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In re Stream Encroachment Permit, 955 A.2d 964 (N.J. Super. Ct. App. Div. 2008)

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not been abandoned, the Court found that they were exempt from any loss of priority provision.

The court rejected AFA's claim that law as presented in *Desert Irrigation, Ltd. v. State of Nevada* controlled. Although the *Desert Irrigation* holding supported AFA's claim that the City should suffer a loss of priority as a result of a canceled permit, the court clarified that the holding applies only to certificated water rights and not vested, prestatutory rights.

Because Nevada case law supported its construction of § 533.085(1), and there was no evidence of intentional abandonment by the City, the court affirmed the State Engineer's decision.

Allison Graboski

NEW JERSEY

In re Stream Encroachment Permit, 955 A.2d 964 (N.J. Super. Ct. App. Div. 2008) (holding that the New Jersey Department of Environmental Protection may place conditions on permits for projects that are highly complex, and that the wetlands area in question was not a "waterway" under the statute because it could not support any water-dependent use).

The New Jersey Department of Environmental Protection ("NJDEP") approved The Mills Corporation and Mack-Cali Realty Corporation's (jointly "Mills") joint application for various permits in connection with the Meadowlands Xanadu development project. The Sierra Club, New Jersey Environmental Federation, and New Jersey Public Interest Research Group (collectively "Sierra") and Hartz Mountain Industries ("Hartz") appealed the NJDEP's approval. The mixed-use project required Mills to fill in 7.69 acres of wetlands. As part of the application process, Mills made an original submission of information, supplemental submissions, and made available an environmental report. Additionally, the NJDEP held a public hearing. On October 4, 2004, the NJDEP approved the permits subject to certain conditions. Sierra and Hartz filed appeals with the New Jersey Superior Court, Appellate Division.

On appeal, Hartz and Sierra argued that the NJDEP did not use sufficient facts to approve the permits and that regulations prohibited the NJDEP from issuing conditional permits. In determining whether there was a sufficient factual basis for NJDEP's approval, the court found because Mills and associated groups submitted numerous original materials, numerous supplemental reports, a report concerning the environmental concerns of the project, and because the NJDEP held a public hearing and a comment period, that a sufficient factual basis did exist for the NJDEP to consider and grant the permits. The court further determined that although it may not have agreed with all of the NJDEP's conclusions, because the NJDEP based the conclusions

on the factual submissions they were not arbitrary or capricious, and therefore the court gave great deference to the agency.

The court also rejected Sierra and Hartz's argument that regulations prohibited the NJDEP from issuing conditional permits. In evaluating the argument, the court relied on precedent that held conditional permits were appropriate when the application basically satisfied the regulations governing construction projects, and when the subject matter involved an evolutionary and highly complex project. Therefore, the court rejected Sierra and Hartz's arguments for both reasons. The court first rejected the argument because the Mills' application had basically satisfied the construction regulations. The court also rejected the argument because the Xanadu project was vast and many of the complex components were subject to market and economic conditions.

Sierra and Hartz further argued that regulations prohibited the development and filling in of the wetlands. The prohibition of filling in the area was determinate upon whether the wetlands area was a waterway. The court found no definition of waterway in the regulation, nor was there a common definition of the word. However, because the wetlands area was not wide enough or deep enough for a boat or ship to travel, nor was it an area that could sustain a water dependent use, the court determined the area was not a waterway. On the other hand, the area did fall into the definition of wetlands, which is an area saturated enough to support hydrophytic vegetation. Because the area was a wetland and not a waterway, the court determined the statutes allowed filling in the property for development. Additionally, in areas that are not waterways, such as the Xanadu project area, New Jersey regulations merely *discourage* the filling in of water areas. If the Department finds there is a public interest in filling in an area, they may issue a permit provided the developer takes compensating or mitigating measures. The court determined the NJDEP found that the project was in the public interest because of the beneficial impacts the project had on the region and state. Furthermore, the project included significant mitigation by providing a 587-acre area dedicated to wetlands space, while only filling in eight acres.

Sierra and Hartz also argued that neither they nor the public would be able to comment on future submissions by Mills regarding the fulfillment of the conditions the NJDEP imposed on the Xanadu project. The court agreed with the argument and remanded this portion back to the NJDEP to establish a way to permit a public comment period on all submissions Mills makes in the future.

The court affirmed in all other respects, holding the NJDEP's decision was not unreasonable, arbitrary or capricious and the conditional permit was appropriate. It further held that the wetlands area was not a waterway under statute and therefore the developer could fill them in for the Xanadu project.

Jonathan Hiller

NEW MEXICO

Hydro Res. Corp. v. Gray, 173 P.3d 749 (N.M. 2007) (holding: (1) New Mexico follows the doctrine of prior appropriation and beneficial use and does not recognize a mining operation exception to these doctrines; and (2) absent any language in the deed to the contrary, the relationship between lessor and lessee does not implicate the agency doctrine).

A complicated transactional history led to two separate entities claiming ownership of a mining lessee's water rights developed in connection with the mining claims of the lessor. Plaintiff, Hydro Resources Corporation ("Hydro"), claimed ownership of the water rights through the lessee, Inspiration Development Company ("Inspiration"). Defendants, Harris Gray and William J. Frost (jointly, "Gray"), claimed ownership through the lessor, Copper Flat Partnership ("CFP"). On competing motions for summary judgment, the Seventh Judicial District Court for the State of New Mexico ruled in favor of Hydro without issuing an opinion. The New Mexico Court of Appeals affirmed. Upon review to the Supreme Court of New Mexico, both parties stipulated that no factual dispute existed and that the court could resolve this issue as a matter of law, as each party claimed principles of New Mexico water law entitled them to ownership of the water rights.

Gray argued the court should rule New Mexico law states "(1) a lessee can acquire water rights on leased land by appropriating water and placing it to beneficial use, and [that] (2) a lessee does not generally act as the agent of the lessor." However, Hydro argued a mining operation's water rights become "necessarily linked" and indispensable to the land and revert to the lessor upon termination of the lease. In addition, Hydro claimed because CFP, the lessor, used the water in connection with a mining operation, CFP developed water rights as Inspiration's, the lessee's, agent.

After review, the court reversed the Court of Appeals and remanded with instructions to quiet title to the water rights in favor of Gray. The court held developing water rights and putting them to beneficial use did not make them appurtenant to the mineral rights, and CFP did not qualify as an agent of Inspiration.

New Mexico law, not federal law, governs water rights in New Mexico, and, in allocating water rights, New Mexico adheres to the doctrine of prior appropriation and beneficial use. While the legislature created an exception to this rule, for water used for irrigation, the court ruled that the judiciary could not take the place of the legislature and expand the law (and the exemption) to include mining. In specific cases, water used for irrigation is appurtenant to the irrigated land and remains with conveyed property unless the deed specifies otherwise. In the context of mining interests, however, New Mexico does