

9-1-2004

Trout Unlimited v. United States Dep't Agric., 320 F. Supp. 2d 1090 (D.Colo. 2004)

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Katherine Iverson, Court Report, Trout Unlimited v. United States Dep't Agric., 320 F. Supp. 2d 1090 (D.Colo. 2004), 8 U. Denv. Water L. Rev. 243 (2004).

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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-

ity to impose bypass flows as a condition of renewal and granted summary judgment on the FLPMA claim. However, the court denied the eight remaining claims. The court reversed the Forest Service's decision to issue the permit and remanded the matter to the agency to consider the permit in accordance with FLPMA.

The Forest Service originally issued the Long Draw Easement in 1973. The permit was extended a number of times, with the final extension covering the time from 1991 to 1994 in order to allow the Forest Service to conduct an analysis of the environmental impact of issuing a renewal. Trout Unlimited challenged this analysis and renewal. In 1993 the Forest Service issued a Draft Environmental Impact Statement ("EIS") that identified four alternatives for renewing the permit. Alternative B, identified in the draft EIS as the proposed action, did not include bypass flow conditions. Alternative B referenced voluntary mitigation measures included in the Proposed Joint Operations for Mainstream Poudre River Flow Enhancement ("JOP"), developed by the WSSC, and the cities of Fort Collins and Greeley. The original JOP provided some additional stream flows during the winter months. In May 1994 the cities and the WSSC issued a revised JOP that provided improved environmental mitigation. The final EIS, however, concluded that while the revised JOP was an improvement over existing conditions in the winter months, it did not provide the level of mitigation and maintenance of aquatic habitat provided in Alternative C. Although the Forest Service's own interdisciplinary team recommended adopting Alternative C because it was the only alternative to achieve a reasonable degree of resource protection, the Forest Supervisor issued a Record of Decision ("ROD") that granted the land-use authorization renewal under the conditions outlined in Alternative B.

The court addressed two primary substantive issues. First, the court determined whether the Forest Service had the authority to prohibit historic diversions of water by private parties in order to protect fish and wildlife habitat. Second, having established that authority, the court examined whether the Forest Service's decision to implement Alternative B violated section 505 of FLPMA, which required the Secretary of Interior's renewals of rights-of-way to contain terms resulting in minimal damage to aquatic habitat.

In addressing the authority of the Forest Service, the court looked to *County of Okanogan*, where the Ninth Circuit rejected the argument that conditioning use of rights-of-way on maintaining instream flows denied the County its vested water rights. The Ninth Circuit held the case was not about water rights, but about rights-of-way that are revocable at the discretion of the federal government. The court also relied on the Tenth Circuit's decision in *City and County of Denver v. Bergland*, holding the Forest Service had the power to condition the use of the forest and to prohibit unauthorized uses. In addition, the court examined the United States Supreme Court's decision in *PUD No. 1 v. Wash-*

ington Dep't of Ecology, which held federally imposed bypass flows do not conflict with state water rights. Based on this precedent, the court held the Forest Service had the regulatory authority to impose bypass flows as a condition of renewal.

The court then turned to Trout Unlimited's claim that the Forest Service's decision not to require minimum bypass flows was arbitrary and capricious and not in accordance with the FLPMA. The Forest Service contended it balanced the public's interest in water facilities and the environment, and the alternative selected reasonably protected National Forest Service lands. The court held, despite its multiple use mandates, the FLPMA did not authorize the Forest Service to ignore options that would minimize environmental harms based solely on costs to private parties, and required that land-use authorizations contain conditions to protect resources. The court determined that even if the Forest Service could balance the interest of private parties and the environment, the administrative record did not show any verifiable evidence that imposing bypass flows adversely affected the WSSC's ability to use Long Draw Reservoir. The court ruled the record did not support the finding that the selected alternative minimized damage to fish and wildlife and the Forest Service's selection of that alternative was arbitrary and capricious.

The court then dismissed the remaining claims. For the NEPA claim that the Forest Service failed to include all necessary information in the EIS, the court held Trout Unlimited failed to show that missing information was essential to the decision and the public was unaware of the limitations of the data the Forest Service was using. Regarding the second NEPA claim that the Forest Service failed to prepare a supplemental EIS, the court held the Forest Service reviewed the revised JOP and provided an explanation for not supplementing the existing EIS and, therefore, its decision was not arbitrary and capricious. The FRRRPA claims all centered on whether the Forest Service followed the proper procedures when deciding not to amend its Forest Plan to allow authorization of Long Draw reservoir without bypass flows. The court deferred to the agency's decision that the authorization constituted a non-significant change, and hence was not arbitrary or capricious. On the Wild and Scenic Rivers Act claim, the court determined the Cache la Poudre had been designated as a wild and scenic river even with the dewatering of its tributary, La Poudre Pass Creek by Long Draw Reservoir. The Wild and Scenic Rivers Act protected existing uses at the time of designation, and, therefore, permitted the use of the reservoir without bypass flows.

In conclusion, the court held the Forest Service did possess the authority to impose conditions on rights-of-way to meet the criteria of the FLPMA, and the Forest Service's decision did not satisfy those criteria. The court reversed the decision to issue the Long Draw Easement and

remanded the easement issue to the Forest Service to consider under its FLPMA obligations.

Katherine Iverson

Nat'l Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170 (D. D.C. Aug. 20, 2004) (invalidating a Clean Water Act permit where the permit is based on an invalid Endangered Species Act Biological Opinion).

The United States Army Corps of Engineers ("Corps") issued a permit to Florida Rock Industries ("Florida Rock") for the operation of a limestone mine near Ft. Meyers, Florida pursuant to the Clean Water Act ("CWA"). The mine site consisted of approximately 6000 acres, over 2300 acres of which were jurisdictional wetlands. Florida Rock proposed to excavate approximately 276 acres and fill approximately fifty-seven acres of jurisdictional wetlands.

The United States Fish and Wildlife Service ("FWS") listed the Florida panther as endangered in 1967. In accordance with the Endangered Species Act ("ESA"), the FWS, along with several other agencies, coordinated recovery planning. The inter-agency committee developed a Habitat Preservation Plan ("HPP") in 1986 to outline those areas of habitat essential to the panthers' future survival and self-sustenance. The HPP strongly discouraged any development of essential panther habitat areas and the proposed mine site was located on a site identified as an essential panther habitat. Pursuant to the CWA, Florida Rock applied to the Corps for a CWA "dredge and fill" permit in September 1997. Following objections by the FWS and the Environmental Protection Agency ("EPA"), Florida Rock reconfigured the site to include a wildlife corridor to facilitate panther migration and agreed to leave a large wetland undisturbed. The EPA withdrew its original objections and the FWS issued a Biological Opinion ("BioOp") stating the proposed mine posed "no jeopardy" to the panther. In February 2003, the Corps relied solely on the "no jeopardy" finding of the BioOp to issue an Environmental Assessment or ("EA") concluding the project met the requirements of the CWA. Additionally, consistent with the National Environmental Policy Act ("NEPA"), the Corps determined a full Environmental Impact Study ("EIS") was not necessary for the project.

National Wildlife Federation, Florida Wildlife Federation, and Florida Panther Society (collectively "NWF") filed suit against the United States Department of the Interior in June 2003, alleging FWS's BioOp and the Corps' issuance of Florida Rock's permit violated the ESA, NEPA, CWA, and the Administrative Procedure Act ("APA"). Particularly, NWF claimed the permit violated the CWA because of the preclusion of issuing permits that pose jeopardy to endangered species' habitats. Both parties filed motions for summary judgment, and the United