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Russell-Smith v. Water Resources Department, 952 P.2d 104 (Or. Ct. App. 1998)

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legislative enactment will be invalidated. In this case, the antidegradation provision was attached to an appropriations bill for the operation of the Ohio Environmental Protection Agency. Hence, the court held that, as a matter of law, the two provisions, the appropriations and the substantive portion, were not so unrelated as to constitute a "manifestly gross and fraudulent violation" of the Ohio Constitution's one-subject rule.

Conversely, Congress drafted a comprehensive and far-reaching federal statute, the CWA, that the court held preempted state legislation. If a state law frustrates the CWA's purpose then the courts will find the state law invalid. The Clean Water Act's purpose is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The United States Environmental Protection Agency ("USEPA") requires states to further this purpose by establishing an antidegradation policy that maintains high water quality.

Ohio created an antidegradation statute pursuant to the USEPA requirement. However, Ohio's statute allowed the state environmental protection director to degrade high quality waters when the director found that the water body lacked exceptional recreational or ecological value. The statute enabled the director to allocate eighty percent of the water's pollutant assimilative capacity to existing sources without a required CWA degradation review. Under the CWA's degradation review, a state may only degrade waters after the director has complied with the public notice and intergovernmental coordination requirements, conducted a public hearing to consider the social and economic impacts, and chosen to lower the stream's water quality based on the result of the public hearing.

Based on the conflict between these two statutes, the court held that Ohio's antidegradation statute failed to comport with the federal requirements. Because the statute allowed the director to lower a stream's water quality by assigning the stream's pollutant assimilative capacity without a degradation review, Ohio's antidegradation statute frustrated the CWA's purpose. By frustrating the purpose, the state statute conflicted with the federal statute. Therefore, the court found the state antidegradation statute violated the U.S. Constitution's supremacy and commerce clauses.

Madoline Wallace

OREGON

Russell-Smith v. Water Resources Department, 952 P.2d 104 (Or. Ct. App. 1998) (holding that there is no statutory forfeiture for nonuse of water, even though the water user obtained water from an unauthorized point of diversion and did not follow the statutory requirements to apply for a change in point of diversion, provided that the water user obtained the water from a source designated from the water right certificate for the designated use in the designated amount).

The petitioner Joann Russell-Smith ("Russell-Smith") and her husband acquired a certificate for water rights for domestic use on two adjoining properties called lots 4 and 5. Russell-Smith lived on lot 4 and rented lot 5 to others. The certificate authorized diversion of water from an "unnamed spring" and identified a particular point of diversion ("POD") where the certificate authorized the owner to take water from that source. From 1977 to the present, the various owners of the two properties captured water at the authorized POD in a collection box. Overflow from the collection box, as well as water flowing from the unnamed spring near the collection box, flowed into an intermittent stream that ran near lot 5. Renters, and later owners, of lot 5 used the water from the intermittent stream. In early April 1996, the present owners of lot 4 filed documents with the Water Resources Department claiming statutory nonuse of the water from the intermittent stream. The owners asked for a cancellation of that portion of the old water right appurtenant to lot 5. The present owners claimed that because use of the water was from a place other than the described POD in the certificate, it met the statutory definition of nonuse.

The main issue was whether a holder of a water right, who takes water from the authorized source but does so from an unauthorized POD has failed to use all or part of the water appropriated, thus, triggering forfeiture of the water right. The court concluded that if, as here, a certificate holder makes an unauthorized change of POD, but continues to use water from a designated source in a designated amount and for the designated use, there is no "failure to use" within the meaning of the statute.

The court reasoned that although there are special rules that a water user must follow when the user changes the POD, the key issue in forfeiture for non-use is use, and not whether the user failed to comply with statutory procedures for changing the POD. Oregon's water law treats "use," "beneficial use," and "point of diversion" as distinct concepts. The statute in question focuses on "use" and "beneficial use," and makes no reference to "point of diversion." Although other statutes do speak to unauthorized changes in point of diversion, none refer to forfeiture as a consequence or remedy.

Moreover, nothing suggests that the legislature, in enacting the forfeiture statute, intended an unauthorized change in POD to give rise to forfeiture.

Joseph A. Dawson

VIRGINIA

Treacy v. Smithfield Foods, Inc., 500 S.E.2d 503 (Va. 1998) (holding that food company failed to demonstrate a justiciable controversy with respect to modification of a state pollution discharge permit).