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## Trout Unlimited v. United States Army Corps of Eng'rs, 187 F. Supp. 2d 1334 (D. Utah 2002)

Katherine J. Ellison

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Baker alleged their property interest was an appurtenant prescriptive easement to the water well and crossway located on the Trailway. Baker argued TPWD's purchase of the Trailway was contingent upon all previously established interests, including easements of record or otherwise. Baker asserted the previous owner, who drilled the water well on the Trailway in 1964, transferred the prescriptive easements with the property when he leased it to Baker. The employees of TPWD, however, disputed the existence of Baker's prescriptive easement.

The court stated a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting or to compel it to act." Furthermore, a federal court does not have authority to hear claims involving a state's property interest without that state's expressed consent. The instant case revolved around Baker's disputed easement rights to the water well and crossway on the Trailway. The State of Texas had record title to the Trailway and was responsible for its operations. The court contended that if Baker had a prescriptive easement, it would clearly be exercising authority over the public domain, restricting the State of Texas' property interests, and violating state sovereignty under the Eleventh Amendment.

Therefore, since the State of Texas' property interests were implicit in this claim and the State of Texas had not consented to adjudication in a federal court, the court did not have the requisite subject matter jurisdiction to hear this case.

*Jessica L. Grether*

**Trout Unlimited v. United States Army Corps of Eng'rs, 187 F. Supp. 2d 1334 (D. Utah 2002)** (holding moot plaintiff's challenges to completed pipeline and water plant construction projects, and holding Army Corps of Engineers' review appropriate in addressing water quality issues related to those projects).

Plaintiffs, including the Utah Council of Trout Unlimited and concerned environmentalists ("Trout Unlimited"), challenged the Army Corps of Engineers' ("Corps") decision to approve permits for construction of a water treatment plant and two pipeline projects in Summit County, Utah. Trout Unlimited alleged the Corps' approval of the construction projects violated various federal regulations, including the Clean Water Act ("CWA"), the Administrative Procedure Act ("APA"), the National Environmental Preservation Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and the Federal Wildlife Coordination Act ("FWCA"). Trout Unlimited appealed the Corps' decision in the United States District Court for the District of Utah, and requested the court remand the agency action. The court

denied Trout Unlimited's motion for remand.

The construction permit applicants planned to build a water treatment plant and two pipelines to supply additional drinking water to the county and to aid in snowmaking operations of local ski resorts. At the time of Trout Unlimited's challenge to the Corps' decision, two of the construction projects were underway, rendering certain claims on those projects moot, claims for procedural remedies notwithstanding. The claims on the final project remained ripe.

Trout Unlimited's complaint listed six specific violations of federal regulations, alleging that: (1) the Corps issued nationwide permits ("NWP") for the construction projects instead of individual permits, which would invoke a stricter standard of review; (2) the Corps failed to analyze the projects' impacts on water quality of the nearby watershed; (3) the Corps failed to evaluate alternatives to the proposed projects; (4) the Corps failed to evaluate the projects using a NEPA analysis; (5) the Corps failed to comply with the FWCA, raising concerns about local trout species; and (6) the Corps failed to address concerns the projects would jeopardize nearby historic properties.

First, Trout Unlimited challenged the Corps' issuance of NWPs as opposed to individual permits. Given the project's distance from, and relatively minimal impact on, nearby East Canyon Creek, the Corps issued the more general NWP. The CWA grants the Corps authority to regulate "discharges of dredged and fill material into wetlands" through permitting systems, and allows the Corps to issue the more general NWPs in certain situations to maximize agency efficiency. The Corps determined that all three construction projects would have minimal impact on East Canyon Creek, thus eliminating the need for an intensive evaluation or NEPA review. The court held the Corps' determination to issue NWPs in lieu of individual permits was satisfactory.

Second, Trout Unlimited alleged the Corps failed to analyze the projects' impact on water quality. The Utah Department of Water Quality ("DWQ") originally indicated it intended to withdraw certification on the pipeline projects because the affected portion of East Canyon Creek fell within the CWA's definition of impaired waters. In response, the permit applicants revised the construction plans in order to lessen the impact on the Creek. The DWQ reviewed the revised plans and reversed its earlier stance. In examining permit applications, the Corps must defer to state certification of the project. Section 401 of the CWA requires permit applicants to obtain certification from the state to ensure compliance with CWA standards. If a state certifies a proposal, the Corps need not analyze water quality issues further. The court held the Corps' reliance on the DWQ's certification served as sufficient analysis of water quality impacts, and thus dismissed Trout Unlimited's second contention.

Third, Trout Unlimited alleged the Corps failed to analyze alternatives to the proposed projects. The court dismissed this claim, holding since the Corps analyzed alternatives to NWPs when the

permits were first created, no federal regulation required the Corps to conduct further analysis.

Fourth, Trout Unlimited alleged the Corps violated NEPA in failing to analyze the proposed construction projects using NEPA review. Again, the court dismissed the argument, holding NEPA review occurred at the time of the creation of the NWP, with the Corps analyzing a relevant class of activities at the time it issued the permit. When applying an NWP to a proposed activity, NEPA does not require further review of the project.

Fifth, Trout Unlimited's claim under the FWCA alleged the Corps failed to address concerns about the projects' impacts on local trout species. The court first pointed out the FWCA does not include a private right of action for citizen suits, but addressed the issue to determine whether the Corps' actions were arbitrary and capricious, and thus in violation of the APA. The Corps' regulations require the agency to give "full consideration" to other agencies' concerns, yet under FWCA, requirements the Corps can rely on information from permit applicants in evaluating compliance with FWCA. The court found while the Fish and Wildlife Service initially expressed concern over the projects, the permit applicants addressed the concerns in an environmental assessment provided to the Corps. Thus, Trout Unlimited failed to meet its burden of proving the Corps acted in an arbitrary and capricious manner.

Finally, the court addressed Trout Unlimited's allegation the Corps' actions violated the NHPA by failing to evaluate possible impacts on historic properties. Under the NHPA, state historic preservation offices must assist federal agencies in the review processes. The Utah State Historic Preservation Office determined the proposed projects would not affect historic properties. The court found the Corps' reliance on such determination reasonable, and dismissed Trout Unlimited's claim under the NHPA.

The court thus denied Trout Unlimited's appeal and motion to remand agency action, and entered judgment for the Corps.

*Katharine J. Ellison*

**United States v. Newdunn Assoc., 195 F. Supp. 2d 751 (E.D. Va. 2002)**  
(holding the United States Army Corps of Engineers' 1986 regulations expanding the definition of "waters of the United States" and extending its jurisdiction over these waters exceeded the grant of authority to the Corps by Congress under the Clean Water Act).

On June 12, 2001, Newdunn Associates ("Newdunn") and its contractors began discharging fill material onto its property, grading its property, and excavating ditches on its property. Newdunn conducted these activities without a permit under section 404 of the