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WWL

FEATURE ARTICLE

A REVIEW OF LEGISLATIVE AND JUDICIAL DEVELOPMENTS IN COLORADO'S ANTI-SPECULATION WATER LAW

By Jason Groves, Esq.

In the 2020 legislative session, Colorado lawmakers passed Senate Bill 20-048—a bi-partisan bill directing the Department of Natural Resources (DNR) to study ways to strengthen Colorado's anti-speculation water laws. The bill arose from renewed concerns about water speculation after a recent trend of water rights investment activities by local and out-of-state investment firms. The DNR recently convened an 18-member workgroup to study the current law and make recommendations to the Colorado Legislature in a written report due later this summer. Meanwhile, the Colorado Supreme Court recently issued a new opinion, further refining the anti-speculation doctrine.

SB 20-048 and the Anti-Speculation Law Workgroup

SB 20-048, signed by Governor Polis in March 2020, required the DNR to assemble a workgroup with the support of the Colorao State Engineer and Attorney General's office "to explore ways to strengthen current water anti-speculation law." In an interview with Colorado *Newsline*, State Senator Kerry Donovan, a Democrat bill sponsor, explained the bill was intended to ensure existing state law has enough teeth to protect against speculation in Colorado's water:

> Water speculators aren't in the business of using the water, they're in the business of owning the water for future times when they can sell it. And that's why you see hedge funds coming into the State and buying water in a portfolio. That is what is concerning me.

The Workgroup Convenes

In the fall of 2020, the DNR acted on its charge by appointing an 18-member workgroup to begin assessing Colorado's anti-speculation water laws. Leading the group are Kevin Rein, the Colorado State Engineer, and Scott Steinbrecher, an assistant deputy attorney general for Colorado. Other members of the group hail from a variety of water-related backgrounds from across the state and include officials from the Colorado Water Conservation Board, water engineers, farmers and ranchers, a retired Colorado Supreme Court Justice, municipal and regional water managers, environmental and water non-profit representatives, and a number of respected water attorneys.

The workgroup held its first meeting in October 2020 to develop a work plan for the group's upcoming written report and recommendations, which are due to the legislative water resources review committee by August 15, 2021. At the initial meeting, members wasted no time diving into the difficult questions and issues surrounding Colorado's anti-speculation doctrine. Workgroup member Joe Frank, who serves as general manager of the Lower South Platte Water Conservancy District in northeastern Colorado, pointed out the tension between the valuable property rights aspects of water rights ownership and attempting to safeguard Colorado's "public" resource against speculation. As he stated in reporting by *Fresh Water News*:

> It's hard to blame farmers for wanting to sell their water because of all different kinds of circumstances. We would prefer them to keep their water and stay in agriculture because that's the economic base for our area. But you can't just go

say, 'We're going to put a stop to it.' Now you're impacting somebody's property rights.

Fortunately, the group will have the next eight months to further grapple with this and other related issues before delivering its final written report. In the near term, the group is expected to take an in-depth review of the current laws and will be looking for opportunities to strengthen them where appropriate. However, the ultimate decision on whether to implement changes to existing law will be up to policymakers and not the workgroup.

Colorado's Anti-Speculation Laws and State Court Decisions

Like other western states, water rights in Colorado are usufructuary rights. Meaning, one does not own the water itself but instead owns the right to "use" the public resource. Moreover, Colorado water law requires water users to have a specific plan and intent to put the water to a beneficial use. The anti-speculation doctrine is rooted in this beneficial use requirement. And courts have clarified the doctrine applies not only to claims for new water rights but also to changes of existing rights, as was the case in *High Plains A&M, LLC v. Southeastern Colo. Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005).

For over a century, Colorado Supreme Court cases have confirmed water rights cannot be obtained within the state merely for future sale and profit motivations alone. As early as 1892, the Court stated:

> . . .the constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation. *Combs v. Agricultural Ditch Co.*, 28 P. 966, 968 (Colo. 1892).

The anti-speculation doctrine's contour has evolved in the many years following the *Combs* case, but the core principle has remained the same.

The *Vidler* Decision

In 1979, the state Supreme Court issued its opinion in *Colorado River Water Conservation District v. Vidler Tunel Water Co.*, 594 P.2d 566 (Colo. 1979) (*Vidler*) applying anti-speculation principles. In *Vidler*, the Court reversed portions of a conditional water right decree for a 156,238 acre-foot reservoir. The water company hoping to sell water to front-range municipalities lacked a "firm contractual commitment" or an "agency relationship" with any municipal end-users to justify the water claim. While the water company had commenced discussions with potential purchasers and had an option contract with the City of Golden for up to 2,000 acre-feet, subject to the project's success, the agreement did not obligate Golden to exercise the option. The Court ultimately found the evidence insufficient to support the full amount and uses of water claimed by Vidler but did affirm the portion of irrigation use to be accomplished on the water company's property.

The *Pagosa* Decisions

In 2007 and 2009, the Colorado Supreme Court revisited a limited exception to the anti-speculation doctrine. *See, Pagosa Area Water and Sanitation District v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007) (*Pagosa I*); *Pagosa Area Water and Sanitation District*, 219 P.3d 774 (Colo. 2009) (*Pagosa II*). A more relaxed standard applies to municipalities and other governmental entities that supply municipal water directly to their end-user customers. Known as the governmental planning exception or the great and growing cities doctrine, the standards recognize governmental water supply agencies have a "unique need for planning flexibility" because a municipality may need to obtain additional water supplies as the population increases. By definition, this is not speculation but rather prudent planning by the city or agency. That said, the *Pagosa I* court clarified the limitations of the governmental planning exception.

Under the exception, a governmental agency's claim must be consistent with its "reasonably anticipated" water demands based on substantiated population projections of future growth within its service area. *Pagosa I*, 170 P.3d at 315. In other words "municipalities must do more than represent to the Water Court that if it had water, they would be able to grow." The *Pagosa I* court ultimately rejected the Water Court's acceptance of a 100-year planning horizon in that particular case. In *Pagosa II*, the Supreme Court approved Pagosa Water and Sanitation District's use of a 50-year planning horizon as a reasonable basis upon which to calculate projected water requirements under the exception. *Pagosa II*,

More recently, in 2018, the Colorado Supreme Court confirmed the anti-speculation doctrine also extends to the state's designated groundwater basins in the eastern plains of Colorado. 22 *W. Water Law & P'lcy Rptr*. 236 (June 2018).

The Anti-Sepculation Doctrine Codified

The present-day anti-speculation doctrine, including the government planning exception, is codified in the state statute, C.R.S. § 37-92-103(3) which provides:

> 'Appropriation' means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following:
>
> 1) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless the appropriator is a governmental agency or an agent in fact for the person proposed to be benefited by such appropriation.
>
> 2) The purported appropriator of record does not have a specific plan and intent to divert, store or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

As the summary above illustrates, the anti-speculation doctrine is not a new legal requirement by any measure. Instead, it's a long-standing fixture in Colorado's water law, leading some to question why the state legislature believes it needs strengthening.

Recent Notable Water Investment in Colorado Water

One particular entity has caught the attention and perhaps ire of west slope water managers and state legislators. Water Asset Management (WAM) is a self-described pubic and private equity investment firm based in New York. In the past few years, WAM has been investing in select western water markets, such as Colorado, by buying irrigated farmland and associated senior irrigation water rights. In a 2020 webinar hosted by the Ceres organization, WAM Chief Operating Officer Marc Robert explainted that WAM's private equity funds have over $300 million invested in western United States agriculture, with particular emphasis on farms with water rich assets. One component of WAM's investment strategy, in addition to on-farm efficiency upgrades, is rotational fallowing, or "buy and dry."

According to recent reporting by *KUNC* and *Aspen Journalism*:

> . . .since 2017, WAM has spent 16.6 million buying up 2,222 acres of irrigated agricultural land in the communities of Fruita, Loma, and Mack, west of Grand Junction[, Colorado].

The land falls within the service area supplied by senior controlling water rights on the Upper Colorado River basin through the Grand Valley Water Users Association and the Grand Valley Irrigation Company. Some observers are suspicious of this investment activity because of its location and timing with ongoing efforts in the state to devise a drought management plan to head off a compact call in the Colorado River Basin. *See*, https://www.kunc.org/environment/2020-06-02/western-colorado-water-purchases-are-stirring-up-worries-about-the-future-of-farming. Colorado is presently investigating the feasibility of a "temporary, voluntary, and compensated" program to bolster flows in the Colorado River by essentially paying irrigators to use less water.

While WAM's newcomer presence is gaining attention in the Colorado River Basin, other water investment proposals are also causing a stir in other parts of the state. One example is the San Luis Valley located in southern Colorado. For decades, water developers have attempted, albeit unsuccessfully, to develop and export water from the San Luis Valley to the much faster growing Denver-metro area.

It remains to be seen whether these particular efforts will ultimately run afoul with the anti-speculation doctrine in Colorado, but they certainly motivated the legislative response in SB 20-048. "The reason I drafted [the bill] is because I'm hearing stories from

the West Slope and the San Luis Valley of outside groups coming in and buying water rights. While we're not entirely sure if this is speculation, some of these companies are more like financial and hedge fund institutions instead of agricultural interests. That seems to have the color of water speculation," said Sen. Kerry Donovan to Fresh Water News.

The *United Water* Decision

On November 23, 2020 the Colorado Supreme Court added to the growing body of anti-speculation law by issuing the opinion in *United Water and Sanitation Dist. v. Burlington Ditch Reservoir and Land Co.*, 2020 CO 80, ___ P.3d ___ (Colo. 2020). At issue in the case was whether United Water and Sanitation District (United) qualified for the governmental planning exception to the anti-speculation doctrine.

Background

United is a special district formed in Elbert County, Colorado, with a service area comprising "one acre of land." The Supreme Court found that there are "no residents" in within United's territorial boundaries, and United's service plan specifies that it was not formed to supply water to individual end-users. The case arose from United's application for new conditional water storage rights proposed to supply a 665-acre residential development near Lochbuie in Weld County.

At the time of the original application in Water Court, United did not have a binding contract or agency relationship with the end-users of water that United sought to appropriate. As a result and in a ruling on a motion to determine a question of law, the

At the Water Court

Water Court ruled that United could not satisfy the anti-speculation doctrine. United subsequently withdrew the application.

One week later, armed with a water supply agreement to provide water to the 665-acre development, United re-filed the application for conditional storage water right in Water Court. Various objectors in the case filed for partial summary judgment on the basis that United did not meet the governmental planning exception discussed above and that United's water supply contract was "insufficiently binding to form a non-speculative basis for the appropriation."

The Water Court granted summary judgment to the objectors finding that United, in this particular instance, acted more as a water broker than a governmental water supply agency. Accordingly, the Water Court held United to the anti-speculation standards applicable to private appropriators under the *Vidler* case and its progeny.

The Supreme Court's Decision

On appeal, the Supreme Court affirmed the Water Court's decision, clarifying the governmental planning exception does not apply where the governmental agency:

> . . .is acting in the capacity of a water supplier on the open market rather than as a governmental entity seeking to ensure future water supplies for its citizens. *Id.* at ¶ 28.

Because United only served a one-acre parcel three counties away from the proposed development and did not have plans to expand its territorial boundaries to encompass the proposed development, the Court held that United failed to establish an agency relationship to the persons it claimed would benefit from its water claim.

Instead, the Court viewed United more as a "water broker" rather than an agency intending to serve its municipal customers. Consequently, United could not qualify for the governmental planning exception to the anti-speculation doctrine and thus needed a firm contractual commitment for the proposed use of water.

Turning to the actual water supply agreement between United and the development owner, the Court found the contract insufficient for reasons similar to *Vidler* because the deal did not require the developer to purchase "any amount of water from United." *Id.* at ¶ 36.

Conclusion and Implications

Since its inception, Colorado water law has repudiated attempts to speculate in the public's water resource to the detriment of other appropriators who have legitimate plans to beneficially use the water. For over a 100 years, the law has been clear; appropriations predicated on speculative future sales or profit seeking motivations are unlawful under the state's

anti-speculation doctrine. Recent investment activity by local and out-of-state firms has prompted the state legislature to direct the Department of Natural Resources to search for vulnerabilities within the anti-speculation water laws. In the coming months, DNR will offer recommendations on how to shore up any loopholes in the existing law.

Meanwhile, some in the water community view the current anti-speculation laws as sufficiently protective. In their view, the Water Courts are the appropriate forum to fill in any gray areas as needs arise locally and on a case-by-case basis rather than through a statewide policy pronouncement. The reason being that a legislative change could have far reaching unintended consequences on private property rights and perhaps lead to constitutional challenges. We'll know more in August 2021 when the DNR issues its written report to the legislature.

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LEGISLATIVE DEVELOPMENTS

FEDERAL LEGISLATION REINTRODUCED TO TACKLE PFAS WATER CONTAMINATION ISSUES

A growing concern over the effects of water contaminants perfluoroalkyl and polyfluoroalkyl substances (commonly referred to as PFAS) in recent years has resulted in several states passing legislation to impose regulations on these "forever chemicals." Congress also made attempts at federal regulation. With a new federal administration on the horizon, Congressional proponents of such regulation are preparing to reintroduce previously stalled PFAS legislation.

Background

PFAS can be found in many household products that have been used for decades. It has also been increasingly discovered in drinking water throughout California and the United States. For example, firefighting foam widely employed on military bases, airports and at industrial sites has been found to be one prevalent source of PFAS in groundwater basins supplying drinking water.

Scientists refer to PFAS as "forever chemicals" because they accumulate in the human body and do not dissipate over time. Human exposure to PFAS chemicals has been linked to kidney and testicular cancer, high levels of cholesterol, thyroid disease and other health issues.

PFAS Legislation Reintroduced in 2020

Early in 2020, the United States House of Representatives passed House Resolution (HR) 535; however, the bill did not go on to pass in the Senate. Recent reports indicate that the House intends to reintroduce PFAS legislation in early 2021, to signal to the incoming Biden administration the importance of regulating PFAS. This bill, unless further modified, would propose to enact a variety of PFAS related controls, including the following:

- The Environmental Protection Agency (EPA) would be required to designate certain PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund). The EPA would then have five years to determine whether the remaining PFAS should be designated as hazardous substances, individually or in groups. However, the bill would exempt public agencies or private owners of public airports that receive federal funding from Superfund liability for remediation of certain releases of PFAS into the environment resulting from the use of aqueous film forming foam in certain circumstances.

- The EPA would be required to create regulations for the disposal of materials containing PFAS or aqueous film forming foam. Within one year, the EPA would be required to issue guidance on minimizing the use of, or contact with, firefighting foam and other related equipment containing any PFAS by fire fighters and other first responders, without jeopardizing firefighting efforts. Additionally, materials containing PFAS would be considered hazardous waste for criminal penalty purposes.

- The bill would also require the EPA to promulgate a national primary drinking water regulation for certain PFAS within two years, and would require it to consider regulating additional PFAS or classes of PFAS in drinking water within a set time frame. The EPA would publish a health advisory for PFAS not subject to a national primary drinking water regulation.

- The EPA would be prohibited from imposing financial penalties for a violation of a PFAS national primary drinking water regulation within the first five years after the bill's enactment into law.

- The bill would require the EPA to establish a grant program to financially assist community water systems with treating PFAS contaminated water.

- The EPA would be directed to investigate methods and means to prevent contamination of surface waters, including those used for drinking water, by certain PFAS.

- An owner or operator of an industrial source would be prohibited from introducing PFAS into treatment works (systems that treat municipal sewage or industrial wastes) unless such owner or operator first provides certain notices to such treatment works, including notice of the identity and quantity of the introduced PFAS.

- The EPA would biennially review the discharge of PFAS from certain point sources and make a determination whether or not to add certain measureable PFAS to the list of toxic pollutants, or to establish effluent limitations and pretreatment standards for such PFAS.

The Biden Administration's Stance on PFAS

Even if the reintroduction of HR 535 again fails in the Senate, the Biden administration would likely consider pursuing actions via the executive action to limit PFAS exposure. Such actions could include Superfund designation of PFAS as hazardous substances. The Biden administration's online environmental justice platform (https://joebiden.com/environmental-justice-plan/) has already signaled that it intends to prioritize PFAS regulation by:

> . . .designating PFAS as a hazardous substance, setting enforceable limits for PFAS in the Safe Drinking Water Act, prioritizing substitutes through procurement, and accelerating toxicity studies and research on PFAS.

Conclusion and Implications

HR 535 is intended to create a safer working environment for those exposed to PFAS while also reducing the exposure of PFAS in drinking water supplies. However, whether this bill becomes law depends largely on the balance of power in Congress, which as of the data of this writing remains undetermined. Nevertheless, this bill is intended to signal the importance of PFAS regulation in order to encourage action from the executive branch with respect to setting new PFAS controls during the next presidential administration. For more information on HR 535 *see*: https://www.congress.gov/bill/116th-congress/house-bill/535

(Gabriel J. Pitassi, Derek R. Hoffman)

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE ISSUES FINAL EIS FOR CHANGES TO MIGRATORY BIRD TREATY ACT

On November 27, 2020, the U.S. Fish and Wildlife Service (FWS or Service) published a final Environmental Impact Statement (EIS) analyzing a proposed rule change to the Migratory Bird Treaty Act (MBTA) that would significantly reduce potential liability under the statute, including for water agencies. Specifically, the proposed rule would adopt a regulation exempting activities that incidentally result in "take" of protected bird species from the scope of the MBTA's prohibitions, meaning that the MBTA would only reach, and create potential civil or criminal liability for, actions designed to intentionally kill or harm migratory birds, their nests, or their eggs. [U.S. Department of the Interior Fish & Wildlife Serv., *Regulations Governing Take of Migratory Birds: Final Environmental Impact Statement* (November 2020).]

Background

The FWS is the federal agency delegated the primary responsibility for managing migratory birds consistent with four international migratory bird treaties (between the United States and Canada, Mexico, Japan, and Russia) and implementing the MBTA. The MBTA was enacted in 1918 to help fulfill the United States' obligations under the 1916 "Convention between the United States and Great Britain for the protection of Migratory Birds." The goal of the MBTA was to stop the unregulated killing of migratory birds at the federal level.

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior (Solicitor), exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M-Opinion 37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." M-Opinion 37050 concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions intentionally or purposefully "taking" migratory birds, their nests or their eggs. In response to this opinion, several environmental groups took legal action in federal court, alleging that the proposed interpretation would severely rollback the ability of the federal government to prosecute industries for violations of the MBTA.

The FWS sought to adopt the Solicitor's opinion, publishing a proposed rule codifying M-Opinion 37050 on February 3, 2020. Following the administrative process required by the National Environmental Policy Act (NEPA), the Service released a draft Environmental Impact Statement on June 5, 2020. After the issuance of the proposed rule and draft EIS, a U.S. District Court vacated M-Opinion 37050. (*See, Natural Resources Defense Council v. U.S. Department of the Interior*, ___F.Supp.3d___, Case 18-cv-4596(S.D. N.Y. Aug. 11, 2020); https://www.biologicaldiversity.org/species/birds/pdfs/Migratory-Bird-Treaty-Act-Ruling.pdf)

In response to the court's *vacatur* of the M-Opinion, the FWS continued to proceed through the NEPA process. On November 27, 2020, the Service published the final EIS, providing responses to comments received throughout the process. The final EIS is available for public review for 30 days, after which the Service will issue a Record of Decision (ROD). *See*: https://www.fws.gov/regulations/mbta/.

After the ROD is issued, the final step of the rulemaking process will be the publication of a final rule.

The Migratory Bird Treaty Act and 'Takings'

The MBTA makes it unlawful to, among other things, take individuals of many bird species found in the United States, unless that taking is authorized by a regulation promulgated under 16 U.S.C.§ 704. 16 U.S.C. § 703. "Take" is defined in the Service's general wildlife regulations as "to pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R § 10.12. Prior to M-Opinion 37050, § 703 of the MBTA was interpreted as a strict liability provision, meaning that no criminal intent is required for a violation to have taken place, any act that takes or kills a bird must be covered as long as the act results in the death of a bird. M-Opinion 37041 at 2 (January 10, 2017). Instead, the FWS relied on enforce-

ment discretion to determine when to pursue alleged incidental take violations. *Id.* at 12.

However, federal courts have adopted different views on whether the MBTA prohibits the "incidental take" of migratory birds. Some Courts of Appeal and District Courts have held that the MBTA criminalizes certain activities that incidentally take migratory birds, generally with some form of limiting construction, while others have indicated that it does not. For instance, the FWS did not enforce incidental take of migratory birds within the jurisdiction of the Fifth Circuit Court of Appeals because that court held the MBTA does not prohibit incidental take. *See: United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

The Fish and Wildlife Service's Proposed Rule

By its most recent action, the Service proposes to develop a regulation in 50 C.F.R part 10 that defines the scope of the MBTA to exclude incidental take, claiming that the adoption of the regulation is necessary to provide legal certainty for the public regarding what actions are prohibited under the MBTA.

In the proposed rule, the FWS seeks to interpret the MBTA to prohibit only actions directed at migratory birds, their nests, or their eggs, clarifying that incidental take is not prohibited. With the proposed rule, the Service proposes to adopt a regulation defining the scope of the MBTA's prohibitions to reach only activities expressly directed at killing migratory birds, their nests, or their eggs. In other words, take of a migratory bird, its nest, or eggs that is incidental to another lawful activity does not violate the MBTA, and the MBTA's criminal provisions do not apply to those activities. Only deliberate acts intended to take a migratory bird are prohibited under the MBTA. As a result, this interpretation would significantly reduce the activities that would result in liability under the MBTA, including activities undertaken by water agencies that may inadvertently lead to take of migratory birds.

Conclusion and Implications

The Record of Decision for the proposed rule is due to be issued at the end of December, after which the final rule will be published. Given the controversy surrounding this issue and previous litigation attempts, it remains to be seen if there will be any last-minute legal challenges. Ultimately, the proposed rule will significantly change current enforcement of the MBTA. However, with a Biden administration coming to office in January 2021, it is possible that these changes to the MBTA may be reversed. (Geremy Holm, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES REPORT TO THE CALIFORNIA WATER COMMISSION HIGHLIGHTS IMPACTS OF SUBSIDENCE ON THE CALIFORNIA AQUEDUCT

In November 2020, the California Department of Water Resources (DWR) provided an update to the California Water Commission (Commission) on several issues affecting the State Water Project (SWP). The update included information related to the impact of subsidence on the California Aqueduct, modernizing SWP fire and safety features, lining and repairing aqueducts and embankments, and other maintenance, improvements, and repairs being made to the SWP.

Background

The State Water Project is a water storage and delivery system comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more than 700 miles from northern to southern California. Water from rain and snowmelt is stored in SWP conservation facilities before flowing through the Sacramento-San Joaquin Delta and being delivered by way of SWP transportation facilities, including the 444-mile California Aqueduct through the Central Valley. According to DWR, the SWP supplies water to more than 27 million people across California, and irrigates roughly 750,000 acres of farmland. The SWP is capable of delivering roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipita-

tion and snowpack, operational conditions, as well as environmental and other legal constraints.

The Commission is comprised of nine members who are appointed by the Governor and confirmed by the State Senate. The Commission provides a variety of functions, including advising the Director of DWR on matters within DWR's jurisdiction, approving rules and regulations, and monitoring and reporting on the construction and operation of the SWP. The Commission is also responsible for the distribution of public funds set aside for the public benefits of water storage projects, and developing regulations for the quantification and management of those benefits.

The DWR Update on Subsidence

At the Commission's November 2020 meeting, DWR updated the Commission on subsidence affecting the California Aqueduct. According to DWR, subsidence, or the sinking of land, has occurred throughout California for almost a century. Before the California aqueduct was built in the 1960s, land near the aqueduct sank as much as 20 to 30 feet as a result of nearby groundwater pumping. While subsidence initially stabilized after the aqueduct was constructed and water delivered to adjacent areas, the aqueduct has sustained a significant increase in subsidence rates in more recent times. For instance, during the drought between 2013 to 2016, some areas along the aqueduct sunk nearly three feet.

DWR prepared a subsidence report in 2017, and a supplemental report in 2019, addressing the impacts of subsidence. According to DWR, deep groundwater pumping is the primary cause of significant subsidence, and is exacerbated by extended periods of drought. Moreover, DWR reports that the effects of climate change will also likely exacerbate increasing subsidence rates, and the conversion of row crops, which are often fallowed in dry years, to orchards and vineyards that cannot be fallowed in dry years, resulting in more subsidence when surface water is unavailable.

The impacts of subsidence, according to DWR's reports, include increased water delivery costs, reduced flow capacity of the California Aqueduct in areas affected by subsidence, and higher operating and electricity costs to move higher volumes of water during on-peak hours. Moreover, subsidence decreases the reliability of the California Aqueduct. Specifically, as the aqueduct sinks, the risk increases that water will spill over the aqueduct's liner. Such spillages can result in erosion or damage to other delivery structures, delivery losses, flooding, and require emergency outages of the aqueduct. These impacts require DWR to continue physically raising the aqueduct lining and embankments, as well as repairing or modifying appurtenant structures.

At the November Commission meeting, DWR reported that over two feet of subsidence along the aqueduct from groundwater pumping during the recent drought cannot be recovered, and that the capacity of the California Aqueduct has been reduced by up to 33 percent in some locations. Ultimately, reduced capacity in the aqueduct reduces its operational flexibility and efficiency, while at the same time increasing maintenance and operation costs. However, DWR suggested that the Sustainable Groundwater Management Act (SGMA) could help protect the aqueduct from further damage by imposing sustainability requirements for groundwater basins along the path of the facility. Additionally, there are two ongoing projects within DWR's California Aqueduct Subsidence Program that are focused on rehabilitation and recovery efforts. Such efforts include raising 35 miles of the aqueduct, reconstructing or repairing parts of the aqueduct, raising bridges, relocating utility crossings, and raising turnout structures. According to DWR, key considerations moving forward include restoring capacity of the aqueduct for reliable water delivery, restoring operational flexibility, ensuring infrastructure resiliency, improving operational efficiency, and pursuing supplemental funding.

DWR also apprised the Commission of recent upgrades, repairs, and maintenance efforts for the benefit of the SWP. Such efforts include modernizing the SWP's fire and safety infrastructure in light of the 2012 Thermalito Powerhouse fire, lining the California Aqueduct and repairing cracked embankments based on the level of risk posed to operations, assessing the integrity of SWP pipelines to ensure continued water deliveries, and various gate, dam, and spillway repairs or improvement projects required by regulation or aging infrastructure. In particular, maintenance on the East Branch of the SWP in the San Bernardino area of southern California was successfully completed, while seismic retrofitting is being made to Anderson Reservoir near the South Bay Aqueduct and the Castaic Dam Tower Bridge in Los Angeles County. Radial gate maintenance and repair

along the California Aqueduct is also ongoing, and spillway improvements are being made to Cedar Dam in San Bernardino County and Pyramid Dam in Los Angeles County.

Conclusion and Implications

The State Water Project is a critical water supply and delivery system to almost 27 million Californians. DWR's report to the Commission presents some concerning aspects related to subsidence and its impact on the California Aqueduct. There is a hope that a combination of efforts focused on the physical facilities and implementation of SGMA may help to alleviate some of the subsidence issues. DWR Subsidence PowerPoint available at: https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/2020/11_November/November2020_Item_10_Attach_1_PowerPoint.pdf?la=en&hash=1FBB9F361DBE0A21DDCD0F431000BC00D9062808
(Miles Krieger, Steve Anderson)

IDAHO DEPARTMENT OF WATER RESOURCES CONSIDERING EXTENT OF MUNICIPAL WATER RIGHT USE IN CONTEXT OF LAND APPLICATION-BASED REUSE

As of December 11, 2020, the Director of the Idaho Department of Water Resources (IDWR) has before him a fully briefed petition seeking answer to the question of whether municipalities or their contracting agents need obtain a new and separate water right to land apply treated wastewater effluent to lands outside traditional municipal (domestic/potable) service areas. The question arises from a contractual arrangement between Nampa, Idaho and Pioneer Irrigation District whereby Nampa intends to discharge Class A Recycled wastewater from its publicly owned wastewater treatment plant (WWTP) to the District's Phyllis Canal for Pioneer landowner irrigation use (land application) within Pioneer's boundaries which overlap, in part, with Nampa's municipal boundaries (including area of impact).

The Nampa-Pioneer Relationship

Currently, Nampa discharges its treated WWTP effluent (approximately 18 cfs at present) to nearby Indian Creek pursuant to a federal Clean Water Act National Pollution Discharge Elimination System (NPDES) permit. Future constituent treatment compliance schedules under the permit require increased treatment of Phosphorus and temperature, in turn necessitating costly WWTP upgrades that can be avoided in part via redirection of Nampa's WWTP discharge to Pioneer's nearby Phyllis Canal instead of Indian Creek. Anticipated savings to Nampa's sewer utility ratepayers is estimated at roughly $20 Million.

Nampa and Pioneer entered into a contract where Nampa will deliver and Pioneer will accept up to 41 cfs of WWTP effluent (treated to Class A Recycled Water standards) annually over the life of the agreement. In furtherance of the agreement, Nampa obtained, with Pioneer's support, a recycled water Reuse Permit from the Idaho Department of Environmental Quality (DEQ) in January 2020. The ten-year permit authorizes the discharge of up to 31 cfs of Nampa WWTP effluent to the Phyllis Canal through 2030.

Pioneer has long provided irrigation water to Nampa and its citizens given their overlapping landmasses. Among other Nampa-related deliveries from Pioneer, Nampa owns and operates a municipal pressurized irrigation system, roughly 3,000 acres of which is served by deliveries from Pioneer Irrigation District. From a mass balance perspective, Nampa's Pioneer-based delivery entitlement (60 cfs for the irrigation of 3,000 acres) exceeds the permitted 31 cfs discharge under the Reuse Permit (and the up to 41 cfs discharge contemplated in the future under the parties reuse agreement).

Regardless, concern over the redirection of Nampa's WWTP effluent from Indian Creek to Pioneer's Phyllis Canal has led to IDWR's review of the matter under a petition for declaratory ruling filed by downstream Indian Creek water user Riverside Irrigation District, Ltd. (Riverside). Riverside alleges injury based on the Nampa-Pioneer project given its (Riverside's) reliance on Indian Creek flows for its own irrigation activities.

The Declaratory Petition Contentions: Is a New Water Right Necessary?

Riverside's petition raises questions over traditional wastewater principles under Idaho's prior

appropriation doctrine and the ultimate scope and flexibility of the more modern attributes of municipal water rights under Idaho's Municipal Water Rights Act. The petition also seeks what will be IDWR's first formal decision under the 2012 enactment of Idaho Code § 42-201(8) relating to the disposal of WWTP effluent by municipalities and other WWTP-owning and operating entities in response to federal or state environmental regulatory requirements.

Nampa, Pioneer and several other municipal intervenors contend that neither Pioneer nor Nampa need obtain a new and separate water right to implement the recycled water reuse authorized under the DEQ permit. Riverside contends that Pioneer, at the least, requires a new water right to accept and use Nampa's WWTP effluent, the absence of which results in an illegal enlargement (additional consumptive use) of Nampa's municipal water rights on the front end and an illegal diversion of "groundwater" (the source of Nampa's potable system water rights, the residual of which is treated at by the Nampa WWTP) by Pioneer. Riverside also asserts that Pioneer's failure to proceed through the water right application process circumvents the senior water right injury analysis that is required under such proceedings.

Nampa, Pioneer, and the municipal intervenors counter otherwise based on prior IDWR administrative authority recognizing that municipal water rights are considered wholly consumptive as a threshold matter (thus there can be no enlargement in use); one (Riverside) cannot compel others to waste water for their downstream benefit under Idaho's prior appropriation doctrine; and, most specifically, Idaho Code § 42-201(8) governs in the context of WWTP effluent land application in response to federal or state environmental regulations and the statute makes clear that no new water right is necessary.

Pioneer and Nampa further contend that Pioneer cannot perfect a new water right even if one was applied for because Pioneer fails the first prong of Idaho's two prong perfection requirement: 1) physical diversion of water from a natural source; and 2) application of the water diverted to a recognized beneficial use. The parties all agree that the "source" of Nampa's WWTP effluent is "groundwater" first diverted by Nampa under its existing potable system groundwater-based water rights. But, those diversions (wellheads) are under the sole ownership, control, and maintenance of Nampa—Pioneer has no access to them or right to compel the diversion of water from them. Thus, while Pioneer landowner end irrigation use of the WWTP effluent is certainly a qualifying beneficial use under Idaho law, whether Pioneer is "diverting" that water by accepting the WWTP effluent via pipeline discharge to the Phyllis Canal is an open question under the IDWR petition.

Conclusion and Implications

It remains to be seen whether the IDWR Director (also serving as the administrative hearing office in the mater) will decide the matter on the briefing already submitted, or additionally request oral argument or some form of preceding evidentiary hearing. Consequently, a timeline for ultimate decision is impossible to predict.
(Andrew J. Waldera)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT RULES IN FAVOR OF NEW MEXICO IN LATEST INTERSTATE COMPACT WATER DISPUTE

Texas v. New Mexico, 592 U. S. ____ (Dec. 14, 2020).

On December 14, 2020, the Supreme Court issued an opinion ruling in favor of New Mexico over the latest dispute with Texas regarding the Pecos River. As the downstream state, Texas' continued focus in this long interstate litigation is ensuring New Mexico meets its various Interstate Compact delivery requirements. In the 7-1 decision, the Court upheld the Pecos River Master's determination in favor of New Mexico as both accurate and fair under the applicable laws and the River Master's Manual. As Justice Kavanaugh succinctly begins his Opinion "[t]his is a case about evaporated water." *Id.* at 1.

Background

This latest dispute between the Texas and New Mexico began in the fall of 2014 when Tropical Storm Odile resulted in heavy rainfall in the Pecos River Basin. The massive rains quickly filled Red Bluff Reservoir located just south of the New Mexico—Texas border on the Pecos River. In order to prevent the ensuing flooding, Texas' Pecos River Commissioner wrote to New Mexico requesting that New Mexico store Texas' apportioned flows until the water could again be stored in Red Bluff Reservoir. New Mexico agreed to store the water in Brantley Reservoir, which is located in New Mexico, but owned by the United States. The Commissioners' exchange during the fall of 2014 included the understanding that but for Texas' request, New Mexico was obligated under the Pecos River Compact to release the water to Texas at the state line. Of course, if the water had been released, it would have caused flooding in Texas. At the time, New Mexico's Commissioner understood that the evaporative losses should be borne by Texas. The back-and-forth exchanges and emails between the Texas and New Mexico Commissioners were key and likely determinative of the Court's decision to uphold the Pecos River Master.

In 2015, Texas and New Mexico continued to negotiate how to account for the evaporated water under the Compact, however, the States failed to reach an agreement. When the stored water was finally released in August 2015, the parties were faced with a significant amount of evaporative loss—approximately 21,000 acre-feet or almost 7 billion gallons. In May of 2015, the Pecos River Master issued a preliminary report, which did not account for the evaporated water because the States were still evaluating options. The Final Report issued in July 2015 continued to note that the outstanding issue of the evaporated water accounting would be resolved at a later date. New Mexico and Texas continued to work toward a joint proposal to submit to the Pecos River Master, but after several years, negotiations eventually broke down. In 2018, New Mexico filed a motion seeking delivery credit of the evaporated water because the evaporative loss should have been borne by Texas. The River Master ruled in favor of New Mexico. Report of the River Master, Water Year 2017, Accounting Year 2018, Final Report, *Texas v. New Mexico*, No. 65, orig. (Sep. 6, 2018) (*available at* https://www.supremecourt.gov/DocketPDF/22/22O65/66243/20181009151349342_Pecos%20Final%20Report%20AY%202018%20Sep%206%20sent.pdf) (last visited Dec. 28, 2020).

The Supreme Court's Decision

The Pecos River Compact was signed by New Mexico and Texas in 1948 and approved by Congress in 1949. The Compact's purpose, *inter alia*, is to provide for the equitable division and apportionment of the use of Pecos River waters, to provide interstate comity, remove causes of present and future controversies and protect life and property from floods.

Under the Interstate Compact, water accounting between New Mexico and Texas is calculated each spring for the prior calendar water year. The River Master must follow the River Master's Manual in making the yearly calculations. In this case, the River Master relied upon the River Master's Manual, which

was adopted by the Supreme Court in 1988. The Manual states:

> . . .[i]f a quantity of the Texas allocation is stored in facilities constructed in New Mexico at the request of Texas, then . . . this quantity will be reduced by the amount of reservoir losses attributable to its storage. Section C.5.

The Supreme Court agreed with the River Master that:

> . . .the water was stored in New Mexico at the request of Texas, so New Mexico's delivery obligation must be reduced by the amount of water that evaporated during its storage. Slip op. at 2.

The Court agreed with the River Master "that the text of Section C.5 of the [River Master] Manual easily resolves this case." *Id.* at 8. In reaching its conclusion, the Court summarily dismisses Texas' proffered arguments that the stored water was not part of Texas' allocation under Section C.5 and that New Mexico did not actually store the water because Section C.5 should be interpreted to mean storing water long term for beneficial use.

In recent years, prolonged drought conditions have played a significant role in all Western states' interstate water issues. Ongoing severe drought seasons implicate New Mexico's delivery obligations to Texas under both the Rio Grande Compact and the Pecos River Compact. Typically, the trend is for downstream states to increasingly seek to invoke the U.S. Supreme Court's original jurisdiction to address problems created in the event drought results in under deliveries and municipal demand increases in the face of decreased supplies and storage. The Supreme Court has declined to accept jurisdiction over many of these requests. However, the Court accepted jurisdiction in this case, which ironically, is not based on drought conditions and delivery requirements, but rather, on delivery credit for evaporated losses from flood storage.

Conclusion and Implications

This case marks the first time the Supreme Court has reviewed the decision of a River Master in an interstate compact case. There are only two appointed River Masters in the country; the other interstate compacts are overseen by Special Masters. The Court did reference the deference it provides to the decisions of its appointed River Masters in a concluding footnote: "[t]he Court has previously stated that the River Master's determinations are reviewed only for clear error. *Texas v. New Mexico*, 485 U.S. 388, 393 (1988) (noting that here, New Mexico prevails even under *de novo* review, so the standards of review does not affect our judgment in this case)." While this case may not provide precedent guidance in other major interstate compact disputes, it does provide a glimpse into how the current Court approaches an interpretation of the language of an established water rights decree and corresponding River Master Manual. The Supreme Court's opinion is available online at: https://www.law.cornell.edu/supremecourt/text/19-0065

(Christina J. Bruff)

DISTRICT COURT BACKS WASHINGTON STATE DEPARTMENT OF ECOLOGY REGARDING BAN ON VESSEL SEWAGE DUMPING IN PUGET SOUND

American Waterways Operators v. Wheeler, ___F.Supp.3d___, Case No. 18-cv-02933 (D. D.C. Nov. 30, 2020).

The U.S. District Court for the District of Columbia recently declined to allow the U.S. Environmental Protection Agency (EPA) to take back and reconsider its decision allowing the Washington State Department of Ecology (Ecology) to impose a vessel sewage dumping ban in Puget Sound prior to ruling on aspects of the merits of what had become a multi-party high profile dispute.

Background

The case arose for judicial review of decisions made by EPA pursuant to federal Clean Water Act, §

312(f)(3). That subsection permits no discharge zones to be established in particular circumstances:

> (3) After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply. Upon application of the State, the Administrator shall make such determination within 90 days of the date of such application. (33 USC § 1322)

EPA initially granted Washington authorities the right to declare a No-Discharge Zone (NDZ) in the Sound. Some 40,000 comments had been submitted in response to the rule under consideration. The state proceeded to establish the ban. Some major shipping interests sued the EPA thereafter, alleging that the EPA had failed to account for the costs involved in meeting the requirements of the ban. Apparently under pressure from commercial shipping companies, EPA responded to the lawsuit by seeking to stipulate that it had erred, and sought a remand to reconsider its ruling. The U.S. District Court (Judge Amit Mehta) denied the remand and the parties (including environmental groups arguing that EPA was correct in its ruling), the state, and the shipping companies made and extensively briefed cross motions for summary judgment.

The District Court's Decision

The case is notable for at least two facets of the decision. The initial portion of the decision reviewed and analyzed whether justice would be better served by remand or by hearing the case. The court determined, somewhat ironically, that unless the EPA had benefit of the court's judgment on what economic consideration is relevant under the Clean Water Act's terms for allowing an NDZ, there could be a decision in a legal vacuum that created undue uncertainties for all parties, as well as risk to the Puget Sound. It followed that he usual saving of judicial effort and time that justified most remands would not necessarily materialize in the context of the Puget Sound dispute.

EPA's Decision, Economic Factors and Judicial Guidance

The court then turns to the merits of the EPA decision, which were at issue between the parties in court. The court emphasized that the review of the EPA decision is based on the record in front of the agency. The court then explored the parameters of arbitrariness and compliance with the law, beginning with the relevance of economic factors.

The court looked to the leading precedents from the U.S. Supreme Court on when courts should rule that agencies must or cannot consider economic costs in reaching their determinations. The District Court looked to holdings and statutory terms under review in two Clean Air Act cases: *Whitman v. American Trucking* Associations, 531 U.S. 457 (2001); and *Michigan v. U.S. EPA*, 576 U.S. 743 (2015) for guidance.

The *Whitman* case the involved the EPA's ability to issue National Ambient Air Quality Standards under Sections 108 and 109 of the federal Clean Air Act. The Supreme Court reversed the ruling of the Court of Appeals, holding that the EPA's interpretation of Sections 108 & 109 of the Clean Air Act did not unconstitutionaly delegae legislative power to the EPA, though the EPA's implementation policy for the 1997 Ozone NAAQS had been unlawful. (*See:* https://ballotpedia.org/Whitman_v._American_Trucking_Associations).

The *Michigan* case the Supreme Court held that cost considerations were required under a provision directing the EPA to regulate power plant if such regulation was "appropriate and necessary." (*See:* https://harvardlawreview.org/2015/11/michigan-v-epa/)

Read together, *Whitman* and *Michigan* stand for the proposition that whether an agency is required to consider costs depends on the breadth of the statutory text and the degree to which it compels the agency to balance costs and benefits. Since the Supreme Court decided *Michigan*, courts in the D.C. Circuit have helpfully fleshed out the *Whitman—Michigan* dichotomy. For example, in *Utility Solid Waste Activities Group v. EPA*, the D.C. Circuit concluded that EPA was not

required to consider costs when determining whether a waste site should be classified as an "open dump." 901 F.3d 414, 448-49, 438 (D.C. Cir. 2018).

Section 312(f)(3)

Armed with judicial precedent, the District Court looked at the specific terms of § 312(f)(3), looking for similarities with either of the two lodestar cases. The court found that the language of the section requiring analysis of "reasonable availability" of disposal facilities and other terms dictate that *economics are in play*. The court found that the EPA did err by failure adequately to analyze cost and benefit of the Puget Sound DNZ, and that a remand would be appropriate.

Conclusion and Implications

The court went on to deal with contentions of the parties as to the adequacy of other aspects of the record and EPA's decision-making. Given the specialized nature of an NDZ rule, most of those are very much issue specific discussions that do not bear repeating here. However, the court did determine that although there will be a remand ordered, it should not include a *vacatur*, or repeal, of the rule that was issued. This is because the record evidence assembled but not adequately parsed and evaluated by EPA does lend credence to the belief that in the end the NDZ costs will be found less than the benefits. The court also found that the state has the exclusive role in deciding there is need for an NDZ under the wording of the law; EPA is not authorized to second guess that judgement.

In addition to fleshing out the law of NDZ determinations, the decision presents an excellent review of some of the leading cases that frame and affect the outcome of judicial review under major environmental statutes, including the Clean Water Act.
(Harvey M. Sheldon)

DISTRICT COURT ADDRESSES LESSOR LIABILITY UNDER THE CWA FOR VIOLATIONS OF FORMER TENANTS UNDER A TERMINATED GENERAL PERMIT REGARDING THE PORT OF TACOMA

Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC,
___F.Supp.3d___, Case No. C17-5016 BHS (W.D. Wash. Nov. 17, 2020).

The U.S. District Court for the Western District of Washington recently granted in part and denied in part motions for summary judgment following a lengthy docket on a federal Clean Water Act (CWA) case regarding liability for successor permittees. The court ruled that once a permit holder has terminated its lease, and terminates its permit, violations of the CWA are not considered ongoing as to the lessor. Therefore, the Port was not held liable for violations of its former lessee.

Factual and Procedural Background

APM Terminals Tacoma, LLC (APM) secured a lease with the Port of Tacoma (Port), and obtained an Industrial Stormwater General Permit (ISGP) to discharge pollutants near the Tacoma Port. In a 2013 annual report, APM admitted to exceeding established benchmarks for pollutants for all four quarters, resulting in Level 1, 2, and 3 corrective action requirements under the ISGP.

In 2017, following discussions with the Washington Department of Ecology (Ecology) to consider corrective actions, including the construction of a new stormwater treatment system, APM terminated its lease, and the Port assumed the design and construction of the stormwater treatment system. Thereafter, the Port applied for a new ISGP through Ecology. Following public comment, Puget Soundkeeper Alliance (Soundkeeper) opposed the new ISGP, indicating in their opposition that the ISGP needed to either include an administrative order for the Port to implement Level 3 corrective actions or to transfer APM's ISGP to the Port.

In October 2017, Ecology issued the new ISGP and signed an Agreed Order with the Port agreeing to implement best management practices, create a new Stormwater Pollution Prevention Plan (SWPPP), and construct the stormwater treatment system by September 30, 2018.

Plaintiff Soundkeeper filed its complaint in January 2017 against APM for the violation of the National Pollutant Discharge Elimination System (NPDES), listing the Port as a defendant in an amended complaint in November 2017. After a series of amended complaints, Soundkeeper and the Port filed cross motions for summary judgment.

Soundkeeper moved for partial summary judgment that it had standing to bring the action, that the Port is jointly liable for alleged violations that occurred during APM's tenancy, that the Port is liable for failing to monitor discharges from the wharf and to identify the wharf in its Stormwater Pollution Prevention Plan. The Port moved for summary judgment on Soundkeeper's entire claim against the Port.

The District Court's Decision

A moving party is entitled to judgment when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof.

Soundkeeper's Motion for Summary Judgment and Standing

The court first considered Soundkeeper's motion for summary judgment. The court considered and rejected four arguments raised by the Port and determined that Soundkeeper had standing to sue under the CWA citizens suit provision. The Port first argued that standing and subject matter jurisdiction should be determined after the completion of discovery. The court rejected this argument, reasoning that standing was a threshold question to be considered before the merits. Additionally, subject matter jurisdiction can be raised at any time, including before discovery.

Second, the Port argued that Soundkeeper failed to bring sufficient evidence to establish an injury in fact, as the Port's discharges only had minimal impact on Commencement Bay. The court found that the Port failed to provide adequate authority on its proposition and found for Soundkeeper's authority, which expanded injuries due to CWA violations. Thus, the court found that Soundkeeper provided sufficient evidence to establish an injury in fact.

Third, the Port argued that Soundkeeper had failed to establish the element of causation. The court found this argument without merit as causation is not an element of standing. Rather, courts must consider whether the injuries are "fairly traceable" to the Port's alleged CWA violations.

Fourth, the Port argued that Soundkeeper failed to bring forth redressable claims because the Port was not violating the CWA. However, the court determined that this argument goes to the merits and cannot be used to determine whether Soundkeeper may bring a claim under the citizens' suit provision. Therefore, redressability was not at issue in determining standing for Soundkeeper.

Soundkeeper's Motion for Summary Judgment and Level 3 Violations Liability

The court next considered two arguments related to the Port's liability for the Level 3 corrective actions. First, Soundkeeper argued the Port was liable because the Port managed and oversaw its lessee, APM. The court recognized that the CWA holds those who violate CWA provisions and permits accountable regardless of whether they are a permit holder, however, this determination is a fact-based analysis.

Second, the Port argued that even if the Port was responsible for permit violations, the violations ceased when APM terminated its lease and were not ongoing. Soundkeeper filed the complaint after APM terminated its lease and after APM's permit was terminated. Rather than transfer APM's permit to the Port, Ecology entered into an Agreed Order with the Port to correct the actions of APM. Because Soundkeeper failed to oppose the transfer during public comment and provided no authority to support the proposition that a lessor's alleged violations are continuous after a permit has been terminated, the court denied Soundkeeper's summary judgement and granted the Port's.

Soundkeeper's Motion for Summary Judgment and the Wharf

The court next considered Soundkeeper's argument that the Port was liable for failing to monitor discharges from the wharf and failing to identify the wharf in its SWPPP. The court quickly found for the Port because the wharf was not covered by the ISGP. Thus, Soundkeeper's argument that the Port was liable for its failure in monitoring discharges from the wharf as well as identifying the wharf in the stormwater pollution prevention plan was moot.

The Port's Motion for Summary Judgment

Finally, the court considered the Port's motion for summary judgment on Soundkeeper's claim of liability for the Level 3 corrective actions required for the violation of the ISGP. The court determined that the Port could not be held liable for the violations of APM, as APM had terminated its ISGP when it terminated its lease with the Port. So, while the Port had applied for a new permit and entered into an Agreed Order with Ecology to establish a new stormwater treatment system and commence corrective actions for the former violations, the Port's permit allowed this to be completed by September 30, 2019 at the earliest. Thus, Soundkeeper's decision to file complaint for violations of the Port's ISGP was premature. The court found that the Port was in violation of its Agreed Order with Ecology, however, it was not determined whether a violation of an Agreed Order was grounds for a citizen suit. Thus, the court granted the Port's motion for summary judgement on Soundkeeper's claim of liability for the Level 3 corrective actions.

Conclusion and Implications

A current permit holder cannot be liable for violations that occurred prior to the transition of permit holders, unless the violation is continuous and ongoing. Here, APM's violations ceased when it terminated its permit. Therefore, the Port, as owner and lessor, could not be held liable. The court's ruling is available online at:
https://casetext.com/case/puget-soundkeeper-alliance-v-apm-terminals-tacoma-llc-4
(Kara Coronado, Rebecca Andrews)

DISTRICT COURT HOLDS ISSUANCE OF NEW NPDES PERMIT DOES NOT MOOT CLAIMS FOR VIOLATIONS OF PRIOR PERMIT IF NEW PERMIT IS STAYED

Sierra Club, Inc. v. Granite Shore Power LLC, ___F.Supp.3d___, Case No. 19-cv-216-JL (D. N.H. Nov. 25, 2020).

The U.S. District Court for New Hampshire recently determined that allegations of violations of a 1992 federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit were not moot even after issuance of a new permit, where the effectiveness of the new permit was subject to a stay while undergoing appellate review. The court also denied defendants' motion for partial summary judgment as to plaintiffs' claim that defendants violated reporting requirements in the 1992 discharge permit, finding that genuine disputes of material fact remained regarding the meaning of the reporting requirement.

Factual and Procedural Background

Granite Shore Power LLC and GSP Merrimack LLC (collectively: Granite Shore) own Merrimack Station, a coal-fueled power plant that discharges heated water into a shallow, impounded section of Merrimack River known as Hooksett Pool. In 1992, the U.S. Environmental Protection Agency (EPA) issued an NPDES permit for Merrimack Station (1992 Permit). The 1992 Permit limited thermal discharges and required regular monitoring and reporting of the river water temperature and dissolved oxygen content. Originally set to expire in 1997, the permit was administratively continued and remained fully effective and enforceable under EPA regulations.

In 2011, EPA issued a new, draft NPDES permit for Merrimack Station (2011 Draft Permit). EPA's draft determinations for the 2011 Draft Permit noted that Merrimack Station's thermal discharges had caused or contributed appreciable harm to the Hooksett Pool's balanced, indigenous community of fish. Issuance of a final permit was delayed several times. According to EPA, this delay was due in part to certain factual and legal developments, including, among other things, EPA's revised understanding of the thermal data evaluated in the 2011 Draft Permit.

In 2019, Sierra Club, Inc. and Conservation Law Foundation, Inc., (plaintiffs) brought suit in the District Court against Granite Shore alleging violations of three conditions in the 1992 Permit. Plaintiffs alleged violations related to thermal discharge limitations and violations of the annual reporting condition.

In May 2020, EPA issued a final permit that would take effect in September 2020 (2020 Permit) and supersede the 1992 permit. Prior to the 2020 Permit's effective date, Granite Shore and plaintiffs challenged different conditions in the 2020 Permit to the Environmental Appeals Board (EAB). As a result, the contested 2020 Permit conditions were stayed, and the corresponding 1992 Permit provisions remained in effect pending final agency action. Thereafter, Granite Shore moved for summary judgment in the District Court case, alleging that plaintiffs' claims were moot as a result of the issuance of the 2020 Permit. Granite Shore also moved for partial summary judgment as to plaintiffs' claim that it violated the annual reporting condition.

The District Court's Decision

Claim of Mootness

The District Court first addressed Granite Shore's argument that the plaintiffs' claims were moot because the 2020 Permit removed and replaced the 1992 Permit conditions at issue in the plaintiffs' complaint. A case is moot when the issues presented are no longer "live" or the parties lack a cognizable interest in the outcome. However, as long as the parties have even a small concrete interest in the outcome of the litigation, the case is not moot. The court's primary inquiry was whether adjudication of the issue would grant meaningful relief.

In reviewing Granite Shore's mootness argument, the District Court noted that lawsuits based on a defendant's violations of a rule have been rendered moot by the enactment of a superseding rule with which the defendant complies. However, the court determined that the 1992 Permit conditions at issue in the present case were not superseded by the corresponding 2020 Permit conditions, because those conditions were contested and therefore stayed pending the appeal before the EAB and final agency action. The court held that because the relevant 1992 Permit conditions remained in effect, the controversy involving those permit conditions was not moot.

Granite Shore also argued that the plaintiffs' complaint was moot because it was premised on EPA's 2011 assessment regarding the harm caused to the Hooksett Pool, which the EPA had abandoned. The court interpreted this argument as mootness based on voluntary cessation. In order for defendants' argument to succeed, defendants needed to show that they were no longer violating the 1992 Permit and that it was absolutely clear that the alleged permit violations could not reasonably be expected to recur. Unpersuaded by defendants' argument, the court concluded that defendants failed to establish that there was no genuine dispute of material fact on these points.

Motion for Partial Summary Judgment

The District Court next addressed Granite Shore's motion for partial summary judgment as to plaintiffs' claim that defendants were violating the 1992 Permit's reporting requirements by providing statistical summaries of certain data rather than the entirety of the continuous data collected. Granite Shore argued that summary judgment was proper because they had complied with their interpretation of the relevant reporting condition, which they asserted was unambiguous.

NPDES permits are interpreted as contracts. Because the 1992 Permit is a contract with the federal government, it is interpreted under the federal common law of contracts. The core principle of contract interpretation requires that unambiguous contract language be construed according to its plain and natural meaning. If ambiguities remain after analyzing the plain language, ultimate resolution of the meaning typically turns on the parties' intent. As such, summary judgment based on contract interpretation is appropriate only if the language's meaning is clear, considering the surroundings circumstances and undisputed evidence of intent, and there is no genuine issue as to the inferences which might reasonably be drawn from the language.

Plaintiffs argued that the 1992 permit required "continuous" monitoring of data, and thus the condition that "[a]ll . . . monitoring program data be submitted" required Granite Shore to report the entirety of the data collected through continuous monitoring." In contrast, Granite Shore contended that "all" modified the term "program" and referred to "categories" of data that must be reported and maintained. Granite Shore also argued that other language in the 1992 Permit indicated that the monitoring data reported should be "representative" of the data collected, and not the entirety of the data collected. The District Court held that both of these interpretations

were reasonable and therefore the plain language of the contested condition was ambiguous.

The court then turned to the "intent manifested" by the contested reporting condition. Granite Shore argued that EPA consistently accepted their annual reports as compliant and that the EPA included a temperature reporting requirement in the 2020 Permit that, according to EPA, follows "the format from the 2018-2019" annual reports. Plaintiffs countered that EPA's failure to contest the adequacy of the annual reports was due in part to "bureaucratic inattention" as evidenced by the long delay in issuing a new NPDES permit and EPA's failure to evaluate annual reports. As evidence of the inadequacy of the annual reports, plaintiffs pointed to a 2015 EPA request for the water temperature data used to create the annual report summary statistics from three stations covering the periods from April to October, from 1984-2004. The court found that the parties' theories as to the intent of the reporting condition raised genuine issues of material fact. Thus, the District Court denied the motion for partial summary judgment because genuine disputes of material fact remained as to the meaning of the reporting requirement and Granite Shore's compliance with it.

Conclusion and Implications

This case elucidates the key inquiry under the mootness doctrine. That is, when reviewing whether a claim is moot, the core question before the court is whether the controversy is presently live. The case also shows the difficulty in succeeding on a motion for summary judgment based on a disputed interpretation of an arguably ambiguous contract condition. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-nhd-1_19-cv-00216/pdf/USCOURTS-nhd-1_19-cv-00216-0.pdf
(Heraclio Pimentel, Rebecca Andrews)

DISTRICT COURT IN OREGON DENIES LANDOWNERS' REQUEST FOR PRELIMINARY INJUNCTION AGAINST IRRIGATION DISTRICT'S CANAL PIPING PROJECT

Smith v. Tumalo Irrigation District, ___F.Supp.3d___, Case no. No. 6:20-cv-00345-MK (D. Or. Nov. 13, 2020).

The U.S. District Court for the District of Oregon denied a request to preliminarily enjoin construction of a project by which the Tumalo Irrigation District (TID) plans to pipe nearly 70 miles of its open canal system within the Deschutes Basin in central Oregon (Project).

Background

A group of eight affected landowners made the request, arguing that the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS), who awarded a federal grant to fund nearly 70 percent of the Project pursuant to the Watershed Protection and Flood Prevention Act, failed to comply with the National Environmental Policy Act (NEPA) in the Environmental Assessment (EA) it adopted to evaluate the Project's effects. Plaintiffs further claimed that the piping the Project entails is beyond the scope of TID's right-of-way under the Carey Desert Land Act of 1894.

The District Court's Decision

As explained below, even though the District Court concluded that plaintiff landowners would be irreparably injured by the Project due to the hundreds of thousands of dollars its property values would plummet as a result of the piping the Project prescribes, it declined to enter a preliminary injunction based on its further findings that plaintiffs had failed to establish any of the other three criteria relevant to securing such relief: that they would be likely to prevail on the merits of their claims, the injunction is in the public interest, and the balance of equities tilts in favor of the requested relief.

Plaintiffs' Likelihood of Success on the Merits

Plaintiffs brought a total of four claims to challenge the Project, although the gravamen of their case arises from allegations that the EA that NRCS adopted fails to comply with NEPA in various respects.

In addition to that claim, plaintiffs also asserted that the Project is inconsistent with NRCS's regulations setting forth specific criteria for its implementation of the Watershed Protection and Flood Prevention Act. The other two claims plaintiffs brought are against TID, with one asserting that the Project is inconsistent with, and exceeds the bounds of, the district's statutory right-of-way under the Carey Act, and the other asserting that the Project constitutes a private nuisance under Oregon state law.

Plaintiffs' NEPA Claim against NRCS

Plaintiffs' NEPA claim asserts that the Project EA violates NEPA and its implementing regulations based on five major arguments: 1) failure to consider a reasonable range of alternatives; 2) failure to adequately consider cumulative impacts; 3) improper assessment of the Project's costs and benefits; 4) unsubstantiated findings of public-safety benefits arising from a reduction in drowning risk; and 5) inadequate analysis of recreational impacts.

As an initial matter, the court nearly declined to address the merits of any of plaintiffs' NEPA issues in their complaint whatsoever given that only two plaintiff landowners participated in the administrative NEPA public process and, even then, only scratched the surface of a few of the myriad issues plaintiffs briefed in support of their preliminary injunction motion. Slip Op. at 5-6. Instead, plaintiffs sought to rely heavily on new declarations of three specialists—an arborist, economist, and real-estate appraiser—in support of the arguments of which they sought the court's review. In this context, the court stated that it remained unconvinced that it should delve into the merits of such arguments, but ultimately decided to do so, quite likely because it believed that plaintiffs might be likely to appeal an adverse ruling.

First, the court found that the EA considered a reasonable range of alternatives. In addition to the selected alternative, which entails replacing approximately 1.9 miles of canals and 66.9 miles of laterals in the TID system across nearly 170,000 acres with high-density polyethylene (HDPE) gravity-pressurized buried pipe, the EA considered two other alternatives in detail: The No-Action alternative and one designed to achieve the water conservation goals of the proposed action by lining open canals and laterals with polyethylene geocomposite, covered with shotcrete. The court reached its ruling largely on two grounds working in concert with one another: 1) the scope of alternatives required to be considered in an EA is narrower than that required for an Environmental Impact Statement (EIS); and 2) its finding that the EA adequately explained why NRCS opted not to consider in detail plaintiffs' preferred on-farm efficiency upgrades alternative, largely due to the agency's determination that it did not meet several elements of the multi-faceted Purpose of and Need for the proposed action at issue. Slip Op. at 6-8.

Second, the court found that the EA's discussion of cumulative effects was not arbitrary and capricious, specifically in the context of impacts to vegetation and wetlands that have developed along the canals since their original construction, largely on the grounds that it did not want to "second-guess" the methodology NRCS used to analyze cumulative effects and in reliance on NRCS's finding that impacts to such resources would overall be "minimal" due to the compensatory benefits projected to accrue to such resources in the vicinity of the natural riverine systems within the area of the Project's potential effects. Slip Op. at 8-9. What is somewhat notable is that, in setting forth its ultimate ruling in this regard, the court does not cite the EA's section addressing cumulative impacts (although it does refer to it earlier in its analysis), but instead cites sections addressing impacts of the Project itself. As a result, the opinion does not directly address the crux of plaintiffs' cumulative impact argument that the EA neglects to evaluate the effects of the Project in conjunction with those resulting from other irrigation district piping projects currently being implemented or "reasonably foreseeable" within the Basin.

Third, the court rejected virtually out-of-hand plaintiffs' argument that the EA violated NEPA by improperly assessing the costs and benefits of the Project, including with respect to the water conservation benefits NRCS projected it will produce. Slip Op. at 9. The court premised its rejection on its reading of caselaw that NEPA does not require a formal cost-benefit analysis given that its principal purpose is protection of environmental, not economic, interests.

Fourth, the court also made quick work of plaintiffs' final two primary NEPA arguments. With respect to plaintiffs' argument that NRCS's analysis of potential drowning risks posed by open canals was little more than a "sham" designed to justify a predis-

position to adopt the proposed action, the court summarily and seemingly somewhat irritatingly rebuffed the notion, going so far as to say it would have been surprising had NRCS not considered such risks. Slip Op. at 9-10. With respect to plaintiffs' argument that the EA failed to adequately address potential recreational impacts, the court construed it as effectively a policy disagreement over the loss of recreational opportunities arising from the Project, and thereby rejected it on the ground that NEPA is a procedural statute designed to ensure consideration of environmental effects, not one to challenge a decision with which one does not agree substantively. *Id.* at 10. [The Court also quickly dispensed of plaintiffs' claim that, in approving the Project, NRCS violated one of the eligibility criteria for such projects laid out in its own implementing regulations for the Watershed Protection and Flood Prevention Program, 7 C.F.R. § 622.11(a)(6), concurring with Federal Defendants' interpretation of the criterion at issue. Slip Op. at 10-11.]

Plaintiffs' State Law Private Nuisance Claim against TID

Plaintiffs' nuisance claim asserted that the Project would substantially and unreasonably interfere with the use and enjoyment of the land plaintiffs own by, among other things, significantly diminishing their property values as a result of the adverse effects it will have on the vegetation and riparian-related resources that have developed along the canals. The court rejected this claim largely on the ground that TID's Project is a legal activity, which it concluded cannot form the basis of a nuisance claim under Oregon law. Slip Op. at 11-12.

Plaintiffs' Carey Act Claim

Plaintiffs' Carey Act claim asserted that the Project is inconsistent with the right-of-way TID holds as a result of operation of that statute because it allegedly goes well beyond the right-of-way's purpose, which it contends that, based on the statute's language, was principally "[t]o aid the public-land States in the reclamation of the desert lands" within their boundaries. The court, relying heavily on its 2006 decision involving a similar piping project in *Swalley Irrigation Dist. v. Alvis*, ___F.Supp.3d___, Case No. Civ. 04-1721-AA (D. Or. Mar. 1, 2006), ruled that the piping the Project involves is "reasonably necessary" for TID to effectuate the purposes of the Carey Act right-of-way, and therefore, fits within its scope. Slip Op. at 12-15.

Irreparable Injury, Balancing of Equities, and the Public Interest

After devoting the vast majority of its opinion to the merits of plaintiffs' claims, the court closed by succinctly addressing each of the other three elements relevant to plaintiffs' preliminary injunction motion. Significantly, the court did find that plaintiffs satisfied their burden to establish that the Project would cause them irreparable injury given what it termed "the unquestionable devaluation of their properties," allegedly on the order of hundreds of thousands of dollars. Slip Op. at 15. At the same time, the court nevertheless went on to rule that the balance of equities leaned against entry of the preliminary injunction that plaintiffs sought, citing the interests the Project is designed to serve of conserving water, improving water resources, and meeting environmental objectives. *Id.* at 15-16. Lastly, in evaluating the public interest, the court relied primarily on the fact that both the United States and Oregon Governor's Office support the Project—as well as noting that no "environmental-advocacy group" had challenged it—to conclude that "Plaintiffs private interests are outweighed by the community's interest" in improving the irrigation system in the Deschutes Basin. *Id.* at 16.

Conclusion and Implications

There are several principal implications of the U.S. District Court's opinion worth noting in conclusion. First, it represents a ruling on a preliminary injunction motion, and thus, as the court itself expressly declared, does not constitute a definitive ruling on the merits of any of plaintiffs' claims. Slip Op. at 4. Second, the court seemed to be influenced by its perception that, in bringing their NEPA claims, plaintiffs were largely animated by economic interests, which may have colored the way it treated their arguments alleging inadequate analysis of environmental effects. Third, and most importantly, as alluded to above, the TID Project is just one of many other similar piping projects that are either ongoing or are proposed in the Deschutes Basin. In fact, seven other irrigation

districts in the region either have implemented, are in the midst of implementing, or have proposed plans to implement similar projects (Arnold, Central Oregon, Lone Pine, North Unit, Ochoco, Swalley, and Three Sisters). Much of the impetus driving these projects is the districts' work, along with that of the City of Prineville, with the U.S. Fish and Wildlife Service and National Marine Fisheries Service on the Deschutes Basin Habitat Conservation Plan (HCP) in support of Incidental Take Permits for which they have applied pursuant to the Endangered Species Act to cover impacts to several listed species affected by their activities. The goal of most conservation measures in the HCP is to modify the hydrology of the natural waters within the Basin for the benefit of covered species, which will require lesser diversions from such waters at various times of the year, thereby giving rise to a need for the districts to achieve greater conservation of the water they will continue to divert for irrigation purposes.

On December 4, 2020, plaintiffs filed an appeal of the District Court's opinion to the Ninth Circuit. (Stephen J. Odell)

SETTLEMENT REACHED IN DISPUTE OVER GROUNDWATER/SURFACE WATER CONFLICTS IN NEVADA'S HUMBOLDT RIVER BASIN

Pershing County Water Conservation District v. Tim Wilson, P.E., Nevada State Engineer, CV15-12019, (11th Dist. Nov. 20, 2020).

In the February 2020 issue of *Western Water Law & Policy Reporter* (24 *W. Wat. Law & Policy Rpter.* 92), we described litigation initiated by surface water users in Nevada's Humboldt River Basin against the State Engineer in 2015 to seek curtailment of groundwater pumping that captured senior, decreed river flows. Five years into the litigation, the court ordered the plaintiff, Pershing County Water Conservation District (PCWCD), to provide notice of the lawsuit to holders of water rights in the basin, setting an October 14, 2020 deadline. The court also scheduled an evidentiary hearing for March 22-26, 2021. Before the notice deadline arrived, the parties filed a stipulation to stay proceedings so they could engage in settlement discussions.

The State Engineer's Efforts to Conjunctively Manage the Humboldt River Basin

While the lawsuit was ongoing, the Nevada Legislature adopted a policy declaration:

> . . .[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water. Nev. Rev. Stat. § 533.024(1)(e).

To facilitate the conjunctive management of groundwater and surface water in the Humboldt River Basin, the Nevada State Engineer contracted with the U.S. Geologic Survey (USGS) and Desert Research Institute (DRI) to build a groundwater capture model to quantify the amount of river depletion caused by groundwater withdrawals. USGS and DRI also developed improved groundwater budgets at the basin scale. Initial model results became available in January 2020.

In addition to the model, the State Engineer undertook other notable steps to proactively manage the Humboldt River region to balance the interests of senior decreed river rights and junior groundwater rights. These included:

- Establishing a policy that requires inclusion of evaporative losses from mine pit lakes in the basin groundwater budget and the permanent relinquishment of groundwater rights to account for such losses;

- Engaging in continued stakeholder outreach, data sharing and uniform region-wide management; and

- Issuing an order requiring the installation of totalizing meters and water use reporting, subsequent field verification of meter installation and data accuracy, and development of a database to manage and report groundwater pumping data.

Settlement Terms

In light of these actions and other management commitments, PCWCD and the State Engineer were able to reach a State Court settlement of the litigation. The settlement requires the State Engineer to issue an administrative order that creates clear procedures and standards—informed by the groundwater model—for considering groundwater applications in the Humboldt River basin. The order must set out specific thresholds for surface water capture by new groundwater appropriations and mandate that an applicant provide sufficient replacement water to avoid conflicts with existing rights. The mitigation requirements must be specific as to quantity, priority, and such other considerations that are necessary to avoid such conflicts.

The settlement terms also require the order to set out specific capture thresholds for applications to change existing groundwater appropriations. When reviewing such applications, the State Engineer must consider variations in capture and any resulting potential conflict caused by a change in the point of diversion. For changes to a point of diversion that will increase river capture, the to-be-issued administrative order must set out specific requirements for offsetting such increases with either surface water replacement or relinquishment of groundwater rights.

In addition, the administrative order must set out a mechanism to address future conflicts between valid existing groundwater users and decreed Humboldt River rights. The State Engineer must articulate a basis upon which future orders would restrict withdrawals to conform to priorities, based upon the best available science, and establish specific considerations for determining whether a curtailment order is warranted.

Whether for new appropriations or change applications, the administrative order must require notice to all applicants that approval of an application would be subject to any long-term conjunctive management plan the State Engineer deems necessary to prevent or avoid conflicts with existing rights.

The settlement necessitates that the administrative order first be issued in draft form and undergo a notice and comment period, followed by a public hearing. The State Engineer agreed to issue the draft order within 90 days of the settlement agreement's effective date, which was October 19, 2020. As a result, the draft order is anticipated in mid-January 2021.

In consideration of these terms, PCWCD agreed to dismiss its litigation with prejudice. The court entered its order of dismissal on November 20, 2020.

Conclusion and Implications

The settlement agreement avoided protracted and expensive litigation that could have ultimately ended up in the same place the parties reached through negotiation. With the USGS/DRI model, the Nevada State Engineer has a powerful tool to conjunctively manage surface and groundwater withdrawals throughout a large geographic area. Using the best available science, and the guard rails established in the settlement, the State Engineer will be able to actively protect against impacts to surface water rights caused by groundwater withdrawals.
(Debbie Leonard)

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