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Andrew L. Ellis

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Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906 (E.D. Cal. 2004)

Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906 (E.D. Cal. 2004) (holding a California statute requiring a dam owner to release a sufficient amount of water necessary to keep any fish that lived below the dam in good condition applied to federal agencies).

The Natural Resources Defense Council and others (collectively "NRDC") filed a motion for summary adjudication of their claim against Roger Patterson, the Department of Interior's Bureau of Reclamation ("BRC"), the Chowchilla Water District ("CWD") and several irrigation districts (collectively "Friant litigants") under the Reclamation Act of 1902 ("Act"). The NRDC alleged the BRC failed to release the amount of water through Friant Dam necessary to keep the historic fisheries in good condition. The irrigation districts and the CWD brought cross-motions for summary adjudication and dismissal in the United States District Court for the Eastern District of California.

Before the construction of Friant Dam, the San Joaquin River supported substantial populations of Chinook salmon and other species of fish. The San Joaquin River had one of the largest Chinook runs on the Pacific Coast. Chinook habitation existed both above and below the Friant Dam. The construction of Friant Dam blocked upstream access to a portion of salmon and steelhead spawning habitat. The dam's construction, however, was not the cause of a decrease in fish population. For several years after Friant Dam was in place, the BRC released a sufficient amount of water to sustain spawning habitat below the dam. Rather, the BRC's increasing water diversions destroyed fish habitation, which led to the decline in fish population.

The California Fish and Game Code ("Code") required the dam owners to "allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, [to] allow sufficient water to pass over, around, or through the dam, [and] to keep in good condition any fish that may be planted or exist below the dam." Furthermore, the Act provided that courts were not to construe the Act in any way that interfered with the laws of any state, including laws regulating the control and use of water used for irrigation. The court held the Act required BRC to comply with California's water laws.

The Friant litigants first argued NRDC lacked standing. The court stated it had already denied the Friant litigants' previous motion to dismiss on the same grounds, and concluded NRDC had constitutional and statutory standing. The Friant litigants next argued the court lacked subject matter jurisdiction because the Administrative Procedure Act ("APA") did not authorize judicial review of NRDC's claim. Relying on the United States Supreme Court, the court noted a litigant could bring an APA claim where that litigant asserts an agency failed to take a discrete action that the agency was required to take. The court held, because the Act required the secretary of an agency to comply with state laws, the court did have subject matter jurisdiction under the

APA and the BRC needed to release sufficient water to reestablish and maintain the historic fisheries.

The Friant litigants also argued a prior decision by the State Water Resource Control Board (“Board”) barred NRDC’s claim. The court reasoned that it had, in a prior ruling, already determined the Board’s decision did not bar NRDC’s claim, and the Friant litigants could not litigate the issue again without a change in law or circumstances. Finally, the Friant litigants argued the Central Valley Project Improvement Act (“CVPIA”) preempted NRDC’s claim. The CVPIA provided that Friant Dam water was not to be released from the Dam to comply with other provisions of the CVPIA regarding the development of a plan to reestablish fish below the Dam. The court concluded it had already denied the Friant litigants’ previous motions to dismiss on the same grounds, and the CVPIA was not in actual conflict with the Code.

After discrediting all of the Friant litigants’ arguments, the court held no genuine issue of material fact as to whether BRC had released sufficient water to maintain historic fisheries below Friant Dam existed. Therefore, the court granted NRDC’s motion for summary adjudication.

Andrew L. Ellis

Romeo v. Sherry, 308 F. Supp. 2d 128 (E.D.N.Y. 2004) (holding waterfront property owner’s claims for trespass, nuisance, interference with riparian rights, and adverse possession failed because property owner did not prove ownership of foreshore and the owner did not have reasonable access to the waterway).

In August 1994 Joseph Romeo (“Romeo”) purchased waterfront property, zoned for heavy industrial use, in hopes of developing the property into a multi-use facility for weddings and other community events. Fourteen steel and wooden barges rested on the foreshore of Romeo’s property, and in his property’s sightline were numerous businesses including a shipyard, a petrochemical tank farm, a sewer outlet, and a railroad. At Romeo’s request, Mark Sherry and John Garner (“Garners”) removed numerous barges they conceded belonged to them, leaving two steel and three wooden barges. The Garners offered to remove the two steel barges at no cost to Romeo, but Romeo declined, believing the Garners’ offer was not genuine. Romeo sued the Garners for trespass, nuisance, interference with riparian rights, and adverse possession, based on the remaining five barges, in the United States District Court for the Eastern District of New York.

Romeo and the Garners agreed that the State of New York owned all lands beneath the median high water mark, including the land between the high and low water marks (“foreshore”). At the bench trial and in post-trial submissions, Romeo contended that his deed indi-