THE HONORABLE JIM ROGERS
HEARING DATE: May 23, 2008
HEARING TIME: 1:30 PM
WITH ORAL ARGUMENT

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

LUMMI NATION, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants. JOAN BURLINGAME, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants, and WASHINGTON WATER UTILITIES COUNCIL, et al., Defendant - Intervenors.	NO. 06-2-40103-4 SEA DEFENDANT-INTERVENOR CASCADE WATER ALLIANCE'S RESPONSE TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Defendant-Intervenor Cascade Water Alliance ("Cascade") responds to Plaintiffs' motions for summary judgment by joining in and incorporating the responses of the Defendant State of Washington (except its contention about "active compliance") and of the

Defendant-Intervenor Washington Water Utility Council to the Plaintiffs' Motions for Summary Judgment. In addition, Cascade offers the following additional argument with respect to certain issues raised by Plaintiffs.

1. Standard of Review.

The Burlingame Plaintiffs cite **Robinson v. City of Seattle**, 102 Wn. App. 795, 10 P.3d 452 (2000) in support of their contention that the "no set of circumstances" test is not the appropriate test by which to review a facial challenge to the constitutionality of a statute. Both the State and the WWUC view the case as an anomaly, with the State characterizing it as a "flawed" decision. Regardless of how characterized, there is no doubt that the case is an "outlier" in Washington, standing alone in its rejection of the "no set of circumstances" test[1] in favor of an unexplained, subjective test dependent upon the "nature of the challenge.[2]" Washington cases before and after, including taxpayer cases, applied the 'no set of circumstances" test in constitutional challenges[3].

Cascade suggests that **Robinson** is *sui generis* and is not precedential with respect to the challenges raised in this case. **Robinson** is unusual, if not unique, in its use of 4th

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[1] Although rejecting the test, given the substance of the ordinance, the court in effect ruled that in every set of circumstances the pertinent sections of the ordinance required unconstitutional searches. Those sections were not declared unconstitutional as applied because no one had been subject to the ordinance. The sections were invalidated as facially unconstitutional.

[2] The "nature of the challenge" language is telling. Although the court framed the issue in terms of taxpayer standing, as noted below, the court's problem with standard of review arises from the nature of the challenge, not the standing of the plaintiff. In fact, it would ironic, if a plaintiff whose standing derives from actual harm was held to a higher standard of review than a plaintiff whose standing derives from policy.

[3] See, cases cited in the State's response to Burlingame Plaintiffs, page 7: 20-25. It is also interesting to note that Judge Ellington author of **Robinson** and Judge Baker, a panel member, were also on the panel in **State v. Foster,** 128 Wn. App. 932, 117 P.3d 1175 (2005). Neither dissented from the application of the standard in **Foster** or cited or distinguished **Robinson**, despite such statements in **Robinson** as: "... Washington courts have not employed the Salerno test for <u>any</u> facial challenges ..." page 806.

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Amendment jurisprudence to invalidate a legislative act. Ordinarily 4th Amendment jurisprudence is invoked to review specific acts of the government taken to enforce the law. By applying that jurisprudence to a city ordinance[4], the court could not logically or legally apply the *Salerno* test. First, unlike a facial constitutional challenge, in a 4th Amendment case, the burden is not on the party challenging constitutional compliance; it is on the party defending constitutional compliance. Second, in **Robinson**, the court found the right in question was a "fundamental" right. **Robinson** at 822. Therefore, the usual presumption favoring constitutionality of the ordinance is reversed and it is presumed unconstitutional. **Robinson** at 804.

No one in this case has suggested that the MWL involves "fundamental" rights, or that the ordinary presumptions should not apply, or that the burden of proof should be reversed. Therefore, Robinson is distinguishable, and should not set the standard of review in this case.

2. Separation of Powers.

Plaintiffs argue that adoption of the MWL violated the separation of powers doctrine in two respects. First, according to them, it retroactively reversed the court's **Theodoratus** "decision" that system capacity certificates were unlawful, and second that it reversed that case's "decision" that private entities could not be municipal suppliers.

With respect to both, separation of powers is not implicated at all. A separation of powers issue arises <u>only</u> when the legislature intrudes upon a court's exercise of the judicial

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[4] Because it was considering an ordinance, the usual respect for a co-equal branch did not come into play for the court.

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power; that is, an intrusion into the court's power to decide cases and controversies[5] by attempting retroactively to undo a decision of the court. **In re Det of Brooks**, 145 Wn.2d 275, 284, 36 P.3d 1034 (2001)[6]. But in both instances there was no case or controversy for the court to decide.

In Theodoratus there was no party challenging or defending a certificate. The court did not have before it a factual record upon which it could draw legal conclusions about certificates. No one had briefed the case in the context of a challenge to a certificate, and the case was devoid of interested parties upon whom the court could rely to present their best arguments. In fact, for Plaintiffs to succeed they have to ask this court to rule that the Washington State Supreme Court invalidated all system capacity certificates, without hearing from one certificate holder, in a proceeding where certificate holders were not represented by similarly situated parties. Even if the legal conclusions they derive from **Theodoratus** ultimately prevail, at the moment those conclusions are, at best, advisory only; there had been no adversary proceeding. The judicial power is not implicated at all by an advisory process and the legislature is free to accept or reject the advice as it chooses. Moreover, ironic hardly describes the position of parties who object to alleged deprivations of procedural due process, while at the same time arguing that the Supreme Court has deprived hundreds, if not thousand of certificate holders, of their rights without the benefit of a hearing.

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[5] United States Constitutuon, Article III, Section 2; Eg, **Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports,** 146 Wn.2d 207, 45 P.3d 186 (2002).

[6] Overruled on other ground, see, **In re Det of Brooks**, 149 Wn.2d 724, 72 P.3d 708 (2003).

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Apparently, Plaintiffs hold a heartfelt belief that private parties ought not to benefit from the municipal exemption for relinquishment, and they distort **Theodoratus** to support that belief. However, **Theodoratus** did not consider the meaning of "municipal supplier" or "municipal supply purposes." In that case, the permit holder did not argue that it was a municipality; instead, according to the court, the permit holder argued that its permit was for a "public water supply system[7]," a phrase that is not synonymous with the term "municipality." The court's response that Theodoratus was not a "municipality" is a *non sequiter* in the context of the argument actually made; nevertheless, limiting the effect of the opinion as it did constitutes an explicit recognition of the special consideration to be afforded to water rights issued to municipalities.

Again, the Plaintiffs' argument that the new definitions of municipal water supplier and municipal water supply purposes violate separation of powers runs afoul of the case and controversy element of the concept of judicial power. Theodoratus did not claim to be a municipality, did not claim entitlement to the status of municipal supplier, and did not claim the benefit of statutory relinquishment - Theodoratus did not even have a water right to relinquish. There was no case or controversy involving municipal supply or supplier or relinquishment for the court to decide.

Before separation of power can become an issue, the court must have exercised judicial power. In this case it did not. Before separation of power can become an issue, the

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[7] A public water system is "any system providing water intended for, or used for, human consumption or other domestic uses." RCW 70.116.030 (3); See also RCW 70.119.020(8). A public water system can be owned by a municipality, a firm, corporation, or cooperative association, among others. RCW 70.116.030 (4).

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legislature must attempt to invade judicial prerogative. In this case it could not. Plaintiffs' arguments must be rejected.

3. Expansion of Place of Use.

Plaintiffs argue that the legislation's expansion of place of use deprives other right holders of procedural due process protections available under the change of place use administrative provisions. Initially, expansion of place of use is not a change in place of use. As a practical matter, for systems operated by cities and water districts (and probably most others) expansion of place of use often (maybe always) cannot affect the rights of junior right holders, unless there is also a change in place of diversion or withdrawal, in which case the administrative procedure, with its attendant procedural rights, must be followed.[8]

Other defendants have noted the affect of water supply infrastructure on Plaintiffs arguments. But that infrastructure also means that municipal water is not a flexible commodity. Water infrastructure is expansive and immobile. It provides water for existing or planned for commercial and residential uses that would not be shifted from those uses because an expanded place of use is granted to a municipality. Once water is put to use for municipal supply it continues to be used where it was put to use[9].

An expansion of place of use does not change the current demand for water or eliminate the constraints (engineering and financial) of existing infrastructure. It will not

[8] Otherwise, water for use in an expanded area will come from new water rights granted under procedures offering due process protection or from existing inchoate rights that were granted under procedures offering due process protection.

[9] Change in the use of municipal water in a given location is not tied to expansion of place of use, but rather economic conditions, changing land use regulation, and redevelopment.

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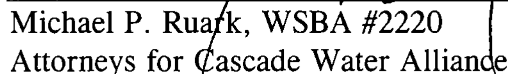
effect return flows or aquifer recharge associated with water already put to use under a specific place of use because that water will continue to be put to use to the same extent and under the same conditions at the same place. Expansion of place of use will allow the use of water previously unused but lawfully available under permit – water to which junior right holders are not entitled and to which they are not entitled to rely upon in the hope that it might not be put to use.

For the reasons set forth as well as the arguments incorporated herein, Cascade requests that the Court grant summary judgment in favor of the Defendants and Defendant-Intervenors on all claims.

DATED this 24th day of March, 2008.

INSLEE, BEST, DOEZIE & RYDER, P.S.



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DATED this 24th day of March, 2008.

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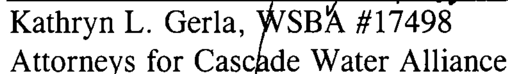

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