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United States v. Washington, Dep't of Ecology, 375 F. Supp. 2d 1050 (W.D. Wash. 2005)

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However, the court found that it had subject matter jurisdiction over the CERCLA claim because NPWA's claim was to recover response costs under section 107, and section 113(h)(1) permits judicial review of this type of action. BAE Systems also argued that NPWA failed to state a claim under CERCLA section 107 because their response costs were inconsistent with the National Contingency Plan. The court found this was a question of fact for trial. The court also permitted NPWA's claims under the Pennsylvania Hazardous Sites Cleanup Act since that statute permitted a private party to bring a claim for recovery of response costs.

BAE Systems challenged the timeliness of NPWA's state tort law claims, claiming NPWA was aware of the contamination 25 years ago and there is a two-year statute of limitations on tort claims. Pennsylvania law allows for tolling of the statute of limitations until a plaintiff knows or reasonably should know that he or she has sustained an injury caused by another person. When there is a continuing violation, Pennsylvania law also tolls the statute of limitations until the contamination ceases. Although the court questioned whether the statute of limitations would bar the state law claims, the court would not dismiss the claims without more of a record.

The court dismissed BAE Systems's claim for injunction under RCRA, but permitted its recovery of response costs and state tort law claims to continue.

Heather Heinlein

United States v. Washington, Dep't of Ecology, 375 F. Supp. 2d 1050 (W.D. Wash. 2005) (holding: (1) water rights are impliedly reserved to fulfill the primary purpose or purposes of an Indian reservation; (2) the practicable irrigable acreage method is an appropriate means of quantifying impliedly reserved agricultural water rights, but impliedly reserved domestic water rights are to be quantified independently of the agricultural rights; (3) under these circumstances, the quantification of impliedly reserved water rights does not necessitate the quantification of those rights for the entire Reservation or the inclusion of sources beyond the Reservation, except as they pertain to the practicable irrigable acreage calculation; (4) an Indian is able to transfer impliedly reserved water rights, even to a non-Indian successor, but the non-Indian successor may lose the rights through non-use, and the rights are then lost to the tribe).

In 1855, the Treaty of Point Elliot ("Treaty") created the Lummi Reservation ("Reservation") which covers two peninsulas in Washington. Both the Treaty and deeds conveying parcels of land to non-Indian successors in interest made no mention of water rights. The portion of the Lummi Reservation involved in this dispute ("Case Area") comprises just over half of the reservation, and the parties

agreed that only seven percent of the Case Area is suitable for agriculture.

The United States and the intervening Lummi Indian Nation (collectively "United States") sought a declaration stating that the Treaty impliedly reserved the groundwater under the Lummi Peninsula for the use of the Lummi Nation. The State of Washington, Department of Ecology ("Ecology") claimed the Treaty did not impliedly reserve groundwater in the amount claimed by the United States. In addition, the water associations ("Associations") who held permits to withdraw and deliver the groundwater of the Lummi Peninsula, claimed a right to withdraw the disputed groundwater. The parties filed cross-motions for summary judgment and the court granted Motions to Reconsider to both parties.

The United States District Court for the Western District of Washington's analysis relied on the decision in *Winters v. United States*. In *Winters*, the Supreme Court held water rights are impliedly reserved for Indians where a treaty does not mention water rights because they are necessary to fulfill the purpose of the reservation ("Winters rights"). This court noted the federal government's intent at the time of the reservation's creation determines the purpose of a reservation, and federal law limits Winters rights to the amount necessary to fulfill a reservation's primary purpose. Furthermore, the court made several statements regarding a reservation's primary purpose: a reservation may have more than one primary purpose; a primary purpose is more than a valuable secondary use; and Winters rights are the amount necessary to fulfill the reservation's primary purpose, no more. As such, the United States was only entitled to Winters rights sufficient to fulfill the Reservation's primary purpose or purposes.

The parties claimed the Reservation had different primary purposes, which lead to substantially different calculations of Winters rights. The United States contended the Treaty's primary purpose was to create a homeland. The United States further argued the court should find sufficient Winters rights to provide for all domestic, agricultural, community, commercial, and industrial purposes. Ecology and the Associations asserted the primary purpose was agricultural because the drafters of the Treaty intended the Reservation to transform the Lummi Nation into an agricultural community. The parties agreed the Treaty impliedly reserved water rights for domestic and agricultural purposes. The court rejected the homeland purpose by noting it was contrary to the primary purpose test under federal law and it conflicted with Ninth Circuit precedent. The court ruled the primary purposes of the Reservation were agricultural and domestic.

Furthermore, the court recognized the need to quantify the Winters rights as part of the proceeding. The parties agreed the practically irrigable acreage method ("PIA") was the appropriate means of quantifying the agricultural Winters rights. The PIA is a two-part test:

the land must be susceptible to sustained irrigation and it must be irrigable at a reasonable cost. However, the United States objected to the use of the PIA for quantification of domestic Winters rights because only roughly seven percent of the Case Area was suitable for agriculture. The court agreed with the United States, stating Winters rights are reserved in quantities to make the entire Case Area livable, not just those areas suitable for agriculture. Therefore, the court ruled the quantification of domestic Winters rights was independent of the agricultural quantification.

The parties continued to dispute whether the quantification should encompass the entire Lummi Reservation and whether the quantification should include water sources beyond the Lummi Reservation. The court ruled the quantification of Winters rights within the Case Area did not necessitate a quantification for the entire Lummi Reservation. Still, Ecology claimed the quantification of the Winters rights needed to include surface and groundwater sources beyond the Lummi Peninsula. The court refused to consider other sources of water except as they related to the calculation of the Lummi's PIA because consideration of all available sources would maximize the determination of the Lummi's agricultural Winters rights. The parties agreed the Lummi's Winters rights should be quantified based solely on Case Area usage, and should not include uses beyond the Lummi Peninsula.

Lastly, the court addressed the use and transferability of the Lummi's Winters rights. The court held as a matter of law the Lummi may use their Winters rights for any purpose. However, the parties raised several questions regarding the transferability of the Lummi's Winters rights, especially in relation to non-Lummi successors. The court's analysis relied on a pair of cases. *Colville Confederated Tribes v. Walton* ("Walton II") held an Indian must be able to sell all of his rights in the Tribe's reserved waters. In *Colville Confederated Tribes v. Walton* ("Walton III"), the Ninth Circuit ruled non-Indian successors in interest must maintain Winters rights through continuous use. Based on Walton II, the court held the Lummi may sell or transfer their agricultural and domestic Winters rights to Lummi and non-Lummi successors alike. Next, the court addressed the question of whether a non-Indian successor's interest becomes subject to loss through non-use. In accordance with Walton III, the court reasoned the Lummi's non-Indian successors must exercise due diligence in perfecting their rights or they become subject to loss through non-use. The court further reasoned it would turn to state law in determining due diligence. After an examination of Washington law, the court found a non-Lummi successor must exercise due diligence within 15 years of the transfer or his or her right is lost through non-use. The next question pertained to the reacquisition of Case Area land from non-Lummi successors where the Winters rights had been lost through non-use. The court found

where the Lummi Nation reacquires Case Area land, it only reacquires Winters rights which were perfected by the non-Lummi successor through due diligence.

Nathan Whitney

STATE COURTS

ARIZONA

Phelps Dodge Corp. v. Ariz. Dep't of Water, 1 CA-CV 04-0491, 2005 Ariz. App. LEXIS 108 (Ariz. App. Sept. 1, 2005) (holding that Arizona's statutes do not require a physical diversion for a valid appropriation of instream water rights).

The United States Forest Service ("Forest Service") applied to the Arizona Department of Water Resources ("ADWR") for a permit to appropriate the waters of Cherry Creek, a tributary of the Salt River located in the Tonto National Forest. The permit would grant the Forest Service the right to certain instream flows for fish, wildlife, and recreation purposes. The ADWR issued a notice to interested parties concerning their right to file protests to the Forest Service's application. Phelps Dodge Corporation ("Phelps Dodge") filed a protest to the Forest Service's application. Phelps Dodge argued that the ADWR may not issue a permit for instream flows because the ADWR had no explicit statutory authority to issue such permits, and that the ADWR violated the Arizona Administrative Procedure Act ("APA") by relying upon the Guide to Filing Applications for Instream Flow Water Rights in Arizona ("1991 Instream Flow Guide") without promulgating it as a rule.

The ADWR referred the protest to the Office of Administrative Hearings. The Administrative Law Judge ("ALJ") held a hearing on whether the ADWR had the authority to issue permits for instream rights. The ALJ concluded that the ADWR had the authority to issue permits to appropriate water for instream flows, and on appeal, the Superior Court in Maricopa County affirmed. Phelps Dodge appealed to the Arizona Court of Appeals, Division One, Department D.

Phelps Dodge argued that under a prior appropriation system, a physical diversion of water is an essential element of an appropriation, and that the legislature implicitly adopted the diversion requirement into Arizona's statutory scheme. Since an instream water right does not involve a physical diversion, Phelps Dodge contended it may not be a valid appropriation of water necessary to effect a water right. Therefore, Phelps Dodge reasoned the ADWR was without authority under Arizona law to issue instream water rights. In response, the ADWR argued that Arizona statutes conferred the necessary authority to issue