Federal Circuits Rule on Bureau of Reclamation Duties

In federal cases arising out of Bureau of Reclamation (USBR) projects in California, the 9th Circuit and the Federal Circuit ruled in USBR’s favor. The courts held that USBR efforts to address environmental and fishery needs did not violate the rights of the water agencies or farmers that its projects serve.

Casitas. In a case arising out of USBR’s operation of the Ventura River Project, the Federal Circuit rejected Casitas Municipal Water District’s claim of an unconstitutional taking without just compensation. A federal ESA biological opinion required construction of a fish ladder and sufficient bypass flows to allow ESA-listed steelhead to swim above Robles Diversion Dam. Casitas filed a contract claim for construction costs and a takings claim for the bypassed water. (The Circuit had previously upheld the dismissal of the contract claim.)

In this February decision, the Circuit affirmed the Court of Federal Claims (CFC) dismissal of the Casitas takings claim due to its failure to show that it had delivered less water to its customers. The CFC and the Circuit held that Casitas’ property right was limited to its beneficial use. It could not claim a taking based on reduced diversions to its reservoir without showing that it had lost the beneficial use of its water (i.e. less deliveries). Reduced storage was not enough.

San Luis Food Processors. In a case arising out of the Central Valley Project (CVP, USBR’s largest), the 9th Circuit rejected claims of farmers served by CVP water contractors that USBR had a mandatory duty to deliver the districts’ full entitlement of water. USBR had made full deliveries until Congress enacted the Central Valley Project Improvement Act in 1992.

The Circuit affirmed the district court’s judgment on the pleadings in favor of USBR. The Circuit held the farmers’ claims failed because of lack of subject matter jurisdiction, as they could not identify any statute that imposed a mandatory duty on USBR to take a discrete action to deliver “the Farmers’ preferred amount of water.” For more information on these court decisions, please visit DTW’s Resources Page.

In a 7-member opinion by Justice Kennedy, the Court affirmed USEPA’s discretion to make a reasonable interpretation of the term “associated with industrial activity” under the Clean Water Act. While the Court allowed for the possibility of a citizen suit against a polluter, it left the decision as to the merits of the claim to the lower courts.

Supreme Court: Logging Road Runoff is Not Stormwater

In Decker v Northwest Environmental Defense Center, the Supreme Court upheld USEPA’s rule exempting runoff from logging roads from regulation as stormwater. A citizen suit by an environmental group challenged EPA regulation exempting logging roads from the Industrial Stormwater Rule.

In an opinion by Justice Kennedy, the Court upheld the USEPA regulation, concluding that the “industrial activity” exception to “stormwater” applied. The opinion did not address the level of review for the administrative decision, but rather highlighted the difficulty of defining “stormwater.”

In Focus: DTW Convener Ramsey Kropf

Ramsey Kropf was part of Dividing the Waters in its earliest development, as a young lawyer working for John Thorson, DTW’s founder, when John served as a water master in Arizona. She has served as a Convener since 2007.

When Kropf moved to Jackson, Wyoming, she had the good fortune to meet Judge Nancy Guthrie, who had just been appointed to the District Court bench, after serving as a Special Master in the Big Horn River Adjudication. With Guthrie’s support, Kropf applied and was appointed her successor. Under the guidance of Judge Gary Hartman, Kropf’s main work in the Big Horn River Adjudication has been establishing Walton rights and working on adjudicating state-based water rights. She currently serves as Special Master under Judge Robert Skar, and practices water rights law in Aspen, Colorado, at Patrick Miller Kropf Noto.

Kropf is continually amazed by the connections she makes with judges, special masters and adjudication staff members at Dividing the Waters conferences. In Wyoming, she is the only special master, working for the only judge with a large water right adjudication. She has no other Wyoming judicial personnel to discuss typical legal issues. DTW provides a collaborative and experienced network for her to access. The breadth and depth of knowledge from participants and faculty always impresses her. Kropf also enjoys the opportunity to visit other watersheds with experience in state adjudications, Indian water rights, endangered species issues, and water allocation challenges. “The on-the-ground learning can’t be beat,” says Kropf.

Kropf graduated from the University of Colorado School of Law, where she enjoyed the honor of working for renowned dean, water law professor, and author of the Nutshell on water law – David Getches. She serves as president for the Roaring Fork Conservancy, a local watershed group.

Have something to share? ALFIII@sbcglobal.net