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Frenchman Cambridge Irrigation Dist. v. Heineman, 974 F.Supp. 2d 1264 (D. Neb. 2013)

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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

("Irrigation Districts"). The defendants were N-CORPE and Upper Republican Natural Resources District ("DNR"); Brian Dunnigan and Dave Heineman ("State Defendants"); Michael Connor, Michael Ryan, Kenneth Salazar, the United States Department of Interior, and the United States of America ("Federal Defendants"). The Irrigation Districts filed a complaint challenging a proposed plan to pump groundwater to surface water streams as a means to correct an alleged overuse of Nebraska's allocation of water under the Interstate Compact. The Irrigation Districts sought a determination of water rights in the Republican River Basin ("RRB"), an order compelling Federal Defendants to protect French Cambridge Irrigation District ("FCID") water rights, and an injunction compelling State and Federal Defendants not to interfere with those water rights.

The Interstate Compact allocated a specific number of acre-feet to each state on a basin-by-basin basis. The Irrigation Districts' first claim for relief argued the DNR's proposed plan unlawfully prioritized water use and bypassed federal lakes and reservoirs. The second claim for relief alleged the State Defendants overused their water allocation and made improper transfers. The third claim for relief argued the State Defendants continued to overuse the groundwater and sanction such conduct. The fourth, fifth, and sixth claims alleged the Federal Defendants breached the obligations required by contract because they failed to assure a supply of water, failed to actually supply water, and failed to protect priority surface water rights.

The Federal Defendants moved to dismiss the claim for lack of subject matter jurisdiction. Also, the Federal Defendants argued that the United States did not waive its sovereign immunity and that the complaint failed to state a claim. Similarly, DNR moved to dismiss for failure to state a claim and lack of subject matter jurisdiction. DNR also asserted Eleventh Amendment immunity and that the court should not exercise supplemental jurisdiction over the Irrigation Districts' state law claims. Finally, DNR claimed the Irrigation Districts lacked standing to initiate the claim. The State Defendants moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction. The State Defendants also asserted Eleventh Amendment immunity and that the court should not exercise supplemental jurisdiction.

If a court lacks subject matter jurisdiction then the court must dismiss the claim. A complaint must plead enough facts to state a claim for relief that is plausible on its face. In order to sue the United States, the Irrigation Districts must show both a grant of subject matter jurisdiction and a clear statement waiving sovereign immunity. The McCarran Amendment articulated the policy of the federal government to make state courts the primary forum for water rights adjudications.

The Eleventh Amendment shields States from suit in federal court without their consent, forcing parties to present the claims in State courts, if the State permits. If the District Court has original jurisdiction over a claim, it may exercise supplemental jurisdiction. However, if a court dismisses all federal claims or if there is an ongoing, parallel state court proceeding, a court will decline to exercise supplemental jurisdiction.

First, regarding the claims against the Federal Defendants, the United States District Court for the District of Nebraska (“court”) noted that the dispute involved appropriation or apportionment of water resources, which is a matter of state law. State law governs water apportionment and the Federal Defendants did not have a corresponding obligation under Federal law. Second, the court found the Irrigation Districts failed to show an unequivocal waiver of the United States’ sovereign immunity because not all entities with water rights in the RRB were parties to the suit, thereby making the McCarran Amendment inapplicable. The McCarran Amendment makes state courts the primary forum for water rights claims and can waive the United States’ sovereign immunity in certain state water cases. Here, the amendment was inapplicable because the Irrigation Districts advanced water rights that arose under Nebraska law and turned on an interpretation of Nebraska law. Also, the court found the Irrigation Districts failed to state a cognizable claim against the Federal Defendants because state law controlled the relevant water rights.

Having found the claims against the Federal Defendants subject to dismissal, the court declined to exercise supplemental jurisdiction regarding the State and DNR Defendants. The court reasoned that the claim involved novel state law issues and a current action was pending in a Nebraska state court. The court did not address the Eleventh Amendment immunity issues because the Irrigation Districts did not allege any federal violations.

Accordingly, the court granted the motion to dismiss all of the Irrigation Districts’ claims.

Dane Mueller

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Precon Dev. Corp. v. U.S. Army Corps of Eng’rs, No. 2:08CV447, 2013 WL 6091882 (E.D. Va. Nov. 18, 2013). (holding (i) the Corps’ extensive factual findings were not arbitrary and capricious and (ii) the Corps’ ultimate determination that a significant nexus existed between the relevant wetlands and the Northwest River was sufficiently persuasive to subject the wetlands to the Clean Water Act).

This case involved 4.8 acres of wetlands (“subject wetlands”) located in Chesapeake, Virginia for which Precon Development Corporation (“Precon”) sought a permit to develop. The development area contained a total of 658 acres, about half of which were wetlands. 166 of the wetland acres flowed into the St. Brides Ditch (“the Ditch”), including the subject wetlands. The Ditch is a tributary, running along the western boundary of the wetlands area, flows south until it joins with the Hickory Ditch, and then both ditches feed into the Northwest River (“the river”). The second tributary to the river consisted of a seasonal relatively permanent water that ran in the southwest corner of the wetlands and flowed into the Ditch.

The United States District Court for the Eastern District of Virginia (“district court”) received the case on remand from the United States Court of Ap-