

9-1-2005

## In re Operation of the Mo. River Sys. Litig., 418 F.3d 915 (8th Cir. 2005)

Kate Brewer

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Kate Brewer, Court Report, In re Operation of the Mo. River Sys. Litig., 418 F.3d 915 (8th Cir. 2005), 9 U. Denv. Water L. Rev. 191 (2005).

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***In re Operation of the Mo. River Sys. Litig.*, 418 F.3d 915 (8th Cir. 2005)** (holding the United States Army Corps of Engineers was exempt from state water quality standards where standards presented an obstacle to the Corps fulfilling its duty to maintain navigation of water).

Lake Sakakawea (“the Lake”) is a main stem reservoir located in North Dakota and created from Garrison Dam. North Dakota brought suit to enjoin the Corps from releasing water from the Lake into the Missouri River. The Corps sought to release the water so that it could maintain downstream navigation on the Missouri River pursuant to its duties under the FCA.

North Dakota alleged that lowering the water level of the Lake would violate its state water-quality standards enacted under § 1313 of the Clean Water Act (“CWA”). These standards designated the Lake as a “cold water fishery,” and required the Lake to sustain salmonid fish growth and associated water life. North Dakota further alleged the amount of water left in the Lake after reduction would not support a cold-water fishery ecosystem and therefore would frustrate the standard. The United States District Court for the District of Minnesota dismissed the complaint, reasoning that the Corps had sovereign immunity. North Dakota appealed the decision.

The U.S. Court of Appeals for the Eighth Circuit stated that the Corps is a federal agency and therefore had sovereign immunity. However, the court noted that if the Corps waived sovereign immunity, North Dakota could enforce its state water quality standards against the Corps. Although the CWA does state a limited waiver of sovereign immunity, there is a strong policy to construe such waivers strictly in favor of the sovereign. Section 1371 of the CWA expressly states, “[the CWA] shall not be construed as...affecting or impairing the authority of the Secretary of the Army... to maintain navigation.” The court held the statute unambiguously exempts the Corps from complying with the CWA in this narrow area of maintaining navigation, and a state cannot use its water-quality standard to control how the Corps releases water from the main stem reservoirs.

The court denied North Dakota’s argument that the Corps must comply with the CWA based on the legislative history of the 1977 amendments to the CWA. The court reasoned that the amendment retained the wording in the CWA providing for a navigation exception and that the unambiguous express words of a statute must prevail over legislative history.

Lastly, the court applied the principles of preemption to support its finding. In the FCA, Congress stated the primary purpose of the Missouri River main stem reservoir system was to provide flood control and down stream navigation. Of secondary importance was irrigation, recreation, fish and wildlife. In order to effectuate these purposes, Congress granted the Corps authority to balance the interests. The court

held that to allow states such as North Dakota to enforce their water-quality standards against the Corps when it is acting to balance these interests would be contrary to the intended purposes of the FCA. Therefore, the court upheld the decision of the district court dismissing North Dakota's complaint, based on the Corps' sovereign immunity and North Dakota's preemption from enforcing its state water-quality standards against the Corps.

*Kate Brewer*

### NINTH CIRCUIT

**Defenders of Wildlife v. U.S. Env'tl. Prot. Agency, 420 F.3d 946 (9th Cir. 2005)** (holding the Environmental Protection Agency acted arbitrarily and capriciously when it failed to consider impact on endangered species, as required by the Endangered Species Act, in transferring Clean Water Act National Pollution Discharge Elimination System authority to Arizona).

Defenders of Wildlife ("Defenders") challenged the Environmental Protection Agency's ("EPA") decision to transfer administration of the Clean Water Act ("CWA") National Pollution Discharge Elimination ("pollution permitting") System to Arizona. When deciding whether to transfer pollution permitting authority, the EPA relied on a biological opinion issued by the Fish and Wildlife Service ("FWS"), which was premised on the proposition that the EPA lacked authority to take into account the impact of transfer on endangered species and their habitat.

The court began by explaining the background of the applicable statutes. Under the CWA, the EPA has authority to issue permits for the discharge of pollutants into navigable waters through the pollution permitting system. The CWA further provides that states may apply to the EPA to administer the pollution permitting program within their borders, whereupon the EPA must determine whether the state has met nine specified criteria and "shall approve" applications that meet those criteria. Section 7 of the Endangered Species Act ("ESA") applies to all federal agencies carrying out actions in which they have discretionary involvement or control. It does not apply to state governmental bodies. Under section 7, federal agencies must determine if proposed actions may affect endangered species or their habitat and must then seek formal consultation with the FWS. As part of this process, the FWS issues a biological opinion analyzing direct and indirect effects of the proposed action to determine whether that action is likely to jeopardize endangered species or their habitats. Agencies rely heavily on biological opinions when making a final determination on a proposed action.