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Firebaugh Canal Water Dist. v. United States, 712 F.3d 1296 (9th Cir. 2013)

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Firebaugh Canal Water Dist. v. United States, 712 F.3d 1296 (9th Cir. 2013)

The issue was whether the NDOW and NWA's proposed use constituted irrigation as defined by the decree. The NDOW and NWA argued that the intended water use constituted irrigation because the water would support plant growth. The Tribe and United States claimed that NDOW and NWA did not seek to transfer the rights for irrigation purposes but rather for the purposes of sustaining wildlife. The engineer approved the transfer application because the engineer found that the proposed water use involved plant growth, which constituted irrigation use. The Tribe appealed to the District Court for the District of Nevada ("district court"). The district court disagreed with the engineer and found that the proposed water diversion for waterfowl habitat was not included in the decree's definition of irrigation. The NDOW and NWA appealed to the Court of Appeals for the Ninth Circuit ("court").

The court first noted that the Tribe established a cognizable injury; the water flow into Pyramid Lake is essential to the Tribe's cultural and economic life. The court noted that irrigation use as stated in the decree was only applicable to agricultural uses, specifically uses to grow cash crops and pasture. The NDOW and NWA were unable to prove otherwise. The decree also incorporated portions of Nevada law, including the Nevada water code ("code"). The code defines "wildlife purposes" to include the establishment and maintenance of wetlands. The court noted that the wildlife purposes definition is precisely what the NDOW and NWA sought to accomplish with the water right transfer. Both the decree and code discuss irrigation solely within the context of agriculture, and both distinguish agricultural uses from wildlife purposes; neither indicates that a water transfer application to sustain wildlife habitat constitutes irrigation.

Accordingly, the court held the district court correctly concluded that the proposed water diversion for waterfowl habitat was not irrigation as defined by the decree. The court affirmed the district court's judgment.

Meghan Leemon

Firebaugh Canal Water Dist. v. United States, 712 F.3d 1296 (9th Cir. 2013) (holding the Department of the Interior is only required to provide drainage for lands within the San Luis Unit, has discretion to choose a drainage solution, and is not liable under the Federal Tort Claims Act for failing to provide drainage to downslope lands).

In 1960, Congress passed the San Luis Act ("Act"), which authorized the Department of the Interior ("Interior") to create and maintain the San Luis Unit ("Unit"). The Unit was to provide irrigation water to 500,000 acres of land in three California counties as part of the Central Valley Project, the largest water reclamation project in the nation. The Act required the Interior to construct a dam, reservoir, pumping plants, drains, and other facilities in the Unit. Concerned that the Unit would increase regional drainage requirements, Congress authorized the Interior to construct drainage facilities to serve the general areas affected by the Unit. Under this authority, the Interior began constructing an interceptor drain. The Unit started making water deliveries in 1967.

However, the inability of federal and state governments to agree on environmental standards prevented the Interior from completing the endpoint of

the interceptor drain. Awaiting approval to finish the interceptor drain, the Interior constructed the middle portion of the drain and the Kesterson Reservoir ("Kesterson") to receive the Unit's output in 1975. In 1983, studies revealed elevated levels of selenium in Kesterson drainage water. As a result, the Interior closed Kesterson and the drains leading to it in 1986. Despite this, the Interior continued to irrigate land within the Unit.

The lack of drainage affected several parties, who filed claims in the District Court of the Eastern District of California ("district court"), including Firebaugh Canal Water District ("Firebaugh"). In 1995, the district court consolidated these claims, and ruled the Act required Interior to provide drainage to the Unit. Interior appealed, and the Ninth Circuit Court of Appeals ("court") heard *Firebaugh I* in 2000. The court upheld part the district court's ruling that required Interior to provide drainage within the Unit. However, the court held that Interior retained discretion on how to satisfy the drainage requirements.

On remand, the district court ruled consistent with the court's holding. The district court ordered Interior to provide drainage to the Unit immediately, but gave Interior broad discretion to select a drainage solution, requiring only that Interior submit a plan describing anticipated actions and milestones. After a reevaluation of the Unit's drainage needs, in 2007 Interior announced an in-valley solution that relied on water treatment and reuse, evaporation ponds, and restricting irrigation to some in-Unit areas.

Due to funding problems, Interior's completion of the in-valley drainage project proceeded slowly and in a piece-meal fashion. In response, Firebaugh submitted an amended complaint against the Interior. First, Firebaugh sought damages under the Federal Tort Claims Act ("FTCA"), arguing that Interior's failure to provide drainage constituted a nuisance and trespass. Second, Firebaugh, invoked the Administrative Procedure Act ("APA") and argued Interior's failure to provide drainage constituted: (1) a final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; or (2) Interior unlawfully withheld or unreasonably delayed agency action. The district court dismissed Firebaugh's first claim, holding California law does not require water suppliers to prevent drainage onto downslope lands, and Interior was immune from a FTCA claim under the discretionary function exception. The district court rejected Firebaugh's second claim as well, holding Interior's only discrete duty was to provide drainage within the Unit, and although its actions were frustratingly slow, the Interior's actions did not presently constitute an unreasonable delay. Firebaugh appealed the district court's decision.

Addressing the first issue on appeal, the court reviewed the district court's determination that both the private analog requirement and the discretionary function exemption barred Firebaugh's claim. Under the private analog requirement, a government agency is liable for negligence only if a private person would be liable for similar acts. With no precedent on point, the court assumed the existence of a private analog and proceeded to the discretionary function analysis. To determine if the discretionary function exemption applied, the court employed a two-step analysis. The first step analyzed whether the challenged actions involved an element of judgment or choice. The second

analyzed whether that judgment was the kind of judgment Congress designed the discretionary function exemption to shield—namely, governmental actions based on public policy concerns. Firebaugh argued the exemption should not apply because the Act imposed a duty on the Interior that was divorced from discretion. The court rejected this argument based on its *Firebaugh I* ruling, holding Interior had broad discretion in providing a drainage solution. Further, the court reasoned that Interior's actions were grounded in multiple public policy concerns and, therefore, the discretionary function exemption applied, negating Firebaugh's FTCA claim.

For Firebaugh's second claim under the APA to prevail, the court required Firebaugh to demonstrate that Interior failed to take a discrete action that it was legally required to take. Firebaugh argued Interior failed to make two specific actions the Act required: (1) to provide drainage to lands outside the Unit, and (2) to provide drainage to lands inside the Unit. The court rejected these assertions. First, it held the Act merely authorized Interior to construct drainage facilities outside the Unit; Interior was not required to do so. Congress never gave Interior discretion to choose necessary drainage facilities, so providing drainage to lands outside the Unit was not a discrete action Congress required Interior to take. Second, although the court recognized that progress on the in-valley drainage solution was slow, it held Interior was not withholding nor unreasonably delaying drainage within the Unit. The court reasoned that the scope and cost of the project was the root of the delay, not Interior failing to take action. Therefore, Firebaugh's second contention failed as well.

The court affirmed the district court's ruling that Interior was not required to provide drainage to lands outside the Unit, Interior was not unlawfully withholding nor unreasonably delaying drainage within the Unit, and that the discretionary function exemption prohibited a federal tort claim against Interior.

James Hanseen

Tehama-Colusa Canal Auth. v. U.S. Dep't of Interior, 721 F.3d 1086 (9th Cir. 2013) (holding area of origin statutes did not control the allocation of federally appropriated water during times of shortage when valid contracts contained no area of origin provision and explicitly allowed for reduced allocation during times of shortage).

The Central Valley Project ("CVP") diverts water from California's two largest rivers, the Sacramento and San Joaquin, for beneficial use throughout the state. The CVP operates under a cooperative agreement between the California State Department of Water Resources and the federal Bureau of Reclamation ("Bureau"). Under the CVP, the State Water Resource Control Board ("SWRCB") issued permits to the Bureau to appropriate water from the Sacramento Valley Basin. Water users then acquire water through contracts with the Bureau, as opposed to the standard practice of obtaining appropriative rights to California water sources through the SWRCB. In the absence of operational constraints or contract terms dictating priority allocation, the Bureau distributes water on a pro rata basis. In addition, all contractors