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FEATURE ARTICLE

DEFINING ‘WATERS OF THE UNITED STATES’
AND ‘WATERS OF THE STATE’—CLEAR AS MUD

By David C. Smith

As many rally to the cry, “Drain the Swamp!,” many others are actually fighting diligently to define, defend, and even expand it. From Washington, D.C., to Sacramento, regulators, politicians, and litigants of all stripes are fighting over what constitutes a “water” worthy of protection, what those protections should be, and who bears the burden and cost of such protection. “Waters of the United States” versus “Waters of the State,” “three-prong wetlands” versus “two-prong wetlands,” and Obama versus Trump have left this critical resource area clear as mud.

On the federal front, the decades-long battle to define “Waters of the United States” or “WOTUS” within statutory and constitutional bounds acceptable to the U.S. Supreme Court remains elusive. Regulations from 1987 were superseded by an Obama Administration Rule in 2015 (2015 WOTUS Rule), but multiple rounds of battling litigation have left it valid in only 22 of the 50 states. The Trump administration on February 14 of this year published its proposed replacement to the 2015 WOTUS Rule (2019 WOTUS Rule), but with at least a 60-day public comment period and the promise of litigation should it be finalized, enactment of the 2019 WOTUS Rule is certainly not imminent.

On the state level in California, the threat of what opponents of the 2019 WOTUS Rule characterize as a severe curtailment of the scope of federal regulatory protection for aquatic resources has breathed new life and urgency into another decade-long undertaking—an effort launched in 2008 by the California State Water Resources Control Board (SWRCB) to adopt a statewide policy and related regulatory procedures to govern the discharge of dredge or fill material to “Waters of the State” (State Program). The state

having largely piggy-backed on the federal program since the inception of regulating such resources, critics of the proposed State Program question the state’s staffing, resources, and sophistication to take on such a broad sweeping program apart from the feds. Critics also find the proposed State Program duplicative and at the same time conflicting with the federal program rendering it, at best, unnecessary and, at worst, costly and will expose the state and its economy to significant peril and litigation.

How We Got Here—Blame The ‘Supremes’

How indeed? The High Court’s first grappling with the issue was back in 1985. In *United States v. Riverside Bay View Homes*, 474 U.S. 121 (1985), the U.S. Supreme Court ruled that wetlands that were adjacent to a clearly jurisdictional resource such as a major lake or river are sufficiently intertwined with the ecology and hydrology that the wetlands themselves warranted protection under § 404 of the federal Clean Water Act that prohibits filling a WOTUS.

However, over 15 years later, the Court ruled that U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) had failed to provide a legitimate justification for exerting federal regulation over large, abandoned mining pits that had filled with water. A majority of the justices held that those pits were “isolated” in that they had no hydrologic or other appreciable connection to true WOTUS, and they were contained only within a single state and had no apparent impact on interstate commerce. Thus, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) or “SWANCC” became the catalyst for many

The opinions expressed in attributed articles in *Western Water Law & Policy Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *Western Water Law & Policy Reporter*.

to define regulatorily a consistent, predictable regime by which to identify and, where appropriate, regulate WOTUS.

The failure of those regulatory efforts (by administrations of both ideological perspectives) was evidenced in *Rapanos v. United States*, 547 U.S. 715 (2006). There, the only thing a fractured Supreme Court could agree upon was that the Corps and EPA had not yet figured it out. In a 4-1-4 ruling with no majority rationale being held, the conservative plurality, led by Justice Scalia, said that to be subject to federal regulation under the Clean Water Act as a WOTUS, a resource must be a “relatively permanent water” as the term “water” is generally understood in common parlance. Conversely, the liberal plurality, led by Justice Stevens, would largely defer to the agencies’ expertise and allow them to regulate any resources they believed warranted protection.

On his own was Justice Kennedy who felt that the “relatively permanent” standard was too restrictive, but he did feel the agencies would have to demonstrate that a given resource had a “significant nexus” to another clear WOTUS. Though he was the only justice to embrace this perspective, Justice Kennedy’s “significant nexus” test largely became the governing standard nationwide in the years that followed.

And the question of what is and is not a WOTUS took on new urgency courtesy of the High Court in 2016. Up until then, the Corps or EPA designating a given area as a WOTUS escaped oversight or judicial review. Having been characterized as not “final agency action,” the assertion of jurisdiction by the agencies could not be challenged in court. But in *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), the Supreme Court found that an exertion of jurisdiction had a sufficient tangible impact on property ownership that it is itself final agency action subject to judicial review.

WOTUS—Where Are We? It Depends Where You Are

The 2015 WOTUS Rule (Obama), 80 Federal Register 37054 (2015)

A major problem for the agencies with Justice Kennedy’s “significant nexus” test from *Rapanos* was that it was very field-intensive. Demonstrating and documenting that any given resource had the requi-

site nexus to an indisputable WOTUS necessitated many hours of boots on the ground, both by private industry consultants and regulators themselves. The costs and work backlog became significant.

Accordingly, the Obama administration sought to craft a rule that would clearly identify criteria that would establish WOTUS status indisputably based on the language of the rule itself. Thus, the 2015 WOTUS Rule established clear and quantifiable criteria—such as a specified linear-feet between one resource and another or presence in a flood plain—that could be affirmed from a desk in an office with access to Google Earth as sufficient for the exertion of jurisdiction.

Critics of the 2015 WOTUS Rule were widespread, both geographically and across industries. They argued that the criteria were arbitrary and cast a jurisdictional net far beyond what Justice Kennedy articulated in *Rapanos*. Upon the 2015 WOTUS Rule’s final adoption on June 29, 2015, the lawsuits were immediate and numerous. States, agriculture, and industry interests all challenged the rule as beyond the agencies’ authority under the Clean Water Act. Multiple courts agreed that the rule was likely invalid and enjoined its implementation. All such courts, however, only enjoined the 2015 WOTUS Rule in states that were parties to that given lawsuit. Thus, a haphazard patchwork of injunctions speckled the nation.

In an effort to reestablish uniformity and to buy itself time to craft its own replacement rule, the Trump administration adopted a separate rule delaying the implementation of the 2015 WOTUS Rule by an additional two years. Defenders of the 2015 WOTUS Rule, primarily environmental interests, sued to challenge the two-year delay, and they were successful. Two federal district courts held that the means by which the Trump administration adopted the delay failed to comply with the Administrative Procedure Act and invalidated the delay. These two courts, however, issued injunctions nationwide, reestablishing the patchwork.

As if that wasn’t confusing enough, in the midst of this swirl and prior to President Trump’s inauguration, the Obama administration in trying to fend off the challenges to the 2015 WOTUS Rule, contended that only a Circuit Court of Appeals had jurisdiction to hear the challenge, not the multiple district courts in which the states had filed their lawsuits. The Sixth

Circuit Court of Appeals agreed and consolidated all of the pending challenges to itself. But then, to the great dismay of the Obama administration, the Sixth Circuit granted the states' request for a nationwide injunction against implementation of the 2015 WOTUS Rule finding that it was likely illegally expansive beyond the bounds of the Clean Water Act.

Still wanting to pursue their actions in local district courts, however, the states appealed to the Supreme Court the Sixth Circuit's procedural decision as to the proper court to hear the matter(s). The High Court made no ruling whatsoever on the merits of WOTUS, but disagreed that the Sixth Circuit had jurisdiction and sent the individual matters back to the district courts in which they were originally filed.

Thus, with sporadic local injunctions against implementation of the 2015 WOTUS Rule, and a nationwide injunction against the Trump administration's two year delay in implementation, we are squarely back at the haphazard patchwork. At the time of this publication, the 2015 WOTUS Rule is the law of the land in 22 states (including California), the District of Columbia, and all U.S. territories. In the other 28 states, the agencies have reverted back to the prior regulations defining WOTUS adopted in 1987. EPA maintains a webpage dedicated to tracking this saga in real time: <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>

The [Proposed] 2019 WOTUS Rule (Trump)—84 Federal Register 4154 (2019)

Amidst then-candidate Trump's promise of regulatory relief and rollback on the campaign trail, particularly in the agricultural heartland, rolling back the 2015 WOTUS Rule was near the top of the list. Opponents of that rule viewed it as a regulatory property and power grab by the federal government, grossly expanding the reach of federal regulation into local land use and water rights. Supporters of Trump called on him to look to Justice Scalia's approach in *Rapanos* and limit the bounds of federal regulation clearly to resources that are only "relatively permanent" in terms of water content and flow.

On December 11, 2018, EPA Acting Administrator Andrew Wheeler and Assistant Secretary of the Army for Civil Works R.D. James "unveiled" the Trump administration's proposed replacement for the 2015 WOTUS Rule. The proposal was merely

"unveiled" because a proposed rule is not officially "released" until it is published in the Federal Register which did not occur until February 14, 2019. Official publication commences the public comment period for the proposed 2019 WOTUS Rule which is presently slated for 60 days, expiring on April 15, 2019.

Immediately upon unveiling, proponents praised and critics panned the proposed 2019 WOTUS Rule. Those in favor said it would provide clarity and consistency, allowing a property owner to walk onto his or her land and readily understand which resources would and would not be subject to federal regulation. Critics decried the pullback asserting that it would leave a significant portion of wetlands, streams, and other features without federal protection. Many have promised immediate litigation should the proposed rule be finalized.

Comparing the Two WOTUS Rules

Although the 2019 WOTUS Rule is clearly closer to the Scalia approach in *Rapanos* than the 2015 WOTUS Rule, it likely extends the jurisdictional net somewhat more broadly than the four corners of Scalia's "relatively permanent" boundaries.

One of the most-stark examples of the differences in the respective WOTUS rules is the jurisdictional character, or lack thereof, of streams. Streams that flow constantly and uninterrupted largely qualify as "traditional navigable waters" and are regulated under both rules. Streams with less consistent flows are another matter.

On the far extreme are "ephemeral" streams. These are features that only flow when it rains. They collect and convey rainwater flows, but have no separate and independent source of water, such as snow melt or groundwater. Other streams are labeled "intermittent tributaries." These features also flow only occasionally, but those flows are not limited just to rainwater. Other sources of water—again, such as snow melt or groundwater—provide an at least partially consistent source of flows.

Under the 2015 WOTUS Rule, both ephemeral streams and intermittent tributaries have the potential to be regulated. The 2015 WOTUS Rule would not focus on how much or how often the respective feature flows. Rather, if the feature has indicators that it *ever* flows, i.e., bed, bank, and "ordinary high water mark," it is subject to regulation.

Conversely, the 2019 WOTUS Rule would not regulate ephemeral streams at all. And as to intermittent tributaries, the question would turn on just how often and how much that tributary actually does flow with water.

Wetlands are another difference in approach. The 2015 WOTUS Rule would regulate all wetlands with a surface or subsurface connection to another WOTUS. The 2019 WOTUS Rule would, generally, regulate wetlands with a surface connection, but would not allow a subsurface connection to establish jurisdiction.

As to wetlands lacking a surface connection, this is where the 2015 WOTUS Rule sought to establish criteria establishing jurisdiction “by rule.” Factors such as being located within a 100-year flood plain or being within 4,000 feet of another WOTUS would be sufficient, *by rule*, for the feature’s regulation. The 2019 WOTUS Rule, conversely, does away with all such criteria and largely excludes such isolated wetlands that lack a surface connection to another WOTUS.

There are, of course, additional differences beyond these illustrative examples.

Again, at the time of this publication, the public comment period for the proposed 2019 WOTUS Rule closes on April 15, 2019. However, in a letter dated February 11, 2019, 36 Democrat senators, led by Thomas Carper, ranking member of the Senate Environment and Public Works Committee, called on EPA to extend the comment period to at least the period for which the 2015 WOTUS Rule was open for comment, 207 days.

California’s Proposed State Program and Regulating Fills of Waters of the State

Overview and Background

On April 15, 2008, the California State Water Resources Control Board (SWRCB) adopted a resolution directing staff to embark on a three-phase effort to adopt policies and procedures necessary to ensure that aquatic resources in the state were sufficiently protected under state law and not solely dependent on federal law. Nearly 11 years later, SWRCB members and staff continue to grapple with the proper policy and procedures to carry out just phase one of the 2008 resolution. As recently as February 22, 2019,

SWRCB staff circulated yet another revised draft to be presented to the SWRCB for consideration. Recognizing that the content and schedule for the proposed State Program is constantly subject to change, at the time of publication of this article, SWRCB staff were scheduled to present the latest proposed State Program to the SWRCB at a March 5, 2019 workshop at which no action would be taken. The matter is tentatively set for SWRCB action on April 2, 2019. The latest information on the State Program and related processes can be found at: https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html

Key elements of the proposed State Program include: 1) a new definition of “wetlands” that is different than the federal definition; 2) processes separate and distinct from existing federal processes, including alternatives analyses, in seeking a permit to fill or alter jurisdictional features; and 3) mitigation ratios for impacts, again, frequently different from standards applied in the federal arena.

But Why?

California, like most states, has relied on the Corps and EPA and their authority under the federal Clean Water Act to analyze and regulate proposed fill and impacts to wetlands and other jurisdictional waters. Under this regime, the state had at least two strong authorities under which it could require project modifications or mitigation beyond what the federal agencies imposed. The first is the state’s authority to “certify,” or not, that granting of the federal permit will not implicate state-established water quality standards. This authority is required under § 401 of the federal Clean Water Act. Additionally, the state has broad authority under California’s Porter-Cologne Water Quality Control Act to impose “Waste Discharge Requirements” or “WDRs.” Quite often the 401 Certification and WDRs are processed by the state concurrently based largely on the work and analyses performed by the federal agencies.

This existing regime led many opponents of the proposed State Program to question why the SWRCB was even pursuing a separate and seemingly conflicting policy. The initial proffered justification dates back to the Supreme Court decision in 2001, SWANCC. Once the High Court held that wholly intrastate isolated features were not subject to federal regulation, fears of a purported “SWANCC gap”

spread rapidly. There was a sense that an untold and significant number of resources would simply fall through the regulatory cracks and be lost if urgent action was not taken.

But critics are quick to point out that the spectre of a SWANCC gap was one of the primary drivers of the original 2008 SWRCB Resolution calling for the proposed State Program. But here we are nearly 11 years later, and the absence of any credible record of lost aquatic resources, opponents assert, demonstrates that the hypothetical SWANCC gap has proven to be a fiction.

The SWRCB staff has also said a uniform state policy is necessary to establish consistency by and between the nine Regional Water Quality Control Boards (RWQCBs) throughout the state. But, again, opponents of the proposed State Program—largely the regulated community that has to deal with the respective RWQCBs on these matters—state that there is no evidence of any such inconsistent operations. Further, they say that if there were inequitable and disparate treatment at the RWQCBs, it would be them, the ones subject to such hypothetical regulatory irregularities, that would be complaining. Nonetheless, the proposed State Program soldiers onward.

Defining ‘Wetlands’

Notwithstanding the confusion surrounding the bounds of jurisdiction related to aquatic resources at the federal and state levels, one component has been dependably clear—what actually *is* a “wetland”? A Corps- and EPA-promulgated regulation has long established that for a feature to be a true “wetland,” three components must be present: 1) hydrology (it is wet); 2) soils of specified characteristics rendering them “hydric” based on saturation; and 3) indicator hydrophytic vegetation. As noted above, there has been much legal debate as to whether any given wetland is jurisdictional, isolated, or otherwise bears the requisite significant nexus to another WOTUS, but the foundational definition has been pretty stable—either all three components are present or they are not.

One of the most controversial aspects of the proposed State Program is a new and different definition of “wetland” for California. The new definition in the State Program would keep the first two components, but effectively eliminate the third, vegetation. Op-

ponents of the State Program have offered multiple alternatives and language supplements that would keep the textbook definition consistent with the federal agencies, and still explicitly loop in resources SWRCB staff says it feels may escape regulation under the federal definition. Critics, again, point out that there is no record of a regulatory gap under the longstanding federal definition.

Alternatives Analysis and the ‘LEDPA’

The most impactful and cumbersome aspect of the proposed State Program is its requirement for the preparation of an alternatives analysis and the lack of alignment with that requirement with the federal process. The proposed State Program does authorize use and deferral to a federally authorized alternatives analysis in limited circumstances, but there are many instances in which a state analysis will be required either in addition to the federal analysis or when the federal agencies do not require one. For example, if the proposed activity is authorized under a federal “general” permit (Nationwide Permits), generally an alternatives analysis is not required. Nonetheless, the proposed State Program almost always requires the alternative analysis unless the state has already certified the federal general permit, and even then, there are multiple disqualifiers that will resurrect the alternatives requirement anew. The magnitude of impact on the aquatic resource—designated as “Tier 1,” “Tier 2,” or “Tier 3”—will dictate how extensive and elaborate the alternatives analysis must be.

Attempting to mirror the federal regulations, the proposed State Program would require the respective RWQCB conducting the alternatives analysis to certify that the proposed activity is the Least Environmentally Damaging Practicable Alternative (LEDPA). In the federal regime, if your impact includes the fill of a wetland or another “special aquatic site” (e.g., a mudflat), you must overcome a rebuttable presumption that an alternative does exist that can avoid the impact to the special aquatic resource. Depending on the region, this presumption, though labeled “rebuttable,” is actually regarded as an insurmountable death knell, so the resource must absolutely be avoided to have any chance of getting the permit. The proposed State Program includes both the LEDPA mandate and presumption for fills to waters of the state, not just resources recognized as independently “special.”

Conclusion and Implications

Notwithstanding the flurry of regulatory activity at both the federal and state levels, clarity on what is or is not a regulated resource in any given context is unlikely in the foreseeable future. And litigation on all fronts is a veritable certainty. Specifically, as to the proposed State Program, advocates on both sides of the issue have questioned whether it is in California's

interest to seek delegation of the federal program under Clean Water Action § 404(g) so as to allow for one integrated program. One of the major gating issues for the regulated community on that front is whether a federal program delegated to the state still operates as a jurisdictional link to § 7 for interagency consultation under the federal Endangered Species Act.

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WESTERN WATER NEWS**PROPOSED UTAH-COLORADO WATER TRANSFER PIPELINE PROJECT REVIVED UNDER NEW TERMS**

A Colorado entrepreneur, through a newly created LLC, has filed for water rights in Utah's Green River in the latest iteration of a decade-old plan to bring additional water to Colorado's Front Range. That application, like its predecessors, faces steep opposition from a variety of environmental, private, and governmental groups.

Background

Aaron Million originally conceived of this plan 15 years ago while working on his master's thesis at Colorado State University. Since then, Million's plans have been defeated and then re-hatched multiple times, giving the project the nickname "zombie pipeline." An early version called for pumping 250,000 acre-feet to Colorado and was quickly dismissed. In 2010 the project was called the Flaming Gorge Pipeline and proposed to pump more than 200,000 acre-feet water from Flaming Gorge Reservoir in Wyoming to Colorado annually. That 500-mile pipeline was slated to run all the way to Pueblo, Colorado on the southern tip of the Front Range. After being opposed on all fronts, it was finally rejected by the Colorado Water Conservation Board and Federal Energy Regulatory Commission in 2012.

A New Proposal

Undeterred, the project has again surfaced, this time under Million's new entity Water Horse Resources, LLC. Water Horse submitted an application to the State of Utah in January of 2018, this time claiming 76 c.f.s. for a total of 55,000 acre-feet, annually, from the Green River below Flaming Gorge. This revised version of the pipeline project is only about a quarter of the 2010 proposal, which Million hopes will allay the 2012 concerns that there was simply not enough water in the river.

Nevertheless, the application was opposed by almost 30 individuals, environmental groups, river districts in Colorado and Utah, and governmental agencies including the Bureau of Reclamation and

the BLM. The State of Colorado has taken a wait-and-see approach, noting that it will remain neutral for the time being.

One of the chief concerns raised by opposers is that the plan is widely speculative, considering that Water Horse has not yet revealed a buyer for the large volumes of water. Million claims that he does in fact have a buyer interested in purchasing the entire 55,000 acre-feet to use on the Front Range. However, the only evidence presented in the application were letters of interest from potential buyers relating to the 2010 proposal. The Central Colorado Water Conservancy District (CCWCD) is the only Colorado entity to have openly expressed interest in the water from the Water Horse pipeline. The CCWCD, which has since joined an advisory board for the Water Horse project, is very interested in the pipeline because water shortages have left the district about 50 percent short on its deliveries in an average year.

This latest proposal plans for an underground pipeline, approximately 40 inches in diameter, that would divert from the Green River—below Flaming Gorge and above Dinosaur National Monument—and then run east across Wyoming before turning south into Colorado along the Front Range. Water Horse has estimated that the project will cost between \$860 million and \$1.1 billion to construct. Million has mentioned the possibility of using existing oil and gas pipelines to transport the water, but there have been no official plans yet revealed so it is unclear how viable such a plan would be.

Water and Hydroelectricity

In addition to revenue from the sale of water, the pipeline is projected to generate 70 megawatt hours of hydroelectric power per year thanks to a 3,800-foot vertical drop from the Continental Divide to the Front Range. After the pipeline is up and running, Million has discussed a second phase involving pumped-storage facilities to increase hydropower efficiency, generating an additional 500 to 1,000

megawatt hours annually. At a November hearing of the Utah Board of Water Resources, Million noted that, “[i]t’s becoming as much a renewable-energy project as water supply.” In that hearing the proposal was roundly criticized by groups and individuals as disparate as Utah ranchers and Colorado environmental groups. The only group to support the project had a clear agenda—Pipeliners Local Union 798. Much of the other criticism brought up at the hearing dealt with the vagueness of the proposal, with the initial plans leaving the public unable to determine the viability of the plan. Those concerns led to the Utah State Engineer’s office on December 10, 2018 to request additional information from Million and Water Horse to prove, principally, that water is available and that the project is feasible.

Update: Water Rights, and Environmental Concerns

Water Horse answered those questions on February 8, 2019 in a sprawling response that totaled almost 250 pages, including exhibits. Responding to the questions about physically and legally available water, Water Horse noted that the Green River has so few diversions compared to users that “it has never been necessary to regulate Green River water rights by priority.” Turning to a legally available water supply, Water Horse claims that: 1) the Law of the River dictates that this water would be charged to Colorado because the 1922 Colorado River Compact focuses on place of use, and 2) the 2010 CWCBC Statewide

Water Supply Initiative found that Colorado has between 445,000 and 1,438,000 acre-feet per year available under its Compact entitlements. Therefore, the response claims, the Water Horse proposal would use both a physically and legally available water supply.

Pivoting to environmental issues, Water Horse admitted that the most straightforward legal approach would have been to divert from the Green River in Colorado, run the pipeline through Colorado, and therefore file the application in Colorado. However, Water Horse claims that technical and environmental issues make that current proposal the most feasible. Other environmental issues, particularly those concerning fish and other wildlife, have been a contentious point through the various iterations of this project. In the February 8 response, Water Horse seemed to punt on this issue, claiming that there is plenty of water in the Green River at the point of diversion to support fish habitat, but that’s also a moot point at this time because federal involvement will necessitate Endangered Species Act and National Environmental Policy Act (NEPA) review in the future.

Conclusion and Implications

All opposers now have 30 days from February 8 in which to offer any comments to Water Horse’s response. There is no timetable on an expected resolution of this proposal, but if the past applications are any guide, it will be several years before the application is granted or denied.
(John Sittler, Paul Noto)

LEGISLATIVE DEVELOPMENTS

**IDAHO GOVERNOR SIGNS HOUSE BILL 1 INTO LAW,
FURTHERING BOISE RIVER BASIN STORAGE WATER SETTLEMENT**

On February 13, 2019, Idaho Governor Brad Little signed House Bill 1 into law furthering a large-scale storage water rights settlement in the Boise River Basin. The settlement resolves several years of litigation over the implementation and interpretation of a computerized water right accounting program in the Boise River Basin (Administrative Basin 63) that, according to the Department, counts flood control releases against the storage water rights stored and released from Arrowrock, Anderson Ranch, and Lucky Peak Reservoirs. The legislation makes clear that the Idaho Department of Water Resources (Department) is required to subordinate new storage water right applications seeking greater than 1,000 acre-feet of storage to the physical filling of the existing 1 million acre-feet of storage contained in the reservoirs.

The Accounting Program

In 1986, the Department implemented a computerized water right accounting program in the Boise River Basin. The program platform itself had been developed a few years prior to track water rights in the Upper Snake River Basin (Administrative Basin 01). The program was then implemented in the Payette River Basin (Administrative Basin 65) in 1994. Each of the river basins where the program is used contain large federal reservoirs that perform flood control functions in addition to storing water for other purposes (such as irrigation, municipal, and recreational purposes).

According to the Department and the state of Idaho, the water right accounting program is designed to (and does) count all water flowing into (and through) a reservoir as accruing to the reservoir water right(s). This includes water that passes (more or less) contemporaneously thru a reservoir and is released for purposes of flood control (making and maintaining open/vacant space in a reservoir so that it can capture anticipated snowpack runoff). In flood control years (good water years) this results in reservoir water rights filling “on paper” under the water right accounting

program despite the fact that the reservoirs are not physically full at the point of paper fill (because open space has been created and maintained to capture and regulate subsequent runoff).

Water users, primarily irrigation entities owning storage space in the Boise River Reservoirs, disagreed with the Department and state’s position. A fundamental tenet of the prior appropriation doctrine is that water rights can only be perfected and sustained through end beneficial use. Because flood control releases are not a recognized beneficial use of water under Idaho law (though they are required as a matter of Idaho common law as part and parcel of non-negligent reservoir operations) the water users contended that flood control releases should not (and cannot) count against a reservoir storage right. In other words, water users contended that their water rights should not be debited for water flowing thru the system that they cannot divert and use because the releases occur prior to the irrigation season.

For years, the disagreement lay dormant because the Department, as a matter of administration, allowed the reservoirs to physically fill and allowed the water users to use the “second-in” storage water under Idaho’s “maximum use” doctrine. However, this meant (at least according to the Department and the state) that the “second-in” water ultimately used for irrigation purposes was being stored and used without a legally protectable water right. This result was unacceptable to the water users; they were unwilling to rely on the administrative good graces of the Department in the absence of a legally protectable water right. Doing so could leave the physical water the water users depend on and use vulnerable to future development and legal challenge from others.

The Resolution

After presentation of the issues to the Idaho Supreme Court, but before oral argument, the parties reached a negotiated resolution driven and encouraged by Idaho Legislative leadership. Generally

speaking, the resolution centers on the creation and judicial decree of two additional water rights known as “Refill 1” and “Refill 2.” The Refill 1 water right is for a quantity of 3.6 million acre-feet annually—the largest discharge volume on record in the Boise River Basin, occurring in 1965. Obviously, such a water right is a bit of a fiction because the aggregate physical storage capacity of the reservoirs is 1 million acre-feet (*i.e.*, it is a practical and physical impossibility to store and beneficially use 2.6 million acre-feet of the right). Consequently, Refill 1 is the flood control water right, a water right against which the water right accounting program can accrue flood control releases while also authorizing physical storage of “second-in” water. Because the water right essentially encumbers the entire runoff of the basin, the right is subordinate to all future in basin uses thereby allowing for additional water development and use in the basin.

However, Refill 1’s fully subordinate nature was concerning because future development could erode its utility and eventually imperil the storage and use of the “second-in” water again at some point in the future. To remedy this, the Refill 2 water right is for a lesser quantity of water (~587,000 acre-feet) that is subordinate to existing junior water rights, but is not subordinate to future water rights. Thus, in theory, physical storage in the existing reservoirs should be protected from future development.

The Purpose of House Bill 1

While the Refill 2 water right should assure the physical filling of the Boise River Reservoirs in flood

control years, water users sought further protection concerning the utility of the Refill 1 water right (*i.e.*, the less “subordinate” Refill 1 is, the more it can be used before having to turn to the more limited quantity, but senior priority Refill 2 water right). To this end, the Refill 1 water right contains subordination “bookends”; carve-outs or exceptions to its otherwise fully subordinated nature. First, the right is not subordinate to out of basin uses. Second, the right is not subordinate to water rights used solely to generate hydropower. Third, the right is not subordinate to water rights used for aquifer/groundwater recharge purposes. And finally, the Refill 1 water right is not subordinate to water rights developed for storage facilities of 1,000 or more acre-feet.

The first three subordination exceptions are already expressly provided for by statute, but the new storage exception is not traceable to any particular statute (though it stands to reason that the prior appropriation doctrine addresses the issue—*i.e.*, new, later in time water rights, whatever the purpose of use are, already junior in priority). But, to leave no doubt, and to allow inclusion of the storage-based subordination remark in the Refill 1 water right, HB1 fills that statutory void.

Conclusion and Implications

The next phase of settlement implementation now requires ratification by the Snake River Basin Adjudication Court, which will (hopefully) decree the water rights as stipulated. Motions to the effect were filed with the court in mid-February.

(Andrew J. Waldera)

REGULATORY DEVELOPMENTS

**U.S. BUREAU OF RECLAMATION RELEASES
BIOLOGICAL ASSESSMENT FOR CALIFORNIA WATER OPERATIONS**

On February 4th, 2019 the U.S. Bureau of Reclamation (Bureau) sent a Biological Assessment (BA) for the re-initiation of consultation on the coordinated long-term operation of the federal Central Valley Project (CVP) and California's State Water Project (SWP) to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively: Fisheries Agencies). Completion of the BA is an important step in the ongoing re-consultation regarding operations of the CVP and SWP. It will provide the basis for the Fisheries Agencies to issue revised Biological Opinions regarding project operations later this year.

Background

A Biological Assessment provides information to support consultation under the interagency cooperation requirements of § 7 of the federal Endangered Species Act (ESA). (16 USC § 1536.) Consultation under ESA § 7 is the mechanism by which federal agencies such as the Bureau and the Fisheries Agencies ensure that the actions they take, fund, or authorize do not jeopardize the continued existence of a listed species, or adversely modify habitat that has been designated as critical. When a federal agency such as the Bureau determines that an action is likely to adversely affect a listed species then it submits a request to the one or both of the Fisheries Agencies for formal consultation. (50 C.F.R. § 402.14.) That request is supported by Biological Assessment, which provides a description of the proposed federal agency action, and analyzes the potential effects of the action on species that are federally listed as endangered or threatened, and which may occur in the action area and designated critical habitat for the species. (50 C.F.R. § 402.12.) The Fisheries Agencies will then prepare a Biological Opinion that determines whether the proposed action is likely to jeopardize the continued existence of the species, or adversely modify habitat that has been designated as critical to the survival or recovery of the species. If so, the

Biological Opinion will identify contain any available reasonable and prudent alternatives to the proposed action which, if followed, would avoid that projected jeopardy or adverse modification. The federal action agency will then consider the conclusions of the Biological Opinion in ensuring that it complies with its duty under ESA § 7 to avoid jeopardizing a species or adversely modifying critical habitat.

The CVP and SWP historically operated in tandem under the same Biological Opinions, because their operations are coordinated, even though the CVP is operated by the federal government and the SWP is operated by the state. The existing Biological Opinions for coordinated operations of the CVP and SWP were issued ten years ago. The provisions of the existing opinions, which include reasonable and prudent alternatives, resulted in the loss of a long term average of 1 million acre-feet of water supply per year for the CVP and SWP. The existing opinions were challenged in court, but ultimately upheld by the Ninth Circuit in *San Luis & Delta-Mendota Water Authority v. Jewell* 747 F.3d 581 (9th Cir. 2014) and *San Luis & Delta-Mendota Water Authority v. Locke* 776 F.3d 971 (9th Cir. 2014).

The Bureau and the California Department of Water Resources (DWR) have been engaged in re-initiated consultation on CVP and SWP project operations since 2016. The re-initiated consultation incorporates new information provided by the recent historic drought and updated and evolving science. Under the currently projected schedule for the reinitiated consultation on long-term CVP and SWP operations, the Bureau expects that the Fisheries Agencies will be provide their Biological Opinions in June, 2019.

A parallel environmental review process under the National Environmental Policy Act (NEPA) is ongoing as well. According to the Bureau's timeline, the draft Environmental Impact Statement (EIS) will be available for public comment in June 2019, and public comment will conclude in August 2019. A Final EIS and Record of Decision are expected in in

November 2019 and December 2019 respectively.

The Proposed Action

The proposed action as described in the BA is to:

...continue the coordinated long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreements; and to increase operational flexibility by focusing on nonoperational measures to avoid significant adverse effects. (BA at 4-1)

The proposed action includes refinements or variations from current operations, including certain elements of the reasonable and prudent alternatives in the existing Biological Opinions. For example, with regard to exports of water pumped at the Delta, the proposed action would use risk-based management that incorporates real-time monitoring for fish presence and models, where possible, in place of calendar-based restrictions on pumping. A summary comparison of current operations and the proposed action is included in Table 4-1 of the BA, at pages 4-1 through 4-4. The proposed action is expected to allow for improved water supply for CVP and SWP contractors as compared to current operations under the existing Biological Opinions.

Impacts to Species and Habitat

To assess the impacts of the proposed action on listed species and their habitat, the BA uses a “without action scenario” as a basis for comparison. The BA explains the:

...without action scenario entails no future operations of the system, including, for example, storing and releasing water from reservoirs and delivering water otherwise required by contract. (BA at 3-16.)

Under the without action scenario the CVP and SWP would not provide any water deliveries to water contractors. Nor would the projects be operated to provide environmental benefits, such as maintaining a cold water pool for fish downstream of dams, or maintaining minimum instream flows during naturally low flow periods. In essence, under the without action scenario inflow to reservoirs would be passed

through the existing dams. The BA explains it used this without action scenario to isolate the effects of project operations from the many other factors that also affect listed species and their habitat. The BA projects that the proposed action would have overall beneficial effects for listed fish species and their habitat as compared to the without project scenario.

Conclusion and Implications

Issuance of the BA is an important step in the reconsultation on CVP and SWP operations. The approach taken in the BA reflects an effort to reexamine the assumptions and conclusions of the existing Biological Opinions, as well as to better isolate the effects of project operations.

The next critical step, expected in June 2019, will be issuance of a Biological Opinion or opinions by the Fisheries Agencies. That will provide the Bureau and the DWR with the Fisheries Agencies’ formal views on the effects of the proposed project operations, including their views on whether proposed operations would jeopardize the affected species or adversely modify critical habitat. If the Fisheries Agencies find the proposed project operations would jeopardize listed species or adversely modify their critical habitat, they will be required to identify any available reasonable and prudent alternatives.

The California Department of Fish and Wildlife (CDFW) will weigh in on whether it agrees with the conclusions of the Fisheries Agencies, exercising its authority under the California Endangered Species Act (CESA). DWR will likely ask CDFW to find that the federal Biological Opinions are consistent with CESA. (California Fish and Game Code § 2080.1.) If it does, DWR would not require any further authorization or approval under CESA for effects on state-listed species.

Past Biological Opinions on CVP and SWP operations have been controversial, and the coming new Biological Opinion or opinions will likely continue that trend. Environmental groups have been critical of the BA, and contend that proposed changes from current operations would add strain to the Central Valley’s fish populations, including winter-run Chinook salmon and Delta smelt. Water users, in contrast, may contend that the new Biological Opinions are perpetuating restrictions on operations that have had significant costs for water supply but have not proven beneficial for fish populations.

In sum, as 2019 unfolds it is likely to bring significant new developments in the application of the ESA to CVP and SWP operations. The BA is available on

the Bureau's website at: <https://www.usbr.gov/mp/bdo/lto.html>.
 (Holly Roberson, Dan O'Hanlon)

NEVADA STATE ENGINEER ISSUES ORDER TO CONJUNCTIVELY MANAGE SURFACE WATER AND GROUNDWATER WITHIN SIZEABLE AREA OF SOUTHERN NEVADA

On January 11, 2019, the Nevada State Engineer (State Engineer) issued Interim Order #1303, which designates a hydrologically connected multi-basin area for management as a joint administrative unit called the Lower White River Flow System (LWRFS) and takes certain actions to prevent overdevelopment of the area's water resources. The basins within the LWRFS are hydrologically connected to the Muddy River Springs, which feed the Muddy River. The order seeks to protect senior rights and the endangered Moapa dace; limits development actions that depend on a water supply that may not exist in the future; and anticipates the creation of a conjunctive management plan for the area.

Background on Conjunctive Management in Nevada

Historically, the Nevada Supreme Court did not interpret the state's water law to recognize the hydrological connectivity between surface and groundwater. In *Mosier v. Caldwell*, 7 Nev. 363 (1872), the Court held as "undoubtedly the settled law" that one may "lawfully dig a well upon his own land, though thereby he destroy the subterranean, undefined sources of his neighbor's spring." *Id.* at 366. To reach this conclusion, the Court pointed to the fact that "there was no visible connection between the wells and the spring--the flow of the water being by percolation." *Id.*

Not long thereafter, the Court again distinguished "percolating" waters from spring waters, concluding that the law of prior appropriation that applied to watercourses did not apply to "percolating" waters but did apply to waters that flowed in "subterranean channels." *Strait v. Brown*, 16 Nev. 317, 320-21 (1881). In 1939, the state passed legislation that adopted the prior appropriation doctrine for groundwater.

Consistent with the prior appropriation doctrine, water rights in Nevada are issued "subject to exist-

ing rights," and applications cannot be approved if "the proposed use or change conflicts with existing rights." NRS 533.370(2); 533.030(1); NRS 534.020. Interpreting Nevada law, the Ninth Circuit Court of Appeals held that if a groundwater permit is later determined to conflict with existing rights, the more senior decreed surface water holder "is still protected by the language 'subject to all existing rights on the source'" and can bring a legal action for injunctive relief to stop groundwater withdrawals. *Salmon River Canal Co., Ltd. v. Bell Brand Ranches, Inc.*, 564 F.2d 1244, 1247 (9th Cir. 1977). More recently, the Ninth Circuit held that a decree court maintains jurisdiction to determine if the State Engineer's subsequent issuance of a groundwater permit adversely affects a party's rights under a surface water decree. *See United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1160 (9th Cir. 2010). If the decree court determines that an adverse effect exists, it must "instruct the [State] Engineer to reduce the amount of allocated groundwater rights by an amount necessary to eliminate that effect." *Id.*

The State Engineer has recognized he must account for existing surface water decrees when considering groundwater applications, noting in one ruling, for example, that:

. . . [s]pring flow is a function of the driving head in the aquifer, so a reduction in head will result in a reduction in the rate of flow. Ruling 6311, p.26, April 16, 2015.

In a recent decision, the Nevada Supreme Court similarly concluded that a conflict exists where a subsequent groundwater withdrawal affects the flow of surface water sources. *Eureka Cnty v. State Eng'r*, 131 Nev. Adv. Op. 84, 359 P.3d 1114, 1121 (2015).

To account for the hydrologic connectivity between surface and groundwater, in 2017, the Nevada Legislature passed Senate Bill 47, which declared, "It is the policy of this State . . . [t]o manage conjunc-

tively the appropriation, use and administration of all waters of this State, regardless of the source of the water.” NRS 533.024(1)(e).

The Lower White River Flow System

The basins comprising the LWRFS have been the subject of special management and study for some time. In the 1980s and 1990s, the State Engineer designated irrigation as a non-preferred use and denied subsequent applications to appropriate groundwater for irrigation purposes. In 2002, the State Engineer issued orders that held in abeyance certain applications to appropriate groundwater from the carbonate-rock aquifer system and ordered an aquifer test to determine whether additional appropriations from such waters could be approved.

The aquifer test began in 2010 and finished in 2012, during which time study participants reported pumping data to the Nevada Division of Water Resources (NDWR) on a quarterly basis. The data demonstrated that pumping within the basins:

...caused sharp declines in groundwater levels and flows in [certain] springs... [that are sentinels] for the overall condition of the Muddy River. Order #1303, p.5.

As a result of the test, the State Engineer concluded that the areas within the LWRFS “have a unique hydrologic connection and share the same supply of water” and that:

...pumping of groundwater within the LWRFS has a direct interrelationship with the flow of the decreed and fully appropriated Muddy River, which has the most-senior rights. *Id.* at 5, 7.

In the more-than-five years since the aquifer test was completed, groundwater levels have not recovered to pre-test levels.

Order Number 1303

Order #1303 initiates certain development restrictions while inviting stakeholders to continue submitting information regarding water availability and movement in the LWRFS.

The order creates a temporary moratorium on the State Engineer’s review of final subdivision maps and other development or construction submissions that

require the State Engineer’s approval until the State Engineer can determine the total quantity of groundwater that may be developed in the LWRFS. An exception to the moratorium exists:

...if a showing of an adequate and sustainable supply of water to meet the anticipated life of the subdivision, other construction or development can be made to the State Engineer’s satisfaction. Order #1303, p.14.

Also, during the pendency of the interim order, permanent applications to change existing groundwater rights will be held in abeyance but temporary change applications will be processed.

To help the State Engineer better determine the amount of water available for use, Order #1303 encourages water users to submit groundwater data and participate in the public process to develop a long-term conjunctive management plan for the LWRFS. Stakeholders have until June 2019 to file reports with useful data regarding the geographic boundary of the LWRFS, aquifer test results, the long-term annual quantity of water that may be pumped from the LWRFS, the effects on the Muddy River of movements of groundwater rights between wells and “[a]ny other matter believed to be relevant to the State Engineer’s analysis.” Order #1303, p.14. The order allows for the filing of rebuttal to reports and indicates that an administrative hearing will occur in September 2019.

Conclusion and Implications

The most visible water rights holder to be affected by Order #1303 is Coyote Springs Investment (CSI), which proposes to develop a 159,000-home master-planned community on 43,000 acres 60 miles northeast of Las Vegas. CSI originally owned more than 4,000 acre-feet of groundwater rights within the LWRFS area, some of which it dedicated to the Clark County-Coyote Springs Water Resources General Improvement District for water delivery to the proposed development.

CSI filed a petition for judicial review of Order #1303, claiming to have spent over \$200 million dollars so far to develop the project. The petition asserts that Order #1303 is arbitrary and capricious and not supported by substantial evidence and questions the validity and reliability of the pump test data on

which the State Engineer relied. CSI also contends that the State Engineer has singled out the Coyote Springs project because it is the only entity within the LWRFS area with current subdivision plans. In association with its petition for judicial review, CSI also filed a motion to stay implementation of Order #1303 so that consideration of its subdivision maps may move forward.

CSI's petition for judicial review will test the State Engineer's authority to conjunctively manage ground-water and surface water resources. The outcome may dictate how the State Engineer engages in conjunctive management in the future. A new bill being considered by the Nevada Legislature would specifically

direct the State Engineer to adopt regulations related to conjunctive management and to levy a special assessment in conjunctively managed areas to help mitigate conflicts. More on that in a future article. [*Interim Order #1303 Designating the Administration of All Water Rights Within Coyote Spring Valley Hydrographic Basin (210), A Portion of Black Mountains Area Basin (215), Garnet Valley Basin (216), Hidden Valley Basin (217), California Wash Basin (218), And Muddy River Springs Area (aka Upper Moapa Valley) Basin (219) As A Joint Administrative Unit, Holding In Abeyance Applications to Change Existing Groundwater Rights, And Establishing A Temporary Moratorium On The Review Of Final Subdivision Maps*] (Debbie Leonard)

OREGON WATER RESOURCES DEPARTMENT ANNOUNCES FIVE-YEAR STRATEGIC PLAN

In December 2018, the Oregon Water Resources Commission (Commission) approved the Oregon Water Resources Department's (OWRD or the Department) Strategic Plan for 2019-2024. OWRD administers Oregon's laws governing surface water and groundwater resources; its duties include processing applications for new water rights and regulating water uses based on existing water rights of record. The Plan identifies the Department's priorities for the next five years and objectives that further each of these priorities.

Integrated Water Resources Strategy

The Plan complements Oregon's Integrated Water Resources Strategy (IWRS), which was adopted pursuant to legislative directive. The Commission adopted Oregon's first IWRS in 2012; it was updated in 2017. The 2017 IWRS identifies 18 critical issues facing Oregon and describes 51 recommended actions to address those issues. The Strategic Plan identifies IWRS recommended actions that correlate with each plan objective.

Strategic Plan Development and Priorities

The Strategic Plan was developed in consultation with the Commission, Department staff, and agency stakeholders. Through the process of developing the Plan, the Department identified three priorities for

the next five years:

1. Modernize management of Oregon's surface water and groundwater resources to meet instream and out-of-stream uses;
2. Work to secure Oregon's instream and out-of-stream water future in the face of increased water scarcity; and
3. Foster a forward-looking team dedicated to serving Oregonians with integrity and excellence.

Modernizing Oregon's Water Management

Within this priority, OWRD identified four objectives:

1. Advance responsible groundwater and surface water management;
2. Modernize water transactions systems and processes;
3. Increase protection of public safety and health; and
4. Improve instream protections and increase water conservation .

Improved data gathering is a key theme of this

priority. Possible action items include increased installation of water use measurement devices and use of the data, more stream measurements and groundwater level measurements collected and processed, and elimination of the backlog of unprocessed surface water and groundwater data. Within the realm of public health and safety, dam safety is a key focus. The Department aims to increase the number of high-hazard dams with completed and exercised Emergency Action Plans. This goal coincides with new recommended actions added to the 2017 IWRS, including ensuring dam safety and preparing for a Cascadia subduction earthquake event.

Securing Oregon's Water Future

OWRD identified three objectives to aid in securing Oregon's water future:

1. Understand Oregon's expected future water supply;
2. Equip basins to plan for their water future; and
3. Invest in Oregon's built and natural water infrastructure.

Most Oregon surface water sources are fully appropriated in the summer, and water users must increasingly rely on conservation, reuse, transfers, and/or storage to satisfy their water needs. Needs are only expected to grow as Oregon's population increases and climate changes like declining snowpack and increased drought frequency put pressure on Oregon's water supply.

The Department hopes to better understand the effects of changes in precipitation and patterns of water availability brought on by climate change through an updated Water Availability Reporting System and other tools. The Department will also endeavor to increase the number of basins and communities with a water plan such as a drought contingency plan, place-based plan, or water management and conservation plan. Infrastructure improvements are another key component of securing Oregon's water future, but progress on infrastructure will be heavily dependent on the identification of available funding sources. These objectives align with new recommended ac-

tions in the 2017 IWRS, including investing in local and regional water planning efforts and investing in implementation of water resources projects.

Develop a Dedicated Team

In the next five years, OWRD aims to:

1. Maintain technical excellence and improve customer service by investing in training for staff; and
2. Improve agency communications .

Examples of action items within this priority include developing succession plans, increasing the number of positions with a back-up, establishing an onboarding plan and/or desk manual for each position to ensure the continuity of institutional knowledge; and improving inter-division communication. Attention to these objectives will better equip OWRD to further its other priorities and objectives.

Budgetary Considerations

A key variable in the implementation of the Strategic Plan will be the availability of sufficient budgetary resources to pursue the desired objectives. The Plan acknowledges that:

... [s]ome of the outcomes in this plan may require additional resources to make further progress. . . [and states]. . . [t]he Department will continue to pursue those resources but will also identify targets for what we can expect to achieve with our existing resources.

Interested readers may wish to peruse OWRD's 2019-2021 Agency Budget Request for insight into OWRD's initial prioritization of Plan objectives.

Conclusion and Implications

OWRD's Strategic Plan represents the next step in operationalizing Oregon's IWRS, but, as the Plan itself states, it "describes the overall strategic direction the Department will take over the next five years but does not specifically identify how we will do it." Specific initiatives and tactics will follow from the Strategic Plan in the years to come.

(Alexa Shasteen)

WASHINGTON STATE DEPARTMENTS OF ECOLOGY AND HEALTH PUBLISH THE 'PURPLE BOOK' HELPING DEFINE IMPLEMENTATION

In February 2019, the Washington State Department of Ecology (Ecology) and the Washington State Department of Health (Health) jointly published a new Reclaimed Water Facilities Manual, dubbed the "Purple Book."

Details of the Purple Book

Ecology makes it clear right out of the gates that the Purple Book is not a certified regulation. It functions solely as a "guidance document. . .intended to clarify the requirements in the Rule." The Rule quoted above refers to the Reclaimed Water Rule (Rule) which appears at: <https://apps.leg.wa.gov/WAC/default.aspx?dispo=true&cite=173>

The purpose of the Purple Book is as follows:

This manual provides assistance for reclaimed water project proponents, applicants, permittees, owners, generators, distributors, design engineers, and users regulated by [the Reclaimed Water Rule]. . . . The Purple Book provides additional process and technical information, including design criteria, intended to guide and assist reclaimed water permittees, project proponents, planners, and/or designers to better understand the Rule requirements.

Ecology further cautions that:

this guidance document is not designed to, nor does it, cover every aspect of the Rule that you might think needs further clarification.

The Importance of Reclaimed Water in Washington State

The Purple Book reminds the reader of the importance of reclaimed water by restating the Washington Legislature legislative intent on reclaimed water:

The legislature further finds and declares that the utilization of reclaimed water by local communities for domestic, agricultural, indus-

trial, recreational, and fish and wildlife habitat creation and enhancement purposes, including wetland enhancement, will contribute to the peace, health, safety, and welfare of the people of the state of Washington.

The Purple Book further confirms the importance of recycled water to the state:

Use of reclaimed water constitutes the development of new basic water supplies needed for future generations and local and regional water management planning should consider coordination of infrastructure, development, storage, water reclamation and reuse, and source exchange as strategies to meet water demands associated with population growth and impacts of global warming.

The Regulatory Framework

The Purple Book goes through, extensively, the statutory framework for requiring recycled water in the state. It also provides detail as to the regulatory framework that Ecology and Health are tasked with. As to the overarching task to the agencies, it states:

The legislature's direction to Health and Ecology is to coordinate efforts towards developing an efficient and streamlined process for review, approval, and permit issuance in order to encourage and enable the use of reclaimed water. The two state agencies have developed the assignment of the lead agency role to correspond with permit issuance already done by that agency. For example, a wastewater utility that has an existing discharge permit from Ecology and wishes to produce reclaimed water from its effluent will work with Ecology as the lead agency.

The Purple Book confirms in great detail the Reclaimed Water Rule. It also lists in table form the several regulations that govern it all.

The Chapters

In addition to substantial coverage to definitions and acronyms, the Purple Book further divided into nine substantive coverage areas via chapter as follows:

- Water Rights,
- The Planning and Permitting Process,
- Treatment, Performance, Monitoring and Reliability,
- Storage, Distribution and Use,
- Commercial, Residential, Industrial and Institutional Uses,
- Land Application/Irrigation Uses,
- Wetlands,
- Streamflow and Surface Water Augmentation, and
- Groundwater Recharge and Recovery.

The Purple Book is clear in its emphasis of the importance of recycled water via the Recycled Water Rule, by affirming the Legislative intent as follows:

The legislature finds that by encouraging the use of reclaimed water while assuring the health and safety of all Washington citizens and the protection of its environment, the state of Washington will continue to use water in the best interests of present and future generations. ...It is hereby declared that the people of the state of Washington have a primary interest in the development of facilities to provide reclaimed water to replace potable water in non-potable applications, to supplement existing surface and groundwater supplies, and to assist in meeting the future water requirements of the state.

Conclusion and Implications

Overall, Washington State has historically been “blessed” with substantial rain and snow. But portions of the state are more arid and with climate change, which the Purple Book acknowledges is a very real issue, the future of water availability is unknowable. In preparation for that unknown future, the state Departments of Ecology and Health have taken action. And at the same time, Washington would seem to recognize the additional goal of being a good steward of water. The complete Purple Book link is available online at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1510024.html>
(R. Schuster)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT FINDS STATES WAIVE CLEAN WATER ACT WATER QUALITY CERTIFICATION LEVERAGE WHEN THEY CONTRACTUALLY AGREE TO DELAY CERTIFICATION FOR MORE THAN ONE YEAR

Hoopa Valley Tribe v. Federal Energy Regulatory Commission, 913 F.3d 1099 (D.C. Cir. 2019).

In a seemingly pedestrian statutory-interpretation ruling, on January 25, 2019, the D.C. Circuit undercut a widespread tactic by which states, project applicants, and interested third parties have used their water quality certification authority to routinely delayed federal dam licensing proceedings.

Background

In 1954, the Federal Energy Regulatory Commission (FERC) licensed a “hydropower project ... consisting of a series of dams along the Klamath River in California” (Project), pursuant to Subchapter I of the Federal Power Act (FPA), 16 U.S.C. § 791a–823g. As the “licensing, conditioning, and development of hydropower projects on navigable waters” pursuant to the FPA “may result in any discharge into the navigable waters,” water quality certification under the federal Clean Water Act (CWA) § 401 (33 U.S.C. § 1341(a)(1)) is a precondition to FERC’s issuance of a license or other FPA-approval. The CWA provides that the “state certification requirements ‘shall be waived with respect to’” a FERC application:

...if the state ‘fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.’ . . . [T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401. *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

In this matter, the original license expired in 2006; PacifiCorp, the successor in interest to the dams, has since operated the Project under “annual interim licenses pending [a] broader licensing process.” PacifiCorp’s proposed “broader licensing” included decommissioning various downstream dams, presum-

able on the basis that bringing them into compliance with modern environmental standards would not be cost-effective; the upstream dams would be modernized and relicensed. Currently, “[a]ll milestones for relicensing have been met except for the states’ water quality certifications under Section 401.”

In 2010, California, Oregon, various environmental groups, business interests and Native American tribes entered into

... a formal agreement in 2010, the Klamath Hydroelectric Settlement Agreement [KHSA or the Agreement], imposing on PacifiCorp a series of interim environmental measures and funding obligations, while targeting a 2020 decommission date.

Under the KHSA, the states and PacifiCorp agreed to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests that serve as a pre-requisite to FERC’s overarching review. The Agreement explicitly required abeyance of all state permitting reviews.

A 2016 amendment to the KHSA provided for the dams slated to be decommissioned to be transferred to a separate entity, and in 2018 FERC approve splitting the licensing proceedings, but has not yet approved the transfer of the annual, interim licenses (and pending application for decommissioning) to a new entity.

The Hoopa Valley Tribe was not a party to the original or amended KHSA. In 2012, the Tribe:

... petitioned FERC for a declaratory order that California and Oregon had waived their Section 401 authority and that PacifiCorp had correspondingly failed to diligently prosecute its licensing application for the Project.

That petition and a 2014 rehearing request were

both denied by the agency; the Tribe then sought review by the D.C. Circuit Court of Appeals. The D.C. Circuit Court held the matter in until the amended KHSA had been adopted, but as:

...the decommissioning the agreement contemplated has yet to occur, and in light of Hoopa's pending petition, [the Court] removed the case from abeyance on May 9, 2018.

The D.C. Circuit's Decision

The D.C. Circuit formulated the issue before it as:

...whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year. If this type of coordinated withdrawal-and-resubmission scheme is a permissible manner for tolling a state's one-year waiver period, then (1) California and Oregon did not waive their Section 401 authority; (2) PacifiCorp did not fail to diligently prosecute its application; and (3) FERC did not abdicate its duty. However, if such a scheme is ineffective, then the states' and licensee's actions were an unsuccessful attempt to circumvent FERC's regulatory authority of whether and when to issue a federal license.

As an exercise in statutory construction, the Court of Appeals described its task as "undemanding inquiry because Section 410's text is clear"—waiver occurs if a state:

...fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.

The inclusion of a temporal element defines "the absolute maximum" time a state can take to act without waiver occurring as one year:

Indeed, the Environmental Protection Agency ("EPA")—the agency charged with administering the CWA—generally finds a state's waiver after only six months. Citing 40 C.F.R. § 121.16.

Here, the states have kept the licensing-decommissioning proceedings in suspended animation for more than a decade by annually, since 2006, withdrawing and refiling identical applications "*in the same one-page letter*" (emphasis by the court). Thus, the Court of Appeals did not have to decide if submitting "a wholly new" application would trigger a new one-year certification period, or just how different a refiled request must be to qualify as "new."

While the opinion is technically narrow, disallowing "California and Oregon's deliberate and contractual idleness" in furtherance of "a coordinated withdrawal and resubmission scheme," its practical impact is potentially broad:

According to FERC, it is now commonplace for states to use § 401 to hold federal licensing hostage. At the time of briefing, 27 of the 43 licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*.

Conclusion and Implications

The byzantine delays and intricacies involved in many environmental permitting proceedings, followed inevitably by litigation, all of which provide ample entry points for third parties to gain leverage, make the kind of contractual circumventions of statutorily-proscribed procedures attractive when a global settlement is on the table. Weighing whether to enter into any such deal should always include a cold-eyed assessment of whether there are any interested parties not included in the deal, and whether the courts may disagree with the legal theories and assumptions underlying the parties' bargain. The D.C. Circuit's decision is available online at: [https://www.cadc.uscourts.gov/internet/opinions.nsf/DC412967A23D8B368525838D0052E4CD/\\$file/14-1271-1770168.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/DC412967A23D8B368525838D0052E4CD/$file/14-1271-1770168.pdf) (Deborah Quick)

NINTH CIRCUIT REJECTS TRIBE'S EFFORTS TO UTILIZE SOVEREIGN IMMUNITY ANTICIPATORY DEFENSE IN WASHINGTON STATE SALMON HABITAT MATTER

Stillaguamish Tribe of Indians v. State of Washington, 913 F.3d 1116 (9th Cir. 2019).

The Stillaguamish Tribe of Indians (Tribe) constructed a revetment in the Stillaguamish River intended to protect salmon. Following a deadly landslide linked to the revetment, the Tribe filed suit in the U.S. District Court against the State of Washington (State) and the Washington Attorney General (Attorney General). The Tribe's suit sought to preemptively establish the Tribe's sovereign immunity in anticipation of an indemnification claim by the State. The Ninth Circuit Court of Appeals vacated the District Court's grant of summary judgment to the Tribe and remanded the case to be dismissed for lack of subject matter jurisdiction. The court determined the well-pleaded complaint rule did not net federal question jurisdiction when applied to an anticipatory federal defense to a contract claim.

Factual and Procedural Background

The Stillaguamish Tribe of Indians is a federally-recognized sovereign Indian Tribe with its reservation in Arlington, Washington. In 2005, the State entered into a series of agreements, including one with the Tribe, for projects designed to protect salmon populations in the Stillaguamish River from habitat-damaging sediment. The agreement provided the Tribe with a grant of \$497,000 to construct the Steelhead Haven Landslide Remediation project. The Tribe completed the project in 2006.

Several years later, a large landslide occurred at the site of the remediation project, leading to the loss of 47 lives. In a separate lawsuit against the State, the remediation project was identified as a possible contributing cause to the landslide. The suit settled without any finding as to cause or assessment of responsibility. In the context of that lawsuit, the State approached the Tribe about indemnification under the agreement.

Anticipating an action by the State for contribution, the Tribe filed suit in the U.S. District Court for the Western District of Washington against the State and its Attorney General, requesting declaratory and injunctive relief. The Tribe sought a declaration that

its tribal sovereign immunity barred any lawsuit for indemnification arising from the agreement with the State. The Tribe argued the agreement was not binding because the employee executing the agreement on behalf of the Tribe's governing body lacked the authority to waive the Tribe's sovereign immunity.

The District Court's Rulings

Both parties filed cross motions for summary judgment. The District Court found two provisions of the agreement relevant: an indemnity clause and a waiver of sovereign immunity. The indemnity clause required the Tribe to "indemnify, defend and hold harmless [the State] from and against all claims ... arising out of or incident to the [Tribe's] ... performance." The waiver clause provided:

Any judicial award, determination, order, decree or other relief, whether in law or equity or otherwise, resulting from the action shall be binding and enforceable. Any money judgment against the Tribe, tribal officers and members, or the State of Washington...may not exceed the amount provided for in Section F-Projection Funding of the Agreement. ... [¶] The Tribe hereby waives its sovereign immunity as necessary to give effect to this section, and the State of Washington has waived its immunity to suit in state court.

The District Court identified the enforceability of the sovereign immunity waiver as dispositive. As quasi-sovereign nations, Indian tribes are generally immune from suit. Tribal immunity is intended to safeguard tribal self-governance, promote economic development, and tribal self-sufficiency. Tribal sovereign immunity can only be waived through an unequivocal expression of waiver by the Tribe. The District Court determined that even though the agreement included a waiver of sovereign immunity, the Tribe's resolution authorizing negotiation and execution of the agreement did not include an unequivocal waiver. Relying heavily on the presump-

tion of sovereign immunity, the District Court denied the State's motion and granted the Tribe's motion for summary judgment. The State appealed the case.

The Ninth Circuit's Decision

The Ninth Circuit did not reach the merits of the Tribe's sovereign immunity defense. Instead, the Ninth Circuit concluded the District Court lacked subject matter jurisdiction. Federal District Courts have original jurisdiction over "federal question" cases, which are cases arising under the Constitution, laws, or treaties of the United States. Courts generally identify federal question cases using the "well-pleaded complaint rule." The Ninth Circuit explained that:

. . . federal question jurisdiction exists only if the plaintiff's cause of action is based on federal law, . . . [and]. . . neither a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction.

Although the existence of tribal sovereign immunity is a question of federal law, the court noted that the Tribe filed its lawsuit in anticipation of a state court action.

Relying on U.S. Supreme Court precedent, the Tribe argued that seeking injunctive relief from state regulation on the basis that the state regulation was preempted by federal law presents a federal question. The court was not persuaded by the Tribe's argument, finding there was no question of federal preemption in the Tribe's case:

Parties cannot circumvent the well-pleaded complaint rule by filing a declaratory judgment action to head off a threatened lawsuit. *See Atay v. Cty. of Maui*, 842 F.3d 688, 697–98 (9th Cir. 2016). When a declaratory judgment action "seeks in essence to assert a defense to an impending or threatened state court action," courts apply the well-pleaded complaint rule to the

impending or threatened action, rather than the complaint seeking declaratory relief. *Id.*

The Tribe argued, *inter alia*, that since tribal sovereign immunity is a matter of federal common law, federal jurisdiction should automatically follow. The court agreed in theory, but emphasized that while an immunity *defense* might have triggered federal jurisdiction, that was not the case here as no defensive position in suit was present:

The Tribe points out that tribal sovereign immunity is a question of federal common law. True enough. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). But tribal immunity is a federal *defense*. *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (*per curiam*). As such, "[t]he possible existence of a tribal immunity defense . . . did not convert [Washington contract claims] into federal questions, and there was no independent basis for original federal jurisdiction." *Id.* It makes no difference that the Tribe asserted its defense in a declaratory judgment action rather than in a lawsuit brought by the state.

The Ninth Circuit vacated the District Court's judgment and remanded with instructions to dismiss for lack of subject matter jurisdiction.

Conclusion and Implications

Application of the well-pleaded complaint rule to an anticipatory defense based on federal law does not create federal jurisdiction for a state-law based cause of action. A potential defendant in an anticipated state court action who may be entitled to sovereign immunity or other federal law defense cannot count on the federal courts as a means of preemptively asserting that defense and evading the state court process.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2019/01/22/17-35722.pdf>

(Derra Leigh Purnell, Rebecca Andrews)

CALIFORNIA SUPERIOR COURT UPHOLDS ENVIRONMENTAL REVIEW FOR POSEIDON DESALINATION PROJECT

California Coastkeeper et al v. California State Lands Commission,
Case No. 34-2017-80002736 (Sac. Super. Ct. 2019).

In January 2019, the Sacramento Superior Court dismissed a California Environmental Quality Act (CEQA) challenge to the State Lands' Commission's (SLC) 2017 approval of a lease amendment under which a Huntington Beach desalination project proposed to operate. The decision, *California Coastkeeper et al v. California State Lands Commission* removes one hurdle for the project, which must still obtain regulatory approvals from the Regional Water Quality Control Board. The decision by Judge Sueyoshi of the Sacramento Superior Court also offers a detailed analysis of the distinctions between "supplemental" and "subsequent" environmental review under CEQA—a distinction that is informative to water agencies in all stages of infrastructure and environmental review planning.

Background

In 2010, acting as the lead agency under CEQA, the City of Huntington Beach (City) certified an Environmental Impact Report (EIR) for the "Seawater Desalination Project at Huntington Beach." The EIR evaluated the addition of a desalination facility at a then-existing powerplant, as well as offshore improvements necessary to carry out the desalination work. The City took that action in its role as lead agency for the project under CEQA.

The tidelands within which the desalination facilities were proposed to operate were subject to a 2007 lease between the powerplant operator and the State Lands Commission. Following the approval of the project's EIR, the State Lands Commission (acting as a CEQA responsible agency, and in reliance on the EIR), approved a lease amendment that added Poseidon Resources as a co-lessee on the project site.

In 2016, Poseidon applied for another amendment to the SLC lease, the purpose of which was to allow for modifications to the desalination facility design to include (among others) the placement of 1 millimeter screens on the facility's existing intake pipes. The SLC determined that these changes, and intervening efforts to comply with the State Water Resources Control Board's 2015 Desalination Amendment, were

sufficient to trigger the requirement for a supplemental EIR, which was released in 2017. The 2017 Supplemental EIR relied upon the analysis in the 2010 EIR for the project, and new material focused on the "minor changes with the Commission's lease area" to the previously approved desalination plant structures and operations.

The SLC approved the lease amendment, subject to the future approval of the Santa Ana Regional Water Quality Control Board. That application remains pending.

Challenges to the SLC Environmental Review

In November 2017, petitioners California Coastkeeper Alliance, California Coastal Protection Network, and Orange County Coastkeeper (petitioners) filed a petition for writ of mandate, challenging the SLC's approval of the lease amendment and challenging the sufficiency of that agency's review under CEQA.

Petitioners argued that the lease amendments and anticipated changes to the desalination plant's proposed operations were "substantial changes" requiring "major revisions" of the project's EIR under Public Resources Code § 15162, and further that the SLC was required under Public Resources Code § 15052 to assume a lead agency role in the preparation of that environmental review. In addition, petitioners argued that the SLC violated its duties under the public trust doctrine to consider and evaluate the proposed project.

The Superior Court's Decision

CEQA Claims

The court rejected each of these arguments in turn. First, CEQA requires that a new, subsequent EIR be prepared only in those situations where: 1) *substantial changes* in the project analyzed or the impacts associated with it, which will require "major revisions" to the prior environmental review, are discovered; or 2) new information, which was not known at the time

of the original documents' preparation, is uncovered. Pub. Res. Code § 21166; CEQA Guidelines § 15162. In the alternative, where "only minor additions or changes would be necessary" to make the prior environmental document applicable to the changed circumstances, a supplemental EIR may be prepared. CEQA Guidelines § 15163.

The court observed that SLC's decision to prepare a supplemental EIR, rather than a subsequent document, was a factual determination subject to the substantial evidence standard of review. Petitioners failed to demonstrate that the SLC's decision to proceed with a supplemental EIR was not supported by substantial evidence. As to certain of the changes in the project's design and operations, the court opined that these changes were either too speculative (*e.g.* future use of the treated water for groundwater supplementation). As to many of the challenged insufficiencies in the project's environmental review, petitioners had failed to identify evidence favorable to the other side, and explain why that evidence was lacking.

Public Trust Claims

Petitioners' public trust claims were tied to the related claim that the SLC had failed to properly

evaluate the project and its impacts under CEQA. The court rejected these claims as well, finding that the SLC through its Supplemental EIR had "engaged in a thorough analysis of the proposed project, as well as a specific public trust analysis." (Slip Op., p. 18). Because petitioners failed to demonstrate that the SLC's decision was arbitrary and capricious, this challenge also failed.

Conclusion and Implications

In addition to representing forward progress for a significant new desalination project, *California Coastkeeper et al v. California State Lands Commission* offers a rare and detailed analysis of distinctions between a supplemental and subsequent EIRs. Given the long time scale and often inter-related nature of environmental review on water infrastructure projects, this discussion may be informative to other water agencies in their planning. In addition, future appeals of the Sacramento Superior Court decision may serve to further develop case law on the distinction between supplemental and subsequent EIRs. Judgment was filed in the case on February 1, 2019, and appeals may be filed through the spring.
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