

DÉJÀ VU: WASHINGTON SUPREME COURT REJECTS PURPORTED “AS APPLIED” CONSTITUTIONAL CHALLENGE TO STATE MUNICIPAL WATER LAW

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Cornelius, et al. v. Dep’t of Ecology, et al., ___ Wn.2d ___, 344 P.3d 199
(2015), 2015 WL 594309 (Washington Supreme Court No. 88317-3)

On February 12, 2015, the Washington Supreme Court issued its long-awaited decision in *Cornelius v. Ecology*, affirming changes in well locations for water rights held by Washington State University to serve its campus in Pullman, Washington. This is the first appellate decision on a purported “as applied” constitutional challenge to Washington’s 2003 Municipal Water Law.

In its 2010 *Lummi Indian Nation* decision, the Court upheld the law against a facial constitutional challenge based on separation of powers, substantive due process, and procedural due process, but left open the possibility of a constitutional challenge to the application of the law in particular circumstances. In *Cornelius v. Ecology*, touted as an “as applied” constitutional challenge, the appellants raised virtually the same arguments as in *Lummi Indian Nation*. The Court rejected *Cornelius*’ “thinly veiled facial challenge” based on separation of powers and due process, underscoring

once again the Legislature’s authority to define “municipal” water rights, enact new “municipal water supply” provisions, and have those statutes applied to existing water rights.

Background: *Lummi Indian Nation v. State*

The 2003 Municipal Water Law defined for the first time the terms “municipal water supplier” and “municipal water supply purposes” (RCW 90.03.015(3) and (4)), and provided that water right certificates for municipal water supply based on system capacity (“pumps and pipes”) are rights “in good standing” (RCW 90.03.330(3)). Another provision of the 2003 Municipal Water Law required the Department of Ecology to amend water right documents and related records, when requested by a municipal water supplier or when processing water right changes or amendments, in order to identify as “municipal” existing water rights that meet the newly-enacted definition (RCW 90.03.560).

In *Lummi Indian Nation, et al. v. State of Washington, et al.*, 170 Wn.2d 247, 241 P.3d 1220 (2010), the Washington Supreme Court affirmed the 2003 Municipal Water Law, rejecting facial constitutional challenges brought by several Indian Tribes, environmental organizations, and individuals – including Scott Cornelius – based on separation of powers, substantive due process, and procedural due process.

In *Lummi*, the Supreme Court rejected the plaintiffs’ separation of powers claims, which rested on a misunderstanding of the Court’s decision in *Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). 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 also rejected arguments that the law violated constitutional guarantees of substantive and procedural due process, 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 emphasized that nothing in the 2003 law “changes the legal status of the group the challengers attempt to represent: junior water

rights holders who take water subject to the rights of senior rights holders whose status may be improved by these changes.” *Lummi*, 170 Wn.2d at 266.

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 2003 Municipal Water Law, and left open the possibility of a so-called “as applied” challenge. The Court explained that an “as applied” challenge “occurs where a plaintiff contends that a statute’s application in the context of *the plaintiff’s* actions or proposed actions is unconstitutional.” *Lummi*, 170 Wn.2d at 258 (emphasis added). By the time the Court provided these hints about the content and context of a successful “as applied” challenge, Mr. Cornelius’ purported “as applied” challenge was already wending its way through the lower courts.

Cornelius’ Appeal of WSU’s Water Rights

Washington State University (“WSU”) has eight wells on its campus in Pullman, Washington, connected to a single integrated water system serving the campus. WSU holds several groundwater rights with priority dates ranging from the 1930’s to the 1980’s, including three “pumps and pipes” certificates based on system capacity rather than actual beneficial use.

Two of WSU’s certificates, issued in 1962 and 1963, were issued for “domestic” supply. All of WSU’s other water rights were documented after 1967 and explicitly identified as “municipal” rights. Significantly, Washington’s relinquishment statute – including an exemption for water rights “claimed for municipal water supply purposes” – was first enacted in 1967.

Over time and without authorization from the Department of Ecology, WSU had shifted its groundwater pumping from older wells to more modern wells. Beginning in the 1990’s, WSU had also dramatically reduced its groundwater pumping as part of a basin-wide effort to conserve groundwater in the Palouse Basin. WSU has not fully utilized the aggregate amount of water to which it is entitled. In 2005, WSU applied to Ecology for changes to its water rights – to legitimize its consolidated pumping operations and to

explicitly identify all its water rights as municipal as required by RCW 90.03.560.

RCW 90.03.560 provides in relevant part:

When requested by a municipal water supplier or when processing a change or amendment to the right, the department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in RCW 90.03.015, are correctly identified as being for municipal water supply purposes.

Applying the newly-enacted Municipal Water Law together with the existing statutory relinquishment exemption for water rights “claimed for municipal water supply purposes” in RCW 90.14.140(2)(d), Ecology determined that WSU’s rights (including the pre-1967 rights issued for “domestic” supply) are for municipal supply and exempt from relinquishment for nonuse. Ecology also determined that WSU’s “pumps and pipes” certificates are rights in good standing, that WSU has exercised reasonable diligence in putting its water rights to beneficial use, and that WSU did not abandon any rights by shifting its pumping to other wells without authorization. Ecology approved changes to WSU’s water rights to allow water under six water rights to be pumped from any of WSU’s eight wells on the Pullman campus.

Scott Cornelius and two environmental organizations appealed Ecology’s approval to the Pollution Control Hearings Board, which ruled in favor of Ecology and WSU on all issues. Cornelius appealed to the Whitman County Superior Court, and then to the Court of Appeals, which transferred the appeal to the Supreme Court.

Cornelius’ much-ballyhooed “as applied” constitutional challenge to the Municipal Water Law consisted of claims that application of that law to WSU violated the separation of powers doctrine and his due process rights as the owner of an exempt well with a junior priority. He argued that the PCHB violated those constitutional doctrines by “adjudicating facts” and “reviving”

groundwater rights that WSU allegedly relinquished by nonuse – specifically, the two certificates issued for “domestic” purposes prior to enactment of the relinquishment statute in 1967.

Separation of Powers Claim

The Supreme Court characterized Cornelius’ separation of powers claim as “a thinly veiled facial challenge.” Retroactive application of a statute does not necessarily violate the separation of powers doctrine; “there must be some interference either with vested rights or with the prerogatives of another branch of government.” Although, as the Court acknowledged in *Lummi*, retroactive application of the law might unconstitutionally disturb previously-litigated adjudicative facts, in this case there was no previous adjudication of WSU’s water rights.

The Court explained that the PCHB could not have violated the separation of powers doctrine by applying the Municipal Water Law to WSU’s water rights, because there were no “adjudicative facts” the PCHB could have upset. The PCHB simply applied the law to WSU’s water rights in the current appeal – “the precise general application of the MWL we found constitutional in *Lummi Indian Nation*.” The Court continued:

Cornelius would have us overrule *Lummi Indian Nation* in all but name. Cornelius would have us rule that the purpose of use stated on water right certificates must control—that only certificates stating a “municipal” purpose can be treated as municipal. That holding would invalidate RCW 90.03.560 on its face and overrule *Lummi Indian Nation*, where we held that the new definition of “municipal water supply purposes” applies retroactively, even to rights that were not originally labeled “municipal.” . . . We refuse to elevate form over substance and overrule *Lummi Indian Nation*.

The Court held that under the Municipal Water Law, “WSU is deemed to have always been a municipal supplier, and that determination does not violate separation of powers because it upsets no adjudicative facts.”

Due Process Claim

Cornelius argued that the PCHB violated his due process rights as a junior water right holder when it “revived” WSU’s allegedly relinquished senior water rights, because such a “revival” moved him “further down the line” of water rights. Here as well, the Court characterized Cornelius’ argument as “a thinly veiled facial challenge.”

The Court explained that it had already disposed of this argument in *Lummi Indian Nation*, where it held that “merely relabeling a previously granted water right as ‘municipal’ does not violate due process, provided the water user falls under the new municipal definition.” Here, Ecology and the PCHB applied the Municipal Water Law retroactively to WSU to determine that WSU’s water rights were valid “municipal” water rights. The Court explained:

This is precisely the kind of action we found constitutional in *Lummi Indian Nation*. If we ruled for Cornelius, Ecology would regularly violate a junior water right holder’s due process rights when it applied RCW 90.03.560 to amend a senior municipal holder’s water right, the precise argument we rejected in *Lummi Indian Nation*.

The Court continued: “While there may be an unconstitutional application of the MWL, we find none in this case.” In a footnote, the Court explained:

If Ecology applied the MWL in a way that invalidated an individual’s vested water right, it might well violate due process. . . . But junior rights holders always take their rights subject to the possibility that senior rights holders’ use will limit, possibly severely, the amount of water available. That is a consequence of scarcity, not a due process violation.

The Court concluded by emphasizing that “it is the legislature’s prerogative to categorize water uses and decide which categories will be relinquished by nonuse.” In the Municipal Water Law, the Legislature

exercised that prerogative by defining the type of water rights entitled to the “municipal” exemption from relinquishment.

Three justices dissented on this issue, opining that the Municipal Water Law cannot be applied to change the character of water rights issued for “domestic” and not “municipal” purposes. Arguing that due process requires the PCHB to evaluate historic nonuse of rights issued for “domestic” purposes and to relinquish water rights in whole or in part when appropriate under the relinquishment statute, the dissenting justices would have remanded to the PCHB for reconsideration of Cornelius’ claims of statutory relinquishment.

Conclusion and Implications

On March 3, 2015, Cornelius filed a motion for reconsideration of the Court’s decision, but only with respect to his separation of powers claim. As of April 3, 2015, the Court has not acted on his motion for reconsideration.

Cornelius unsuccessfully raised many other non-constitutional challenges to WSU’s water right changes. For example, the Court rejected the argument that WSU had not employed reasonable diligence in making full use of its water rights, refusing to “essentially punish WSU for taking water conservation measures.” These non-constitutional aspects of the Court’s decision – overshadowed at the moment by the attention focused on the purported “as applied” constitutional challenge – will no doubt receive greater consideration in the future.

For now, however, the question is: how likely is an actual application of the Municipal Water Law that would give rise to a successful claim of a constitutional violation? After *Cornelius v. Ecology*, a credible “as applied” challenge will require more than just the application of the law. It would probably require the (extremely unlikely) application of the law so as to upset the results of a previous adjudication or to invalidate a plaintiff’s vested water right.