Klamath Basin water 'takings' appeal denied

By HOLLY DILLEMUTH
For Capital Press

The U.S. Court of Appeals for the Federal Circuit has denied an appeal by Klamath Basin farmers and ranchers whose water deliveries were halted by the Bureau of Reclamation in 2001.

The original lawsuit, a claim filed in 2001 against the U.S. government, sought $28 million for the shutoff, which was prompted by concerns about drought impacts on the threatened coho salmon and endangered Lost River and shortnose suckers.

The farmers and ranchers argued the shutoff was an unconstitutional government "taking" of their water.

In 2017, the Federal Claims Court denied the claim, ruling the shutoff wasn't a government seizure because several native tribes held senior water rights.

These in-stream tribal water rights entitle them "to prevent other appropriators from depleting the flows of the Klamath River below levels required to support the fish they take in exercise of their treaty rights," according to the 2017 ruling.

The appeals court agreed.

"We therefore see no error in the court's holding that Bureau of Reclamation's action in temporarily halting deliveries of Klamath Project water in 2001 did not constitute a taking of appellants' property," the appeals court said in an opinion issued Thursday.

The appeals court found that Reclamation's actions to comply with the ESA and to protect tribal water resources were "one and the same."

The appeal cost Klamath Basin irrigation districts within the Klamath Water Users Association $75,000.

If the court had reversed the decision, farmers and ranchers would have been compensated for the taking of water.

"It was never about the money," said Gary Wright, former president of the Klamath Water Users Association, in a news release. "It has always been about the future of our families and our community."

Paul Simmons, executive director of the Klamath Water Users Association, said that the lower court had acknowledged that many landowners within the Klamath Project have a property interest in the water that is protected by the Fifth Amendment.

Simmons also said a lower court recognized the the serious nature of the impacts to the agricultural community from events in 2001.

Nathan Ratliff, an attorney in Klamath Falls coordinating efforts on the case, laid out concerns with the outcome in a news release.

"It is extremely disappointing," Ratliff said. "There are fundamental principles of western water law and water rights adjudication and administration that we just do not believe sunk in with the court. And the idea that federal agencies can make administrative determinations of water rights that bind some people and not others raises serious due process questions."

Simmons said the water users who filed the case will make any decisions about whether to appeal the ruling.

"The alternatives for any further review consist of filing a petition for reconsideration with the same court or asking the U.S. Supreme Court to review the decision," Simmons said in a news release. "The plaintiffs will no doubt evaluate the decision more carefully and consider their options."

Farm groups urge Supreme Court against expanding Clean Water Act liability

By MATEUSZ PERKOWSKI
Capital Press

U.S. Supreme Court

The U.S. Supreme Court heard oral arguments on Nov. 6 in a case that agriculture groups fear may expand Clean Water Act liabilities for farmers.

Agricultural groups fear that farmers nationwide will face increased Clean Water Act liabilities if the U.S. Supreme Court upholds an environmentalist victory in a lawsuit over wastewater treatment.

On Nov. 6, the nation's highest court heard oral arguments in the legal dispute over a facility in Hawaii that injects treated wastewater into the ground.

Last year, the 9th U.S. Circuit Court of Appeals ruled that the treatment plant owned by Maui County was required to obtain a Clean Water Act permit even though it didn't discharge directly from a "point source" into a navigable waterway.

The treatment plant was still required to obtain such a permit because the pollutants eventually seep into navigable water and can be traced back to the facility's injection wells in more than minimal quantities, according to the 9th Circuit.

While the case pertains to a wastewater treatment plant, agricultural organizations argue the 9th Circuit ruling will effectively require farms and ranches that were traditionally considered "non-point sources" of pollution to obtain National Pollutant Discharge Elimination System permits or face lawsuits and penalties.

The American Farm Bureau Federation, National Cattlemen's Beef Association, Family Farm Alliance and several other organizations claim that under the 9th Circuit's opinion, farmers would be regulated under the federal law if they apply fertilizers and pesticides to land that eventually leak into groundwater.

"Ordinary farmers and ranchers would be unable to undertake the most basic agricultural activities without risking crushing fines or assuming the often unmanageable cost and prohibitively long delays associated with obtaining NPDES permits," the groups said in a court brief.

During the oral arguments, Supreme Court justices asked questions probing the more extreme outcomes possible under differing interpretations of the Clean Water Act.

"So what happens if you just take the pipe and you decide what we'll do is we're going to end the pipe 35 feet from the river or from the ocean or something?" asked Associate Justice Stephen Breyer. "Now you know perfectly well that it'll drip down into the ground and it'll be carried out into the navigable water."

Elbert Lin, attorney for Maui County, said that if the pollutants first flowed into the groundwater, then they'd be regulated under non-point source management programs that are overused by state governments.

Breyer responded that this approach would amount to "an absolute road map for people who want to avoid the point source regulation" and that he's looking for "a standard that will prevent evasion."

The federal government, which sided with Maui County's interpretation, doesn't believe the scenario in which pollutants "will travel through two inches of groundwater but won't travel over land doesn't seem realistic," said Malcolm Stewart, deputy solicitor general for the U.S. Department of Justice.

Stewart acknowledged, however, that an underground pipe releasing pollutants wouldn't be regulated as a point source under the government's interpretation, since the law distinguishes between ways that pollutants enter the water.

"And so, for example, if you apply fertilizer to your lawn and a rainstorm comes and the fertilizer is washed into a nearby river, the contraption that you use to apply the fertilizer might fit the statutory definition of a point source, but that would still be treated as non-point source pollution," he said.

The plaintiffs in the underlying lawsuit — Hawaii Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association — maintained that pollutants don't need to flow directly into waterways to be regulated as point sources.

"When you buy groceries, you say they came from the store, not from your car, even though that's the last place they were before they entered your house," said David Henkin, attorney for the environmental groups.

Large dairy heifer feedlot proposed at Burns

The Oregon Department of Agriculture through Dec. 21 will take comment on Silver Sage Farms LLC's plan to build and operate a 2,000-head dairy heifer feedlot in Burns.

Chris Eggert of Tualatin proposes Silver Sage Heifer Ranch at 28870 Weaver Springs Road, Burns. The department said in a public-participation notice that it proposes to issue a Confined Animal Feeding Operation registration under a National Pollutant Discharge Elimination System general permit that regulates manure, litter and process waste to protect water quality.

Eggert said it would be a new facility. He would not elaborate.

A nutrient management plan included in application materials says Silver Sage would dehydrate manure and use it as bedding in pens, or apply it to crops when heifers are on pasture.

Plans also call for a storm-runoff lagoon, feedlot-adjacent ditches not connected to surface water, and berms and grass strips around pens. The 6,092-acre site includes 4,027 acres of cropland.

A hearing is scheduled from 2 to 4 p.m. Dec. 16 at Harney Education Service District, 25 Fairview Heights, Burns.

Comments can be submitted by mail to William Matthews of the state Agriculture Department's CAFO program, 635 Capitol St. N.E., Salem, Ore., 97301, by email at wmatthews@oda.state.or.us or by fax at 503-986-4730.