

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

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4 LUMMI NATION, et al.,) VERBATIM REPORT OF
5 Plaintiffs,) THE PROCEEDINGS
6 vs.) Cause No. 06-2-40103-4SEA
7 STATE OF WASHINGTON,)
8 et al.,)
9 Defendants,)
10 -----)
11 JOAN BURLINGAME, et al.,)
12 Plaintiffs,)
13 vs.)
14 STATE OF WASHINGTON,)
15 et al.,)
16 Defendants,)
17 and)
18 WASHINGTON WATER)
19 UTILITIES COUNCIL,)
20 et al.,)
21 Intervenor.)

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23 TRANSCRIPT
24 of the proceedings had in the above-entitled cause
before the HONORABLE JIM ROGERS, Superior Court
Judge, on the 11th day of June, 2008, reported by
Kimberly H. Girgus, Certified Court Reporter.

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1 APPEARANCES:

2 FOR THE PLAINTIFF, JOAN BURLINGAME:

3 SHAUN GOHO
4 ATTORNEY AT LAW

5 FOR THE MAKAH TRIBE:

6 JOHN ARAM
7 ATTORNEY AT LAW

8 FOR THE DEFENDANT, STATE OF WASHINGTON:

9 ALAN REICHMAN
10 PROSECUTING ATTORNEY

11 FOR THE INTERVENORS, WASHINGTON WATER UTILITIES:

12 ADAM GRAVELY
13 ATTORNEY AT LAW

14 FOR CASCADE WATER ALLIANCE:

15 MICHAEL RUARK
16 ATTORNEY AT LAW

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1 PROCEEDINGS

2 JUNE 11, 2008

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4 THE COURT: Good afternoon. This is
5 Judge Rogers. Is everyone, all the many of you,
6 present?

7 MR. REICHMAN: Good afternoon, your Honor.
8 This is Alan Reichman with the Attorney General's
9 Office. And I believe we have counsel for all the
10 parties present, and even some media
11 representatives as well, but everybody on the
12 bridge to join you is here that needs to be here
13 to my knowledge, your Honor.

14 THE COURT: Thank you. I'm going to then
15 give my oral decision. You still there?

16 MR. REICHMAN: Yes. I think somebody might
17 have just joined us.

18 MR. MACLEARY: It's Robert MacCleary. I
19 keep getting knocked off the phone. I apologize.

20 THE COURT: It's all right. This is my
21 oral decision in Lummi Indian Nation, et al.
22 versus State, 06-2-40103-4, SEA, and Joan
23 Burlingame, et al. versus State, 06-2-28667-7,
24 SEA.

25 I'm giving this oral ruling, and today I am

1 signing a separate written order which
2 incorporates my oral decision based on that
3 proposed orders of the parties. The parties do
4 not need to submit any further proposed orders or
5 pleadings following this oral ruling.

6 And initially let me note the obvious, and
7 that is the great importance of this case to all
8 of the water right holders who's in this case, the
9 plaintiffs, the defendants, the defendant
10 intervenors, and those not joined in the case.

11 And I note that I ruled at the time of the
12 argument that the motion in limine of Washington
13 Water Utilities counsel was denied.

14 This decision addresses the claims in the
15 order raised. The challenges to sections that
16 Municipal Water Law 2003 under claims of violation
17 of separation of powers, substantive due process,
18 and procedural due process. On their facial
19 challenges to these statutes, the Burlingame and
20 Tribes, plaintiffs, bear the burden of proving
21 that these portions of the laws are
22 unconstitutional beyond a reasonable doubt,
23 including 90.03.330(2), 015 (3, 4), 386(2), 260
24 (4, 5).

25 As a preliminary matter, this Court must

1 decide what standard to apply in reviewing the
2 claims.

3 Plaintiffs have urged this Court not to
4 adopt a standard noting that certain courts like
5 the court in San Carlos Apache have ruled without
6 citing a specific standard. I acknowledge that
7 some courts have done this, but declined to
8 analyze the claims in this matter. The standard
9 defines in certain respects the relationships
10 between the branches of government, and the heated
11 debate over what standard should be applied
12 nationwide highlights its importance. And while I
13 note there are disagreements over the continuing
14 vitality of the various standards, for example,
15 the Washington State Grange case, it continues to
16 be hotly debated.

17 This Court has concluded that the Salerno
18 set of circumstances test is the appropriate
19 standard to apply to the facial challenges raised
20 by the plaintiffs. The Court reached this
21 decision in spite of the decision of the Court of
22 Appeals in Robinson versus City of Seattle at 102
23 Wn.App. 795. The court in Robinson disapproved
24 the Salerno standard in taxpayer challenges like
25 this one, and part of the Robinson court's

1 reasoning was, one of the main reasoning not to
2 adopt Salerno was that it was not used in
3 Washington, and it was disapproved in a large
4 majority of cases nationwide.

5 But in a reading of Washington state cases
6 since Robinson, Salerno is now consistently cited
7 by our State Supreme Court, and Divisions II and
8 III of the Court of Appeals as that the standard
9 to be applied in facial challenges to statutes.

10 The parties have cited many cases. I have
11 read them all, and I'm not going to recite them
12 here. And I agree that in some of the Washington
13 cases the standard is simply cited without
14 actually being used often because the challenge
15 was an as applied challenge.

16 But as I noted, the standard is either
17 cited or consistently used and discussed by all of
18 our courts except Division I, I acknowledge that,
19 and I conclude its vitality in this state
20 undermine the basic reasoning that was used in the
21 Robinson decision, and I therefore conclude
22 Robinson is no longer good law on this issue.

23 This Court applied Salerno to all the
24 challenges in the statute, including procedural
25 due process, and I disagreed that Salerno is not

1 considered in Matthew versus Eldridge analysis,
2 and I would cite to City of Redmond versus Moore,
3 151 Wn.2d for both Justice Sanders in the
4 majority, and Justice Bridge in the dissent, both
5 cited the standard.

6 I now address the separation of powers
7 claims as to 330 and 015 (3, 4). As counsel for
8 the Burlingame plaintiffs noted there is only one
9 set of circumstances that really I am to look at
10 in separation of powers arguments, and that is the
11 review of these statutes with the Theodoratus
12 decision, and I conclude after reviewing those
13 statutes and the Theodoratus decision that 330 and
14 015 (3, 4) are retroactive statutes that
15 unconstitutionally attempt to reinstate water
16 rights that were invalidated by the Washington
17 State Supreme Court in Department of Ecology
18 versus George Theodoratus, 135 Wn.2d 682.

19 In that case the majority and the dissent
20 stated the issue as, and I will quote the
21 majority, "the primary issue in this case is
22 whether a final certificate of water right, i.e.,
23 a vested water right may be issued based upon the
24 capacity of the developers water delivery system
25 or whether a vested water right may be obtained

1 only in the amount of water actually put to
2 beneficial use." Close quote.

3 Justice Sanders in dissent agreed, quote,
4 "the majority correctly frames the question as to
5 whether a final certificate of water right may be
6 issued based upon the capacity of a public water
7 system under the pumps and pipes approach, but
8 incorrectly says no, based upon its interpretation
9 of RCW 90.03.290," end quote.

10 And there is other language in Theodoratus,
11 including the language, "the vested water right
12 for appellant's development will depend upon the
13 actual application of water to beneficial use, and
14 a final certificate of water right cannot be
15 issued to appellant for a quantity of water not
16 actually put to beneficial use. Close quote.

17 In Theodoratus our Supreme Court in the
18 context of a specific factual situation announced
19 a general principle of law of how water rights
20 vest, and decided that it was through beneficial
21 use, not the capacity of a public water system.

22 I now turn to the statute 330. The State
23 concedes and rightly so that the statute is
24 retroactive by its terms. The statutory language
25 is careful to define the type of water right that

1 is being held, quote, "in good standing," close
2 quote. The contrast is drawn by using words,
3 quote, "rather than," close quote, in describing
4 certificates for water rights issued once, quote,
5 "works," close quote, were constructed, rather
6 than after water have been placed by actual
7 beneficial use. This statute clearly reinstates
8 pumps and pipe certificates issued prior to
9 September 9th, 2003, and this is an attempt to
10 reverse the Theodoratus decision.

11 The State argues that the phrase in good
12 standing means only that the legislature did not
13 intend to take these certificates issued out of
14 good standing. It is also argued that good
15 standing has a specific meaning that must be
16 employed within the context of the statute, and
17 that meaning is not necessarily a vested water
18 right.

19 But if the legislature took this view in
20 adopting this legislature, and I see no evidence
21 that it did, and frankly find this a strained
22 interpretation at best, it still cannot reinstate
23 water rights that may have been relinquished in
24 part or whole through lack of beneficial use
25 because to do that would be to make a legislative

1 determination of the due diligence of the parties
2 in the past, and thus the creation of adjudicative
3 facts considering the good standing of particular
4 water rights.

5 The next question is posed by the parties
6 is whether the Theodoratus court addressed the
7 issue of municipal water suppliers in any respect.
8 It is true that the Theodoratus court expressly
9 declined to address the issues of beneficial
10 versus pumps and pipe certificates as applied to
11 municipalities. There's been arguments that they
12 impliedly decided those issues, but I'm not even
13 going to address that.

14 In that case, however, George Theodoratus
15 specifically argued that, quote, "a distinction is
16 warranted because his is a public water supply
17 system. Initially we note that appellant is a
18 private developer and his development is finite.
19 The appellant is not a municipality, and we
20 decline to address issues concerning municipal
21 water suppliers in the context of this case,"
22 close quote.

23 I would also note that in Theodoratus'
24 earlier arguments in the case to distinguish his
25 situation from the Acquavella case he also argued

1 that his was a public water supply system.

2 Despite not reaching issues concerning
3 municipal water suppliers, the Theodoratus court
4 reached a decision that decided an issue with
5 respect to Mr. Theodoratus' water rights. In
6 other words, because of the very arguments made by
7 Mr. Theodoratus that court was forced to address
8 whether or not Theodoratus was or was not in the
9 situation of a party holding the water rights of a
10 public water supply system under state statutory
11 and common law. This court decided he was not,
12 and that his rights vested only through beneficial
13 use.

14 The Theodoratus court noted no reason such
15 as ambiguity of state law, lack of definitions, or
16 interpretations or practices by Ecology, to avoid
17 reaching a decision in Mr. Theodoratus' status,
18 and thus the issue in this case.

19 So while the definition of the water
20 supplier now exists and point 015 did not exist at
21 the time the claimed ambiguity, according to that
22 Court, did not exist as to Mr. Theodoratus. For
23 this reason the definition is not curative.

24 90.03.015 (3, 4) now defines municipal
25 water supplier. Under this definition George

1 Theodoratus, if he still has water rights, has
2 retroactively had his pumps and pipe certificates
3 reinstated as a municipal water supplier. He was
4 not a municipal water supplier before but he is
5 now. This broad definition of municipal water
6 supplier violated separation of powers, and does
7 so by creating new municipal water suppliers who
8 through operation of subsection have had their
9 water rights changed retroactively.

10 I do not accept Washington Water Utilities
11 counsel's argument that the precipitating event
12 for relinquishment is an adjudication. I agree
13 with the Tribe's analysis of adjudication is more
14 analogous to an adverse possession cause of action
15 where the court actually "finds" facts that
16 already existed. And I also note this was not the
17 prior interpretation of the law by the regulating
18 agency Department of Ecology, and even apart from
19 that in an adjudication as, I guess I'm repeating
20 myself here, but even in an adjudication, facts
21 that would need to be established. This
22 legislature essentially established those facts
23 retroactively through this legislation.

24 This Court is aware of the heavy burden any
25 party has when arguing the facial and validity of

1 the statute. The legislature is to be accorded
2 great deference, and indeed I have decided to use
3 the strictest standard in scrutinizing these
4 challenges. However, it appears to this Court
5 that in significantly recasting the substantive
6 and procedural rights and roles of those who hold
7 water rights in this state in 2003, the
8 legislature overreached unconstitutionally by
9 attempting to retroactively restore water rights
10 to certain parties holding pumps and pipes
11 certificates and expanding the number of parties
12 holding such rights to include Mr. Theodoratus.

13 I grant the summary judgment of the
14 Burlingame and Lummi plaintiffs as to these
15 claims, and the defendants and defendant
16 intervenors motions for summary judgment as to
17 these claims are denied.

18 Now I move to substantive due process. I
19 declined to decide the motions for substantive due
20 process under 330 and 015, having decided these
21 provisions that are unconstitutional under the
22 separation of powers. And I specifically do not
23 decide the apparent disagreement between the State
24 and Washington Water Utilities counsel, whether
25 the definitions do not violate substantive due

1 process because they do or do not require active
2 compliance for a water right to qualify for the
3 new municipal water supplier exception.

4 As for the remaining subsections 386(2)
5 place of use, and 260 (4, 5) service and
6 connection limitations under substantive due
7 process, I conclude for 386(2) that the plaintiffs
8 have not proved beyond a reasonable doubt that
9 there is no set of circumstances under which the
10 statute can be constitutionally applied. The
11 statute can be constitutionally applied to water
12 suppliers whose water right certificates already
13 defined the place of use to its area without metes
14 and bounds as the State quoted in its argument and
15 its brief.

16 Also conditions must be satisfied before
17 the authorized place of use is enlarged to
18 coincide with a suppliers service area, and if
19 complied prospectively renders the statute
20 constitutional.

21 For 260 (4, 5) service and connection
22 limitation, while I acknowledge that there have
23 been conditions of permits that have included such
24 limitations there is no prior statutory law
25 providing that service connections or populations

1 were an attribute limiting the exercise of the
2 water right.

3 And I conclude that if the statute is
4 interpreted in a prospective manner, then this
5 portion of the 2003 municipal water law is also
6 facially constitutional.

7 Finally, this Court concludes under the
8 Salerno standard and under the Matthews versus
9 Eldridge analysis that the plaintiffs have not
10 carried their burden to prove beyond a reasonable
11 doubt the unconstitutionality of 386(2) place of
12 use, 260 (4, 5) service connection limits, and 330
13 the revocation limitation.

14 Matthews versus Eldridge has three parts,
15 and the question is whether there's been an
16 erroneous deprivation and important right. I have
17 noted earlier that Salerno, I do believe, applies
18 to the analysis. I initially note that these
19 sections clearly contain different and more
20 limited procedural due process than was allowed
21 under earlier statutory law and regulation, and I
22 think that's obvious to everyone.

23 The legislature has drastically limited the
24 role of ecology and limited other rights, and
25 decided not to include certain procedures that,

1 for example, were suggested by the tribes could be
2 or could have been included, for example, under
3 380(1).

4 But my inquiry is simply whether the
5 statutes are unconstitutional beyond a reasonable
6 doubt under the Matthews versus Eldridge test,
7 keeping in mind that the plaintiffs must prove
8 there is no set of circumstances under which the
9 statutes may be found to be constitutionally
10 applied.

11 And while I, again, I may be repeating
12 myself, water rights are unquestionably an
13 important right. The legislature does have some
14 power to alter the due process available to
15 classes of possessors of rights, and I conclude
16 there is not a substantial risk of deprivation
17 with the procedural safeguards that remain in
18 place, albeit far more limited under SEPA on
19 section 386, Department of Health 260.

20 And I note under 260 (4, 5) that it's far
21 from established that many water rights would even
22 be affected under these changes, and under other
23 respects I have agreed with the arguments by the
24 State in this regard under the Matthews versus
25 Eldridge challenges.

1 On these issues therefore the Court
2 declined to decide the claims of substantive due
3 process under 330 and 015 (3, 4), and grant
4 summary judgment motions of the defendants and
5 defendant intervenors as to 386(2), and 260 (4, 5)
6 on substantive due process, and procedural due
7 process claims, and 330(2) on procedural due
8 process claims under the State and Federal
9 Constitutions, and under those claims I deny the
10 Burlingame and Tribes plaintiff's motions for
11 summary judgment.

12 That concludes my oral decision, and the
13 order that I enter will simply be limited to the
14 legal conclusions that I reached and to what I
15 considered. It will incorporate this oral
16 decision, which, in any case, as the parties well
17 know, will be reviewed de novo by the Court of
18 Appeals and ultimately the Supreme Court.

19 Thank you all for the comprehensive, and
20 argument, and briefing, which I greatly
21 appreciate. And if you wish to speak to
22 Ms. Girgus, who is present, and is the court
23 reporter I can put her on the telephone right now.

24 MR. REICHMAN: Thank you, your Honor.

25 THE COURT: Counsel, do you wish to speak

1 to Ms. Girgus?

2 MR. REICHMAN: Yes. I would like to do so.

3 Thank you.

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5 (Court adjourned.)

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C E R T I F I C A T E

STATE OF WASHINGTON)

) SS.

COUNTY OF KING)

I, Kimberly H. Girgus, Certified Court Reporter, in and for the State of Washington, do hereby certify:

That to the best of my ability, the foregoing is a true and correct transcription of my shorthand notes as taken in the cause of LUMMI NATION, et al., Plaintiffs vs. STATE OF

WASHINGTON, et al., Defendants; JOAN BURLINGAME,

et al., Plaintiffs, vs. STATE OF WASHINGTON,

et al., Defendants and WASHINGTON WATER UTILITIES

COUNCIL, et al., Intervenors, on the date and at the time and place as shown on page one hereto;

That I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney of counsel, and that I am not financially interested in said action or the outcome thereof;

Dated this 14th day of June, 2008.

Kimberly H. Girgus
Certified Court Reporter