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Skokomish Indian Tribe v. Fitzsimmons, 982 P.2d 1179 (Wash. Ct. App. 1999)

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reasoned that to find otherwise required an adjacent landowner to file suit within three years from any pumping of groundwater from adjoining lands in case such pumping caused future damage.

Alternatively, Stephen City argued that the English Rule, not the American Rule, applied for dealing with legal rights and liabilities of subterranean water. The English Rule permitted a landowner unlimited exploitation of the water beneath his land. The American Rule permitted the owner of surface land to make reasonable use of subterranean percolating waters, but prohibited unreasonable withdrawal for sale or distribution for uses not connected with the beneficial use and enjoyment or ownership of the land. Defendants argued that pursuant to section 1-10 of the Code of Virginia, the Common Law of England applied unless overruled by statute or found repugnant to the principals of the Bill of Rights and Constitution of the Commonwealth. Therefore, the English Rule was applicable because the Virginia legislature never modified the English Rule.

The court reviewed the history of section 1-10 and the English Rule, recognizing that most states rejected the English Rule. Precedent established that if the question of whether the English or American Rule would be adopted in Virginia rose again, the court would address it "de novo." However, the court stated it was too premature to reach a definitive answer in this action.

The court stated it would require a substantial showing that the English Rule was consistent with the peculiar needs and requirements of Virginia as it approaches the twenty-first century. Additionally, the court provided guidance to counsel in the presentation of their case. The court noted that prudence dictated the case be tried on the assumption that the rule requiring the most substantial amount of evidence would apply. Therefore, the American Rule, requiring proof of unreasonable amounts of water, methods of extraction, failure to take remedial steps, and/or sale of water off premises was applicable.

Elaine Soltis

WASHINGTON

Skokomish Indian Tribe v. Fitzsimmons, 982 P.2d 1179 (Wash. Ct. App. 1999) (holding Department of Ecology action arbitrary and capricious by failing to object to Federal Energy Regulatory Commission licensing where project was substantially noncompliant with state law).

On November 15, 1974, the City of Tacoma applied to the Federal Energy Regulatory Commission ("FERC") for licensing of the Cushman Dam Project ("Project"). The proposed project would balance the designated uses with the public health and safety concerns of the flood prone Skokomish River. The Skokomish Indian Tribe

("Tribe") actively participated in the proceedings as an interested party.

Part of the licensing process required FERC to determine whether the proposed project comported with the Coastal Zone Management Program ("CZMP") of the state. The city's licensing application submitted to FERC included a "consistency certification" stating the project complied with Washington's CZMP. The federal Coastal Zone Management Act ("CZMA") required a state or designated agency to concur or object to this "consistency certification" within six months. Concurrence is conclusively presumed if the state fails to respond by the deadline. The Washington Department of Ecology ("DOE") had until May 30, 1997 to concur or object to the city's 'consistency certification.'

On May 7, 1997, the DOE issued a letter constituting the agency's 'formal action.' This letter admitted that the proposed project failed to comply with the requirements of Washington's Coastal Zone Program. However, citing the already exorbitant amount of time the project had taken to license, and the likely gridlock an objection would cause, the agency determined that the purpose of the program is served better by declining to take any action; therefore, it expressly declined to object.

FERC issued the license for the project on May 30, 1997. On June 5, 1997, the Tribe filed a petition for review of the agency's May 7th letter. On May 1, 1998, the district court dismissed the Tribe's petition for review, holding that even if jurisdiction existed, the case was moot because the State's opportunity to object had passed with the expiration of the six-month review period and FERC's issuance of the license. The Tribe appealed.

On appeal, the DOE argued that because the state court could not order FERC to rescind the city's license, the court could provide no 'effective relief' and, therefore, the Tribe's petition was moot. The Tribe responded, and the court of appeals agreed, that armed with a state court judgment, the Tribe could compel FERC to reopen the Project's application. Reevaluation of the licensing decision required FERC to consider whether its decision complied with the CZMP. Upon reconsideration and exhaustion of administrative remedies, the Tribe could then seek review of the agency's decision in federal court. Thus, the state court could provide "effective relief" on the Tribe's petition.

Washington's Shoreline Management Act ("SMA") appointed the DOE the state's representative in actions involving FERC, and directed the DOE to take "all reasonable steps necessary" to preserve the integrity of the state's SMA policies. This court found that DOE's letter declining to take action under CZM authority constituted, in its own words, "formal agency action," opening it to the scrutiny of the court. Taking this action under review, the court held that the DOE's decision to acquiesce without regard to the acknowledged noncompliance directly undercut the policies the agency was meant to preserve and thus, was arbitrary and capricious. The court reversed

the lower courts decision and remanded with directions to the DOE to issue a new letter in response to the city's "consistency certification" which comported with state law and accurately and affirmatively stated DOE's concurrence or objection to the city's certification.

John B. Ridgley

WISCONSIN

Milam v. Wisconsin Dep't of Natural Resources, No. 98-1585, 1999 WL 391577 (Wis. Ct. App. 1999) (holding that the Wisconsin Department of Natural Resources properly denied the Milams' request for the water quality certification necessary to fill a wetland on their property in order to construct residential housing).

James and Herminia Milam owned seventeen lots on which they wanted to construct a subdivision. Three of the lots contained a wetland totaling three-quarters of an acre. The Milams applied to the Wisconsin Department of Natural Resources ("DNR") for a water quality certification to fill the wetland. According to the Wisconsin Code, the DNR must consider practicable alternatives to the proposed property use, which will not adversely affect the wetland or create significant adverse impacts. The DNR's wetland/water management specialist denied the application because a practicable alternative to filling the wetland existed and filling would cause adverse impacts. The specialist proposed combining four lots into two larger lots and building homes on the upper portions of the two plots that did not encompass the wetland area. This created fifteen residential units, as opposed to the original seventeen. The Milams requested a contested case hearing before an administrative law judge ("ALJ").

The ALJ found the DNR properly denied the Milams' request for the water quality certification. The ALJ held the Milams had not demonstrated the absence of practicable alternatives and the filling of the wetland would result in detrimental impacts to its functional values. The circuit court affirmed the decision.

The issue before the appellate court was whether substantial evidence supported the ALJ's determination. The court of appeals reviewed only the decision of the ALJ, not that of the circuit court. The ALJ determined a practicable alternative to filling the wetland existed. The court stated that a practicable alternative included one which considered cost, available technology, and logistics in light of the overall project purposes. The ALJ determined that fifteen of the lots contained developable land for the purpose of residential development. Clearly, the alternative allowed the construction of houses on the residential lots with only two less than the Milams' original plan. The court also found substantial evidence supporting the ALJ's environmental impact determination because the specialist