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Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
Jessica Bernardini &
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Editors' Note: This issue contains summaries of recent judicial opinions that may be of interest to members of the Environmental & Natural Resources Section.

A special thank you to our talented contributors: Allie Schauer, Sitka Tribe of Alaska; Brenden Catt, Assistant Attorney General, Utah Attorney General's Office; Dallas DeLuca, Markowitz Herbold PC; Greg Allen, Saalfeld Griggs, PC; and Ryan Shannon, Center for Biological Diversity.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Greater Hells Canyon Council v. Wilkes, No. 2:22-CV-00859-HL,
2023 WL 6443823 (D. Or. Aug. 31, 2023)

Linthicum v. Federal Energy Regulatory Commission, No. 1:23-CV-00834-AA,
2023 WL 5275491 (D. Or. Aug. 16, 2023)

Smith v. Tumalo Irrigation District, No. 6:20-CV-00345-MK,
2023 WL 6004234 (D. Or. Aug. 29, 2023), *report and recommendation adopted*,
No. 6:20-CV-00345-MK, 2023 WL 7130302 (D. Or. Oct. 30, 2023)

United States v. Klamath Drainage District, No. 1:22-CV-00962-CL,
2023 WL 5899910 (D. Or. Sept. 11, 2023)

Wild v. United States Forest Service, No. 1:22-CV-01007-MC,
2023 WL 5002473 (D. Or. Aug. 4, 2023)

***Greater Hells Canyon Council v. Wilkes*, No. 2:22-CV-00859-HL, 2023 WL 6443823 (D. Or. Aug. 31, 2023);** *summarized by* Greg Allen, Saalfeld Griggs, PC.

Background

In 1994, the U.S. Forest Service ("Forest Service") adopted a set of protective standards for six national forests called the "Eastside Screens." The Eastside Screens were meant to be a short-term set of standards until the Forest Service could conduct a more thorough Environmental Impact Statement ("EIS"), but the Eastside Screens have remained in place for almost 30 years. At issue in this case was an amendment to the Eastside Screens ("Amendment") that changed a prohibition on cutting trees of a certain diameter to a more flexible guideline that allowed for more Forest Service discretion. The Forest Service conducted an Environmental Assessment ("EA") and issued a Finding of No Significant Impact ("FONSI"), concluding that the Amendment was unlikely to affect endangered or aquatic species, without holding an objection period.

A coalition of environmental groups ("Plaintiffs") sued the Forest Service under the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA"), and the Endangered Species Act ("ESA").

Ripeness

As an initial matter, the court addressed the issue of ripeness before addressing the merits of the case. The Forest Service argued that Plaintiffs' claims were not ripe because their claims were not based on the Eastside Screen's site-specific implementation but rather on "speculation." Plaintiffs argued that their claim was procedural and thus ripe for review. The court agreed with Plaintiffs; under Ninth Circuit caselaw, procedural challenges are ripe when the procedural failure occurs.

Objection Period Violations under NFMA

Plaintiffs argued that the Forest Service violated NFMA by failing to hold the objection process. The Forest Service argued that the undersecretary's signature on the decision notice could exempt the Amendment from the objection process. The court agreed with Plaintiffs; under the plain language of 36 CFR § 219.51(b), the undersecretary's signature could not exempt the Amendment from the objection period and the Amendment was subject to the objection process.

Endangered Species Act No Effect Determination

Plaintiffs next argued that the Forest Service's finding that the Amendment would not affect endangered aquatic species was arbitrary and capricious in violation of the ESA. The Forest Service did not analyze the Amendment's effect on endangered aquatic species, reasoning that the Amendment necessarily did not affect aquatic species because the Amendment did not change a pre-existing, stronger regulation that regulated logging in riparian areas. Plaintiffs, on the other hand, asserted that there could be instances where the Amendment would remove a limitation of tree diameter logging in riparian areas found in the pre-amendment standard, as well as affect logging *near* riparian areas that would affect aquatic species that the Forest Service failed to analyze at all. The court agreed with Plaintiffs; the Forest Service arbitrarily and

capriciously assumed that the Amendment would have no effect on aquatic species in the face of contrary evidence in the record.

Environmental Impact Statement Required Under NEPA

Plaintiffs next argued that the Forest Service should have conducted an EIS due to four factors: (1) significant context; (2) uncertainty; (3) scientific controversy; and (4) adverse effect on endangered aquatic species. The court found that given the massive scope of the project—7.8 million acres of national forest—that the context weighed toward requiring an EIS. Under the uncertainty prong, the court found that Plaintiffs raised substantial questions because the Amendment replaced a "clear and binding forest plan standard" with a flexible guideline that allowed for more Forest Service discretion, also weighing toward requiring an EIS. Under scientific controversy, the court gave deference to the Forest Service and found that the agency sufficiently analyzed the alternative science offered by Plaintiffs' experts. And under the effect on endangered aquatic species, the court found that the Forest Service failed to analyze the Amendment's full impact on logging in riparian areas. Weighed altogether, the court concluded that the Amendment necessitated an EIS.

Hard Look Under NEPA

Lastly, Plaintiffs argued that the Forest Service failed to take a "hard look" as required by NEPA in two ways: (1) by assuming the guidelines would be implemented as a standard; and (2) by assuming the Amendment would have no effect on aquatic species. On the first assertion, the court agreed with Plaintiffs, finding that the Forest Service should have analyzed how a flexible guideline—instead of a binding standard—would affect the environment, rather than assuming that the guidelines would always be followed. On the second assertion, the court held that the Forest Service should have analyzed the Amendment's effects on aquatic species, instead of assuming without analysis that not changing the existing riparian area logging standard would have no effect on aquatic species. Thus, the court concluded that the Forest Service failed to take a "hard look" under NEPA.

Remedy

Due to the Forest Service's multiple, serious errors, the court ordered that the Forest Service vacate its EA and FONSI, and conduct an EIS.

***Linthicum v. Federal Energy Regulatory Commission*, No. 1:23-CV-00834-AA, 2023 WL 5275491 (D. Or. Aug. 16, 2023);** *summarized by* Brenden Catt, Assistant Attorney General, Utah Attorney General's Office.

The views and opinions expressed in this summary are those of the author and do not necessarily reflect the views and opinions of the Utah Attorney General or the Utah Attorney General's Office.

Factual Background

The Klamath River flows from its headwaters in Southern Oregon through Northern California and into the Pacific Ocean. Along this journey, the Klamath River's flow is momentarily impeded by four dams. The first of those dams—J.C. Boyle—is located in Oregon, while the remaining three dams—Copco No. 1, Copco No. 2, and Iron Gate—are located in California (collectively, the "dams"). The dams are regulated by the Federal Energy Regulatory Commission ("FERC") and part of the Klamath Hydroelectric Project. While the dams operated for many years under licenses issued by PacifiCorp, PacifiCorp ultimately negotiated with stakeholders to remove the dams. Those stakeholders agreed that the Klamath River Restoration Corporation ("KRRC") would manage the removal of the dams.

Legal Background

In 2021, FERC issued an order approving the transfer of the dams' licenses from PacifiCorp to Oregon, California, and KRRC. In 2022, FERC, through a second order, approved the surrender of the licenses and removal of the dams. FERC's second order evaluated the implications of dam removal on Section 7(a) of the Wild and Scenic Rivers Act (the "Act"), which states that FERC "shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works . . . on or directly affecting any river which is designated" as part of the wild and scenic river system. 16 U.S.C. § 1278(a). FERC concluded that Section 7(a) did not apply because it was not licensing the construction of any project.

Plaintiffs, pro se litigants from Oregon and California, filed suit against FERC, the State of Oregon, and the State of California (the "Defendants") alleging that FERC's second order violated Section 7(a) of the Act. Plaintiffs initially moved the court to preliminarily enjoin the State of California and the State of Oregon (the "States") from (1) activities related to the removal of the dams; (2) authorizations of funding related to the removal of the dams; and (3) expenditures of monies related to the removal of the dams.

Plaintiffs' complaint bifurcated their claims. As to FERC, Plaintiffs sought a declaration that its approval of any project to remove dams along the Klamath River was contrary to the will of Congress, as expressed in the Act, and therefore contrary to law. Plaintiffs also sought a court order reversing FERC's order approving the removal of the dams, or that the court remand the question to FERC for further review. As to the States, Plaintiffs sought a court order directing the States to restore damage to existing infrastructure and refrain from activities related to the removal of the dams. Plaintiffs also sought an injunction forbidding the States from current or future financial activities related to removing the dams.

The Defendants responded to the preliminary injunction by questioning the court's subject matter jurisdiction. The States filed motions to dismiss the complaint on the grounds that the court lacked subject matter jurisdiction, the States were immune from suit under the Eleventh

Amendment to the United States Constitution, and Plaintiffs failed to state a claim under Federal Rule of Civil Procedure 12(b)(6).

The Court's Analysis

1. *Plaintiffs' Preliminary Injunction*

In response to Plaintiffs' request for preliminary injunction, Defendants raised the issue of subject matter jurisdiction. Under the Federal Power Act, a party aggrieved by an order issued by FERC "may obtain a review of such order *in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located* or has its principal place of business . . ." 16 U.S.C. § 825l(b) (emphasis added). Here, Plaintiffs sought review of FERC's order in district court, not the court of appeals.

Despite this clear statutory and precedential directive, Plaintiffs pursued two avenues to evade the application of 16 U.S.C. § 825l(b). First, Plaintiffs argued that 16 U.S.C. § 825l did not apply to them because they were not "parties." Unconvinced, the court noted that only parties can challenge a FERC decision. Second, Plaintiffs claimed that the court has jurisdiction under 16 U.S.C. § 825p, not 16 U.S.C. § 825l. Again, the court found this argument unpersuasive—Plaintiffs did not argue that FERC violated its order, which is required under 16 U.S.C. § 825p.

Absent subject matter jurisdiction, Plaintiffs could not demonstrate a likelihood of success on the merits or serious questions going to the merits of their claims. Accordingly, the court denied Plaintiffs' motion for preliminary injunction for lack of subject matter jurisdiction.

2. *The States' Motions to Dismiss*

The States filed motions to dismiss on the grounds that the court lacked subject matter jurisdiction, the Eleventh Amendment barred Plaintiffs' claims, and Plaintiffs failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). The court granted the States' motions to dismiss.

a. *The court lacked subject matter jurisdiction.*

As discussed above, the Federal Power Act expressly provides the forum in which a party is to challenge an order issued by FERC. A party aggrieved by an order issued by FERC is to seek review in the "court of appeals for any circuit wherein the licensee or public utility to which the order relates is located." 16 U.S.C. § 825l(b). Thus, the court lacked subject matter jurisdiction.

b. *The Eleventh Amendment barred Plaintiffs' claims against the states.*

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. However, a state's Eleventh Amendment immunity does not extend to

circumstances in which the state consents to suit or Congress has abrogated such immunity. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990).

Plaintiff Linthicum is a citizen of Oregon, and Plaintiff Intiso is a citizen of California. Together, these Plaintiffs brought suit against Oregon and California. Such suit would only be permissible if the States consented to suit or Congress had acted to abrogate the States' immunity. Plaintiffs demonstrated neither. Accordingly, Plaintiffs' claims against the States were barred by the Eleventh Amendment.

c. Plaintiffs failed to state a claim under Federal Rule of Civil Procedure 12(b)(6).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges a pleading for failure to state a claim upon which relief can be granted. To overcome such a motion, a pleading must allege facts that support a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

When assessing the sufficiency of a complaint's allegations, a court may consider a document outside of a complaint if the document is judicially noticed. *Louisiana Mun. Police Employees' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1063 (9th Cir. 2016). A court may judicially notice a fact if it is not subject to reasonable dispute because it is "generally known within the trial court's territorial jurisdiction" or it "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). California sought to have the court judicially notice seven exhibits—five of which were public documents pertaining to the administrative matters that preceded the dam removal project. The two remaining exhibits were documents from the Superior Court of California related to Plaintiff Intiso's attempt to litigate the removal of the dams in California state court. The court judicially noticed the seven exhibits, which were persuasive in its assessment of the allegations contained in Plaintiffs' complaint.

Through the course of the case, Plaintiffs all but conceded that they did not state a claim against the States. Rather, Plaintiffs named the States in their suit with the hopes that, if the court were to find in their favor, the States would be similarly enjoined from any activities related to removing the dams. The court concluded that injunctive relief is not a cause of action but a form of relief, and Plaintiffs had therefore failed to state a claim against the States.

Conclusion

Ultimately, the Court denied Plaintiffs' motion for injunctive relief, granted the States' motions to dismiss, and dismissed Plaintiffs' claims against FERC *sua sponte*. The court also concluded that Plaintiffs' claims were beyond reprieve by amending the complaint or alleging new facts, and therefore dismissed their claims without prejudice but without leave to amend.

The removal of the dams has remained on schedule. KRRC oversaw the beginning stages of removing Copco No. 2 in June 2023. The process to remove the remaining three dams will begin

in 2024. While the Klamath River is projected to flow unimpeded by the end of 2024, restoration of its ecosystem will continue for many years.

***Smith v. Tumalo Irrigation District*, No. 6:20-CV-00345-MK, 2023 WL 6004234 (D. Or. Aug. 29, 2023), *report and recommendation adopted*, No. 6:20-CV-00345-MK, 2023 WL 7130302 (D. Or. Oct. 30, 2023);** *summarized by* Dallas DeLuca, Markowitz Herbold PC.

Overview

The Findings and Recommendation ("F&R") rejects claims that several local landowners brought under the National Environmental Policy Act ("NEPA") and the Watershed Protection and Flood Prevention Act that challenge the Tumalo Irrigation District Irrigation Modernization Project (the "Project"). The F&R recommends that the court deny Plaintiffs' motion for partial summary judgment and grant the motion for partial summary judgment from the two federal defendants concerning those two federal claims. The court subsequently adopted the F&R. 2023 WL 7130302 (D. Or. Oct. 30, 2023)

Procedural History

The Tumalo Irrigation District ("District") manages the water resources in an area northwest of Bend. "The stated purpose of the Project, approved by defendant Natural Resource Conservation Service ('NRCS') in 2018, is to update antiquated and inefficient open-canal irrigation waterways, to eliminate seepage water loss in the District's system, improve water delivery, benefit fish and aquatic habitat, and improve public safety." *Id.* at *1. Plaintiffs own property that will be burdened by the District's easements and allege that the Project will cause their property to significantly lose value. *Id.*

Plaintiffs filed claims under NEPA and the Watershed Protection and Flood Prevention Act, and they also filed state law claims for private nuisance and improper expansion of the District's easements. In 2022, the court adopted the Findings and Recommendations to grant the District's motion for partial summary judgment against the state law claims and to deny the Plaintiffs' motion for partial summary judgment on those same claims. *Smith v. Tumalo Irrigation Dist.*, No. 6:20-CV-00345-MK, 2022 WL 3357678, at *1 (D. Or. May 2, 2022), *report and recommendation adopted*, No. 6:20-CV-00345-MK, 2022 WL 4551898 (D. Or. Sept. 29, 2022). Earlier, the district court denied Plaintiffs' motion for a preliminary injunction to stop construction because, among other reasons, the court concluded that Plaintiffs were unlikely to prevail on any of their claims. *Smith v. Tumalo Irrigation Dist.*, 500 F. Supp. 3d 1148 (D. Or. 2020). The Ninth Circuit dismissed the appeal of that decision as moot because the project was completed. *Smith v. Nat. Res. Conservation Serv.*, No. 20-36057, 2021 WL 1529107 (9th Cir. Apr. 13, 2021).

In the 2023 motions at issue in the F&R, Plaintiffs and the two Federal Defendants (the NRCS and its state conservationist in his official capacity) filed cross-motions for partial summary judgment on the NEPA claim and the Watershed Protection Act.

The Court Found No Violations of NEPA

Plaintiffs NEPA claim is predicated on their assertion that the approval process for the Environmental Assessment ("EA") for the Project was arbitrary and capricious, in excess of Federal Defendants' authority under the Administrative Procedures Act, and an abuse of discretion. Plaintiffs also challenged the EA under both NEPA and the Watershed Protection Act because Federal Defendants did not provide an adequate cost-benefit analysis and because the Project will allow for low-flow hydro power development. 2023 WL 6004234, at *1.

***Smith v. Tumalo Irrigation District*, No. 6:20-CV-00345-MK, 2023 WL 6004234 (D. Or. Aug. 29, 2023), *report and recommendation adopted*, No. 6:20-CV-00345-MK, 2023 WL 7130302 (D. Or. Oct. 30, 2023);** *summarized by* Dallas DeLuca, Markowitz Herbold PC.

In analyzing the NEPA claim, the F&R first rejected the argument that the EA failed to consider a reasonable range of alternatives, "including alternatives that would have accomplished the goal of improving water conservation and delivery efficiency without destroying the environmental character, functionality, and economic value of Plaintiffs' properties." *Id.* at *2. The court described how in the EA Defendants had considered a range of alternatives, and noted that defendants did not have to select the best possible alternative, "only that their consideration of alternatives constitutes a 'reasoned choice.'" *Id.* (citation omitted). Defendants also adequately explained their rejection of certain alternatives, such as infeasibility and failure to address the public safety purpose of the Project. *Id.*

Second, the F&R next rejected Plaintiffs' argument that the EA was deficient because it did not address the plan to develop low-flow hydroelectric power. The District discussed hydroelectric development in the briefs during the preliminary injunction motion but it was not addressed in the administrative record. The court explained that it would not consider extra-record material because that would lead to the court substituting its judgment for that of the agency, and it rejected Plaintiffs' argument. *Id.* at *3-4.

Third, the F&R disagreed with Plaintiffs' contention that the EA did not adequately address "cumulative effects." The court found the EA did address cumulative effects in two paragraphs, which included "a table of quantified effects within the relevant areas." *Id.* at *4. Nothing more in-depth was required under controlling precedent. *Id.*

Fourth, the F&R rejected Plaintiffs' cost-benefit claim because, simply put, NEPA does not require one. "'NEPA was enacted to protect the environment, not a party's economic interest.'" *Id.* at *5 (quoting opinion denying the preliminary injunction motion).

Fifth and finally, the F&R rejected Plaintiffs' contention that the Project's goal of addressing public safety risks was a "sham justification." The F&R noted that the record adequately supported that replacing open canals with pipes would reduce public safety risks from drowning, and that the record included a report of a boy drowning in the open canals. *Id.* at *5.

<u>The Court Found No Violations of the Watershed Protection Act</u>

The F&R first addressed Plaintiffs' claim that the Project should not have received federal funding because such funding is ineligible for projects that could be installed by landowners. The court noted that Plaintiffs had not raised this argument at the agency or even in their complaints before the court, and thus, the court should reject this claim that had never been pleaded. *Id.* at *6.

Next and finally, the F&R rejected Plaintiffs' argument that EA failed to adequately provide a cost-benefit analysis, an analysis that the Watershed Protection Act requires. The F&R explained that Federal Defendants provided a more in-depth cost-benefit analysis in a separate National Economic Development Analysis and the court would defer to the agency's expertise in that analysis. *Id.* at *7.

***Smith v. Tumalo Irrigation District*, No. 6:20-CV-00345-MK, 2023 WL 6004234 (D. Or. Aug. 29, 2023), *report and recommendation adopted*, No. 6:20-CV-00345-MK, 2023 WL 7130302 (D. Or. Oct. 30, 2023);** *summarized by* Dallas DeLuca, Markowitz Herbold PC.

Conclusion and Related Case

On October 30, 2023, Judge McShane adopted Magistrate Judge Kasubhai's F&R. 2023 WL 7130302 (D. Or. Oct. 30, 2023). As the court noted in its opinion denying the preliminary injunction, the open canals (which the Project replaced) lost approximately 50 percent of their water to evaporation and seepage. The Project thus should save water in the high desert.

This is not the only lawsuit objecting to a Deschutes River Basin irrigation district replacing open canals with pipes. Local property owners in 2022 filed a lawsuit against the Arnold Irrigation District which has a project approved by state and federal agencies to replace 12 miles of open canals with pipes. Judge McShane denied those plaintiffs' motion for a preliminary injunction to stop construction because those plaintiffs were also unlikely to succeed on the merits of their NEPA and easement claims. *Save Arnold Canal v. Arnold Irrigation Dist.*, No. 6:22-CV-01462-MK, 2023 WL 5447291, at *2 (D. Or. Aug. 24, 2023). The court also affirmed an earlier findings and recommendation dismissing the private nuisance and easement claims. *Save Arnold Canal v. Arnold Irrigation Dist.*, No. 6:22-CV-01462-MK, 2023 WL 4474653, at *5 (D. Or. June 8, 2023), *report and recommendation adopted*, No. 6:22-CV-01462-CL, 2023 WL 4461762 (D. Or. July 11, 2023).

***United States v. Klamath Drainage District*, No. 1:22-CV-00962-CL, 2023 WL 5899910 (D. Or. Sept. 11, 2023);** *summarized by* Allie Schauer, Sitka Tribe of Alaska.

Background

The Klamath Basin is an expansive area of interconnected waters, wildlife, and wilderness in southern Oregon and northern California. The Basin is home to several species listed under the Endangered Species Act ("ESA") and includes designated critical habitat for some of those species.

Authorized by the U.S. Department of the Interior, the Bureau of Reclamation ("Reclamation") has been engaged since 1905 in the Klamath River Basin Project ("Klamath Project"), an irrigation project authorized under the Reclamation Act of 1902. In its operation of the Klamath Project, Reclamation must weigh three competing interests. First in priority are those interests of the Klamath, Hoopa Valley, and Yurok Tribes, which include rights to Reclamation's compliance with the ESA and other water level and quality standards that support thriving fish populations. Second in priority are Reclamation's obligations to act in a manner consistent and compliant with the ESA, especially in terms of maintaining the water elevation levels and instream flows needed to support the ESA-listed species in the Klamath Basin. Third and subservient to the two prior interests are those of contracting irrigators, who rely on the Klamath Project's irrigation for their crops. Reclamation further weighs and prioritizes irrigators' contracts in a categorical hierarchy.

Reclamation publishes an annual water distribution plan, which describes how much water each interested party may receive and how that allocation meets the needs of the Tribes, the ESA obligations, and the contracting irrigators. In years where drier conditions have left a more limited water supply, Reclamation publishes an additional drought plan.

The Klamath Drainage District ("KDD"), which falls in the irrigator category of interested parties, has had three contracts with the United States allowing the KDD to divert water from the Klamath Basin at Ady Canal to farming lands in the district. The first contract was entered into in 1917: the United States agreed to close certain gates along the Klamath Strait to allow KDD to reclaim land for farming in exchange for KDD paying the partial cost of the reclamation. The second contract in 1921 expanded on the first: the United States agreed to deliver a "sufficient" quantity of irrigation water—up to 27,500 acre-feet—from the Klamath Basin to KDD in exchange for KDD paying Reclamation for the maintenance and operation of the Klamath Project.

The third contract in 1943 ("1943 Contract") superseded the prior contracts and governs today. In the 1943 Contract, the United States agreed to deliver irrigation water in the amount that could be "used beneficially" for irrigation, again up to 27,500 acre-feet. This 1943 Contract also stated that in periods where there is a shortage of water in the Klamath Basin, the supply of deliverable water would be modified and distributed as the Secretary and/or the U.S. officer in charge of the Klamath Project sees fit.

In addition to this operable 1943 Contract, KDD was granted a water appropriation permit ("Permit") from the State of Oregon in 1977, which it maintains today. The Permit allows KDD to divert up to 57,702.9 acre-feet of water from the Klamath River, and was requested by KDD as a supplement to its contract with the United States. In response to the Permit, Reclamation sent a letter to KDD in 1978 to notify KDD that the Permit would be of low priority in its irrigator

hierarchy, such that, in periods of water supply shortage, there would be less water available to KDD under the Permit than the amount stated therein.

In 2012, issues arose between Reclamation and KDD about the amount of water that KDD was diverting from the Klamath Project. Reclamation inquired into the nature of KDD's Permit with the State of Oregon. As a result of this inquiry, Reclamation notified KDD that the Permit was supposed to be the primary source of KDD's water diversion, with the 1943 Contract supplementing the Permit and only allowing for diversion of Klamath Project water after the full amount available through the Permit was utilized. Reclamation also stated that this additional water would only be made available to KDD if Reclamation determined that there were available water supplies.

The Klamath Basin experienced drought conditions for the several years following Reclamation's letter. In 2014, 2015, 2018, and 2021, Reclamation published drought plans for annual distribution of Klamath Project water. Despite the diversion limits prescribed in these drought plans, KDD did not alter their diversion of Klamath Project water. In the 2022 drought plan, Reclamation specifically instructed KDD to not divert any Klamath Project water, and instead directed KDD to divert water as allowed solely under its Permit. Again, KDD proceeded to divert Klamath Project water under the 1943 Contract.

The Court's Analysis

The United States filed this case against KDD for breach of the 1943 Contract. Both parties filed Motions for Summary Judgment.

The court first addressed KDD's argument that the United States' claims were moot, as the 2022 drought plan is no longer in effect. The court found that the United States' claims were subject to the "capable of repetition, yet evading review" exception to mootness, as the drought plans are annual and thus exist for too short a period for judicial review. Further, it was reasonable to expect the United States to have the same claim again, as KDD had not complied with the drought plans for multiple years.

Next, the court addressed the parties' breach of contract arguments. The United States argued that KDD breached the 1943 Contract by diverting water in excess of what was allocated to it and failing to follow the drought plans. KDD argued that the United States breached the 1943 Contract by wrongfully considering the drought plans "rules and regulations" as under Article 35 of the contract, failing to give APA-required notice and comment opportunities for the drought plans, and unilaterally amending the terms of the 1943 Contract with the drought plans. Additionally, KDD argued that its 1977 Permit was with the State of Oregon, and thus not subject to federal control.

According to the court, the dispute centered around two questions arising from fundamentally disagreed-upon interpretations of the 1943 Contract and the 1977 Permit: (1) whether Reclamation can allocate KDD zero of its potential 27,500 acre-feet of Klamath Project water under the 1943 Contract; and (2) if the terms of the 1943 contract preclude KDD from diverting water under its Permit.

***United States v. Klamath Drainage District*, No. 1:22-CV-00962-CL, 2023 WL 5899910 (D. Or. Sept. 11, 2023);** *summarized by* Allie Schauer, Sitka Tribe of Alaska.

In response to the first question, the court found that the United States can allocate zero of the maximum 27, 500 acre-feet of Klamath Project water in compliance with the 1943 Contract. Following the plain language and common usage canons of interpretation, the court found that the term “rules and regulations” in the Contract was clear and unambiguous, and in relation to the Reclamation Act, allowed for Reclamation’s discretionary annual and drought plans. Support for this finding was also apparent the clear terms of Article 14 of the Contract, which clearly and unambiguously allowed for Reclamation to modify the amount of water diverted to KDD in the event of a shortage of water. The court also found that, as the Contract predated the APA and is outside the scope of the APA’s procedural requirements, Reclamation had no obligation to follow the APA’s requirements in its publication of annual or drought plans. The court confirmed that Reclamation underwent all otherwise-necessary steps for approval for its drought plans to be valid.

For the second question, the court found that the 1943 Contract’s terms, and the fact that KDD is a contracting irrigator with the Klamath Project, preclude KDD’s diversions under the 1977 Permit. The court stated that the doctrine of conflict preemption allows for the preemption of state laws when those laws conflict with federal law. The federal ESA was passed with the purpose of protecting species from extinction and promoting the recovery of endangered and threatened species. As Reclamation has the duty to adhere to its obligations under the ESA by managing water diversion in a way that meets the needs of ESA-listed species, Reclamation must be allowed to decrease water allocations to all interested parties during times of drought, and those decreases preempt state water permit laws. In meeting the needs of the three competing interests of the Klamath Basin and following its irrigator hierarchy, the court thus found that Reclamation may prioritize and decrease water allocations to KDD and other irrigators in its annual and drought plans.

Further, the court found that when KDD continued to divert water after Reclamation’s drought plans limited their diversion, KDD breached its contractual obligations to adhere to Reclamation’s plans.

Conclusion

KDD’s Motion for Summary Judgment was denied and the United States’ Motion was granted. The court refrained from issuing a declaratory judgment, but issued a permanent injunction against KDD from diverting water from the Klamath River when Reclamation has not authorized such diversions.

***Wild v. United States Forest Service*, No. 1:22-CV-01007-MC, 2023 WL 5002473 (D. Or. Aug. 4, 2023);** *summarized by* Ryan Shannon, Center for Biological Diversity.

Conservation Groups sued the Forest Service over alleged violations of the APA and NEPA regarding the approval of three commercial logging projects under a NEPA categorical exclusion known as CE-6. *Id.* at *1. The Conservation Groups challenged whether the logging projects could be covered by CE-6 and whether CE-6 could be applied to commercial logging projects generally. *Id.*

Generally, NEPA requires federal agencies to analyze the environmental effects of any "major Federal actions significantly affecting the quality of the environment." *Id.* (citing *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 987 (9th Cir. 2020) ("*EPIC*"). "An agency can comply with NEPA in three ways: by preparing an Environmental Impact Statement ("EIS"), by preparing an Environmental Assessment ("EA"), or through a categorical exclusion ("CE")." *Id.* "The use of a CE is permitted for 'actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect." *Id.* (quoting *EPIC*, 968 F.3d at 988). CE-6, the categorical exclusion at issue in this case, allows for:

Timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction. Examples include, but are not limited to:

> (i) Girdling trees to create snags;
> (ii) Thinning or brush control to improve growth or to reduce fire hazard including the opening of an existing road to a dense timber stand;
> (iii) Prescribed burning to control understory hardwoods in stands of southern pine; and
> (iv) Prescribed burning to reduce natural fuel build-up and improve plant vigor.

36 C.F.R. § 220.6(e)(6).

The stated purposes of the three projects in question were wildlife habitat restoration, and the improvement of forest stand conditions. *Oregon Wild*, 2023 WL 5002473 at *2. Because the Forest Service approved the projects under CE-6, it did not prepare an EIS or EA. *Id.* at *3. Relying on a recent Ninth Circuit opinion, the court found that "the language of 'CE-6 unambiguously allows commercial thinning.'" *Id.* at *5 (quoting *Mt. Cmtys. for Fire Safety v. Elliott*, 25 F.4th 667, 675 (9th Cir. 2022). Thus, the Conservation Groups could not attack the use of CE-6 based solely on the project's use of commercial thinning. *Id.*

The court also rejected the Conservation Groups challenge based on acreage, finding that "[l]ike the Ninth Circuit in *Mountain Communities*, … the plain language of CE-6 [is] clear on this issue. It contains no acreage limit." *Id.* In doing so, the court rejected the Conservation Group's attempt to analogize their case to *EPIC*, finding that EPIC and its progeny "involved an entirely different categorical exclusion [addressing road repair and maintenance] with different limiting criteria." *Id.* Ultimately, the court found that "it [was] apparent that the activities involved in the [three projects fell] squarely within those permitted by CE-6." *Id.* at *6.

Regarding the Conservation Groups' facial challenge to CE-6 as being fatally flawed because the Forest Service never determined that commercial logging has no significant impacts when it

promulgated CE-6, *id.*, the court found that their challenge was time-barred by the six-year statute of limitations for challenges to agency actions under the APA. *Id.* at *7 (citing 28 U.S.C. § 2401(a)). Noting that NEPA is a procedural statute, the court found that the Conservation Groups' claim that the Forest Service failed to make allegedly required findings when it promulgated CE-6 was necessarily a procedural claim regarding a procedural violation relating back to CE-6 promulgation in 1992. *Id.* at *8. Being outside of the six-year statute of limitations, their claim was time-barred. *Id.*