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Ctr. For Envtl. Law & Policy v. United States Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011)

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were no longer entitled to its use, and therefore suffered no property deprivation when ordered to discontinue using water. The court also reasoned that the permits provided to the farmers gave notice that officials could discontinue use rights during periods of water shortage and that officials had authority to make a scarcity determination.

Accordingly, the court affirmed the district court's grant of summary judgment for the defendant officials.

Lauren Varner

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ctr. for Envtl. Law & Policy v. United States Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011) (holding that the U.S. Bureau of Reclamation's Environmental Assessment and its consideration of the cumulative effects, future impacts, and alternatives to the proposed drawdown project from Lake Roosevelt was adequate to comply with NEPA).

Lake Roosevelt ("Lake") is located above the Grand Coulee Dam on the Columbia River in Washington State. The U.S. Bureau of Reclamation ("Reclamation") manages the Lake in conjunction with various other Federal and State agencies. The Lake typically holds about 5 million acre-feet of water and the consortium of agencies responsible for managing water levels lower the Lake twice a year, once in the spring for flood control, and once in the summer to increase stream flows in the Columbia River. The State and Federal governments also divert 2.65 million-acre feet of water from the Lake to provide water to irrigate Washington farmland.

Due to increased water needs in the Columbia River Basin, Reclamation and various State agencies decided to evaluate options for increasing the water supply. In 2004, these groups entered into a memorandum of understanding to divert an additional 82,500 acre-feet of water from the Lake for municipal and industrial use, groundwater replacement, and increased flows downstream to benefit fish populations. The groups also agreed that an additional 50,000 acre-feet could be diverted in drought years to prevent water shortages.

In 2006, the Washington State Legislature passed the Columbia River Water Management Act ("CRWMA"). The CRWMA, recognizing the State's need to aggressively pursue development of the State's water supplies, provided for the release of the additional acre-feet of water listed in the 2004 memorandum. In accordance with the CRWMA the Washington State Environmental Policy Act, the Washington State Department of Ecology ("Ecology") prepared an environmental impact statement ("EIS"), which considered the environmental consequences of the draw-down project and alternatives to the project.

Shortly after Ecology issued the EIS, Reclamation applied to Ecology for, and received, permits to withdraw 82,500 acre-feet of water from the Lake for municipal, industrial, agricultural, and in-stream use. Reclamation then issued an Environmental Assessment (“EA”) evaluating the project as laid out in the 2004 memorandum of understanding, and in accordance with the CRWMA, and Ecology’s EIS. Reclamation then issued a finding of no significant impact, stating the project would not significantly affect the quality of the human environment. The Center for Environmental Law and Policy (“CELP”) sued, claiming that the EA was too late (in light of the fact that Reclamation had already obtained the permits for the drawdown) and therefore untimely, and included inadequate information regarding the cumulative and indirect effects of the project, and reasonable alternatives to the project.

The District Court for the Eastern District of Washington (“district court”) granted summary judgment in favor of Reclamation, holding that Reclamation’s EA combined with Ecology’s EIS were sufficient to satisfy the requirements of the National Environmental Policy Act (“NEPA”). Similarly, the district court held that, although it had obtained the water permits, because Reclamation still had discretion over whether to move forward with the project or not, its EA was not untimely. CELP appealed the district court’s decision to the Ninth Circuit Court of Appeals.

The court first addressed CELP’s claim that Reclamation’s completion of the EA was untimely. The court noted that an EA must be completed before the agency makes an irreversible and irretrievable commitment of resources. The court recognized that Reclamation had obtained the right to divert water from the Lake, but that Reclamation could still choose not to do so. Because Reclamation did not divert any additional water before the it completed the EA, the court held there was no irreversible and irretrievable commitment of resources, and Reclamation therefore completed the EA in a timely manner.

The court then considered CELP’s claim that Reclamation had not sufficiently considered the cumulative effects of the project when added to other past, present, and reasonably foreseeable actions, regardless of what person or agency takes the actions. The court agreed with CELP that the portion of the EA labeled “cumulative effects” was not sufficient to comply with NEPA. However, the court also noted that, throughout the EA, Reclamation had considered the cumulative effects of all relevant actions along the Columbia River. The court ultimately held that the EA taken its entirety and in conjunction with Ecology’s EIS (which was referenced in the EA) sufficiently considered the cumulative effects of the project and complied with NEPA.

Next, the court addressed whether Reclamation adequately considered the indirect effects of the project in order to sufficiently comply with NEPA. The court held that although Reclamation did fail to consider various indirect effects that could occur from related projects, those projects had yet to undergo their own NEPA review. Because the effects could not escape NEPA review at *some* stage, the Court held Reclamation did not violate NEPA when it excluded these effects from its EA.

Last, the court considered whether Reclamation's analysis of alternatives to the project was sufficient to comply with NEPA. The court noted that Reclamation had been working with Ecology throughout the entire project development process. Ecology's EIS considered and rejected five alternatives to the project and Reclamation referenced Ecology's EIS in its EA. The court ultimately held that because another document related to the same project had already considered the alternatives, the EA did not have to again evaluate those same alternatives. Therefore, the court held the alternatives discussed in Reclamation's EA complied with NEPA.

Accordingly, the court affirmed the district court's grant of summary judgment to Reclamation.

Alan Kitchen

STATE COURTS

COLORADO

Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist., 266 P.3d 401 (Colo. 2011) (*en banc*) (holding that a municipal service provider's protectable and unique interest in its right to reuse return flows from a wastewater treatment plant would be impaired if the provider were prohibited to intervene in prior litigation).

Cherokee Metropolitan District ("Cherokee") and Meridian Service Metropolitan District ("Meridian") are government bodies that provide water to residents and landowners within their boundaries. Upper Black Squirrel Creek Ground Water Management District ("UBS") is a government body that manages ground water withdrawals from the Upper Black Squirrel Creek designated ground water basin ("UBS basin") - from which Cherokee and Meridian both source water. In 1998, Cherokee and UBS began litigation over Cherokee's water rights in the UBS basin. The parties settled and entered a Stipulation and Release whereby Cherokee was required to deliver certain wastewater returns back into the UBS basin for recharge of the aquifer.

In 2003, Cherokee and Meridian entered into an intergovernmental agreement ("IGA") to build a new wastewater treatment facility to treat wastewater from both Cherokee and Meridian and return the water back into the UBS basin. In 2008, Cherokee and Meridian applied for a replacement plan with the Colorado Ground Water Commission ("Commission") to obtain replacement credit for the return flows from the wastewater treatment facility into the UBS basin. UBS filed a statement of objection with the Commission and a motion to dismiss the replacement plan, which the Commission denied. UBS then filed motions for declaratory judgment and injunctive relief.