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Lummi Indian Nation v. State, 241 P.3d 1220 (Wash. 2010)

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Group's takings claim.

Next, the court held that the statute of limitations did not bar the Group's negligence claim, and the City owed the Group a duty of care with regard to the method the City used to divert water pursuant to its established water rights. The court further held that the City's continued negligence was a natural extension of the continuing tort doctrine and, therefore, tolled the statute of limitations. In addition, the lawful appropriation of the water right did not relieve the City of its obligation to exercise care in obtaining its water. Accordingly, the court found that the City owed a duty of reasonable care to the Group.

Finally, the court elaborated on the Group's recommendation that the City use the alternative confined aquifer instead of the unconfined aquifer. It noted that, if viable, the Group could prevail on its negligence claim and it would be unreasonable for the City not to implement the change.

Accordingly, the court affirmed the district court's grant of summary judgment with regard to the Group's takings and interference claims, reversed the district court's grant of summary judgment with regard to the Group's negligence claim, and remanded for further proceedings.

Kelly Miller

WASHINGTON

Lummi Indian Nation v. State, 241 P.3d 1220 (Wash. 2010) (holding that statutory amendments to the state's water law act that alter the requirements for private water rights to vest do not facially violate due process or separation of powers).

To acquire water rights in Washington, a prospective user first must submit an application specifying a proposed beneficial use to the Department of Ecology ("Department"). If the Department determines the proposed use is beneficial and water is available, it issues a permit that quantifies the user's water right and identifies all permitted uses. This permit represents a conditional right that is perfected when the user applies the water to its designated beneficial use. If the user perfects the right with reasonable diligence, the Department issues a certificate relating back to the time of application. Since the 1950s, the Department and its predecessor quantified numerous certificates based on need and capacity rather than actual beneficial use, contrary to case law. In 1998, the Washington Supreme Court held in *Department of Ecology v. Theodoratus* that new private water rights do not fully vest until the water is put towards an actual beneficial use, not when the capacity to use the water was built. The court held that because the private developer in that case was not a municipal water supplier, his conditional water use permit should be quantified based on actual beneficial use, not capacity. The court

made clear that *Theodoratus* applied only to private water rights and did not extend to municipal water rights.

In 2003, in order to calm concerns in the wake of *Theodoratus* about current municipal water rights based on capacity, the legislature significantly amended the water law act ("2003 amendments"). In 2006, two groups of challengers argued that various sections of the 2003 amendments were unconstitutional. The trial court consolidated these cases and agreed that the challenged amendments violated separation of powers. The trial court did not address the substantive due process challenge to the provisions and rejected the facial procedural and substantive due process challenges. The court granted review on the motion of all parties.

Lummi Indian Nation made two facial separation of powers challenges to the 2003 amendments. It contended that the definition in the 2003 amendments of municipal water suppliers including private developers whose projects include more than fifteen houses violates separation of powers by overturning *Theodoratus*. According to Lummi Indian Nation, this definition is broad enough to include the private developer in that case. Lummi Indian Nation also contended that an amendment declaring certificates issued to municipal water suppliers under the capacity standard were in good standing also violated separation of powers. Lummi Indian Nation argued that this amendment vested water rights in municipalities that would not have vested under *Theodoratus*. The trial court held that the amendments violated separation of powers by making a legislative determination of adjudicative facts relating to the 'good standing' of certain water rights.

To resolve the separation of powers question, the court had to determine if the actions of one branch interfered with or undermined another branch. In general, the legislature violates separation of powers whenever it adjudicates facts and makes a legal conclusion. For example, retroactive legislation that interferes with vested rights established by judicial rulings may violate separation of powers. Under this standard, however, the court found no facial violation of separation of powers created by these amendments. The court overruled the trial court and held that the legislature did not adjudicate facts. Rather, the court held that the amendment simply confirmed that the water certificates issued under the pipe and pump standard before *Theodoratus* continued to be valid and that *Theodoratus* did not divest any rights.

Lummi Indian Nation also made several facial due process challenges to the 2003 amendments. One of these challenges was based on a likely detrimental effect on any junior water rights holder whose rights vested between *Theodoratus* and the 2003 amendments. Lummi Indian Nation claimed that the 2003 amendments improperly expanded water rights held by municipalities by "resurrecting" certificates issued before *Theodoratus* based on capacity.

The court recognized that vested water rights cannot be deprived

without due process of law. However, the court also noted that junior water rights holders take their water subject to senior rights. Therefore, junior water rights holders are subject to the risk there will not be enough water to fulfill their rights. The court held that the amendments did not facially violate due process despite the increased probability of injury to a group of hypothetical water rights holders.

Lummi Indian Nation also contended that one of the 2003 amendments was facially unconstitutional because it allowed for municipal water users to change the place of use with approval from the Department of Health or local legislative body. The Department of Ecology must approve changes in place of use for non-municipal users. Lummi Indian Nation argued that this might allow municipal users to change their place of use to the detriment of other water rights holders without proper notice or an opportunity to comment. However, the court rejected this argument because it felt Washington law provides those who hold water rights sufficient process. The court reasoned that any impact on the rights of others would be collateral and indirect, that the provision applies prospectively, and that it would deal with any injuries on a case-by-case basis.

Finally, Lummi Indian Nation argued that two of the amendments allowing municipalities to increase the population served did not provide other water rights holders sufficient notice and an opportunity to comment. The court held that these provisions do not violate due process because they only apply to future applications and integrate the provisions into the current regulatory system. Furthermore, municipalities were never limited to a maximum number of clients prior to the 2003 amendments, and their plans are reviewable by the Department of Health.

The court overruled the trial court's determination that the amendments violated separation of powers because they overruled *Theodoratus* and affirmed the rejection of the other constitutional challenges. However, the court emphasized its ruling on these facial challenges does not foreclose an as applied challenge in the future.

John Lahner