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CALIFORNIA WATER NEWS

CONSERVED WATER AND CALIFORNIA WATER CODE SECTION 1011: INCENTIVIZING CONSERVATION THROUGH THE PROTECTION OF WATER RIGHTS

With Lake Mead receding to disturbing depths, southern California's water users seem to be understandably counting every last drop of water flowing from the Colorado River. Among these users, the Imperial Irrigation District (IID) has taken a model position in utilizing "Conserved Water" to its fullest extent. California Water Code § 1011 lays the stage for Conserved Water, allowing appropriative users to retain their water rights over water despite periods of non-use due to conservation efforts. While some formal requirements from the State Water Resources Control Board (SWRCB) may need to be met, § 1011 provides water users with the ability to take much needed conservation efforts to preserve their future rights without forfeiting those rights due to non-use. IID's utilization of Conserved Water from the Colorado River showcases the importance of § 1011 in preserving California's water resources and sets an example of water management practices which can be used to bring California water users up to efficient 21st century standards while also preserving water rights.

The Utility of IID's Conserved Water from the Colorado River

Since its commencement in 2003, the Quantification Settlement Agreement (QSA) has functioned as one of several contracts settling the disputes of certain Southern California water users. Specifically, the QSA seeks to resolve disputes as to the reasonable and beneficial use of the Colorado River, the ability to conserve, transfer, and acquire conserved Colorado River water, and each user's obligation to implement and fund related environmental impact mitigation. Aside from IID's involvement, the QSA also includes participation by the United States, the State of California, Metropolitan Water District of Southern California (MWD), Coachella Valley Water District (CVWD), and the San Diego County Water Authority (SDCWA).

The real meat of the QSA comes from the use of the Conserved Water created. Under the terms of the QSA, IID provides transfers of up to 370,000 acre-feet annually (AFA) to SDCWA, MWD, and CVWD of Conserved Water from delivery system improvements and on-farm efficiency improvements.

While the goal of § 1011 is to promote conservation of water resources, its strength of incentive comes from the protection of one's appropriative rights over water declared as conserved. With respect to IID, for example, it is able to utilize any non-use of water because of conservation efforts by freely allowing for the transfer of said water and foreclosing the threat of forfeiture of any portion of IID's appropriative rights to Colorado River water. This being said, IID is unique in that California Water Code §§ 1012 and 1013 refer specifically to their handling of Conserved Water, with § 1013 governing the treatment of the QSA. Apart from these uniquely dedicated statutes, IID's participation among the parties in the QSA shows how Conserved Water can be properly utilized from both a conservation standpoint and a property one as well.

Qualifying for Conserved Water

On its face, § 1011 provides water users with an appropriative right the ability to preserve the sum of their appropriative rights despite failing to use all or any part of the water. This section accomplishes this by providing that:

> . . .any cessation or reduction in the use of the appropriated water [because of water conservation efforts] shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use.

Under the terms of § 1011, "water conservation" is defined as "the use of less water to accomplish the same purpose or purposes of use allowed under the

existing appropriative right," leaving water users with a broad definition to work with.

Furthermore, water conserved under § 1011 may be sold, leased, exchanged, or otherwise transferred, and upon the termination or completion of a water transfer agreement, the right to the use of the water "shall revert to the transferor as if the water transfer had not been undertaken."

Conserved Water under § 1011 is not held without restrictions, however. Any user of water who seeks the benefit of declaring water as Conserved Water under § 1011 is subject to period reporting to the SWRCB. Such reports must describe both the extent and the amount of the reduction in water use as a result of water conservation efforts.

Conclusion and Implications

Simple as it may seems, § 1011 has been underutilized by many and its applicability has been doubted. The apparent "broadness" behind the meaning of "water conservation" has functioned as a limiting factor for water users rather than an open door. The frugal reading of § 1011 may create a skepticism surrounding the practicability of such a statute. However, with its proper enforcement the state could use this section as a carrot to promote water conservation efforts by water users. Efficiency is clearly key in the world of water use, and § 1011 could operate to incentivize holders of appropriative rights to take the efforts towards water conservation it wants to courage, if only its ambiguity could be usurped by its apparent clarity.
(Wesley A. Miliband, Andrew D. Foley)

LEGISLATIVE DEVELOPMENTS

FEDERAL WATER DEVELOPMENT APPROPRIATIONS BILL PROVIDES FUNDING FOR CALIFORNIA WATER PROJECTS

On December 20, 2019, the federal Energy and Water Development and Related Agencies Appropriations Act, 2020 (Act), became law. The Act provides $565 million to the U.S. Army Corps of Engineers (Corps) and the U.S. Bureau of Reclamation (Bureau) for water infrastructure and drought resiliency programs throughout California and the West. The Act provides funding for projects and programs that affect the Colorado River Basin and several California storage, desalination, recycled water, CalFed and federal Central Valley Project related facilities.

Background

HR 1865 is one of two legislative packages containing a total of 12 appropriations bills. The Act, which is Division C of H.R. 1865, contains nationwide water and energy related appropriations for both the Corps and the Bureau. Deemed a must-pass bill, HR 1865 was signed by the President on December 20, 2019. Appropriations for the Corps generally pertain to Corps' functions related to rivers and harbors, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related efforts.

The Bureau appropriations generally pertain to the management, development, and restoration of water and related resources, as well as Bureau administration. Many of the water related appropriations provided for in the Act advance projects identified in the Water Infrastructure Improvement Act for the Nation (WIIN Act), which became law in 2016 as Public Law 114-322; *see:* https://www.congress.gov/bill/114th-congress/senate-bill/612.

The Energy and Water Development and Related Agencies Appropriations Act

The Act makes available approximately $1.5 billion for Bureau related projects and programs. Funding is thus generally available for existing facilities, cooperative and other agreements with states and local agencies, and to fulfill fiduciary responsibilities to Native American tribes. This includes approximately $70 million made available to the Upper Colorado River Basin Fund, and approximately $5 million for the Lower Colorado River Basin Development Fund. However, funds appropriated under the Act may not be used to create or initiate new programs or projects, eliminate existing projects or programs, or otherwise fund projects for which prior funding has been denied or restricted.

Funding for California Projects and Infrastructure

In California, the Act makes funding available for several water infrastructure projects, recycled water programs, water storage, desalination, and environmental and scientific projects in accordance with the WIIN Act. Water infrastructure projects for which the Act provides funding, and which were identified in the WIIN Act, include the Los Vaqueros Reservoir Phase 2 Expansion Project, the North-of-the-Delta Off Stream Storage (*i.e.* the Sites Reservoir Project), and the Friant-Kern Canal and Capacity Correction project. (See Public Law 114-322, § 4007). Funding is now available to these storage projects, because § 4007 of the WIIN Act mandates that storage projects can only receive funding if enacted appropriations legislation, such as the Act, "designates funding to them by name," following Secretary of the Interior recommendations for specific projects for funding.

Funded water recycling programs include the Expanding Recycled Water Delivery Project (Ventura Water Pure), the Pure Water Monterey Groundwater Replenishment Project, the Groundwater Reliability Improvement Program Recycled Water Project, the North Valley Regional Recycled Water Program, the South Sacramento County Agriculture and Habitat Lands Recycled Water Program, and the Central Coast Blue project. These recycling projects fall under the Title XVI Water Reclamation and Reuse program, to which $64 million is allocated by the Act. (*See also*, Public Law 114-322, §. 4009(c).)

The Act also allocates $8 million in funding for several California desalination projects contemplated by the WIIN Act. In particular, the Act provides funding for the Doheny Ocean Desalination Project near Dana Point in San Diego County, the North Pleasant Valley Desalter Facility in Ventura County, and the Mission Basin Groundwater Purification Facility Well Expansion and Brine Minimization project near Oceanside, also in San Diego County.

The Act appropriates approximately $55 million for carrying out the programs, projects, plans, habitat restoration, improvement, and acquisition provisions of the Central Valley Project Improvement Act. However, the Act prohibits using any of the allocated funds for the acquisition or leasing of water for in-stream purposes if the water is already committed to in-stream purposes by a court adopted decree or order.

The Act also provides $33 million for California Bay-Delta restoration activities authorized by the WIIN Act, including for the federal share of CalFed program costs. However, the Act provides that CalFed implementation must be carried out in a "balanced manner with clear performance measures demonstrating concurrent progress in achieving the goals and objectives of the Program." Related to Central Valley projects and activities, the Act appropriates $28 million for the San Joaquin River Restoration project.

Additionally, the Act provides $55 million for WaterSMART grants, $5 million to update U.S. Army Corps Flood Control manuals to help Oroville Dam and other dams operate more safely and efficiently, and $50 million for donor and energy transfer ports, such as the Ports of Los Angeles and Long Beach. Funding for updated Flood Control manuals follows the Oroville Dam and associated spillway's partial failure during high flow events in the early winter months of 2017.

Conclusion and Implications

The Energy and Water Development and Related Agencies Appropriations Act provides important funding for several large California water projects throughout the state. The Act, which was deemed to be a must-pass bill, reflects bipartisan support for important water related facilities and programs in California and the West. The text and history for the Act is available online at: https://congress.gov/bill/116th-congress/house-bill/2960.
(Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF LAND MANAGEMENT OPENS THE DOOR TO FRACKING ON FEDERAL LANDS IN CENTRAL CALIFORNIA

On December 12, 2019, the U.S. Bureau of Land Management (BLM) issued a record of decision (ROD) that will open up more than 1 million acres of public land in central California to leasing for oil and gas drilling, including the controversial extraction method of hydraulic fracturing, or "fracking," a process involving the injection of a high-pressure stream of water and chemicals into rock in order to extract oil and gas. (*See*, https://eplanning.blm.gov/epl-front-office/projects/nepa/100601/20010045/250011767/FINAL_Bakersfield_Hydraulic_Fracturing_Supplemental_EIS_Record_of_Decision_508.pdf) Though BLM claims the drilling will result in substantial economic benefits, the ROD has met with stringent opposition on environmental grounds, largely due to the perceived risks posed by fracking. Politically, the ROD has also sharpened the contrast and deepened the rift between the California government and the Trump administration. On December 13, 2019 BLM issued a press release announcing the ROD and its position on fracking in California (*see*, https://eplanning.blm.gov/epl-front-office/projects/nepa/100601/164025/200167/Press_Release_-_December_13,_2018.pdf).

The Bureau of Land Management's Decision

The ROD sets forth BLM's determination that its supplemental Environmental Impact Study (SIES) adequately showed that no environmental harm would result from fracking within BLM's Bakersfield planning area, which will allow leases to be granted for fracking and other drilling for the first time since 2014. BLM prepared the SIES in accordance with a 2017 order issued by the U.S. District Court in a lawsuit brought by conservation groups, resulting in a moratorium on leasing in the area pending further environmental review concerning the impact of fracking. The ROD represents the completion of the court ordered review according to BLM, and allows oil and natural gas companies to bid on public land in the Bakersfield planning area for fracking and other previously suspended drilling.

The Bakersfield planning area is large in size and influence, consisting of approximately 1.2 million acres of federal mineral interests, including approximately 400,000 surface acres of BLM managed public land, covering parts of Fresno, Kern, Kings, Madera, San Luis Obispo, Santa Barbara, Tulare and Ventura counties. BLM estimates that 80-90 percent of surface-disturbing oil and gas production activities on public lands in California occur on land administered by its Bakersfield Field Office. According to BLM, oil and gas production on federally-leased land accounts for approximately 8-10 percent of the total production in the state.

BLM Emphasizes the Economic Benefits

Support for BLM's is based primarily on the anticipated economic benefits of the drilling. BLM claims that oil and gas development in California will create thousands of jobs and generate hundreds of millions of dollars in tax revenue, with half of the royalty fees for mineral rights incurred going to the state. In its press release regarding the ROD, BLM estimates that oil and gas development on BLM-managed land within the Bakersfield planning area generates 3,500 jobs and $200 million annually. BLM generally characterizes the leasing of public land in California for drilling as consistent with the goals of generating economic opportunity though responsible energy development, in accordance with a May 2017 executive order issued by President Trump. To temper negative reaction to the expansion of drilling in California, BLM has publicly stressed that the ROD approves no new public land for leasing that had not been approved prior to the 2017 district court order, and has downplayed the number of new drilling leases expected to arise in undeveloped areas as opposed to renewals.

Substantial Environmental and Political Opposition

The BLM decision has met with strong political and environmental opposition. Environmental con-

cerns include the vast amount of land to be opened to drilling, and the heightened environmental risk posed by fracking, which includes air pollution from methane that escapes from wells and potential contamination of groundwater sources. BLM has admitted that most new lease activity for oil and gas drilling involves fracking, though it claims new lease activity in California is expected to be limited as noted above. More generally, organizations such as the Center for Biological Diversity, one of the litigants in the 2013 lawsuit that led to the moratorium on federal leasing for drilling, assert that a slowdown of drilling generally is required to achieve the state's commitment to reducing greenhouse gas production and ongoing sustainability.

Significant political pushback has accompanied environmental concerns, with many critics viewing the ROD, and the Trump administration's plan to recommence and expand drilling in California more broadly, as another example of the administration rewarding politically-friendly corporate interests with deregulation at the expense of the environment. Perhaps most prominently, the issue deepens the rift between Sacramento and the federal government under President Trump, in what has been an openly-contentious relationship. The state has opposed the Trump administration's plans to expand drilling in California under both the Brown administration and Newsom administration. As asserted by Attorney General Becerra, the state views the expansion of drilling as a boon to the fossil fuel industry rather than the sustainable energy development claimed by BLM.

California Files Suit Seeking Injunctive Relief

In response to the ROD, on January 17, 2020, California filed a lawsuit against BLM to block the leasing of public land due to the insufficiency of the SIES. [*State of California, et al. v. Stout, et al.*, Case No. 2:20-cv-504 (C.D. Cal.); *see*, https://oag.ca.gov/system/files/attachments/press-docs/1%20Complaint.pdf).]

In particular, the state alleges that the SIES fails to account for the potential impact of drilling on nearby communities, fails to consider more environmentally-favorable alternatives, and further alleges that BLM failed to allow for the requisite public comment opportunities, in violation of the National Environmental Policy Act and the Administrative Procedure Act. The state's lawsuit claims that approximately 90 percent of new wells on the land to be leased would be utilized for fracking. BLM has defended the sufficiency of the proceedings challenged by the lawsuit and stresses that each permit or lease for drilling would be subject to its own review process.

Conclusion and Implications

The ROD represents an important development in the Trump administration's plans to promote oil and gas drilling on federal land in central California. Time will be required to determine how much additional fracking activity will be generated and how much impact this activity will have in the area environmentally, economically and otherwise. In the meantime, challenges to drilling from its many opponents will continue, including the 2020 lawsuit filed by the State of California.
(Wesley A. Miliband, Andrew D. Foley)

CALIFORNIA STATE AGENCIES RELEASE 2020 WATER RESILIENCE PORTFOLIO IN RESPONSE TO GOVERNOR'S EXECUTIVE ORDER

In April of 2019, California Governor Newsom issued Executive Order N-10-19 directing certain state agencies to develop a water resilience portfolio strategy to address long-term water management challenges and opportunities in California. (*See*, https://cawater-library.net/document/executive-order-n-10-19/)

Those agencies recently released the 2020 Water Resilience Portfolio report (Resilience Report).

Background

According to the Resilience Report, California faces unique and unprecedented water security challenges. The Resilience Report anticipates climate change effects leading to unpredictable wet seasons

reducing snowpack and runoff predictability. The Resilience Report further states that California's growing population, depleted groundwater basins and aging water infrastructure also present 21st century water supply and reliability challenges. For example, the Resilience Report highlights California's highly variable statewide annual precipitation ranging from 100 million acre-feet in dry years to more than 250 million acre-feet in wet years.

In an effort to retool California's water management system, the Governor directed state agencies through Executive Order N-10-19 (Executive Order) to develop a water resilience portfolio.

Seven Principles to Follow

The Executive Order identified seven principles on which to base the portfolio:

- Prioritize multi-benefit approaches that meet several needs at once;
- Utilize natural infrastructure such as forests and floodplains;
- Embrace innovation and new technologies;
- Encourage regional approaches among water users sharing watersheds;
- Incorporate successful approaches from other parts of the world;
- Integrate investments, policies, and programs across state government; and
- Strengthen partnerships with local, federal and tribal governments, water agencies and irrigation districts, and other stakeholders.

In complying with the Executive Order's directives and principles, state agencies solicited broad input from tribes, local and regional agencies, individuals, groups, leaders and stakeholders throughout California in developing the Resilience Report.

The 2020 Water Resilience Portfolio Resilience Report

The California Natural Resources Agency, California Environmental Protection Agency and Department of Food and Agriculture developed the draft to fulfill Governor Gavin Newsom's Executive Order calling for a portfolio of actions to ensure the state's long-term water resilience and ecosystem health.

The Resilience Report seeks to avoid a "one-size-fits-all approach." Instead, it emphasizes the principle that water resilience will be achieved primarily at the regional level responding to local challenges. The Resilience Report encourages agencies and groups to create and improve partnerships to integrate water management and planning, especially for shared watersheds and aquifers. Finally, the Resilience Report prioritizes the role of state government to include continuing to establish statewide standards, supporting projects having statewide significance and addressing issues beyond regional scope.

The Resilience Report identifies four broad approaches: 1) maintain and diversify water supplies; 2) Protect and enhance natural ecosystems; 3) Build connections; and 4) Be prepared. (*See*, http://waterresilience.ca.gov)

Maintain and Diversify Water Supplies

In response to anticipated reductions in snowpack and increases in the number and severity of droughts, the Resilience Report emphasizes establishing regional water security by diversifying supplies and not relying solely upon a single water source. The Resilience Report acknowledges that diversification will require different approaches for each region. It encourages the state to invest resources and work with each region and local agencies to prioritize achieving greater water use efficiency, improving groundwater management, increasing and improving recycled water and desalination projects and increasing capture of rain and stormwater runoff.

Protect and Enhance Natural Ecosystems

The Resilience Report addresses the need to protect and restore the health of California's natural ecosystems. The Resilience Report calls for State agencies to take an active leadership role in accomplishing multiple objectives. Those objectives include preserving aquatic habitat to help fish and wildlife endure droughts and to adapt to climate change conditions, supporting the expansion of wetlands to create habitat and to recharge groundwater basins,

simplifying permitting to expedite multi-benefit and multi-partner projects, upgrading and maintaining state wildlife refuges, hatcheries and restoration areas, improving soil health and conservation practices on California farms and ranches and restoring habitat at the Salton Sea.

Build Connections

The Resilience Report asserts that California's water management system is highly decentralized and has led to thousands of entities managing water in "silos." The Resilience Report calls for significant improvement in regional connectivity, including establishing necessary physical connections, pipelines, aqueducts and storage infrastructure to move water from places of surplus to places of scarcity. The Resilience Report encourages the State to establish policies and programs designed to improve physical infrastructure to store, move and share water more flexibly than in the past, including by simplifying and expediting the water transfers process. Building partnerships, improving collaboration, minimizing regulatory burdens on local water agencies and taking action toward shared water management are key components of the Resilience Report.

Be Prepared

The Resilience Report highlights the need to help regions prepare for new flood patterns and droughts. It identifies a high priority need to review state, federal, and local permits for flood management projects and to recommend ways to simplify permitting processes. It also identifies the importance of supporting regional decision making with watershed-scale climate vulnerability assessments that include strategies to address risks to water supply, ecosystems, and water quality.

Conclusion and Implications

The security of California's water supply requires proactive planning to meet both today's challenges and the anticipated risks and opportunities of the future. The Governor's Executive Order and the responsive Resilience Report mark meaningful steps toward achieving those objectives at the State, regional and local levels. Even with a plan, the difficult work of implementation lies ahead.
(Chris Carrillo, Derek R. Hoffman, Mike Davis)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS SUE FEDERAL AGENCIES OVER RECENT DELTA BIOLOGICAL OPINIONS

On December 2, 2019, several environmental organizations filed a lawsuit in the U.S. District Court for the Northern District of California challenging the Biological Opinions of the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), each of which conclude that a proposed operations plan by the U.S. Bureau of Reclamation (Bureau) would not jeopardize threatened and endangered species in and around the Sacramento-San Joaquin Delta. Claims for relief are premised on violations of the Administrative Procedure Act and the federal Endangered Species Act. [*Pacific Coast Federation of Fishermen's Associations, et al. v. Ross, et al.*, Case No. 19-7897 (N.D. Cal.).]

Background

The Bureau and the California Department of Water Resources (DWR) operate two of the nation's largest water projects—the federal Central Valley Project and the California State Water Project, respectively. Together, these projects deliver millions of acre-feet of water to agricultural, municipal, and industrial water users throughout California. Both the CVP and SWP take water from the Sacramento and San Joaquin River systems, and the Sacramento-San Joaquin Delta (Delta) that empties into San Francisco Bay. The river systems and Delta are spawning, migration, and critical habitat for several endangered and threatened fish species, including species of Chinook salmon, steelhead, and Delta smelt.

The federal Endangered Species Act (ESA) imposes requirements for the protection of endangered and threatened species and their ecosystems. In 2008 and 2009, the FWS and NMFS determined, in documents called Biological Opinions (BiOps) issued under the federal Endangered Species Act (ESA), that the continued long-term operation of the CVP and SWP would jeopardize certain endangered or threatened species. The FWS and NMFS BiOps included alternative project operations ("reasonable and prudent alternatives") that effectively compelled the Bureau and DWR to operate many aspects of the CVP and SWP according to the direction of the federal wildlife agencies, rather than in compliance with the proposed operating plans offered by the Bureau and DWR.

In 2017, the Bureau proposed a new operations plan following its 2016 request to reinitiate consultation with FWS and NMFS regarding those agencies' 2008 and 2009 BiOps. On October 22, 2019, FWS and NMFS each issued BiOps concluding that newly proposed operation plans for the CVP and SWP would not jeopardize endangered and threatened species. The proposed operations plan contemplates significant investments in research and restoration actions for smelt and salmonid species, revised management plans for operations of river systems tributary to the Delta, and changes to cold water pool management at Lake Shasta (part of the CVP) for the benefit of salmon.

On December 2, 2019, the Pacific Federation of Fishermen's Associations, Institute for Fisheries Resources, Golden State Salmon Association, Natural Resources Defense Council, Defenders of Wildlife, and the Bay Institute (collectively: plaintiffs) filed suit in the U.S. District Court for the Northern District of California alleging violations of the Administrative Procedure Act and ESA. Plaintiffs challenge FWS and NMFS' adoption of their respective BiOps as allegedly arbitrary, capricious, and not in accordance with law. According to plaintiffs, the BiOps were improperly influenced by political motivations and authorize CVP and SWP operations that will further injure endangered and threatened species and their habitats.

The Complaint

The BiOps are the result of the Bureau's request in 2016 to reinitiate consultation with FWS and NMFS regarding those agencies' BiOps for Delta operations from 2008 and 2009, respectively. Both of those opinions were "jeopardy" opinions and included

reasonable and prudent alternatives. In their complaint (Complaint), plaintiffs allege that the Bureau's request to reinitiate consultation resulted from new information related to multiple years of drought and data demonstrating low Delta smelt populations and "extremely low" populations for certain salmonid species. FWS and NMFS both agreed to reinitiate consultation, and in 2017, NMFS issued a draft amendment to its BiOp that plaintiffs allege would have immediately strengthened protections for endangered winter-run Chinook salmon, but which The Bureau refused to accept or implement under the 2009 BiOp.

Instead, plaintiffs allege that, in 2017, the Bureau prepared a Biological Assessment for a newly proposed CVP and SWP operation plan that sought to maximize water deliveries and river system diversions that would correspondingly harm protected fish species.

Specifically, plaintiffs allege that the Bureau's proposed operations plan would entrain Delta smelt and salmonids, reduce Delta outflows on which those species rely for habitat and reproduction, fail to provide adequate water temperatures required by those species, reduce Delta inflows from the Sacramento and San Joaquin River systems, and increase salinity. As a result of the Bureau's Biological Assessment, plaintiffs allege that the FWS and NMFS began drafting BiOps, the final versions of which conclude that the proposed operations plan would not be likely to jeopardize the continued existence of listed threatened or endangered fish species, nor adversely modify their designated critical habitat.

Allegation of 'No Reasoned Explanation'

Plaintiffs primarily challenge the BiOps on the ground that there is no "reasoned explanation" between, on the one hand, the agencies' findings related to the status of the fish species, the propriety of increased protections, and the impacts of the Bureau's proposed operations plan, and, on the other hand, the BiOps' no jeopardy/adverse habitat modification conclusions. In particular, the Complaint alleges that the BiOps eliminate existing protections for listed species, fail to increase protections for the species, and fail to provide a reasoned explanation why increased protection is not necessary. The Complaint references earlier wildlife agency findings to the contrary and language in the new BiOps regarding the imperiled status of protected species and the additional adverse effects that the proposed plan will allegedly have on those species and their habitat.

Four Additional Claims

Plaintiffs allege four additional categories of ESA violations: 1) future mitigation measures in the BiOps are not reasonably certain to occur, 2) the BiOps do not consider the full extent of proposed operations or long-term impacts, 3) the BiOps are not based on the best available science, and 4) the incidental take statements contained in the BiOps threaten the survival of the protected species the BiOps are designed to cover.

In particular, plaintiffs allege that the BiOps improperly rely on future mitigation measures without supporting evidence indicating that the measures are reasonably certain to occur and will be effective in mitigating negative impacts to certain species and their habitats. For instance, plaintiffs point to the BiOps allowance for increased pumping during storm events despite protective restrictions on Delta pumping, and that BiOp provisions providing for real-time adaptive management will be less protective of listed fish species. Similarly, plaintiffs contend that the BiOps do not account for the possibility of future waiver of pumping restrictions during periods of drought, under adaptive management protocols.

Plaintiffs also fault the BiOps for allegedly failing to consider the full extent of the proposed project operations and their long-term impacts. For instance, plaintiffs allege that some water supply contracts for CVP/SWP water extend beyond 2040, yet the BiOps only analyze impacts through the year 2030. Additionally, plaintiffs allege that the BiOps do not consider full water deliveries under water supply contracts, instead relying on historical modeling and analysis that only accounts for partial water deliveries. According to plaintiffs, greater water deliveries would increase impacts on protected species, but such outcome is not analyzed in the BiOps. With respect to long-term impacts, plaintiffs allege, among other things, that the BiOps fail to consider the effects of climate change on the proposed operations and corresponding effects on protected species. Allegedly outdated climate change data also forms the basis of plaintiffs' contention that the BiOps are not based on the best available science—a contention further colored by allegations that the BiOps do not consider the impacts of reduced Delta inflows and outflow on

Delta smelt and other protected species.

Finally, plaintiffs challenge the BiOps' incidental take statements, and allege that the incidental take limits set by the BiOps would jeopardize protected species. For instance, plaintiffs contend that the NMFS BiOp allows for three consecutive years of complete mortality—"zero percent egg to fry survival of winter-run Chinook salmon below Shasta Dam"—before reinitiation of consultation is required. In plaintiffs' view, this means that high water temperatures could result in the extinction of winter-run Chinook salmon in the wild before reinitiation of consultation would be required, which plaintiffs allege sets a "meaningless reinitiation trigger" and would jeopardize the continued existence and recovery of the species.

Conclusion and Implications

Given the continuing controversy over Delta and Sacramento and San Joaquin River system water use, the initiation of a lawsuit challenging the recently released federal BiOp is not surprising. This litigation, like its predecessor over the 2008 and 2009 BiOps, will likely be long, highly technical, and heavily dependent on expert reports and testimony. This case differs from its predecessor in part because of political influence allegations, although what role those alleged actions may have on the outcome of the litigation is unclear. The Complaint is available online at: https://www.nrdc.org/sites/default/files/pccfa-v-ross-complaint-20191202.pdf.

ENVIRONMENTAL AND FISHING ORGANIZATIONS CHALLENGE APPROVAL OF GRASSLANDS BYPASS PROJECT UNDER STATE AND FEDERAL LAW

On November 12, 2019, five environmental and fishing organizations filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief (Petition) challenging the San Luis & Delta-Mendota Water Authority's (Authority) ongoing operations of the Grasslands Bypass Project (Grasslands Project). [*North Coast Rivers Alliance, et al. v. San Luis and Delta-Mendota Water Authority*, Case No. 19CV-04989 (Merced County Super. Ct.).]

Specifically, the Petition alleges that the Authority: 1) violated the California Environmental Quality Act (CEQA) by failing to prepare a supplemental Environmental Impact Report (SEIR) in connection with its approval of its Long-Term Storm Water Management Program; 2) violated the Delta Reform Act by operating the Grasslands Project; 3) violated the public trust doctrine by approving the Grasslands Project's discharge of water to Mud Slough; and 4) is in violation of the federal Clean Water Act and the state Porter-Cologne Water Quality Control Act (Porter-Cologne) by operating the Grasslands Project without a National Pollutant Discharge Elimination System (NPDES) permit. The U.S. Bureau of Reclamation (Bureau) is named in the Petition as a real party in interest.

Factual Background

Since 1996, the Authority and the U.S. Bureau of Reclamation have operated the Grasslands Project in an effort to reduce the load of selenium and other pollutants discharged from the Grassland Drainage Area (Drainage Area) into wetlands and refuges. The Grasslands Project diverts water from the Drainage Area through the San Joaquin River Water Quality Improvement Project and conveys the water through the San Luis Drain to Mud Slough. According to the Bureau, since 1996, the Grasslands Project has substantially reduced selenium loads associated with drainage water from the Drainage Area into the San Luis Drain, Mud Slough, and Salt Slough. (U.S. Bureau of Reclamation, Draft Environmental Assessment, 10-Year Use Agreement for the San Luis * Delta-Mendota Water Authority's Long-term Storm Water Management Plan for the Grasslands Drainage Area (Dec. 2019) at 1.) Selenium is harmful to fish and wildlife. (Petition at ¶ 43.)

Although the Grasslands Project was initially permitted for only five years, the Bureau and the Authority entered into a Use Agreement in 2001 that covered the Grassland Project's operations from

September 28, 2001 through December 31, 2009. The Bureau and the Authority entered into another Use Agreement in 2010, which allowed the continued operation of the Grasslands Project through December 31, 2019.

In August 2019, the Authority issued an Addendum to the Final Environmental Impact Statement and Environmental Impact Report for the Grassland Bypass Project, 2010-2019 (Addendum), which assesses the environmental impacts of the Authority's Long-Term Storm Water Management Program (Storm Water Program). The Authority issued a Notice of Determination (NOD) certifying the Addendum and approving the Storm Water Program on October 10, 2019. (Petition at ¶ 46.) In doing so, the Authority authorized the operation of the Grasslands Project until 2045. (Id. at ¶ 44.)

The Lawsuit

Filed in the Superior Court for the County of Merced by North Coast Rivers Alliance, San Francisco Crab Boat Owners Association, California Sportfishing Protection Alliance, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources, the Petition challenges the Authority's approval of the Storm Water Program under CEQA, the public trust doctrine, the Delta Reform Act, and the Clean Water Act and Porter-Cologne. The petitioners' First Cause of Action for Violation of CEQA alleges that the Authority's decision to prepare the Addendum rather than an SEIR was improper because the Storm Water Program proposes substantial changes to the Grasslands Project, there have been numerous changes in the circumstances surrounding the Project, and because new information has shown changes in the Grassland's Project's effects that were not previously analyzed when it was last approved in 2009. (Id. at ¶50-53.) The Petition also alleges that operation of the Grasslands Project under the LTSWMP violates the Clean Water Act and Porter-Cologne by discharging polluted flows into waters of the United States without a NPDES permit. (Id. at ¶ 54.)

The petitioners' Second Cause of Action for Violation of the Delta Reform Act contends that the Authority failed to make comply with the Delta Reform Act's by failing to prepare a written certification of consistency with detailed findings as to whether the Storm Water Program is consistent with the Delta Plan. (Id.at ¶ 72.) The petitioners further allege that approving the Storm Water Program resulted in a substantive violation of the Delta Reform Act because it is not consistent with the Delta Plan or the coequal goals of the Delta Reform Act. (Id.)

The petitioners' Third Cause of Action for Violation of the public trust doctrine contends that the Authority's approval of the Storm Water Program substantively violated the public trust doctrine because the continued operation of the Grasslands Project will "harm public trust resources," and thus "impermissibly promotes a non-public trust use at the expense . . . of the Delta's imperiled fish and wildlife and other public trust resources." (Id. at ¶ 81.)

The Fourth Cause of Action contends that the Authority's alleged violations of CEQA, the Delta Reform Act, the public trust doctrine, the Clean Water Act, and Porter-Cologne in approving the Storm Water Program exceeded its jurisdiction and constitute a prejudicial abuse of discretion. (Id. at ¶ 87.) Accordingly, the petitioners seek preliminary and permanent injunctive relief to prevent the Authority of implementing the Storm Water Program and continuing to operate the Grasslands Project. They also seek a writ of mandate setting aside the Authority's approval of the Storm Water Program and certification of the Addendum, and directing the Authority to suspend all activity implementing the Storm Water Program. Finally, the petitioners seek a judicial declaration declaring the Project and its Addendum to be unlawful. (Petition, Prayer for Relief at ¶¶ 1-4.)

Conclusion and Implications

If the petitioners are successful, the Authority and the Bureau may be required to prepare a new or amended document in compliance with CEQA or take other remedial actions in order to continue to operate the Grasslands Project. As of January 20, 2020, neither the Authority nor the Bureau has responded to the Petition.
(Sam Bivins, Meredith Nikkel)

NATURAL RESOURCES DEFENSE COUNCIL FILES SUIT AGAINST VARIOUS MUNICIPALITIES FOR FAILURE TO COMPLY WITH CALIFORNIA WATER REGULATIONS

The Natural Resources Defense Council (NRDC) recently filed an unprecedented lawsuit against more than half of all California cities and counties asserting harm from their alleged failure to submit reports regarding local irrigated landscape permitting programs required by California regulations. The NRDC filed a petition for writ of mandate in San Bernardino Superior Court demanding compliance with the regulations (Petition). [*Natural Resources Defense Council, Inc. v. San Bernardino County et al.*, Case No. CIVDS 1937969 (San Bernardino County Super. Ct.).]

Background

As described in the Petition, California's Water Conservation in Landscaping Act (Act; *see*, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2515) was enacted in 1990 to promote the conservation and efficient use of water and prevent waste. The Act requires local governments to oversee and ensure that new irrigated landscapes within their jurisdictions meet certain water efficiency design and operation protocols. California cities and counties must adopt, implement, and enforce the 2015 Model Water Efficient Landscape Ordinance (Model Ordinance; *see*, https://water.ca.gov/Programs/Water-Use-And-Efficiency/Urban-Water-Use-Efficiency/Model-Water-Efficient-Landscape-Ordinance) or a more stringent ordinance.

The Model Ordinance provides standards for new and retrofitted landscapes through encouraging the use of efficient irrigation systems, graywater usage and onsite storm water capture, and by limiting the portion of landscapes that can be covered in turf. The Model Ordinance also requires that all local agencies submit annual reports to the California Department of Water Resources (DWR) summarizing their local landscape permitting programs and their implementation. These reports must include certain information deemed necessary by DWR to evaluate the success of the local permitting programs, including the number of permits issued, the specific local water efficiency requirements, the square footage of new irrigated landscapes and local procedures for inspection and enforcement. Data is submitted using a report format required by the DWR.

The Petition alleges that in 2015, 2016, and 2017, approximately 30 percent of cities and counties submitted the required reports, and approximately 50 percent submitted reports in 2018. Prior to filing the Petition, the NRDC sent letters to approximately 400 jurisdictions demanding that all missing reports be filed promptly According to the Petition, over 300 jurisdictions did not meet the reporting requirements.

The NRDC Petition Respondents

NRDC named as respondents the County of San Bernardino and the Cities of Chino Hills, Rancho Cucamonga, and Redlands, and requests that the court name those four jurisdictions as representatives of a respondent class of more than 300 California cities and counties that have allegedly failed to file one or more of the reports required for the years 2015 through 2018.

The Petition apparently targets the four named respondents primarily due to the robust new development that has occurred in those jurisdictions since 2015, which has resulted in commensurate increases in building permits for thousands of dwelling units and accompanying landscapes.

The Petition seeks an order directing the respondents to complete and submit the annual reports to DWR to file periodic reports both with the court and to NRDC, and to award NRDC attorney fees and costs of the lawsuit.

As of the date of this publication, the four named respondents had not yet appeared in the lawsuit. While spokespersons for the four jurisdictions reportedly declined to comment on the pending litigation, several acknowledged making concerted efforts to comply with the regulations and stated continued commitment to achieving water conservation and reporting requirements.

A status hearing on the Petition is scheduled in mid-February, followed by a complex case management conference late in the month.

Conclusion and Implications

While it is too early to predict the outcome of the case, this lawsuit marks an interesting twist in the implementation of the comprehensive landscape water efficiency reporting requirements. Notably, recent reports indicate that approximately half of the drinking water supplied to California residents, business and other organizations is used for urban landscape irrigation, improved data collection and reporting of this water use is intended to improve water efficiency over time among and for the benefit of Californians.
(Paula Hernandez, Derek R. Hoffman, Mike Davis)

RECENT FEDERAL DECISIONS

SIXTH CIRCUIT FINDS CITIZEN-SUIT NOTICE OF INTENT OMITTING A DATE-CERTAIN FOR ALLEGED CWA REPORTING VIOLATION LEGALLY ADEQUATE

Cooper v. Toledo Area Sanitary District, ___F.3d___, Case No. 19-3216 (6th Cir. Dec. 17, 2019).

A citizen-suit notice of intent to sue for failure to comply with federal Clean Water Act permit conditions requiring a local vector-control district to prepare and publish a Pesticide Discharge Management Plan failed to specify the date of the alleged failure. The notice was nonetheless found adequate by the Sixth Circuit Court of Appeals, as the alleged violation was ongoing in nature.

Background

The Toledo Area Sanitary District (TASD) carries out mosquito control efforts in Toledo, Ohio including by "spraying and misting" pesticides "into communities and waterways throughout" its jurisdiction. TASK's pesticide discharges require permits under the Clean Water Act (33 U.S.C. § 1251 *et seq*., the CWA), and the Ohio Water Pollution Control Act (Ohio Rev. Code § 6111). TASD first operated under a National Pollutant Discharge Elimination System (NPDES) General Permit issued by the Ohio EPA on October 17, 2011, which expired on October 31, 2016, and thereafter under a renewed permit effective January 1, 2017, which is set to expire December 31, 2021.

For those relying on the General Permit to apply pesticides for "Mosquitoes and Other Insect Pests" in amounts "greater than [the] treatment area threshold[]" of 6,400 acres or more, Part V of the General Permit:

> . . .requires that polluters … prepare a Pesticide Discharge Management Plan (PDMP) for the pest management area, which must document how the polluter will implement the Permit's effluent limitations.

It is undisputed that TASD was required to create a PDMP under the General Permit and that it did not do so until after this lawsuit was filed.

Plaintiff Cooper sent TASD a "Notice of Intent to File Citizen Suit for Clean Water Act Enforcement" on March 12, 2016, pursuant to 33 U.S.C. § 1325(b)(1)(B), in which he alleged:

> . . .that TASD routinely discharges hundreds of gallons of chemical pesticides each year into residential neighborhoods and waterways covering 300,000+ acres of land[,]. . .[u]nder the Pesticide General Permit, large-volume-chemical-pesticide polluters such as TASD must comply with the mandatory provisions of Part V of the permit. TASD must publish a detailed Pesticide Discharge Management Plan (PDMP)[, and]. . .that [a]lthough TASD has been required to comply with the Pesticide General Permit since its effective date, October 2011, the people of Lucas County have yet to gain any benefit from this law.

In a March 28, 2016 letter, TASD denied any violation of the General Permit. Cooper sent TASD a further letter on August 5, 2015:

> . . .reiterating that TASD was violating the General Permit. It stated that 'TASD's massive toxic-chemical dispersal is governed, in part, by Part V of the permit, because they use pesticides to control mosquitoes covering more than 6400 acres of treatment area.'

Cooper filed suit on July 1, 2016, alleging *inter alia* TASD's failure to prepare and publish a PDMP. TASD obtained a dismissal on the basis that Cooper's Notice was deficient because it failed to identify a specific date of the violation, *i.e*., a specific date on which TASD failed to prepare and publish a PDMP.

The Sixth Circuit's Decision

The sole issue before the Sixth Circuit, according to the court, was "whether the March 12, 2016 Notice was deficient."

The CWA authorizes citizen-suits against a "government instrumentality or agency ... who is alleged to be in violation of ... an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). 33 U.S.C. § 1365(b)(1)(B), however, provides that:

> . . .[n]o [citizen-suit] action may be commenced ... prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator.

The court went on to state that:

> [T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. *Atl. States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 476 (6th Cir. 1995) (quoting *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59–60 (1987)).

Alternatively, the court found that the "60-day notice provides federal and state governments with the time to initiate their own enforcement actions," *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007). In the instance of federal or state enforcement actions, a citizen-suit is precluded. The court pointed out that U.S. Environmental Protection Agency's regulations provide that a pre-suit notice must include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. (40 C.F.R. § 135.3(a).) Prior Sixth Circuit authority has "held that to satisfy the notice requirement, the notice must 'contain sufficient information to allow Defendants to identify all pertinent aspects of its [alleged] violations without extensive investigation.'" *Sierra Club*, 504 F.3d at 644.

Failure to provide adequate, conforming notice prior to filing a citizen-suit mandates dismissal. *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 31 (1989) (citizen-suit dismissed for failure to comply with notice provision of Resource Conservation and Recovery Act); *Bd. of Trs. of Painesville Twp. v. City of Painesville*, 200 F.3d 396, 400 (6th Cir. 1999) (same for Clean Water Act); *United Musical Instruments*, 61 F.3d at 478 (same for Emergency Planning and Community Right to Know Act).

The Notice Was Adequate

The Sixth Circuit found that Cooper's March 12, 2016 Notice met the standard set forth in 40 C.F.R. § 135.3(a), as it 1) identified the "specific standard ... alleged to have been violated" (Part V of the General Permit); 2) the "activity alleged to constitute a violation" (failure to publish a PDMP); 3) the "person or persons responsible for the alleged violation" (TASD); 4) the "location of the alleged violation" (Lucas County, Ohio); 5) the "date or dates of such violation" ("since [the General Permit's] effective date, October 2011"); 6) and "the full name, address, and telephone number of the person giving notice." The court found that "No more is required."

Reliance on the *United Musical Instruments* Decision was Wrong

The Court of Appeals rejected the District court's reliance on *United Musical Instruments*, 61 F.3d at 478. In that Emergency Planning and Community Right-to-Know Act case, the plaintiffs' "notice stated an intention to sue" over defendant's "fail[ure] to file" "reports about their storage release of toxic chemicals and" "for calendar years 1987-1990," but "the complaint alleged violations through calendar year 1991." Further, the notice stated that the defendant "may also be responsible for violations not yet known." The Court of Appeals in that case found the notice deficient as to the 1991 violations because "the vague warning of possible other claims failed to inform [the defendant] of the year of the additional alleged violation or even the specific EPCRA reporting requirement involved."

Here, the Sixth Circuit found that TASD's non-compliance was beyond dispute. As for Cooper's purported failure to identify a specific date on which TASD failed to prepare and publish a PDMP, that was a "failure to take a specific act mandated by the permit, [and] the violation was necessarily ongoing until the action was taken."

Conclusion and Implications

Where the permit violation alleged in a citizen-suit notice of intent to sue is an ongoing obligation, the notice's failure to identify a specific date on which an alleged failure to comply occurred may not render the notice deficient—query whether the outcome here would have been different had the General Permit required that the report be, *e.g.*, filed with a third party by a date certain. The court's decision, recommended for *partial* text publication, appears online at: https://www.opn.ca6.uscourts.gov/opinions.pdf/19a0622n-06.pdf.
(Deborah Quick)

COURT OF FEDERAL CLAIMS FINDS U.S. GOVERNMENT LIABLE FOR UPSTREAM FLOODING CAUSED BY DAM DURING TROPICAL STORM HARVEY

In re Upstream Addicks and Barker Flood-Control Reservoirs, ___F.Supp.3d___, Case No. 17-9001L (Fed. Cl. Dec. 17, 2019).

The U.S. Court of Federal Claims recently found that the government's actions relating to the Addicks and Barker Dams (Dams) and the accompanying flooding of properties upstream from the Dams during Tropical Storm Harvey constituted a taking of a flowage easement under the Fifth Amendment of the U.S. Constitution. The court rejected the government's defenses and found the government liable. The court will begin the process of selecting five test properties to determine damages beginning January 21, 2020.

Background

Downtown Houston and the area surrounding the Dams have a long history of storms that produce intense rainfall. Against this backdrop, Congress authorized the U.S. Army Corps of Engineers (Corps) to build the Addicks and Barker Dams with the primary purpose of preventing downstream flooding, especially in downtown Houston.

The Corps deviated from the original plans when constructing the Dams. The Corps did not complete extra reservoirs that would have decreased the load on the main reservoirs behind the Dams, and did not complete a south canal that would have diverted extra water flows from the main reservoirs behind the Dams. As a result, the Dams were the only storage available to prevent downstream flooding, and they could only release water downstream toward Houston. In addition, the government acquired all land at and below a certain elevation behind each Dam, but the government knowingly did not acquire the full amount of land the Dams could inundate when filled to maximum design capacity. The Corps decided the expected damages of inundating the land was less than the cost of buying the additional land.

In the 1970s and 1980s significant land development occurred in the area immediately surrounding the government's land. At this point, the Corps knew that flooding beyond the extent of the government-owned land upstream from the Dams was inevitable during a severe storm. By 1995, the area surrounding the reservoirs had become densely populated and the Corps still decided to take no action upstream. Information that the reservoirs would cause upstream flooding was publicly available at this point through maps, County warnings about the risks, and Corps public outreach efforts.

During Tropical Storm Harvey in 2017, the Corps operated the Dams according to the 2012 Water Control Manual, with the primary goal of protecting downstream development. The Corps let the reservoirs fill to record capacity to protect downstream property. The water rose far above the government-owned land, onto private property. 154,000 upstream

homes were flooded, but the Corps avoided an estimated $7 billion in losses in Houston by prioritizing downstream development.

The Court of Federal Claims' Decision

Takings Analysis

The main issue before the court was whether a taking occurred during the government's construction, maintenance, and operation of the Dams. The court primarily relied on *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), *see*, https://www.supremecourt.gov/opinions/12pdf/11-597_i426.pdf) for the relevant factors to determine whether a taking had occurred.

First, the court analyzed the time and duration of the alleged taking. The court determined that the government, through its construction, maintenance, and operation of the Dams, had taken a permanent flowage easement on the plaintiff's properties because the flooding was likely to occur again in the future. The permanent nature of the invasion supported the finding of a taking.

Second, the court analyzed the severity of the government interference to determine whether the government's actions were sufficiently substantial to justify a takings remedy. The court held the government action here was sufficiently severe to rise to a taking. The severity of the flooding was compounded by the fact that future storms like Harvey remain likely to occur, therefore the properties will continue to be at risk of flooding. The court was also persuaded by the fact that the present damage and likely future damage substantially declined the market value of plaintiffs' properties.

Third, the court analyzed the benefit to the government and the public. When government actions appropriate private property for the public's benefit, the private property owners are entitled to just compensation for a taking. The court determined that the public received a notable benefit from the government's actions at the expense of upstream private property owners: the government protected downstream property owners from an estimated $7 billion in losses.

Fourth, the court analyzed whether the flooding was the foreseeable result of the government action. The government argued that the foreseeability inquiry only asks if flooding of this magnitude was foreseeable when the Dams were originally built. The court found this argument unpersuasive and decided that the foreseeability inquiry spans the entirety of the Dams' construction, maintenance, and operation, into the present day. Given that the Corps had known for years that the flooding was a possibility, and more recently that flooding was almost inevitable, the flooding was foreseeable.

Fifth, the court addressed causation, which is a vital component of the foreseeability inquiry. Both parties agreed that ten of the 13 properties were flooded because of the governments' actions. However, the government argued that its expert's modeling showed three of the properties would have flooded even if the Dams were not in place. Ultimately, the court determined that causation was established for all 13 properties because the government's modeling evidence was flawed.

Sixth, the court addressed whether the government intended a physical occupation. In short, the court found the government had the requisite intent to invade the plaintiffs' properties because the Corps had known that storms capable of flooding these properties were likely to occur and still intended to occupy the property concerned.

Seventh, the court determined that the plaintiffs' reasonable investment backed expectations must be investigated even in physical takings cases. The court held that the plaintiffs did have reasonable investment backed expectations that their properties would be free from flooding because they could not have been expected to know of the flooding risks. Overall, the court held that each of the factors identified in *Arkansas Game & Fish Commission* supported the finding of a taking of a flowage easement on all 13 of the plaintiffs' properties.

The Government's Defenses

The government argued that its actions were an exercise of police power during an emergency such that no taking existed, and that the doctrine of necessity absolved it of liability. The court found that the government was not responding to an emergency because the government had made calculated decisions to allow for this type of flooding years in advance after building, modifying, and operating the Dams in such a way that would flood the properties. The court also found the necessity doctrine unpersuasive

because the it found the government was responsible for creating the emergency in the first place.

Conclusion and Implications

This case exhibits a detailed exercise of the *Arkansas Game & Fish Commission* takings analysis and provides that reasonable investment backed expectations should be analyzed even in physical-invasion takings cases. Practically, this case holds the government liable for the damages it caused by flooding the reservoirs behind the Addicks and Barker Dams during Tropical Storm Harvey. The court will begin the process of selecting five test properties to determine damages beginning January 21, 2020. The court's decision is available online at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv9001-260-0.
(William Shepherd IV, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT DECLINES TO ADDRESS ISSUE OF FUTURE PRESCRIPTION IN APPEAL TO SANTA MARIA GROUNDWATER ADJUDICATION

City of Santa Maria v. Adam, 43 Cal.App.5th 152 (6th Dist. 2019).

On December 12, 2019, a three-justice panel of the Sixth District Court of Appeal released a third published opinion in the decades-long adjudication of the Santa Maria Groundwater Basin. Following a multiphase trial and during the pendency of a second appeal to the underlying judgment, a group of overlying groundwater users sought clarification from the trial court on whether the overlying rights established in the adjudication were subject to future prescription. The trial court denied the motion on substantive grounds, and the reviewing Sixth District Court of Appeal concluded that the appellants were not entitled to clarification because doing so would require the trial court to answer a hypothetical question without adequate evidence that an actual controversy existed between the parties. Because there was no live controversy, the issue was not ripe and thus not judiciable. The Court of Appeal reversed and remanded the matter to the trial court to issue a decision denying the motion to clarify on the sole ground that the issue was not ripe.

History of the Santa Maria Groundwater Adjudication

The Santa Maria Groundwater Basin underlies much of the southern portion of San Luis Obispo County and the northern portion of Santa Barbara County. A groundwater adjudication commenced in 1997. The Santa Maria Valley Water Conservation District, water companies, and local municipalities reached a stipulation resolving much of the case. Two groups of landowners opposed the stipulation, however. One, the "Landowners Group," consisted of overlying agricultural users. Following a multiphase trial, the trial court determined that the Landowners Group had overlying rights, but the City of Santa Maria and the Golden State Water Company had established prescriptive rights. The trial court's conclusion was largely upheld on appeal in 2012, but the Court of Appeal remanded to the trial court to determine a narrow issue on priority rights to salvaged water. (*City of Santa Maria v. Adam*, 211 Cal.App.4th 266 (2012).)

The trial court thereafter adopted an amended judgment pursuant to the Court of Appeal's opinion. The amended judgment stated that the landowners' overlying rights were prior and paramount to any existing or appropriative rights but subject to the prescriptive rights of the City of Santa Maria and the Golden State Water Company. The Court of Appeal affirmed the amended judgment in 2016, as well as the trial court's decision that the Landowners Group was not a prevailing party entitled to attorneys' fees. (*City of Santa Maria v. Adam*, 248 Cal.App.4th 504 (2016).) Following the amended judgment and during the pendency of the second appeal, the Landowners Group filed a motion with the trial court to clarify the amended judgment. The Landowners Group asked whether the judgment barred the City of Santa Maria and the Golden State Water Company from acquiring additional prescriptive rights in the future. The trial court denied the motion on a number of grounds, and the Landowners Group appealed.

The Landowners Group's Appeal on the Motion to Clarify

During the pendency of the appeal to the amended judgment, the Landowners Group sought a post-judgment determination from the trial court clarifying whether the judgment barred the City of Santa Maria and the Golden State Water Company from acquiring additional prescriptive rights in the future. The City of Santa Maria and the Golden State Water Company argued that the issue was not ripe because the landowners were merely discussing a hypothetical possibility that might occur in the future. The trial

court denied the motion on a number of grounds, including that the authority relied on by the Landowners Group was not applicable, the Landowners Group essentially were seeking injunctive and declaratory relief in the motion when their action was only for quiet title, and the amended judgment reserved the possibility of prescriptive rights being acquired in the future. The trial court did not deny the motion on the ripeness grounds asserted by the City of Santa Maria and the Golden State Water Company.

The Court of Appeal's Decision

The Court of Appeal upheld the trial court solely on the basis that the issue was not ripe. The Landowners Group had argued during the hearing on the motion and again on appeal that the Basin was currently in overdraft, thus the question of prescription was not hypothetical. But the record on appeal did not include any evidence on the overdraft issue. The Landowners Group pointed to statements during the hearing by counsel for the City of Santa Maria, but the Court of Appeal pointed out that such statements by counsel were not evidence. The Landowners Group quoted assertions regarding overdraft from briefs filed by the respondents, but they did not include the underlying documents in the record of appeal. Thus, there was no evidence that an overdraft existed. Because the fact of overdraft was not established, the Landowners Group could not show that a present controversy existed. Accordingly, the Landowners Group was essentially seeking an advisory ruling.

The Landowners Group argued that because the issue was capable of repetition, the Court of Appeal could rule on the issue in order to avoid unnecessary serial proceedings. The Court of Appeal concluded that the exception did not apply.

The trial court's decision addressed the merits of the appellants' substantive arguments. But the Court of Appeal concluded that because the trial court had no jurisdiction to decide a nonjusticiable controversy, it should not have expressed any position on the substantive issues. The Court of Appeal thus reversed the trial court's decision and remanded the matter with instructions to deny the motion to clarify solely on the ground that the issue was not ripe. The Landowners Group did not seek review before the California Supreme Court.

Conclusion and Implications

The resolution of the Landowners Group's appeal on the narrow issue of future prescription reinforced the existing ripeness doctrine without addressing the merits of the underlying substantive water law issue. Still, the resolution is significant as it is likely the final challenge to the judgment in the over 25-year old adjudication of the Santa Maria Groundwater Basin. (Brian Hamilton, Meredith Nikkel)

THIRD DISTRICT COURT UPHOLDS DENIAL OF WRIT SEEKING TO SET ASIDE PROPERTY PURCHASE IN THE SACRAMENTO-SAN JOAQUIN DELTA FOR ALLEGED CEQA VIOLATION

County of San Joaquin v. Metropolitan Water District of Southern California, Case No. C087640 (3rd Dist. Dec. 30, 2019).

In an *unpublished* decision, the Third District Court of Appeal upheld a decision of the trial court denying the petition for writ of mandate against Metropolitan Water District of Southern California (Metropolitan). Challengers sought to set aside Metropolitan's approval of the purchase of property in the Sacramento-San Joaquin Delta (the Islands) for failure to comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000.)

Factual and Procedural History

In March 2016, Metropolitan approved the purchase of the Islands. Prior to the approval, five public meetings were held by Metropolitan's Real Property and Asset Management Committee (Committee), where public comment was invited. After which, the Committee prepared a letter to the Metropolitan Board of Directors outlining 11 potential benefits of the purchase of the Islands and indicating that

most "would require additional study, environmental review, and various permits before they could be implemented."

Following the approval of the purchase, Metropolitan filed a notice of exemption claiming the project was exempt from CEQA on the basis that it was a transfer of ownership in land to preserve existing natural conditions (CEQA Guidelines, § 15325) and under the "common sense" exemption (CEQA Guidelines, § 15061, subd. (b)(3).)

Petitioners filed suit asserting that Metropolitan intended to purchase the Islands to facilitate the California WaterFix project—and therefore Metropolitan was required to comply with CEQA, including preparation of an Environmental Impact Report (EIR). Petitioners argued that the purchase committed Metropolitan to a definite course of action that would result in significant environmental impacts. The trial court denied the petition finding that no future projects had been approved or defined and further finding that petitioners' argument was based on speculation.

This appeal followed.

The Court of Appeal's Decision

Exhaustion of Administrative Remedies

On appeal, Metropolitan contended that the judgment must be affirmed because during the administrative proceedings, petitioners never raised the claim of failure to comply with CEQA thereby failing to exhaust their administrative remedies.

As a procedural defense, petitioners argued that Metropolitan could not raise the issue on appeal because the trial court had found no violation of the exhaustion requirement and Metropolitan had not filed a cross-appeal. The court, however, found that the limited statutory exception found in Code of Civil Procedure § 906, which allows a respondent to assert a legal theory which may result in affirmance of the judgment, without filing a cross-appeal applied in this instance and holding that no cross-appeal was necessary.

With respect to the merits of Metropolitan's argument, CEQA requires exhaustion of administrative remedies prior to approval of the project. Exhaustion, however, is not required if there was no public hearing or if the public agency failed to give proper notice. Here, even though the purchase was listed on the agenda of a number of public meetings, and the public was allowed to comment—no notice had been given that Metropolitan intended to rely on a CEQA exemption. As such, the court found that there was no opportunity to contest the exemption determination, and therefore the exhaustion requirement did not apply.

The CEQA Claims

Petitioners asserted that the acquisition of the Islands is a "project" under CEQA for which Metropolitan was required to prepare a full EIR. They pointed to Metropolitan's enabling legislation to contend that Metropolitan is only allowed to acquire property for the purpose of facilitating water delivery and therefore the acquisition was not "merely a transfer of title."

The court of appeals disagreed. It found that while Metropolitan may intend to use the Islands to facilitate water delivery, there was nothing in the record that committed Metropolitan from doing so, or conversely precluded Metropolitan from deciding not to use the Islands and selling them. The court held that whatever the ultimate use of the Islands was, it was not "foreseeable, definite, or even identifiable. In support, the court pointed to the 11 potential benefits or business justifications—which included using the Islands for the WaterFix project to using the Islands for flood storage, among other uses. The court found that it was unknown what use or potential use would apply to each island.

The court also rejected petitioners' comparison of the acquisition of the Islands to the adoption of a zoning ordinance authorizing the establishment of medical marijuana dispensaries in *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171. The court explained that in that case, the authorization (*i.e.*, the ordinance) constituted an essential step in changed land use by allowing establishment of dispensaries where none were previously allowed. Here, however, acquisition of the Island's did not change its current use. Moreover, at oral argument Metropolitan acknowledged that any change in current use of the Islands would be subject to CEQA.

Because the court found that the acquisition was not a project subject to CEQA, it did not consider whether the purchase was exempt under CEQA.

Petitioners also contended that CEQA requires

environmental review before a public agency acquires real property relying on CEQA Guidelines section 15004, subdivision (b)(1) which states that "CEQA compliance should be completed prior to acquisition o a site for a public project." The court again reiterated that because it was unknown what use, if any, Metropolitan would make of the Islands, Metropolitan's purchase was not an acquisition of a site for a public project.

Extra-Record Evidence and Discovery

Petitioners contended that the trial court erred in refusing to consider extra-record evidence and further erred in denying their request for discovery. The court of appeal held that even if the trial court erred by excluding the extra-record evidence, petitioners failed to meet their burden to show prejudice.

Petitioners argued that a declaration from a landowner provided substantial evidence of reasonably foreseeable environmental impacts. The court explained that the issue, however, is not whether a particular use would cause environmental impacts—but rather whether the use of the Islands was definite enough to require CEQA review.

With respect to discovery, petitioners sought information as to the existence of a foreseeable use of the Islands and whether Metropolitan had approved any specific use. The court found that petitioners' request was designed to seek evidence to contradict the administrative record, which is inadmissible under *Western States Petroleum Assn. v. Super. Ct.*, 9 Cal.4th 559 (1995). Petitioners therefore failed to meet their burden that the information they sought would lead to admissible evidence.

Conclusion and Implications

While the opinion is *unpublished*, it provides a lengthy explanation of the CEQA's "three-tier process" along with discussion of case law on the timing of preparation of an EIR. Also noteworthy, is the court's exhaustion of administrative remedies discussion. While the court did not rely on it, the First District Court of Appeal came to a similar conclusion in *Defend Our Waterfront v. California State Lands Commission*, 240 Cal.App.4th 570 (2015), when it held that CEQA's exhaustion requirement did not apply where the agency did not include any mention of CEQA or the CEQA exemption in the staff report, agenda, or public notice of the hearing. While CEQA does not require public notice of agency's reliance on an exemption prior to its approval of a project determined to be exempt, erring on the side of conservatism, an agency may want to consider noting the CEQA exemption on the agenda so as not to preclude any exhaustion defenses.

The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/C087640.PDF.
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