

**FILED**

SEP 03 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 311953

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

CITY OF WENATCHEE, a  
municipal corporation,

Appellant,

vs.

CHELAN COUNTY PUBLIC  
UTILITY District NO. 1, a municipal  
corporation,

Respondent.

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APPELLANT'S REPLY BRIEF TO AMICI WASHINGTON  
ASSOCIATION OF SEWER AND WATER DISTRICTS, THE  
SHORELINE WATER DISTRICT AND SOOS CREEK WATER AND  
SEWER DISTRICT

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TABLE OF CONTENTS

I.	ARGUMENT .....	1
	A. Reply To Amicus curiae, WASWD and SWD .....	1
	B. Reply to Amicus curiae, Soos Creek Water and Sewer District.....	4
II.	CONCLUSION.....	7

TABLE OF AUTHORITIES

**Table of Cases**

<i>Burba v. Vancouver</i> , 113 Wn.2d 800, 783 P.2d 1056 ..... (1989).....	3
<i>City of Tacoma v. City of Bonney Lake</i> , 173 Wn.2d 584, 269 P.3d 1017 (2012).....	2
<i>Hutton v. Martin</i> , 41 Wn.2d 780, 252 P.2d 581 (1953).....	5
<i>King County v. City of Algona</i> , 101 Wn.2d 789, 681 ..... P.2d 1281 (1984) .....	1, 2, 3 4, 5
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003).....	5
<i>Russell v. City of Grandview</i> , 39 Wn.2d 551, 236 P.2d 1061 (1951).....	2, 6
<i>Wilson v. Seattle</i> , 122 N.2d 814, 863 P.2d 1336 (1993).....	6

**Table of Statues and Other Authority**

RCW 35.13B.010.....	2, 3
RCW 35A.82.020.....	2
RCW 54.28.070 .....	1
16 McQuillan Municipal Corporation §44.59(3d ed. 2012)..	5

## I. ARGUMENT

The arguments put forth by the Washington Association of Sewer and Water Districts, the Shoreline Water District, and Soos Creek Water and Sewer District are akin to that of the Chelan County Public Utility District. That the legislature has not enacted a statute that regulates the levy of tax on water service revenues does not signify that the City of Wenatchee (“City”) is without authority to impose such a tax. The City is not looking for this Court to overturn *King County v. Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) as argued by Soos Creek Water and Sewer District. Furthermore, a reduction in the net revenue as a result of a tax on the sale of water, and the inconvenience that may arise therefrom, does prohibit the City from levying a tax on revenue from the sale of water.

### A. Reply to Amicus curiae, the WASWD and SWD

Amicus curiae, the Washington Association of Sewer and Water Districts and the Shoreline Water District (collectively “Amici”) assumes that because there is no statute allowing the City to levy a tax against municipalities that provide domestic water to paying customers that the City of Wenatchee (“City”) is prohibited from levying a tax on revenues generated from the sale of domestic water. Amici Br. at 5-6. Amici points to RCW 54.28.070, which authorizes taxation on the sale of electricity. Amici contends that there is no similar statute with regard to

the provision for domestic water and concludes that because there is no such provision for the sale of water, as there is for electricity, the City is prohibited from levying a tax for the provision of domestic water. Amici Br. at 5.

Amici, however, ignores the entire body of law that distinguishes governmental acts from proprietary acts and the governing law that provides when a municipal corporation acts as a proprietor its business powers are viewed, from a legal standpoint, akin to those as a personal actor. *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012); *see also King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) (distinguishing operation of solid waste transfer station as a governmental function); *Russell v. City of Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951) (providing domestic water is a proprietary function). Amici also ignores RCW 35A.82.020 which grants to the City the authority to levy taxes for regulation or revenue on all kinds of businesses and occupations within the City limits.

Amici next contend that because the state legislature has adopted a statute that authorizes cities to tax the gross revenues of water-sewer districts in very narrow circumstances, the City in this case is not authorized to tax the Chelan County Public Utility District (“PUD”) without express authorization to do so. *See* RCW 35.13B.010. By implication Amici is arguing that in the absence of a similar statute

authorizing the City to tax the PUD, there is no authority to tax the PUD's water revenues. This argument is flawed for several reasons. First, the argument overlooks the import of *King County v. Algona, supra*, where the Court looked at the activity in which the government was engaged to discern whether the tax was legal, and *Burba v. Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989), where the Court upheld the constitutional validity of the utility tax upon water and sewer utility revenues as analogous to a B & O tax. *Id.* Secondly, the fact that the state legislature has not enacted a similar law as RCW 35.13B.010, only suggests that the legislature has not decided to regulate taxing a water or utility district as to the sale of domestic water within a municipality, not that the tax is entirely prohibited. When considering RCW 35.13B.010 it is clear the legislature only intended to regulate the imposition of a tax by cities on water-sewer districts by prohibiting a franchise fee, requiring an interlocal agreement between the city and the water-sewer district, and allowing the tax only in cities with a 2009 population of between 80,000 and 85,000 in a county with a population of more than 1,500,000. So this statute was obviously intended to regulate the imposition of a tax in a very specific instance, perhaps Renton, King County, as identified by Amici. It should not be interpreted inversely to imply that where no similar statute exists for other locales that the tax is illegal.

Amici refers to several instances where the legislature has reviewed various bills which would regulate utility taxes on Title 57 RCW water-sewer districts, but the fact that the legislature has not enacted such laws does not denote that the City, in this case, cannot levy taxes against the PUD for revenues received from operating as a proprietor by selling water. Rather, one could just as easily postulate that the legislature chose not to regulate the tax.

**B. Reply to Amicus curiae Soos Creek Water and Sewer District**

Amicus curiae Soos Creek Water and Sewer District (“Soos Creek”) mischaracterizes the City’s position. Specifically Soos Creek’s briefing suggests that the City is asking this Court to reverse course with respect to the holding in *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) and its implications. Soos Creek Br. at 3-4, 7-8. To reiterate the City’s position, the pertinent language in *Algona* with regard to taxing revenue of proprietary acts is as follows:

The governmental immunity doctrine provides that one municipality may not impose a tax on another without express statutory authorization. The majority of jurisdictions adhere to this rule on the theory that a local tax imposed on a political subdivision such as a county is tantamount to a tax imposed on the state . . . . *Where the primary purpose in operating the transfer station is public or governmental in nature the county cannot be subject to the city B & O tax, absent expressed statutory authority. We hold that King County was operating in a governmental function.*

*Id.* at 793-794. (emphasis added).

The *Algona* Court prefaces its determination regarding a municipality's authority to tax another municipality by stating that it is the governmental immunity doctrine that prohibits the levying of taxes; that is, when the government is operating in a governmental function it cannot be taxed without express authority. *Id.*; see also *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953) (the governmental immunity doctrine applies when a city or other municipal corporation acts on behalf of the state in performing governmental functions); *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003); *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008). As succinctly stated by McQuillin on Municipal Corporations:

[I]t is generally conceded that a city which enters the field of private competitive business for profit divests itself of its sovereignty pro tanto and forfeits its immunity from taxation . . . . Property of a municipality is subject to taxation if it is not devoted to public use but is held for revenue or like purposes, or for possible future public use, or if it is held by a city acting in its proprietary, as distinguished from its governmental, capacity.

16 McQuillin Mun. Corp. § 44.59(3d ed. 2012).

The PUD is not immune from the tax imposed on its revenue from the sale of water. This conclusion is congruent with the body of law regarding the governmental immunity doctrine as it relates to the levy of taxes, including *King County v. Algona*, *supra*, and it is also consistent with the authority the City has pursuant to the law permitting the City to

levy a tax on businesses and occupations within the City limits, RCW 35A.82.020.

Soos Creek next contends that the levying of taxes would reduce its sole source of revenue. Soos Creek Br. at 5. A reduction in revenue, however, is irrelevant to this inquiry. When a water or utility district sells water, it is acting as a proprietor, it steps outside the protections of state sovereignty, and it is treated like any ordinary business. *See e.g. Russell v. City of Grandview*, 39 Wn.2d 551, 236 P.2d 1061, 553 (1951) (providing domestic water is a proprietary act); *Wilson v. Seattle*, 122 Wn.2d 814, 863 P.2d 1336 (1993) (governmental immunity of a city derives from the state as a sovereign.) Further, Soos Creek does not affirmatively deny that the sale of domestic water to paying customers is a proprietary function. The City understands net revenue may be affected by additional taxes, but a utility district may pass the burden of taxes on the sale of water to its customers through its rate structure.

Soos Creek argues that the Court should affirm the trial court's ruling because if the levying of taxes was permitted in this instance it would disrupt the business relationship among Soos Creek and the cities it serves. Soos Creek Br. at 10. Soos Creek basically argues that to impose a tax on water district revenues is impractical. Soos Creek cites to the various inter-local agreements between and among cities and utility districts and suggests that allowing a tax would complicate the

arrangements among cities and utility districts. The City acknowledges that there may be some practical implications and challenges for Soos Creek and similarly situated water districts as to their interlocal agreements with respect to the provision for water. However, the only issue in this case is whether the City's tax on water and sewer revenues is legal. The practical considerations of Soos Creek have no bearing on the legality of the tax. Soos Creek's argument is not based on the legal considerations but seems aimed more toward the sentiment of the court. Thus, inconvenience and disruption of the various arrangements among cities and utility districts is not a controlling factor as the legal basis for the City's tax in this instance.

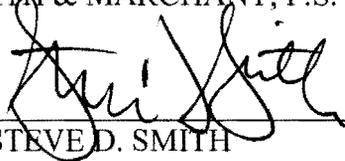
## **II. Conclusion**

The governmental immunity doctrine is based on notions of sovereign immunity. A municipal corporation is not acting as an agent of the state when it sells domestic water to paying customers. That the legislature has not passed a law regulating taxes on water district revenues does not signify that the City is without the authority to tax the PUD on the revenue it generates from the sale of water. The City has express authority to levy taxes on the PUD when it functions in a proprietary capacity. Thus, the City's tax is lawful.

Respectfully submitted,

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CHELAN COUNTY PUBLIC UTILITY  
DISTRICT NO. 1, a municipal corporation,

Respondent.

) NO. 311953

) DECLARATION OF SERVICE

I, Barbara A. Coffin, under penalty of perjury under the laws of the state of Washington,  
declare as follows:

I am a legal assistant at Johnson, Gaukroger, Smith & Marchant, P.S., attorneys for City of  
Wenatchee, Appellant herein. On the 30<sup>th</sup> day of August, 2013, and in the manner indicated  
below, I caused a copy of the Appellant's Reply Brief to Amici Washington Association of

1 Sewer and Water Districts, the shoreline Water District and Soos Creek Water and Sewer District

2 to be served on:

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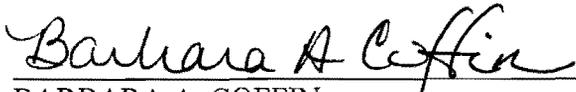
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17   
18 BARBARA A. COFFIN

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23 DECLARATION OF SERVICE

Page 2 of 2

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