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## Delta Canal Co. v. Frank Vincent Fam. Ranch, LC, 321 P.3d 1027 (Utah 2013)

Edgar Barraza

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court did not err in concluding the State owns the mineral interests under the shore zone.

Consequently, the Court affirmed summary judgment for the State. However, the Court stressed that its decision does not preclude an upland owner from taking to the low watermark if it can establish a chain of title wherein the State granted its equal footing interest to the upland owner.

*Ashley Basta*

## UTAH

**Delta Canal Co. v. Frank Vincent Fam. Ranch, LC, 321 P.3d 1027 (Utah 2013)** (holding (i) partial forfeiture was available before statutory amendment specifically providing for such forfeiture became effective when forfeiture was inherent in the principle of beneficial use; and (ii) statutory exemption for time periods when water was insufficient to satisfy a water allowance did not prevent forfeiture of available but unused water).

Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, and Central Utah Water Company (collectively, "Irrigation Companies") and Frank Vincent Family Ranch ("Vincent") were water rights holders on the Sevier River system. Vincent purchased the water right at issue from the Samuel McIntyre Investment Company (McIntyre) in 1998. McIntyre originally obtained the water right in 1936 as part of the general adjudication of the Sevier River system. A district court at the time issued the "Cox Decree," awarding McIntyre twenty-two cubic feet of water per second (c.f.s.) from March 1 through October 1 of each year and a storage component from April 16 to October 1. The Irrigation Companies filed a complaint alleging that Vincent partially forfeited and partially abandoned its water right.

The Irrigation Companies alleged that during the twenty-two year period leading up to the filing of their 2008 complaint, Vincent and McIntyre forfeited and abandoned a portion of their water right. They claimed that from 1988 to 1998 McIntyre irrigated only 830 of its 1,051.5 acres, and that Vincent cultivated less than 900 acres after 1998. Vincent countered that it did not cultivate the full acreage for several reasons: first, the Sevier River Commissioner reduced Vincent's diversion right during water shortages; next, Vincent could not use the land beneficially due to frozen and unprepared ground; and finally, no storage right was available at that time.

The district court held Utah law did not provide for partial forfeiture or partial abandonment before 2002, and an exception in Utah Code section 73-1-4(3)(f)(i) shielded Vincent from the same after 2002. The exception provided that partial forfeiture and partial abandonment provisions did not apply in times when surface water sources did not yield sufficient water to satisfy the water right, or when groundwater was unavailable due to sustained drought. The district court found that because Vincent had not received an uninterrupted flow of twenty-two c.f.s. between 2002 and the filing of the complaint, the Irrigation Companies could not claim partial forfeiture or abandonment. Accordingly, the district court granted summary judgment in favor of Vincent. The Irrigation Companies appealed to the Utah Supreme Court ("Court").

First, the Court addressed whether partial forfeiture was available in Utah before 2002. Vincent argued that such doctrine was not available and cited precedent holding that Utah statutes did not address partial forfeiture. The Court disagreed and determined that a review of the case law showed that the recognition of partial forfeiture extended as far back as 1897. In addition, the Court noted the pre-2002 Utah Code provision, which provided that a water right ceased when an appropriator abandons or stops using water for a five year period, did not specify whether "water right" should be read to include portions of an appropriator's water right. Accordingly, the Court observed that a reasonable interpretation of this provision could state that forfeiture occurs when an appropriator ceases to use either a portion or the entirety of the water right. In resolving that ambiguity, the Court examined Utah's forfeiture and beneficial use statutes under the principle that the interpretation of a statute must be in harmony with neighboring provisions. It rejected Vincent's interpretation that partial use was sufficient to maintain a water right under the forfeiture statute, as this was inconsistent with Utah's beneficial use policy of preventing water from running without its application to beneficent uses, such as those promoting conservation, recreation, and other values deemed socially desirable, for any number of years. The Court concluded that forfeiture and partial forfeiture were inherent in the concept of beneficial use, and that when read together, the forfeiture and beneficial use statutes allowed the forfeiture of a water right in part or in whole.

Next, the Court considered whether the exemption in the post-2002 Utah forfeiture statute disallowed the forfeiture of Vincent's water right. The Court rejected the district court's interpretation that the statutory exemption barred forfeiture of any amount in periods when a water right was not satisfied. It considered that such interpretation was inconsistent with beneficial use, by which validity of a water right is contingent on use. The Court reasoned that such interpretation would allow an appropriator to use a small deficit of water to protect a water right from forfeiture even if most of the water was actually available but not put to use. However, the Court maintained that the post-2002 statute was a codification of the common law physical-causes exception, which protected appropriators from forfeiture who made beneficial use of material amounts of available water.

Subsequently, the Court addressed whether Vincent had abandoned a portion of its water right. The Court disagreed with the district court's summary judgment ruling on the abandonment claim, because such ruling hinged on the same erroneous interpretation of the physical-causes exception statute. Further, the Court determined that abandonment was not a statutory claim under the forfeiture provisions. The Court reasoned that abandonment was different from forfeiture because it required definite intent to relinquish a water right and did not require a specific period of time, whereas forfeiture required that the appropriator cease to use the water for a period of five years. Accordingly, the Court reversed the grant of summary judgment on the abandonment claim and remanded for reconsideration.

Further, the Court considered the extent of Vincent's water right. The Court determined that Vincent's water right was not a continuous award. It pointed out that the Cox Decree specified only flow and allowing a constant

diversion of twenty-two c.f.s. would result in a diversion greater than 9,000 acre-feet of water, far surpassing any quantity Vincent and its predecessor had ever used. In addition, the Court pointed out that the Cox Decree did not dispute the proposed determination drawn up in preparation for the 1936 general adjudication of the Sevier River system, which indicated that Vincent's predecessor used 5,000 acre-feet of water annually. Thus, it was reasonable to infer that the volume component of Vincent's water right was 5,000 acre-feet.

Last, the Court considered various issues that could potentially arise on remand. The Court first outlined a proper forfeiture analysis. It declared that because flow awards are not continuous, a failure to divert the maximum amount allowed did not result in automatic forfeiture. It recognized that a forfeiture analysis should focus on whether the appropriator has failed to use material amounts of its volume allowance. Also, the Court maintained that the number of acres irrigated was not determinative of forfeiture. Rather, the deciding factor was whether the appropriator used all of its water allowance in a reasonable manner and for a beneficial purpose. Thereafter, the Court addressed whether the water available to Vincent and its predecessor between March 1 and April 15 should count as available water for purposes of forfeiture. It reasoned that distinguishing the pre-irrigation season would be significant only in a drought year under the physical-causes exception. Additionally, it determined that because the Cox Decree did not provide otherwise, it did not have to exclude early water from the physical exception analysis. Last, the Court noted that contrary to Vincent's claim, the watering of indigenous vegetation was generally not beneficial use and that a trier of fact should be wary of such use to prevent forfeiture.

*Edgar Barraza*

## WASHINGTON

**Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology**, 311 P.3d 6 (Wash. 2013) (holding a Department of Ecology rule invalid because the Department of Ecology may not rely upon the water code's statutory exception for overriding considerations of public interest as broad authority to reallocate water from established minimum flow rights to reserve water for future beneficial uses).

The Skagit River system supplies water to numerous water rights holders and is the only river system in the contiguous United States that accommodates all six species of Pacific salmon. In 2001, the Washington State Department of Ecology ("Ecology") enacted the Skagit River Basin Instream Flow Rule ("Instream Flow Rule"), which established minimum instream flow requirements to protect wildlife, recreation, and aesthetic values.

In 2003, Skagit County and others filed suit against Ecology challenging the Instream Flow Rule. Skagit County argued the Rule was invalid because it did not allocate noninterruptible water for new uses and thus effectively prevented any new development that required water throughout the year. After several years, Skagit County and Ecology agreed to a settlement that resulted in Ecology promulgating an amended instream flow rule ("Amended Rule"). The