

1-1-2004

## Sierra Club v. Hankinson, 351 F.3d 1358 (11th Cir. 2003)

Lisa M. Thompson

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



Part of the [Law Commons](#)

---

### Custom Citation

Lisa M. Thompson, Court Report, *Sierra Club v. Hankinson*, 351 F.3d 1358 (11th Cir. 2003), 7 U. Denv. Water L. Rev. 469 (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](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

Sierra Club v. Hankinson, 351 F.3d 1358 (11th Cir. 2003)

**ELEVENTH CIRCUIT**

**Sierra Club v. Hankinson, 351 F.3d 1358 (11th Cir. 2003)** (holding that environmental organizations were entitled to attorneys' fees and costs for monitoring the Environmental Protection Agency compliance with a 1997 consent decree).

The Sierra Club and other state environmental organizations (collectively "Environmental Organizations") filed suit against the United States Environmental Protection Agency ("EPA") under the Clean Water Act ("CWA"). Specifically, the Environmental Organizations wanted the EPA to update Georgia's "water quality limited segments" ("WQLS") lists and establish Total Maximum Daily Loads ("TMDLs") for impaired streams. The United States District Court for the Northern District of Georgia granted summary judgment in favor of the Environmental Organizations, thereby requiring the EPA to complete a TMDL list within five years. While the government's appeal was pending, the parties entered into two consent decrees obligating the EPA to update Georgia's WQLS list and set a timetable for establishing TMDLs in each body of water. The EPA fulfilled its obligations under the consent decree by completing a list of proposed TMDLs. In court, the Environmental Organizations claimed they were entitled to recover costs and attorneys' fees for their work associated with monitoring the EPA's consent decrees compliance. The district court awarded costs for experts and attorneys' fees to the Environmental Organizations and the United States Court of Appeals for the Eleventh Circuit affirmed.

Under the CWA, every state must categorize the designated uses of each body of water and set water quality standards based upon those uses. In addition, every discharger of a pollutant from a discrete "point source" must obtain a National Pollutant Discharge Elimination System ("NPDES") permit from the EPA. In some areas, an NPDES permit alone cannot control water quality due to extensive "non-point source" pollutants. In these waters, the state must assemble a list of "water quality limited segments" and establish a TMDL, the highest level of a pollutant allowed within the water body for each day. If a state fails to fulfill these duties, the CWA requires the EPA to take responsibility for generating the list and standards.

Furthermore, the Eleventh Circuit stated that under the terms of the CWA, a court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. Additionally, a court may award fees for post-judgment monitoring of a consent decree.

Here, the court determined that examination of the TMDL and WQLS list by the Environmental Organizations was necessary for meaningful enforcement of the consent decree, and the especially

complex litigation required the Environmental Organizations to hire a water expert. Consequently, the court held the environmental organizations were entitled to fees associated with monitoring the consent decree, including expert fees, and the Eleventh Circuit affirmed the district court's judgment.

*Lisa M. Thompson*

## COURT OF FEDERAL CLAIMS

**Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed. Cl. 246 (2003)** (holding state implemented water restrictions to protect salmon prior to the issuing of a biological opinion by the lead federal agency did not represent federal action conferring liability on the government for a taking; biological opinion issued by the federal agency pursuant to the Endangered Species Act effected a taking of water rights; Congressional statutory rate of interest set for inverse condemnation cases is the appropriate rate of interest to be applied in awarding damages for a federal taking of water).

Tulare Lake Basin Water Storage District ("Tulare"), Kern County Water Agency ("Kern") and their subcontractors (collectively "water contractors") contracted with the California Department of Water Resources ("DWR"), operator of the State Water Project facility ("SWP"), and the Bureau of Reclamation ("BOR"), operators of the Central Valley Project ("CVP") for water distribution in southern California. Pursuant to these contracts, the water contractors were eligible for two categories of water: an annual entitlement, called Table A water; and Article 21 water, also referred to as unscheduled or interruptible water. Table A water is a percentage of available water as determined by the DWR in a particular year. The DWR bases the amount on the water contractors' requests or a portion thereof, up to their entitled amount as determined by the contract (1,153,400 acre-feet per year for Kern and 118,500 acre-feet per year for Tulare). Article 21 water is available at the request of the water contractors if water is available in excess of the amount required to meet the needs of the water project.

Integral to the water distribution system relied on by the water contractors was the Delta Cross Channel. The Delta Cross Channel is a federal facility that diverts fresh water from the Sacramento River to the southern Sacramento-San Joaquin Delta ("Delta") and toward SWP and the CVP. In the late 1980s, the SWP and CVP noticed an increase of fish kills at their facilities. The BOR and DWR contacted the National Marine Fisheries Service ("NMFS") who initiated a consultation in early 1991 pursuant to the Endangered Species Act ("ESA"). On February 3, 1992, the BOR and DWR, upon the recommendation of NMFS, closed the Delta Cross Channel in an