

**American Bar Association
Section of Environment, Energy, and Resources**

**41st Annual Conference on Environmental Law
Salt Lake City, Utah
March 22-24, 2012**

***Lummi v. State: Washington State Moves Toward a
Balanced Growing Communities Doctrine***

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I. Abstract

The Washington State Supreme Court's decision in *Lummi Indian Nation v. State of Washington*, 170 Wash.2d 247, 241 P.3d 1220 (2010), brings closure to a chapter in the state's municipal water story. The chapter begins in the mid-1990s with administrative regulatory efforts and the State Supreme Court's decision in *Dept. of Ecology v. Theodoratus*, 135 Wash.2d 582, 957 P.2d 1241 (1998). Although *Theodoratus* involved an appeal by a developer-owned water system, the decision cast a pall over municipal water rights status generally and highlighted inconsistent agency practice and the growing disconnect between the water rights code and other statutes regarding drinking water and growth management. In 2003, the legislature responded by adopting the Municipal Water Law ("MWL").¹ The MWL enacted provisions to provide certainty and flexibility for municipal water rights and required water conservation and efficiency measures. Two groups of plaintiffs facially challenged several MWL provisions under separation of powers and due process theories. In *Lummi*, the Court unanimously rejected the facial constitutional claims, but left the door open to future as-applied challenges. As the next chapter of the municipal water story begins with MWL implementation, Washington can be said to have embraced a balanced version of the "growing communities doctrine."

¹ Washington Laws of 2003, 1st Sp. Sess., Ch. 5 (Second Engrossed Second Substitute House Bill 1338).

II. The Growing Communities Doctrine

The “growing communities doctrine” refers to a loose set of principles that accord cities and other public water providers unique status within the prior appropriation water rights system that prevails across the western states. In general, the prior appropriation doctrine holds that vested (or “perfected”) water rights arise from actual beneficial use of water within a reasonable time and are subject to “first in time, first in right” and “use it or lose it” rules. *See e.g., Dept of Ecology v. Acquavella*, 131 Wash.2d 746, 935 P.2d 595 (1997); Rev. Code Wash. § (“RCW”) 90.03.010 (2012). The numerous policy reasons supporting the growing communities doctrine include the need for municipal water suppliers to engage in long term planning and project development; stability of property rights needed for financing; and the fact that municipal water suppliers do not entirely control water usage and, as public utilities, respond to customer needs and the pace of community growth.

One commentator describes the growing communities doctrine as a “subset” of the prior appropriation doctrine. Janis E. Carpenter, *WATER FOR GROWING COMMUNITIES: REFINING TRADITION IN THE PACIFIC NORTHWEST*, Northwest Water Law and Policy Project (1996), at 12. Two common themes in the northwest states are observed. First, the growing communities doctrine gives municipal water suppliers a longer period of time to perfect their water rights. Second, municipal water rights are usually exempted from loss for non-use of water. *Id.* at 13.

The genesis of the doctrine is traced to early 20th century western water law decisions that recognized the need for flexibility in municipal water planning and that did not find conflict with the traditional rule of perfecting water rights within a “reasonable time.” A 1913 federal court decision out of Idaho rejected the argument that it was against public policy for a city to appropriate more water than needed to supply the immediate needs of the city. *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913), *aff’d* 214 F. 214 (9th Cir. 1914). Specifically, the court stated that the reasonable time rule “should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality.” *Id.* at 80. A year later, the Supreme Court of Wyoming echoed this sentiment by holding that a city is not limited in the amount of its appropriation to the needs of its citizens at the time of an adjudication. *Holt v. City of Cheyenne*, 137 P. 876, 880 (Wyo. 1914). In perhaps the leading case, the Supreme Court of Colorado explained that “it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable time period.” *City & County of Denver v. Sheriff*, 96 P.2d 836, 839 (Colo. 1939).

No Washington court decision has expressly adopted the growing communities doctrine. However, the dissent in *Theodoratus* argued for the court to adopt an aggressive version of the growing communities doctrine. “Under the ‘growing communities doctrine’ a community may perfect a water right in the amount of water it reasonably anticipates it will need to ensure water for future growth.” *Theodoratus*, 957 P.2d at 1258 (Sanders, J., dissenting). “It allows communities to secure a source of water to meet growing needs. It also allows a community to construct a properly scaled water system at the start rather than constantly expanding the system on a piece-meal basis to meet growing population.” *Id.* The majority opinion in *Theodoratus*, however, sparked a legislative debate that resulted in the 2003 passage of the MWL.

III. State Administrative Practice & the *Theodoratus* Controversy

Washington has historically treated water utilities differently than other water rights holders because of their unique need to serve fluctuating populations and plan for growth. For

example, municipal water rights are exempt from statutory relinquishment that generally applies to water rights not used, in whole or in part, for five consecutive years.² Compared with other types of uses where water needs are controlled by the owner, a water utility responds to the dynamic demand of the community and to population and economic growth. Accordingly, since 1967 water rights that are “claimed for municipal water supply purposes” have been exempt from relinquishment. RCW 90.14.140(2)(d). Because the term “municipal water supply purposes” was not defined, uncertainty arose as to the types of water rights it covered.

In the administrative arena, for several decades the Department of Ecology implemented a water rights permitting policy for water utilities that became known as the “pumps and pipes” policy. Typically, to acquire a new water right, the agency issues a permit specifying the amount of water that can be used and the “beneficial use” to which the water may be applied. RCW 90.03.290(1). A water right permit is only an inchoate, or incomplete, right that must be developed and becomes perfected, or vested, when the water is put to actual use, and a water right certificate is then issued. RCW 90.03.330. By contrast, the Department of Ecology often issued certificates under the pumps and pipes policy when the utility demonstrated built capacity of a water system in recognition that water utilities typically planned to serve population growth over several decades.

This approach was good public policy because it allowed water utilities to securely invest in infrastructure and land use jurisdictions to plan for growth based on water system capacity. However, the pumps and pipes policy departed from statute, and by the mid-1990s inconsistencies and concerns had reached a critical point. As the Court put it in *Lummi*, “[u]neasiness developed among Washington’s water users as different administrations of the Department of Ecology dealt differently with application of the statutory term ‘beneficial use.’ The tension between the application of the ‘beneficial use’ and the ‘pumps and pipes’ capacity standards came to a head with this court’s decision in *Theodoratus*[.]” *Lummi*, 241 P.3d at 1225.

Although *Theodoratus* concerned a water right permit for a private development, the decision became the driver of municipal water policy debate that led to the MWL. Mr. Theodoratus held a water right permit for a 253-lot residential development. His project limped along for decades and asked for several extensions of time. On the last permit extension, the Department of Ecology imposed a condition that the water right would not vest and a certificate would not issue until the water was put to actual beneficial use. Theodoratus appealed this condition and argued that system capacity should be the proper measure of his vested water right. He argued that his proposal was akin to a public water system that required special treatment.

The Washington Supreme Court rejected Theodoratus’ argument and upheld the permit condition requiring actual beneficial use. While the Court agreed that the “statutory scheme allows for differences between municipal and other water uses,” it noted that he was a private developer, not a municipality, and that his system would serve a finite number of residents, instead of the ever-growing number of residents a municipal system would serve. *Theodoratus*, 957 P.2d at 1247. With respect to the pumps and pipes policy, the Court held that water rights perfect upon putting water to actual beneficial use, not system capacity. Therefore, the Department of Ecology’s policy to issue certificates based on system capacity was unlawful.

² RCW 90.14.160–.180. However, a municipal water right may be lost through common law abandonment, which requires a long period of non-use and intent to abandon. *Okanogan Wilderness League v. Twisp*, 133 Wash.2d 769, 947 P.2d 732 (1997).

Even though *Theodoratus* explicitly “decline[d] to address issues concerning municipal water suppliers,” the decision prompted questions as to the status and validity of the thousands of water rights certificates previously issued to water utilities under the pumps and pipes policy. *Id.* A draft administrative policy proposed to extend the agency’s interpretation of *Theodoratus* to previously issued pumps and pipes certificates. The draft policy opined that those certificates were no longer valid and proposed a range of corrective actions. Although the draft policy was never adopted, it stoked controversy, and the level of uncertainty relating to municipal water rights interfered with growth management and land use planning, provision of water service to new areas, and coordination of water system functions.

IV. The 2003 Municipal Water Law (“MWL”)

The legislature responded to the uncertainties by enacting the MWL. The MWL is a complex enactment that includes several new sections of law and amendments to existing water rights and public water system statutes. The MWL was a legislative compromise with a dual purpose -- certainty and flexibility of municipal water rights and increased conservation and efficiency of use. The bill title reflects the twin policy objectives and the range of statutes affected.

AN ACT Relating to certainty and flexibility of municipal water rights and efficient use of water; amending RCW 90.03.015, 90.03.260, 90.03.386, 90.03.330, 90.48.495, 90.48.112, 90.46.120, and 70.119A.110; adding new sections to chapter 90.03 RCW; adding a new section to chapter 70.119A RCW; adding a new section to chapter 43.20 RCW; adding a new section to chapter 90.82 RCW; adding a new section to chapter 90.54 RCW.³

While the MWL contains numerous provisions affecting municipal water, the controversy and ensuing litigation centered on three sections in the MWL – the definition of municipal water rights, provisions to clarify the status of existing water certificates, and a fix to a place of use / service area disconnection.

A. Definition of "municipal water supply purposes."

For the first time in Washington statutes, the MWL defined “municipal water supplier” and “municipal water supply purposes” (together the “Definitions”). RCW 90.03.015(3)-(4). The legislature had used the undefined term “municipal water supply purposes” in 1967 when enacting the state’s relinquishment law. Within the MWL, the Definitions function as terms of art that trigger various water right benefits and water system planning and service duties.

In the debate leading up to passage of the MWL, two approaches to the Definitions competed. One school of thought held that a municipal water definition should depend on the nature of the entity, *i.e.*, that all of the water rights held by cities or towns, for example, should qualify but no others. In contrast, others argued for a function test that turned on the nature of the public water service provided. Washington features an array of private, cooperative, and other non-governmental entities that serve as public water utilities. The MWL combines the entity and function approaches in a long and complex definition of municipal water supply purposes.

"Municipal water supply purposes" means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for

³ Washington Laws of 2003, 1st Sp. Sess., Ch. 5 (Second Engrossed Second Substitute House Bill 1338).

providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes. If a governmental entity holds a water right that is for the purposes listed in (a), (b), or (c) of this subsection, its use of water or its delivery of water for any other beneficial use generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes.

RCW 90.03.015(4). Note that non-governmental and private water systems serving 15 or more residential connections are included in the definition.

B. Status of “pumps and pipes” certificates.

The MWL contains three provisions intended to resolve the uncertainty created by *Theodoratus* regarding pumps and pipes certificates. First, the legislature prospectively codified *Theodoratus*'s central holding by requiring Ecology to issue a new certificate only upon “actual beneficial use.” RCW 90.03.330(4). Second, the legislature limited the agency’s authority. With exceptions for a change or transfer application, general stream adjudication, or instances of misrepresentation, the agency “shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes.” RCW 90.03.330(2). Third, the legislature declared that existing pumps and pipes certificates are valid water appropriations.

This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

RCW 90.03.330(3) (emphasis added). Much of the *Lummi* litigation concerned the meaning and effect of the “right in good standing” phrase. To water utilities, the phrase clearly invoked the passage from the Hutchins treatise that the Supreme Court had quoted in *Theodoratus*.

C. Place of use and utility service areas.

The MWL provided planning flexibility to municipal water suppliers, including the process for modification of place of use. Before the MWL, agencies or stakeholders had sometimes argued that a water utility that desired to change its service area (*e.g.*, in response to an annexation) needed to apply for a water right change of place of use. Over time, a disconnect

arose between water system planning statutes that governed utility service area and the water rights code. Moreover, the state's Growth Management Act, Ch. 36.70A RCW, generally requires utilities to serve population growth within a defined growth area, but that Act had not addressed water rights. The MWL defines a municipal water supplier's place of use to include the approved utility service area, as set forth in RCW 90.03.386(2):

The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20 RCW, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 70.116 RCW, is that the place of use of a surface water right or groundwater right used by the supplier includes any portion of the approved service area that was not previously within the place of use for the water right if the supplier is in compliance with the terms of the water system plan or small water system management program, including those regarding water conservation, and the alteration of the place of use is not inconsistent, regarding an area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter 36.70A RCW; any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county; or any watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after September 9, 2003, if such a watershed plan has been approved for the area.

Also, the MWL clarified the legal significance of population and connection figures that are typically collected in a water right application. While many had argued that the water rights were limited to the amount necessary to serve the projected population provided in a public water supplier's application, the MWL clarifies that water rights are not limited to the number of connections or population figures as long as the quantity is consistent with an approved water system plan and/or approved number of service connections. RCW 90.03.260(4) and (5).

D. Water conservation and efficiency and duty to serve.

The MWL contains several provisions intended to strike a balance with the statutory amendments providing water rights certainty and flexibility, including the following. None of these provisions was challenged by the Plaintiffs or analyzed in *Lummi*; however, they must be considered in any evaluation of the MWL's overall effect on urban development, water resources management, and impact on other water rights and stream conditions.

- The MWL requires water conservation and efficiency. The Department of Health is directed to “establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability.” RCW 70.119A.180. Water use efficiency includes conservation planning requirements, water distribution system leakage standards, and water conservation performance reporting requirements. *Id.*; See Wash. Admin. Code § 246-290-800 *et seq.*
- A municipal water supplier “must implement cost-effective water conservation” as part of its approved water system plan. RCW 90.03.386(3).
- A municipal water supplier can only expand its water right's place of use (through the water system planning process) if it is in compliance with the terms its water system plan

(including water conservation requirements) and with local comprehensive plans and development regulations. RCW 90.03.386(2).

- Ecology shall require sewer plans to include a discussion of water conservation measures that would reduce flows to the sewerage system and an analysis of their anticipated impact on public sewer service and treatment capacity. RCW 90.48.495
- A municipal water supplier has a “duty to provide retail water service within its retail service area” to all new connections if 1) service can be provided in a “timely and reasonable” manner, 2) the supplier has sufficient water rights, 3) the supplier has sufficient system capacity, and 4) the service request is consistent with local comprehensive plans and development regulations. RCW 43.20.260.

V. Facial Constitutional Challenge to the MWL & Trial Court Decision.

In separate complaints that were consolidated into a single case by the trial court, two groups of plaintiffs (collectively, “Plaintiffs”) challenged the facial constitutionality of eight sections of the MWL.⁴ The Plaintiffs consisted of Indian tribes, environmental groups, individual water right holders, and a commercial fisherman. The Plaintiffs brought the actions as “taxpayers” and asserted taxpayer standing. The trial court granted defendant-intervenor status to Washington State University, the Cascade Water Alliance, and the Washington Water Utilities Council, an association whose members collectively supply drinking water to approximately 80 percent of the state’s population.⁵

The Plaintiffs alleged that certain provisions of the MWL facially violated three constitutional doctrines: (1) the separation of powers doctrine by contravening *Theodoratus*; (2) substantive due process under the Washington and federal constitutions because it retroactively expanded senior water rights at the expense of junior water rights holders; and (3) procedural due process under the Washington and federal constitutions because some senior water rights could be expanded at the expense of a junior water rights holder without notice or an opportunity to be heard. Plaintiffs’ claims were predominantly based on an interpretation of *Theodoratus* that highly limited the legislature’s discretion to act on the subject.

On cross motions for summary judgment, the trial court agreed with the Plaintiffs that certain provisions of the MWL violated the separation of powers doctrine, but agreed with the defendants that the remaining provisions did not suffer from substantive or procedural due process flaws.⁶ The trial court ruled that the MWL’s Definitions and RCW 90.03.330(3) violated the separation of powers doctrine by attempting to overrule the Supreme Court’s interpretation of the water code in *Theodoratus*. In the alternative, the trial court concluded that the legislature made an unconstitutional conclusion of adjudicative facts by declaring that a pumps and pipes certificate is a “right in good standing.” Because the trial court decided the challenges to the Definitions and RCW 90.03.330(3) on separation of powers grounds, the trial court declined to rule on the substantive due process claims pertaining to those provisions. All parties successfully applied for direct appellate review from the Washington State Supreme Court.

⁴ As codified, RCW 90.03.015(3); RCW 90.03.015(4); RCW 90.03.330(2); RCW 90.03.330(3); RCW 90.03.560; RCW 90.03.260(4); RCW 90.03.260(5); and RCW 90.03.386(2).

⁵ The author represented the Washington Water Utilities Council throughout the *Lummi* litigation.

⁶ Order on Summary Judgment (King County Superior Court No. 06-2-40103-4 SEA, June 11, 2008).

VI. Supreme Court Unanimously Upholds MWL

In a 9-0 opinion, the Washington State Supreme Court held in *Lummi* that the MWL does not violate separation of powers or facially violate procedural and substantive due process. The Court reversed the trial court's separation of powers rulings as to the Definitions and RCW 90.03.330(3) and affirmed the rest of the trial court decision. In sum, *Lummi* rejects all of Plaintiffs' facial constitutional challenges. The Court flatly rejected due process challenges based on the mere possibility of injury to unknown and hypothetical rights. In the same breath, however, the Court left the door open for "as applied" challenges based on a specific set of facts.

At the outset of its analysis, the Court highlighted the difference between a "facial" and an "as applied" constitutional challenge:

An "as applied" challenge occurs where a plaintiff contends that a statute's application in the context of the plaintiff's actions or proposed actions is unconstitutional. If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. A statute is rendered completely inoperative if it is declared facially unconstitutional. However, a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied.

Lummi, 241 P.3d at 1227. The Court noted that many of the Plaintiffs' arguments "might be better raised in an 'as applied' challenge." *Id.* Thus, *Lummi* stands for the broad proposition that a party raising a facial constitutional challenge in Washington courts must show that there is "no set of circumstances" under which the law can be applied constitutionally.⁷

Before *Lummi*, some questioned the proper standard for a facial constitutional challenge under Washington law.⁸ Federal courts have not uniformly applied the "no set of circumstances" standard, instead choosing to apply a less rigorous standard for certain facial constitutional claims such as challenges to abortion regulations.⁹ Although most Washington cases have applied the "no set of circumstances" standard,¹⁰ one decision declined to apply the test to facial challenges brought by those with taxpayer standing.¹¹ Some of the *Lummi* Plaintiffs unsuccessfully argued that as taxpayers they were similarly entitled to a less onerous standard. Interestingly, the Court did not comment on the taxpayer aspect of the challenges.

Applying the "no set of circumstances" test, the Court found that the Plaintiffs failed to carry their burden for each of their three facial constitutional claims. The Court generally found that any harm to the Plaintiffs was simply too speculative to meet the standard. The Court did allow Plaintiffs' proffered evidence of illustrative examples of water rights impairment, but the Court concluded that, at best, the Plaintiffs' theories could only demonstrate that the MWL might harm some rights under some circumstances. *Lummi*, 241 P.3d at 1231-1232. Moreover, because the MWL regulates municipal water suppliers, any harm to the Plaintiffs is too indirect and remote to support a facial challenge.

⁷ Articulated in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

⁸ See *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000) (listing state and federal court decisions declining to apply "no set of circumstances" test).

⁹ See, e.g., *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1457 (8th Cir. 1995).

¹⁰ See, e.g., *City of Redmond v. Moore*, 151 Wash.2d 664, 91 P.3d 875 (2004).

¹¹ *Robinson*, 102 Wn. App. at 806.

A. Plaintiffs' facial separation of powers claims.

The Court rejected the Plaintiffs' arguments that the Definitions and the "right in good standing" language violated the separation of powers doctrine. Plaintiffs' separation of powers claim was based on their view that the MWL retroactively overruled *Theodoratus*. According to the Plaintiffs, *Theodoratus* held that all previously issued pumps and pipes certificates are void and private water systems could not be "municipal water suppliers." Because the Definitions encompass private systems that serve 15 residences or more, the Plaintiffs contended that *Theodoratus* himself would now be considered a municipal water supplier. Moreover, the Plaintiffs read the MWL to overrule *Theodoratus* on grounds that it retroactively expanded municipal water rights by "resurrecting" pumps and pipes certificates issued before *Theodoratus*. *Lummi*, 241 P.3d at 1232.

The Court disagreed that *Theodoratus* reached those issues or otherwise limited the legislature's ability to make policy decisions and resolve uncertainty in the wake of its decision. The Court held that the legislature had not violated separation of powers because it had not threatened "the independence or integrity or invade[d] the prerogatives of" the judicial branch by upsetting prior judicial decisions. *Id.* at 1229. To the contrary, the Court observed that "[t]he Legislature approached its legislative task both thoughtfully and with deference to this court's construction in *Theodoratus*." *Id.* The Court further held that the MWL's retroactive application is constitutionally justified as a "legislative refinement in the face of changing conditions." *Id.* The legislature may enact a retroactive law to cure or clarify ambiguous or confusing law, as was the state of municipal water law after *Theodoratus*.

Similarly, the Court also disagreed with the trial court's alternative holding that the "right in good standing" provision in RCW 90.03.330(3) is a legislative determination of adjudicative facts. The Court noted that the Plaintiffs' claim relied on a contested interpretation of the operation of the statute. The Plaintiffs posited that *Theodoratus* had invalidated scores of pumps and pipes certificates and the legislature resuscitated them through the MWL. The Court disagreed that the legislature engaged in any adjudication of facts. "Confirming existing rights was a legislative policy decision, not a factual adjudication." *Id.* at 1230.

B. Plaintiffs' facial substantive due process claims.

Because Plaintiffs' substantive due process claims were also largely based on their broad interpretation of *Theodoratus*, the Court rejected their substantive due process claims on similar grounds. The Plaintiffs theorized that the MWL retroactively impacted junior water rights because various provisions retroactively changed the law, thereby expanding or strengthening some water rights at the expense of others. Plaintiffs' claims were based on a fundamental characterization of water rights as pieces in a jigsaw puzzle or a zero sum game, where one right's gain is another right's loss.

For example, the Plaintiffs argued that the definition of "municipal water supply purposes" would retroactively widen the class of municipal water providers to include water systems (such as private systems) that previously might not have been defined as such. Because municipal water rights enjoy exemption from relinquishment, the Plaintiffs argued that the MWL might protect the rights of an entity that might not have previously been considered a "municipal water supplier" if that entity held rights that were subject to relinquishment due to non-use predating the adoption of the MWL. Similarly, the Plaintiffs alleged that the MWL restored pumps and pipes certificates invalidated by *Theodoratus*, effectively impairing other water rights.

The Plaintiffs argued that these gains to municipal water suppliers must, on their face, equal a loss to other water rights.

The Court rejected the Plaintiffs' substantive due process theory for two reasons. First, Plaintiffs' concerns were speculative and hypothetical. The Court noted that "the challengers have cited no case and we have found none, where mere potential impairment of some hypothetical person's enjoyment of a right has been held to be sufficient for a successful facial due process challenge." *Lummi*, 241 P.3d at 1231. Second, the Court rejected Plaintiffs' broad characterization of *Theodoratus* and the operation of the challenged MWL provisions: "There was no party before the Court [in *Theodoratus*] with a perfected right under challenge, and thus we had no occasion to consider whether an erroneously perfected right would be invalidated by the department's mistaken practice." *Id.* at 1232. Thus, the Definitions and the "right in good standing" policy declaration do not by themselves resurrect any relinquished rights to the detriment of vested rights.

Finally, the Court distinguished cases from other states relied on by the Plaintiffs. Plaintiffs relied heavily on *San Carlos Apache Tribe v. Super. Ct. ex rel. County of Maricopa*, 193 Ariz. 195, 972 P.2d 179 (1999), for the proposition that the legislature could not amend water statutes that had been judicially interpreted, particularly where the amendments could have retroactive effect like the MWL. The Court distinguished the Arizona legislation considered in *San Carlos* as a "statute that by its plain terms applied to perfected rights, changed the actual priorities of various rights holders, eliminated judicial review of certain factual findings in adjudications[.]" *Lummi*, 241 P.3d at 1232. In contrast, the MWL amendments at issue "may impact the enjoyment of water rights by some junior water rights holders, but do not by their terms change the legal right or prioritization of water rights holders." *Id.* In short, *San Carlos* concerned statutory amendments that changed the outcome for specific water rights that had been adjudicated, whereas the MWL clarified ambiguous law and made policy declarations in advance of adjudication or judicial determination of specific water rights.

C. Plaintiffs' facial procedural due process claims.

Similarly, the Court rejected the Plaintiffs' procedural due process claims, which centered on RCW 90.03.386(2), the MWL provision that aligns water rights place of use and utility service area (discussed and set forth in section IV(C) above). Plaintiffs argued that this provision of the MWL effectively exempts municipal water suppliers from the procedures under water change and transfer statutes designed to protect other water rights from injury. A proposed change in water rights place of use typically requires publication of notice and a protest period. The Plaintiffs' asserted that RCW 90.03.386(2) allows place of use to be changed through the Department of Health water system planning process, which does not include notice to other water right holders notice and an opportunity to be heard. Plaintiffs further argued that changes in a place of use would negatively impact junior water right holders by affecting the pattern of return flows that both senior and junior water rights holders rely on. Rejecting these arguments in the facial context, the Court concluded that RCW 90.03.386(2) met the constitutional standard. Any impact to the rights of others, from return flows or otherwise, that might arise from a municipality changing its place of use is collateral and indirect. Washington law still gives "considerable process" before any change of use can be made and returned to the conclusion that any alleged impairment would be best addressed on "a case by case basis." *Lummi*, 241 P.3d at 1233. Broadly viewed, *Lummi* signals problems for a procedural due process plaintiff who complains of a governmental process that directly applies to the rights of others with only a potential indirect impact on the plaintiff's rights.