WASHINGTON SUPREME COURT REBUFFS LOCAL BALLOT INITIATIVE ON "RIGHTS OF NATURE" FOR THE SPOKANE RIVER

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Spokane Entrepreneurial Center, et al. v. Spokane Moves to Amend the Constitution, et al., ___ Wn.2d ___ (2016), 2016 WL 455957 (Washington Supreme Court No. 91551-2, February 4, 2016)

The Washington Supreme Court has rejected a ballot initiative in the City of Spokane that would have extended the novel concept of "rights of nature" to the Spokane River by giving the river an enforceable legal right to "exist and flourish." The Court held that the initiative must be excluded from the ballot because it attempts to regulate water law and other subjects outside the scope of local initiative authority. The Court's decision decisively forecloses similar initiatives at the municipal level, which means that proponents of "rights of nature" laws must resort to the State Legislature or the state initiative process.

Washington's Initiative Process

Direct enactment of legislation by ballot initiative is a ubiquitous feature of civic life in Washington. The Washington Constitution sets out the right of the people to file statewide initiatives, but does not confer the right to file a local initiative. By statute, cities may establish a local initiative process in the city charter. RCW 35.22.200 allows a city charter to "provide for direct legislation by the people through the initiative and referendum upon any matter within the scope of the powers, functions, or duties of the city."

In part because the people's right of initiative is enshrined in the constitution, pre-election review of initiatives is disfavored. Courts are also reluctant to review initiatives prior to enactment because of the Washington Supreme Court's general concerns that "the courts should not interfere in the electoral and

legislative processes, and that the courts should not render advisory opinions." The Court has strictly limited the types of pre-election challenges that can be reviewed, allowing only challenges based on whether the initiative complies with procedural requirements (e.g., ballot titles) and whether the subject matter is proper for direct legislation.

The 2013 "Envision Initiative"

Envision Spokane is the primary sponsor of the "Community Bill of Rights" initiative to amend the Spokane City Charter. This case involves Envision Spokane's third attempt to amend the city charter. In 2009, an expansive "Community Bill of Rights" was placed on the ballot and overwhelmingly rejected by the voters. In 2011, a scaled-down "Community Bill of Rights," limited to four primary provisions, was placed on the ballot but failed to pass by just two percentage points. In 2013, Envision Spokane gathered enough signatures to place the initiative on the ballot again.

The "Community Bill of Rights" has four primary provisions, described by the Court as follows:

> "First, the initiative would require any proposed zoning changes involving large developments to be approved by voters in the neighborhood. Second, it would give the Spokane River the legal right to 'exist and flourish,' including the right to sustainable recharge, sufficient flows to support native fish, and clean water. . . . It would also give Spokane residents the right to access and use water in the city, as well as the right to enforce the Spokane River's new rights. Third, it attempts to give employees the protections of the Bill of Rights against their employer in the workplace. Fourth, it would strip the legal rights of any corporation that violated the rights secured in the charter."

Spokane County, an electric utility operator, various business organizations, and other petitioners filed a declaratory judgment action challenging the validity of the 2013 "Community Bill of Rights" initiative. The trial judge ruled that the initiative exceeded the scope of the local initiative power and struck it from the ballot. On appeal, the court of appeals ruled that the petitioners lacked standing to challenge the initiative and ordered it to be placed before the voters. On

February 4, 2016, the Supreme Court reversed the court of appeals, affirming the trial court's ruling.

The Supreme Court's decision

Standing

Due to concerns about pre-election review of initiatives, the court of appeals had concluded that petitioners must meet heightened standing requirements. The Supreme Court disagreed with this approach, clarifying that rules regarding standing and restrictions on pre-election review of initiatives "address different concerns and should not be conflated." If a declaratory judgment action involves an allowable pre-election challenge to an initiative, the petitioners must meet traditional standing requirements: (1) their interest must be within the zone of interests that the initiative will protect or regulate; and (2) they must show injury in fact, "economic or otherwise."

The Court explained that one of the petitioners' strongest arguments about the "zone of interests" prong of the standing test relates to the initiative's provision giving water rights to the Spokane River:

> "Two of the petitioners actively use the Spokane River—Spokane County (which maintains a sewage treatment plant on the river) and Avista Corporation (a utility company that, among other things, stores water in Lake Coeur d'Alene that might otherwise flow into the Spokane River). . . . we hold that petitioners are certainly within the zone of interests that the initiative protects or regulates. The initiative gives the Spokane River its own water rights, including the rights to sustainable recharge, sufficient flows to support native fish, and clean water. This protects or regulates the water of the Spokane River, which petitioners use pursuant to state and federal law."

The Court also held that petitioners will face injury if the initiative were enacted. The "clearest examples" of injury arise from the initiative's provisions assigning water rights:

> "Petitioners include a utility company and a county entity that use the Spokane River pursuant to existing state law who would certainly suffer harm if others were given conflicting water rights related to the Spokane River. . . . Regardless of whether these harms might be justified or offset by other societal benefits, these petitioners will suffer harm. Therefore, they meet the second requirement for standing and can bring a challenge to the initiative."

Initiative scope

Turning to the issue of whether the "Community Bill of Rights" exceeds the scope of the local initiative power, the Court explained that the provisions of a local initiative must be within the scope of the authority of the city itself. The inhabitants of a municipality may enact legislation governing local affairs, but they cannot enact legislation which conflicts with state or federal law.

The trial court had ruled that the initiative's water right provision conflicts with state law, which already determines the water rights for the Spokane River. This provision is "particularly problematic" because it deals with an aquifer located in the neighboring state of Idaho—considerably beyond the jurisdiction of the City of Spokane. The Supreme Court agreed: "This broad provision is directly contrary to the water rights system established by the State and is outside the scope of the city's authority."

Addressing each provision of the "Community Bill of Rights" in turn, the Court affirmed the trial court's ruling that all four provisions of the initiative were outside the scope of the local initiative power, "as they either dealt with nonlegislative matters or were outside the authority of the city." The Court held that the initiative is beyond the scope of local authority and therefore should be excluded from the ballot.

Conclusion and Implications

Envision Spokane's attempt to confer on the Spokane River enforceable legal rights to "sustainable recharge, sufficient flows to support native fish, and clean water" is part of a broader effort to establish rights of ecosystems or "rights of nature," as a rights-based legal framework to protect the environment. The

Community Environmental Legal Defense Fund (CELDF), a non-profit law firm headquartered in Mercersburg, Pennsylvania, has championed this concept. According to its website, CELDF has worked to develop "rights of nature" laws in more than three dozen communities in the United States, including Spokane.

Applying the straightforward rationale that local municipal initiatives are an improper vehicle for changing state and federal laws, the Court's decision in *Spokane Entrepreneurial Center* has dampened the prospects for additional "rights of nature" initiatives at the local level in the Washington. Perhaps in the future the state Legislature will be receptive to the "rights of nature" approach and will amend the Water Code and other state environmental laws accordingly. If not, the statewide initiative process always awaits.

Postscript: While this case proceeded through the appellate courts, Envision Spokane qualified a narrower initiative—with no water rights provisions—for the municipal election ballot in November 2015. Its "Worker Bill of Rights" was defeated, with 62% of the voters opposed to it.

The Court's decision is available at https://www.courts.wa.gov/opinions/pdf/915512.pdf.

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