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Northern Plains Res. Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155 (9th Cir. 2003)

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Northern Plains Res. Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155 (9th Cir. 2003) (holding coal bed methane discharge water constitutes a pollutant under the Clean Water Act and the Clean Water Act does not give Montana the authority to create state law exemptions for such discharges).

The Ninth Circuit Court of Appeals reversed the United States District Court for the District of Montana's grant of summary judgment to Fidelity Exploration & Development Company ("Fidelity") on an appeal made by the Northern Plains Resource Council ("NPRC"). The NPRC had filed a citizen suit under the Clean Water Act ("CWA") alleging Fidelity unlawfully discharged pollutants into navigable waters of the United States. On appeal, the Ninth Circuit considered (1) whether coal bed methane ("CBM") discharge water constituted a pollutant under the CWA, and (2) whether Montana state law could exempt Fidelity from obtaining National Pollution Discharge Elimination System ("NPDES") permits under the CWA. After holding CBM discharge water constituted a pollutant under the CWA, the court then held Montana could not create a state law exemption to the CWA for CBM discharge water.

Fidelity extracted coal bed methane from deep coal seams beneath the Powder River Basin in Montana. The process involved releasing unaltered groundwater into the surface waters of Squirrel Creek and the Tongue River. The unaltered groundwater contained several chemical constituents identified as pollutants by the EPA and had characteristics that could degrade soil, making it unfit for irrigation. While Fidelity added nothing to this water, the resulting discharge had a "salty" quality from its high sodium absorption ration ("SAR"), making it a threat to water quality standards and irrigated land. Nevertheless, the district court found CBM water was not a pollutant and granted summary judgment for Fidelity.

On appeal, the Ninth Circuit held CBM discharge water fell within the definition of pollutant either as "industrial waste" or discharges "of, pertaining to, or derived from industry." Furthermore, the "produced" character of water drawn up from the "hydro-carbon bearing strata" and then discharged into surface streams compelled the court to find such water constituted a pollutant under the CWA. Finally, the court referred to a portion of the definition of pollutant characterizing it as a "man-made alteration of the chemical, physical, [or] biological . . . integrity of water." Because CBM discharge water fit all the above definitions, the court held it constituted a pollutant under the CWA.

Second, Fidelity argued Montana state law exempted CBM water from the permitting requirements of the CWA. Before this case, the Environmental Protection Agency ("EPA") already had approved Montana's state permitting system, including the provision Fidelity cited in its exemption argument. That section set forth criteria for discharges that would *not* require a permit, and the CBM discharge

water met these criteria. The court of appeals believed the district court viewed the EPA's approval of the Montana state permitting system as an implicit grant of authority to Montana to amend the CWA's permitting system, and admonished that belief stating, "only Congress may amend the CWA to create exemptions from regulation." Thus, the EPA cannot allow a state like Montana to create a CBM exemption because the EPA cannot delegate to a state more power than it has under the CWA.

Thus, the court reversed the grant of summary judgment for Fidelity and remanded with instructions to enter summary judgment for NPRC.

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State Eng'r v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians, 339 F.3d 804 (9th Cir. 2003) (holding that: (1) under the doctrine of prior exclusive jurisdiction, federal district court lacked subject matter jurisdiction over contempt action arising out of state water right decree; (2) the McCarran Amendment applies to disputes involving water rights acquired before its enactment; and (3) the McCarran Amendment did not repeal the doctrine of prior exclusive jurisdiction).

The controversy in this case arose over efforts by the State of Nevada ("State") to administer a 1935 decree adjudicating water rights on the Humboldt River ("Humboldt Decree"). The Humboldt Decree defined water rights appurtenant to land purchased by the federal government to create a reservation for the South Fork Band of the Te-Moak Tribe of Western Shoshone Indians ("Tribe"). The Tribe held the right to use the water rights, while the federal government retained fee ownership of the land. Initially, the federal government paid county water right assessments on behalf of the Tribe, but ceased doing so in 1997. The Tribe made payments for a short period, but soon passed resolutions challenging the State's authority to administer the river within its reservation, and eventually charged a state water commissioner with trespass. After failing to persuade the Tribe to rescind its resolutions, the State initiated contempt proceedings in state court, alleging the Tribe violated the Humboldt Decree. The United States joined as a necessary party and removed the action to the United States District Court for the District of Nevada pursuant to the federal removal statute, 28 U.S.C. § 1442. The district court concluded it possessed concurrent jurisdiction over the contempt action, but abstained under *Colorado River Water Conservation District v. United States* ("Colorado River"). The parties appealed to the United States Court of Appeals for the Ninth Circuit. Both the Tribe and the United States challenged the district court's abstention ruling; the State challenged the district court's finding of concurrent jurisdiction.

As a threshold matter, the Ninth Circuit examined the question of