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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LUMMI INDIAN NATION, MAKAH)	
INDIAN TRIBE, QUILEUTE INDIAN)	
TRIBE, QUINAULT INDIAN NATION,)	NO. 06-2-40103-4 SEA
SQUAXIN ISLAND INDIAN TRIBE,)	
SUQUAMISH INDIAN TRIBE, and the)	
TULALIP TRIBES, federally recognized)	BURLINGAME PLAINTIFFS' REPLY AS
Indian tribes,)	TO PROCEDURAL DUE PROCESS
)	CHALLENGE TO RCW 90.03.330(2)
Plaintiffs,)	
)	
v.)	
)	
STATE OF WASHINGTON; CHRISTINE)	
GREGOIRE, Governor of the State of)	
Washington; WASHINGTON)	
DEPARTMENT OF ECOLOGY; JAY)	
MANNING, Director of the Washington)	
Department of Ecology; WASHINGTON)	
DEPARTMENT OF HEALTH; and MARY)	
SELECKY, Secretary of Health for the State)	
of Washington,)	
)	
Defendants.)	
)	

1 JOAN BURLINGAME, an individual; LEE)
BERNHEISEL, an individual, SCOTT)
2 CORNELIUS, an individual; PETER)
KNUTSON, an individual; PUGET SOUND)
3 HARVESTERS; WASHINGTON)
4 ENVIRONMENTAL COUNCIL; SIERRA)
CLUB; and THE CENTER FOR)
5 ENVIRONMENTAL LAW AND POLICY,)

NO. 06-2-28667-7 SEA

6 Plaintiffs,)

7 vs.)

8 STATE OF WASHINGTON,)
9 WASHINGTON STATE DEPARTMENT OF)
ECOLOGY, and WASHINGTON STATE)
10 DEPARTMENT OF HEALTH,)

11 Defendants,)

12 and)

13 WASHINGTON WATER UTILITIES)
14 COUNCIL, CASCADE WATER ALLIANCE)
and WASHINGTON STATE UNIVERSITY,)

15 Defendant-Intervenors.)
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INTRODUCTION

Plaintiffs Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget Sound Harvesters, Washington Environmental Council, and the Center for Environmental Law and Policy (collectively the “Burlingame Plaintiffs”) file this reply brief in support of their motion for summary judgment regarding RCW 90.03.330(2). Under RCW 90.03.330(2), the Department of Ecology (“Ecology”) is prohibited from revoking or diminishing a certificate issued for “municipal water supply purposes” except in the context of a general water rights adjudication or a water right change application.

Under the Supreme Court’s decision in Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998), the holder of a “pumps and pipes” certificate held at most an inchoate right to the unused portions of that water right. Such rights were subject to periodic review and cancellation by Ecology under RCW 90.03.320. RCW 90.03.330(2) now allows the use of these at least partially unexercised rights to be expanded without the protection for other water right holders provided by the cancellation and extension procedures of RCW 90.03.320. This expansion violates procedural due process.

ARGUMENT

I. STANDARD OF REVIEW

Under City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004), the appropriate course of action for the Court in reviewing this claim is simply to apply the three-part test from Mathews v. Eldridge, 424 U.S. 312 (1976). See Burlingame Plaintiffs’ Reply at 4-5. In that case, the Washington Supreme Court responded to a claim that a mandatory driver’s license suspension statute facially violated procedural due process by weighing the interests of all drivers with suspended licenses under the Mathews test. The court concluded that the statute violated procedural due process because it did not “provide adequate procedural safeguards to ensure against the erroneous deprivation of a driver’s interest in the continued use and possession

1 of his or her driver's license." City of Redmond, 151 Wn.2d at 677. Similarly, here, the
2 appropriate standard of review is to decide whether, under the Mathews test, the scheme created
3 by RCW 90.03.330(2) provides sufficient protection for the interests of junior water right holders
4 who might be harmed by the exercise of water rights represented by pumps and pipes certificates
5 that have not been developed with due diligence.

6 The appropriate test is not, as the State claims, whether there is any situation in which
7 RCW 90.03.330(2) can "be constitutionally applied." Defendant State of Washington's
8 Memorandum in Response to Plaintiffs' New Claims Pertaining to RCW 90.03.330(2) at 3.
9 Under the State's approach, RCW 90.03.330(2) would be constitutional if even one holder of an
10 inchoate pumps and pipes certificate did "not increase their use of water even without
11 applicability of RCW 90.03.320." Id. at 8. This is not the approach the Washington Supreme
12 Court adopted in City of Redmond. In that case, the plaintiffs' claims were premised on the risk
13 of ministerial errors in the processing of license suspensions. City of Redmond, 151 Wn.2d at
14 669. The court did not, however, uphold the statute on the basis that in many cases, license
15 suspensions are carried out without ministerial errors. Yet that result is precisely what the
16 State's interpretation of the "no set of circumstances" test would require.

17 The court's approach in City of Redmond highlights an important aspect of judicial
18 review of facial challenges: even if the "no set of circumstances" test is the appropriate standard
19 of review (which it is not), a court cannot know what counts as a relevant "set of circumstances"
20 without considering the nature of the substantive constitutional test.¹ Thus, for a separation of
21

22 ¹ Although federal decisions are not binding on this Court in determining the standard of review,
23 the U.S. Supreme Court's recent decision in Crawford v. Marion County Election Bd., ___ U.S.
24 ___, 128 S. Ct. 1610 (2008), is instructive regarding that court's approach to the "no set of
25 circumstances" test. In a facial equal protection challenge to an Indiana voter identification law,
26 none of the justices cited the "no set of circumstances" test, and none would have treated the
27 possibility that the statute could be constitutionally applied in a single situation as sufficient to
28 declare it constitutional on a facial challenge. Instead, they applied the relevant constitutional
test to the set of facts presented to them.

1 powers claim that the legislature has retroactively overruled a decision of the Washington
2 Supreme Court the only relevant set of circumstances consists of the decision of the court and the
3 meaning of the statute. Burlingame Plaintiffs' Reply at 3-4. Similarly, in this procedural due
4 process challenge, the relevant set of circumstances is the sum of the information relevant to the
5 Mathews test, including the nature of the private interests affected by the law, the overall risk
6 that the procedures under the challenged statute will result in the erroneous deprivation of these
7 interests, the existence of reasonable alternatives, and the interests of the government.

8 II. APPLICATION OF THE MATHEWS TEST

9 The Burlingame Plaintiffs incorporate by reference the Tribes' Reply in Support of
10 Motion for Summary Judgment re RCW 90.03.330(2), which explains that RCW 90.03.330(2) is
11 facially unconstitutional under the Mathews test. In addition, the Burlingame Plaintiffs briefly
12 make the following points.

13 First, the second part of the Mathews test looks at the risk of an erroneous deprivation of
14 a protected interest, as well as the value of alternative safeguards. City of Redmond, 151 Wn.2d
15 at 671. As the Tribes have explained, the procedures under RCW 90.03.330(2) provide virtually
16 no protection for the interests of other water right holders, while the permit extension process
17 under RCW 90.03.320 would provide adequate protection. Tribes' Reply at 3-5.

18 The State and defendant-intervenor WWUC argue, however, that the risk of an erroneous
19 deprivation of a protected interest is too remote or speculative to create a problem under the
20 Mathews test. State's Response at 7; WWUC's Response at 6-7. Under the prior appropriation
21 scheme of western water law, however, there is nothing speculative in concluding that the
22 expansion of certain water rights will necessarily harm other, reciprocal rights. See A & B
23 Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist., 141 Idaho 746, 752, 118 P.3d
24 78 (2005) (“[P]roposed enlargements create a per se injury to junior water rights holders.”). That
25 conclusion is particularly compelling given the sweeping changes carried out by RCW
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1 90.03.330(2)-(3): these provisions apply to literally thousands of improperly-issued pumps and
2 pipes certificates and the quantity of inchoate water represented by these certificates is immense.
3 Burlingame Plaintiffs’ Motion for Summary Judgment at 7-8. Given that at least sixteen
4 watersheds in Washington are over-appropriated, it is inevitable that the exercise of some rights
5 represented by pumps and pipes certificates that previously were not developed with due
6 diligence will harm the interests of other water rights holders. These circumstances obviously
7 satisfy this prong of the Mathews test, which requires only the risk of an erroneous deprivation,
8 rather than proof of an actual erroneous deprivation of any particular interest.

9 The State also underestimates the value to third parties of the alternative procedures
10 available under RCW 90.03.320. Ecology currently releases all permit extension letters to the
11 public through its web site.² In addition, before Ecology began posting these letters, some
12 entities—including plaintiff the Center for Environmental Law and Policy—had standing
13 requests to receive Ecology’s orders, including permit extensions. It is thus misleading to
14 suggest that the permit extension process “would provide little opportunity for involvement for
15 third party water right holders.” Defendant State of Washington’s Memorandum in Response to
16 Plaintiffs’ New Claims Pertaining to RCW 90.03.330(2) at 7.

17 Second, defendant-intervenor WWUC also argues that “the Legislature has frequently
18 enacted amendments to water rights statutes that benefit a class of water users without providing
19 third parties or junior water right holders the type of ‘procedural due process’ to which the
20 Plaintiffs insist they are entitled in the case of a permit extension.” WWUC Response to
21 Plaintiffs’ New Claim at 5-6. Yet the provisions that WWUC cites merely serve to reinforce
22 how unusual the Municipal Water Law is. The statute governing additional or replacement wells
23 includes several protections for other water right holders, including that any additional well
24 “shall not enlarge the right conveyed by the original water use permit or certificate.” RCW

25 _____
26 ² Links to the permit extension letters from each of Ecology’s regional offices can be found at
<https://fortress.wa.gov/ecy/wrx/wrx/roe/#reports>.

1 90.44.100(3). Another statute cited by WWUC allows seasonal or temporary changes and use
2 rotation only when these changes “can be made without detriment” to existing water rights.
3 RCW 90.03.390. The other situation covered by this provision allows the construction of
4 interties for use only during short-term emergencies—a far cry from the permanent right to
5 expand water use created by the Municipal Water Law. Finally, a statute allowing changes in
6 place of use by individual water users within an irrigation district also includes limitations that
7 protect other water users, including the requirement that “the use of water continues within the
8 irrigation district.” RCW 90.03.380(3). In any event, even if any of these amendments were
9 comparable to RCW 90.03.330(2), that similarity would prove nothing: WWUC does not
10 identify any judicial decisions upholding the constitutionality of these provisions.

11 **CONCLUSION**

12 For the foregoing reasons, the Burlingame Plaintiffs respectfully request that the Court
13 grant their motion for summary judgment and declare that RCW 90.03.330(2) violates the
14 procedural due process requirement of the Washington Constitution.

15 Respectfully submitted this 12th day of May, 2008.

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