Washington: Update on the Municipal Water Law Case

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Overview

- History of the Washington Municipal Water Law (MWL)
- Key elements of the Muni Water Law
- Challenges to the MWL
- What did utilities do?
- Supreme Court decision
- What can we expect?

History of Washington MWL

- Western Water Law Appropriation Doctrine
- 1917 Water Code – Surface Water
- 1930-90 Historical granting of certificates to munis based on pumps and pipes capacity (10,000 rights)
- 1998 Theodoratus Case
  - A private developer (non-muni)
  - Certificates should be based on beneficial use
- 2003 Muni Water Law (MWL) passed
- 2006 Lawsuit filed against MWL
- 2006 Utilities intervened in lawsuit

"The certainty of misery is better than the misery of uncertainty."

2003 Municipal Water Law

<u>Legislative quid pro quo:</u>

- More water rights flexibility and certainty
- Water conservation and efficiency requirements

Key Elements of the MWL

- Primary purpose: To clarify existing water code (law)
- Definition of municipal water supplier
- Establish place of use = service area consistency
- Confirm existing muni certificates – Pumps & pipes
- Water use efficiency (Conservation)
- Departments of Health and Ecology share jurisdiction

MWL Definitions

Municipal Water Supplier (Muni)

- Used for “municipal water supply purposes”
  - By a city, county, or water or public utility district, or
  - Residential = 15+ connections by any entity

Municipal Water Supply Purposes

- Residential
- Commercial & Industrial
- Irrigation of parks and open spaces
- Institutional
- Landscaping
- Fire flow
- Water system maintenance and repair
- Related purposes that:
  - Benefit fish and wildlife, water quality
  - Implement environmental obligations in a watershed plan, HCP, FERC license

Population

- Munis are NOT limited by population or connections on water right document
- Population to be served must be consistent with municipal water suppliers "Water System Plan"

Place of Use

- DOE/DOH coordination of service area
- Place of Use = Service Area (IF consistent with land use plans or watershed plans)
- Identify in munis Water System Plan
- Implement cost effective conservation

Local Planning Consistency

- DOH Water System Plan (WSP) approval ensures consistency with land use plans
- Muni has “duty” to serve within service area
- Subject to reasonableness standard

Certificates

- DOE may not revoke or diminish existing muni water right certificates
- Muni water right CERTIFICATE based on “Pumps and Pipes” is a right in “good standing”

Lummi v. State, 170 Wash.2d 247, 241 P.3d 1220 (2010)

Lummi Indian Nation; Makah Indian Tribe; Quinault Indian Nation; Squaxin Island Indian Tribe; Suquamish Indian Tribe; Tulalip Tribes; Joan Burlingame; Lee Bernheisel; Scott Cornelius; Peter Knutson; Puget Sound Harvesters; Washington Environmental Council; Sierra Club; The Center for Environmental Law and Policy

v.

State of Washington; Christine Gregoire; Washington Department of Ecology; Jay Manning; Washington Department of Health; Mary Selecky; Washington Water Utilities Council; Cascade Water Alliance; Washington State University

Plaintiffs Claims

- Provisions of MWL are unconstitutional
- Violates separation of powers (overrules Theodoratus)
- Violates due process
  - Includes private developer systems in definition
  - Eliminates beneficial use to perfect water
  - Change place of use without due process
  - Impairs vested property rights
  - Injures junior water right holders

Legal Challenge

- Filed on September 1, 2006
- Started in King County Superior court
- Ended up in Washington State Supreme Court in 2008
- Supreme Court decision issued October 2010

WWUC Involvement

- WWUC – Washington Water Utility Council , a subcommittee of the PNWS AWWA
- Intervened at outset of case in trial court
- Not amicus – a full party
- Participated throughout case

WWUC Involvement, cont.

- Assembled utility attorney team, joint defense agreement
- Advisory committee, research and drafting contributions
- Joint defense agreement with State for coordination purpose

Key Elements of Legal Challenge

- Definition of municipal water supplier
  - Concern about use of relinquished water (ghost towns)
- Pumps and pipes certificates in “Good Standing”
  - Overrules Theodoratus – Separation of powers
  - Eliminates beneficial use requirement
  - Retroactive expansion of water rights

Key Elements of Legal Challenge

- Place of Use = Service Area
  - Expands use of water rights
  - Avoids going through change process
- Population constraint removal
  - Expands use of water rights
  - Avoids going through change process

What did Plaintiffs Want

- Declare the muni parts of the law is unconstitutional
  - Keep the conservation portions
- Not allow state to implement or enforce these provisions

Utilities Case and Position

- Provide understanding of how municipal water suppliers operate
- Explain types of munis – Cities, Districts, PUDs, privates, mutuals, others
- Growing communities need to provide water
  - multiple water rights to get certainty
- Pumps and pipes certificates are not void and remain valid appropriations
- MWL does not retroactively harm other water rights

Supreme Court - *Lummi*

- Supreme Court ruled in favor of State and utilities on all issues
- Adopted our narrative
- Opinion is narrowly drafted

Supreme Court: Facial Challenge

- "No set of circumstances" test
- Facial challenge fails if there are "any circumstances" where a statute can apply constitutionally
- Decision limited to facial context
- "As applied" issues left for another day

Supreme Court: *Lummi* – Background

- Not clear until recently “what it took to perfect a water right”
- Ecology pumps and pipes practice was in tension with beneficial use standard
- Ecology approach different over time
- Came to a head in *Theodoratus*

Supreme Court: *Theodoratus* 1996 Decision

- Supreme Court concluded that Ecology "had not been following the statute when it vested water rights based on system capacity"
- Did not consider issues concerning municipal water suppliers
- Did not "automatically divest or invalidate any vested or perfected rights"
- *Theodoratus* caused concerns

Supreme Court: 2003 Municipal Water Law

- Legislature “responded to these uncertainties”
- “The legislation essentially put the legislature’s imprimatur on our holding in *Theodoratus* prospectively while confirming the good standing of water certificates issued under the former system.”

Supreme Court: Separation of Powers

- Legislature approached its “task both thoughtfully and with deference” to Court
- Adopted beneficial use as perfection standard
- Legislature did not apply law to an existing set of facts
- “Confirming existing rights was a legislative policy decision, not a factual adjudication.”

Supreme Court: Substantive Due Process

- "Some junior right holders will likely suffer" because of MWL
- But Plaintiffs' claim too speculative and hypothetical
- An "increased likelihood" or "mere potential" that impairment of unknown or hypothetical rights is insufficient to sustain a facial challenge
- Alleged harm to junior rights to be handled on case-by-case basis ("as applied")

Supreme Court: Procedural Due Process

- DOH or CWSP approval for service area – RCW 90.03.386(2)
- Connection and population numbers – RCW 90.03.260(4), (5)
- MWL provisions operate prospectively
- Do not take away others' rights – only collateral or indirect impact
- Any harm to be addressed on case-by-case basis

Going Forward

- What does “good standing” mean?
- Prospective / Retroactive
- “Active Compliance” & Ecology review of policy statement
- As applied challenges – Court said 4 times it was not precluding
- Plaintiffs next steps

“Active Compliance” Issue

- Ecology reads definition to require active use to be “minor”
- Effect is to require use to qualify for relinquishment exclusion
- Illegal and unnecessary
- Utilities strenuously object

Questions