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N. Gualala Water Co. v. State Water Res. Control Bd., 43 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006)

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not expand their license for the pipeline by extending the pipeline, and that the Barneses' predecessors had forfeited their right to additional water. The court found no error in the trial court's decision that the Barneses did not harm the Hussas by extending their pipeline. The court held that Water Code section 1706 governed the case because the Barneses' predecessors acquired their water rights before the Water Commission Act came into effect in 1914. As a result, the controlling test was that a water user may change the place where one uses the water as long as the change does not adversely affect the rights of other water users. Furthermore, the court held that the person seeking to change the place of use does not carry the burden of demonstrating that the change will not affect the rights of other water users.

The court held that the Barneses' predecessors in interest did not forfeit the right to use water that did not fit through the pipeline. Under California law, a water user forfeits the water rights the user does not exercise within a five year period. The court was unable to determine if the lower court believed the testimony of the witnesses. It found that even if the lower court believed the testimony regarding the excess water, the testimony was not sufficient to establish forfeiture of rights through the nonuse of the water. The court reasoned that the Hussas would have had to proffer evidence that water had been available for diversion for at least five years and that the Barneses' predecessors failed to divert it. The Hussas failed to proffer such evidence.

In affirming the trial courts decision, the court held that the Barneses had an irrevocable water right and that extending their pipeline to use water at a different location did not adversely affect the Hussas.

Jacki Lopez

N. Gualala Water Co. v. State Water Res. Control Bd., 43 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006) (holding that the California State Water Resources Control Board had jurisdiction over North Gualala Water Company when it pumped from two wells that drew groundwater from a subterranean stream; that the Board correctly construed a statute compelling the Water Company to obtain a permit to pump groundwater from the two wells; and that the Board appropriately interpreted pumping limitations placed on the permit).

The North Gualala Water Company ("NGWC") provided water service for approximately 1,000 customers in the town of Gualala. Between 1965 and 1989, NGWC held a permit from the California State Water Resources Control Board's ("Board") predecessor which allowed them to operate an infiltration gallery to divert a limited amount of surface water directly from the North Fork of the Gualala River. In 1989 and 1996, NGWC developed two production wells near the North Fork. When developing the wells, NGWC believed the well pumped

percolating groundwater, which was not subject to permitting by the Board. The Board first agreed that the pumped water was percolating groundwater and did not require a permit. However, the Board later determined the water was from a subterranean stream. The Board notified NGWC of this change in status and subsequently advised it to submit a water right application to legalize the extraction of water from the wells.

In 1993, NGWC filed a petition to change the authorized points of diversion in its permit to include the wells while stating it reserved the right to challenge the Board's determination that the wells pumped from a subterranean stream. In January 1998, NGWC's consultants filed a report which concluded the North Fork did not recharge the groundwater under the wells and that the water did not flow from a subterranean stream. The Board's Division of Water Rights ("DWR") responded that it still believed the water pumped by the wells was subject to the Board's jurisdiction, because they understood the water was flowing in a known and definite channel. DWR told NGWC that if it wished to withdraw its petition, DWR would recommend the Board hold a groundwater classification hearing. NGWC informed the Board that it wanted to reserve the issue of groundwater classification for a future hearing and wished to carry on the process of petitioning the wells to be included in its diversion permit. In August 1999, the Board granted an order accepting NGWC's petitions to substitute the wells for the prior points of diversion. As conditions on the order, NGWC had to present a surface flow measurement plan to guarantee compliance with the original permit and prepare a water flow contingency plan to address how it would meet the customers' water needs. While preparing the plans, NGWC requested a hearing to determine the classification of the groundwater and to discuss the Board's application of the original permit. After receiving the plans from NGWC, DWR denied approval because it determined the terms of the original permit applied. DWR encouraged NGWC to petition the change of bypass flow requirements in the original permit and take the matter of groundwater classification to the Board.

NGWC challenged the validity of the evidence supporting the Board's denial of the plans and contested the interpretation of the original permit by filing a declaratory relief and a writ of mandate. The Superior Court of Mendocino County stayed the case to allow the Board to conduct a groundwater classification hearing to resolve the issue. After a formal request from NGWC, the hearing took place in June 2002. The Board applied the test from the 1999 *In re Garrapata Water Co.* case which determined:

[F]or groundwater to be classified as a subterranean stream flowing through a known and definite channel, the following physical conditions must exist: (1) A subsurface channel must be present; (2) the channel must have a relatively impermeable bed and banks; (3) the

course of the channel must be known or capable of being determined by reasonable inference; and (4) groundwater must be flowing in the channel.

NGWC determined that the wells did not meet the requirements of the test because the only subsurface channel present did not contract or narrow, the bedrock forming the bed and banks of the alluvial channel was not adequately impermeable, and that the groundwater did not flow with the channel. The Board rejected these arguments and affirmed that the subterranean stream under the wells met all elements of the *Garrapata* test. In May 2003, NGWC filed a new writ of mandate, and the trial court held the *Garrapata* test was appropriate and that substantial evidence supported the Board's findings. NGWC appealed to the California Court of Appeals, First Appellate District, Division One.

The court established that it would uphold the Board's findings unless the Board lacked substantial evidence in making its decision. NGWC argued for a de novo review alleging that the Board did not make any findings of fact on the disputed factual issues. The court first used the four-part test to determine the level of deference the court should give to the Board's interpretation. The court found that the Legislature intended the Board's jurisdiction over groundwater to be the exception to the rule, and the court did not need to defer to the Board's views on this matter. The court then went on to examine the issues that NGWC raised.

NGWC argued there was a distinction between flowing and percolating groundwater. NGWC alleged that a subterranean stream is of a defined character and flows in known and definite channels and, thus, does not apply to their wells. NGWC argued that the "relatively impermeable" wording of the Board's four-point test concerning the bed and banks of the channel was not consistent with the pre-1913 case law. NGWC argued the four-part test omitted important restrictive factors which are implicit in the *City of Los Angeles v. Pomeroy* case and in doing so was over inclusive and overstated the Board's statutory authority. NGWC also asserted that since *Pomeroy* defined channels as contracted and bounded, there was no channel below the wells because the groundwater did not contract and the bed and banks were not sufficiently impermeable to bind the groundwater. The court ruled that the evidence did not support the assumption that a channel must contract to be a definite channel and that NGWC's absolute standard that subterranean channels be watertight was unrealistic. The court also held that the pre-1913 cases better supported the Board's position that confinement of the groundwater once it entered the channel proved the existence of a subterranean channel.

The court then addressed the relevance of flow direction. NGWC argued the flow should be parallel to the channel or at least always flowing in the same direction. The Board countered that nothing in

the statute or the case law required the subterranean stream follow the exact flow of the channel. The court held that as long as the subterranean stream flowed in the same general direction as the channel it would suffice to meet the test and the directional deviation would be irrelevant. The Board noted that the channel which runs beneath the wells deviated from flowing parallel to the subterranean stream when it hit the less permeable clay sediments near the wells, which forced the streamflow into more permeable soils. The Board argued that the divergence of the groundwater flow was consistent with the general downstream flow of the subterranean stream. The court found this explanation to be adequate to explain the perpendicular flow.

Finally, NGWC argued that the four-part test be replaced with the classifications found in 1911 treatise authored by Samuel C. Wiel, *WATER RIGHTS IN THE WESTERN STATES*. Wiel stated that known underground streams were rare and the presumption was against their presence. The court found that the pre-1913 case law distinguished subterranean streams as a subclass of underground streams, which when looked at together failed to support NGWC's claims. The court held that the four-part test was consistent with the language and objective of the statute and that substantial evidence supported the Board's findings. The court also found that NGWC waived the issue of the Board's application of the original permit when it failed to raise it in 1999. The court then noted that even if NCWC had timely raised the issue, it would not be persuasive because courts extend considerable deference to an administrative agency's explanation of its own regulations and language.

The court affirmed the judgment of the trial court, holding that the Board accurately interpreted a statute to determine whether groundwater fell within the Board's permitting authority.

Kathleen Brady

COLORADO

Pub. Serv. Co. of Colo. v. Meadow Island Ditch Co. No. 2, 132 P.3d 333 (Colo. 2006) (holding that the recipient of a contractually-delivered water right may not change its use without the consent of the appropriative owner and that a plan for augmentation does not violate a contractual prohibition against changing the point of diversion for a subject water).

The Public Service Company of Colorado ("PSCo") derived its water rights in the subject water through its 46.25% ownership in the Beeman Ditch and Milling Company ("Beeman"). Meadow Island Ditch Company No. 2 ("Meadow") and Beeman, under a 1905 decree, shared a head-gate on the South Platte River, where each diverts its respective water rights. In 1925, a dispute arose between Meadow and