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County of Okanogan v. Nat'l Marine Fisheries Serv., No. 02-35512, 2003 U.S. App. LEXIS 16748 (9th Cir. Aug. 14, 2003)

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Rueth then argued it would be unfair for the court to hold him to the terms of the consent decree because at the time of the original settlement, unlike the time of the appeal, the government still had the ability to enforce jurisdiction over isolated waters. The court rejected this argument stating that at the time of the consent decree, Rueth weighed his options, calculated the chances of success, and voluntarily settled the case. The court referred to *United States v. Krilich* as the basis for rejecting this argument. In *Krilich*, the court rejected Krilich's motion to vacate a consent decree based on SWANCC because the court believed that to vacate the decree would discourage the negotiation of settlements and would undermine the finality of such agreements.

Next, Rueth argued the consent decree's language imposed cumulative stipulated penalties not for each uncompleted milestone, but rather for each day of noncompliance, regardless of the number of violations. The court rejected this argument, stating that the clear intent of the consent decree was to mandate a restoration in a short period of time and that if the court were to accept Rueth's proposition, there would have been no incentive to complete unfinished milestones if already in violation of others.

The court also rejected Rueth's final arguments that: (1) the penalties violated due process, (2) the district court erred by failing to examine whether the EPA consented to the delays, and (3) the district court should have considered the CWA's statutory criteria for determining penalties because Rueth voluntarily signed the consent decree. Thus, the court affirmed the district court's judgment.

Gerritt James Koser

NINTH CIRCUIT

County of Okanogan v. Nat'l Marine Fisheries Serv., No. 02-35512, 2003 U.S. App. LEXIS 16748 (9th Cir. Aug. 14, 2003) (holding Forest Service had authority to restrict the use of rights of way to protect endangered fish under Federal Land Policy and Management Act, National Forest Management Act, Organic Administration Act, and Multiple Use Sustained Yield Act of 1960).

The United States Forest Service ("Forest Service") restricted the use of the Early Winters Ditch and the Skyline Irrigation Ditch to maintain instream flow levels for the protection of fish under the Endangered Species Act ("ESA"). The United States District Court for the Eastern District of Washington held that the Forest Service had the authority to place restrictions on rights-of-way permits.

On appeal to the United States Court of Appeals for the Ninth Circuit, Okanogan County, a company, a partnership and three individuals (collectively "Okanogan") sought review of the district

court's ruling. Okanogan argued the Forest Service was not authorized to comply with the ESA and did not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions would deny them their vested water rights under state law.

In affirming the district court's holding, the Ninth Circuit reasoned that ditch rights-of-way granted over federal land, from their inception, were subject to termination at the discretion of the federal government through its designated agent. The Ninth Circuit noted that the Forest Service had the authority to restrict the use of the rights-of-way to protect the endangered fish, and that the permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way.

Furthermore, the court held the Federal Land Policy and Management Act ("FLPMA"), National Forest Management Act, Organic Administration Act, and Multiple Use Sustained Yield Act of 1960 granted the Forest Service authority to restrict the use of the rights-of-way to protect the endangered fish. FLPMA specifically authorized the Forest Service to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards without any requirement that the Forest Service defer to state water law. Therefore, the Ninth Circuit affirmed the district court's ruling.

Regan H. Rozier

Friends of the Wild Swan v. EPA, No. 00-36001, 2003 U.S. App. LEXIS 15271 (9th Cir. July 25, 2003) (holding a district court may utilize equitable power to tailor remand requirements, tailor its remand order with a timeframe for compliance, prohibit the Environmental Protection Agency from issuing new permits, but may not prevent a state from delisting water quality limitation segments).

The primary controversy in this case concerned whether the Environmental Protection Agency ("EPA") and the State of Montana violated the Clean Water Act ("CWA") because Montana failed to meet deadlines for submitting pollution control limits. The CWA requires states to identify water quality limitation segments ("WQLSs")—water bodies where technology-based effluent limitations alone are not stringent enough to implement the applicable water quality standards—and set total maximum daily loads ("TMDLs") for each WQLS. Montana submitted revised lists of WQLSs in 1992, 1994, 1996, and 1998 (identifying approximately 900 WQLSs in 1998), but only submitted one TMDL in 1996 and 130 TMDLs in 1998. Displeased with Montana and the EPA's progress, several environmental groups commenced an action in the United States District Court for the District of Montana, Missoula Division. The district court found that the EPA violated the CWA when it approved Montana's list. The district court required the EPA to approve or establish TMDLs for all