

9-1-2005

Ward County Irrigation Dist. No. 1 v. Red Bluff Water Power Control Dist., 08-04000322-CV, 2005 Tex. App. LEXIS 5063 (Tex. App. Jun. 30, 2005)

Noah Klug

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Noah Klug, Court Report, Ward County Irrigation Dist. No. 1 v. Red Bluff Water Power Control Dist., 08-04000322-CV, 2005 Tex. App. LEXIS 5063 (Tex. App. Jun. 30, 2005), 9 U. Denv. Water L. Rev. 274 (2005).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

tification to the Port. The following day, the cities of Shoreacres, Taylor Lake Village, Seabrook, and the Galveston Bay Conservation and Preservation Association (collectively "Cities") filed an administrative appeal seeking reversal of the 401 certification and remand to the Commission, claiming that issuance of a 401 certification was not a final action and the Corps could not rely upon it in granting a 404 permit. The Corps issued the Port a 404 permit on January 5, 2005, and the Port began construction thereafter. On April 29, 2005, the Port filed a motion for summary judgment stating the Cities' claim was moot because the Corps issued a 404 permit in reliance on the 401 certification and revocation of the 401 certification would not affect the validity of the 404 permit. The Travis County District Court granted the Port's motion on May 28, 2005.

The court examined Texas' statutory scheme regarding dredge-and-fill permits and the Clean Water Act. The Texas Water Code expressly forbids the Commission from issuing dredge-and-fill permits. However, under the Clean Water Act, the Commission is capable of vetoing the issuance of the 404 permit by denying the 401 certification because a 404 permit is contingent upon issuance of 401 certification. The Commission chose to grant the 401 certification. As a result, the issuance of 401 certification terminated the Commission's veto power.

The court reasoned that federal permit rather than state certification authorized the Bayport Project's progress. Therefore, the court affirmed the trial court and concluded the Cities' claim was moot because a state court's ruling on the validity of the Commission's 401 certification could have no legal effect on the project. In sum, by choosing to grant 401 certification, the Commission lost its veto power, rendering the Cities' claim moot.

Nathan Whitney

Ward County Irrigation Dist. No. 1 v. Red Bluff Water Power Control Dist., 08-04000322-CV, 2005 Tex. App. LEXIS 5063 (Tex. App. Jun. 30, 2005) (holding membership in power control districts is not limited to improvement districts, but may also include irrigation districts).

Red Bluff District is a power control district, whose members consist of seven improvement districts including Ward County Irrigation District No. 1 ("Ward District 1") and Ward County Irrigation District No. 3 ("Ward District 3"). In 1977, the Texas legislature adopted Chapter 58 to the Texas Water Code, which provided that any improvement district or control and improvement district could convert into an irrigation district. In 2001 and 2003, respectively, Ward District 1 and Ward District 3 converted under this provision.

Following their conversion, Ward District 1 and Ward District 3 sent representatives to sit on the Red Bluff District Board of Directors ("the Board"). Red Bluff District, however, refused to seat the two rep-

representatives, claiming that the conversion of these districts disqualified them as organized divisions of the Red Bluff District and prevented them from electing representatives to the board. Both sides sought declaratory relief and, following a bench trial, the 143rd District Court of Ward County entered judgment in favor of Red Bluff District. Ward District 1 and Ward District 3 appealed to the Court of Appeals of Texas, Eighth District.

In interpreting the statute *de novo*, the court observed that the legislature initially approved control and improvement districts for inclusions in power control districts such as Red Bluff, but later amended the statute to omit them. Red Bluff maintained, as did the trial court, that this change in the statute indicated an intention by the legislature to restrict membership in power control districts to improvement districts. However, the court held that, rather than evidencing an intent to forever restrict membership to improvement districts, the legislature intended only to exclude the more powerful control and improvement districts from inclusion in power control districts. Furthermore, the trial court's restrictive approach to the statute was inconsistent with a general legislative intent to permit conversion of one type of water district to another. As such, Ward Districts 1 and 3 could remain functional members of the Red Bluff District.

Red Bluff also claimed that Chapter 58 irrigation districts could not elect representatives to its board because the election procedures provided for these districts would lead to voter disenfranchisement. Under Chapter 58, eligibility to vote in irrigation district elections is based on ownership of irrigable land, excluding non-landowners. The court, however, pointed to United States Supreme Court precedent concluding that such elections do not violate equal protection because of the special limited purpose of water districts. The court concluded that the issue was irrelevant here because Chapter 58 only applies to elections of the irrigation district's own board of directors and does not apply to the election of representatives to the Board. Thus, the court reversed the trial court in favor of the irrigation and water improvement districts.

Noah Klug

UTAH

Searle v. Milburn Irrigation Co., No. 20040406, 2005 Utah LEXIS 98 (Utah Sept. 2, 2005) (holding: (1) an applicant seeking a change in water use need only show reason to believe approval of an application will not result in impairment of a vested water right; (2) applicant bears the burden of persuasion throughout the application process; and (3) protestant may successfully oppose an application approval by