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WWL

FEATURE ARTICLE

CALIFORNIA WATER COMMODITIZED?—A NEW PRICING INDEX EMERGES ON THE NASDAQ

By Derek Hoffman and Michael Duane Davis

On the first day of one esteemed university economics course, a professor circulates physical objects around the classroom for students to heft and examine—things like corn, wheat, soybeans, gold, silver, copper, spices and wood. These items, the lesson goes, are valuable natural resources. They also comprised the means of trade in the earliest of civilizations—gold for wheat; spices for wood—that is, until the concept of *money* took hold as the primary currency of trade. "Currency" is commonly defined as the fact or quality of being generally accepted or in use. So long as money is "generally accepted" and "in use" in the marketplace, those with gold can simply *buy* wheat. Those with spices can simply *buy* wood. No longer must one commodity be directly exchanged for another.

In today's sophisticated and global marketplace, thousands if not millions of commodities transactions occur daily. Data-driven financial indexes inform buyers and sellers regarding commodity prices. Tradable financial instruments enable transactions not only to meet today's commodity demands but also future demands, and can hedge against anticipated fluctuations in price and availability.

But what about water? More specifically, what about California water? Is it—or should it be—considered a commodity? How does such a characterization reflect and respect established water rights, laws and regulations? How are—or should—water rights transactions be priced, and based on what types and quality of information?

A New Index on the NASDAQ®

Indexes have long existed to track value and provide investors with access to *companies and utilities* that develop, produce, treat and supply water resources (*e.g.*: S&P Global Water Index, ticker symbol: SPGTAQD). Likewise, indexes for commodities like those mentioned above are ubiquitous.

On October 31, 2018, a new index emerged. The NASDAQ Veles California Water Index (ticker symbol: NQH20) (NQH20 or Index) tracks what it describes as the "spot price" of *water* in California based on certain types of groundwater and surface water transactions in specific California water markets. Veles Water Limited's (Veles) Chief Executive Officer expects the Index:

> . . .to facilitate tradeable cash-settled futures contracts within [a year] to allow farmers, utilities and industrial water users to hedge the financial risk of volatile water availability [and] provide investors with a means to speculate on the future price of water without taking on the underlying risk of owning assets. (*See*, https://www.globalwaterintel.com/news/2019/2/california-water-pricing-index-launches-on-nasdaq, last visited February 21, 2019.)

NQH20 was developed and is maintained by NASDAQ, Veles and WestWater Research LLC (WestWater). NASDAQ created the world's first electronic stock market and today provides global trading, clearing, exchange technology, listing, information, and public company services, including supporting more than 100 marketplaces in 50 countries and over 4,000 total listings with a market value of approximately $15 trillion. (*See*, https://business.nasdaq.com, last visited February 21, 2019.) Veles is a financial products company based in the United Kingdom specializ-

ing in water pricing, water financial products, and water economic and financial methodologies. (*See*, www.veleswater.com, last visited February 21, 2019.) Data for the Index is provided exclusively by WestWater, an economic and financial consulting firm specializing in water rights and water resource acquisition and development throughout the United States.

Index Calculations, Adjustments, Pricing

While many aspects of the Index are deemed proprietary, NASDAQ provides some information about the functionality of the Index in its "NQH20 Methodology Report" (Index Report) (*See*, https://indexes.nasdaqomx.com/docs/methodology_NQH2O.pdf, last visited February 21, 2019.) The Index Report states that listed figures reflect the "commodity value of water" at the source, and do not include additional costs associated with transportation or losses such as through evaporation. Index data is also limited to transactions resulting from arms-length negotiations, and excludes transactions that do not include financial consideration.

The Index is priced in terms of U.S. Dollars per acre-foot and uses a "modified volume-weighted average" of prevailing prices in selected underlying water markets after adjusting for "idiosyncratic pricing factors" specific to those water markets and specific types of eligible transactions. The Index is calculated and published following the close of business each Wednesday based on data obtained through the end of the prior week.

On opening day, the Index listed a California water "spot price" of $511.33 per acre-foot based upon 293 water transactions between approximately January and August 2018. Since then, the listed spot price has ranged between a low of $ 447.64 per acre-foot and a high of $576.30 per acre-foot. (*See*, https://indexes.nasdaqomx.com/Index/History/NQH2O, last visited February 21, 2019.)

Index Data: Eligible Water Markets and Transactions

Only certain groundwater and surface water markets and transactions are deemed eligible data sources for the Index. As described in the Index Report, current Index-eligible data sources are limited to five large and actively traded markets in California, including four groundwater markets and a generally-described surface water market.

Central Basin—Groundwater

The Central Basin underlies an approximately 227-square-mile area in Los Angeles County. The original judgment in Central Basin adjudication was entered in 1965 (*Central and West Basin Water Replenishment District v. Charles E. Adams et al.*, Los Angeles County Superior Court Case No. 786656) and has since been amended several times including most recently in 2013. The Central Basin adjudication establishes limits on total annual groundwater production and establishes allowed pumping allocations (APA) among the parties. The total APA exceeds the natural yield of the basin and relies upon recharge from imported and reclaimed water. The adjudication authorizes parties to purchase or lease APA through an established "Exchange Pool". Unused APA may be carried over into the following administrative year subject to certain timing and volumetric limitations; and, carryover water may also be traded. Eligible transactions for inclusion in the Index include permanent transfers of APA, single- and multi-year leases of APA and leases of carryover water.

Chino Basin—Groundwater

The Chino Basin underlies an approximately 235-square-mile area of the Upper Santa Ana River Watershed within portions of San Bernardino, Riverside, and Los Angeles counties. The original judgment in the Chino Basin adjudication was entered in 1978 (*Chino Basin Municipal Water District v. City of Chino et al.*, San Bernardino Superior Court Case No. RCV 164327 (now Case No. RCV 51010)), and has since been amended several times including most recently in 2012. The Chino Basin adjudication established a basin safe yield and allocated water rights among three distinct producer "Pools", including an Overlying Agricultural Producers Pool, an Overlying Non-Agricultural Producers Pool and an Appropriative Producers Pool.

Transfers and leases of water rights are subject to specific limitations. Transfers are generally not permitted within the Agricultural Pool; though, unused water is made available annually to the Appropriative Pool. Overlying Non-Agricultural Pool producers may both permanently transfer and temporarily lease water within their Pool and may lease water annually to Appropriative Pool producers pursuant to specific regulatory requirements. Appropriative Pool produc-

ers which primarily comprise municipal water providers, may both permanently transfer and temporarily lease water within their Pool. Both Overlying Non-Agricultural Pool and Appropriative Pool producers may carry over unexercised rights subject to certain limitations. Supplemental water may be stored, and both carryover and storage water may be transferred following the same rules applicable to the use of groundwater rights for each Pool.

Eligible transactions for the Index include temporary (single- and multi-year) transfers within the Appropriative Pool and within the Overlying Non-Agricultural Pool, and annual leases from the Overlying Non-Agricultural Pool to the Appropriative Pool pursuant to the regulatory framework. Eligible temporary transfers include those with single or multi-year terms. Temporary transfers of carryover and storage water are also considered eligible. The Index also includes permanent transfers of rights among Appropriative Pool and Overlying Non-Agricultural Pool producers.

Main San Gabriel Basin—Groundwater

The Main San Gabriel Basin underlies an approximately 167-square mile area in the southeasterly portion of Los Angeles County. The original judgment in the Main San Gabriel adjudication was entered in 1973 (*Upper San Gabriel Valley Municipal Water District v. City of Alhambra, et al.*, Los Angeles County Superior Court Case No. 924128), and has since been amended several times including most recently in 2012. Among many of its major components, the judgment established a Watermaster responsible to determine an annual basin Operating Safe Yield (OSY). The judgment allocated prescriptive water rights (and other types of rights in certain circumstances) among producers, which also provides the basis for each party's share of the OSY. Unused OSY may be carried over one fiscal year. Eligible transactions for the Index include both temporary (single- and multi-year) transfers of production rights and carry over, as well as permanent transfers of water rights.

Mojave Basin Alto Subarea—Groundwater

The Mojave Basin Area underlies an expansive approximately 3,400-square-mile area the high desert region of San Bernardino County. The original judgment in the Mojave Basin Area adjudication was entered in 1996 (*City of Barstow, et al. v. City of Adelanto, et al.*, Riverside County Superior Court Case No. CIV 208568) comprising a stipulation among over 75 percent of the parties and representing over 80 percent of the verified water production within the basin. The judgment was partially amended in 2002 following a decision of the California Supreme Court (*City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224 (2000)) arising from appeals pursued by certain non-stipulating parties.

The judgment recognized five distinct but hydrologically interconnected Subareas including the Alto (including a portion referred to as the "Transition Zone"), Centro, Este, Oeste and Baja Subareas. The judgment required each Subarea to ensure a certain amount of Mojave River flow to adjacent downstream Subareas. The Judgment established Base Annual Production Rights (BAP) within each Subarea, and imposed Rampdown obligations to achieve basin sustainability. Each year, the court reviews and determines the volume of water to be allocated to water producers in the form of a Free Production Allowance (FPA), which is a portion of BAP that may be produced during without incurring a Replacement Obligation necessary to fund imported supplemental water. Unproduced FPA may be carried over for one administrative year. The judgment authorizes both temporary and permanent transfers of BAP and FPA.

Eligible transactions for the Index are limited to those within the Alto Subarea, which is the largest and most active Subarea market. The Index includes temporary (single- and multi-year) transfers, including carryover, and permanent transfers of Alto Subarea BAP.

Surface Water

As noted in the Index Report, the majority of California's surface water resources originate north of the Sacramento-San Joaquin River Delta (Delta), while the majority of demand for that water is located south of the Delta. The extensive California State Water Project (SWP) and federal Central Valley Project (CVP) storage and conveyance facilities enable a surface water market through which (complex) water transfers are established among parties throughout California. The Index Report describes eligible surface water transactions for the Index to include temporary (single- and multi-year) and permanent

transfers of SWP entitlements, CVP entitlements, and "other surface water entitlements.

A First Step—To Where?

According to Veles' CEO:

> . . .[w]ater is our most important commodity and until now, there were no financial risk management instruments available in the global financial markets. We see the [Index] as an important first step to understanding water as a commodity, which means a more transparent and accessible marketplace for all.

Similarly, NASDAQ's Vice President and Head of Research and Product Development for NASDAQ's Global Indexes, Dave Gedeon, stated that:

> . . .[t]he NASDAQ Veles California Water Index can bring dramatic change to the way we quantify and value an important resource. (*See*, https://www.nasdaq.com/press-release/nasdaq-launches-water-pricing-index-20190108-00379, last visited February 21, 2019.)

Notably, these comments declare the Index to be a first step toward dramatic change in the way water is valued. This begs the question, "a first step to where?" One notable financial industry leader has painted a picture of what he believes this "dramatic change" will be. In a lengthy report principally authored by Willem Buiter, Global Chief Economist for Citi Investment Research & Analysis (a division of Citigroup Global Markets Inc.) (Citi) Citi predicted in 2011:

> I expect to see in the near future a massive expansion of investment in the water sector, including the production of fresh, clean water from other sources (desalination, purification), storage, shipping and transportation of water. I expect to see pipeline networks that will exceed the capacity of those for oil and gas today. I see fleets of water tankers (single-hulled!) and storage facilities that will dwarf those we currently have for oil, natural gas and LNG … I expect to see a globally integrated market for fresh water within 25 to 30 years. *Once the spot markets for water are integrated, futures markets and other derivative water-based financial instruments—puts, calls, swaps—both exchange-traded and OTC will follow. There will be different grades and types of fresh water, just the way we have light sweet and heavy sour crude oil today. Water as an asset class will, in my view, become eventually the single most important physical-commodity based asset class, dwarfing oil, copper, agricultural commodities and precious metals.* (Citi, "Global Themes Strategy: Thirsty Cities—Urbanization to Drive Water Demand, July 20, 2011, http://www.capital-synthesis.com/wp-content/uploads/2011/08/Water-Thirsty-Cities.pdf, last visited February 21, 2019.)

Water Rights and SGMA

The changes predicted by Citi are, indeed, dramatic. While price indexing may serve to inform market participants and transactions, water markets themselves are governed by established and (generally) orderly water rights laws and principles —at least in California and the United States.

In California, one potentially fertile testing ground for the Index's informational value may be through the implementation of the Sustainable Groundwater Management Act of 2014 (SGMA). As of today, the California Department of Water Resources has identified 517 distinct groundwater basins and sub-basins, approximately a quarter of which are required to develop and implement first-ever Groundwater Sustainability Plans (GSPs) to achieve long-term basin sustainability.

Among its many features, SGMA authorizes newlyformed Groundwater Sustainability Agencies (GSAs) to establish groundwater pumping allocations and transferability as a management tool to achieve basin sustainability. (California Water Code, § 10726.4). GSP allocation schemes are, however, subject to limitations including, for example, generally complying with established land use plans and occurring only within the GSA's jurisdictional boundaries. (*Id.*) Of course, neither a GSP nor a GSA has authority to determine or alter water rights, which also delimits the parameters of an allocation framework. (*Id.* at § 10720.5.)

In this context, the question to be tested in the coming years would be whether and to what extent the Index (or something like it) might meaningfully inform a specific buyer and/or seller regarding an

appropriate price in transacting a pumping allocation transfer in a specific groundwater basin pursuant to a specific allocations framework that is subject to specific GSP provisions and other State laws and municipal ordinances. Extending the hypothetical, the question becomes more acute with respect to inter-basin transfers (subject to the same, if not more, legal limitations). In other words, the ultimate informational value of the Index will likely be shaped by the extent to which the underlying assumptions and data that are used for the Index are considered to be similar to and reflective of the local conditions of a particular basin and transaction.

As GSAs implement allocation frameworks through their GSPs resulting in new local markets, more transactional data will presumably become available for inclusion in the Index, which may reduce perceived data asymmetry and build confidence in the Index. Regardless, buyers and sellers will need sufficient information about the Index itself, including how it functions and the data upon which it is based, in order to evaluate its appropriateness in valuing a particular transaction.

Conclusion and Implications

Clearly, the value of water as a natural resource necessary to life and economy in California will only continue to rise. The whiplash of the recent historic Drought followed by dramatic wet years has triggered major changes in California water law and policy, including providing for the development of new water markets and more expansive and robust databases and information.

Transferability of water resources will continue to serve an important management tool. The price attributed to a particular transfer is expected to be governed by *market conditions*, the applicable *laws and ordinances* and the nature and value of the underlying water *rights* upon which the transaction is based. The informational value of the Index to any particular transaction remains to be seen and will depend on these and many other factors. A buyer and seller would need to evaluate whether and to what extent the "spot price" of the Index reflects the unique local conditions and aspects of the transaction. That informational value may grow over time as new and broader market data is incorporated.

So long as that buyer and seller are transacting in a system still governed by water rights laws, they are probably not confronted with the naval-gazing question of whether water is simply a commodity.

Derek Hoffman is a senior associate attorney at Gresham | Savage practicing extensively in the areas of California water rights and natural resources law, real estate, business and eminent domain. In his water law practice he represents landowners, agricultural interests, developers, water districts, mutual water companies and regional to multi-national businesses in evaluating, protecting and litigating water rights and supply. He actively represents clients in SGMA implementation and provides guidance for effective water resources management and compliance with state and federal water law and regulation. Derek writes regularly for the *California Water Law & Policy Reporter*.

Michael Duane Davis is of counsel and vice president of Gresham | Savage who has represented businesses, individuals and governmental clients in complex real estate and business transactions and litigation for nearly 40 years. Mr. Davis has decades of experience evaluating water rights and resources and in water rights disputes, with an emphasis on groundwater basin adjudications. He has represented dozens of clients in the Mojave and Antelope Valley Groundwater Adjudications. He provides business and land use guidance, and water resources management under the Sustainable Groundwater Management Act, and regarding Urban Water Management Plans, Integrated Regional Water Management Plans, Water Supply Assessments and Proposition 218. He has extensive experience serving as general counsel to numerous county water districts and mutual water companies. Mr. Davis serves on the Editorial Board of the *California Water Law & Policy Reporter*.

WESTERN WATER NEWS

RIVERS AND DAMS—LOS ANGELES COUNTY SUPERVISORS URGE FEDERAL GOVERNMENT TO CONSIDER HANDING OVER OWNERSHIP AND OPENING FEDERAL FUNDING FLOODGATE

The Los Angeles County Board of Supervisors (Board) recently approved sending letters to Congressional leaders and the U.S. Army Corps of Engineers (Corps) regarding a path toward transferring the Corps' ownership and responsibility over to L.A. County (County) for stretches of the Los Angeles River (River) and urging federal funding to flow for immediate repairs to be made to Whittier Narrows Dam and Reservoir which were recently deemed at risk of failure.

The Los Angeles River

In the early-to-mid-20th century, most of the 51-mile River bottom was lined with concrete to manage and mitigate flood risk through vast and densely populated Los Angeles. Since then, the County and nearly every jurisdiction straddling the River—not to mention many environmental, non-profit and other organizations—has developed plans for the River's long-term management and revitalization. The Corps and the Los Angeles County Flood Control District (District) work collaboratively to operate the Los Angeles County Drainage Area (LACDA) system, a broad network of water management infrastructure components in Los Angeles County including the River, which provides flood risk management for approximately 10 million residents and 2.1 million parcels with a value of more than $1 trillion. The District is responsible for 14 major dams and roughly 500 miles of open channels. The Corps owns and is responsible for managing most of the River for flood control purposes, including four dams and 40 miles of open channels.

The Whittier Narrows Dam

The Whittier Narrows Dam and Reservoir (Dam) is located on the San Gabriel River and Rio Hondo—tributaries to the Los Angeles River—in a densely populated area approximately 11 miles east of downtown Los Angeles, a focal point for the combined 556-square-mile drainage area of the San Gabriel River and Rio Hondo watersheds. The 56-foot-tall earthen Dam was built in 1957 primarily for flood control protection of approximately 1.25 million downstream residents and for groundwater basin recharge. The Dam is owned by the federal government and operated and maintained by the Corps. The Corps recently determined that the Dam is at very high risk of failure in a catastrophic flooding event and that it requires immediate major upgrades, retrofitting, and rehabilitation work.

Board Seeks Control over River, Urging Federal Funding for Dam Repairs

The Board recently authorized its Chief Executive Officer to send a letter, signed by all members of the Board, to the Los Angeles County Congressional Delegation requesting their support for a disposition study to examine transferring ownership and operations of Corps-owned River channels to the District. Last year, the District sent a similar letter requesting that the Corps initiate a disposition feasibility study to examine transferring ownership and operations of its channels in Los Angeles County to the District.

In these letters, the Board asserts that while the District has maintained its facilities over the years, many portions of the Corps infrastructure are "not being maintained at acceptable levels" due largely to what the Board describes as insufficient federal funding. The Board finds that the Corps needs approximately $193 million annually to address deferred maintenance, but only receives about 10 to 15 percent of that in any given year—a trend the Board expects will continue. According to the Board, assuming local control of the Corps-managed River channels would provide:

- efficiency in designing, building, and maintaining flood risk management projects;

• improved response to issues involving the homeless encampments in the River channels;

• greater opportunities for ecosystem restoration and recreation projects; and

• increased transparency and accountability among local cities with respect to River management.

At that same Board meeting at which the Board authorized the letter to the Los Angeles County Congressional Delegation requesting a disposition study to examine transferring ownership and operations of Corps-owned River channels to the District, the Board also approved sending a five-signature letter to the United States Department of Interior and the Los Angeles County Congressional Delegation, requesting an immediate allocation of Federal funds to expedite needed repairs and upgrades to the Dam. The Board also directed the County Director of Public Works to report back to the Board on efforts being made to coordinate with the Corps and downstream communities to ensure local measures are in place during emergencies.

Conclusion and Implications

The circumstances giving rise to the Board's letters are representative of much of California's vast and aging water infrastructure: Federally-funded, collaboratively managed, complex systems built in the mid-20th Century, subjected to 21st century regulation and now in desperate need of money and attention. While "local control" may—eventually—simplify the bureaucratic landscape (if there is such a thing), it would also accompany a hefty local price tag. When it comes to managing something as large as the River, defining "local" would itself present challenges as competing jurisdictions would likely seek to maximize benefits with minimal financial obligations. Of course, it doesn't hurt to start the conversation, and for that the Board should be commended.
(Derek Hoffman, Michael Duane Davis)

LEGISLATIVE DEVELOPMENTS

IDAHO LEGISLATURE CONSIDERING TWO JOINT MEMORIALS RELATED TO MAJOR WATER INFRASTRUCTURE PROJECTS

In anticipation and now furtherance of a $20 million appropriation by the Idaho Legislature's Joint Finance and Appropriations Committee (JFAC), the Idaho House and Senate are nearing ratification of two joint memorials related to major water infrastructure projects. In the House, Joint Memorial No. 4 supports final feasibility analyses and ultimate construction of the Anderson Ranch Dam raise on the South Fork of the Boise River, providing additional water storage opportunity in the most populous and fastest-growing region of the state (if not the country). And, in the Senate, Joint Memorial No. 104 supports state and federal partnership regarding the construction, operation and maintenance of a 14-mile long pipeline and related infrastructure supplying water to Mountain Home Air Force Base from the Snake River.

Anderson Ranch Dam Raise

Located on the South Fork Boise River, Anderson Ranch Dam is one of three federally-owned dams and reservoirs in the Boise River drainage (the others being Arrowrock Dam and Lucky Peak Dam located downstream). Anderson Ranch and Arrowrock are owned and operated by the U.S. Bureau of Reclamation (Bureau), and Lucky Peak is owned and operated by the U.S. Army Corps of Engineers (Corps). The dams serve the dual purposes of flood control and water storage (primarily for irrigation purposes) in the Treasure Valley (including the Boise metropolitan area consisting of approximately 700,000 residents stretching from Boise to Caldwell, Idaho).

Additional water storage opportunities in the Boise River Basin have been discussed and studied for decades. However, with the era of big dam building largely passed primarily due to cost and environmental concerns, much of the modern focus has been on raising the existing dams in the basin to yield additional storage. Over time, these studies have further found Anderson Ranch Dam to be the most feasible from an engineering standpoint, despite the fact that the existing reservoir is already the largest bucket on the smallest spigot in the system (the existing reservoir encompasses approximately 450,000 acre-feet of the aggregate 1 million acre-feet of storage in the basin while the South Fork Boise River is the smallest sub-watershed in the system).

Treasure Valley water supply studies have long projected ever-increasing need for new/additional water supplies to serve population growth. Those studies have also consistently concluded that while groundwater supplies in the valley are relatively robust, groundwater alone will not be sufficient to meet future needs. Thus, the need to develop additional surface water supplies in the basin has long been known.

To this end, the Bureau estimates that a relatively minor dam raise at Anderson Ranch could, for roughly $40 million, yield an additional 29,000 acre-feet of storage. Though nowhere near the 150,000 acre-feet of projected additional need in the Treasure Valley by 2065, the Anderson Ranch Dam raise is step in the right direction for a comparatively (and seemingly anyway) modest total expenditure. Because the Boise River reservoirs are joint use facilities operated equally for flood control and beneficial use water storage, the $40 million cost would be split evenly between the federal government and local Idaho interests.

House Joint Memorial No. 4 urges Idaho's Congressional delegation, and Congress in general, to collaborate with the Bureau and local Idaho stakeholders to construct the Anderson Ranch dam raise, and further requests that dam raise opportunities be revisited at Arrowrock and Lucky Peak Dams in the Boise system and at Minidoka and Island Park Dams in the Upper Snake River Basin in eastern Idaho.

Mountain Home Air Force Base Pipeline

Located in relatively water poor Elmore County, Idaho (in the vicinity of the city of Mountain Home), Mountain Home AFB had been plagued (as has the city) with declining aquifer levels and poor drinking

water quality for decades. Current studies indicate that the Mountain Home Aquifer suffers from average pumping deficits of approximately 30,000 acre-feet per year. At the base in particular, groundwater levels are declining at a rate of two feet per year, and four of the base's six drinking water wells are contaminated and unsuitable for drinking water use.

The continuing viability of the base is an important economic consideration in Idaho. The base employs roughly 10,500 people (both on-base and regional support) and generates $797 million in all forms of income, including wages, salaries, rent and profit. Total economic impact from the base is estimated to be $1.02 billion annually.

While one cannot control base closure decisions of the U.S. Department of Defense, Idaho does not want to hasten any potential closure of the base over water supply concerns. Consequently, the state is partnering with the base to (hopefully) construct a pumping plant and 14.4-mile pipeline from the Snake River (out of existing C.J Strike Reservoir) to the base, together with a water treatment plant on base to provide a steady and reliable supply of drinking water. The state anticipates constructing, owning and operating the pumping plant and pipeline, with the federal government constructing, owning and operating the water treatment plant on base.

Senate Joint Memorial No. 104 reinforces this plan and Idaho's commitment to the same in hopes of securing ongoing Mountain Home AFB operations well into the future. The site itself (absent current groundwater deficits) is well located in an area of little urban encroachment (or the potential of future encroachment owing to the surrounding desert landscape), uncluttered airspace, and a high number of clear weather flight training days annually.

Conclusion and Implications

The Idaho Legislature and the Idaho Water Resource Board are hopeful that JFAC's recent $20 million appropriation will serve not only as much-needed seed money to support Idaho water infrastructure projects going forward, but as a strong indicator of Idaho's serious interest in these matters and its willingness to further leverage federal funding with the state's own willingness to spend.
(Andrew J. Waldera)

WATER IN THE NEW MEXICO 2019 LEGISLATIVE SESSION: THE YEAR OF THE ACEQUIAS, BUT NOT SO MUCH FOR PRESCRIPTIVE WATER PLANNING

The 54th New Mexico Legislative Session convened in mid-January for its extended, 60-day session. As in years past, water, agriculture and natural resource issues were at the forefront of the nearly 1,300 pieces of legislation introduced. While most of the proposed legislation amounted to updates of bill versions introduced in prior years, there were a few new initiatives.

Background

New Mexico's acequias were successful in gaining passage of significant pieces of legislation aimed at affirming acequia governance, establishing a stable revenue stream for acequia infrastructure and improving transparency and due process at the New Mexico Office of the State Engineer.

Acequias are local ditch organizations that are modeled on those in Spain and even earlier based upon traditions of the moors under Arabic law. These community operated watercourses were used in Spain and former Spanish Colonies. In New Mexico, acequias persist as a transplanted Iberian civil and social institution. These organizations have flourished in New Mexico since long prior to the Treaty of Guadalupe Hidalgo and the disputes between these acequias and some of the Indian Pueblos have formed the basis for the longest ongoing case in the federal court system—the *Aamodt* case. *State of New Mexico, et al v. Aamodt, et al.*, Case No. 6:66-cv-06639-WJ-WPL (D. N.M.).

Bills that Passed

New Mexico's collection of acequias have developed political expertise over the decades banning

together through the New Mexico Acequia Association. The fruits of their decades of effort at organizing resulted in great progress in the 2019 Legislative Session. While the Governor has yet to sign all of the bills that have come before her, there is little reason to expect opposition to any of the acequia legislation. These include SB 438 / HB 517, Acequia and Community Ditch Irrigation Fund. This legislation establishes a $2.5 million annual fund for the Interstate Stream Commission's Acequia Program.

Senate Bill 5, Interstate Stream Commission Membership, changes the composition of the Interstate Stream Commission by specifying which sectors of water stakeholders will have seats on the Commission. This legislation includes one seat for an acequia representative.

House Bill 379, Acequia Liens, clarifies that an acequia may obtain a money judgment from a magistrate court that can serve as a lien on delinquent property. This legislation significantly simplifies the process of obtaining a lien by removing the necessity of going through district court.

Other significant water legislation includes Senate Bill 12, Water Notifications, which requires that the New Mexico Office of the State Engineer post notices of water applications on its website. This is an additional notice requirement expanding upon the current requirement of publishing in the newspaper. This additional requirement of posting notices online contributes to the protection of due process rights of persons whose water rights may be affected by a decision of the State Engineer.

Finally, House Bill 651, Water Data Act, establishes a newly created water data council with agencies and higher education institutions to standardize the management of water data in New Mexico. This legislation directs the water data council to develop consistent water data standards backed by data collections' best practices.

A Mixed Success

There were numerous other water bills put forward that met with mixed success. These included proposed appropriations for massive water planning support both at the Interstate Stream Commission and the Utton Center at the University of New Mexico School of Law. Recently appointed State Engineer, John D'Antonio, was sworn in by newly elected Governor Michelle Lujan Grisham. D'Antonio previously served as New Mexico's State Engineer from 2003-2011. State Engineer D'Antonio expressed reservation about the major legislative funding for "prescriptive" water planning included in HB 560. However, State Engineer D'Antonio committed to work on water planning issues before next year's legislative session. Governor Lujan Grisham is committed to putting together a 50-year Water Plan that takes into account climate change.

Conclusion and Implications

As a result, most of these seeping legislative proposals stalled and did not reach fruition. However, the momentum behind water planning and further efforts to streamline the processes of distribution of water and for the State of New Mexico to possibly reach a settlement on current interstate water litigation will likely see much more attention in next year's legislative session.
(Christina J. Bruff)

OREGON LAWMAKERS CONSIDER DAM SAFETY LEGISLATION

Oregon's dam safety law turns 90 years old this year. Of the 953 dams regulated by the Oregon Water Resources Department (OWRD or the Department), over 200 are considered "high-hazard" or "significant-hazard." Of the 75 high-hazard dams, only 31 are considered to be in satisfactory condition, with the rest being fair, poor, or unsatisfactory (two dams remain under analysis).

Modernization is sorely need and dam safety improvements are one of the ten recommendations identified in Oregon's 2017 Integrated Water Resources Strategy. Oregon House Bill 2085 (HB 2085) would repeal and replace Oregon's dam safety laws. The proposed law would apply only to state-regulated dams. Some dams in Oregon are regulated by the federal government; those dams would be exempt from this proposed legislation.

Oregon House Bill 2085 and its component parts are summarized below:

•Requires OWRD Approval of Dam Construction and Modification
HB 2085 would require Department approval of plans and specifications for the construction of new dams or modifications to existing dams. The bill would establish a fee for plan reviews based on actual time spent on review, up to a specified cap. The cap is set at $1,750 for a low-hazard dam, $3,500 for a significant-hazard dam, and $8,500 for a high-hazard dam. HB 2085 would also require submission of final engineering documentation to OWRD showing that the dam was built as specified before water or wastewater can be impounded for a new or modified structure.

•Codifies Authorities Related to Dam Safety Administration
HB 2085 would codify OWRD's general authorities to implement dam safety laws, which are not expressly stated in the existing laws. The bill would also establish the Department's authority to act to protect people and property in the event of an actual or imminent dam failure.

•Delineates Dam Owner Responsibilities
HB 2085 sets forth the responsibilities of dam owners, such as maintaining the dam and acting in the event of dam failure.

•Outlines Inspection Procedures
The bill provides procedures for the Department to inspect dams and specifies that high-hazard dams shall be inspected annually unless the Department determines a different inspection schedule is appropriate.

•Establishes Process to Ensure Safe Dam Removal
The bill would establish a process to ensure safety precautions are taken during the removal of high-hazard or significant-hazard dams. Before removing such a dam, owners would be required to obtain the Department's approval of a removal plan designed to protect people and property downstream.

•Revises Approach to Handling Unsafe Dams
HB 2085 would revamp the process by which OWRD will address unsafe dams. It would also permit the Department to compel maintenance before a dam becomes unsafe. The bill would allow OWRD to work with the dam owner to develop a plan and timeframe for repair, rather than limiting the Department's response options to enforcement actions. The Department would also be permitted to issue a proposed final order and hold a hearing if one is requested by the dam owner. (Currently, the Department *must* set a hearing, even if the dam owner does not request one.) The bill also provides procedures to expedite the hearing if there is an imminent dam safety threat. The Department would be empowered to seek injunctive relief to judicially compel action in the event of an imminent risk to people or property.

•Provides Enforcement Mechanism
HB 2085 provides for civil penalties of up to $5,000 per violation for failure to comply with certain requirements the dam safety statute, such as by failing to address maintenance issues or submit the required plans and specifications before building or modifying a dam. The bill, however, does not authorize civil penalties for failure to address an unsafe or potentially unsafe dam. Failure to comply with a Department order or an order of an appellate court on appeal of such an order would be punishable as a Class B misdemeanor.

•Directs Water Resources Commission to Adopt Rules
Finally, HB 2085 directs the Oregon Water Resources Commission to adopt rules to administer the new dam safety law.

Conclusion and Implications

In testimony before the House Committee on Natural Resources on March 5, OWRD Senior Policy Coordinator Racquel Rancier and State Engineer Keith Mills indicated that OWRD will work with stakeholders to pursue further amendments to the bill. Owners of state-regulated dams and other interested parties should follow the bill's progress and contact their legislators with input or questions. If passed, the law is scheduled to take effect 90 days after the Legislature adjourns. Certain sections will become operative on July 1, 2020. More information can be found at www.oregonlegislature.gov
(Alexa Shasteen)

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

•March 14, 2019 - The U.S. Environmental Protection Agency (EPA) has announced a civil settlement with Mora Development Corporation and Mora Development S.E., two affiliated Puerto Rico real estate development companies, for violations of the Clean Water Act. The companies built two housing developments—the Cascadas in Toa Alta, Puerto Rico, and Montecielo in Guaynabo, Puerto Rico—with sewage collection systems that illegally discharged sewage into local waters. Under the settlement, Mora Development will pay a $242,400 penalty. Today's settlement is in addition to actions and penalties required when Mora Development Corporation pled guilty to violating sewage regulations. The violations at the housing developments were corrected under prior orders issued by EPA. In 2012, EPA received a citizen complaint that sewage discharges from the Cascadas sewage collection system retention pond were seeping into the citizen's front yard and that sewage was entering the Cascadas storm sewer collection system. EPA inspected and confirmed the claims and, in 2013, issued an order to Mora Development Corporation requiring the immediate termination of sewage discharge into surrounding water. The order also required submission of records proving that sewage was being properly hauled to a wastewater treatment plant and a schedule for removal of all unauthorized connections (by-pass pipes) between the Cascadas' sewage and storm water collection systems. In 2013, EPA received citizen complaints claiming sewage from Montecielo was emptying into an unnamed creek, a tributary of Rio Bayamón, which in turn discharges into the Atlantic Ocean. EPA inspected Montecielo and confirmed the discharges. Mora Development did not have a permit to allow those discharges. In 2013, EPA issued an order to bring Mora Development S.E. and Mora Development Corporation into compliance with the Clean Water Act, including the immediate cease of sewage discharge into waters of the United States. In 2018, Mora Development Corporation pled guilty in a 2016 criminal case involving a felony violation for discharging sanitary wastewater from residences at the Cascadas Development in Toa Alta. Mora Development Corporation violated the Clean Water Act by discharging from a holding tank through a by-pass pipe into the Toa Alta municipal storm water system and then into a local waterbody without a National Pollutant Discharge Elimination System permit. The plea required Mora Development Corporation to pay a fine of $3 million, serve a five-year term of probation, and pay restitution to the victims affected by its criminal conduct. The civil settlement involves both Mora Development Corporation and Mora Development S.E. for their involvement in Montecielo and Mora Development Corporation's non-criminal violations in Cascadas.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•March 7, 2019 - The United States and the Commonwealth of Virginia have entered into an agreement under which the U.S Environmental Protection Agency (EPA) and Virginia will recover nearly $64 million to address cleanup costs at the Atlantic Wood Industries (AWI) Superfund Site in Portsmouth, Virginia. In a proposed consent decree filed today in federal court, the U.S. Department of Defense (DoD) and the Department of the Navy will pay EPA $55.3 million for cleanup costs, and pay Virginia $8.5 million for past costs and future activities Virginia will conduct at the site. Along with cleanup costs, DoD and the Navy will fund a $1.5 million oyster restoration project to be implemented by Virginia in the Southern Branch of the Elizabeth River. The

settlement also provides that Atlantic Wood Industries and Atlantic Metrocast, the AWI Site owners/operators, will reimburse EPA and Virginia $250,000 plus interest for site cleanup costs. The agreement was reached under the federal Superfund law—formally known as the Comprehensive Environmental Responsibility, Compensation, and Liability Act (CERCLA)—which requires landowners, current and former operators, waste generators and waste transporters responsible for contaminating a Superfund site to clean up the site or reimburse the government or other parties for cleanup activities. The AWI site, located on the Southern Branch of the Elizabeth River and immediately north of the Norfolk Naval Shipyard's Southgate Annex, was the former location of a wood treating facility and includes approximately 50 acres of land and more than 30 acres of river sediments. Since 2010, EPA has been performing the cleanup at the site to remediate hazardous substances, including polycyclic aromatic hydrocarbons from creosote, pentachlorophenol, and associated dioxin, as well as heavy metals present in soils, ground water, and sediments at the site. The EPA-approved plan for the cleanup of contaminated soils, river sediments, and groundwater at the site includes: construction of an offshore sheet pile wall; dredging with consolidation and capping of contaminated sediments behind the wall and at the west portion of the site; excavation or on-site treatment of contaminated soils; monitoring natural attenuation of ground water and natural recovery of contaminated sediments; operation and maintenance of the remedy; and land-use controls. The proposed consent decree is subject to a 30-day public comment period and court approval.

•February 25, 2019 - The U.S. Environmental Protection Agency (EPA) announced four settlements with companies in Connecticut and Maine for violations of federal oil spill laws. The three companies in Connecticut and a company in Maine have all created oil spill prevention plans and come into compliance with federal oil pollution prevention laws, ensuring that the environment in the communities where they operate are better protected from damaging oil spills. According to the agreements, the four companies will pay penalties ranging from $4,000 to $9,900 to settle claims by EPA that they each violated federal laws meant to prevent oil spills. These settlements were reached under an expedited settlement program whereby EPA agreed to resolve these cases for reduced penalties with companies that were able to quickly correct violations of the oil pollution prevention regulations. The companies involved in settlements were GCA Logging of Avon, Maine; Superior Fuel Oil Company, of Waterbury, Conn.; Academy Bus of Bridgeport, Conn., and GBC Metals of Waterbury, Conn. Federal oil spill prevention, control, and countermeasure rules provide requirements for business that store oil and prevent oil discharges into nearby water resources. The rules require certain businesses to prepare, amend, and implement oil spill prevention and response plans, which are part of the oil pollution prevention regulation requirements of the Clean Water Act. These cases include the following:

1. GCA Logging of Avon, Maine, on Sept. 20, 2018 agreed to pay a $4,000 penalty and to address violations of the Oil Pollution Prevention regulations of the Clean Water Act. In February 2018, a fuel delivery company over-filled an above-ground storage tank, causing a spill, which resulted in oil discharging into a nearby stream that flows into the Sandy River. At the time of the spill, the facility did not have a required Spill Prevention, Control and Countermeasure plan. In a separate action, the Maine Department of Environmental Protection penalized both GCA Logging and the fuel delivery company for causing the oil spill.

2. Superior Fuel Oil Company, of Waterbury, Conn., on Sept. 6, 2018, agreed to pay a $9,900 penalty and to address violations of federal Oil Pollution Prevention regulations. During an inspection at the company, EPA saw that the facility did not have adequate spill containment for oil truck loading racks and wasn't fully implementing its oil spill prevention, control and countermeasure plan.

3. Academy Bus of Bridgeport, Conn., on Aug. 13, 2018, agreed to pay a $4,700 penalty and address violations of the oil pollution prevention regulations. The state responded to an oil spill at the company and referred the facility to EPA. During an inspection at the company, EPA saw that the facility did not have an adequate oil spill prevention control, and countermeasure plan. Academy Bus amended its plan and put in place measures to prevent future spills.

4. GBC Metals of Waterbury, Conn., also known as Somers Thin Strip, agreed in June 2018 to pay a $6,100 penalty and to take measures to prevent future spills. In January, piping associated with an external valve on an oil cooling tower system at the facility failed, causing a release of about 5,790 gallons of oil from the system into a nearby storm drain. Between 625 and 650 gallons of oil was recovered from the Naugatuck River. The company responded promptly to the spill and did a cleanup.

•February 21, 2019 - The U.S. Environmental Protection Agency (EPA) ordered Greka to conduct sampling at its Santa Maria, California refinery to determine whether improper storage and management of hazardous wastes contaminated local soil and groundwater. A December 13, 2018 EPA inspection found Greka's facility, which does not have a required permit to store hazardous waste, had improperly stored, labeled and managed hazardous waste from their refinery processes. EPA inspectors documented waste dumped directly into an unlined pit, also known as a surface impoundment, located 90 feet from agricultural lands. The order requires Greka to develop a plan to determine and catalogue the magnitude and extent of possible off-site migration of hazardous wastes. The work plan must provide extensive information on the surface impoundment, including age, capacity, structural integrity, construction, and maintenance procedures. Greka must analyze the hazardous waste and develop a comprehensive groundwater and soil monitoring plan to ensure contamination is not migrating off-site. The company has 45 days to submit the plan to EPA for approval. The EPA is coordinating its investigation with the California Department of Toxic Substances Control and the Regional Water Quality Control Board to ensure effective oversight of the facility. Greka's Santa Maria facility is surrounded by agricultural land and close to residential neighborhoods of Santa Maria and Guadalupe.

Indictments, Convictions and Sentencing

•March 18, 2019 - The Department of Justice and the U.S. Environmental Protection Agency (EPA) announced that the United States filed suit under the federal Safe Drinking Water Act against the city of New York and the New York City Department of Environmental Protection for their longstanding failure to cover the Hillview Reservoir located in Yonkers, New York. A consent decree requiring the City to make improvements and cover the Reservoir at an estimated cost of $2.975 billion and to pay a $1 million civil penalty was also lodged with the Court. The State of New York will be a co-plaintiff and is a party to the consent decree. The Reservoir is part of New York City's public water system, which delivers up to a billion gallons of water a day. The Reservoir is an open storage facility and is the last stop for drinking water before it enters the City's water tunnels for distribution to city residents. The 90-acre reservoir is divided into two segments, the East and West Basins. Prior to the water entering the Reservoir, it receives a first treatment of chlorine and ultraviolet treatment. Since the Reservoir is an open storage facility, the treated water in the Reservoir is subject to recontamination with microbial pathogens from birds, animals, and other sources, such as viruses, Giardia, and Cryptosporidium. Giardia and Cryptosporidium are protozoa that can cause potentially fatal gastrointestinal illness in humans. The City has been required to cover the Reservoir since it first executed an administrative order with the State of New York on March 1, 1996. Under the Safe Drinking Water Act and its regulations, the City also became obligated, as of March 6, 2006, to cover the Reservoir by April 1, 2009. In May 2010, EPA entered into an administrative order with the City requiring the City to meet a series of milestones to cover the Reservoir. The first milestone was Jan. 31, 2017. When the City failed to meet that date, this lawsuit followed. The consent decree requires construction of two projects in addition to the cover, the Kensico Eastview Connection (KEC) and the Hillview Reservoir Improvements (HRI). The KEC entails the construction of a new underground aqueduct segment between the upstream Kensico Reservoir and Eastview ultraviolet treatment facility. The HRI requires extensive repairs to the Hillview Reservoir, including replacing the sluice gates that control water flow and building a new connection between the reservoir and water distribution tunnels. The completion of the KEC is expected to take until 2035. The City estimates the construction cost of the KEC to be approximately $1 billion. The HRI project will be conducted concurrently with the KEC and is anticipated to be completed by 2033. The City estimates the construction cost of the HRI to be approximately $375 million. Following the comple-

tion of the KEC and the HRI, the East Basin cover will be constructed, with expected commencement of full operation in 2042, and then the West Basin cover will be constructed, with expected commencement of full operation in 2049. The City's estimate in 2009 for the cost of its then planned concrete cover for the 90-acre Reservoir was $1.6 billion. Until the cover is in operation, the consent decree also requires the City to implement Interim Measures to help protect the water, including enhanced wildlife management at the Reservoir and Reservoir monitoring. In addition, under the consent decree, the City will pay the United States a civil penalty of $1 million for its past violations of federal requirements. The consent decree also provides that the City will pay New York State $50,000, and implement a state Water Quality Benefit Project in the amount of $200,000, to settle the State's claim for penalties for violations of a state administrative order. The proposed settlement which is subject to a 30-day public comment period. (Andre Monette)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT WILL CONSIDER WHETHER THE CLEAN WATER ACT APPLIES TO DISCHARGES CONVEYED TO NAVIGABLE WATERS OF THE UNITED STATES THROUGH GROUNDWATER

On February 19, 2019, the U.S. Supreme Court granted a writ of *certiorari* to the appellants in *Hawai'i Wildlife Fund v. County of Maui*, where the Ninth Circuit Court of Appeals held that the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) applies to point discharges into groundwater that connect with navigable waters. 886 F.3d 737 (9th Cir. 2018), *amending and superseding on denial of rehearing en banc* 881 F.3d 754 (9th Cir. 2018), *and cert. granted sub nom.* Case No. 18-260, 2019 WL 659786, at *1 (U.S. Feb. 19, 2019). Facing a similar legal issue, the Sixth Circuit Court of Appeals rejected the "conduit" theory, leaving a circuit split for the Supreme Court to resolve.

Background on the Clean Water Act

The Clean Water Act's NPDES permit system regulates the discharge of pollutants from point sources into the navigable waters of the United States. 33 U.S.C. § 1311. The U.S. Environmental Protection Agency (EPA) and state agencies administer and enforce the program, and violations are also subject to citizen suits. 33 U.S.C. § 1365. A point source is:

> . . .any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . . 33U.S.C. § 1362(14).

The navigable waters of the United States are broadly defined to include traditionally navigable waterways and certain related wetlands and hydrological features. *See, Rapanos v. United States*, 547 U.S. 715, 730–731, 735 (2006); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

The Ninth Circuit Adopts the Conduit Theory and the Fourth Circuit Follows

The County of Maui operated a municipal wastewater treatment facility. *Hawai'i Wildlife Fund*, 886 F.3d at 742. The facility discharged treated effluent into four injection wells. *Id.* Wastewater from the injection wells entered the groundwater, which carried the effluent to the Pacific Ocean. *Id.* at 742–43. The Ninth Circuit determined that the County of Maui was properly subject to liability for a CWA citizen suit:

> . . .because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable waters are more than *de minimis*. *Id.* at 759.

The Fourth Circuit soon thereafter followed suit and adopted the Ninth Circuit's "conduit" theory. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018).*Upstate Forever* involved an underground pipeline that burst, releasing petroleum directly into nearby groundwater. *Id.* at 641. Petroleum from the pipeline thereafter appeared in nearby navigable waters approximately 1,000 feet away from the pipeline. *Id.* The Fourth Circuit held that such a discharge into the groundwater constituted a point discharge into navigable waters because the groundwater served as a direct hydrological connection between the point source (the broken pipeline) and the navigable waters. *Id.* at 652.

Later that same year, the Fourth Circuit held in *Sierra Club v. Virginia Electric Power Co.*, 903 F.3d 403 (4th Cir. 2018), that the conduit theory did not apply to a coal ash heap and settling pond that leached arsenic into underlying groundwater on the basis that the heap and settling pond did not constitute point sources under the CWA.

The Sixth Circuit Rejects the Conduit Theory, Creating a Circuit Split for the Supreme Court to Resolve

The Sixth Circuit faced a similar set of facts as the Fourth Circuit's *Sierra Club*, but decided the case on different grounds, rejecting the conduit theory entirely. *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018). In *Kentucky Waterways Alliance*, an advocacy group brought a citizen suit against the operator of a coal-fired power plant, claiming that chemicals leached from the plant's coal ash ponds into groundwater that reached a nearby lake. *Id.* at 930–31. The Circuit Court concluded that the CWA does not apply to point source discharges that eventually reach navigable waters through a groundwater conduit or permeable rock. *Id.* at 938. The groundwater did not constitute the sort of "discernible, confined, or discrete" conveyance that satisfies the CWA's definition of a point source; instead, "groundwater is a 'diffuse' medium that seeps in all directions, guided only by the general pull of gravity." *Id.* at 933. Because the CWA applies to point sources that discharge directly into navigable waters, the court held that the statute does not apply to discharges that reach navigable waters through an intermediate conduit. *Id.* at 934.

In light of this split in authority, the losing parties in *Hawai'i Wildlife Fund* and *Upstate Forever* filed petitions for writs of *certiorari*. The U.S. Supreme Court invited the United States to submit an *amicus* brief. The Solicitor General argued that the Supreme Court should grant *certiorari*, but only to the appellants in *Hawai'i Wildlife Fund* on the basis that the discharge reached the navigable waters solely through groundwater. *Upstate Forever*, on the other hand, would have required the Supreme Court to resolve ancillary issues that did not warrant review by the Supreme Court. The Solicitor General further argued that the Supreme Court should only review the County of Maui's first question: whether the CWA requires an NPDES permit for point source discharges of pollutants into a nonpoint source such as groundwater that conveys the pollutant to navigable waters. The Supreme Court agreed and granted *certiorari* in *County of Maui* on that question alone.

Conclusion and Implications

Water resource agencies who supported the request for Supreme Court review have argued that the conduit theory should be rejected because the discharge of pollutants into groundwater is already heavily regulated. For example, the injection wells at issue in *Hawai'i Wildlife Fund* were already subject to underground injection control (UIC) permits pursuant to the Safe Drinking Water Act. Other relevant federal laws also control the discharge of pollutant into groundwater: the Coastal Zone Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Resource Conservation and Recovery Act, in addition to state-level regulation. Another reason water resource agencies have argued to reject the conduit test is that it could open wastewater treatment facilities to citizen suits for routine and difficult-to-detect leaks. Large scale water infrastructure such as the canals, reservoirs, and aqueducts essential to water delivery in California could also be affected by the conduit rule, as could large-scale groundwater recharge projects.

On the other hand, supporters of the conduit theory argue that the CWA broadly applies to discharges to navigable waters, not just discharges directly into navigable waters. Supporters point out that the injection wells in *Hawai'i Wildlife Fund* are simply an attempt to circumvent the CWA by using groundwater as an intermediary between the County of Maui's point source discharge and the Pacific Ocean. Supporters also reject fears that the conduit theory as applied in *Hawai'i Wildlife Fund* would result in a sweeping expansion of the NPDES program. Instead, it would only be applied on a case-by-case basis where a discharge through a groundwater conduit is functionally the same as a direct discharge.

The case will now be briefed to the Supreme Court and then set for oral argument, likely during the Court's 2019–2020 term.
(Brian Hamilton, Meredith Nikkel)

JUDICIAL DEVELOPMENTS

THE TRUMP ADMINISTRATION BORDER WALL—NINTH CIRCUIT DETERMINES ILLEGAL IMMIGRATION ACT ALLOWS FOR WAIVER OF ENVIRONMENTAL LAWS

Center for Biological Diversity et al. v. U.S. Department of Homeland Security et al.
___F.3d___, Case Nos. 158-55474; 18-55475; and 18-55476 (9th Cir. Feb 11, 2019).

In August and September of 2017, the Secretary of the Department of Homeland Security (Secretary) published a notice of determination in the Federal Register that waived applicable environmental laws for the construction of the border wall in San Diego and Calexico. On February 11, 2019, a three-judge panel from the Ninth Circuit Court of Appeals determined the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorizes the Department of Homeland Security's (DHS) waiver of environmental laws that environmental groups seek to enforce is appropriate.

Factual Background

On August 2, 2017, the Secretary published a notice of determination regarding the construction and evaluation of wall and replacement of fourteen miles of fencing in San Diego County. The Secretary invoked § 102 of the IIRIRA's authorization to waive all legal requirements that the Secretary herself determines necessary to ensure expeditious construction barriers under the IIRIRA. Similarly, On September 12, 2017, the Secretary again invoked § 102's waiver in another notice of determination in the Federal Register in Calexico. The construction in Calexico involved a three-mile replacement of primary fencing along the border near Calexico. The secretary deemed both the projects as "necessary" and waived twenty-seven federal laws in its notice.

Plaintiffs, the State of California, Center for Biological Diversity (Center), and various environmental groups (Coalition) asserted three claims: 1) *ultra vires* claims, which alleging that the Department of Homeland Security exceeded its statutory authority in working on the border barrier projects and issuing waivers; 2) environmental claims contending that DHS violated various environmental laws by building the wall; and 3) constitutional claims asserting that the Secretary's waivers violate the U.S. Constitution.

The U.S. District Court rejected the constitutional claims and granted summary judgment to DHS with respect to the others. Plaintiffs each appealed the District Court's judgment. Now in a consolidated case, the Ninth Circuit Court heard the appeals and chose not to decide the environmental claims at this time stating that the claim was not ripe.

Then Ninth Circuit's Ruling

Jurisdiction

Section 102(c)(2)(A) states that the U.S. District Courts of the United States:

> . . .shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought or claim alleging a violation of the Constitution of the United States.

The Ninth Circuit Court interpreted this provision to mean that only constitutionally based claims are under the exclusive jurisdiction of District Courts.

Paragraph 1 includes a waiver provision that the:

> . . .Secretary of Homeland Security shall have the authority to waive all legal requirements… in such secretary's sole discretion, determines necessary to ensure the expeditious construction of the barriers and roads under this section.

Additionally, § 102(c)(2)(C) states that:

> . . .[a]n interlocutory of final judgment decree, or order of the district court may be reviewed upon petition for a writ of *certiorari* to the supreme court of the United States.

The Ninth Circuit Court interpreted the three provisions to mean that the Supreme Court's direct review only applies to claims under the District Court's exclusive jurisdiction—the constitutional claims—and have no bearing on any other claim including Plaintiffs' *ultra vires* and environmental claims.

Ultra Vires Claims Do Not Survive Summary Judgment

Plaintiffs argue that the San Diego and Calexico Projects are not authorized by § 102(a) ad 102(b) and challenge the scope of the Secretary authority to build roads and walls.

Under § 102 (a) of the IIRIRA states that:

> . . .[t]he Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install *additional physical barriers and roads* (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of *high illegal entry* into the United States. (Emphasis added.)

Specifically, plaintiffs argued that § 102(a) only applies to "additional physical barriers" and because the projects aim to replace the border fencing and do not technically create new and additional barriers, they fall out of the scope of the statute's authority. Plaintiffs contend that legislative intent was to only include construction of barriers that would add to the total miles of the border wall.

By relying on *Webster's Dictionary*®, the Ninth Circuit Court ultimately held that the term "additional" is equivalent to "supplemental" and that barrier means "a material object…that separates…or serves as a unit or barricade." The Ninth Circuit Court further opined that, common sense supports the court's analysis and to suggest that Congress would authorize DHS to build barriers but implicitly prohibit its repairs "makes no practical sense."

Plaintiffs also argued that the borders were not in areas of "high illegal entry" because there are other places with *higher* illegal entry. However, plaintiffs' argument failed because the IIRIRA does not define what constitutes "high illegal entry" and it certainly does not dictate that illegal entry is a comparative determination. Further, the panel found that plaintiffs did not dispute the DHS' statistics that show that San Diego and El Centro are in the top 35 percent of the border where the most illegal immigrants are apprehended. In essence, plaintiffs were challenging the Secretary's discretion in selecting where to exercise her authority under § 102(a), which is barred under § 102(c). Finally, the Ninth Circuit determined that § 102(b) does not impose limits on the section's broad grant of authority.

The Dissent

In her dissent, Ninth Circuit Judge Consuelo M. Callahan's argued that the plain language of § 102 of limits appellate review of the lower California court's decision to the U.S. Supreme Court. Judge Callahan disagrees and reasons the majority ignores the plain language of the text which requires that for all actions filed in a District Court that arises from "any section undertaken, or any decision made, by the Secretary of Homeland Security," —that appellate review is limited to the Supreme Court.

Callahan criticizes majority's analysis and contends that the opinion ignored the statute's restriction on appellate jurisdiction by arguing that the *ultra vires* claims do not "arise out of" the Secretary's waiver of legal requirements under § 102 (c). Thus, § 102(c) restricts review of this case to the Supreme Court and should have never been determined by the Ninth Circuit.

Conclusion and Implications

In this 2-1 decision, the Ninth Circuit ultimately upheld the Trump administration's decision to reconstruct a border wall in Calexico and San Diego, supporting the Secretary's decision. The Ninth Circuit Panel's discussion of its interpretation of the statutes provides a seemingly iron-clad protection for the Secretary's decisions made under § 102(c) and even bolsters the Secretary's authority by holding that the section does not impose any limits. The Secretary's broad authority stems from legislative

intent to prioritize border security and sacrifice other federal policy concerns including many environmental considerations. The panel's ruling in *In Re Border Infrastructure Environmental Litigation* is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/02/11/18-55474.pdf
(Rachel S. Cheong; David D. Boyer)

DISTRICT COURT HOLDS ARMY CORPS' DECISION TO MAINTAIN TIDAL WATERS DEFINITION OF 'HIGH TIDE LINE' IS FINAL AGENCY ACTION FOR SUBJECT MATTER JURISDICTION

Sound Action v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. C18-0733 (W.D. Wash. Feb. 5, 2019).

In January of 2018, the Commander of the U.S. Army Corps of Engineers' Northwestern Division (Corps) issued a memorandum putting on hold any further consideration of a change in the Corps' method, in use since the 1970s, for determining its jurisdiction over tidal waters. That memorandum had the effect of bringing to an abrupt halt consideration of the recommendation of an interagency, multi-disciplinary working group to adopt a new method for establishing the high tide line, which would have brought an additional 8,600 acres of Washington state shoreline within the Corps' jurisdiction. The U.S. District Court for the Western District of Washington found the memorandum constituted final agency action sufficient to establish subject matter jurisdiction.

Background

The Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1363. Tidal waters "up to the high tide line" are included within navigable waters. 33 C.F.R. § 328.4(b). Clean Water Act § 404 prohibits the discharge of dredged or fill materials into navigable waters, including tidal waters, without a permit. 33 U.S.C. § 1344. "The construction of seawalls, bulkheads, and similar structures for shoreline armoring within navigable waters constitutes a discharge" requiring a § 404 permit. 33 C.F.R. 323.2.

Since 1986, the Corps has defined the "high tide line" as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide." 33 C.F.R. § 328.3(c)(7). "The parties do not dispute that this is the current definition of high tide line." The Corps' definition provides that:

> . . .[t]he line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. 33 C.F.R. § 328.3(c)(7).

Beginning in the 1970s, the Corps' Northwestern Division has used "the mean higher high water" (MHHW) datum to determine the high tide line and, consequently, the limit of its § 404 jurisdiction in tidal waters. According to plaintiffs, MHHW "is unequivocally significantly lower than the maximum height reached by a rising tide" and "is surpassed between three to five times a week in Washington state." In other words, "about a quarter of high tides" in the Seattle District's region are above MHHW.

In January 2016, the Corps along with the U.S. Environmental Protection Agency's Region 10 and the West Coast Region of the National Oceanic and Atmospheric Administration (NOAA) "formed an interagency workgroup to address the Seattle District's high tide line datum." The workgroup considered two other "datums" that could be used to establish the high tide line: the "highest astronomical tide (HAT) and mean annual highest tide (MAHT)." The court pointed out that, according to plaintiffs:

> . . .the difference between MHHW and HAT on a shoreline in Puget Sound varies by location, ranging from 15 to 32 vertical inches. The difference between MHHW and MAHT ranges from 13 to 29 inches. Plaintiffs claim that 'the

> area between [MHHW] and [MAHT] represents up to 8,600 acres of shoreline area in Washington state.'

In November 2016, "the workgroup recommended to the Corps' Northwestern Division (which oversees the Seattle District) that the Seattle District use MAHT as its high tide line datum," explaining that MAHT is an elevation that is reasonably representative of the intersection of the land and the water's surface at the maximum height reached by the rising tide, is based on gravitational forces, is predictable, reliable, repeatable, reasonably periodic, measurable, simple to determine, scientifically defensible, and based on data that is reasonably available and accessible to the public.

Nonetheless, on January 19, 2019, the Corps' Northwestern Division Commander Spellmon issued a memorandum (Spellmon Memo) stating that while he had reviewed the workgroup's recommendation:

> . . .in light of the EPA and Army's efforts to review and revise the 'waters of the United States' definition as directed by. . . [President Trump's 2017 Executive Order] . . .the Corps' 'current focus must shift to other initiatives,' and that '[f]urther efforts to study, re-evaluate or reinterpret the [high tide line] definition would not be an organizationally consistent use of resources within the Corps.'

Further, the Spellmon memo stated that:

> . . .'elevations such as MAHT as they would be applied in Puget Sound are not consistent with the intent of the current definition of [high tide line]' [and] 'direct[ed]' the Seattle District 'to shift away from further consideration of changing the Corps Clean Water Act jurisdiction limit in tidal waters.'

The environmental group plaintiffs alleged that the Northwest Division's use of MHHW to determine the high tide line allows substantial amounts of environmentally-damaging shoreline armoring to proceed each year without first undergoing the § 404 permit process. The Corps sought to dismiss this claim on the grounds that the Spellmon Memo is not a final agency action subject to review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551(13), 704 and 706(2).

The District Court's Decision

Examining the motion to dismiss as a facial attack on the plaintiffs' assertion of subject matter jurisdiction, the District Court assumed the allegations in the complaint were true, and considered along with the complaint the Spellmon memo and the Workgroup Report.

The APA allows review of "final agency action[s]." 5 U.S.C. § 704.

When analyzing whether an agency action is final:

> . . .[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. *Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992).

The Supreme Court has established a two-part test to determine if an agency action is "final." *See, Bennett v. Spear*, 520 U.S. 154, 177-78 (1997):

> First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' *Id.* (citations omitted).

The District Court rejected the Corps' argument that the Spellmon memo "deferred" action on the Workgroup Report, or expressed an intent by the agency to "establish law and policy in the future." Quoting *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996). Rather,

> . . .the Spellmon memo direct[s]' the Seattle District to stop evaluating high tide line datum and 'shift away from further consideration of changing the Corps [CWA] jurisdictional limit.' The District Court went to state that. . . . By reiterating that the Seattle District will use MHHW as its high tide line datum, and by precluding future consideration of the issue, the Corps, 'for all practical purposes, has ruled definitively' on the Seattle District's § 404 jurisdic-

tion. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016).

And the Spellmon memo was issued on the basis of an evaluation of "new information from a group of experts that the Corps assembled"—the workgroup—"support[ing] a finding of final agency action." Citing *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005):

> The Spellmon Memo's conclusion that the Seattle District maintain MHHW and halt any future consideration of its high tide line datum reflects the consummation of the Corps' decision-making process regardless of the documents that the Corps relied upon to reach that conclusion.

Thus, the court found:

> . . .that Plaintiffs have properly challenged a specific agency action: the Corps' decision to indefinitely maintain MHHW as the Seattle District's high tide line datum. The Spellmon Memo marks the consummation of the Corps' decision-making process on this point.

Conclusion and Implications

In this era of abrupt regulatory about-turns arising from executive agency communications in a wide variety of forms and guises, District Courts continue to apply established precedent to determine whether public interest plaintiffs have standing to challenge various agency decisions as "final" under the APA. It remains to be seen whether the Circuit Courts will shape the controlling law to shield any of these regulatory actions from review. The court's decision is available online at: https://earthjustice.org/sites/default/files/files/21_Judge_Order-Denying-MTD_02-05-2019.pdf
(Deborah Quick)

DISTRICT COURT FINDS IT HAS JURISDICTION UNDER CERCLA OF UK ENTITY FOR 'DIRECTED' ACTIVITIES IN CALIFORNIA DURING CORPORATE MERGER

Successor Agency to the Former Emeryville Redevelopment Agency v. Swagelok Co., ___F.Supp.3d___, Case No. 17-cv-00308 (N.D. Cal. Jan. 30, 2019).

A United Kingdom-based corporate entity may be sued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other environmental statutes in the Northern District of California based on its California "directed" activities during a corporate merger in the 1980s, by which the UK entity's affiliate took title to a contaminated industrial site in Emeryville, California. The U.S. District Court found the UK entity controlled the corporate merger, including the dissemination of press releases and advertising directed at the California market, and that the target of the merger had contributed to the contamination of the property at issue, and therefore the plaintiffs established a *prima facie* case the court could exercise personal jurisdiction over the UK entity.

Background

From 1910 through 1999, an industrial property at 5679 Horton Street in Emeryville, California, was the site of various manufacturing processes—including mechanical calculating machines, machine valves and vale parts—resulting in soil and groundwater contamination with "various oils, chemical solvents, and other chemicals." In 1999, the city's Redevelopment Agency purchased the property and investigated the contamination as well as the identity of various potentially liable parties.

In 2017 the city sued various individuals and entities, seeking contributions to clean-up costs. Defendant Hanson Building Materials Limited (HBML), a UK entity, was named on the basis of alleged successor liability arising from HBML's relationship

to Smith-Corona Marchant Inc. (SCM). SCM was created as a result of a 1958 merger involving the original owner-operator of the property, and owned the property until the mid-1960s. SCM was later, in the 1980s, the target of a successful hostile takeover by HBML.

The District Court's Decision

HBML moved for dismissal on the basis that the District Court had neither general nor specific personal jurisdiction over it; the city opposed solely on the basis that the court had specific jurisdiction. Therefore, the court analyzed only whether it had specific jurisdiction over HBML applying the "three-factor test:

> (i) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (ii) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (iii) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable. *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008) (internal citation and quotations omitted).

Purposeful Availment

The court found that:

> . . .[t]he first factor may be satisfied by 'purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof.' *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

The "purposeful availment" analysis is generally applied in the contract context, while "purposeful direction" typically is applied to torts. In *Pakootas v. Teck Cominco Metals, Ltd.* 905 F.3d 565, 577 (9th Cir. 2018), the Ninth Circuit applied the "purposeful direction" analysis to a defendant facing allegations of liability under CERCLA "because the statute sounded in tort more so than in contract":

> To determine whether activities directed at a forum are sufficient, courts require facts indicating the defendant: '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.' *Yahoo!*, 433 F.3d at 1206 (internal quotation and citations omitted).

HBML's hostile takeover of SCM was first considered in 1985, with discussions by HBML's board of directors "preceding any press release that HBML would announce a tender offer."

> When the takeover efforts began, HBML announced that the tender offer would be 'advertised nationally by use of the national financial press and by the interstate mail.'

HBML's "national press strategy" with respect to the takeover continued "[f]rom 1986 to 1993," during which time "HBML ran advertisements in California, at times through the Los Angeles Times." Also during this time HBML "periodically filed SEC documents involved in the tender offer and liquidation of SCM." The District Court rejected HBML's attempt to liken its actions to those of the facts in *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194, 1198 (C.D. Cal. 2000), where "the District Court found that a nationwide press release" issued by the defendant seeking to evade personal jurisdiction:

> . . .was not sufficient to establish purposeful availment because '[n]one of the four U.S. media publications ... [were] located in California, nor did defendant send press releases to any entity or person with a California address.' Quoting *Callaway*, 125 F. Supp. 2d at 1198–1200.

But HBML's nationwide press releases were accompanied by:

> . . .advertising directed towards California specifically. Given HBML's direct involvement in

> the nationwide press coverage of its tender offer, and subsequent ads in California, it purposefully availed itself of California.

Citing *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990), as:

> . . .finding that the decision to provide a nationwide press coverage permitted jurisdiction in Montana where the claims happened to be filed . . . .Lord Hanson and Sir Gordon White, who were partners in managing HBML, lived part-time in California and conducted business there.

As for the second factor, whether the city's CERCLA claim "arises out of or relates to the defendant's forum-related activities," *Boschetto*, 539 F.3d at 1016, the District Court found that the city alleged sufficient facts to establish successor liability, thereby satisfying this factor:

> A court has personal jurisdiction over an alleged successor company, here HBML, if: (i) 'the court would have had personal jurisdiction over the predecessor' and (ii) 'the successor company effectively assumed the subject liabilities of the predecessor.' *Lefkowtiz v. Scytl USA*, No. 15-CV-05005-JSC, 2016 WL 537952, at *3 (N.D. Cal. Feb. 11, 2016).

Here, it was undisputed that HBML obtained the assets, rather than just the stock, of SCM and that SCM had owned and operated the property (thus, the court would have had jurisdiction over SCM). The city argued that HBML's "dominat[ion] and control[]" of the takeover established that HBML essentially owned and controlled SCM "while SCM allegedly contributed to the contamination of the Property." HBML's argument that affiliates it did not control had actually acquired SCM foundered on evidence from HBML's own witnesses that it was doubtful those entities:

> . . .had the resources (employees, bank accounts, phone and fax numbers) to perform the merger with SCM independent of HBML.

And even if HBML successfully spun-off SCM's liabilities via a series of entity-level transactions in 1988, that did not shield it from successor liability for SCM's pre-1988 contaminating activities.

Conclusion and Implications

The city having established a *prima facie* case that the District Court has personal jurisdiction over HBML, the defendant did not succeed in carrying its burden of demonstrating it would not be reasonable to force it to litigate in California, as, among other reasons, the alternative would be to force the city to litigate in the UK.

The long-arm of successor liability for contribution costs under CERCLA and other environmental statutes drives the structure of many contemporary transactions. This case is a reminder that long-ago transactions can come back to haunt defendants, decades later. The court's decision is available online at: https://scholar.google.com/scholar_case?case=8469295132104795911&q=Successor+Agency+to+the+Former+Emeryville+Redevelopment+Agency+v.+Swagelok+Co&hl=en&as_sdt=2006&as_vis=1
(Deborah Quick)

COLORADO SUPREME COURT CLARIFIES WATER COURT JURISDICTION

Allen v. State of Colorado, 2019 CO 6 (Colo. 2019).

The Colorado Supreme Court has ruled that an inverse condemnation claim regarding shares in a mutual ditch company was not an exclusive water matter, and therefore not within the jurisdiction of Colorado's Water Courts. This decision was the most recent in a line of case law that has attempted to clarify the often-murky definition of a "water matter" under Colorado law.

Background and Water Court Decision

The subject case, *Allen v. State of Colorado*, began as an inverse condemnation claim. As background, Mesa County Land Conservancy, Inc. (Mesa) acquired a conservation easement over a 140-acre ranch, water rights, and nine shares of Big Creek Reservoir Company stock. As part of that conservation easement, Mesa secured a covenant that "[a]ll water rights held at the date of conveyance shall remain with the land." The plaintiff, Sam Allen, later purchased the ranch, including the accompanying water rights and ditch company shares.

Sometime after that purchase, Mr. Allen again sold the ranch, but this time only included the water rights, not the ditch company shares. Mesa then filed a declaratory judgment action against Allen, alleging that he had violated the specific conservation easement terms that that the water rights must stay with the land. Mesa was granted a permanent injunction in the District Court, and that judgment was later affirmed by the Colorado Court of Appeals. *Mesa County Land Conservancy, Inc. v. Allen*, 318 P.3d 46 (Colo.App. 2012). Allen then further appealed to the Colorado Supreme Court, claiming that the conservation easement only applied to the decreed water rights, not the ditch company shares. Allen's petition for a writ of *certiorari* was denied, leading him to file the present case in Water Court, alleging that the permanent injunction was tantamount to a judicial taking of his ditch company shares.

The defendants in that case, including Mesa and the State of Colorado, moved for a dismissal under C.R.C.P. 12(b)(1) and 12(b)(5) for lack of subject matter jurisdiction. The Water Court granted the dismissal, holding that, because the dispute was grounded in ownership of water, not use of water, Allen's claims were an action more appropriate for the District Court. Allen then appealed—in Colorado, Water Court appeals go straight to the Supreme Court, leading to this current case.

Water Court vs. District Court Jurisdiction

Under Colorado law, the Water Courts have exclusive jurisdiction over "water matters." C.R.S. § 37-92-203(1). Unfortunately, the Colorado Legislature's definition of water matters— "only those matters which [C.R.S. article 92] and any other law shall specify to be heard by the water judge of the District Courts"—is sufficiently vague to give rise to an intricate body of case law. *Id.*

The closest approximation to a bright line rule comes from *Humphrey v. Sw. Dev. Co.*, in which the Supreme Court explained that the:

> . . .[r]esolution of what constitutes a water matter turns on the distinction between the legal right to *use* of water (acquired by appropriation), and the *ownership*, of a water right. 734 P.2d 637, 640 (Colo. 1987).

The past 30 years of case law has shown that "use" includes, but is not limited to, applications for decrees, changes, abandonment, and adverse possession. *See, S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1234 (Colo. 2011). Conversely, the "water matters" jurisdiction of the Water Courts does not extend to quiet title, instruments of grant or conveyance, and other similarly situated real estate matters. *Kobobel v. Colo. Dep't of Nat. Res.*, 249 P.3d 1127, 1132 (Colo. 2011).

The Colorado Supreme Court's Decision

A simple reading of the above cases might seem to make clear that Allen's claims are not water claims but rather an issue concerning the conservation easement and therefore a matter for the state District

Court. However, Allen claimed that the question of ownership is not at issue, because the previous case resulting in a permanent injunction had satisfied any questions of ownership of the ditch company shares. Instead Allen argued that, because he was forced to transfer the shares against his will, his right to *use* of that water was taken without just compensation.

Analysis under the *Kobobel* Decision

To make that argument, Allen relied chiefly on *Kobobel*, in which the plaintiff was able to bring an inverse condemnation action in Water Court after the State Engineer's Office ordered him to cease and desist the use of several of his wells. 249 P.2d at 1130-31.

The Supreme Court fully rejected that claim, principally basing its argument on the fact that, contrary to Allen's assertions, the rights at issue in this case were his ditch shares, not any right to use that water. In *Kobobel*, the ownership of the wells was not questioned; the case was only about if plaintiff had a right to use the water. Here, the Supreme Court said, the distinguishing issue is the ownership of the water right (vis-à-vis ownership in the ditch company). This argument is further supported by C.R.S. § 7-42-104(4) which defines ditch company stock as "personal property and transferable as such in the manner provided by the bylaws." With that definition, it is clear that the ditch company shares are much more akin to a real estate instrument than a specific right to *use* water.

The court also noted that, although Allen's claims could have an incidental impact on the use of that water (*i.e.*, he could not use it if he didn't own it), that fact was not enough to give the Water Court jurisdiction over the inverse condemnation action. *See, Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 180 (Colo. 1991).

Conclusion and Implications

Although this case may seem rather straightforward in hindsight, it exists as a good example of the lack of clarity parties face in Colorado when deciding whether to bring a claim in Water Court or District Court. Because of procedural differences in Water Court, including the direct appeal to the Supreme Court, Colorado has been understandably protective and has sustained a rather restrictive view of what constitutes a "water matter." With its latest decision in *Allen v. State of Colorado*, the Court has doubled down, and hopefully offered a bit more clarity, on its distinction between questions of ownership and question of use. The Supreme Court's decision is available online at: https://www.courts.state.co.us/Courts/Supreme_Court/Case_Announcements/Files/2019/B6E4921.22.19.pdf
(John Sittler, Paul Noto)

UTAH SUPREME COURT REMANDS STREAM ACCESS CASE TO DISTRICT COURT DUE TO ERROR

Utah Stream Access Coalition v. VR Acquisitions and State of Utah, 2019 UT 7 (2019).

The Utah Supreme Court has held that its prior decision, recognizing a public stream access easement right "to touch privately owned beds of state waters in ways incidental to all recreational rights," is not rooted in constitutional law, but is rather based in common-law easement principles. Common law decisions are subject to adaption or reversal by the legislature. Consequently, the Supreme Court remanded this action to the state District Court to correct the error in treating the public's stream access easement as a matter beyond the state legislature's power to revise or revisit.

Factual and Procedural Background:

This case touches on many complicated issues related to the public trust doctrine and the scope of the easement afforded to the public to utilize the waters of the state of Utah. In 2008, the Utah Supreme Court held that:

(1) touching the water's bed is reasonably neces-

> sary and convenient for the effective enjoyment of the public's easement—its right to float, hunt, fish, and participate in all lawful activities that utilize state waters; and (2) that such touching does not cause unnecessary injury to owners of private streambeds. 2019 UT 7, ¶ 13, citing *Conatser v. Johnson*, 2008 UT 48, ¶ 19.

Following this decision, the Utah State Legislature adopted legislation for the purpose of restoring the:

> . . .accommodation existing between the recreational users and private property owners as it existed before the decision in *Conaster*. Id. at ¶ 14, citing UCA § 73-29-103(6).

This legislation, known as the Public Water Access Act (PWAA), significantly limited the *Conatser* decision, by defining the scope of the public easement:

> . . .to incidental touching and portage, without any recognition of a right to wade in the stream for hunting, fishing, swimming and other recreational uses. Id. at ¶ 2, *citing* UCA § 73-29-202(2).

The instant case involves members of the Utah Stream Access Coalition (USAC), who were excluded from fishing and wading on a section of the Provo River that flows through property owned by Victory Ranch (VR). Citing the PWAA, VR expelled the USAC member from the land. The USAC member was escorted off the land by local law enforcement and was cited for criminal trespass. Id. at ¶ 17. USAC challenged these actions by filing this lawsuit and challenging the constitutionality of the PWAA on three grounds: 1) that it infringed upon USAC members' rights to the use of any of the waters of this state for any useful or beneficial purpose, guaranteed in article XVII, § 1 of the Utah Constitution; 2) that it ran afoul of the "public trust" doctrine as established in article XX, § 1 of the Utah Constitution; and 3) that it alternatively violated the public trust principles set forth in federal common law, such as those established in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892). *Id.* at ¶ 18

After many rounds of briefing, the state District Court granted partial summary judgment against USAC. It held that the PWAA did not violate article XVII or the public trust doctrine in federal common law. The court found a "right[] to the use of … the waters in this state for any useful and beneficial purpose," is protected by the Utah Constitution, but held the legislature retain broad discretion to regulate water rights under article XVII. *Id.* at ¶ 19. As to the federal common law public trust doctrine, the court held that that doctrine applies only to navigable waters—and thus does not extend to the stretch of the Provo River in question (which is not alleged to be navigable.) *Id.*

However, the court held that the protections of Article XX, § 1 extend to the public easement right in question, but concluded that there were disputed facts that required a trial on the merits. *Id.* at ¶ 20. The conclusion was underpinned by several determinations of the relevance of the constitutionality of the PWAA. The court held that the easement right claimed by USAC was an "interest in land" protected by Article XX, § 1. *Id.* at ¶ 21. This conclusion also implicitly held that this interest had been "acquired" by the state under the terms of Article XX, and that it had been "disposed of" in a manner triggering the protections of the public trust doctrine. *Id.* Following a hearing on the merits, the court concluded that the PWAA substantially impaired the right of Utah fishers to recreate in public waters. *Id.* at ¶ 23. Specifically, the court held that the PWAA closed 43 percent of fishable rivers and streams to almost all public recreational use, which exceeded the bounds of the legislature's authority under Article XX, § 1. *Id.*

Both parties appealed and presented five questions for the Supreme Court to resolve. Those questions include: 1) whether the easement recognized in *Conaster* is a "land[] of the State"; 2) whether such land has been "acquired" in a manner triggering the public trust doctrine; 3) whether the state "disposed of" the land as that term is used in the Utah Constitution; 4) the applicable standard of scrutiny for assessing the constitutionality of the PWAA under Article XX, § 1; and 5) whether the PWAA survives scrutiny under that standard. *Id.* at ¶ 25.

The Supreme Court's Decision to Remand Due to Threshold Error

The Court considered the issues presented, but did not ultimately resolve this appeal on those grounds. Rather, the Court reversed and remanded on what is described as an important threshold error in the

District Court's analysis. Specifically, the Court found an error with the District Court's:

> . . .implicit conclusion that the scope of the easement recognized in *Conatser v. Johnson*… was an interest in land that was 'acquired' and 'accepted' by the state at the time of the ratification of the Utah Constitution in 1896. *Id.* at ¶ 29.

Article XX, § 1 of the Utah Constitution protects:

> . . .all lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, … or that may otherwise be acquired …. UTAH CONST. art. XX, § 1.

Such lands are hereby "accepted" and "declared to be the public lands of the State." *Id.* Finally, it provides that these lands:

> . . .shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired. *Id.*

Distinguishing Public Easements

The District Court found that the public easement recognized in *Conatser* is an interest in land that is included in article XX, § 1. This holding is rooted in the understanding that the *Conatser* decision, and prior decisions, "applied principles of real property law" in defining the public easement. 2019 UT at ¶ 58. This conclusion was challenged by the state and VR, which asserted several claims, including () that the public easement was not a "land[] of the State," subject to the protections of Article XX, § 1; 2) the state has not disposed of any such lands; and 3) the District Court applied the wrong standard in its application of the public trust doctrine. *Id.* at ¶ 59. The Court addressed each of these arguments, but stopped short of resolving the case on these grounds.

Rather, the Court focused upon the above stated threshold error, which it held was fatal to the District Court's decision. The Court's analysis of that issue revolves around the question of whether or not the easement in question was "acquired" or "accepted" by the state. The Court noted that the language of Article XX, § 1, identifies several means of acquisition that require the participation of the state (such as gift, grant or devise). *Id.* at ¶ 83. Consequently, the Court recognized that there is an outstanding question of whether the easement in question fits under the scope of Article XX, § 1. However, this question was left for another day as the Court concluded that the District Court had implicitly answered this question in the affirmative, by concluding the *Conatser* easement was protected under Article XX, § 1.

The Court deemed this a threshold error, which misapplied the ruling in *Conatser*. *Id* at 86. Consequently, the Court now holds that the correct analysis should target the "historical scope of a public easement in use of public waters at the time of the framing of the Utah Constitution." *Id.* In order to rise to the level of lands "acquired" or "accepted" by the state, the easement would, at a minimum, have to be shown to be in line with the sort of public access right that our law would have dictated at the time of the framing of the Utah Constitution. *Id.* at ¶ 88.

Conclusion and Implications

This decision is yet another chapter in a long-standing conflict. The Utah Supreme Court, ultimately declined to resolve the primary issues in this action, preferring to remand for the resolution of a threshold error. The Court's conclusion that Article XX, § 1 only protects those lands "acquired" or "accepted" by the state is very narrow in its application. There are few lands, other than the public easement over waters of the state, that would fall into this category. The implications of this decision may not extend much beyond the specific facts of this case. However, scope of the public trust may be significantly narrowed by this decision.

The Utah Supreme Court Decision may be found at: https://www.utcourts.gov/opinions/supopin/Utah%20Stream%20v.%20VR%20Acquisitions20190220_20151048_7.pdf
(Jonathan Clyde)

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