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United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004)

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mately require further permitting under the CWA, the project had an independent utility apart from any future phases of the project. However, the court rejected this argument, concluding that the Corps should have considered the other phases of the project because the other phases were reasonably foreseeable.

The court ultimately concluded that the Corps had acted arbitrarily, capriciously, and abused its discretion by issuing the section 404 permit without preparing an EIS as required by NEPA and granted O'Reilly's motion for summary judgment enjoining the section 404 permit issued by the Corps.

Donald E. Frick

United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004) (holding: (1) because Tribe's water rights were federal reserved rights the water rights were not subject to the theories of forfeiture, abandonment, or failure to perfect; (2) a proposed change in water usage from the amount currently used to the full amount of the water right did not impair junior appropriators' rights; (3) the Tribe was immune from paying state fees associated with a water transfer; (4) and the amount of water transferable was the amount of the water duty).

The Truckee-Carson Irrigation District ("Irrigation District") and the City of Fallon ("Fallon") appealed to the United States District Court, District of Nevada, the ruling of the State Engineer granting the transfer applications for two of the Tribe's water rights. The United States and the Tribe cross-appealed claiming they had a right to transfer more water than the State Engineer granted and claiming a right to avoid paying fees associated with the transfer. The Tribe possessed two water rights, Claim No. 1 and Claim No. 2 of the Orr Ditch Decree. The Tribe wished to transfer water from both claims from bottom land irrigation to instream fishery use for a period of one year. The United States and the Tribe filed an application for both transfers in 2001 with the Nevada State Engineer. The Tribe requested a transfer of 9,914 acre feet under Claim No. 1. The State Engineer granted a transfer of 8,420 acre feet. In addition, the Tribe requested a transfer of 15,344.55 acre feet under Claim No. 2 of which the State Engineer granted a transfer of 11,254.5 acre feet. Several parties, including the Irrigation District and Fallon, opposed the transfer of both water rights.

In granting the transfer applications, the State Engineer ruled that neither of the transfer applications could be contested on the basis that the water rights were abandoned, forfeited, or not perfected. In addition, the State Engineer stated that because the Tribe wished to transfer the rights to fishery purposes, a primary purpose of the Tribe's reservation, the Tribe need not apply for a new water right, but merely satisfy the transfer requirements of state law.

The court first determined that the water rights recognized in the Orr Ditch Decree were federal reserved water rights, not state rights. State law limits a water right to what amounts of water an appropriator puts to beneficial use. State water law also subjects a water right to doctrines of forfeiture, abandonment, and failure to perfect. Federal water rights, however, are immune from the doctrines of forfeiture, abandonment, and failure to perfect. Furthermore, federal law does not limit a water right to amounts put to beneficial use. The amount reserved by the federal government for the creation and purpose of the Indian reservation is the only limit on the water right.

The federal government created the reserved water rights by withdrawing the lands of the reservation from the public domain on December 8, 1859. That date became the priority date for the tribe's water rights. A priority date that mirrors the date of creation of a reservation is an attribute of a federal reserved water right. Additionally, nothing in the Orr Ditch Decree indicated the date that beneficial use of the water reserved to the Tribe began. This indicated that the water right was not based on beneficial use, an attribute of state law. The language in the Orr Ditch Decree indicated that the rights inherent in Claim No. 2 were in addition to the rights in Claim No. 1. Furthermore, the historical evidence indicated that the federal government set aside both rights in the amount needed to irrigate particular tracts of land at the reservation's creation. Because the priority date of the water right mirrored the date of the reservation withdrawal, the right was not created when the water was put to beneficial use, and because history indicated the rights were reserved for the reservation, the court declared both water rights to be federal reserved water rights. As a result, the doctrines of forfeiture, abandonment, and lack of perfection did not apply to Claims No. 1 and 2 nor were the water rights based upon how much water the Indian Tribe put to beneficial use. The court also decided that the language of the Orr Ditch Decree dictated the two federal water rights; the State Engineer, thus, properly excluded further evidence as to whether the Tribe forfeited, abandoned, or failed to perfect those rights.

The court next decided that although the water rights are federal reserved rights, they are subject to state substantive and procedural law. The parties to the Orr Ditch Decree agreed at the signing of the decree that transfer of water rights would occur in the "manner provided by law." The Ninth Circuit decided the "manner provided by law" indicated the application of both state substantive and procedural law, except where federal law preempted state law. The Tribe, through the United States, signed the decree and was, therefore, bound by its terms. Therefore, Claims No. 1 and 2 were subject to Nevada state law except where preempted by federal law.

The court then decided that the Tribe could properly transfer their water rights for fishery purposes. A right noticed at the creation of the

water right is a primary right. At the time of their creation, the Tribe's reserved water rights included a right to maintain a fishery. Therefore, a fishery was a primary right. A federal water right can be transferred to another primary purpose without establishing a new right. Therefore, the Tribe could transfer its right to fishery purposes so long as it did not impair the rights of junior appropriators as required by state law.

In order to determine whether a transfer impaired the rights of junior appropriators, the court compared the impact of the proposed use against the baseline of current conditions. The baseline was the Tribe's decreed right, not the amount of water the Tribe put to use. Fallon and the Irrigation District proved only that their rights would be impacted if the Tribe used its entire decreed right. Such an impact was not an injury. Since no injury existed, the State Engineer properly concluded that the tribe could transfer its water rights under state law.

The next issue the court decided was the amount of water the Tribe available to transfer for fishery purposes. The Orr Ditch Decree dictated that each water right contains a contingent right to the actual amount of water lost in transportation. Those contingent rights did not transfer with a water right. Only the actual amount of water lost in transportation for the proposed use transferred. Therefore, the Tribe could not transfer the full amount of their water right plus the amount currently lost in transportation. The decree entitled the Tribe to transfer only the water right plus the amount that would be lost in transportation with the new use. The fishery was an in-stream use, so there no transportation loss would occur. As a result, the Tribe could transfer only the original amount of the water right.

The Tribe and the United States also argued they were immune from state fees associated with the transfer of water rights. The United States is immune from state law mandated fees unless the United States waives that immunity. A waiver of immunity must be specific. The Orr Ditch Decree lacked any language indicating the United States or Indian Tribe specifically waived immunity. Therefore, the Tribe was immune from fees associated with the transfer of their water rights.

The court also decided the issues were not moot. Despite the fact that the evidence before the court was several years old, it was not stale. Therefore, resolution at the appellate court was appropriate.

Finally, the court agreed with the State Engineer that the issue of whether the Tribe was applying water to its land in a manner inconsistent with its decreed rights was an issue appropriate for resolution by a Federal Water Master.

Therefore, the court affirmed the transfer of water in the amounts indicated by the State Engineer and reversed the decision of the State Engineer to subject the Tribe to state transfer fees.