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FPL Energy Maine Hydro LLC v. Dep't of Env'tl. Prot., 2007 ME 97, 926 A.2d 1197

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tion because contracts between the entities and the U.S. already do that. The court held that the SRBA court did not err in denying this request because the SRBA court specifically stated, "ownership of this water right is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations."

Thus, the court remanded the decision of the district court in part, with an order to substitute the court's remark, and affirmed the decision in part.

Matthew Willson

MAINE

FPL Energy Maine Hydro LLC v. Dep't of Envtl. Prot., 2007 ME 97, 926 A.2d 1197 (affirming the State Board of Environmental Protection's denial of water quality certification for a water storage project where the Board's interpretation of the statutory requirements of certification was reasonable, and therefore, entitled to deference).

FPL Energy Maine Hydro LLC ("FPL"), which owns and operates the Flagstaff Storage Project on the Dead River in Somerset and Franklin Counties, appealed a Superior Court judgment that affirmed the Board of Environmental Protection's ("Board") denial of water quality certification. The Board is the reviewing body within the Department of Environmental Protection ("Department"), the agency in Maine responsible for water quality. Although the Department initially approved certification on FPL's application for the Flagstaff Project, the Board ultimately vacated the Department's decision and denied the water quality certification. FPL appealed to the Supreme Judicial Court of Maine after the Superior Court affirmed the Board's decision, and held the Board's interpretation of the standards for water quality review were entitled to deference.

FPL based its appeal on three arguments: (1) when the Board failed to act on the application within a one-year statutory deadline, the Department waived the certification requirement; (2) the Board analyzed water quality with an incorrect standard; and (3) the Board erred in concluding the Flagstaff Storage Project did not meet the correct Class C water quality standard. FPL premised each argument on the Board's misinterpretation of the applicable Maine statute, and in each case, the court held that where the agency's interpretations were reasonable, supported by the plain language of the statute, or otherwise consistent with legislative intent, the Board's decision was entitled to deference.

After reviewing the statute's legislative history, the court held that the Board acted consistent with the legislative intent and was not a waiver of the certification requirement. Although the statute did not define "act on," the legislative history revealed that the purpose of the

statute was to prevent denial by way of delay rather than by substantive decision. Here, there was no indication that the Board attempted to deny certification by way of procedural delay. Further, the court held that the statute was silent in defining “act on”; therefore, the Board’s interpretation was reasonable.

The court held that the Board exercised proper discretion in its interpretation of the relevant statute. On review of the Department’s initial approval of FPL’s water quality certification, the Board found the Department had employed a new standard for assessing water quality, bypassing the relevant Maine statutory requirements for approval of the new standard. Specifically, the Department analyzed the Flagstaff Storage Project application with an impoundment-to-impoundment standard, comparing a storage reservoir to another storage reservoir, rather than to a natural lake standard. The Board reversed the Department’s certification because the Department was required to receive EPA approval before changing the natural lake standard to the lesser impoundment-to-impoundment standard, which it failed to do. The court reviewed the legislative intent, which indicated a desire to change the standard, but found that it did not exempt the Department from obtaining EPA approval. The court held that the Board’s interpretation of the statute’s plain language was reasonable to utilize the natural lake standard as a baseline for all water quality certifications.

Finally, the court held that the Board’s expertise in environmental concerns and experience in administering those provisions enabled the Board to interpret the relevant statutes reasonably. FPL argued that regardless of the certification standard used, the Flagstaff Storage Project achieved the required water quality standards as a matter of law because as a hydropower project, it did not discharge any pollutant. The Board found this position inconsistent with a long line of state and federal holdings that waters from hydropower projects do constitute discharges subject to environmental regulation. The court affirmed the Board’s decision after determining that the Board’s interpretation of the statutes was reasonable.

Jeff McGaughran

NEVADA

Walker v. United States, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (holding that the right to graze livestock on federal land is not implicit in a vested water right or a right-of-way used to convey the water associated with a vested water right).

Cattle Ranchers (“Walkers”) brought a takings claim against the United States after the Forest Service terminated a grazing permit for overgrazing-related deterioration of the allotment. The Walkers brought suit in the United States Court of Claims (“Claims Court”) after the United States District Court for the District of New Mexico