Ninth Circuit upholds FWS's EIS and comprehensive conservation plan for national wildlife refuges in Klamath Basin refuge complex

The Klamath Basin National Wildlife Refuge Complex covers approximately 200,000 acres above and below the California-Oregon border. The Complex includes six refuge areas, five of which were subject to an environmental impact statement and a comprehensive conservation plan issued by the Fish and Wildlife Service and adopted in a 2017 record of decision. Three federal statutes—the National Environmental Policy Act, the 1964 Kuchel Act (16 U.S.C. §§ 695k to 695r), and the National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C. § 668dd to 668ee)—principally governed the EIS's and CCP's validity. The Kuchel Act provides in part that lands lying within the Tule Lake National Wildlife Refuge, the Lower Klamath National Wildlife Refuge, the Upper Klamath National Wildlife Refuge, and the Clear Lake Wildlife Refuge are "dedicated to wildlife conservation" and "shall be administered by the Secretary of the Interior for the major purpose of waterfowl management, but with full consideration to optimum agricultural use that is consistent therewith." *Id.* § 695*l*. The Refuge Act directs the Interior Secretary, inter alia, "to 'ensure that ... the purposes of each refuge are carried out" but authorizes her to "permit the use of any [refuge] ... for any purpose ... whenever [s]he determines that such uses are compatible with the major purposes for which such areas were established." *Id.* § 668dd(a)(4)(D), (d)(1)(A). A magistrate judge subsequently rejected challenges to portions of the EIS and CCP concerning the Lower Klamath Refuge, the Tule Lake Refuge, and the Clear Lake Refuge brought by environmental groups and agricultural interests in a report and recommendation that the district court adopted without modification. *Audubon Soc'y of Portland v. Zinke*, Nos. 1:17-cv-00069-CL et al., 2019 WL 8371180 (D. Or. Nov. 18, 2019), *adopted*, 2020 WL 1693677 (Apr. 6, 2021).

The Ninth Circuit affirmed in three separate opinions. *Audubon Soc'y of Portland v. Haaland*, No. 20-33508, 2022 WL 2794306 (9th Cir. Jul. 18, 2022) (*Aububon I*); *Audubon Soc'y of Portland v. Haaland*, Nos. 20-35509 & 20-35513, 2022 WL 2799170 (9th Cir. Jul. 18, 2022) (*Aububon II*); and *Tulelake Irr. Dist. V. U.S. Fish & Wildlife Serv.*, No. 20-35515, 2022 WL 2800729 (9th Cir. Jul. 18, 2022). The *Aububon* decisions deferred to FWS's balancing of competing environmental and agricultural concerns and addressed one substantive issue of statutory interpretation, while the *Tulelake* decision was devoted entirely to the proper construction of the Kuchel and Refuge Acts.

In *Audubon I*, the Audubon Society of Portland raised four contentions: (1) "the failure of the Service under the EIS/CCP to provide sufficient water for the Lower Klamath Refuge violates the Refuge Act"; (2) "the EIS/CCP's continuation of the present pattern of agricultural leasing in the Tule Lake and Lower Klamath Refuges violates the Kuchel and Refuge Acts, and is arbitrary and capricious in violation of the [Administrative Procedure Act]"; (3) "the EIS/CCP delegates administrative responsibilities to the Bureau of Reclamation in violation of the Refuge Act"; and (4) "the failure of the EIS/CCP to consider a reduced-agriculture alternative violates NEPA." As to the first contention, the panel stated that

> [a]ll agree that the water currently available for the Lower Klamath Refuge is inadequate to serve the purposes of the refuge. But we are also cognizant of the constraints on the Service, whose ability to provide water is severely limited. We are satisfied on the record before us, given the constraints on the Service, that the EIS/CCP fulfills the Service's obligation to "assist in the maintenance of adequate water quantity ... to fulfill the mission

of the System and purposes of each refuge," and to "acquire, under State law, water rights that are needed for refuge purposes."

As to the second contention, it found that the FWS "recognized that grains grown on farmed land in the refuges are nutritionally incomplete as compared to natural foods, but, at the same time, it noted in the EIS/CCP that such grains provide more concentrated calories than natural foods" and further "recognized that poor water quality in the refuges is caused in part by agricultural runoff, some of it coming from upstream of the refuges and some of it coming from within the refuges." However, on the latter issue, the EIS/CCP "noted that 'refuge staff' will participate in developing a plan for the Upper Klamath Basin as part of an 'Agricultural Discharge program' implemented by the California North Coast Water Quality Control Board" and that when the plan is completed, "'the Service will assess what modifications to the farming program might be warranted to be in compliance with the plan.'" The panel was unpersuaded that the EIS/CCP improperly delegated from the FWS to the Bureau of Reclamation the former's administrative Refuge Act responsibilities, holding instead that the FWS merely authorized certain management functions by the Bureau whose performance "is subject to the Service's direction and approval." Finally, the NEPA claim foundered on the fact that the EIS/CCP provided adequate reasons "why it did not include the elimination of lease land farming as a listed alternative" for the refuges and why "lease land agriculture in the two refuges provide benefits."

In *Audubon II*, the panel dealt with appeals by the Center for Biological Diversity and Western Watersheds Project. The CBD advanced three contentions: (1) "FWS failed to consider reduced-pesticide alternatives for Lower Klamath and Tule Lake Refuges"; (2) "FWS failed to take a sufficiently hard look at the effects of pesticides on these Refuges"; and (3) "FWS violated the Refuge and Kuchel Acts by permitting continued pesticide use on the Refuges." Western Watersheds argued that (1) "FWS violated NEPA by failing to consider a formal reduced-grazing alternative and by failing to take a hard look at the effects of continued grazing on the greater sage-grouse and two species of suckerfish" and (2) "FWS violated the Refuge Act because ... grazing is an incompatible use of the Refuge." The panel engaged in a detailed record review of each of these arguments and, as it explained in the opinion's third paragraph, "FWS adequately considered its chosen approaches to pest-management and grazing, and it reasonably considered other alternatives. Our task is not to second-guess FWS's scientific judgment and institute our own program for Refuge management, but to determine whether FWS's decision-making process was in accordance with law."

In *Tulelake*, the agricultural interest plaintiffs advance two arguments with respect to the Tule Lake and Lower Klamath Refuges: (1) "under the Kuchel Act 'all lease land farming is automatically consistent with waterfowl management,' and that the Service is therefore not authorized to limit agricultural uses on leased land in the two refuges to ensure 'consistency' with proper waterfowl management"; and (2) "under the Refuge Act that lease land farming is a 'purpose,' not a 'use,' of the Klamath Refuges, and that the Service is therefore not authorized to regulate agriculture practices to ensure 'compatibility' with the purposes of the refuges." The panel rejected the proposed interpretation of 16 U.S.C. § 695n—which reads "[t]he Secretary shall, consistent with proper waterfowl management, continue the present pattern of leasing [specified] reserved lands ... within the Executive order boundaries of the Lower Klamath and Tule Lake National Wildlife Refuges"—on two grounds. First, it deemed the plaintiffs' argument that the phrase "consistent with proper waterfowl management" is a "'nonrestrictive' clause" and thus

"'not essential to the meaning of the sentence'" contrary to the canon that "[w]hen construing a statute, courts should 'avoid any statutory interpretation that renders any section superfluous.'" Second, "we do not consider the language of § 695n in isolation[,]" and "[o]ther parts of the Act unambiguously prioritize wildlife management objectives over agricultural uses on leased land"—in particular "Section 695k of the Act [which] specifies that the 'policy' of Congress in the Klamath Refuge Complex is 'to preserve intact the necessary existing habitat for migratory waterfowl.'" Equally unpersuasive was the plaintiffs' proposed interpretation of the Refuge Act that "requires a CCP to 'identify and describe ... the purposes of each refuge'" and authorizes the Secretary to "'permit the use of any area' within a refuge 'whenever [s]he determines that such uses are compatible with the major purposes for which such areas were established.'" 16 U.S.C. § 668dd(d)(d)(1)(A), (e)(2)(A). Construing the Refuge and Kuchel Acts together, the panel held that "it is apparent that agriculture on lease land in the refuges is not a 'purpose' holding co-equal status with waterfowl management, and that lease land agriculture is not insulated from a compatibility determination." It added on this point that "[w]e look to the Kuchel Act to understand the distinction drawn in the Refuge Act between a 'purpose' and a 'use[]' and that "Section 695*l* of the Kuchel Act ... characterizes 'waterfowl management' as the 'major purpose' of the refuges, and provides that agriculture is a 'use.'"

Decision links

Aububon I
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/18/20-35508.pdf

Aububon II
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/18/20-35509.pdf

Tulelake
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/18/20-35515.pdf