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United States v. Alpine Land & Reservoir Co., 510 F.3d 1035 (9th Cir. 2007)

NINTH CIRCUIT

United States v. Alpine Land & Reservoir Co., 510 F.3d 1035 (9th Cir. 2007) (holding that no abandonment or forfeiture occurred except for selected parcels in three of the ten water right transfer applications).

Nevada law requires individuals seeking to transfer water rights to new parcels of land to apply to the State Engineer. Courts uphold the State Engineer's ultimate findings of fact if substantial evidence supports his decision. Pyramid Lake Paiute Tribe of Indians ("Pyramid") appealed the order of the United States District Court of Nevada affirming the State Engineer's decision that granted ten transfers of water rights from parcels of property to new parcels. Pyramid claimed that the transfer applicants either abandoned or forfeited their water rights, and thus, could not transfer these rights. The court addressed whether transfer applicants abandoned or forfeited their water rights.

In determining abandonment, the United States Court of Appeals for the Ninth Circuit initially stated that nonuse alone does not presume abandonment. Rather, the State Engineer considers evidence of nonuse against evidence presented by transfer applicants in determining abandonment and forfeiture. The court stated that transfer applicants can present evidence in four ways: (1) show beneficial use of water on the parcel with rights attached; (2) show continuous use of water on another parcel other than the one with rights attached and that a government entity thwarted a proposed transfer; (3) show payment of taxes and assessments during nonuse periods and no improvements inconsistent with irrigation on the parcel with rights attached; or (4) show a sale of water rights by the previous owner before an abandonment, and that the new owner presented evidence of a lack of intent to abandon the water rights.

The court concluded that the State Engineer correctly determined no abandonment of water rights concerning the following applications: the Inglis and Bright applications showed beneficial use; the Ponte, Rambling River Ranches, and Harriman applications showed continuous use and government thwarting; the Stix application showed payment of taxes and use not inconsistent with irrigation); and the Workman application showed a sale by the prior owner before abandonment and the buyer's intent not to abandon.

The court, however, reversed the State Engineer's determination of no abandonment in parcels of the DeBraga application because the thwarting of a government entity occurred twenty-five years after the applicant used the parcels inconsistent with irrigation. Additionally, the court reversed the State Engineer's decision regarding the Wolf application because the parcel contained a drain ditch that used water inconsistent with irrigation.

In determining forfeiture of a water right, the court explained that it may grant equitable relief when water rights are subject to forfeiture (nonuse for any five successive years) if transfer applicants attempted to transfer the rights during the nonuse, a governmental entity thwarted the transfer, and the balance of hardships favored the applicant. The court agreed with the State Engineer in granting the Thomas transfer application because Pyramid submitted insufficient evidence showing nonuse for five consecutive years. In reversing some of the transfer grants in Rambling River Ranches, however, the court explained that no thwarted attempt occurred, and in the remanding two parcels, the court stated that the State Engineer's findings could not determine whether the five year period passed without a thwarted attempt. Most of the parcels in this transfer application passed the third rule of abandonment.

The court fully affirmed the State Engineer's decision in seven of the ten grant applications and partially affirmed three of the ten applications. The court reversed the State Engineer's decision for parcels of three of the applications and remanded the parcels of one application for further consideration.

Adam Hernandez

UNITED STATES DISTRICT COURTS

W. Watersheds Project v. Kraayenbrink, Nos. CV-05-297-E-BLW, CV-06-275-E-BLW, 2007 WL 1667618 (D. Idaho June 8, 2007) (holding as it relates to water rights: (1) the BLM must disclose conflicts between its experts concerning the possible impacts of granting grazing permit holders title to water rights; and (2) the BLM must consult with the FWS regarding the potential adverse effect such a change in title of water rights may have on threatened and endangered species).

Congress passed the Federal Land Policy and Management Act ("FLPMA") to improve the degraded conditions of rangelands and their accompanying riparian areas in the United States. In 1995, the Bureau of Land Management ("BLM") promulgated regulations to administer the nation's rangelands and govern grazing in compliance with FLPMA. In 2006, the BLM began the process of promulgating new regulations, making major changes to the 1995 regulations. As relevant to western water issues, the 2006 regulations decreased public input and allowed permit holders, not the United States, to hold title to water rights on the rangelands.

The BLM circulated a Draft Environmental Impact Statement ("ARC-DEIS") internally that indicated the proposed regulations would result in a decrease in the condition of the nation's rangelands and accompanying riparian areas. In addition, the ARC-DEIS stated changes in water rights ownership would likely decrease the BLM's regulatory authority over water allotments, resulting in long-term im-