

1-1-2004

County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003)

Jeff Gillio

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Jeff Gillio, Court Report, County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003), 7 U. Denv. Water L. Rev. 452 (2004).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003)

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

ditches—the USFS declared the Skyline Ditch’s fish screen ineffective and found that continued use of the ditch would harm steelhead trout and Chinook salmon. Similarly, the USFS determined that use of the Winters Ditch could harm steelhead and Chinook spawning areas. Thus, the USFS issued the ditch permits with notices of their possible revision, contingent upon the results of ongoing talks with the NMFS and the Fish and Wildlife Service (“FWS”). In 2000, after the USFS’s federally required consultation with the NMFS, the NMFS issued biological opinions on both ditches. The opinions found that while the plan proposed for the Winters ditch was not likely to harm the fish, provided Okanogan implemented measures insuring the Chewuch River’s minimum instream flows, the proposed Skyline Ditch modifications lacked protections for steelhead and Chinook populations. Accordingly, the USFS amended the Skyline Ditch permit, limiting its diversions, to maintain specified instream flow levels.

On appeal, Okanogan raised two claims: (1) the USFS lacked authority to implement instream flow requirements because such requirements denied Okanogan its vested water rights, and (2) the USFS lacked the authority to comply with the Endangered Species Act (“ESA”) at the expense of Okanogan’s vested state law water rights.

Regarding Okanogan’s first argument, the court held the rights-of-way permits for the ditches allowed the USFS to terminate the permits. Moreover, the language of the permits explicitly subjected them to future amendment by the USFS when “necessary or desirable to incorporate new terms, conditions . . . as may be required by law” Further, the ESA required federal agencies, including the USFS, “to consult with . . . designated agencies whenever . . . federal action ‘may affect’ . . . threatened or endangered species.” Thus, the USFS had authority to condition the use of the rights-of-way.

Examining Okanogan’s second argument, the court stated that the authority of the USFS to limit the use of the rights-of-way for protection of endangered fish stemmed, in part, from the permits’ language, which reserved the USFS’s “unqualified discretion to restrict or terminate the rights-of-way.” Further, the court held the Federal Land Policy and Management Act of 1976 empowered the USFS to set flow levels for rivers within the boundaries of the Okanogan National Forest for protection of endangered fish. Moreover, the court held Okanogan had no vested property rights because the 1901 Act authorizing the Secretary of the Interior to grant ditch rights-of-way on forest reservations stated that any permits issued “shall not be held to confer any right . . . over any public land.” Finally, the court held Okanogan mistakenly relied on *United States v. New Mexico* because it discussed water rights, whereas the instant case involved rights-of-way running through federal government lands.

Based on these findings, the court affirmed the lower court’s grant of summary judgment in favor of the NMFS.

Jeff Gillio