

1-1-2005

Kennewick Pub. Hosp. Dist. v. Pollution Control Hearings Bd., Nos. 22741-3-11, 22742-1-HI, & 22758-8-HI, 2004 Wash. App. LEXIS 454 (Wash. Ct. App. Mar. 17, 2005)

David W. Hall

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

David W. Hall, Court Report, *Kennewick Pub. Hosp. Dist. v. Pollution Control Hearings Bd.*, Nos. 22741-3-11, 22742-1-HI, & 22758-8-HI, 2004 Wash. App. LEXIS 454 (Wash. Ct. App. Mar. 17, 2005), 8 U. Denv. Water L. Rev. 717 (2005).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

manded the case, holding the trial court improperly granted summary judgment to the County.

Thomas Jantunen

Kennewick Pub. Hosp. Dist. v. Pollution Control Hearings Bd., Nos. 22741-3-III, 22742-1-III, & 22758-8-III, 2004 Wash. App. LEXIS 454 (Wash. Ct. App. Mar. 17, 2005) (holding the Pollution Control Hearings Board erred in its decision on the sufficiency of the Washington Department of Ecology's consultation regarding applications for surface water rights with the Columbia River Intertribal Fish Commission).

During the 1980s and 1990s, the Lower Stemilt Irrigation District ("LSID"), Kennewick Irrigation District ("KID"), Mercer Ranches ("Mercer"), and Kennewick Public Hospital District ("KPHD") (collectively "Applicants") filed five applications with the Washington Department of Ecology ("Department") for Columbia River water rights. Washington state regulations required the Department to consult with federal, state, local agencies, and Indian tribes before deciding whether to approve the applications. The Department requested that several entities review the applications, including the Columbia River Intertribal Fish Commission ("CRITFC"). The Department specifically asked the CRITFC to identify someone to participate in the consultation on the permit applications. The CRITFC responded in 2001, asserting that it opposed the applications. The Department prepared preliminary decisions based on its evaluations of the applications and provided draft Reports of Examinations to the various consulted parties. The Yakama Nation and the CRITFC indicated their continuing opposition in response to these drafts.

The Department revised the drafts based on settlements with the Columbia-Snake River Irrigators Association and KPHD. These revisions provided the Applicants with two options to mitigate the possible effect of their surface rights. On January 15, 2003, the Department approved the five applications for surface water rights from the Columbia River. The Confederated Tribes of the Umatilla Indian Reservation ("Umatilla Tribes"), the Nez Perce Tribe, and the Yakama Nation (collectively "Indian Tribes"), appealed the Department's approvals to the Pollution Control Hearings Board ("PCHB"). The PCHB ruled the Department's consultation with CRITFC satisfied the requirements of state law, but reversed the Department's approvals. The PCHB held that the Department failed to adequately consult with the Indian tribes on the draft revisions. The Department, KID, and KPHD appealed the PCHB's decision to the Washington Court of Appeals.

The court stated that it could provide relief from a PCHB order if the order was outside the statutory authority or jurisdiction of the PCHB or if the PCHB erroneously interpreted or applied the law. The

court examined whether the PCHB erred upon concluding that the Department did not comply with statutory consulting requirements, and determined whether the Department properly consulted with the appropriate tribes. The Department, KID, and KPHD claimed the PCHB should defer to the Department's interpretations of state regulations governing such consulting procedures. However, the court ruled the regulations unambiguous. The court held it was unable to rule on the sufficiency of the revision consultation because the court determined that the PCHB's first ruling was in error, and that the initial consultation with CRITFC was insufficient. The Department, KID, and KPHD contended that the sufficiency of CRITFC's consultation was not at issue, but the court held, as the Indian Tribes devoted a section of their brief to the sufficiency of the CRITFC consultation, that the Tribes preserved that issue for appeal.

The court ruled that state regulations governing the consultation process for surface water rights required consultation with affected Indian Tribes. The court determined that CRITFC was not an official Indian Tribe, but was a supporting organization governed by the fish and wildlife committees of the governing tribes. The Department admitted that it did not contact either the Nez Perce or Umatilla Tribes during the consultation process, despite the lack of ambiguity in the state regulations. The court also found that an issue of fact existed regarding possible harm to fish, and held that the PCHB correctly determined that issue. Additionally, the Indian Tribes requested attorney fees and costs. However, the court stated that the Indian Tribes offered no basis for which they could be entitled to fees under state law, and no basis to determine whether the Indian Tribes satisfied the definition of "qualified party" under the statute. The court affirmed the PCHB's reversal of the application approvals, but held that the PCHB should have reversed the approvals because of insufficient consultation with CRITFC, as regulations required the Department to consult with the Indian Tribes, and the Department failed to do so.

David W. Hall

WISCONSIN

Helnore v. Dep't of Natural Res., 694 N.W.2d 730 (Wis. Ct. App. 2005) (holding a state department of natural resources' adoption of a wetlands map that rezoned landowner's property did not constitute a regulatory taking).

In 1968, the Wisconsin Department of Natural Resources ("DNR") promulgated a wetlands map that designated residentially zoned lots within the Pioneer Acres Subdivision in Ozaukee County ("County"), Wisconsin as wetlands. The County did not adopt the wetlands map at that time. In 1993 James and Constance Helnore ("Helnores") pur-