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WESTERN WATER LAW & POLICY REPORTER™

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WESTERN WATER NEWS

NEVADA UPDATE: WATER PURCHASED BY WALKER BASIN RESTORATION PROGRAM IN 2010 FINALLY REACHES WALKER LAKE AFTER YEARS OF COURT DELAYS

Almost a decade after completing its first water acquisition, on July 5, 2019, the Walker Basin Restoration Program (Program) finally saw its purchased water flow into Walker Lake. This milestone sets the stage for additional water transactions in furtherance of the Program's goal of restoring this desert terminal lake to a level that can support native fish and wildlife species. Additional water acquisitions are already underway.

History of Walker Lake

Walker Lake is the terminus of the Walker River, which flows from the Sierra Nevada mountains in California into the Great Basin of Nevada. The majority of precipitation and surface water flow into the Walker River Basin occurs in California, but most of the water is consumed by irrigators in Nevada. Since agricultural appropriations from the river and its tributaries first commenced in the mid-19th century, the size and volume of Walker Lake have shrunk significantly, and the concentrations of total dissolved solids have risen to the point where the lake can no longer sustain a fishery. The health of Walker Lake affects many species, including the once-thriving population of Lahontan cutthroat trout and migratory birds, including the common loon, which once used Walker Lake as a stopover on the Pacific Flyway.

Lawsuits over the waters of the Walker River commenced over a century ago and are ongoing. The most recent iteration of that litigation includes efforts to augment flows into Walker Lake for fish and wildlife based upon the public trust doctrine. That issue is currently being considered by the Nevada Supreme Court (*see*, September 2018 issue of *Western Water Law and Policy Reporter* [22 *West. Water L. & P'lcy Rptr.*301]).

The Walker Basin Restoration Program

In addition to the litigation, a program is underway to purchase and lease water rights from willing sellers for transfer to Walker Lake. Established by Congress in 2009, the Walker Basin Restoration Program seeks to restore and maintain Walker Lake while protecting agricultural, environmental and habitat interests in the Walker Basin. Originally administered by the National Fish and Wildlife Foundation (Foundation), the Program is now being implemented by the Walker Basin Conservancy, which acquires agricultural land and appurtenant water rights, implements land and water stewardship measures and creates opportunities for increased public access to the river for recreational uses.

The Program's First Application to Transfer Irrigation Water to Instream Uses

The Foundation purchased its first water rights under the Program in 2010. In 2011, the Foundation filed Application 80700 with the Nevada State Engineer to change the point of diversion, place of use and manner of use of certain water rights adjudicated under the Walker River Decree. Application 80700 sought to change 7.745 cubic feet per second (cfs) of irrigation water to instream flow purposes for wildlife.

Numerous individuals and entities filed protests. To address those protests and ensure that no other water user was injured by the proposed changes, the Foundation agreed to limit its in-stream water use to the historic consumptive-use portion of the decreed water rights and to dedicate the non-consumptive portion to be managed at the discretion of the federal water master to mitigate hydrological losses in the system.

In 2014, the Nevada State Engineer approved the application in Ruling 6271, issuing a permit for the consumptive use portion of the irrigation rights, which amounted to 4.122 cfs, not to exceed 2,003.10 acre-feet annually. The place of use is Walker Lake and lower reaches of the Walker River in Nevada.

Decree Court Review of the Nevada State Engineer's Approval of the First Change Application

The administrative regulations that govern the

Walker River Decree require the federal decree court to approve any proposed modification to decreed rights. Consistent with that requirement, after the Nevada State Engineer issued Permit 80700, the Foundation petitioned the decree court for approval. Certain water users and the federal water master charged with administering the Walker River Decree opposed the petition.

The District Court denied the requested modifications to the decree, finding that they would injure the water rights of farmers. The court also accepted the argument made by the federal water master that Walker Lake is not within the Walker River Basin, as that term is used in the decree, and therefore cannot be designated a place of use of decreed rights.

The Ninth Circuit's Reversal of the Decree Court

The Foundation appealed, and on May 22, 2018 the Ninth Circuit Court of Appeals reversed, concluding that the District Court had not afforded the Nevada State Engineer proper deference and erroneously concluded that Walker Lake is outside the Walker River basin. Looking at the record before the Nevada State Engineer, the appellate court panel concluded that substantial evidence supported the State Engineer's finding that limiting the transfer to the consumptive portion of the decreed rights would avoid conflict and injury to other existing water rights. The panel further held that the State Engineer applied the correct legal rule. Finally, the panel held that, to the extent the District Court made its own findings of fact, those findings were clearly erroneous.

While the appeal was pending, the Walker Basin Conservancy took over administration of the Program. Because the Foundation remained the owner of record of the water rights under Permit 80700, it was still the named party and litigant in the decree court proceedings.

The Foundation's Petition for Writ of *Mandamus* to Compel Federal Water Master's Compliance With Modified Decree

On remand, the federal water master objected to the decree court issuing an order conforming the Decree to Ruling No. 6271 upon the ground that owners of portions of water rights claims remaining under irrigation should be provided with separate, individual notice of the proposed modification of the decree. In response to that concern, the decree court directed the Foundation to provide such notice. The Foundation complied, and no water rights owner submitted comments on the proposed order modifying the decree.

On April 15, 2019, the District Court issued an order modifying the decree to conform to the State Engineer's Ruling 6271. Thereafter, however, the federal water master would not administer the modified decree to deliver the water for instream use without the Foundation's compliance with additional conditions, including installation of new instream measuring devices. Representatives of the Walker Basin Conservancy met with the federal water master in an effort to overcome the impasse, but the parties could not resolve their differences.

As a result, the Foundation filed a petition for writ of *mandamus* in the decree court, which requested that the court order the federal water master to start delivering water immediately according to Ruling 6271. After the water master filed a response but before the court held a hearing, the parties reached a resolution that avoided adjudication of the writ petition. The parties agreed that: 1) an existing gage could be used to measure the Foundation's instream water rights; 2) the Program would fund the reactivation of a USGS gage for a three-irrigation season trial period in order to obtain additional stream flow data; and 3) the parties would engage in a technical analysis at the end of the three-year trial period and revisit at that time whether additional gages are needed. The parties reserved their rights to relitigate the issues raised in the writ petition, should the need arise.

The decree court signed an order approving the stipulation between Foundation and the water master on July 1, 2019. Four days later, and nine years after the water rights were acquired, for the first time, the purchased water remained in stream for the benefit of fish and wildlife.

Conclusion and Implications

The administrative and judicial proceedings related to Application 80700 were the prototype for all future water acquisitions and change applications that will be sought by the Walker Basin Restoration Program in furtherance of its goals of restoring Walker Lake. To date, approximately $82 million of Program funds have been expended to acquire 43.7 percent

of the water the Program has estimated is needed to restore Walker Lake's fishery.

With the primary legal issues now settled, future applications and any permits issued to change decreed irrigation to in-stream flow rights will have fewer barriers to approval by the Nevada State Engineer and the decree court. As transaction costs and the time to effectuate those transactions decrease, we can anticipate that more water will reach Walker Lake in the near future.
(Debbie Leonard)

NEW MEXICO UPDATE ON REMEDIATION AND EVENTUAL PERMANENT REMEDY OF THE KIRTLAND AIR FORCE BASE JET FUEL SPILL IN ALBUQUERQUE AREA AQUIFER

Kirtland Air Force Base (KAFB) has continued to move forward with remediation efforts regarding the jet fuel spill discovered almost 20 years ago. The most recent correspondence on the matter came in the form of a letter from the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) to Assistant Air Force Secretary John Henderson which discussed the future of the clean-up process as well as certain concerns the ABCWUA has going forward. Analyses of soil cores is ongoing as well as the construction of additional data-gap wells and has been determined to be necessary before a permanent solution can be reached; this data will be included in a report that will be sent to the New Mexico Environmental Department (NMED) in November. The current interim solution is a pump-and-treat system, which began operation in June 2015 as well as a soil vapor extraction system. As of June 30, 2019, 668 million gallons of water have been treated resulting in 118 grams of ethylene dibromide (EDB) being removed. KAFB also touts an 86% reduction of the EBD plume north of Ridgecrest Drive.

Background

In 1999, jet fuel was discovered 500 feet below the ground in the Albuquerque Aquifer, which is a partial source of the City of Albuquerque's municipal water supply. The spill was initially estimated to be around 8 million gallons, however, most recent information estimates the spill to be as large as 24 million gallons, which would make it the largest toxic spill into a public water system in U.S. history. In 2007, it was concluded that the spill had reached the water table. The consensus regarding the plume's direction of travel is that it has and is currently moving north of KAFB and into the vicinity of southeast Albuquerque near the Ridgecrest neighborhood. This area contains two of the largest drinking water wells maintained by the ABCWUA. Negotiations have remained a regular occurrence between ABCWUA and KAFB as they discuss specific contingency plans should the spill reach drinking water wells.

The Rio Grande bisects Albuquerque's Aquifer, which is located in the Middle Rio Grande Basin. The Aquifer is approximately 100 miles long and 25-40 miles wide. It is bounded on the west by the Rio Puerco, Tijeras Canyon on the east, Cochiti Pueblo to the north and San Acacia on the south. The Aquifer's porous composition allows for the easy flow and percolation of water. Recharge to the Aquifer comes from snowmelt in the northern mountains and approximately eight inches of annual rainfall. Factors affecting the Aquifer's recharge rate include soil permeability, topography, evapotranspiration rates, soil—moisture content, depth to the Aquifer, and irrigation return flows.

The jet fuel leak is believed to have originated from corroded, underground pipes that supplied fuel to KAFB's Bulk Fuel Facility (BFF) which was constructed in 1953. The leaks are estimated to have originated and continuously occurred for a period of 40 years prior to their discovery. The spill site is located in the western part of KAFB where the BFF fuel processing and storage occurred. The spill site includes the former fuel offloading rack and the underground, light non-aqueous phase liquid plume, both of which fall under the "BFF Spill." Since the spill began, and in the following decades, the fuel seeped an estimated 400-500 feet downward into the Albuquerque Aquifer. The Air Force is continuing to work with the NMED's Hazardous Waste Bureau on remediation efforts in accordance with, *inter alia*, the federal Resource Conservation and Recovery Act and the New Mexico Hazardous Waste Act.

The Latest on Remediation

Current feelings of both the NMED and the ABCWUA are that KAFB has seemingly become less transparent in their release of data and concern has risen as to the timetable set for the permanent remedy to the spill. Specific attention is being focused on the plume still located south of Ridgecrest Drive where a considerable amount of contamination still exists. Statements made by Assistant Air Force Secretary John Henderson indicate that the remedy will not be able to take place until 2023. Several steps must be taken before a remediation can commence, namely, KAFB must wait for the NMED to approve their investigative report that will be submitted in November, approval of which is not expected until 2021. Once this report is approved, a corrective measures evaluation by KAFB is set to begin but cannot do so until soil cores are collected, and additional data-gap wells can be installed to better evaluate the sources of the EBD. This evaluation must also obtain the approval of the NMED before any remedial action can take place, pushing the remediation date into 2023. The Air Force has expressed interest in working with NMED to shorten the timeline.

Further disagreement between KAFB and NMED has arisen due to NMED's concern that the Air Force is committed to protecting drinking water, but seems less inclined to treat all groundwater, regardless of its use. KAFB argues that special attention must be paid to the City of Albuquerque's drinking water supply and that it will remain the priority, however overall remediation is still the goal once a permanent remedy can begin.

Monitoring Wells

KAFB has drilled more than 130 monitoring wells in its efforts to assess the jet fuel's plume, however more are still needed. Of these wells, 24 are sentinel wells strategically positioned between the plume and the ABCWUA drinking water wells. These wells monitor any potential threat to the water supply. These wells are monitored quarterly while the remaining KAFB wells, along with VA hospital wells and City of Albuquerque wells, are monitored monthly. As of July 2019, none of the sentinel wells have reported any EBD. It is KAFB's monitoring wells that provided the data for the increase in the estimated size of the spill from 8 million gallons to as much as 24 million gallons. The data and calculations continue to be reviewed and the actual size of the spill will remain unknown until it is fully remediated.

Soil Vapor Extractors

Current interim remediation is being conducted by KAFB via soil vapor extractors which are used to vacuum out and then burn off gases from the spill's plume. It is important to note, however, that not all of the EBD will be able to volatize and be vacuumed out. NMED has stated that it is anxious to see the results of the vapor extraction, but data on its effectiveness has yet to be released. Between pump-and-treat methods and soil vapor extraction, $1.3 million has been reserved as funding for remediation in 2019, down from the $2.5 million in 2018. A total of $125 million has been spent on the clean-up project so far.

KAFB acknowledged early on that it "owns" the BFF Spill and is committed to leading the containment and remediation efforts and has seemingly followed through on those commitments, regardless of concerns regarding the timetable. In its March 2011 Assessment Report to Congressional Committees, KAFB concludes:

> . .[t]he Air Force accepts responsibility for the spill and its remediation and is leading the effort to ensure it is completed as quickly as possible . . . . To be effective the effort will require the close cooperation and communication of all stakeholders to include the public, NMED, the Air Force, the City of Albuquerque and the Albuquerque Bernalillo County Water Utility Authority.

Conclusion and Implications

The NMED and KAFB will need to solve some of their disagreements in order to further the remediation process and are both under increasing public pressure to do so. However, with the involvement of stakeholders, federal and state agencies, and active negotiations regarding monitoring and permanent remediation, the logistics of the clean-up are moving forward. The Air Force states that in the interim, pump-and-treat systems and soil vapor extraction will continue "until the final remedy or remedies are in place, or cleanup standards in the [Resource Conservation and Recovery Act] Permit are achieved." (Christina J. Bruff)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA GOVERNOR NEWSOM SIGNS SB 200 ESTABLISHING SAFE AND AFFORDABLE DRINKING WATER FUND

Beginning in fiscal year 2020-21 and until June 30, 2030, the California State budget will include a newly-established "Safe and Affordable Drinking Water Fund" to be appropriated by an allocation amounting to 5 percent of the proceeds of the state Greenhouse Gas Reduction Fund (GGRF), up to $130 million per year. If, beginning in fiscal year 2023-24 and until June 30, 2030, the annual transfer is less than $130 million, the difference will be covered by a transfer from the state's General Fund. In addition, in August 2019, the State Water Resources Control Board (SWRCB) also authorized $80 million to assist severely disadvantaged community projects. This latter one-time funding comes from Proposition 68 appropriations.

Governor Newsom's meeting with the families of a small community outside of Sanger, California highlighted his commitment to the issue of safe and reliable drinking water, while also serving well to illuminate the situation in which thousands of Californians find themselves in day in and day out. For instance, the families of the community of Tombstone receive their water through a grant program in the form of five eight-gallon jugs every other week. They receive their water this way because their own taps—when functioning—would spray air, dirt, and other contaminants along with any water produced.

This community is just one of many across the state in need of assistance, which is why the 2019-2020 state budget, enacted on June 27, 2019, allocated $130 million to safe drinking water solutions. Just shy of one month after the enactment of the state budget, SB 200 was signed into effect to help such disadvantaged communities in accordance with California's policy that safe, clean, affordable, and accessible water is a right that every human being is entitled.

The Life and Death of a Water Tax

The budget action came about in a surprise move by the Senate that undercut a multi-year effort to impose a tax on water agencies by some of the most powerful players in Sacramento, including former Governor Jerry Brown. The hope of certain non-governmental agencies and high-level administrative staff was to tax drinking water to provide a permanent funding source for the more than 300 disadvantaged communities currently without access to safe drinking water. While the goal was laudable, the method created a host of problems. Opponents argued that a tax on water is regressive and takes away funds from local investment in needed water infrastructure.

The Budget and the 'No Tax' Option

Although rumors of a "no tax" option in the Senate had made the rounds for weeks before the passage of SB 200, the speed of the last-minute budget play still came as a shock to many involved. On one morning, with little warning or fanfare, the budget item appeared on a budget subcommittee agenda and was passed, and Senate leadership let it be known that there would be no vote on any tax on the Senate Floor this year. It took several more weeks for all stakeholders to support the action, but all sides eventually did.

Allocating the money was the first and most significant part of creating the new program, but all budget items need control language to direct how the money will be spent. Usually that happens in a budget trailer bill, but in instance Senator Bill Monning was allowed to put the control language into one of his bills. That bill became SB 200, which passed with no opposition and significant bipartisan support.

Senate Bill 200

In brief, SB 200 creates the account to receive the funds from the GGRF and the General Fund, and requires the SWRCB to create a plan to identify public water systems that consistently fail to meet drinking water standards, and then prioritize the funding needs. Most importantly, SB 200 addresses the funding gap that has frustrated numerous attempts to address the problem in the past. Hundreds of millions

of dollars have been made available over the last ten years for safe drinking water, but new projects and infrastructure need operation and maintenance to be effective. These are the funds that most smaller water agencies lack. By providing a reliable way to fund operations and maintenance for safe drinking water, SB 200 will likely be viewed as one of the more significant steps in addressing the problem.

The bill establishes the operation of public water systems, wherein administrators of such public water systems may be contracted with or provided with grant funding to assist with the goal of providing an adequate supply of affordable, safe drinking water. Local agencies and privately owned public utilities may file applications with the SWRCB to serve as administrator and operate their designated water system, but eligible recipients of grant funding detailed in the Health and Safety Code § 116766(c) extend to nonprofit organizations, mutual water companies, Native American tribes, and others.

Grant funding under the bill will be provided to eligible applicants for a host of specified purposes (listed in California's Health and Safety Code § 116766) including activities related to the delivery of safe drinking water, consolidation and expansion of existing water systems, efforts to create self-sufficiency of water systems, and the accompanying board costs for implementation and administration of programs.

Conclusion and Implications

Recent statistics indicate that nearly one million Californians rely on water from non-public water systems or reside in disadvantaged communities that are disproportionately affected by a lack of access to clean drinking water. Senate Bill 200 makes funds available for projects aimed at providing safe drinking water to rural communities within the state including, without limitation by way of consolidation of water systems or extension of drinking water services to other public water systems, domestic wells and small systems; the development, implementation, and sustainability of long-term drinking water solutions; and certain costs related to the implementation and administration of the various programs eligible for funding under this bill. The bill also addresses adverse impacts related to climate change on water supply and water quality by helping secure water resources statewide.

It is expected that the first set of funding will be provided in the form of grant and awards to those water systems facing the most pressing issues. Funding may also be provided to facilitate longer term planning solution as well.

The Drinking Water Fund offers much needed funding to water systems in need of assistance in reaching that level of accessibility so demanded by the California Constitution and by the policy adopted in Water Code § 106.3(a). With the bill's implementation, local agencies and other eligible applicants will be able to seek the additional aid they need in providing safe drinking water to the people of California.

The full text and history of SB 200, signed into law by Governor Newsom on July 24, 2019, is available online at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB200
(Miles Krieger, Steve Anderson, Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. ENVIRONMENTAL PROTECTION AGENCY ISSUES PROPOSED RULE LIMITING STATE AND AUTHORIZED TRIBAL AUTHORITY WHEN ISSUING SECTION 401 WATER QUALITY CERTIFICATIONS

On August 9, 2019, the U.S. Environmental Protection Agency (EPA) issued a proposed rule, which would limit the authority of the states and authorized tribes to review the water quality impacts of discharges from federally-permitted energy and other infrastructure projects. Review of projects by states and authorized tribes will be limited to a one-year review period (or shorter "reasonable" timeframe if established by relevant federal permitting agencies) that begins upon receipt of a Clean Water Act (CWA) § 401 certification application request, rather than when the application is deemed complete by the reviewing state agency or authorized tribe. If not completed within the firm one-year timeframe, the ability of the state or authorized tribe to impose conditions pursuant to CWA § 401 will be waived. More importantly, the proposed rule limits the states' and tribes' authority to consider only water quality impacts of projects, eliminating the ability of states to impose conditions other than those specifically related to the discharge of "pollutants" from a "point source" into "waters of the United States," such as conditions that pertain to "non-point" source discharges or other unrelated project elements. Because a limitation or requirement offered by a state or authorized tribe unrelated to water quality would not be considered a "condition" that the federal agency must include in the federal permit under the proposed rule, federal agencies are being provided what has been called a "veto" power over the state's or authorized tribe's conditions.

Background

Under § 401 of the CWA, states and authorized tribes have the authority to assess the potential quality impacts of discharges from federally-permitted or licensed projects into the navigable waters within their borders through a water quality certification process. Section 401 requires a state or an authorized tribe to finish its review within a reasonable period, which shall not exceed one year after "receipt" of such request, or the state certification requirement is waived. (33 U.S.C. §§ 1341(a)(1), 1377(e).) Further, CWA § 401(d) authorizes the states and authorized tribes to include conditions, including "effluent limitations and other limitations, and monitoring requirements" that are necessary to assure that the applicant for a federal license or permit will comply with the CWA and the appropriate state law requirements. (33 U.S.C. §§ 1341(d), 1377 (e).)

On April 10, 2019, President Trump issued Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth" (Exec. Order No. 13868, 84 Federal Register 15495 (Apr. 10, 2019), directing the EPA to update the "outdated" guidance and regulations regarding the CWA § 401 water quality certification process. The Executive Order stated that the outdated guidance and regulations are the cause of "confusion and uncertainty and are hindering the development of energy infrastructure." As such, the Executive Order directed the EPA to issue new § 401 guidance within 60 days of the Order, and propose new section 401 regulations within 120 days of the Order.

Following the Executive Order, on June 7, 2019, the EPA issued an updated guidance document to modernize previous guidance and clarify existing CWA § 401 requirements. On August 9, 2019, EPA then issued the proposed rule to revise the CWA § 401 water quality certification regulations in accordance with the Executive Order.

Proposed Rule on CWA Section 401 Water Quality Certification

The EPA states that the proposed rule is based on consistency with the plain text of CWA § 401, and it:

> . . .increase[s] efficiencies, and clarif[ies] aspects of CWA § 401 that have been unclear or subject to differing legal interpretations in the past.

The major changes of the proposed rule follow. The proposed rule clarifies that CWA § 401 certi-

fication conditions are triggered only by the potential "discharge" into "a water of the United States" from a "point source." The proposed rule elaborates on the definitions of these key terms, but the intention is to strictly limit the scope of conditions that can be imposed. States and authorized tribes would no longer be able to consider effects and impose conditions unrelated to water quality as part of the water quality certification review process.

The proposed rule also mandates that any conditions resulting from a CWA § 401 certification be imposed not in the certification, but in a federal permit issued for the project.

The proposed rule limits the review period of the states and authorized tribes to a maximum of one year, and the federal agencies have the discretion to establish even a shorter review period, as long as the agency's determination is reasonable. This review period commences upon receipt of a certification application, rather than the receipt of a "complete application," as determined by the certifying authority. If not complete within the timeframe, the states or authorized tribes waive their ability to impose conditions under CWA § 401.

Conclusion and Implications

Once the proposed rule is published in the Federal Register (Docket ID No. EPA-HQ-OW-2019-0405), EPA will open a 60-day public comment period. Pursuant to Executive Order 13868. The Executive Order requires that the proposed rule must be finalized by May 2020. The proposed rule effectively narrows the scope and timeline of state review of the water quality certification and, to an extent, provides federal agencies with a veto power over the water quality certification conditions. If this proposed rule is finalized, in all likelihood, it would be subject to challenges from several states and tribes. In fact, Attorneys General of 16 states previously filed a comment letter with the EPA on May 24, 2019, stating that the proposal undermines the broad statutory authority of the states to vet projects for impacts on water quality under CWA § 401, (*see generally*, *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology,* 511 U.S. 700 (1994)), and the long standing principles of cooperative federalism. (Nicole Granquist, Hina Gupta, Meredith Nikkel)

NEW BIOLOGICAL OPINIONS ANTICIPATED TO IMPACT THE COORDINATED OPERATION AND WATER SUPPLY OF CALIFORNIA'S LARGEST WATER PROJECTS

In August 2016, the U.S. Department of the Interior, the U.S. Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) requested reinitiation of the Endangered Species Act (ESA) Section 7 consultation with the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) on the Coordinated Long-Term Operation of the federal Central Valley Project (CVP) and State Water Project (SWP). It is anticipated that pursuant to this consultation process, FWS and NMFS will soon issue new Biological Opinions for the coordinated long-term operation of the CVP and SWP. The new Biological Opinions may have significant implications for the operations and water supplies of the CVP and SWP—the two largest water storage and delivery systems in the state of California.

Background

The CVP is the largest water storage and delivery system in California and provides water to irrigate approximately 3.25 million acres of farmland and supplies water to more than 2 million people through long-term water contracts. The SWP is the largest state-operated water supply project in the United States. The CVP and SWP have been operated pursuant to a series of cooperative operating agreements between the Bureau and DWR.

The Bureau's operation of the CVP is subject to numerous laws, including the ESA, 16 U.S.C. § 1531 *et seq*. Under the ESA, since the early 1990s, the Bureau has engaged in what are referred to as "Section 7" consultations (16 U.S.C. § 1536) with the FWS and the NMFS. At the conclusion of these Section 7 consultations, FWS and NMFS have issued Biological Opinions regarding the potential effects

of the coordinated long-term operation of the CVP and SWP on certain species listed under the ESA and those species' Critical Habitat.

The coordinated long-term operations of the CVP and SWP are currently subject to two Biological Opinions issued pursuant to § 7 of the ESA—a 2008 Biological Opinion issued by FWS and a 2009 Biological Opinion issued by NMFS. The 2008 Biological Opinion concluded that the proposed coordinated operations of the CVP and SWP were likely to jeopardize the continued existence of the ESA-listed delta smelt and included a Reasonable and Prudent Alternative (RPA) designed to allow continued operations through various operating prescriptions. Likewise, the 2009 Biological Opinion concluded that the proposed coordinated operations of the CVP and SWP were likely to jeopardize the continued existence of certain ESA-listed salmonid species and included a RPA with several operating restrictions. The prescriptions in those two Biological Opinions have been estimated to have reduced the long term average annual combined deliveries by the CVP and SWP by about 1 million acre-feet.

Anticipated New Biological Opinions

In August 2016, the Bureau and DWR jointly requested reinitiation of ESA Section 7 consultation with FWS and NMFS on the Coordinated Long-Term Operation of the CVP and SWP, and FWS and NMFS accepted the reinitiation request. According to the Bureau, it requested reinitation of consultation based upon the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evolution of best available science. The new Biological Opinions are nearing completion and are anticipated to be released within the next few months.

Meanwhile, on July 11, 2019, the Bureau issued a Draft Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*:

> . . .evaluating the potential long-term direct, indirect, and cumulative impacts on the environment that could result from implementation of modifications to the continued long-term operation of the CVP and SWP. (Draft EIS at p. 1-2.)

According to the Bureau, the:

> . . .EIS evaluates alternatives to maximize water supply deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements and to augment operational flexibility by addressing the status of listed species. (*Id.* at p. 1-1.)

The Draft EIS was available for public review, and the Bureau was accepting comments on the draft until August 26, 2019. The Bureau is not expected to decide on changes to CVP operations until late in 2019 or early 2020. The conclusions of the new Biological Opinions will certainly inform that decision.

Conclusion and Implications

If the new Biological Opinions conclude that the proposed coordinated operations of the CVP and SWP are likely to jeopardize the continued existence of ESA-listed species, they will contain RPAs designed to modify proposed operations so as to avoid a jeopardizing effect. The impact of the biological opinions' prescriptions on CVP and SWP water supply, whether it will increase or decrease, cannot be determined until the Biological Opinions issue.

NEPA requires that the Bureau analyze any new operating requirements contained in the biological opinions' RPAs for potentially significant environmental impacts. If the RPAs included in the new Biological Opinions impose new requirements that fall outside of the range of alternatives for operations analyzed in the Bureau's Draft EIS, the Bureau may be required to supplement its NEPA analysis. The coming months will therefore be very important in determining what new rules will govern CVP and SWP operations, and how CVP and SWP water supplies will be affected.

The only certainty is that litigation will follow. The final word on the next set of ESA rules governing CVP and SWP operations likely will not be known for a couple of years or more.
(Rebecca Harms, Dan O'Hanlon)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES FINAL CALIFORNIA WATER PLAN UPDATE 2018

The California Department of Water Resources (DWR) publishes a California Water Plan Update every five years as required by the California Water Code. DWR recently released its latest update—the Final California Water Plan Update for 2018 (Plan). The Plan outlines the state's strategy for sustainably managing and developing California's water resources for current and future generations. It also presents the status and trends of California's water-dependent natural resources, water supplies and agricultural, urban and environmental water demands.

Background

DWR updates the California Water Plan Update every five years to incorporate the latest information and science. The Plan and the updating process provide a way for stakeholder groups to collaborate on findings and recommendations and make informed decisions regarding California's water resources. Policy makers, elected officials, government agencies, tribes, water and resource managers, businesses, academia, stakeholders and the general public all look to the Plan to inform decision-making.

While the Plan itself cannot mandate actions or authorize spending for specific actions, and while it does not make project or site-specific recommendations, it does require policy and lawmakers to take definitive steps to authorize the specific actions proposed and appropriate funding needed for their implementation. The ultimate goal for the Plan and each update is to receive broad input and support from Californians, meet California Water Code requirements, guide state investments and advance integrated regional water management and regional sustainability.

The Need for a Visionary Plan Moving Forward in California

The 2018 Plan update states that California has experienced significant effects of climate change since the last Plan update in 2013. Devastating drought, widespread flooding, sea level rise and historic wildfires have all been challenges California has faced over the past several years. In the past decade alone, California weathered the deepest drought and wettest period on record. These two extremes provide a good picture of the volatility and uncertainty of California's hydrology. The 2018 Plan update recognizes the need to adapt to these challenges by encouraging a greater collaborative and coordinated statewide water management throughout the state.

The Revisions and California's Water Roadmap to 2024

The most significant change in the 2018 Plan update is DWR's awareness and sensitivity to climate change and its anticipated impact on water use in California. Within this context, the 2018 Plan update focuses on six primary goals and recommends many specific priority actions within those goals:

•Improve Integrated Watershed Management
Priority actions include: strengthen state support for vulnerable communities, support the role of working landscapes, and promote flood-managed aquifer recharge and sustainable groundwater management policies. The Plan recommends that DWR provide technical, planning and facilitation assistance for local and regional entities to evaluate opportunities and implement projects using flood flows and alternative water supplies for managed aquifer recharge.

•Strengthen Infrastructure Resiliency
The primary priority action for this goal is improving infrastructure and promoting long-term management. It prioritizes utilizing natural infrastructure and promoting partnerships, and strongly supports local and regional efforts to build water supply resilience across California.

•Restore Ecosystem Functions
Priority actions include: addressing legacy impacts, facilitating multi-benefit water management projects, and quantifying natural capital.

•Empower Under-Represented Communities
Priority actions include: expanding tribal involvement in regional planning efforts and engaging proactively with disadvantaged community liai-

sons. The Plan addresses California's vulnerable communities that lack access to a safe and reliable water supply and suggests that the state work with disadvantaged community liaisons to provide technical, managerial and financial expertise to prepare proposals for infrastructure and operations and maintenance improvement programs.

•Improve Inter-Agency Alignment and Address Regulatory Challenges
Priority actions include: incorporating ecosystem needs into water management infrastructure planning and implementation, streamlining ecosystem restoration project permitting, and addressing regulatory challenges.

•Support Adaptive Management and Long-term Planning
Priority actions include: facilitating comprehensive water resource data collection and management, coordinating climate science and monitoring efforts, improving performance tracking, developing regional water management atlas, reporting on outcomes of projects receiving state financial assistance, expanding water resource education, and exploring ways to develop stable and sufficient funding. It stresses the importance of the state assisting local agencies with their development of long-term solutions for infrastructure management, including water supply reliability, flood risk reduction, aquifer replenishment and remediation, and surface and groundwater storage. The Plan also underscores that effective water management requires access to reliable data and information, and as a result, recommends that state agencies should maintain data management best practices and work with local agencies to improve data gathering, accessibility, quality and related decision-support tools.

Conclusion and Implications

In April 2019, Governor Newsom signed an Executive Order calling for state agencies to work together to form a comprehensive strategy for building climate-resilient water systems through the 21st Century. The Plan's focus on regional and local partnerships reflects a timely response to that executive order and its important role in informing and better aligning state and local agencies, water suppliers and stakeholders on the best ways to build California's water resilience strategy as we enter a new decade. (Chris Carrillo, Michael Duane Davis)

IDAHO DEPARTMENT OF WATER RESOURCES ISSUES STATUTORY MAXIMUM PENALTY TO ADA COUNTY AND HYDROPOWER DAM OPERATORS

On August 14, 2019, the Idaho Department of Water Resources (Department) issued a statutory Notice of Violation to the Ada County Board of County Commissioners, Enel Green Power North American, Inc., and Fulcrum, LLC concerning their ownership and operation of a hydropower generation facility located at Barber Dam on the Boise River approximately four miles upstream of the City of Boise. The Notice of Violation (NOV) stems from an August 2, 2019 power outage in the early morning hours that took the hydro facility offline causing the dam to impound water that would typically flow through the facility and the Boise River downstream.

Background

Barber Dam, owned by Ada County, is a historic facility dating from the early 1900s originally constructed on the Boise River to generate a pool and power source for milling logs. After coming into the ownership of Ada County, the dam's power generation facilities were modernized to generate hydroelectric power sold through the local energy market. Ironically, and despite generating electricity from the flow of water, the dam's power generation equipment is dependent upon input of existing electricity, part of which is used to regulate the turbine water intake gates. In the event of a power outage at the dam, the turbine gates close which, in turn, causes the dam to impound and back up river water that would ordinarily flow through the facility. This can cause significant problems downstream on the Boise River, especially during the irrigation season when flows of the river are managed very carefully to meet irrigation demand/diversions from the river downstream. Essentially,

nearly all flow in the river during the latter half of the irrigation season is irrigation diversion flow, which diversions are replenished by drain-based return flows downstream. If the management balance is disrupted enough, the river can dry up in places.

This is what happened during the early morning hours of August 2. Barber Dam experienced a power outage, causing water to pool behind the dam. This caused downstream Boise River flows to dwindle while the pool was filling, wreaking havoc on downstream irrigation canal diversions, many of which are automated and set to divert set quantities of water. With the dam pool taking water, other canal gates downstream opened wider to take in more water to meet their settings, which started a domino effect drying up the river at the Phyllis Canal diversion gate near the head of Eagle Island roughly seven miles downstream of Boise. The Phyllis Canal gate opened entirely and diverted all remaining flow in the river. This caused a myriad of canal setting/delivery problems up and down the river, leaving canal managers scrambling to serve their landowners with less water than would otherwise be in the system.

Though the power outage lasted only an hour or so, canal systems can take several hours to equalize after re-adjustment in order to make deliveries to those entitled to the water. The opposite is also a problem: the subsequent spike in river flow once the power facility comes back on line, releasing water rapidly out of the Barber Dam pool. For example, automated canal headgates cannot always react fast enough to the flow spike, causing the diversion of too much water into a canal, which can overtop, flood neighboring properties, or threaten the integrity of canal diversion structures altogether—which can be catastrophic given the size of many canals exceeding 200 cfs in capacity.

In the case of the August 2 power outage, the pooling of water behind Barber Dam effectively "diverted" 1,665 cfs of the 3,710 cfs that was otherwise in the river to meet downstream irrigation demand. And, this is not the first time Barber Dam has gone down in this way—there have been several instances over the years drawing the ire of downstream irrigation entities, the Boise River Watermaster, and now the Idaho Department of Water Resources.

The Notice of Violation

Because the Barber Dam hydroelectric generation water right is a "run-of-river" water right absent a storage component, none of Ada County, Enel or Fulcrum has the legal right to divert and "store" water in the Barber Dam pool (which is what happens during a power outage at the dam). Thus, each were violating the terms of the hydropower water right.

Idaho Code §§ 42-351 and 42-1701B authorize the Idaho Department of Water Resources to enjoin the illegal diversion and use of water, and to levy a fine/penalty amounting to $50 per every one-tenth (0.01) cfs of water illegally diverted. Based on the dam's illegal diversion of 1,665 cfs of water to storage in the Barber pool during the power outage, the Department calculated a potential financial penalty of $832,500. Fortunately for Ada County, Enel, and Fulcrum, the statute caps the maximum fine at $50,000. Consequently, the Department served the entities with a formal Notice of Violation (NOV) containing the statutory maximum $50,000 penalty.

The NOV ordered the parties to immediately cease illegal diversions of water into the Barber Dam pool, and to pay the $50,000 civil penalty no later than September 1, 2019. In the meantime, the parties were advised of their opportunity to schedule a compliance conference to discuss the issue and to offer any rebuttal or explanation of mitigation efforts.

Conclusion and Implications

The Department of Water Resources' NOV also requires the parties to include the NOV in the current, ongoing Federal Energy Regulatory Commission (FERC) relicensing proceedings concerning the facilities. While the Boise River Watermaster and several irrigation entities have requested one or all of Ada County, Enel, and Fulcrum to make operational/engineering changes at the dam to prevent these occurrences in the future, they have largely been met with silence. Consequently, many downstream irrigation entities are also intervening in the pending FERC proceedings to seek relief in the form of facility modification or other permit conditioning.
(Andrew J. Waldera)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Nationwide Actions

•July 11, 2019—The U.S. Environmental Protection Agency (EPA) announced a final policy to enhance effective partnerships with states in civil enforcement and compliance assurance work. Articulated in a memorandum from EPA's Assistant Administrator for Enforcement and Compliance Assurance Susan Bodine, the final policy describes procedures and practices for effective coordination between EPA and states when carrying out shared responsibilities under environmental laws. The final policy memorandum is divided into three sections. The first section details requirements for joint planning and regular communication between EPA and states to promote enhanced, shared accountability. The second section of the policy provides greater detail on EPA and state roles and responsibilities in implementing authorized programs. The third and last section of the policy provides a process for the elevation and resolution of issues. The issuance of today's final policy replaces the interim guidance memorandum on enhanced planning and communication between EPA regional offices and states issued by Susan Bodine on January 22, 2018. EPA indicated that it would update and finalize that guidance based on input from EPA regional offices, states, and a workgroup on compliance assurance that EPA and the Environmental Council of States convened in September of 2017. On May 13, 2019, EPA published a federal register notice soliciting public comment on a draft final policy. Today, EPA is releasing the final policy on Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work. To read EPA's policy on Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work: https://www.epa.gov/compliance/enhancing-effective-partnerships-between-epa-and-states-civil-enforcement-and-compliance

•August 9, 2019—The U.S. Environmental Protection Agency (EPA) issued a proposed rule to implement Section 401 of the federal Clean Water Act (CWA). EPA Administrator Andrew Wheeler made the announcement at the Council of Manufacturing Associations Summer Leadership Conference in Charleston. The proposed rule seeks to increase the transparency and efficiency of the 401 certification process and to promote the timely review of infrastructure projects while continuing to ensure that Americans have clean water for drinking and recreation. "Under President Trump, the United States has become the number one oil and gas energy producer in the world, while at the same time continuing to improve our air quality," said EPA Administrator Andrew Wheeler. "Our proposal is intended to help ensure that states adhere to the statutory language and intent of Clean Water Act. When implemented, this proposal will streamline the process for constructing new energy infrastructure projects that are good for American families, American workers, and the American economy." In April, President Trump issued an executive order and directed the administration to take appropriate action to accelerate and promote the construction of pipelines and other important energy infrastructure. The president's executive order directs EPA to consult with states and tribes on reviewing and updating guidance and regulations related to § 401 of the CWA. Section 401 of the CWA gives states and authorized tribes the authority to assess potential water quality impacts of discharges from federally permitted or licensed infrastructure projects that may affect navigable waters within their borders. The EPA's existing certification rules have not been updated in nearly 50 years and are inconsistent with the text of CWA § 401, leading to confusion and unnecessary delays for infrastructure projects. With today's action, EPA is proposing to modernize and clarify the timeline and scope of CWA § 401 certi-

fication review and action to be consistent with the plain language of the CWA.

EPA will accept public comment on the proposed rule for 60 days following publication in the Federal Register. To review the proposed rule and learn more about the CWA Section 401 certification process, see: https://www.epa.gov/cwa-401

Civil Enforcement Actions and Settlements—Water Quality

•July 8, 2019—The U.S. Environmental Protection Agency has ordered the Grindstone Indian Rancheria near Elk Creek, California, to provide alternative drinking water to rancheria water system costumers, disinfect the system's water and monitor the water for contamination. The Grindstone Indian Rancheria Public Water System serves approximately 150 residents. The system uses water from Stony Creek, which has numerous potential contaminants from agricultural, municipal and industrial operations. EPA found the system was not complying with a 2017 drinking water order by not properly disinfecting the system's water and not employing a certified drinking water operator. The order requires Grindstone Indian Rancheria Public Water System to:

- Provide at least one gallon of water per person per day for every individual served by the system.
- Immediately procure and continuously use National Sanitation Foundation International certified and Federal Insecticide, Fungicide, and Rodenticide Act registered approved chlorine disinfectant.
- Employ a qualified drinking water operator.
- Adequately fund the system's operations.
- Issue a boil water notice to all customers.
- Properly monitor the system's water and report findings to the EPA.

Failure to comply with the EPA's order could result in penalties levied against the Grindstone Indian Rancheria Public Water System of up to $23,963 per day.

•July 16, 2019—The U.S. Environmental Protection Agency announced an agreement with the U.S. Department of Agriculture (USDA) Forest Service to close 15 campground pit toilets, considered to be large capacity cesspools, at four Arizona national forests. The Forest Service will have until December 2024 to comply with the federal Safe Drinking Water Act's ban on large capacity cesspools (LCCs). The Forest Service's Southwestern Region disclosed that it continued to use LCCs despite a 2005 ban under the Safe Drinking Water Act's Underground Injection Control program. The four Arizona forests that will remove the noncompliant systems are Apache-Sitgreaves, Tonto, Coconino and Kaibab. The agreement also includes specific reporting requirements and allows for penalties should the Forest Service fail to meet deadlines. Cesspools collect and discharge waterborne pollutants like untreated raw sewage into the ground, where disease-causing pathogens can contaminate groundwater, streams and the ocean. The settlement is subject to a 30-day comment period before becoming final. For more information and to submit comments, please visit: https://www.epa.gov/uic/usda-forest-service-southwestern-region-proposed-safe-drinking-water-act-underground-injection

•July 17, 2019—The U.S. Environmental Protection Agency reached a settlement for civil penalties with U.S. Lubricants Inc. for Clean Water Act violations. Under the agreement, U.S. Lubricants will pay a $196,314 penalty. EPA recently entered into a separate agreement with the company to take steps to reduce the risk of oil spills from their petroleum storage facility in Commerce, California, to the Los Angeles River. "It is essential that companies operating near our waterways develop and follow a spill prevention plan," said EPA Pacific Southwest Regional Administrator Mike Stoker. "Our action will help prevent oil spills to the Los Angeles River." The facility is located near the Los Angeles River, which flows to Long Beach Harbor and the Pacific Ocean. An EPA inspection in May 2017 found that the company had violated the Clean Water Act›s oil pollution prevention regulations by failing to:

Inspect tanks and perform tank integrity testing; Provide adequate secondary containment around tanks to keep potential spills from leaving the site and entering waterways; Develop and implement a Facility Response Plan (FRP) to respond to major oil spills; Develop a Spill Prevention, Control and Countermeasure Plan (SPCC) certified by a professional engineer.

The requirement to develop an FRP Plan applies to facilities that store more than 1 million gallons of oil. The plan helps staff prevent and respond to an

oil spill on-site. FRPs also help local and regional response authorities better understand potential hazards and response capabilities in their area. EPA's oil pollution prevention regulations aim to prevent oil from reaching navigable waters and adjoining shorelines and to ensure containment of oil discharges in the event of a spill. Specific prevention measures include developing and implementing spill prevention plans, training staff, and installing physical controls to contain and clean up oil spills. EPA's proposed settlement with U.S. Lubricants, which is subject to a 30-day comment period, can be found at: https://www.epa.gov/ca/us-lubricants-inc-commerce-ca-proposed-settlement-clean-water-act-class-ii-administrative-penalty

•July 30, 2019—The U.S. Environmental Protection Agency recently reached a settlement with Sutter County Water Works District No. 1 (SCWWD), located in Robbins, California, over arsenic violations of the Safe Drinking Water Act. SCWWD will provide residents with alternative water until the system is in compliance with federal and state drinking water laws. "We are pleased this system will make critical investments to secure and serve safe drinking water," said EPA Pacific Southwest Regional Administrator Mike Stoker. "EPA will ensure all requirements of this agreement will be met for the long-term protection of the community." As part of the agreement, the Sutter County Water Works District will design and build a new drinking water treatment facility that reduces arsenic in the drinking water. The system will also procure land to drill a new groundwater well. SCWWD is required to provide EPA with quarterly progress reports and participate in quarterly meetings with EPA and the California State Water Resources Control Board on its progress towards compliance. The Sutter County Water Works District system serves approximately 350 residents, including over 100 households, a school and businesses with 93 connections located in Robbins, California. The system's current source of drinking water is groundwater from one primary and one backup well that serves its customers. Arsenic occurs naturally in the environment and as a by-product of some agricultural and industrial activities. It can enter drinking water through the ground or as runoff into surface water sources. Drinking water containing excess arsenic is linked to skin damage, circulatory problems and an increased risk of cancer.

•August 2, 2019—A Massachusetts developer agreed this month to resolve allegations by the U.S. Environmental Protection Agency (EPA) that the company failed to follow the terms of its permits for discharging stormwater from three construction sites. EPA alleged that Fafard Real Estate and Development Corporation, based in Milford, Massachusetts, did not follow its Clean Water Act permit at the Ledgemere Country Residential Development in Uxbridge as well as at Maplebrook Commons Condominiums and Lakeview Estates, both in Bellingham. Under a settlement with EPA, Fafard will pay a $48,000 civil penalty. After EPA issued a notice to inform Fafard of the potential violations, Fafard promptly worked to correct erosion control issues at the three construction sites. Fafard failed to adequately put in place and maintain erosion controls at each of the sites, in violation of its permit under the Clean Water Act, EPA claimed. Inadequate erosion controls can lead to sediment washing into waterways, affecting the ecosystem and human uses. The case stems from 2018 inspections at all three sites by EPA New England and Fafard's subsequent responses to EPA's request for information. In 2010, Fafard paid a $150,000 penalty and performed other environmental projects to settle charges by EPA that it had not fully complied with federal stormwater permits at about a dozen construction sites. This settlement is the latest in a series of enforcement actions taken by EPA New England to address stormwater violations from industrial facilities and construction sites around New England. More information is available on stormwater permits in New England at: https://www.epa.gov/npdes-permits/npdes-stormwater-permit-program-new-england. (Andre Monette)

LAWSUITS FILED OR PENDING

DEFENDERS OF WILDLIFE APPEALS FINDING OF NON-NAVIGABILITY IN ARIZONA'S SALT, GILA, AND VERDE RIVERS

Can the State of Arizona legally transfer ownership of its riverbeds to private entities? Many Arizona rivers have been dammed to control the variability of flows and limit the devastating impacts of drought and flood. Therefore, the streambeds in many Arizona rivers, especially the downstream reaches, are dry most of the year except during storm events. Some of these bedlands have been transferred over the years from the State of Arizona to private owners who have relied upon title to those lands and have invested in everything from sand and gravel mining operations to managed reservoirs and underground water storage. A finding that these private property rights were based on invalid transfers of title could have significant ramifications. However, the Arizona State Land Department, public interest groups, and environmental groups have sued over the years, asserting that, under the "public trust doctrine," the state has a responsibility to manage the streambeds for the benefit of the public, and under the Arizona Constitution, the state cannot divest itself of title to the streambeds of navigable rivers without a particularized assessment of the public trust interests.

Background

The "equal-footing doctrine" established more than a century ago that title to the lands under navigable watercourses is transferred from the federal government to the state government on the date of statehood. *Arizona Ctr. For Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 359 (App. 1991) (*Hassell*); *see also, Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 436-37 (1892); *Pollard v. Hagan*, 44 U.S. 212, 223 (1845). In the case of Arizona, title to lands below the high-water mark in all navigable watercourses transferred from the federal government to the state government on February 14, 1912. *Hassell*, 172 Ariz. 356, 359-60.

In 1987, the question of riverbed ownership arose in a case called *Land Dep't v. O'Toole*, 154 Ariz. 43, 44-45 (App. 1987), in which the State of Arizona claimed title to the beds of all Arizona watercourses that were navigable at statehood. However, many riverbeds are dry since upstream dams were constructed and private owners claim title to lands within those riverbeds. *Hassell*, 172 Ariz. At 360; *see, O'Toole*, 154 Ariz. At 46. As a result, the Arizona Legislature passed House Bill 2017 in 1987 to quiet title by relinquishing most of the state's interest in the bedlands of watercourses in Arizona. *See, Defenders of Wildlife v. Hull*, 199 Ariz. 411, 416 ¶ 3 (App. 2001). SB 2017 quitclaimed the bedlands of all rivers except for the Colorado, Gila, Salt, and Verde Rivers without compensation, and allowed record titleholders of lands in or near the beds of the Gila, Salt, or Verde to obtain a quitclaim deed for $25 per acre. *Hassell,* 172 Ariz. At 360. The Arizona Center for Law in the Public Interest and Defenders of Wildlife sued arguing that HB 2017 violated the "gift clause" of the Arizona Constitution, Article IX, § 7, and the public trust doctrine when it alienated the riverbeds, which it had a duty to protect. *Hassell*, 172 Ariz. At 361.

In 1991, the Arizona Court of Appeals concluded that under the public trust doctrine, the state has a responsibility to hold Arizona's navigable watercourse lands in trust for the benefit of the people and the state's control of those waters is forever subject to that trust. *Hassell*, 172 Ariz. At 366 (citing *Illinois Central*, 146 U.S. 387 at 453). Therefore, HB 2017 was struck down as contrary to the public trust doctrine and the gift clause. The Court of Appeals held that:

> . . .[b]ecause the state may not dispose of trust resources except for purposes consistent with the public's right of use and enjoyment of those resources, any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations. *Id.* at 368.

Creation of the Arizona Navigable Stream Adjudication Commission

The Legislature responded to the court's ruling in *Hassell* by creating the Arizona Navigable Stream Adjudication Commission (ANSAC) in 1992.

A.R.S. §§ 37-1121 to 1131 (1993) (subsequently repealed). ANSAC was responsible for collecting information about the navigability of Arizona's rivers and streams, holding hearings, and issuing a final administrative determination regarding navigability. On November 10, 1993, ANSAC concluded that the Lower Salt River had "characteristics of possible navigability as of February 14, 1912." [ANSAC Minutes, 11/10/1993]. *See,* A.R.S. § 37-1125 (1993). The Legislature responded by repealing the ANSAC statutes and replacing them with a new process for determining navigability, under which new presumptions of non-navigability were created that could only be overcome by clear and convincing evidence of navigability. A.R.S. § 37-1128(B), (D) (1994) (repealed) (1994 Act). In addition, ANSAC was not permitted to consider factors such as the use of ferries, fishing from the banks, and waters appropriated before statehood when determining navigability. A.R.S. § 37-1128(E) (1994) (repealed). The Act also required ANSAC to:

> . . .consider the existence of dams and diversions of water and the impact of other human uses that existed or occurred at the time of statehood as part of the ordinary and natural condition of the watercourse. A.R.S. § 37-1128(F) (1994).

Based on the new criteria for determining navigability, ANSAC determined that various rivers were non-navigable. In response, the Legislature disclaimed the state's right, title or interest to the beds of these watercourses.

The Current Dispute

Defenders of Wildlife and the Arizona State Land Department then challenged the constitutionality of the 1994 Act, arguing that it was contrary to the federal navigability test. Under the federal navigability test, a river is navigable if at statehood the river:

> . . .in its natural and ordinary condition, either was used or was susceptible to being used for travel or trade in any customary mode used on water. *Defenders of Wildlife*, 199 Ariz. At 426 (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)). The Arizona Court of Appeals held that the Legislature must apply the federal navigability test and much of the 1994 Act was deemed unconstitutional. The court also found that determinations of navigability under the equal footing doctrine must begin with a strong presumption against defeat of the state's title. *Defenders of Wildlife*, 199 Ariz. At 426, ¶ 54 (citing *United States v. Alaska*, 521 U.S. 1, 34 (1997)). In 2001, the Legislature revised the statutes and began holding public hearings on navigability again, and in 2005 ANSAC determined again that the Lower Salt was non-navigable.

In 2010, the Arizona Court of Appeals vacated ANSAC's conclusion, finding that ANSAC failed to apply the proper legal standard, which required both consideration of the river's "ordinary" and its "natural" condition. *State ex rel. Winkelman v ANSAC*, 224 Ariz. 230, 241-242, ¶ 28 (App. 2010). The court defined "ordinary" as "usual, absent major flooding or drought" and "natural" as "without man-made dams, canals, or other diversions." *Id.* Nevertheless, ANSAC issued its final administrative decision on June 28, 2018, in which it again determined that the Salt River was non-navigable in its ordinary and natural condition at statehood.

Conclusion and Implications

On December 26, 2018, the Arizona State Land Department did not seek judicial review, but Defenders of Wildlife, and certain individuals filed a Notice of Appeal on March 25, 2019. On July 1, 2019, Defenders of Wildlife filed its Opening Brief appealing ANSAC's determination that the Salt River is not navigable, and on August 19, 2019 Answering Briefs were filed. Reply Briefs are due on October 17, 2019. (*Defenders of Wildlife v. Arizona Navigable Stream Adjudication Commission* (Maricopa Cnty. Sup. Ct)). (Alexandra M. Arboleda, Lee Storey)

JUDICIAL DEVELOPMENTS

TRIBE INTERVENES AS REQUIRED PARTY AND CASE DISMISSED BASED ON TRIBAL SOVEREIGN IMMUNITY

Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs, ___F.3d___, Case No. 17-17320 (9th Cir. July 29, 2019).

In *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, the Ninth Circuit Court of Appeals affirmed a U.S. District Court for the District of Arizona decision to dismiss an action because a tribal corporation was a required party, but could not be joined because of tribal sovereign immunity. Similar assertions of tribal immunity and indispensable party status may arise in disputes over rights to surface and groundwater, in light of tribes' increasingly active assertion of their water rights.

Background

The Navajo Mine (Mine) is located on tribal land of the Navajo Nation, a federally recognized Indian tribe. The U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement issued a surface mining permit to the Mine pursuant to the Surface Mining Control and Reclamation Act of 1977. The Mine produces coal that the Four Corners Power Plant (Power Plant), also located on Navajo Nation tribal land, uses to generate electricity. Electric transmission lines run from the Power Plant to lands reserved to the Navajo Nation and Hopi Tribe.

In 2013, the Navajo Nation Council created the Navajo Transitional Energy Company (NTEC) to purchase the Mine from the private company that owned and operated it. The Power Plant is owned by several utility companies and operates subject to a lease agreement with the Navajo Nation. The agreement provides that the Mine sells coal only to the Power Plant, and the Power Plant buys coal only from the Mine. The Navajo Nation authorizes rights-of-way easements over Navajo lands for the Power Plant, and the Navajo Nation and Hopi Tribe authorize rights-of-way easements for transmission lines across tribal lands.

In 2011, the lease for the Power Plant operations was extended, causing the previous Mine owner to seek to renew the existing surface mining permit and apply for a new surface mining permit to expand operations. The lease amendment and its rights of way, and the permits were dependent on approvals from the federal defendants, who eventually granted them. NTEC, after taking ownership of the Mine, proceeded to make "significant financial investments" in its operations. At issue in the case were the federally approved leases and permits that permitted Mine and Power Plant operations expected to generate an estimated $40 to $60 million of annual revenue for the Navajo Nation.

Procedural History

In April 2016, plaintiffs Dine Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Amigos Bravos, Sierra Club, and Center for Biological Diversity (plaintiffs) sued the Bureau of Indian Affairs (BIA), the U.S. Department of Interior, the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE), the U.S. Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service, and David Bernhardt, the Secretary of the U.S. Department of the Interior, (federal defendants) challenging federal defendants' approvals that allowed the Mine and Power Plant to continue operations.

Plaintiffs alleged that: 1) the U.S. Fish and Wildlife's Biological Opinion violated federal Endangered Species Act (ESA) requirements; 2) the BIA, OSMRE, and BLM violated the ESA by relying on the flawed Biological Opinion; and 3) federal defendants violated the National Environmental Policy Act (NEPA) because they crafted "an unlawfully narrow statement of purpose and need for the project in the EIS," did not consider reasonable alternatives, and did not take the required "hard look" at mining complex impacts.

Plaintiffs requested that the court declare that the federal defendants violated the ESA and NEPA,

order U.S. Fish and Wildlife to set aside its Biological Opinion, and order federal defendants to set aside their Record of Decision and Environmental Impact Statement (EIS) and remand for the agencies to further analyze their decisions. Plaintiffs' also sought injunctive relief, including stopping federal defendants from approving mining operations until they complied with NEPA.

NTEC filed a motion to intervene "for the limited purpose" of filing a motion to dismiss pursuant to Federal Rules of Civil Procedure §§ 19 and 12(b)(7). NTEC argued it was a required party because of its financial interest in the Mine and, because it could not be joined based on its tribal sovereign immunity, the action must be dismissed. The district court granted both motions. Plaintiffs appealed.

The Ninth Circuit's Decision

NTEC Was a Required Party That Could Not Be Joined Because of Its Tribal Sovereign Immunity

The Ninth Circuit agreed with NTEC that it was a required party and joinder was mandatory because NTEC had a legally protected interest in the lawsuit's subject matter and NTEC's interests would be impaired if the lawsuit proceeded without it. Plaintiffs' lawsuit, if successful in vacating the federal defendants' approvals of the Biological Opinion and related environmental documents, could have retroactive effects that would impair NTEC's interests in the lease, rights-of-way, and surface mining permits relied on to operate the Mine and Power Plant. The court determined that:

> . . .without the proper approvals, the Mine could not operate, and the Navajo Nation would lose a key source of revenue in which NTEC has already substantially invested.

The Ninth Circuit determined that under Rule 19, NTEC could not feasibly be joined as a party to the litigation because of tribal sovereign immunity. The court considered the Rule 19(b) factors and a "wall of circuit authority" that favors "dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity" and concluded that the litigation could not continue without NTEC.

The "public rights" exception, which allows litigation to continue without a necessary party when litigation "seeks to vindicate a public right," did not apply. The court focused on "the practical effect" of the litigation on NTEC's rights. "[T]he question at this stage must be whether the litigation *threatens* to destroy an absent party's legal entitlements." Even though plaintiffs sought to require a redo of the NEPA and ESA process, it was with the implication that federal defendants should not have approved the mining activities, which presented a threat to NTEC's rights.

The Ninth Circuit noted that by not applying the public rights exception, it:

> . . .arguably 'produce[s] an anomalous result' in that '[n]o one, except [a] Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands.'

The court, however, concluded that:

> . . .[t]his result … is for Congress to address, should it see fit, as only Congress may abrogate tribal sovereign immunity.

Conclusion and Implications

How *Dine Citizens* will be applied in other contexts, including water rights disputes, remains to be seen. *Dine Citizens* favors tribes' assertion of sovereign immunity and Rule 19 to halt litigation where that suits their interests. The Ninth Circuit relied on a "wall of circuit authority" favoring dismissal of actions under the Rule 19(b) factors when a tribe asserts its immunity. As the *Dine Citizens* court noted, the practical effect of its decision to not apply the "public rights" exception to avoid dismissal of the case may mean only a tribe may seek judicial review of some federal agency decisions. But, the court noted, any disagreement with that outcome is best addressed to Congress, which has granted tribes sovereign immunity.

(Jenifer Gee, Dan O'Hanlon)

IT'S ALL IN THE NAME—DISTRICT COURT FINDS TMDL FAILED THE CLEAN WATER ACT AS IT DIDN'T SPECIFY DAILY LIMITS ON *E. COLI*

Anacostia Riverkeeper, Inc. v. Wheeler, ___F.Supp.3d___, Case No. 16-cv-1651 (D. D.C. Aug. 12, 2019).

The D.C. District Court has held that the U.S. Environmental Protection Agency (EPA) acted outside its authority under the federal Clean Water Act in approving Total Maximum Daily Loads (TMDLs) for the discharge of *E. coli* from a Washington, D.C. sewage treatment plant, where the approved maximum values for single samples were described as variable daily limits that would fluctuate so as to allow an average "geometric mean" for the presence of fecal matter in surface water bodies used for recreational purposes.

Background

The Clean Water Act (33 U.S.C. § 1251 *et seq.*):

> . . .requires each State to develop water quality standards for any interstate water body in its boundaries, and to submit these standards to [the Environmental Protection Agency] for review and approval. 33 U.S.C. § 1313(a).

EPA's regulations specify that state water quality standards must include "designated uses" for each covered water body as well as "water quality criteria." 40 C.F.R. § 131.16. A water body's designated use "reflects" its uses by people, animals and plants. 40 C.F.R. § 131.10(a). "For example, a State might designate a water body for recreational use or agricultural use." Water quality standards, when met, "will generally protect the designated use," and include both numeric limitations on the concentration of specific pollutants as well as a narrative statements "applicable to a wide set of pollutants." 40 C.F.R. § 131.3(b); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 246, 349 (D.C. Cir. 1993).

To enforce the Clean Water Act's pollution limitations, "point source" discharge of pollutants, *i.e.*, from a "discernible, confined and discrete conveyance," requires the issuance of a National Pollutant Discharge Elimination System (NPDES) permit requiring the discharge to meet the state's approved water quality standards. 33 U.S.C. § 1362(14). However, non-point source discharge "such as natural erosion, agricultural runoff, or overflows from urban areas" is not captured by the NPDES permit system, the NPDES system "alone does not ensure that pollution levels satisfy water quality standards."

Separately, states have a duty to monitor water quality in covered water bodies, and identify on a biennial basis "which of their water bodies do not, and based on existing pollution limitations are not expected to, attain the applicable water standards," submitting to EPA "so-called "303(d) lists."" 40 C.F.R. § 130.7(d). For every water body on its 303(d) list, a state must "develop maximum daily loads" (TMDLs) that "specify the absolute amount of particular pollutants the entire water body can take on while still satisfying all water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 215 (D. D.C. 2011), citing 33 U.S.C. § 1313(d)(c).

> The Act requires States to engage in a 'continuing planning process' to improve water body conditions, including by implementing TMDLs, 33 U.S.C. § 1313(e)(3)(C), and to consider TMDLs as part of water quality management plans to improve water conditions, 40 C.F.R. § 130.6(c)(1).

While "TMDLs themselves have no self-executing regulatory force... NPDES permits must be 'consistent with the assumptions and requirements of any available wasteload allocation' in a TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B)."

> In short, the TMDL process requires States to account for the background pollution caused by non-point sources and budget to each point source a daily discharge limit that will ensure compliance with the underlying water quality standards.

The District of Columbia, which is subject to the state-requirements of the Clean Water Act, classifies its covered water bodies as "Class A" waters for "primary contact recreation," or "activities that result in frequent whole body immersion or involve a significant risk of ingestion of water." Its narrative water quality standards, therefore, state that the Dis-

trict's "surface waters of the District shall be free from substances in amounts or combinations that ... [c]ause injury to, are toxic to, or produce adverse physiological or behavioral changes in humans" and that they shall "be free of discharges of untreated sewage ... that would constitute a hazard to the users of Class A waters." The District adopted two numeric criteria, "a 'geometric mean' and a 'single sample value'—for *E. coli* concentration in the District's waters," specifying that:

> . . .'[t]he geometric mean criterion shall be used for assessing water quality trends and for permitting,' while '[t]he single sample value criterion shall be used for assessing water quality trends only.'

As a result of water sampling demonstrating the standards had not been met, in 2004 the District "for the first time developed TMDLs for fecal bacteria." The D.C. Circuit rejected EPA's approval of those TMDLs because they were expressed in "annual or season, rather than daily, terms." Following an extended process including multiple iterations of draft TMDLs and notice and comment periods, the District submitted revised TMDLs to EPA for approval in 2014. EPA approved the TMDLs in 2014, but subsequently withdrew the approval and its decision rationale after EPA was sued by D.C. Water, the operator of "Blue Plains Advanced Wastewater Treatment Plant, the world's largest advanced wastewater-treatment facility." It re-approved the TMDLs and issued a revised decision rationale in 2017.

The District Court's Decision

Applying the *Friends of the Earth v. EPA* Decision

The bulk of the District Court's decision applies the D.C. Circuit's opinion in *Friends of the Earth v. EPA*, 446 F.3d 140 at 144 (D.C. Cir. 2006), which held that the plain language of the Clean Water Act requires the adoption of total maximum *daily*, rather than seasonal or annual, pollutant loads. Environmental petitioners alleged the 2014 District TMDLs for the Blue Plains facility failed to comply with the *Friends of the Earth*, particularly as interpreted in the decision rationale.

The 2014 TMDLs establish "dry weather" "Max daily loads" for two separate outfalls at Blue Plains. The decision rationale explained that the Max daily load:

> . . .is not intended—despite its label—to function as a ceiling or limit applicable to discharges … [b]ut represents an average of the daily maximum loadings expected to occur. . .and still achieve the applicable water quality standard.

Further, the Max daily load is not a "'never-to-be-exceeded-on-a-daily-basis' target[] or value[]. … Rather, they "express on a 'daily' basis the modeled loads of *E. coli* predicted to meet'" the 30-day geometric mean numeric value. In other words, so long as the 30-day geometric mean numeric standard can be met, the daily maximum can be understood as, functionally, a "maximum daily load that varies on the basis of previous discharges."

The District Court held this rationale is contrary to *Friends of the Earth*, as it would:

> . . .allow[] the District to fold the first condition (establishing a daily maximum) into the second (ensuring the daily maximum is sufficiently low to achieve the water quality standard.

This conclusion is supported, the District Court reasoned, not only by the plain language of the CWA but also by TMDLs' remedial and planning role. Remedial, because TMDLs are only required once a state concludes that its water quality standards cannot be met solely by enforcement of NPDES. Planning, because NPDES permits need only reflect and take account of TMDLs, rather incorporate TMDLs as strict limits on discharges:

> [T]he Act treats TMDLs as informational tools. They allow stakeholders—whether regulated sewer authorities, federal or local regulators, environmental groups, or recreational users—to plan and monitor water body anti-pollution efforts. Thus, regardless of whether identifying a daily maximum has immediate regulatory impact through NPDES permitting, it serves a purpose in the statutory scheme

Faithfully applying *Friends of the Earth*, the District Court also rejected EPA's argument that *E. coli* is not

a pollutant suited to the expression of maximum daily loads, noting that the agency—exercising statutory discretion granted by Congress—has the ability to revise its own regulatory pronouncement that *all* pollutants are suitable to be subject to TMDLs.

Conclusion and Implications

The D.C. District Court's application of *Friends of the Earth* reflects the Circuit split established by the D.C. Circuit when it "declined to follow the Second Circuit in holding that requiring daily loads" for all pollutants "would be 'absurd,'" *NRDC v. Muszynski*, 268 F.3d 91, 99 (2nd Cir. 2001)." That split may well persist so long as EPA declines to revise its blanket declaration that all pollutants are suitable for the expression of Total Maximum Daily Loads under the Clean Water Act. The court's opinion is available online at: https://earthjustice.org/sites/default/files/files/50_Judge_Memo%20Opinion_08-12-2019.pdf (Deborah Quick)

COLORADO SUPREME COURT DECLINES TO EMBRACE 'CHARACTER OF EXCHANGE RULE'

City & County of Denver v. Consolidated Ditches of Water District, Case No. 2, 2019 CO 68 (Col. July 1, 2019).

The Colorado Supreme Court recently declined to fully embrace the "character of exchange rule," an unofficial concept declaring that water diverted by exchange takes on the "character" of the substitute supply. By refusing to entirely embrace this concept, the Court has instead elected to "cultivate flexibility [and] optimize the beneficial use of the state's waters."

Background

The physical and legal background of this case is quite expansive, and the opinion itself took 33 pages including three maps to fully explain the history. While such in-depth review may have been necessary for the Supreme Court, this article will instead provide a more cursory overview of the relevant Colorado water systems and laws, and the procedural history of this case.

The present dispute centers on a 1940 Agreement between Denver and Consolidated Ditches of Water District No. 2, an amalgam of various ditch and irrigation companies. The 1940 Agreement attempted to resolve disputes regarding seepage and evaporation losses from Denver's in-channel reservoirs on the South Platte River. [The Water Court in the present case later reasoned that the 1940 Agreement, at the time it was executed, assumed that the water saved by prohibiting reuse was roughly equivalent to the amount lost from evaporation.] Instead of making additional releases from the reservoir to offset these losses, the typical practice, Denver instead agreed not to reuse or successively use return flows from water imported from Colorado's western slope. [In Colorado, "imported water" (*i.e.*, water diverted from a different basin) may be reused and successively used to extinction. This is different from normal diversions whose return flows must be allowed to return to the stream.]

Several decades later, a decision in Case No. 81CW405 clarified that the 1940 Agreement only applies to return flows from "decreed water rights from Colorado River sources with appropriation dates before May 1, 1940," the day Denver signed the Agreement. Therefore, Denver is fully able to reuse and successively use return flows from sources acquired or appropriated after that date. That distinction led to the singular question in the present case: whether the 1940 Agreement prohibits Denver from using return flows from water imported from the Blue River system under exchange and substitution operations that use water stored in the Williams Fork Reservoir under a 1935 priority date as a substitute supply. To understand that question, a brief overview of the relevant reservoirs and systems is required.

In brief, the Blue River Diversion Project collects water at the confluence of the Snake River, Blue River, and Tenmile Creek. That water can be stored in Dillion Reservoir, or piped directly into the Roberts Tunnel where it is pumped across the mountains and into the North Fork of the South Platte River. Denver owns water rights in the Blue River that were adjudicated in 1955, with a 1946 appropriation date—clearly post-May 1, 1940.

The Williams Fork River is tributary to the Colorado on the western slope of the continental divide.

Denver owns water rights in the Williams Fork Reservoir. Particularly relevant to this case, those water rights were decreed in 1937 with an appropriation date of 1921.

Importantly, Denver can release water stored in the Williams Fork Reservoir to make replacements under Blue River exchange and substitution operations. Water stored in the Williams Fork Reservoir physically cannot be transported to the Front Range because the reservoir lies below the collection systems and relevant tunnels. Therefore, Denver operates a simple exchange and substitution that releases water from Williams Fork Reservoir to compensate for water it diverts out-of-priority from its Blue River water rights.

Water Exchanges in Colorado

Water exchanges are a central tool used by Colorado appropriators to allow flexibility of use. Essentially, a junior water right is allowed to divert out-of-priority by acquiring an exchange and substitution plan that reintroduces water to the river above the senior calling rights. C.R.S. §§ 37-38-104, -80-120(2)-(4). Because the substitute supply is provided in lieu of the water that is diverted out-of-priority upstream, it must mimic the diverted water in quality, quantity, and continuity, and must not injure any downstream users. *Id.* [Briefly the four required parts of an exchange are: 1) the source of substitute supply must be above the senior calling water right; 2) the substitute supply must be equivalent in amount and of suitable quality to the downstream appropriator; 3) there must be available natural flow at the point of natural upstream diversions; and 4) the rights of others cannot be injured when implementing the exchange. *See generally*, C.R.S. § 37-80-120(4).] Necessarily, an exchange reduced the amount of water available between the upstream out-of-priority diversion, and the downstream releases—but the physical supply of water in the river, as measured below the substitute supply, is unchanged.

Denver's Exchange and Substitution Plan for Augmentation

In practice, Denver wanted to continue to divert its Blue River water (and pump it across the divide) even when that relatively junior 1946 water right was called out. To accomplish this, Denver appropriated an exchange and substitution plan for augmentation that allowed it to pump that Blue River water, even when not in priority, and replace those diversions by making extra releases from Williams Fork Reservoir, which was still above the senior calling water right. That exchange and substitution is the subject of this case.

The Water Court found in favor of Denver, ruling that the Blue River water imported by Denver has a priority date of 1946, regardless of whether it is imported after diversion in-priority, or by substitution and exchange via Williams Fork Reservoir releases. The Supreme Court used much of the same analysis and reasoning in affirming the Water Court's decision.

The Supreme Court's Decision

For a myriad of complex reasons not necessary to understand this ruling, Denver and the Consolidated Ditches were engaged in litigation when the parties filed competing Rule 56 motions asking the Court to determine, as a matter of law, whether Denver was entitled, in light of the 1940 Agreement, to reuse return flows from water imported from the Blue River system via exchange from the Williams Fork Reservoir substitute supply. Denver's argument was that by its plain language, and the decision in 81CW405, the 1940 Agreement only prohibited Denver from reusing water that was acquired or appropriated before 1940. Because the Blue River water rights have a priority date of 1946, Denver reasoned, it should have no restrictions on its use.

The Consolidated Ditches countered these claims by relying on the "character of exchange rule." This so-called rule provides that water diverted by exchange takes on the "character" of the substitute supply—in this case the water diverted out-of-priority in the Blue River was therefore no longer Blue River water, but rather it was Williams Fork Reservoir water that had been "moved" upstream via the legal fiction of substitution and exchanges. If this were the case, then the water being diverted under that exchange would have a pre-1940 priority date and therefore Denver would be prohibited from reusing and successively using those return flows.

Character of Exchange Rule Not Legally Defined

The Court noted that the character of exchange rule is not codified, nor has it ever been expressly

defined in case law. Instead, it is an "unofficial, permissive practice recognized by the State Engineer." [*See*, Ans. Br. Appellees State Engineer and Division Engineer, Water Division 1 at 29 ("As the administrators of exchanges, the Engineers know of no mandatory character-of-exchange rule, but have regularly permitted the water diverted upstream to take on the character of the substitute supply as necessary to accomplish an appropriator's non-speculative purposes, consistent with Water Court decrees, and without impairment to the rights of others.").] Nothing in the various exchange statutes, cited above, mentions such a rule, or provides for its operation. Although the substitute supply must mimic the out-of-priority diversions and therefore could be view as the "same" water, "this court has never formally endorsed this legal fiction." In declining to exercise this view, the Court identified several problems.

First, it is unclear what is meant by "character" of the substitute supply. For example, does character mean type of source, priority date, decretal restrictions (*e.g.*, type of use), contractual limitations, or even "all legal characteristics"? Various briefs from the parties as well as amici revealed disagreement about even this basic point.

Second, as mentioned above, the Colorado Supreme Court has never expressly defined or embraced the character of exchange rule in its decisions. In the present decision, the Court noted that the "rule" has been mentioned twice previously but "in neither case did [the court] expressly apply the principal or hold that it functions as a mandatory 'rule.'" That being said, the Supreme Court did include a discussion of two cases that it believed "implicitly relied on the character of exchange concept." After examining those cases, the Court allowed that:

> . . .at a minimum, the character of exchange concept reflects the statutory requirements applicable to a substitute supply.

The rule, then, is not a rigid set of restrictions but rather:

> . . .a flexible tool to preserve the fully reusable character of transmountain water used as a substitute supply in exchanges.

Turning to the dispute between Denver and the Consolidated Ditches, the Colorado Supreme Court agreed with the Water Court that the Blue River water, no matter how diverted, is a source acquired after May 1, 1940 and therefore Denver may reuse or successively use all return flows from that water.

Conclusion and Implications

This case represents the first time the Colorado Supreme Court has conclusively spoken on the character of exchange rule. By refusing to fully embrace the rule, the Court has chosen to side with Colorado's "longstanding water management policy of maximizing the beneficial use of waters of the state." Exchange and substitution operations are a critical part of Colorado's water infrastructure, allowing users to divert at different times of the year, and from different locations than they otherwise would be allowed to under a strict priority approach. The Court noted that applying a strict character of exchange rule to all exchanges would "neither cultivate flexibility nor optimize the beneficial use of the state's waters." Therefore, this ruling can be seen as a victory for flexible water use in Colorado. Provided that an exchange comports with the four main statutory provisions, it will not be held to the strict standards of the character of exchange rule. That being said, the Court did hedge its opinion on the specific facts presented here. So, although the character of exchange rule is clearly not going to present a strict standard, the Court has left the door open for it to be applied in a smaller function in future cases. The Supreme Court's slip opinion in this matter is available online at; https://www.courts.state.co.us/Courts/Supreme_Court/Case_Announcements/Files/2019/E2714207-01-19.pdf
(John Sittler, Paul Noto)

OREGON SUPREME COURT UPHOLDS OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY'S ISSUANCE OF SUCTION DREDGE MINING GENERAL PERMIT

Eastern Oregon Mining Assoc. v. Department of Environmental Quality, 365 Or. 313 (Or. 2019).

In *Eastern Oregon Mining Assoc. v. Department of Environmental Quality*, the Oregon Supreme Court upheld the Oregon Department of Environmental Quality's (DEQ) regulation of in-stream turbidity caused by suction dredge mining. The Court held that DEQ had authority to regulate the activity under the federal Clean Water Act (CWA) authority delegated to it by the U.S. Environmental Protection Agency (EPA).

Suction dredge mining involves, in lay terms, vacuuming water and sediment from a streambed, separating out heavy metals like gold, and discharging the rest of the material back into the waterway. As the Court explained it:

> . . .[i]n addition to discharging the leftover sediment and water, suction dredge mining creates a turbid wastewater plume and can remobilize pollutants, such as mercury, that otherwise would have remained undisturbed and relatively inactive in the sediment.

The Clean Water Act's Division of Regulatory Authority

Suction dredge mining requires a Clean Water Act permit because the federal CWA prohibits point source discharges of pollutants into waters of the United States without a permit issued by the EPA or the U.S. Army Corps of Engineers (Corps). Discharges of most pollutants are permitted by EPA under § 402 of the CWA, the National Pollutant Discharge Elimination System (NPDES). Most states, including Oregon, have authority to administer the federal NPDES program at the state level. In Oregon, DEQ is the permitting authority. Unlike other pollutants, however, discharges of "dredged material" are permitted by the Corps under § 404 of the CWA. This case is about the contours of the division between the two agencies' authorities.

NPDES General Permits

This case concerns DEQ's issuance of a "general permit" for suction dredge mining. Under the NPDES program, a discharger may be covered by an "individual" permit or a "general" permit. A general permit:

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

Individual operators then apply for coverage under the general permit, which contains permit conditions generally applicable to the type of activity permitted under the general permit. Applying for coverage under a general permit is typically a much simpler process than applying for an individual NPDES permit.

Procedural History

The Court's recent decision follows a complicated 14-year-long procedural history. The case first arose when the Oregon Environmental Quality Commission (DEQ's predecessor) issued a general permit for suction dredge mining in Oregon in 2005. On appeal by both miners and environmentalists, the Oregon Court of Appeals concluded that suction dredge mining created both turbid wastewater plumes and dredged spoil, which required permitting by the EPA (or DEQ, through its delegated authority) and the Corps, respectively.

Both sides appealed to the Oregon Supreme Court, but after the Court granted review, the permit expired and the case was dismissed as moot. In 2010, DEQ issued a new permit (the 700-PM permit). The permit expired while on appeal to the Court of Appeals, which that court dismissed as moot. The Supreme Court reversed because the issue "was capable of repetition yet evading review." It remanded the case back to the Court of Appeals, which exercised its discretion to consider one of petitioner, Eastern Oregon Mining Association's, assertions of error: that DEQ lacked authority to issue a permit for suction dredge mining. The Court of Appeals affirmed DEQ's authority to issue the permit.

The Supreme Court's Decision

On appeal to the Supreme Court, petitioners argued that DEQ lacked authority to issue a permit for suction dredge mining because: 1) the procedure does not *add* a pollutant to a waterway and is therefore outside EPA's permitting authority, and 2) even if suction dredge mining did add a pollutant to a waterway, that pollutant is unprocessed dredged material subject to the Corps' permitting authority, not EPA's or DEQ's.

Addition of a Pollutant

Petitioners first argued that EPA has permitting authority only over the "discharge of a pollutant," which is defined in statute to mean "any addition of any pollutant to navigable waters from any point source." Because suction dredge mining does not *add* anything to the water, petitioners argued, EPA has no authority to permit the practice.

The Court quickly rejected petitioners' argument as contrary to established Ninth Circuit law and EPA interpretations (although their authority is not binding on the Oregon Supreme Court).

Dredged Material

The heart of the case centers on the meaning of "dredged material." Petitioners argued that:

> . . even if suction dredge mining adds pollutants to the water, the material discharged as a result of suction dredge mining constitutes 'dredged material' over which the Corps has exclusive permitting authority.

DEQ maintained:

> . . .that, in interpreting and administering their regulations, the Corps and the EPA reasonably have concluded that the material is processed waste subject to the EPA's permitting authority rather than unprocessed dredged material subject to the Corps' permitting authority and that [the Court] should defer to those agencies' reasonable interpretation.

A full discussion of the Court's analysis on this point is beyond the scope of this article, but in short, the Court's analysis proceeded as follows. First, the Court concluded that neither the CWA itself nor its implementing regulations squarely answered the question of whether discharges from suction dredge mining constitute "dredged material" subject to the Corps' permitting authority. However:

> . . .from 1986 to 2018, the EPA and the Corps have been on the same page…. [B]oth agencies consistently have recognized that processed waste discharged as a result of suction dredge mining is a pollutant that requires a permit from the EPA under section 402. Similarly, they consistently have concluded that the discharge resulting from suction dredge mining is not 'dredged material' that requires a permit from the Corps under section 404.

Finally, the Court concluded the agencies' interpretation was "reasonable" and deserving of deference.

The Dissent

Justice Balmer dissented, reasoning that the Corps' 2008 definition of "dredged material" as "material that is excavated or dredged from waters of the United States" was dispositive and should have resulted in the Court reaching the opposite conclusion. Administrative law connoisseurs interested in early interpretations of *Auer* deference post-*Kisor* will want to read Justice Balmer's dissent in full. *See, Auer v. Robbins*, 519 U.S. 452 (1997) (establishing that courts must defer to reasonable agency interpretations of their own ambiguous regulations); *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) (exploring the limits of *Auer* deference and establishing a five-step analysis to determine whether to apply it).

Conclusion and Implications

Suction dredge mining in Oregon may proceed under the most recent 700-PM permit, which was issued in 2015. That permit was modified in 2018 to reflect new Oregon law banning motorized mining in essential salmon habitat. That law and the resulting litigation was previously covered in-depth by this publication. *See, Bohmker v. Oregon*, 903 F.3d 1029 (9th Cir. 2018); *Campbell v. Oregon Dep't of State Lands*, 2017 WL 3367094 (D. Ore. 2017). The current 700-PM permit expires January 1, 2020. This means DEQ should initiate a new permitting process soon (although DEQ sometimes fails to comply with NPDES permitting deadlines).
(Alexa Shasteen)

UTAH COURT SUPREME COURT REQUIRES WATER USER PARTICIPATION IN ADMINISTRATIVE PROCEEDINGS REGARDING IMPAIRMENT OF WATER RIGHTS

Rocky Ford Irrigation Company v. Kents Lake Reservoir Company and Beaver City, 2019 UT 31 (Ut. 2019).

The Utah Supreme Court has held that a water user must participate in the administrative proceedings in order to assert impairment of its water rights. In so holding the Court rejected the concept of a hybrid priority date system related to change applications. Rather the Court concluded that a water right retains its priority date and the only avenue to assert impairment arising from a change application is during the administrative process to approve or reject the same. This decision places renewed emphasis on protesting and disputing change applications that may potentially impact water rights.

Factual and Procedural Background

This case is the latest episode in a long running dispute between two water users' groups. Kents Lake Reservoir Company (Kents Lake) and Rocky Ford Irrigation Company (Rocky Ford) divert and store water from the Beaver River in Central Utah. Each company owns direct-flow and storage water rights that were recognized in the 1931 Beaver River Decree. The Beaver River Decree held that all upper users were entitled to obtain their water rights prior to the lower users, irrespective of their relative priority dates. Kents Lake is located upstream of Rocky Ford and is considered to be in the upper basin, while Rocky Ford is in the lower basin.

Kents Lake filed change applications in 1938 and 1940 to store additional water in its reservoir. These change applications were both approved by the Utah Division of Water Rights over the protests of Rocky Ford. Subsequently, the two companies entered into an agreement to:

> . . .provide for the practical administration of storage … and to prevent future controversy concerning the diversion for storage. *Rocky Ford v. Kents Lake*, 2019 UT 31, ¶ 9.

This agreement provided that: 1) Rocky Ford would not protest Kents Lake's planned change application seeking an option storage right in Three Creeks Reservoir, 2) Kents Lake would not oppose Rocky Ford's enlargement of its reservoir, and 3) Rocky Ford has an exclusive right to store all water available to it from November 1 to the following April 1 each year.

As agreed, Kents Lake submitted a change application to the State Engineer seeking to create an option storage right in Three Creeks Reservoir. Rocky Ford, as promised, did not protest the application. The State Engineer approved the application and granted Kents Lake's request for these "direct-storage changes." Kents Lake now had a direct-storage right, allowing it to either use the water directly or store it in Three Creeks Reservoir. Kents Lake subsequently perfected this change and received a certificate of beneficial use for the direct-storage right.

Beginning in the 1970s Beaver River water users gradually shifted to sprinkler irrigation, which requires less diversion of water and produces less return flows. Entities such as Kents Lake began to store these efficiency gains and this reduced the flow available to lower users, such as Rocky Ford. The reduction of return flows can adversely impact lower users as insufficient water is made available.

In 2010, after requesting assistance from the Division of Water Rights, Rocky Ford brought suit in District Court against Kents Lake. The suit alleged water right interference, conversion of water rights, and negligence, and seeking declaratory relief, injunctive relief, and rescission of the 1953 Agreement. Rocky Ford contends that its water rights have been impaired by the approved changes to the direct-storage and other actions taken by Kents Lake. Essentially, Rocky Ford asserted that its water rights had priority over the direct-storage rights approved in Kents Lake's change application when the issue of localized impairment arises.

At the District Court

Following discovery, Rocky Ford moved for partial summary judgment. It asserted that: 1) the direct-storage changes maintain an 1890 priority date only to the extent they don't impair Rocky Ford's direct flow rights, and 2) Rocky Ford's direct flow rights are

not subordinated or waived under a plain language reading of the Agreement. The state District Court denied the motion holding that Rocky Ford had "intentionally waived its direct flow rights against [Kents Lake] through its entrance into the 1953 agreement" and that Kents Lake could continue to store its water as it has "even to the detriment of [Rocky Ford]'s direct flow rights." *Id.* at ¶ 15.

Following a bench trial, the District Court issued its written Memorandum Decision. The court first denied Rocky Ford's request for injunctive and declarative relief regarding Kents Lake's measurement obligations. Because Kents Lake had followed the instructions of the State Engineer with regard to measurement, the District Court concluded that Rocky Ford was not entitled to declarative or injunctive relief. The District Court also declined to rescind the 1953 Agreement. It concluded that Rocky Ford had not proved material breach, impracticability, frustration of purpose, or mutual mistake. Lastly, the District Court awarded attorney fees to Kents Lake and Beaver City *sua sponte* under Utah Code § 78B-5-825.

Issues on Appeal

Rocky Ford appealed the decision and asserted five principal questions for review. First, did the trial court commit legal error when it denied Rocky Ford's motion for summary judgment? Second, did the trial court err in refusing to declare that Kents Lake could not store the water it saved through improved efficiency? Third, did the trial court err in refusing to declare that Kents Lake must measure its usage consistent with the requirements of the Beaver River Decree? Fourth, did the trial court err in refusing to rescind the 1953 Agreement? And fifth, did the trial court err in awarding attorney fees to Kents Lake and Beaver City?

The Utah Supreme Court's Decision

The Utah Supreme Court affirmed the denial of Rocky Ford's motion for partial summary judgment on alternative grounds. It also affirmed the trial court's holdings that Rocky Ford had no claim on Kents Lake's efficiency gains and that the 1953 Agreement should not be rescinded. However, the Court reversed and remanded the District Court's refusal to enter a declaratory judgment regarding Kents Lake's measurement obligations and also the denial of the rule 59 motion and hold that Kents Lake and Beaver City are not entitled to attorney fees. *Id.* at ¶ 20.

The Court addressed each of the five principal issues on appeal, however the question of whether the District Court erred in denying Rocky Ford's motion for summary judgment is of particular interest. The Court affirmed the decision of the District Court, but did so on alternative grounds. The District Court ruled that the 1953 Agreement was clear and unambiguous and that Rocky Ford had intentionally subordinated its direct flow rights, allowing Kents Lake to use the water to Rocky Ford's detriment. *Id.* at ¶ 21. This holding relied upon the plain text of the 1953 Agreement. The Supreme Court disagreed with this holding. Rather the Court held that Rocky Ford had "agreed it was not impaired" under doctrines of "waiver, release, ratification, or … estoppel." *Id.* at ¶ 25. Rocky Ford consented not to protest Kents Lake's change application, in doing so it also waived any right to subsequently assert impairment.

Utah law provides that a water user may change the use of their water right. Utah Code § 73-3-3 (1953). However, a changed use is not permitted "if it impairs any vested right." *Id.* Likewise, other water users are entitled to file a protest with the State Engineer, claiming that the change would impair vested rights in the water source. *Id.* § 73-3-7 (1953). Finally, "no such change of approved application shall affect the priority of the original application." *Id.* § 73-3-3 (1953).

How a Change Application Affects Priority?

Rocky Ford asserted that the change in use by Kents Lake's is junior to Rocky Ford's direct flow rights. Accordingly, the Court was charged with resolving the question of how a change application affects priority. If a change application retains the original priority date, Rocky Ford's rights are junior to Kents Lake's, and Kents Lake can use its water to the detriment of Rocky Ford. But if a change application receives the priority date of the approved change, Rocky Ford's rights would be senior to Kents Lake's direct-storage right. The Court applied the plain text of the statute; holding that a change application does not affect the priority date of a water right. In reaching this conclusion, the Court expressly rejected a hybrid priority system that would utilize the priority date of a change application to resolve issues of localized impairment.

A Party Must Utilize the Administrative Process to Assert a Water Right Impairment

Importantly, the Supreme Court held that a party must utilize the administrative process in order to assert impairment of a water right. The Utah Code provides a process for asserting impairment and that requires a party to protest a change application and participate in the administrative process. Further, the Utah Code provides for judicial review within 60 days of a final Division of Water Rights order. *Id.* at § 73-3-14. However, once a certificate of beneficial use is issued for the change in question, it is "*prima facie* evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the specified time therein, subject to prior rights." *Id.* at § 73-3-17. Consequently, Rocky Ford's failure to participate in the administrative process, by choice or in accordance with a contract, effectively barred its assertion of impairment.

Conclusion and Implications

This decision represents a change in how many have perceived changed water rights to be administered. Change applications are typically assigned a priority date by the Division of Water Rights. This decision renders that priority date obsolete and confirms that the priority date of the underlying water right remains unchanged. Further, it places additional emphasis on the administrative process, by holding that failure to participate in that process can result in an absolute bar on the ability to subsequently assert impairment arising from a change.

The Utah Supreme Court Decision may be found at: https://www.utcourts.gov/opinions/supopin/Rocky%20Ford%20v.%20Kents%20Lake20190711_20170290_31.pdf

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