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North Dakota v. United States Army Corps of Eng'rs, No. AI-03-50, 2003 U.S. Dist. LEXIS 12072 (D.N.D. July 14, 2003)

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affected the bottom elevation of those ditches. HRA maintained that the check dams fell under the silvicultural exemption of section 404, which allowed the discharge of fill material from “plowing, seeding, cultivating, [and] minor drainage” without regulation. The exemption however, included a recapture provision requiring a permit for discharges of fill material designed to alter or bring the area to new use. NCCF and NCSGA claimed the network of ditches were beyond the definition of “minor drainage,” and specifically created for converting wetland to non-wetland. The court refused to determine whether the silvicultural exemption applied under section 404 due to the conflicting factual disputes. However, because undisputed evidence proved discharges of fill material into waters of the United States, NCCF and NCSGA could obtain a determination of liability for HRA’s underlying violation of CWA section 404.

Dara Lum

North Dakota v. United States Army Corps of Eng’rs, No. A1-03-50, 2003 U.S. Dist. LEXIS 12072 (D.N.D. July 14, 2003) (finding that a high probability of failure on the merits and lack of greater public interest precluded the court from issuing a preliminary injunction for water level control in reservoirs regardless of possible irreparable harm).

The State of South Dakota moved for a preliminary injunction to prevent the United States Army Corps of Engineers (“Corps”) from lowering the water level of the reservoirs in South Dakota. The procedural events preceding South Dakota’s motion began with North Dakota filing a complaint in North Dakota state district court on April 29, 2003. The State of North Dakota alleged that the Corps violated North Dakota’s water quality standards through its operation of Garrison Dam. The parties removed the case to the United States District Court for the District of North Dakota, Southwestern Division, and the States of Nebraska and South Dakota intervened. South Dakota then filed a separate complaint. South Dakota alleged that judicial estoppel prohibited the Corps from reducing water levels on mainstream reservoirs to support navigation, that lowering the water level was contrary to the Flood Control Act of 1944, and that the Corps’ actions were in violation of the Administrative Procedure Act. A hearing on June 4, 2003, determined both North Dakota’s and South Dakota’s Motions for Preliminary Injunctions.

In evaluating the Motions for Preliminary Injunction, the court evaluated four factors: (1) the movant’s probability of success, (2) the threat of irreparable harm to the movant absent injunction, (3) the balance between the harm to the movant and the injury on other interested parties, and (4) public interest. The burden of proving these factors is on the moving party.

The court held that South Dakota was not likely to succeed on the

merits of this case. The Eighth Circuit Court of Appeals previously held in *South Dakota v. Ubbelohde* that South Dakota was not likely to succeed on these exact same arguments. That decision from the Eighth Circuit limited this court's ability to grant a preliminary injunction based on these arguments. The court therefore concluded that South Dakota was not entitled to a preliminary injunction based on future probability of success.

On the second factor of irreparable harm, the court held that the Corps would irreparably harm South Dakota if it managed the water levels. The death of rainbow smelt eggs, which would result from the lowered water levels, would harm South Dakota's fisheries. These facts alone persuaded the court to find for South Dakota on the factor of irreparable harm.

The court combined the last two factors, reasoning that since all parties involved were governmental entities, the balancing of harm between the parties and the effects on the public interest were essentially the same. Because there were compelling arguments on both sides, the court held that the interests did not weigh in favor of either party.

In conclusion, the court held that although South Dakota had shown a threat of irreparable harm, the State did not show it was likely to win on the merits nor did it put forth a convincing argument of greater public interest for their cause. The court further noted that the previous decision of Eighth Circuit was controlling and it would be improper for the court to issue a preliminary injunction in this case.

Ryan D. Phillips

S.E. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26 (D.D.C. 2004) (approving water supply Settlement Agreement negotiated by municipal electricity providers and state, provided that United States District Court for the Northern District of Alabama first vacated a previously-entered temporary injunction).

The plaintiff in this dispute ("D.C. litigation") in the United States District Court for the District of Columbia, Southeastern Federal Power Customers ("SeFPC"), was a non-profit corporate consortium of rural and municipal electricity suppliers servicing the southeastern United States. These suppliers receive a portion of their electricity from the hydroelectric power generated by the Buford Dam. The United States Army Corps of Engineers ("Corps") built the Buford Dam on the Chattahoochee River in the 1940s, creating Lake Lanier.

Congress initially authorized Lake Lanier and Buford Dam expressly for hydropower generation, flood control, and navigation purposes. The Corps contended that future local water supply usage was always within Congressional intent, but intervening parties in this action disagreed. Beginning in the 1970s, the Corps reserved some of