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Regents of the Univ. of Cal. v. New Mexico Water Quality Control Comm'n, 94 P.3d 788 (N.M. Ct. App. 2004)

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of ownership and the two-prong test only applied when the water right owner wished to apply the priority date of the surface water right to the groundwater well. The court rejected this theory and held the two-prong requirement applied to all surface to groundwater transfers. The court further rejected the Herringtons' claim that the court needed to conform the groundwater application to satisfy the two-prong requirements, citing the unreasonable burden such a requirement places on the Office of the State Engineer. The Court thus affirmed all of the trial court's holdings.

Aimee Wagstaff

Regents of the Univ. of Cal. v. New Mexico Water Quality Control Comm'n, 94 P.3d 788 (N.M. Ct. App. 2004) (holding New Mexico Water Quality Control Commission correctly adopted revised water quality standards).

The New Mexico Water Quality Control Commission ("Commission") adopted revisions to the state's water quality standards necessary to comply with state and federal laws and regulations in response to a warning issued by the Environmental Protection Agency ("EPA"). In accordance with proper procedure, the Commission unanimously adopted the amended standards after a hearing where the Regents of the University of California ("Regents"), along with other parties, submitted only written testimony. After the Commission subsequently issued an order and statement of reasons for adopting the amendment, the Regents appealed the adoption of the sentence, "the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses."

On appeal to the Court of Appeals of New Mexico, the Regents first argued the Commission did not provide an adequate statement of reasons for adopting the revised standard. However, the court held the Commission provided an adequate statement of the reasons, finding the more than 1000-page statement to be thorough and comprehensive. The statement provided the court with the ability to determine the basis for the Commission's adoption of the regulations. The court further reasoned the statement was adequate, because the statement explained how the new standards protected public health and welfare, enhanced the quality New Mexico's waters, respected the use and value of water, and met EPA guidelines.

Next, the Regents argued the Clean Water Act ("CWA"), or alternatively New Mexico's Water Quality Act ("WQA"), required the Commission to designate a fishery use for ephemeral tributaries before adopting human health standards. The court held the Commission's failure to designate fishery uses for ephemeral tributaries before adopting human health standards for those tributaries did not violate the

WQA or the CWA. The court reasoned that nothing in the statutes prohibited the Commission from applying higher standards to tributaries to protect waters with fishery uses. Moreover, the court held the standard did not regulate effluent. The court further reasoned the standard limited regulation to water quality, and noted the distinction between overall water quality standards and setting effluent limits.

Finally, the Regents asserted the Commission's action was not supported by substantial evidence in the record, and was arbitrary and capricious. The court ruled substantial evidence within the whole record supported the Commission's action. Moreover, the court held the Commission's action was not arbitrary or capricious because, regardless of the availability of other alternatives, the Commission's decision was not irrational, unreasonable, or an abuse of discretion. Accordingly, the court affirmed the Commission's adoption of revised water quality standards.

Alexandra Farkouh

OREGON

Hannigan v. Hinton, 97 P.3d 1256 (Or. Ct. App. 2004) (holding water rights appurtenant to a mining right were subject to forfeiture because use of water at a location different than the one designated on water rights certificate did not constitute a use under the forfeiture statute).

In 1987, the Hannigans purchased mining claims and appurtenant water rights to water flowing in the Pete Mann Ditch ("Ditch"). The Water Resources Department ("Department") alleged nonuse at the certificates' designated place from 1979 to 1986, as the previous water rights owner did not use water at the Ditch during those years. The water in the Ditch ran near an area called Parkerville where the Hannigans also owned mining rights. However, the water rights certificate for the Ditch did not designate Parkerville as an area of use. The Department found the Hannigans forfeited their water rights because, under the relevant forfeiture statute, an owner of a perfected water right forfeits his/her rights when he/she fails to use all or part of the water appropriated for a period of five successive years.

The Hannigans sought review of the Department's final order canceling the Hannigans' water rights in the Oregon Court of Appeals. The Hannigans first argued Oregon's forfeiture statute did not apply to water rights designated for mining. The Hannigans argued Oregon's mining statute granting appurtenant water rights was subject only to the provisions of the Oregon Water Rights Act ("Act"). The Act specifically encompassed other statutes, but did not include forfeiture. As such, the Hannigans argued the appropriate standard was the common law doctrine of abandonment, which required proof of intent to abandon. The court noted that portions of the Act, to which mining water rights were clearly subject, incorporated the limitations of the