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United States of America v. Alisal Water Corp., 431 F.3d 643 (9th Cir. 2005)

NINTH CIRCUIT

United States of America v. Alisal Water Corp., 431 F.3d 643 (9th Cir. 2005) (holding under the Safe Drinking Water Act a federal district court has subject matter jurisdiction over enforcement actions, a routine sample to establish maximum contaminant level violations is a sample that is not special purpose or otherwise invalidated, and divestiture of water treatment facilities is among possible remedies).

The United States, on behalf of the Environmental Protection Agency, brought a civil enforcement action against the Alisal Water Corporation (“Alisal”) for numerous violations of the Safe Drinking Water Act (“SDWA”). The district court granted summary judgment in favor of the United States on nine counts and one more count after a trial. The district court ordered divestiture of Alisal’s smaller owned water systems and imposed a monetary penalty. Alisal appealed the district court’s decision to the Court of Appeals for the Ninth Circuit.

Alisal challenged the district court’s subject matter jurisdiction. Federal courts have subject matter jurisdiction over civil actions arising under laws of the United States, including suits for violations of federal water quality statutes, unless limited by specific reference in the statute. Federal district courts also have original jurisdiction over suits commenced by the United States or an agency authorized by Congress, unless otherwise provided by statute. Alisal argued that section 300(g)(3)(b)(2) of the SDWA, which required States to request enforcement actions, limited the federal court’s jurisdiction. The court found this section only limited the government’s authority to bring the suit but not the district court’s jurisdiction over it. The court did not find an express statutory exception to the district court’s subject matter jurisdiction over enforcement actions under the SDWA.

Alisal challenged two maximum contaminant level violations for total coliform. It contended the government established the violations through “special” samples and the SDWA required “routine” samples to show total coliform violations. The court addressed what constitutes a “routine” sample. The court agreed with the United States and held a sample representative of water throughout the system and not a “special purpose sample” or otherwise invalidated was “routine.” Alisal argued a corporation takes a “routine” sample according to a present monitoring plan. The court rejected this interpretation of “routine” because it would threaten public health and safety since a violator could conceal excessive total coliform levels in its routine monitoring plan and insulate itself from judgment. The court found the samples in this case to be routine. A corporation takes a “special purpose sam-

ple” to determine if disinfection practices were sufficient following maintenance. Alisal did not take the samples after recent changes in the system, and therefore the district court could rely upon them for a total coliform violation.

Alisal argued ordering divestiture of water facilities was not within the district court’s statutory authority since Congress did not expressly list divestiture as a possible remedy in the SDWA. Alisal also argued this remedy was invalid because the district court did not consider the current state of the small water systems or consider each system separately. Under the SDWA, the court has authority to enter “such judgment as protection of public health may require.” The court held the remedies under the SDWA incorporate all of the court’s equitable powers, and therefore partial divestiture was not outside the district court’s statutory authority. The court also held the district court considered the overall compliance improvements but still found continued violations. The court held the remedy was rational and appropriate and took into consideration both the public interest and the personal interests of Alisal’s owners.

The court held the district court did not violate Alisal’s due process rights when it considered information obtained in public hearings when fashioning a remedy for the regulatory violations. The court based this decision on Alisal’s failure to object to the lack of an oath or cross-examination at the time of the hearings, and failure to show admission of the evidence prejudiced them.

The court affirmed the decision of the district court.

Heather Heinlein

Baccarat Fremont Developers, LLC v. U. S. Army Corps of Engineers, 425 F. 3d 1150 (9th Cir. 2005) (holding that jurisdiction is appropriate under CWA when a significant nexus between wetlands and adjacent tidal waters exists. The CWA does not require a significant hydrological or ecological connection in order to have jurisdiction over adjacent wetlands).

The Army Corps of Engineers (“Corps”) determined that it had jurisdiction over 7.6 acres of wetlands property under the Clean Water Act (“CWA”) owned by Baccarat Fremont Developers, LLC (“Baccarat”). Baccarat purchased nearly 31 acres in July 1997, including the 7 acres in question, with the intention to develop office, research, and manufacturing facilities. Fabricated beams that abut the southern and western site boundaries separate nearby flood control channels from the 7.6 acres of wetlands. At the closest point, Baccarat’s wetland property is approximately 65 feet from the flood control channels.

In February 1998, the Corps determined that it had jurisdiction under CWA over 7.6 acres of the site. At that point, Baccarat sought a