

# WESTERN WATER LAW™

## & POLICY REPORTER

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## FEATURE ARTICLE

CALIFORNIA ENVIRONMENTAL QUALITY ACT CONSIDERATIONS  
WHEN EVALUATING IMPACTS TO AQUATIC  
AND OTHER BIOLOGICAL RESOURCES

By Robbie Hull, Scott Birkey, and Clark Morrison

One of the stated legislative policies underlying the California Environmental Quality Act (CEQA) is to:

... [p]revent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities. (Pub. Res. Code § 21001(c).)

To meet this goal, CEQA requires local agencies to review, analyze, and mitigate a project's anticipated impacts on biological resources, including impacts to threatened and endangered species, habitats, and wetlands.

The CEQA statute and the CEQA Guidelines leave a lot of questions unanswered, however. Some of these questions are rooted in legal considerations, while others reflect the practical realities of trying to evaluate unpredictable and variable biological systems. For example: What issues should a local agency consider when a project has the potential to impact biological resources? To what extent do those impacts inform the need for either an Environmental Impact Report (EIR) or a Mitigated Negative Declaration (MND)? What is the appropriate scope of the CEQA document's analysis of impacts to biological resources? What are acceptable thresholds of significance, and what triggers a determination that an impact is significant? What constitutes adequate mitigation to offset a project's significant impacts to biological resources? In what circumstances can that mitigation be deferred until later?

This article attempts to address these and other issues that often arise when consultants and lawyers prepare and review the biological resources discussion and analysis in CEQA documents. Though not exhaustive, this article is intended to provide for your consideration some thoughts on these issues to help you navigate the nuances of the biological-resources evaluation in a CEQA document. We presume the reader has at least a good working knowledge of fundamental CEQA principles, but to help place some of these issues into context, we remind the reader of certain basic concepts that apply more generally to CEQA documents and evaluation of projects.

### Biological Resources Impacts and the Level of CEQA Clearance Required

During its preliminary review process, a lead agency must determine the appropriate type of CEQA clearance required for a project. A key consideration at this stage in the process is whether an exemption can be used as the CEQA clearance for the project. The potential for impacts to biological resources is sometimes one of the main reasons a project may not be eligible for an exemption. For example, a commonly used exemption—the “Class 32 Infill Exemption”—specifically disallows the use of the exemption in the event the project site has “value as habitat for endangered, rare or threatened species.” (14 CCR § 15332(c).)

Relatedly, practitioners should keep in mind that a project may not rely on a “mitigated categorical exemption” to avoid CEQA review. In the context of biological resources, this issue typically arises when

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a project is in proximity to a sensitive environment or may have significant impacts on species or habitat and the applicant or lead agency seeks to incorporate mitigation into the project in order to make the project fit within an exemption.

For example, in *Salmon Protection & Watershed Network v. County of Marin*, 125 Cal.App.4th 1098, 1102 (2004), Marin County approved the construction of a single-family home pursuant to the Class 3 categorical exemption for “New Construction or Conversion of Small Structures.” The home, however, was in a protected “stream conservation area,” pursuant to the County’s General Plan designation for areas adjacent to natural watercourses and riparian habitat. (*Id.* at 1102-03.) In approving the project, the county imposed various mitigation measures, including construction limitations, a riparian protection plan, and erosion and sediment control, aimed at minimizing adverse impacts. (*Id.* at 1102-04.)

According to the Court of Appeal, the county erred in relying upon mitigation measures to grant a categorical exemption:

Reliance upon mitigation measures (whether included in the application or later adopted) involves an evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIRs or negative declarations. (*Id.* at 1108; *see also Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal.App.4th 1165, 1198-1200 (1997) [operation and minor alteration of existing landfill not exempt, despite mitigation measures addressing leaking of pollutants].)

In a somewhat complicated twist to this principle, a project may include design or operational features that reduce or avoid environmental impacts while remaining eligible for a categorical exemption. In *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.*, 242 Cal.App.4th 555, 570 (2015), the Court of Appeal held that a rodeo could rely on the Class 23 exemption for normal operations of existing facilities for public gatherings, despite the implementation of a manure management plan to minimize pollution to a nearby creek and the resulting indirect impacts to aquatic species. The court

found that the management plan was not proposed as a mitigation measure for the rodeo project and, therefore, did not preclude the use of the Class 23 exemption. (*Id.*) Rather, it preexisted the project and was directed at preexisting concerns. (*Id.* at 570-71; *see also Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329, 1352-53 (2011) [dedication of left-hand turn lane as part of project design was not a mitigation measure].)

Another consideration to take into account are the CEQA Guidelines pertaining to “mandatory findings of significance.” (14 CCR § 15065(a).) These Guidelines specifically refer to impacts to biological resources and specify that an EIR must be prepared in the event certain biological resources are impacted, subject to certain specific requirements. The Guidelines state:

(a) A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur:

(1) The project has the potential to: . . . substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species . . .

(b)(2) Furthermore, where a proposed project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species, the lead agency need not prepare an EIR solely because of such an effect, if:

(A) the project proponent is bound to implement mitigation requirements relating to such species and habitat pursuant to an approved habitat conservation plan or natural community conservation plan;

(B) the state or federal agency approved the habitat conservation plan or natural community conservation plan in reliance on an environmental impact report or environmental impact statement; and

(C)(1) such requirements avoid any net loss of habitat and net reduction in number of the affected species, or

(2) such requirements preserve, restore, or enhance sufficient habitat to mitigate the reduction in habitat and number of the affected species to below a level of significance.

Practitioners should keep these “mandatory findings of significance” standards and requirements in mind for projects where the key consideration is biological resources impacts. These CEQA Guidelines can serve as the touchstone for whether an exemption can be used, and whether the lead agency is required to prepare an EIR rather than a negative declaration or MND.

A benefit of these mandatory findings is that they specifically allow the lead agency to rely on the provisions of an approved Habitat Conservation Plan (HCP) in determining that biological impacts have been addressed. Given that the Guidelines require the HCP to have been reviewed in an EIR or environmental impact statement (EIS), these benefits are probably limited to the regional HCPs and Natural Community Conservation Plans (NCCPs) that have been adopted in various counties in northern and southern California. Project-specific HCPs do not always generate the need for EIS- or EIR-level review. Moreover, they are rarely entered into prior to completion of CEQA review by the lead agency for the underlying project. Where such review has been conducted, however, a lead agency may rely on its provisions to obviate the need for EIR-level review at the local level. Moreover, projects within regional HCPs that have an aquatic focus may also benefit under the State of California’s new wetlands policies, which provide streamlining for projects consistent with such HCPs where they serve as a “watershed plan.”

### **The Substance of a Biological Resources Analysis**

This section provides a discussion of how impacts to biological resources should be described, analyzed, and mitigated in a CEQA document.

### **Describing Biological Resources in the Project Description and Environmental Setting**

An accurate, stable, and finite project description has been described as the “sine qua non” of a legally sufficient CEQA document. (*County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 193 (1977).) It should inform the public about the project’s likely effect on the environment and ways to mitigate any significant impacts. Importantly, the project description must include a list of the permits and other approvals required for the project and a list of the agencies that will use the CEQA document in issuing those permits. (14 CCR § 15124.) Accordingly, if a project will require, for example, an incidental take permit or a wetland fill permit, the CEQA document must provide sufficient information for other governmental agencies to complete their decision-making processes as “responsible agencies” pursuant to CEQA. (14 CCR § 15096.) This may include, for example, a detailed discussion of any special-status species and their habitat located on or in the vicinity of the site, as well as any wetlands or other protected waters that exist and may be impacted by the project. In our experience, state agencies such as the California Department of Fish and Wildlife (CDFW) can be quite exacting in what they expect to see in a CEQA document in order for the agency to use that document as its own CEQA clearance for the issue of its permits. (See, e.g., *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918 (2017).)

Like the project description, the environmental setting should provide a complete and accurate description of the project setting, *i.e.*, the existing environmental conditions and surrounding uses, to establish the baseline for measuring environmental impacts resulting from the project. (14 CCR § 15125; see also, *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus*, 27 Cal.App.4th 713, 729 (1994) [finding EIR inadequate without “accurate and complete information pertaining to the setting of the project and surrounding uses”].) To satisfy this requirement, lead agencies generally should incorporate a detailed review of biological databases (most notably the California Natural Diversity Database, or CNDDB), on-site data gathering and, if necessary, project-specific studies to determine existing environmental conditions. (See, e.g., *North Coast Rivers Alliance v Marin Mun. Water District*, 216 Cal.App.4th

614, 644-45 (2013) [upholding EIR environmental setting based on database review and specific study to assess aquatic species].) As a practical matter, the level of this effort should be commensurate with the extent to which biological resources are a concern on the project site.

### Thresholds of Significance for Impacts to Biological Resources

Once the project and environmental setting have been adequately described, the CEQA document must identify the environmental impacts likely to result from project development, followed by mitigation measures or project alternatives that will avoid or reduce these impacts. To determine whether mitigation is required, or if mitigation can reduce an impact to a level of insignificance, a lead agency must compare a project's impacts to thresholds of significance. (14 CCR § 15064.)

For biological resources, lead agencies often use the checklist from Appendix G of the CEQA Guidelines, which requires the lead agency to consider whether the project may:

- Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?
- Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?
- Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?
- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

- Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

- Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

Other common examples of significance thresholds include the mandatory findings of significance discussed above or local regulations and plans created for species protection. Ultimately, lead agencies have significant discretion when devising significance thresholds, but their decisions must be supported by substantial evidence. (See, *Save Cuyama Valley v. County of Santa Barbara*, 213 Cal.App.4th 1059, 1068 (2013) [Appendix G's thresholds of significance "are only a suggestion" (alterations omitted)]; *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal.App.4th 1099, 1111-12 (2004) [setting aside EIR for failure to adequately discuss impacts of stream flow reduction]; *San Bernardino Valley Audubon Soc'y v. County of San Bernardino*, 155 Cal.App.3d 738, 753 (1984) [setting aside project approval based on inconsistency with general plan policy protecting rare plants].)

### Analysis of Biological Resources

When analyzing project-related impacts to determine if they exceed defined significance thresholds, lead agencies may use a variety of methods, provided that the chosen method is supported by substantial evidence. For example, an agency may employ protocol-level, species-specific surveys adopted or recommended by wildlife agencies to determine whether protected species or habitat exists on the project site. Or, a lead agency may use broader, reconnaissance-level studies to assess biological resources. (See, *Gray v. County of Madera*, 167 Cal.App.4th 1099 (2008) [county not required to follow CDFW study protocols for California Tiger Salamander], 1124-25; *Association of Irrigated Residents v. County of Madera*, 107 Cal. App.4th 1383, 1396 (2003) ["CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required."])

Though CEQA does not require an agency to conduct all possible tests or surveys, additional tests or surveys may be necessary if previous studies are insufficient. In particular, lead agencies should beware of outdated studies and information. In *Save Agoura Cornell Knoll v. City of Agoura Hills*, 46 Cal.App.5th 665, 692-93 (2020), the Court of Appeal set aside a project approval based, in part, on a CDFW comment letter, which noted that botanical surveys older than two years may be outdated. CDFW also commented that surveys should be performed in conditions that maximize detection of special-status resources, to the extent feasible. (*Id.*) Surveys performed in a drought, for example, “may overlook the presence or actual density of some special status plant species on the [p]roject site.” (*Id.* at 692.)

One important fact to consider is that CEQA’s scope of review related to biological resources is quite broad. For example, the CEQA Guidelines broadly define “endangered, rare or threatened species” that must be evaluated in a CEQA document. (14 CCR § 15380.) The definition states:

(a) “Species” as used in this section means a species or subspecies of animal or plant or a variety of plant.

(b) A species of animal or plant is:

(1) “Endangered” when its survival and reproduction in the wild are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors; or

(2) “Rare” when either:

(A) Although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens; or

(B) The species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range and may be considered “threatened” as that term is used in the Federal Endangered Species Act.

(C) A species of animal or plant shall be presumed to be endangered, rare or threatened, as it is listed in:

(1) Sections 670.2 or 670.5, Title 14, California Code of Regulations; or

(2) Title 50, Code of Federal Regulations Section 17.11 or 17.12 pursuant to the Federal Endangered Species Act as rare, threatened, or endangered.

(D) A species not included in any listing identified in subdivision (c) shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision (b).

(E) This definition shall not include any species of the Class Insecta which is a pest whose protection under the provisions of CEQA would present an overwhelming and overriding risk to man as determined by:

(1) The Director of Food and Agriculture with regard to economic pests; or

(2) The Director of Health Services with regard to health risks.

As such, the scope of a CEQA document’s evaluation of a project’s impacts to biological resources typically go far beyond impacts to species listed under the federal or California Endangered Species Act as threatened or endangered.

This result is particularly noticeable with respect to plant species. Largely because of this expansive review, CEQA documents include an analysis of plant species based on the well-known ranking system established by the California Native Plant Society (CNPS), which is a non-governmental organization that has made its own determinations as to threats to plant species. Although the use of the CNPS ranking system in CEQA documents is generally accepted in the industry, CEQA’s definition of special-status plant species does not reference the ranking system and thus, arguably the use of this system is not predicated on any actual legal foundation. Notably, some plant species identified as “rare, threatened, or endangered” (Rare Plant Rank 1B) by the California Native Plant

Society are not listed as threatened or endangered under the federal or California Endangered Species Act.

### **Mitigation Measures for Impacts Related to Biological Resources**

To satisfy CEQA's requirements that significant environmental impacts must be mitigated, lead agencies must set forth and identify feasible mitigation measures. (Pub. Res. Code §§ 21002.1(a), 21100(b) (3); 14 CCR § 15126.4.) Significant case law exists regarding the concept of mitigation in the context of biological resources. Based on that case law, several themes are apparent.

#### **Deferral**

Generally, deferring the formulation of a mitigation measure is not allowed. However, deferral can be appropriate if it is impractical or infeasible to fully formulate the mitigation measure during the CEQA review process, provided that the agency commits itself to specific performance criteria for future mitigation. (14 CCR § 15126.4.) For example, a lead agency is not required to identify the exact location of off-site mitigation, provided that it adequately analyzes project-related impacts and imposes specific mitigation, i.e., preservation or creation of replacement habitat at a specific ratio. In such an event, the agency is entitled to rely on the results of future studies to fix the exact details of the implementation of the mitigation measures it identified in the EIR. (*California Native Plant Society v. City of Rancho Cordova*, 172 Cal.App.4th 603, 622 (2009); see also *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 793-96 (2005) [enumeration of possible future mitigation options, including on- and off-site habitat preservation at specific ratios was not improper].)

Deferral also may be allowed if future mitigation is dependent on permits required by other regulatory agencies. For biological resources, this typically involves incidental take permits, Clean Water Act § 404 permits, and other similar species and habitat-related permitting requirements. (See, e.g., *Clover Valley Foundation v. City of Rocklin*, 197 Cal.App.4th 200, 237 (2011) [requirement that project obtain all necessary federal and state permits from Army Corps of Engineers and CDFW for impacts to protected bird habitat was permissible].) But, even when it is

expected that another agency will impose mitigation measures on a project, the project's CEQA document must still commit itself to mitigation, identify the methods the agency should consider and possibly incorporate, and indicate the expected outcome. (See, *Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal.App.4th 899, 944-46 (2012) [holding that formal consultation with USFWS was appropriate, and that proposed methods, including avoidance, minimization, and purchase of off-site habitat, ensured impacts would be mitigated].)

With respect to permits issued by other agencies, and specifically permits protecting special-status species, CEQA does not require that a lead agency reach a legal conclusion on whether a "take" is expected to occur as a result of the project. A finding that a project will not significantly impact biological resources does not "limit the federal government's jurisdiction under the Endangered Species Act or impair its ability to enforce the provisions of this statute." (*Association of Irrigated Residents v. County of Madera*, 107 Cal.App.4th 1383, 1397 (2003).) Accordingly, a lead agency may disagree with federal or state wildlife agencies regarding the possible take of a species. Such a disagreement will not invalidate an EIR if the agency's conclusion is supported by substantial evidence in the record.

Relatedly, CEQA does not require that a lead agency compel a project applicant to obtain a federal or state take permit to mitigate impacts to species. (*Id.*) However, if project impacts to protected species are expected to be significant, CEQA imposes upon the lead agency an independent obligation to incorporate feasible mitigation measures which reduce those impacts.

#### **Treatment of Unlisted Species**

Pursuant to CEQA Guidelines 15380(d):

... [a] species not included in any [federal or state] listing ... shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision (b).

In *Sierra Club v. Gilroy City Council*, 222 Cal. App.3d 30, 47 (1990), the court considered whether CEQA Guideline 15380 requires a lead agency to make specific findings as to whether an unlisted spe-



cies may be considered rare or endangered. The court held that there is no mandatory duty to do so, as CEQA Guideline 15380 was intended to be directory rather than mandatory, and the ultimate authority to designate a plant or animal species as rare or endangered is delegated to the state and federal governments. (*Id.*) However, in that case, the court also noted that the lead agency extensively considered the potentially rare species and incorporated significant mitigation measures to assure its continued viability. (*Id.*) Accordingly, lead agencies should carefully consider impacts to unlisted species, particularly when presented with significant evidence that they may be rare or otherwise in jeopardy.

**Replacement Habitat and Conservation Easements**

CEQA Guideline 15370(e) provides that mitigation may include:

. . . [c]ompensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of resources in the form of conservation easements. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278 [conserving habitat at a 1:1 ratio]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [on- or off-site habitat preservation at 2:1 ratio].)

Conservation easements over lands set aside as mitigation for impacts to biological resources are often a key element of preserving these lands in perpetuity, thereby justifying their mitigating effect.

There is, however, a growing split of authority on the adequacy of conservation easements as mitigation, at least in the context of easements related to impacts to agricultural resources. Some local governments in California take the position that, because conservation easements merely protect existing land from future conversion, but do not truly replace or offset the loss of converted land, the easements do not reduce project impacts on land conversion. In *King and Gardiner Farms v. County of Kern*, 45 Cal. App.5th 814, 875-76 (2020), the court found that:

. . .the implementation of agricultural conservation easements for the 289 acres of agricultural

land estimated to be converted each year would not change the net effect of the annual conversions. At the end of each year, there would be 289 fewer acres of agricultural land in Kern County.

By contrast, in *Masonite Corp. v. County of Mendocino*, 218 Cal.App.4th 230, 238 (2013), the court concluded that:

ACEs [agricultural conservation easements] may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. . . .ACEs preserve land for agricultural use in perpetuity.

While this split of authority generally pertains to mitigation for the loss of agricultural land, it may be relevant to mitigation for the loss of habitat land. Notably, CDFW and other natural resource agencies in the state routinely rely on this form of mitigation to offset impacts to biological resources. On-site or off-site preservation of comparable habitat, coupled with a conservation easement or other form of development restriction, is a typical form of mitigation included in many permits issued by both the state and federal natural resource agencies.

**In-Lieu Fees**

Impacts to biological resources are sometimes mitigated using in-lieu fees, either in conjunction with or independent of habitat restoration. The court in *California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1055 (2009), however, cautions that an in-lieu fee system will only satisfy the duty to mitigate if the fee program itself has been evaluated under CEQA, or the in-lieu fees are evaluated on a project-specific basis. There, El Dorado County adopted by ordinance a rare plant impact fee program for use by developers to mitigate project impacts, which certain developers relied on in preparing an MND, rather than an EIR. (*Id.* at 1029.) After petitioners challenged the adequacy of the fee program, the court set aside the project MND, finding that:

. . .[b]ecause the fee set by the ordinance have never passed a CEQA evaluation, payment of the fee does not presumptively establish full

mitigation for a discretionary project. (*Id.* at 1030; see also, *Save Agoura Cornell Knoll v. City of Agoura Hills*, 46 Cal.App.5th 665, 701-02 (2020) [in-lieu fee payment for oak tree planting inadequate to mitigate project impacts; the MND did not provide any evidence that the off-site tree replacement program was feasible].)

### **Mitigation Cannot Violate other Laws**

Perhaps it goes without saying, but mitigation measures, even those with laudable species protection and conservation goals, may not violate other laws. In *Center for Biological Diversity v. Dept. of Fish & Wildlife*, 62 Cal.4th 204, 231-32 (2015), for example, the court held that while the CDFW generally may conduct or authorize the capture and relocation of a fully protected species as a conservation measure, it could not as the lead agency rely in a CEQA document on the prospect of capture and relocation as mitigation for a project's adverse impacts. There, the Fish and Game Code expressly permitted capture and relocation as part of an independent species recovery effort. (*Id.* at 232.) However, outside of a species recovery program, those same actions were considered a take of the species: "[m]itigating the adverse effect of a land development project on a species is not the same as undertaking positive efforts for the species' recovery." (*Id.* at 235.)

### **Battle of the Experts**

Litigation regarding the effectiveness of proposed mitigation measures often involves a battle of expert opinions. In these cases, the survival of the proposed mitigation, and the project's CEQA clearance, may depend on the type of CEQA document used for the project. An EIR is subject to the deferential "substantial evidence" standard of review, limiting the court's review to whether there is any substantial evidence in the record supporting the EIR. (See, *National Parks & Conservation Assn. v. County of Riverside*, 71 Cal. App.4th 1341, 1364-65 ["Effectively, the trial court selected among conflicting expert opinion and substituted its own judgment for that of the County. This was incorrect."].) For MNDs, however, courts apply the "fair argument" standard, which only requires that the petitioner demonstrate there is substantial evidence in the record supporting a fair argument

that the proposed project may have a significant effect even after mitigation measures are considered. (See, *California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1060 (2009) ["Where the views of agency biologists about the ineffectiveness of MND's plant mitigation measure conflicted with those of the expert who reviewed the project for the developer, the biologists' views were adequate to raise factual conflicts requiring resolution through an EIR."].)

### **How Biological Resources Might Inform Subsequent CEQA Analysis**

Under Public Resources Code § 21166 and CEQA Guideline 15162, a project may require subsequent environmental review if new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. In the context of biological resources, new information is often an issue when a species is newly listed as threatened or endangered. In *Moss v County of Humboldt*, 162 Cal.App.4th 1041 (2008), for example, the court held that the new listing of the Northern California coastal coho salmon as a threatened species was not new information requiring additional review, as there was no evidence that the species' habitat was located on or near the project site. (*Id.* at 1064-65.) In contrast, the newly listed coastal cutthroat trout did constitute new information, as evidence suggested the species was linked to a creek on the project site. (*Id.* at 1065.) As such, the court required that the lead agency undertake supplemental review with respect to the project's environmental impacts on the newly listed coastal cutthroat trout.

### **Conclusion and Implications**

This article addresses only the tip of the proverbial iceberg. Over CEQA's 50-year history, much has been said about how lead agencies should approach impacts to biological resources. We hope this article has been helpful in identifying some of the key themes that we've seen in our practice as consultants and lawyers alike struggle (at times) to capture the nuances associated with impacts to biological resources and mitigation to offset those impacts.

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## REGULATORY DEVELOPMENTS

### U.S. BUREAU OF RECLAMATION RELEASES DRAFT ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED RAISING OF ANDERSON RANCH DAM ON THE BOISE RIVER

Discussions concerning new/additional reservoir storage capacity in the Boise River Basin have been occurring for decades. But, with the golden age of dam building well in the past, questions over who, how, and how much (including cost) repeatedly surface with no clear answers. Over the last several years, however, the U.S. Bureau of Reclamation (Bureau) and other stakeholders have focused their attention on potentially raising Anderson Ranch Dam on the South Fork of the Boise River to yield additional water storage in the Boise River Reservoir system. Conversations have progressed to feasibility studies and, most recently, the release of a draft Environmental Impact Statement (DEIS) on July 31, 2020.

#### The Boise River Reservoir System and Population Growth

The current Boise River Reservoir system includes three facilities: Arrowrock Dam, Anderson Ranch Dam, and Lucky Peak Dam. Together, the facilities yield approximately 1 million acre-feet when full. The system is jointly operated for beneficial use water storage (e.g., irrigation and other uses) and for flood control (Arrowrock and Anderson Ranch are owned and operated by the Bureau, while Lucky Peak is owned and operated by the U.S. Army Corps of Engineers).

Idaho water users and the Bureau have discussed potential storage opportunities in the Boise Basin for decades, the potential Twin Springs dam site being the most elusive unicorn of all proposals. But, renewed focus on the Boise Basin began in the early 2000s, and accelerated with the completion of a 2016 study funded by the Idaho Water Resource Board addressing and projecting future water supply sources and needs (surface and groundwater) largely in light of the ever-increasing (explosive at times) population growth in the Boise Basin downstream of Lucky Peak Dam in particular. The City of Boise sits approxi-

mately six miles downstream of the dam, and the larger Treasure Valley (from Boise to Ontario, Oregon) is home to many (if not all) of the fastest growing cities in Idaho and, in some cases, the nation.

Proponents of additional reservoir storage capacity also point to climate change as another driver. Over time, models predict that more of the Boise Basin's precipitation will fall as rain with less snowpack, and balancing changing hydrologic regimes with future flood control needs suggest that additional storage is one potential answer.

#### The Dam Raise Preferred Alternative and Potential Feasibility

Ultimately, the Bureau and the Idaho Water Resource Board seek to leverage federal WIIN Act authority and funding, to raise Anderson Ranch Dam by six feet (from the present full pool elevation of 4,196 feet to 4,202 feet), to yield approximately an additional 29,000 acre-feet of water storage opportunity. Obviously, raising the pool elevation and storing more water will have its effects; environmental, altered shoreline/additional inundation, altered recreational opportunities and need to relocate facilities, etc. Not to dismiss these issues, but they can likely be solved and engineered around. The real question (to water user stakeholder interests anyway) is the reliability and utility of the additional storage space, and at what cost. Unfortunately, Anderson Ranch Reservoir is the largest "bucket" on the system (existing live storage capacity of 413,100 acre-feet) on the smallest "spigot" (the South Fork of the Boise River, as opposed to Arrowrock and Lucky Peak, which are located downstream of the confluence of the Middle and South Forks).

From a hydrologic perspective, the water right application supporting the proposed dam raise is already junior to (behind in priority) two other ambitious projects (one a 200 cfs permit owned by Elmore County, and the other an off-stream pump-back

hydroelectric generation and related storage project by Cat Creek Energy, LLC). During the Elmore County application proceedings, water availability analyses projected that meaningful water would be available for diversion roughly 60 percent of years. The Bureau's DEIS projects a full fill probability for the 29,000 acre-feet of additional space to occur only 38 percent of years given the proposed, senior-priority Elmore County and Cat Creek Energy projects. Consequently, in the best of cases it seems probability of filling the space is 60 percent if the Elmore County and Cat Creek Energy projects are not completed, and 40 percent if they are.

Given these probabilities, the DEIS estimates average annual delivery of wet water in the new space to equal 11,020 acre-feet. Of that amount, the project proposes reserving 1,102 acre-feet for federal fish and wildlife needs, leaving 9,918 acre-feet for annual average use downstream.

From a cost perspective, how much is an acre-foot of water in the new space, and who can afford to pay for it (including consideration of the fact that refill probabilities are far less than 100%)? The most likely end users of any additional storage water supply are irrigators and DCMI stakeholders (those like municipi-

palities and potable water supply entities who supply Domestic, Commercial, Municipal, and Industrial water to their consumers).

On the irrigation side, the DEIS projects that the "Irrigator Willingness to Pay" value tops out at \$105 per acre-foot in 2025 dollars. The DEIS projects that the "DCMI Willingness to Pay" value tops out at \$748 per acre-foot.

### Conclusion and Implications

At a projected/estimated base capital construction cost of \$83,300,000, the irrigation use values seemingly suggest that DCMI users are the ones who can best shoulder, and make sense of, the costs involved in the project unless initial project costs and ongoing O&M can be tempered over many years of term repayment contracts or other methods. It remains to be seen what options are available even presuming that the Idaho Water Resource Board's pending application for water right permit is approved as a threshold matter.

In sum, more storage in the Boise River Basin continues to be a collective goal. Whether more storage pencils out from a cost-benefit perspective remains a legitimate question.

## FERC ORDER REQUIRES PACIFICORP TO REMAIN ON FOR KLAMATH DAM REMOVALS

A recent ruling by the Federal Energy Regulatory Commission (FERC) has inserted a new condition on a longstanding plan to demolish four hydroelectric dams on the Klamath River in northern California and southern Oregon. Despite the terms of a settlement agreement that called for PacifiCorp, the dams' current owner and operator, to sever ties—and liability—by transferring its operating license to the group that would oversee the demolition, FERC's approval of the transfer includes a condition that PacifiCorp remain a co-licensee.

### Background

For decades, the Klamath River Basin (Basin) has been an epicenter for disputes over water and other natural resources among farmers, tribes, fishermen, environmentalists, and state and federal authorities.

The Basin spans over 16,000 square miles in Oregon and California, consisting of agricultural, forest, and refuge lands. The four hydroelectric dams proposed for demolition were built between 1908 and 1962, along the Lower Klamath River. The placement of the dams interrupts access to hundreds of miles of historical spawning and rearing habitats in the Upper Klamath for migratory chinook and coho salmon.

In 2004, PacifiCorp sought FERC approval to re-license its operation of the dams for another 30 to 50 years. In response, a 2004 economic study by the California Energy Commission and the U.S. Department of the Interior found that decommissioning the dams instead could actually saving PacifiCorp ratepayers up to \$285 million over a 30-year period. A settlement group comprised of representatives from PacifiCorp, Klamath Basin tribes, state and federal

agencies, counties, farmers, fishermen and conservation groups, was formed in 2005 to potentially resolve the years of disputes and litigation over habitat, fishery, and water quality concerns surrounding the four contested dams.

### **The 2010 Klamath Hydroelectric Settlement Agreement**

The 2010 Klamath Hydroelectric Settlement Agreement, amended in 2016 to incorporate delayed state legislative approvals, finally brought the parties to terms on the decommission and demolition of the four Lower Klamath dams. Under a key provision of the Settlement Agreement, PacifiCorp would request to transfer its ownership of the dam facilities and FERC operator's license and contribute \$200 million collected through utility bill surcharges towards the \$450 million removal effort. In exchange, PacifiCorp would be protected from all liability for potential damages caused by the ensuing dam removal process.

#### **FERC Grants Partial Transfer of PacifiCorp's License**

On July 16, 2020, four years after the transfer application was submitted, FERC's 31-page Order Approving Partial Transfer of License, Lifting Stay of Order Amending License, and Denying Motion for Clarification and Motion to Dismiss, 172 FERC ¶ 61,062 (FERC Order) granted only a partial transfer of PacifiCorp's license to the Klamath River Renewal Corporation (KRRC), a nonprofit organization formed to carry out the decommission and removal of the dams.

In requiring that PacifiCorp and KRRC accept their status as co-licensees, FERC pointed to the discrepancy between KRRC's limited finances and lack of experience with hydropower dam operation and removal, and PacifiCorp's additional financial resources and 32 years of experience in operating the Lower Klamath facilities. (FERC Order, pp. 17-18.)

While the Settlement Agreement contemplated a budget of \$450 million that would fully fund the removal project, FERC cautioned that "[c]osts could escalate beyond the level anticipated and unexpected technical issues could arise." (*Id.* at p. 17.)

Out of concern for the "uncertainties attendant on final design and project execution, and the potential impacts of dam removal on public safety and the environment," FERC determined it would not be in the public interest for KRRC to bear all responsibility and liability on its own, despite the express intent of the settling parties. (*Id.* at 17-18.) Thus, FERC's approval of the transfer is conditioned on PacifiCorp remaining on the license.

Despite the significant change to the parties' proposal, FERC suggests PacifiCorp's status as co-licensee may not ultimately affect the final results. In the event KRRC has access to sufficient funding and no unforeseen issues arise in the removal process, PacifiCorp would not bear additional burdens. (*Id.* at p. 18.) FERC also suggested that the parties may further amend the Settlement Agreement so that KRRC agrees to indemnify PacifiCorp for any expenses or damages that may result from the shared licensing obligation. (*Id.*)

#### **Conclusion and Implications**

While the Federal Energy Regulatory Commission Order provides a pathway forward to the next milestone, it may take more time before the plan to demolish the four Lower Klamath dams can be realized. Consistent with FERC's recommendation, it can be expected that PacifiCorp, KRRC, and the other stakeholders to the Settlement Agreement will coordinate to develop satisfactory terms to account for this latest snag in an already drawn-out process. The July 16, 2020 FERC Order is available at: [http://www.klamathrenewal.org/wp-content/uploads/2020/07/FERC-Order-20\\_0716.pdf](http://www.klamathrenewal.org/wp-content/uploads/2020/07/FERC-Order-20_0716.pdf). (Austin C. Cho, Meredith Nikkel)

## COUNCIL ON ENVIRONMENTAL QUALITY PUBLISHES FINAL RULE UPDATING NEPA'S IMPLEMENTING REGULATIONS

The Council on Environmental Quality (CEQ) recently published a final rule updating the National Environmental Policy Act's (NEPA) implementing regulations. Among other things, the updated regulations are intended to promote a more timely and efficient NEPA review process, streamline the development of federal infrastructure projects, and promote better federal decision-making. The new regulations, however, have also prompted concerns voiced by some in the environmental community.

### Background

NEPA was signed into law by President Nixon on January 1, 1970. The purpose of NEPA is to:

... foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (42 U.S.C. § 4331(a).)

To that end, NEPA requires that federal agencies undertaking a "major" federal action that significantly affect the quality of the human environment to prepare detailed statements on their actions' environmental effects, any such adverse effects that cannot be avoided if the proposed action is implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (*Id.* at § 4332(C).)

NEPA does not, however, mandate specific outcomes, rather it requires "Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making processes." (85 Fed. Reg. 43304-01, 43306.) Thus, in very general terms, federal agencies comply with NEPA by: 1) preparing an Environmental Assessment of their proposed actions; and 2) preparing an Environmental Impact Statement if the Environmental Assessment concludes that the action may have significant effects on the

environment. (*See generally*, 40 C.F.R. § 1501.4(c).)

NEPA also established the CEQ and empowered it to administer the implementation of the statute. (42 U.S.C. §§ 4332(B), 4342, 4344.) In 1977, President Carter directed the CEQ to issue implementing regulations for NEPA, and the CEQ did so in 1978. (85 Fed. Reg. 43304-01, 43307. Since then, the CEQ has only once issued substantive amendments to those regulations. (*Id.*)

### President Trump Directs the CEQ to Make Changes

In 2017, President Trump directed the CEQ to issue such regulations as it deemed necessary to, among other things, enhance interagency coordination of environmental review and authorization decisions, ensure that interagency environmental reviews under NEPA are conducted efficiently, and require that agencies reduce unnecessary burdens and delays in applying NEPA. (*Id.* at 43312.) In accordance with this directive, CEQ issued an advance notice of proposed rulemaking on June 20, 2018. (*Id.*) The CEQ's notice of proposed rulemaking was published in the *Federal Register* on January 10, 2020.

### Discussion and Summary of Key Elements of the Final Rule

The Final Rule published on July 16, 2020, contains numerous changes to NEPA's implementing regulations. (*See generally* 85 Fed. Reg. 43304-01.)

### Definitions

Among the most significant are changes to the regulatory definitions of "Effects," "Cumulative Impacts," and "Major Federal Action." Under the new definition of "Effects," effects must be "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives[.]" (*Id.* at 43343.) Thus, under the definition, a but-for causal relationship will be insufficient to make an agency responsible for the environmental effects of a major federal action under NEPA. (*Id.*) CEQ's explanation of this definition indicates that it is similar to the test of proximate causation applied in tort law.

(*Id.*) The Final Rule also completely eliminates the definitions of, and references to, “cumulative impacts” from NEPA’s implementing regulations. CEQ has explained that it has eliminated this definition to:

. . .focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect. . .[and because]. . .cumulative effects analysis has been interpreted so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives. (*Id.* at 43343-43344.)

Finally, the new regulations clarify that “Major Federal Actions” do not include projects where, due to “minimal Federal funding or minimal Federal involvement” the agency lacks control over the outcome of a project. (*Id.* at 43347.)

### **Deadlines and Page Limits**

The new regulations also set deadlines and page limits that govern the development of environmental documents. Under the Final Rule, federal agencies must issue Environmental Assessments within one year of deciding to prepare such a document, and Environmental Impact Statements must be issued within two years. (*Id.* at 43327.) Similarly, the Final Rule now sets a 75-page limit for Environmental Assessments, a 150-page limit for typical Environmental Impact Statements, and a 300-page limit for Environmental Impact Statements of “unusual” scope or complexity. (*Id.* at 43352.) However, all of these

deadlines and page limits may be extended if approved by a senior agency official. (*Id.*)

### **Prohibition on ‘Irreversible and Irretrievable’ Commitments of Resources**

Finally, while NEPA prohibits the “irreversible and irretrievable” commitment of resources which would be involved in a proposed action before the environmental review process is complete (42 U.S.C. § 4332(C)(v)), the Final Rule clarifies that non-federal entities may take actions necessary to support an application for federal, state, tribal, or local permits or assistance. (85 Fed. Reg. 43304-01, 43336.) Such actions may include, but are not limited to, the acquisition of interests in land and the purchase of long lead-time equipment. (*Id.* at 43370.)

### **Conclusion and Implications**

The CEQ’s Final Rule is more than 70-pages long and contains many more changes in addition to those described above. Although interests such as the U.S. Chamber of Commerce support the new regulations, numerous environmental groups have already challenged the CEQ’s adoption of the Final Rule on both substantive and procedural grounds. These lawsuits filed in the U.S. District Courts for the Western District of Virginia (*Wild Virginia, et al. v. Council on Env’tl. Quality, et al.*, Case No. 3:20-cv-00045) and the Northern District of California (*Alaska Comty. Action on Toxics, et al. v. Council on Env’tl. Quality, et al.*, Case No. 20-cv-05199) are in the earliest stages of litigation, and it is unclear if they will succeed. For more information on the changes to NEPA, see: <https://www.whitehouse.gov/ceq/nepa-modernization/> (Sam Bivins, Meredith Nikkel)

## **RIO GRANDE COMPACT COMMISSIONERS GRANT EMERGENCY PERMISSION UNDER THE RIO GRANDE COMPACT TO RELEASE STORED WATER IN NEW MEXICO’S EL VADO RESERVOIR**

In mid-July, the States of Texas and Colorado took the historic step of granting New Mexico and the Middle Rio Grande Conservancy District permission to release up to 38,000 acre-feet of stored water in El Vado Reservoir. The water is held in storage under the Rio Grande Compact. El Vado Reservoir, an

earthen dam, impounds flows from the Rio Chama in Northern New Mexico.

Earlier this summer, the Middle Rio Grande Conservancy District was forced to cease irrigation deliveries due to naturally low Rio Grande flows. New Mexico began its 2020 irrigation season amidst



increasing drought conditions. The lack of significant snowpack in high mountain elevations resulted in less actual water available statewide. Precipitation throughout New Mexico is well below normal. In addition, the water content in the snowpack is low. Flows in New Mexico's two major river basins, the Rio Grande and the Pecos, are below normal.

### Background

As neighboring states and partners to several interstate compacts (the Pecos River Compact, the Rio Grande Compact, and the Canadian River Compact), New Mexico and Texas share a long water history. As the downstream state, Texas' focus remains on ensuring New Mexico meets its various Compact delivery requirements. Under the Rio Grande Compact, New Mexico is required to deliver a certain amount of water to Elephant Butte Reservoir in southern New Mexico each year. In the event New Mexico accrues a water debt, it must reserve an equal amount of water in storage in El Vado Reservoir to ensure the water debt will be paid.

In dividing the waters of the Rio Grande between Colorado, New Mexico and Texas, the Compact maximizes the beneficial use of the water among all states without impairment of any beneficial uses under the conditions that prevailed in 1929. (Water is also delivered from Elephant Butte Reservoir to Mexico pursuant to an international accord). While Colorado and New Mexico can increase their storage, Texas is assured that no matter what actions are taken above Elephant Butte Reservoir, if available, 790,000 acre-feet will be released to the lands below Elephant Butte Reservoir. However, based on Reservoir levels, during drought conditions Colorado and New Mexico may be required to release water from storage and may be precluded from increasing the amount of water in storage. The application of these Compact requirements during a drought depends, inter alia, on the accrued debit/credit status of each state. Unlike some compacts, the Rio Grande Compact acknowledges the variability of the hydrograph and allows accruals of credits and debits.

As with most compacts, the 1938 Rio Grande Compact was developed out of a shared desire to remove all causes of present and future controversy with respect to the use of the waters of the Rio Grande. The Rio Grande Compact effects an equitable apportionment of the waters of the Rio Grande

among Colorado, New Mexico and Texas by establishing delivery amounts due at specific gauges. The last gauge for delivery in the Rio Grande Compact is Elephant Butte Reservoir, which feeds Caballo Reservoir right below it. Because of siltation and other practical problems, the gauge was moved to the outflow at Caballo Reservoir. The Compact allocates water among the three states, and in the case of the downstream state, Texas, guarantees water by use of a set of indexing stations whereby when "x" quantity of water passes a station, then "y" must reach the lower point. The Compact, however, is silent about what happens below Elephant Butte Reservoir.

In July, significantly, all three Rio Grande Compact Commissioners from Texas, Colorado and New Mexico had to agree to allow New Mexico to release storage water under the Compact. In a typical year, the stored debit water in El Vado Reservoir is not released until late in the year when it can flow to Elephant Butte without experiencing major evaporation or irrigation loss.

### Drought Prompts the Emergency Decision

The emergency decision to use the El Vado Reservoir storage was the result of what water managers predicted was certain to be extensive drying of the Rio Grande south of Albuquerque, New Mexico's largest metropolitan area this summer. Emergency permission to use the stored water has been granted only one other time, back in the 1950s. The release ensures water continues to flow in key stretches of the Rio Grande for endangered species and irrigators. The historic nature of the emergency grant of permission to use the stored water under the Compact is underscored by the fact that New Mexico and Texas are in ongoing litigation over delivery requirements under the Compact.

Water managers predicted 2020 would develop into a challenging water year due to drought forecasts. New Mexico is experiencing severe drought despite relatively normal snowpack during the winter of 2019-2020. Multiple factors account for New Mexico's current drought conditions. For example, despite last winter's normal snowpack, the 2019 nearly nonexistent monsoon season caused low soil moisture levels throughout New Mexico. When the snowpacks began to melt in early spring, the runoff failed to reach the rivers due to the parched soils soaking up moisture from the runoffs.

## Covid Exacerbates the Situation with Increased Demand

The challenge was quickly exacerbated last spring with the onslaught of COVID-19 and the ongoing public health crisis. Comparing data from January 1 through July 31, the Albuquerque metro area has experienced an increase of approximately 1.2 billion gallons in water use from 2019 to 2020. Due to people working from home, residential water use is on the rise, up 11 percent in 2020. Data from other western cities such as Tucson, Las Vegas and San Antonio reflect similar pandemic related rising water use trends.

### Conclusion and Implications

The recent decision by the Rio Grande Compact

Commissioners to grant New Mexico emergency authorization to release stored water in El Vado Reservoir to prevent significant drying of the Rio Grande is an historic decision reflecting the states' shared commitment to upholding best water management practices on a regional scale on a shared river. The decision to not allow significant stretches of the Middle Rio Grande to dry this summer ensured protection of endangered species like the Rio Grande silvery minnow and the farmers in the Middle Valley upstream of Elephant Butte Reservoir. Many water managers along the Rio Grande view the decision to help New Mexico as a positive sign of collaboration during these unprecedented times.  
(Christina J. Bruff)

## COLORADO DIVISION OF WATER RESOURCES ISSUES 2020 WATER RIGHTS ABANDONMENT LIST

On July 1, 2020, the Colorado Division of Water Resources (DWR) issued its proposed abandonment list for existing water rights throughout the entire state. Every ten years, state law requires DWR to review and determine if any water rights should be declared abandoned due to prolonged non-use of the water. Publication of the 2020 list triggers what could be for some Colorado water rights owners, a lengthy process to keep their listed water rights intact and off of the chopping block.

### Colorado's Abandonment Law

In Colorado, water rights typically arise by diverting water from the stream or aquifer and applying the water to a beneficial use. Once a water right has been confirmed by a Water Court, the right can be lost over time, either in whole or in part, by abandonment. State law defines abandonment as:

...the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder.  
C.R.S. § 37-92-103(2) (2020).

An abandoned water right cannot later be revived

by the owner or subsequent owners. Instead, the priority date is forfeited and the water reverts to the stream. This allows other water users on the stream the ability to appropriate the water, but likely under a much more junior priority status.

Abandonment law requires a court finding of prolonged and unjustifiable non-use of the water coupled with the subjective intent of the water right owner to abandon the water right. As a result, proving abandonment in court can be difficult because mere non-use of the water right alone is not enough to prove that a water right has been abandoned. Despite the high standard of proof required in abandonment cases, state law also provides that failure to use an available water right for a "period of ten years or more" creates a rebuttable presumption of abandonment, which then shifts the burden of proof to the water right owner to come forward with objective and credible evidence excusing the non-use and negating the intent to abandon. C.R.S. § 37-92-402(11) (2020).

As the legal standards suggest, a judicial finding of abandonment will depend upon the facts and circumstances of each case. In recent cases, the Colorado Supreme Court has found the following factors indicative of intent not to abandon a water right:

- repair and maintenance to diversion structures;
- efforts to put the water to beneficial use;
- active recording of diversions and the non-appearance of the right on the State Engineer's abandonment lists;
- efforts to market or sell the water right;
- filing documents to protect, change, or preserve the right;  
leasing the water right; and
- economic or legal obstacles to exercising the water right.

### Colorado's Decennial Abandonment List

Under Colorado law, the Division Engineers for each of the state's seven water divisions are required every ten years to undertake the laborious task of compiling a list of all absolute water rights proposed for abandonment to the Water Court. C.R.S. § 37-92-401(1)(a). To decide whether to include a water right on the list often requires the Division Engineers and local water commissioners to closely review the water rights owners' reported diversion records and to perform site visits during the intervening years between abandonment list publications. The state's previous decennial abandonment list occurred in 2010.

The 2020 abandonment list identifies over 4,000 water rights throughout the state as ripe for abandonment with priority dates ranging between 1882 and 2009. However, a specific category of water rights located in the Colorado River basin was intentionally excluded from the 2020 abandonment list. In 2018 while investigations were underway for the 2020 abandonment list, the State Engineer instructed the Divisions Engineers in Water Divisions 4, 5, 6, and 7 not to include pre-Colorado River Compact rights on the decennial abandonment list. These pre-Compact rights are viewed as water rights on the Colorado River or its tributaries that pre-date June 25, 1929, which is the date the Colorado River Compact took effect under the Boulder Canyon Project Act. According to the State Engineer's directive, these pre-Compact rights have value to all Coloradoans that extends beyond the individual water right owner.

DWR anticipates that the pre-Compact rights may play an important role in the administration of the Colorado River Compact given their senior priorities. A similar directive to exclude the pre-Compact rights was given by the former State Engineer during the 2010 abandonment list process.

### Timelines for DWR's Decennial Abandonment List Process

Water rights owners whose rights appear on the 2020 Abandonment List, but who do not intend to abandon their rights will have an opportunity to file a Statement of Objection with the appropriate Division Engineer. If the objection cannot be resolved before the Division Engineer, then a formal protest may be filed with the Water Court at the appropriate time. Below are the key dates and time frames for the 2020 Abandonment List process:

- July 1, 2020: The official publication date for the prosed abandonment list.
- July 31, 2020: The Division Engineer shall notify the owner or last-known owner of the water right.
- July-August 2020: Publication of the relevant portion of the abandonment list must be made in local area newspapers for four successive weeks.
- July 1, 2021: Deadline for filing a written Statement of Objection to the Division Engineer.
- July to December 2021: The Division Engineer will make revisions to the initial abandonment list deemed proper after consultation with interested parties.
- December 31, 2021: The Division Engineer will file the revised abandonment list in Water Court and make copies available to the public.
- January 31, 2022: The Water Court will publish notice of the revised abandonment list in area newspapers within each water division.
- June 30, 2022: Deadline for filing written protests to the revised abandonment list with the Water Court and Division Engineer.

- October 2022: The Water Court may begin conducting trials and hearings on protests to the abandonment list.

Once all trials have concluded within the respective water division, the Water Court will then enter a judgment and decree confirming the final 2020 Abandonment List together with any modifications that the Water Court determines necessary after trial.

### **Conclusion and Implications**

As the 2020 Abandonment List process gets underway in Colorado, affected water rights owners should take proactive steps to review the list and prepare to take action to preserve any water rights that they

wish to maintain. For some water rights owners, this may be as simple as resolving the objection administratively before the Division Engineer. For others, it may require prolonged litigation before the Water Court. For now, water users affected by the abandonment list have ample time to begin preparing their cases. This process is also important for other water users to pay attention to because as stream conditions become tighter—particularly in the Colorado River basin—and with compact administration looming in many western water managers' minds, the decision to include (or exclude) a water right on the 2020 Abandonment List could have effects beyond just the individual water right owner facing the prospect of abandonment.

(Jason Groves)

**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. Due to COVID-19 and recent efforts by the Trump administration to relax enforcement actions, there were fewer items to report on this month.*

**Civil Enforcement Actions and Settlements—  
 Water Quality**

•June 18, 2020—Pacific Seafood—Westport, LLC, has settled with the U.S. Environmental Protection Agency (EPA) over federal Clean Water Act violations at its Westport, Washington, crab and shrimp processing facility. Pacific Seafood—Westport, LLC, is part of a major global seafood processing operation that employs more than 3,000 people at 41 facilities in 11 states, including several offshore locations. According to settlement documents, EPA identified over 2,100 violations of the Westport facility’s wastewater discharge permit during an unannounced inspection in 2017. EPA documented discharge limit violations, as well as violations related to monitoring frequency, incorrect sampling, and incomplete or inadequate reporting. As part of the settlement, the company agreed to pay a penalty of \$190,000. In addition to paying the penalty, Pacific Seafood—Westport, LLC has launched a variety of new programs and implemented technologies to address compliance challenges at its Westport facility. By calculating the environmental impact of the violations, EPA expects to see the following environmental benefits as a direct result of the enforcement action taken:

Fecal Coliform reduced by 17,995 lbs/year

Biochemical Oxygen Demand (BOD<sub>5</sub>) reduced by 256,564 lbs/year

Total Suspended Solids (TSS) reduced by 115,845 lbs/year

Oil & Grease (O&G) discharge reduced by 48,255 lbs/year

As part of the agreement, Pacific Seafood—Westport, LLC neither confirms nor denies the allegations contained in the signed Consent Agreement and Final Order.

•July 7, 2020—The United States and the state of Nebraska have reached a settlement with Henningsen Foods Inc. to resolve alleged violations of the federal Clean Water Act at the company’s egg processing facility in David City, Nebraska. Under the terms of the settlement, the company will spend about \$2 million in upgrades to reduce the amount of pollutants the facility sends to the David City wastewater treatment system. The company also agreed to pay a \$827,500 civil penalty. Henningsen processes approximately 1.2 million eggs per day and is one of the largest egg processors in the state. The facility is subject to Clean Water Act regulations that prevent industries from overloading municipal wastewater treatment systems with industrial pollutants. According to the EPA, high loads of egg-processing waste and cleaning solution generated by Henningsen are sent to the David City wastewater treatment facility. Since at least 2014, this waste has caused both Henningsen and David City to violate the Clean Water Act on multiple occasions by discharging pollutants in excess of state and federal limits to Keysor Creek, which flows into the North Fork Big Blue River. These pollutants included ammonia and oxygen-depleting substances that are toxic to aquatic life and potentially harmful to people. Further, EPA alleges that Henningsen repeatedly failed to submit timely and accurate pollutant monitoring information required by law. As a result of this enforcement action, Henningsen has installed pretreatment equipment at its facility and agreed to operate and maintain it in order to reduce pollutants before they reach the David City wastewater treatment facility. The company will also continue to pay for its share of upgrades

to the wastewater treatment facility to adequately treat Henningsen's wastewater, and will increase the frequency of its pollutant monitoring and reporting. The settlement is detailed in a Consent Decree that was filed with the United States District Court for the District of Nebraska on July 7, 2020, and will be subject to a 30-day public comment period before final court approval.

- July 8, 2020—EPA and the Bogus Basin Recreational Association, Inc., have settled a Clean Water Act enforcement case stemming from alleged violations of construction stormwater permit requirements at the ski area and recreation complex located 16 miles northwest of Boise, Idaho. Bogus Basin is a 501(C)(3) non-profit organization which operates by a Special Use Permit on the Boise National Forest under the U.S. Department of Agriculture. EPA alleges violations took place at Bogus Basin's Stabilization Project, designed to support existing ski and recreation facilities. Construction included installing a retention dam, creating an in-stream 42-acre-foot water storage pond for snowmaking, and chair lift replacement. Concluded under an Expedited Settlement Agreement, the action included a penalty of \$52,680. Expedited Settlement Agreements offer business and industry a faster, more streamlined process to resolve permit violations with monetary penalties commensurate to the severity of the violations.

- July 13, 2020—EPA and the U.S. Department of Justice announced an agreement with the City of Manchester that will result in significant reductions of sewage from the city's wastewater treatment systems into the Merrimack River and its tributaries. The State of New Hampshire joined the U.S. government as a co-plaintiff on this agreement, which also resolves alleged violations of the Clean Water Act by the City of Manchester. Under a proposed consent decree filed in the U.S. District Court for the District of New Hampshire, the City of Manchester has agreed to implement a 20-year plan to control and significantly reduce overflows of its sewer system, which will improve water quality of the Merrimack River. The plan is estimated to cost \$231 million to implement. The Merrimack River is a drinking water source for more than 500,000 people, is stocked with bass and trout for fishing, is used for kayaking and

boating and other recreational opportunities. The settlement addresses problems with Manchester's combined sewer system, which when overwhelmed by rain and stormwater, frequently discharges raw sewage, industrial waste, nitrogen, phosphorus and polluted stormwater into the Merrimack River and its tributaries. The volume of combined sewage that overflows from the Manchester's combined sewer system is approximately 280 million gallons annually, which is approximately half of the combined sewage discharge volume from all communities to the Merrimack River. Under the proposed consent decree, Manchester will implement combined sewer overflow (CSO) abatement controls and upgrades at its wastewater treatment facilities that are expected to reduce the city's total annual combined sewer discharge volume by approximately 74 percent from approximately 280 million gallons to 73 million gallons. The city will also design and construct projects to separate the combined sewers for areas adjacent to the Cemetery Brook drain. These drainage and sewer separation projects will together address the largest drainage basin in the city and produce the greatest volume of CSO reduction. The work under the proposed consent decree also includes the construction of a new drain and sewer separation in the Christian Brook drainage basin, which will remove the third largest brook from the wastewater collection system. The proposed consent decree also requires the city to implement a CSO discharge monitoring and notification program, which will include direct measurement of all discharges from six CSO outfalls estimated to be more than 99 percent of all of the city's total CSO discharge volumes. In addition to the 20-year control plan, the proposed settlement also requires the upgrades to improve the handling of solid waste at the wastewater treatment plant to reduce discharges of phosphorus.

- July 22, 2020—The EPA will take enforcement actions on Oahu and the Big Island to bring about the closure of three pollution-causing large-capacity cesspools (LCCs) and issue \$268,000 in fines. Under the Safe Drinking Water Act, EPA banned LCCs in 2005.

EPA is authorized to issue compliance orders and/or assess penalties to violators of the Safe Drinking Water Act's LCC regulations. EPA actions to close LCCs owned by state and local government include:

1) the Helemano Plantation: Located in central Oahu, which is owned by the Hawai'i Department of Land and Natural Resources and leased by the City and County of Honolulu (CCH) and 2) the Kainaliu Comfort Station: Located on the leeward side of the Big Island in Kealahou. The comfort station has a public toilet in its parking lot which discharges to an LCC. Hawai'i County has agreed to pay a \$133,000 fine and close the cesspool by the end of this year.

Since the 2005 LCC ban, more than 3,600 LCCs in Hawai'i have been closed; however, many hundreds remain in operation. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. Groundwater provides 95 percent of all local water supply in Hawai'i, where cesspools are used more widely than in any other state.

In 2017, the state of Hawai'i passed Act 125, which requires the replacement of all cesspools by 2050. It is estimated that there are approximately 88,000 cesspools in Hawai'i. A state income tax credit is available for upgrading qualified cesspools to a septic system or aerobic treatment unit or connecting them to a sewer. The tax credit ends on December 31, 2020.

•July 22, 2020—The U.S. Department of Justice and the EPA have entered into a Consent Decree (CD) with Pacific Energy South West Pacific, Ltd. (Pacific Energy) related to that company's violations of the Clean Water Act. Under the CD, Pacific Energy will pay \$300,000 in a civil penalty and will take action to protect Pago Pago Harbor by eliminating unauthorized wastewater discharges from the American Samoa Terminal. Pacific Energy also will take steps to return the terminal to compliance with Clean Water Act sampling and reporting requirements. Pacific Energy operates a major bulk fuel terminal in Pago Pago that stores large quantities of petroleum fuel for distribution on American Samoa. The terminal routinely generates industrial wastewater by draining water that has separated from the fuel in its tanks. This industrial wastewater is then comingled with stormwater and discharged to Pago Pago Harbor. Under the Clean Water Act, the terminal is required to have a National Pollutant Discharge Elimination System (NPDES) permit and meet the requirements of that permit. Pacific Energy had an NPDES permit

from 2010 through 2015 but did not conduct regular wastewater sampling or meet the permit's other requirements. Pacific Energy allowed its NPDES permit to expire in 2015 and then operated without a permit—in violation of the Clean Water Act and of a related 2016 EPA administrative order—until November 1, 2019, when its current NPDES permit became effective. Pacific Energy's unmonitored discharge of pollutants such as oil, grease and other toxic pollutants to Pago Pago Harbor may have damaged water quality and harmed the chemical, physical, and biological balance of the Harbor. Many Samoans fish and recreate in Pago Pago Harbor, which is home to important cultural and environmental resources, including nearly 200 species of coral.

•July 27, 2020—EPA has announced an agreement with Pacific Seafood-Eureka, LLC over violations of the federal Clean Water Act. The settlement requires the company to pay a \$74,500 penalty after an EPA inspection found the company was discharging wastewater in violation of local and federal standards into the City of Eureka's sewer system and Humboldt Bay's Eureka Slough. Pacific Seafood-Eureka, part of the Pacific Seafood Group headquartered in Portland, Oregon, operates a seafood processing facility at its Eureka location. During a 2018 inspection with the North Coast Regional Water Quality Control Board and Eureka's Public Works Department, EPA found the company discharged wastewater directly to the Eureka Slough waterway without the appropriate permit. EPA conducted its inspection after the City of Eureka issued several notices of violations to the facility. The facility also discharged wastewater to the city of Eureka's sanitary sewer in violation of pretreatment standards. Violations associated with operation and maintenance of the facility's pretreatment system were identified, including: wastewater from the indoor shrimp processing area was bypassing the facility's pretreatment system; the facility lacked adequate secondary containment in the indoor bulk chemical storage area and outdoor chemical storage area; wastewater from the de-shelling process was observed entering a storm drain; and the company was discharging the water used to rinse off oysters and crabs directly into the Eureka Slough. The company addressed all of these compliance issues.

•August 14, 2020—EPA, the U.S. Depart-

ment of Justice and the California Department of Toxic Substances Control (DTSC) have reached a \$56.6 million settlement with Montrose Chemical Corporation of California, Bayer CropScience, Inc., TFCF America, Inc., Stauffer Management Company LLC, and JCI Jones Chemicals, Inc. for further cleanup work of contaminated groundwater at the Dual Site Groundwater Operable Unit of the Montrose Chemical Corp. and Del Amo Superfund Sites (also known as the Dual Site) in Los Angeles County, California. This work will include operating and maintaining the primary groundwater treatment system for the remedy selected in the 1999 Dual Site cleanup plan. The settlement also includes payment to EPA of \$4 million in past costs, another payment of costs incurred by DTSC, and payment of EPA's and DTSC's future oversight costs. Groundwater at the Dual Site is contaminated with hazardous substances from industrial operations, including chlorobenzene from the former Montrose facility where DDT was manufactured, benzene from the Del Amo facility where synthetic rubber was manufactured, and trichloroethylene (TCE) related to several facilities. This settlement specifically addresses the chlorobenzene plume, which refers to the entire distribution of chlorobenzene in groundwater at the Dual Site and all other contaminants that are commingled with the chlorobenzene. Cleanup activities will involve pumping the groundwater in the chlorobenzene plume and treating it to federal and State of California cleanup standards identified in the 1999 remedy. The treated water will then be reinjected into the aquifer outside of the contaminated groundwater area. The objective is to contain a zone of groundwater contamination surrounding source areas (also known as the 'containment zone') and clean up the chlorobenzene plume outside of that zone. Containment will occur soon after pumping operations begin, and cleanup of groundwater beyond the containment zone is expected to take approximately 50 years to complete. In addition, EPA will pursue settlements with other parties to conduct cleanup work selected for the benzene and TCE plumes in the Dual Site cleanup plan.

### **Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste**

• July 2, 2020—EPA announced a settlement with Waste Management of Wisconsin, Inc. (WMWI) that will include enhanced monitoring for hazardous

waste near the Metro Landfill in Franklin, Wis., and a \$232,000 fine to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA). WMWI, a subsidiary of Waste Management, Inc., owns and operates the Metro Recycling and Disposal Facility (Metro Landfill), in Franklin, Wis. The Metro Landfill is licensed by the State of Wisconsin to accept non-hazardous municipal, commercial, industrial, and special wastes for disposal, but is not authorized to treat, store, or dispose of hazardous waste. EPA alleged that WMWI improperly disposed of hazardous electric arc furnace dust from a steel casting foundry at the Metro Landfill on at least ten days. The dust was contaminated with chromium, a hazardous waste and known human carcinogen. Under the terms of the settlement, WMWI has agreed to conduct leachate and groundwater monitoring, and update its waste management plan and training program. The settlement also includes a civil penalty of \$232,000.

• July 9, 2020—EPA and the U.S. Department of Justice announced a settlement with J.R. Simplot Company and its subsidiary, Simplot Phosphates LLC (Simplot), involving Simplot's Rock Springs, Wyoming, manufacturing facility. This settlement resolves allegations under the Resource Conservation and Recovery Act (RCRA) at the facility, including that Simplot failed to properly identify and manage certain waste streams as hazardous wastes. The settlement requires Simplot to implement process modifications designed to enable greater recovery and reuse of phosphate, a valuable resource. The settlement also requires Simplot to ensure that financial resources will be available when the time comes for environmentally sound closure of the facility. Simplot's Rock Springs facility manufactures phosphate products for agriculture and industry, including phosphoric acid and phosphate fertilizer, through processes that generate large quantities of acidic wastewater and a solid material called phosphogypsum. The phosphogypsum is deposited in a large pile known as a gypstack, and acidic wastewater is also routed to the gypstack. The gypstack at the Wyoming facility is fully lined and has a capacity to hold several billion gallons of acidic wastewater. This settlement also resolves alleged violations of the Emergency Planning and Community Right-to-Know Act (EPCRA) for Simplot's failure to report certain quantities of toxic chemicals in accor-



dance with EPCRA standards. Under the settlement, Simplot agrees to implement specific waste management measures valued at nearly \$20 million. Significantly, these measures include extensive new efforts to recover and reuse the phosphate content within these wastes and avoid their disposal in the gypstack. The settlement also includes a detailed plan setting the terms for the future closure and long-term care of the gypstack. The settlement requires Simplot to immediately secure and maintain approximately \$126 million in dedicated financing to ensure that funding for closure and long-term care will be available when the facility is eventually closed. Simplot also agrees to submit revised EPCRA Form R reports (Toxic Release Inventory) for 2004 to 2013 to include estimates of certain metal compounds manufactured, processed, or otherwise used at the facility. Simplot will also pay a \$775,000 civil penalty to resolve both the RCRA and EPCRA claims.

- July 14, 2020—EPA and the U.S. Department of Justice announced a proposed settlement between the United States and 16 parties that will require the design and implementation of cleanup actions in the southwestern portion of the Wells G&H Superfund Site, known as Operable Unit 4 (OU4) or the “Southwest Properties” (SWP), in Woburn, Massachusetts. The proposed settlement, if approved by the federal court, will require cleanup measures on the southwestern portion of this Superfund site. The cleanup being made possible through this settlement agreement will protect human health and the environment by addressing unacceptable risks in site soils, wetlands, and groundwater. Under the proposed consent decree, three current or former owners or operators of parcels within the SWP, 280 Salem Street LLC; ConAgra Grocery Products Company, LLC, as successor-in-interest to Beatrice Company; and Murphy’s Waste Oil Service, Inc. are responsible for performing the cleanup work at the site. In addition, 13 arrangers for disposal of hazardous substances at the SWP will be required to make payments into a trust fund, to be used by the settling defendants performing the cleanup to help finance that work. Settling defendants will make payment into a trust fund. The work includes excavation and off-site disposal of contaminated soil, non-aqueous phase liquid

(NAPL), NAPL-impacted soil, and wetland sediment; backfilling soil and NAPL excavations; construction of impermeable caps; pumping and treating contaminated groundwater; wetland restoration; operation and maintenance; long-term monitoring; five-year reviews; and institutional controls. EPA estimates that the remedial work will cost approximately \$19.1 million.

- July 13, 2020—EPA, the U.S. Department of Justice, and the state of Texas have announced a settlement with E.I. Du Pont de Nemours and Company (DuPont) to resolve alleged hazardous waste, air, and water violations at its former La Porte, Texas chemical manufacturing facility. In 2014, the La Porte facility was the site of a chemical accident where the release of nearly 24,000 pounds of methyl mercaptan resulted in the death of four workers and forced the company to permanently close the chemical manufacturing plant in 2016. As part of a separate settlement in 2018, DuPont paid a \$3.1 million civil penalty for violating EPA’s chemical accident prevention program. Under this settlement agreement, DuPont will pay a \$3.195 million civil penalty. This settlement resolves alleged violations of the Resource, Conservation and Recovery Act (RCRA), the Clean Water Act (CWA) and the Clean Air Act (CAA) from DuPont’s past chemical manufacturing operations. The alleged RCRA violations include failure to make hazardous waste determinations; treatment, storage or disposal of hazardous waste without a permit; and, failure to meet land disposal restrictions. The alleged CWA violations include failure to fully implement the facility’s oil spill prevention plan. Even though the facility closed in 2016, DuPont continues to operate a wastewater treatment system on site and, as a result of this settlement, will perform sampling and analysis to determine the extent of any existing soil, sediment, or groundwater contamination within or around impoundments remaining on site which may contain wastes from the closed chemical manufacturing plant. DuPont will perform this work pursuant to Texas’ Risk Reduction Program and perform any necessary cleanup. The Consent Decree was lodged on July 9, 2020 in the United States District Court for the Southern District of Texas. (Andre Monette)

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## JUDICIAL DEVELOPMENTS

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### UTAH SUPREME COURT DISTINGUISHES WATER RIGHT IMPAIRMENT FROM INTERFERENCE—FINDS CLAIMANT NEED NOT MAKE ADMINISTRATIVE PHASE PROTEST OF CHANGE APPLICATION TO LATER RAISE INTERFERENCE ARGUMENT

*Rocky Ford Irrigation Company v. Kents Lake Reservoir Company*, 2020 UT 47 (UT July 13, 2020).

The Utah Supreme Court issued an *amended* decision in this case and clarified the distinction between impairment of and interference with water rights. Crucially, the Court held that a party need not protest a change application at the administrative phase in order to assert interference at a later date.

#### Factual and Procedural Background

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

Kents Lake filed change applications in 1938 and 1940 to store additional water in its reservoir. These change applications were both approved by the Division of Water Rights over the protests of Rocky Ford. Subsequently, the two companies entered into an agreement to "provide for the practical administration of storage ... and to prevent future controversy concerning the diversion for storage." *Rocky Ford v. Kents Lake*, 2019 UT 31, ¶ 9. This agreement provided that: 1) Rocky Ford would not protest Kents Lake's planned change application seeking an option storage right in Three Creeks Reservoir, 2) Kents Lake would not oppose Rocky Ford's enlargement of its reservoir, and 3) Rocky Ford has an exclusive right to store all water available to it from November 1 to the following April 1 each year.

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

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

#### At the State District Court

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

Following discovery, Rocky Ford moved for partial summary judgment. It asserted that: 1) the direct-storage changes maintain an 1890 priority date only

to the extent they don't injure Rocky Ford's direct flow rights, and 2) Rocky Ford's direct flow rights are not subordinated or waived under a plain language reading of the Agreement. The District Court denied the motion holding that Rocky Ford had "intentionally waived its direct flow rights against [Kents Lake] through its entrance into the 1953 agreement" and that Kents Lake could continue to store its water as it has "even to the detriment of [Rocky Ford]'s direct flow rights." *Id.* at ¶ 15.

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

### The Supreme Court's 2019 Decision

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

The Court heard argument on the appeal and published an opinion in July 2019. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 2019 UT 31. The parties filed petitions for rehearing, seeking substantive changes to Parts II(A) and (B) of the original opinion. The Court granted the petitions and reheard the case in March 2020.

### The Supreme Court's Amended Decision

There are five principal questions at issue: 1) Did the District Court err in denying Rocky Ford's motion for summary judgment? 2) Did it err in refusing to declare that Kents Lake could not store its efficiency gains? 3) Did it err in refusing to declare that Kents Lake must measure its usage consistent with the requirements of the Beaver River Decree? 4) Did it err in refusing to rescind the 1953 Agreement? 5) Did it err in awarding attorney fees to Kents Lake and Beaver City?

The Court reversed the lower court's denial of Rocky Ford's motion for summary judgment, the denial of Rocky Ford's request for declaratory judgment as to Kents Lake's measurement obligations under the Decree, and the decision awarding attorney fees to Kents Lake and Beaver City. But the Court affirmed the lower court's decision refusing to declare that Kents Lake could not store its efficiency gains and the decision refusing to rescind the 1953 Agreement. The case was remanded for further proceedings.

### Changes Are Expressly Made Subject to Vested Rights at New Point of Diversion or Place of Use

The key clarification in this amended opinion is that the Court held that Kents Lake's direct storage changes retain their original priority only to the extent they do not injure Rocky Ford's direct flow rights. This is made clear in the Utah Code, which provides that a water user may seek to change its rights in a water source by filing a change application with the State Engineer. Utah Code § 73-3-3. A change application requests a change in the "place of diversion or use" of the water for a purpose other than that originally appropriated. *Id.* Because such a change is not permitted "if it impairs any vested right," *id.*, other water users are entitled to file a protest of a proposed change with the State Engineer. *id.* § 73-3-7. The State Engineer then reviews the impairment claims and approves the change if there is "reason to believe" that the approval will not impair vest water rights. *Searle v. Millburn Irr. Co.*, 2006 UT 16, ¶ 31, also Utah Code § 73-3-3.

Because a change to a water right is made subject to preexisting water rights, it is clear that the change cannot harm those preexisting water rights. A subsidiary point is also implicit: The change maintains

its original priority only so long as it does not harm preexisting rights. See, *Hague v. Nephi Irrigation Co.*, 52 P. 765, 769 (Utah 1898) (“[w]hen water has been lawfully appropriated, the priority thereby acquired is not lost by changing the use for which it was first appropriated and applied, or the place at which it was first employed, provided that the alterations made ... shall not be injurious to the rights acquired by others prior to that change.”) In this case, Kents Lake’s changed right retains priority over Rocky Ford’s rights so long as Kents Lake’s changed water storage does not injure Rocky Ford’s direct flow rights.

The Court held that there exists a presumption that a water right subject to a change application retains its original priority date. An aggrieved party may allege an injury sufficient to defeat the presumption of original priority by either protesting a change during the application process or bringing a claim after the change has been approved. A party can, in other words, allege either prospective injury stemming from another water user’s proposed change, or actual injury stemming from another water user’s actual change.

### **Distinguishing ‘Impairment’ from ‘Interference’**

The Supreme Court noted that impairment and interference have historically been used interchangeably, but now holds that they are “distinct legal claims meriting distinct labels.” ¶ 37. The Court clarified that “impairment” claims are statutory claims brought under Utah Code §§ 73-3-3 and 73-3-7 during the change application process, and that “interference” claims are common-law claims brought under our case law after the change application process ends. The distinction between “impairment” and

“interference” is important to the extent it highlights the two distinct roles our courts play in water law cases: 1) reviewing administrative decisions regarding water rights, and 2) adjudicating the water rights themselves (including their priority).

A determination of impairment is an administrative function and refers to a protest of proposed changes of water rights. Because the change is only proposed at this stage, the preliminary decision is whether there is “reason to believe” that injury will occur. At this stage the applicant seeking the change has the burden to show that there is reason to believe that no injury to vested rights will occur. Conversely, interference is a judicial function and refers to the determination of actual injury to a vested water right. Accordingly, once a change application is approved the burden shifts and the opponent of the change must show by a preponderance of the evidence that the change has interfered with their water rights.

### **Conclusion and Implications**

The Utah Supreme Court’s earlier decision recognized that a change application did not alter the underlying priority date of a water right, but did not acknowledge the fact all changes are made subject to existing rights. This amended decision clarifies that a change is expressly made subject to vested rights at the new point of diversion or place of use. Further, it firmly delineates that impairment and interference are separate and distinct causes of action. The Utah Supreme Court’s Decision may be found at: [https://www.utcourts.gov/opinions/supopin/Rocky%20Ford%20v.%20Kents%20Lake20200713\\_20170290\\_47.pdf](https://www.utcourts.gov/opinions/supopin/Rocky%20Ford%20v.%20Kents%20Lake20200713_20170290_47.pdf) (Jonathan Clyde)

## WASHINGTON SUPREME COURT OVERTURNS THE COURT OF APPEALS ON THE INSTREAM FLOW RULE— REINSTATES SUMMER INSTREAM FLOWS

*Center for Environmental Law & Policy, et al., v. State of Washington, Department of Ecology, Case No. 97684-8 (August 6, 2020), on review of Center for Environmental Law & Policy, American Whitewater, and Sierra Club v State of Washington, Dept of Ecology, 444 P.3d 622 (Wash.App., Div. II, 2019).*

The Washington Supreme Court has upheld summer flows set by the Department of Ecology (Ecology), overturning a state Court of Appeals decision. (See, 24 West. Water L. & Policy Rptr 103 (Feb. 2020).

### Background

Ecology established minimum instream flows for portions of the Spokane River by rule in 2015. A collection of environmental groups challenged the validity of a portion of the Rule, calling into question the agency's authority and methodology for establishing instream flow rules. The Court of Appeals found in favor of the appellants, invalidating the summer portion of the rules in favor of revisiting whether recreational values were adequately considered. The Washington Supreme Court overturned the Court of Appeals, reinstating the summer instream flows rules as set by rule.

### The Spokane River

The Spokane River runs 111 miles from its Lake Coeur D'Alene headwaters in Northern Idaho across the state line into Washington where it flows through the heart of the City of Spokane to its eventual confluence with the Columbia River. The Spokane River is a focal point in an otherwise arid landscape, providing cultural, economic and recreational touch points to a growing population and is home to much fish and wildlife, including trout and mountain whitefish among other species.

### Regulation of Instream Flows in Washington

The case arose from a challenge by recreational water users to instream flows set by rule on the grounds that the rule was Arbitrary and Capricious because the summer flows failed to accommodate flows recommended by recreationists which were higher than the flows recommended for fish.

Ecology is authorized and directed by various statutes to manage the waters of the state for a myriad of

purposes, including setting instream flows by regulation. The authority for setting instream flows arises under multiple code sections, adopted and amended over the course of the last fifty plus years. The creation of instream flow rules has become increasingly controversial, as these rules have become the fulcrum in the balance between authorizing new out of stream uses of water and restricting or requiring mitigation of for the protection of flows. Once adopted, the minimum instream flow established by rule becomes an appropriative right within the priority scheme of "first in time, first in right," which must be protected from injury by junior water uses.

### The Supreme Court's Decision

#### Issues on Appeal to the Supreme Court

At issue was the interpretation of two different code provisions with seemingly contradictory provisions.

Under the Minimum Water Flows and Levels Act (Ch 90.22 RCW, first adopted in 1969, amended in 1987, 1988, 1994, and 1997), Ecology is authorized to establish:

. . . minimum water flows or levels. . . for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. RCW 90.22.010.

Under the Water Resources Act (Ch 90.54 RCW, adopted in 1971, amended in 1990), the legislature added additional nuance to Ecology's water management considerations, with such additional goals as directing the agency to allocate water for "the maximum net benefits for the people of the state" while also converting and refining the laundry list of purposes from the Minimum Water Flows and Levels Act

including making the list of purposes to be considered conjunctive and obligatory with the use of “shall” and “and” in the contexts of protecting and enhancing the quality of the natural environment, and retaining “base flows” “for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”

Ecology took a narrow read by relying solely on the Minimum Water Flows and Levels Act (RCW 90.22) in setting instream flows levels on the basis of fish needs alone, and the appellants taking a more expansive position that Ecology is required to consider and address all instream flows uses under the direction of the Water Resources Act (RCW 90.54). The Court of Appeals invalidated the rule finding its adoption was arbitrary and capricious, and in doing so the Court created a hybrid of the two legislative enactments which created a higher standard than either of the provisions acting alone.

In addition to the Administrative Procedures arguments requiring the reconciliation of code provisions, the appellants raised Public Trust Doctrine arguments which the Court of Appeals did not find persuasive. The Public Trust argument were not raised by the appellants to the State Supreme Court but was raised by Amicus. The Court was not persuaded and elected not to consider the matter in a footnote.

### Statutory Interpretation

When the paragraph headings in the opinion is a grammar primer—[“Shall,” “or,” “and”]—be prepared for some hairsplitting. In this case, the Court applied its exception to the rule instead of the rule itself. Instead of finding that “shall” imposes a mandatory requirement, the Court went to find that shall isn’t mandatory when “a contrary legislative intent is apparent,” and that a “contrary legislative intent” is

indeed found within RCW 90.54. RCW 90.54.020, with the statutory captions of “General declaration of fundamentals for utilization and management of waters of the state” according to the Court, are “guidelines, not elements that must be met..

When establishing minimum instream flows under RCW 90.22.010, the Court found that Ecology can balance competing interests based on the disjunctive “or” found in the statute. “. . . RCW 90.22.010’s plain language provides it with the authority to:

. . . establish minimum water flows. . . for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. *No. 97684-8, p14.*

In doing so, the Court recognized that Ecology has authority to decide instream flows *and to exercise its discretion in doing so.*

The Court further doubled down on Ecology’s discretion in these regulatory matters, quoting previous cases wherein the agency was given broad discretion.

### Conclusion and Implications

This is the first water case in which the Washington Supreme Court has accepted direct review since 2016 (*See, Whatcom County v Hirst Et Al*, 186 Wash.2d 648, 381 P.2d 1 (2016)). The case opinion is also notable as evidenced by the Court’s unanimous decision—rare for the Court in a water case. The Washington Supreme Court overturned the Court of Appeals, reinstating the summer instream flows rules as set by rule.

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