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Pete's Mountain Homeowners Ass'n v. Or. Water Res. Dep't, 238 P.3d 395 (Or. Ct. App. 2010)

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require the State Engineer to re-notice the applications and reopen the protest period. The court reasoned that voiding the State Engineer's ruling and preventing him from taking further action would be inequitable to SNWA and applicants should not be punished for the State Engineer's failure to follow his statutory duty. The court further reasoned that it would be inequitable to the protestants if the State Engineer's inaction over a fourteen-year period resulted in the application's approval.

Accordingly, the court reversed the district court's order denying the petition for judicial review and remanded the matter to the district court with directions to further remand the matter to the State Engineer for further proceedings.

Toby Weiner

OREGON

Pete's Mountain Homeowners Ass'n v. Or. Water Res. Dep't, 238 P.3d 395 (Or. Ct. App. 2010) (holding that members of a local homeowner association, who owned water rights in Clackamas County, had standing to seek judicial review of the Oregon Water Resources Department's final order approving an application to amend a water company's water right permit).

Pete's Mountain Water Co., Inc. ("the water company") owned a water right permit in Clackamas County that authorized the withdrawal of groundwater for group domestic use and limited irrigation on roughly 147 acres of land. In 2004, the water company applied to the Oregon Water Resources Department ("the department") to amend its water right permit to expand the authorized place of use. Interestingly, the amendment application did not request to change the amount of homes that the water company would serve.

In late 2006 and early 2007, pursuant to chapter 537 of the Oregon Revised Statutes, Pete's Mountain Homeowners Association and a number of local residents (collectively referred to as "the homeowner association") filed comments with the department opposing the water company's application. The homeowner association alleged that approval of the application would fail to protect the public interest and neglect existing groundwater rights held by association members and local residents. Neither chapter 536 nor chapter 537 of the Oregon Revised Statutes required the department to hold a contested case hearing. Without further action, the department issued a final order approving the water company's application.

The homeowner association then filed a petition for judicial review with the Clackamas County Circuit Court. The water company subsequently intervened and moved to dismiss the petition asserting that the homeowner association lacked standing to seek review. The

trial court agreed and granted the water company's motion to dismiss.

On appeal, the Oregon Court of Appeals considered whether the homeowner association had standing to seek judicial review of the department's final order approving an application to amend a water right permit. The legislature determines the status or qualification required to establish standing. Accordingly, to determine the meaning of the statute, the court examined the statutory language in the context of relevant legislative history.

The water rights statute states that any "party affected" by a final order may appeal the order to the circuit court. However, the statute does not define the term "party." The water company argued that the court should interpret "party" to have a limited meaning. Specifically, the water company alleged that "party" referred only to persons to whom a state agency has granted formal status as a party to the proceeding. In contrast, the homeowners association asserted that the court should interpret "party" as a person who the final order affected, but who had not necessarily achieved formal status in the agency proceedings.

After a close examination of the statute and its context, the court found that the water company's limited definition of "party" was somewhat supported. Notably, another provision of the water rights statute, the contested case provision, utilized "party" to indicate persons with formal status only. The court reasoned that the water company's assumption of consistency in the legislature's use of terms in the same statute was permissible. On the other hand, the court found that other provisions of the statute suggested that the legislature intended a different meaning of the term "party" in the provision that relates to judicial review of orders in uncontested cases. Accordingly, the court found that the homeowners association's definition of "party" was also plausible.

Given a lack of pertinent legislative history available to resolve the conflict, the court determined to resolve the ambiguity between the two competing and reasonable constructions of the term "party" by utilizing two canons of construction: (1) the absurd results canon, and (2) the avoidance canon. Under the absurd results canon, when one construction would lead to an absurd result and the other would not, the court will favor the latter. Here, the water company's interpretation indicated that a person that a final order adversely affects would be required to obtain a declaration that he, she, or it was a party to a proceeding. However, no statutory provision existed for obtaining such a declaration and there was no such requirement that such a proceeding occur. Thus, the court reasoned that the water company's reading of the statute would make little sense.

Under the avoidance canon, if there is a plausible argument that one of the competing constructions would render a statute unconstitutional, the court will favor the other construction. Here, the statute provided for no process whereby a person could obtain recognition as a formal party. Accordingly, the court reasoned that if it adopted the water company's definition, the homeowners

association could face the prospect of being unable to obtain judicial review of department orders that adversely affect its property rights.

Considering the outcomes under the two canons of construction, the court found that the trial court erred in dismissing the petition for judicial review on the ground that the homeowners association was not a “party” within the meaning of the water rights statute.

Accordingly, the court reversed and remanded the trial court’s decision.

Molly Callender

WASHINGTON

Fitzpatrick v. Okanogan Cnty., 238 P.3d 1129 (Wash. 2010) (holding that statutory immunity does not apply where the cause of action is based solely on constitutional grounds and that the common enemy doctrine does not bar inverse condemnation claims for property damage caused by water flowing through a natural watercourse).

In 1999, Okanogan County (“County”) implemented major improvements to the Sloan-Witchert Slough Dike (“Dike”) on the Methow River (“River”). Afterwards, a Washington State Department of Ecology hydrogeologist (“State hydrogeologist”) submitted a memorandum to the County shoreline permit coordinator, explaining that the improvements cut off the River’s natural overflow channels. He maintained that the cut off would compress more flood flow into the main channel and reduce that natural flood conveyance capacity of the river.

In 2002, the River flooded and washed away a substantial portion of private real property, including the Fitzpatrick and Sturgill’s (“owners”) private log cabin. The owners had built the cabin outside the 100-year flood level. They alleged that the Dike caused the River to change course and wash away their property. The owners filed a complaint with the Douglas County Superior Court (“trial court”) against the County and the State of Washington (“State”). The complaint contained claims for inverse condemnation, trespass, negligence, and wrongful injury or waste to property. An inverse condemnation claim is an action alleging a governmental taking or damaging to recover the value of property that the government appropriated in fact, with no formal exercise of the power of eminent domain. The elements of an inverse condemnation claim include: (1) a taking or damage (2) of private property (3) for public use (4) without just compensation (5) by a governmental entity that has not instituted formal proceedings.

The County and State moved for summary judgment, citing the common enemy doctrine and statutory immunity, which the trial court granted. On appeal, Division Three of the Washington Court of Appeals (“court of appeals”) reversed the trial court, holding that