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FEATURE ARTICLE

**NEVADA SUPREME COURT FOLLOWS COLORADO'S LEAD
 REGARDING ANTI-SPECULATION DOCTRINE**

By Debbie Leonard

On May 2, 2019, the Nevada Supreme Court issued a decision in *Sierra Pacific Industries v. Wilson*, Case which held that the anti-speculation doctrine applies to a permit holder's application for an extension of time to complete the diversion works and put water to beneficial use. In reaching that conclusion, the Court continued to look to Colorado jurisprudence, as it has since Nevada first formally recognized the anti-speculation doctrine in 2006. [*Sierra Pacific Industries v. Wilson*, Case No. 73933, 135 Nev. Adv. Op. 13]

Nevada's Beneficial Use Requirement and the Perfection of Permitted Rights

In Nevada, which follows the law of prior appropriation, "[t]he water of all sources of water supply within the boundaries of the State. . . belongs to the public." Nev. Rev. Stat. (NRS) 533.025:

[E]ven those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use. *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997).

The Nevada Supreme Court has characterized "the concept of beneficial use" as:

. . . singularly the most important public policy underlying the water laws of Nevada and many of the western states. *Id.*

When the Nevada State Engineer approves an application to appropriate water, the permit that gets

issued contains deadlines within which the permit holder must construct the diversion works and put the water to beneficial use. A permit holder can apply to the Nevada State Engineer (State Engineer) for any number of extensions of time. NRS 533.380(3).

Every applicant for an extension of time to complete the diversion works and prove beneficial use must demonstrate "good faith" and "reasonable diligence to perfect the application." NRS 533.380(3) (b). All applications for an extension must be:

. . . [a]ccompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application. . . . [T]he measure of reasonable diligence is the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances. NRS 533.380(6).

The Nevada State Engineer is prohibited from granting an extension of time unless this standard is met. NRS 533.380(3)(b); *see also, Desert Irr.*, 113 Nev. at 1059, 944 P.2d at 842 (holding that a "prospective appropriator [must] fulfill[] the strict conditions imposed by our statutory scheme"). Beyond the requisite showing of good faith and reasonable diligence, water intended for municipal uses must meet an additional five criteria. NRS 533.380(4). Failure to demonstrate good faith and reasonable diligence to perfect the application requires cancellation of the permit so that the water may be appropriated by others.

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Adoption of the Anti-Speculation Doctrine in Nevada

Although Nevada's beneficial use requirement incorporates a prohibition against water speculation into the statutory scheme, in 2006, the Nevada Supreme Court expressly adopted the anti-speculation doctrine, using Colorado law for guidance. *See, Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 793 (2006). The anti-speculation doctrine:

...addresses the situation in which the purported appropriator does not intend to put water to use for its own benefit and has no contractual or agency relationship with one who does. *Id.* at 1119, 146 P.3d at 799 (quoting *Three Bells Ranch v. Cache La Poudre*, 758 P.2d 164, 173 n. 11 (Colo. 1988)).

The *Three Bells* Decision, in turn, emphasizes that the anti-speculation doctrine:

...is intended to preclude the acquisition of a water right with a view to sale for profit rather than with the purpose of application of water to beneficial use. *Id.*

Bacher involved an application to appropriate water from one basin for use in another, not an extension of time. Referring to the statute that governs the approvals of such change applications, the Court held that pursuant to the anti-speculation doctrine:

...an applicant seeking an interbasin groundwater transfer under NRS 533.370 must have an agency or contractual relationship with the party intending to put the water to beneficial use. *Id.*

As explained by the Court, Nevada's statutory scheme "protects against speculation" by requiring financial ability, a reasonable expectation of constructing the work and applying the water, and reasonable diligence in putting the water to beneficial use. *Id.*, citing NRS 533.370(1)(c)(2). Where a permittee is speculating on anticipated need, the beneficial use requirement is not satisfied. *Id.*

Both before and after *Bacher*, the State Engineer had construed Nevada's statutes to protect against

speculation. As the State Engineer explained:

...the beneficial use requirement provides that the Applicant must demonstrate an actual beneficial use for the water applied for and does not allow for an applicant to tie up water for some project it might find in the future. Nevada State Engineer Ruling 6063 at 4 (Oct. 18, 2010).

Speculation in water "threatens to prove detrimental to the public interest." Ruling 6063 at 5. Enforcing these principles, the State Engineer routinely prohibited water speculation. *See, id.* at 10 (denying applications where the applicant "did not provide evidence of where the water would actually be used or in what quantities [such that] there is not sufficient evidence to overcome a conclusion that the applications are filed for speculative purposes"); State Engineer's Ruling 4548 at 9-10 (July 25, 1997) (denying applications for municipal uses as speculative where the applicant was not a municipality, lacked financial ability to place the water to beneficial use, had no intention to itself build the project and sought to resell the water rights); State Engineer's Ruling 4192 at 6 (June 19, 1995) (denying applications for municipal purposes and concluding that "the applications were filed for possible resale and speculation" where the applicant was not a municipality and could not provide evidence of the proposed place of use).

Factual and Procedural Background of *Sierra Pacific Industries*

Starting in 1999, the respondent, Intermountain Water Supply (Intermountain), filed applications to appropriate groundwater in the Dry Valley Hydrographic Basin for an interbasin transfer to the Reno area for municipal purposes. Starting in 2002, the State Engineer granted Intermountain multiple permits for nearly all of the available groundwater in the Dry Valley Basin (the Permits). In the ensuing years, Intermountain never commenced construction of the pipeline and necessary infrastructure to put the permitted water to use. Starting in 2005, the State Engineer has given Intermountain a series of one-year extensions to do so.

Intermountain never submitted any evidence that it had the ability to finance or obtain financing for the necessary capital expenditures to construct the well field, pipeline and treatment system. Because

its 1999 applications to appropriate water predated *Bacher*, the State Engineer had not required that Intermountain demonstrate that it had secured a contractual or agency relationship with a municipal water purveyor that is authorized to serve the proposed place of use. And none of its extension requests contained any such evidence. Intermountain acknowledged in multiple extension applications that it was actively seeking to market the water for sale rather than put it to beneficial use.

The appellant, Sierra Pacific Industries (SPI) owns agricultural land in the Dry Valley Basin known as the Wilburn Ranch. In 2015, SPI submitted applications to the State Engineer to appropriate groundwater for a proposed expansion of its irrigated lands. Two protests were filed, which argued that SPI's applications should be denied because Intermountain's unexercised permits encompass the entire perennial yield of Dry Valley such that no groundwater remained available to appropriate. The State Engineer has not acted on SPI's applications.

While SPI's applications were pending, Intermountain again sought extensions in 2016. Because Intermountain's unexercised Permits were obstructing SPI's ability to expand its agricultural operations, SPI filed an objection to the State Engineer granting any further extensions of time to Intermountain to perfect its appropriations. In support of its extension requests, Intermountain submitted an affidavit of its principal, Robert Marshall, which stated that Intermountain had entered into option contracts with an unidentified engineering firm and a separate, also unidentified, construction firm. Marshall's affidavit also stated that Intermountain had negotiated a contract with a public utility company to distribute water in an area outside the permitted place of use and was negotiating with unidentified developers. Intermountain did not submit the alleged option agreements or utility contract.

Based on the statements in Marshall's affidavit, the State Engineer concluded that Intermountain "has secured agreements with engineering and construction firms, [the utility] and developers." As a result, yet again, the State Engineer granted extensions to Intermountain.

SPI timely filed a petition for judicial review,

which the District Court denied. SPI then appealed to the Nevada Supreme Court.

The Nevada Supreme Court's Decision

Application of the Anti-Speculation Doctrine to Extensions of Time to Perfect Water Rights

On appeal, the Court picked up where *Bacher* left off, concluding that Nevada's policy mandating beneficial use of water requires application of the anti-speculation doctrine to requests for extensions of time, not just original applications to appropriate. As a result, a permit holder must show that it has a formal relationship with the end user of the water, or a purveyor who can distribute the water to an end user, not just with an original application but also with each extension request. Because the statute requires an extension request to be accompanied by "proof and evidence" of reasonable diligence to perfect the appropriation, "proof and evidence" of the third-party relationship must be submitted as well.

In reaching that conclusion, the Court again looked to Colorado, adopting the ruling in *Front Range Resources, LLC v. Colorado Ground Water Comm'r*, 415 P.3d 807, 813 (Colo. 2018), that a generic option contract does not satisfy the anti-speculation doctrine. In *Front Range*, the Colorado Supreme Court held that an option contract, even though specifically naming an end-user, was too abstract to overcome the anti-speculation doctrine because the end-user could elect to purchase the water rights in full, in part, or not at all. As a result, the option contract too speculative to the application at issue.

Applying this rationale, the Nevada Supreme Court held that the vague statements in Marshall's affidavit regarding alleged option contracts failed to overcome the anti-speculation doctrine. The affidavit did not identify the option holder, state how the agreements related to the pipeline project, or establish a contract or agency relationship with the end user. As explained by the Court:

...is not possible to ascertain a formal contractual relationship from the mere mention in an affidavit of an option contract, especially when

the third parties are unidentified and there is no description of how the third parties will perfect the appropriation.

Based on the shortcomings of the affidavit, the Supreme Court concluded that the Nevada State Engineer's approval of the extensions was not supported by substantial evidence. The Court reversed and remanded to the State Engineer.

Conclusion and Implications

The Nevada Supreme Court's decision is doctrinally consistent with the public policy of beneficial use. If a permit holder does not intend to itself put water to beneficial use, it is axiomatic that it must have a contract or agency relationship with someone who does. The Court reached the correct conclusion that, if an applicant for a water permit must demonstrate the requisite third-party relationship when seeking to make an original appropriation, a permit holder must likewise do so when seeking extension requests.

The process of permitting, financing and building water infrastructure projects can take many years. But

in order to ensure that the scarce water resources of the West are not being held hostage at the expense of other would-be appropriators, the third-party relationship requirement of the anti-speculation doctrine makes good policy sense. If a developer or municipal water purveyor is not willing to contractually commit to the permit holder, the permit holder should not be allowed to sit on unexercised water rights with the hope that, at some point, those rights might become profitable.

The Court made clear that the requisite third-party relationship cannot be manufactured through vague references to agreements that do not even describe what is being "optioned." And *Front Range* gives appropriate scrutiny to the fact that the mere existence of an option agreement does not fit the bill. In sum, by adopting Colorado's approach to the anti-speculation doctrine, and making clear that speculation is prohibited at all steps in the appropriation process, the Court has furthered the core public policy of beneficial use. The link, online to the Court's decision in *Sierra Pacific Industries v. Wilson* is available at: <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=44165>

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Her prior experiences as a scientist and educator give her a multi-dimensional view of the law and a practical approach to conflict resolution. Ms. Leonard represented the appellant Sierra Pacific Industries in the legal proceedings described in this article.

Soon, Debbie will open her own law practice group based in Reno. Debbie serves on the Editorial Board of the *Western Water Law & Policy Reporter*.

WESTERN WATER NEWS**ARIZONA AND DROUGHT CONTINGENCY PLANNING
REGARDING THE COLORADO RIVER—THE NEED FOR
A COLLABORATIVE APPROACH TO ADAPTIVE MANAGEMENT**

On April 8, 2019 Congress passed the Colorado River Drought Contingency Plan Authorization Act, and on April 16th the President signed it. On May 20, 2019, representatives of the seven basin states signed the agreements necessary to implement the Drought Contingency Plan. Future voluntary agreements may be the path to a sustainable Colorado River.

Background

The Colorado River Drought Contingency Plan (DCP):

...is a region-wide balancing act among dozens of large water users that will be used in times of shortage. It's a short-term fix intended to reduce the risks of dwindling water storage over the next six years and an effort to stave off shortages that would trigger severe cutbacks across parts of the Southwest. (Nicla, Andrew, *As States Gather to sign Colorado River Drought Plan, Focus Turns to What's Next* Arizona Republic (May 20, 2019) <https://www.azcentral.com/story/news/local/arizona-environment/2019/05/20/drought-contingency-plan-done-now-what/3477317002/>)

Although the process may have appeared to some as unwieldy and marred by periodic threats of derailment, it might more optimistically be described by others as the “painstaking work of building consensus.”

The DCP will provide three important things for the Colorado River Basin and the 40 million people who call it home: certainty, resiliency, and sustainability. It does so in a system marked by over-allocation and high variability of flows.

DCP is an example of individual interests negotiating for the greater good, with a belief that principled compromise towards a common goal results in the best outcomes. The result of bipartisan cooperation and a recognition of the legitimate policy concerns

of those with whom one might disagree, DCP implements creative, innovative solutions that resulted from listening to others' viewpoints with an eye towards problem solving. Water users, the seven basin states (Arizona, California, Nevada, Colorado, New Mexico, Utah and Wyoming), the federal government, and Mexico have voluntarily agreed to curtail Colorado River diversions with an understanding that we all share in the benefits that the River provides; so, we must also work together to conserve and to use our water responsibly.

How Did We Get Here?

In December 2018, the U.S. Bureau of Reclamation (Bureau) Commissioner set a deadline of January 31, 2019 for the Lower Basin Drought Contingency Plan (LBDCP) to be done. Facing the threat of federal management of the river, on the afternoon of January 31st, the Arizona Legislature passed and the Governor signed the Joint Resolution and LBDCP implementing legislation. Nevertheless, on February 1st, the Bureau Commissioner announced that she would be seeking input from the Governors of all seven basin states recommending how to proceed with imposing reductions on the states without a voluntary agreement. However, on March 19th, Governor's representatives of the seven basin states formally submitted DCP legislation to Congress for authorization and the Commissioner rescinded the Federal Register Notice seeking input. On April 8, 2019 Congress passed the Colorado River Drought Contingency Plan Authorization Act, and on April 16th the President signed it. The various parties worked diligently to complete all the necessary agreements to implement the DCP. Finally, on May 20, 2019, representatives of the seven basin states signed the agreements implementing the DCP.

The Arizona Implementation Plan

In Arizona, DCP reduces Colorado River water use by creating incentives for conservation and storage of

water and through agreements to voluntarily reduce water use. Further, CAWCD and the State of Arizona are providing mitigation resources to soften some of the immediate impacts to Arizona water users. It should be noted that Arizona, and specifically Central Arizona Project (CAP) water users, bear the brunt of the DCP voluntary reductions. For example, CAP diverts about 1.6 million acre-feet of water per year of Arizona's entitlement to 2.8 million acre-feet. Under the DCP, if Lake Mead elevations were to fall to elevation 1,025', CAP and its water users have agreed to reduce their use by 720 thousand acre-feet per year. That is a reduction of *almost half* of CAP's allocation from the Colorado River. Furthermore, water users in other basin states, the federal government and Mexico have all agreed to reduce their water use from the river, so that jointly and voluntarily the collective reduction at elevation 1,025' is 1.475 million acre-feet per year. These collective actions reduce the risk of Lake Mead reaching critical levels from 43 percent to 8 percent.

Certainty, Resiliency, and Sustainability

How does Arizona achieve certainty, resiliency, and sustainability on the Colorado River system in the face of drought and growth? Certainty means that the it must be able to rely on existing water supplies, resiliency means it must have the ability to thrive in the face of change, and sustainability means it must use only as much water as needed without depleting the river for future generations. At least since 1968, when Garrett Hardin published *The Tragedy of the Commons*, Arizona has been debating how best to manage a 'common pool resource'. (Hardin, Garrett, *The Tragedy of the Commons*, *Science* (December 13, 1968).) A common pool resource, such as water, is distinguishable from a private good, such as food, and a public good, such as air, in that it is not excludable and can be depleted. The challenge is to allow an optimal amount of use to occur while still preserving the core resource. According to Hardin's theory, if individuals act in their own self-interest, they will ultimately deplete a common pool resource. As a result, he posits that, to preserve the core resource, a common pool resource must be managed as private property or the state must regulate its use. In 1990,

Elinor Ostrom challenged Hardin's theory by describing another way of managing common pool resources based on self-management of a local community. (Ostrom, Elinor, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, UK: Cambridge University Press, (1990).) She observed that people using a common pool resource often come together to preserve a core resource by developing common property protocols and a system of adaptive self-governance.

Use of Voluntary Agreements

How then does Arizona find a way to allow optimal utilization of the Colorado River while still preserving the health of the core resource? Through collaboration and consensus driven voluntary agreements, we can develop protocols and management approaches that are flexible and adaptive to changing needs. DCP may be an example of Ostrom's idea that local communities can develop common property protocols through a system of adaptive self-governance. System Conservation and Intentionally Created Surplus (ICS) in the DCP are both innovative concepts that allow water users to preserve the core resource by creating property protocols that are adaptive to the challenges of climate change and reduced water supply. DCP is also an example of high priority users agreeing to mitigate harm to lower priority users by contributing water and/or money for the benefit of the core resource, even if it is not in their immediate individual interest to do so.

Conclusion and Implications

Much work remains ahead to achieve the optimal balance between water use and preservation of the Colorado River, but DCP will stabilize a threatened system and may serve as an example of how to achieve voluntary and mutually beneficial water management agreements in the future. Arizona has chosen a path towards certainty, resiliency and sustainability for its Colorado River water. The collaborative solutions the parties to DCP have reached exemplify the old adage: 'It's better to bend a little than to break.'

(Alexandra Arboleda, Lee Storey)

MODERN DAY GOLD RUSH ACTIVITY ON IDAHO'S SOUTH FORK BOISE RIVER

If water is considered by some to be more valuable than gold, there is a rush of sorts occurring on the South Fork of the Boise River, Idaho, centered on Anderson Ranch Reservoir. Three different projects seek to appropriate spring flood flows when available for a variety of uses including hydropower, irrigation, municipal supply, and groundwater recharge. All of the projects are complex in nature (and projected cost), and all seek to appropriate water on, perhaps, the least reliable portion of the larger Boise River watershed, the South Fork being the smallest watershed already supplying the largest federal reservoir (Anderson Ranch) in the three-reservoir Boise River Reservoir system.

The Boise River Reservoirs

The Boise River Drainage supplies natural flow and storage water rights predominantly used in the Lower Boise River valley (Ada and Canyon counties) in southwest Idaho. The three reservoirs (Anderson Ranch, Arrowrock, and Lucky Peak) yield approximately 1 million acre-feet of water storage in aggregate, and the three reservoirs serve a flood control function as well (and are operated jointly accordingly) with average annual runoff in the basin totaling approximately 1.7 million acre-feet. Anderson Ranch and Arrowrock reservoirs are owned, operated and maintained by the U.S. Bureau of Reclamation (Bureau), and Lucky Peak Reservoir is owned, operated and maintained by the U.S. Army Corps of Engineers (Corps). Anderson Ranch Reservoir is the largest of the three, totaling approximately 413,000 acre-feet of active storage and it is located highest in the system capturing water from the South Fork Boise River drainage only. Arrowrock (272,000 acre-feet) and Lucky Peak (264,000 acre-feet) are located below the confluence of the South and Middle Forks of the Boise River and, between them, have the ability to capture water from the Middle and North Forks of the Boise River, the South Fork Boise River, and the Mores Creek drainage (the Middle and North Forks being the primary sources).

Despite being the “largest bucket on the smallest spigot” in the Boise River system, Anderson Ranch Reservoir is the focus of three different projects seek-

ing to appropriate flood flows otherwise spilled from the dam (and the larger system in general) during high runoff years. Elmore County, Idaho seeks to divert upwards of 20,000 acre-feet from Anderson Ranch Reservoir; Cat Creek Energy, LLC seeks upwards of 100,000 acre-feet, and the Bureau is likely to file an application seeking to appropriate upwards of 29,000 acre-feet.

Runoff records over the past 20 years suggest that flood control releases from Anderson Ranch Reservoir, further released from the system at Lucky Peak, have ranged between roughly 100,000 acre-feet and 800,000 acre-feet when flood control years occur (which has been in nine of the last 20 years, or roughly 50 percent of years). Reviewing runoff records dating back to the completion of Anderson Ranch Dam in 1950 suggests a more modern trend of “feast or famine,” with more flood control years occurring historically but of lesser overall volumes—the past 20 years suggests a “flashier” system with a lot of flood control release volume in flood control years, but fewer flood control years overall (*i.e.*, there are 11 “zeros” populating the last 20 years, many of which occur in back-to-back years; sometimes for three or more years in a row).

The Projects and Proposals

The first entity to file an application for permit was Elmore County (County) in March of 2017. The County sought upwards of 20,000 acre-feet for use in and around the City of Mountain Home. The County proposes to use the water for supplemental irrigation purposes within Mountain Home Irrigation District and for groundwater recharge purposes in an effort to stem historic groundwater declines in and around the City of Mountain Home (population approximately 14,500). The Elmore County project is both expensive and controversial; expensive given the capital expenditure needed to build a pumping plant and pipeline whole cloth and controversial because it involves the exportation (trans-basin diversion) of water from the Boise River drainage to the Mountain Home plateau. Consequently, the County’s water right application was protested by a number of citizens and entities located in the lower Boise River

basin (which is the most populous, economically diverse, and fastest growing region of the state—the Boise metropolitan area (or Treasure Valley) is currently home to approximately 725,000 inhabitants and projected to eclipse 1,000,000 by 2040). Protestants included irrigation districts and water delivery entities, the City of Boise, and the Idaho Conservation League.

The Idaho Department of Water Resources (IDWR) granted Elmore County's application for permit, albeit with 28 conditions of approval—chief amongst them limiting the permit to an annual volume of 10,000 acre-feet rather than the 20,000 acre-feet the county contends its application sought. The IDWR's most recent order on the matter (*Order on Reconsideration; Amended Preliminary Order Approving Permit Upon Conditions*) issued on May 7, 2019, and the parties (including Elmore County) have filed exceptions with the Director. Thus, the final version of the permit, if one issues at all post-Director review, remains to be seen.

Shortly after Elmore County filed its application, Cat Creek Energy, LLC (CCE) filed its own on May 17, 2017. CCE followed its initial application with a second one on April 26, 2019. CCE also seeks to divert water from Anderson Ranch Reservoir during flood control releases for hydropower generation, municipal, mitigation, and supplemental irrigation purposes. Combined, the applications seek upwards of 100,000 acre-feet for power generation and 30,000 acre-feet for municipal, mitigation, and supplemental irrigation purposes proposed for storage in a new 100,000 acre-foot reservoir to be constructed on private land located on the bluff/canyon rim above Anderson Ranch Reservoir. Power generation would occur as a pump back project; water would be pumped up into the new reservoir when power demand is low, and then released down-gradient back into Anderson Ranch Reservoir during times of high/peaking power demand. The municipal, mitigation, and supplemen-

tal irrigation uses are all proposed within the Treasure Valley. Thus, while numerous protests were filed, water exportation out of the Boise River Basin is not presently an issue.

Finally, the third “competing” potential project seeking flood flows on the South Fork Boise River is the Anderson Ranch Dam-raise proposal of the Bureau. Additional water storage opportunities in the Boise River Basin have long been studied in recognition of ongoing population growth and increasing water demand in the Treasure Valley. Capital costs and environmental concerns have greatly curtailed (if not ended) the era of big federal dam building. Consequently, there has been renewed focus on investigating additional storage opportunities achieved through raising existing dams. The Bureau of Reclamation and the Idaho Water Resource Board (a sub-agency embedded within the IDWR charged with water resource planning policy), with renewed and additional support and funding from the 2019 Idaho Legislative Session, are progressing with a plan to raise Anderson Ranch Dam to yield an additional 29,000 acre-feet of storage. A water right permit application has yet to be filed; whether there is a trans-basin diversion/water exportation component to the project remains to be seen.

Conclusion and Implications

Time will tell whether any of the three projects will be built or differently scaled, and how and to what extent they divvy available flood flow runoff from the South Fork Boise River drainage. Regardless, the projects are being carefully followed given existing Anderson Ranch Reservoir operations (including the existing “biggest bucket, smallest spigot” concern), and in response to any water exportation components they contain (and the related controversy that water exportation proposals beget). (Andrew J. Waldera)

FLORIDA MAKES SCIENCE PARAMOUNT IN WATER RESOURCES, WATER QUALITY AND SEA LEVEL RISE CONCERNS

Florida's Governor Ron DeSantis, on the campaign trail, has been pushing for improvements to water resources and water quality improvements throughout the state. The Governor has now, via Executive Order, created a "Science Officer" who will be charged with these tasks. He also will soon create the position of Chief Resilience Officer to address other related issues like sea level rise from climate change.

Background

In the six months since he took office Florida's Governor, Ron DeSantis, has surprised many Floridians by backing his campaign expressions of concern about the importance of environmental protection with pledges to expend upwards of \$2.5 billion on projects to preserve Lake Okeechobee and improve the state's water quality and water resources.

The Office of Environmental Accountability

The Governor had spoken of putting science as the basis on which program decisions would be made. In April he appointed the first-ever Science Officer for the state. The man he chose for the role is Dr. Thomas K. Frazer. Dr. Frazer will lead the newly established Office of Environmental Accountability and Transparency within the State's Department of Environmental Protection.

According to the DeSantis administration:

Dr. Frazer will guide funding and strategies to address priority environmental issues, as well as, but not limited to, making recommendations for increased enforcement of environmental laws necessary to improve water quality within key waterbodies.

Dr. Frazer, a water ecologist, formerly was the Director of the University of Florida's School of Natural Resources and Environment. And formerly served as Acting Director of the UF Water Institute. Before this position, he served as Associate Director of the School of Forest Resources and Conservation and the Leader of the Fisheries and Aquatic Sciences Program. At UF, his research focused on the effects of anthropogenic activities on the ecology of both freshwater and marine ecosystems.

On May 17, the DEP invited Florida journalists to a press briefing in order to ask questions of Dr. Frazer. Together with Noah Valenstein, the Director of Department of Environmental Protection, Frazer indicated that one of the most important priorities for him is mitigating the problem of algae in Florida's waters. He noted the Governor's program establishes a Blue-Green Algae Task Force, charged with focusing on expediting reduction of the adverse impacts of blue-green algae blooms. This task force of a half dozen or so experts will identify priority projects for funding that are based on scientific-data. There will be a push to acquire more data immediately through existing restoration programs in order to facilitate informed decision-making by the Task Force in formulating an effective plan.

Clean Air and Climate Change-Related Sea Level Rise

When asked whether greenhouse gases are a priority, both Dr. Frazer and Director Valenstein responded that sea level rise is a priority, but that the main focus of the Department of Environmental Protection is on nitty-gritty clean air and clean water issues. Valenstein noted that a separate position, "Chief Resilience Officer," will be filled soon by the Governor once applications for it are fully reviewed. That position, through a beefed-up Division of Coastal Protection will focus on improving coastal resilience.

Small Strategic Projects

Dr. Frazer indicated that the \$680 million available this year from the legislative session just ended will help jump-start a number of small but strategically important projects around the state, to begin the restoration process for water bodies affected by the blue-green algae. The Task Force is expected to convene in June. It will formulate longer term strategy recommendations. It will be meeting in a venue where the public is able to attend.

Conclusion and Implications

Dr. Frazer and the DeSantis administration will have to deal with resistance from Florida's water management districts. These regional districts

throughout the state have the direct authority to manage the flow of water and its availability. The Governor has already clashed with some district officials regarding the need to immediately build additional reservoir capacity near Lake Okeechobee to assure freshwater availability for future drinking water needs of the population. The administration wishes to see two new reservoirs constructed, but actions of the South Florida Water Management District have, so far,

been contrary to that vision. The Governor has asked for resignations of some commissioners, including a number appointed by his predecessor, Rick Scott. His Executive Order urged better transparency and accountability from the Water Districts. A copy of the DeSantis Executive Order on the priority of water quality efforts can be found at https://www.flgov.com/wp-content/uploads/orders/2019/EO_19-12.pdf (Harvey M. Sheldon)

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**

•April 15, 2019—The U.S. Environmental Protection Agency (EPA) announced that StarKist Co. and its subsidiary, Starkist Samoa Co., will be assessed \$84,500 in penalties for violating the terms of a 2018 settlement designed to remedy deficiencies at their tuna processing facility in American Samoa to achieve environmental compliance. StarKist violated the 2018 settlement on multiple occasions when it made unauthorized discharges from the facility to Pago Pago Harbor, including one incident where StarKist discharged 80,000 gallons of wastewater to the inner harbor. The company also violated the consent decree terms on 27 days when wastewater was routed around one of the required treatment measures to bypass a step in the wastewater treatment process. Under the 2018 settlement, StarKist paid a \$6.5 million penalty to resolve violations of federal environmental laws. The company was also required to make upgrades to reduce water pollution and the risk of releases of hazardous substances. In addition, StarKist agreed to provide American Samoa with \$88,000 in emergency equipment for responding to chemical releases. Starkist Samoa Co. owns and operates the tuna processing facility, located on Route 1 on the Island of Tutuila in American Samoa. Starkist Samoa Co. is a subsidiary of StarKist Co., which is owned by Korean company Dongwon Industries. StarKist Co. is the world's largest supplier of canned tuna. Its American Samoa facility processes and cans tuna for human consumption and processes fish byproducts into fishmeal and fish oil.

•April 29, 2019—The U.S. Environmental Protection Agency (EPA) has reached an agreement with Asanuma Kokuba Joint Venture and Nippo USA Inc. to resolve stormwater violations from their Hotel Nikko expansion—the Tsubaki Tower project—which lacked controls to prevent discharge of pollutants into Tumon Bay and the Pacific Ocean in Guam. An EPA inspection found the project's construction companies were operating without the required Clean Water Act Stormwater Construction General Permit and had an unauthorized non-stormwater discharge from the construction site at the time of inspection. EPA also found that the best management practices that were in place to control the discharge of stormwater were not properly implemented. The companies will pay a settlement of \$129,048 and have already obtained the proper permit and corrected the site's stormwater controls. Many construction sites have operations that disturb soil and include areas for maintenance and cleaning of equipment. Rainfall runoff flowing through such sites can pick up pollutants, such as sediment, metals from exposed steel, and other chemicals found in construction products, and transport them directly to nearby waterways, degrading water quality and damaging coral reefs. Federal regulations require construction sites to obtain coverage under EPA's Stormwater Construction General Permit by implementing best management practices to keep pollutants out of stormwater, preventing non-stormwater discharges from the site, and following a site-specific stormwater pollution control plan. The settlement is subject to a 30-day comment period before becoming final.

•April 25, 2019—The U.S. Environmental Protection Agency (EPA) reached a settlement agreement with Denbury Onshore, LLC to resolve federal Clean Water Act (CWA) and Oil Pollution Act (OPA) violations in Alabama and Mississippi. The State of Mississippi is a co-plaintiff under the consent decree in which Denbury has agreed to

implement an extensive injunctive relief package, including a risk-based program designed to prevent future oil spills, and pay a civil penalty of \$3.5 million. Denbury is the owner and operator of onshore oil production facilities located in the Gulf Coast and Rocky Mountain regions of the United States. Denbury's facilities in Region 4 are in Alabama and Mississippi. The company's business model involves acquiring older oil fields and extending the life of the fields using advanced engineering extraction techniques. EPA is pursuing penalties for 26 CWA discharges that occurred between August 8, 2008 and November 11, 2015 and resulted in approximately 7,000 barrels of oil and produced water discharged to the environment. The 26 violations took place at ten different Denbury facilities in Region 4—one facility in Alabama and nine facilities in Mississippi. Most of the discharges were the result of internal corrosion of pipes and flow lines, breaks in old lines, and failed equipment.

Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste

•April 18, 2019— The U.S. Environmental Protection Agency (EPA) and the Department of Justice announced a settlement with Honeywell International Inc. and International Paper Co. for cleanup of contaminated soils and sediments at the LCP-Holtrachem plant in Riegelwood, Columbus County, North Carolina. The United States brought its action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund Law, and the Resource Conservation and Recovery Act (RCRA). The LCP-Holtrachem Superfund Site is about 24 acres adjacent to the Cape Fear River at 636 John Riegel Road. From 1963 to 2000, the LCP-Holtrachem plant made chemicals such as sodium hydroxide, liquid chlorine, hydrogen gas, liquid bleach and hydrochloric acid using a mercury cell process. According to the complaint filed simultaneously with the settlement today in the Eastern District of North Carolina, the Honeywell and International Paper are liable for historic industrial discharges of metals, including mercury, and polychlorinated biphenyls (PCBs) at the site. Under the proposed settlement, Honeywell and International Paper will address contaminated soils and sediments through a combination of in-situ treatment, on-site storage, and off-site treat-

ment and disposal. The two companies will also reimburse the United States for all past and future costs associated with the cleanup. In exchange, the two companies will receive a covenant not to sue and protection from suit by third parties. The two companies previously performed investigations and preliminary cleanup work under prior agreements with EPA. EPA uses the Superfund Alternative Approach (SAA) for the site, so it has not been proposed for addition to the National Priorities List (NPL). Under the SAA, EPA uses the same investigation and cleanup process and standards it uses for NPL sites, and saves the time and resources associated with NPL listing. Honeywell is the current owner of the site, which is contiguous to about 1,300 acres of land owned by International Paper. Since 1951, International Paper has operated a bleached kraft paper mill there, which manufactures paperboard from wood fiber. International Paper used many of the chemicals manufactured at the LCP-Holtrachem plant. Hazardous substances from the LCP-Holtrachem plant were disposed of at the International Paper property and are being addressed under the settlement. The consent decree is subject to a 30-day public comment period and final approval by the court.

Indictments, Convictions and Sentencing

•April 15, 2019— A judgement was entered holding 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. 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 U.S. Environmental Protection Agency (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 Or-

der, 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 clean-up 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. Cohen and LAI were ordered to pay restitution to the EPA of \$105,816.

- April 23, 2019—A federal grand jury in Wilmington, Delaware, returned a six-count indictment today charging Chartworld Shipping Corporation, Nederland Shipping Corporation, and Chief Engineer Vasileios Mazarakis with failing to keep accurate pollution control records, falsifying records, obstruction of justice, and witness tampering, the Justice Department announced. The charges stem from the falsification of records and other acts designed to cover up from the Coast Guard the overboard discharges of oily mixtures and machinery space bilge water from the Bahamian-flagged cargo vessel, M/V Nederland Reefer. According to the indictment, on Feb. 21, 2019, the M/V Nederland Reefer entered the Port of Delaware Bay with a false and misleading Oil Record Book available for inspection by the U.S. Coast Guard. The Oil Record Book failed to accurately record transfers and discharges of oily wastewater on the vessel. The vessel's management company, Chart-

world Shipping Corporation, the vessel's owner, Nederland Shipping Corporation, and the Chief Engineer of the vessel, Greek national Vasileios Mazarakis, are all charged with failing to maintain an accurate oil record book as required by the Act to Prevent Pollution from Ships, a U.S. law which implements the International Convention for the Prevention of Pollution from Ships, commonly known as MARPOL. The defendants were also charged with falsification of records, obstruction of justice, and witness tampering for destroying evidence of the illegal discharges and directing lower level crew members to withhold evidence from the Coast Guard. Finally, the corporate defendants are charged with the failure to report a hazardous condition to the Coast Guard, namely a breach in the hull of the vessel and resulting incursion of seawater into tanks on board the vessel that occurred before the vessel came to port in Delaware.

- May 3, 2019— Two Greek shipping companies, Avin International LTD and Nicos I.V. Special Maritime Enterprises, were sentenced in the Eastern District of Texas on charges stemming from several discharges of oil into the waters of Texas ports by the oil into the waters of Texas ports by the oil tanker M/T *Nicos I.V.* Avis International was the operator and Nicos I.V. Special Maritime Enterprises was the owner of the *Nicos I.V.*, which is a Greek-flagged vessel. The Master of the *Nicos I.V.*, Rafail-Thomas Tsoumakos, and the vessel's Chief Officer Alexios Thompopoulos, also pleaded guilty to making material false statements to members of the United States Coast Guard during the investigation into the discharges. Both companies pleaded guilty to one count of obstruction of an agency proceeding, one count of failure to report discharge of oil under the Clean Water Act, and three counts of negligent discharge of oil under the Clean Water Act on November 26, 2018. Under the plea agreement, the companies will pay a \$4 million criminal fine and serve a four-year term probation, during which vessels operated by the companies will be required to implement an environmental compliance plan, including inspections by an independent auditor. The Master and Chief Officer both pleaded guilty to one county of making a material false statement and were sentenced to pay fines of \$10,000 each. According to documents filed in court, the *Nicos I.V.* was equipped with a segregated ballast system, a connected series of tanks used to control the

trim and list of the vessel by taking on or discharging water, the latter involving an operation called deballasting. At some point prior to July 6, 2017, the ballast system of the Nicos I.V. became contaminated with oil and that oil was discharged twice from the vessel into the Port of Houston on July 6 and July 7, 2017, during deballasting operations. Both Tsoumakos and Thomopoulos were informed of the discharges of oil in the Port of Houston. Tsoumakos failed to report the discharges, which, as the person in charge of the vessel, he was required to do under the Clean Water Act. Neither discharge was recorded in the vessel's oil record book, as required under MARPOL and the

Act to Prevent Pollution from Ships. After leaving the Port of Houston, en route to Port Arthur, Texas, oil was observed in several of the ballast tanks. After arriving in Port Arthur, additional oil began bubbling up next to the vessel, which was then reported to the U.S. Coast Guard. During the ensuing investigation, both Tsoumakos and Thomopoulos lied to the Coast Guard, stating, among other things, that they had not been aware of the oil in the ballast system until after the discharge in Port Arthur, and that they believed that the oil in the ballast tanks had entered them when the vessel took on ballast water in Port Arthur. (Andre Monette)

REGULATORY DEVELOPMENTS

EPA ISSUES INTERPRETIVE STATEMENT ON APPLICATION OF THE CLEAN WATER ACT TO POINT SOURCE DISCHARGES TO GROUNDWATER

The U.S. Environmental Protection Agency (EPA) issued a statement (Statement) interpreting the application of the federal Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permit requirements to point sources that discharge through hydrologically connected groundwater. The Statement repudiates the "direct hydrologic connection" theory EPA advanced fewer than three years earlier in the Ninth Circuit in *County of Maui v. Hawaii Wildlife Fund et al.*, 886 F.3d 737 (9th Cir. 2018), petition granted Case No. 18-260 (Feb. 19, 2019) (*Maui*). [84 Fed. Reg. 16,810 (Apr. 23, 2019).]

Background

Relevant to EPA's Interpretive Statement, § 301 of the CWA prohibits the discharge of any pollutant by any person except pursuant to an NPDES permit. "Discharge of a pollutant" means:

(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft . . . [and] . . . navigable waters. . . [as] . . . the waters of the United States, including the territorial seas. *Id.* § 1362(7), (12).

Historically, NPDES permit programs have not applied to most discharges to groundwater. In *Maui*, however, the Ninth Circuit determined the County of Maui was required to obtain an NPDES permit for injection wells that discharged to groundwater where the groundwater had a direct hydrologic connection to the Pacific Ocean and the pollutants were "fairly traceable" from the wells to the ocean "such that the discharge [was] the functional equivalent of a discharge into the navigable water." In its *amicus* brief in *Maui*, EPA urged the Ninth Circuit to reach this ruling, reiterating its "longstanding position" that a

discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements.

In February 2018, only 20 days after the Ninth Circuit issued its opinion in *Maui*, EPA solicited comments on whether it should consider clarifying or revising its position on the direct hydrologic connection theory of liability. Later in 2018, the Fourth Circuit Court of Appeals issued a decision aligned with *Maui*, and the Sixth Circuit issued two decisions rejecting the Fourth and Ninth circuits' analysis.

On February 19, 2019, the U.S. Supreme Court granted the County's petition for *certiorari* in *Maui* on the question of:

. . . [w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

EPA's Interpretative Statement

On April 23, 2019, the EPA released its Interpretive Statement concluding that the CWA does not regulate the discharge of pollutants to groundwater. In explaining this conclusion, EPA reviewed the CWA's structure, text, legislative history, case law, and public policy, finding that each supports its interpretation.

On structure, EPA noted that:

. . . [t]he CWA approaches restoration and protection of the Nation's waters as a partnership between states and the federal government, assigning certain functions to each in striking the balance of the statute's overall regulatory scheme.

Specifically, the CWA governs discharges from a point source, defined as "any discernible, confined and discrete conveyance," while Congress reserved

the regulation of nonpoint source pollution exclusively to the states.

Holistic Approach in Reading Section 301

As to text, EPA explained that a “holistic approach” is necessary, and § 301’s broad prohibition against the discharge of pollutants to jurisdictional waters must be read in the context of the specific provisions dealing with groundwater. The CWA generally describes four categories of waters: navigable waters, waters of the contiguous zone, the ocean, and groundwater, and that the CWA’s operative NPDES regulatory provisions only apply to the first three. In contrast, the CWA’s provisions related to groundwater pertain to EPA providing information, guidance, and funding to states in order to enable states to regulate groundwater pollution. EPA also relied on the fact that Congress left groundwater out of the definition of “effluent limitations,” and the important role effluent limitations occupy in NPDES permit programs.

In discussing the CWA’s legislative history, EPA focused on the numerous instances in which Congressmen and Senators acknowledged the hydrological connection between surface water and groundwater, but nonetheless rejected amendments that would have explicitly brought discharges to groundwater under the NPDES program.

Case Law

Regarding relevant case law, EPA acknowledged the view expressed in the Interpretive Statement is difficult, if not impossible, to reconcile with its previous positions. Addressing its earlier support for the direct hydrologic connection theory in *Maui*, EPA explained that its amicus brief failed to take into account Congress’ unique treatment of groundwater in the CWA when interpreting the definition of discharge of a pollutant and improperly equated releases of pollutants to groundwater with releases of pollutants from a point source to surface water that occur

above ground. EPA further reasoned that the CWA and its legislative history indicate Congress intended all discharges to groundwater to be left to state regulation and control, regardless of any future contribution of pollutants to jurisdictional surface waters.

EPA also relied on cases from the Fifth and Seventh circuits that, in its view, took the necessary “holistic” approach in interpreting the statute and legislative history to hold that the CWA’s coverage does not include groundwater pollution.

A ‘Mosaic of Laws and Regulations’

Finally, responding to comments and criticism that its interpretation creates a massive enforcement loophole that could eviscerate the CWA’s explicit purpose to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” EPA explained that its position “does not preclude states from regulating these releases under state law,” and that other federal environmental protection laws govern discharges to groundwater omitted from the CWA, including the Safe Drinking Water Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act. Thus, EPA concluded these statutes and state programs “form a mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters.”

Conclusion and Implications

EPA’s course reversal reflected in the Interpretive Statement comes as the U.S. Supreme Court considers a Circuit split on the issue of point source discharges through groundwater. It remains to be seen whether the Supreme Court adopts one of the EPA’s positions. For more information, see, <https://www.govinfo.gov/content/pkg/FR-2019-04-23/pdf/2019-08063.pdf>

(Dakotah Benjamin, Rebecca Andrews)

EPA ANNOUNCES PROPOSED RULE ESTABLISHING CLEAN WATER ACT ALUMINUM AQUATIC LIFE CRITERIA FOR OREGON FRESHWATERS

The U.S. Environmental Protection Agency (EPA) recently issued a proposed rule regulating aluminum in Oregon fresh water for the purpose of protecting aquatic life. Aluminum occurs naturally in fresh surface water, but it can be harmful to aquatic life at elevated concentrations.

Water Quality Standards

The federal Clean Water Act (CWA) directs states to adopt water quality standards, which consist of: 1) one or more designated uses for the water body, such as the protection of fish and aquatic life; 2) numeric and narrative criteria specifying the water quality condition necessary to protect the designated use(s); and 3) an antidegradation policy that ensures that uses are protected and that high quality waters will be maintained and protected. *See*, 33 U.S.C. 1313(c).

States must review water quality standards at least every three years and revise or adopt new standards if necessary. New or revised water quality standards are subject to approval by the EPA. If EPA disapproves a standard, the state must adopt a new, compliant standard within 90 days. If the state does not do so, EPA must promulgate a compliant standard itself.

Water quality standards form the basis for several CWA programs, including National Pollutant Discharge Elimination System (NPDES) permitting and listing of impaired waters under § 303(d) of the CWA.

Recommended Criteria Guidelines

EPA publishes criteria guidelines for states to reference when developing water quality criteria. Where such guidelines exist, states must establish numeric water quality criteria based on EPA's recommended criteria, recommended criteria modified to reflect site-specific conditions, or other scientifically defensible methods.

EPA published recommended freshwater aquatic life criteria for aluminum in December 2018, consistent with EPA's Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses. These criteria replaced the former national recommended fresh-

water aquatic life criteria for aluminum, which were established in 1988.

History and Litigation Surrounding Oregon's Aluminum Criteria

On July 8, 2004, Oregon submitted to EPA revised aquatic life criteria for several pollutants, including acute and chronic criteria for aluminum. Oregon submitted revised criteria again on April 23, 2007. EPA did not act to approve or disapprove of the criteria.

Northwest Environmental Advocates (NWEA) filed suit in U.S. District Court for the District of Oregon to compel EPA to approve or disapprove of the criteria. On May 29, 2008 the District Court entered a consent decree with a timeline for EPA to act. The decree was later amended, allowing EPA until January 31, 2013. On that date, EPA disapproved Oregon's aluminum criteria because the state had not provided a scientific rationale for the conditions under which the criteria would apply.

In April 2015, NWEA sued EPA for failing to promulgate replacement criteria as directed by statute (the lawsuit pertained to several criteria, but this article will address only aluminum). The parties entered into a consent decree in which EPA would propose freshwater aluminum criteria by December 15, 2017 and take final action by September 28, 2018. Several extensions later, EPA published a proposed rule in the Federal Register on May 1, 2019.

EPA's Proposed Rule

EPA's proposed aluminum criteria for Oregon are based on EPA's national recommended freshwater aquatic life criteria for aluminum (described above). The recommendation includes a calculator for deriving criteria output values based on site-specific ambient water chemistry. The calculator uses three ambient water body characteristics that affect the toxicity of aluminum as input parameters: pH, dissolved organic carbon, and total hardness.

The outputs identify acute and chronic aluminum criteria values to protect aquatic life at the site under a range of ambient conditions, including when aluminum is most toxic given variations in the site's water

chemistry. A full discussion of the calculation methodology is beyond the scope of this article; interested readers can find more information in the Federal Register notice.

Oregon Can Still Issue Its Own Criteria

Oregon still has the opportunity to adopt aluminum aquatic life criteria to remedy EPA's disapproval of its 2004 criteria. If Oregon does adopt criteria, and if EPA approves the criteria before finalizing its proposed rule, then EPA would withdraw its proposed rule.

Conclusion and Implications

Entities potentially affected by this rule include

industrial facilities, stormwater management districts, and publicly owned treatment works that discharge pollutants to fresh waters of the United States.

Interested parties may wish to comment on the proposed rule. EPA is accepting public comments until June 17, 2019. Comments may be submitted at www.regulations.gov under Docket ID No. EPA-HQ-OW-2016-0694. EPA is also holding two online public hearings: Tuesday, June 11 from 4:00-6:00 p.m. Pacific Time and Wednesday, June 12 from 9:00-11:00 a.m. Pacific Time. Information about the public hearings can be found at <http://www.epa.gov/wqs-tech/water-quality-standards-regulations-oregon> (Alexa Shasteen)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ANNOUNCES PHASE 2 DRAFT BASIN PRIORITIZATION

In April, the California Department of Water Resources (DWR) released its second phase of groundwater basin prioritizations. The new prioritizations implicate the applicability of the Sustainable Groundwater Management Act (SGMA) to local agencies within certain priority basins, including the need to develop groundwater sustainability plans or alternative plans to sustainably manage groundwater within certain groundwater basins in the state. The Department of Water Resources has provided a 30-day public comment period for interested parties to submit comments on the second phase of basin prioritizations. [See: DWR Announces Draft Basin Prioritization under SGMA for 57 Modified Basins, available at <https://water.ca.gov/News/News-Releases/2019/April/DWR-Announces-Draft-Basin-Prioritization-under-SGMA-for-57-Modified-Basins>]

Background

The California Sustainable Groundwater Management Act, which went into effect in January 2015, requires that the Department of Water Resources (DWR) prioritize all groundwater basins by Jan. 31, 2015, and every time Bulletin 118 basin boundaries are updated or modified. Basins are prioritized as either high-, medium-, low-, or very low-priority, based on the components listed in the California Water

Code § 10933(b).

A basin's priority informs which provisions of SGMA and the California Statewide Groundwater Elevation Monitoring (CASGEM) apply to that particular basin. CASGEM is a groundwater monitoring tool developed in 2009 to track seasonal and long-term groundwater elevation trends statewide. When SGMA went into effect in 2015, DWR used the 2014 CASGEM Basin Prioritization as the initial SGMA basin prioritization. Shortly after the passage of SGMA, 54 requests for groundwater basin boundary modification were submitted to the DWR. In 2016, DWR completed and released groundwater basin boundary modifications (Bulletin 118 – Interim Update 2016), and in 2018, DWR released the draft basin prioritization results for all 515 California groundwater basins (2018 Draft Boundary Modifications).

Phase 1 and Phase 2 Basin Prioritization Process

After the DWR released the Bulletin 118 – Interim Update 2016, several other requests for groundwater basin boundary modification were submitted for DWR review, which prompted DWR to initiate a two-phase basin prioritization process to reassess the priority of groundwater basins in accordance with SGMA requirements.

DWR finalized and released the “SGMA 2019 Basin Prioritization Phase 1” in January 2019. The SGMA 2019 Basin Prioritization Phase 1 focused on the 458 basins that were not affected by the 2018 Draft Boundary Modifications. Under the SGMA 2019 Basin Prioritization Phase 1, 25 basins were assigned as high priority, 31 as medium priority, nine as low priority and 393 basins as very low priority.

The final version of the 2018 Draft Boundary Modifications was released in February 2019 (2018 Final Boundary Modifications), affecting 57 basins, including 53 that were previously modified and approved, as well as two that were not approved by DWR as part of the 2018 Draft Boundary Modifications.

In April 2019, DWR released a draft version of the second basin prioritization phase (SGMA 2019 Basin Prioritization Phase 2). This draft covers the remaining 57 basins, which includes the subdivision of the San Luis Rey Valley Groundwater Basin into an upper and lower sub-basin when Assembly Bill 1944 was approved by then Governor Jerry Brown in September 2018. Under the draft SGMA 2019 Basin Prioritization Phase 2, 22 basins were designated as high priority, 16 as medium, two as low priority and 17 basins as very low priority. According to DWR, the priority designation for 75 percent of the basins prioritized in SGMA 2019 Basin Prioritization Phase 2 remains the same as the 2015 designation.

The prioritization affects which SGMA requirements apply to a basin, including the deadline by which a Groundwater Sustainability Plan (GSP) must be submitted to the DWR. Under SGMA, previously identified critically overdrafted high and medium priority basins in Bulletin 118 – Interim Update 2016 are required to submit a GSP by January 31, 2020.

The remaining high and medium priority basins are required to submit a GSP by January 31, 2022. In light of SGMA 2019 Basin Prioritization Phase 2, 38 basins are required to develop GSPs, while 12 will not.

Following release of the prioritizations, DWR opened a 30-day comment period ending May 30 to receive input from the public, and held a public meeting on May 13 for that same purpose. The basin prioritization results under this second phase are expected to be finalized in early summer 2019.

Groundwater basins that were previously categorized as low- or very-low priority and that are *newly* identified as high or medium priority are required to form a Groundwater Sustainability Agency (or submit an alternative to GSP) within two years from the date the SGMA 2019 Basin Prioritization Phase 2 prioritization is finalized, and are required to submit a GSP five years from that date. GSPs are optional for basins prioritized as low or very low priority.

Conclusion and Implications

Because basin prioritizations affect the applicability of SGMA to any given basin, DWR’s newly released prioritizations could have a significant impact on basins that are designated as high or medium priority. It is unclear whether the public comment period ending May 30 will affect basin prioritizations, but it is likely that interested parties for high or medium priority basins will submit commentary. Once basin prioritizations are finalized, local agencies will begin developing applicable GSPs or alternative plans to ensure compliance with SGMA within the coming years. (Maya Mouawad, Steve Anderson)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT REVIVES ENVIRONMENTAL GROUPS' NEPA CHALLENGE TO DEPARTMENT OF AGRICULTURE'S GRAY WOLF KILLING POLICY

Western Watersheds Project et al. v. Todd Grimm et al., ___F.3d___, Case No. 18-35075 (9th Cir. Apr. 23, 2019).

On April 23, 2019, the Ninth Circuit Court of Appeals overturned a U.S. District Judge's January 2018 dismissal of an action brought by plaintiffs Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense (plaintiffs) to enjoin the federal government's participation in the elimination of gray wolves in Idaho, pending additional National Environmental Policy Act (NEPA) analysis. The U.S. District Court originally dismissed the suit based on the plaintiffs' lack of Article III standing.

Factual Background

In 1973, the U.S. Fish and Wildlife Service (FWS) listed the Northern Rocky Mountain gray wolf (*Canis lupus irremotus*) as endangered under the federal Endangered Species Act (ESA). This subspecies of gray wolf is native to the northern Rocky Mountains and preys on bison, elk, the Rocky Mountain mule deer, and the beaver. However, the gray wolves are known to prey upon many other species of animals given the opportunity. In 1994, FWS' goal was to assist the gray wolf reach a population of thirty breeding pairs by reintroducing them into central Ohio. In anticipation of conflict between the wolves, and humans and their livestock and animals, the FWS authorized the killing of those wolves that preyed on livestock, domestic animals, and ungulates in the area. FWS reached its wolf breeding goal and in 2011, the gray wolf was successfully delisted.

Back in 2002, the Idaho Department of Fish and Game (IDFG) prepared a plan to be executed upon the gray wolves' delisting under the ESA. IDFG would maintain responsibility for managing the wolves in Idaho with the goal of addressing these issues of predation by way of sport hunting as its primary method. Ever since its delisting, FWS supported IDFG's wolf management activities through both legal and non-legal methods, including aerial hunting.

In June 2017, plaintiffs sued the USDA alleging that the agency violated NEPA for its wolf killing policy. The USDA said that NEPA's law did not constitute a major federal action significantly affecting, individually or cumulatively, the quality of the human and natural environment."

Procedural History

In June 2016, plaintiffs brought the following NEPA-based claims against the U.S. Department of Agriculture, Wildlife Services (Wildlife Services) in District Court: 1) Failure to prepare an Environmental Impact Statement (EIS); 2) Failure to take a hard look at the effects of actions and alternatives; 3) Violations under 5 U.S.C. §706 (2)(A) for decisions not to supplement NEPA analysis as arbitrary and capricious; and 4) Violations under U.S.C. §706 (1) for failure to supplement the 2011 Environmental Assessment as an action unlawfully withheld or reasonably delayed.

Specifically, plaintiffs alleged that NEPA requires Wildlife Services to prepare an Environmental Impact Statement and supplement the Environmental Assessment for the agency's killing of the gray wolf. The District Court held that plaintiffs failed to show that Article III standing because plaintiffs failed to show redressability. The District Court explained that plaintiffs failed to show that eliminating the USDA's rule would actually result in fewer wolf killings therefore, making their injury not redressable.

The Ninth Circuit's Decision

NEPA violations constitute procedural injuries. To prevail on a cause of action involving procedural injuries, plaintiffs are required to:

...show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his

standing.

Further, to establish injury in fact, the plaintiffs may demonstrate that they:

...use the affected area and are persons or who the aesthetic and recreational values of the area will be lessened by the challenged activity.

Standing: Injury in Fact

In order to prevail, plaintiffs needed to establish injury in fact:

Environmental plaintiffs may establish injury-in-fact by demonstrating that “they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000)).

In this case, plaintiffs submitted declarations from their members stating that the wolf-killing threatened the aesthetic and recreational interests in tracking and observing wolves in the wild, often in specific regions. The Court of Appeals deemed those interests to fall under the scope of NEPA’s protections. Thus, plaintiffs successfully established injury-in-fact.

Standing: Redressability

Next, the Ninth Circuit reviewed the District Court’s ruling that the plaintiffs’ injuries were not redressable:

To establish redressability, ‘[p]laintiffs alleging procedural injury ‘must show only that they have a procedural right that, if exercised, could protect their concrete interests.’ *Salmon Spawning*, 545 F.3d at 1226 (quoting *Defs. of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), overruled on other grounds by *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)). Thus, the proper inquiry here is whether Plaintiffs have shown that halting Wildlife Services’ wolf-killing activities pending additional NEPA analysis could protect their aesthetic and recreational interests in gray wolves in Idaho. We hold that they have.

The Ninth Circuit overturned the District Court’s conclusion and emphasized that the court erred because it relied on an incorrect standard by relying on an unpublished case that lacks precedential effect. Additionally, to properly establish redressability, plaintiffs must show that they have a procedural right and if exercised, *could* protect their concrete interests—a more relaxed standard applied to procedural injury cases. Under this standard of redressability, plaintiffs need only show that merely halting Wildlife Services’ wolf-killing activities pending additional NEPA analysis would have the potential to protect their aesthetic and recreational interests in gray wolves in Idaho. This differs from the District Court’s heightened standard which ruled the plaintiffs must show that fewer wolves would be killed.

Wildlife also argued that based on its current wolf-maintenance responsibilities, IDFG would exercise its independent authority and continue wolf-hunting to address the predation issues thus, defeating redressability. The Ninth Circuit quickly held that IDFG has not expressed an intent or ability to replace Wildlife Services’ lethal wolf-management operations. Therefore, whether IDGF would implement an identical program as such is a matter of speculation.

Conclusion and Implications

In a win for the conservation groups, the Ninth Circuit Court of Appeals reversed the U.S. District Court’s ruling and held that the plaintiffs’ procedural injuries were indeed redressable. Though courts generally grant a high level of deference to oversight agencies such as the Fish and Wildlife Service, a win on a procedural challenge, like Article III standing, may be a new avenue for conservation groups to challenge controversial laws to better protect endangered species. Interestingly the court pointed out in a footnote why it did not directly address the additional issue of demonstrating causation: “Causation is not at issue here. However, because standing is a constitutional requirement, we note that Plaintiffs’ injury—reduced aesthetic and recreational enjoyment of wolves in Idaho—is ‘not too tenuously connected’ to Wildlife Services’ alleged NEPA violation, thus establishing causation under the relaxed standard for procedural injuries. *Salmon Spawning*, 545 F.3d at 1229.” The Ninth Circuit’s decision is available online at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/23/18-35075.pdf> (Rachel S. Cheong; David D. Boyer)

DISTRICT COURT FINDS FEDERAL GOVERNMENT WAIVED SOVEREIGN IMMUNITY FOR NEGLIGENT RESPONSES TO FLINT WATER CRISIS

Burgess v. United States, ___F.Supp.3d___, Case Nos. 17-11218, 18-10243 (E.D. Mich. Apr. 18, 2019).

The U.S. District Court for the Eastern District of Michigan denied the federal government's motions to dismiss residents' suit against the United States under the Federal Tort Claims Act (FTCA) for the U.S. Environmental Protection Agency's (EPA) role in the Flint water crisis. A group of Flint residents alleged that EPA officials were negligent in carrying out the agency's oversight authority under the federal Safe Drinking Water Act (SDWA). The federal government moved to dismiss plaintiffs' action for lack of subject matter jurisdiction, contending sovereign immunity had not been waived because: 1) state law would not impose liability in similar circumstances (the premise for waiving immunity under the FTCA), and 2) the discretionary function exception to liability would apply. The District Court rejected both contentions.

Factual and Procedural Background

Plaintiffs' suit against the United States, arising from what is now known as the Flint Water Crisis, follows earlier actions brought against the City of Flint, the State of Michigan, and related officials.

The Safe Drinking Water Act

Section 1414 of the SDWA requires the EPA to notify a state and provide technical assistance when a public water system does not comply with the act. If the state fails to take timely enforcement action, the EPA is required to issue an administrative order requiring compliance or commence a civil action. Section 1431 of the SDWA further grants the EPA emergency powers when it has information that (i) a contaminant has entered or is likely to enter a public water system, (ii) which may present "an imminent and substantial endangerment to the health of persons," and (iii) state or local authorities have not acted to protect the public health.

The Flint Water Crisis

In April 2014, the City of Flint (City), Michigan changed the source of its water supply, suspending

the purchase of finished drinking water from Detroit to draw on raw water from the Flint River processed through Flint's outdated water treatment plant.

Within weeks after the switch, EPA received a record number of resident complaints about skin rashes, hair loss, and foul smelling and tasting water. After some investigation, EPA determined that: (1) the water service lines in Flint were galvanized iron, (2) water drawn from the Flint River was highly corrosive and lead-based service lines posed a significant danger of lead leaching out of pipes, (3) Michigan was not requiring corrosion control treatment in Flint (despite communications from EPA staff urging otherwise), (4) the City was distorting its water samples to give residents false assurances about water lead levels, and (5) water samples from residents' homes showed noncompliant lead levels. The EPA was also aware of the health risks posed by lead exposure, particularly to children and pregnant women.

Internal reports established that EPA had the authority and sufficient information to issue an SDWA § 1431 emergency order to protect Flint residents from lead-contaminated water as early as June 2015. The EPA did not issue an emergency order until January 2016. In at least some of its communications with Flint residents, EPA also indicated that the City's drinking water met applicable health standards.

The District Court's Decision

The United States must waive its sovereign immunity in order for a court to have jurisdiction over a claim against the federal government. Through the FTCA, Congress waived the federal government's immunity from claims of injury arising from an act or omission of an employee, if state law imposes liability on a private person under similar circumstances. The FTCA excludes from its waiver of immunity any claim based on a discretionary function.

Liability under State Law

Rejecting the federal government's contention that Michigan law would not impose liability on pri-

vate individuals in similar circumstances, the District Court found plaintiffs stated a cause of action under Michigan's Good Samaritan doctrine. The doctrine provides that undertaking services to protect another person creates a duty of care and liability for negligent performance, if the negligence increases the risk of harm. The court found that EPA had undertaken to render services to plaintiffs by engaging in the oversight of state and local actors under the SDWA. By alleging EPA's negligent oversight increased the risk of harm to Flint's residents, plaintiffs' stated a claim for liability under state law sufficient to proceed under the FTCA.

The Discretionary Function Exception

To determine whether plaintiffs' suit was barred by the discretionary function exception, the District Court applied a two-step analysis. The court first determined whether the challenged act or omission was discretionary in nature, and second, if so, whether the challenged discretionary conduct was susceptible to policy analysis. The discretionary function exception applies only to judgments based on policy.

Plaintiffs alleged that EPA was negligent in failing to timely respond to the crisis as mandated by §§ 1414 and 1431 of the SDWA, including failing to warn residents of the health risks posed by Flint water. Plaintiffs also alleged the EPA was negligent when responding to residents' complaints by misleading them about the safety of the water and the character of state and local management.

On plaintiffs' first claim, the District Court found that EPA had discretion to issue warnings under the SDWA, but that the agency's failure to warn residents

could not be justified by any permissible exercise of policy judgment. While regulatory decisions are generally presumed to be based in policy, the court found that the SDWA authorized EPA to exercise discretion in oversight based only on objective scientific and professional standards. Moreover, the facts of the crisis presented:

. . . a safety hazard so blatant that [officials'] failure to warn the public could not reasonably be said to involve policy considerations.

Given the "obvious danger" to the community and EPA's knowledge of the facts, the court concluded "this is an instance where decisions by government actors, even if discretionary, may pass a threshold of objective unreasonableness" that bars exemption from liability.

On plaintiffs' second claim, the court again found EPA's decision regarding whether and how to respond to residents' complaints was discretionary, but that once the government decided to act, "it was required to do so without negligence." Exemption from liability was thus denied.

Conclusion and Implications

The exercise of administrative discretion is presumed to be grounded in considerations of public policy, and thus beyond the reach of tort liability. This case provides a rare example of discretionary conduct that falls outside the presumption of regulatory immunity. The court's decision is available online at: <https://www.courthousenews.com/wp-content/uploads/2019/04/burgess-flint.pdf>

COLORADO SUPREME COURT CLARIFIES STANCE ON RESUME NOTICE, WATER COURT JURISDICTION

Sheek v. Brooks, 2019 CO 32 (Colo. 2019).

The Colorado Supreme Court recently upheld a Water Court's decision in a case that clarified the required resume notice for Colorado Water Court cases. The High Court's decision also addressed the subject-matter jurisdiction of district-level Water Courts.

Background

Roger Brooks filed a change application in Water Court in 2008. In that application, he requested to change the point of diversion for his water from the Giles Ditch to the Davenport Ditch because the location of the property made him unable to use water diverted at the Giles Ditch. In Colorado, all Water Court applications are required to be published—called “resumes”—in a local paper. C.R.S. § 37-92-302(3). The resume must contain pertinent information such as to:

... put interested parties 'to the extent reasonably possible on inquiry notice of the nature, scope, and impact of the proposed diversion.' *Monaghan Farms, Inc. v. City & Cty. of Denver By & Through Bd. Of Water Comm'rs*, 807 P.2d 9, 15 (Colo. 1991) (quoting *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 633 (Colo. 1987)).

Typically, this information includes the legal description for the point of diversion, the source (traced to the principal basin river), the appropriation date, and use of the water, among other things. Brooks's resume included all of the necessary information, however the legal description of the headgate for the Davenport Ditch, where the water would be changed to, listed in the incorrect section and range. The mistake was realized four months later, and Brooks moved to amend the application to change the description from “NE ¼ of the SE ¼ of Section 13, Township 36N, Range 13W” to “NW ¼ of the SW ¼ of Section 18, Township 36S, Range 12W.” The motion noted that the headgate was essentially on the section line (the east line of Section 13 and the west line of Section 18) and therefore the actual change in

the legal description was only 100 feet.

The Water Court granted the motion, finding that “no person [would] be injured by the amendment.” The only objector to the application was the Colorado Water Conservation Board (CWCB). Stipulation was later reached with the CWCB and the court entered a decree granting the change in point of diversion on December 23, 2009.

Fast forward to 2016. Gary Sheek, the Sheek Family Limited Partnership, and Pamsey I. Sheek (Sheek) filed a complaint in the Water Court seeking: 1) declaratory judgment that Brooks's change decree was void; 2) quiet title to an access easement for the Davenport Ditch; 3) trespass; 4) theft and interference with a water right; and 5) injunctive relief. Although Sheek did not own the land underlying the Davenport Ditch headgate (that land was owned by the James Fenberg Revocable Trust, to which Brooks had provided notice in 2008) but rather Sheek claimed sole ownership of all Davenport Ditch water rights. He also claimed to have “exclusively operated, maintained, and repaired the headgate and the ditch.”

In response, Brooks filed a motion for summary judgment on the first claim and a motion to dismiss the other four claims. The Water Court for Division No. 7 granted both motions, stating that Brooks's resume was sufficient to meet the standards of C.R.S. § 37-92-302(3) and therefore the decree was valid. The order granting the motion to dismiss noted that, because of the decree, Brooks had a right to use the Davenport Ditch and therefore claims for trespass and injunctive relief were moot. The court then held that it lacked ancillary jurisdiction over the other two claims. Sheek then appealed—in Colorado Water Court appeals skip the Court of Appeals and go straight to the Colorado Supreme Court.

The Supreme Court's Decision

The Colorado Supreme Court affirmed the Water Court's ruling that Brooks's resume notice was sufficient. The court also upheld the dismissal of the remaining four claims; However the Supreme Court ruled that those claims should have been dismissed by

the Water Court for lack of subject matter jurisdiction.

Resume Notice

Turning first to the resume notice, the court recited that:

To meet the standard, a resume notice must include “fact sufficient to attract the attention of interested persons and prompt a reasonable person to inquire further.” *Monaghan Farms*, 807 P.2d at 15; *see also City of Black Hawk v. City of Central*, 97 P.3d 951, 959-61 (Colo. 2004). Thus, a resume notice is defective only if, “taken as a whole [it] is insufficient to inform or put the reader on inquiry of the nature, scope [,] and impact of the proposed diversion.” *Monaghan Farms*, 807 P.2d at 15. We have explained that “[i]n cases where notice was inadequate, the applicants’ filings were ‘characterized by the complete absence of material information concerning the dispute water rights.’” *City of Black Hawk*, 97 P.3d at 959 (quoting *City of Thornton v. Bijou Irrigation*, 926 P.2d 1, 26 (Colo. 1996)).

As mentioned above, Brooks’s resume included all pertinent information, with the exception of the erroneous legal description for the Davenport Ditch headgate. However, the resume did mention the Davenport Ditch by name five times, including once in bold font. As the Court noted, sufficiency of resume notice is fact-specific inquiry particular to each specific case. Here, Sheek claimed to be the only user of the Davenport Ditch and the application specifically stated that the change was to be from the Giles Ditch to the Davenport Ditch. Therefore, the Court ruled, Sheek couldn’t possibly argue that he did not have adequate notice of Brooks’s proposed change.

Erroneous Legal Description

Regarding the erroneous legal description, Colorado Water Rule 4 generally requires republication of a resume if the correction results in a change to a

different quarter section. But subsection (c) of Rule 4 provides that the water judge may determine that republication is not necessary if no injury will result—as mentioned above the Water Court made that finding in 2008. This resulted in a rather clear decision, the Supreme Court ruled, that Brooks’s resume was sufficient and therefore the granting of the motion for summary judgment was proper.

Subject Matter Jurisdiction

The Supreme Court then took an interesting angle on dismissing the remaining four claims, finding that the Water Court in 2016 should have dismissed the claims for lack of subject matter jurisdiction. The Colorado Water Courts have jurisdiction over “water matters” under C.R.S. § 37-92-203, and also over “issues ancillary to water matters.” *Crystal Lakes Water & Sewer Ass’n v. Backlund*, 908 P.2d 534, 543 (Colo. 1996). That being said, property issues, such as the claims for trespass or theft, are not considered ancillary to water matters and instead are in issue more proper for a regular District Court. *FWS Land & Cattle Co. v. Colo. Div. of Wildlife*, 795 P.2d 837, 841 (Colo. 1990). Therefore instead of dismissing the claims for mootness, the Supreme Court affirmed the dismissal, but on the grounds of lack of subject matter jurisdiction.

Conclusion and Implications

It is surprising that this case was appealed to the Colorado Supreme Court, as the factual circumstances, statutory standards, and accompanying case law were relatively straightforward. The Court affirmed the leniency of the resume notice standard—it does not have to be perfect so long as any interested party would be placed on sufficient notice. Finally, the Court, for the second time in 2019, further clarified “water matters” and the jurisdiction of Water Courts. The Supreme Court’s decision is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2018/18SA110.pdf (John Sittler, Paul Noto)

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