

1-1-2004

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South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003)

**South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003)** (holding North Dakota and South Dakota were not entitled to preliminary injunctions barring the United States Army Corps of Engineers' planned release of water from reservoirs within those states and that the Corps must abide by its Master Manual guiding Missouri River water uses and priorities).

The Federal District Court for South Dakota ("South Dakota District Court") granted the State of South Dakota an injunction barring the United States Army Corps of Engineers ("Corps") from releasing water from an in-state reservoir along the Missouri River to maintain downstream river flows. South Dakota's action caused the Corps to seek the release of water from a reservoir further upstream in North Dakota. The State of North Dakota responded by obtaining an injunction from the Federal District Court for North Dakota ("North Dakota District Court") barring the Corps from releasing water from a reservoir in their state. In response, the State of Nebraska brought an action in the Federal District Court for Nebraska ("Nebraska District Court") and received an injunction requiring the Corps to adhere with its initial planned action and to release upstream-reservoir waters to maintain the downstream flows effecting Nebraska.

Although the period on the injunctions had passed, the Eighth Circuit Court of Appeals heard the Corps' appeal of each district court's ruling so that the water use issues raised now could be addressed before similar future actions occurred. The Eighth Circuit reversed the judgment of the South Dakota and North Dakota District Courts and affirmed the judgment of the Nebraska District Court.

This matter arose from prolonged drought conditions and the resulting decreased water levels that occurred in the Missouri River Valley in the spring of 2002. To meet its obligations in the management of the Missouri River under the Flood Control Act of 1944 ("Act"), the Corps chose to release water from a single main stem reservoir on the river. The Corps determined that releasing water from Lake Oahe in South Dakota would maintain the downstream flows necessary for navigation and limit any short-term environmental impacts to that one reservoir. On the other hand, South Dakota sought to maintain the existing water levels and restore the walleye fishery and the related recreational benefits in Lake Oahe. South Dakota contended maintenance of minimum water levels was necessary to increase the population of the walleye's main prey, the rainbow smelt. Even a slight decrease in the reservoir water level would lead to an unsuccessful spawning season and would negatively impact South Dakota's efforts to restore the recreational value of the walleye fishery within the reservoir.

South Dakota sued the Corps, arguing the Corps' actions to maintain navigational water levels instead of maximizing recreational benefits were arbitrary and capricious. South Dakota sought an injunction barring the release of water from the reservoir until after

the spawning season. The District Court of South Dakota granted a preliminary injunction preventing the Corps from releasing water from Lake Oahe and one other reservoir until the end of the spawning season.

In response, the Corps planned to release water from Lake Sakakawea in North Dakota to meet its obligations in maintaining the navigational water levels on the river. North Dakota sued in the Federal District Court of North Dakota and obtained an injunction preventing the release of water from its reservoir. The South Dakota District Court denied Nebraska's earlier request to intervene in the South Dakota case. As a result, Nebraska brought an action and received an injunction against the Corps in the Nebraska District Court requiring the Corps to maintain navigational water levels as prescribed under the Corps' Master Manual consistent with the Act. Because of the three district courts' decisions, the Corps was unable to meet its obligations under the Act.

On appeal, the Eighth Circuit considered whether the three district courts erred in granting preliminary injunctions. The standard of review of a district court's decision to grant a preliminary injunction is for an abuse of discretion by finding the district court "erred in the characterization of the facts, made a mistake of law, or abused its discretion in considering the equities."

The Corps claimed its actions were not subject to judicial review. The court disagreed, indicating that the Corps' actions were reviewable under law from both the Act and the Master Manual. The court found that while the Corps has considerable discretion under the Act, that power is not unconstrained and the Corps' actions are therefore subject to judicial review under the Act. Further, the court found that the Corps' issuance of and adherence to its Master Manual created a binding obligation on the Corps. That obligation is also subject to judicial review to ensure conformity.

Finding the Corps' actions subject to judicial review, the court looked first at the injunction issued by the South Dakota District Court. South Dakota argued it was entitled to relief on several claims. It claimed first that the Act required the Corps to act in a manner maximizing all benefits including recreation. South Dakota also claimed the Corps acted arbitrarily and capriciously by weighing navigational interests more heavily over recreational interests.

With respect to South Dakota's first claim that the Corps must balance all interests in its decision making process, the court found the Corps' decision to prioritize navigation over recreational benefits is not the type of standard the "courts regularly employ in reviewing agency actions." The court stated the Act did not provide it the power to review every decision of the Corps to ensure that all benefits were maximized for all interests.

The court next addressed South Dakota's claim that lowering the water level in Lake Oahe was arbitrary and capricious, citing the rule that "[a] court may find an action to be arbitrary and capricious only

when there is no rational basis for the policy choice.” Here, the court found the Corps’ planned actions to be rational and based on facts specifically relating to the affected reservoir. The planned draw of water from the reservoir was consistent with the Master Manual and would not result in long-term detrimental affects to the reservoir fishery. The court concluded South Dakota’s claim would not succeed on its merits and therefore it was not entitled to the preliminary injunction.

North Dakota’s arguments to support the preliminary injunction issued by the North Dakota District Court were similar to South Dakota’s. Like South Dakota’s claims, the court found North Dakota’s claims would likely not succeed on the merits. The court therefore held North Dakota was not entitled to the preliminary injunction.

Lastly, the court reviewed the injunction entered by the Nebraska District Court. The court agreed with the Nebraska District Court, finding the Corps bound by the policies adopted and listed in its Master Manual. Specifically, the plan provided for the maintenance of navigational water levels as a higher priority than wildlife and recreational benefits. Therefore, Nebraska was entitled to the preliminary injunction as issued by the Nebraska District Court.

*Chris Wittenbrink*

## NINTH CIRCUIT

**County of Okanogan v. Nat’l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003)** (holding the Endangered Species Act authorizes the United States Forest Service to restrict rights-of-way in water ditches within its boundaries, notwithstanding contrary state water law).

Okanogan County (“Okanogan”) filed a declaratory judgment suit against the National Marine Fisheries Service (“NMFS”) in the United States District Court for the Eastern District of Washington after the United States Forest Service (“USFS”) limited Okanogan’s use of both the Skyline Irrigation Ditch (“Skyline Ditch”) and the Early Winters Ditch (“Winters Ditch”), both located in Washington state, to protect certain species of fish. The district court heard cross-motions for summary judgment, ruling in favor of the NMFS because the USFS had authority to restrict the rights-of-way. Okanogan appealed to the Ninth Circuit Court of Appeals.

The original rights-of-way for the Skyline Ditch and Winters Ditch dated from the early 1900s. The USFS previously issued several rights-of-way permits to Okanogan, all reserving the USFS’s discretion to revoke the permits. The rights-of-way terms permitted the USFS to include new terms, and specifically stated that the permits transferred no water rights to Okanogan. Following a 1998 assessment of special use permits on the Chewuch River—the water source for both