

NINTH CIRCUIT FAVORS SALMON IN CALIFORNIA WATER BATTLE

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A unanimous three-judge Ninth Circuit panel ruled that the Department of Interior (“DOI”) and the Bureau of Reclamation (“Bureau”) had both the right and the obligation to release water to preserve a Native American fishing ground and prevent salmon die-off downstream. -Central to this case is the balancing act between Congressional goals to maintain and protect fisheries (environmental objectives) and the state-wide need for water (commercial objectives).-

Two congressional acts, both of which call for the protection and/or maintenance of fisheries as well as providing water for the Central Valley, played a key role in the Ninth Circuit’s decision: the Act of August 12, 1955 (the “1955 Act”) and the Central Valley Project Improvement Act (“CVPIA”).- The primary purpose of the 1955 Act is to provide water for the Central Valley.- However, Congress also specifically directed the Secretary of the DOI (“Secretary”) to preserve and propagate fish and wildlife.- Similarly, the CVPIA is a Congressional act that seeks “to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins,” while also seeking “to achieve a reasonable balance among competing demands for use of Central Valley Project water.”- Specifically at issue was section 3406(b)(23), which called for a permanent water release that would serve only the Trinity River basin, and section 3411(a), which required the Bureau to comply with state water permitting requirements.

In late summer 2013, the Bureau proposed releasing an additional 62,000 acre-feet of water from the Lewiston Dam in the late summer to reduce the likelihood of a mass fish die-off in the lower Klamath River.- The release would have been above and beyond the amount designated in a water release schedule that was devised to solely benefit the Trinity River basin.

Plaintiffs, water contractors serving the Central Valley, sued the DOI, Bureau, and individuals working within these agencies (the “federal defendants”) and argued that in light of the record drought in California—which only recently ended in Northern California—the augmented release to protect salmon populations imposed a “steep cost upon the people and environment” in California’s Central Valley.- The Hoopa Valley Tribe, the Yurok Tribe, the Pacific Coast Federation of Fishermen’s Association (“Pacific Coast Federation”), and the Institute for Fisheries Resources intervened as defendants (collectively, the “intervenor defendants”), arguing that the Bureau had the authority to release water to protect fish populations in the lower Klamath River, particularly in light of the Tribe’s dependency on fishery resources, as well as the commercial fishermen and communities who rely on healthy rivers and healthy salmon populations.-

Plaintiffs alleged that the federal defendants violated four statutes in implementing the flow augmentation release: (1) the Endangered Species Act (“ESA”); (2) the National Environmental Protection Act (“NEPA”); (3) CVPIA § 3411(a) and 43 U.S.C. § 383 (the “Reclamation Act”); and (4) CVPIA § 3406(b)(23).- The district court granted the federal defendants’ motion for summary judgment on all four claims.- However, it also concluded that the 1955 Act did authorize the federal defendants to implement the 2013 flow augmentation increase to benefit fish in the lower Klamath. -Federal defendants and the intervenor defendants appealed the ruling regarding the 1955 Act, and the water contractors appealed all of the claims except the NEPA claim. -

The Ninth Circuit reversed in part and affirmed in part.- First, reversing the district court, the court held that pursuant to the 1955 Act, the Bureau had power to release water to preserve a Native American fishing ground and prevent salmon die-off downstream.- Although the

principal purpose of the 1955 Act was to provide water for the Central Valley, the court noted that the law also authorizes and directs the Secretary to “adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including . . . the maintenance of the flow of the Trinity River below the diversion point.”- Accordingly, even if Congress, when it enacted the 1955 Act, did not contemplate a mass fish die-off or the need for flow augmentation to prevent it, the general language of the 1955 Act authorized the release.

Second, affirming the district court, the court held that the Bureau did not violate the Reclamation Act or CVPIA § 3411(a) by implementing the flow augmentation release without obtaining a modification in its water rights permits prior to reallocating water to a new place of use. -Because the Klamath River is not listed as an approved place of use, plaintiffs argued that the defendants were required to modify the state water right permits.- The court disagreed because California Fish & Game Code § 5937 creates an exception to the permit change requirement that not only allows, but also requires, the Bureau to allow sufficient water to pass the Lewiston Dam to maintain the fish below the dam.- Thus, the Ninth Circuit affirmed the district court’s holding that, because the 2013 flow augmentation release fell under the section 5937 exception, the Bureau did not violate the Reclamation Act or CVPIA § 3411(a).

Third, affirming the district court, the court held that the flow augmentation release did not violate CVPIA § 3406(b)(23), which sets a minimum and maximum amount of water that the Bureau may release for the Lewiston Dam, because section 3406(b)(23) is geographically limited to the Trinity River basin.- Thus, any water released to aid areas outside the Trinity River basin is not subject to the water release schedule, including the maximum cap of water that can be released.

Finally, the court did not reach the merits of the ESA claim because the plaintiffs did not have standing.

Notwithstanding this year’s wet winter and the Governor’s recent declaration that the California drought emergency is over, it is likely that the “fish vs. human” battle for water will continue in the coming years.- The California environmental attorneys at Bick Law LLP will continue to monitor litigation regarding the competing demands for water in the West.

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