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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, QUINALT 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. 06-2-40103-4 SEA
ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTIONS FOR SUMMARY JUDGMENT;
GRANTING IN PART AND DENYING IN
PART DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT

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

NO. 06-2-28667-7 SEA

9 Plaintiffs,)

10 vs.)

11 STATE OF WASHINGTON,)
12 WASHINGTON STATE DEPARTMENT OF)
13 ECOLOGY, and WASHINGTON STATE)
14 DEPARTMENT OF HEALTH,)

15 Defendants,)

16 and)

17 WASHINGTON WATER UTILITIES)
18 COUNCIL, CASCADE WATER ALLIANCE)
19 and WASHINGTON STATE UNIVERSITY,)

20 Defendant-Intervenors.)

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28 ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT - 2 -

1 This matter came before the Court on motions for summary judgment filed by all parties.
2 The Court heard the oral arguments of counsel and considered the pleadings filed in this action
3 and the following evidence:

- 4 1. Burlingame Plaintiffs' Motion for Summary Judgment.
- 5 2. The declarations of Joan Burlingame, Scott Cornelius, Joan Crooks, Shaun
6 Goho, Peter Knutson, Michael O'Brien, and John Osborn, and the exhibits
7 attached thereto.
- 8 3. Plaintiff Tribes' Motion for Summary Judgment.
- 9 4. The declarations of Joel Massman, Terry R. Williams, Leonard Forsman, Merle
10 Jefferson, John B. Arum, and Crystal Sampson, and the exhibits attached thereto.
- 11 5. Defendant State of Washington's Motion for Summary Judgment.
- 12 6. The declarations of Ken Slattery and Michael Dexel and the exhibits attached
13 thereto.
- 14 7. Defendant-Intervenor Washington Water Utilities Council's Motion for
15 Summary Judgment.
- 16 8. The declarations of Tadas Kisielius, Jim, Miller, Thomas D. Mortimer, John C.
17 Kirner, Nancy Davidson, Michael Ireland, John Kounts, and Jeffrey N. Johnson,
18 and the exhibits attached thereto.
- 19 9. Defendant-Intervenor Cascade Water Alliance's Motion for Summary Judgment.
- 20 10. Burlingame Plaintiffs' Response to Defendants' Motions for Summary
21 Judgment.
- 22 11. The declarations of Shaun Goho and Lee Bernheisel and the exhibits attached
23 thereto.
- 24 12. Plaintiff Tribes' Response to Defendants and Defendant-Intervenor's Motions
25 for Summary Judgment.
- 26 13. The Second Declaration of John B. Arum and the exhibits attached thereto.
- 27 14. Defendant State of Washington's Memorandum in Opposition to Burlingame
28 Plaintiffs' Motion for Summary Judgment.
15. Defendant State of Washington's Memorandum in Opposition to Plaintiff Tribes'
Motion for Summary Judgment.

- 1 16. The declarations of Alan M. Reichman, Ken Slattery, and Jay Cook, and the
2 exhibits attached thereto.
- 3 17. Defendant State of Washington's Memorandum in Response to WWUC's
4 Motion for Summary Judgment.
- 5 18. Defendant-Intervenor Washington Water Utilities Council's Response to
6 Plaintiffs' Motions for Summary Judgment.
- 7 19. The declarations of Tadas Kisielius, Joseph Becker, Bradley D. Lake, Robert D.
8 Hunter, and James W. Miller, and the exhibits attached thereto.
- 9 20. Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' Motions
10 for Summary Judgment.
- 11 21. Defendant-Intervenor Washington State University's Response to Plaintiffs'
12 Motions for Summary Judgment.
- 13 22. Burlingame Plaintiffs' Reply in Support of Motion for Summary Judgment.
- 14 23. Plaintiff Tribes' Reply in Support of Motion for Summary Judgment.
- 15 24. State's Memorandum in Rebuttal to Burlingame Plaintiffs' Response to State's
16 Motion for Summary Judgment.
- 17 25. State's Memorandum in Rebuttal to Plaintiff Tribes' Response to State's Motion
18 for Summary Judgment.
- 19 26. Defendant-Intervenor Washington Water Utility Council's Reply to Plaintiff
20 Tribes' and Burlingame Plaintiffs' Memoranda in Response To WWUC's
21 Motion for Summary Judgment.
- 22 27. Defendant-Intervenor Washington Water Utilities Council's Reply to State's
23 Memorandum in Response to WWUC's Motion for Summary Judgment.
- 24 28. The declarations of Bill Clarke and Tom McDonald and the exhibits attached
25 thereto.
- 26 29. Defendant-Intervenor Cascade Water Alliance's Reply to Plaintiffs' Responses
27 to Motions for Summary Judgment.
- 28 30. Defendant State of Washington's Memorandum in Response to Plaintiffs' New
Claims Pertaining to RCW 90.03.330(2).
- 31 31. Defendant-Intervenor Washington Water Utilities Council's Memorandum in
Response to Plaintiffs' New Claim Regarding RCW 90.03.330(2).
- 32 32. Defendant-Intervenor Cascade Water Alliance's Response to Plaintiffs' New
Claims Pertaining to RCW 90.03.330(2).

1 33. Burlingame Plaintiffs' Reply as to Procedural Due Process Challenge to RCW
2 90.03.330(2).

3 34. Plaintiff Tribes' Reply in Support of Motion for Summary Judgment re: RCW
4 90.03.330(2).

5 The Court also considered the argument of counsel, and hereby incorporates its oral
6 ruling made on June 11, 2008.

7 THEREFORE, IT IS HEREBY ORDERED;

8 1. Plaintiffs Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget
9 Sound Harvesters, Washington Environmental Council, and the Center for Environmental Law
10 and Policy (collectively the "Burlingame Plaintiffs") and plaintiffs Lummi Nation, Makah Indian
11 Tribe, Quinault Indian Nation, Squaxin Island Indian Tribe, Suquamish Tribe and the Tulalip
12 Tribes (collectively the "Tribes") have standing as taxpayers to bring this action;

13 2. The Motion in Limine of Washington Water Utilities Council is Denied;

14 3. The Motions of the Plaintiffs are GRANTED IN PART and the Motions of the
15 Defendants and Defendant -Intervenors are DENIED IN PART as follows:

16 a. RCW 90.03.015(3) and (4) violate the separation of powers under the state
17 constitution because they have retroactive effect and attempt to overrule an interpretation of the
18 Water Code in Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

19 b. RCW 90.03.330(3) violates the separation of powers under the state constitution
20 because it has retroactive effect and attempts to overrule an interpretation of the Water Code in
21 Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

22 c. Alternatively, even if one were to accept the State's interpretation of the statute that it
23 addresses only valid inchoate water rights (or rights "in good standing") (which this Court does
24 not), then RCW 90.03.330(3) violates the separation of powers under the state constitution
25 because it purports to make a legislative determination of adjudicative facts concerning the
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28 ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT - 5 -

1 "good standing" of particular water rights.

2 4. Having found certain provisions unconstitutional, the Court declines to decide the
3 substantive due process claims related to RCW 09.03.300(3), 90.03.015(3) and (4) and RCW
4 90.03.560;

5 5. The Motions of the Defendants and Defendant -Intervenors are GRANTED IN
6 PART and the Motions of the Plaintiffs are DENIED IN PART as follows:

7 a. RCW 90.03.260(4) and (5) do not facially violate substantive due process under the
8 state and federal constitutions.

9 b. RCW 90.03.386(2), does not facially violate substantive due process under the state
10 and federal constitutions.

11 c. RCW 90.03.386(2), does not facially violate procedural due process under the state
12 and federal constitutions.

13 d. RCW 90.03.260(4) and (5), do not facially violate procedural due process under the
14 state and federal constitutions.

15 e. RCW 90.03.330(2), does not facially violate procedural due process under the state
16 and federal constitutions.

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18 June 11, 2008

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22 THE HONORABLE JIM ROGERS
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28 ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT - 6 -