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## Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000)

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Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000)

one section of the CWA, an NPDES permit required a permit-holder to achieve effluent limitations. This provision also required the permit-holder to follow stringent standards established by state law. The court also observed that the CWA generally did not require entities discharging storm water to obtain an NPDES permit. However, the CWA did require a permit for discharges related to industrial activity and discharges from municipal sewer systems. When such a permit was required, the CWA established two different standards. For industrial users, the CWA required permits for discharges to comply with all sections of the CWA, including provisions requiring strict adherence to state standards. On the other hand, the CWA did not require permits for municipal discharges to comply with the strict statutory section that required compliance with state standards. Rather, the statute required municipalities to use “controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design and engineering methods.”

Thus, under the two-step analysis, the court found that the language of the CWA was clear and unambiguous and that Congress did not require municipal storm water discharges to comply with state standards. The court also stated that textual clues supported the plain meaning since the CWA also contained other provisions that exempted certain discharges (i.e. irrigated agriculture and storm water runoff from oil, gas, and mining operations) from compliance with state water-quality standards. This interpretation was also supported by a previous decision by the Ninth Circuit in which the court held that the 1987 amendments to the CWA allowed for relaxed controls for municipal storm water discharges.

Nevertheless, the court stated that although the CWA did not require municipal storm sewer discharges to strictly comply with state standards, the EPA was given discretion under the CWA to determine what pollution controls were appropriate. Thus, the EPA’s choice to include the additional water management practices in each applicant’s permit was within its statutory discretion. Finally, the court held that the EPA did not act arbitrarily by issuing the permits to the Arizona municipalities.

*Stephanie Pickens*

**Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000)**

(holding that the United States Department of the Interior had a duty to provide drainage pursuant to the San Luis Act, but that the United States had discretion regarding the manner in which it provided such drainage).

In June 1960, as an integral part of the Central Valley Reclamation Project (“Act”), Congress authorized construction of the San Luis Unit, principally to provide water for irrigation of land in certain California counties. As a part of the Act, Congress recognized the necessity for drainage and conditioned the construction of the San Luis Unit on the provision for drainage facilities to be provided either by the State of California (“State”) or by the United States Department of the Interior

(“Department”). A feasibility report for the San Luis Unit contemplated a system of drains that would empty into a receptor drain that would convey the water to the Contra Costa Delta (“Delta”) for disposal. In January 1962, after the State notified the Secretary of the Interior (“Secretary”) that it would not provide the master drain for the San Luis Unit, the Secretary notified Congress that the Department would arrange for and construct the required drain.

The Department began construction of the San Luis Unit and, in 1967, began water service to the Westlands Water District (“District”). Construction of the master drain began in March 1968 and approximately forty percent of the drain was complete by 1975. During the construction period, the Secretary also built the Kesterson Regulating Reservoir (“Reservoir”) near the middle portion of the drain to act as a regulator before drainage waters reached the planned terminus at the Delta.

Beginning in 1965, certain appropriations were approved which contained provisions prohibiting selection of a final discharge point for the drain until the State, in conjunction with the Bureau of Reclamation (“Bureau”), addressed concerns regarding the effect of the effluent on the San Francisco Bay. The Department suspended construction of the interceptor drain in 1975 due to “questions” and “concerns” raised by the public. However, the Department did construct a subsurface drainage collector system for the District and commenced temporary drainage service to the Reservoir in 1978.

Pursuant to studies conducted at the Reservoir in 1983, the Secretary found instances of deformity and mortality in waterfowl, suspected to be the result of selenium carried into the Reservoir with the effluent. The Secretary closed the Reservoir in March 1985, plugged the District drains, and closed the middle portion of the interception drain. After this, the District received water with no means of drainage.

In 1992, affected landowners sued the Department seeking completion of the master drain, claiming that the Secretary was obligated to construct drainage facilities. The district court granted plaintiff partial summary judgment holding that the Act required the United States Government (“Government”) to provide drainage to lands receiving water through the San Luis Unit. In response, the Government argued that changes in law and knowledge regarding the environment subsequent to the Act made compliance impossible and, therefore, excused its duty to construct the drain. The district court determined that the Secretary’s obligation to construct the drain was not excused. It ordered the Secretary and the Bureau to take necessary steps to pursue an application for a discharge permit. The Government appealed.

On appeal, the Ninth Circuit Court of Appeals considered several contentions of the Government. First, the Government claimed that the plain language of the Act did not require it to build the master drain to the Delta. Second, the Government argued that the appropriations riders, which required consideration of water quality and environmental standards, cumulatively led to an implicit repeal of the Department’s duty to provide drainage under the Act. Finally, in response to the contention that the Department had been negligent in failing to fulfill its obligations, the

Government argued that Congress, through actions subsequent to the Act, encouraged the Department to investigate alternatives to the interceptor drain.

On the Government's first claim, the court held that the district court's finding that the Act mandated the Secretary to provide the interceptor drain was proper. In considering the plain language of the Act, the court acknowledged that the Act authorized the Secretary to construct, operate, and maintain the San Luis Unit, but did not mandate it. However, the court stated that the Act denied discretion as to what constituted the San Luis Unit through use of the word "shall" in requiring engineering features of the San Luis Unit to include particular characteristics (including necessary drains). The court determined that although the Department had discretion to decide whether to participate in construction of the drain for the San Luis Unit pursuant to the Act, once the Department committed to construction, it had no discretion in determining whether or not to include the interceptor drain.

Next, the court of appeals held that it was apparent from the language of the Department appropriations acts that it was not Congress's intention to repeal the drainage requirements, but merely to order the Secretary to develop a plan for addressing environmental problems associated with the discharge of effluent. The court noted that repeals by implication were not favored and that the intention of the legislature to repeal had to be "clear and manifest." The court recognized that the appropriations acts contemplated the existence of an interceptor drain and, therefore, Congress did not intend to repeal the drainage requirement.

Finally, in response to the Government's argument that Congress encouraged the Department to investigate drainage solutions other than an interceptor drain, the court acknowledged that Congress appropriated funds subsequent to the Act in order for the Bureau, in cooperation with other interested entities, to examine alternatives to the interceptor drain. The court confirmed that the ability of the Department to examine alternatives did not eliminate its duty to provide some form of drainage pursuant to the Act.

*Megan Becher-Harris*

**Klamath Water Users Protective Assoc. v. Patterson, 191 F.3d 1115 (9th Cir. 1999)** (holding that irrigators did not possess third-party beneficiary water rights, the government retained overall control over the dam, direct dam operations were subject to the Endangered Species Act, and Indian water rights were protected).

In 1905, the United States appropriated all available water rights in the Klamath and Lost Rivers pursuant to the Reclamation Act of 1902. In 1917, as part of the construction of a series of water diversion projects, the United States Bureau of Reclamation ("Reclamation") entered into a contract with the California Oregon Power Company ("Copco") under which Copco would construct the Link River Dam and convey it to the United States, but maintain