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

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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

transfers, contending Fernley had forfeited or abandoned the water rights at issue. The district court, affirming the decision of the Engineer, held none of the water rights had been forfeited or abandoned. The Ninth Circuit, however, reversed and remanded for further proceedings.

The Project diverts the flow of the Truckee and Carson Rivers to supply the needs of water users in Nevada. The federal government operates the Project, but individual landowners hold water rights in the Project pursuant to contracts between the land-owners and the Department of the Interior. The nature and extent of those water rights are determined, in large part, by Nevada state law.

Fernley sought to satisfy its growing water needs by acquiring water rights from the Project. Thus, Fernley filed an application with the Engineer to change the manner and place of use of twenty-six separate water use permits it had acquired. The Tribe resides on a half-million acre reservation surrounding Pyramid Lake, which is dependent on the flow of the Truckee River. Thus, the Tribe's economy, culture, and heritage are linked to the size of the flow of the Truckee River and to the health of Pyramid Lake. As such, the Tribe and the federal government filed opposition to Fernley's application, contending the water rights sought were either forfeited or abandoned.

The Engineer approved the transfer of all but a few of the water rights at issue, maintaining Fernley was the bona fide owner of the water rights, and the town paid the operation and maintenance fees for those rights. Furthermore, the Engineer ruled all of the water rights at issue were exempt from forfeiture, rejecting the argument the non-forfeited water rights were abandoned.

Water rights can be lost either through forfeiture or abandonment, with both established via a "clear and convincing evidence" standard. In most cases, it is easier to establish forfeiture than abandonment because forfeiture requires only a showing of five successive years of non-use. However, forfeiture does not apply to water rights vested prior to, or for which appropriations were initiated before 1913. The Tribe and the federal government argued some of the water rights in question were subject to forfeiture while Fernley claimed none of the water rights were subject to forfeiture. The Ninth Circuit held the Engineer erred in concluding all water rights were initiated when land for the Project was withdrawn from public entry by the federal government in 1902. Further, the court held the district court made the same error when, in affirming the Engineer, it concluded that because each individual Project water right has a priority date of July 2, 1902, it was therefore initiated on that same date. Thus, the Engineer was to determine "when the individual landowner took the 'first steps' to appropriate the water appurtenant to his land, and not [to] rely on the 1902 priority date." Failure to do so is deemed an abuse of discretion.

If a water right is exempted from forfeiture, it may be lost only through abandonment. Abandonment is the "relinquishment of the right by the owner with the intention to forsake and desert it." Thus,

abandonment requires a showing of actual intent, on the part of the holder of a water right, to abdicate. Non-use can provide “some evidence” of intent, but it is not by itself sufficient to establish abandonment. Therefore, indirect and circumstantial evidence are generally necessary to show abandonment. The Tribe asserted the Engineer was wrong to consider payment of operation and maintenance fees as sufficient evidence to support a finding that the particular water rights had not been abandoned. However, abandonment is determined from all surrounding circumstances—including the payment of assessments and taxes. Other important influences include non-use of the water right as well as the construction of structures incompatible with irrigation. Thus, the court concluded the Tribe failed to provide clear and convincing evidence of abandonment.

Ultimately, the court reversed and remanded for further proceedings. As such, the district court was ordered to review the Engineer’s forfeiture findings on a parcel-by-parcel basis, and to incorporate into the record the evidence submitted to the Engineer relevant to those findings.

Kimberley E. Montanaro

Mohave Valley Irrigation & Drainage Dist. v. Norton, 244 F.3d 1164 (9th Cir. 2001) (holding that the Department of the Interior allotted the correct amount of water to the Mohave Valley Irrigation and Drainage District, and landowners who held present perfected rights not only constituted parties to the contract, but also factored into the water delivery calculation).

The Mohave Valley Irrigation and Drainage District (“District”) appealed a grant of summary judgment to the Secretary of the Department of the Interior (“Department”), Gale Norton. The District alleged the Department breached a 1968 contract allotting it 41,000 annual acre-feet of water. In response, the Department argued ambiguity within the contract due to a lack of language explicitly mentioning the entitlement received by landowners who held present perfected rights (“PPRs”).

The Department allotted water to the District by subtracting it, as provided by the PPRs located within the District, from the amount fixed by the contract. The district court agreed with the Department’s allotment system. The District appealed to the United States Court of Appeals for the Ninth Circuit, seeking the full allotment, as well as a separate calculation for the PPRs. The court defined the contract broadly, and held the omission of PPRs from the contract had the effect of including those landowners as parties to the contract.

The District, under the Uniform Commercial Code (“UCC”), argued that the contract was ambiguous. Courts will only review