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United States v. Truckee-Carson Irrigation Dist., 429 F.3d 902 (9th Cir. 2005)

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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, Brady's negligence and nuisance claims 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-

feet that were designated for irrigation and not those portions designated to cover for transportation losses. The City of Fallon and the Truckee-Carson Irrigation District appealed the Engineer's ruling to the United States District Court for the District of Nevada and obtained a stay of the ruling, which the Tribe appealed and the United States Court of Appeals for the 9th Circuit affirmed.

The Tribe owned water rights in the Truckee River, which originates in California and terminates in Pyramid Lake on the Pyramid Lake Reservation in Nevada. These rights were provided by the Orr Ditch Decree ("Decree") in 1944, a final decree from the federal district court in Nevada that had adjudicated the water rights to the Truckee. This Decree was the end result of a suit brought by the United States in 1913 to quiet title to all water rights in the area for the purposes of a federal irrigation project.

The Tribe applied to change two of their water rights, Claims 1 and 2, from use for irrigation to one that would preserve their fishery. The water would no longer be diverted from the river for irrigation, but would remain in the river to flow into Pyramid Lake. These rights included the right to take up to a maximum amount of water to compensate for transportation losses, above those amounts which had been designated for use in irrigation.

In 2002, the Engineer granted the applications in part, and allowed the Tribe to transfer the majority of its acre-feet to the use it requested. These amounts included only the amount of water that was actually applied to the land, however, and not those amounts designated for transportation losses. The resulting amounts were roughly 85% of Claim 1 and 73% of Claim 2. The Tribe appealed this ruling and the district court affirmed the Engineer's ruling. The Decree stated that the "amount of water *applied* to the land shall not exceed four acre feet per year," and the water "*diverted* shall not exceed 4.71 acre feet per year." The Tribe argued that the language "creates an unqualified entitlement to divert water up to the overall maximum." The district court disagreed and read this language to mean that the Tribe was only entitled to the "maximum amount of water it is permitted to apply to the land," instead of the maximum amount it could divert. The Tribe appealed the district court's decision.

The court of appeals focused solely on the issue of "whether the Tribe may transfer the transportation-loss component of its decreed water rights under Claim Nos. 1 and 2." The court held that the transportation loss amount of the right was not transferable to a new use that did not involve such a loss, namely the instream right requested by the Tribe. The court looked to the Alpine Land Decree, an adjudication similar to the Orr Ditch Decree, which explicitly provided that the change of a right shall only extend to the amount of "net consumptive use," and not transportation loss. The Water Master responsible for administering the Decree and case law both supported this under-

standing of the issue. Based on this reasoning, the court affirmed the district court and held that the Tribe was only allocated the amount it would have applied to irrigation, and not those amounts meant to compensate for transportation losses.

Charles Sweet

TENTH CIRCUIT

United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005) (holding knowledge of a pollutant's path is irrelevant in determining whether an individual is guilty of negligently discharging a pollutant into a protected waterway).

At trial in the United States District Court for the District of Colorado, a jury found David Ortiz guilty of violating the Clean Water Act ("CWA") because he negligently discharged industrial wastewater into a protected waterway. Following the guilty verdict, Ortiz moved for an acquittal. The district court granted the acquittal finding that Ortiz did not knowingly pollute a protected waterway. The government appealed to the Tenth Circuit Court of Appeals by arguing that the CWA does not have a *mens rea* provision.

Ortiz manufactured airplane wing de-icing fluid. The manufacturing process creates a substantial amount of wastewater that requires either treatment or a National Pollution Discharge Elimination System ("NPDES") permit for legal release into the environment. Ortiz did not treat the water or obtain a NPDES permit. Instead, Ortiz dumped the wastewater down a toilet at his manufacturing facility. Once in the toilet, the wastewater traveled through the municipal water system until it reached the Colorado River. The wastewater did not receive any treatment as it traveled through the municipal water system from Ortiz's toilet to the Colorado River. Investigators discovered the wastewater dumping after they responded to complaints about unusual odors downstream from Ortiz's business.

The district court jury found that Ortiz violated the CWA by negligently discharging a pollutant, from a point source, into the navigable waters of the United States, without a permit. The district court acquitted Ortiz, finding that Ortiz could not have negligently dumped wastewater since he did not know the wastewater would end up in a protected waterway.

The court reversed the acquittal because the district court improperly applied the term "negligently" as a *mens rea* provision. Under the CWA, negligently means a "failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." Since Ortiz did not use ordinary prudence when he