

WASHINGTON'S MUNICIPAL WATER LAW APPEALED TO STATE SUPREME COURT

Lummi Indian Nation, et al. v. State of Washington, et al., and Joan Burlingame, et al. v. State of Washington, et al., King County Superior Court Nos. 06-2-40103-4 and 06-2-28667-7

As expected, all parties have appealed the June 11, 2008 decision by the King County Superior Court that three provisions of Washington's 2003 municipal water rights legislation violate the separation of powers doctrine. (For a discussion of the Superior Court ruling, see *Western Water Law & Policy Reporter*, Volume 12, No. 9.) All parties are requesting direct review by the Washington Supreme Court, bypassing the intermediate court of appeals. In the meantime, the state agencies with regulatory authority over municipal water systems are attempting to devise an "interim guidance" for staff to follow.

The Cross-Appeals

In June 2008, responding to a challenge by some Washington tribes and environmental organizations, Judge Jim Rogers ruled unconstitutional the definitions of "municipal water supplier" and "municipal water supply purposes" in RCW 90.03.015(3) and (4). Judge Rogers also ruled that RCW 90.03.330(3), which confirms the validity of certain inchoate municipal water rights, is unconstitutional. Judge Rogers refused to invalidate the other provisions of the municipal water rights legislation challenged by the plaintiffs.

Attorney General Rob McKenna announced the state's appeal in early July. "We respectfully disagree with the Superior Court's decision to strike down three of the eight challenged sections of the Municipal Water Law," McKenna said. "We believe that the law as crafted by the Legislature is a constitutionally sound way to protect our growing water needs while protecting the environment. I'm confident that our view will ultimately prevail in court."

Other parties quickly followed with their own appeals, including the municipal water suppliers who had intervened in the litigation, and the original plaintiffs who were disappointed with the court's refusal to strike down other sections of the law. Citing the statewide significance and precedential importance of the case, all parties are seeking direct review by the Washington Supreme Court. Opening briefs will be filed in October, and the Supreme Court is expected to decide later this fall whether to hear the appeals or send the case first to the court of appeals.

Meanwhile: "Interim Guidance"

The Department of Ecology and the Department of Health, which regulate municipal water systems, are now faced with the dilemma of how to do business while the appeal is pending. Both agencies have announced that, because the superior court ruling "affects

the administration of water rights by Ecology and the oversight of public water systems by Health,” they are developing “interim policies” for staff to follow.

“Given the current uncertainties, our goal is to minimize inconvenience to the public and provide clear guidance to water suppliers,” the agencies explained, announcing that they “will not change any reviews and decisions made between the time the Municipal Water Law was enacted in 2003 and June 11, 2008, when the judge announced his ruling.”

On September 15, 2008, the Department of Ecology began circulating for discussion a draft definition of “municipal water supplier” which suggests that privately-owned water systems cannot be municipal water suppliers unless they already hold a water right explicitly designated as a “municipal” right. Cities and towns, counties, public utility districts, and water districts would automatically be considered “municipal” under the draft definition. Other public entities such as irrigation districts, ports, and public institutions could be “municipal” depending upon the specific facts and circumstances. In Washington, a variety of private entities also supply water within urban and suburban areas, including investor-owned water companies, cooperatives, and private associations; such privately-owned entities would not be “municipal” under Ecology’s draft definition.

Conclusion and Implications

As water utilities await the issuance of final interim policies, the most pressing issues appear to involve which entities will be considered “municipal water suppliers” and which water rights will be considered rights for “municipal water supply purposes” – terms undefined in the Water Code before 2003. The answers to these questions could significantly affect utility operations, including the applicability of water use efficiency requirements and other duties imposed on “municipal” suppliers under the 2003 statute.

The view that privately-owned entities are excluded from being “municipal” water suppliers is obviously inconsistent with the functional approach adopted by the Legislature in the 2003 legislation. It also appears to stem from an overly-broad reading of Judge Rogers’ ruling, which was that the “retroactive” application of the definitions to include a developer-owned water system – such as the one at issue in *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) – is unconstitutional. Prospective application of legislative amendments does not violate the separation of powers doctrine, but it is by no means certain that the state agencies will recognize this principle in their interim guidance.

Eventually, the Washington Supreme Court will decide the extent to which the separation of powers doctrine restricts the Legislature’s power to amend the Water Code. Meanwhile, “clear guidance” for municipal water suppliers may be an elusive goal.

UPDATE (May 2009): On March 3, 2009, the Washington Supreme Court announced that it will hear and decide the Municipal Water Law appeal. The Supreme Court Clerk has advised the parties that the case may not be set for oral argument until the Court’s Fall 2009 or Winter 2010 term. On May 14, 2009, the

Department of Ecology finally issued its Water Resources Program Guidance entitled “2003 Municipal Water Law Interim Guidance and Interpretive and Policy Statement” (GUID-2030).