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EASTERN WATER NEWS

U.S. ARMY WAR COLLEGE REPORT ANALYZES ENVIRONMENTAL CHALLENGES TO ARMY BY CLIMATE CHANGE

In a previous issue we reviewed a United States (U.S.) Department of Defense (DoD) report regarding the vulnerability of DoD infrastructure to climate-related events, including sea-level rise and wildfires. A recent report prepared by the U.S. Army War College, went one step further and looked specifically at the challenges to the U.S. Army (Army).

Background

The report, “Implications of Climate Change for the U.S. Army” (Report), was published summer 2019, but gained more recognition towards the end of the year when some news publications reviewed the Report and published articles about it with headlines warning about a potential Army collapse within 20 years.

The Report includes two parts with the first discussing the challenges posed by climate change and the second including the Report’s recommendations.

Under the summary section of the Report, it states that:

In light of these findings, the military must consider changes in doctrine, organization, equipping, and training to anticipate changing environmental requirements. Greater inter-governmental and inter-organizational cooperation, mandated through formal framework agreements, will allow the DoD to anticipate those areas where future conflict is more likely to occur and to implement a campaign-plan-like approach to proactively prepare for likely conflict and mitigate the impacts of mass migration.

The Report goes on to state in summary that:

Finally, the DoD must begin now to promulgate a culture of environmental stewardship across the force. Lagging behind public and political demands for energy efficiency and minimal environmental footprint will significantly ham-

string the Department’s efforts to face national security challenges.

Part 1: The Challenge of Climate Change

In this first part, the Report highlights three challenges: 1) Climate Change and the Physical Environment, 2) Climate Change and the Social, Economic, and Political Environment, and 3) the Army and DoD – Organizational Confusion and Lack of Accountability for Climate Change.

Climate Change and the Physical Environment

In this section, the Report notes that climate change “affects the conditions in which people live, and the environment in which military organizations operate.” According to the Report, many factors are putting more people in harm’s way and thereby creating multi-dimensional stress on conventional military forces. Human migration and refugee relocation due to climate change also “create an environment ripe for conflict and large-scale humanitarian crises.” The Report goes on to detail a number of potential climate change impacts including sea-level rise, the opening of the Arctic, the increased range of insect-borne diseases, decreased fresh water availability, decreased food security, and stress to the power grid.

Climate Change and the Social, Economic, and Political Environment

The Report notes that although climate change’s potential impacts are likely familiar, the “social, political, and economic effects of human concerns about climate change” are not. The Report opines that the more the human population believes in climate change, its cause (human-induced), and its threat, this will lead to consequences that the Army will be unable to ignore. The Report proposes a framework to understand this challenge. The framework is composed of social, market, regulatory, and technological responses to climate change.

The Army and DoD—Organizational Confusion and Lack of Accountability for Climate Change

The Report is critical of the military's inattention to climate change. It opines that "we currently have no systemic view to assess and manage [climate change] risk." It compares China's actions to that of the U.S. and notes that the potential exists "to create very significant asymmetries in resilience between the U.S. and China to climate-induced effects and any other type of attack or disaster." The Report notes DoD's responsibility to create another climate change vulnerability assessment in the coming years, but questions whether the Army will do much beyond providing the answers required for DoD's report.

The Report also provides examples showing the Army's "environmentally oblivious culture," including jet fuel dumped overboard when turbine engines are shut off, the soil damage caused by armored vehicles and the "thousands of pages of PowerPoint presentations" that are printed every day and discarded after a briefing. The Report summarizes its position succinctly: "the Army is an environmental disaster."

Report Recommendations

The second part of the Report includes recommendations in four "areas": 1) the Army Operating Environment, 2) the Army Institution, 3) the Joint Force and DoD, and 4) the National Context.

The Army Operating Environment

In this section, the Report includes a number of recommendations to address the Army's hydration challenges in arid environments. It also recommends increased planning in order to prepare for an expanded role in Arctic operations associated with global climate adaptation.

The Army Institution

The Report contends that the Army lacks a culture of environmental stewardship and recommends that its "norms and values must change." The Report notes that although the current administration may have backed out of the Paris Agreement, "the majority of the American people believe that climate change is a threat." The Report sees an opportunity for the Army to "lead the nation in preparedness and environmental awareness" or, alternatively, it can continue "hurtling through the night in the belief that it is as unsinkable as the Titanic."

The Joint Force and the Department of Defense

In this section, the Report details the type of inter-agency collaboration it believes is necessary to adequately address a lack of coordination and to consolidate climate-change related intelligence.

The National Context

In this section, the Report looks at potential power grid vulnerabilities and recommends "reverse infrastructure degradation around military installations" and the development of "cutting edge strategies for decentralized power generation and storage."

Conclusion and Implications

Although the Report is very technical, it also serves as an effective call to action. It will be interesting to see if the Army's leaders implement any of the Report's recommendations. In the end, the Report finds that the U.S. Army is "precariously unprepared" for the impacts of climate change. The Report is available online at: https://climateandsecurity.files.wordpress.com/2019/07/implications-of-climate-change-for-us-army_army-war-college_2019.pdf. (Kathryn Casey)

HYDROELECTRIC PROJECT SEEKS WATER FROM HEAVILY LITIGATED WALKER RIVER BASIN—PART OF PROJECT WILL USE RENEWABLE ENERGY SOURCES

Recently, a private energy development company based in California applied to the Federal Energy Regulatory Commission (FERC) for permits to explore the feasibility of constructing two reservoirs above Walker Lake and Pyramid Lake in Nevada to generate electricity for sale in the Los Angeles energy market. The Walker River Working Group and Walker River Paiute Tribe recently intervened and provided commentary, respectively, opposing issuance of the permits for the Walker Lake project. Both entities are concerned that the proposed project would cause environmental, recreational, and aesthetic harm by decreasing lake levels.

Background

On July 10, 2019, Premium Energy Holdings, LLC (Premium Energy) filed an application for a preliminary permit to study the feasibility of what it calls the Walker Lake Pumped Storage Project (Project). The Project would be located on Walker Lake and Walker River, in Mineral County, Nevada. The Walker River originates in the eastern Sierra Nevada Mountains in California before emptying into Walker Lake. According to FERC, the sole purpose of a preliminary permit is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not, however, entitle the permit holder to construct the proposed project, and instead limits the authority conferred on the permit holder to study the feasibility of a proposed project. Moreover, a preliminary permit does not authorize the permit holder to enter privately owned lands or waters without permission.

The Project, as currently formulated, would be a closed-loop pumped storage hydropower facility consisting of an upper and lower reservoir. Water would be pumped from the lower reservoir using excess renewable energy, such as from solar and wind, into the upper reservoir. Water would be released from the upper reservoir to generate hydroelectricity when other renewable energy sources were unavailable. Premium Energy's application proposes three alternative upper reservoirs: Bald Mountain Reservoir, Copper Canyon Reservoir, or Dry Creek Reservoir. Walker

Lake, which holds approximately 1.4 million acre-feet of water, would be the lower reservoir for either of the alternative upper reservoirs. The estimated annual generation of the Project under each of the alternatives would be about 6,900 gigawatt-hours.

The Bald Mountain Reservoir alternative consists of a proposed 101-acre upper reservoir at an elevation of 6,500 feet above sea level. The upper reservoir would have a total storage capacity of 23,419 acre-feet, and would be impounded by a 615-foot-high concrete dam. Water conveyance facilities would include a series of tunnels and shafts, as well as a 500-foot-long, 85-foot-wide, 160-foot-high powerhouse located in an underground cavern. The powerhouse would contain five pump-turbine generator-motor units capable of generating 400 megawatts each. A 0.45-mile-long, 32-foot-diameter tunnel would discharge into Walker Lake. Similarly, the Copper Canyon Reservoir alternative would consist of a 235-acre upper reservoir, with a 505-foot concrete dam impounding as much as 36,266 acre-feet, and would include a powerhouse identical to the Bald Mountain Reservoir alternative. The Dry Creek Reservoir alternative would consist of a 105-acre upper reservoir with a total storage capacity of 21,953 acre-feet impounded by a 775-foot-high concrete dam and utilize slightly shorter water conveyance facilities. An identical powerhouse to the Bald Mountain and Copper Canyon Reservoirs is included in the Dry Creek alternative. Under either alternative, the powerhouse would be connected to the electrical grid via a ten-mile-long, 500 kilovolt transmission line extending to a proposed converter station.

Legal Issues Raised

Premium Energy's permit application has raised several legal concerns by parties to ongoing litigation involving Walker Lake and the Walker River Basin, primarily with respect to the availability of water for the Project. Mineral County, the Walker River Working Group, and the Walker River Paiute Tribe have all expressed concerns that any water contemplated for use by the Project would diminish the amount of water flowing into or stored in Walker Lake, thus

negatively impacting environmental, recreational, and aesthetic values, as well as precipitating lakebed ownership questions that have not been judicially resolved.

Water rights to the Walker River are governed by the Walker River Decree, which was issued by the United States District Court for Nevada in 1936 and modified in 1940. Currently, the United States and Walker River Paiute Tribe are seeking additional water rights for the tribe than were originally adjudicated in the Walker River Decree, including storage rights of Walker River water in Weber Reservoir north of Walker Lake. Additionally, Mineral County and the Walker River Working Group filed a lawsuit currently pending before the Nevada Supreme Court alleging that the State of Nevada and the Walker River Decree fail to satisfy or recognize the state's public trust duties to maintain Walker Lake for the benefit of the public, which could require imposing inflow requirements for Walker Lake. Accordingly, the parties opposing Premium Energy's permit application argue that either no water is available for the Project, or any water rights obtained by Premium Energy will be encompassed by ongoing litigation.

In response to some of these concerns, Premium Energy has recently stated that it will seek to acquire water rights to the Walker River, potentially via litigation. According to Premium Energy, it is interested in acquiring water rights from users upstream of Walker Lake. Instead of consumptively exercising those water rights, Premium Energy suggests that it

would direct the water to Walker Lake, which would then be cycled between Walker Lake and an upper reservoir, resulting in less than one-foot fluctuations in Walker Lake levels. Premium Energy has not identified whether it will seek Nevada or California water rights to the Walker River, nor has it articulated its legal basis for how acquiring those rights would allow Premium Energy to store—as opposed to consumptively use—water in Walker Lake and an upper reservoir.

Conclusion and Implications

Premium Energy's application is only for studying the feasibility of the Walker Lake Pumped Storage Project. It is unclear what water rights may be available for Premium Energy to acquire to meet the needs of the Project without interfering with existing water rights. Moreover, it is unclear if water rights may be available to Premium Energy that would allow the company to non-consumptively store water in Walker Lake for cycling between an upper reservoir. Answering these questions could significantly impact the viability of the Project, and could potentially involve litigation to settle those or related questions.

The Premium Energy Preliminary Permit Application, available at: <https://www.federalregister.gov/documents/2019/10/04/2019-21638/premium-energy-holdings-llc-notice-of-preliminary-permit-application-accepted-for-filing-and>.

(Miles B. H. Krieger, Steve Anderson)

NEWS FROM THE WEST

In this month's News from the West we report on efforts in California, at the administrative level, to finalize the priority categorization of the state's groundwater basins. It was only in the last few years that *state* regulation of groundwater began in earnest.

We also report on a decision out of the Utah Court of Appeals addressing historic water conveyance easements and their enforcement—recognizing that claims that might date back as far as 1866—might only be proven by the “best information currently available.”

California Department of Water Resources Completes Groundwater Basin Prioritization Process

The California State Department of Water Resources (DWR) recently completed its multiphased prioritization of the state's 515 groundwater basins and sub-basins. As a result, many basins are now required to comply with the mandates of California's landmark Sustainable Groundwater Management Act (SGMA). By contrast, some basins are now left to decide whether they will voluntarily comply with SGMA.

Background

In 2009, California enacted legislation requiring DWR to evaluate the effectiveness of local groundwater basin monitoring systems and data across the State. In response to that legislation, DWR created the California Statewide Groundwater Elevation Monitoring (CASGEM) program, which included prioritizing all California basins and sub-basins and establishing monitoring and reporting requirements.

SGMA requires local agencies in all non-adjudicated, high- and medium-priority basins to establish local groundwater sustainability agencies (GSAs) and to develop and implement groundwater sustainability plans (GSPs). DWR utilized the 2014 CASGEM basin prioritization for the initial SGMA prioritization requirements, which resulted in the designation of 127 high-and medium-priority basins.

2019 Basin Prioritization Phases

The 2009 groundwater monitoring law, as amend-

ed by SGMA, requires DWR to consider multiple components in establish basin priorities, including:

- The population overlying the basin or sub-basin.
- The rate of current and projected growth of the population overlying the basin or sub-basin.
- The number of public supply wells that draw from the basin or sub-basin.
- The total number of wells that draw from the basin or sub-basin.
- The irrigated acreage overlying the basin or sub-basin.
- The degree to which persons overlying the basin or sub-basin rely on groundwater as their primary source of water.
- Any documented impacts on the groundwater within the basin or sub-basin, including overdraft, subsidence, saline intrusion, and other water quality degradation.
- Any other information determined to be relevant by DWR, including adverse impacts on local habitat and local streamflows.

SGMA further requires DWR to reassess groundwater basin prioritization any time it updates Bulletin 118 basin boundaries. In December 2016, DWR published Bulletin 118 – Interim Update 2016, which defined 517 groundwater basins and sub-basins in California. In May 2018, DWR released a draft prioritization for those basins and initiated a lengthy public comment period, during which time some local agencies requested a further review of basin boundary modifications. In response, DWR's prioritization process occurred in two phases (referred to as SGMA 2019 Basin Prioritization Phase 1 and Phase 2).

SGMA 2019 Basin Prioritization Phase 1

The SGMA 2019 Basin Prioritization Phase 1 focused on the basins that were defined according to

Bulletin 118 – Interim Update 2016 and not affected by the 2018 basin boundary modifications. In January 2019, DWR finalized the SGMA 2019 Basin Prioritization Phase 1 priorities for 458 basins.

SGMA 2019 Basin Prioritization Phase 2

SGMA 2019 Basin Prioritization Phase 2 (Phase 2) was completed in December 2019. Phase 2 prioritized the remaining 57 basins that included the 53 basins for which boundaries were modified and approved through the 2018 boundary modification process, two basins for which boundary changes were not approved, and two basins for which boundaries were established pursuant to statutory amendments to SGMA. In total, Phase 2 completed prioritization for all 515 California basins and sub-basins.

DWR reports that the SGMA 2019 Basin Prioritization followed the same technical process used in prior basin prioritization efforts, with certain updates to reflect statutory changes to SGMA. In conducting the SGMA 2019 Basin Prioritization, the following items were particularly drawn into focus: 1) Adverse impacts on local habitat and local streamflows; 2) Adjudicated areas; 3) Critically overdrafted basins; and 4) Groundwater-related transfers.

As with previous prioritization processes, DWR assigned points to each component of the analysis.

Point totals were determined and scaled, resulting in high-, medium-, low- or very-low priority designations. Phase 2 resulted in the following prioritizations: 1) High priority – 46 basins; 2) Medium priority – 48 basins; 3) Low priority – 11 basins; and 4) Very Low priority – 410 basins

According to DWR, the 94 basins and sub-basins now designated high- and medium-priority, in combination with adjudicated areas which have existing local groundwater management in place, collectively account for 98 percent of the pumping (20 million acre-feet), 83 percent of the population (25 million Californians), and 88 percent of all irrigated acres (6.7 million acres) within the California's groundwater basins. SGMA implementation is already well underway, and in some cases nearly complete, for many of those basins that were already identified as high- and medium-priority.

Basins previously ranked low- or very-low priority that are now are prioritized as high- or medium-priority are required to form GSAs within two years

and develop their GSPs within five years (or submit a qualifying GSP alternative as provided in SGMA).

Basins previously prioritized as high- or medium-priority that are now low- or very low-priority are not required to form a GSA or prepare a GSP. These basins are, however, still encouraged by DWR to form GSAs and develop GSPs and to develop and or update existing local groundwater management plans.

Reports and Tools

DWR issued a report detailing the SGMA 2019 Basin Prioritization, entitled *Sustainable Groundwater Management Act 2019 Basin Prioritization*. The report explains DWR's process, criteria and results. The report, along with other SGMA 2019 Basin Prioritization information, including maps and tools, is available on DWR's website at: <https://water.ca.gov/Programs/Groundwater-Management/Basin-Prioritization>.

Conclusion and Implications

SGMA implementation continues to develop and evolve throughout California. At nearly the same moment some basins became subject to SGMA's mandates through the SGMA 2019 Basin Prioritization, GSPs are coming due in January 2020 for the approximately twenty basins that have been designated as "critically overdrafted." By contrast, some basins previously required to establish GSAs and develop GSPs are now left to decide whether to do so voluntarily and how to address previously awarded grant funding. One thing is certain: groundwater management in California will look and function much differently over the next 20 years. (Derek Hoffman, Michael Duane Davis)

Utah Court of Appeals Finds Water Conveyance Easement Established Pursuant to 1866 Mining Act Permits Easement Holder to Seek Attorney's Fees

The Utah Court of Appeals ruled that an easement established under the 1866 Mining Act can be established upon the best information available and that interference with such a water conveyance easement, if proven at court, will entitle the aggrieved party to collect attorneys' fees. [*Allen Family Trust v. Holt*, 2019 UT App 197 (Ut. Dec. 5, 2019).]

Factual and Procedural Background

The 1866 Mining Act was enacted in part to recognize water rights acquired by owners and predecessors of those rights that were acquired by local custom, laws and decisions of local courts. *See*, 14 Stat. 251-53 (codified at 43 U.S.C. § 661(1976)). The present case involves an easement to convey water from a neighboring party through ditches, which were alleged to have been constructed prior to 1896, to a parcel of irrigated ground in Section 34.

Ammon Allen originally settled the land in question in the 1890s and commenced construction of conveyance works in or around 1896, to divert water from what were colloquially known as Gardner Springs and Dan's Camp to his property in Section 34. This water right was recognized in the 1948 Ogden River Decree, which held that Abner Allen [a successor] had a right to convey water from Gardner Springs and Dan's Camp through an "unnamed ditch" to irrigate land in Section 34. By this time, the conveyance works ran through and across abutting lands now owned by the Utah School and Institutional Trust Lands Administration (SITLA).

In 1963, Abner's sons formed the Allen Ranch Company (ARC), which acquired right to Section 34 property and the water rights from Abner. ARC entered into a 25-year lease with SITLA for farming purposes. The lease provided, among other things that "fixtures left on servient estate for more than one year after lease termination would become SITLA's property," however the lease was also made "subject to any and all valid and existing rights in [the servient estate]."

ARC dissolved in 1977 with the water being distributed out to the incorporators, but following some confusion as to title, the Parties more or less agreed that Ross Allen had 70 percent interest in the water right and Scott Allen had the other 30 percent. In or around 1979, Ross and his son David constructed a pipeline to improve conveyance of the water from Gardner Springs and Dan's Camp to the Section 34 property for irrigation purposes. This pipeline generally followed the existing open ditch route across the SITLA property.

In or around 1998, SITLA sold the abutting land, which was ultimately acquired by the Millennial parties (Holt and Millennial Partners are collectively referred to herein as the Millennial Partners and are the

appellants). The Millennial parties subsequently became concerned about the Allens (appellees) "gaining access to the property in an unregulated way to maintain the easement." 2019 Ut. App. 197, ¶ 11. In the ensuing conflict, Millennial Partners sent letters to David Allen to try to assert control over access to the property, erected fences around the property, and eventually dug up and cut the pipes with a chainsaw to interrupt the conveyance of water to the Section 34 property. The District Court entered a stipulated judgment in this dispute with findings that Allens possessed a water right at Dan's Camp and owned the conveyance system that was on the servient estate. *Id.*

Finally, in 2012, the Allens instigated the present lawsuit. They sought a declaratory judgment affirming that they own an easement to convey water through the servient estate to the Section 34 property as well as the pipe system. They also alleged that the Millennial parties unlawfully interfered with their water right and that the Millennial parties had forfeited their water right as the result of nonuse. Following a bench trial, the District Court agreed with the Allens that they owned a water right easement and that the Millennial parties had interfered with that water right. However, the District Court found that nonuse of the Millennial Parties' water right had not been proven by clear and convincing evidence.

The Millennial parties now appeal the District Court's rulings against them, and the Allens cross-appeal the District Court's rejection of their water forfeiture claim. The Millennial parties raise numerous issues on appeal, including whether the District Court: 1) erred in finding that Dan's Camp is a diversion point for the Allens' water right, 2) erred in concluding that the Allens have a right of way pursuant to the 1866 Mining Act, 3) abused its discretion by reconsidering and reversing its own prior summary judgment ruling, 4) erred in finding that the Allens had not abandoned their easement and right to convey water from the Upper Spring diversion point, and 5) erred in finding that the Millennial parties interfered with the Allens' water right and awarding attorney fees based on that interference. Despite the apparent complexity of these issues, all of them turn on whether the District Court properly found that the Allens have a current water right easement pursuant to the 1866 Mining Act that includes both Dan's Camp and the Gardner Springs as diversion points.

The Court of Appeals' Decision

On cross-appeal, the Allens argue that the District Court erred in concluding that the Millennial parties did not forfeit their water right under Utah Code section 73-1-4 by failing to put the water to beneficial use. "Whether a water right holder has put her water to beneficial use is a mixed question of fact and law, and we grant the District Court's ruling significant, though not broad, discretion." *Salt Lake City Corp. v. Haik*, 2019 UT App 4, ¶ 43, 438 P.3d 913. However, because water forfeiture rulings are heavily dependent on questions of fact, "we will reverse the court's findings of fact only if they are clearly erroneous." *Id*

A Water Conveyance Pursuant to the Mining Act

To establish a water conveyance easement under the 1866 Mining Act, a "prospective grantee must possess valid water rights under state law, and the water facilities must have been constructed on unoccupied and unreserved lands." *Roth v. United States*, 326 F. Supp. 2d 1163, 1175 (D. Mont. 2003) (citing *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1, 12 (1896)). The parties agree that the Ogden River Decree satisfies the first element by establishing that the Allens had a valid water right under Utah law. As to the second element, the parties also appear to agree that Dan's Camp was unoccupied and unreserved until 1896, when Utah became a state. Thus, a primary dispute in this case is whether the ditches at Dan's Camp were constructed before 1896, as the District Court found.

The Court of Appeals was charged with determining if the District Court made a clearly erroneous finding. The court noted that:

... because of the difficulties inherent in proving actions regarding water use that occurred more than a century ago, the law does not require prospective grantees to put on 'overwhelmingly clear evidence' of a water ditch's date of construction or location." *Id* at ¶ 18. *See, Eskelsen v. Town of Perry*, 819 P.2d 770, 774 (Utah 1991) (declining to adopt "[r]igid standards regarding proof" of pre-1903 beneficial water use).

Rather, a water conveyance easement will be recognized so long as it is supported by the "best infor-

mation available." *See, Eskelsen* at 774.

The Court of Appeals concluded that the Allens presented the best information available regarding the timing and location of the original ditch's construction, and it supports the District Court's finding that it was located at Dan's Camp. Based on this finding, the District Court acted within its discretion in applying the facts to the law, specifically the 1866 Mining Act, to reach the legal conclusion that the Allens had a water conveyance easement at Dan's Camp. Accordingly, the Court of Appeals held that the best available evidence was presented and that the District Court had not exceeded its broad discretion. *Id.*

Interference with the Easement

Once it was determined that that Allens had a valid 1866 Mining Act water right, the remaining issues on appeal were easily resolved by the court. First, because the Allens had a right of way prior to SITLA's ownership, SITLA took ownership of the property subject to the water conveyance. *Id.* at ¶ 21, *See Sullivan v. Northern Spy Mining Co.*, 40 P. 709, 710-11 (Utah 1895) (explaining that a subsequent owner who takes possession of land takes the land subject to any water easements burdening it). Further, the Allens could improve their property and SITLA could not give away the water system, because "the water system was never SITLA's to give away." *Id.*

Additionally, the Court of Appeals determined that since the Allens had a valid water right, the Millennial parties interfered with that right, noting that it:

... is difficult to imagine a more clear-cut case of interference with a water right than a party threatening to shut off access to the water, fencing off the right of way, and sawing through a pipe conveying the water to its rightful recipients." *Id.* at ¶ 23.

Attorney's Fees

The existence of the water right and the acts of interference also compel the conclusion that the District Court was correct to award attorney's fees to the Allens. *Id.* at ¶ 24, *see e.g.* Utah Code Ann. §73-2-28(2) (providing attorney fees for the prevailing party of a civil action brought under Utah Code section

73-1-15). Notably, since the District Court awarded them below, the Allens are also entitled to the attorney fees they have requested on appeal. *Id.* See *CORA USA LLC v. Quick Change Artist LLC*, 2017 UT App 66, ¶ 7, 397 P.3d 759 (“In general, when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.” (cleaned up))

Burden of Proof for Forfeiture

Finally, the Court of Appeals declined to opine on the correct burden of proof for establishing forfeiture. Rather, the Court of Appeals ruled that because the un rebutted evidence at trial established nonuse for a period of more than seven years, the Allens proved forfeiture regardless of whether the preponderance-of-the evidence or clear-and-convincing standard applies. Consequently, the District Court exceeded its discretion in concluding that the Millennial parties

had not forfeited their water right. *Id.* at ¶ 29. As such, the burden of proof for forfeiture remains unresolved by the courts.

Conclusion and Implications:

This decision highlighted the difficulties that courts have when they are tasked with evaluating the validity of century old diversion works. The passage of time diminishes the evidence available for consideration. As such, the best available information standard has been adopted to resolve this conundrum. Likewise, this case reaffirms that water conveyance works can be improved and are a dominant estate where an easement has been established.

The Utah Court of Appeals’ Decision may be found at: https://www.utcourts.gov/opinions/appopin/Allen%20Family%20Trust%20v.%20Holt20191205_20180614_197.pdf.
(Jonathan Clyde)

REGULATORY DEVELOPMENTS

U.S. DEPARTMENT OF THE INTERIOR DENIES FEDERAL CONSTRUCTION FUNDING EXTENSION FOR GILA RIVER PROJECT DIVERSION

On December 20, 2019, the U.S. Department of the Interior denied the New Mexico Central Arizona Project Entity (CAP Entity) an extension of time to receive \$56 million in diversion construction funds. The CAP Entity had until the end of December 2019 to receive a federal Record of Decision on the Project's Environmental Impact Statements (EIS). While environmental groups welcomed the Interior's announcement denying an extension, supporters of the Project decried the latest news pointing out the water supply benefits that the diversion promises to deliver to farms and rural communities.

Background

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

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

In 2004, Congress approved the Arizona Water Settlements Act, which gave New Mexico the right to divert a maximum of 14,000 acre-feet of water per year from the Gila River. New Mexico's Interstate Stream Commission (ISC) proposed a plan that would divert water from the Gila River across the

Continental Divide to a reservoir outside of Deming in the far southwest section of New Mexico. On November 24, 2014, the ISC voted 7-1 in favor of moving forward with a project to divert water from the Gila River. That vote met the December 31, 2014 federal deadline providing for \$62 million in federal funding. The vote also ensured that more cost analyses and environmental studies will be done in order to determine whether this project will continue towards completion. The Arizona Water Settlements Act, signed in 2004, gave the proposed project \$66 million in startup costs for proposed diversion projects. The federal government promised \$62 million towards a particular chosen project if it was selected by the ISC by December 31, 2014. Analysts predict that the project will cost anywhere from \$575 million to \$1 billion to complete.

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

The Gila River Diversion Project—Contentious Positions

In 1963, the U.S. Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963) accepted a settlement amount for diversion and consumption for the State

of New Mexico of 14,000 acre-feet to be diverted and consumed from the Gila River. The State of New Mexico expended thousands of dollars conducting an adjudication of all of the rights affecting the Gila River and reduced domestic uses in some cases to indoor use. The original idea was to generate a project that would consume water for commercial use, but not violate the decreed amount. A hard look at the issue began to demonstrate that the major use of water was in another basin, that the costs were overwhelmingly negative, and that the highest and best use of the water might be to generate an in-streamflow to protect native trout species and promote regional recreation. The momentum for this latter concept was linked to the fact that the Gila Wilderness, where the Gila originates, is the oldest wilderness designation in the country as supported by Aldo Leopold.

However, decades later, the Gila River Diversion Project has become a point of debate among many groups. Some argue that New Mexico cannot afford to spend half a billion or more on a diversion project that will struggle to divert consistently high yields. Other opponents contend that not enough work has been done to assess the costs. There is still a large gap between the estimated cost of the Project and the funds provided by the federal government. Those who oppose the Project ask for more information and planning regarding the cost of the Project, as well as the probable increases in municipal water rates. Some environmental groups, such as the Gila Conservation Coalition, are concerned about the possible negative effects the Project will have on the surrounding eco-

system and endangered species. The Project's supporters believe the diversion will provide New Mexico a rare opportunity to develop a new water supply for local communities and agriculture. New Mexico and its inhabitants are in a constant struggle for more water and many argue that the Project will provide newly developed water sources where needed.

Conclusion and Implications

The complex calculus of changing values, the reality of the geography and changing federal and state perceptions of the need for water projects finally caught up with the stark language of the Decree. See, *Arizona v. California*, 376 U.S. 340 (1964). Interestingly, while New Mexico is an Upper Basin State for purposes of the Colorado River Compact drawing water from San Juan River, it is a Lower Colorado River Basin State as well because the Gila River is a tributary of the Colorado in the Lower Basin. As a result of anticipated shortages over the next decade, the Lower Basin States of Arizona, Nevada and California are seeking methods to reduce consumption from the Colorado River. While 14,000 acre-feet of new consumption is a very small amount in comparison to the millions of acre-feet consumed in the Lower Basin, the idea of creation and development of new consumptive uses is bucking the trends, particularly in Arizona where users in Arizona will be the first to be reduced in the event of shortages under the recently adopted Drought Contingency Plan signed onto by Secretary of Interior Bernhardt. (Christina J. Bruff)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements— Water Quality

•November 25, 2019 - The Hopi Tribe has agreed to pay a \$3,800 penalty for failing to meet the terms of a 2016 agreement to reduce arsenic levels in drinking water at the Hopi Cultural Center. The Cultural Center supplies drinking water for approximately 25 people within the Hopi Reservation, 60 miles east of Tuba City. The 2016 agreement between the Hopi Tribe and the U.S. Environmental Protection Agency (EPA) outlined mitigation measures to reduce naturally occurring arsenic in drinking water at the Cultural Center. The Hopi Tribe failed to meet the agreement's deadline to implement a necessary treatment system to meet the federal Safe Drinking Water Act's (SDWA) arsenic standards of 10 micrograms per liter. In quarterly tests throughout 2018, the system failed to meet SDWA standards and to date is running an annual average of 13 micrograms of arsenic per liter. In addition to paying the penalty, the Hopi Tribe has informed EPA of its plans to complete an arsenic treatment system at the Cultural Center that was part of the 2016 settlement agreement. The Hopi Tribe has allocated funding and selected contractors to complete the work with a goal of finishing the project by early 2020. EPA's ongoing efforts with the Hopi Tribe and the Indian Health Service also includes a more comprehensive fix to address arsenic concerns on the Hopi Reservation, the Hopi Arsenic Mitigation Project (HAMP). The HAMP is a regional pipeline project intended to bring compliant source water to affected Hopi Villages and the Hopi Cultural Center by the end of 2023.

•December 3, 2019 - The U.S. Environmental

Protection Agency has finalized an administrative order with Charles Miguel Sr., a property owner, over the unpermitted construction of a diversion channel in Southeast Molokai, Hawaii. Under the terms of the order, Mr. Miguel has agreed to submit and implement a mitigation plan that will remove the diversion channel and restore the quarter acre of wetlands impacted by his unauthorized activity. In October 2018, EPA, U.S. Army Corps of Engineers (the Corps), the Hawaii Department of Public Health (DOH), and the County of Maui conducted site inspections and found extensive soil disturbance. Afterward, the Corps referred the case to EPA for enforcement and EPA has coordinated with DOH on this important case. The unpermitted construction activity in the Waialua Stream wetlands created a linear channel through two adjacent neighbors' properties. Mr. Miguel then placed the excavated fill from the new channel in wetlands without authorization under a permit from the Corps, which regulates wetlands under § 404 of the Clean Water Act.

Indictments, Convictions and Sentencing

•December 11, 2019 - The U.S. Environmental Protection Agency, U.S. Department of Justice, the Kalamazoo River Natural Resource Trustee Council, and Michigan Department of Environment, Great Lakes, and Energy (EGLE) announced a proposed consent decree that would require NCR Corp. to clean up and fund future response actions at a significant portion of the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site. The consent decree also includes payments related to natural resource damages and past cleanup efforts at the site. The consent decree is subject to a 30-day public comment period. This Superfund site has been listed on the EPA Administrator's Emphasis List of Superfund sites targeted for immediate, intense action. Each site on the list has a short-term milestone to provide the basis for tracking the site's progress. The Allied Paper Inc./Portage Creek/Kalamazoo River Superfund site is in Allegan and Kalamazoo counties and is divided

into six segments, or operable units (OUs), that require cleanup. According to the settlement terms, NCR Corporation has agreed to spend approximately \$135.7 million cleaning up three areas of OU 5. OU 5 includes 80 miles of the Kalamazoo River and three miles of Portage Creek. In addition, NCR will pay: 1) \$76.5 million to EPA for past and future costs in support of river cleanup activities; 2) \$27 million to natural resource trustees of the Kalamazoo River Natural Resource Trustee Council for natural resources damage assessment and claims; and 3) \$6 million to State of Michigan for past and future costs.

Historically, the Kalamazoo River was used as a power source for paper mills that were built along the river and a disposal site for the paper mills and the communities adjacent to the river. NCR arranged for disposal of carbonless copy paper contaminated with chemicals called polychlorinated biphenyls (PCBs) at the site. In the early 1970's, PCBs were identified as a problem in the Kalamazoo River. In 1990, in response to the nature and extent of PCB contamination, the site was added to the National Priorities List, which includes the nation's most serious uncontrolled or abandoned hazardous waste releases. EPA, working along with EGLE, has cleaned up three of the six operable units, removed nearly 450,000 cubic yards of contaminated material from the site, cleaned up and restored seven miles of the Kalamazoo River and banks, and capped 82 acres worth of contaminated material.

•December 16, 2019 - Sea Harvest Inc., operator of the fishing vessels Enterprise and Pacific Capes, along with Fishing Vessel Enterprises Inc., the vessels' owner, pleaded guilty to violating the Clean Water Act for both knowing and negligent discharges of oily bilge water from the vessels' engine rooms. The companies were sentenced to pay a \$1 million criminal fine and serve a five-year term of probation. As a special condition of probation, the companies will be required to implement a robust environmental compliance plan at their own expense that will cover 36 commercial fishing vessels that are owned or operated by the defendants. According to court documents, the defendants owned and operated multiple vessels engaged in commercial fishing operations out of New Bedford, Massachusetts. From at least early 2017 until late 2018, as a result of insufficient supervision, fishing vessels owned and operated by the

defendants discharged oily bilge waste from the vessels into the sea on multiple occasions. Count one of the information charged that, on Sept. 20, 2017, the New Bedford Massachusetts Police Port Security Unit traced an oil sheen in the Acushnet River to the F/V Enterprise, which was owned and operated by the defendants. When questioned about the sheen, the vessel's manager confirmed that he had illegally pumped oily bilge water from the Enterprise's engine room bilge overboard into the Acushnet River. Previously, the vessel had been subject to several enforcement actions related to their improper management of oily bilge waste on the vessel. On Nov. 19, 2016, the U.S. Coast Guard issued a Letter of Warning to the vessel for pumping oily bilge waste into the Acushnet River. In addition, on or about Jan. 26, 2017, the Coast Guard issued a Captain of the Port Order requiring the vessel to return to port and discharge oily bilge water to a shore side facility. On Aug. 22, 2017, the U.S. Coast Guard held a community outreach meeting aimed at informing the commercial fishing community about the problem of discharging oily bilge water into New Bedford Harbor. Defendant's representatives did not attend this meeting. Nevertheless, U.S. Coast Guard representatives went to the vessel to meet with the defendant's representative after the meeting and provided handouts and information that detailed the prohibition of discharging oily bilge water into the sea. Less than a month later, the vessel made the illegal discharge that forms the basis of count one. In a second incident that forms the basis of count two, on July 3, 2018, the Captain of the F/V Pacific Capes attempted to discharge water from a fish hold into New Bedford Harbor in Fairhaven, Massachusetts. In doing so, the Captain negligently failed to ensure that the valve alignment on the vessel's bilge manifold was in the proper configuration to prevent the bilge pump from pumping oily bilge water overboard. Oil contamination was discovered alongside the Pacific Capes, as well as approximately 1,000 yards north of the vessel along the beach. Commercial fishing vessels, such as the F/V Enterprise and F/V Pacific Capes, generate oily bilge water in their machinery spaces. This oily bilge water is the result of fuel, lubrication oil, fresh water, and sea water entering the bilge of the vessel and comingling. These leakages may originate from the main engines, generators, fuel lines, stern-tube packing glands and other piping, valves and machinery in the vessel.

There are two lawful means of disposing of oily bilge water from commercial fishing vessels such as the F/V Enterprise and F/V Pacific Capes. First, the oily bilge water may be retained onboard the vessel and then discharged ashore to a properly licensed reception facility. Second, the oily bilge water may be discharged offshore if it has been processed through an Oily Water Separator (OWS) that ensures that the oily bilge water discharged contains no more than 15 parts per million of oil to water. At all times relevant to the information, neither the F/V Enterprise nor the F/V Pacific Capes had onboard an OWS. Therefore, the only lawful manner in which oily bilge water could have been discharged from either vessel was to land the oily bilge water ashore and dispose of it through a properly licensed reception facility.

•December 20, 2019 - Nikolaos Vastardis, Evridiki Navigation Inc., and Liquimar Tankers Management Services Inc., were convicted by a federal jury in Wilmington, Delaware, of violating the Act to Prevent Pollution from Ships, falsifying ship's documents, obstructing a U.S. Coast Guard inspection, and making false statements to U.S. Coast Guard inspectors. The crimes were committed in order to conceal Vastardis' deliberate bypassing of required pollution prevention equipment in order to illegally discharge oil-contaminated bilge waste overboard from the foreign-flagged oil tanker Motor Tanker (M/T) Evridiki. The M/T Evridiki was an 899 foot Liberian-flagged oil tanker owned by Evridiki Navigation and operated by Liquimar Tankers Management Services. Vastardis was the Chief Engineer of the M/T Evridiki. On March 10, 2019, the ship arrived in the Big Stone Anchorage, within Delaware Bay, for the purpose of delivering a cargo of crude oil.

The following day, the ship underwent a U.S. Coast Guard inspection to determine, among other things, the vessel's compliance with international environmental pollution prevention requirements. The jury found that during the inspection, Evridiki, Liquimar, and Vastardis tried to deceive Coast Guard inspectors regarding the use of the ship's oily water separator (OWS), a required pollution prevention device. Under the International Convention for the Prevention of Pollution from Ships (MARPOL), an international treaty to which the U.S. is a party, only bilge waste containing less than 15 parts per million (ppm) oil can be discharged overboard and must be first run through an OWS and oil content meter (OCM) to ensure that no waste containing more than 15 ppm oil is discharged. During the Coast Guard inspection, Vastardis operated the equipment with unmonitored valves that trapped fresh water inside the OCM's sample line so that its oil sensor registered zero ppm instead of what was really being discharged overboard. However, historic OCM data recovered during the inspection proved that the OCM was being tricked and bypassed. When the Coast Guard opened the Evridiki's OWS, they found it was fouled with copious amounts of oil and soot. Each defendant was convicted of all four felony counts including knowingly failing to maintain an accurate oil record book, in violation of the Act to Prevent Pollution from Ships; obstruction of justice; obstruction of the Coast Guard's inspection; and making a materially false statement to the Coast Guard concerning how the OWS was operated at sea.
(Andre Monette)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT ORDERS EPA TO REGULATE WATER TEMPERATURE
IN COLUMBIA AND SNAKE RIVERS
TO PROTECT SALMON AND TROUT

Columbia Riverkeeper v. Wheeler, ___F.3d___, Case No. 18-35982 (9th Cir. Dec. 20, 2019).

Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Inc., Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources (plaintiffs) sued the U.S. Environmental Protection Agency (EPA) under the federal Clean Water Act's (CWA) citizen-suit provision, asserting that because the States of Oregon and Washington had failed to develop temperature Total Maximum Daily Loads (TMDLs) for the Columbia and Snake Rivers, the CWA required EPA to do it instead. They won.

The Statutory Framework

The CWA, passed in 1972, required states to identify "impaired waters" (also called "water quality limited segments") that are contaminated by a specific pollutant, like aluminum or arsenic, or a condition such as temperature or turbidity. States then had to rank their impaired waters by priority on so-called "§ 303(d) lists." For each pollutant in each impaired water segment, a state must develop and submit to EPA a TMDL that sets the maximum amount of the pollutant that the segment can receive without exceeding the applicable water quality standard. Within 30 days of a state's submission, EPA must approve the TMDL or disapprove the state's TMDL and issue a new one in its place.

Procedural History

The original deadline for states to submit their § 303(d) lists and TMDLs to EPA was in 1979. Like many states, Oregon and Washington missed the deadline by over a decade and did not even submit their § 303(d) lists to EPA until the 1990s, at which point they still did not have functioning TMDL programs. Oregon and Washington's § 303(d) lists identified segments of the Columbia and Snake Rivers as water quality limited for temperature.

In 2000, Oregon and Washington entered into an agreement with EPA whereby EPA would produce the Columbia and Snake River TMDL for them. After a bit more administrative wrangling, EPA published a draft TMDL in July 2003, which stated that a final TMDL would be issued after the 90-day public comment period. Since publication of the draft TMDL, neither state nor the EPA has made any progress on finalizing the TMDL, although both states have developed TMDL programs and issued over 1,000 *other* TMDLs. Both states maintain § 303(d) lists with target dates for completing their remaining TMDLs, but neither list includes the Columbia and Snake River temperature TMDL.

The Litigation

In early 2017, plaintiffs sued to compel EPA to issue a final TMDL to protect salmon and trout, which can be harmed or killed when river water gets too warm. The summer of 2015 illustrated the problem: that year, an estimated 250,000 Snake River sockeye salmon died before they could spawn. The District Court granted plaintiffs' motion for summary judgment and ordered EPA to issue a final TMDL. EPA appealed and sought a stay, which the court granted.

The Ninth Circuit's Decision

The CWA does not specify what happens if a state fails to develop a TMDL as required. However, the Ninth Circuit in the *BayKeeper* case held "that where a state has 'clearly and unambiguously' decided that it will not submit TMDLs for the entire state, that decision will be 'construed as a constructive submission of no TMDLs, which in turn triggers the EPA's nondiscretionary duty to'" issue a TMDL. *Columbia Riverkeeper v. Wheeler*, ___F.3d___, Case No. 18-35982, 2019 WL 6974376, at *4 (9th Cir. Dec. 20, 2019) (quoting *San Francisco BayKeeper v. Whitman*, 297

F.3d 877, 883, 880 (9th Cir. 2002)). Several other circuits have reached the same conclusion.

Here, EPA argued that *BayKeeper* only requires EPA to issue TMDLs if a state completely refuses to issue any TMDLs for the whole state. The Ninth Circuit rejected that argument, stating that “our holding in *BayKeeper* does not limit the application of the constructive submission doctrine to a wholesale failure by a state to submit any TMDLs. Such a limitation is not supported by either the language and purpose of the CWA or the logic of our case law.” The court observed that the CWA’s purpose—“to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”—“would be dramatically undermined if we were to read into § 1313(d)(2) a loophole by which a state, and by extension the EPA, could avoid its statutory obligations by a mere refusal to act.” The Ninth Circuit’s conclusion is consistent with other Circuit decisions.

The Ninth Circuit agreed with the District Court’s finding that “Washington and Oregon have clearly and unambiguously indicated that they will not produce a TMDL for these waterways.” Therefore, the court ordered EPA to issue a final TMDL within 30 days of its December 20, 2019 decision:

Because Washington and Oregon have conclusively refused to develop and issue a temperature TMDL for the Columbia and Snake Rivers, the EPA is obligated to act under § 1313(d)(2).

This constructive submission of no TMDL triggers the EPA’s duty to develop and issue its own TMDL within 30 days, and it has failed to do so. The time has come—the EPA must do so now.

Conclusion and Implications

The Ninth Circuit’s decision in this case represents a major victory for environmental advocacy groups in their multi-pronged legal and political effort to rehabilitate the Pacific Northwest’s imperiled anadromous fish populations and the endangered southern resident orcas that depend on them. Coincidentally, the Ninth Circuit’s ruling came out on the same day as a draft report from Washington Governor Jay Inslee’s office analyzing arguments for and against breaching the four lower Snake River dams, which contribute to warm temperatures in the river (the report, however, does not actually make a recommendation one way or the other). Dam removal or changes in flow regimes could have significant impacts on the region’s economy; dams provide irrigation water and access to barge shipping as well as hydroelectric power. By the time this article is published, the final TMDL should be issued (absent further appeal and stay), which will begin to delineate the implications of the court’s ruling. The Ninth Circuit’s decision is available online at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/20/18-35982.pdf>. (Alexa Shasteen)

DISTRICT COURT AFFIRMS MARYLAND’S CLEAN WATER ACT SECTION 303D INTEGRATED REPORT

Blue Water Baltimore v. Wheeler, ___F.Supp.3d___, Case No. 16-452 (D.C. Dist. Dec. 2, 2019).

On December 2, 2019, the U.S. District Court for the District of Columbia affirmed the U.S. Environmental Protection Agency’s (EPA) approval of the Maryland 2018 Integrated Report of Surface Water Quality under the federal Clean Water Act (CWA).

Factual and Procedural Background

The Clean Water Act requires states to identify waters within their jurisdictions for which effluent limitations are not stringent enough to implement water quality standards applicable to such waters

and to establish the Total Maximum Daily Load (TMDL) of pollutants at a level necessary to implement the applicable water quality standards. The list of impaired waters is often known as a 303d list. The CWA requires states to submit their 303d lists and TMDLs to the EPA periodically for approval. A 303d list often contains categories of impaired waterbodies. Relevant to this decision are Category 5 waters, which are impaired waters requiring a TMDL, and Category 4a, which are impaired waters that already have a TMDL. A 303d list with multiple categories

of impaired waters is often known as an Integrated Report.

In 2012, Maryland produced a draft Integrated Report, which moved 139 impaired waters from Category 5 to Category 4a. Maryland determined this reclassification was appropriate because the 139 waterbodies were part of the 53 watersheds which drained into the Chesapeake Bay and were subject to the existing Chesapeake Bay TMDL.

EPA approved Maryland's 2012 Integrated Report on November 9, 2012. On April 16, 2015, Maryland submitted the 2014 Integrated Report, a document with the same language regarding the 139 impaired waters as the 2012 Integrated Report. This was approved by the EPA on October 16, 2015.

Plaintiffs filed their complaint challenging the 2012 Integrated Report on March 8, 2016. On October 7, 2016, EPA filed a motion to dismiss the Complaint as moot because the 2012 Integrated Report was no longer effective with the approval of the 2014 Integrated Report. Plaintiffs filed a Motion to Leave to Amend the Complaint to challenge the 2014 Integrated Report. While this was pending, the EPA approved the 2016 Integrated Report and the court allowed the plaintiffs to file an amended complaint challenging the 2016 Integrated Report. On January 19, 2018, the defendant filed a motion for judgement on the pleadings because the claims regarding the 2012 and 2014 Integrated Reports were moot. The court granted that motion on June 28, 2018. The parties then moved for summary judgment. After the summary judgment motions were briefed, Maryland's 2016 Integrated Report was superseded by the 2018 Integrated Report. Plaintiffs amended their complaint again to include the 2018 Integrated Report.

In all claims regarding the 2012, 2014, 2016, and 2018 Integrated Reports, plaintiffs argued the approval of the Integrated Report was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law because the approval was not supported by evidence that the Chesapeake Bay TMDL would actually resolve localized water quality impairments in the 53 segments.

The District Court's Decision

Scope of Authority

Plaintiffs first argued the EPA exceeded the scope of its authority under the CWA when it approved

Maryland's Integrated Report without any evidence that the Chesapeake Bay TMDL ensures localized attainment of the applicable water quality standards within Maryland's 53 impaired segments. According to the plaintiffs, because Maryland made no finding specific to the impaired segments themselves, as required by the CWA, EPA could not lawfully approve Maryland's reclassification of the segments.

The court rejected plaintiff's argument. It reasoned that although plaintiffs correctly noted that a state must establish a TMDL for impaired waterbodies, this requirement applies to a state's obligation—not the EPA's obligation to approve or disapprove a state's list of impaired waters, which was the action challenged by the plaintiffs in this case. As a result, the court concluded the EPA acted within the scope of the CWA.

Reclassification of Impaired Upstream Water Body

Plaintiffs next argued the EPA acted arbitrarily by allowing Maryland to reclassify an impaired upstream water body based solely on the fact that there is a TMDL in a different, downstream water body. The court rejected this argument as well, noting that plaintiffs' position misconstrued the scope of the Chesapeake Bay TMDL. It reasoned that Maryland did not reclassify the 139 impairment listings because total maximum daily loads were established for different, downstream water bodies. To the contrary, the court noted that the Chesapeake Bay TMDL included TMDLs for those particular waterbody listings.

Approval of the Integrated Report

Finally, plaintiffs argued EPA's approval of the Integrated Report was arbitrary and capricious because there was no evidence that the Chesapeake Bay TMDL addressed the localized impairments in Maryland's impaired waterbodies and the local TMDL development process differs greatly from the development of the Chesapeake Bay TMDL development process.

The court rejected this final argument as unsupported by the record. First, the court determined the water bodies at issue were connected and the pollutants in the local waterbodies were of the same type identified in the Chesapeake Bay TMDL. Thus, the Chesapeake Bay TMDL included TMDLs of all the

connected water bodies. Second, the court reasoned that the 303d listing process only requires a rational connection between the EPA's determination and the facts. The court was not required to perform a detailed evaluation of the scientific data supporting a TMDL as part of a challenge to a 303d listing process. The court concluded that EPA's explanation of the approval of the Integrated Report contained a rational connection between the facts found and the choice made.

Conclusion and Implications

This decision supports a reclassification of an impaired waterbody from Category 5 to Category 4a where an existing TMDL already addresses pollutant loadings in that waterbody, even if the existing TMDL is primarily focused on a different waterbody. The court's decision is available online at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv0452-69.

(Anya Kwan, Rebecca Andrews)

FLORIDA SUPREME COURT DETERMINES THAT PERSONAL INJURY DAMAGES ARE RECOVERABLE UNDER THE STATE'S WATER QUALITY ACT

Charles L. Lieupo, v. Simon's Trucking, Inc.,
Case No. SC18-567; 44 Fla. L. Weekly S 298 (Fl. Dec. 19, 2019).

In *Charles L. Lieupo, Petitioner, vs. Simon's Trucking, Inc., Respondent* the Florida Supreme Court has made an important ruling about the scope of damages available for personal injury under Florida statutory water law.

Background

Florida has had a statute regulating discharges to waters since at least 1970. Florida Statutes, chapter 376 regulates the discharge and removal of certain pollutants. There is a rather robust means of recovery of damages to the waters and affected lands in that statute. However, a 1990 amendment to the 1970 law carefully and expressly excluded injuries to human beings from the scope of recovery for violations. This language had resulted in a decision by the Florida Supreme Court in 2010 barring personal injury claims under the 1970 law and also a 1983 act in the same chapter.

The two portions of chapter 376 at issue in this case are the Pollutant Discharge Prevention and Control Act, passed in 1970 and codified at §§ 376.011-376.21, Fla. Stat. (1970 act), and the Water Quality Assurance Act, passed in 1983 and codified at §§ 376.30-376.317, Fla. Stat. (the 1983 act).

The 1970 act is intended to protect coastal waters and adjoining lands, whereas the 1983 act is intended to combat pollution to surface and ground waters. §§ 376.021, 376.041, 376.30(1)(b), and (2)(b), Fla. Stat. Section 376.021, Fla. Stat. (2011), is entitled legislative intent with respect to pollution of coastal waters and lands. Section 376.041, Fla. Stat. (2011), provides that the discharge of pollutants into or upon any coastal waters, beaches, beaches, and lands adjoining the seacoast of the state in the manner defined by §§ 376.011-376.21, Fla. Stat., is prohibited.

The *Curd v. Mosaic Fertilizer* Decision

In *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), the Florida Supreme Court's majority ap-

plied the 1970 Pollutant Discharge Prevention and Control Act's (the 1970 act) definition of "damage" to a claim for economic loss brought by commercial fishermen under the 1983 Water Quality Assurance Act (the 1983 act). The 1970 act was amended in 1990 and defines "damage" as "destruction to or loss of any real or personal property . . . or . . . any destruction of the environment and natural resources, including all living things *except human beings*, as the direct result of the discharge of a pollutant."

The Damages Claim at Trial

A tow truck driver, Mr. Lieupo, responding to an accident involving an overturned truck on a highway encountered and came in contact with battery acid which came from the truck's cargo. He suffered very serious injuries. Although the defendant trucking company argued that the Florida statute prohibited personal injury recovery, that argument was rejected by the trial court. A jury then found damages for the plaintiff's injuries exceeded 5 million dollars.

At the Court of Appeals

The First Appellate court heard an appeal of the trial court result in the *Lieupo* case and issued an opinion that held no personal injury damage should have been awarded because of the precedent effect of the Florida Supreme Court's decision in the *Curd* case. It nevertheless certified a question of great public importance to the Supreme Court asking whether the definition of damages under the 1983 Water Quality Act should be held to include personal injury.

The Supreme Court's Decision

The Supreme Court accepted the question, and its opinion goes into detail on the statutory history and differences in language governing damages between sections passed with the different 1970 and 1983 laws. The opinion points out that the 1983 statute expressly includes language stating that nothing in

the law shall preclude a person from seeking “all damages resulting from a discharge or other condition of pollution.” The opinion then explains that the Supreme Court majority was wrong to include the restriction on human injury recovery in its opinion in *Curd* in a way that made it applicable to the 1983 Act. It recedes from the *Curd* majority’s apparent, incorrect application of the 1970 act’s definition of “damage” to a claim brought under the 1983 act:

... In this case, because Lieupo filed his cause of action under section 376.313(3) of the 1983 act, the “all damages” language of the 1983 act applies, not the more restrictive definition of the 1970 act that expressly only applies to the 1970 act. The plain meaning of “all damages” includes personal injury damages.

The Court of Appeals opinion was then reversed on the point at issue and the case is remanded for correction in accord with the new opinion.

Conclusion and Implications

At this writing the Supreme Court decision is not yet official. If a rehearing is timely sought there is a chance of an altered result. Assuming no alteration occurs, one can foresee a growing number of personal injuries claims from discharges of hazardous products to coastal waters, other water bodies and lands adjoining them and to the considerable amount of Florida lands underlain with groundwater resources.

The Court’s decision is available online at: <https://www.floridasupremecourt.org/content/download/545397/6145300/file/sc18-657.pdf>. (Harvey M. Sheldon)

TEXAS COURT GRANTS INTERNATIONAL BOUNDARY AND WATER COMMISSION’S REQUEST FOR TEMPORARY RESTRAINING ORDER PREVENTING CONSTRUCTION OF PRIVATE BORDER WALL

North American Butterfly Association v. Neuhaus & Sons, LLC,
Case No. C-5049-19-1 (Tex. Dist. Ct. Dec. 3, 2019).

The Texas state court for Hidalgo County granted a temporary restraining order, preventing excavation and continuing construction of a private border wall along the United States-Mexico border. In granting the order, the court found that the construction of the wall would likely result in significant damage to plaintiffs’ property caused by increased water and debris flows, proving an imminent and irreparable harm. Because plaintiffs’ property serves as a butterfly sanctuary, a unique use of the land, the court also found that there was no adequate remedy at law if the plaintiffs’ property was damaged before the matter reached judicial resolution.

Background

Defendant, We Build the Wall, Inc., is a non-profit organization that seeks to build border walls along the United States-Mexico border at a lower cost and faster rate than the federal government. In order to construct these walls, We Build the Wall contracts for building rights with private landowners located along

the border. In 2019, We Build the Wall entered into an agreement with co-defendant Neuhaus to build a border wall on his property, located on the banks of the Rio Grande River. Beginning on or about November 15, 2019, development began to clear the banks of the Neuhaus property along the riverbank as the initial step to build a private border wall.

Around the time construction began, the contractors hired by the defendants received an official request from the United States Section of the International Boundary and Water Commission (IBWC) to cease construction of the proposed private border wall. The IBWC stated that defendants failed to file the necessary permits which would allow the IBWC to measure the project’s compliance with international treaties. The plaintiffs allege that defendants subsequently further failed to file the necessary permit applications, despite receiving notice from the IBWC. It is also alleged that despite this notice, defendants stated publicly on social media that construction was going to continue and quickly be completed.

The Butterfly Sanctuary and the Alleged Redirection of Surface Water

Plaintiffs own a butterfly sanctuary, bordering the Rio Grande River, located directly adjacent to the Neuhaus property. Plaintiffs claim that building a permanent wall on the banks of the Rio Grande River and within the floodplain would cause a redirection and buildup of surface water during flood events. This redirection of surface water and accompanying debris would cause permanent damage to plaintiff's property, potentially destroying portions of the land. Plaintiffs also claim that defendants' actions would result in topographic and vegetative changes detrimental to the ecological value of the land as a butterfly sanctuary. In response to plaintiffs' opposition to the construction of the wall, it is alleged that defendants carried out a number of acts designed to discredit and vilify the plaintiffs. Plaintiff's claims that defendants falsely claimed the North American Butterfly Association was engaged in human trafficking and drug smuggling. Based on the social media comments and potential irreparable damage to their property, plaintiffs sought a temporary restraining order (TRO) that barred defendants from the continued excavation and construction of a permanent steel wall on a cleared portion of the banks of the Rio Grande River.

The District Court's Ruling

Under Texas law a temporary restraining order must not be granted without notice unless it clearly appears that immediate and irreparable injury will result before notice can be served and a hearing held on the matter. Here, the court found that the plaintiffs

clearly demonstrated they will suffer an imminent and irreparable harm if the status quo of the matter is not preserved. Specifically, the court found that the characteristics and subsequent rights of the butterfly sanctuary at issue were unique and irreplaceable. The potential flooding and debris that could be caused by the installation of the wall would make it difficult, if not impossible, to accurately measure, the damage caused by defendants' conduct in monetary terms.

The court also found that defendants' inflammatory public responses concerning the plaintiff coupled with the conscious indifference of the risk involved with the construction of the wall showcased the defendants' intent to commit great harm to the plaintiffs. Based on these facts, the court found that the temporary restraining order should be granted without notice because the previous actions and public comments made by the defendants demonstrated an immediate need to preserve the status quo until a ruling could be made to issue a temporary injunction.

Conclusion and Implications

A temporary restraining order is preliminary step in the eventual resolution of this matter. The matter is set for a temporary injunction hearing which may further be followed with an eventual trial on the merits. If the eventual outcome is similar to the granting of this temporary restraining order, it may pave a way to prevent construction of private border walls along the Rio Grande River. The court's order is available online at: <http://cdn.cnn.com/cnn/2019/images/12/04/tro.signed.pdf>.

(Jeremy Holm, Rebecca Andrews)

VERMONT SUPREME COURT FINDS STATE WATER QUALITY STANDARDS MAY COMPEL REDUCTION IN HYDROELECTRIC POWER GENERATION AS A CONDITION OF 401 CERTIFICATION

In re Morrisville Hydroelectric Project Water Quality, Case No. 2018-339 (Vt. Sup. Ct. Nov. 22, 2019).

Vermont's Supreme Court concluded that state's water quality standards do not compel a balancing of protection for existing uses against attaining water quality standards. The state agency charged with issuing water quality certifications under § 401 of the

federal Clean Water Act therefore acted properly in imposing conditions on a § 401 certification compelling a 21 percent reduction in power in order to attain water quality sufficient to support fish habitat.

Background

Morrisville Water and Light (MWL) began operating three hydroelectric facilities on waterways in Vermont from the 1890s through the 1940s. The Federal Energy Regulatory Commission (FERC) first issued licenses for the facilities in 1981, set to expire in 2015. In conjunction with FERC license-renewal proceedings, MWL sought state water-quality certification from Vermont.

Vermont's Agency of Natural Resources (ANR) has been delegated authority to provide water quality certifications pursuant to the federal Clean Water Act's § 401. Pursuant to that delegation, "ANR has adopted the Vermont Water Quality Standards. Agency of Natural Resources, Vermont Water Quality Standards, Code of Vt. Rules 12 030 025," the "VWQS." ANR's delegated authority allows it to "impose reasonable conditions" on § 401 certifications, and "[t]hese conditions can regulate the quantity of water because stream flow impacts a waterbody's water quality." See, *PUD No. 1 of Jefferson Cty. v. Washington Department of Ecology*, 511 U.S. 700, 712 and 719 ("[W]ater quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery.").

Both the Clean Water Act and the VWQS "require water bodies 'to achieve and maintain a level of quality that fully supports' the 'designated uses' of those waters." VWQS § 3-04(A), 40 C.F.R. § 131.10(a). "Uses specified in water quality standards for each water body or segment whether or not they are being attained" are that water body's "designated uses" (40 C.F.R. § 131.3(f)); Vermont designates uses by class of water. VWQS § 1-01(B)(14):

The waters at issue in this appeal are Class B waters, and the designated use that was the primary focus in this case is the preservation of aquatic biota and wildlife through the establishment and maintenance of 'high quality aquatic habitat.' VWQS § 3-04(A)(1).

Separately, the VWQS address protection of "existing use," "uses that have occurred in the waterbody on or before November 28, 1975." VWQS § 1-01(B)(18). Lastly, "[t]he VWQS include an antidegradation policy, which requires that waters be managed 'to pro-

tect, maintain, and improve water quality.'" VWQS § 1-03(A).

ANR's § 401 certification imposed conditions requiring MWL to release minimum amounts of water to support fish habitat. MWL sought review of the certification by Vermont's state court Environmental Division, which rejected ANR's conditions regarding minimum flow rates, and imposed the alternative—less restrictive—flow rates proposed by MWL, on the basis that Vermont's antidegradation policy requires ANR to consider protection of the dams as "existing uses."

The Vermont Supreme Court's Decision

Agency Deference

The Vermont Supreme Court faulted the lower state court's failure to accord deference to ANR's interpretation of its regulations, under which "does not protect existing uses or allow an allocation of water to a use that degrades water below minimum levels required by the [Clean Water Act]."

MWL did not dispute that its proposed flow requirements for at least one dam "did not support the designated use of providing high-quality aquatic habitat," while ANR's more-restrictive flow requirement condition "would provide high-quality aquatic habitat but would result in a 21 [percent] decrease in energy generation."

ANR interpreted its antidegradation policy:

. . . to mean that water quality necessary to support the water's highest and best use must be protected and that conditions cannot be imposed to 'protect' an existing use if those conditions will not provide water quality for the highest and best use.

Applying deferential, *de novo* review, the Supreme Court held that MLW failed to present "compelling indications" that ANR's interpretation was in error. *In re Musto Wastewater*, 106 A.3d 929 (Vt. Sup. Ct. 2014); *In re Lathrop Ltd. P'ship I*, 121 A.3d 630 (Vt. Sup. Ct. 2015).

Vermont's Agency of Natural Resources Antidegradation Policy

The Supreme Court then examined ANR's inter-

pretation of its antidegradation policy in light of “the purposes of the VWQS, state water-quality law, and the CWA.” Vermont’s:

. . .overall water-quality policy. . .seeks to both protect and enhance or improve water quality. . . . This policy also furthers the overall goal of the CWA that state water-quality standards ‘be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.’ 33 U.S.C. § 1313(c)(2)(A).

Lastly, Vermont’s policy “complies with the CWA’s implementing regulatory language requiring uses ‘to be achieved and protected’ and to protect the most sensitive use.” *See*, 40 C.F.R. §§ 131.10(a), 131.11(a)(1) (requiring water-quality criteria to “protect the designated use” and for water with multiple use designations to “support the most sensitive use”).

Analysis under the PUD No. 1 Decision

Further, ANR’s interpretation of its antidegradation policy accords with the U.S. Supreme Court’s decision in *PUD No. 1 of Jefferson County*, 511 U.S. 700, in which the Court “held that the state could

impose restrictions on [a hydroelectric] facility to ensure compliance with the state’s water-quality standards adopted pursuant to the CWA.” *Id.* at 712. Specifically, the Court held that a state “could impose minimum stream flow conditions as ‘a proper application of the state and federal antidegradation regulations’ to protect and maintain existing instream water uses.” *Id.* at 719. This was because “a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” *Id.* at 715. Therefore, ANR’s interpretation of its antidegradation policy was entitled to deference and ANR properly rejected MWL’s proposed “balancing” test to protect the existing rate of electricity generation at the expense of lower water quality.

Conclusion and Implications

The rapid changes in federal agency-administered standards and procedures under multiple environmental statutes stand in contrast to the stability in state-administered delegated and certified programs, such as the Clean Water Act’s § 401 certification program. Without Congressional action, this state-level stability may prove difficult for the executive to disturb. In the end, agency deference would seem to remain paramount in Vermont.
(Deborah Quick)

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