

THE HONORABLE JIM ROGERS
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LUMMI INDIAN NATION, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

NO. 06-2-40103-4 SEA

DEFENDANT-INTERVENOR
CASCADE WATER ALLIANCE'S
REPLY TO PLAINTIFFS'
RESPONSES TO MOTIONS FOR
SUMMARY JUDGMENT

JOAN BURLINGAME, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants,

and

WASHINGTON WATER UTILITIES
COUNCIL, et al.,

Defendant - Intervenors.

Defendant-Intervenor Cascade Water Alliance ("Cascade") replies to Plaintiffs' responses to Defendant's and Defendant-Interveors' motions for summary judgment by joining in and incorporating the replies of the Defendant State of Washington (except its

1 contention about “active compliance”) and of the Defendant-Intervenor Washington Water
2 Utility Council to the Plaintiffs’ Motions for Summary Judgment. In addition, Cascade offers
3 the following additional argument with respect to certain issues raised by Plaintiffs.

4 **1. Standard of Review.**

5 Plaintiffs attack the no set of circumstances vigorously because they recognize that
6 application of that test defeats all of their claims. They cannot show that in every case a
7 retroactive reinstatement of pumps and pipes certificates would impair all junior water
8 rights; they cannot show that in every case retroactive application of the MWL definitions
9 would impair all junior water rights; and they cannot show in every case expansion of place
10 of use or changes in population or connections will impair all junior water rights. In each
11 instance the effect of the MWL would be fact dependent and varied. That is true with
12 respect to most laws, and that is why facial challenges are disfavored. The constitution
13 empowers the legislature to adopt the laws of the state, including laws that are not
14 constitutional in all applications. The courts are empowered to review legislation for
15 constitutional compliance, but the judicial power does not extend to voiding laws that are
16 constitutional in some applications but not others. If a law is constitutional in some
17 applications, the policy choice to adopt that law rest with the legislature. A court is not
18 empowered to overturn that policy choice under the guise of constitutional jurisprudence.

19 As noted by the State and the WWUC in their replies, the Plaintiffs attack the only
20 principled standard of review¹ offered up by the courts, but substitute nothing in its place.

21 _____
22 ¹ Plaintiffs’ suggest the no set of circumstances” standard of review would “eviscerate” the
doctrine of taxpayer standing. Hardly. A standard of review makes it more or less difficult for a

1 They even fail to urge the illusory standard proffered by *Robinson v. City of Seattle*, 102
2 Wn. App. 795, 10 P.3d 452 (2000), “the test dictated by the nature of the challenge.” The
3 standard of review for every legal question is intimately associated with the “nature of the
4 challenge”, which in *Robinson* was a facial challenge.² That court simply side-stepped the
5 issue and went to the merits, offering nothing of precedential value with respect to standard
6 of review in facial challenges.


7 According to Plaintiffs, a court deciding a facial challenge may declare a statute
8 adopted by a co-equal branch of government facially unconstitutional if it is unconstitutional
9 in many instance (?), some instances (?), or one instance (?). Plaintiffs offer no guidance for
10 selecting the standard of review. Plaintiffs’ position is simply an invitation to the court,
11 under the guise of constitutional jurisprudence, to concur in plaintiffs’ policy choices –
12 choices rejected by the legislature. And that invitation ignores a principle they strive
13 mightily, if unsuccessfully, to apply elsewhere in their argument: the doctrine of separation
14

15 party to prevail, but it has nothing to do with a party’s right to be in court. Adopting a standard of
16 review according to who brings the suit seems likely to set the courts on a slippery slope. Even
Robinson recognizes that the nature of the challenge is the baseline for standard of review, burden of
17 proof and presumptions.

18 ² To bolster their argument, Plaintiffs cite a number of cases involving facial challenges that
19 do not discuss standard of review at all. In each of those cases, the standard of review was not at
20 issue because the law at issue could not be defended by showing it could be applied constitutionally
21 in some, if not all, cases. The law was either unconstitutional or it was not. See, *Farris v Munro*, 99
22 Wn.2d 326, 662 P.2d 821 (1983) (Action to enjoin operation of lottery); *State ex rel Tattersall v.
Yelle*, 52 Wn.2 856, 329 P.2d 841 (1958) (Challenging authority to enter into interstate compact);
Washington Water Jet Workers Ass’n v. Yarbrough, 151 Wn.2d 470, 90 P.3d 42 (2004) (Challenge
to statute authorizing convict labor program). In *Weden v. San Juan County*, 135 Wn.2d 678, 958
P.2d 273 (1998) the court reviewed a police power ordinance under the unreasonable, arbitrary or
capricious and the unduly oppressive standards of review historically applied to those ordinances.
Given the nature of that ordinance, it, too, could not be defended “under the no set of circumstances”
standard. In *Biggers v. City of Bainbridge Island*, _____ Wn.2d _____, 169 P.3d 14 (2007), a police
power ordinance was challenged for conflicting with a general state law. A local police power
ordinance that conflicts with state law is unconstitutional in all circumstances.

23 DEFENDANT-INTERVENOR CASCADE WATER
24 ALLIANCE’S REPLY TO PLAINTIFFS’ RESPONSES TO
MOTIONS FOR SUMMARY JUDGMENT - Page 3

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1 of powers. The courts, too, can improperly intrude into the sphere of a co-equal branch of
2 government, and, unlike the other branches, the only control on the courts is the courts.

3 These plaintiffs brought a facial challenge. They have not asked the court to declare
4 the statute unconstitutional in one case, or in some cases, or in many cases; they are asking
5 the court to rule that the statute is unconstitutional and void³, without having to bear the
6 burden of proving that it should be void; that is, inoperative in all cases. Such a ruling would
7 be a violation of the separation of powers, unless constitutional doctrine holds that legislation
8 is unconstitutional and void whenever it cannot be constitutionally applied in all cases.
9 Manifestly, that is not so as evidenced by two hundred years of “as applied” case law.

10 2. Municipal Water Law Definitions.

11 Plaintiffs’ repeats as a mantra the claim that the MWL retroactively reinstates water
12 that a newly minted municipal supplier had previously relinquished by operation of law. In
13 their drive to persuade this court to adopt their policy choices, they offer no legal analysis
14 supporting retroactive reinstatement, and they point to no evidence in the statute to support a
15 legislative intent for retroactivity: they merely state it as fact. Statutes are presumed to
16 operate prospectively, unless a clear legislative intent for retroactivity is expressed. *See,*
17 *e.g., 1000 Virginia Ltd Partnership v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006).*
18 There is no such expression in this statute. On this issue, they cannot find support for a
19 retroactive intent in the MWL, and they disregard (and hope the court will overlook) the lack
20 of any reference to the relinquishment statute in the MWL.

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22 ³ A successful challenge renders the statute “inoperative.” *Tunstall v. Bergeson*, 141 Wn.2d
201, 221, 5. P.3d 691 (2000).

1 This statute is “presumed constitutional” and Plaintiffs must prove that the statute is
2 unconstitutional “beyond a reasonable doubt.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 220,
3 5. P.3d 691 (2000). The court’s duty is to interpret this statute so as to uphold, rather than
4 find against, its constitutionality. *State v. Browet*, 103 Wn.2d 215, 691 P.2d 571 (1984) (the
5 duty of the Supreme Court is to construe a statute so as to uphold its constitutionality
6 wherever possible). *State v. Brayman*, 110 Wn.2d 183 (1988) (if court can reasonably
7 conceive of state of facts to exist which would justify legislation, those facts will be
8 presumed to exist and statute will be presumed to have been passed with reference to those
9 facts); *High Tide Seafoods v. State*, 106 Wn.2d 695, 725 P.2d 411 (1986) (if possible,
10 statute should be construed to be constitutional).

11 Even if relinquishment occurs by operation of law, a constitutional interpretation of
12 the MWL is possible and required. A relinquishment by operation of law occurs when all
13 necessary facts are present. When those facts are present, the water right is either eliminated
14 or its authorized quantity is reduced. The MWL does not affect that operation of law. A
15 new municipal supplier may receive prospective protection afforded by the exemption from
16 relinquishment, but only for those rights it holds as of the effective date of the MWL. Lost
17 rights or lost water are not reinstated or protected.⁴ This reading supports a prospective
18 application of the statute eliminating the constitutional concerns alleged by Plaintiffs.

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21 ⁴ If relinquishment occurred before 2003 as a result of an Ecology order (or after its order is
22 affirmed on appeal), the same principle applies. The new municipal supplier receives protection
going forward for its water rights held as of 2003.

1 The MWL defined the attributes of a water right held for municipal water supply
2 purposes and who or what is a municipal water supplier. With respect to some water rights,
3 the MWL changed their purpose of use by operation of law on September 9, 2003. A
4 change of use of a water right never operates to increase the quantity of water associated
5 with that right, but it often results in a decrease through application of the relinquishment
6 statute. There is nothing in the MWL to suggest a different result for a change of use by
7 operation of law. Ecology retains its authority under the relinquishment statute to commence
8 relinquishment proceedings to determine what quantity, if any, of a new municipal water
9 right is protected from further relinquishment. The MWL does not explicitly "resurrect" any
10 relinquished water right, nor does it explicitly apply the exemption for municipal supply
11 purposes retroactively; and such an interpretation is not necessary, especially since it would
12 strain the language and raise serious constitutional issues.

13 3. Separation of Powers.

14 The plaintiffs argue that adoption of RCW 90.03.330(3) violates the doctrine of
15 separation of powers because the statute retroactively overruled *Theodoratus* by reinstating
16 certificates that case had ruled unlawful. But even a superficial reading of the statute reveals
17 that it has no effect on water right certificates. RCW 90.03.330 (3) reads:

18 (3) This subsection applies to the **water right** represented by a water right
19 certificate issued prior to September 9, 2003, for municipal water supply
20 purposes as defined in RCW 90.03.015 where the certificate was issued
21 based on an administrative policy for issuing such certificates once works for
22 diverting or withdrawing and distributing water for municipal supply
23 purposes were constructed rather than after the water had been placed to
24 actual beneficial use. Such a **water right** is a right in good standing.
[Emphasis supplied.]

1 The section applies to the water right, not to the certificate. The statute has no affect on the
2 law of inchoate rights (water available for use, but not yet used – not a water right).

3 In Plaintiffs’ analysis water right and certificate are synonymous. But in law they are
4 not! A certificate is not a water right; at most, because Ecology makes only a tentative
5 determination when it issues a certificate, a certificate is evidence of a water right. *See,*
6 *e.g., Rettowski v DOE*, 122 Wn.2d 219, 858 P.2d 232 (1993). RCW 90.03.330(3)
7 recognizes this: “... the water right *represented* by a water right certificate....” In a judicial
8 proceeding (the only forum for finally determining beneficial use, reasonable diligence, and
9 quantities) a certificate is prima facie evidence that can be rebutted.

10 This statute simply affirms that a water right (water beneficially used according to
11 law) incorrectly and possibly prematurely certified by Ecology is a water right regardless of
12 Ecology’s error. The legislature acted to protect the innocent applicant who played by the
13 rules and who did eventually perfect a water right by putting water to beneficial use. The
14 legislature did not – retroactively or prospectively – bestow any additional privileges or
15 immunities to such water rights and no one else’s rights are diminished or enhanced by this
16 law.

17 **4. Cascade’s Response to Ecology’s Active Compliance Position.**

18 Cascade adopts the argument presented by the WWUC in its reply and adds the
19 following argument.

20 The State exceeds its authority and by administrative fiat repeals the relinquishment
21 statute. The State explains its active compliance as follows: “if a municipal water supplier
22 fails to use a water right for at least one of the stated criteria in RCW 90.03.015(4) for

1 a period of five or more consecutive years, then the water right is subject to
2 relinquishment.”⁵ Compare the foregoing with the relinquishment statute: “...there shall be
3 no relinquishment of any water right ...(d) If such right is claimed for municipal water
4 supply purposes under chapter 90.03 RCW;...” RCW 90.14.140(2)(d). The exemption
5 statute requires: (1) water beneficially used in the past according to law (a water right), that
6 is (2) now “claimed” (not “used” in whole or in part) for (3) municipal water supply
7 purposes. Before the Ecology re-write, a municipality could purchase a water right from a
8 private party, and hold that water right (as quantified in the change process) for municipal
9 purposes and defer using the right indefinitely because once the change was approved it was
10 exempt from relinquishment. Under Ecology’s re-write, the municipality must put the right
11 to use within five years from the date of last use, regardless of any immediate need for the
12 water, or it will be lost. Ecology’s re-write repeals the exemption to relinquishment adopted
13 by the legislature.

14 **5. Conclusion.**

15 During the course of these proceedings the MWL has been interpreted, reinterpreted
16 and interpreted once again. Its provisions have been glossed over, ignored, and
17 misinterpreted. But in the final analysis Plaintiffs bring a facial challenge to the
18 constitutionality of a legislative enactment, asking this court to declare the work of the
19 legislature inoperative and void, despite their inability to prove that the MWL can never be
20 applied constitutionally and, in fact, when each of its provisions can operate constitutionally.

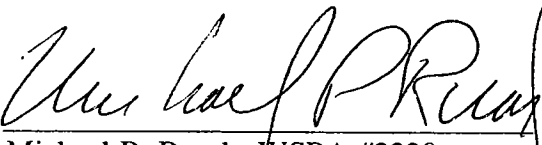
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22 ⁵ State’s Reply to Burlingame Plaintiffs, Page 21.

1 Plaintiffs, having lost the battle of policy at the legislature, under the guise of
2 constitutional argument, move the battle over policy choices to this forum. Seemingly
3 solicitous of the judicial interest in separation of powers, they invite the courts to ignore the
4 legislature's equally valid interest in that doctrine. Under our constitutional doctrine, the
5 legislature can adopt legislation that may be unconstitutional as applied in some instances;
6 under our constitutional doctrine, the peoples are entitled to the benefit of legislation when it
7 can be constitutionally applied; and under our constitutional doctrine the public is entitled to
8 the benefit of regulations that can be constitutionally applied - even if the legislation cannot
9 be so applied in all cases.

10 Cascade requests that this court deny the motions of the Plaintiffs and the grant the
11 motions of the State, the WWUC and Cascade and affirm the right and the authority of the
12 legislature to adopt police power legislation incorporating policy choices that can be
13 constitutionally applied.

14 DATED this 24th day of April, 2008.

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16 INSLEE, BEST, DOEZIE & RYDER, P.S.
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20 By 
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