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McConnell v. PacifiCorp, Inc., No. C 07-02382 WHA, 2007 U.S. Dist. LEXIS 63948 (N.D. Cal. Aug. 17, 2007)

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material can violate the CWA. Moses asserted as a defense that his conduct fell within the incidental fallback exception as set forth in the Corps' regulations. However, the court quickly disposed of this argument by highlighting the stark contrast between the actual definition of incidental fallback and the evidence presented. The record clearly showed that Moses moved mass quantities of material in the course of rerouting Teton Creek.

Finally, the court rejected Moses' arguments that he never needed a CWA permit in the first place. Noting that a court must construe exceptions from the CWA narrowly, the court found no basis for Moses' conduct to fall within the CWA exception for discharges due to the maintenance of serviceable structures. The court also rebutted Moses' theory that the permit issued pursuant to the Rivers and Harbors Act covered his stream alteration work because such permits do not apply to activities within the scope of the CWA.

Since the evidence clearly supported the finding of discharge of pollutants into a water of the United States without a permit, the court concluded that the district court acted within its discretion when it denied Moses' motions for a new trial and affirmed the judgment of the district court.

Risa Borowick

UNITED STATES DISTRICT COURTS

McConnell v. PacifiCorp, Inc., No. C 07-02382 WHA, 2007 U.S. Dist. LEXIS 63948 (N.D. Cal. Aug. 17, 2007) (holding that: (1) the Federal Power Act preempts injunctive relief, and (2) the Federal Power act provides a remedy when a hydroelectric plant's construction, operation, or maintenance causes damages).

The Klamath Watershed is home to the Yurok and Karuk Native Americans and other members of the community (collectively "McConnell"), who use the area for fishing. PacifiCorp operates the Klamath Hydroelectric Project ("KHP"), which uses river and creek water to produce electric power under the Federal Energy Regulatory Commission ("FERC"). McConnell alleged that PacifiCorp's operation of the dams polluted the Klamath River by increasing water temperatures above natural levels. The increase in temperature reduced the levels of dissolved oxygen to levels lethal to fish. Additionally, the heightened temperatures promoted the growth of brown-green algae and the associated toxin, microcystin. McConnell sued PacifiCorp alleging that PacifiCorp's operation of the dams was a nuisance.

The Federal Power Act ("FPA") governs the operation of the KHP. The FPA charges FERC with balancing the competing interests in projects like KHP. PacifiCorp contended that the FPA preempts the McConnell's claim for injunctive relief. FERC stated that the FPA preempts all state and local laws concerning hydroelectric licensing,

apart from those adjudicating proprietary water rights. Moreover, the Supreme Court in *California v. FERC* upheld the supremacy of the FPA over state law. Consequently, PacifiCorp argued that state law has no role in the regulation of hydropower except in proprietary water rights.

McConnell sought a permanent injunction directing PacifiCorp to cease operation of the dams and reservoirs in a manner that caused the aforementioned environmental hazards. The court held that the injunctive relief impermissibly intruded on the comprehensive regulatory scheme for a hydropower project. Three key decisions influenced the court in its determination. First, the Supreme Court in *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n* established federal preemption in regards to hydropower. Second, *California* reaffirmed *First Iowa's* holding that the FPA established a comprehensive federal regime, subject to a limited reservation of state authority. Finally, the Ninth Circuit applied *California* in *Sales Hydro Assoc. v. Maughan* and held that the FPA preempted the field of hydropower regulation. The court held that the KHP is subject to the FPA, which gave FERC broad powers and exclusive licensing authority of the development and operation of non-federal hydroelectric projects on navigable waters.

Although the FPA prevents injunctive relief, Congress preserved state-law damage remedies under 16 U.S.C. § 803. The FPA provides a right to recover from a licensee for damages caused by the construction, maintenance, or operation of the projects. McConnell's nuisance claim fell under state-law; therefore, the FPA did not bar their claim. The court found that PacifiCorp's license did not have the specificity required by the California Civil Code Section 3482 to gain exemption from the nuisance claim. Furthermore, the California Supreme Court explained in *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, that "although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance." McConnell alleged that the manner that PacifiCorp operated the dams was a nuisance. As a result, the court did not bar the nuisance claim.

The court held that the FPA preempted McConnell's claim for injunctive relief. Consequently, the court granted PacifiCorp's motion for judgment on McConnell's request for injunctive relief. However, the court denied the motion to dismiss or for judgment on the pleadings because the FPA allows for recovery based on damages caused by the construction, operation, or maintenance of the hydroelectric plant.

Tamara Qureshi

Fitzgerald v. Harris, No. 07-16-B-W, 2007 U.S. Dist. LEXIS 61806 (D. Me. August 20, 2007) (holding that the Wild and Scenic Rivers Act did not preempt state control of state owned lands along a river protected as "wild river area" and, as such, the state could permit motor