

9-1-2014

California ex rel. Imperial Cnty. Air Pollution Control Drist. v. U.S. Dep't of Interior, 767 F.3d 781 (9th Cir. 2014)

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Matt Freemann, Court Report, California ex rel. Imperial Cnty. Air Pollution Control Drist. v. U.S. Dep't of Interior, 767 F.3d 781 (9th Cir. 2014), 18 U. Denv. Water L. Rev. 191 (2014).

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California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior,
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winter of 2008–2009 that experts considered an “outlier” among Texas’ cyclical drought conditions. Other variables included constantly changing weather, tides, and temperature, as well as varying degrees of water use by permittees. Ultimately, the court concluded that a “fortuitous confluence” of “multiple, natural, independent, unpredictable and interrelated forces” caused the deaths of the whooping cranes in the Refuge. Calling this set of circumstances “the essence of unforeseeability,” the court found causation lacking as a matter of law and vacated the district court’s finding of liability against the state defendants.

Last, the court addressed the district court’s grant of an injunction. The court held the district court erred in three ways in granting injunctive relief. First, the district court improperly based injunctive relief upon an improper proximate cause analysis. Hence, the court’s vacation of the state defendants’ liability “commanded” the quashing of the injunction. Second, assuming *arguendo* that TCEQ’s actions did proximately cause the crane deaths, the district court erred in applying a “relaxed” standard for granting injunctions under the ESA. Third, the court held that the district court erred in finding a real and immediate threat of future injury to the cranes.

The district court had determined that a “relaxed” standard existed for granting injunctions under the ESA. The court noted that, while it is true that the balance of equities favor protecting wildlife under the ESA, an injunction still requires a showing of “certainly impending” future harm. Additionally, the court found that even if the district court had applied the correct standard, it did not make sufficient factual findings to support that conclusion. The court noted that, after 2008–2009, substantial evidence existed to the contrary, including no evidence of unusual deaths, no evidence of dangerous salinity levels, no evidence of deficient blue crabs or wolfberries, no evidence of lack of a drinking water shortage in the Refuge, and no evidence of emaciated birds or extreme behavioral patterns. The court concluded that “[i]njunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication.”

Accordingly, the court reversed the district court’s finding that TCEQ caused the whooping crane deaths and denied TAP’s request for injunctive relief.

Keith Tart

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

California *ex rel.* Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep’t of Interior, 767 F.3d 781 (9th Cir. 2014) (holding that the plaintiffs had standing to sue and that the Department of Interior’s environmental impact statement on the effects of water transfer agreements on the Salton Sea in southern California did not violate the National Environmental Policy Act or the Clean Air Act).

Plaintiffs Imperial County and the Imperial County Air Pollution Control District (“Imperial”) sued the Secretary of the Interior (“Secretary”), claiming that the Secretary’s environmental impact statement (“EIS”) did not comply with the National Environmental Policy Act (“NEPA”) or the Clean Air Act (“CAA”). Several California water districts, parties to the proposed transfer

agreement, intervened as defendants. The United States District Court for the Southern District of California ("district court") granted summary judgment to the defendants, finding that Imperial did not have standing to sue, and in the alternative, that the Secretary did not violate NEPA. Imperial appealed to the United States Court of Appeals for the Ninth Circuit ("court").

As a result of conservation efforts in California aimed at decreasing the state's reliance on Colorado River water, water districts in the state agreed to transfer use of some Colorado River water from the Imperial Valley to areas in Southern California. In 2001 the Secretary prepared an EIS, which, in part, analyzed the potential consequences of the transfers on the Salton Sea. After detailing potential environmental consequences, the Secretary filed both a Final Implementation Agreement EIS and a Draft Transfer EIS in 2002. The Final Implementation Agreement EIS did not discuss subsequent minor changes to the proposed master implementation agreement—the Colorado River Water Delivery Agreement ("CRWDA")—or changes to proposed environmental mitigation measures. After the Secretary prepared an environmental evaluation of the modifications and determined that a supplemental EIS was unnecessary, she issued a final record of decision.

First, the court reviewed the district court's determination that Imperial lacked standing to sue. Imperial asserted that the Secretary violated NEPA and Council on Environmental Quality ("CEQ") regulations. Imperial further argued that the Secretary should have made a CAA conformity determination because the proposed transfers would expand the Salton Sea's shoreline, increasing ambient levels of small particulate matter. Because both of the plaintiffs' alleged injuries were procedural, the court required Imperial to show that the Secretary violated procedural rules designed to protect Imperial's concrete interests and that the challenged action would threaten those same interests. The court held that Imperial had standing to bring its claims. The court reasoned that the Secretary's action sufficiently threatened Imperial's concrete interests in land management and that both NEPA and the CAA were designed to protect Imperial's interests.

Next, the court reviewed the district court's finding that the Final Implementation Agreement EIS complied with NEPA and that no supplemental EIS was required. This review required the court to determine whether the Secretary reasonably evaluated the facts and took a "hard look" at the environmental impacts of the proposed transfers. Imperial first argued that it was not clear whether the Final Implementation Agreement EIS incorporated the state Transfer Environmental Impact Report ("EIR") or the federal Transfer EIS, and that the Final Implementation Agreement EIS improperly cited the EIR. The court held that Imperial was incorrect on both claims. The court reasoned that Imperial did not identify relevant material that was solely discussed in the EIR nor significant information that the Secretary incorrectly excluded from the Transfer EIS. Further, the court determined that the Secretary's minor mistake of citing the Transfer EIS and EIR as a single document did not prejudice the court's review.

Imperial next argued that the Final Implementation Agreement EIS improperly tiered to nineteen non-NEPA documents. The non-NEPA documents consisted of federal statutes, state environmental impact assessments, and

other Colorado River EISs. The court held that the Secretary did not improperly tier to these documents in the Final Implementation Agreement EIS. The court determined that the Secretary merely cited the documents to provide a road map of previous Colorado River projects and not to sidestep any NEPA obligations.

Imperial further argued that the Secretary violated her obligations under NEPA because she cited to the Coachella Valley Water Management Plan, which was not released for public review during the comment period for the Final Implementation Agreement EIS. Imperial also claimed that it was improper for the EIS to state that the Final Implementation Agreement EIS was tiered to non-NEPA documents. First, the court noted that a final EIS may include information not cited in a draft and that recirculation is only required if there are significant new circumstances or new information relating to the proposed action. The court reasoned that there were no such circumstances requiring the Secretary to recirculate the Final Implementation Agreement EIS. Second, the court conceded that it would be improper for the Secretary to actually tier to state environmental reports in the Final Implementation Agreement EIS. However, the court held that the “tiers to” language included in the Final Implementation Agreement EIS was merely a “scrivener’s error,” and that despite that statement the Secretary properly incorporated by reference, and did not tier to, the non-NEPA documents.

In addition, Imperial claimed the Secretary improperly incorporated by reference discussions of environmental impacts instead of providing those discussions in the text of the Final Implementation Agreement EIS, and also relied too heavily on indirect impact analysis when discussing the environmental impacts to the Salton Sea. Imperial relied on *Pacific Rivers Council v. United States Forest Service*, 689 F.3d 1012 (9th Cir. 2012), to assert these claims. The court pointed out that the *Pacific Rivers* opinion was vacated as moot, and alternatively distinguished the facts of *Pacific Rivers* from the Secretary’s actions in the present case. The court held that the Secretary acted properly because the text of the Final Implementation Agreement EIS thoroughly considered the CRWDA’s potential environmental impacts on the Salton Sea.

Imperial next argued that the Secretary improperly segmented the Quantification Settlement Agreements by preparing two EISs. The court applied the “independent utility” test to determine whether multiple actions are so connected as to mandate consideration in a single EIS and held the Secretary did not act arbitrarily by preparing a Transfer EIS and a Final Implementation Agreement EIS. The court reasoned that the Final Implementation Agreement EIS analyzed on-river effects, while the Transfer EIS considered a separate water-transfer agreement among the districts and proposed habitat conservation programs.

Imperial also argued that the Secretary abused her discretion by finding that a supplemental EIS was unnecessary. Imperial argued that a supplemental EIS was necessary because the water districts altered their proposed conservation strategies, but the Final Implementation Agreement EIS failed to discuss them. The court held that the Secretary did not abuse her discretion because the Final Implementation Agreement EIS reasonably considered the consequences of providing the Salton Sea with no mitigation water at all, thereby qualitatively considering the water district’s changed conservation strategies. Additionally,

the court held that the Secretary's decision to discuss only one alternative, a no-action alternative, was not arbitrary and capricious. The court cited NEPA regulations that require an EIS to rigorously explore and evaluate all reasonable alternatives, but do not detail a minimum number of alternatives. The court reasoned that there was no benefit for the Final Implementation Agreement EIS to discuss other hypothetical alternatives because the transfer plans were carefully negotiated agreements between the parties.

Finally, even though the district court did not address the claim, the court considered Imperial's argument that the Secretary should have conducted a CAA conformity determination. Imperial claimed that such a determination was necessary because the planned transfers would increase the Salton Sea's shoreline, thus increasing the amount of particulate matter with a diameter of ten microns or less ("PM10") in the ambient air. The court held that the Secretary did not violate the CAA by not performing a conformity determination. The court reasoned that neither state nor federal rules mandate the form an agency must use when announcing that it will not conduct a full-scale conformity determination. In this case, the Secretary announced that she believed a conformity determination was unnecessary in the Final Implementation Agreement EIS, and the court agreed that the CAA did not require a standalone document. Both federal and state rules require a full-scale conformity determination when both direct and indirect emissions exceed the mandated level. The court held the Secretary did not abuse her discretion by concluding that the project would neither directly nor indirectly cause PM10 emissions. The project would not directly increase PM10 emissions at the Salton Sea because the proposed action would occur at diversions at the Parker and Imperial Dams—far from the Salton Sea. The court reasoned that the project would not indirectly cause an increase in PM10 emissions because the Secretary could not practicably control any resulting emissions. Rather, the State of California and Imperial would ultimately be responsible for the allocation of water to the Salton Sea, thus indirectly causing any subsequent PM10 emissions.

Accordingly, the court affirmed the judgment of the district court and held that the Secretary did not violate NEPA or CAA regulations.

Matt Freemann

Lacano Invs., LLC v. Balash, 765 F.3d 1068 (9th Cir. 2014) (holding that the Eleventh Amendment barred patent owners' action for declaratory judgment against Alaska state officials for the ownership of streambeds because it was the functional equivalent of an action to quiet title).

The federal government issued land patents to Lacano Investments, LLC, Nowell Avenue Development, and Ava L. Eads (collectively, "Patent Owners") before Alaska joined the Union in 1959. Patent Owners alleged that the land patents gave them ownership of particular streambeds in Alaska. However, the Alaska Department of Natural Resources ("the Department") contended that the streambeds were "state-owned." The Department based this contention on its determinations in 2010 and 2011 that the associated waterways were first navigable in 1959 and continued to be navigable. Further, the Submerged Lands Act of 1953 grants the state title and ownership of lands beneath navigable waters.