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Walker v. United States, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882

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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

denied their surface ownership claim and ordered them to remove their cattle from the allotment. The Claims Court certified two questions to the New Mexico Supreme Court ("The Court"), which answered both questions in the negative.

The first certified question asked whether a limited forage right is implicit in a vested water right. The Walkers claimed that historical use of a water right for watering cattle, the customary practices of the area, and New Mexico law all implied a right to use the land surrounding their water right for livestock forage. In determining whether New Mexico law implied such a right, the Court first looked to federal case law applying New Mexico law. The Court focused on *Diamond Bar Cattle Co. v. United States* which rejected a claim similar to the Walkers'; namely, that New Mexico law grants a possessory property right for cattle grazing on federal land to those with a vested water right because grazing is required to exercise the water right. The Court cited New Mexico case law in agreement with the *Diamond Bar* Court's finding that because no state law can grant a property interest in federal lands enforceable against the federal government, New Mexico law only allowed those with vested water rights to use public lands for grazing to the exclusion of those without vested water rights.

New Mexico water law follows the doctrine of prior appropriation, whereby beneficial use establishes and exercises a water right which is separate and distinct from adjacent land. Since water rights are independent of a particular location, the Court rejected the Walkers' argument that by terminating their grazing license, the federal government prevented the beneficial use of their water right and thus the water right would be lost because the Walkers could always use the water right for other purposes or sell it. The Court also rejected the argument that a land right utilized to gain a water right is incident to a water right, because under New Mexico law, the only water right appurtenant to land is an irrigation right. Finally, the Court rejected the Walkers' argument that customary practice in New Mexico Territory extended a vested water right to a right to forage on adjacent lands. The Court found that although the practical result was that the owner of a water right usually grazed stock nearby, none of the laws or customs of Spain, Mexico, or New Mexico Territory maintained that a stock watering right includes an appurtenant grazing right. The Court also stated that even if there was evidence of customary practice, such evidence was irrelevant as it was inconsistent with New Mexico law.

The second certified question asked whether New Mexico recognizes a limited forage right implicit in a right-of-way for the maintenance and enjoyment of a vested water right. The Walkers argued that the right to forage is within the scope of a right-of-way under the Mining Act of 1866 and New Mexico law. Specifically, they argued that because New Mexico law requires adequate water for grazing cattle, it implied a right to bring the cattle to the water, and thus allowed graz-

ing on the federal land en route to the water source. The Court rejected this argument and found that New Mexico does not convey or imply any grazing rights and the Mining Act of 1866 only recognized a property right in public lands for the construction of ditches and canals to carry water, not a property right for cattle grazing. The Court concluded that the scope of an easement in New Mexico is narrow and measured by the easement's nature and purpose. After determining that the purpose of the Walker's easement was for water conveyance not cattle grazing, the Court concluded that while the Walkers have a right to bring water to their cattle, it is outside the scope of any statutory right-of-way to authorize cattle grazing on federal land.

The Court answered both certified questions, whether grazing rights are implicit in water rights and whether grazing rights are implicit in rights-of-way, in the negative; leaving the determination of whether a taking occurred to the Claims Court.

Steven Earl

NORTH CAROLINA

Ellison v. Gambill Oil Co., Inc., No. COA06-1016, 2007 WL 2827477 (N.C. Ct. App. Oct. 2, 2007) (holding that the trial court erred in not providing instructions to the jury regarding the third-party exception to strict liability provisions for water pollution and that questions included on the verdict sheet regarding third-party negligence did not render this error harmless).

Kate H. Ellison ("Ellison") sued several parties in Watauga County Superior Court ("trial court"), including Gambill Oil, Jim Gambill ("Gambill"), B&B Mini Mart, Inc. ("Mini Mart"), and Gunvantpuri B. Gosai ("Gosai"), president of Mini Mart, under the strict liability provisions of the North Carolina Oil Pollution and Hazardous Substances Control Act ("OPHSCA"). Following a jury trial, the trial court awarded Ellison \$500,000 for compensatory and punitive damages. Gambill Oil appealed the award and argued for a new trial. Gambill Oil claimed that the trial court erred when it refused to instruct the jury on the third-party exception to strict liability provisions of OPHSCA. The Court of Appeals of North Carolina reversed and remanded.

In May 2001, Gambill Oil hired Jeff Barrett ("Barrett") to install a new monitoring system, sumps, and lines at the Mini Mart. In January 2005, Ellison discovered that her well had been contaminated with gasoline, which leaked from underground storage tanks located at the nearby Mini Mart. After discovering the problem, Gambill Oil hired Barrett to repair the leak. Testimony and evidence during the jury trial indicated that Barrett improperly installed a sump, causing the gasoline leak.