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Marseilles Hydro Power, L.L.C. v. Marseilles Land and Water Co.,2004 U.S. Dist. LEXIS 9849 (N.D. Ill. May 28, 2004)

Mark Terzaghi Howe

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Marseilles Hydro Power, L.L.C. v. Marseilles Land and Water Co., 2004 U.S. Dist. LEXIS 9849 (N.D. Ill. May 28, 2004)

sions. Thus, the court granted the EPA's motion to dismiss for lack of jurisdiction on all POTW claims.

Michael Graetz

Marseilles Hydro Power, L.L.C. v. Marseilles Land and Water Co., 2004 U.S. Dist. LEXIS 9849 (N.D. Ill. May 28, 2004) (holding:(1) water right agreements should be interpreted as contracts, not as covenants running with the land; and (2) a hydroelectric power company was the proper second party to those water rights agreements).

Marseilles Land and Water Company ("MLWC") leased water power generated by the diversion of the Illinois River through canals including the North Race canal. In 1910 MLWC entered into a ninety-year water rights agreement known as an indenture ("1910 Indenture") with Eugene Chubback, who owned a power station on the North Race canal, for rights to a portion of water flowing through the canal. In 1924 a dispute arose under the 1910 Indenture between MLWC and a subsequent power station owner; the parties decided to enter into a new indenture ("1924 Indenture") in order to clarify the 1910 Indenture. In 2000 Marseilles Hydro Power, L.L.C. ("MHP"), the present owner of the power plant, sought declaratory and injunctive relief with respect to agreements on water rights under the 1910 and 1924 Indentures. MHP and MLWC both sought summary judgment on the issue of whether MHP was the proper second party to the Indentures, and if so, what MHP's rights and obligations were under the Indentures.

The United States District Court for the Northern District of Illinois first considered whether MHP was the proper second party under the 1910 Indenture. The 1910 Indenture stated that transferring ownership of the power station to a second party did not separate the 1910 Indenture from the property. Therefore, transferring ownership of the power station also transferred the rights and obligations of the 1910 Indenture to the new owner. The 1924 Indenture stated that if an owner of the power station transferred the 1910 Indenture separately from the land, MLWC could cancel the 1910 Indenture. The court held that the 1910 Indenture was not a covenant running with the land because the 1910 Indenture did not "affect the use, value, and enjoyment of the property." Since the 1910 Indenture was not a covenant running with the land, an owner could legally transfer the 1910 Indenture separately from the power station, however the transfer would still violate the 1924 Indenture.

The court found that the prior owners of the power station made transfers of the land separately from the Indentures in violation of the 1924 Indenture, which created a contractual duty not to separate the Indentures from the property. However, the court found that MLWC waived MLWC's right to cancel the Indentures by failing to terminate

the Indentures in a timely manner. The court also rejected MLWC's argument that MHP had violated the 1910 Indenture by failing to operate the power plant and to pay rent. Because MLWC had not terminated the Indentures in a timely manner after violation of the 1924 Indenture, and because there were no other violations that prevented MHP for being the second party to the Indentures, the court granted MHP summary judgment on the issue of whether MHP was the proper second party.

The court then considered MHP's rights and obligations as a second party. MHP claimed that it had a right to all water not otherwise appropriated through other agreements predating June 1, 1910. The court found that MHP, as the second party, had a right of first refusal on expired agreements. The court granted partial summary judgment to MHP, exempting from MHP's claim all leases not predating June 1, 1910, offered to and refused by a second party that remained under contract with another party.

The court finally considered whether MHP was liable for past unpaid rent. The court considered three ways to construe the Indentures: as a lease, as a license, or as an ordinary contract. The court, electing to take guidance from Vermont courts, decided to apply a modern contract approach in the interest of equity and flexibility. Applying this approach, the court found that, under the Indentures, MHP was liable to pay the minimum rent, but was also entitled to a full refund because of MLWC's failure to maintain the canal. Because requiring MHP to pay rent so that MLWC could refund MHP would be pointless, the court granted summary judgment to MHP on this issue.

The court granted MHP's motion for summary judgment in part and issued an order declaring MHP the proper second party under the Indentures. The court stated MHP's rights under the Indentures as requested by MHP, but excluded those water rights that did not predate June 1, 1910, and that the second party had refused, so long as they remained under contract with another party.

Mark Terzaghi Howe

O'Reilly v. United States Army Corps of Eng'rs, No. 04-940, 2004 U.S. Dist. LEXIS 15787 (E.D. La. Aug. 10, 2004) (holding that the United States Army Corps of Engineers abused its discretion in issuing a permit under section 404 of the Clean Water Act absent an Environmental Impact Statement in accordance with the National Environmental Policy Act; the Corps failed to show a connection between the project's adverse environmental impacts and the mitigation measures identified in the Environmental Assessment in issuing the section 404 permit).

August Hand, Jr. filed an application with the United States Army Corps of Engineers ("Corps") for a permit, in accordance with section 404 of the Clean Water Act ("CWA"), for the dredging and filling of