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Cal. Pines Prop. Owners Ass'n v. Pedotti, 141 Cal. Rptr. 3d 793 (Cal. Ct. App. 2012)

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already testified that fences the government erected in 1988 and 1990 did not exclude cattle from their water sources; (c) a water right has no "access component" and there is thus no appurtenant right to use and occupy federal rangelands for access to the water; and (d) the Hages failed to prove that they could have put the water to beneficial use.

First, the court of appeals found the Hages' claim for a regulatory taking of their water rights was not ripe. Neither party entered evidence that the government would have denied the Hages a permit, had they applied for one. The appeals court rejected the Hages' argument that the mere existence of a requirement for a permit constituted a regulatory taking. Accordingly, the appeals court concluded the claims court erred in finding the government had effected a regulatory taking of the Hages' water rights. The appeals court further held the Hages did not presently have to apply for a permit because it would be futile based on the history of the parties involved and the permit requirement itself would amount to a prohibition of their use; a taking of their water rights.

Next, the appeals court examined the government's claim that any physical takings claim based upon fences built in 1981 and 1982 were time-barred pursuant to the six-year statute of limitations period prescribed in 28 U.S.C. § 2501. The appeals court agreed. The Hages had, in fact, filed the suit in 1991; nearly a decade after the BLM built fences on the property. The appeals court did agree with the Hages' assertion that the government could not prevent them from accessing their water without just compensation, and that entirely fencing off a water source could, theoretically, amount to a physical taking. The court of appeals held, however, in the absence of any evidence that the government "took" water the Hages could have put to beneficial use, the Hages failed to satisfy the requirements for a successful Fifth Amendment takings claim. Therefore, the appeals court held the claims court erred in ruling that the government's construction of the fences amounted to a physical taking.

Accordingly, the appeals court affirmed the claims court's ruling that the erection of fences in 1981 and 1982 were time-barred; reversed the claims court's ruling that there had been a regulatory and physical taking of the Hages' water rights; vacated any damages awards; and remanded the case without costs.

Michael Lerch

STATE COURTS

CALIFORNIA

Cal. Pines Prop. Owners Ass'n v. Pedotti, 141 Cal. Rptr. 3d 793 (Cal. Ct. App. 2012) (holding that by acting in accord with typical practices of a rancher in Modoc County, Pedotti satisfied the "best efforts" clause of a water storage agreement because he used the diligence of a reasonable person under comparable circumstances).

In 1992, California Pines Property Owners Association ("Association") acquired land in Modoc County, California, which included the Donovan Reservoir ("Reservoir"). Nearby, Robert Pedotti purchased the 1,761-acre

Diamond C Ranch ("Ranch") in 1993. In 1960 and 1972, the Ranch's previous owners obtained two licenses for irrigation and other water purposes from the Rye Grass Swale, a source of water for both the Ranch and the Reservoir.

Both Pedotti and the Association were assignees of a 1986 fifty-year water storage agreement ("1986 agreement") between previous owners defining the rights of the parties with respect to water in the Reservoir. Pursuant to the 1986 agreement, the previous owner of the Reservoir allowed the Ranch to divert water out of the Reservoir for use on the Ranch. The 1986 agreement required the Ranch owner to use "best efforts" to maintain the water level of the Reservoir at 4,353 feet above sea level. However, the 1986 agreement did not specifically define conduct that would satisfy the "best efforts" requirement. Since 1993, Pedotti irrigated the Ranch using flood irrigation ditches to divert water from the Reservoir.

The Association sued Pedotti in the Superior Court, Modoc County ("trial court"), alleging Pedotti took more water than was allotted to him under the 1986 Agreement and failed to use his best efforts to maintain the water level of the Reservoir. The Association brought causes of action for breach of contract, violation of reasonable and beneficial use of water, and injunctive relief. The trial court entered judgment in favor of Pedotti on each of the Association's causes of action.

The Association appealed the trial court's rulings to California's Third District Court of Appeals ("appeals court"). On appeal, the Association made five arguments only one of which the appeals court addressed in the published version of this opinion. The Association argued "best efforts" meant the efforts required of a fiduciary. The appeals court held when a contract does not define the phrase " best efforts," the promisor must use the diligence of a "reasonable person" under comparable circumstances, not the diligence required of a fiduciary. Turning to the "reasonable person" standard, the appeals court noted the Association had the burden of affirmatively demonstrating reversible error by the trial court in determining that the "best efforts" clause required merely "reasonably diligent efforts."

The appeals court analyzed the "best effort" clause first by looking at prior precedent. In California, courts had not explicitly defined the term "best efforts" but instead construed the meaning of "best efforts" on a case-by-case basis after considering the individual facts of the case and the specific contractual agreement in question.

The appeals court also looked to other jurisdictions, which had defined "best efforts" on a conceptual basis. These jurisdictions held that a "best efforts" clause in a contract did not in itself create a fiduciary relationship because the promisor was not acting purely for the benefit of the promisee. Instead, these courts defined "best efforts" as the "diligence of a reasonable person under comparable circumstances." The appeals court ultimately agreed with the persuasive authority in other jurisdictions and held "best efforts" did not require every conceivable effort nor performance of actions that would incur substantial losses to the promisor.

Based on this definition of "best efforts," the appeals court addressed the Association's claim that the trial court applied an erroneous standard, which required a lengthy evaluation of the trial court's findings.

The trial court explicitly stated the "best efforts" clause did not create a fiduciary duty and Pedotti's customary or typical efforts satisfied the "best efforts" standard. In so ruling, the trial court compared Pedotti's actions with the best practices of a typical rancher in the area. The trial court found flood irrigation was typical in Modoc County, where the Ranch was located. In addition, the trial court found Pedotti checked the irrigation system on a daily basis to ensure efficient irrigation practices and irrigated during the winter to further ensure efficiency by keeping the soil saturated until the spring. Although the appeals court noted Pedotti's practice of irrigating while livestock were in the field was not a "best practice," it was a typical practice in Modoc County.

Moreover, notwithstanding the fact that livestock could potentially compact the non-established soil, which could cause ponding during irrigation, the trial court found fields on the Ranch were well established and such damage would be minimal. The trial court also found Pedotti regularly measured his water use in volume so as to not overdraw. The trial court also found Pedotti used less water from the Reservoir than his licenses permitted at times of low water levels and, in 2009, took no water from the Reservoir at all.

Based on its review of these factual findings by the trial court, the appeals court held the evidence supported a "best effort" finding under the "diligence of a reasonable person under comparable circumstances" standard. Accordingly, the appeals court affirmed the trial court's ruling that Pedotti acted within the "best efforts" clause of the 1986 agreement and held the Association failed to prove the trial court's findings were erroneous.

Robert Sykes

COLORADO

In re Revised Abandonment List of Water Rights in Water Div. 2, 276 P.3d 571 (Colo. 2012) (en banc) (holding (i) an application for a change of a water right must be supported by proof of historic use; (ii) denial of an application for a change of a water right for failure to prove historic use does not amount to an unconstitutional taking of property without just compensation; and (iii) the failure of an applicant to prove historic use does not establish abandonment of the water right).

In this case, John C. Harrison ("Harrison"), acting as personal representative for the estate of Nolan G. Thorsteinson and trustee of The Margie (Dotts) M. Thorsteinson Trust, sought to avoid an abandonment order for a disputed 1.04 c.f.s. interest in the Mexican Ditch. In May 2001, the Division Engineer placed this disputed water right on the decennial abandonment list and Harrison filed protests in the Water Court for Water Division No. 2 ("water court").

In 2006, Harrison entered into a stipulation with the State and Division Engineers ("Engineers") whereby he would file an application for a change in the point of diversion reflecting the historic use of the water right and the Engineers would remove the water right from the abandonment list. The stipulation also required Harrison to divert the water right only from the original decreed point of diversion nowhere else. If Harrison failed to abide by the