AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 10: The Reagan Era – Individual Rights/Property/Due Process

**Cougar Business Association v. State of Washington, 97 Wn.2d 466 (WA 1982)**

*The town of Cougar, Washington, is located near Mount St. Helens. In March 1980, Mount St. Helens erupted after a series of earthquakes in the region and remained active for some time afterwards. The governor declared an emergency and restricted access to specified areas near the volcano. For several months, the town of Cougar was inside one of these restricted zones.*

*The Cougar Business Association filed suit in state court contending that the governor’s actions were not justified and that the owners of businesses in the town had been deprived of their property without due process or just compensation. The trial court dismissed the suit in a summary judgment, and the business association appealed to the state supreme court. The state supreme court affirmed the lower court, holding that the governor’s order was a valid exercise of the state’s police power.*

Judge [DIMMICK](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

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. . . . [T]he State is liable for tortious conduct to the same extent as private individuals. In interpreting that statute we held that truly discretionary governmental acts on an executive level could not be characterized as tortious and thus could not be cognizable under the statute. We set forth a 4-part test for determining whether an action is truly discretionary:

(1) Does the challenged act ... necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act ... essential to the realization or accomplishment of that policy, program, or objective ...? (3) Does the act ... require the exercise of basic policy evaluation, judgment, and expertise ...? (4) Does the governmental agency involved possess the requisite constitutional, [or] statutory ... authority ... to do or make the challenged act ...?

If all four questions can be clearly and unequivocally answered in the affirmative, then the act or decision can be classified as a discretionary governmental function and nontortious.

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Criteria for characterizing an action as discretionary are met in the instant case. First, in an area affected by a natural disaster the preservation and maintenance of life, health, property and the public peace is a basic governmental policy. Second, in the case of a volcano, such as Mount St. Helens, the establishment of a restricted zone of entry around the mountain during a period of uncertain eruptions is essential to the realization and accomplishment of that policy. Third, the decision of whether a particular area or town should be included within the restricted access zone requires the exercise of basic policy evaluation, judgment and expertise. Fourth, the Governor possesses the requisite constitutional and statutory authority to restrict access to certain localities for the protection of the public. Finally, the Governor made a conscious decision to include the Town of Cougar within the area of the red zone because of her concern that it was exposed to danger from Mount St. Helens.

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The Constitution of the State of Washington imposes on the Governor the duty to see that the laws are faithfully executed.

RCW 43.06.010 prescribes the general powers and duties of the Governor, including:

(12) The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation

. . . .

RCW 43.06.220 sets forth the powers of the Governor after proclaiming a state of emergency and provides in pertinent part:

The governor after proclaiming a state of emergency and prior to terminating such, may, in the area described by the proclamation issue an order prohibiting: ... (8) The use of certain streets, highways or public ways by the public; and (9) Such other activities as he reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace. In imposing the restrictions provided for by RCW 43.06.010, and 43.06.200 through 43.06.270, the governor may impose them for such times, upon such conditions, with such exceptions and in such areas of this state he from time to time deems necessary.

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Appellants concede that in the event of a disaster a Governor has the requisite emergency powers to take the actions Governor Ray took in response to the Mount St. Helens eruption. They contend a disaster is a specifically definable event causing harm or injury, that there was no such "disaster" until May 18, thus the proclamation of emergency prior to May 18 and the executive orders issued pursuant thereto were void.

This definition of "disaster" is unduly narrow and restricts the legislative intent to empower the Governor to respond to emergencies. In this case the disaster was not only the eruption of May 18 but was in fact the reactivation of a dormant volcano. If appellants' definition of "disaster" is accepted, only an actual pyroclastic eruption of the volcano constituted a disaster. The Governor's apparently broad emergency powers would be limited to clean-up operations. The Governor would have had no power to act before the actual eruption to save lives or property. In other words, nothing of a preventive nature could have been done. Such a contention is contrary to the legislative intent of the statutes upon which the Governor's actions were based.

. . . . The Governor's discretion is the same in determining both the start and end of such an occurrence. This is particularly true when the disaster is an active but not currently erupting volcano.

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Appellants also allege that the inclusion of Cougar within the restricted area and the continued restrictions of the area until October 1 constituted a taking without just compensation violative of the Fifth Amendment of the United States Constitution and article 1, section 16 of the Washington State Constitution. It is a well established principle that if a regulation is a valid exercise of the State's police powers, it does not constitute a taking. *Mugler v. Kansas* (1887); *Rains v. Department of Fisheries* (WA 1978).

We have set forth the statutes delegating legislative police powers to the Governor in times of an emergency. Specifically, RCW 43.06.220(9) grants the Governor power to prohibit activities he or she feels are necessary to protect the life, health or property of the general public. There is no doubt that the restrictions imposed by the Governor were inherently within her police power. In fact, appellants present no argument countering the fact that the Governor imposed the restrictions to protect the public. The question narrows, therefore, to whether the restrictions imposed by the Governor were a valid exercise of police powers.

The United States Supreme Court in *Goldblatt v. Hempstead* (1962) enunciated the vague standard applicable in determining the validity of a police power regulation.

Except for the substitution of the familiar standard of "reasonableness," this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton v. Steele* (1894), is still valid today: "To justify the State in ... interposing its authority in behalf of the public, it must appear, first, that the interests of the public ... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Even this rule is not applied with strict precision, for this Court has often said that "debatable questions as to reasonableness are not for the courts but for the legislature...."

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In applying these tests, we find that the restrictions imposed upon appellants' land by the Governor were valid exercises of her police power. Thus, appellants' complaint was properly dismissed.

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The general rule is that the State is not deprived of the power to enact regulations reasonable in character by the Fourteenth Amendment, and a restriction which is a valid exercise of the police power does not violate the due process clause of the federal constitution. *Barbier v. Connolly* (1884). The United States Supreme Court has, in addition, required that governmental regulations shall be accomplished by methods consistent with due process and thus the due process clause is a limitation upon an arbitrary or unreasonable exercise of the power. *Nebbia v. New York* (1934).

. . . . We previously discussed the judicial test for reasonableness of a regulation adopted under the state's police power and concluded that the restrictions herein met those standards. Accordingly, the restrictions did not deprive appellants of any property rights without due process of law and appellants' complaint was properly dismissed. . . .

In sum, it is obvious that Washington is in the unique and unenviable position of having an active volcano in its midst. The unpredictable volcano presents continuing problems as indicated by Governor Spellman's, Governor Ray's successor, involvement in monitoring the restricted areas around a still active volcano. A cause of action for damages such as that brought by appellants is not the proper mode to challenge the Governor's actions. If it were, a suit could be brought by persons disagreeing with the decisions made contending that Cougar should have been excluded from the restricted zone and other suits contending, at the same time, that Cougar should have been included in the restricted zone earlier. Each damage suit would collaterally attack the Governor's decision and the proper location of the restricted zones would be determined by different courts in different forums.

*Affirmed*.