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San Luis & Delta-Mendota Water Auth. v. Jewell, NO. 1:15-CV-01290-IJO-GSA, 2017 WL 1375232 (E.D. Cal. Apr. 17, 2017)

Jeremy Frankel

San Luis & Delta-Mendota Water Auth. v. Jewell, NO. 1:15-CV-01290-IJO-GSA, 2017 WL 1375232 (E.D. Cal. Apr. 17, 2017)

Second, the Court determined whether the Guidelines caused an injury to the Nation's generalized interest in Lower Basin water. Although the Nation does not have decreed rights to Lower Basin water, it may still be eligible for standing because the need for water to sustain the Reservation is a cognizable interest that may provide standing under NEPA. The Nation's argument was simply that it would have less Lower Basin water available due to the Guidelines. It contended that the Surplus Guidelines would limit the Nation's supply by allocating all surplus water each year, and the Shortage Guidelines would limit the Nation's supply because its share is charged against Arizona's apportionment, which is already the smallest of the Lower Basin apportionments. The Nation feared that either excessive "Intentionally Created Surplus" ("ICS") development or an increased likelihood of a declared shortage will reduce the availability of water for its lands.

The Court held that the Nation has not suffered an injury to its generalized interest in water sufficient for Article III standing. First, the Guidelines merely prescribe the conditions necessary to declare either surplus or shortage—they do not make allotments of water themselves. Second, a statute—not the Guidelines—provides the prioritization scheme that disadvantages Arizona. Third, the Nation failed to demonstrate how the Guidelines would make it more likely that a shortage will be declared. Finally, the Nation's argument that excessive ICS development will limit its supply of water was flawed because the Guidelines only allow users to bank water for the purpose of banking it—users must offset their water consumption when any of it is banked.

Finally, the Court held that the Nation's breach of trust claim against the United States was not barred by sovereign immunity. Section 702 of the APA provides that a party who suffers a legal wrong as a result of agency action is not barred from filing suit against the agency or an officer thereof on the ground that it is against the United States.

There was a split in the Ninth Circuit regarding the interpretation of Section 702, so the Court consolidated the two interpretations into one rule. The Court concluded that: (1) Section 702 waives sovereign immunity for *all* non-monetary claims; and (2) Section 704's final agency action requirement is limited only to actions brought under the APA. Because the Nation sought non-monetary relief against DOI, DOI's sovereign immunity was waived.

Accordingly, the Court affirmed the district court's ruling that the Nation is not entitled to relief for its NEPA claims. However, the Court reversed the district court's ruling that the Nation's breach of trust claim was barred by sovereign immunity and remanded it to the district court for full consideration on the issue.

Gianni Puglielli

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

San Luis & Delta-Mendota Water Auth. v. Jewell, NO. 1:15-CV-01290-LJO-GSA, 2017 WL 1375232 (E.D. Cal. Apr. 17, 2017) (holding that: (i) if an agency justifiably relied on a specific provision of a federal act to make Flow

Augmentation releases, claims attacking the agency's reliance on other provisions of the act will fail, and (ii) claims attacking Flow Augmentation releases under NEPA are moot and do not meet the "capable of repetition yet evading review" exception when an agency adopts a Long-Term Plan EIS that makes it unlikely the agency will follow the same procedures).

In order to reduce the risk of fish kill in the Lower Klamath River, the U.S. Bureau of Reclamation ("the Bureau") made Flow Augmentation releases ("FARs") in both 2014 and 2015 from Lewiston Dam, which is a part of the Trinity River Division. The Bureau released a total of 64,000 acre-feet of water in connection with the 2014 FARs. In 2015, the Bureau planned on making similar FARs and prepared an Environmental Assessment ("EA") according to the National Environmental Policy Act ("NEPA"). After the Bureau released the EA, the San Luis and Delta-Mendota Water Authority and the Westlands Water District filed suit against the Bureau and its parent agency, the Department of the Interior, in the United States District Court for the Eastern District of California. The lawsuit included eight separate claims for relief, as well as a request for injunctive relief that was quickly denied.

The first, second, and third claims for relief challenged the Bureau's statutory authority to make FARs. To justify the 2014 FARs, the Bureau relied on a proviso of a federal 1955 Act (the Act), which authorizes the Secretary of the Interior to adopt measures that protect fish and wildlife including maintaining the flow of the Trinity River below the diversion point ("Proviso 1"). Plaintiffs asserted in their second claim that Proviso 1 did not give the Bureau the authority to implement the 2014 FARs. While this lawsuit was pending, the Ninth Circuit Court of Appeals decided this issue, finding that the Bureau has the authority to implement FARs under Proviso 1. In light of the Ninth Circuit's decision, the Court found the second claim to be moot and dismissed the claim with prejudice.

The Bureau also relied on a second proviso of the Act to justify the 2014 and 2015 FARs—this proviso required that at least 50,000 acre-feet of water be released annually from the Trinity River and be made available to downstream users ("Proviso 2"). The first and third claims attacked the Bureau's reliance on Proviso 2. The first claim alleged that Proviso 2 did not give the Bureau the legal authority for FARs. The third claim alleged that even if the Bureau had legal authority under Proviso 2, reclamation law still requires that the Bureau enter into a contract for delivery of the water. The Court found that the Bureau had specifically relied on both Proviso 1 and Proviso 2 in justifying the FARs. Because the Court already concluded that the Bureau had the authority to make FARs under Proviso 1, the Court found that the first and third claims attacking Proviso 2 were moot. The Court dismissed these two claims without prejudice, contemplating a future challenge to FARs where the FARs are justified solely on Proviso 2.

The fourth and fifth claims alleged that the Bureau did not follow procedures required by NEPA. The fourth claim asserted that the Bureau's EA for the 2015 FARs did not meet NEPA requirements and that the Bureau also needed to prepare an Environmental Impact Statement ("EIS"). The fifth claim alleged that the Bureau also acted unlawfully by not preparing either an EA or and EIS for the 2014 FARs. The Court found that these claims were technically moot "because the 2014 and 2015 FARs expired of their own accord."

However, because the duration of FARs is so short relative to the timeline of litigation, the Court entertained that these claims might still be valid as capable of repetition yet evading review. However, the Court found that the claims did not meet this exception to mootness because there was no evidence that this same controversy would be likely to occur again. In making its determination, the Court relied on the Bureau's recently issued Long-Term Plan to Protect Adult Salmon in the Lower Klamath River EIS, which identifies FARs as a proposed action and makes it unlikely that the Bureau would follow the same procedures for FARs as it did in 2014 and 2015. The Court also pointed out that even though the Long-Term Plan EIS only runs through 2030, that lack of clarity did not give rise to a demonstrated probability that the controversy would occur again. The Court dismissed the fourth and fifth claims without prejudice to a renewed claim with new facts showing the controversy is likely to recur.

The sixth, seventh, and eighth claims alleged that the Bureau did not comply with requirements in the Endangered Species Act ("ESA") and Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). While this lawsuit was pending, the Ninth Circuit addressed nearly identical claims in a companion case and found that the plaintiffs there did not have standing for their ESA and MSA claims. Accordingly, the Court requested a supplemental briefing in light of that decision and did not decide the merits of the sixth, seventh, and eighth claims.

Jeremy Frankel

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

United States v. N. Colo. Water Conservancy Dist., 2017 U.S. Dist. LEXIS 42298 (D. Colo. 2017) (certifying unopposed facts surrounding Denver's conditional right to 654 cfs from the Blue River Decree and vacating the 1977 Order compelling federal jurisdiction over in-state water issues arising from the Blue River Decree).

The ruling in this case from the United States District Court for the District of Colorado resolves a long-standing issue involving federal jurisdiction over water law in Colorado. The United States first brought this action in 1949 to determine federal interests in the water flowing from the Blue River and stored in the Green Mountain and Dillon reservoirs. Between 1949 and 1955, various companion cases were joined to the first action. These cases involved non-federal water rights but remained under the jurisdiction of the district court under the terms of the 1955 Decree settling the original dispute.

The instant issue arises under that long arm of federal jurisdiction. In 2006 (and with an amended complaint in 2013), Denver sought to make absolute an additional portion of its conditional rights under the 1955 Decree, which granted the city a conditional right to 788 cfs. Prior rulings had made absolute 520 cfs, to which Denver wanted to add 134 cfs, bringing its total absolute right to 654 cfs. All parties who initially opposed this change reached independent agreements with Denver outside of the court system. Thus, the court found no