San Luis Obispo Coastkeeper v. Santa Maria Water Conservation District—Divided Ninth Circuit holds that Interior Secretary has discretion to release flows from Twitchell Dam to facilitate Southern California Steelhead migration

The Santa Maria River begins at the confluence the Cuyama and Sisquoc Rivers in Santa Barbara County and continues for 24 miles before flowing into the Pacific Ocean. Historically, its short streambed provided access for the migration of the Southern California Steelhead distinct population unit declared as endangered in 1997 under the Endangered Species Act. However, the Bureau of Reclamation's management of Twitchell Dam, constructed in 1954 on the Cuyama six miles above its confluence with the Siquoc, created an impediment to the species' recovery. The lodestar for Reclamation's operational protocols was Public Law No. 83-774, 68 Stat. 1190 (1954), that provides in part:

> [T]he Secretary of the Interior is hereby authorized to construct the project for irrigation and the conservation of water, flood control, and for other purposes, on Santa Maria River, California, pursuant to the laws of California relating to water and water rights, and, otherwise substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953.

Under the referenced report, "the project's primary purpose is to recharge the Santa Maria River Valley's groundwater aquifer and to eliminate the threat of extensive flood damage." It also "identifie[d] examples of other permissible uses, including municipal and industrial uses, of the dam water." Consistent with this understanding of Public Law 774's directive, "Twitchell Dam is presently operated to retain water during high precipitation periods. The water is then released from behind the dam during dry periods at a rate designed to maximize percolation into the dry riverbed and recharge the groundwater basin." Flows sufficient for anadromous fish migration to the Pacific therefore do not exist.

With this guidance in hand, Reclamation and other federal, state and local government entities opposed a suit brought under the ESA by two environmental groups alleging that Twitchell Dam's operation "interferes with Southern California Steelhead's reproductive migration." The defendants argued, and the district court agreed, that Public Law 774 deprived them of the discretion to provide seasonal flows to enable the Steelhead's migration. *San Luis Obispo Coastkeeper v. Santa Maria Water Conservation Dist.*, No. CV-19-08696 (AB (LPRx), 2021 WL 1918789, at *8 (C.D. Cal. Apr. 15, 2021) ("[T]he Court finds that operating Twitchell Dam in the manner that the Plaintiffs propose is so foreign to the original express purposes of Twitchell Dam as to be arbitrary and capricious. This is because releasing water that will necessarily flow into the ocean—as Plaintiffs seek—conflicts with the express water conservation purpose of Twitchell Dam.").

On appeal, a divided Ninth Circuit panel reversed. *San Luis Obispo Coastkeeper v. Santa Maria Water Conservation Dist.*, No. 21-55479, 2022 WL 4393596 (9th Cir. Sept. 23, 2022). The point of disagreement, as before the district court, centered on the words "other purposes" in Public Law 774. In the majority's view:

> PL 774 expressly authorizes Twitchell Dam to be operated for "other purposes" in addition to the enumerated purposes of "irrigation and the conservation of water, [and] flood control." ... This expansive language reflects a congressional intent to grant the Agencies discretion to operate the dam for a variety of purposes, including

> to accommodate changed circumstances such as the enactment of new statutes. [¶] If Congress had intended to limit the dam's operations solely to the enumerated purposes, it knew how to do so and would have used limiting rather than broad language.

It fortified this interpretation by looking to the rule of statutory construction that "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." [Cleaned up.] The majority found

> no clear congressional intent to preclude the dam from being operated to avoid take of Southern California Steelhead. PL 774 explicitly authorizes the dam to be used for other purposes. While the Secretary's Report identifies some secondary purposes for which the dam may be operated, there is no language suggesting that it provides an exhaustive list of permissible purposes. Moreover, there is no implied conflict between PL 774 and the ESA. Twitchell Dam can readily be operated to provide modest releases at certain times of the year and during certain water years, while still satisfying the dam's primary purpose of conserving water for consumptive uses.

It also rejected the dissent's reliance on a competing statutory interpretation canon—*ejusdem generis*—because it "'comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute'" and, "[h]ere, the statute's plain meaning is apparent."

The dissent argued, as the majority discussed, that "the meaning of the phrase 'other purposes' is constrained by the specific terms that precede it pursuant to the canon of *ejusdem generis*." It added that "[t]he Secretary's Report further limits my interpretation of 'other purposes' by describing the planned operation of the Dam, explaining the needs of the human community for flood control, water conservation and irrigation purposes, below it that the Dam was meant to serve, and accepting certain costs—including the loss of steelhead trout—that the Dam's operation would incur." The dissent thus could not "agree that a proposal to send approximately four percent of a community's primary source of fresh water into the ocean, on purpose, to benefit steelhead trout, substantially accords with a plan that was designed to conserve all the water from that source and to waste none of it into the ocean." It concluded:

> It may be that today our political community is more concerned with the welfare of endangered species, and the effect of such welfare on the human species, than was Congress in 1954. But even if our society has changed by adopting new values and an understanding of the natural world less centered on certain human needs, and especially if such new perspectives bring into disfavor the expressed aims of old laws, our commitment to the separation of powers must not falter. Congress has the authority to revise the specific and clear policy choice it made in enacting PL 774: that the Cuyama River's water should be conserved for human agricultural, water conservation, and industrial use, even at the loss of some steelhead trout. This court does not have that authority—by design.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/23/21-55479.pdf