

9-1-2004

## Cent. Valley Water Agency v. United States, 327 F. Supp. 2d 1180 (E.D. Ca. 2004)

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Donald E. Frick, Court Report, Cent. Valley Water Agency v. United States, 327 F. Supp. 2d 1180 (E.D. Ca. 2004), 8 U. Denv. Water L. Rev. 240 (2004).

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First, the trial court held Fraser failed to prove the delays resulted from unforeseeable causes irrespective of any fault of Fraser. The circuit court specifically addressed the foreseeability of the high water levels following high peak flows. Fraser conceded the overtopping of the dike due to high peak flows was foreseeable, but argued the extended high water level that occurred days after the overtopping was not foreseeable. The trial court reasoned that if Fraser designed the dike to withstand foreseeable high peak flow incidents, than the higher average daily flows would not have created problems. Therefore, the circuit court concluded the trial did not err in its analysis.

Next, Fraser argued argument the Corps' thirty-day extension was inadequate. Fraser asserted the Corps' extension was untimely, was only granted after adverse weather conditions occurred, and the Corps forced Fraser to work during the period anyway. The trial court reasoned the Corps expressed a willingness to grant extensions and the Corps did not necessarily need to grant extensions on the spot. The circuit court agreed with the trial court's finding against Fraser on this issue.

Third, Fraser contended the Corps' extension was inadequate because the project should have been suspended rather than just extended. However, Fraser failed to specify dates that the Corps should have granted an extension. In addition, evidence showed that during times of dike repair, Fraser could still haul material from the excavation site. The circuit court again found no error in the trial court's decision that Fraser failed to show its entitlement to long-term suspension.

Finally, the circuit court reviewed the trial court's holding that the Corps' insistence that Fraser uphold the contract and complete the project did not constitute forced acceleration of performance. Fraser asserted the Corps pressured Fraser to finish the job while also refusing to grant every requested extension. The Corps presented evidence it was willing to grant extensions for which Fraser had sufficient claim. Despite the mixed evidence, the circuit court agreed with the trial court's decision that it was reasonable for the Corps to remind Fraser of its responsibility and insist Fraser complete the project according to the contract.

Thus, the circuit court concluded the trial court did not err and affirmed the trial court's ruling that Fraser failed to prove its claim of constructive acceleration.

*Lynn Noesner*

#### UNITED STATES DISTRICT COURTS

**Cent. Valley Water Agency v. United States, 327 F. Supp. 2d 1180 (E.D. Ca. 2004)** (holding when Congress enacted the Central Valley Project Improvement Act, Congress deferred to the Bureau of Reclamation regarding the operation of the Central Valley Project in California in

order to meet the requirements imposed by the Act while maintaining water quality standards imposed by the State of California, and that other water users had no authority to compel the Bureau's manner of implementation of the Act).

The United States Bureau of Reclamation ("BOR") operated the Central Valley Project ("CVP") in California, encompassing the major watersheds of the Sacramento and San Joaquin rivers. Through the CVP, the BOR appropriates water from various sources and delivers it for beneficial use in central California for agricultural, municipal, industrial, and environmental protection purposes. As a part of the CVP, the BOR operated the New Melones Dam and Reservoir, diverting water from the Stanislaus River pursuant to federal reclamation statutes, and four California water rights issued in 1973. The subject water rights allowed the BOR to release water from the New Melones Reservoir so long as salinity concentrations, measured at a point downstream of the confluence of the San Joaquin and Sacramento rivers at Vernalis, did not exceed certain concentration standards (the "Vernalis Standard").

Congress enacted the Central Valley Project Improvement Act ("CVPIA") in 1992, which required the BOR to manage 800,000 acre-feet of CVP water for restoration of fish and wildlife habitat and authorized the BOR to develop a program for the acquisition of a water supply to supplement the quantity of water dedicated to fish and wildlife purposes. Thereafter, the BOR began diverting and storing water in the New Melones Reservoir for use in fish habitats the BOR would otherwise have released to the Stanislaus and San Joaquin rivers. In 1999, the BOR adopted an interim operations plan that provided for the release of water from the New Melones Reservoir to supplement fishery flows and for the purchase of water from other users for the same purpose pursuant to the CVPIA. The BOR operated pursuant to this interim operating plan for five years without ever exceeding the Vernalis Standard.

Four parties, the Central Valley Water Agency, South Delta Water Agency, Alexander Hildebrand, and R.C. Farms, Inc. (collectively "Water Users"), brought suit against the BOR in the Federal District Court for the Eastern District of California seeking declaratory relief. The Water Users alleged the BOR's method for operating the New Melones Reservoir was highly likely to cause the salinity of the Stanislaus River to exceed the Vernalis Standard thereby injuring their ability to make beneficial use of the CVP water pursuant to their own riparian water rights.

The Water Users argued, based on the statutory construction of the CVPIA, the BOR could only make releases from the Reservoir after the BOR met the Vernalis Standard through releases from the New Melones Reservoir, and the acquisition of water to supplement the quantity

of water dedicated to fish and wildlife restoration purposes would increase the number of exceedances of the Vernalis Standard. In response, the BOR argued that it should be granted discretion to determine how best to allocate water from the Reservoir to satisfy all requirements, and that the Water Users had not provided any evidence of any alleged violations of the CVPIA by the BOR.

The central issue in the case was whether the CVPIA required the BOR to make releases from the Reservoir to meet the Vernalis Standard before making any releases for fish and wildlife habitat restoration, and whether the BOR, operating under its interim operating plan, violated the CVPIA. The statutory construction of the CVPIA was pivotal in this determination. When a statute leaves the implementation of the statutory scheme to an agency, the court must defer to the administrative agency. If a court, using traditional tools of statutory construction, determines Congress had a clear intent on the question at issue, the court must give that intent effect as law. If a statute is silent or ambiguous with respect to the issue at hand, then the reviewing court must defer to the agency so long as the agency's interpretation of the statute is not arbitrary, capricious, or manifestly contrary to the statute.

The court held that in enacting the CVPIA, Congress allowed the BOR to determine how to allocate CVP water to meet the Vernalis Standard while providing water for fish and wildlife restoration as required by the CVPIA. The court reasoned that requiring the BOR to make releases from the Reservoir to meet the Vernalis Standard prior to making water available for fish and wildlife restoration impairs the BOR's discretionary operation of the CVP, preventing it from engaging in the complex day-to-day operations of the CVP. Further, the court concluded that through the CVPIA, Congress allowed the BOR to balance and use the CVP's water resources to satisfy the Vernalis Standard, as well as the requirements under the CVPIA.

Similarly, the court rejected the Water Users' contention that the acquisition of water to supplement the quantity of water dedicated to fish and wildlife restoration purposes would necessarily increase the number of exceedances of the Vernalis Standard. The court reasoned that Congress's deference to the BOR's discretion, in implementing the interim operating plan, allowed the BOR to purchase supplemental water to provide for the flows required by the CVPIA. Further, the court noted deference to the BOR provided flexibility to meet the Vernalis Standard through various means, the choice of which depended on ever-changing hydrologic, weather, and land use conditions.

The court next addressed the question of whether the Water Users' water rights required the BOR to make CVP releases from the New Melones Reservoir. The Water Users can only claim injuries arising from their rights to the natural flow of the stream. Riparian right

holders cannot require release of water stored in another season for their benefit because water stored in another season is not natural flow of the stream. However, an upstream diverter can injure riparian right holders if it increases its use of the natural flow or detains the water so that the change could injure downstream riparian right holders. The court held the Water Users' riparian water rights did not allow them to direct or control the release of water from the New Melones Reservoir because the water stored in the New Melones Reservoir was not the natural flow of the river.

In conclusion, the court denied the Water Users' motion for summary judgment and granted the Bureau's motion for summary judgment on the question of whether the CVPIA provided authority for any water users to dictate how the BOR must manage the CVP. Additionally, the court held that in enacting the CVPIA, Congress deferred to the BOR to allocate the waters of the CVP to meet the requirements of the CVPIA and pre-existing water quality standards.

*Donald E. Frick*

**Trout Unlimited v. United States Dep't Agric., 320 F. Supp. 2d 1090 (D. Colo. 2004)** (holding: (1) the Forest Service had the authority to prohibit historic diversions of water by non-federal parties in order to protect fish and wildlife habitat, and (2) the permit issued for use of Long Draw Reservoir did not meet the Forest Service's mandate under the Federal Land Policy Management Act by failing to require bypass flows in order to preserve aquatic habitat).

Trout Unlimited challenged the Forest Service's approval of a land-use authorization renewal that allowed the Water Supply and Storage Company ("WSSC") to use water contained in Long Draw Reservoir and to operate Long Draw Dam. The permit failed to require the bypass flows in Poudre Pass Creek during the winter months necessary to preserve aquatic habitat for native greenback cutthroat trout and several other threatened species. Trout Unlimited filed thirteen claims in United States District Court for the District of Colorado, alleging the issuance of the permit violated the Federal Land Policy and Management Act ("FLPMA"), five provisions of the National Environmental Policy Act ("NEPA"), four provisions of the Forest and Rangeland Renewable Resources Planning Act ("FRRRPA"), the Wilderness Act, the Wild and Scenic Rivers Act, and the Administrative Procedures Act ("APA"). The WSSC, the City of Greeley, the Greeley Water and Sewer Board, the State Engineer of the State of Colorado, and the Colorado Water Conservation Board intervened to challenge the Forest Service's authority to prohibit water diversions by non-federal parties. The court dismissed two of Trout Unlimited's NEPA claims, one of its FRRRPA claims, and its APA claim for failing to exhaust administrative remedies. The court held the Forest Service retained the regulatory author-