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## Idaho Conservation League v. Bonneville Power Admin., 826 F.3d 1173 (9th Cir. 2016)

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State contended that the Treaties did not impose a duty on the State to abstain from constructing barrier culverts, and objected to the scope of the district court's injunction

First, the court of appeals determined the State's duties under the Treaties. The court of appeals found that the State misconstrued the Treaties by characterizing their primary purpose as "opening up the region to settlement"; the court of appeals instead deemed the primary purpose as establishing a reliable means to sustain tribal livelihoods once the Treaties took effect. The court of appeals, relying on United States Supreme Court precedent, construed treaties between tribes and the United States in favor of the tribes. Along that vein, the court of appeals reasoned the Tribes understood that the Treaties would provide not only access to usual and accustomed fishing places, but also to sustainable salmon populations; thus, regardless of explicit language, the court of appeals would infer that promise.

The court of appeals then reviewed the facts presented to the district court regarding the State's culverts and recognized their effects within the Case Area as "block[ing] approximately 1,000 linear miles of streams suitable for salmon habitat." Therefore, the culverts precluded sufficient salmon populations that would maintain a moderate living for the Tribes. The court of appeals further reasoned that replacing or modifying culverts to increase salmon migration would render more mature salmon available for Tribal harvest.

Next, the court of appeals addressed the appropriateness of the district court's injunction and rejected the State's contentions. The State contended that the Tribes did not provide sufficient evidence that the culverts significantly caused the salmon's decline. However, the court of appeals determined that the Tribes had presented extensive evidence. Specifically, the Tribes presented a report prepared by state agencies, which acknowledged culverts as a type of barrier to fish migration and as "correctable obstacles." The State also contended that the district court's injunction ordered the State to correct almost all state-owned barrier culverts without evidence that such corrections would improve salmon migrations. However, the court of appeals reiterated that the State's own evidence illustrated that once salmon habitat is accessible by unblocking barrier culverts, "hundreds of thousands of adult salmon" would be available to Tribes.

Accordingly, the court of appeals affirmed the district court's holdings and concluded that the district court did not abuse its discretion by issuing the permanent injunction.

*Gia Austin*

**Idaho Conservation League v. Bonneville Power Admin., 826 F.3d 1173 (9th Cir. 2016)** (holding that three federal agencies managing a dam did not violate the requirements of NEPA when they decided to fluctuate the level of a reservoir without filing an environmental impact statement, because that decision was within the range of action originally available when the dam was first operational, and therefore, was not a major federal action).

The National Environmental Policy Act ("NEPA") requires that federal agencies prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." An

EIS is a detailed study that examines the environmental consequences of an agency's action. To determine whether an EIS is necessary, Agencies prepare environmental assessments ("EA"). In this case, the United States Court of Appeals for the Ninth Circuit decided whether the Bonneville Power Administration ("BPA") violated the requirements of NEPA when BPA concluded in an EA that no EIS would be necessary to raise and lower the level of Lake Pend Oreille to generate power through the Albeni Falls Dam.

The Albeni Falls Dam ("Dam") lies on the Pend Oreille River and operates to balance a variety of competing objectives including flood control, power generation, navigation, and wildlife conservation. Lake Pend Oreille ("Lake") serves as the Dam's reservoir. The Dam's electricity output corresponds with the amount of water released from the Lake. Higher output lowers the Lake and causes its shoreline to recede.

The Army Corps of Engineers ("Corps"), the BPA, and the Bureau of Reclamation jointly manage the Dam. Since its completion in 1957, the Corps fluctuated the level of the Lake to generate power as needed during the winter months. However, from 1997 to 2011, the Corps maintained the Lake at a constant level to mitigate adverse effects on the kokanee salmon population.

In 2009, the BPA advocated for more "flexible winter power operations." The operating agencies developed a new plan (the "Plan"), which preserved the Corps' discretion to raise and lower the level of the lake by up to five feet during the winter. Along with the Plan, the agencies published an EA in which they concluded that fluctuating the level of the Lake had no significant environmental impact. The agencies moved forward without preparing an EIS.

The Idaho Conservation League ("Petitioner") challenged the agencies' decision to move forward without preparing an EIS as a violation of the requirements of NEPA. The Petitioner requested the court of appeals to require that the BPA prepare an EIS. The Petitioner also challenged the EA's finding of no significant impact, claiming the agencies failed to consider the Plan's impact on the spread of the flowering rush, an invasive species. The court of appeals held that the Plan did not violate the requirements of NEPA.

First, the court of appeals rejected the Petitioner's EIS request, explaining that an action is not a major federal action when an agency operates a facility "within the range originally available to it," and that the EIS requirement only applies where the proposed action is major. Actions regarding ongoing projects can be major when agencies make changes that "themselves amount to major Federal actions." There was no change in the Plan. In other words, the Plan "did not change the status quo" because if the agencies had before consistently fluctuated the levels of the Lake during the winter, then formalizing the approach to fluctuation would be "doing nothing new, nor more extensive, nor other than that contemplated when the [Dam] was first operational." The court of appeals concluded the Corps never relinquished its discretion to fluctuate the level of the Lake from 1997 to 2011 when the agency maintained the Lake at a consistent level. The court of appeals reasoned that because the agencies decided to maintain the Lake at a consistent winter level on a year-to-year basis, that they had always retained the authority to respond to annual changes in power demands. By rejecting Petitioner's request, the court of appeals held that all other challenges to the EA were moot. Since the Plan did not trigger a major federal action, the agencies had no need to further consider the flowering

rush.

Finally, the court of appeals noted that the Petitioner may have had a separate colorable claim if they had argued that the agencies must have supplemented an existing EIS with an analysis of how year-round dam operations affect the spread of the flowering rush. Agencies have a duty to supplement if there are “significant new circumstances or information relevant to environmental concerns” that were not considered in an earlier EIS. However, the court of appeals found that issue was outside the scope of the case and only raised on appeal.

Accordingly, the court of appeals held that the agencies’ decision to move forward with the Plan without preparing an EIS did not violate NEPA.

*Trevor C. Lambirth*

### UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**New Mexico, ex rel. State Engineer v. Trujillo, 813 F.3d 1308 (10<sup>th</sup> Cir. 2016)** (holding that a special master in a general stream adjudication properly granted summary judgment against an individual who objected to a district court’s proposed order limiting her water use to 0.5 acre-feet per year (“AFY”).

This case came before the Tenth Circuit Court of Appeals as an individual challenge to a general stream adjudication initiated by New Mexico to determine water rights in the Nambe-Pojoaque-Tesuque Basin (“Basin”), which originates in the Sangre de Cristo Mountains. Elisa Trujillo held a domestic well permit allowing her to divert underground water in the Basin. The individual adjudication of water rights led to the conflict between Trujillo and New Mexico. In 1983, the United States District Court for the District of New Mexico prevented the State from issuing domestic well permits in the Basin unless the water was used only for household purposes. This permit provision specifically excluded using water for irrigation. In 1985, Trujillo’s predecessor-in-interest received a domestic well permit in accordance with the 1983 injunction (prohibiting irrigation) and was granted a maximum use of 3.0 AFY.

In 1994, the district court directed a special master to determine the appropriate amount of water rights for all permits granted after 1982, including Trujillo’s. The doctrine of beneficial use controls how much water is granted to each permit and, under the New Mexico Constitution, is the amount of water that can be used beneficially and with purpose; water rights are limited based on that use.

Because of the 1994 order by the district court, Trujillo’s permit was amended to limit water use to either 3.0 AFY or the historic, beneficial use, whichever was less. The district court allocated 0.5 AFY for domestic wells unless permit holders showed a greater beneficial use. In 2006, the district court required permit holders to show (1) why the permit should not be adjudicated to 0.5 AFY and (2) why the water rights should not be otherwise adjudicated consistent with the terms of the domestic well permit in order to obtain more AFY. Essentially, the burden was placed on the permit holder to prove a need for more than 0.5 AFY in keeping with the doctrine of beneficial use.

Trujillo’s permit was originally designated for domestic use, and in 1985, the permit allowed for up to 3.0 AFY of water. The State’s proposed order