

# Municipalities' Water Withdrawal: NEPA/National Forest Management Act Challenge to U.S. Forest Service Authorization



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The United States Court of Appeals for the 9th Circuit (“Court”) addressed in an October 23rd opinion Plaintiffs-Appellants Central Oregon LandWatch and WaterWatch of Oregon (collectively “Plaintiffs”) challenge to the United States Forest Service (“Service”) issuance of a Special Use Permit (“Permit”) relating to source water withdrawal authorizing the City of Bend, Oregon (“Bend”) to:

... upgrade its intake facility, construct a new pipeline, and operate the system for 20 years subject to certain requirements (these actions collectively referred to as the Bridge Creek Water Supply System Project (the Project)).

See *Central Oregon Landwatch and Waterwatch of Oregon v. Kent Connaughton and City of Bend*, 2017 WL 3616386 (August 23, 2017).

Bend had traditionally obtained drinking and municipal water from two creeks that were tributaries of a river. The city had been authorized by the Service to operate an intake facility and pipeline for withdrawing the referenced water from a national forest waterbody.

Plaintiffs filed an action in United States District Court challenging the Project (i.e., upgrade of the intake facility, construction of a new pipeline, 20-year operation, etc.) arguing that the Service’s authorization violated the:

- National Environmental Policy Act (“NEPA”)
- Federal Land Policy and Management Act (“FLPMA”)
- National Forest Management Act (“NFMA”).

The United States District Court granted summary judgment to the Service and Plaintiffs appealed.

Plaintiffs’ arguments on appeal included a contention that the Project violated the Inland Native Fish Strategy (“INFISH”) guidelines LH-1 and LH-3. They deemed the Project inconsistent with the Deschutes National Forest Plan (“Plan”) violating FLPMA and NFMA. The referenced guidelines are stated to direct the Service to:

... avoid effects that would retard or prevent attainment of the [interim water temperature Riparian Management Objectives (RMOs) established by INFISH] and avoid adverse effect on inland native fish.

The Service viewed the RMOs as benchmarks to measure progress for its ultimate goal and contended that INFISH does not require the elimination of all existing activities to attain interim RMOs. Instead, the

agency argued that the requirement simply mandated that any new activities maintain existing conditions and move towards improvement. It had determined that the Project would improve conditions in the relevant creek and therefore comply with INFISH by “trending toward attainment” of the RMOs.

The Court also agreed that the Service was not required to impose minimum instream flow requirements. It held that doing so would “do little to improve the conditions of Tunalo Creek.”

The Service was stated to have determined that the Project would positively impact stream flows in certain reaches and have no or minimal impact in others. As a result, the Service’s determination that the Project was consistent with the Forest Plan was not deemed arbitrary and capricious.

As to the NEPA challenge, Plaintiffs argued that the Service violated the federal statute because it only discussed two alternatives in detail which include:

1. Implementation of the Project
2. A “no action” alternative based on the existing Special Use Permit

The Plaintiffs contended that:

1. The “no action” alternative was not a true “no action” alternative
2. Analyzing two near – identical alternatives is inadequate
3. The Service was required to analyze a no – or reduced – diversion alternative

In analyzing the NEPA issue, the Court noted that in addressing an environmental assessment (“EA”) a federal agency is only required to include a brief discussion of reasonable alternatives. In addition, there is no “minimum number of alternatives that an agency must consider.” Instead, it is the “substance of the alternatives” that matter.

The Court stated that the purpose of the Special Use Permit was to authorize use of the National Forest System lands for planned upgrade to the City’s existing Bridge Creek intake facility and replacement of the City’s aging Bridge Creek water supply pipelines. As a result, the Service determined that the surface water formed a “critical component of the City’s dual-source [water] supply.”

The Plaintiffs did not object to the stated NEPA purpose and need. They contended that the Service was required to analyze a “true no action alternative involving no withdrawal” or a “reduced diversion alternative.” The two alternatives studied in detail were deemed insufficient.

The Court stated that the EA did describe the additional alternatives that were considered and dismissed from the detailed study. Further, the EA is stated to have explained that:

- Groundwater-only options would “compromise the City’s ability to provide a safe and reliable water supply”
- Reduce water flows at other parts of the Deschutes River
- Be costly
- Be less reliable than a dual-source system

The EA was also stated to have identified possible environmental concerns posed by the groundwater-only options which included:

- Reduce surface stream flows (which are fed by groundwater)
- Increased energy consumption caused by pumping groundwater

As a result, the Court considered this discussion sufficient.

The Service was also held to have not acted arbitrarily or capriciously by defining its “no action” alternative as a continuation of the existing Special Use Permit. Operating in this manner was deemed to be permitted by the Service’s own regulations, Council of Environmental Quality regulations and 9th Circuit precedent.

Finally, the Court rejected the Plaintiffs' claim that the Service's analysis of the impact of climate change on the Project and the levels of stream flow in the referenced creek was inadequate. The Plaintiffs argued that the analysis was arbitrary and capricious because the Service:

- Used a qualitative, not quantitative, analysis
- Called for additional monitoring and future adjustments rather than taking a "hard look" at the impacts of climate change before authorizing the Special Use Permit

The Court held that the Service was not required to conduct a quantitative analysis. It stated that NEPA provides for an analysis of impacts "in proportion to their significance" and requires "only a brief discussion of other than significant issues."

The Service was deemed to have determined that the climate change would have the same potential impact on the stream flows under either alternative. As a result, the Court agreed that only a brief discussion of such impact on the Project areas was required. It noted that agencies were allowed to describe environmental impacts in qualitative terms as long as they explained their reasons for doing so and "why objective data could not be provided." The Service provided such an explanation.

The United States District Court granting of summary judgment to the Service was upheld.

[A copy of the opinion can be downloaded here.](#)