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Hannigan v. Hinton, 97 P.3d 1256 (Or. Ct. App. 2004)

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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

forfeiture statute. Under the Act, all water rights seekers needed to apply for a permit and obtain a certificate. Since the forfeiture statute applied to those permits, the court reasoned all permitted water rights, including those for mining, were subject to the statute as well. Thus, the court concluded the forfeiture statute also applied to the mining water rights.

The Hannigans next argued that even if the statute applied, the use of water at Parkerville during the relevant period should satisfy the term "use" under the statute. The court determined "place of use" was a component of "use" for the purposes of forfeiture because water rights were appurtenant to specific parcels of land. The court further reasoned the right to use water connected to the location of the perfection of the water right, the place named on the certificate. Additionally, the Department provided a procedure for water rights holders to apply to change places of use, but the Hannigans failed to go through that approval process. Accordingly, the court determined that to avoid forfeiture under the statute, a holder must use water in the place designated on the certificate. After finding substantial evidence to support the Department's decision, the court affirmed the final judgment of the Department canceling the Hannigans' water rights due to of nonuse.

Story Washburn

WaterWatch, Inc. v. Water Res. Comm'n, 88 P.3d 327 (Or. Ct. App. 2004) (holding municipalities must adhere to the five-year construction requirements of Oregon's water law statute).

The Coos Bay North Bend Water Board ("CBNB") applied to the Water Resources Department ("Department") in March 1990 for a permit to appropriate water from Tenmile Creek. CBNB also submitted four water demand forecasts projecting growth and water needs through 2050. The Department issued a proposed final order in December 1997 that approved the permit with conditions. WaterWatch of Oregon, Inc. ("WaterWatch") filed protests claiming the water demand forecasts showed the CBNB included plans for water that would not go into effect until 2050. The Oregon Water Resources Commission ("Commission") held a contested case proceeding and approved the permit as well as the third forecast. The forecast predicted that by 2050, the CBNB needed 3 million gallons of water per day at a diversion rate of 4.6 cubic feet per second ("cfs") and included an additional 18.6 cfs for a potential industrial user. The Commission granted the permit, allowing the CBNB to withdraw water at a maximum rate of 23.2 cfs. WaterWatch appealed to the Court of Appeals of Oregon to contest the order.

The court first analyzed the issue of standing. Since the water law statutes had more specific judicial review provisions than the general