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## O'Reilly v. United States Army Corps of Eng'rs, No. 04-940, 2004 U.S. Dist. LEXS 15787 (E.D. La. Aug. 10, 2004)

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the Indentures in a timely manner. The court also rejected MLWC's argument that MHP had violated the 1910 Indenture by failing to operate the power plant and to pay rent. Because MLWC had not terminated the Indentures in a timely manner after violation of the 1924 Indenture, and because there were no other violations that prevented MHP for being the second party to the Indentures, the court granted MHP summary judgment on the issue of whether MHP was the proper second party.

The court then considered MHP's rights and obligations as a second party. MHP claimed that it had a right to all water not otherwise appropriated through other agreements predating June 1, 1910. The court found that MHP, as the second party, had a right of first refusal on expired agreements. The court granted partial summary judgment to MHP, exempting from MHP's claim all leases not predating June 1, 1910, offered to and refused by a second party that remained under contract with another party.

The court finally considered whether MHP was liable for past unpaid rent. The court considered three ways to construe the Indentures: as a lease, as a license, or as an ordinary contract. The court, electing to take guidance from Vermont courts, decided to apply a modern contract approach in the interest of equity and flexibility. Applying this approach, the court found that, under the Indentures, MHP was liable to pay the minimum rent, but was also entitled to a full refund because of MLWC's failure to maintain the canal. Because requiring MHP to pay rent so that MLWC could refund MHP would be pointless, the court granted summary judgment to MHP on this issue.

The court granted MHP's motion for summary judgment in part and issued an order declaring MHP the proper second party under the Indentures. The court stated MHP's rights under the Indentures as requested by MHP, but excluded those water rights that did not predate June 1, 1910, and that the second party had refused, so long as they remained under contract with another party.

*Mark Terzaghi Howe*

**O'Reilly v. United States Army Corps of Eng'rs, No. 04-940, 2004 U.S. Dist. LEXIS 15787 (E.D. La. Aug. 10, 2004)** (holding that the United States Army Corps of Engineers abused its discretion in issuing a permit under section 404 of the Clean Water Act absent an Environmental Impact Statement in accordance with the National Environmental Policy Act; the Corps failed to show a connection between the project's adverse environmental impacts and the mitigation measures identified in the Environmental Assessment in issuing the section 404 permit).

August Hand, Jr. filed an application with the United States Army Corps of Engineers ("Corps") for a permit, in accordance with section 404 of the Clean Water Act ("CWA"), for the dredging and filling of

certain wetlands, a portion of which were protected wetlands under the CWA. The Corps issued the permit after performing an Environmental Assessment ("EA") and determining that the project would not significantly affect the environment in light of proposed mitigation measures. Loretto O'Reilly, Jr. ("O'Reilly") filed suit against the Corps in the United States District Court for the Eastern District of Louisiana to enjoin the permit claiming that the Corps illegally issued the permit because the Corps did not prepare an Environmental Impact Statement ("EIS") in accordance with the National Environmental Policy Act ("NEPA"). O'Reilly and the Corps subsequently filed motions for summary judgment on the merits.

O'Reilly contended that the Corps' decision to issue the permit in the absence of an EIS was arbitrary and capricious because the Corps' EA did not address the cumulative impacts of the project in light of past and reasonably foreseeable development in the area, and because the Corps did not analyze the mitigation measures proposed by the EA. O'Reilly also contended that the Corps failed to consider the cumulative impacts of potential future phases of the development of which the subject project was a component.

Section 404 of the CWA gives the Corps authority to issue permits for the discharge of dredged or fill material into navigable waters of the United States, including wetlands. When considering an application for a section 404 permit, the NEPA requires the Corps to consider the environmental impacts of their actions and prepare an EIS. The Corps may decline to prepare an EIS even though the proposed project will result in significant environmental impacts where the permittee agrees to employ mitigation measures that will lower the otherwise significant environmental impacts to a level of insignificance. The Corps' decision not to prepare an EIS can only be set aside upon a showing that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Thus, the Corps must provide enough analysis and data so that the court may insure that the Corps has complied with the NEPA.

The court reviewed O'Reilly's and the Corps' motions for summary judgment based solely on the administrative record and the applicable law. The court concluded that the EA prepared by the Corps contained no support for the Corps' conclusion that the mitigation measures would reduce the identified adverse impacts of the project. Due to the absence of a connection between the project's adverse impacts and the proposed mitigation measures, the court assumed that the Corps based its decision on speculation that the project successfully mitigates the potential environmental impacts. Therefore, the Corps' decision to issue the permit in the absence of an EIS was arbitrary and capricious.

Further, the Corps contended that although the project was potentially just the first phase of a larger development, one that would ulti-

mately require further permitting under the CWA, the project had an independent utility apart from any future phases of the project. However, the court rejected this argument, concluding that the Corps should have considered the other phases of the project because the other phases were reasonably foreseeable.

The court ultimately concluded that the Corps had acted arbitrarily, capriciously, and abused its discretion by issuing the section 404 permit without preparing an EIS as required by NEPA and granted O'Reilly's motion for summary judgment enjoining the section 404 permit issued by the Corps.

*Donald E. Frick*

**United States v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004)** (holding: (1) because Tribe's water rights were federal reserved rights the water rights were not subject to the theories of forfeiture, abandonment, or failure to perfect; (2) a proposed change in water usage from the amount currently used to the full amount of the water right did not impair junior appropriators' rights; (3) the Tribe was immune from paying state fees associated with a water transfer; (4) and the amount of water transferable was the amount of the water duty).

The Truckee-Carson Irrigation District ("Irrigation District") and the City of Fallon ("Fallon") appealed to the United States District Court, District of Nevada, the ruling of the State Engineer granting the transfer applications for two of the Tribe's water rights. The United States and the Tribe cross-appealed claiming they had a right to transfer more water than the State Engineer granted and claiming a right to avoid paying fees associated with the transfer. The Tribe possessed two water rights, Claim No. 1 and Claim No. 2 of the Orr Ditch Decree. The Tribe wished to transfer water from both claims from bottom land irrigation to instream fishery use for a period of one year. The United States and the Tribe filed an application for both transfers in 2001 with the Nevada State Engineer. The Tribe requested a transfer of 9,914 acre feet under Claim No. 1. The State Engineer granted a transfer of 8,420 acre feet. In addition, the Tribe requested a transfer of 15,344.55 acre feet under Claim No. 2 of which the State Engineer granted a transfer of 11,254.5 acre feet. Several parties, including the Irrigation District and Fallon, opposed the transfer of both water rights.

In granting the transfer applications, the State Engineer ruled that neither of the transfer applications could be contested on the basis that the water rights were abandoned, forfeited, or not perfected. In addition, the State Engineer stated that because the Tribe wished to transfer the rights to fishery purposes, a primary purpose of the Tribe's reservation, the Tribe need not apply for a new water right, but merely satisfy the transfer requirements of state law.