

Municipal Water Law Springs a Leak

By Jeff Kray, Marten Law Group PLLC

In a blow to Washington water supply planning, King County Superior Court Judge Jim Rogers has invalidated portions of Washington's highly contentious Municipal Water Law.

The MWL was enacted as a compromise between municipal and other water users, but the future of that compromise is now uncertain.

The June 11 ruling decided a pair of lawsuits that environmental groups, small-boat fishermen, individuals, and tribes filed against the state in late 2006: Lummi Indian Nation v. State of Washington, and Burlingame v. State of Washington, each alleging that the law was unconstitutional.

The Washington Water Utilities Council, an association of more than 100 water utilities (including 19 water-service public utility districts), which collectively serve approximately 80 percent of the state's population, intervened in the suits as a defendant.

The case came down to complex legal arguments that would generally only interest water law experts, but the ruling will have significant impact on PUDs and other municipal water rights holders, water conservation, and future water availability.

The practical result is that until the courts fully resolve the MWL's meaning, Washington Public Utility District Association members and other parties will once again have difficulty ascertaining the extent and availability of their water rights for various purposes.

The trial court ruled that the Legislature violated the state constitution by including private developers in the definition of "municipal water supplier" that is a key part of the MWL.

Unlike other types of water rights—such as those used for agricultural irrigation or industrial purposes—municipal water rights are protected from being relinquished, or forfeited, back to the state if they are not used for five years. This protection allows municipal utilities to meet community needs as they change and grow over time.

For the first time in state law, the MWL defined which types of water systems qualify as municipal water suppliers and extended this definition to include privately owned systems serving at least 15 residential connections, which can include developer-built systems for residential subdivisions.

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MWL that allowed developers to hold final, "certificated" rights for water they have not yet put to use. These "inchoate" water rights had been routinely granted by the state on the basis of a water system's capacity to withdraw and distribute water—based on a system's "pumps and pipes"—without the water being put to actual use.

Rogers ruled unconstitutional that part of the MWL that protected as "rights in good standing" the certificated municipal water rights for unused, inchoate amounts of water that were granted to utilities before the MWL took effect in 2003.

The Legislature enacted this part of the MWL in response to a 1998 Washington Supreme Court decision, *Theodoratus v. Ecology*, which held that state law did not allow the Department of Ecology to grant water rights based on water system capacity. But Rogers said the Legislature's actions were unconstitutional because they violated

the separation of powers between the courts and the Legislature.

In addition to responding to the Theodoratus decision, the Legislature passed the MWL to address several issues that municipal water suppliers and other state and local agencies believed would benefit from clarification. The law includes provisions that:

- Allow municipal water suppliers to use their water rights anywhere within their service areas, up to the full amount of water specified in their water rights, as long as they remain in compliance with their state-approved water system plans.
- Establish new water conservation standards for municipal water utilities and those that use their water, and impose a fee to fund conservation activities.
- Require consistency with land use plans and set forth a duty to provide retail water service.
- Impose on municipal water suppliers a duty to provide water service to all new connections within their retail service area, if they can do so in a “timely and reasonable” manner according to the Department of Health and have suffi-

cient water to meet the request, and if the request is consistent with approved land-use plans.

- Establish criteria for changing or transferring municipal water rights.
- Allow use of water for environmental goals and pilot watershed agreements.

The trial court decision affirmed many of these MWL provisions. However, the MWL’s key definitions of “municipal water supplier” and “municipal water supply purposes” run throughout the act. By invalidating those definitions, the trial court decision restored much of the uncertainty about the scope of the municipal water right exemption from relinquishment that led the Legislature to enact the MWL in the first place.

The MWL defined municipal water rights by defining a “municipal water supplier” as “an entity that supplies water for municipal

water supply purposes.”

In turn, the MWL defined “municipal water supply purposes” to include traditional residential, commercial, industrial, landscape irrigation, and fire flow uses, but also broadly included the use of water “for any other beneficial use generally associated with the use of water within a municipality.”

This definition was not limited to uses by cities, towns, PUDs, or other public utilities, but included any beneficial use of water to serve 15 or more residential

connections, the threshold at which water systems must comply with federal regulations under the nation’s Safe Drinking Water Act.

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These MWL provisions require municipal water suppliers to forecast and collect data about water use, set goals for improving the efficiency of water use and report on their performance in meeting these goals, and limit leakage from distribution system to ten percent or less of total water supplied to its customers.

Soon after the MWL was enacted, Ecology and the state Department of Health, which have slightly overlapping and complementary roles with regard to regulating municipal water supplies, began to implement the law.

As of September 2005, more than 17,000 drinking water systems in Washington provided water to more than 5 million residents, most of whom received their household water from water systems regulated under the Safe Drinking Water Act.

Most Washington residents receive water from fewer than 200 large systems, all of

which serve more than 1,000 homes. Many of the rest are served by a large number of smaller systems — including nearly 13,000 systems that serve an average of eight people each and do not meet the MWL's definition of a municipal water system.

The plaintiffs in the lawsuit did not challenge the MWL's provisions regarding water use efficiency and conservation. However, by invalidating key definitions in the law, the trial court limited the number of water suppliers required to comply with the conservation provisions of the act and, as a result, may have set back the state's water system planning

and conservation efforts.

The court decision is also likely to put increased pressure on the limited pool of municipal water suppliers, including public utilities, to supply water to those systems now excluded from the MWL, and developers are likely to seek water from municipalities and other water providers.

The practical result of the decision may be that cities, PUDs, water districts, and, in particular, private developers will be left without clear guidance as to who is a "municipal water supplier" and what amount of water they have available for future use.

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Appeals are almost certain and it is possible that either the trial court or the appellate courts will stay the decision's effect pending the outcome of such appeals. ☐

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