



ENDANGERED SPECIES ACT LITIGATION UPDATE

Bear Valley Mutual Water Co. v. Jewell
Cape Hatteras v. DOI
Catron County v. FWS

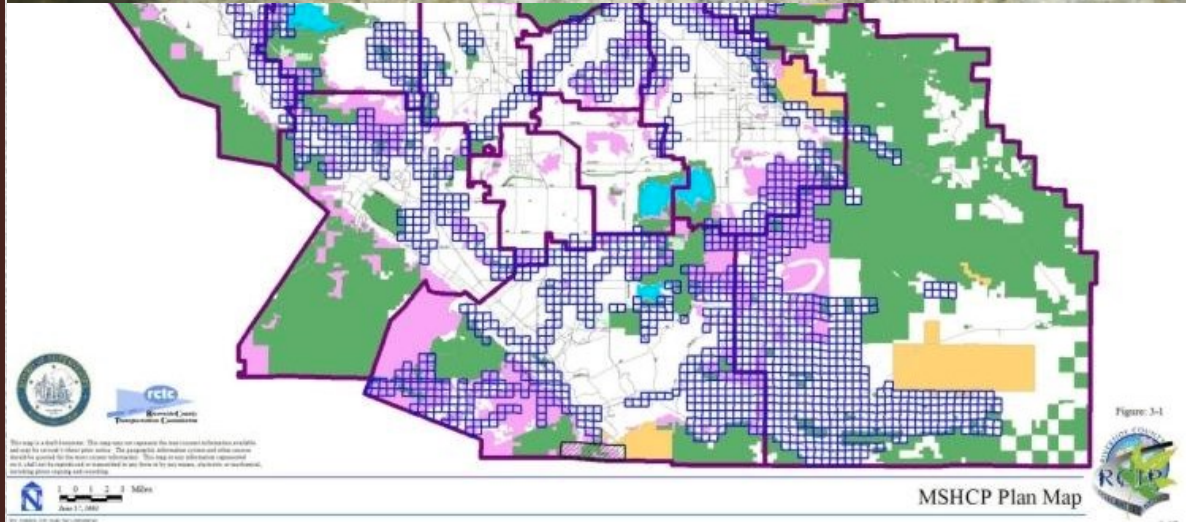
Bear Valley Mutual Water Co. v. Jewell

- **U.S. District Court, California Decision – October 2012**
 - FWS complied with statute, and ESA §2(c)(2) imposes no substantive/procedural obligations on federal agencies
 - FWS critical habitat designation not arbitrary/capricious, and overriding the habitat conservation plan is discretionary and not subject to judicial review
 - NEPA claim (failure to prepare EIS) barred by *Douglas County v. Babbitt*
- **9th Circuit Decision – June 25, 2015**
 - Affirmed: ESA §2(c)(2) has no independent cause of action; FWS designation of HCP lands not arbitrary/capricious; FWS designation of unoccupied areas as critical habitat was proper
- **Petition for Certiorari – filed September 22, 2015**
 - 1-Whether ESA displaces NEPA requirements; 2-whether ESA §2(c)(2) is meaningless, non-operative statement of policy
- **Request for *amicus curiae* briefs – due October 26, 2015**

Water Diversions, Dams, and Habitats

Santa Ana River flows through San Bernardino & Riverside Counties to the Pacific, with 2 dams to assist with flood control

1991 – Water districts applied for stormwater diversions from the California State Water Resources Control Board. (Extensive review process, thorough environmental review, adjustments to protect environment, FWS ignored invitations to participate in proceedings – USFS was there! – applications granted 2009)





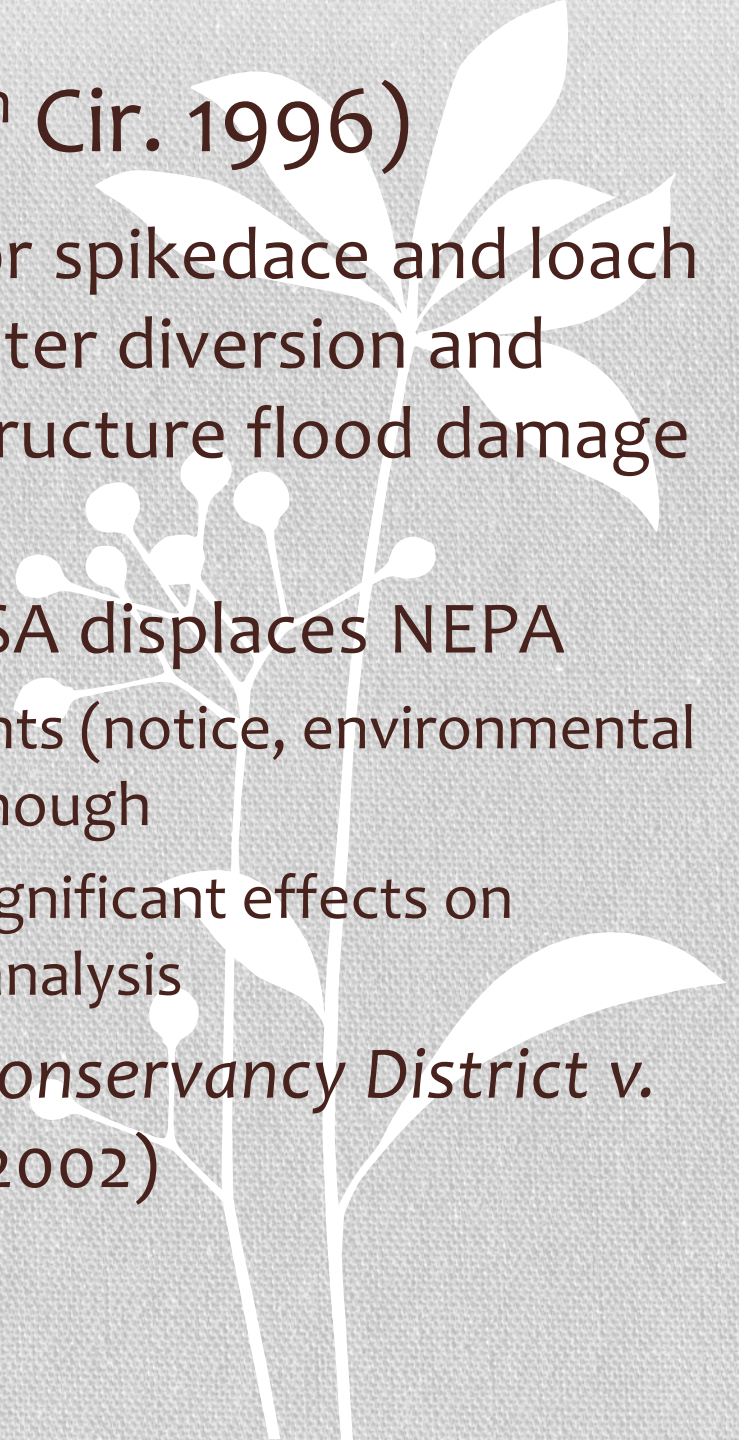
16 U.S.C. §1531. Congressional findings and declaration of purposes and policy [ESA Section 2]

(C) POLICY

(2) it is further declared to be the policy of congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species.

Catron County v. FWS (10th Cir. 1996)

- Designation of critical habitat for spikedace and loach minnow would prevent floodwater diversion and impoundment and cause infrastructure flood damage in the county
- Court rejected argument that ESA displaces NEPA
 - ESA partially fulfills NEPA requirements (notice, environmental considerations) – but partial is not enough
 - Critical habitat determination with significant effects on human environment requires NEPA analysis
- Reaffirmed: *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220 (10th Cir. 2002)





Revised Critical Habitat for the
Santa Ana Sucker 75 Fed.Reg.
77962, 78001 (Dec. 14, 2010)

[O]utside of the jurisdiction of
the U.S. Court of appeals for the
Tenth Circuit, we do not need to
prepare environmental analyses
as defined by NEPA . . . in
connection with the designating
of critical habitat under the
[ESA].

Cape Hatteras v. DOI (D.C. Cir. 2004)

- Winter habitat for the piping plover in North Carolina (137 coastal areas), areas not actually occupied, but ecosystem components of the critical habitat
 - Counties allege impact on beach tourism, fishing, land improvements, building dunes to protect against surf, response and repairs following catastrophic events (Hurricane Isabel)
- ESA and NEPA have overlapping interests and parallels in procedure, but each statute involves different impacts and protects different interests
 - ESA: conserve and protect threatened and endangered species
 - NEPA: impact of federal actions on human physical environment
- An implicit repeal of NEPA by ESA not supported by ESA text or legislative history



WATER TRANSFERS LITIGATION UPDATE

ORNC Action v. Reclamation

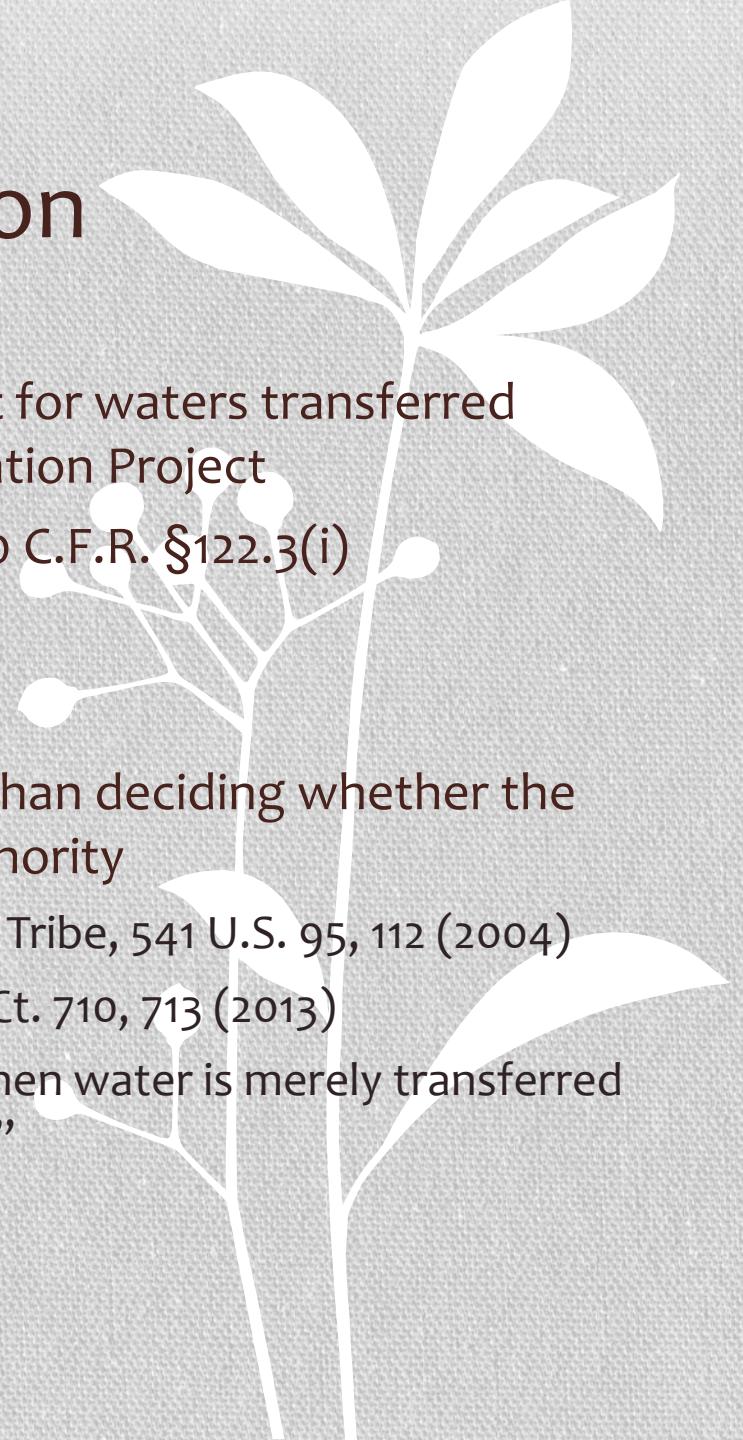
ORNC Action v. Reclamation

- **U.S. District Court Oregon**

- BLM not required to obtain CWA 402 permit for waters transferred through a drain as part of the Klamath Irrigation Project
- Exempt under EPA's Water Transfer Rule, 40 C.F.R. §122.3(i)

- **9th Circuit**

- Affirmed on other grounds
- “meaningfully distinct” test a simpler path than deciding whether the Water Transfers Rule is within the EPA's authority
 - South Florida Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 112 (2004)
 - L.A. County Flood Control Dist. v. NRDC, 133 S. Ct. 710, 713 (2013)
 - “no pollutants are added to a body of water when water is merely transferred between different portions of that water body”

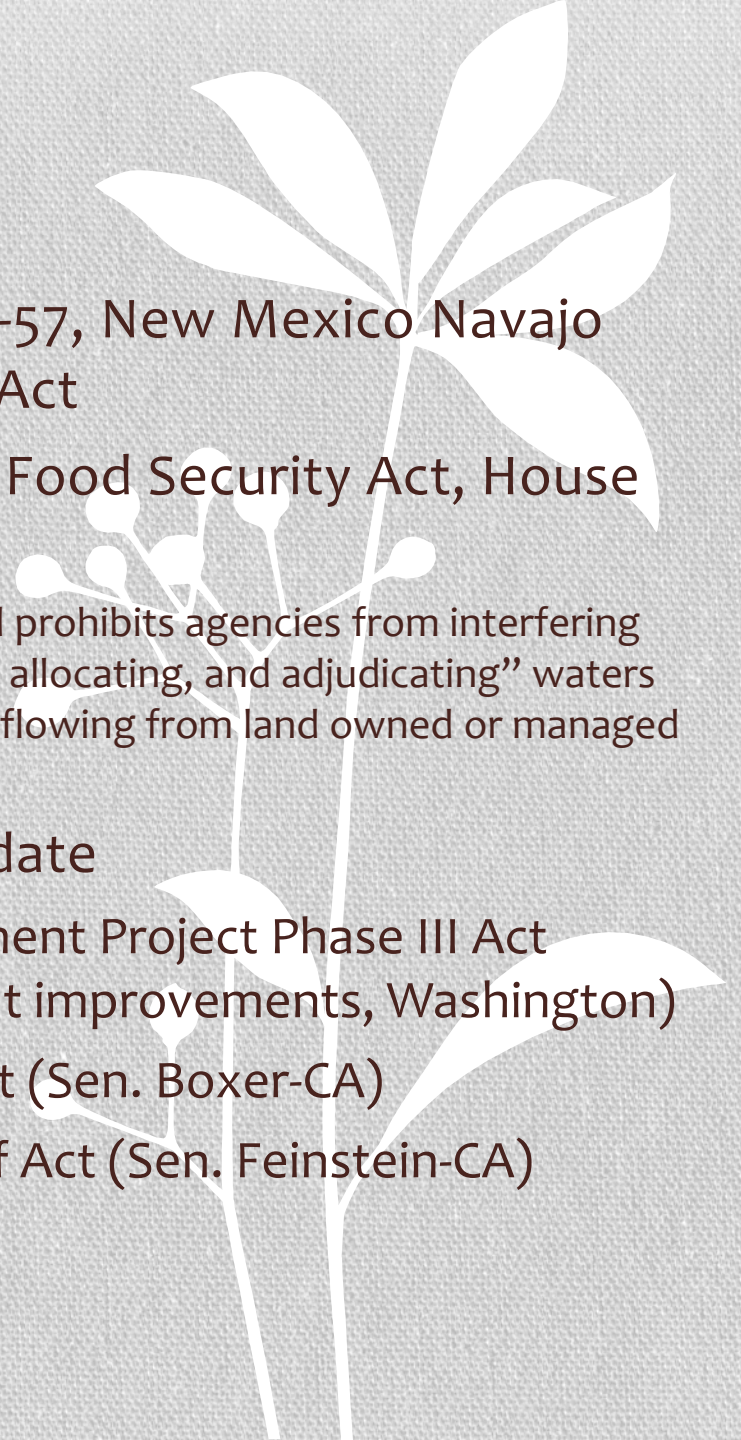




LEGISLATION & LITIGATION UPDATE

Notable Legislation

- **S. 501** signed into law 9/30/15, Pub. L. 114-57, New Mexico Navajo Water Settlement Technical Corrections Act
- **H.R. 2898**, Western Water and American Food Security Act, House passed 7/16/15
 - acknowledges longstanding authority of states and prohibits agencies from interfering with rights and obligations of states in “evaluating, allocating, and adjudicating” waters of the state, surface/groundwater, including water flowing from land owned or managed by the federal gov’t
- New legislation introduced since last update
 - **S. 1694**, Yakima River Basin Water Enhancement Project Phase III Act (amends Pub. L. 103-434, water management improvements, Washington)
 - **S. 1837**, Drought Recovery and Resilience Act (Sen. Boxer-CA)
 - **S. 1894**, California Emergency Drought Relief Act (Sen. Feinstein-CA)



Litigation Updates

- ***Catskill Mountains v. EPA***
 - EPA Water Transfers Rule
 - **Oral Arguments scheduled for December 1**
- ***Wyoming et al. v. BLM***
 - Hydraulic Fracturing Rule
 - **Nationwide preliminary injunction issued September 30**
- By request at the last meeting, *Texas v. New Mexico* and *Aransas Project v. Shaw* added to the Legislation-Litigation Update table (no new developments since last meeting)





This expanded, deluxe
version of the Legislation-
Litigation Update has been
brought to you by the letters

N, O and P

in your briefing books