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FEATURE ARTICLE

THE EBB AND FLOW OF THE FEDERAL CLEAN WATER ACT—EPA RELEASES NEW PROPOSED 'WATERS OF THE UNITED STATES' RULE DEFINING THE SCOPE OF THE ACT

By John Sittler and Paul Noto

The U.S. Environmental Protection Agency (EPA) released its new proposed "waters of the United States" (WOTUS) rule on December 11, 2018. The proposed rule has not yet been officially published in the *Federal Register*, but is expected to be published soon. The new proposed rule would replace rules enacted under President Obama and repeal protections on large stretches of U.S. waterways.

Background

The federal Clean Water Act (CWA) was passed in 1972 with the goal of reversing significant water pollution across the country by protecting "navigable waters." The general understanding of the term was that used by the Supreme Court in *The Daniel Ball*, 77 U.S. 557, 563 (1871)—waterways are navigable:

> . . .when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

By the time of the CWA, U.S. Supreme Court precedent had expanded the term to include non-navigable tributaries, if that was necessary to protect the navigable waterway. *See, Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). Unfortunately, Congress did not further define "navigable," but rather left it up to EPA and the U.S. Army Corps of Engineers (Corps), paving the way for decades of litigation that attempted to determine what waters the CWA protects.

The last time the Supreme Court spoke on the issue was in 2006 in *Rapanos v United States*, 547 U.S. 715 (2006). That case was a plurality decision, further muddying the issue and resulting in unclear precedent. *Rapanos* particularly focused on wetlands and the extent to which they are covered under the CWA. The late Justice Antonin Scalia, writing for the four-justice plurality, said that WOTUS can only refer to "relatively permanent, standing or flowing bodies of water" not "occasional," "intermittent," or "ephemeral" flows. Justice Kennedy, who voted with the plurality, but only through his separate concurring opinion, said that wetlands need only a "significant nexus" to a navigable water in order to be protected under the CWA.

The Clean Water Rule

In 2015, the Obama administration enacted the Clean Water Rule (2015 Rule) in an attempt to clarify what constituted navigable waters under the CWA. Key components included the inclusion of wetlands and ephemeral streams (those that only flow when it rains). Instead of adjudicating tributaries on a case-by-case basis, the 2015 Rule clarified that if a stream had a bed, bank, and high-water mark (physical features of flowing water), it garnered CWA protections. Regarding wetlands, the 2015 Rule used Justice Kennedy's "significant nexus" test but also provided they would be protected if they were within 100 feet, or within the 100-year floodplain, of a navigable waterway. This distance requirement in particular was met with opposition because it was not included in the proposed rule, only the final rule.

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Although the EPA claimed that the 2015 Rule merely created certainty for 3 percent of the nation's waterways, it was met with significant blowback, particularly from agriculture and industry groups. The 2015 Rule was repeatedly called a federal power grab, even with its explicit exemptions for certain farm waterways including puddles, ditches, artificial stockwatering ponds, and irrigation systems that would revert to dry land if irrigation were to stop.

One of the more vocal opponents of the 2015 Rule was then candidate Donald Trump who called the rule "destructive and horrible" during his campaign. Throughout the 2016 election cycle, he repeatedly promised to do away with the rule, a promise, which he began fulfilling immediately.

'Repeal and Replace'

Shortly after entering office, President Trump announced his plan to "repeal and replace" the 2015 Rule. On February 28, 2017 he issued an executive order instructing the EPA to begin this process. The plan is comprised of two phases: first, a repeal of the 2015 Rule to revert regulation back to the pre-Obama WOTUS definition for the immediate future, and second, to adopt a new rule with the goals of eliminating uncertainty and reducing regulatory costs.

EPA published a final rule on February 6, 2018 adding an "applicability date" to the 2015 Rule. That means that the 2015 Rule, which was scheduled to go into effect on August 16, 2018, now doesn't take effect until February 6, 2020. This essentially gives the Trump EPA additional time in which to repeal the 2015 Rule and to propose and implement a new rule. The applicability date rule was immediately challenged in several lawsuits across the country. The principle challenge was that the EPA was in violation of the Administrative Procedure Act because it did not solicit comments as part of the standard notice and comment rulemaking process. The EPA argued that the applicability date rule was not an entirely new rule, and therefore notice and comment was not required.

The Southern Environmental Law Center was the principal plaintiff in a challenge that resulted in the applicability date rule being invalidated on procedural grounds. The U.S. District Court for the District of South Carolina invalidated the rule in 26 states, creating a patchwork of jurisdictions where the 2015 Rule applies. Additional lawsuits have resulted in the 2015 Rule now applying in 28 states, the District of Columbia, and the U.S. Territories, while the pre-Obama WOTUS definition, thanks to the applicability date rule, controls in the remaining 22 states. The only western states where the 2015 Rule applies are California, Oregon, and Washington.

The actual repeal of the 2015 Rule has been a messy process with several comment periods. After initially publishing a proposed repeal rule on July 27, 2017, the EPA later republished the rule on June 29, 2018 clarifying that this proposed rule would repeal the 2015 Rule in its entirety. The comment period for that proposed rule closed on August 13, 2018, and a final rule has not yet been published.

The New Proposed Rule

Although the new proposed rule has not yet been published, the EPA and Corps released a "pre-publication" rule on December 11, 2018. The rule lists six categories of waters that will be protected under the CWA, while including language that specifically exempts any waterway not mentioned in those six categories.

The categories of protected waters follow.

Traditionally Navigable Waterways

The least controversial category, there is no doubt that the WOTUS definition includes traditionally navigable waterways. This term includes rivers, streams, large lakes, and oceans that could be traveled by boat or used for commerce. There is no question that these larger waterways were intended to be included as WOTUS.

Impoundments

There is no change from the 2015 rule regarding regulation of impoundments—this is also the same as the 1986 CWA regulations. This category includes check dams and perennial rivers that form lakes and ponds behind them. However if fill material, under a valid § 404 permit, transforms a water body into an upland (an area above the high-water mark that does not qualify as a wetland), the waters would no longer be considered WOTUS. The proposed rule notes that EPA will be seeking comment on the status of an unprotected wetland if, after being turned into a pond, no longer meets the standards for ponds, discussed below.

Tributaries to Navigable Waterways

The standard for tributaries under the new proposed rule is those that contribute "extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year" to traditionally navigable waters. This is a departure from the 2015 Rule physical standard of having a bed, bank, and high-water mark.

Although the new rule specifically excludes ephemeral streams, it is unclear how often, or how much, water a tributary would need to carry to be federally regulated. The proposed rule states that the tributaries would be evaluated on whether they contribute on a typical year—based on a 30-year average—but offers no further guidance. EPA noted in a press conference that it would require decisions in the field to determine what constitutes a typical year within the 30-year average. Several commentators believe that this classification includes streams that do not flow all year, provided the flows are predictable and continuous within the season of flows. That means that some, but not all, of western snowmelt-fed streams would continue to be protected.

Ditches

Regulation of ditches under the new proposed rule is split into two main categories. First, ditches that function like a traditional navigable waterway—such as the Erie Canal—will continue to be federally regulated as navigable waters. However, other ditches are regulated much like tributaries to navigable waterways. If the ditches contribute flow to a traditional navigable waterway in a typical year, they will continue to be regulated. Again, like tributaries, it is unclear how often, or how much water will need to flow from the ditches to a navigable waterway to meet the "typical year" standard. Ditches that relocate a protected tributary, or ditches built through wetlands with surface water connections would be regulated.

Lakes and Ponds

Lakes large enough to be considered traditionally navigable waters are of course still included as WOTUS under the proposed rule. However, smaller lakes and streams would now be subject to the same standard as ditches and tributaries—they will only be regulated if they contribute intermittent or perennial flow to downstream navigable waters. This is a departure from the 2015 Rule that covered all naturally occurring lakes and ponds either within 100 feet of a navigable waterway, or within 100-year floodplain and within 1,500 feet of its ordinary high-water mark. Lakes and ponds that contribute to navigable waterways via flooding, such as oxbow lakes, would be regulated provided that the contribution happens when examined on the rolling 30-year average standard. Artificial ponds, such as those constructed for stockwatering, would continue to be exempt from regulation.

Wetlands

The proposed rule would include all "adjacent wetlands", *i.e.* those that abut or have a direct hydrological connection to a federally regulated WOTUS. This is a split from the 2015 Rule's standard of having a "significant nexus," which itself was taking from Justice Kennedy's concurring opinion in *Rapanos*. The 2015 Rule also included specific distance requirements for jurisdictional wetlands—100 feet from a navigable water or within that waterway's 100-year floodplain. This controversial requirement would be eliminated under the new proposed rule. Waters that have been naturally or artificially (with a valid § 404 permit) transformed to uplands would no longer be considered wetlands.

Everything Else Is Not WOTUS

The new proposed rule specifically provides that any water that does not fit into one of the above categories is *not* a water of the United States subject to regulation under the CWA. This includes ditches (other than those listed above), prior converted cropland (excluded since 1993), and importantly, all groundwater. The regulation of groundwater under the CWA has been a contentious issue over the history of the act, most recently resulting in a circuit split between the Fourth and Sixth Circuits.

The main issue is whether discharges into groundwater that later end up in a navigable water are able to be regulated. The Fourth Circuit Court of Appeals held that, although it takes a specific fact inquiry, if groundwater can be hydrologically traced to a navigable water, then that groundwater is considered WOTUS. *Upstate Forever v. Kinder Morgan Energy Partners LP* (4th Cir. April 12, 2018). The Sixth Circuit later held the exact opposite, finding that

groundwater, by its very nature, can never be traceable to a navigable water. *Tennessee Clean Water Network, et al. v. Tennessee Valley Authority* (6th Cir. September 24, 2018). Although either, or both, of those cases are likely to be appealed to the Supreme Court, the issue of groundwater regulation would no longer matter under the proposed rule.

Interstate Waters

The 1986 CWA regulations first introduced separate sections for interstate waters, including interstate wetlands. Under the new proposed rule, that section would be eliminated, and the classification of all interstate waters would be under one of the other six categories, or not regulated.

Initial Reception

EPA and the Corps released a joint press release and held a press conference concurrently with the pre-publication rule to discuss the proposed changes. Acting EPA Administrator Andrew Wheeler said the new proposed rule would be "clearer and easier to understand" and "would end years of uncertainty over where federal jurisdiction begins and ends." This goal of simplicity was echoed by EPA Assistant Administrator for Water David Ross who said the "goal was to provide as few categories [of WOTUS] as possible."

As expected, industry and agriculture groups have been initially favorable to the proposed rule in its pre-publication form, while environmental groups have been opposed. American Farm Bureau Federation President Zippy Duvall said the new rule will "empower" farmers and ranchers to comply with the law. Other supporters included U.S. Secretary of Agriculture Sonny Perdue, U.S. Secretary of the Interior Ryan Zinke, the National Cattleman's Beef Association, the National Council of Farmer Cooperatives, and the Agricultural Retailers Association.

Several environmental groups immediately released statements condemning the new proposed rule, including the National Resources Defense Council, which said the proposal "would be the most significant weakening of the Clean Water Act protections in its history." Trout Unlimited also took aim at the reduction in tributary protections, noting that "more than 117 million Americans get their drinking water from small intermittent and ephemeral headwater streams."

There has also been controversy surrounding the exact number of waterways currently protected under the 2015 Rule that would no longer be classified as WOTUS under this proposal. Various environmental groups have claimed that the new proposed rule would eliminate protections on 60 percent of the country's waterways and up to 1/3 of the country's drinking water. Acting Administrator Wheeler responded to these claims in the press briefing, saying:

> . . .[t]hat 60 percent number is from the previous administration. But maps do not distinguish between ephemeral and intermittent waters. There is not map that identifies all the waters of the United States.

In a rebuttal to Wheeler's claim to not know exactly how many waterways would lose protection under the proposed rule, *E&E News* recently obtained a 2017 slideshow by EPA and Corps staff showing that 18 percent of streams and 51 percent of wetlands would not be protected under the new WOTUS definition. The slides, obtained through a Freedom of Information Act request, were prepared for a presentation to former EPA Administrator Scott Pruitt and former Corps Deputy Assistant Secretary Douglas Lamont.

Conclusion and Implications

The new proposed rule is expected to immediately be published in the *Federal Register*, upon which interested parties will then have 60 days to file comments. EPA and the Corps are planning to host an informational webcast on January 10, 2019, and then a listening session in Kansas City, Kansas on January 23, 2019, implying that the rule will at least be published before then. After the comment period closes, EPA will then review the comments and publish a final rule that takes into account those comments and is based on the record established throughout the process. This is often a long process, and it is possible that there will be a second comment period as with the repeal rule. Considering the amount of litigation that has already gone into the applicability rule, it is likely that there will be legal challenges to both the repeal rule and new proposed rule once they are published.

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WESTERN WATER NEWS

IDAHO UPDATE—INAUGURAL FLOOD MANAGEMENT GRANT FUNDING EXHAUSTED

In response to historic flooding and corresponding flood damage throughout southern Idaho during the winter and spring of 2017, the 2018 Idaho Legislature passed House Bill 712, transferring $1 million from the state's General Fund for use in a new flood mitigation grant program. The funds were moved to the Water Management Fund of the Idaho Department of Water Resources for the establishment of a competitive grant program administered by the Idaho Water Resource Board. Applications exceeded available funding and by November 2018, the funds were exhausted. Proponents of the program plan to seek additional funding during the 2019 legislative session, which begins in January.

Background

The grant program requires an applicant 50 percent match, and the funds can be used in either reactive or proactive projects. Reactive uses include after-the-fact debris and gravel removal, bank stabilization and repair, and other stream channel restoration activities. Proactive projects include stream channel and floodplain modeling, anticipatory flood channel maintenance, and agency and volunteer coordination programs to reduce equipment mobilization times and to streamline response. Applicants were required to have projects that were shovel ready no later than November 2018.

The Grant Program Application

The Idaho Water Resource Board received 19 applications, but was only able to fund/approve 14 of them given the available funding. Applications were received and evaluated in two rounds. Though the grant funding was available state-wide, projects receiving finding tended to be clustered in areas of greatest damage during the 2017 floods—the Pocatello area (Portneuf Creek and the Portneuf River); Blaine County (Big Wood River and tributaries); the Nez Perce and Clearwater conservations district areas (Clearwater River drainage and tributaries); and the Treasure Valley (Boise River Valley).

The four largest projects (measured by grant funding) were: the Bear Creek flood reduction project (grant funding of $200,000) in Nez Perce County; the Quartz Creek project ($155,220) by the Clearwater Soil and Water Conservation District; the Duck Alley Pit Capture project ($153,550) by Flood Control District No. 10 on the Boise River; and the Della View Subdivision Flood Mitigation project ($121,331) on the Big Wood River in Blaine County.

On the Bear Creek project, the Nez Perce Soil and Water Conservation District will perform bank repair and bridge restoration/replacement work, including gravel removal and channel restoration. The Quartz Creek project will remove and replace sixteen undersized culverts in the Quartz Creek drainage and two additional culverts in the Calhoun Creek drainage to reduce flooding effects and roadway washouts on/along Snake Creek Road, which is a major secondary road in the area. The Duck Alley Pit Capture project seeks to restore Boise River flow back in the river channel rather than an alternate channel now flowing across private property resulting from the river leaving its banks and capturing a nearby gravel pit which has effectively dried up the preexisting river channel during normal flows. The Duck Alley project will restore and armor the former river bank, stabilize the bank with a variety of rock and willow and cottonwood plantings, and remove gravel from the river channel to improve river course/flow dynamics. And, the Della View Subdivision project seeks to shore up banks along the Big Wood River and activate/re-engage a side river channel, which eroded during flood flows causing extensive flooding in the neighboring Della View Subdivision. The project will also construct floodwater conveyance channels within the subdivision.

The largest project receiving grant funds, though amounting to far less than half of the overall cost of the project, was the East Perrine Pond/Wetland project proposed by the Twin Falls Canal Company. Some of the worst flooding during the winter and spring of

2017 did not result from natural streams and creeks at all; rather it resulted from the inundation and corresponding breaches of several irrigation canals an laterals in the Magic Valley (Twin Falls, Idaho area). Ice dams formed, banks breached, and several roads, culverts, and bridges were damaged.

The East Perrine Pond/Wetland project seeks to attenuate flows through the East Perrine Coulee, which drains several thousands of acres of agricultural lands. Flooding from the coulee has become more problematic /damaging with the construction of high-end housing developments downstream. The project proposes to create a 24-acre pond and wetland network, which will slow and attenuate East Perrine Coulee flows upstream of the residential developments. The project is being designed to yield an added water quality benefit as well—the estimated capture and removal of approximately 3,000 tons of sediment per year that would otherwise flow into the Snake River. The project will remove sediment and phosphorus bound to the sediment, which will provide significant non-point source contribution to meeting existing CWA TMDL goals in the Snake River.

Conclusion and Implications

Given the application demand (application numbers exceeding available funds), advocates of the grant program are hopeful that the Idaho Legislature will provide the funding on an annual basis as part of the Water Management Fund. Time will tell once the 2019 Legislative Session begins in January, but the program should have a solid chance to continue. The Idaho Legislature has been taking recent, consistent interest in water-related matters, authorizing multiple millions of dollars of funding for a variety of projects and programs over the last several years. A few years ago, the Legislature became a key proponent (and funding source) for aquifer recharge projects on the Eastern Snake Plain Aquifer, depleted by several hundreds of thousands of acres of groundwater-based agriculture, municipal growth and drought cycles. Two years ago the Legislature approved what was intended to be one-time funding for water quality improvement projects statewide to assist stakeholders in meeting TMDL requirements. That one-time funding has carried over into annual funding for grant disbursement through the Idaho Department of Environmental Quality. It would seem that the flood mitigation grant program administered by the Idaho Department of Water Resources and the Idaho Water Resources Board are well positioned to turn the one-time funding into an annual budget item.
(Andrew J. Waldera)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•November 28, 2018—The U.S. Environmental Protection Agency has settled its case against Connell Development Company, owned by Colin Connell, a Boise-area developer the agency found had committed numerous violations of a federal Clean Water Act permit for stormwater management at Connell's Eyrie Canyon project. Connell has agreed to pay a $68,000 penalty for failing to comply with EPA's Construction General Permit, which requires developers to implement stormwater controls to minimize the amount of sediment and other pollutants associated with construction sites from being discharged in stormwater runoff. Connell has also come into compliance with the permit and agreed to perform additional work beyond the requirements of the permit—such as more frequent inspections—to ensure that he remains in compliance. Stormwater runoff from the project flows to Sand Creek, either directly or through the Ada County Highway District Municipal Separate Storm Sewer System. Sand Creek flows into the Boise River. After both the Ada County Highway District and the City of Boise issued numerous Notices of Violation and 'Stop Work Orders,' EPA was notified of the on-going problems at the site. EPA representatives inspected the project twice in January 2016, and again in September 2017, and found multiple violations of stormwater management requirements,

•November 19, 2018—The U.S. Environmental Protection Agency has reached an agreement with the Saratoga Springs Owners Association, Inc. and Cross Marine Projects, Inc. (defendants) resolving alleged unpermitted dredge and fill activities and damages to wetlands at a Utah Lake marina facility in Utah County, Utah. Under the terms of a consent decree in the Federal District Court of Utah, the defendants will restore and enhance more than seven acres of wetlands and pay a civil penalty of $150,000. In December 2017, the United States filed a complaint against the Saratoga Springs Owners Association and Cross Marine Projects for damages associated with alleged illegal dredge and fill activity. EPA asserts that between September 2013 and February 2014, the Saratoga Springs Owners Association and Cross Marine Projects dredged a marina access channel and discharged the resulting fill material into Utah Lake and adjacent wetlands without a Clean Water Act (Section 404) permit from the U.S. Army Corps of Engineers. In March 2018, EPA, the U.S. Department of Justice, and the U.S. Army Corps of Engineers participated in mediation with the defendants. The resulting consent decree requires the defendants to pay a civil penalty of $150,000 and to restore an approximately 0.37-acre wetland and enhance an additional 7.0 acres of wetlands adjacent to Utah Lake. The restoration plan also includes reporting requirements and success criteria. The court entered the decree on November 19, 2018. Utah Lake is a water of the U.S. and is habitat for projects associated with an Endangered Fish Recovery Program, established in 1999, to protect the June Sucker, a fish that naturally occurs only in Utah Lake and spawns only in the lower Provo River.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•December 4, 2018—EPA cited the Rust-Oleum Corporation for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. RCRA is designed to protect public health and the environment, and avoid long and exten-

sive cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste. Under terms of the settlement, Rust-Oleum will pay a $168,000 penalty, and has ensured EPA it will properly contain and manage hazardous waste in the future. The facility, which has been in operation at this location since 1978, manufactures paints that are primarily contained in aerosol cans.

•November 28, 2018—EPA settled with a West Chester, Pennsylvania contractor for alleged violations of "Lead Safe" renovation protections. This rule protects the public from toxic lead hazards created by renovation activities involving lead-based paint. RRP safeguards are designed to ensure "lead safe" practices in the renovation and repair activities involving "target housing" built before the 1978 federal ban on lead-based paint. EPA alleged during multiple renovations of target housing in West Chester in February 2017 that Chapman Windows and Doors, while working under the parent company Air Tight Home Improvements, violated the RRP "lead safe" requirements by: 1) Failing to document whether target housing owners had timely received the required lead hazard information pamphlet titled "Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools"; 2) Failing to retain records to document compliance with lead-practices during renovation; and 3) Failing to ensure that the renovators conducting the work were EPA-certified to conduct lead-safe renovations.

As part of the settlement, the company did not admit these alleged violations, but has cooperated with EPA in resolving this matter and certifying its compliance with applicable RRP requirements.

Indictments Convictions and Sentencing

•December 12, 2018—The U.S. Department of Justice announced that Navimax Corporation, incorporated in the Marshall Islands with its main offices in Greece, was sentenced to a $2,000,000 fine by a federal District Court for violating the Act to Prevent Pollution from Ships and obstructing a Coast Guard investigation. The Act to Prevent Pollution from Ships is a codification of international treaties known as the "MARPOL Protocol." To ensure that oily waste is properly stored and processed at sea, all ocean-going ships entering U.S. ports must maintain an Oil Record Book in which all transfers and discharges of oily waste, regardless of the ship's location in international waters, are fully recorded. According to court documents and statements made in court, Navimax operated the Nave Cielo, a 750-foot long oil tanker. Prior to a formal inspection on December 7, 2017, the U.S. Coast Guard boarded the vessel near Delaware City when a crewmember gave the officers a thumb drive containing two videos, depicting a high-volume discharge of dark brown and black oil waste from a five-inch pipe, located 15-feet above water level. Subsequent investigation during a more comprehensive inspection on December 7, 2017, disclosed that the approximately 10-minute discharge occurred on November 2, 2017, in international waters, after the ship left New Orleans en route to Belgium. During the Coast Guard boarding on December 7, 2017, crewmembers presented the ship's Oil Record Book, which did not record this discharge. The District Court ordered Navimax to pay the $2,000,000 fine immediately and placed the company on probation for four years. This case was investigated by the U.S. Coast Guard Sector Delaware Bay and the Coast Guard Investigative Service.

•November 27, 2018—Two Greek shipping companies, Avin International LTD, and Nicos I.V. Special Maritime Enterprises, pleaded guilty in federal court in Beaumont, Texas, to charges stemming from several discharges of oil into the waters of Texas ports by the oil tanker M/T Nicos I.V., announced Assistant Attorney General Jeffrey Bossert Clark for the Justice Department's Environment and Natural Resources Division and United States Attorney Joseph D. Brown for the Eastern District of Texas. Avin International was the operator and Nicos I.V. Special Maritime Enterprises was the owner of the Nicos I.V., which is a Greek-flagged vessel. The Master of the Nicos I.V., Rafail-Thomas Tsoumakos, and the vessel's Chief Officer, Alexios Thomopoulos, also pleaded guilty to making material false statements to members of the United States Coast Guard during the investigation into the discharges. Both companies pleaded guilty to one count of obstruction of an agency proceeding, as well as one count of failure to report discharge of oil under the Clean Water Act, and three counts of negligent discharge of oil under the Clean Water Act. Under the plea agreement, the companies will pay a $4 million criminal fine and serve a four-year term of probation,

during which vessels operated by the companies will be required to implement an environmental compliance plan, including inspections by an independent auditor. Mr. Tsoumakos and Mr. Thomopoulos each pleaded guilty to one count of making a material false statement and face up to five years in prison when sentenced. A sentencing date has not been set. According to documents filed in court, the Nicos I.V. was equipped with a segregated ballast system, a connected series of tanks used to control the trim and list of the vessel by taking on or discharging water, the latter involving an operation called deballasting. At some point prior to July 6, 2017, the ballast system of the Nicos I.V. became contaminated with oil and that oil was discharged twice from the vessel into the Port of Houston on July 6 and July 7, 2017, during deballasting operations. Both Tsoumakos and Thomopoulos were informed of the discharges of oil in the Port of Houston. Tsoumakos failed to report the discharges as required under the Clean Water Act. Neither discharge was recorded in the vessel's oil record book, as required under MARPOL and the Act to Prevent Pollution from Ships. After leaving the Port of Houston, en route to Port Arthur, Texas, the deck crew was instructed to open the ballast tanks, and oil was observed in several of the tanks. After arriving in Port Arthur, additional oil began bubbling up next to the vessel, causing a report to the U.S. Coast Guard. During the ensuing investigation, both Tsoumakos and Thomopoulos lied to the Coast Guard, stating, among other things, that they had not been aware of the oil in the ballast system until after the discharge in Port Arthur, and that they believed that the oil in the ballast tanks had entered them when the vessel took on ballast water in Port Arthur. The case was investigated by the U.S. Coast Guard Investigative Service with assistance from the U.S. Coast Guard Sector MSU Port Arthur, which conducted the inspection of the ship.
(Andre Monette)

REGULATORY DEVELOPMENTS

U.S. DEPARTMENT OF AGRICULTURE ANNOUNCES $449 MILLION LOAN TO ASSIST IN DEVELOPING THE SITES RESERVOIR PROJECT

In November 2018, the U.S. Department of Agriculture committed to a $449 million loan for the Maxwell Water Intertie (MWI), a component of the Sites Reservoir Project. The Sites Reservoir Project is a proposed off-stream reservoir, designed to provide new water storage to increase water supply flexibility, benefit fish and wildlife, and aid in drought relief. The Sites Reservoir Project would accomplish these goals by creating an additional source of water, which would allow existing water sources to retain more water when demand is high.

Background

A Joint Powers Authority composed of local public agencies, the Sites JPA, is pursuing the Sites Reservoir Project, a project intended to provide another source of water storage for the state. Located in the Sacramento Valley, the Sites Reservoir would divert high winter flows and storm event flows from the Sacramento River and would receive water diverted from the Glenn-Colusa and Tehama-Colusa canals.

With this new water storage source, one goal of the Sites Reservoir Project is to relieve the stress on California's water system by allowing other reservoirs to hold more water for a longer period of time. The addition of an extra reservoir would effectively increase the total storage in northern California by about 500,000 acre-feet of water. The project will also benefit the environment by providing up to half of its annual water supplies to environmental flows and lessen the impact of drought on sensitive species. Specifically, the project will improve water quality for endangered fish, reduced salinity levels in the Sacramento-San Joaquin Delta and improve habitat for migratory birds.

The Loan

After the California Water Commission approved $816 million of Proposition 1 bond funding earlier this year, the Sites Reservoir Project received yet another source of funding in the form of a loan from the U.S. Department of Agriculture and the Department of the Interior. This loan totals $449 million, the largest ever given by the Department of Agriculture. The loan will be used to build the Maxwell Water Intertie, a pipeline between the Tehama Colusa Canal and Glenn Colusa Irrigation District canal, which will deliver water for Sites Reservoir during high Sacramento River flows. However, the money received does come with a cost. The loan will need to be paid off in 40 years at 3.875 percent interest.

The Sites Reservoir Project is still undergoing environmental review, but the MWI is expected to be completed by 2024 and the reservoir is set for completion in 2030. As of the time of the receipt of this loan, the total amount of the project is estimated to be $6.4 billion. Most of this price tag still lacks a significant source of funding.

Conclusion and Implications

Taken together with the allocation of Proposition 1 bond funds, the U.S. Department of Agriculture loan provides a boost as the Sites JPA seeks more funding for the Sites Reservoir Project. However, it remains to be seen just how the rest of the project, which has a projected $5.1 billion price tag, will be financed. Given the current status of water management in California, the Sites Reservoir Project remains an attractive option to address future water concerns. For more information, *see: Sites Project: Introduction*, Sites Projects Authority, 30 Nov. 2017, https://www.sitesproject.org/

USDA Invests in Innovative Management of California Water Supply, Sites Project Authority, 27 Nov. 2018, https://content.govdelivery.com/accounts/USDAOC/bulletins/21e5d9b

(Geremy Holm, Steve Anderson)

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY REACHES AGREEMENT WITH GROUPS TO REDUCE CLEAN WATER ACT PERMIT BACKLOG

In March 2017, Northwest Environmental Advocates (NWEA), the Northwest Environmental Defense Center (NEDC), and Bill Bakke filed a Petition for Judicial Review in Multnomah County Circuit Court, alleging the Oregon Department of Environmental Quality (DEQ), and its director, Richard Whitman, had unreasonably delayed making decisions regarding pending Clean Water Act (CWA) permits. *See Northwest Environmental Advocates, et al. v. Oregon Department of Environmental Quality, et al.*, Case No. 17-CV-10217 (Or. Cir. 2018). In November 2018, the parties reached an agreement and entered into a consent judgment.

Oregon's Permitting Program

Pursuant to the Clean Water Act (CWA), the U.S. Environmental Protection Agency (EPA) operates the National Pollutant Discharge Elimination System (NPDES) permitting program, which issues permits establishing effluent limitations for point-source discharges of pollutants into waters of the United States. The EPA also authorizes states to run their own NPDES permitting programs. Oregon is authorized to operate its NPDES program.

Under the CWA and Oregon regulations, a NPDES permit is issued for a specific term of up to five years. A permittee seeking renewal of its NPDES permit must submit a written renewal application at least 180 days before the existing permit's expiration. Once a renewal application is timely submitted, the existing permit will not expire until DEQ takes final action on the renewal application. If DEQ does not take final action on the renewal application, a permittee can continue to operate under an expired permit indefinitely.

Petition for Review

Petitioners' petition for review arose out of a serious backlog of NPDES permit renewals in Oregon. At the time the petition was filed, some permittees had been operating under old permits for as long as 28 years after their initial expiration date. Because NPDES permits incorporate new water quality standards (WQS) and total maximum daily loads (TMDLs) for specific pollutants as WQS and TMDLs are updated, this meant that many Oregon permittees were operating under NPDES permits based on long-outdated WQS and TMDLs.

The petition was filed under ORS 183.490, which authorizes the court to:

> . . .upon petition…compel an agency to act where it has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision.

Petitioners asserted respondents':

> . . .failure to make decisions regarding pending NPDES permit renewal applications has resulted in multiple unreasonable delays. . . .[and their]. . .pattern and practice of allowing an excessive backlog of administratively continued applications to exist also constitutes an ongoing refusal to act and/or an unreasonably delayed agency action.

Consent Judgment

In November 2018, the parties reached an agreement and entered into a consent judgment. The consent judgment states that within ten years of the date of its entry, DEQ will review all administratively continued permits and take final administrative action on each permit. These permits are identified in an appendix to the consent judgment.

The consent judgment requires DEQ to publish at the beginning of each fiscal year plans to reduce the permit backlog. Each fiscal year, DEQ must issue a Five-Year Permit Issuance Plan for all individual NDPES permits in the state, including both administratively continued and non-administratively continued permits, which will identify dates for final administrative action on the permits. The Plan must make progress toward reducing the permit backlog to no more than a 10 percent backlog within ten years, with only 5 percent of permits being administratively continued for more than five years. DEQ also must

issue an Annual Permit Issuance Plan, which will identify the NPDES permits DEQ intends to issue in each quarter of the upcoming fiscal year.

The consent judgment also sets out requirements for internal processes within DEQ, transparency, and reporting.

Milestones in the Consent Judgment

The consent judgment sets progress milestones DEQ is required to achieve:

- Within two years of entry of the judgment, DEQ must take final administrative action on at least 10 percent of the administratively continued permits.

- Within four years, DEQ must take final action on at least 25 percent of the permits.

- Within six years, DEQ must take final action on at least 40 percent of the permits, including all permits that were continued for more than ten years as of the date of the judgment.

- Within eight years, DEQ must take final action on at least 75 percent of the permits.

- Within ten years, DEQ must take final action on all the permits.

The consent judgment requires DEQ to take final action on three general NPDES permits within three years of the date of entry of the consent judgment: 1) 900J Permit for Seafood Processing; 2) 2300A Permit for Pesticides; and 3) 1500A Permit for Cleanup Sites.

Contingencies in the Consent Judgment

The consent judgment identifies several "contingencies," which could affect DEQ's ability to meet these milestones. Examples of contingencies include staff reductions in DEQ's Water Quality Program due to budget shortfalls or the invalidation of WQS or TMDLs under certain circumstances. Should a contingency occur, DEQ may seek to amend one or more of the milestones. DEQ must overcome the rebuttable presumption against amending a milestone by showing substantial evidence that: 1) the event has occurred; 2) it will prevent DEQ from meeting the milestone(s); and 3) the event is the direct cause of DEQ's inability to meet the milestone(s). If DEQ meets this burden, the parties will negotiate to revise the milestone(s), and if unable to reach an agreement, will initiate a dispute resolution process set forth in the consent judgment.

Conclusion and Implications

Permittees operating under expired NPDES permits can expect action to be taken on their renewal applications within the next ten years. Although contingencies could arise that would affect this timeline, this agreement will likely result in significant progress toward reducing the backlog of NPDES permit renewal applications within DEQ.
(Alexa Shasteen)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL 747, THE STATE WATER RESOURCES CONTROL BOARD, THE ADMINISTRATIVE HEARINGS OFFICE AND WATER RIGHTS PROCEEDINGS

Transparency, fairness and ultimately due process of law are bedrock principles to the foundation of our judicial system, which expands to administrative regulatory forums when acting in an adjudicatory role, such as California's State Water Resources Control Board (SWRCB) does when presiding over water rights proceedings. During this past legislative session, Assembly Bill No. 747 (AB 747) was passed, becoming effective July 1, 2019, for establishing an Administrative Hearings Office composed of lawyers to act as hearing officers in adjudicative proceedings involving water rights matters. Some stakeholders view AB 747 as facilitating greater protection of due process rights. After all, appearance does not always align with reality, meaning even well-intentioned and properly handled matters by the SWRCB might not be held in the same light in the eye of some stakeholders.

Background

AB 747 harkens back, albeit perhaps unintentionally, to 2009 when in *Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal.4th 731 (2009), the California Supreme Court held that a water rights license holder's constitutional right to due process of law was not violated when a SWRCB lawyer served the SWRCB in an advisory function in a matter unrelated to another matter in which the same lawyer was part of the prosecution team in an adjudicatory proceeding seeking to revoke a license.

The trial and appellate courts had held that due process was violated based on existing case law (*Quintero v. City of Santa Ana,* 114 Cal.App.4th 810 (2003)) requiring a "bright-line" test. The California Supreme Court, however, reasoned in part that that absent:

> . . .financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. (*Id.* at p. 741.)

In that matter, evidence was not presented of bias.

Assembly Bill No. 747

Underlying AB 747 is existing law that declares the diversion or use of water other than as authorized by specified provisions of law is a trespass. Existing law authorizes the executive director of the SWRCB to issue a complaint to a person who violates certain use and diversion of water provisions and subjects the violator to administrative civil liability. Existing law also authorizes the SWRCB to issue an order to a person to cease and desist from violating, or threatening to violate, certain requirements relating to water use, including diverting or using water, other than as authorized.

AB 747 requires the Administrative Hearings Office to preside over hearings on the following matters: 1) a complaint subjecting a violator of certain water use and diversion provisions to administrative civil liability; 2) a proposed cease and desist order for violating, or threatening to violate, certain requirements relating to water use; and 3) a revocation of a permit or license to appropriate water.

AB 747 excludes from the office's purview a hearing that includes, in addition to any of those enumerated matters, consideration of a matter not enumerated. AB 747 authorizes the SWRCB to assign additional work to the office, as specified. The bill would prescribe procedures for hearings presided over by the office, including the adoption of a final order by the office for certain matters imposing administrative civil liability, and the preparation of a proposed order to be submitted for final review by the board for all other matters presided over by the office.

AB 747 is chaptered as Chapter 3.5 (commenc-

ing with § 1110) to Part 1 of Division 2 of the Water Code.

Conclusion and Implications

Trying to align and keep harmonious the principles of fairness, efficiency and competent decision-making can be challenging. AB 747 can be read to seek to achieve all three principles by having a separate unit of lawyers within the State Water Resources Control Board committed to presiding over water rights proceedings. In addition, with existing water use reporting requirements and increasingly competing interests for water use, the Administrative Hearings Office may become quite busy, making its existence all the more necessary for ensuring water rights holders have matters decided in a timely manner. For more information on the language of Assembly Bill 747, *see:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB747
(Wesley A. Miliband)

LAWSUITS FILED OR PENDING

APPEAL FILED FOLLOWING NEW MEXICO COURT RULING IN ACTION TO COMPEL NEW MEXICO STATE ENGINEER TO COMPEL THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT TO FILE A PROOF OF BENEFICIAL USE

WildEarth Guardians v. Tom Blaine, Case No. A-1-CA-37737 (N.M. Ct.App.).

A New Mexico environmental and endangered species special interest organization is pursuing a state court remedy that seeks to obtain unappropriated water in the Rio Grande in New Mexico for preservation of endangered species. *See*, *WildEarth Guardians v. Blaine*, Cause No. D-101-CV-2016-00734 (1st Dist. Mar. 21, 2016). The organization asked the state court to rule that New Mexico's state water administrative agency must compel a water conservancy district in the Middle Rio Grande Valley to prove beneficial use of the waters within that reach, and declare that all waters not appropriated by consequence of that filing are unappropriated and available for use for protection of endangered species. The District Court issued an Order Denying Peremptory Writ of *Mandamus* and Quashing Alternative Writ of *Mandamus*. *See*, http://pdf.wildearthguardians.org/support_docs/PBU%20Case_Order%20Denying%20Writ%2009-19-2018.pdf

WildEarth Guardians appealed the Order to the New Mexico Court of Appeals. *WildEarth Guardians v. Tom Blaine*, Case No. A-1-CA-37737 (N.M. Ct.App.). *See*, http://pdf.wildearthguardians.org/support_docs/Notice%20of%20Appeal.pdf

Background

On March 21, 2016, WildEarth Guardians filed a lawsuit, pled as an Alternative Writ of *Mandamus*, in state District Court in Santa Fe, contending that the New Mexico State Engineer had violated his statutory duty by not requiring the Middle Rio Grande Conservancy District (MRGCD) to file a "proof of beneficial use form" demonstrating that the MRGCD had been putting water to beneficial use in accordance with its permits. A First Amended Verified Petition for Writ of *Mandamus* was filed on March 29, 2016. See, Verified Petition for Alternative Writ of *Mandamus*, *WildEarth Guardians v. Blaine*, N.M. First Jud. Dist. Cause No. D-101-CV-2016-00734 (March 21, 2016). The argument was made by the WildEarth Guardians that if a PBU form were filed and if it did not demonstrate full beneficial use, there was excess water in the Rio Grande available for appropriation for species by the WildEarth Guardians.

The amended *Mandamus* Petition requested that State Engineer Tom Blaine be ordered to direct MRGCD to file a Proof of Beneficial Use of Water (PBU) form as specified in the general statutes relating to Permits for the use of water. The United States and the MRGCD were named as the real parties in interest. State Engineer Blaine argued, inter alia, that the procedure for proper issuance of the Writ had not been followed, and, in any event, the State Engineer had discretion in deciding whether to issue the Writ. Having been named as the real party in interest, the entity that would have to file the PBU form, the MRGCD filed for and was granted intervention. The United States took the position that it could not be joined in the New Mexico state court as it was immune from suit. In its response to the Petition/Alternative Writ, the MRGCD argued that there was no obligation to file a PBU form on either of its two Permits (Permit 1690 and Permit 0620), and furthermore, it was obvious that since the MRGCD had been providing water to all users within the Middle Rio Grande Valley for close to 100 years, the water was being fully utilized and consumed within the Middle Rio Grande Valley. The argument was made further that under the Conservancy Code, the MRGCD has no duty to file the PBU form. Finally, it was pointed out by the MRGCD that the MRGCD has been providing water for the last 90 years to its irrigators and supporting multiple beneficial uses of water.

WildEarth Guardians' lawsuit requests the court to compel the New Mexico State Engineer to either set a deadline for the MRGCD to prove its actual water use or cancel the MRGCD's water Permits. The Permits were issued in 1930 and 1931, respectively. WildEarth Guardians contends that the MRGCD's failure to file a PBU form renders the Permits void. The suit states that the United States Bureau of Reclamation and the MRGCD are the real parties in interest, but does not join either party. WildEarth Guardians argues that:

> . . .[n]either the statutes nor regulations governing water appropriation provide the State Engineer with the discretion to allow a permit holder to divert water in perpetuity without providing proof of beneficial use. First Amended Pet. at 21.

WildEarth Guardians also filed two Applications with the Office of the State Engineer to appropriate any water the MRGCD is not putting to beneficial use. Such water would be committed to a storage pool in Abiquiu Reservoir for environmental purposes. WildEarth Guardians entered into an agreement with the Albuquerque Bernalillo County Water Utility Authority in 2013 allowing WildEarth Guardians to store up to 30,000 acre-feet of water in Abiquiu Reservoir for environmental purposes. The lawsuit also contends that:

> . . .[t]he State Engineer's failure to perform his nondiscretionary duties under state law harms Guardians and its members because they have not been able to take advantage of the opportunity for environmental storage to protect their interests in the Rio Grande given that 'there is no unappropriated surface water. 19.26.2.12(F)(1)(e) NMAC; *see also*, Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth., 2014-NMCA-032, ¶ 49, 320 P.3d 492, 507 (noting "[i]t cannot be ignored that the Rio Grande Basin is fully appropriated and has been for some time."); First Amended Petition at Paragraph 8.

The District Court's Rulings

After close to two years, the District Court held a hearing as to whether it should issue the Writ. At the hearing, attorneys for State Engineer Tom Blaine argued, inter alia, that the State Engineer had discretion to decide whether to require a PBU, and further *mandamus* was not the correct remedy. MRGCD presented evidence that the MRGCD was fully diverting water for beneficial use within its boundaries, that the Conservancy Code governed proof of beneficial use not the water code, and likewise, that *mandamus* was not the proper remedy. Furthermore, because the United States was an indispensable party, the case could not go forward. The MRGCD represented to the court that even though the MRGCD was not obligated to file a PBU, it had been working with the New Mexico State Engineer for a year and a half to develop such a document using the common data bases of the OSE and the MRGCD.

On September 13, 2018, the court ruled that the *Mandamus* petition should be denied as it was not the appropriate remedy for the relief requested.

The Appeal

On October 9, 2018, the WildEarth Guardians filed a notice of appeal. On November 8, 2018, the WildEarth Guardians filed its Docketing Statement. In the Docketing Statement it listed the issues on appeal as:

> •Is the State Engineer's duty to either set a due date for demonstrating proof of beneficial use of water under Permit Nos. 0620 and 1690 or cancel the permits mandatory?
>
> •Does the hearing provision at NMSA 1978 § 72-2-16 constitute a plain, speedy and adequate remedy in the ordinary course of law for Guardians? See WildEarth Guardians v. Tom Blaine, Case No. A-1-CA-37737 (N.M. Ct. App.).

Middle Rio Grande Conservancy District September Resolution

On September 24, 2018, the MRGCD passed Resolution M-09-24-18-157. This Resolution directed the CEO/Chief Engineer of the MRGCD to work with Staff, the Chief Water Counsel and the OSE to generate a document denominated as a PBU, which would be filed with the OSE, and also be filed with the Conservancy Court.

The Resolution made clear that the PBU would have no effect on the water rights of Indian Pueblo

with the MRGCD, or individuals with private water rights or of the water rights of any other federal or state entity. It pointed out that the amount contemplated for beneficial use within the Middle Rio Grande Project Original Plan was water to irrigate 123,267 acres of land within the boundaries of the MRGCD. Because the Rio Grande Compact used the variable scale of deliveries at accounting point gages, which were established by the Rio Grande Compact utilizing variable rates of flow between Otowi Gage and Elephant Butte Reservoir, the amount consumed in this reach would be the consumptive entitlement of the MRGCD.

The Resolution provides that the PBU would aggregate all depletions within the MRGCD and provide umbrella coverage of all water right classes from Cochiti Dam to the northern boundary of the Bosque del Apache National Wildlife Refuge. The PBU would include not only irrigated lands, but all areas providing benefits within the MRGCD, including Bosque acres, depletions associated with protection of species, wetlands, maintenance of ditches and drains, recreational uses, but, most importantly, protection of the primary water rights associated with the irrigation of crops.

Finally, the Resolution provided that the filing of the PBU for the aggregate uses within the MRGCD would not provide proof of beneficial use for any individual tract within the MRGCD, but would contain aggregate numbers among kinds of beneficial uses, while not limiting the rights of any irrigation or other commercial user or quantifying the rights of any Pueblo or other users of water.

The PBU would only be filed after approval of the MRGCD Board and it is intended to:

- Ensure against any violations of the Rio Grande Compact;

- Not limit the amount of water available for irrigation purposes to any irrigation user utilizing water in an efficient manner;

- Not cause injury to any endangered species;

- Protect the Bosque forest and its substantial recreational benefits along with other environmental amenities with the MRGCD; and

- Contain a mechanism for administration that is true to the spirit of the conservancy statutes of sharing of shortages and promoting the public welfare of the MRGCD.

Conclusion and Implications

The final version of this document will take a lengthy period of negotiation, but the Geographic Information System maps and other related maps that are available will greatly facilitate the success of this undertaking. It is clear that these goals will need to be accomplished without causing any injury to existing water right holders, but once completed, this comprehensive water rights inventory filed in the form of a PBU could serve the residents of the Middle Rio Grande Valley very well. The WildEarth Guardians' *mandamus* case will likely become moot upon the filing of the PBU.
(Christina J. Bruff)

JUDICIAL DEVELOPMENTS

THE CURIOUS CASE OF THE DUSKY GOPHER FROG—U.S. SUPREME COURT LIMITS AGENCY DISCRETION UNDER THE ENDANGERED SPECIES ACT

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, ___U.S.___, Case No. 17-71 (Nov. 27, 2018).

In a victory for landowners and other regulated entities, the U.S. Supreme Court unanimously limited the U.S. Fish and Wildlife Service's (FWS) discretion when designating critical habitat under the federal Endangered Species Act (ESA). In its recent *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* decision, the Supreme Court held that: 1) only "habitat" may be designated as "critical habitat" under the ESA, and 2) FWS decisions regarding whether to exclude property from critical habitat designation due to economic considerations are subject to judicial review.

Background

The ESA requires the Secretary of the Interior to designate "critical habitat" for a species upon that species' listing as endangered or threatened. Critical habitat is defined by the ESA to include:

> . . .specific areas outside the geographical area occupied by the species. . .upon a determination by the Secretary that such areas are essential for the conservation of the species.

Before the Secretary may designate an area as critical habitat, however, the ESA requires him to "tak[e] into consideration the economic impact" and other relevant impacts of the designation. The statute further authorizes the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]," unless exclusion would result in extinction of the species.

Weyerhaeuser stemmed from FWS' designation of 1,544 acres of private property in Louisiana as critical habitat essential for the conservation of the endangered dusky gopher frog—even though no such frogs had occupied the property since 1965, and even though the property in its current condition cannot be inhabited by the endangered frog.

The dusky gopher frog requires rare ephemeral ponds for breeding (*i.e,* ponds that are dry for part of the year) and open canopy forest. Though the subject property lacks open canopy forest, FWS nonetheless designated it as critical habitat "essential for the conservation of the species" on the basis that the property has five high quality ephemeral ponds, and that modification to the property—such as replacing portions of the property's closed-canopy timber plantation with an open-canopy pine forest—could allow the property to support a sustainable population of the endangered frog.

The private landowners opposed the designation. While a critical-habitat designation does not directly limit a landowner's rights, it does limit the federal government's authority to engage in action – such as issuing a permit—that could adversely affect designated critical habitat. Here, the landowners claimed that the designation could bar their ability to develop the property if such development were to require federal permits under the Clean Water Act; if this were the case, the critical habitat designation could potentially cost the owners up to $33.9 million in lost development potential. The landowners filed suit, challenging both the critical habitat designation and the sufficiency of FWS' determination not to exclude the subject property from critical habitat designation despite the designation's economic impacts. After the Fifth Circuit Court of Appeals upheld the critical habitat designation, the case was reviewed by the Supreme Court.

The Supreme Court's Decision

FWS May Only Designate 'Habitat' as Critical Habitat

The landowners contended that the subject

property could not be critical habitat for the dusky gopher frog because the property was not "habitat" for the frog; in particular, the landowners noted that the frog could not survive at the subject property unless portions of the closed-canopy timber plantation were replaced with an open-canopy pine forest. In rejecting this argument, the Fifth Circuit dismissed the suggestion that the definition of critical habitat contains any "habitability requirement."

On appeal, the Supreme Court did not address whether the FWS erred in designating the subject property as critical habitat. Rather, the Court addressed the very narrow question of whether critical habitat must also be "habitat" under the ESA. Rejecting the Fifth Circuit's prior holding, the Supreme Court held that the ESA does not authorize FWS "to designate [an] area as *critical* habitat unless it is also *habitat* for the species."

This holding, however, constitutes only a limited victory for landowners. While the Supreme Court held that critical habitat must also be "habitat," the Supreme Court did not define "habitat" or determine that habitat cannot include areas where the species could not currently survive. Rather, the High Court remanded the case back to the Fifth Circuit to consider the definition of habitat and whether it may include areas, like the property in question, that would require some degree of modification to support a sustainable population of a given species.

FWS Decisions to Exclude Property from Critical Habitat Subject to Judicial Review

The landowners further contended that, even if the subject property could be properly classified as critical habitat for the dusky gopher frog, FWS should have excluded the property from designation. As noted above, the ESA requires FWS to consider the economic impact of specifying an area as critical habitat before acting. The ESA further authorizes FWS to exclude an area from critical habitat designation if FWS determines that the political, social, economic or other benefits of such exclusion outweigh the benefits of designating the area as critical habitat. For years, FWS has maintained that it enjoys full discretion on whether to exclude property from a critical habitat designation based on economic considerations, and that its discretion could not be reviewed by federal courts.

In the more momentous of the Supreme Court's two holdings, the Court held that FWS' determination of whether to exclude property from a critical habitat designation based on economic or other factors is subject to judicial review. In doing so, the Supreme Court rejected the Fifth Circuit's holding that a decision to exclude a certain area from critical habitat is unreviewable by federal courts. In particular, the Supreme Court held that a federal court may review FWS' economic analysis and determination to ensure that they are not arbitrary, capricious, or an abuse of discretion. The Supreme Court then sent the case back to the Fifth Circuit to determine whether the FWS' assessment of the costs and benefits of its critical habitat designation passed legal muster.

Conclusion and Implications

This case illustrates the potential intersection between the Endangered Species Act and the Clean Water Act. FWS' critical habitat designation effectively limited the federal government's authority to issue permits under the Clean Water Act for development of the subject property, and this limitation could have cost the landowners tens of millions of dollars in lost development potential.

The primary import of this case, however, is that property owners are not without redress when the FWS designates critical habitat, particularly as to economic impact analysis. The Supreme Court's holding provides property owners with potent legal arguments to challenge future critical habitat designations.
The Supreme Court's decision is available online at: https://www.supremecourt.gov/opinions/18pdf/17-71_omjp.pdf
(Ali Tehrani, Steve Anderson)

TENTH CIRCUIT FINDS SETTLEMENT AGREEMENT BETWEEN BLM AND ENVIRONMENTAL GROUPS NOT RIPE FOR CHALLENGE UNTIL AGENCY IMPLEMENTS THE SETTLEMENT PROVISIONS

Southern Utah Wilderness Alliance v. Burke, 908 F.3d 630 (10th Cir. 2018).

Environmental groups and the U.S. Bureau of Land Management (BLM) entered into a settlement agreement requiring the agency to adopt new land use management plans taking into account specifically enumerated agency regulations and adopted guidance. The State of Utah's challenge to the settlement agreement was found to be unripe because the agency had yet to implement the settlement agreement.

Background

In January of 2017, the Bureau of Land Management, various environmental groups led by the Southern Utah Wilderness Alliance (SUWA) and intervenors entered into a Settlement Agreement to resolve "a longstanding, complex dispute dating from 2008" concerning BLM's adoption of "six resource management plans (RMPs) and associated travel management plans (TMPs) adopted by" BLM for federal lands located within Utah. *See*, http://suwa.org/wp-content/uploads/APPELLATE-349183-v2-SUWA_-_Final_Settlement_Agreement_Signed_with_Maps.pdf

The state of Utah had intervened in the litigation, but did not enter into the Settlement Agreement. When the settling parties sought to have the Settlement Agreement approved by the District Court and the underlying lawsuit dismissed, Utah challenged the Settlement Agreement on the grounds that it:

> . . .illegally codified interpretative BLM guidance into substantive rules, impermissibly binds the BLM to a past Administration's policies, infringes valid federal land rights (known as 'R.S. 2477 rights'), and violates a prior BLM settlement [the "Wilderness Settlement.]

The U.S. District Court did not agree and it approved the Settlement Agreement.

The Tenth Circuit's Decision

The settling parties opposed Utah's appeal on the grounds that the state's:

> . . .claims are not ripe for judicial review. . . .[T]he ripeness doctrine has two underlying rationales: preventing courts from becoming entwined in 'abstract disagreements over administrative policies,' and 'protect[ing] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' *Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1191-92 (10th Cir. 2008).

Three Prong Factor Analysis for Ripeness

The Tenth Circuit applied the three-factor ripeness test set forth in *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1262-63 (10th Cir. 2002):

> 1) whether delayed review would cause hardship to the plaintiffs; 2) whether judicial intervention would inappropriately interfere with further administrative action; and 3) whether the courts would benefit from further factual development of the issues presented.

The Settlement Agreement was entered into in the following legal context. BLM manages the federal lands at issue under the Federal Land Policy and Management Act (43 U.S.C. §§ 1701-1787, FLPMA) and its associated regulations and adopted agency Instruction Memorandum, Handbooks and Manuals. R.S. 2477 rights are right-of-way interests across federal lands created without any administrative formalities, *i.e.*, requiring "no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was

vested," obtained prior to 1976. *Utah*, 535 F.3d at 41. And BLM had previously entered into the Wilderness Settlement to resolve:

> . . .land-use litigation between several of the same parties to this litigation that concerned wilderness study areas (WSAs) in Utah.

BLM conceded in the Wilderness Settlement "that its authority to establish new wilderness study areas expired no later than October 21, 1993," and the agency:

> . . .stipulated. . .that it would not utilize its general land use planning authority under FLPMA § 202 to establish, manage, or otherwise treat non-WSA public lands as wilderness or as WSAs.

The Settlement Agreement, as is typical, may only be amended with the written consent of all parties to it. Substantively, it provides at Paragraph 13 "deadlines by which BLM will issue five new TMPs for five specific travel management areas [and] details the process by which BLM will prepare the TMPs," including a catalogue of Instruction Memorandum, Handbooks and Manuals that BLM will apply in formulating the new TMPs. "Utah contends that Paragraph 15 elevates certain agency guidance to the level of substantive rules in violation of the [Administrative Procedures Act], and also provides SUWA with veto power," by way of requiring SUWA's written consent to any Settlement Agreement amendments:

> . . .over future BLM guidance and substantive rulemaking that could apply to the five specific travel management areas listed in Paragraph 13.

Various other provisions of the Settlement Agreement require that BLM take into account, and explain in writing how it has done so, various environmental considerations related to road configuration and wilderness designations, in developing the new TMPs.

Applying its ripeness test to the Settlement Agreement, the Court of Appeals observed that:

> . . .[a] common thread [runs] through all three factors point[ing] to our concluding that Utah's appeal is unripe: at this point, no one knows how BLM will implement the Settlement Agreement.

For example, there are no final travel management plans. Additionally, BLM has not rescinded any of the guidance referenced in the Settlement Agreement, and therefore SUWA has not had the opportunity to exercise its alleged veto power provided by the Settlement Agreement. Further, the Settlement Agreement has no effect on R.S. 2477 rights, App. 1107, and nothing in the Settlement Agreement requires BLM to protect wilderness characteristics when developing a TMP. Instead, the Settlement Agreement lays out criteria for BLM to consider as it develops TMPs in a complex regulatory scheme. BLM may ultimately develop a TMP that creates *de facto* wilderness, or may impermissibly consider guidance that has been rescinded or ignore future substantive rules. But BLM might not.

The Settlement Agreement neither requires BLM to create *de facto* wilderness, nor mandates that BLM reject future agency action taken by the present Administration. Accordingly, this court can more confidently address the substantive legal arguments raised by Utah when BLM finalizes the TMPs subject to the Settlement Agreement and ultimately reveals the Settlement Agreement's "true effect[.]"

The court concluded it could "more confidently" adjudicate any disputes Utah might have with specific new TMPs "with the benefit of insight into how BLM actually implements the settlement in practice."

Conclusion and Implications

Parties settling with agencies where the terms of the settlement require future agency regulatory action will typically bargain for the agency's future action to comply with specific, identified statutory and regulatory provisions. This case illustrates an equally common hurdle to challenging such settlement agreements prior to their implementation—until the agency performs under the settlement terms, courts are reluctant to consider with that implementation is unlawful.
(Deborah Quick)

DISTRICT COURT DISMISSES CLEAN WATER ACT CITIZEN SUIT CHALLENGING UNPERMITTED DISCHARGE OF POLLUTANTS VIA GROUNDWATER SEEPS

Prairie Rivers Network v. Dynegy Midwest Generation, LLC,
___F.Supp.3d___, Case No. 18-CV-2148 (C.D. Ill. Nov. 14, 2018).

Environmental group brought citizen suit challenging unpermitted discharge of coal ash wastewater via groundwater seeps and thence to navigable surface waters. The U.S. District Court for the Central District of Illinois dismissed the complaint, relying on a 1994 Seventh Circuit Court of Appeals precedent holding that the Clean Water Act (CWA) does not regulate discharges to groundwater, *even* when that groundwater is unquestionably hydrologically linked to navigable surface waters.

Background

Dynegy operated a coal-fired power plant in Illinois, the Vermillion Power Station, from the 1950s until 2011. Coal ash from the plant's operation is stored in three unlined pits containing an approximate total of 3.33 million cubic yards of coal ash:

> Coal ash wastewater such as that in the coal ash pits contains heavy metals and other toxic pollutants that are harmful and at times deadly to people, aquatic life, and animals.

Dynegy and holds a permit that authorizes the company to discharge pollutants from the Vermilion Power Station to the Middle Fork [of the Vermillion River] through nine external outfalls. The plant also discharges pollutants into the Middle Fork "from numerous, discrete, unpermitted seeps on the riverbank.

Coal ash at the VPS has groundwater flowing through it year round. While the thickness of saturated ash varies as groundwater levels rise and fall with the seasons, groundwater has saturated coal ash at depths of more than 21 feet. That groundwater flows laterally through the ash, picking up contaminants in the process, while precipitation leaching down through the top of the coal ash mixes with the groundwater and further adds to the pollutant load contained within the discharge to the Middle Fork. Defendant's own reports and information have concluded that the coal ash contaminated groundwater flows right into the adjacent Middle Fork.

Prairie Rivers Network (PRN) sued Dynegy under the citizen suit provisions of the federal Clean Water Act, 33 U.S.C. §§ 1311 and 1342, alleging the seeps:

> . . .are not authorized by any permit and are contrary to the limited authorization to discharge within Defendant's discharge permit.

PRN also alleged Dynegy via the seeps "discharged and is discharging on an ongoing basis, pollutants into the Middle Fork in concentrations, colors, and with characteristics that violate Illinois effluent limits and water quality standards that are incorporated as conditions of the Vermilion [discharge] permit" governing the nine external outfalls.

The District Court's Decision

Dynegy moved to dismiss, arguing "the CWA does not regulate discharges of contaminants to groundwater, even where that contaminated groundwater reaches navigable waters," citing *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). PRN opposed on the basis that *Oconomowoc:*

> . . .governs discharges *into groundwater itself*, absent evidence that the groundwater discretely conveys pollution into a navigable water.

Oconomowoc concerned discharges to groundwater from a six-acre retention pond that drained runoff from a warehouse parking lot containing oil and other pollutants. The contaminated groundwater "eventually reached streams, lakes, and oceans," including water of the United States regulated under the CWA.

The Seventh Circuit affirmatively held that the CWA did not assert authority over groundwaters, just because those waters "may" be hydrologically

connected with surface waters. This court's reading of that passage is that the Seventh Circuit found any hydrological connection between surface waters and groundwater to be *irrelevant* in terms of whether groundwaters were covered by the CWA. If the discharge is made into groundwater, and the pollutants somehow later find their way to navigable surface waters via a discrete hydrological connection, the CWA is still not implicated, because the offending discharge was made into groundwater, which is not subject to the CWA.

The District Court rejected PRN's more limited reading of *Oconomowoc*, by which the Seventh Circuit was:

> . . .distinguishing between discharges of pollutants into groundwater with only the hypothetical possibility of further seepage into navigable waters and discharge of pollutants into groundwater with *definite* seepage into navigable waters.

Instead, the District Court found the *Oconomowoc* Court held that

> . . .*even if* there was a possibility (or reality) of discharged pollutants into groundwater seeping into navigable waters, such a discharge was not covered by the CWA, because the *actual discharge* from the artificial pond was into groundwater, regardless of whether those pollutants later seep into navigable surface waters via discrete groundwater seepage.

The court cited in support of its interpretation a recent U.S. District Court for the Eastern District of North Carolina decision citing *Oconomowoc* as holding that "an NPDES permit is not required for discharges to groundwater even if those discharges eventually migrate to surface waters." *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F.Supp.3d 798, 809 (E.D. N.C. 2014).

Applying *Oconomowoc* to the facts in this case, the District Court dismissed the complaint because all of its allegations were premised on discharges via the seeps, rather than the nine external outfalls.

Conclusion and Implications

The effects of the Circuit split with respect to Clean Water Act jurisdiction over discharges to groundwater continues to percolate through the District Court, with wildly varying outcomes based on the Circuit within which each District Court is located. The court's decision is available online at: https://will.illinois.edu/nfs/Bruce_-_2018_-_UNITED_STATES_DISTRICT_COURT_CENTRAL_DISTRICT_OF_I.pdf
(Deborah Quick)

ARIZONA SUPREME COURT DISMISSES HOPI TRIBE'S PUBLIC NUISANCE CLAIMS, ALLOWING SNOW-MAKING WITH RECLAIMED WATER TO CONTINUE AT RESORT

Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership, Case No. CV-18-0057-PR (Az Nov. 29, 2018).

In a published opinion issued on November 29, 2018, the Supreme Court of Arizona ruled against the Hopi Tribe in its effort prevent a ski resort's use of treated wastewater for snowmaking. The ski resort operates on federal land and received the U.S. Forest Service's permission to use the reclaimed water.

Background

Should Arizona Snowbowl be permitted to use reclaimed water for snowmaking on the San Francisco Peaks? In 2002, Arizona Snowbowl entered an agreement with the City of Flagstaff to buy treated wastewater and use it for snowmaking at the ski resort. The U.S. Forest Service, who owns the land upon which Arizona Snowbowl operates a ski resort, approved of the use of reclaimed water, but the Hopi, other tribes and environmental groups opposed it, and filed suit in federal district court against Arizona Snowbowl raising numerous environmental concerns and arguing that snowmaking with reclaimed water infringed upon the tribes' religious freedom. After a series of appeals, the federal courts resolved the claims in favor of the Forest Service and Arizona Snowbowl. Nevertheless, the Hopi Tribe filed another lawsuit in 2010 in state court, this time against the City of Flagstaff who was not a party to the federal lawsuit claiming that the use of reclaimed water for snowmaking was a public nuisance. Other tribes did not join in the Hopi lawsuit against the City of Flagstaff; and Arizona Snowbowl intervened.

The Claims

To allege damages under the doctrine of public nuisance, the Hopi Tribe would have to prove damages that constituted a 'special injury'. The trial court denied the Tribe's claim, but the Court of Appeals reversed the decision, concluding that the Tribe's allegation of 'special injury' was not precluded by law. *See, Hopi Tribe v. Arizona Snowbowl Resort Ltd. P'ship*, 418 P.3d 1032 (App. 2018). However, In November 2018, the Arizona Supreme Court, in a 5-2 decision, agreed with the trial court that the Tribe was precluded by law from bringing a public nuisance claim because the harm it alleged was not a 'special injury'. *Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership*, 430 P.3d 362 (2018).

The Arizona Supreme Court's Ruling

The Arizona Supreme Court ruled in favor of Arizona Snowbowl and the City of Flagstaff, holding that environmental damage, including the use of treated wastewater to make snow on public land with religious, cultural, or emotional significance to the plaintiff, is not 'special injury' for public nuisance purposes. The Court dismissed the Hopi Tribe's claims, ending the Tribe's longstanding litigation against the ski resort that operates on the San Francisco Peaks, which are considered sacred to the Hopi Tribe.

Justice John Pelander, writing for the majority, held that the Hopi Tribe's alleged injury from environmental damage to public land, which had religious and cultural significance to the Tribe, was different in degree but not in kind or quality suffered by the public. Therefore, the Tribe was precluded from bringing a public nuisance claim. While the Tribe sufficiently alleged that the use of reclaimed wastewater on the San Francisco Peaks constituted a public nuisance, he reasoned, the Tribe failed to articulate any harm beyond that suffered by the general public. "Indeed, the Tribe's graphic descriptions of reclaimed wastewater and its effects … strongly suggest that anyone and everyone who visits the Peaks, not just the Tribe, will suffer substantial environmental harm," wrote Justice Pelander. *Hopi Tribe v. Arizona Snowbowl Resort* at 371.

Furthermore, the Court concluded that, "the Tribe has not presented sufficient reason for departing from the property-and-pecuniary-interest-based approach that our caselaw has followed," and decisions about religious beliefs are "best addressed by public officials or congressional acts governing the Tribe's sue of public lands for religious purposes," not by the judiciary. *Hopi Tribe v. Arizona Snowbowl Resort* at 368-369.

Chief Justice Scott Bales and Justice Clint Bolick disagreed with the majority, however, and finding that the defendants are allegedly "turning formerly pure ceremonial locations into a secondary sewer" and the "sacred sites, springs and rituals will be tainted by sewer snow." *Hopi Tribe v. Arizona Snowbowl* at 373. Moreover, Justice Bales wrote, "All that is required, and easily met by the Hopi here, is distinct and tangible harm. Slamming the courthouse door shut on those whose claims do not involve their own land or money, or personal injury, is not supported by our caselaw and unduly limits the public nuisance doctrine." *Id.* at 374.

The Tribe Responds

Hopi Chairman Tim Nuvangyaoma said the Tribe was disappointed with the ruling: "As we have said before, while the use of treated wastewater to make snow may provide some commercial benefit to the ski resort, the long-term impact is immeasurable on the natural resources, shrines, and springs on the San Francisco Peaks, a sacred site for the Hopi," he said. Woods, Alden, *Hopi Lose Arguments on Snowbowl Snowmaking in State Supreme Court Ruling* www.azcentral.com (Nov. 29, 2018).

Nevertheless, "[m]ore than 85 percent of the United States' largest ski resorts rely on at least some artificial snow, a spokesperson for the National Ski Areas Association confirmed." *Hopi Lose Arguments on Snowbowl Snowmaking in State Supreme Court Ruling*:

> They use the fake flakes to cover bald spots on the slopes, to add an extra layer of powder, or even to stay open when nothing falls from the sky. It's the only way to add reliability to an unpredictable business. *Id.*

Before Arizona Snowbowl started freezing its own snow, the resort faced the uncertainty inherent in relying on unpredictable snowfall each year. In fact, in one year, Snowbowl opened for just four days. "Now we have good conditions all the time," Snowbowl general manager J.R. Murray said. "If we're open, we have good skiing. We'll just continue to make snow." *Id.*

Conclusion and Implications

According to Snowbowl leaders and Flagstaff city officials, the water quality exceeds all standards. *Id.* The use of reclaimed or recycled water is often lauded as an excellent means of conserving water and using a scarce resource more efficiently. Arizona communities are at the forefront of using new technologies for water reuse. For example, the City of Scottsdale recently celebrated its' twentieth anniversary of using recycled water for turf watering and other demands (www.scottsdaleaz.gov/water/recycled-water), and the Arizona Department of Environmental Quality recently approved the use of recycled water for drinking water purposes. (www.azdeq.gov/recycled-water-rulemaking)

Flagstaff treats its water at the Rio de Flag Treatment Center to "Class A+" quality—"the highest possible level—using fine filters." *Hopi Lose Arguments on Snowbowl Snowmaking in State Supreme Court Ruling. Id.* In a community facing water scarcity, reuse of water at Arizona Snowbowl for snow-making may, in fact, be the most responsible choice from a water efficiency viewpoint. The Supreme Court's decision is available online at: https://www.courthousenews.com/wp-content/uploads/2018/11/HopiSupremeCourtRuling.pdf

(Alexandra Arboleda, Lee Storey)

NEVADA STATE COURT REVERSES NEVADA STATE ENGINEER'S PROHIBITION ON DOMESTIC WELL DRILLING IN PAHRUMP BASIN

Pahrump Fair Water, LLC, et al. v. Jason King, P.E., et al., Case No. 39525 (5th Dist. Dec. 6, 2018).

The Nevada State Engineer's efforts to regulate groundwater withdrawals in the over-appropriated Pahrump Artesian Basin were dealt a blow recently when a state District Court reversed the State Engineer's order that prohibited the drilling of new domestic wells without first obtaining a two-acre-foot water right. The court concluded that the State Engineer exceeded his statutory authority; violated affected property owners' due process rights by failing to give notice and opportunity to be heard; and lacked substantial evidence to support his decision. As a result, the court directed the State Engineer to immediately give notice to the public that the drilling restriction was no longer in effect.

Factual and Procedural Background

The Pahrump Basin has a long history of over-appropriation. To address this problem, the Nevada State Engineer first designated it for special administration in 1941. Once an area receives such a designation due to groundwater depletion, the State Engineer may make appropriate rules, regulations and orders that, within the State Engineer's judgment, are essential for the welfare of the area. Nevada Revised Statute (NRS) 534.120(1).

To that end, in 1953, the State Engineer ordered that meters be installed at all points of diversion. In 1970, the State Engineer determined that irrigation would be a non-preferred use and ordered that new irrigation applications be denied. Over time, the State Engineer limited new applications to small commercial, small industrial and environmental uses and then curtailed new applications altogether except for limited exceptions.

Nevada law does not require a person who drills a domestic well to apply for or obtain a water right permit. NRS 534.030(4); NRS 534.180(1). A domestic well is for culinary and household purposes directly related to a single-family dwelling, including the watering of a family garden, lawn, livestock and any other domestic animals or household pets. To qualify as a domestic use, the amount withdrawn annually may not exceed two acre-feet annually. NRS 533.013 and 534.180.

As of 2017, committed groundwater rights in the Pahrump Basin were close to 60,000 acre-feet per year, while the State Engineer calculated the Basin's perennial yield as 20,000 acre-feet annually. Because domestic wells do not require a water right, the State Engineer estimates that an additional 11,385 acre-feet committed for domestic well use based on the number of existing domestic wells. According to the State Engineer's pumpage inventories, pumping steadily increased from 14,355 acre-feet in 2013 to 16,416 acre-feet in 2017, with domestic well pumping accounting for approximately one third of the total.

The State Engineer estimates the Pahrump Basin to have 11,280 domestic wells at a density of 1 to 469 wells per square mile. If each domestic well pumps the two acre-feet annually that is allowed by statute, the pumping from domestic wells alone would exceed the Basin's perennial yield. The State Engineer has determined that pumping by domestic wells has the potential to be the greatest source of groundwater use in the Basin, estimating that an additional 8,000 domestic wells could be drilled, which could withdraw as much as 16,000 acre-feet more groundwater from the aquifer.

Due to these concerns regarding the proliferation and impact of domestic wells, in 2017, the State Engineer issued Order #1293, which except for specified exceptions, prohibited the drilling of new domestic wells in the Pahrump Basin without first obtaining a two acre-foot water right. A group called Pahrump Fair Water, LLC (PFW), an association that was formed to challenge Order #1293, filed a petition for judicial review in Nevada District Court. While that case was pending, the State Engineer issued amended Order #1293A, which added two additional exemptions to the drilling restriction. PFW dismissed its petition for judicial review of Order #1293 and filed a new petition for judicial review of the amended Order #1293A.

On review, PFW advanced four arguments: 1) the State Engineer lacked the statutory authority to restrict drilling of domestic wells; 2) the State Engineer violated property owners' due process rights by not providing notice and an opportunity to be heard;

3) Order #1293A was not supported by substantial evidence; and 4) Order #1293A amounted to an unconstitutional taking of private property without just compensation.

The District Court's Decision

The Nevada Legislature has authorized a party aggrieved by a decision of the State Engineer's to seek judicial review, which amounts to an appeal based on the record before the agency. The role of the reviewing court is to determine if the State Engineer's decision was arbitrary, capricious, an abuse of discretion or legally erroneous. The State Engineer's factual findings must be supported by substantial evidence in the record, which is evidence that "a reasonable mind might accept as adequate to support a conclusion."

The District Court reversed Order #1293A on three grounds. First, the court concluded that the State Engineer exceeded his statutory power because the Legislature expressly exempted domestic wells from the scope of the State Engineer's general supervisory control and the permitting process otherwise required for water appropriations. Because there is no statutory language that authorizes the State Engineer to restrict domestic wells in the manner done in Order #1293A, the court concluded, the order is unenforceable.

Second, the court found that the State Engineer failed to afford property owners who are affected by Order #1293A with notice and an opportunity to be heard. Absent publication of the proposed order, opportunity to oppose it and a public hearing at which testimony and other evidence could be presented, the court concluded, a due process violation occurred, which rendered Order #1293A invalid.

Third, the court held, even setting aside these legal impediments, Order #1293A was not supported by substantial evidence that new domestic wells will interfere with existing rights. The court took issue with the State Engineer's statement that:

> . . .if existing pumping rates will lead to well failures, an increase in the number of wells and therefore an increase in pumping will accelerate the problem undoubtedly causing an undue interference with existing wells.

Finding no support for that assertion in the record, the court found that the State Engineer did not fully analyze alleged conflicts or determine how the restrictions in Order #1293A would benefit existing wells.

The court also criticized the model used by the State Engineer, concluding that the model looked at possible failures of existing wells, not the impact of potential new wells. The court further faulted the State Engineer for failing to use objective standards to determine whether the lowering of the static water level caused by new wells would be "reasonable" within the language of the statute. Having concluded that Order #1293A was invalid, the court determined there was no need to address whether the order resulted in a taking.

Conclusion and Implications

Faced with increasing demands on the state's scarce water resources, the State Engineer has construed the Nevada Revised Statutes to give him broad regulatory authority. Historically, Nevada's courts have afforded the State Engineer considerable deference to interpret the state's water law and regulate water users. The *Pahrump Fair Water* decision is one of a handful of recent cases, however, in which the courts have declined to give the State Engineer such latitude.

This trend begs the question as to whether the Nevada Legislature will take steps to expressly broaden the State Engineer's statutory authority. Because water tends to be a politically charged issue in Nevada, and if recent efforts are any indication, the Legislature is unlikely to embark on such an undertaking. It will be up to the Nevada Supreme Court to delineate the contours of the State Engineer's powers on a case-by-case basis. *Pahrump Fair Water* is poised to be the next such case in line for Supreme Court review. (Debbie Leonard)

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