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Baccarat Freemont Developers, LLC v. U.S. Army Corp of Engineers, 425 F. 3d 1150 (9th Cir. 2005)

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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 divesture of water facilities was not within the district court's statutory authority since Congress did not expressly list divesture 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 divesture 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 Freemont 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

permit from the Corps to fill 2.36 of those acres. After the Corps denied the permit, Baccarat appealed, citing the recent United States Supreme Court decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers* ("SWANCC"), which held that adjacent wetlands must be hydrologically or ecologically connected to waters of the United States to be subject to the CWA. The Corps reaffirmed its jurisdiction in January of 2002, and found that SWANCC did not diminish the Corps authority to regulate wetlands adjacent to a flood control channel.

On February 6, 2002, the Corps offered Baccarat the permit subject to conditions 1) that is would create a minimum of 2.36 acres of on-site seasonal freshwater wetlands and 2) that it would make enhancements on the remaining 5.3 acres subject to CWA jurisdiction. Baccarat agreed, signed the permit, and subsequently filed suit in California Superior Court. The Corps removed the suit to federal district court. The district court granted summary judgment for the Corps holding that the Corps has jurisdiction.

The United States Court of Appeals for the Ninth Circuit first looked to the statute and to the Corps to define some of the terms in question. The CWA defines navigable waters to mean the waters of the United States. The Corps has defined the waters of the United States to mean, in relevant part, wetlands adjacent to waters. These regulations also define adjacent as "bordering, contiguous or neighboring." They specify that wetlands that are separated from other waters of the United States by manmade dikes or barriers do constitute adjacent wetlands.

The parties agree that the flood control channels adjacent to Baccarat's land contain waters of the United States. However, relying on SWANCC, Baccarat argued that adjacency alone is not sufficient. However, the facts in SWANCC surrounded the Migratory Bird Rule application to the CWA where migratory birds used intrastate waters. The court held that the CWA did not support the Migratory Bird Rule on the ground that reading the CWA to extend jurisdiction to inland ponds would effectively negotiate "navigable waters" out of the statute.

SWANCC did not address the issue of jurisdiction over adjacent wetlands. The fact that the court in SWANCC did not allow the Corps to extend its jurisdiction to waters not adjacent to jurisdictional waters as applied to the Migratory Bird Rule, has no bearing on its earlier holding in *United States v. Riverside Bayview Homes* that the Corps has jurisdiction over wetlands that are adjacent to jurisdictional waters.

The court held Baccarat's contention that a significant hydrological or ecological connection is required to support the Corps' jurisdiction is not supported by the CWA, or by case law in the Ninth Circuit or the United States Supreme Court. Because no such contention was

required, the Ninth Circuit affirmed the decision of the district court granting the Corps's motion for summary judgment.

Brandon Saxon

Brady v. Abbott Labs., 433 F.3d 679 (9th Cir. 2005) (holding landowner's extraction of ground water to improve the land constitutes a reasonable use and is acceptable even if the extraction proves detrimental to others).

In the fall of 1997, Abbott Laboratories ("Abbott") sought to create an underground storage facility. To further the project, Abbott acquired an emergency permit from the Arizona Department of Water Resources ("ADWR") to remove 2.07 acre-feet of groundwater from the construction site. However, in order to keep the site dry, Abbott had to remove over 120 acre-feet of water. Originally, an onsite basin stored the excess ground water, which was supposed to seep back into ground and recharge the aquifer. However, due to the volume of excess water, Abbott had to remove most of it from the premises. The removal of the groundwater caused a sixteen-foot drop in the aquifer causing Brady's pecan trees to die. The loss of the pecan trees destroyed Brady's farm and business.

Brady ignored the potential claim that Abbott violated the ADWR permit, and instead, filed a negligence and nuisance claim for violation of the reasonable use doctrine. In Arizona, a landowner who removes the water to benefit the development of the land does not violate the reasonable use doctrine. Therefore, because Abbott removed the water to benefit its construction project, even though Brady suffered detriment, Abbott had not violated the reasonable use doctrine. The court held that because Abbott had not violated the reasonable use doctrine, Bradly's negligence and nuisance claimed failed.

Brian Stewart

United States v. Truckee-Carson Irrigation Dist., 429 F.3d 902 (9th Cir. 2005) (holding that the Pyramid Lake Paiute Tribe's right to apply for a change of water right was limited to that amount of water they had previously used for irrigation, and not the maximum amount they could have used to compensate for transportation losses).

The Pyramid Lake Paiute Tribe of Indians ("Tribe") and the United States, as trustee for the Tribe, applied to the Nevada State Engineer ("Engineer") for an initial adjudication of applications to change the use of two water rights from irrigation to instream use to support the Tribe's fishery. The Engineer issued a ruling that granted the applications in part, but allowed the Tribe to transfer only the acre-