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Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)

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ensure the aquifer would produce safe water. The court examined SATET's recommendations and concluded that SATET supported this methodology because of the City of Lansing's opposition to other approaches, not because this constituted the only scientifically sound method. The court found that the EPA's technical recommendation was rooted in Lansing's preference, not in sound science. Also, because EPA based the numeric concentration on an unquestioned baseline, not a technical study, the EPA's order lacked a rational basis. Thus, the court vacated the EPA's order as arbitrary and capricious.

Kirstin E. McMillan

FIFTH CIRCUIT

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)

(affirming summary judgment and holding the protections of the Oil Pollution Act of 1990 inapplicable to groundwater, because groundwater is not "navigable water" under the Act).

D.E. and Karen Rice ("Rices") sued Harken Exploration Company ("Harken"), alleging Harken discharged oil into or upon "navigable waters" in violation of the Oil Pollution Act of 1990 ("OPA"). The United States District Court for the Northern District of Texas granted Harken's motion for summary judgment because according to the court's interpretation of OPA and the facts of the case, the Rices could not sustain a cause of action under OPA. The Rices appealed and the United States Court of Appeals for the Fifth Circuit affirmed.

The Rices were trustees for the Rice Family Living Trust ("Trust"), which owned the Big Creek Ranch ("Ranch") in Texas. Harken leased property on the Ranch, upon which it owned and operated facilities for exploration, pumping, processing, transporting, and drilling oil.

The Rices alleged Harken discharged hydrocarbons and other pollutants onto the Ranch and into Big Creek, tributaries of Big Creek, and other independent ground and surface waters, contaminating or threatening 9,265.24 acre-feet of groundwater and over ninety noncontiguous surface acres of the ranch. The Rices alleged Harken damaged their land through a series of small discharges that occurred over a long period. Furthermore, they maintained a \$38,537,500 clean-up cost for the contaminated soil and groundwater.

The Rices sought application of OPA because it imposes strict liability for cleanup costs and damages on parties that discharge or threaten to discharge oil into or upon navigable waters. OPA defines "navigable waters" as "the waters of the United States, including the territorial sea."

The Rices argued that the district court's interpretation of "navigable waters" in OPA was erroneous. They claimed the court

erred by refusing to apply OPA to inland areas. Since Congress used the same language in both OPA and the Clean Water Act, the Rices believed the scope of both acts should be similar. Thus, OPA should apply to discharges into “waters of the United States,” regardless of the distance of those waters from an ocean or similar body of water. The Rices also maintained the district court improperly excluded groundwater from “waters of the United States.” They claimed that Congress, through OPA, intended to regulate all waters that could affect interstate commerce. Accordingly, the Rices argued that OPA should impose liability on facilities that discharge oil and related wastes into any body of water, including groundwater, that affects interstate commerce. The Rices contended that under the proper interpretation of “navigable waters,” they had a viable OPA claim since Harken’s discharges of oil affected surface water and groundwater under the Ranch.

The Fifth Circuit stated OPA would have provided the Rices with a remedy if they could have demonstrated that Harken discharged oil into a navigable body of water or water adjacent to an open body of navigable water. Nothing, however, in the record linked Big Creek or any of the other creeks on the ranch to navigable water as to qualify for protection under OPA. No evidence existed of any oil discharge directly into Big Creek or any other intermittent creek containing above ground water. Rather, the facts demonstrated Harken’s various discharges of oil were all onto dry land, some of which, over time, may have seeped into groundwater and into Big Creek or another creek. The court held a generalized assertion that gradual, natural seepage from contaminated groundwater that will eventually affect covered surface waters did not establish liability under OPA. Accordingly, the Rices had no cause of action under OPA for discharges of oil that contaminated only the groundwater under the Ranch, and the court deemed summary judgment appropriate.

Kevin R. Rohnstock

NINTH CIRCUIT

United States v. Orr Water Ditch Co., 256 F.3d 935 (9th Cir. 2001)

(holding water rights can either be forfeited through five successive years of nonuse, commencing with initiation of appropriation, or abandoned due to proof of actual intent via indirect and circumstantial evidence).

The town of Fernley (“Fernley”) applied to the Nevada State Engineer (“Engineer”) to change the manner and place of use of rights to roughly 280 acre-feet of water from the federal Newlands Reclamation Project (“Project”). The Pyramid Lake Paiute Tribe of Indians (“Tribe”) and the federal government opposed the proposed