

9-1-2001

## Mohave Valley Irrigation & Drainage Dist. v. Norton, 244 F.3d 1164 (9th Cir. 2001)

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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

contracts involving mutual conduct, trade usage, or performance for ambiguous terms. The first individual PPR contract contained language expressly prohibiting an increased water delivery to the District. Although the individual contract constituted trade usage, the court reasoned the contract did not increase the District's water entitlement. The court also rejected the Board of Directors' meeting minutes, which suggested the PPRs delivery amount would add to the annual allotment. Thus, the minutes did not factor into a UCC ambiguity argument. In conclusion, the court affirmed summary judgment in favor of the Department.

*Jon Hyman*

## TENTH CIRCUIT

### **American Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001)**

(holding: (1) the Environmental Protection Agency's approval of Montana's water quality standard, which exempted nonpoint source pollution from antidegradation review, was permissible because nothing in the Clean Water Act demanded that a state regulate nonpoint sources, or give the EPA the authority to regulate such sources; and (2) the EPA's approval of Montana's policies and procedures, which exempted areas within the mixing zone from antidegradation review, was permissible because the use of mixing zones was widespread and a practical necessity for meeting water quality criteria at a discharge pipe).

Pursuant to the Clean Water Act ("Act"), the State of Montana adopted water quality standards and submitted such standards to the Environmental Protection Agency ("EPA") for review. In 1998, American Wildlands filed suit in the United States District Court for the District of Colorado alleging that the EPA failed to take timely action to approve or disapprove of Montana's standards, and failed to promptly promulgate replacement standards for those failing to meet the Act's requirements. In October 1998, American Wildlands moved for summary judgment. The parties agreed to postpone that motion when the EPA stipulated that it would complete its review of Montana's standards by January 15, 1999. On January 26, 1999, the EPA completed its review of Montana's standards, disapproving some and approving others.

On March 31, 1999, American Wildlands amended its original complaint and challenged the EPA's approval of several of Montana's standards. The district court affirmed each of the EPA's actions. American Wildlands appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit. Specifically, American Wildlands disagreed with the district court's conclusions that: (1) the EPA properly approved Montana's water quality standards that