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Owen v. Div. of State Lands, 76 P.3d 158 (Or. Ct. App. 2003)

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raise the forfeiture issue in the transfer proceedings. The court then examined whether the Kerivans' failure to protest the transfers precluded them from requesting the Department to initiate the forfeiture proceedings. The Kerivans argued the transfer orders did not affect their ability to seek forfeiture, claiming (1) the statute provides "whenever" a right appears forfeited, the Department shall initiate cancellation proceedings; and (2) the transfer application must show either water was used or is not subject to cancellation. Ultimately, the court held the transfer orders were "conclusive evidence of the priority and extent of the appropriation therein," and therefore the Department was not obligated to initiate forfeiture proceedings. Thus, the court upheld the circuit court's judgment dismissing the Kerivans' petition for judicial review and declaratory relief complaint.

Jared B. Briant

Owen v. Div. of State Lands, 76 P.3d 158 (Or. Ct. App. 2003) (holding that depositing fill material on the existing footprint of a submerged farm road to raise it above water level is "farm road maintenance" under Oregon state law).

In 1987, Owen, through the nonprofit Redding Foundation, Inc. ("Redding"), purchased property zoned for exclusive farm use in hopes of protecting wetlands on the property. A road through the marsh provided the only access to the non-wetland portion of the property. The road, approximately 500 feet long, existed since 1978. Owen used the road several times a year and maintained it so that it was passable to four-wheel drive vehicles. In late 1999 or early 2000, part of the road became permanently submerged due to a silt constriction in the Williamson River. Owen hired a contractor to raise the roadbed above the water level by adding some 2600 cubic yards of fill material.

On October 20, 2000, the Division of State Lands ("DSL") issued a cease and desist order, directing Owen to stop fill activities on the portion of the road that crossed the marsh on his property. DSL held a hearing on April 3, 2001. On October 16, 2001, DSL issued its final order, which adopted the findings of the hearing officer and concluded that no permit exemption applied. Owen sought judicial review of the DSL final order. Owen argued the fill was exempt from permit requirements under Oregon law, which allowed maintenance of farm roads as long as the maintenance did not significantly and adversely affect wetlands. DSL argued the wetland statute controlled and only exempted emergency reconstruction of "recently damaged parts of currently serviceable roads," and because the road was submerged, it was not currently serviceable, thus excluding permit exemption.

The Oregon Court of Appeals first considered the meaning of the

term “maintenance” as used in the wetland statute. The court determined that maintenance, as used in the statute, means “keeping something in a state of repair or efficiency.” This, the court said, suggested a functional baseline condition; in this instance, a road above the water line.

Next, the court examined the meaning of “reconstruction” as used in the statute. Here the court determined that, while reconstruction differs from maintenance, there is an overlap in their meanings. The court noted that reconstruction generally requires the nonexistence of the object being rebuilt. However, because both words can mean “repair,” and, because the road was merely submerged, not nonexistent, even if the fill work was reconstruction it was reconstruction in the repair sense of the word.

Finally, the court noted that because the statute contains no requirement that the road be serviceable, “the legislature’s intention was to treat farm roads differently from other roads.” Serviceability, the court determined, was not the distinguishing factor under the law. Based on the legislative record, the court concluded that maintenance as used in the statute included restoration to the “previously sound and efficacious condition . . . that [had] recently been lost.” Accordingly, the court reversed the DSL final decision.

Jeff Gillio

TEXAS

City of San Marcos v. Tex. Comm’n on Envtl. Quality, No. 03-02-00724-CV, 2003 WL 22024663 (Tex. App. Aug. 29, 2003) (holding discharged effluent lost its distinguishable qualities when commingled with the San Marcos River, therefore becoming part of the river watercourse).

San Marcos River Foundation and Dr. Jack Fairchild (“Foundation”) appealed the district court’s ruling to uphold the Texas Commission on Environmental Quality’s (“Commission”) decision granting the City of San Marcos (“City”) a permit to convey discharged wastewater effluent in the San Marcos River and then to divert water from the river three miles downstream from the discharge point. At the time of the controversy in question, Texas Code required that no person appropriate or divert state water without first obtaining a permit from the Commission. The City, believing it only used the river as a vehicle to transport its privately owned water and thus did not use state water, did not seek an appropriation permit in their original application. In 1997, while the City’s original application was still pending, the Texas Legislature passed the comprehensive statewide water plan known as Senate Bill 1. Although the Bill related directly to the types of reuse allowed in Texas, all