



NO. 81809-6

**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Respondents/Cross-Appellants,

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,,

Appellants/Cross-Respondents,

and

WASHINGTON WATER UTILITIES COUNCIL, CASCADE WATER ALLIANCE and WASHINGTON STATE UNIVERSITY,

Intervenors-Appellants/Cross-Respondents.

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**OPENING BRIEF OF  
RESPONDENTS/CROSS-APPELLANTS JOAN BURLINGAME, ET AL.**

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## INTRODUCTION

This case involves constitutional challenges by a number of water rights holders, commercial fishing interests, environmental and water protection organizations, and Washington taxpayers<sup>1</sup> (the “Burlingame Plaintiffs”) to portions of the 2003 Municipal Water Law (“MWL”). 2003 Wash. Laws, 1<sup>st</sup> Sp. Sess., Ch. 5. The challenged provisions of the MWL violate the separation of powers and due process provisions of the Washington Constitution by attempting to retroactively overrule this Court’s decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). The MWL overrules *Theodoratus* by retroactively expanding the rights of a class of water rights holders to the detriment of all other water rights, and it limits or in some cases eliminates notice and right to administrative hearing for those vested water rights adversely affected by the expansion of rights for that favored class.

The King County Superior Court correctly decided the MWL violates the separation of powers provisions in the Washington Constitution because it (1) declared that all water right certificates issued prior to the MWL that were based on system capacity (known as “pumps

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<sup>1</sup> The Burlingame Plaintiffs are Joan Burlingame, Lee Bernheisel, Scott Cornelius, Peter Knutson, Puget Sound Harvesters, Washington Environmental Council, Sierra Club, and Center for Environmental Law and Policy.

and pipes” certificates) as opposed to beneficial use were rights in good standing, and (2) retroactively defined the terms “municipal water supplier” and “municipal water supply purposes” to include private water suppliers with as few as 15 residential customers. RCW 90.03.330(2) and (3) and RCW 90.03.015(4). The King County Superior Court found these provisions of the MWL were in direct conflict with this Court’s determinations regarding the validity of pumps and pipes certificates and the nature of private versus municipal water suppliers in *Theodoratus*. The Burlingame Plaintiffs ask this Court to affirm the Superior Court’s decision that the validation of pumps and pipes certificates in RCW 90.03.330(2 and (3), and that the municipal water supplier definitions, RCW 90.03.015(3) and (4), are facially unconstitutional.

In the same decision, the Superior Court erred in holding that several other provisions of the MWL do not facially violate the due process clause of the Washington Constitution. Those provisions include the limitation on pumps and pipes certificate revocation or diminishment in RCW 90.03.330(2) and the automatic change or expansion in place of use provisions in RCW 90.03.386(2). RCW 90.03.386(2) allows water suppliers to expand or change water rights which normally include limitations on amount and place of use, without regard to, or process for, other water rights that will likely be adversely affected by such changes.

The Burlingame Plaintiffs ask this Court to reverse the Superior Court's decision and to find that the pumps and pipes provisions and the expansion in place of use provisions facially violate the substantive and procedural due process provisions of the Washington Constitution.

#### ASSIGNMENTS OF ERROR

1. The Superior Court erred in holding that RCW 90.03.386 does not facially violate substantive and procedural due process under the Washington Constitution. CP 617 (Summary Judgment Order ¶¶ 5.b and c).

2. The Superior Court erred in holding that RCW 90.03.330(2) does not facially violate procedural due process under the Washington Constitution. CP 617 (Summary Judgment Order ¶ 5.e).

#### ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. The Burlingame Plaintiffs restate the issues relating to the State's assignments of error as follows:

1. Does RCW 90.03.330(3) violate the separation of powers because it (a) applies retroactively and overrules this Court's determination in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) that a vested water right cannot be issued on the basis of system capacity, and (b) makes improper judicial determinations?

2. Does RCW 90.03.330(3) violate substantive due process by retroactively enlarging the water rights of the holders of system capacity certificates at the expense of other vested rights?

3. Do RCW 90.03.015(3) and (4) violate the separation of powers by retroactively overruling this Court's determination in *Theodoratus* that a private developer is not a "municipal water supplier" that may hold rights for "municipal water supply purposes"?

4. Do RCW 90.03.015(3) and (4) violate substantive due process because they retroactively change the legal consequences of nonuse of water occurring before the MWL's effective date?

B. The following issues relate to the Plaintiffs' assignments of error:

1. Does RCW 90.03.386(2) violate substantive due process by retroactively expanding the place of use of water rights held by "municipal water suppliers" at the expense of other vested rights?

2. Does RCW 90.03.386(2) violate procedural due process by depriving affected water right holders of notice and an opportunity to be heard before the State approves changes in place of use for "municipal water suppliers"?

3. Does RCW 90.03.330(2) violate procedural due process by depriving affected water right holders of notice and opportunity to be

heard to contest the “good standing” of unperfected water rights represented by system capacity (“pumps and pipes”) certificates?

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

It is more than a cliché that water is the essence of life. Plaintiffs, like all Washington residents, need water to drink, wash, sustain their gardens, and support salmon fisheries. Yet water is a finite resource. In times of scarcity, water supplies throughout Washington State are insufficient to support urban needs, irrigated agriculture, and existing salmon runs. Many watersheds in Washington, including more than a dozen salmon-supporting watersheds, are already over-appropriated, meaning that more water is claimed than is available. To preserve available water for water rights holders and instream needs, the Department of Ecology (“Ecology”) has adopted regulations closing hundreds of streams to new water rights.

For several decades, Ecology issued water right certificates to developers, utilities, and municipalities that quantified a water right as the applicant’s system capacity rather than as the amount of water actually used. *Theodoratus*, 135 Wn.2d at 587. These certificates are commonly referred to as “pumps and pipes” certificates. *Id.* In the early 1990s, Ecology changed its policy to provide that a water right certificate would

only be issued on the basis of actual beneficial use. *Id.* at 588. As a result of this change in policy, Ecology began amending pumps and pipes permits, ultimately leading to a legal challenge by private developer, George Theodoratus.

This Court rejected the validity of these system capacity certificates in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), holding that “a water right certificate may be issued only for the amount of water actually put to beneficial use.” *Id.* at 600.<sup>2</sup> Ecology’s “pumps and pipes” policy was “ultra vires in utilizing an unlawful system capacity measure of a water right.” *Id.* at 598. Mr. Theodoratus therefore did not own a perfected water right, but only an inchoate right.<sup>3</sup> *Id.* When Mr. Theodoratus requested additional time to develop this right, the Court found Ecology was free to add conditions “to satisfy any public interest concerns which arise.” *Id.* at 597.

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<sup>2</sup> The Court had previously held that beneficial use, not system capacity, was the measure of a water right used for irrigation. *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997). *See also Department of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993). The Court in *Theodoratus* found no reason to distinguish “between what constitutes beneficial use for water for irrigation and water for other purposes.” *Theodoratus*, 135 Wn.2d at 593.

<sup>3</sup> Mr. Theodoratus’s right was an “inchoate” right only because there was no issue about whether he had acted with reasonable diligence. *Id.* at 596. “An inchoate right . . . remains in good standing so long as the requirements of law are being fulfilled.” *Id.* (quoting 1 Wells A. Hutchins, *Water Rights Law in the Nineteen Western States* 226 (1971)). Contrary to the implications of Appellants’ arguments, an unused right that is not being developed with reasonable diligence is not an inchoate right in good standing.

