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## Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001)

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“navigable waters” in *Solid Waste Agency of Northern Cook County v. United States Army Core of Engineers*. In light of this decision, Buday submitted a brief claiming Fred Burr Creek and the surrounding wetlands were no longer navigable waters, and the United States thus lacked jurisdiction to prosecute him. The court construed this brief as a motion to withdraw his guilty plea. The court denied the motion, and in so doing, found the holding in *Solid Waste* inapplicable.

In *Solid Waste*, the Supreme Court held seasonal ponds or wetlands that were entirely within one state’s borders and not adjacent to any navigable streams or tributaries were not navigable waters within the meaning of the CWA. However, the district court found that this definition did not apply to the wetlands surrounding Fred Burr Creek. Although Fred Burr Creek was not navigable, it drained into Flint Creek, which in turn flowed into the Clark Fork of the Columbia River. The Clark Fork was navigable-in-fact; thus Fred Burr Creek was a tributary of a tributary of a navigable waterway. The CWA specifically covers such tributaries, and the court cited numerous cases, including *United States v. Texas Pipe Line*, which found tributaries such as Fred Burr Creek within the scope of the CWA envisioned by Congress.

Furthermore, the court held the inclusion of tributaries in the CWA fell within the boundaries of congressional power dictated by the Commerce Clause, authorizing Congress to regulate the channels of interstate commerce. By definition, navigable waters are channels of interstate commerce. The court reasoned that although Fred Burr Creek’s effect on interstate commerce was minimal, the effect of tributaries as a whole was not. Thus, in protecting tributaries in the CWA, Congress was protecting the interests of interstate commerce.

Since Fred Burr Creek was a tributary of a navigable waterway, it was protected by the CWA even after *Solid Waste*. Since this protection is within the powers constitutionally granted to Congress, Mr. Buday’s motion to withdraw his guilty plea was denied.

*James Siegesmund*

**Kandra v. United States**, 145 F. Supp. 2d 1192 (D. Or. 2001) (holding lack of entitlement prevented citizens either from enjoining the implementation of the Bureau of Reclamation’s annual plan for a water project, or from forcing releases for irrigation without a showing of probable chance of success on the merits.)

The Upper Klamath Lake (“Lake”) provided primary storage for a limited-capacity water project (“Project”) established in 1905. It also served as a valuable resource to Indian tribes as well as a source of nourishment and life for endangered and threatened fish and birds. This suit arose out of problems concerning the allocation of water to irrigators holding contracts for water from the Project.

The project allowed the Bureau of Reclamation (“Bureau”) to

form contracts with irrigators along both the Klamath and Lost Rivers in Oregon. The Lake was listed as “critical habitat” for two types of endangered suckerfish under the Endangered Species Act (“ESA”). These fish provided food, employment opportunities, and a basis for culture and tradition among the Yurok Indian Tribes. The Yurok and Klamath Tribes held treaty rights dating back to “time immemorial,” which secured the Tribes’ water and fisheries in the Klamath River Basin. Furthermore, the river below the terminal dam in the project provided “critical habitat” for threatened Coho salmon. Finally, two wildlife refuges far below the Lake depended on water to provide habitat for waterfowl, a primary food source for threatened bald eagles.

All of these interests came into conflict when a 2001 Natural Resources Conservation Service forecast predicted critically dry conditions that would lead to the lowest inflows to the Lake on record. This forced the Bureau to severely curtail releases for irrigation in order to protect fish habitat in the lake and river below the Iron Gate Dam. Irrigators dependent on such releases protested the Bureau’s 2001 plans because they provided little or no water for irrigation.

Kandra sued on behalf of the irrigators for the Bureau, alleging breach of contract. Kandra further claimed the Bureau’s 2001 plan constituted an arbitrary and capricious use of administrative power under the Administrative Procedure Act (“APA”), and was a violation of both the National Environmental Policy Act (“NEPA”) and the ESA. The Oregon District Court faced the decision of whether Kandra could bar implementation of the plan by injunction and obtain an order to release 262,000 acre-feet from the Lake, dropping its elevation one foot below minimum recommended levels. The Bureau insisted its plan complied with NEPA and ESA requirements and that Indian treaty rights antedated irrigators’ rights. The Wilderness Society intervened, arguing the needs of wildlife refuges presented an even greater challenge to irrigators’ claims.

The court decided Kandra could neither bar the plan’s implementation nor order releases because he could not show probable success on the merits of his case or demonstrate that the balance of hardships tipped sharply in his direction. Kandra’s claims did not show the requisite “fair chance” at success because they arose from unfounded assumptions about priority of the Bureau’s responsibilities and incorrect analysis of ESA, APA and NEPA requirements.

First, the contract between irrigators and the Bureau subjected water allowances to availability. After satisfying the superceding environmental demands of the ESA, and the superior Indian treaty rights, the Bureau had little or no available water remaining for irrigators.

Second, the court addressed Kandra’s claim that the Bureau violated NEPA by failing to produce an Environmental Impact Statement (“EIS”). The court held an EIS was not required because the Bureau’s 2001 plan comprised only part of an ongoing process,

and, thus, the Bureau could not feasibly complete an EIS before critical deadlines for the delivery of irrigation water had passed. Therefore, to impose impossible duties on the Bureau made “no sense.”

Lastly, the court challenged Kandra’s notion that, because the Fish and Wildlife Service (“FWS”) provided the Bureau with contestable expert opinions, implementing the 2001 plan violated the ESA and APA. The ESA prevents the Bureau from engaging in any action likely to jeopardize the continued existence of endangered or threatened species. It also requires certain due diligence procedures in forming water plans, such as including reasonable and prudent alternatives (“RPAs”) in those plans. The Bureau relied on experts in the FWS who formulated RPAs. While Kandra claimed the Bureau’s experts failed to use or correctly interpret the best information available, the court found this insufficient to prove the Bureau acted arbitrarily and capriciously in violation of the APA.

The court further held the Bureau’s ability to choose and rely on expert opinions allowed for reasonable discretion, not omniscience. The ESA simply requires expert opinions not ignore biological information. Kandra had merely argued certain experts disagreed on the significance of biological information used by the FWS. Thus, the court held Kandra’s ESA claim sought to impose a standard inconsistent with the standard actually imposed by law.

Considering all of these factors, the court concluded Kandra’s claim failed to show a likelihood of success on the merits or an entitlement to the relief sought. Accordingly, the court denied Kandra’s motion for a preliminary injunction.

*Dan Wennogle*

**United States v. Commonwealth of Puerto Rico, 144 F. Supp. 2d 46 (D.P.R. 2001)** (holding that the Commonwealth of Puerto Rico lacked jurisdiction over the United States Navy to compel adherence to local regulations, due to the sovereign immunity of the United States).

The United States moved for a declaratory judgment that the Commonwealth of Puerto Rico (“Commonwealth”) and its Secretary of the Department of Natural and Environmental Resources could not compel the United States’ participation in local administrative proceedings regarding the adjudication of stream water for use on a Naval base. The Commonwealth relied on the McCarran Amendment (“Amendment”) of 1952, which waived the United States’ sovereign immunity for administrative proceedings regarding stream adjudication. The United States obtained permits granting the adjudication of stream waters for use on a Navy base in 1942 and 1944, and thus contended that the permits are not subject to the Amendment. The court granted declaratory relief.

Congress’ purpose in ratifying the Amendment was “allowing states