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## United States v. Orr Ditch Co., 391 F.3d 1077 (9th Cir. 2004)

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court dismissed this claim because the FPA clearly exempted the United States from liability.

In dissent, Judge Berzon disagreed with the majority's grant of summary judgment on the issue of water rights. Judge Berzon argued there a sufficient factual dispute over whether fishing was a primary purpose of the reservation existed. Thus, Judge Berzon believed the Tribe's claims should survive summary judgment. First, Judge Berzon argued the court could interpret the treaty as implicitly giving the Tribe the right to fish on the reservation. Based on United States Supreme Court precedent in *Winters v. United States*, the parties to the treaty were concerned with protecting the Tribe's fishing rights on the reservation because the treaty preserved the right to fish off-reservation. In addition, prior precedent in *Fishing Vessel* suggested the court should construe the treaty in the manner in which it "would naturally be understood by the Indians." Therefore, the court should have given weight to the Tribe's understanding of the treaty. Thus, Judge Berzon believed on-reservation fishing could be a primary purpose of the reservation and the court could construe the treaty as retaining water rights sufficient to provide for fishing.

The court thus affirmed the district court's holding that the Project did not violate the Tribe's water rights.

*Kathryn L. Garner*

**United States v. Orr Ditch Co., 391 F.3d 1077 (9th Cir. 2004)** (holding under the Orr Ditch Decree, Nevada procedures were applicable to the adjudication of water rights).

The Orr Ditch Decree represented the final adjudication of water rights in the Truckee Division of the federal Newlands Reclamation Project, and allowed entitled parties to change the place, means, manner, or purpose of water use so long as they did so in a manner provided by law. This case arose after the United States District Court for the District of Nevada ruled Nevada law, rather than the Federal Rules of Civil Procedure, governed a motion for a stay of the State Engineer's ruling under the Orr Ditch Decree.

The Orr Water Ditch Company appealed the State Engineer's ruling, granting the Lake Paiute Tribe of Indians ("Tribe") and the United States' application to make temporary changes to two water rights. Nevada Revised Statute section 533.450(5) allowed for an automatic stay of the State Engineer's ruling on a change application upon a timely request and posting of bond. The Tribe and the United States argued the Federal Rules of Civil Procedure should control because the stay was a procedural matter. However, the district court concluded Nevada law governed the motion for a stay.

In upholding the district court's decision, the United States Court of Appeals for the Ninth Circuit concluded the Orr Ditch Decree's

order that parties make changes in water use in a manner provided by law required the application of both substantive state water law and procedural state water law. More importantly, the court determined Nevada Revised Statute section 533.450(5) was an inseparable part of Nevada water law because without an automatic stay, as provided by Nevada Revised Statute section 533.450(5), it would be impossible to remedy an error by the State Engineer since the water at issue would already be used. Finally, the Ninth Circuit noted it previously held Nevada procedures for adjudicating water disputes applied to Orr Ditch proceedings. Thus, the court affirmed the district court's ruling that Nevada law, rather than the Federal Rules of Civil Procedure, governed the motion for a stay of the State Engineer's ruling under the Orr Ditch Decree.

Charles P. Kersch, Jr.

### ELEVENTH CIRCUIT

**Ambrosia Coal & Constr. Co. v. Pages Morales, 368 F.3d 1320 (11th Cir. 2004)** (holding the District Court for the Southern District of Florida abused its discretion when it granted an abstention based on a misapplication of the *Colorado River* doctrine, because even the six factors the Eleventh Circuit Court of Appeals considered in analyzing the permissibility of an abstention failed to overcome the strong bias against abstention).

This case arose between Ambrosia Coal and Construction Company ("Ambrosia") and Pages Morales ("Pages") over a settlement agreement ("Settlement") concerning a leasehold interest in real estate in Isla Verde, Puerto Rico. After the entering into the Settlement, Pages entered into an agreement with Green Isle, Ltd. that unilaterally compromised the Settlement. Ambrosia filed a suit in the United States District Court for the Southern District of Florida ("Federal Case"). Simultaneously, Pages and other defendants filed a lawsuit in the Court of First Instance of the Commonwealth of Puerto Rico ("Puerto Rico Case").

Pages filed a motion to dismiss the Federal Case. Although it denied the motion, the district court considered whether it should abstain, pending final judgment in the Puerto Rico Case, based on the United States Supreme Court's opinion in *Colorado River Water Conservation District v. United States*. After the district court granted an abstention, Ambrosia appealed to the United States Court of Appeals for the Eleventh Circuit, alleging the abstention was an abuse of discretion.

The court began its analysis by discussing *Colorado River*, a case where the United States filed a suit in federal court against approximately 1000 water users, seeking declaration of the government's water rights. Before any proceedings occurred in that case, one of the water