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W. James Tilton

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Stockton E. Water Dist. v. United States, 761 F.3d 1344 (Fed. Cir. 2014)

## COURT REPORTS

### FEDERAL COURTS

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

**Stockton E. Water Dist. v. United States, 761 F.3d 1344 (Fed. Cir. 2014)** (holding that (i) the plain language of a Bureau of Reclamation contract required the Bureau only to make available the contractual amounts of water, not to deliver it; (ii) the trial court improperly focused its damages determination on the amounts of water the appellant actually requested under the contract, as opposed to the amounts it would have requested but for the Bureau of Reclamation's initial repudiations; and (iii) the United States waived its right to dispute the trial court's award of cost of cover damages by failing to properly cross-appeal the issue).

In 1983 Central San Joaquin Water Conservation District ("Central") and Stockton East Water District ("Stockton") (collectively "the Districts") contracted with the United States Bureau of Reclamation ("Reclamation") for appropriations of water from the New Melones Reservoir ("Reservoir") in California's San Joaquin Valley. Central's contract called for Reclamation to make available, after a ten-year buildup period, between fifty-six thousand and eighty thousand acre-feet of water annually.

To determine the type and location of the conveyance systems needed to distribute the anticipated water, Central retained an engineering firm, CH2M Hill, to help determine projected demand. After meeting with the area's agricultural community, surveying their lands, and obtaining letters of intent, CH2M Hill concluded that Central would need at least seventy thousand acre-feet of water annually from the Reservoir. The conveyance system was completed in 1993 at a cost of \$7.4 million.

The year before, in 1992, Congress enacted the Central Valley Project Improvement Act ("CVPIA"), requiring Reclamation to dedicate eight hundred thousand acre-feet of water to fish, wildlife, and habitat development. As a result, Reclamation informed the Districts that it would likely only be able to provide them with water in the wettest of years. Central brought suit against Reclamation for breach of contract and a takings claim, seeking injunctive and declaratory relief and damages. In 2006 the United States Court of Federal Claims ("trial court") held a trial on liability. The trial court found for Reclamation on the breach of contract claims and dismissed a related takings claim. The Districts appealed, challenging the trial court's judgment of non-liability for the years 1994, 1995, and 1999-2004. The United States Court of Ap-

peals for the Federal Circuit (“Court”) affirmed the trial court’s judgment for the years 1994 and 1995, but reversed its finding of non-liability for the years 1999–2004 and remanded with instructions to determine damages. On remand, the trial court awarded Central \$149,950 in cover damages but denied Central any expectancy damages.

On appeal a second time, Central argued that the trial court misinterpreted the nature of the breach and therefore failed to consider all evidence relevant to damages. The trial court had found that Reclamation was obligated only to make *available* the specified quantities of water, and that “Central did not set forth persuasive evidence demonstrating how much New Melones water its farmers plausibly might have requested in the 1999–2004 non-breach world, one in which Reclamation made full allocations under the 1983 contract.” Central argued, on the other hand, that beginning in the eleventh year, “Reclamation was obligated to provide, and Central was obligated to pay for, at least 56,000 acre-feet of water per year regardless of whether Central actually requested that quantity or not.” Therefore, Central argued, the trial court should have considered evidence such as the initial CH2M Hill demand estimates to properly determine expectancy damages.

The Court disagreed with Central’s assertion that the trial court erroneously interpreted the nature of Reclamation’s breach, but agreed that the trial court erred in failing to award expectancy damages and in how it analyzed those damages based on the facts of the case. Specifically, the trial court improperly “focused its damages analysis on Central’s failure to request at least the minimum amount of water specified in the contract in the years following Reclamation’s non-performance announcements.” Because the trial court failed to consider these years in the context of Reclamation’s repeated announcements from 1993–1999 that it would be unable to provide the minimum contractual amounts of water, the trial court assumed that Central’s requests for less than the minimum amount of water was due to a lack of demand by Central’s customers. This interpretation implied that Central did not have actual economic loss attributable to Reclamation’s contractual breach during those years.

Instead, to properly analyze expectancy damages, the Court held that the trial court needed to focus on what would have happened but for Reclamation’s initial repudiation in 1993. In other words, the trial court should have taken into account testimony and other data from 1993 onward that could have revealed the amount of water the farmers might have requested from Central if Reclamation had complied with the contract. The Court stated that, by 1994, Central was on notice that “Reclamation was not going to supply the contractual quantities of water,” and that “[a]t some point most people stop asking for what they have been told they are not going to get, and they make other plans to meet their needs.”

In Reclamation’s brief to the Court, it raised for the first time the argument that the cost of cover damages the trial court awarded to Central was incorrect. Reclamation claimed that the trial court erred by including the excess costs that Central paid South San Joaquin Irrigation District for water during certain breach years, because Central failed to take all the water made available by Reclamation during those years. Central argued that Reclamation waived its right to challenge the awarded amount by not properly filing a cross-

appeal on the issue. The Court agreed with that position.

Accordingly, the Court vacated the trial court's judgment not to award expectancy damages and remanded with orders to make a damages determination consistent with the Court's opinion.

*W. James Tilton*

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971 (9th Cir. 2014)** (holding that (i) the district court abused its discretion by improperly admitting extra-record declarations and substituting its own analysis for the National Marine Fisheries Service's ("NMFS") opinion; (ii) NMFS acted within its discretion by using a non-scaled data model to set river flows where it adequately explained its decision and used additional studies to validate its decision; (iii) NMFS did not act arbitrarily or capriciously when determining the State Water Project's and the Central Valley Project's continued operations were likely to jeopardize the viability and essential habitat of species because it demonstrated sufficient research to support its conclusions; and (iv) NMFS's various reasonable and prudent alternative recommendations and requirements were not arbitrary or capricious).

Over twenty-five million agricultural and domestic users in California's arid Central Valley rely on the government's extraction of water from its rivers. However, this extraction dramatically alters the rivers' natural states and threatens the viability of the species that depend on the water. To resolve this conflict, the US Department of the Interior's Bureau of Reclamation ("Reclamation") called upon the NMFS to evaluate under the Endangered Species Act ("ESA") how the State Water Project's and Central Valley Project's ("the Projects") continuing water withdrawal would impact certain endangered Salmonid species in the rivers.

In a 2009 Biological Opinion ("BiOp"), NMFS found that continuing extraction threatens species, and proposed a solution. In response to the proposed remedies, San Luis & Delta-Mendota Water Authority and Westlands Water District ("the Water Districts") filed suit against the Department of Commerce, the National Oceanic and Atmospheric Administration and NMFS (collectively, "the Federal Defendants"), arguing that the 2009 BiOp was arbitrary and capricious. On summary judgment, the United States District Court for the Eastern District of California ("district court") found that NMFS violated the Administrative Procedure Act's ("APA") arbitrary or capricious standard when developing the BiOp and granted relief in part.

On appeal to the United States Court of Appeals for the Ninth Circuit ("court"), the Federal Defendants asked the court to overturn the components of the BiOp that the district court struck down, and the Water Districts asked the court to overturn the district court's holdings that were favorable to the BiOp. Before reviewing the 2009 BiOp, the court resolved the initial question of whether the district court erred in its own record review by supplementing the administrative record with extra-record declarations. The court