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Kinross Copper Corp. v. State, 981 P.2d 833 (Or. Ct. App. 1999)

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utility facilities owned and operated by a regional water and sewer district. The Utility Clause of the Constitution authorized municipalities to exercise the power of eminent domain to acquire existing public utilities. Thus, the court concluded that the City, in exercising its power of eminent domain over the District's facilities within its boundaries, acted within the intended purpose of the Utility Clause. However, a municipality may not exercise its power of eminent domain over the property of another municipal corporation, if the municipality's actions would either destroy the existing use or interfere, leading to destruction of the use. The court broadly interpreted this limitation making necessary the determination of whether the proposed appropriation would interfere with the District to such an extent that it would effectively lead to the destruction of the District itself.

Although recognizing the existence of substantial evidence regarding the effect of the proposed appropriation, because neither the trial court nor the appellate court considered this issue clearly, the court remanded the case for findings as to the effects of the City's proposed appropriation of the District property. If the proposed appropriation would result in the destruction of an existing public use or the destruction, including economic destruction, of an existing public utility operated by the District, the appropriation was prohibited. If no such destructive effect was found, however, the City would rightfully be exercising its power of eminent domain over an existing public use.

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Kinross Copper Corp. v. State, 981 P.2d 833 (Or. Ct. App. 1999) (holding that the state's decision to deny plaintiff's NPDES permit application did not effect an uncompensated taking of plaintiff's unpatented mining claims).

In 1975, Amoco Minerals Company ("Amoco") staked unpatented mining claims in the North Santiam River Subbasin in the Willamette National Forest. In 1977, the Oregon Environmental Quality Commission ("EQC") promulgated the Three Basin Rule prohibiting any new or increased waste discharges to the North Santiam River Subbasin.

In 1989, Amoco leased the unpatented mining claims to the plaintiff, Kinross Copper Corporation ("Kinross"). Two years later, Kinross developed a plan of operations for a copper ore mining project. The plan required Kinross to discharge wastewater and groundwater pumped from the mine into the North Santiam Subbasin. The plan included obtaining a National Pollutant Discharge Elimination System ("NPDES") permit under applicable state and federal laws.

In 1992, Kinross submitted an application for an NPDES permit to the Oregon Department of Environmental Quality ("DEQ"). The DEQ concluded that: (1) the discharge would not violate applicable water quality standards; (2) no viable alternatives to discharging the wastewater from the proposed mining operation existed; and (3) without the NPDES permit, Kinross would be unable to develop and operate its proposed copper mine. In 1995, however, the DEQ denied the Kinross's application for an NPDES permit since the Three Basin Rule prohibited any new discharges into the North Santiam River Subbasin.

Kinross then brought inverse condemnation claims against the state. Kinross alleged the state's denial of Kinross's permit application reduced the value of its mining claims to zero, and constituted a compensable taking under both the state and federal constitutions. The state argued that because unpatented mining claims are subject to state regulation, the plaintiff never had the right to develop its mining claim in violation of state law.

The trial court entered judgment for the state. The court held that the state's permit denial did not constitute a taking because unpatented mining claims constitute a unique form of property right. The court reasoned that this unique property right was subject to state and federal regulations and was more appropriately analogized to a contract right than subject to a condition subsequent.

On appeal, Kinross argued that the trial court erred by concluding that the state was entitled to judgment as a matter of law, and that Kinross' property was not taken under the state or federal constitutions. In analyzing this issue, the court stated that two settled principles of takings law applied. First, the court recognized that under both state and federal constitutions, government actions depriving property of all value without compensation is an unconstitutional taking. Thus, the court found that under both the Oregon and federal constitutions, property owners could maintain an action for inverse condemnation against a government agency that has taken action depriving the owner of all economically beneficial use of the property.

The second applicable principle of takings law was that governmental action could not be a taking if what the government prohibited did not amount to a private property right in the first place. Looking to United States Supreme Court precedent, the Oregon court explained that regulations that deprive land of all economically beneficial use will not give rise to takings liability if the inquiry into the nature of the owner's estate shows that the proscribed use interests were not originally part of his title.

Kinross argued that it suffered a taking because it was denied the right to mine copper as otherwise permitted by its unpatented mining claims. The court explained that the EQC did not prohibit Kinross from mining, but rather prohibited the plaintiff from discharging wastewater into the North Santiam River Basin. The court further explained that Kinross carried the burden to show that it had a right to

discharge wastewater into a state river. If Kinross did not have the right to discharge water into the river basin, then Kinross could not complain that it suffered an uncompensated taking.

Kinross then argued that EQC's denial of a permit to discharge mining wastewater constituted a deprivation of a private property right. The court stated that, historically, rights to use water in mining operations were obtained as an incident of mining activity and that competing claims to the use of the water was determined by the time of actual appropriation of the water for use. The court noted that Congress first recognized the rule of prior appropriation in the Mining Act of 1866. The statute stated that rights to use water for mining, obtained by prior possession, which are vested and recognized by the local customs, laws, and decisions of the courts, shall be maintained and protected. Further, the court noted that although the basic grant of unpatented mining claims originated in the Mining Law of 1872, that law did not change the preexisting recognition of state water rights rules pertaining to mining claims. However, the Desert Land Act of 1877 did. The Oregon Court of Appeals held that, in enacting the Desert Land Act of 1877, Congress effectively severed title to all public land, not just desert lands, from title to the nonnavigable waters on that land.

Moreover, in 1909, Oregon adopted the doctrine of prior appropriation and established a comprehensive permit system for appropriating water. Under the rule of prior appropriation, water rights were determined not as an incident of land ownership, but as a function of actual diversion of water to a recognized beneficial use. Thus, the court found that no water rights were granted as part of an unpatented mining claim. Water rights must be obtained as provided in the water rights of the state in which the site of the claim is located.

Kinross next asserted that under current state water law, it was entitled to use up to 5,000 gallons of ground water without a permit. The court found that the Oregon statute permitted consumption of ground water, but did not permit the discharge of anything into a state river.

Finally, the court found that Kinross's takings claim was predicated on the loss of the right to discharge mining wastes into the waters of the state. Because this was a right Kinross never possessed, the court held that the state's NPDES permit denial did not constitute an uncompensated taking of property. Thus, the court affirmed the trial court's rulings.

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