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Consejo de Desarrollo Economico de Mexicali, AC v. United States, 438 F. Supp. 2d 1207 (D. Nev. 2006)

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UNITED STATES DISTRICT COURTS

Consejo de Desarrollo Economico de Mexicali, AC v. United States, 438 F. Supp. 2d 1207 (D. Nev. 2006) (holding that the Bureau of Reclamation All-American lining project does not require a Subsequent Environmental Impact Statement for impacts to wetlands, groundwater, air quality, and seepage flow in Mexico, and the Bureau of Reclamation was not required to reinitiate consultations with the Fish and Wildlife Service for impact to Mexican wetlands and the Peirson's milk-vetch).

The All-American Canal, located in California's Imperial Valley, provides a route through which Colorado River water is delivered to the Mexicali Aquifer underlying the Imperial Valley and the Mexicali Valley in Mexico. In 1988, the San Luis Rey Indian Water Rights Settlement Act authorized the Secretary of the Interior to line the All-American canal to reduce water seepage and increase water flows. The Bureau of Reclamation ("Reclamation") conducted an environmental study considering the impacts of the All-American Canal lining project and other alternatives and issued a Final Environmental Impact Statement ("FEIS") in 1994. Reclamation authorized the project later that year. In 1996, Fish and Wildlife Services ("FWS") issued a conference opinion, confirmed later as a biological opinion, regarding the effects of the All-American lining project on the Peirson's milk-vetch.

In February 2006, Consejo de Desarrollo Economico de Mexicali ("CDEM"), Citizens United for Resources and the Environment ("CURE"), and Desert Citizens Against Pollution ("DCAP") (collectively "CDEM") filed suit in United States District Court for the District of Nevada asserting eight claims seeking injunctive and declaratory relief. The court dismissed these claims and CDEM filed an amended complaint. After dismissing six claims of the amended complaint for lack of standing, the court allowed CDEM's claims asserting Reclamation violated the National Environmental Protection Act ("NEPA") and the Endangered Species Act ("ESA") by failing to issue a supplemental environmental impact statement ("SEIS") and reinitiate formal consultation on the Peirson's milk-vetch following the discovery of significant new information and circumstances. CDEM moved for summary judgment and Reclamation cross-moved for summary judgment, arguing that no significant new information, circumstances, or substantial change required an SEIS or reinitiating formal consultation.

Regarding the alleged NEPA violation, CDEM argued that existence of new information on the canal's impact to Mexico, including its transboundary effects, and domestic impacts required the Reclamation to issue an SEIS. Reclamation argued that the court should have dismissed CDEM's claims involving impacts to Mexico on three grounds: (1) the issue presented a non-justiciable political question;

(2) NEPA does not require federal agencies to analyze extraterritorial effects; and (3) Reclamation was only required to look at the effects within the extent of the agency's control.

The court held that the political question doctrine, which prevents the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch, did not apply. Reclamation argued the 1944 Water Treaty between Mexico and the United States made this a matter of diplomatic consultation, invoking the political question doctrine. CDEM countered, arguing NEPA compliance does not constitute a dispute between the United States and Mexico subject to the political question doctrine. The court held that although the United States and Mexico engaged in diplomatic negotiations regarding the lining project, whether NEPA requires an extra-territorial examination was a purely legal question of statutory interpretation and the political question doctrine did not apply.

However, the court found that NEPA did not apply extraterritorially. CDEM argued that the significant impacts to Mexico's wildlife, economy, water flow, and air quality required Reclamation to prepare an SEIS. Reclamation conversely argued that NEPA does not apply outside of the United States and therefore does not require it to analyze the lining project's impacts in Mexico. The court agreed and found that nothing in NEPA suggested Congress intended it to apply extra-territorially. Furthermore, the court found that the environmental impacts fell exclusively within Mexico, the agency action was entirely within the United States, and the United States did not have legislative control over the impacted area. Accordingly, the court held NEPA did not apply to the All-American Canal.

Finally, CDEM argued that the transboundary impacts damaged wildlife, reduced crop importation and trade, and led to increased illegal immigration, therefore invoking NEPA. Reclamation argued that it sufficiently considered transboundary impacts using reasonably available information and reciprocal impacts to allocation of water share were beyond agency control because such effects were governed by the 1944 Water Treaty. The court agreed and found all information was too speculative and attenuated to support CDEM's claim and therefore NEPA's "rule of reason," which does not require agencies to consider remote and highly speculative consequences, did not necessitate Reclamation to prepare an SEIS regarding those impacts. Accordingly, the court denied CDEM's motion for summary judgment and granted Reclamation's cross-motion for summary judgment on the NEPA claim.

Regarding the ESA claim, plaintiff CURE argued Reclamation's critical habitat rule for the Peirson's milk-vetch was unlawful and the loss of the Mexican Andrade Mesa Wetlands, a critical habitat to the protected Yuma Clapper Rail, required Reclamation to consult with the FWS to re-initiate formal consultation. Reclamation argued that it

met its obligation under the ESA and sufficiently consulted with the FWS. Similar to the NEPA claim, the court found that the Andrade Mesa Wetlands were located outside of the United States and therefore did not require further action. In addition, the court found that a new critical habit legal fact did not exist, Reclamation did not act arbitrarily or capriciously, and therefore Reclamation was not required to reinitiate consulting. Accordingly, the court granted United States' motion for summary judgment.

Because CDEM could not show entitlement to the declaratory and injunctive relief requested for the alleged NEPA and ESA violations, the court granted summary judgment to Reclamation on both counts.

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Friends of the Earth v. U.S. Env'tl. Prot. Agency, 446 F.3d 140 (D.C. Cir. 2006) (holding that Congress was unambiguous when creating the total maximum daily load provision of the Clean Water Act, and therefore the EPA must issue only *daily* maximum loads).

Friends of the Earth brought suit against the United States Environmental Protection Agency ("EPA") alleging that the Clean Water Act ("CWA") required daily loads under the Total Maximum Daily Load ("TMDL") provision rather than the seasonal or annual loads established by the EPA for the Anacostia River. The United States District Court for the District of Columbia ruled in favor of the EPA on summary judgment, stating that Congress did not indicate a clear intent to require only daily loads, and therefore, EPA's approval of the TMDL was not arbitrary and capricious. Friends of the Earth appealed. The United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision, finding that the CWA clearly requires a TMDL to designate a *daily* load.

On appeal, the court conducted a *Chevron* analysis of the agency's interpretation of "total maximum daily load," finding that Congress spoke directly to the issue. Therefore, the EPA was foreclosed from any differing interpretations. The court looked to the CWA's language, citing the use of the term "daily" in the statute as indicative of Congress's intent was to require *daily* maximum loads when establishing TMDLs for "pollutants which the Administrator identifies as suitable for such calculations." The court held the term "daily" in "total maximum *daily* load" requires a daily maximum load for all TMDLs.

Furthermore, the EPA had the discretion to determine which pollutants were suitable for a TMDL. The EPA argued that daily loads for various pollutants were impractical due to the nature of the pollutant, and the pollutants at issue were perfect examples of such pollutants. However, according to previous EPA regulations, the EPA concluded that *all* pollutants were "suitable for such calculations." Therefore, the court found that the EPA must establish daily loads for the pollutants