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COURT REPORTS

FEDERAL COURTS

NINTH CIRCUIT

United States v. Orr Water Ditch Co., 600 F.3d 1152 (9th Cir. 2010) (holding that the district court decree that allocated senior water rights in a river to an Indian tribe forbids groundwater allocations that adversely affected the tribe's decreed water rights and that the district court has subject matter jurisdiction over the tribe's petition).

The Truckee River is the principal source of water for Pyramid Lake, which sits entirely within the boundaries of the Pyramid Lake Paiute Tribe Reservation. Under the Orr Ditch Decree ("the Decree"), the Pyramid Lake Paiute Tribe of Indians ("the Tribe") owns the two most senior water rights on the Truckee River, Claims No. 1 and 2. In November 1998, the Nevada State Engineer ("Engineer") granted the Tribe the right to all of the water remaining in the river after the Orr Ditch Decree rights and other rights were satisfied.

In June 2007, in Ruling 5747, the Engineer granted new groundwater allocations in the Tracy Segment Hydrological Basin ("the Basin"). The Basin abuts Pyramid Lake Paiute Tribe Reservation, and a thirty-mile stretch of the Truckee River runs through the Basin on its way to Pyramid Lake. According to the United States Geological Survey, the Truckee River receives an average net gain of about 11,000 acre-feet per year from the Basin's groundwater unless there has been an over allocation of that water. Although the United States Geological Survey had estimated the perennial yield of the Basin to be approximately 6,000 acre-feet per year resulting from groundwater recharge from precipitation, the Engineer revised the yield upward to approximately 11,500 acre-feet per year. The Engineer concluded that the new allocations in addition to the existing groundwater allocations of 7,976 acre-feet per year would therefore not result in over-allocation of the groundwater in the basin. The Engineer concluded further that even if the new allocations resulted in over-allocation of the groundwater and a diminution of the base flow of the Truckee River, this would not conflict with any of the decreed water rights in the river.

The Tribe appealed the Engineer's ruling to the United States District Court for the District of Nevada, alleging that the district

court had jurisdiction to review the Engineer's ruling as it affected its rights under the Decree and its rights under the Engineer's 1998 ruling. The district court granted The Engineer's motion to dismiss for lack of subject matter jurisdiction, holding that appellate jurisdiction should be determined by reference to the applicant's water rights in order to avoid multiple courts having "exclusive" jurisdiction depending on reference to any water rights affected by an Engineer's ruling. The Tribe appealed to the United States Court of Appeals for the Ninth Circuit ("the court").

The court first addressed whether the Decree forbids the Engineer from allocating groundwater if it has an adverse effect on the Tribe's decreed rights in the Truckee River. Although the Decree does not explicitly protect the Tribe's decreed rights from groundwater allocation to others, the Decree indicates that the water rights granted to the Tribe were intended to fulfill the United States' purpose in reserving "a reasonable amount of water" for use on the reservation. Due to the reciprocal hydraulic connection between groundwater and surface water, the court stated that it is inconsistent with United State's purpose to allocate water, whether allocation of surface water or groundwater, to other users if that allocation diminishes the Tribe's reserved water supply. The court also supported its finding with a rule of interpretation of agreements and treaties with Native Americans that requires ambiguities to be resolved from the standpoint of Native Americans.

The court then addressed whether the district court has subject matter jurisdiction over an appeal from a ruling of the Engineer that allegedly conflicts with the Decree. The court held that the federal district court acts as an appellate court for decisions of the Engineer. Nevada law provides for jurisdiction of appeals from decisions of the Engineer in the court that entered the decree, which also supports federal court review because the district court entered the Orr Ditch Decree. However, the court noted that the district court does not have jurisdiction over the Tribe's appeal from Ruling 5747 insofar as it may adversely affect the Tribe's rights under the Engineer's 1998 ruling because it was based on state law. The court acknowledged that the district court properly recognized the practical difficulties of exercising jurisdiction over an appeal from the Engineer's ruling as well as the conflict between federal courts' exercise of subject matter jurisdiction and the general principle that a single court should have exclusive jurisdiction over an interrelated system of water rights. However, the court limited its decision to the Engineer's allocation of water rights that adversely affect the Tribe's rights under the Decree.

Thus, the court held that the groundwater allocations in the Tracy Segment Hydrographic Basin might adversely affect the Tribe's decreed water rights under the Orr Ditch Decree. It also held that the district court has subject matter jurisdiction over the Tribe's appeal from the Engineer's 5747 Ruling insofar as the allocation of groundwater rights is alleged to adversely affect the Tribe's decreed water rights. Accordingly, the court reversed and remanded.

Caroline Powers

STATE COURTS

COLORADO

City of Englewood v. Burlington Ditch, Reservoir & Land Co., 235 P.3d 1061 (Colo. 2010) (holding that an agreement between the City of Denver and companies owning senior water rights was a valid no-call agreement that did not unlawfully change or expand Denver's water rights and that the City of Englewood was not entitled to a presumption of injury as a junior water right holder).

In 1999, the City of Denver entered an agreement with several companies holding senior water and storage rights diverted at the Burlington headgate of the South Platte River. The water and storage rights in the agreement were held by Farmers Reservoir and Irrigation Company ("FRICO"), Burlington Ditch, Reservoir and Land Company, and Henrylyn Irrigation District (collectively "the Companies"). The Companies held the senior storage rights for filling the Barr and Oasis Reservoirs ("Oasis storage right") to 11,081 acre feet at a rate of 350 cubic feet per second ("cfs"). FRICO possessed additional storage rights to fill Milton Lake and Barr Lake after using its Oasis storage right. The City of Denver held water rights upstream of the Burlington headgate that are junior to the Companies' Oasis storage right. The City of Denver and the Companies agreed that the Companies would not place a call under the Oasis storage right but could place calls under their Barr Lake or Milton Lake storage rights until the Oasis storage right achieved Paper Fill. (Paper filling is when the carry-over storage and storable inflow equals the decreed storage amount.) In return, Denver agreed not to reduce the amount of water divertable for the Oasis storage right below 150 cfs.

The City of Englewood challenged the agreement in 2002. Englewood held water rights on the South Platte River junior to the rights held by the Companies and Denver. Englewood argued that the agreement was an invalid subordination agreement that improperly expanded Denver's water rights and violated the one-fill rule. (The one-fill rule refers to the Colorado's law allowing use of