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Case No. 90405 – 7

SUPREME COURT
OF THE STATE OF WASHINGTON

GERALD G. RICHERT, et al.,

Plaintiffs/Respondents,

vs.

CITY OF TACOMA,

Petitioner.

RESPONDENTS' RESPONSE TO AMICI CURIAE BRIEF OF THE ASSOCIATION OF WASHINGTON CITIES AND THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF THE CITY OF TACOMA'S PETITION FOR REVIEW

(Proof of Service Included)

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ORIGINAL

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I. INTRODUCTION

The *Amici*, the Association of Washington Cities and the Washington State Association of Municipal Attorneys have provided no legitimate reasons for this Court to grant review of the Utility's Petition. Their argument attempts to lend support to the Utility's misguided reliance upon *Large v. Shively,* 186 Wn. 490, 58 P.2d 808 (1936). Next, they simply claim that water utilities, which depend on water rights, will somehow be harmed by the appellate decision. *See Amici Curiae* Brief of the Association of Washington Cities and the Washington State Association of Municipal Attorneys in Support of the City of Tacoma's Petition for Review ("Municipal Brief"), pp. 2-4. Neither contention is accurate.

II. ARGUMENT

First, the appellate court recognized that it had a very limited inquiry before it. The appellate court observed that the "superior court entered a very limited final judgment to facilitate our interlocutory review..." *See Richert v. Tacoma Power Utility,* 179 Wn. App. 694, 702, 319 P.3d 882 (2014). The issue was whether the *Funk* condemnation action precluded the Ranchers' ability to pursue their claims. *Id.* The factual backdrop here is rare. The Utility condemned the flows of the North Fork. CP 1289-1295. Aggradation occurred in the river over the decades lessening its capacity. CP 97-107. The Endangered Species Act was passed and salmon were listed as endangered. CP 545. The Utility had to pursue a re-licensing of the Cushman Dams. Its license included thrusting an enormous amount of flows into the narrowed river which it knew would cause flooding. CP 544-560; *see Indemnity Insurance Co. of*

North America v. City of Tacoma, 158 Wn. App. 1022 (2010)[1]. The entire acreage of the Skokomish Valley, which had been used for agriculture and pasture land after the *Funk* condemnation, is turning into wetlands. CP 2498-2502.

A. *Large v. Shively* Is Not in Conflict With the Appellate Court's Decision

The Ranchers have responded to the Utility's assertion that *Large* is in conflict with the appellate decision and that its holding is somehow supportive to the Utility. *Large* does not support the Utility and it does not provide a basis for further review. Briefly, the facts of *Large* are completely different than the facts here. In *Large,* the trial court disposed of the Plaintiff's case on the basis of *res judicata. See Large*, at 491. In doing so, the trial court refused to allow one of the attorneys to enter "portions of the proceedings in the two former actions." *Large*, at 497. Because of a lack of evidence, the appellate court stated that: "Neither the trial court nor the appellate court can judicially notice the record in another cause, even though between the same parties and in the same court, unless such record is both pleaded and proved." Here, the Ranchers put in the entire certified record from the *Funk* proceedings. CP 1296-2486. The lower courts considered the record and analyzed it carefully as is their role. *Highline School District v. King County,* 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *American Universal Insurance Co. v. Ranson,* 59 Wn.2d 811, 815-16, 370 P.2d 867 (1962).

The concerns raised in *Large* do not exist in this case. The Utility has argued error because certain sections of the record should have been

[1] Respondents cite to the unpublished Court of Appeals case of *Indemnity Insurance Co. of North America v. City of Tacoma,* 158 Wn.App. 1022 (2010) not as precedential authority (GR 14.1), but to establish the Utility's prior positions on the issues here.

read differently and should have been given different weight by the lower courts. There is no support in *Large* or any other case in Washington state for this supposition. The appellate decision is not at odds with *Large* and, procedurally, the record in *Funk* was pleaded and proved in compliance with *Large*.

B. Water Utilities Are Not In Any Way Affected by the Appellate Decision

The remainder of the *Amici* argument uses statutes to make the case that, first, water utilities need an ample supply of water which could be impacted by this case. *See* Municipal Brief, p. 3 *citing* RCW 35.92.010. Second, that growth management planning for utilities will be affected. *Id., citing* RCW 36.70A.020; 36.70A.020(1) and 36.70A.020(10). And, finally, it is asserted that the duty to supply domestic and retail water will be harmed by the appellate decision. *See* Municipal Brief, p. 4 *citing* RCW 43.20.260 and WAC 246-290-106. These three arguments ignore the area of law that water utilities deal with and the content of most of the statutes cited.

The fact that a city or town can condemn to build "waterworks" to furnish the "inhabitants...with an ample supply of water" pursuant to RCW 35.92.010 speaks to "appropriative rights," which is an entirely different area of water law. *See State v. Theodoratus,* 135 Wn.2d 582, 957 P.2d 1241 (1998). Appropriative rights are controlled by statute, not by case law. RCW 90.03. Appropriations of groundwater and the issuance of a groundwater right of withdrawal are controlled under RCW 90.44.080. Surface water appropriations are controlled under RCW 90.03.250 through RCW 90.03.340. A water right is issued which sets out the quantity of the water obtained and the date of the issuance. Generally,

there cannot be a conflict about a water right once it is issued. However, the courts can become involved in appropriation law when they perform a "general adjudication" of the water rights amongst various senior and junior water right holders on a specific river or in a river basin. *See e.g. Dept. of Ecology v. Acquavella,* 131 Wn. 2d 746, 935 P.2d 595 (1997) (Yakima River Basin). The *Amici*, as water utilities, have confused the area of law that they operate in.

The claim is made that growth management will be affected by the appellate decision without any explanation as to how that could happen. Citation is made to two Growth Management Act sections, RCW 36.70A.020 (1) and RCW 36.70A.020(10). *See* Municipal Brief, p. 3. Any decisions under the Growth Management Act already must give consideration to private property rights. At RCW 36.70A.020 (6) it states: "Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory acts." *Amici* ignores the impact of the statutory section between the two that they rely upon. The appellate decision in this case can have no impact on the Growth Management Act.

Finally, RCW 43.20.260 and WAC 246-290-106 are cited to support the notion that the appellate decision will "jeopardize the variability (sic) of municipalities to provide the necessary water services needed for their citizens, businesses and commercial customers." *See* Municipal Brief, p. 4. The statute and the rule both recognize that water services are controlled by the water utilities' water rights. RCW 43.20.260 (2) states that a municipal supplier "has a duty to supply retail water service within its retail area if.... the municipal water supplier has

sufficient water rights to provide the service." Similarly, WAC 246-290-105 (1)(b) requires municipal water suppliers to provide service if "there is sufficient water right to provide water service." The appellant decision in this case cannot have any effect upon the water rights or water services of any municipality.

III. CONCLUSION

No basis exists for the assertion by *Amici* that the appellate decision in this matter threatens its industry. The Court is respectfully asked to decline to review the decision since it is very narrow, does not implicate riparian law, and no conflict exists with *Large* and its progeny.

DATED this 10TH day of SEPTEMBER, 2014.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Dear Clerk,

Attached please find Respondents' Response to Amici Curiae Brief of the Association of Washington Cities and the Washington State Association of Municipal Attorneys in Support of the City of Tacoma's Petition for Review.

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