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WaterWatch, Inc. v. Water Res. Comm'n, 88 P.3d 327 (Or. Ct. App. 2004)

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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

review provisions of Oregon's Administrative Procedures Act, the court determined the water law statutes controlled. The pertinent statute required the person or group is a party affected by a final order. WaterWatch filed a timely protest against the proposed order and, thus satisfied met the statutory requirements to qualify as a party. To determine if WaterWatch was an affected party, the court looked at the legislative intent and whom the proposed final order would positively or negatively affect. The court determined three groups of persons that could be parties to a contested case proceeding: the applicant; a person who requested standing or supported the proposed final order; and a person who protested the proposed final order. In its protest, WaterWatch indicated it represented the public and included how the proposed final order adversely affected its interests in instream rights of Tenmile Creek. The court ruled that because WaterWatch included specifics in its protest, including time, money, and effort spent to create an instream water right in Tenmile Creek, and because the permit would affect this right, WaterWatch demonstrated standing.

In addition to standing, WaterWatch needed to demonstrate it satisfied constitutional justiciability requirements by showing the Commission's decision would practically affect its rights. In its protest, WaterWatch explained the CBNB would have an earlier priority date than any instream right, making any instream rights subject to CBNB's use. This later priority would significantly diminish WaterWatch's investment in the instream rights in Tenmile Creek. WaterWatch also provided several affidavits from its own members to show that the issuance of the permit detrimentally affected their own use and enjoyment. For these reasons, the court concluded WaterWatch satisfied the justiciability requirements.

To defeat the proposed final order, the court stated the record must show CBNB's plan violated one or more of the criteria in the water law statute or the proposed use would be detrimental to the public interest. The statute set a timeline for the perfection of a water right that required actual construction begin within one year from the date of the application approval, the construction shall be pursued with due diligence and completed within a reasonable time, and that time shall not exceed five years. There was an exception to the five year limitation: for good cause shown or if governmental requirements relating to the project significantly delayed completion. The Commission described CBNB's plan and determined that the earliest date for perfection of the right was 2025. The Commission approved this plan based on the CBNB proceeding with due diligence. The court rejected this argument because the statute imposes a five-year limit on due diligence by requiring construction to finish in five years.

The CBNB argued that applications for municipal uses should receive special consideration due to the significant and substantial differences from other uses. Therefore, the five-year limit was only a

guideline. The court disagreed, stating the Oregon's water law required that water was appropriated for beneficial use in a timely manner. The text of the statute exempted municipal uses from the one year start time, but applied the five year limit to all diversions. The court found no municipal exemption for the completion requirement existed in the statute. The CBNB argued it could get an extension for good cause shown, however, the text stated extensions only apply after the issuance of a permit and after delays occur. The CBNB also argued if it was in the public interest for CBNB to obtain the permit for municipal use, the permit should be issued regardless of the statutory terms. The court held that because the statute did not allow for this, the five year restriction still applied.

For the reasons above, the court concluded the CBNB could not exercise due diligence in the construction of the diversion and that the Commission erred as a matter of law. The court reversed the Commission's decision and remanded to the Commission for further proceedings.

Kathleen Booth

SOUTH CAROLINA

Lucas v. Rawl Family Ltd., 598 S.E.2d 712 (S.C. 2004) (holding the common enemy rule applies regardless of a landowner's intent to cause a nuisance to an adjacent, lower landowner's property).

Franklin Lucas brought action against adjacent landowner Rawl Family Limited Partnership ("Rawl") in the Lexington County Court for negligence, trespass, and nuisance. Lucas sought damages for repeated flooding to his land that resulted after Rawl cut down trees and removed stumps from forty acres of the land in order to prepare the land for farming. Rawl's land sat at a higher elevation than Lucas' land. Water naturally flowed from Rawl's land onto Lucas' land. After Rawl cleared the land, Lucas' land flooded after every heavy rain, preventing Lucas from growing crops.

The trial court granted Rawl a directed verdict for negligence, but allowed the jury to consider the trespass and nuisance claims. The jury rejected the trespass claim, but awarded damages to Lucas for nuisance. On appeal, the South Carolina Court of Appeals held that the trial court should have entered a directed verdict for Rawl on the nuisance claim because the common enemy rule did not apply. The court of appeals found that the common enemy rule only applied when landowners take "direct action" regarding surface water on their properties that obstruct or alter natural flow and, as a result, harm adjoining landowners. Rawl had no intent to influence the natural flow of the surface water because Rawl cleared the land only in preparation for farming, not to alter the flow of surface water. Thus, the court of ap-