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**San Luis & Delta-Mendota Water Auth. v. Jewell, No.
1:13-CV01232-LJO-GSA, 969 F.Supp 2d 1211 (E.D. Cal. Aug. 22,
2013)**

Nicholas Rising

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the precise amount of damages; both tests require the plaintiff to show the amount of damages to a reasonable approximation.

The Commission also argued that the evidence that the claims court relied upon in granting damages for the 349 acres was not materially different than the evidence with regard to the remaining portions. The court noted that the claims court found that the Commission had not presented adequate evidence to differentiate which of the remaining acreage would require regenerative work and which retained oak stands that may well regenerate themselves. The court held that the claims court did not commit clear error in finding that the Commission failed to meet its burden in this regard.

Accordingly, the court affirmed the claims court's original ruling that the government took a temporary flowage easement over the Management Area that constituted a compensable Fifth Amendment taking, and upheld the claims court's calculation of damages to the Commission.

Dale Ratliff

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

San Luis & Delta-Mendota Water Auth. v. Jewell, No. 1:13-CV01232-LJO-GSA, 969 F.Supp 2d 1211 (E.D. Cal. Aug. 22, 2013) (lifting a Temporary Restraining Order and denying a motion for preliminary injunction, thereby permitting the United States Department of the Interior to perform flow augmentation releases of water from Trinity Reservoir to combat a potential parasitic fish kill).

San Luis & Delta-Mendota Water Authority and Westlands Water District ("San Luis") sought to enjoin the United States Department of the Interior and United States Bureau of Reclamation ("Interior") from making flow augmentation releases of water from Trinity Reservoir to the Trinity and Klamath Rivers in California. The Trinity River Division ("TRD"), a component of the Central Valley Project, dams the Trinity River at Trinity Reservoir. The Klamath Project dams the Klamath River. The court noted that the construction and operation of these projects had severely altered the environment and degraded fish habitat. The United States District Court for the Eastern District of California ("court") originally issued a Temporary Restraining Order ("TRO"), which prevented the flow augmentation until the court had an opportunity to consider whether to convert the TRO into a preliminary injunction.

To evaluate San Luis' motion for preliminary injunction, the court turned to the injunction test found in *Winter v. Natural Resources Defense Council, Inc.* That test states a party seeking an injunction must show (i) it is likely to succeed on the merits, (ii) it is likely to suffer irreparable harm in the absence of relief, (iii) the balance of equities tip in its favor, and (iv) an injunction is in the public interest.

Interior claimed the purpose of the flow augmentation was to reduce the likelihood and severity of a fish kill in 2013. San Luis argued that Interior (i) did not have authority to make flow augmentation releases in excess of those permitted by the Central Valley Project Improvement Act ("CVPIA"); (ii) failed

to comply with CVPIA and 43 U.S.C. § 383 (2012) by not obtaining an amendment to the approved place of use of the water Interior planned to release under its plan; and (iii) failed to adequately evaluate the flow augmentation's environmental impacts under the National Environmental Policy Act ("NEPA").

The court addressed each of these claims in the context of San Luis' likelihood of success on the merits. Ultimately, however, the court declined to issue definitive rulings on these issues, reasoning that a *lack* of likelihood of success on the merits was not a prerequisite to refusing relief. First, the court addressed Interior's authority to make the flow augmentation releases under CVPIA. San Luis argued the daily flow volume in Trinity River was subject to maximum and minimum limits, and more water directed to instream uses, as opposed to transferred to the Sacramento/San Joaquin basin, resulted in greater environmental impacts to the Trinity River. Conversely, Interior pointed out that implementing the flow augmentation was within its discretionary authority to benefit certain fish populations and satisfy the Interior's trust responsibility to various Indian tribes that rely on the fish populations in question. The court found both of these arguments colorable but ultimately declined to issue a definitive ruling on Interior's authority under CVPIA.

Second, the court declined to resolve the issue of whether state law required Interior to obtain permission from the California State Water Resources Control Board ("SWRCB") to change the place of use of the water. The court noted in passing that the contradiction between the language in California's water code—which suggested Interior needs a permit—and language in a prior SWRCB letter—which stated a similar flow augmentation plan would be consistent with Interior's existing permits—made the state water law issue a close question.

Third, Interior conceded that NEPA applied to the impacts of the flow augmentation plan. The court stated that the Environmental Assessment evaluating the impacts of the flow augmentation was arguably not in conformity with previous rulings because it gave little attention to the potential environmental impacts of reduced water supplies to water users in the Sacramento San Joaquin Basin. However, the court refused to issue injunctive relief on this point because doing so could cause more environmental harm than it would prevent.

The court then went on to address the potential for irreparable harm by balancing the environmental harms, which the flow augmentation plan sought to prevent, against San Luis' economic interest in the water. The proposed flow augmentation would operate Trinity Reservoir to target a minimum flow of 2,800 cubic feet per second ("cfs") in the Klamath River, subject to environmental and biological conditions. Interior estimated that the flow augmentation plan would utilize about twenty thousand acre-feet ("af") of water, although previous worst-case scenario estimates indicated up to 109,000 af would be necessary. In terms of San Luis' interest, the court agreed that all additional water San Luis could obtain would help alleviate economic and environmental harms due to a lack of water within its service area. The court also noted there existed a contingent potential for irreparable harm to San Luis, as a tunnel used to re-divert water from Trinity Reservoir was of limited capacity, thus reducing the cumulative volume of water Trinity Reservoir could hypothetically deliver when accounting for the following summer. The court alluded to the fact that although

the conditions facing San Luis were dire, the flow augmentation plan did not cause the drought affecting San Luis because it already faced shortage due to storage deficits and its junior priority in the Central Valley Project. Nonetheless, the court found it undisputable that the flow augmentation would diminish San Luis' total allocation.

To analyze the balance of the equities, the court next examined the potential for environmental harm if the court enjoined the flow augmentation. The court was particularly interested in expert witnesses who could explain the scientific basis for the flow augmentation. The purpose of increasing the amount of water using the flow augmentation plan was to prevent fish die off as a result of an Ich parasite outbreak. The court noted that an Ich parasite outbreak is less likely to occur when water velocities are greater and fish population densities are lower. In 2002 a large fish kill had severe impacts on commercial fishing interests, tribal fishing rights, and the ecology of the Klamath River. Experts agreed that in 2002 there were remarkably low flows, crowded fish conditions, migration delays, and relatively high temperatures.

Noting the importance of preventing an Ich outbreak given the difficulties in addressing an outbreak once it takes hold in a population, experts testified that the flow, fish density, and temperature components of the augmentation plan were particularly important issues. Historically, there had only been two years on record in which flows dropped below 2,500 cfs: in 2002 (when a fish kill occurred) and in 1988 (when no fish kill occurred, potentially due to a relatively high level of fish harvest that might have minimized fish density and lowered the likelihood that the Ich parasite could transfer from fish to fish). The court accepted the experts' opinion that flows of 2,500 to 2,800 cfs were the minimum required to reasonably prevent an Ich outbreak. Ultimately, the court found the balance of potential harms tipped in favor of Interior, and it was in the public interest to permit the flow augmentation.

Finally, the court held that although both parties' positions implicated significant public interests, neither party held veto power over the other. Nevertheless, upon balancing the projected decreased volume of water and the risk to fish populations of doing nothing, the court found that it was in the public interest to allow the augmentation to proceed.

Accordingly, the court denied San Luis' request to convert the TRO into a preliminary injunction, lifted the TRO, and permitted the flow augmentation to proceed.

Nicholas Rising

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Frenchman Cambridge Irrigation Dist. v. Heineman, 974 F.Supp. 2d 1264 (D. Neb. 2013) (holding the United States District Court for the District of Nebraska lacked proper subject matter jurisdiction because state law governs water rights and therefore declining to exercise supplemental jurisdiction).

The plaintiffs included two political subdivisions in Nebraska, three farmers, various landowners, and water-use patrons of those political subdivisions