

ORIGINAL

NO. 81809-6

SUPREME COURT OF THE STATE OF WASHINGTON

LUMMI NATION, MAKAH INDIAN TRIBE, QUINULT 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.

RESPONDENTS/CROSS-APPELLANTS' ANSWER TO AMICI CURIAE SPANAWAY WATER COMPANY ET AL.

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INTRODUCTION

The Washington State Constitution prohibits the legislature from retroactively overruling a decision of this Court. While the legislature is free to pass new water laws and draft new definitions for public and private water suppliers, what the legislature cannot do is pass a statute that applies backwards – that changes the law as announced by this Court. And yet that is precisely what two of the challenged provisions of the 2003 Municipal Water Law (“MWL”) did. RCW 90.03.015(3) and (4), 90.03.330(3).

Decades of legal decisions from this Court upholding and underscoring the primacy of the beneficial use doctrine in Washington water law and the common-sense definition of a municipality led to the 1998 decision in *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). In *Theodoratus*, this Court reaffirmed its prior decisions that a perfected water right is limited to actual beneficial use – the “[r]elevant statutes, case law and recent legislative history leave no doubt that quantification of a water right for purposes of issuing a final certificate of water right must be based upon actual application of water to beneficial use, not system capacity.” *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 590, 957 P.2d 1241 (1998). The Court also held that, as a private entity, Mr. Theodoratus’s water right was subject to

statutory relinquishment, and to base his water right on his system capacity (similar to what might be allowed for a municipality) would “render these provisions of the relinquishment statutes meaningless.” *Id.* at 595. In reaching this decision, this Court necessarily held that private developers were not municipalities for purposes of the Water Code, and that developers could not benefit from the special rights accorded municipalities under the Code. *Id.* at 594. (“We are also not persuaded by [Mr. Theodoratus’s] claim that a distinction is warranted because his is a public water supply system...Appellant is a private developer...not a municipality....”) *Id.*

In direct response, the state legislature passed the MWL, 2003 Wash. Laws, 1st Sp. Sess., Ch. 5, to retroactively overrule *Theodoratus*. It is that retroactive application of the law which is the primary focus of this case, and yet *amici* Spanaway Water Company *et al.* fail to discuss retroactivity in any way. Because *amici* do not address the issue of retroactivity, their brief is of limited relevance.

THE RETROACTIVE DEFINITIONS FOR MUNICIPAL WATER SUPPLIERS VIOLATES THE SEPARATION OF POWERS IN THE WASHINGTON CONSTITUTION.

Separation of powers is implicit in the tripartite form of Washington government and has been recognized by the Washington Supreme Court. *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494,

503-06, 198 P.3d 1021 (2009); *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000); *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997). The constitutional separation of powers exists to prevent one branch of government from encroaching upon the functions of another. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). “[T]he fundamental functions of each branch [must] remain inviolate.” *Blilie*, 132 Wn.2d at 489.

In our system of separated powers, the legislature’s role is essentially forward-looking while the judiciary’s is backward-looking; in other words, the legislature makes the laws, and the judiciary interprets them. *See Marine Power & Equip. Co. v. Washington State Human Rights Comm’n*, 39 Wn. App. 609, 615 n.2, 694 P.2d 697 (1985) (“The function of a Legislature is to make laws, not to construe them. Nor can the Legislature construe the intent of other legislatures. The latter functions are primarily judicial.”). A judicial interpretation of a statute by the highest court of the state “operates as if it were originally written into it.” *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976); *accord In re Det. of Halgren*, 156 Wn.2d 795, 803, 132 P.3d 714 (2006). The legislature does not have the power to overrule a judicial interpretation, because “it is, emphatically, the province and duty of the judicial department, to say what the law is.” *State v. Pillatos*, 159 Wn.2d 459,

473-74, 150 P.2d 1130 (2007) (quoting *Marbury v. Madison*, 5 U.S. (1 *Cranch*) 137, 177, 2 L.Ed. 60 (1803)).

The MWL violates the separation of powers doctrine because it directly contradicts this Court's holdings in *Theodoratus*. RCW 90.03.015(3) and (4) retroactively elevate private developers to the status of municipalities, exempting them from the relinquishment of their water rights, and RCW 90.03.330(3) retroactively validates the very category of "pumps and pipes" certificates that *Theodoratus* found "ultra vires."

The retroactive intent in the provisions is unquestioned. The definitions of "municipal water supplier" and "municipal water supply purposes" in RCW 90.03.015(3) and (4) apply retroactively as the definitions apply to all relevant provisions of the MWL. *See* RCW 90.03.015. RCW 90.03.330(3) expressly refers to "municipal water supply purposes as defined in RCW 90.03.015," evincing the legislature's plain intent that these definitions apply to the retroactive provisions of the MWL. Additionally, the State admits these sections are retroactive. State Br. at 23.

Judge Rogers found that:

Despite not reaching issues concerning municipal water suppliers, the *Theodoratus* court reached a decision that decided an issue with respect to Mr. Theodoratus' water rights. In other words, because of the very arguments made by Mr. Theodoratus that Court was forced to address

whether or not [Mr.] Theodoratus was or was not in the situation of a party holding the water rights of a public water system under state statutory and common law. This Court decided that he was not....

RP at 11. Contrary to the assertion of *amici* (at 11), the Superior Court did not draw “a blunt and arbitrary distinction between water systems owned by ‘municipalities’ and all other types of water systems.” Instead, the Superior Court correctly relied on this Court’s reasoning in *Theodoratus* to hold that the definition of municipalities prior to passage of the MWL did not include private developers, and that the legislature’s attempt to retroactively change that definition was constitutionally invalid. Even accepting that some private developers “perform the same functions and public service as water systems owned by local governments,” *Amici Br.* at 12, the fact remains that they are not municipalities. *See Theodoratus*, 135 Wn.2d at 594 (despite Mr. Theodoratus’s claim that he operated a public water supply system, “[a]ppellant is a private developer...not a municipality....”).

Moreover, RCW 90.03.015(3) and (4) retroactively apply to a much larger group than the *amici* private water suppliers – “municipal water supply purposes” were redefined to encompass entities serving as few as 15 residential connections, a category that would clearly include Mr. Theodoratus and other similarly situated private developers. RCW

90.03.015(4). This definition includes many private residential developments, trailer parks, and mobile home parks. *See* CP 369-79 (Ex. A, 2003 Municipal Water Law Interpretive and Policy Statement). The MWL conferred “municipal” status on all these private developers and allowed them to reserve water that otherwise would have been available for junior water rights holders or instream flows. This Court need not delve into the question of whether there are categories of private water supply entities that are more like municipalities than others; the constitutional question presented requires the Court only to inquire whether the MWL retroactively changed the law announced in *Theodoratus*. While the legislature is free to choose “function” over “form” when changing statutory definitions into the future, *Amici Br.* at 20, the legislature cannot reach into the past to redefine these entities – especially when that action supplants other valid water rights.¹

¹ Similarly, the pumps and pipes provision explicitly states that its repeal of the beneficial use requirement for the water rights of municipal water suppliers applies to “the water right represented by a water right certificate issued prior to September 9, 2003.” RCW 90.03.330(3) (emphasis added). In contrast, RCW 90.03.330(4) requires that after the effective date of the legislation (i.e., prospectively), Ecology may issue certificates only on the basis of actual beneficial use. As Judge Rogers found, “[t]his statute clearly reinstates pumps and pipes certificates issued prior to September 9, 2003, and this is an attempt to reverse the *Theodoratus* decision.” RP at 9.

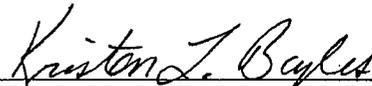
Unlike the situation in *Hale* – this Court’s most recent foray into separation of powers – the legislature did not carefully craft the MWL to avoid reversing *Theodoratus*. The challenged provisions here explicitly apply before the date of enactment. RCW 90.03.330(3). In *Hale*, the provisions that the Court found constitutional applied retroactively only in a window of time not controlled by this Court’s precedent. “Being careful not to reverse *McClarty*, the legislature explicitly declared the new statutory definition applied retroactively to causes of action occurring the day before the *McClarty* opinion was filed and to causes of action occurring on or after the effective date of the amendment.” *Hale*, 165 Wn.2d at 498. “The effect of this provision was to carefully carve out a window of time during which claims would still be controlled by the definition of “disability” we announced in *McClarty*.” *Id.* at 502. Here, the legislature purposely provided for the retroactive reversal of *Theodoratus*.

CONCLUSION

Because *amici* fail to address the issue at the heart of this case, their brief cannot aid this Court in its decision. There is no issue in this case as to whether non-governmental public water systems are functionally equivalent to municipal water suppliers, or even if they should be. The issue for this Court is whether the legislature overstepped

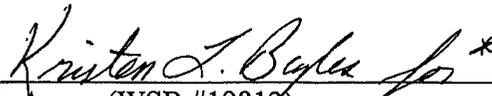
its bounds by redefining municipal water suppliers to include private developers after this Court rejected that very interpretation. *See Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (judicial interpretation of a statute by the highest court of the state “operates as if it were originally written into it.”). Private developers are not municipalities, and the MWL’s retroactive provisions violate the separation of powers.

DATED this 18th day of December, 2009.



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