

THE HONORABLE JIM ROGERS
HEARING DATE: May 23, 2008, 1:30 P.M.

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

LUMMI INDIAN NATION, MAKAH
INDIAN TRIBE, QUINAULT
INDIAN NATION, SQUAXIN
ISLAND INDIAN TRIBE,
SUQUAMISH INDIAN TRIBE, and
the TULALIP TRIBES, federally
recognized Indian tribes,

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.

NO. 06-2-40103-4SEA

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

Plaintiffs,

NO. 06-2-28667-7SEA

STATE OF WASHINGTON'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFF TRIBES' MOTION FOR
SUMMARY JUDGMENT

ATTORNEY GENERAL OF
WASHINGTON
Agriculture & Health Division
7141 Cleanwater Drive SW
PO Box 40109
Olympia, WA 98504-0109
(360) 586-6500

ATTORNEY GENERAL OF
WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

v.
STATE OF WASHINGTON,
WASHINGTON STATE
DEPARTMENT OF ECOLOGY, and
WASHINGTON STATE
DEPARTMENT OF HEALTH,
Defendants,
WASHINGTON WATER UTILITIES
COUNCIL, CASCADE WATER
ALLIANCE and WASHINGTON
STATE UNIVERSITY,
Defendant-Intervenors.

**DEFENDANT STATE OF WASHINGTON'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF TRIBES' MOTION FOR SUMMARY JUDGMENT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

I. RELIEF REQUESTED AND SUMMARY OF ARGUMENT 1

 A. Relief Requested 1

 B. Summary of Argument 1

II. COUNTER-STATEMENT OF FACTS 6

III. STATEMENT OF ISSUES 6

IV. EVIDENCE RELIED UPON 7

V. AUTHORITY 7

 A. Standard of Review 7

 B. The Municipal Water Law Does Not Violate the Separation of Powers
 Doctrine (Issues 1 and 2) 8

 C. The Municipal Water Law Does Not Violate Substantive Due Process 8

 1. RCW 90.03.015(3, (4) and RCW 90.03.560 Do Not Violate Substantive
 Due Process Under the State and Federal Constitutions (Issue 3) 8

 2. RCW 90.03.260 (4) and (5) Do Not Violate Substantive Due Process
 (Issue 4) 9

 3. RCW 90.03.386(2) Does Not Violate Substantive Due Process (Issue 5) 13

 4. RCW 90.03.330(3) Does Not Violate Substantive Due Process (Issue 6) 19

 D. The Municipal Water Law Does Not Violate Procedural Due Process 19

 1. RCW 90.03.386(2) Does Not Violate Procedural Due Process (Issue 7) 19

 2. RCW 90.03.260(4) and (5) Do Not Violate Procedural Due Process
 (Issue 8) 23

VI. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1000 Virginia Ltd. P'ship v. Vertecs Corp.,
158 Wn.2d 566, 146 P.3d 423 (2006)..... 13

Anderson v. Morris,
87 Wn.2d 706, 558 P.2d 155 (1976)..... 4

City of Redmond v. Moore,
151 Wn.2d 664, 91 P.3d 875 (2004)..... 21

Dep't of Ecology v. Campbell & Gwinn, LLC,
146 Wn.2d 1, 43 P.3d 4 (2002)..... 18, 20

Dep't of Ecology v. Theodoratus,
135 Wn.2d 582, 957 P.2d 1241 (1998)..... 3

*Fremont-Madison Irr. Dist. & Mitigation Group v. Idaho Ground Water
Appropriators, Inc.*,
129 Idaho 454, 926 P.2d 1301 (1996) 16

In re F.D. Processing, Inc.,
119 Wn.2d 452, 832 P.2d 1303 (1992)..... 13

In re Water Rights in Alpowa Creek,
129 Wash. 9, 224 P. 29 (1924) 12

Johnson v. Cont'l W., Inc.,
99 Wn.2d 555, 563 P.2d 482 (1983)..... 17

Mathews v. Eldridge,
424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)..... 20

Morrissey v. Brewer,
408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)..... 20

R.D. Merrill Co. v. Pollution Control Hearings Bd.,
137 Wn.2d 118, 959 P.2d 458 (1999)..... 12

San Carlos Apache Tribe v. County of Maricopa,
193 Ariz. 195, 972 P.2d 179 (1999) 15

Schuh v. Dep't of Ecology,
100 Wn.2d 180, 667 P.2d 64 (1983)..... 12

State Farm Bur. Fed'n v. Gregoire,
162 Wn.2d 284, 174 P.3d 1142 (2007)..... 10, 17

1	<i>State v. Bash</i> , 130 Wn.2d 594, 925 P.23d 978 (1996).....	18
2		
3	<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	18
4	<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. ___, ___ S. Ct. ___, WL 704368 (2008)	2
5		
	<u>Statutes</u>	
6	RCW 34.05	22
7	RCW 43.20.250	24
8	RCW 43.20.260	17, 18
9	RCW 70.119A.180	17
10	RCW 90.03.015(3).....	3, 6, 8, 9
11	RCW 90.03.015(4).....	3, 6, 8, 9
12	RCW 90.03.260	passim
13	RCW 90.03.260 (1996).....	11
14	RCW 90.03.260(4).....	passim
15	RCW 90.03.260(5).....	passim
16	RCW 90.03.280	20
17	RCW 90.03.290	12
18	RCW 90.03.330(2).....	1
19	RCW 90.03.330(3).....	3, 6, 7, 19
20	RCW 90.03.380	20, 24
21	RCW 90.03.380(1).....	16, 17, 20
22	RCW 90.03.386(2).....	passim
23	RCW 90.03.560	3, 6, 8, 9
24	RCW 90.14.140(2)(d).....	3, 8
25	RCW 90.44.100	16, 20, 24
26		

Regulations

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

WAC 246-290-100 21, 24
WAC 246-290-100(4)(k)(i) 22
WAC 246-290-100(9)..... 22
WAC 246-290-100(10)..... 22
WAC 246-290-106 21
WAC 246-290-107 21
WAC 246-290-108 21
WAC 246-290-110 24

1 **I. RELIEF REQUESTED AND SUMMARY OF ARGUMENT**

2 **A. Relief Requested**

3 Defendants State of Washington, Governor Christine Gregoire, Department of Ecology
4 (Ecology), Department of Health (Health), Ecology Director Jay Manning, and Health
5 Secretary Mary Selecky (collectively referred to as "the State"), by and through their counsel,
6 Alan M. Reichman, Mark H. Calkins, and Stephen H. North, Assistant Attorneys General,
7 submit this memorandum in opposition to the Plaintiff Tribes' Motion for Summary Judgment.

8 The State agrees with the Plaintiffs that this case wholly involves questions of law and
9 that summary judgment is appropriate. However, for the reasons fully articulated below, as
10 well as those in the Defendant State of Washington's Motion for Summary Judgment
11 submitted on January 22, 2008, (hereinafter the "State's Motion for Summary Judgment"), it is
12 the State that is entitled to judgment as a matter of law that the seven¹ sections of the
13 Municipal Water Law (MWL) challenged by the Plaintiff Tribes in this taxpayer action² do not
14 violate the United States and Washington Constitutions. Accordingly, the State respectfully
15 requests the Court to grant the State's cross-motion for summary judgment, and deny the
16 Plaintiffs Tribes' motion and dismiss with prejudice all causes of action asserted in their
17 complaint.

18 **B. Summary of Argument**

19 The Plaintiff Tribes challenge the facial constitutionality of several sections of the
20 MWL, asking the Court to completely erase these laws from Washington's code. On March

21 _____
22 ¹ In their summary judgment motion, the Plaintiff Tribes attempt to raise a new cause of action by
23 asserting that Section 6(2) of the MWL, RCW 90.03.330(2), violates procedural due process. On or about March
24 19, 2008, the Court entered its Order Granting in Part and Denying in Part Defendant-Intervenor Washington
25 Water Utilities Council's Motion to Strike Plaintiffs' New Claims. This order requires Plaintiffs to file proposed
26 amended complaints in order to pursue this new claim. If such an amended complaint is filed, and accepted by
the Court, the State reserves the right to oppose the new claim and counter the arguments in the Plaintiff Tribes'
motion that pertain to RCW 90.03.330(2).

² The fact that this is a "taxpayer" action is of no significance to the Plaintiff Tribes' lawsuit other than
the fact that taxpayer status is the asserted basis for their standing, which the State has chosen not to challenge at
this juncture.

1 18, 2008, the United States Supreme Court issued a decision rejecting a facial challenge to
2 Washington's primary election law. *Wash. State Grange v. Wash. State Republican Party*, 552
3 U.S. ___, ___ S. Ct. ___, WL 704368 (2008). This decision explains the "several reasons"
4 why facial challenges to statutes are disfavored:

5 Facial challenges are disfavored for several reasons. Claims of facial
6 invalidity often rest on speculation. As a consequence, they raise the risk of
7 "premature interpretation of statutes on the basis of factually barebones
8 records." *Sabri v. United States*, 541 U. S. 600, 609 (2004) (internal quotation
9 marks and brackets omitted). Facial challenges also run contrary to the
10 fundamental principle of judicial restraint that courts should neither " 'anticipate
11 a question of constitutional law in advance of the necessity of deciding it' " nor
12 " 'formulate a rule of constitutional law broader than is required by the precise
13 facts to which it is to be applied.' " *Ashwander v. TVA*, 297 U. S. 288, 347
14 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia*
15 *S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). Finally,
16 facial challenges threaten to short circuit the democratic process by preventing
17 laws embodying the will of the people from being implemented in a manner
18 consistent with the Constitution. We must keep in mind that " '[a] ruling of
19 unconstitutionality frustrates the intent of the elected representatives of the
20 people.' " *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320,
21 329 (2006) (quoting *Regan v. Time, Inc.*, 468 U. S. 641, 652 (1984) (plurality
22 opinion)).

23 *Id.* at *5.

24 With these principles in view, the Court must turn to the facial challenge at hand. The
25 Plaintiff Tribes' claims essentially rest on speculation. If Plaintiffs believe that implementation
26 of the MWL is actually causing constitutional injury to them, then their proper avenue to seek
redress would be to bring "as applied" challenges based on specific factual scenarios.
However, Plaintiffs have instead opted to bring a facial challenge, and now seek summary
judgment on all issues.

 The Plaintiffs' request for summary judgment should be denied for two reasons.
Foremost, Plaintiff Tribes cannot satisfy their heavy burden in a facial constitutional challenge
to prove that the challenged sections of the MWL are unconstitutional beyond a reasonable
doubt, or that there can be no set of circumstances under which the challenged sections can be

1 constitutionally applied. In addition, like the Burlingame Plaintiffs, many of the Plaintiff
2 Tribes' claims rest on a misconstrued and mischaracterized view of the Supreme Court's
3 narrow holding in *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998).

4 Plaintiff Tribes' claims that RCW 90.03.015(3) and (4) and RCW 90.03.560 facially
5 violate substantive due process rest solely on their misinterpretation of the law. Their
6 challenge to the facial constitutionality of RCW 90.03.015(4), which defines the term
7 "municipal water supply purposes," is misplaced because nothing in the MWL retroactively
8 resurrects previously unused water rights by changing the purpose of use of those rights to
9 municipal purposes. This due process claim, which is largely duplicative of the Burlingame
10 Plaintiffs' challenge to this section of the MWL, rests on the false assumption that only public
11 entities could hold municipal purpose water rights prior to enactment of the MWL. Prior to the
12 MWL, however, the term "municipal water supply purposes" was included in one section of
13 state water law, RCW 90.14.140(2)(d), without being defined, and there was uncertainty as to
14 who could hold a municipal right. Moreover, any holder of a municipal supply purpose water
15 right must actively use the right for the minimal purposes stated in the definition or risk loss of
16 that right. Plaintiff Tribes' assertions regarding resurrected water rights with changed purposes
17 are thus unfounded. Finally, because the definitions can unquestionably be applied in a
18 prospective manner without violating the constitution, Plaintiff Tribes cannot satisfy their
19 burden of proof in a facial challenge to this section of the MWL.

20 Plaintiff Tribes' claim that RCW 90.03.330(3) facially violates substantive due process
21 also fails. Again, Plaintiff Tribes' arguments on this issue are duplicative of those of the
22 Burlingame Plaintiffs and rest on the false belief that RCW 90.03.330(3), which declared water
23 rights documented by certificates based on system capacity to be in "good standing,"
24 automatically perfected all quantities of unused water associated with those water rights. The
25 State has made clear to both sets of Plaintiffs that this is simply not true, and that any
26 unperfected (inchoate) quantities of water associated with system capacity water rights must

1 still be perfected with due diligence. Rather than accepting the State's position, Plaintiffs
2 maintain that it is their interpretation of the law that the Court must accept, and that if the
3 Court accepts their interpretation of the law, that the Court must declare the law facially
4 unconstitutional. Plaintiffs in essence turn their burden in a facial challenge on its head.
5 Rather than argue that the State's interpretation of the law is facially unconstitutional, Plaintiffs
6 argue that it is their differing interpretation of the law that is facially unconstitutional. Where,
7 as here, the State has offered a constitutional interpretation of the law, the Court cannot declare
8 the law to be unconstitutional on its face.³

9 Plaintiff Tribes' due process challenges to RCW 90.03.386(2) should be rejected.

10 Plaintiff Tribes' assertion that RCW 90.03.386(2) violates substantive due process because it
11 applies retroactively to the detriment of junior water right holders is unfounded as this section
12 of the MWL plainly has only prospective effect. Further, the Plaintiff Tribes complain about
13 the expansion of a municipal water supplier's place of use to coincide with its designated water
14 service area "regardless of impact on existing rights," but cannot demonstrate that in all
15 circumstances this provision will retroactively deprive other water right holders of vested
16 rights. Plaintiff Tribes' assertions challenging this section, which again are duplicative of
17 those of the Burlingame Plaintiffs, are based solely upon the speculative expectation that any
18 time a water purveyor's place of use is expanded that there will be more water use and/or an
19 alteration in return flow patterns to the detriment of other water right holders. Claims based
20 upon speculative and unprovable expectations, however, are insufficient to sustain a facial
21 challenge to the constitutionality of a law.

22
23
24
25 ³ See *Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976) (Where a statute is susceptible to
26 more than one interpretation, the court's duty is "to adopt the construction sustaining its constitutionality if at all possible.").

1 Plaintiff Tribes' procedural due process challenge to RCW 90.03.386(2) also fails
2 because the provision can be constitutionally applied, and because procedural due process
3 protections are in place through Health's water system planning process.

4 Plaintiff Tribes' facial challenges to RCW 90.03.260(4) and (5) rest on false
5 assumptions about the operation of the MWL. The Plaintiff Tribes' claims that RCW
6 90.03.260(4) and (5) must be invalidated because they violate the Constitution should be
7 denied. These provisions state that population figures and service connection limits in water
8 right documents are not limiting attributes of a water right when those figures or limits are
9 consistent with an approved water system plan. This challenge, unique to Plaintiff Tribes in
10 this lawsuit, speculatively assumes that every time population figures are expanded or service
11 connections added, there will be injury to junior water right holders. The substantive due
12 process challenge to these sections of the MWL fails because it is based on the false
13 expectation that an increase in population or service connections will automatically injure
14 existing water right holders even though nothing in these provisions authorizes the use of any
15 additional water under a particular water right. Plaintiff Tribes mistakenly assume that
16 population figures and service connections were limiting attributes of water rights prior to the
17 MWL. The Legislature clarified that they were and are not, and that what limits the exercise of
18 a water right is the maximum annual and instantaneous quantities associated with that right.
19 Plaintiff Tribes' procedural challenge to this section fails because prior to the MWL, water
20 right holders were not required to apply to Ecology to adjust the maximum population or
21 service connections they could serve. Absurdity would indeed be the result if every time an
22 individual moved into a city's designated service area in excess of the population or service
23 connections projected by that city that the city would have to apply to "change" its initial
24 projections even if the city could accommodate that individual within the designated maximum
25 quantities of its existing water rights. This claim fails for the simple reason that no process is
26

