the service is limited to
7 guests of a particular hotel or resort, or even if the transportation is offered as part
8 of a package of services that includes lodging, a tour, or other services that may
9 constitute the primary business of the entity providing the transportation as an
10 adjunct to its primary business.”

11 89. Mr. Danner indicated that the conclusions in his letter reflected “the
12 Commission staff’s opinion” and that a “formal determination by the
13 commissioners could only follow either a petition for a declaratory ruling (in
14 which the existing certificate holder would have to agree to participate) or a
15 ‘classification proceeding’ . . . , which [WUTC] staff could ask the Commission to
16 initiate if you were to initiate service without first applying for a certificate.” The
17 declaratory ruling process, particularly as it would require the agreed participation
18 of Lake Chelan Boat Company, would be as futile as the certificate of public
19 convenience and necessity process, and Jim and Cliff were, and still are, not

1 willing to initiate service in violation of the law and risk fines.

2 90. Around the time of this correspondence, Cliff also contacted WUTC
3 staff by telephone to discuss several additional scenarios, including an association
4 or club that would provide boat service for its own members. In each instance,
5 Cliff was advised that the scenarios he proposed would require a certificate.

6 91. Consequently, Cliff never undertook any of the services described in
7 the scenarios he proposed.

8 *Pursuit of a Legislative Relaxing of the Public Convenience and Necessity*
9 *Requirement (2009-2010)*

10 92. Frustrated that he and Jim had been repeatedly thwarted by the anti-
11 competitive ferry regulations, Cliff sent a letter on February 14, 2009, to Governor
12 Gregoire and to Jim and Cliff's state legislators—Senator Linda Evans Parlette,
13 Representative Mike Armstrong, and Representative Cary Condotta—describing
14 the need for competition on Lake Chelan, explaining the problems created by the
15 public convenience and necessity requirement (including the futility of applying
16 for a certificate), and urging them to eliminate or relax the certificate requirement.

17 93. That spring, the legislature passed, and Governor Gregoire signed
18 into law, Engrossed Senate Bill 5894, which, among other things, directed the
19 WUTC to conduct a study and report on the appropriateness of the regulations

1 governing commercial ferry service on Lake Chelan. *See* 2009 Wash, Legis. Serv.
2 ch. 557, § 6 (West).

3 94. The WUTC published its report in January 2010 and recommended
4 that there be no “changes to the state laws dealing with commercial ferry
5 regulation as it pertains to Lake Chelan.”

6 95. The report noted that the WUTC could conceivably “allow some
7 limited competition” on Lake Chelan under the existing regulatory framework “by
8 declining to require a certificate for certain types of boat transportation services
9 that are arguably private rather than for public use”—for example, “a hotel or
10 resort providing transportation services for the exclusive use of its guests, either
11 with its own vehicles or by arranging a ‘private charter.’” But the report added
12 that any such interpretation would have to be “supported by expert testimony in an
13 adjudicative hearing” and would have to be shown to not “significantly threaten
14 the regulated carrier’s ridership, revenue and ability to provide reliable and
15 affordable service.”

16 96. The report concluded that it is “unlikely” that such an interpretation
17 “could be relied upon to authorize competing services on Lake Chelan.”

18 **HARM TO PLAINTIFFS**

19 97. The public convenience and necessity requirement has harmed and

1 continues to harm Jim and Cliff Courtney.

2 98. Jim and Cliff have had, and continue to have, the desire and ability to
3 start a competing boat transportation service on Lake Chelan that is open to the
4 general public, but the public convenience and necessity requirement has
5 prevented them from doing so.

6 99. Jim and Cliff have had, and continue to have, the desire and ability to
7 provide boat transportation service on Lake Chelan for customers and patrons of
8 Courtney family businesses and other businesses, but the public convenience and
9 necessity requirement has prevented them from doing so.

10 100. The public convenience and necessity requirement has subjected Jim
11 and Cliff's right to use the navigable waters of the United States—specifically, in
12 connection with their right to earn an honest living—to a veto by established
13 business interests and by a government agency acting to protect those interests
14 from competition.

15 101. Jim has already applied for and been denied a certificate of public
16 convenience and necessity. Having to undergo the certificate process again would
17 impose substantial financial and personal costs on Jim and Cliff. It would require
18 them to: expend tens of thousands of dollars in application fees, attorneys' fees,
19 expert fees, and related costs; force them to divulge sensitive financial and

1 business data to the government and the incumbent ferry provider (that is, their
2 would-be competitor); subject them to intrusive discovery requests, depositions,
3 and cross-examination at the hands of the incumbent ferry provider's attorneys;
4 and consume an incalculable amount of personal time and energy. The money,
5 time, and energy that Jim and Cliff would be forced to expend in applying for a
6 certificate is money, time, and energy they could otherwise invest in their
7 proposed boat transportation business, other businesses, and families.

8 102. Jim and Cliff's experience—including Jim's previous application and
9 denial of a certificate for Lake Chelan; their thwarted attempts to provide various
10 types of boat service on the lake; and the WUTC's refusal to relax the certificate
11 requirement on the lake—is that the WUTC will not authorize any additional boat
12 transportation service on Lake Chelan. Jim and Cliff have concluded that any
13 further efforts with the WUTC are futile. They have been dealing with the WUTC
14 for fourteen years, have pursued every angle they can think of to provide boat
15 transportation service on Lake Chelan, and have received the absolutely consistent
16 message that they will not be allowed to provide such service under current law
17 and WUTC policies.

18 103. Jim and Cliff's experience is that the elements they would have to
19 prove to secure a certificate of public convenience and necessity are unnecessary

1 and unrelated to the safe provision of boat transportation services on Lake Chelan.
2 Thus, even if they could ultimately obtain a certificate, it would come at the cost
3 of being subjected to an onerous and expensive application process that serves as a
4 significant barrier to entry and does nothing to protect the public safety.

5 104. Jim and Cliff have been in negotiations to purchase a boat that they
6 would use to provide their planned transportation services and that complies with
7 all applicable Coast Guard and Department of Labor and Industry standards, but
8 they have refrained from purchasing the vessel because of their inability to provide
9 transportation services with the boat. If they are unable to engage in their desired
10 business in the near future, they may lose the favorable terms they have negotiated
11 for the purchase and, possibly, the opportunity to purchase the boat at all.

12 105. If Jim and Cliff were to exercise their constitutional right to use the
13 navigable waters of the United States without undergoing the certificate process,
14 or after availing themselves of the certificate process and being denied a
15 certificate, they would face conviction of a gross misdemeanor, punishable by up
16 to 364 days' imprisonment, a \$5,000 fine, and significant monetary penalties. *See*
17 Wash. Rev. Code §§ RCW 81.04.390, .385; *id.* § 81.84.050; *id.* § 9.92.020.

18 106. In addition to barring Jim and Cliff from engaging in the business of
19 providing boat transportation services on Lake Chelan, the certificate requirement

1 harms Jim and Cliff as Stehekin residents who are forced to use the inefficient and
2 unresponsive monopolist ferry service in commuting to and from the southeast end
3 of the lake. When Jim, Cliff, and their respective families have medical
4 appointments, business meetings, *etc.*, on the southeast end of the lake, they are
5 forced to spend at least one and often two unnecessary nights in Chelan before
6 returning home.

7 107. The public convenience and necessity requirement also harms Cliff as
8 owner of Stehekin Valley Ranch and Stehekin Outfitters. The inconvenient
9 schedule and service of the existing monopoly have dissuaded potential patrons of
10 the ranch and outfitter from making the trip to Stehekin and patronizing the
11 businesses. This has resulted in lost revenues to Cliff, his businesses, and his
12 family.

13 **CONSTITUTIONAL VIOLATIONS**

14 **CLAIM I: FEDERAL PRIVILEGES OR IMMUNITIES**

15 ***(Boat Transportation Service on Lake Chelan Open to the General Public)***

16 108. Plaintiffs re-allege and incorporate by reference all of the allegations
17 contained in all of the preceding paragraphs.

18 109. The Privileges or Immunities Clause of the Fourteenth Amendment to
19 the United States Constitution provides, “No State shall make or enforce any law

1 which shall abridge the privileges or immunities of citizens of the United States . .
2 . .”

3 110. “The right to use the navigable waters of the United States” is one of
4 the privileges protected by the Privileges or Immunities Clause. *Slaughter-House*
5 *Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

6 111. The right to use the navigable waters of the United States is
7 inextricably linked with the economic liberty of citizens. It guarantees citizens the
8 ability to use such waters not only in looking for and traveling to work, but also in
9 engaging in business—for example, providing boat transportation service that is
10 open to the general public, or providing boat transportation service for customers
11 or patrons of specific businesses or group of businesses.

12 112. Lake Chelan is a navigable water of the United States.

13 113. By requiring a certificate of public convenience and necessity to
14 provide boat transportation service on Lake Chelan that is open to the general
15 public, the WUTC is abridging the right of citizens, including Jim and Cliff
16 Courtney, to use the navigable waters of the United States.

17 114. Because the right to use the navigable waters of the United States is
18 inextricably linked with the economic liberty of citizens, by requiring a certificate
19 of public convenience and necessity to provide boat transportation service on Lake

1 Chelan that is open to the general public, the WUTC is also abridging the
2 economic liberty of citizens, including Jim and Cliff Courtney, whose ability to
3 pursue their chosen livelihood has been barred by the certificate requirement.

4 115. The regulatory regime requiring a certificate of public convenience
5 and necessity is incredibly burdensome and operates as a de facto prohibition on
6 the use of Lake Chelan in connection with a boat transportation enterprise. The
7 elements an applicant must prove to secure a certificate—that the public
8 convenience and necessity require the proposed service; that the existing certificate
9 holder is not providing reasonable and adequate service; and that the applicant has
10 the financial ability to provide at least twelve months of service—are
11 unreasonable, unnecessary, and effectively insurmountable conditions for the
12 government to require before allowing someone to provide boat transportation
13 service on Lake Chelan that is open to the general public. The certificate
14 application process is litigious, prohibitively expensive, and incredibly time-
15 consuming, and it requires an applicant to divulge sensitive business plans and
16 financial data to the government and the incumbent ferry provider. In Jim and
17 Cliff’s experience, the process is futile and allows the established provider to
18 effectively veto the right of new operators to use the lake.

19 116. The WUTC has no compelling, substantial, or even legitimate interest

1 in requiring a certificate of public convenience and necessity to provide boat
2 transportation service on Lake Chelan that is open to the general public.

3 117. The WUTC’s justification for its public convenience and necessity
4 regulations—“protection from competition”—is not a legitimate governmental
5 interest, much less a substantial or compelling one. The purpose and effect of the
6 regulations are anti-competitive and provide an advantage to one commercial
7 enterprise over another.

8 118. The certificate of public convenience and necessity requirements set
9 forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-
10 025(1), and the provisions governing the application process for a certificate, set
11 forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040;
12 and Wash. Admin. Code §§ 480-07-300 to -885, are not narrowly tailored to
13 achieve, nor are they rationally related to, any compelling, substantial, or
14 legitimate governmental interest.

15 119. As applied to the provision of boat transportation service on Lake
16 Chelan that is open to the general public, the certificate of public convenience and
17 necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash.
18 Admin. Code § 480-51-025(1), and the provisions governing the application
19 process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin.

1 Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885, are so
2 burdensome, unreasonable, and unnecessary as to violate the Privileges or
3 Immunities Clause of the Fourteenth Amendment to the United States
4 Constitution.

5 120. As a direct and proximate result of Defendants’ enforcement of the
6 certificate of public convenience and necessity regulations on Lake Chelan, Jim
7 and Cliff Courtney have no adequate remedy at law by which to prevent or
8 minimize the continuing irreparable harm to their rights. Unless Defendants are
9 enjoined from committing the above-described constitutional violations, Jim and
10 Cliff will continue to suffer great and irreparable harm.

11 **CLAIM II: FEDERAL PRIVILEGES OR IMMUNITIES**

12 *(Boat Transportation Service on Lake Chelan for Customers or Patrons of*
13 *Specific Businesses or Groups of Businesses)*

14 121. Plaintiffs re-allege and incorporate by reference all of the allegations
15 contained in all of the preceding paragraphs.

16 122. The Privileges or Immunities Clause of the Fourteenth Amendment to
17 the United States Constitution provides, “No State shall make or enforce any law
18 which shall abridge the privileges or immunities of citizens of the United States . .
19 . .”

1 123. “The right to use the navigable waters of the United States” is one of
2 the privileges protected by the Privileges or Immunities Clause. *Slaughter-House*
3 *Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

4 124. The right to use the navigable waters of the United States is
5 inextricably linked with the economic liberty of citizens. It guarantees citizens the
6 ability to use such waters not only in looking for and traveling to work, but also in
7 engaging in business—for example, providing boat transportation service that is
8 open to the general public, or providing boat transportation service for customers
9 or patrons of specific businesses or group of businesses.

10 125. Lake Chelan is a navigable water of the United States.

11 126. By requiring a certificate of public convenience and necessity to
12 provide boat transportation service on Lake Chelan for customers or patrons of
13 specific businesses or groups of businesses, the WUTC is abridging the right of
14 citizens, including Jim and Cliff Courtney, to use the navigable waters of the
15 United States.

16 127. Because the right to use the navigable waters of the United States is
17 inextricably linked with the economic liberty of citizens, by requiring a certificate
18 of public convenience and necessity to provide boat transportation service on Lake
19 Chelan for customers or patrons of specific businesses or groups of businesses, the

1 WUTC is also abridging the economic liberty of citizens, including Jim and Cliff
2 Courtney.

3 128. The regulatory regime requiring a certificate of public convenience
4 and necessity is incredibly burdensome and operates as a de facto prohibition on
5 the use of Lake Chelan in connection with a boat transportation enterprise. The
6 elements an applicant must prove to secure a certificate—that the public
7 convenience and necessity require the proposed service; that the existing certificate
8 holder is not providing reasonable and adequate service; and that the applicant has
9 the financial ability to provide at least twelve months of service—are
10 unreasonable, unnecessary, and effectively insurmountable conditions for the
11 government to require before allowing someone to provide boat transportation
12 service on Lake Chelan for customers or patrons of specific businesses or groups
13 of businesses. The certificate application process is litigious, prohibitively
14 expensive, and incredibly time-consuming, and it requires an applicant to divulge
15 sensitive business plans and financial data to the government and the incumbent
16 ferry provider. In Jim and Cliff’s experience, the process is futile and allows the
17 established provider to effectively veto the right of new operators to use the lake.

18 129. The WUTC has no compelling, substantial, or even legitimate interest
19 in requiring a certificate of public convenience and necessity to provide boat

1 transportation service on Lake Chelan for customers or patrons of specific
2 businesses or group of businesses.

3 130. The WUTC’s justification for its public convenience and necessity
4 regulations—“protection from competition”—is not a legitimate governmental
5 interest, much less a substantial or compelling one. The purpose and effect of the
6 regulations are anti-competitive and provide an advantage to one commercial
7 enterprise over another.

8 131. The certificate of public convenience and necessity requirements set
9 forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-
10 025(1), and the provisions governing the application process for a certificate, set
11 forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040;
12 and Wash. Admin. §§ Code 480-07-300 to -885, are not narrowly tailored to
13 achieve, nor are they rationally related to, any compelling, substantial, or
14 legitimate governmental interest.

15 132. As applied to the provision of boat transportation service on Lake
16 Chelan for customers or patrons of specific businesses or group of businesses, the
17 certificate of public convenience and necessity requirements set forth at Wash.
18 Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the
19 provisions governing the application process for a certificate, set forth at Wash.

1 Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash.
2 Admin. Code §§ 480-07-300 to -885, are so burdensome, unreasonable, and
3 unnecessary as to violate the Privileges or Immunities Clause of the Fourteenth
4 Amendment to the United States Constitution.

5 133. As a direct and proximate result of Defendants' enforcement of the
6 certificate of public convenience and necessity regulations on Lake Chelan, Jim
7 and Cliff Courtney have no adequate remedy at law by which to prevent or
8 minimize the continuing irreparable harm to their rights. Unless Defendants are
9 enjoined from committing the above-described constitutional violations, Jim and
10 Cliff will continue to suffer great and irreparable harm.

11 **PRAYER FOR RELIEF**

12 Plaintiffs respectfully request that the Court grant the following relief:

13 A. A declaratory judgment by the Court that, as applied to the provision
14 of boat transportation service on Lake Chelan that is open to the general public,
15 the certificate of public convenience and necessity requirements set forth at Wash.
16 Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(1), and the
17 provisions governing the application process for a certificate, set forth at Wash.
18 Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; and Wash.
19 Admin. Code §§ 480-07-300 to -885, violate the Privileges or Immunities Clause

1 of the Fourteenth Amendment to the United States Constitution;

2 B. A declaratory judgment by the Court that, as applied to the provision
3 of boat transportation service on Lake Chelan for customers or patrons of specific
4 businesses or group of businesses, the certificate of public convenience and
5 necessity requirements set forth at Wash. Rev. Code § 81.84.010(1) and Wash.
6 Admin. Code § 480-51-025(1), and the provisions governing the application
7 process for a certificate, set forth at Wash. Rev. Code § 81.84.020; Wash. Admin.
8 Code §§ 480-51-030, -040; and Wash. Admin. Code §§ 480-07-300 to -885,
9 violate the Privileges or Immunities Clause of the Fourteenth Amendment to the
10 United States Constitution;

11 C. A preliminary and permanent injunction prohibiting Defendants from
12 enforcing the certificate of public convenience and necessity requirements set
13 forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-
14 025(1), and the provisions governing the application process for a certificate, set
15 forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040;
16 and Wash. Admin. Code §§ 480-07-300 to -885, to the provision of boat
17 transportation service on Lake Chelan that is open to the general public;

18 D. A preliminary and permanent injunction prohibiting Defendants from
19 enforcing the certificate of public convenience and necessity requirements set

1 forth at Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-
2 025(1), and the provisions governing the application process for a certificate, set
3 forth at Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040;
4 and Wash. Admin. Code §§ 480-07-300 to -885, to the provision of boat
5 transportation service on Lake Chelan for customers or patrons of specific
6 businesses or group of businesses;

7 E. An award of attorneys' fees, costs, and expenses pursuant to 42
8 U.S.C. § 1988; and

9 F. Such other legal or equitable relief as this Court may deem
10 appropriate and just.

11 Dated: October 19, 2011

Respectfully submitted,

12
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**CIVIL RIGHTS COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF - 40**

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