WASHINGTON'S MUNICIPAL WATER LAW UPHELD BY STATE SUPREME COURT

***Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010)**

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On October 28, 2010, the Washington Supreme Court issued a unanimous decision affirming the State of Washington's 2003 municipal water law, which had been challenged by environmental organizations, individuals, and Indian tribes. The Court's opinion is a significant victory for municipal water utilities in Washington.

In *Lummi Indian Nation, et al. v. State of Washington, et al.,* No. 81809-6, the Supreme Court reversed the decision by King County Superior Court Judge Jim Rogers, which ruled unconstitutional the Legislature's recent definitions of "municipal water supplier" and "municipal water supply purposes" as well as the statute that validated existing "pumps and pipes" certificates for municipal water supply. The Supreme Court also rejected facial constitutional challenges to the legislation based on substantive and procedural due process.

Background: *Ecology v. Theodoratus*

In 1998, the Washington Supreme Court ruled that a developer was not entitled to obtain a certificate of water right until water had been actually put to beneficial use within his development. George Theodoratus had sought and obtained several extensions of his water right permit, but challenged a condition placed on his most recent extension under which he would be required to submit proof that water was appropriated and put to beneficial use before he could obtain a water right certificate. Mr. Theodoratus challenged this condition, arguing that during the preceding 40 years the Washington Department of Ecology ("Ecology") and its predecessor agencies had routinely issued water right certificates upon installation of permanent withdrawal facilities and water distribution systems capable of furnishing water to all lots intended to be supplied under a water right. This approach had been followed primarily – but not exclusively – with respect to municipal and community domestic water rights.

The *Theodoratus* dispute arose during the 1990s, when Ecology decided that, notwithstanding its longstanding practice, this so-called "pumps and pipes" approach to water right certification was not consistent with the state Water Code. In that case, the Washington Supreme Court agreed with Ecology that actual beneficial use of water, rather than a demonstration of system capacity, is required before a water right permit holder can obtain a water right certificate. The Court affirmed Mr. Theodoratus' permit extension, including the new condition requiring full beneficial use before a certificate could issue. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998).

In *Theodoratus,* the Court explained that Mr. Theodoratus' water right was for a private residential development: "Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case. We do note that the statutory scheme allows for differences between municipal and other water use." *Id*., 957 P.2d at 1247.

Despite this caveat from the Court, many people – including some staff and attorneys representing the Department of Ecology – interpreted the decision as a significant blow to the thousands of water right holders with "pumps and pipes" certificates, including municipal water utilities. As a result of the *Theodoratus* decision, several questions were elevated to center stage in Washington's ongoing water policy debate: First, what are (or should be) the rules applicable to rights for municipal water suppliers? Second, exactly who is (or should be) a "municipal water supplier" anyway? (This question was critical because under Washington law, water rights held for municipal water supply purposes are exempt from statutory relinquishment, but the Legislature had never defined "municipal water supply purposes" in the Water Code.) And finally, after *Theodoratus*, what is the status of all the "pumps and pipes" water right certificates issued during the past several decades?

2003 Municipal Water Law

In 2003, the Washington Legislature finally responded to these questions by enacting a statute addressing numerous aspects of municipal water rights.

For the first time, the Legislature defined the terms "municipal water supplier" and "municipal water supply purposes" in the Water Code (RCW 90.03.015(3) and (4)). In addition to use of water by a city, town, public utility district, county, sewer district, or water district, "municipal water supply purposes" also includes use for "residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year." RCW 90.03.015(4). A "municipal water supplier"

is defined as "an entity that supplies water for municipal water supply purposes." RCW 90.03.015(3).

These definitions were immediately controversial because they embrace non-governmental entities, including private developers – like Mr. Theodoratus – who furnish water to fifteen or more residences. This would have been unremarkable were it not for the fact that Washington law since 1967 has provided an exemption from relinquishment for non-use of water rights "claimed for municipal water supply purposes" – a term that was undefined until 2003. Opponents of the municipal water right exemption, including many environmental organizations and tribes, were highly critical of the Legislature's decision to expand it.

The Legislature also attempted to address the status of the thousands of "pumps and pipes" water right certificates previously issued to municipal water utilities. RCW 90.03.330(3) provides that a water right represented by such a certificate "is a right in good standing." This provision echoes the language used to describe inchoate water rights in Hutchins, *Water Rights Laws in the Nineteen Western States* (1971) ("an incomplete appropriative right in good standing") – language cited approvingly by the Washington Supreme Court in *Theodoratus*.

Notably, the 2003 statute also imposed significant new obligations and duties on "municipal water suppliers" (e.g., conservation and water use efficiency requirements), but these went virtually unnoticed by opponents of the legislation. Instead, most attention focused on the applicability of the "municipal water supply purposes" exemption from relinquishment, which opponents claimed would result in constitutional violations similar to those recognized by the Arizona Supreme Court in *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (1999).

During the three years following passage of the municipal water law, no "as applied" challenges – i.e., claims of constitutional violations from the application of the law in any individual circumstances – appear to have surfaced. Finally, in 2006 several Indian tribes, environmental organizations, and individual plaintiffs sued to overturn various provisions of the legislation as facially unconstitutional under the state and federal constitutions.

The Superior Court Ruling

On June 11, 2008, a superior court judge in Seattle ruled that three provisions of Washington's 2003 municipal water rights legislation violate the doctrine of separation of powers under the Washington State Constitution. Judge Jim Rogers ruled that the Washington Legislature's enactment of definitions of "municipal water supplier" and "municipal water supply purposes," as well as its effort to confirm the validity of certain

inchoate municipal water rights, were an unconstitutional attempt to overrule the Washington Supreme Court's 1998 interpretation of the Water Code in *Theodoratus*.

The plaintiffs raised over a dozen facial constitutional challenges – based upon separation of powers, substantive due process, and/or procedural due process – to eight provisions of the municipal water law. All claims were addressed in cross-motions for summary judgment. The superior court ruled that the definitions of "municipal water supplier" and "municipal water supply purposes" in RCW 90.03.015(3) and (4) "violate the separation of powers under the state constitution because they have retroactive effect and attempt to overrule an interpretation of the Water Code" in the *Theodoratus* decision.

Judge Rogers also ruled that RCW 90.03.330(3), which reassured municipal water suppliers that a prematurely-issued certificate represents a "right in good standing," "violates the separation of powers under the state constitution because it has retroactive effect and attempts to overrule an interpretation of the Water Code" in *Theodoratus*. Alternatively, he ruled that RCW 90.03.330(3) also violates the doctrine of separation of powers "because it purports to make a legislative determination of adjudicative facts concerning the 'good standing' of particular water rights."

Having found those three provisions facially unconstitutional based on the separation of powers doctrine, the superior court declined to address the plaintiffs' substantive due process challenges to those provisions, and rejected all the remaining claims asserted by the plaintiffs. All parties filed cross-appeals, which were accepted for review by the Washington Supreme Court.

The Supreme Court decision

The Supreme Court disagreed with the superior court's analysis of the separation of powers claims, but noted that the superior court had not had the benefit of the Court's decision in *Hale v. Wellpinit School District*, 165 Wn.2d 494, 198 P.3d 1021 (2009), a separation of powers case decided after the superior court's ruling. The Court began its analysis by explaining that its decision in the *Theodoratus* case did not go as far as the plaintiffs had argued. The Court said that "we concluded that the Department of Ecology had not been following the statute when it vested water rights based upon system capacity instead of actual beneficial use of water. We cautioned however that we were not considering 'issues concerning municipal water suppliers' and noted that 'the statutory scheme allows for differences between municipal and other water use.'"

In a lengthy footnote, the Court alluded to some parties' overly broad interpretation of *Theodoratus*, cautioning that the fact that an issue may have been briefed in that case did not mean that the Court addressed it: "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."

The Court recognized that its decision in *Theodoratus* "caused concern among existing water users about the vitality of their existing water rights based upon capacity" (the so-called "pumps and pipes" certificates issued to many municipal and community domestic water suppliers). The Court explained: "Apparently some water users were further unnerved by a draft policy floated by the Department of Ecology, but never adopted," which would have invalidated or rescinded existing "pumps and pipes" water right certificates. Indeed, that is precisely the situation that set the stage for the 2003 municipal water law.

The Supreme Court made clear that "it is wholly within the sphere of authority of the legislative branch to make policy, to pass laws, and to amend laws already in effect." The court concluded that the Legislature did not violate the separation of powers doctrine by amending the Water Code in "an area of the law subject to ongoing legislative refinement in the face of changing conditions." The court emphasized that confirming existing rights, as the municipal water law did by providing that municipal "pumps and pipes" certificates are rights in good standing, was a legislative policy decision appropriately left to the Legislature.

Judge Rogers had refused to invalidate other provisions of the municipal water law, including provisions restricting Ecology's authority to alter water right certificates, allowing municipal suppliers to use their water rights anywhere within their approved service areas, and clarifying that municipal water suppliers in compliance with an approved water system plan are not limited by population figures or service connection numbers in their water rights.

The original plaintiffs, disappointed with the superior court's refusal to strike down those other sections of the law, argued to the Supreme Court that those sections violated constitutional guarantees of substantive and procedural due process. Here as well, the Court refused to find the law unconstitutional, holding that "mere potential impairment of some hypothetical person's enjoyment of a right" was not a good enough reason to find the legislation facially invalid as a violation of due process.

The court acknowledged that it is possible that some junior water right holders' enjoyment of their water rights may be impaired by the application of the municipal water law, and left open the possibility of a so-called "as applied" challenge. An "as applied" challenge to the municipal water law might, if successful, prevent the law from being applied in a particular situation, but would not invalidate the legislation.

Conclusion and Implications

Since enactment of the law in 2003, no actual "as applied" challenge has been asserted successfully. Now that the plaintiffs have failed in their effort to wipe the law off the books entirely, it should be anticipated that municipal water right holders' efforts to take advantage of the 2003 law will draw more "as applied" constitutional challenges.

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