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Ctr. for Native Ecosystems v. Cables, No. 04-CV-02409, 2006 U.S. Dist. LEXIS 1594 (D. Colo. January 9, 2006)

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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).

The Center for Native Ecosystems, Biodiversity Conservation Alliance, and Forest Guardians (collectively "CNE") brought a Petition for Review of Agency Action in United States District Court for the District of Colorado, claiming that the United States Forest Service's ("Forest Service") approval of livestock grazing permits violated Wyoming's water quality standards, the Clean Water Act ("CWA"), the Administrative Procedure Act ("APA"), and the Endangered Species Act ("ESA"). CNE sought both declaratory and injunctive relief against Rick Cables in his official capacity as Regional Forester, and the Forest Service.

Between May 1999 and June 2004, the Forest Service issued grazing permits for seven allotments in the Pole Mountain area of the Medicine Bow National Forest in Wyoming. Before the court, CNE claimed that the Forest Service was aware of adverse impacts from livestock grazing as early as 1996, when state investigations labeled creeks within Pole Mountain as "functioning," though "at risk." CNE cited recent water samplings in which fecal coliform levels in Pole Mountain creeks violated Wyoming's state standard for fecal coliform concentrations. CNE argued that by violating Wyoming's state standards, the Forest Service also violated section 313 of the CWA, which requires federal agencies to comply with all state and local requirements. In response, the Forest Service presented evidence that it took voluntary improvement measures in response to the fecal coliform contamination and other harmful effects of livestock grazing.

Citing CNE's failure to prove arbitrary and capricious action on the part of the Forest Service, the court denied CNE's Petition for Review. The court observed that, in its decision to approve cattle grazing, the Forest Service relied on factors such as social and economic considerations, which the Wyoming standards specifically authorize. Moreover, the court maintained that the Forest Service did not present an implausible rationale for its actions, in light of the fact that only two creeks within the Pole Mountain area were affected. Additionally, the court acknowledged that the Forest Service worked with local conservation districts to address specific pollution and complied with state water quality standards to the same extent as any nongovernmental entity, as required by section 313 of the CWA. Further, the court noted that Wyoming state provisions require more than a violation of water quality standards in order to be enforced. Lastly, the court held that the Forest Service's reliance on other indicators of riparian health, in its decision to measure at the allotment satisfied the Forest Service's burden, supply a reasoned analysis for any change in policy.

The court denied CNE's Petition for Review because CNE failed to prove arbitrary and capricious action by the Forest Service.

Kathleen Potter

Florida Wildlife Fed'n v. United States Army Corps of Eng'rs, 401 F.Supp.2d 1298 (S.D. Fla. 2005) (holding that the United States Army