

WESTERN WATER

Judges grill Ore. ranchers on tribal rights

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The E. Barrett Prettyman U.S. Courthouse houses the U.S. Court of Appeals for the District of Columbia Circuit. Francis Chung/E&E News

Federal judges yesterday questioned Oregon ranchers' claims that the process for local tribes to exercise their water rights is threatening agriculture and lacks any "political accountability."

The complicated case at the U.S. Court of Appeals for the District of Columbia Circuit concerns a long-running dispute between tribes in southern Oregon and irrigators over water that is in increasingly short supply.

The ranchers have run into legal hurdles, however. A lower court dismissed their lawsuit, arguing that the ranchers lacked standing to sue because their injury was unclear.

A three-judge D.C. Circuit panel yesterday expressed similar skepticism.

Under a treaty with the government, the Klamath Tribes hold senior water rights and may "call" for that water, which they usually do for several reasons, including for the river's threatened salmon. That means the water is allowed to flow downstream; irrigators with junior water rights can't use it.

The ranchers aren't challenging the seniority of those rights, Pacific Legal Foundation attorney David Deerson told the D.C. Circuit during oral arguments yesterday. Instead, they contend that a "protocol agreement" for the calls lacks proper federal oversight and delegates too much federal authority to the tribes.

The ranchers are "seeking to vindicate certain important procedural principles," Deerson said, arguing that the calls should "bear some modicum of political accountability."

Under the protocol agreement, the tribes call for the water, and the Oregon Water Resources Department then executes the call, typically by telling irrigators to shut off their pumps. The ranchers contend Oregon takes that step with a "concurrence" from the federal Bureau of Indian Affairs.

"The shut-offs just don't happen unless BIA concurs," Deerson said.

Consequently, BIA's action should be subject to federal review, Deerson said, including a National Environmental Policy Act analysis.

Judge Judith Rogers questioned whether the court could provide the relief the ranchers are seeking, noting "that the tribe could continue to make a full call" regardless of a ruling on the protocol.

Rogers and other judges also said the treaty is clear about the rights reserved for the tribe. Rogers, a Clinton appointee, also suggested that the treaty — not the protocol process or any state law — is what controls in the case.

"The question is where does the right arise in the United States to limit what the treaty otherwise preserves," she said. "There is no concurrence obligation that affects the tribe under state law. ... You're relying on the treaty and the treaty's promotion of agriculture."

Judge Gregory Katsas appeared to agree.

"The more important point is that the tribe retains its independent right to make a call," said the judge, who was appointed during the Trump administration.

Justice Department attorney John Smeltzer urged the panel to uphold the lower court's dismissal. He echoed Katsas, saying that the "linchpin" is the authority of the tribes to manage their own water rights under the treaty.

Smeltzer also argued that there is no federal action that the ranchers may legally challenge.

In his closing argument, Deerson said the government should step in to enforce some of the "balancing" between the environment and agricultural demands, as intended by the treaty.

"One of the purposes of the Klamath treaty was to promote agriculture. The deleterious environmental effects here may well frustrate that purpose of promoting agriculture," he said. All the ranchers are "trying to do is to restore some measure of political accountability where there currently is none."

Judge Neomi Rao, another Trump appointee, also sat on the panel.

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