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United States v. Moses 496 F. 3d 984 (9th Cir. 2007)

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stituted “waters of the United States” because it is an “adjacent wetland” within the Corps’ regulatory definition.

Although the court had already found that the Pond was within the CWA’s jurisdiction, the court next looked at whether the Pond qualified as a water of the United States based on whether a “significant nexus” existed between the Pond and River. A significant nexus exists if “the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters.” The court found that there was a significant nexus because (1) a physical connection existed through both a hydrologic and a surface connection between the River and Pond, (2) an ecological connection existed because both the River and Pond support similar populations of fish, mammals, and birds, and (3) Healdsburg’s discharge of sewage directly resulted in higher concentrations of chloride in the River downstream from the Pond, and thereby affected the chemical integrity of the River. Thus, the court affirmed the district court’s finding that the Pond’s effects on the River are “not speculative or insubstantial” and have a significant impact on the “chemical, physical, and biological integrity” of the River.

The court rejected Healdsburg’s argument that the Pond fell within the CWA’s exception for waste treatment systems and for ongoing excavation operations. The waste treatment exception is intended to exempt “either water systems that do not discharge into waters of the United States or waters that are incorporated in an NPDES permit as part of a treatment system.” Because the Pond is neither incorporated in an NPDES permit nor a closed system treatment pond, it did not fall under this exemption. The excavation operation exception applies only to bodies of water that are currently under excavation. The court determined that using the pond to discharge wastewater from the treatment plant and to deposit mining waste from other locations did not constitute an ongoing excavation operation. Therefore, the court affirmed the district court’s conclusion that the excavation operation exception did not apply because the Company abandoned its excavation activities in 1984 and there was no “ongoing excavation operation.”

In conclusion, the court held that the Pond was a water of the United States regulated by the CWA. Therefore, Healdsburg violated the CWA by discharging wastewater into the Pond.

James Shine

United States v. Moses, 496 F.3d 984 (9th Cir. 2007) (holding that the evidence sufficiently supported the determination that Teton Creek constituted a water of the United States, that Moses caused the unauthorized discharge of pollutants into the Creek, and that the district court did not abuse its discretion when it denied consecutive motions for a new trial).

Charles Lynn Moses (“Moses”) conducted work to re-route and reshape a channel of Teton Creek in Teton County, Idaho, adjacent to one of his development projects in order to control the Creek’s seasonal flow of waters. Due to an upstream manmade diversion structure, water only flows in this particular segment of Teton Creek during the spring run-off months. Moses’ stream alteration work spanned a period of twenty years, during which he ignored multiple governmental warnings, including a warning from the Army Corps of Engineers (“Corps”) requiring a Clean Water Act (“CWA”) permit for his work, a subsequent cease and desist order from the Corps, and an administrative compliance order from the Environmental Protection Agency.

In light of this conduct, the government prosecuted Moses for violations of the CWA. The United States District Court for the District of Idaho upheld a jury verdict convicting Moses of violations of the CWA for knowingly discharging and causing to be discharged pollutants from a point source into the waters of the United States without a proper permit. The district court denied both of Moses’ consecutive motions for a new trial. Moses appealed.

The United States Court of Appeals for the Ninth Circuit identified and resolved the three issues presented on appeal: whether for the purposes of the CWA: (1) Teton Creek constituted a water of the United States, (2) Moses’ stream alteration work caused discharge of a pollutant into waters of the United States, and (3) Moses’ work required a permit.

The court approached the issue of whether Teton Creek constituted a water of the United States from two separate angles. First, the court considered the historical condition of the Creek. In *United States v. Appalachian Elec. Power Co.*, the United States Supreme Court introduced the notion that the courts cannot take away a water’s navigability status once established. Since Teton Creek fell within the Corps’ regulations defining waters of the United States prior to the man-made diversion, the court insisted that this classification remain unchanged in its aftermath. Second, the court considered the Creek’s present condition apart from its historical roots. The court relied on its previous holding in *Headwaters, Inc. v. Talent Irrigation Dist.* that tributaries that flow intermittently constitute waters of the United States. The *Headwaters* analysis met support in the recent Supreme Court case of *Rapanos v. United States*, where a divided bench expressed unanimity with respect to the issue of intermittent streams as waters of the United States. Therefore, finding no reason to distinguish the instant case from precedent, the court held that the channel of Teton Creek altered by Moses constituted a water of the United States.

The court then evaluated whether Moses’ work caused an unauthorized discharge of a pollutant in a water of the United States when he conducted the work only during the dry months. The court answered affirmatively on the basis that the simple dredging and redepositing of

material can violate the CWA. Moses asserted as a defense that his conduct fell within the incidental fallback exception as set forth in the Corps' regulations. However, the court quickly disposed of this argument by highlighting the stark contrast between the actual definition of incidental fallback and the evidence presented. The record clearly showed that Moses moved mass quantities of material in the course of rerouting Teton Creek.

Finally, the court rejected Moses' arguments that he never needed a CWA permit in the first place. Noting that a court must construe exceptions from the CWA narrowly, the court found no basis for Moses' conduct to fall within the CWA exception for discharges due to the maintenance of serviceable structures. The court also rebutted Moses' theory that the permit issued pursuant to the Rivers and Harbors Act covered his stream alteration work because such permits do not apply to activities within the scope of the CWA.

Since the evidence clearly supported the finding of discharge of pollutants into a water of the United States without a permit, the court concluded that the district court acted within its discretion when it denied Moses' motions for a new trial and affirmed the judgment of the district court.

Risa Borowick

UNITED STATES DISTRICT COURTS

McConnell v. PacifiCorp, Inc., No. C 07-02382 WHA, 2007 U.S. Dist. LEXIS 63948 (N.D. Cal. Aug. 17, 2007) (holding that: (1) the Federal Power Act preempts injunctive relief, and (2) the Federal Power act provides a remedy when a hydroelectric plant's construction, operation, or maintenance causes damages).

The Klamath Watershed is home to the Yurok and Karuk Native Americans and other members of the community (collectively "McConnell"), who use the area for fishing. PacifiCorp operates the Klamath Hydroelectric Project ("KHP"), which uses river and creek water to produce electric power under the Federal Energy Regulatory Commission ("FERC"). McConnell alleged that PacifiCorp's operation of the dams polluted the Klamath River by increasing water temperatures above natural levels. The increase in temperature reduced the levels of dissolved oxygen to levels lethal to fish. Additionally, the heightened temperatures promoted the growth of brown-green algae and the associated toxin, microcystin. McConnell sued PacifiCorp alleging that PacifiCorp's operation of the dams was a nuisance.

The Federal Power Act ("FPA") governs the operation of the KHP. The FPA charges FERC with balancing the competing interests in projects like KHP. PacifiCorp contended that the FPA preempts the McConnell's claim for injunctive relief. FERC stated that the FPA preempts all state and local laws concerning hydroelectric licensing,