

1-1-2006

**Natural Res. Def. Council v. Norton, No. 1:05-CV-01207 OWW TAG,  
2006 U.S. Dist. LEXIS 1363 (E.D. Cal. Jan. 5, 2006)**

Matthew Smith

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

## Custom Citation

Matthew Smith, Court Report, Natural Res. Def. Council v. Norton, No. 1:05-CV-01207 OWW TAG, 2006 U.S. Dist. LEXIS 1363 (E.D. Cal. Jan. 5, 2006), 9 U. Denv. Water L. Rev. 635 (2006).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

the access claim was not collaterally estopped and refrained from analyzing the scope of the right-of-way at this stage of the case.

The court could not identify any New Mexico case law examining the issue of whether New Mexico recognizes a forage right, limited or otherwise, as implicit in a vested water right or a related right-of-way. As such, it deferred the question to the Supreme Court of the State of New Mexico.

Finally, the court examined the issue of whether the just compensation claims violated the Tucker Act's six-year statute of limitations. The court found that a taking occurs when the owner's property use is deprived. The Walkers utilized their appropriate water rights until June 30, 1998 as ordered in the District Court's February 27, 1998 judgment. Accordingly, the court held the statute of limitations did not bar the just compensation claims that accrued no earlier than February 27, 1998.

*Michael Graetz*

#### UNITED STATES DISTRICT COURT

**Natural Res. Def. Council v. Norton, No. 1:05-CV-01207 OWW TAG, 2006 U.S. Dist. LEXIS 1363 (E.D. Cal. Jan. 5, 2006)** (granting intervention by state agencies, managing state-built water projects not adequately represented by existing federal authorities, in actions concerning coordinated water supply management plans).

The California Department of Water Resources ("Department") made a motion to the United States District Court for the Eastern District of California to intervene in a case concerning the coordinated operation of the federally-managed Central Valley Project ("CVP") and the State of California's State Water Project ("SWP"). Both projects divert large volumes of water from the California Bay Delta ("Delta") and use the Delta to store water. The Department manages the SWP and operates diversion facilities in both the southern and northern Delta to divert water for distribution to much of California. The Department and other agencies share certain facilities and coordinate operations with one another. The Operating Criteria and Plan ("OCAP") is the most recent document describing the coordinated management and proposing a number of changes to the operation of the CVP and SWP. The OCAP must comply with the Endangered Species Act ("ESA") after consultation with the United States Fish and Wildlife Service ("USFWS") to ensure that any actions taken in the Delta will not jeopardize the continued existence of any endangered or threatened species.

A coalition of environmental groups including the National Resources Defense Council ("NRDC") brought the original action to

challenge the legal validity of a Biological Opinion (“BiOp”) issued by the USFWS concerning the OCAP’s effect on a specific endangered species residing in the Delta – the Delta smelt. A number of future actions proposed in the OCAP BiOp specifically affect operations by the Department such as the South Delta Improvement Project (“Delta Project”) directed at improved water supply reliability, and the Environmental Water Account (“EWA”) that buys, diverts, banks, stores, transfers, and releases water to protect fish and compensate water users. The OCAP BiOp also proposed changes to the Delta smelt monitoring protocol known as the Delta Smelt Risk Assessment Matrix (“Matrix”).

The NRDC and environmental coalition asserted that the existing federal defendants sufficiently represented the Department’s interest in the effects of the OCAP BiOp, especially the United States Department of the Interior’s Bureau of Reclamation (“Bureau”). However, the district court accepted the Department’s assertion that its interests diverged from the federal defendants in several respects. Specifically, the Department would be solely responsible for implementation of any Delta Project related environmental compliance efforts and have a greater interest in the continuation of the Delta Project. The Department maintained specific long-term interests in the EWA and any invalidation of the OCAP BiOp would have a disproportionate impact upon the Department not shared by the Bureau. The Matrix presented potential modifications of state water projects managed solely by the Department, and lastly, any action taken with regard to the OCAP BiOp posed potential criminal liability on the Department for its actions or inactions in SWP management.

The district court held the Department possessed a direct interest in participating in the continuing action concerning the OCAP BiOp to help shape and have standing to challenge any injunctive relief directly applicable to its management and operation of the SWP. Further, the district court determined that the Department’s interests are different from the federal defendants as it represented a different sovereign; the Department presented new questions concerning the propriety of certain forms of potential relief issued in the case; and the Department retained independent duties to protect the public trust. Thus, the district court granted the Department’s motion to intervene as a matter of right.

*Matthew Smith*

**Ctr. for Native Ecosystems v. Cables, No. 04-CV-02409, 2006 U.S. Dist. LEXIS 1594 (D. Colo. January 9, 2006)** (holding that the Forest Service’s approval of cattle grazing permits in the Pole Mountain Area did not violate state water quality standards or the Clean Water Act).