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Hohenlohe v. Dep't of Natural Res. and Conservation, 357 Mont. 438 (2010) (holding that the Department of Natural Resources and Conservation must grant an application for a change of use to instream use where all of the Water Use Act's statutory criteria are proven by the preponderance of the evidence, and that the Department retains the right to limit the amount of water within a change of use application and such discretion does not constitute an adjudication to quantify the right).

Christian and Nora Hohenlohe ("Hohenlohes") sought judicial review of Montana's Department of Natural Resources and Conservation's ("Department") denial of their change of use application. At trial, the First Judicial District Court, County of Lewis and Clark, ordered the Department to grant the application. The Department appealed to the Supreme Court of Montana, disputing the lower court's holding that the Department abused its discretion by denying the Hohenlohes' change of use application.

After switching their ranch from flood to sprinkler irrigation, the Hohenlohes filed for a temporary change from their prior irrigation right (32.5 cubic feet per second "cfs") to a combined right including both irrigation and instream flow. The proposed change had no apparent adverse effect on any downstream rights holders, and led to a much greater amount of water remaining instream, benefiting the fishery. However, the Department issued a Statement of Opinion 742 days after the objection deadline had passed, stating that the application should be denied based on an incomplete return flow analysis. A Final Order followed six months later stating the same opinion.

Initially, the court determined whether the Department's review of the Hohenlohes' water right constituted an adjudication of the water right's quantity. The court held that the Montana Water Court, and not the Department, had exclusive jurisdiction to adjudicate the quantities of water rights. Additionally, a holder may only quantify his water rights through the adjudication process, and not through the permitting process. However, state law also authorizes the Department to require an applicant for a change of use authorization to provide information regarding the flow rate and volume of the right to be changed. Thus, the Department's decision on whether to approve a temporary change to instream flow did not constitute an adjudication of the applicant's water right.

Next, the court decided whether the Department abused its discretion in denying the Hohenlohes' application. The court focused on the Water Act's requirement that an applicant for a change of use for instream flow prove by a preponderance of the evidence certain statutory criteria listed in MONT. CODE ANN. § 85-2-402(2) to 408(3) (2010). If the applicant demonstrates each statutory criterion by a preponderance of the evidence, the Department must grant the

change application. The statutory criteria include a lack of adverse effects upon right holders, evidence that the proposed change constitutes a beneficial use, proof that proposed saving methods will salvage the amount of water asserted, and evidence that the amount of water claimed is necessary to benefit the fishery. The burden of this proof is squarely upon the applicant.

The court rejected, in this case, that the Department may deny an application based on an incomplete return flow analysis under § 85-2-408(7). Section 85-2-408(7) does not create an additional criteria and thus cannot be used to deny an application.

The only criterion in contention was whether the proposed change would have had an adverse effect upon any right holders. The court found that the proposed change of use resulted in no adverse effect upon any other right holder, and that, in fact, the application actually benefitted the only right holder noticeably affected. Additionally, the court placed some weight on the proposed change's benefit for the fishery by leaving more water instream. Because the Hohenlohes established all the statutory criteria by the preponderance of the evidence, namely that no other right holder would be adversely affected, the court found that the Department's denial of the Hohenlohes application based upon incomplete return flow analysis was arbitrary and constituted an abuse of discretion.

The final issue facing the court was whether the Department may consider past waste in deciding the quantity of water to be included in a change of use. While § 85-2-408 cannot be used to reject an application, the court held that this section limits the maximum amount of water to be protected instream to the amount historically diverted by an applicant. Additionally, the court found that this section gives the Department discretion to further limit the amount to the amount historically *consumed.* The court defined consumptive use as the volume of water used annually for a beneficial purpose, including incorporation into products that does not return to the ground or surface water. The court further stated that the Department may take into account reasonable or wasteful historic use of a water right to amend or modify a proposed change of use application accordingly.

Based upon these findings, the court held: (1) the Department was not adjudicating the quantity of the Hohenlohes' water rights by requiring proof of historic volume of their water rights and return flow analysis; (2) the Department's denial of the Hohenlohes' application was arbitrary and constituted an abuse of discretion; and (3) past wasteful use is a permissible factor for the Department to consider in determining whether a proposed change in use should be approved for the full historical diverted amount, the amount historically consumed, or a smaller amount.

Accordingly, the Supreme Court of Montana reversed the district court's decision.

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Great Basin Water Network v. Taylor, 234 P.3d 912 (Nev. 2010) (holding that a statutory amendment that allowed the State Engineer to postpone ruling on municipal-use groundwater applications for more than one year did not apply retroactively and that the proper remedy for a State Engineer's untimely ruling was to re-notice applications and reopen the protest period).

In order for the Las Vegas Valley Water Department ("LVVWD") to appropriate public water from groundwater sources, LVVWD filed roughly one hundred and forty-six applications for water rights with the State Engineer in 1989. In 1990, eight hundred and thirty parties ("protestants") filed protests with the State Engineer in response to these applications. In 1991, the Southern Nevada Water Authority ("SNWA"), a regional agency formed to address the water needs of the Las Vegas valley, acquired LVVWD's rights to the 1989 applications. Between 1991 and 2002, some of the applications were withdrawn and others were ruled on after hearings held by the State Engineer.

In 1989, Nev. Rev. Stat. § 533.370(2) required that the State Engineer decide on each water appropriation application within one year of the final protest date. The State Engineer could only postpone action beyond one year if he received written authorization from the applicant and protestant, if there was ongoing water supply studies, or if there was ongoing court action concerning the water right. In 2003, the legislature amended the statute, adding a fourth exception that allowed the State Engineer to postpone the disposition of pending applications prepared for municipal use.

In October 2005, the State Engineer attempted to notify approximately three hundred people by certified mail of a prehearing conference scheduled for January 2005, concerning the protest of SNWA's remaining groundwater applications. The postal service returned a vast majority of the notices undelivered. The State Engineer did not attempt to resend the notices. At the hearing in January of 2006, protestants requested that the State Engineer re-notice SNWA's applications and reopen the protest period. In March 2006, the State Engineer denied these requests. In August 2006, fifty-four protestants filed a petition with the Seventh Judicial District Court, White Pine County ("district court") for judicial review of the State Engineers decision to deny the request for re-notice. The district court determined that the State Engineer did not abuse his discretion because there was no statutory provision that required