Supreme Court Upholds Constitutionality of Municipal Water Law (Again)

In what appears to have been an agonizing 6-3 decision by the Washington Supreme Court (it took over 20 months to issue a decision after oral argument), the municipal water law of 2003 (MWL)[i] has been upheld against an as-applied constitutional challenge. The new decision in *Cornelius v. Ecology*[ii] resolves substantial uncertainty about the legal effect of the MWL as applied to water rights that meet the MWL's statutory definition of "municipal water supply purposes" but were issued prior to 2003 with a "domestic" or "community domestic" purpose of use.

Appellant Scott Cornelius and others challenged decisions by the Department of Ecology approving several water right change applications by Washington State University, contending that most of WSU's water rights were relinquished for nonuse prior to the MWL, and that "resurrection" of these relinquished rights violated separation of powers and due process. This was the first "as-applied" challenge to the MWL after the Supreme Court upheld the MWL against facial constitutional challenges in *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010).

The key distinction between Justice Owens' majority opinion and Chief Justice Madsen's dissent is in their characterization of the nature of the problem resolved by the legislature in 2003, and the constitutionality of applying that resolution retroactively. To understand this distinction, it is necessary to review the history of water rights relinquishment law and the case that led to the MWL, *Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Washington's water laws are based on the prior appropriation doctrine -- "first in time is first in right." This system focuses on the beneficial use of water as the measure of a water right and the means of perfecting those rights. However, many decades ago Ecology and its predecessor agency issued permits and certificates based on a user's need and capacity rather than on actual beneficial use. This capacity approach, called "pumps and pipes," was rejected by the Supreme Court in *Theodoratus* as the basis for perfecting a water right.[iii] The Court, however, stated that its decision did not involve "municipal water suppliers, which are treated differently under the statutory scheme. In 1967, the legislature adopted statutory relinquishment for nonuse of water without legal excuse for a period of five consecutive years. RCW 90.14.130 et seq. Water rights that are "claimed for a municipal water supply purpose" are exempt from statutory relinquishment. However, despite the importance of this distinction between "municipal" and other purposes, the statutes did not define who qualified as a "municipal water supplier" or which uses qualified as "municipal water supply purposes." This ambiguity particularly impacted water systems not owned by cities but that functioned liked municipal water systems, such as those owned by universities, water districts, public utility districts, cooperatives and homeowners associations, and privately-owned and regulated water service companies.

The uncertainty after *Theodoratus* concerning the validity of "pumps and pipes" certificates and relinquishment led to the legislature's adoption of the MWL, which defined "municipal water supplier" and "municipal water supply purposes" and declared that water right certificates issued prior to September 8, 2003 for "municipal water supply purposes" based on system capacity were in good standing. The constitutionality of these provisions and others were challenged in *Lummi Indian Nation*. While the Court held in that case that the MWL did not facially violate separation of powers or due

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process, it left for another day whether the MWL would violate these constitutional provisions "as-applied" to the facts in a particular case. That case was *Cornelius*, which brings me back to the key distinction between the majority and dissenting opinions.

Justice Owens' majority opinion concluded that the meaning of "municipal" in the context of water rights purpose of use and relinquishment was undefined and ambiguous prior to the 2003 MWL and constituted a "labeling problem" that the legislature sought to resolve in passing the MWL. She noted that prior to 1967, for instance, Ecology did not have a reason to be precise about distinguishing municipal and domestic uses, and could have issued domestic supply certificates to entities that functioned as municipal and vice versa, a situation that it recognized in the record relating to WSU. The majority refused to elevate "form over substance" and held that under the MWL, WSU is deemed to have always been a municipal water supplier. That construction of the MWL's problem and solution led directly to the majority's conclusion that separation of powers was not violated because it did not upset any adjudicated facts (there had been no finding prior to the MWL that WSU's water rights were non-municipal or relinquished for nonuse). Similarly, the majority concluded that Cornelius's due process rights were not violated because the MWL did not "resurrect" any senior water rights. Because WSU's water rights were always "municipal" despite their label, they were always in good standing and the retroactive application of the MWL did not alter their status or priority compared to Cornelius's junior water rights.

Chief Justice Madsen's dissent did not recognize the existence of the same definitional ambiguity prior to the MWL, and would have found WSU's rights already relinquished by nonuse because they were domestic, not municipal. That distinction is key because all of Cornelius's constitutional claims stem from the concept that the MWL changed the status of WSU's water rights from relinquished and invalid domestic rights to municipal rights in good standing. If the dissent had prevailed, the MWL as applied to the facts of the case would have violated separation of powers by retroactively altering the legal status of a water right, and would have violated Cornelius's due process rights by resurrecting a senior water right with priority over Cornelius's junior water right in a water-short basin.

The majority decision in *Cornelius* resolves a state-wide uncertainty affecting an unknown number of water rights issued prior to the MWL which meet the "municipal water supply purposes" definition, but which may have experienced a five-year or more nonuse period prior to 2003. Such water rights can now be categorized as municipal and exempt from statutory relinquishment, with the result that communities dependent on such rights can rely on them for future growth (subject, of course, to availability and senior water rights).

Please call Tom Pors at (206) 357-8570 if you have any questions about the *Cornelius* case or municipal water rights in general. He can assess the scope, validity, and flexibility of your municipal water rights portfolio in light of the MWL and *Cornelius* decision.

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[i] Laws of 2003, 1st Spec. Sess., ch. 5. (2E2SHB 1338).

[ii] *Cornelius v. Wash. Dept. of Ecology, Wash. State Univ., and Wash. Pol. Ctrl. Hearings Bd.*, Case No. 88317-3 (2015).

[iii] Theodoratus was the developer of a subdivision and private water system who contested an Ecology condition on approval of an extension to his water right permit that would measure his water right based on actual beneficial use rather than the capacity of his water system. The Court upheld the condition as the proper basis for certifying water rights.