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United States v. Washington, No. C01-0047Z, 2007 WL 3273545 (W.D. Wash. Nov. 2, 2007)

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cy consultation. Because the BLM did not engage consultation with the FWS, the agency violated ESA.

As a result of finding the BLM violated NEPA, FLPMA, and ESA, the Court enjoined the 2006 regulations.

Elizabeth Dawson

United States v. Washington, No. C01-0047Z, 2007 WL 3273545 (W.D. Wash. Nov. 2, 2007) (holding that the moving parties' proposed Settlement Agreement satisfied the standard for judicial approval and offered a practical solution for all water users).

The United States initiated this action on behalf of the Lummi Indian Nation. The United States sought a declaration that the Treaty of Point Elliott implicitly reserved to the Lummi Nation rights to surface water and groundwater in the Lummi Peninsula (the "Case Area") that are superior or equivalent to the rights of other water users. The United States and the Lummi Indian Nation together with the Washington State Department of Ecology ("Ecology"), Whatcom County, assorted Water Associations, and various property owners reached a Settlement Agreement that addressed three primary issues: division of water, management of the aquifer, and dispute resolution. The United States District Court for the Western District of Washington conditionally approved the Settlement Agreement upon the determination that the Settlement Agreement was essentially fair, adequate, and reasonable.

The Settlement Agreement equitably apportioned the available groundwater on the Lummi Peninsula without regard to the seniority or vesting of water rights. Non-Lummi defendants owned approximately twenty percent of the land within the Case Area and the Settlement Agreement apportioned twenty-four percent of the safe yield to them, with Ecology determining the allocations. In the Settlement Agreement, the Lummi Nation retained the right to all groundwater in the Case Area for any purpose permitted under federal or tribal law, provided that it was not otherwise subject to allocation by Ecology or other non-Lummi water users and that the chloride levels remained within an acceptable range. By dividing Ecology's allotment, the Settlement Agreement provided water for every existing home in the Case Area and allowed for a realistic amount of additional construction. Thus, the agreement secured new development water rights not provided for under federal and state law, where water rights depend on actual use. The court, however, directed the parties to revise the Settlement Agreement to reflect that the water reserved to the Lummi Nation may not exceed those amounts that other settlement agreements and service arrangements do not govern.

The Settlement Agreement explicitly addressed the effect of transferring property from non-Lummi to Lummi ownership or vice versa and provided a safety net in the event of saltwater intrusion. In addi-

tion to allocating groundwater, accounting for the transfer of rights, and anticipating well failures, the Settlement Agreement outlined various obligations for managing and preserving the health of the aquifer. As a result, the Settlement Agreement bound all parties to the litigation, prohibited new unauthorized wells, mandated registering and metering of each well, required annual reporting of well monitoring, disallowed overuse, and compelled safe operation. Lastly, the Settlement Agreement established a framework for dispute resolution by a court appointed water master.

Approximately one percent of the property owners objected to the Settlement Agreement on a number of grounds. The court considered two types of objections: disputes over the factual premises underlying the hydrogeologic analysis fundamental to the allotments in the Settlement Agreement and objections that the Settlement Agreement's daily household water allotment was too low. The evidence persuaded the court that the moving parties based their allocations of groundwater on reasonable expectations concerning probable trial court findings. Additionally, the court found the record left any claim of insufficient water allocation unproven and amounted solely to conjecture. The court determined that those objecting to the Settlement Agreement failed to establish either a water right superior or even equivalent to that of the Lummi Nation, or a water right that the Settlement Agreement materially injured.

Finally, as the Settlement Agreement significantly departed from the federal and state law systems for determining the allocations of water rights, the moving parties appealed to the court to vacate its prior orders relating to the relevant federal and state law. Under the Settlement Agreement, the United States and the Lummi Nation agreed not to assert seniority, assumed the risks connected with potential water shortages, and allocated water based on the aquifer's actual safe yield rather than the "practicably irrigable acreage combined with a domestic use allocation." Consequently, the previous orders stood at odds with the Settlement Agreement, and the court vacated the previous orders accordingly.

In conclusion, the Court established that the Settlement Agreement proposed by the moving parties satisfied the standard for judicial approval and offered a comprehensive and workable solution for all water users in the Case Area.

Kathleen Brady

N. Cal. River Watch v. Redwood Landfill Inc., No. C07-05058 WHA (N.D. Cal. Dec. 21, 2007) (holding that the court maintained subject matter jurisdiction because the notice alleging environmental violations was sufficiently specific, thereby satisfying the mandatory notice requirements of the Clean Water Act).