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Fort v. Dep't of Ecology, 135 P.3d 515 (Wash. Ct. App. 2006)

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United States had sovereign immunity from joinder in state water law general adjudication. The court rejected the United States argument, referencing Congressional intent to allow joinder of the United States in state court when the controversy relates to water rights as outlined in the McCarran Amendment. In addition, the court noted the long-reaching effects that the outcome of these adjudications could have on downstream users as further reasoning against characterizing this controversy as a private dispute.

In conclusion, the court determined that federal jurisdiction was appropriate for federal reclamation contract disputes, while issues of water usage rights belonged within state jurisdiction. The United States was subject to joinder in the proceedings of both the courts because of the McCarran Amendment. Finally, settling the disputes in general adjudication was appropriate because the dispute reached beyond a mere private interaction.

The court remanded the case to the Eighth District Court, ordering a postponement of the Eighth District Court's proceedings pending the outcome of the Third District Court and the federal court. The court ordered the Third District to defer to federal court law if the parties focus adjudication on their contractual duties, and subsequently decide how the federally-interpreted contracts exist under Utah water law.

Ryan Malarky

WASHINGTON

Fort v. Dep't of Ecology, 135 P.3d 515 (Wash. Ct. App. 2006) (holding the futile call doctrine does not apply in the State of Washington).

In September 1921, a decree adjudicated the rights and priorities to Beaver Creek resulting in 18 classes of water rights. Michael D. Fort ("Fort") held class 1, 8, and 9 rights under the decree. Class 1 is the most senior right on Beaver Creek. Fort's point of diversion for all three rights is the last one on Beaver Creek before its confluence with the Methow River. In 2001, insufficient water was available to satisfy all classes of water users on Beaver Creek. Accordingly, the Department of Ecology ("Ecology") ordered all rights junior to class 5 shut off. However, Fort continued to divert his class 8 and 9 rights. Ecology issued Fort a notice of regulation. Fort appealed to the Pollution Control Hearings Board ("Board") which granted summary judgment in favor of Ecology. Fort appealed to the Okanogan County Superior Court, which denied his petition for judicial review. He then appealed to the Court of Appeals of Washington.

The court limited its review of the Board's decision to the administrative record before the Board. The court held that it will only reverse an agency decision if the decision is outside of its statutory authority or

jurisdiction, erroneous, not supported by substantial evidence, or arbitrary and capricious. The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

Fort claimed that, because his diversion point is farthest downstream, it does not interfere with other parties' respective priorities under the futile call doctrine. The futile call doctrine provides that a senior appropriator may prevent a junior appropriator from diverting water only when doing so will benefit the senior. The court held that the State of Washington does not recognize the futile call doctrine. Refusing to read provisions into an adjudication decree that do not exist, the court held that the focus of the decree was the prioritization by class and the decree's priority system must be respected regardless of whether some users can exercise their rights by virtue of their location on the creek.

Fort further argued, without citing authority, that excess water allowed to travel past his head gate is "wasted" if he is not allowed to divert it to satisfy his class 8 and 9 rights. Fort did not raise this argument before the Board. The court refused to consider the issue because issues not raised before the agency may not be raised on appeal.

The court held that the Board properly upheld the notice of regulation requiring Fort to curtail his class 8 and 9 water rights. Affirmed.

Kelly L. Snodgrass

