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Phelps Dodge Corp. v. Ariz. Dep't of Water, 1 CA-CV 04-0491, 2005 Ariz. App. LEXIS 108 (Ariz. App. Sept. 1, 2005)

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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

instream water permits, and that Arizona's prior appropriation system did not require an actual physical diversion of water where no diversion was necessary, to put the water to beneficial use.

The court reviewed Arizona's statutes concerning general water usage rights to decide whether the ADWR had the authority to issue the permit and if a physical diversion was a necessary element for a valid appropriation. In interpreting the statutes, the court assessed the legislative intent of the statutes and examined their historical background, effects, consequences, spirit, and purpose.

The court found that under the statutory scheme, beneficial use was the basis, measure, and limit to the use of water, and that beneficial uses included recreation, wildlife, and fishing. In addition, the court determined that surface waters of lakes, ponds, or streams are all subject to appropriation and beneficial use. However, the court noted that the sections defining an acceptable appropriation and beneficial use did not explicitly refer to either instream flows or a diversion requirement.

When looking at the historical context of the statutes, the court found that the focus of early water use law concerned the appropriator's intent to use, and that diversion was acknowledged only as a practical necessity for irrigation and other off-site uses. The court noted Arizona common law did not require that a diversion occur for an appropriation to be valid. Additionally, the court stated that Arizona's common law principles regarding notice to effect an appropriation, abandonment, or forfeiture of a water right did not reference a diversion requirement. The court concluded the statutory analysis by stating that had the legislature intended to require a diversion for a successful application for a water use permit, it could have done so in the applicable statutes.

The court acknowledged that it should award great deference to ADWR's interpretation of Arizona's water law. The court reasoned that absent clear statutory guidance to the contrary, the ADWR decision should not be overturned since the ADWR has consistently interpreted the statutes and made decisions regarding instream flow rights since 1983.

The court briefly addressed Phelps Dodge's argument that ADWR violated the APA and negated its authority to issue a permit by applying the 1991 Instream Flow Guide without codifying it as a regulation. Although Phelps Dodge did not adequately address the issue on appeal, the court held that ADWR did not violate the APA. The court noted that ADWR adopted the 1991 Instream Flow Guide as a substantive policy statement in accordance with Arizona Revised Statute § 41-1091, and that the statute permits an agency to adopt a written expression that "informs the general public of an agency's current approach to, or opinion of, the requirements of . . . [the]state statute."

The court affirmed the district court's holding that Arizona statutes do not require a physical diversion for a valid appropriation of in-stream water rights. The ADWR thus had the authority to issue permits for instream water rights under Arizona law.

James E. Downing

CALIFORNIA

City of Burbank v. State Water Res. Control Bd., 108 P.3d 862 (Cal. 2005) (holding that regional water quality boards may not consider economic factors to justify restrictions that are less stringent than federal standards, and therefore publicly operated waste water treatment facilities must comply with the federal Clean Water Act, but California law allows regional water quality boards to consider economic factors when deciding whether to make pollutant restrictions in a waste water discharge permit more stringent than federal law requires).

Three publicly owned treatment plants discharge wastewater under National Pollutant Discharge Elimination System ("NPDES") permits issued by the Los Angeles Regional Board. Together the Donald C. Tillman and Los Angeles-Glendale Water Reclamation Plants, owned and operated by the City of Los Angeles, and the Burbank Water Reclamation Plant, owned and operated by the City of Burbank ("Cities"), process and release hundreds of millions of gallons of sewage each day. The treated wastewater released is sufficiently safe for watering crops and human contact. California's State Board and nine Water Quality Control Boards ("Boards") are responsible for coordinating and controlling California's water quality. Prior to 1998, the Boards enforced effluent limitations and standards under the federal Clean Water Act by issuing NPDES permits containing broad statements of desirable water quality goals. This controversy arose in 1998 when the Board sought to replace the narrative water quality criteria with specific numeric pollutant concentrations.

The Cities filed petitions for writs of administrative mandate in Superior Court, alleging the Board failed to comply with Sections 13241 and 13263 of California's Porter-Cologne Act ("Act"), requiring Boards to consider the economic burden on Cities having to substantially reduce the pollutant content of their discharged wastewater. Additionally, the Cities claimed that compliance with the numeric pollution restrictions would collectively increase their treatment costs by \$68.7 million per year. The Board responded that sections 13241 and 13263 do not require Water Quality Control Boards to consider compliance costs when issuing a NPDES permit that restricts the pollutant content of discharged water. The trial court stayed the contested pollutant