

9-1-1998

Treacy v. Smithfield Foods, Inc., 500 S.E.2d 503 (Va. 1998)

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Elise S. Wald, Court Report, Treacy v. Smithfield Foods, Inc., 500 S.E.2d 503 (Va. 1998), 2 U. Denv. Water L. Rev. 156 (1998).

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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).

Smithfield Foods owned subsidiary corporations that operated two pork processing plants in Isle of Wight County. In 1986, the State Water Control Board (the "Board"), through the Commonwealth of Virginia, issued a permit that regulated the wastewater Smithfield discharged into the Pagan River. The Board later modified the permit, adding a compliance schedule for the construction of facilities that would meet a monthly average effluent limitation of phosphorous and limited nitrogen. Smithfield appealed the modification, challenging the phosphorous standards that were set forth by the Board.

In 1991, a special order was issued in which Smithfield agreed to dismiss its appeal and to decide within a specified time if it would comply with the permit. Smithfield agreed one month later to connect its wastewater plants to the Hampton Roads Sanitation District wastewater plant. In 1992, a new permit was issued with the same phosphorous levels.

In 1996, the Board filed a complaint alleging that Smithfield committed numerous permit violations and violated the special order. The EPA then filed suit against Smithfield in the U.S. District Court seeking penalties under the Clean Water Act for violations of certain effluent standards, including phosphorous and TRN standards in the 1992 permit. Smithfield filed a cross-bill seeking declaratory judgment that the special order revised, superseded, and replaced the earlier permit.

The Chancellor issued the declaratory judgment that the phosphorous standards were inconsistent with the special order. The Commonwealth appealed, arguing that there was no controversy at issue because they had agreed that the special order precedes the permits. Smithfield however, argued that there was a controversy because the special order was a contract with the Commonwealth which the Commonwealth breached by issuing the 1992 permit.

The Virginia Supreme Court held that Smithfield was not entitled to a declaratory judgment because it failed to demonstrate a justiciable controversy. The court found that to be justiciable a controversy must involve specific adverse claims that are based on present, not future or speculative, facts that are ripe for justiciable assessment. Thus, the trial court did not have authority to issue an advisory opinion or answer speculative inquiries. No controversy existed with the Commonwealth because they agreed on the importance of the special order. Rather, the controversy was with the EPA in the federal case against Smithfield and it should have been pursued in that forum.

Elise S. Wald

WASHINGTON

Tiegs v. Watts, 954 P.2d 877 (Wash. 1998) (affirming a lower court decision which held Defendants liable for breach of a farm lease and