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In re The Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.,
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construction and engineering companies seeking damages for injuries to McCormick's real property allegedly caused by negligent operation of the Town's stormwater drainage systems. McCormick alleged that the Town operated its drainage systems in a manner such that stormwater previously diverted elsewhere flowed across Walmart's property and onto McCormick's property causing injury. The Circuit Court of Greenbrier County granted a motion to dismiss the Town as a defendant on the grounds that McCormick's complaint failed to state a claim against the Town for which the circuit court could grant relief. McCormick appealed.

The Supreme Court of West Virginia first addressed the Town's contention that because the stormwater from Town facilities first flowed over Walmart's property before entering McCormick's property, the Town could not be liable. Citing *Whorton v. Malone*, the court noted that a landowner could not claim immunity because of the subsequent path of stormwater through a third party's land before injury occurred on the land of another.

The court next dismissed the Town's argument that because the Town granted Walmart a permit to construct a store on Walmart's property, West Virginia law granted the Town statutory immunity from the suit. Section 29-12A-5(a) immunizes political subdivisions for claims that arise due to the action of private parties who first obtain a permit. However, the court noted McCormick was not attempting to hold the Town liable for Walmart's actions. Specifically, McCormick had alleged that the Town itself had been negligent in operating the Town's own drainage systems, and therefore McCormick's claim was not precluded by § 29-12A-5(a). The court thus found that McCormick had stated a claim against the Town for which the circuit court could grant relief and accordingly reversed the circuit court. Chief Justice Maynard, in dissent, found no basis in case law for holding a non-adjacent landowner liable for water runoff injuries to another. The dissent stated that case law only required that a landowner be reasonable in light of effects on adjacent landowners when diverting stormwater. Additionally, the dissent stated that because the court had never recognized a duty of a landowner to alleviate stormwater problems caused by the development of nearby land, the court should have affirmed the circuit court.

Matthew Sarles

WYOMING

***In re The Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 85 P.3d 981 (Wyo. 2003)** (holding: (1) the district court lacked jurisdiction to hear claim to the extent irrigators sought to enforce federal rights, (2) irrigators failed to preserve the right to bring claim by not challenging reservoir certificate, (3) irrigators were not entitled to reopen water rights certification confirmation process, (4)

res judicata barred the claims, (5) laches barred the claims, and (6) the irrigators' due process rights were not violated).

John Max and Roberta Lee Stutzman ("the Stutzmans"), owners and individual irrigators of Wyoming farmland, brought an action in the Wyoming Supreme Court appealing the district court's dismissal of their petition to intervene in the Big Horn River general adjudication ("Adjudication") claiming rights to water stored in the Buffalo Bill Reservoir ("Reservoir").

The Stutzmans' farmland in Park County, Wyoming is located within the Shoshone Reclamation Project ("Project"). The Project, initiated in 1899, was a federal reclamation project constructed and operated by the Bureau of Reclamation ("BOR") pursuant to the Reclamation Act of 1902. As early settlers acquired Project land, they were required to complete a water rights application, allowing them and their heirs to use stored water in the Reservoir. The Reservoir was the centerpiece of the Project and provided water for irrigation, power generation, municipal supply, recreation, and other beneficial uses. The Reservoir also provided water to four irrigation districts that supplied water to individual users like the Stutzmans through contracts.

In January 2001 the Stutzmans filed a petition to intervene in the Adjudication because they were dissatisfied with the BOR's administration of the Reservoir's stored water. Alleging their predecessors acquired Project lands through water applications and patents, the Stutzmans, as heirs, claimed implied secondary water rights from Reservoir permits and ownership of a proportionate share of water in the Reservoir by virtue of federal land patents, water rights applications, repayment contracts, and the Reclamation Act of 1902. They did not allege denial of any specific amount of water to which they were entitled under these contracts, but rather raised the broader question of who owned or controlled the water stored in the Project.

Both the United States and the State of Wyoming filed separate motions to dismiss the petition. The district court granted these dismissals based on a lack of lacked jurisdiction over the claims after consideration of the federal patents, the Reclamation Act, and the doctrines of laches and res judicata. The Stutzmans' appeal arose out of the continued Adjudication, first initiated in 1977. Primarily, the Adjudication determined what water rights the federal government reserved for the Wind River Indian Reservation's benefit, but the Adjudication consisted of three phases. The Stutzmans' case fell under Phase III litigation, which addressed adjudication of all state water rights evidenced by a permit or certificate.

On appeal, the Wyoming Supreme Court first addressed the issue of jurisdiction. The court concluded that at least four entities held rights to Project water, including the federal government, the state, the district, and the end user. The Stutzmans' alleged rights to a share of

the stored water involved both the state and the federal government. While the district court retained jurisdiction over their state property rights, the court could not enforce their rights against the United States pursuant to federal patents and contracts. Therefore, the court held the district court properly found it lacked jurisdiction over the Stutzmans' claims to the extent that they sought to enforce federal contracts and ruled that the district court could determine the state claims.

Examining these state claims, the court next addressed the question of whether the Stutzmans failed to preserve their right to bring a claim by not challenging the Reservoir certificates. The Stutzmans sought a declaratory judgment in the district court for their implied secondary water rights after failing to obtain a secondary reservoir permit from the BOR, their irrigation district, and the State Engineer. The district court held the Stutzmans' failure to challenge the reservoir certificates within the time limit set out in Phase III litigation procedures barred their claims by laches and res judicata. The court concluded the district court correctly found the Stutzmans' claims were untimely and barred by looking at the nature and scope of their water rights claims.

The Stutzmans based their claim for an implied secondary water right upon *Condict v. Ryan* and Wyoming common law. They argued the right had not yet been adjudicated, because only the right to store water under the permits had been adjudicated in 1963 and then confirmed in 1985. They contended their implied secondary right gave them, not the BOR, the power to control their share of stored water based on: (1) reservoir permit conditions stating the intent of stored water was for irrigation of lands, including theirs, (2) patents issued to the land with the right to use the water for the Project, (3) the specific share of water allotted via the water rights applications required of their predecessors, and (4) the repayment contract between the United States and the Shoshone Irrigation District. The court looked again at the principles established in *Condict* to determine the nature of the Stutzmans' claim and held the Stutzmans failed to preserve their right to bring a claim by not challenging the reservoir certificates.

Also on appeal, the court addressed whether the Stutzmans had the ability to challenge the issuance of their water rights certificate to the BOR. Both the State of Wyoming and the United States contended the reservoir permits were fully adjudicated in 1963 and the applicable statutes barred the Stutzmans from filing late claims. The court determined the legislature designed the water rights statutes intending fully adjudicated certificates to be final and complete statements of the holder's rights. In addition, Phase III procedures allowed the Stutzmans to challenge the confirmation of their previously adjudicated permit by 1985. They could have also filed an application for a secondary permit by the deadline. The Stutzmans argued neither action was

necessary because their rights already vested and they were not required to challenge or seek additional permits. The district court held it was unwilling to set aside years of progress in the general adjudication to consider the Stutzmans' petition and, instead, needed to conform to its scheduling order and move forward. Thus, the court also held the Stutzmans were not entitled to reopen the water rights certification confirmation process by failure to challenge their certificate at the appropriate time.

To address the district court's ruling that *res judicata* barred the Stutzmans' claims, the court looked at four factors: identity in parties, identity in subject matter, similar issues relating to the subject matter, and whether the capacities of the persons were identical in reference to both the subject matter and the issues between them. The court held that while the subject matter and issues involved in the Stutzmans' claims were different from those actually litigated in the adjudication of the reservoir permits, such issues could have been raised, and all other elements of *res judicata* were present. Since *res judicata* applies to issues that should have been litigated, the court found the Stutzmans had ample time to raise their claims and since they did not, *res judicata* rightfully barred their claims.

The district court also held the doctrine of laches barred the Stutzmans' claims. The court noted a claim of laches is comprised of two elements, inexcusable delay and injury and prejudice to an opposing party or others. The court determined the Stutzmans' delay to make claims in 1963 or 1985 was clearly inexcusable. The court found the nature of water rights and the limited nature of the resource itself presumed prejudice to others competing for water on the Big Horn River system and, thus, laches applied. The Stutzmans argued their case involved legal title and therefore making a laches analysis inapplicable. However, the court stated that under Wyoming law, water users do not own the water. Water users, like the Stutzmans, are only granted rights to its use; therefore, this case did not involve title. Therefore, the court held laches properly barred the Stutzmans' claims.

Finally, the court addressed the issue of whether the district court violated the Stutzmans' right to due process when it dismissed their petition to intervene. The district court's dismissal did not bar the Stutzmans from all rights to use the stored water. The court held no right existed for them to have their claim to a state water right decided in the general adjudication. Their irrigation flow rights confirmed by the Irrigation District had not changed nor had their ability to make claims in federal court. In addition, the due process clauses of the United States and Wyoming Constitutions protect citizens against deprivation of property without due process of law. The Stutzmans had the burden to show the court affected their property interest in an impermissible way. However, the Stutzmans did not satisfy the burden of

proof, based on their benefit from both the proper procedures for notice and opportunity to object. Therefore, the court held the district court did not violate the Stutzmans' due process rights.

In conclusion, the Wyoming Supreme Court held the district court properly exercised its long established procedures to bring finality and certainty to an extended, expensive, and complicated judicial effort, and affirmed the decision of the district court. However, the Stutzmans were not limited in pursuing their contract rights against the BOR.

Julia Herron