

WESTERN WATER LAW™

& POLICY REPORTER

C O N T E N T S

WESTERN WATER NEWS

Banner Year for Snowpack Does Not Necessarily Yield Reservoir Storage in Nevada 187

Faced with Climate Change Impacts and Increasing Scrutiny Surrounding Feasibility of Proposed Diversion Project, New Mexico's Gila River Named Nation's Most Endangered 189

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 191

REGULATORY DEVELOPMENTS

California Department of Water Resources and Bureau of Reclamation Announce Increased Water Allocations Following Early Spring Storms 194

California State Water Resources Control Board Adopts 'State Wetland Definition' and 'Procedures for Dischargers of Dredge or Fill Material' 195

Oregon Department of Environmental Quality Issues Draft General NPDES Permit for Seafood Processing 197

LEGISLATIVE DEVELOPMENTS

The California Environmental, Public Health, and Workers Defense Act of 2019—California Pushes Back 199

Proposed California Water Tax and Legislative Funding Proposals for Water Projects Compete for Support in Uphill Climb for Approval 200

Continued on next page

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JUDICIAL DEVELOPMENTS

Federal:

Supreme Court Addresses Federally Reserved Water Rights, National Alaska Lands Act and Scope of the Park Service’s Authority over the Nation River 203
Sturgeon v. Frost, et al., ___U.S.___, 139 S. Ct. 1066 (U.S. Mar 26, 2019).

District Court:

District Court Rules EPA Acted Arbitrarily and Capriciously in Refusing to Regulate Certain Stormwater Discharges 205
Blue Water Baltimore, Inc. v. Wheeler, ___F. Supp.3d___, Case No. GLR-17-1253 (D. Md. Mar. 22, 2019).

District Court Addresses Motions to Dismiss and to Stay in Case with Pollutant Discharges into the Tennessee River 207
King v. West Morgan-East Lawrence Water and Sewer Authority, ___F.Supp.3d___, Case No. 5:17-CV-01833 (N.D. Ala. Mar. 13, 2019).

District Court Denies States’ Request for Preliminary Injunction in Challenge to Clean Water Rule 209
Ohio v. U.S. Environmental Protection Agency, ___F. Supp.3d___, Case No. 2:15-CV-2467 (S.D. Ohio Mar. 26, 2019).

State:

1909 Water Rights ‘Decree’ Overturned by Colorado Supreme Court for Lack of ‘Indicia of Enforceability’ 210
Yamasaki Ring v. Dill, 2019 CO 14 (Colo. 2019).

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WESTERN WATER NEWS**BANNER YEAR FOR SNOWPACK DOES NOT NECESSARILY YIELD RESERVOIR STORAGE IN NEVADA**

The winter of 2018-2019 yielded considerable snow fall amounts in the Rockies and the Sierra Nevada mountain ranges that feed the water supply for Nevada. Notwithstanding an excellent year for surface water runoff, however, reservoir levels have not necessarily rebounded from past drought years. In northern Nevada, the reservoirs on the Truckee River that store water for the Reno metropolitan area are projected to fill. In southern Nevada, however, the forecast is for reservoir levels to hover just above critical levels, below which a shortage is declared and a reduction in deliveries would occur.

Water Supply for Nevada's Population Centers

Northern Nevada and southern Nevada differ in many respects, the source of their water supplies being just one of them. The Las Vegas metropolitan area relies almost exclusively on water from the Colorado River, which begins as snowmelt in the Rocky Mountains. Colorado River water makes up nearly 90 percent of the supply for southern Nevada's 2 million residents. Currently, only 10 percent of southern Nevada's municipal water supply comes from Las Vegas Valley groundwater.

The Reno metropolitan area relies primarily on the Truckee River for its water supply, which is delivered by the Truckee Meadows Water Authority (TMWA). The Truckee River flows out of Lake Tahoe in California and into Nevada, where it passes through Reno and then ends at Pyramid Lake. TMWA holds approximately 119,000 acre-feet of Truckee River rights to serve over 385,000 people and generate revenue from its hydroelectric facilities. TMWA conjunctively manages its water supplies through a combination of natural river flows, injection of treated surface water into aquifers, groundwater pumping, and releases of its upstream drought reserves.

Legal Framework for Water Deliveries

With the 1922 Colorado River Compact (Compact) as the legal keystone, the Colorado River is

managed and operated under numerous compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines, which are collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. Lake Powell, behind Glen Canyon Dam, and downstream Lake Mead, behind Hoover Dam, are the storage reservoirs that serve the Lower Basin States, including Nevada. Nevada's allocation under the 1922 Compact is 300,000 acre-feet per year, which is delivered by Southern Nevada Water Authority (SNWA) through a contract with the U.S. Bureau of Reclamation (Bureau).

In the nearly century since the 1922 Compact was entered into, the basin states and Mexico have largely avoided litigation, focusing instead on finding consensus over river operations. On December 13, 2007, the Secretary of the Interior signed the Record of Decision for the Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (Guidelines), which implement a new management regime for Lake Powell and Lake Mead. The Guidelines specify the amount of water that will be released from Lake Powell based on the elevations of both reservoirs and establish criteria for the Secretary to declare a shortage. Key to the Guidelines is a new concept called "intentionally created surplus" (ICS), which permits Lower Basin States to store water in Lake Mead for future use. ICS water is defined as water that has been conserved through an extraordinary conservation measure, such as land fallowing, seawater desalination or lining irrigation canals. The goal behind ICS water is to avoid a shortage declaration triggered by the lake levels dropping below established thresholds.

The Truckee River is one of the most heavily litigated waterways in the country. It is managed under the 1944 Orr Ditch Decree, which adjudicated ownership, priority, and relative rights to Truckee River water in Nevada, as amended by the Truckee River Operating Agreement (TROA). TROA was signed

by the States of Nevada and California, the United States, TMWA and the Pyramid Lake Paiute Tribe on September 6, 2008. Implementation of TROA began in December 2015.

TROA allows for more efficient and flexible use of available reservoir storage to provide benefits to fish and wildlife, municipal, industrial, and irrigation water users, including supplies for emergency conditions and worse-than-worst-case droughts. It resolved decades of litigation and promotes future cooperation through a dispute resolution process. TROA's major innovation is the ability for major stakeholders to establish "credit water" in upstream storage reservoirs during times when it is not needed. The credit water can then be carried over into subsequent years and released as needed. Using "credit water," TROA significantly increases the amount of upstream drought storage.

Effects of Drought on Water Storage

Since 2000, the Colorado River Basin has experienced historically dry conditions, causing the combined storage in Lakes Powell and Mead to reach its lowest level since Lake Powell began filling in the 1960s. Fifteen of the last 19 years have had below average unregulated inflow into Lake Powell. Lake Mead's elevation has dropped more than 130 feet since 2000. Due to drought conditions in the Rockies, the 2018 runoff was the third-lowest on record inflow into Lake Powell. With the deepening drought, beginning in 2014, the Basin States began working on Drought Contingency Plans (DCPs) to reduce the likelihood that the reservoirs will decline to critical elevations.

As of April 29, 2019, Lake Powell was at 38 percent capacity, while Lake Mead stood at 41 percent capacity. The Bureau's January 2019 model runs projected that cuts to water deliveries in the Lower Basin would occur in 2020 to avoid the reservoirs reaching critically low levels. If Lake Mead dips below 1,075 feet, the Secretary of the Interior could declare a shortage, meaning Nevada would be required to reduce its Colorado River allocation. The amount of allocation reduction depends upon Lake Mead's elevation level.

The winter of 2018-2019 produced heavy snowfall

in the Rockies, resulting in the Colorado River Basin snowpack being 121 percent of average as of April 29, 2019. March precipitation in the Upper Colorado Basin was 175 percent of average. However, the hot and dry conditions of 2018 left parched ground throughout much of the basin, which is likely to soak up much of the run off. Although the Lake Powell inflow is forecast to be 128 percent of average, the reservoir levels are not anticipated to rebound significantly. Current forecasts project that, at the end of the 2019 water year, Lake Powell's elevation will near 3,611.59 feet, which is 55 percent of capacity. The projected elevation of Lake Mead is 1,076.17 feet, just above the critical shortage level.

The Sierra Nevada Mountains that feed the Truckee River also experienced heavy snowfall, resulting in the basin having 179 percent of average snowpack as of April 29, 2019. Truckee River flows at the California/Nevada state line are expected to be 188 percent of average. In contrast to the situation in southern Nevada, all storage reservoirs on the Truckee River system are expected to fill, in part due to credit water that was stored in the last few years since TROA was implemented. Although northern Nevada also experienced a grave drought in 2018 and many dry years since 2000, the smaller basin size and shorter distances over which surface run off must travel to reach the Truckee River and its reservoirs, in addition to improved river management under TROA, have likely contributed to the excellent storage capacity that the region now enjoys

Conclusion and Implications

The concepts of "credit water" (under TROA) and "intentionally created surplus" (under the Colorado River Guidelines) both allow for reservoir storage that can be tapped in future times of need. Credit water stored in the Truckee River reservoirs since TROA implementation began in 2015 has assured that reservoirs will fill this year. In contrast, even though the Colorado River basin experienced a banner snow year, the lingering effects of 15 dry years are still apparent in Lower Basin reservoir levels. ICS and other management strategies are being implemented in an effort to prevent shortages and provide future stability in the face of drought.

FACED WITH CLIMATE CHANGE IMPACTS AND INCREASING SCRUTINY SURROUNDING FEASIBILITY OF PROPOSED DIVERSION PROJECT, NEW MEXICO'S GILA RIVER NAMED NATION'S MOST ENDANGERED

On April 16, 2019, American Rivers named the Gila River the most endangered river in America. The annual America's Most Endangered Rivers Report is a list of rivers facing a critical juncture. The list is published by American Rivers, a national conservation and advocacy group. In the case of the Gila River, climate change coupled with the proposed Gila River Diversion Project (Project), pose grave threats to New Mexico's last free flowing, wild river.

The Gila River

The Gila River is a 649-mile tributary of the Colorado River and flows through New Mexico and Arizona. The river's source lies in western New Mexico's Sierra County. It travels southwest through the Gila National Forest and the Gila Cliff Dwellings National Monument before flowing westward into Arizona where it is impounded by Coolidge Dam. The Gila River is also the last major undammed river in the State of New Mexico. It drains a watershed of approximately 60,000 square miles within the United States and extending into northern Mexico.

The Arizona Water Settlements Act

In 2004, Congress approved the Arizona Water Settlements Act, which gave New Mexico the right to divert a maximum of 14,000 acre-feet of water per year from the Gila River. New Mexico's Interstate Stream Commission (ISC) proposed a plan that would divert water from the Gila River across the Continental Divide to a reservoir outside of Deming in the far southwest section of New Mexico. On November 24, 2014, the ISC voted 7-1 in favor of moving forward with a project to divert water from the Gila River. That vote met the December 31, 2014 federal deadline providing for \$62 million in federal funding. The vote also ensured that more cost analyses and environmental studies will be done in order to determine whether this project will continue towards completion.

The Arizona Water Settlements Act gave the proposed project \$66 million in startup costs for proposed diversion projects. The federal government promised

\$62 million towards a particular chosen project if it was selected by the ISC by December 31, 2014. Analysts predict that the project will cost anywhere from \$575 million to \$1 billion to complete.

The Proposed Diversion Project

The proposed diversion would draw water from the Gila just downstream from where it leaves the Gila Wilderness Area, the Nation's first wilderness area. If completed, the project would allow New Mexico to divert a maximum of 14,000 acre-feet of water per year into nearby reservoirs, although some analysts are quick to point out that the Gila's historic flows coupled with reservoir seepage and evaporation would result in a much lower yield. Most recently, climate change has altered and reduced Gila River flows. Experts predict that by mid-century, climate change will result in the Gila being a snowpack-fed river. Opponents of the Project claim that New Mexico does not have the money for such a Project, and that the diversion will hurt the ecosystem of the Gila River.

The proposed Project anticipates that water will only be diverted during times of high flow. According to the ISC, the actual average yields will be between 6,000 and 8,000 acre-feet after evaporation and reservoir seepage has been accounted for. ISC estimates that the maximum yield would be around 12,500 acre-feet and it could possibly yield nothing in years of low flow. ISC staff have acknowledged that nearly half of the proposed water diversions could be lost by evaporation and reservoir seepage.

Opponents to the Project

The Gila River Diversion Project has become a point of debate among many groups. Some argue that New Mexico cannot afford to spend half a billion or more on a diversion project that will struggle to divert consistently high yields. Other opponents contend that not enough work has been done to assess the costs. There is still a large gap between the estimated cost of the Project and the funds provided by the federal government. Those who oppose the Project ask for more information and planning regarding the

cost of the Project, as well as the probable increases in municipal water rates.

Environmentalists, such as the Gila Conservation Coalition, are concerned about the possible negative effects the Project will have on the surrounding ecosystem and endangered species. Once the ISC notifies the federal government of their approval, many environmental studies will be done to determine the impact of the Gila River Diversion as mandated by the National Environmental Policy Act. Most recently, on March 30, 2019, the U.S. Bureau of Reclamation sent a letter to the New Mexico Entity of the Central Arizona Project stating that it does not believe the Environmental Impact Statement for the project will be completed by the December 31, 2019 deadline. Funding for the Project is dependent on meeting that deadline or qualifying for an extension.

Project Supporters

The Project also has supporters who believe that it will provide New Mexico a rare opportunity to develop a new water supply for local communities and agriculture. New Mexico and its inhabitants are in a constant struggle for more water and many argue that

this project will provide newly developed water sources where needed. Those who voted for the project are aware of the problems of cost and environmental impact, but argue that this stage must be passed in order for these problems to be better understood. Supporters believe that voting no would have shut the door on the issue before the facts are brought to light, and if these problems were insurmountable, the project could be scrapped completely at a later stage.

Conclusion and Implications

The latest update on the Gila River being named the Nation's most endangered river reflects the increasing scrutiny faced by the Gila River Diversion Project. While the project's viability continues to face challenges, the reality of the impacts of climate change and undoubtedly affect the amount and availability of water that can be developed by the proposed Project. As the last remaining undammed river in New Mexico, chief among the debates will be a continued focus on long-standing concerns about the both the costs and the ecological impacts of a dam on the Gila.

(Christina J. Bruff)

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 18, 2019 - The U.S. Environmental Protection Agency (EPA) and the Department of Justice 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 completion 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 is subject to a 30-day public comment period.

• March 19, 2019 - The U.S. Environmental Protection Agency (EPA) and Georgia-Pacific Wood Products, LLC, of Coos Bay, Oregon, reached a federal Clean Water Act settlement that is expected to reduce uncontrolled industrial stormwater threats to Isthmus Slough and Coos Bay. The EPA found that Georgia-Pacific Wood Products committed numerous violations of their Oregon state industrial stormwater permit at their Coos Bay facility. As part of the two-part agreement settling the matter, Georgia-Pacific agreed to comply with existing Oregon industrial storm water regulations and pay a \$79,000 penalty. Georgia-Pacific agreed to the settlement terms under Oregon's industrial stormwater permit regulations. Oregon's program requires facilities to implement comprehensive stormwater controls to minimize the amount of sediment and other pollutants from being discharged in stormwater runoff. EPA performed the inspection and is taking this action as part of a compliance work sharing agreement with the Oregon Department of Environmental Quality. Stormwater runoff from the facility discharges—through a series of outfalls—directly to tidally influenced Isthmus Slough, which is considered a tributary to Coos Bay and the Pacific Ocean. Isthmus Slough has “impaired” water quality and does not meet the state of Oregon's water quality standards. Some of the violations found during the EPA inspection were: Failure to collect representative samples; Failure to maintain control measures; Failure to complete adequate Tier 1 corrective action response; Failure to monitor outfall 3A; Failure to properly monitor oil and grease. Georgia-Pacific neither admits nor denies the factual allegations contained in the Consent Agreement and Administrative Order on Consent.

• April 4, 2019 - The U.S. Environmental Protection Agency announced a settlement with Detroit Diesel Corporation (DDC) for failing to close a large-capacity cesspool (LCC) in Campbell Industrial Park Kapolei, Oahu. Detroit Diesel will pay a \$129,000 fine and the cesspool was replaced with an individual wastewater treatment system in January. Detroit Diesel owns the property where Freightliner of Hawaii operates a heavy-duty truck dealership and truck service center. EPA inspectors found a large-capacity cesspool serving the bathrooms on the property. DDC is the fifth facility in the Campbell Industrial Park area where EPA has identified illegal LCCs over the

past two years. Large capacity cesspools were banned under the federal Safe Drinking Water Act in 2005. Cesspools are used more widely in Hawaii than in any other state, even though 95 percent of all drinking water in Hawaii comes from groundwater sources. In the 13 years more than 3,400 large-capacity cesspools have been closed statewide, many through voluntary compliance. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. The settlement is subject to a 30-day comment period.

Indictments, Convictions and Sentencing

• April 15, 2019 - United States District Judge Joan M. Azrack entered judgment holding liable Lawrence Aviation Industries, Inc. (LAI), a former defense contractor, and its long-time owner and CEO, Gerald Cohen, for environmental cleanup costs and penalties under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). As proven at trial, LAI and Cohen, in violation of several environmental laws and regulations, discharged a number of hazardous substances at LAI's Port Jefferson facility on Long Island that could pose threats to human health and the environment. The court found that, in addition to contaminating the LAI facility itself, LAI and Cohen were responsible for a mile-long contaminant plume in the groundwater beneath Port Jefferson. The court's judgment found LAI and Cohen jointly liable for \$48,116,024.31 in costs incurred by the EPA in cleaning up the site, and imposed civil penalties of \$750,000 against both LAI and Cohen, individually, for their failure to comply with requests for information issued by EPA. In a separate, 37-page Memorandum and Order, the Court detailed the evidence establishing LAI's and Cohen's long history of disregard for federal, state and county environmental laws. In the early 1980s, for example, after the Suffolk County Department of Health issued a series of recommendations for LAI to come into compliance with various pollution control laws, LAI used a front-end loader to crush 55-gallon drums containing hazardous substances (among more than 1,600 of such drums identified on the property), resulting in a massive discharge of waste directly onto the ground. Samples taken from those drums revealed impermissibly high levels of trichloroethylene (TCE), among other

pollutants. Nearly two decades later, in 1999, testing performed by the New York State Department of Environmental Conservation revealed contamination of groundwater and surface water at the site. Thereafter, in March 2000, the site was placed on the National Priorities List. For these and other reasons, the groundwater in the vicinity of the site is not currently used for drinking water. EPA's cleanup of the site, now into its 19th year, has included an exhaustive remedial investigation into the nature and scope of the contamination, various hazardous waste removal and stabilization activities, and the implementation and maintenance of two groundwater treatment systems designed to capture and treat contaminated groundwater. As noted in the Court's decision, EPA's activities at the LAI site have resulted in a decrease in size

of the groundwater TCE plume and the removal of over 18,000 tons of soil contaminated with polychlorinated biphenyls, among other hazardous substances, including asbestos containing materials. Various creditors have asserted claims against LAI and Cohen properties based on their respective liens. Those claims remain pending before the court. Previously, in 2008, Cohen and LAI pleaded guilty to violating the Resource Conservation and Recovery Act for storing hazardous wastes at the LAI Facility without a permit issued by the EPA or New York State. Cohen was sentenced to a term of imprisonment of one year and a day, and supervised release of 36 months. He and LAI were ordered to pay restitution to the EPA of \$105,816.

(Andre Monette)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES AND BUREAU OF RECLAMATION ANNOUNCE INCREASED WATER ALLOCATIONS FOLLOWING EARLY SPRING STORMS

Following significant precipitation in February and March, the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) both announced increases in water allocations to water contractors in 2019. DWR, which operates the State Water Project (SWP), increased allocations to SWP contractors to 70 percent, compared with 35 percent announced at the beginning of February. The Bureau, which operates the Central Valley Project (CVP), increased allocations to agricultural, municipal, and industrial water contractors. Each category of CVP contractor located in the Sacramento-San Joaquin Delta (Delta) area will receive 100 percent of its contract amount, while south of Delta agricultural contractors and municipal/industrial contractors will receive 55 percent and 80 percent of contract amounts, respectively.

Background

The State Water Project is a water storage and delivery system comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more than 700 miles from northern to southern California. According to DWR, the SWP supplies water to more than 27 million people across California, and irrigates roughly 750,000 acres of farmland. The SWP is capable of delivering roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipitation and snowpack, operational conditions, as well as environmental and other legal constraints.

According to the Bureau, the Central Valley Project spans roughly 400 miles from the Cascade Mountains near Redding in the north to the Tehachapi Mountains near Bakersfield in the south. CVP facilities include reservoirs on the Trinity, Sacramento, American, Stanislaus and San Joaquin rivers. In particular, the CVP takes water from the Trinity River and stores it in Clair Engle Lake, Lewiston Lake, and Whiskeytown Reservoir. The water is then diverted

through a system of tunnels and powerplants into the Sacramento River for the Central Valley. Additionally, water is stored in Shasta and Folsom lakes.

In total, the project consists of 20 dams and reservoirs, 11 power plants, and 500 miles of major canals, as well as conduits, tunnels and related facilities. System wide, the CVP manages approximately 9 million acre-feet of water, delivers roughly 7 million acre-feet of water annually to various CVP contracts, and generates 5.6 billion kilowatt hours of electricity annually. The CVP was initially designed to protect the Central Valley from substantial water shortages and floods. However, the CVP is operated today in ways that increase the Sacramento River's navigability, provides domestic and industrial water supplies, generates electric power, and helps regulate environmental conditions.

The State Water Project and Water Supply Contracts

The SWP is primarily designed to provide a consistent water supply to 29 public agencies that entered into water supply contracts with DWR. These contractors distribute SWP water to agricultural, residential, commercial, and industrial users. The long-term water supply contracts, which are set to expire in 2035, establish the maximum amount of SWP water a contractor may request annually (known as Table A amounts), although the contracts also provide for situations where surplus water may be available. In turn, SWP contractors contractually agreed to repay principal and interest on general obligation and revenue bonds used to pay for the SWP's initial construction and additional facilities, respectively. Contractors also pay for the maintenance and operation of SWP facilities.

The Central Valley Project and Water Supply Contracts

Similarly, the CVP provides water for agricultural, municipal, and industrial users in California's Central

Valley and urban centers like San Francisco pursuant to contracts akin to those for SWP water. CVP contracts also contain surplus water provisions. CVP reservoir operations are managed to produce maximum yields and deliveries to mainstream river channels and artificial canals. According to the Bureau, irrigation and municipal water is delivered from the main canals pursuant to long-term contracts with irrigation districts and other local agencies, which in turn deliver water to individual water users.

Increase in Water Deliveries

Water deliveries for SWP and CVP water will increase as a result of the allocation announcements from DWR and the Bureau. Prior to storm events in late February and March, both DWR and the Bureau had announced the availability of project water far below contract maximums. Thus, DWR and the Bureau adjusted those allocations according to substantially changed hydrological conditions. Notably, operations for both projects appear to be capable of managing and distributing the increased supplies to water contractors. Local agencies in and south of the Delta receive the additional water as it moves from the northern portion of the projects south through the allocation system.

In addition, the Bureau has announced that surplus water may be available to south-of-Delta contractors who enter into temporary water service contracts for

surplus water. Section 215 of the Reclamation Reform Act of 1982 provides for surplus water, and defines such supplies as those which are unusually large and not storable for CVP purposes. The act also provides for how such non-storable water may be used. The availability of surplus water is ultimately contingent on hydrological conditions in the near future.

Conclusion and Implications

Following the significant increase in available supply, the SWP and CVP have demonstrated notable flexibility in handling and distributing water throughout their respective systems. Local agencies and, ultimately, individual water users can anticipate increased allocations pursuant to their respective contracts. It is unclear, however, whether the amounts of water stored in the SWP and CVP following the February and March storm events will lead to similar or otherwise higher allocation amounts in 2020.

DWR Increases State Water Project Allocation to 70 Percent (March 20, 2019), available at: <https://www.acwa.com/news/dwr-increases-state-water-project-allocation-to-70-percent/>;

Reclamation Updates 2019 Central Valley Project Water Allocations (March 15, 2019), available at: <https://www.acwa.com/news/reclamation-updates-2019-central-valley-project-water-allocations/> (Steve Anderson, Miles Kreiger)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS ‘STATE WETLAND DEFINITION’ AND ‘PROCEDURES FOR DISCHARGERS OF DREDGE OR FILL MATERIAL’

Well known is that water is a natural resource of limited supply, leading to what history and current events illustrate to be epic “water wars.” What is less known is when or how use of water is regulated by the State of California. A common-sense approach in California is to assume that some regulatory oversight likely exists. From the legal perspective, that approach has proven true illustrated by the recent adoption on April 2, 2019 by the State Water Resources Control Board (SWRCB) with defining “wetlands,” which creates broad implications for public and private interests around the state.

Waters of the State

While the federal definition of “waters of the United States” has ebbed and flowed in recent years as the political pendulum swings on the federal landscape, and notwithstanding California’s long-standing definition of “waters of the State” as codified in Water Code § 13050(e), the state has been focused for over one decade to address declining acreage of wetlands premised upon the ecosystem benefits that wetlands provide to enhancing water quality and environments for aquatic and riparian habitats.

The Water Code defines waters of the state to include any surface or groundwater, including saline waters. While that definition leaves some room for interpretation, what has been unclear is what is meant by “wetlands.” Clarity to that term is important for at least two reasons: 1) to conform to public policy set forth by California Executive Order (W-59-93) dating back to Governor Pete Wilson calling for “no net loss” of wetlands; and 2) to understand what permitting is required under the federal Clean Water Act, namely section 404.

Defining What is a “Wetland”

By way of brief background, common examples of California wetlands include rivers, lakes and the ocean. Well-found scientific benefits of wetlands consist of flood control during storm events, provision of fish and wildlife habitat and public enjoyment for touring around wetlands.

The SWRCB’s efforts to defining “wetlands” traces back to its 2008 Resolution in which the SWRCB set its Wetland Riparian Area Protection Policy. The SWRCB’s rationale was: 1) to strengthen protection no longer covered by the federal Clean Water Act, coupled with approximately 95 percent of historical wetlands eliminated; 2) to create consistency amongst the state’s nine Regional Water Quality Control Boards (RWQCBs); and 3) to clarify new procedures for certain discharges, namely dredged or fill material, to all water of the state, not just wetlands.

Resulting from the SWRCB’s decade-long effort is the adoption on April 2 of the “State Wetland Definition” and “Procedures for Dischargers of Dredge or Fill Material,” summarily called here “The Procedures.”

In light of the new definition, “wetland” consists of: 1) an area with continuous saturation from groundwater or surface water; 2) conditions in which duration of saturation is sufficient to cause anaerobic conditions (or water quality problems); and 3) an area’s vegetation is dominated by hydrophytes (aquatic plants). In contrast to the federal definition, California’s new definition allows a wetland to exist even if vegetation is not supported, thus providing a broader scope for determining what is a “wetland.”

Ultimately, stakeholders and practitioners servicing those with projects involving wetlands will need to determine if “waters of the state” are involved, and if so, is a “wetland” involved with the project. If so,

then an application must be adequately completed pursuant to California Code of Regulations title 23, § 3856. Various tiers exist for projects depending on the size of the project, thus dictating the level of environmental impact analysis necessary as well as the extent of related mitigation measures, including potential compensatory mitigation measures.

Exemptions

Under limited circumstances a stakeholder might be eligible for an exemption to either The Procedures altogether or the extent of environmental analysis under The Procedures. As to the former, exemptions exist under the federal Clean Water Act, § 404, subsection (f), which generally relate to farming practices and maintenance of drainage or irrigation ditches and stock ponds. Exemptions to some of The Procedure’s environmental analysis requirements relate generally to project discharges that are already covered by a SWRCB or U.S. Army Corp of Engineers General Permit. The key qualification factor to an exemption from the environmental analysis is that the subject project activities cannot be new use of water that would result in a reduction of flow or circulation.

Conclusion and Implications

The SWRCB’s April 2 adoption of The Procedures imposes broad implications for stakeholders, namely for land developers and stakeholders with dredging or fill operations. While providing a definition of “wetland” theoretically provides the scope of what is or is not subject to The Procedures, stakeholders should expect additional complications with permitting as often happens as regulations expand or merely evolve, either or both of which occurred here. For instance, might federal or state endangered species requirements be heightened by species now deemed to be in a “wetland,” and thus entitled to additional mitigation measures to limit adverse impacts to the species. Another unknown variable currently is to what extent the SWRCB might seek to impose more mitigation requirements when issuing new permits under the new regulations. Only time will answer these questions, and the ultimate question of whether any of these regulatory requirements and subsequent efforts achieve the nearly 25-year old goal of achieving “no net loss” of wetlands.
(Wesley A. Miliband)

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY ISSUES DRAFT GENERAL NPDES PERMIT FOR SEAFOOD PROCESSING

On April 4, 2019, the Oregon Department of Environmental Quality (DEQ) issued public notice of a new seafood processing general permit under the National Pollutant Discharge Elimination System (NPDES). The permit covers the approximately 24 seafood processing facilities that discharge wastewater to Oregon’s state waters. These facilities are located primarily along the Oregon Coast in Astoria, Bay City, Brookings, Charleston, Coos Bay, Hammond, Newport, North Bend, Warrenton, and Winchester Bay. The permit also covers recreational sportfishing cleaning stations. These are facilities typically provided by cities or ports for use by holders of valid recreational fishing licenses. These stations may not be used by commercial processors and discharge less than an estimated 500 pounds of fish cleaning residuals per day.

Clean Water Act National Pollutant Discharge Elimination System Overview

The federal Clean Water Act (CWA) prohibits point source discharges of pollutants into waters of the United States unless such discharges are covered by a NPDES permit. The term “point source” refers to a conveyance such as a pipe, ditch, or channel, and also includes vessels or other floating craft from which pollutants are or may be discharged. The term “pollutants” is defined broadly and includes substances that may not be considered “pollutants” as that word is commonly used; for example, dredged soil is considered a pollutant. Most states, including Oregon, have authority to administer the federal NPDES program at the state level. In Oregon, DEQ is the permitting authority.

NPDES General Permits

Under the NPDES program, a discharger may be covered by an “individual” permit or a “general” permit. A general permit:

...cover[s] one or more categories or subcategories of discharges...except those covered by individual permits, within a geographic area. 40 C.F.R. § 122.28(a)(1).

Individual facility operators then apply for coverage under the general permit, which contains permit conditions generally applicable to that category of facility operator.

Oregon Seafood Processing General Permit History

Oregon’s current seafood processing general permit was issued in 2006 and expired in 2011 (federal regulations dictate that NPDES permits are valid for no longer than five years). Operators covered by the permit have been operating under an administrative extension since 2011. In January 2019, this publication covered a consent decree entered into between DEQ and Northwest Environmental Advocates (NWEA) concerning these administratively extended or so-called “zombie” permits. *See, Nw. Env’tl. Advocates, et al. v. Oregon Dep’t of Env’tl. Quality, et al.*, Case No. 17-CV-10217 (Or. Cir. 2018); 23 *West. Water L. & Policy Rptr.* 78. Oregon suffers from a serious NPDES permit backlog; dozens of individual and general permits have been granted administrative extensions, sometimes for decades. In response to NWEA’s lawsuit, DEQ has agreed to a schedule aimed at reducing the permit backlog. As part of the settlement, DEQ agreed to take final administrative action on the seafood processing general permit within three years of entry of the November 2018 consent order.

The New Seafood Processing General Permit

The new permit sets conditions for how seafood processing facilities manage pollutants like biochemical oxygen demand, total suspended solids, oil and grease, pH, ammonia, total chlorine residual, bacteria, and temperature. Compliance requirements depend on the facility’s “tier.” There are three tiers, which are based on the operation’s scale and potential water quality impact.

The draft permit was initially released for public comment in spring 2018. The draft permit issued in April 2019 reflects significant changes that arose from the first round of public comment. For example, temperature, ammonia, chlorine, and bacteria limits were replaced by benchmarks and monitoring and reporting requirements. DEQ intends to gather data

to assess what limits may be necessary and appropriate in the future.

Conclusion and Implications

The new general permit will have important implications for Oregon's seafood processing industry. For one, new processors may be eligible for coverage under the general permit. Because DEQ cannot issue the expired but administratively continued permit to new applicants, issuance of a new general permit is required before new applicants may seek coverage

under the general permit. Another implication is that some facilities may need to implement more advanced wastewater treatment systems to comply with the permit conditions. Facilities that are unable to comply with the general permit conditions may also consider applying for an individual permit.

DEQ may make further changes to the draft permit based on additional public comments. DEQ was accepting public comments until 5:00 p.m. on Friday, May 10, 2019.

(Alexa Shasteen)

LEGISLATIVE DEVELOPMENTS

**THE CALIFORNIA ENVIRONMENTAL, PUBLIC HEALTH,
AND WORKERS DEFENSE ACT OF 2019—CALIFORNIA PUSHES BACK**

In its latest effort to shield California from the Trump administration's rollbacks on major environmental protections, the California Senate introduced the California Environmental, Public Health, and Workers Defense Act of 2019, Senate Bill 1 (SB 1). The bill seeks to put in place, the environmental, public health, and labor standards set by the Obama administration in 2017 as the baseline standard in California. This means that if the standards in the federal Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), and Endangered Species Act (ESA), Fair Labor Standards Act, Occupational Safety and Health Act, and Coal Mine Health and Safety Act are weakened, the change will not affect standards set forth in their state counterparts. The bill also authorizes citizens to bring suits and enforce the bill's new standards.

**Trump Administration Environmental
Rollbacks and Background of Senate Bill 1**

The Trump administration consistently attempts to roll back federal environmental protections such as those in CAA, CWA, and ESA.

In July 2018, the administration unveiled its proposal to roll back various provisions of the ESA. The proposal sought to change the application of ESA's protections and decide the protection offered to a threatened animal on a case-by-case basis rather than applying its blanket rule under § 4(d), which automatically conveys the same protections for threatened species as for endangered species.

Additionally, in November 2018, the administration implemented a policy that loosened the EPA's review process regarding the permit requirements for emitting air pollutants under the CAA. This effectively allows power plants and other industrial facilities to increase its total pollutant emission. Similarly, in December 2018, the administration announced that the U.S. Environmental Protection Agency (EPA) would change its definition of "waters of the United States," to narrow the definition and limit

the various types of waterways that received federal protections under the CWA. The change effectively repeals the definition set forth by the Obama administration in 2015, which broadened the definition to include more types of waterways, streams, and tributaries.

In effort to combat regulatory changes such as these, SB 1 was reintroduced at the end of 2018, as a revised version of SB 49 (2017-18)—a bill authored by California Senators De Leon and Stern but died in the Assembly. Now sponsored by Senators Atkins, Portantino, Hueso, and Stern, and numerous environmental groups, SB 1 was passed and referred to the Committee on Natural Resources and Water on March 20, 2019. On April 10, 2019, the bill passed as amended and was re-referred to Committee on Judiciary.

**Procedural Changes to Regional Environmental
Boards and Authority**

SB1 focuses on maintaining the federal environmental standards in effect as of January 19, 2017, under the CWA, CAA, SDWA, and ESA.

As applied to the CWA and SDWA, the bill would set federal standards in effect as of January 2017 as the baseline federal standards. The bill requires that the State Water Resources Control Board (SWRCB) regularly assess proposed and final changes to federal standards and then assess and publish a list of changes identifying whether the change made to the federal standard is more or less stringent than the baseline federal standards.

Next, if SWRCB's assessment shows that the federal standard is now less stringent than the prior federal baseline standard, SWRCB must consider whether it should adopt the prior federal standard as a measure to maintain California's current standard of environmental protection standard. The bill allows SWRCB to skirt the standard procedural review by the Office of Administrative Law by treating the regulation as emergency regulations. In doing so, SWRCB must

publish a list of regulations and assessments under consideration for adoption at least 30-days prior to any vote. Any emergency regulation adopted automatically sunsets on January 20, 2021.

SB 1 also allows the public to enforce any prior federal baseline standard adopted by SWRCB through citizen suits. To protect this right, the bill deems any amendment which restricts or limits a private citizen's right to enforce the CWA baseline as an amendment to the baseline, which triggers the entire review process.

The bill offers similar changes to the definition of "baseline" and to the procedural requirements to regional oversight under the state counterparts to the CAA and ESA.

Challenges Ahead

While the goal of SB 1 seems straightforward and practicable, its adoption will change the administrative and procedural structure of many state agencies. Pinning the federal baseline standard to that existing on January 19, 2017 would effectively require agencies to review over two years of environmental proposals, reports, opinions, and assessments, potentially negating many environmental determinations and opinions issued within the last two years. Additionally, the bill does not define what each federal baseline standard from January 2017 actually is, leaving much room for future litigation over each variation of the baseline standard used.

The bill also fails to provide any practical guidance on how the state agencies should restructure or delegate to achieve its added requirements which include new rule-making, enforcement, and reporting requirements. Specifically, the bill fails to address the increase of administrative fees and staffing changes necessary for each affected agency to comply with the new law.

Conclusion and Implications

Senate Bill 1's goal is to maintain California's environmental standards in the event the current or any future federal administration repeals or weakens federal standards. The bill may be direct on first glance but is actually rife with ambiguous language upon further review. If passed, SB 1's application will rely heavily on agency and judicial interpretation of the law. On its surface, the bill fails to include any practical guidance for agencies to achieve its lofty goals. Following, heavy litigation over the interpretation of "federal baseline standard," could foreseeably arise from SB 1, adding more confusion to California's challenging environmental legal landscape. Tracking and the full text of the bill is available at: <https://trackbill.com/bill/california-senate-bill-1-california-environmental-public-health-and-workers-defense-act-of-2019/1609416/>

(Rachel S. Cheong, David D. Boyer)

PROPOSED CALIFORNIA WATER TAX AND LEGISLATIVE FUNDING PROPOSALS FOR WATER PROJECTS COMPETE FOR SUPPORT IN UPHILL CLIMB FOR APPROVAL

California Governor Gavin Newsom is proposing to tax water users throughout California to help fund projects and programs to assist low-income communities where water quality and water supply issues are dire. Competing proposals urge utilizing existing funding sources rather than imposing a new and controversial water tax. Meanwhile, some Democratic California legislators are also pushing to lower the voting threshold to impose new local special taxes.

Background

With more than supermajority democratic control of both houses of the California Legislature in place, Governor Newsom wasted no time proposing a new and controversial tax on water. In January, Governor Newsom released a California budget proposal that included spending millions of dollars for a "Safe and Affordable Drinking Water Fund." That money would be used to help water systems, domestic wells and water users secure and maintain clean water supplies, primarily in small and disadvantaged communities.

The Water Tax

The details of Newsom's plan trickled out recently, revealing that water customers would be taxed from 95 cents to \$10 a month in order to raise about \$140 million annually. The amount of the tax would vary depending on factors such as the size of water meters and would include exceptions for certain disadvantaged communities. More than 3,000 local water suppliers throughout California would be made responsible for collecting the tax. Animal farmers, dairies and fertilizer producers and handlers would also pay sizeable fees for programs to remedy nitrate and other types of groundwater contamination.

Newsom describes the water quality and water supply conditions for many in low income communities through the state, "a moral disgrace and a medical emergency." According to Newsom, 1 million Californians live without clean water for drinking or bathing, and hundreds of water systems are out of compliance with primary drinking water quality standards due to contamination. Many struggling systems are located in the Central Valley and San Joaquin Valley.

Opposition

Similar legislative proposals were made and killed last year, including under threat of veto by then-Governor Jerry Brown. Newsom's water tax also faces stiff opposition, not only from taxpayer associations but also from Democratic legislators representing largely agricultural districts and from the vast majority of public water agencies. Last year's recall of a Democratic senator who voted to raise California's gas tax also has many legislators nervous. Despite Democratic supermajorities, the water tax may have difficulty reaching the required two-thirds threshold of votes necessary to impose or increase new taxes.

Those opposed to the water tax note that voters have approved no less than eight water bonds totaling more than \$30 billion since 2000, and they cite concerns that little of that funding has been used to create new water storage or develop new sources of water supply. Water tax opponents assert that statewide funding efforts should focus on these statewide water supply needs rather than directing funds to select local areas. Association of California Water Agencies (ACWA) representatives have taken the position that taxing a resource that is essential to

living does not make sense and is not necessary when alternative funding solutions exist and the state has a substantial budget surplus.

The California Legislative Analyst's Office, which is the Legislature's non-partisan fiscal and policy advisor, recommends that the Legislature consider several issues as it deliberates and evaluates Newsom's Safe and Affordable Drinking Water proposal, including: 1) its consistency with the state's existing human right to water policy, 2) uncertainty about the estimated revenues that would be generated and the amount of funding needed to address the problem, 3) a comparison of the beneficiaries of the program with those who would pay the new charges, 4) the limited nature of alternative fund sources for the proposed program, and 5) trade-offs associated with the proposal's safe harbor provisions.

Competing Proposals

Democratic State Senator Anna Caballero (D - 12th Senate District) has proposed a competing proposal that appears to be gaining traction. Rather than imposing a new tax, Senator Caballero would utilize money from California's multi-billion-dollar budget surplus to create a trust fund to pay for water system and water supply related improvements.

Similarly, earlier this year California Assemblyman Devon Mathis (R - 26th Assembly District) introduced the Clean Water for All Act, a California Constitutional amendment that would cause, beginning with the 2021-22 fiscal year, not less than 2 percent of California's General Fund revenues to be set apart for the payment of principal and interest on bonds authorized under the Water Quality, Supply, and Infrastructure Improvement Act of 2014, for water supply, delivery, and quality projects administered by the California Department of Water Resources, and water quality projects administered by the State Water Resources Control Board.

Local Tax Thresholds

As these statewide tax proposals move their way through the legislative process, so too does a proposed major Constitutional amendment to reduce the voter approval threshold to approve bonds and impose or raise *local* special taxes. California Assemblywoman Cecilia Aguiar-Curry (D - 4th Assembly District)'s proposed amendment, which could potentially be

placed on the November 2020 ballot, would reduce that threshold from a two-thirds vote to a 55-percent majority.

According to Assemblywoman Aguiar-Curry:

I have heard about deteriorating buildings, decrepit community facilities and our extreme lack of affordable housing. This will empower communities to take action at the local level to improve the economies, neighborhoods and residents' quality of life.

Taxpayer advocate David Wolfe, legislative director for the Howard Jarvis Taxpayers Association, however, says "If this passes it's going to be devastating for property owners," asserting that the new taxes and bonds that might be approved under the lowered

thresholds would significantly increase costs of homeownership and burden taxpayers with long-term debt that lasts for decades.

Conclusion and Implications

Funding water projects and programs at practically any level in California is often difficult. While stakeholders across California largely share the view that such projects and programs are necessary to sustain life and economy in California, there is significant disagreement in how to fund them. As the proposed water tax and competing and related proposals work their way through the legislative process, stakeholders will surely demand to know how existing revenues and funding sources are—or could be—utilized to tackle these significant challenges before imposing new taxes, fees or charges on all or any Californians. (Derek Hoffman, Michael Duane Davis)

JUDICIAL DEVELOPMENTS

SUPREME COURT ADDRESSES FEDERALLY RESERVED WATER RIGHTS,
NATIONAL ALASKA LANDS ACT
AND SCOPE OF THE PARK SERVICE'S AUTHORITY
OVER ALASKA'S NATION RIVER

Sturgeon v. Frost, et al., ___U.S.___, 139 S. Ct. 1066 (U.S. Mar 26, 2019).

The U.S. Supreme Court has held that the National Park Service (Park Service) may not apply a regulation banning hovercraft use on navigable waters within national parks to the Nation River in Alaska's Yukon-Charley Preserve (Preserve). The Court's unanimous decision overturned a prior ruling of the Ninth Circuit Court of Appeals in favor of the Park Service, whereby the Ninth Circuit held that the reserved water rights doctrine permitted the Park Service to exercise regulatory authority over the state-owned Nation River in accordance with the Alaska National Interest Lands Conservation Act (ANILCA). *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017). The Supreme Court's decision addresses the extent of federal regulatory over national parks in the State of Alaska under ANILCA and the nature of interests retained by the federal government under the reserved water rights doctrine.

Factual and Statutory Background

The dispute before the Court arose when Park Service rangers in the Preserve informed John Sturgeon, a hunter traveling by hovercraft on a stretch of the Nation River leading to moose hunting grounds, that Park Service regulations prohibit the use of hovercraft on navigable waters located within the boundaries of national parkland (Regulation). 36 C.F.R. § 2.17(e). The rangers ordered Sturgeon to remove his hovercraft from the Preserve. Sturgeon complied with the order and subsequently filed an action for an injunction against the Park Service, claiming that the Regulation could not be enforced on the Nation River under § 103(c) of ANILCA. 16 U.S.C. 3103(c).

The Secretary of the Interior, through the Director of the Park Service, issued the Regulation pursuant

to the National Park Service Organic Act, 39 Stat. 535 (Organic Act), which allows the Park Service to regulate both lands and waters within all national park system units in the United States, without regard to ownership. *See*, 54 U.S.C. §§ 100751, 100501, 100102. Specifically, the Organic Act allows the Park Service to issue rules thought "necessary and proper" for "System units," and that the Park Service may prescribe rules regarding activities on "water located within system units." 57 U.S.C. §§ 100751(a), 100751(b). While ordinarily the Regulation would fall within the broad regulatory authority granted by the Organic Act, ANILCA alters the Park Service's usual authority with respect to national parks in Alaska, such as the Preserve. As noted in the Court's decision, "if Sturgeon lived in any other state, his suit would not have a prayer of success." *Sturgeon*, 139 S. Ct. at 1081.

ANILCA set aside certain federal land in Alaska for conservation purposes, and divided such land into "conservation system units" that became part of the National Park System. 54 U.S.C. § 100102(6). Unlike most national park territory, ANILCA created conservation system units in Alaska with boundaries that follow natural features of the land rather than boundaries drawn to encompass only federal property. This approach resulted in the inclusion of an unusual amount of non-federally owned property within Alaskan national parks, referred to as "inholdings," which elicited concerns from the state and native Alaskans prior to ANILCA's enactment regarding the Park Service's regulatory powers over the inholdings. Partially in response to such concerns, ANILCA includes both a goal of protecting the national interest in public lands in Alaska as well as a goal of satisfying the economic and social needs of the people of Alaska. 16 U.S.C. § 3101(d).

In its discussion of § 103(c) of ANILCA, the language on which Sturgeon’s claim relies, the Court’s decision explains that the legislative history and stated purposes of ANILCA show that Congress intended to assure the state and native Alaskans that their inholdings would not be treated the same as other federal property. *Sturgeon*, 139 S. Ct. at 1076. Section 103(c) of ANILCA provides that only “public lands” are deemed included as part of a “conservation system unit” over which normal Park Service regulatory authority extends, and that no lands conveyed to the state, a Native Corporation or any private party are subject to the regulations “applicable solely to public lands within such units.” 16 U.S.C. § 3103(c). Sturgeon argued that Nation River does not constitute “public lands” subject to federal regulation under § 103(c) of ANILCA; thus, the Park Service did not have the authority to enforce the Regulation on Nation River. *Sturgeon*, 139 S. Ct. at 1077.

Procedural History

Previous rulings by the U.S. District Court and Ninth Circuit have upheld the application of the Regulation to the portion of the Nation River within the Preserve. The Ninth Circuit determined that the Nation River qualified as “public land” under ANILCA due to the implied reservation of water rights retained by the federal government pursuant to the reserved water rights doctrine as interpreted by prior holdings of the Ninth Circuit by which that court was bound. *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017).

Following the lower court decisions in favor of the Park Service, the Supreme Court granted *certiorari* to examine whether: 1) the Nation River constitutes “public land” for purposes of ANILCA, and 2) if not, would the Park Service still have the authority to regulate Sturgeon’s use of the hovercraft on the Nation River.

The Supreme Court’s Decision

‘Public Land’ under ANILCA and Federal Reserved Water Rights

The Court determined that Nation River is not “public land” as defined under ANILCA. *Sturgeon*, 139 S. Ct. at 1079. As defined in ANILCA, “public lands” includes “lands, waters, and interests therein”

to which the United States has title, except for certain lands selected for future transfer to the state or a Native Corporation. 16 U.S.C. § 3102(1)(2)(3). Accordingly, the Court reasoned that Nation River is non-public land because title cannot be held to running water, and the state owns the land beneath the Nation River as a result of the Submerged Lands Act, which vested title to the lands beneath navigable waters in the United States to the states in which such navigable waters are located. *Sturgeon*, 139 S. Ct. at 1078.

The Park Service argued that even if United States did not have title to the water flowing in Nation River or the land beneath it, but the United States has “title” to an “interest in the river under the reserved water rights doctrine,” because ANILCA requires that waters within the land set aside by ANILCA be safeguarded from “depletion and diversion.” *Id.* At 1079. The reserved water rights doctrine provides that:

[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappert v. United States*, 46 U.S. 128 (1976).

Dismissing the Park Service’s contention, the Court explained that the reserved water rights doctrine merely permits the federal government to use (by withdrawing or maintaining) certain waters it does not own, and that such rights do not convey title. *Sturgeon*, 139 S. Ct. at 1079. Further, the Court explained that any federal right to Nation River under the reserved water rights doctrine would be limited, and if the right related to safeguarding against depletion or diversion as suggested by the Park Service, that purpose would not support the application of the Regulation to Nation River. *Id.*

ANILCA Exemption from Ordinary Park Service Authority

After concluding that Nation River constitutes non-public land for purposes of ANILCA, the Court further held that § 103(c) of ANILCA means that the Park Service does not have authority to enforce the Regulation on Nation River, because § 103(c)

generally exempts non-public lands from the ordinary regulatory authority of the Park Service. *Id.* at 1081. The Court rejected the Park Service’s assertion that language of § 103(c) stating that non-federally owned lands “shall be subject to the regulations applicable solely to public lands within such units” should be interpreted to mean that non-public lands are exempt only from regulations specific to public lands, but not from rules that apply generally. *Id.* at 1082. The Court noted that if the Park Service’s interpretation of this language were correct, it would mean that the sentence does “nothing but state the obvious.” *Id.* at 1083. Further, the Court noted that the Park Service’s construction would severely impair the core function of the third sentence of § 103(c), which provides that inholdings acquired by the federal government become part of a conservation unit at such time and may be administered as other federally-owned lands. *Id.*

ANILCA and Navigable Waters

The Court also rejected the Park Service’s argument that the “overall statutory scheme” of ANILCA at least gave it the ability to regulate navigable waters, finding that navigable waters are similarly exempt from the ordinary regulatory authority of the Park Service pursuant to § 103(c) of ANILCA. *Id.* at 1086. The Park Service specifically cited statements regarding the protection of rivers in ANILCA’s general statement of purposes and in sections regarding specific conservation units formed thereunder.

Id. Nonetheless, the Court found no reason to treat navigable waters differently than other non-federally owned lands under ANILCA, especially since the definition of “land” set forth in ANILCA specifically includes “waters.” *Id.* In its concluding discussion, the Court’s decision emphasizes that ANILCA provides the Park Service with alternate methods for safeguarding rivers in Alaskan national parks, including the regulation of lands flanking the rivers or at the very least, purchasing the submerged lands under a river and regulating it as part of the federally-owned conservation unit pursuant to third sentence of § 103(c). *Id.*

Conclusion and Implications

Though the much of the Court’s ruling applies only to the Park Service’s regulatory authority over national park territory in Alaska, the Court’s holding as to the nature of rights held by the United States under the reserved water rights doctrine is more broadly applicable. The Court’s decision confirms that reserved water rights relate only to the use of water and do not represent an interest in which “title” can be held within the common understanding of the term. The Court’s decision further establishes that the reserved water rights doctrine does not grant absolute authority over a particular waterway; rather, the government may take or maintain only the amount of water required for the purpose of the land reservation giving rise to reserved water rights. (Andrew D. Foley, David D. Boyer)

DISTRICT COURT RULES EPA ACTED ARBITRARILY AND CAPRICIOUSLY IN REFUSING TO REGULATE CERTAIN STORMWATER DISCHARGES

Blue Water Baltimore, Inc. v. Wheeler, ___F.Supp.3d___, Case No. GLR-17-1253 (D. Md. Mar. 22, 2019).

The U.S. District Court for Maryland recently granted summary judgment against the U.S. Environmental Protection Agency (EPA) for acting arbitrarily and capriciously when it refused to regulate stormwater discharges from privately-owned commercial, industrial, and institutional sites on the basis of other state and federal programs’ efforts to control stormwater discharges.

Factual and Procedural Background

Plaintiffs Blue Water Baltimore, Inc., Natural Resources Defense Council, and American River filed a petition with EPA under § 402(p)(2) of the federal Clean Water Act (CWA), asking the EPA to determine whether stormwater discharges from privately-owned commercial, industrial, and institutional (CII) sites were contributing to violations of water quality

standards in the Back River Watershed (Baltimore, Maryland). EPA denied plaintiffs' petition on three factors: 1) the likelihood of the pollutants' exposure to precipitation at the CII sites; 2) the sufficiency of available data to evaluate the stormwater discharges' contribution to water quality standards at the CII sites; and 3) whether other federal, state, or local programs adequately addressed the known stormwater discharge. Plaintiffs then sued the EPA, Andrew Wheeler, and Cosmo Servidio (collectively: EPA), alleging that EPA violated the CWA and the Administrative Procedure Act (APA) because: 1) EPA's denial of the petition was arbitrary and capricious for relying on other federal, state, or local programs, and 2) EPA's denial ran counter to the evidence before it. The court granted a prior motion to dismiss plaintiffs' Clean Water Act claims, and therefore only the APA claims remained at issue.

Plaintiffs filed a Motion for Summary Judgment on their two claims of the APA violations. EPA filed a Cross-Motion for Summary Judgment.

The District Court's Decision

Under the APA, a court is required to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The court considered four main arguments raised by the EPA: 1) that the court should defer to the EPA's determination that it may consider other federal, state, and local programs; 2) that consideration of existing programs is a "reasonable explanation" for declining to act; 3) that the § 402(p)(2) set forth prerequisites that EPA must establish prior to exercising its discretion to regulate stormwater discharges; and 4) that § 402(p)(6) expands the permissible grounds on which EPA may make its decision. The court rejected each argument.

Agency Deference

First, EPA argued it was entitled to *Chevron* deference for its interpretation that the Clean Water Act allows consideration of other federal, state, and local programs. The court rejected this argument, reasoning that *Chevron* deference applies only when the statute is ambiguous or silent as to the question at issue. Here, § 402(p)(2)(E) was not silent or ambiguous—the statute left no room for open interpreta-

tion when directing EPA to determine whether the discharge contributed to water quality violations. The court therefore did not accord any deference to EPA's interpretation of the statute. In reaching this conclusion, the court relied on an analogous provision in the federal Clean Air Act, and the U.S. Supreme Court's determination in *Massachusetts v. U.S. EPA*, 549 U.S. 497 (2007) that considering other programs was arbitrary and capricious under the Clean Air Act.

Instead of deferring to EPA's interpretation of § 402(p), the court determined that EPA was required to conduct a scientific inquiry when making its decision. EPA's first two factors, 1) the likelihood of the pollutants' exposure to precipitation at the CII sites and 2) the sufficiency of available data to evaluate the stormwater discharges' contribution to water quality standards at the CII sites, were proper grounds for EPA to make its scientific finding of whether stormwater discharges from CII sites contribute to violations of water quality standards. The third factor, looking at other existing programs, was "unrelated to this scientific inquiry and is, therefore, 'divorced from the statutory text,'" because it deferred to other existing programs and how they addressed environmental impacts of the stormwater discharge. The court determined that although EPA can consider data from existing programs for the purpose of determining whether the stormwater discharges from the CII sites contribute to water quality violations, it could not rely on the environmental impacts of stormwater discharges through existing programs.

Reasonable Explanation

Second, the court rejected EPA's argument that consideration of existing programs is a "reasonable explanation" as to why EPA declined action. EPA also argued that EPA should be allowed to consider policy concerns in making its findings. The court also rejected this misinterpretation of the *Massachusetts*' decision, stating that the Supreme Court in *Massachusetts* never reached question of allowing EPA to factor in policy concerns, but nevertheless emphasizing that the *Massachusetts* made it clear EPA must base its decision in the statute, not external factors. Here, EPA failed to do that.

Discretion to Regulate and Expansion

Third, EPA argued that § 1342(p)(2)(E) merely

sets forth prerequisites that EPA must establish prior to exercising its discretion to regulate stormwater discharges. The court disagreed, holding that in light of the *Massachusetts* decision, EPA may only decline to regulate if it answers the scientific question that stormwater discharges do not violate water quality standards, or concludes that there is not enough information to answer this question.

Finally, the court dismissed EPA's argument that § 402(p)(6) expands the permissible grounds on which EPA may make its decision. The court found that §§ 402(p)(2) and 402(p)(6) are mutually exclusive. EPA's decision in refusing to regulate stormwater discharges from CII sites must be grounded solely in the text of § 1342(p)(2)(E).

Conclusion and Implications

This case provides two excellent examples of the relationship between environmental statutes. First, this case demonstrates how the Clean Air Act often serves as an interpretive guide for the Clean Water Act. Second, this case outlines the limits that a regulatory action under one environmental program has to other programs. That is, the EPA cannot rely solely on the existence of other regulatory programs to refuse to regulate under Clean Water Act, § 402(p)(2). The court's decision is available online at: https://www.nrdc.org/sites/default/files/media-uploads/baltimore_rda_district_court_decision_3-22-19.pdf (Rebecca Andrews, Hannah Park)

DISTRICT COURT ADDRESSES MOTIONS TO DISMISS AND STAY IN CASE WITH POLLUTANT DISCHARGES INTO THE TENNESSEE RIVER

King v. West Morgan-East Lawrence Water and Sewer Authority,
 ___F.Supp.3d___, Case No. 5:17-CV-01833 (N.D. Ala. Mar. 13, 2019).

The U.S. District Court for the Northern District of Alabama dismissed a private nuisance class action claim based on the discharge of perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) into the Tennessee River. Remaining claims survived the motion to dismiss.

Factual and Procedural Background

Plaintiffs, individually and as a class, sued 3M®, Daikin, and the West Morgan—East Lawrence Water and Sewer Authority (Authority) under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and under state law. Plaintiffs alleged that 3M and Daikin own and operate manufacturing and disposal facilities in Decatur, Alabama that released and continue to release PFOA-PFOS, and related chemicals into ground and surface waters. Plaintiffs also claim the Authority's intake of PFOAs and PFOS and distribution of these chemicals through the water supply system, and collection of these chemicals from 3M's wastewater discharge caused kidney, cancer, thyroid disease, hyperthyroidism, thyroid cancer, or ulcerative colitis.

The court noted that PFOA and PFOS persist in

the environment because they have no known environmental breakdown mechanism. The human body readily absorbs PFOS and PFOA, and the chemicals tend to accumulate over time with repeated exposure. Studies have found a probable link between PFOA and PFOS exposure to various cancers and other diseases. Plaintiffs alleged that 3M knew for over three decades that PFOA and PFOS are toxic, accumulate in the human body, and that 3M continues to discharge the chemicals into the river upstream from the Authority's water intake source. 3M filed a motion to stay and motion to dismiss the amended complaint

The District Court's Decision

First, the court rejected 3M's motion to stay, finding that plaintiffs' claims were not substantially similar to the claims in a similar case against 3M wherein the Authority is the plaintiff.

The court then turned to 3M's motion to dismiss and considered two primary arguments for dismissal: 1) that the claims against 3M are time-barred by the statute of limitations, and 2) that the plaintiffs have failed to plead viable claims.

Statute of Limitations

Under Alabama law, a two-year statute of limitations applies to negligence, nuisance, fraudulent concealment, and wantonness claims. In toxic exposure cases, the two-year period generally begins to run when the plaintiff sustains “a manifest, present injury.” Under Alabama law, when a defendant commits a continuing tort, the statute of limitations is tolled until the defendant ceases the tortious conduct. Here, the amended complaint alleged that 3M continued to release PFOA, PFOS, and related chemicals into the Tennessee River and its tributaries, and that 3M continued to deny and conceal the harmful effects of these chemicals. 3M contended that the continuing tort doctrine did not apply because plaintiffs alleged specific, manifest personal injuries caused by exposure to PFOA and PFOS, which meant the statute of limitations should have begun when each plaintiff received a diagnosis of disease. The court rejected 3M’s argument because plaintiffs did not allege when the individual plaintiffs received a diagnosis of their condition.

3M also argued that the statute of limitations under CERCLA, barred the claims. CERCLA’s statute of limitations preempts a state’s statute of limitations to the extent state law provides for a date of accrual before the “federally required commencement date” (FRCD) imposed by CERCLA. 3M argued the FRCD was no later than October 5, 2015. The court rejected 3M’s argument because CERCLA only preempts the state’s statute of limitations when a claim would accrue before the FRCD under state law, and 3M had not shown the plaintiffs’ claims accrued before October 5, 2015.

Failure to Plead a Viable Claim

3M sought to dismiss plaintiffs’ negligence and wantonness claims because the plaintiffs failed to allege the existence of a duty owed to them by 3M and because the Authority’s intervening acts were

the proximate cause of plaintiffs’ injuries. The court rejected 3M’s arguments, finding that plaintiffs’ allegations suggest that 3M could have reasonably foreseen that discharging PFOA and PFOS into the Tennessee River would injure the plaintiffs, and were sufficient to plead the existence of a duty. The court also found 3M’s intervening cause argument unpersuasive. It reasoned that 3M could foresee that the Authority would collect, treat, and distribute drinking water from the river, and that the Authority’s water treatment processes were incapable of removing the chemicals from the plaintiffs’ drinking water.

3M also contended that the plaintiffs failed to state a claim for nuisance because they did not specify whether the nuisance was public or private and failed to allege facts to support the claim. While the plaintiffs conceded that they did not allege facts to support a private nuisance claim, the court upheld the viability of the public nuisance claim finding that plaintiffs sufficiently alleged they suffered special injuries as a result of the contamination that is different in degree and kind from the injury sustained by the public at large.

Finally, the court allowed a fraudulent misrepresentation claim to survive, reasoning that 3M knew PFOS and PFOA were present in the discharge used for public consumption, and that consumption was harmful to human health.

Conclusion and Implications

As the debate surrounding regulation of PFOS and PFOA continues among federal agencies, CERCLA and state law claim continue to serve an important role in the courts. The District Court’s rulings are available online at: https://scholar.google.com/scholar_case?case=7343086878446377193&q=King+v.+West+Morgan-East+Lawrence+Water+and+Sewer+Authority&hl=en&as_sdt=2006&as_vis=1 (Benjamin Bodell, Rebecca Andrews)

DISTRICT COURT DENIES STATES' REQUEST FOR PRELIMINARY INJUNCTION IN CHALLENGE TO CLEAN WATER RULE

Ohio v. U.S. Environmental Protection Agency,
___F.Supp.3d___, Case No. 2:15-CV-2467 (S.D. Ohio Mar. 26, 2019).

The U.S. District Court for the Southern District of Ohio has held that the States of Ohio and Tennessee were not entitled to a preliminary injunction in their challenge to the U.S. Environmental Protection Agency's (EPA) 2015 'Waters of the United States' (WOTUS or the Clean Water Rule).

Factual and Procedural Background

EPA and the U.S. Army Corps of Engineers (Corps) adopted the Clean Water Rule on June 29, 2015, clarifying the waterbodies covered by the Clean Water Act's (CWA) definition of "waters of the United States." See, 33 U.S.C. §§ 1251 *et seq.* Ohio and Tennessee (Plaintiff States) sued to enjoin the Clean Water Rule and moved for a preliminary injunction in November 2015. Plaintiff States alleged that EPA's and the Corps' (Defendant Agencies) Clean Water Rule impermissibly extends the scope of the CWA in conflict with the language of the CWA and the Tenth Amendment to the U.S. Constitution, and that the Defendant Agencies violated the Administrative Procedure Act in promulgating the Clean Water Rule.

Before the U.S. District Court considered Plaintiff States' initial motion for preliminary injunction, the Sixth Circuit Court of Appeals issued an order staying application of the Clean Water Rule nationwide in order to determine whether circuit courts have original jurisdiction to hear challenges to the Clean Water Rule. *In re E.P.A.* 803 F.3d 804 (6th Cir. 2015). The Sixth Circuit's stay was lifted following the U.S. Supreme Court's opinion in *National Association of Manufacturers v. U.S. Department of Defense, et al.*, 138 S. Ct. 617 (2018), in which the Court held that the District Courts have original jurisdiction to hear challenges to the Clean Water Rule.

Subsequently, Defendant Agencies issued a rule suspending application of the Clean Water Rule until February 2020 (Suspension Rule), in order for Defendant Agencies to officially repeal the Clean Water Rule and replace it with a new set of regulations defining the "waters of the United States" subject to the CWA. However, in August 2018, the U.S. District

Court for the District of South Carolina enjoined the Suspension Rule in all states that had not previously obtained an injunction against application of the Clean Water Rule, making the Clean Water Rule effective in Ohio and Tennessee. Accordingly, Plaintiff States renewed their request for a preliminary injunction prohibiting application of the Clean Water Rule in their states.

The District Court's Decision

The court first granted an unopposed motion to file *amicus* brief brought by the District of Columbia, the Commonwealth of Massachusetts, and the states of New York, Washington, California, Maryland, New Jersey, Oregon, Rhode Island, and Vermont (Amici States). Plaintiff States argued that the court should grant a preliminary injunction because: 1) they are likely to succeed on the merits of their challenge; 2) they are currently suffering, and will continue to suffer, irreparable harm without an injunction; 3) a balancing of interests favors granting an injunction; and 4) granting an injunction would serve the public interest. Defendant Agencies opposed Plaintiff States' motion on the basis that Plaintiff States have not shown they will suffer irreparable harm and that Defendant Agencies are in the process of repealing the Clean Water Rule. Amici States argued that Plaintiff States had not demonstrated irreparable harm, were not likely to succeed on the merits of their challenge, and that the balance of harms weighs against granting the requested injunction.

The court agreed with Defendant Agencies and Amici States that Plaintiff States had failed to demonstrate they would suffer irreparable injury in the absence of an injunction. The court recognized Plaintiff States' concern that the Clean Water Rule is in effect due to the South Carolina district court's injunction against the Suspension Rule, but explained that Plaintiff States had not articulated "any particularized harm they will suffer while this matter remains pending." The court also agreed with Plaintiff States that their allegations regarding the Clean Water Rule's

usurpation of state rights and violation of the constitution were serious; however, the court noted that Defendant Agencies had rescinded the challenged government action, and that Plaintiff States' claims that would suffer monetary losses was unpersuasive. Accordingly, because Plaintiff States did not carry their burden to show they would suffer imminent and irreparable injury without an injunction, the court denied the motion.

Conclusion and Implications

This case adds another layer to the complex web of challenges to the Clean Water Act, Clean Water Rule. Despite the controversy surrounding the South Carolina District's enjoining of the Suspension Rule, the court found that Plaintiff States' protestations are more or less 'much ado about nothing' considering that Defendant Agencies are in the process of repealing the Clean Water Rule.

(Dakotah Benjamin, Rebecca Andrews)

1909 WATER RIGHTS 'DECREE' OVERTURNED BY COLORADO SUPREME COURT FOR LACK OF 'INDICIA OF ENFORCEABILITY'

Yamasaki Ring v. Dill, 2019 CO 14 (Colo. 2019).

The Colorado Supreme Court has held that, because a priority date is the most important element of a water right, a 1909 water decree lacking that detail was unenforceable. The complex facts of this case confirm a basic tenant of Colorado water law—a decree must set forth certain required "indicia of enforceability" to be valid against other water rights users.

Background and Water Court Decision

This case relies on a string of 100-year-old decisions, and therefore a detailed recitation of the factual history is necessary to understand the Colorado Supreme Court's recent decision. In 1909 Messrs. Horton and Alexander were in the District Court of Fremont County litigation a 1905 decree to the Campbell Ditch. Because of errors in that decree, the 1909 court annulled that decision and entered a new decree, declaring that the Campbell Ditch, in addition to receiving water from Cherry Creek is "entitled to received and conduct water" from nearby springs.

Turning to the present dispute, appellant Yamasaki Ring (Yamasaki) owns certain water rights in the Campbell Ditch. Appellees the Dills and Pearces (Dills) own property upon which spring water has been put to beneficial use since at least 1903. In its semi-natural state, water from the springs would flow (via a 1903 ditch extension) directly into Cherry Creek and shortly thereafter to the Campbell Ditch headgate. Along with that extension, a 40-foot culvert was constructed upstream of the Campbell Ditch

that carries water from the springs over Cherry Creek into a series of ditch that serve what is now the Dills' land. The pertinent question, then, is whether that 1909 decree granted the Campbell Ditch an enforceable right to that spring water, specifically as against the Dills.

The 1905 decree (later annulled) importantly split its definitions of the Campbell Ditch water rights. Regarding the Cherry Creek rights, the court included appropriation dates, priority numbers (for both Cherry Creek and the Arkansas River which is fed from Cherry Creek), and quantification information. For the springs, the court said only that the Campbell Ditch was entitled to "receive and conduct water." The 1909 correction decree similarly did not include that specific information but only the "receive and conduct" language in relation to the springs.

This 100-year-old issue first resurfaced in 2011 when the Division Engineer for Water Division 2 (Arkansas River) issued the Dills a cease and desist order instructing them to stop using water from the springs, thereby allowing that water to flow to the Campbell Ditch where it was used by Yamasaki. The Dills then sued the State and Division Engineers seeking a declaratory judgment that "water from [the springs] have always been treated as separate and distinct" from Cherry Creek water rights. The Dills concurrently filed a water rights application to adjudicate their springs' water rights. Yamasaki filed both an answer and statement of opposition to these claims.

In January 2016 the Water Court issued two identical orders for both cases ruling that:

The 1909 Decree fails to establish a priority number, date or flow rate for this supplemental water source. Therefore, [Judge Bailey] did not confirm a specific water right attributable to the springs but only decreed an entitlement to receive and conduct the springs' water without adjudicating any appropriation date or priority enforceable or administrable for a water right in the springs.

Therefore, the Water Court held, Yamasaki does not have an enforceable right to the spring water. The water rights application then went to trial in 2017 where the court ruled that: 1) the springs' water is actually tributary to Stout Creek, not Cherry Creek, 2) the Dills' predecessors had been using that spring water since 1903, six years before the 1909 decree, and 3) the Dills were therefore "entitled to a decree for 0.46 cfs absolute and 0.54 cfs conditional, for irrigation and domestic purposes." Yamasaki appealed.

Water Rights in Colorado

In Colorado a water decree does not confer a right but rather "confirms a pre-existing water right." *Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 748 (Colo. 1997). Critically, a water right "is not legally enforceable until it is adjudicated." *Id.* at 749. A decree is then first reviewed by analyzing its plain language, and that plain language must "measure, limit and define both the nature and extent" of the water right," including such essential elements as "priority, location of diversion at the source of supply, and amount of water for application to beneficial uses." *Orchard City Irr. Dist. v. Whitten*, 361 P.2d 130, 135-36 (Colo. 1961); *Empire Lodge Homeowners' Ass'n. v. Moyer*, 39 P.3d 1139, 1148 (Colo. 2001). Perhaps the most critical: a water right's priority is "the most important stick in the water rights bundle." *Empire Lodge*, 39 P. 3d at 1148.

The Colorado Supreme Court's Decision

Both parties agreed that the 1909 decree was clear and unambiguous, therefore the analysis should be limited to the plain language of the decree. Agreeing with the Water Court, the Supreme Court noted that the 1909 decree lacks "typical decree language" and "is wholly lacking in indicia of enforceability" regarding the springs. The statutes then still made clear that

"adjudication was required in order to obtain the benefits of *priority* administration." *Id.* at 1149 (emphasis added by Colorado Supreme Court). Therefore, the Water Court reasoned, the Campbell Ditch's entitlement to the spring water:

. . . cannot be deemed an adjudicated water right that can be enforced or administered against other adjudicate water rights.

On appeal, Yamasaki countered this finding, arguing that the springs' water is merely supplemental to Cherry Creek, and therefore a separate water right was never necessary for the springs because that water was tied to the clearly adjudicated Campbell Ditch claims on Cherry Creek. Yamasaki relied on the 1909 language that the springs were "adjudged." Importantly, the 1909 decree discussed the springs in a stand-alone paragraph (separate from the Cherry Creek water rights) starting with the phrase "And it is further adjudged." This distinction mattered, the Supreme Court ruled, because clearly something was different in the two water rights to necessitate two separate distinctions.

Further, and perhaps more pertinent, "that something was 'adjudged' is not what matters most to use; it's *what* was 'adjudged.'" Even if the 1909 decree adjudged some right to the springs on behalf of the Campbell Ditch, it was lacking a priority number, appropriation date, and quantification information and therefore fell well short of anything that could be called an adjudicated water right.

Conclusion and Implications

In sum, the Supreme Court doubled down on the idea that a priority date, among other pertinent information, is the "most important stick in the water rights bundle." Any court decision lacking this critical indicia of enforceability is therefore moot when a party attempts to enforce a claim against other water rights users. Therefore Yamasaki "does not have an adjudicated water right in the springs; instead it has 'an unenforceable entitlement to water from the springs when the two [Cherry Creek] water rights are not fully satisfied.'" The Dills' spring water rights were consequently adjudicated, dating back to 1903, and they now have the superior claims to the springs with respect to Yamasaki.
 (Paul Noto, John Sittler)

Western Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
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