Volume 16, Number 2
March 2021

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

WATER NEWS

U.S. Bureau of Reclamation Report Summarizes Factors Impacting Water Resources in the United States 27

News from the West 29

LEGISLATIVE DEVELOPMENTS

Congress Introduces Bill to Coordinate River Restoration Efforts Between the United States and Mexico and to Protect the Salton Sea 34

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 36

LAWSUITS FILED OR PENDING

The Yakima River Surface Water Adjudication—Washington State Supreme Court Accepts Direct Review 39

RECENT FEDERAL DECISIONS

Circuit Court of Appeals:
D.C. Circuit Vacates Federal Easement Awarded to Dakota Access Pipeline, Finding U.S. Army Corps Violated NEPA By Failing to Prepare an EIS 41
Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 985 F.3d 1032 (D.C. Cir. 2021).

District Court:
District Court in Georgia Dismisses Clean Water Act Citizen Suit for Failure to Show an Environmental Injury to Establish Standing 43
Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC, ___F. Supp.3d___, Case No. 2:2019-cv-00050 (S.D. Ga. Jan. 29, 2021).

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California Corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

EWL

EASTERN WATER NEWS

U.S. BUREAU OF RECLAMATION REPORT SUMMARIZES FACTORS IMPACTING WATER RESOURCES IN THE UNITED STATES

In January, the U.S. Bureau of Reclamation released its 2021 SECURE Water Act Report, which provides a summary of projections on several factors that influence water resources and management in the western United States. The report discusses projections for temperature, precipitation, snowpack, streamflow, drought, water demand, and groundwater in eight river basins, including the Sacramento-San Joaquin River and Klamath River basins. The report also outlines mitigation strategies the Bureau is undertaking in response to the projected risks to water supplies in the West.

Background

The U.S. Bureau of Reclamation (Bureau) is the nation's largest wholesale water supplier, operating 338 reservoirs and providing water to 140,000 farmers in the western United States. The Bureau is also the second largest producer of hydroelectric power in the United States with 53 power plants. In 2009, Congress passed the SECURE Water Act (Act), which authorizes the Bureau to assess the risks from climate change to water supplies in each major Bureau river, analyze the impact on various water uses and services as a result of such changes, and develop appropriate mitigation strategies. The Bureau is required to submit a report to Congress every five years on these issues. In January of this year, the Bureau issued its third such report under the Act (Report). The Report summarizes basin reports and factsheets for each of the eight major river basins identified in the Act and a 2021 West-Wide Climate and Hydrology Assessment (2021 Assessment).

Eight major river basins are identified under the Act and discussed in the Report. Among the basins reviewed are arguably two of the most important water basins in California: the Sacramento and San Joaquin River basins. Given the closely interrelated water management issues of these two basins, the Report discusses them jointly. The other basins discussed in the report are the Klamath river basin, Truckee and Carson River basins, the Colorado River Basin, Columbia River Basin, Missouri River Basin, and Rio Grande Basin.

Summary of the Report

The Bureau uses observations and future projections to operate its reservoirs, deliver water and power, and develop water management strategies. These observations and future projections on water supply and demand are based on the assessment of seven factors: temperature, precipitation (rainfall and snowfall), snowpack, streamflow (runoff), droughts, water demands, and groundwater.

Temperature and Precipitation Models

The Bureau's future projections of temperature and precipitation are based on two models, both of which generally yielded similar broad trends. In general, the Report projects that temperatures will increase over the West during the 21st century, with temperature increases becoming greater over time. For example, the area around the Sacramento-San Joaquin rivers at Delta are projected to increase in temperature between 2-3 degrees Fahrenheit through the 2020's and between 4-6 degrees Fahrenheit in the 2070's. Projections under scenarios with higher greenhouse gas (GHG) concentrations generally yield more severe increases in temperature than scenarios with lower GHG concentrations. Precipitation is projected to increase over the northwestern and northcentral United States, particularly in the Columbia and Missouri River basins, but decrease in the southwestern and southcentral portion of the country. The Bureau projects decrease snowpack overall in the West. Snowmelt is also projected to occur sooner, changing the timing and quantity of streamflow. The Report predicts that many locations are likely to experience increased stream flow from December through March and decreased streamflow from April through July.

Drought is projected to increase in duration, severity, and frequency. While periods of drought are not uncommon in the West, the Bureau's projection is

particularly significant because these projected increases are in relation to droughts of the distant past. Drought maps provided in the Report project that large portions of California, Nevada, Arizona, and southern Idaho, as well as several central states, will experience more severe droughts on average over the coming century. Drought is also expected to generally last longer overall. The Bureau predicts that increased temperatures and longer growing seasons will results in increased evaporation and irrigation requirements. While natural groundwater recharge is generally predicted to follow changes in precipitation and increased evaporation from soil, the Report acknowledges that the unique circumstances within each area will play an important role in natural groundwater recharge.

Anticipated Impacts to Water Uses

In addition to providing projections of the foregoing factors and summary of the 2021 Assessment, the Report also includes a summary of expected impacts to water uses. In particular, due to the projections of the foregoing factors, water supplies are expected to become less predictable and water deliveries more difficult to manage. The Report points out that end-of-year water storage is projected to decrease in areas, including reservoirs identified in a 2016 Sacramento-San Joaquin Rivers basin study. The Bureau also notes that warming water temperatures and shifts in streamflow may have an effect on water quality and fish populations. Recreation may suffer from the negative impact of climate change in some areas leading to shortened fishing seasons, diminished wildlife viewing opportunities, and a reduction in hunting game. Reduced hydropower operational flexibility may also occur during summer months causing supply and demand problems on communities dependent on hydropower.

Mitigation Strategies

The Report also discusses actions the Bureau has taken to develop appropriate mitigation strategies, including strategies in water delivery, hydropower, habitat, ecosystem and reaction, and risk management. According to the Report, the Bureau has about 350 active constructions activities, including new delivery systems and storage, recreation rehabilitation activities, and dam safety projects. The Report also highlights certain projects supported in part by Water Infrastructure Improvements for the Nation (WIIN) Act and WaterSMART funding. Among these projects is a North-of-Delta Off-Stream Storage Investigation, which was finalized using WIIN Act funding. The Bureau also notes that it provides grant funding through the Title XVI Water Reclamation and Reuse Program for projects that reclaim and reuse wastewater and impaired ground and surface water. One project cited under Title XVI is the Pure Water Monterey Title XVI Project, which is expected to produce up to 8,200 acre-feet of water for communities in Monterey County, California. The project includes collection and conveyance facilities and an advanced treatment plant. The Report provides many more details about its mitigation strategies, including drought planning and managing risks from increasing wildfires.

Conclusion and Implications

The projections provided by the Bureau in its Report provide a starting point for stakeholders and affected parties to begin planning for the projected changes affecting water resources in the West. While the Report provides general trends and observations, it is important for stakeholders to understand the projected changes specific to their region and how those changes may affect their water resources over time. Stakeholders may check the Bureau's climate website after March 2021 to review more detailed information provided in associated documents summarized in the Report. Stakeholders may also want to research further into the various funding programs and mechanism mentioned in the Report when assessing their own mitigation strategies with regard to their water resources and requirements. The Bureau's Report is available online at: https://www.usbr.gov/climate/secure/docs/2021secure/2021SECUREReport.pdf
(Steve Anderson)

NEWS FROM THE WEST

In this month's News from the West we report on two state Supreme Court decisions on water rights. First, we report on a decision out of the Colorado Supreme Court offering guidance to the state's series of water court regarding what each must rely upon in interpreting water decrees. Our second decision comes out of the Nevada Supreme Court wherein the Court affirmed the authority of the State Engineer to regulate groundwater withdrawals in over-appropriated basins.

Colorado Supreme Court Declines to Allow Extrinsic Evidence to Interpret an Unambiguous Water Decree

Mike & Jim Kruse Partnership v. Cotten, 2021 CO 6 (Colo. 2021).

The Colorado Supreme Court, on January 25, 2021, declined to clarify which materials a court may rely on when determining whether a Water Court decree is ambiguous. The Court acknowledged, but refused to resolve, the conflict in Colorado case law as to whether the court should limit their inquiry to the text of the decree, to include statements of claim and transcript of testimony, or to examine all materials before the court of the original proceedings. In the present case, the Court reversed the Water Court's decision after determining that a decree was unambiguous under all three interpretative approaches, and therefore any extrinsic evidence should not have been allowed. Extrinsic evidence, the Court ruled, may only be consulted after a finding of ambiguity—it may not be used to create the ambiguity.

Factual and Procedural History

The La Garita Creek (Creek) begins in mountains on the west side of the San Luis Valley and flows onto the plain where it intersects with the Rio Grande Canal (Canal). Over time, the natural pile up of sediment altered the Creek's path and changed the location where the Creek intersects the Canal. Since at least 1914, a siphon (Siphon) has funneled the channelized Creek underneath the Canal to prevent Creek water from entering the Canal. The water from the Siphon empties into an eastern channel which runs directly into the Rocky Hill Seepage and Overflow Ditch (Ditch), owned in part by the plaintiff.

The plaintiff filed an application asking the Water Court to interpret a 1933 decree for the Ditch to determine whether the channel starting at the mouth of the Siphon is a continuation of the Creek's channelized bed or whether it is a part of the Ditch. If the channel was found to be part of the Ditch, then plaintiff would be entitled to water from the Siphon. The text of the decree listed "waste, seepage and spring waters" as the Ditch's only sources. Defendants, the Colorado Division 3 Engineer's Office and the State Engineer's Office (collectively: the Engineers), argued the decree's failure to mention the Creek or the Siphon meant the Siphon was not a decreed source for the Ditch and therefore plaintiff had no right to the water from the Siphon.

Although the Water Court determined the text of the decree unambiguously did not include the Creek as a source of water for the Ditch, it found the decree was ambiguous as to whether the Creek was the intended source of the decreed "waste, seepage and spring waters." Due to this ambiguity, the Water Court declared the decree ambiguous and consulted further extrinsic evidence, including a 1936 aerial photograph, which suggested the Siphon water was in fact to the Ditch. The Engineers appealed the Water Court's use of extrinsic evidence to interpret the decree, as well as its conclusion that the water at issue was decreed to the Ditch.

The Supreme Court's Decision

Although the Colorado Supreme Court eventually overturned the Water Court and determined the decree was unambiguous, the decision noted "[o]ur case law on ambiguity is itself ambiguous" and therefore analyzed three possible methods of decree interpretation. While the Court acknowledged the conflict in case law surrounding the use of the three interpretation methodologies, the Court declined to specify which method should take preference in Colorado.

Applying the Three Methodologies

In the first approach, a court can only look to the text of the decree. This approach, sometimes called the "four corners" approach, draws on contract law to hold that, when a decree is clear and unambiguous,

a court will not "look outside the four corners of the instrument, nor admit extrinsic evidence to aid in interpretation." *City of Golden v. Simpson*, 83 P.3d 87, 93 (Colo. 2004). In the second approach, the court can expand their review beyond the decree to include the statements of claim and the testimony from the original proceedings. This approach allows courts to admit additional evidence, even when the decree is facially unambiguous. The principle of allowing claim statements and testimony this approach dates back to "the advent of Colorado water law." *In re Water Rights of Cent. Colo. Water Conservancy Dist.*, 147 P.3d 9, 16 (Colo. 2006). Lastly, a third school of interpretation allows the court to review all materials from the original proceedings.

After interpreting the decree under each of the three methods of interpretation, the Court found all three approaches provided the same result—the decree was unambiguous in that the Siphon water was not decreed to the Ditch. Because the Court found the results were identical under all three approaches, it declined to adopt one of the approaches for Colorado courts to utilize when interpreting ambiguous decrees.

The Decree Was Unambiguous under Any Theory of Interpretation—Extrinsic Evidence Cannot Create Ambiguity

Given that, under any theory of interpretation, the decree was unambiguous, the Colorado Supreme Court determined the Water Court improperly consulted the 1936 photograph when interpreting the decree's text. Importantly, "such evidence may be consulted only after a finding of ambiguity, not to create the ambiguity." *Mike & Jim Kruse P'ship v. Cotton*, 2021 CO 6 at 4. Consequently, the Water Court's reliance on this extrinsic evidence was in error.

Under the strict four corners approach, the decree did not mention the Siphon, or even the Creek. Additionally, the Ditch was given Priority No. 1. If the Siphon was in fact the decreed source of the Ditch, the Ditch would have received a lower priority number, Priority No. 75, due to the other senior water rights in the area. Therefore, the plain language unambiguously provides that the Siphon is not a decreed source for the Ditch. Similarly, when analyzing claim statements and testimony, or even all materials before the 1933 court, there is no mention of the Siphon or other evidence to suggest it was intended as a source for the Ditch.

Because the text of the decree categorically excluded Siphon water as a source for the Ditch and the 1933 proceedings exposed no latent ambiguities, the Court held the Water Court erred by allowing and relying on the extrinsic evidence of the 1936 photograph. Consequently, the 1936 photograph was improperly used in the interpretation of the decree and the Court held the Siphon water was unambiguously not the decreed source of the Ditch.

Conclusion and Implications

The Colorado Supreme Court plainly stated that courts may not look at evidence extrinsic to the original proceedings when the decree is clear and unambiguous. However, the Court refused to define or limit what evidence from the original proceedings, if any, is admissible to determine whether a decree is ambiguous.

The Supreme Court's refusal to choose one approach leaves the choice of decree interpretation as an unresolved issue in Colorado. Consequently, Colorado courts do not have a strict rule or consistent guidance that directs the court on which evidence from the original proceedings, if any, it can examine when interpreting Water Court decrees. The Court clarified that review cannot go beyond the most expansive interpretive approach, which allows admission of all materials before the original court. However, the Court also declined to limit courts to a stricter approach that admits only statements of claim and transcript of testimony, or even the strictest approach to allow no evidence beyond the text of the decree itself.

When determining the ambiguity of a decree and the potential for the introduction of extrinsic evidence, individual courts in Colorado will have the choice to adopt a strict approach, allowing only for review of the decree's text, or a more expansive approach, which enables either the admission of the statements of claim and transcript or all the materials of the original proceedings. The most likely scenario, given the Court's decision in this case, is that the Colorado Supreme Court will not offer a preferred method of interpretation Water Court decrees until it takes on a new case with a decree in which the three methods produce conflicting results. The Court's

advance sheet opinion is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2020/20SA32.pdf
(Lisa Claxton, John Sittler)

Nevada Supreme Court Upholds the State Engineer's Prohibition on Domestic Well Drilling in Pahrump Basin

Tim Wilson, P.E., et al v. Pahrump Fair Water, LLC, Case No. 77722, 137 Nev. Adv. Op. 2 (Nev. Feb. 25, 2021).

After three years of litigation, including a defeat at the state District Court, the *en banc* Nevada Supreme Court recently handed a big win to the Nevada State Engineer's efforts to regulate groundwater withdrawals in over-appropriated basins. The Court fully reinstated the State Engineer's Order No. 1293A, which prohibited the drilling of new domestic wells in Pahrump Valley Basin without first obtaining and relinquishing a two-acre-foot water right.

Noting that the case "involves a question of survival for certain rural communities in this, the driest state in the Nation," the Court held that Nevada Revised Statute (NRS) 534.110(8) authorized Order 1293A. This statute allows the State Engineer to "restrict the drilling of wells" in a specially designated basin "if the State Engineer determines that additional wells would cause an undue interference with existing wells."

The Supreme Court further held that the State Engineer did not need to provide notice and opportunity to be heard prior to issuing Order 1293A because "water is a public resource in this state, not private property," and the prior appropriation system does not guarantee the right to drill a new domestic well.

Nevada's History of Domestic Well Regulation

When the Nevada Legislature established the prior appropriation system for groundwater, it entirely excluded domestic wells from the statutory obligations. *See,* 1939 Nev. Stat., ch. 178, § 3, at 274-75 (stating that "[t]his act shall not apply to the develop[ment] and use of underground water for domestic purposes"). A domestic well is for culinary and household purposes directly related to a single-family dwelling, including the watering of a family garden, lawn, livestock and any other domestic animals or household pets.

Over time, the Legislature gradually eroded the domestic well carve out. Now, the groundwater statute simply spares a person who drills a domestic well from obtaining a water right permit so long as the draught does not exceed two acre-feet annually. NRS 534.030(4); NRS 534.180(1). But the Legislature has expanded the State Engineer's power to regulate domestic wells.

For example, in 1955, the Legislature authorized the State Engineer to restrict the drilling of new domestic wells in depleted basins under certain circumstances. Moreover, domestic wells are now subject to curtailment by priority according to the date they were drilled. NRS 534.080(4); NRS 534.110(6); NRS 534.120(3). In 2019, the Legislature provided some relief from such curtailment by allowing preexisting domestic wells to still draw 0.5 afa, without regard to priority date. *See,* NRS 534.110(9). Nevertheless, the Legislature's overall trajectory has been to progressively chip away at the domestic well exclusion and to expand the State Engineer's power to regulate them.

Overcommitments in the Pahrump Basin

The Pahrump Basin has a long history of over-appropriation. To address this problem, the Nevada State Engineer first designated it for special administration in 1941. Once an area receives such a designation due to groundwater depletion, the State Engineer may make appropriate rules, regulations and orders that, within the State Engineer's judgment, are essential for the welfare of the area. NRS 534.120(1).

To that end, in 1953, the State Engineer ordered that meters be installed at all points of diversion. In 1970, the State Engineer determined that irrigation would be a non-preferred use and ordered that new irrigation applications be denied. Over time, the State Engineer limited new applications to small commercial, small industrial and environmental uses and then curtailed new applications altogether except for limited exceptions.

As of 2017, committed groundwater rights in the Pahrump Basin were close to 60,000 acre-feet per year, while the State Engineer calculated the Basin's perennial yield as 20,000 acre-feet annually. Because domestic wells do not require a water right, the State Engineer estimates that an additional 11,385 acre-feet committed for domestic well use based on the number of existing domestic wells. According to

the State Engineer's pumpage inventories, pumping steadily increased from 14,355 acre-feet in 2013 to 16,416 acre-feet in 2017, with domestic well pumping accounting for approximately one third of the total.

The State Engineer estimates the Pahrump Basin to have 11,280 domestic wells at a density of 1 to 469 wells per square mile. If each domestic well pumps the 2 acre-feet annually that is allowed by statute, the pumping from domestic wells alone would exceed the Basin's perennial yield. The State Engineer has determined that pumping by domestic wells has the potential to be the greatest source of groundwater use in the Basin, estimating that an additional 8,000 domestic wells could be drilled, which could withdraw as much as 16,000 acre-feet more groundwater from the aquifer.

Due to these concerns regarding the proliferation and impact of domestic wells, in 2017, the State Engineer issued Order #1293, which except for specified exceptions, prohibited the drilling of new domestic wells in the Pahrump Basin without first obtaining and relinquishing a two acre-foot water right.

The Legal Challenge to Order 1293A

A group called Pahrump Fair Water, LLC (PFW), an association that was formed to challenge Order #1293, filed a petition for judicial review in Nevada District Court. While that case was pending, the State Engineer issued amended Order #1293A, which added two additional exemptions to the drilling restriction. PFW dismissed its petition for judicial review of Order #1293 and filed a new petition for judicial review of the amended Order #1293A.

On review, PFW advanced four arguments: 1) the State Engineer lacked the statutory authority to restrict drilling of domestic wells; 2) the State Engineer violated property owners' due process rights by not providing notice and an opportunity to be heard; 3) Order #1293A was not supported by substantial evidence; and 4) Order #1293A amounted to an unconstitutional taking of private property without just compensation. The District Court reversed Order #1293A on the first three grounds and did not reach the fourth.

The Supreme Court's Decision

The Supreme Court focused its analysis on the language of the statute invoked by the State Engineer in support of Order #1293A, which provides:

> In any basin or portion thereof in the State designated by the State Engineer, the State Engineer may restrict drilling of wells in any portion thereof if the State Engineer determines that additional wells would cause an undue interference with existing wells. NRS 534.110(8).

According to the Court, "[a] straightforward reading" of this language gives the State Engineer the authority to restrict the drilling of new domestic wells in the manner done in Order #1293A.

The Supreme Court noted that only because of the "complicated" history of domestic well regulation under the prior appropriation statute is there is any question as to the interpretation of this plain language. Because of the increasingly encompassing legislative amendments, however, the Court concluded that the Legislature "completely brought domestic wells into the prior appropriative system." As a result, the reference to "wells" in NRS 534.110(8) necessarily includes domestic wells. The Court brushed off the statute upon which PFW relied, NRS 534.030(4) (which provides that "[t]he State Engineer shall supervise all wells ... , except those wells for domestic purposes"), as merely a vestige of a bygone era that had since been overwritten.

Having concluded that the State Engineer had statutory authority for Order #1293A, the Court found that substantial evidence supported the State Engineer's determination that the drilling of any new domestic wells in the Pahrump Basin would threaten the supply of water to existing wells. The State Engineer had relied on a study that assumed for methodological purposes that no new domestic wells would be drilled in the Basin yet still concluded that well failures would likely ensue under then-existing conditions. PFW contended that because the study did not actually look at the effect of new domestic wells, it did not meet the substantial evidence standard.

The Court rejected this argument, pointing to the State Engineer's ability to draw reasonable inferences from evidence. As articulated by the Court:

> . . .if the Basin's wells are likely to fail even absent new drilling, then it reasonably follows that additional drilling in the Basin would only increase that likelihood.

The Court would not second guess the State Engineer's technical expertise.

Finally, the Court concluded that the State Engineer could issue Order #1293A without notice and hearing because, under the prior appropriation system, a landowner does not have an established property right in the underlying water. Because Order #1293A simply imposed a condition on the drilling of new domestic wells in a designated groundwater basin and did not limit established water rights, no due process concerns were implicated.

The Court further concluded that:

> . . .a property owner in a basin that has been over-allocated for decades, and where new wells threaten the supply of existing wells, could not legitimately expect to be able to arbitrarily drill and pump even 2 afa or less without any restrictions.

Conclusion and Implications

Having upheld Order #1293A, the Supreme Court reversed and remanded to the District Court to address the takings question that had not yet been addressed.

The Supreme Court's decision to uphold Order #1293A ultimately rested on just one particular statute, NRS 534.110(8). However, it canvassed a host of other statutory provisions that, together, create a framework to seemingly give the State Engineer broad authority to regulate groundwater. Other cases that are pending before the courts will continue to test the boundaries of that authority.

Because the "takings" question had not been properly teed up below, the Court did not reach it and remanded for further proceedings. Its language regarding the lack of a reasonable expectancy interest to be able to drill a new well signals that should that issue return to the Court, it likely will find that Order #1293A did not effectuate a taking. The question of whether groundwater regulation constitutes a taking is an area of considerable interest that has been raised in other cases. Whether in the Pahrump case or another, a Nevada Supreme Court decision that addresses the takings question is likely forthcoming.

As competition for Nevada's scarce water supply has intensified in recent years, and with the effects of past decisions that overcommitted many basins in the state becoming increasingly felt, the scope of the State Engineer's regulatory control over groundwater withdrawals will continue to receive a lot of attention going forward.
(Debbie Leonard)

LEGISLATIVE UPDATE

CONGRESS INTRODUCES BILL TO COORDINATE RIVER RESTORATION EFFORTS BETWEEN THE UNITED STATES AND MEXICO AND TO PROTECT THE SALTON SEA

On January 25, 2021, U.S. House of Representatives Members Raul Ruiz (CA -36) and Juan Vargas (CA-51) introduced HR 491, the "California New River Restoration Act of 2021," which would direct the administrator of the U.S. Environmental Protection Agency (EPA) to establish a federal restoration program for the California New River that flows from Mexico to the Salton Sea.

Background

The Salton Sea is California's largest lake, situated along the San Andreas Fault in southern California, between Imperial and Riverside counties. In addition to its size, the Salton Sea is notable for its low elevation (226 feet below sea level) and high salinity (25 percent higher than the Pacific Ocean). The Salton Sea serves as an important stopover for hundreds of species of migratory birds traversing the 5,000-mile Pacific Flyway, and has been identified by the National Audubon Society as a bird area of global significance. It provides habitat for numerous listed species, including the desert pupfish, the brown pelican, and the Yuma clapper rail. The Salton Sea started as a freshwater lake formed by Colorado River floods in the early 20th century, but became saline over time due to declining water levels and the steady inflow of agricultural tailwaters high in salts and nutrients from the Imperial, Coachella, and Mexicali valleys.

While it was once regarded as one of California's most productive fisheries, the Salton Sea has become less hospitable to wildlife, due in part to reduced inflows, climate fluctuations, and a lack of natural outlets beyond evaporation and seepage. Over the past few decades, deteriorating conditions in the Salton Sea have led to fish and bird die-offs, a reduction in overall bio-diversity, and an increased threat of harmful dust storms due to reduced water levels and exposed lake bed. Numerous programs and initiatives have been developed to address conditions in the Salton Sea, including one of its primary pollutant sources, the New River.

The New River originates near the City of Mexicali, Mexico and flows north through agricultural lands in the Imperial Valley, to the Salton Sea. Once regarded as one of the most polluted rivers in the country, the New River contributes nearly 400,000 acre-feet of water to the Salton Sea each year, constituting approximately 10-15 percent of the annual inflow. As such, the discharge of urban runoff, agricultural tailwater, treated municipal waste, and partially treated industrial waste in the New River affects the water quality and habitat conditions in the Salton Sea, as well as human health and economic development in the Imperial Valley.

New River Restoration

The California-Mexico Border Relations Council (CMBRC) was created in 2006 to coordinate interagency programs, initiatives along the California-Mexico border between California agencies and their counterparts in Mexico. In 2010, the CMBRC formed a New River Technical Advisory Committee to oversee the development of a New River Strategic Plan to monitor, study, and address prevailing water quality concerns in the New River. The Technical Advisory Committee released a Strategic Plan to the public in 2012, which it revised based on community input in 2016. The revised Strategic Plan delivered to the California legislature included recommendations to construct a trash screen, disinfection facility, and associated conveyance structures in Calexico to remove pollutants from the New River. California's legislature appropriated $1.4 million to provide grants and contracts to implement the planning, design, and permitting work needed for the recommended project components.

Citing a need for coordination of federal and non-federal funding and resources to assist restoration efforts in the New River, Representatives Ruiz and Vargas introduced HR 491 to direct the EPA to form the California New River Restoration Program (Program). Under the Program, the EPA adminis-

trator would facilitate restoration and protection activities for the New River among Mexican, federal, state, local, and regional agencies and groups. The objectives of those activities include the enhancement of habitat restoration and protection activities, the improvement of water quality to support fish and wildlife, enhancement of water and flood management, and increased opportunities for public access to, and recreation in, the New River.

The EPA administrator would coordinate and consult with representatives of the Mexican government, the United States Department of the Interior, Department of Agriculture, and Department of Homeland Security, the California Natural Resources Agency, California Environmental Protection Agency, State Water Resources Control Board, and Department of Water Resources, as well as local government agencies and other stakeholder groups, to implement the Program.

HR 491 also calls for the provision of federal grants and technical assistance to state and local governments and other stakeholders, both in the U.S. and in Mexico, to carry out the aforementioned purposes of the Program. These grants would incorporate criteria developed to ensure that the activities are aligned with and accomplish the goals of the Program, and include a federal cost-sharing allotment of up to 55 percent. While HR 491 does not directly involve projects in the Salton Sea, the New River restoration activities would reduce the volume of pollutants entering the Salton Sea and work to improve overall water quality.

Conclusion and Implications

House Resolution 491 declares federal coordination and funding is needed to build on and support activities already in motion to restore conditions in the New River. However, similar federal legislation introduced in 2016, 2017, and 2019, was unsuccessful. After its introduction, HR 491 was referred to the House Committee on Transportation and Infrastructure, the Committee on Natural Resources and the Subcommittee on Water Resources and Environment for review and consideration.

A copy of HR 491, the California New River Restoration Act of 2021, is available at: https://www.congress.gov/bill/117th-congress/house-bill/491/text?r=24&s=1

(Austin C. Cho, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•January 27, 2021 - EPA has announced a settlement with Keehi Marine, Inc. to resolve Clean Water Act (CWA) violations for discharge of contaminants into Honolulu's Ke'ehi Lagoon. Under the settlement, Keehi Marine will pay a $127,821 penalty and will maintain preventative measures to reduce the discharge of pollutants like lead, zinc, and copper through stormwater runoff. Such discharges harm aquatic life and sensitive coral reef ecosystems. Keehi Marine completed the terms of an Administrative Order EPA issued to the facility on November 3, 2020, after EPA identified CWA violations at the facility. Under the Order, Keehi Marine has: 1) Developed a Stormwater Pollution Control Plan to control pollutants; 2) Resurfaced the 1.3-acre boatyard area to prevent discharges from work areas; 3) Implemented a plan to monitor for copper, lead, zinc and other pollutants; 4) Conducted employee training and daily inspections; 5) Installed a stormwater treatment system to remove pollutants from their stormwater discharge; and 6) Implemented sample analysis policies and practices.

EPA's settlement with Keehi Marine resolves CWA violations found at the facility and is subject to a 30-day public comment period prior to final approval.

•January 27, 2021—EPA has announced a settlement with Guam Industrial Services, Inc., doing business as Guam Shipyard, over Clean Water Act (CWA) violations for discharge of contaminants into Apra Harbor. Under the settlement, Guam Shipyard will pay a $68,388 penalty and will install preventative measures in to reduce the discharge of pollutants like sandblast and paint debris in stormwater to the harbor. Sandblast and paint debris contain metals that harm aquatic life and sensitive coral reef ecosystems. Guam Shipyard has completed the terms of an Administrative Order EPA issued to the facility on September 5, 2019, after EPA identified numerous violations at the facility.

found at the facility.

•February 2, 2021 - The City of Pittsburgh and the Pittsburgh Water and Sewer Authority (PWSA) are required to adhere to a schedule of corrective actions to address stormwater inspection and enforcement violations under a consent agreement announced by EPA. Under the agreement, the city and PWSA are required to:

1) submit an updated stormwater code for approval to the Pittsburgh city council by July 2021;

2) hire additional inspectors and enforcement staff for 2022; and

3) put management partnership procedures in place by the end of January 2022.

The violations included failure to implement inspections and enforcement procedures for construction site erosion and sediment control measures, and for post-construction stormwater management best management practices. The agreement requires the city and PWSA to comply with a schedule of activities to ensure full compliance with these requirements by March 31, 2022 and to submit quarterly progress reports to EPA. EPA coordinated with the Pennsylvania Department of Environmental Protection in developing the settlement.

•February 10, 2021—EPA announced a Clean Water Act (CWA) settlement with Fleur de Lis Energy and Fleur de Lis Operating, LLC (Fleur de Lis) in which the companies have agreed to pay $1.9 million

for alleged Clean Water Act violations associated with the operation of oil and gas facilities in the state of Wyoming. The settlement, lodged in the United States District Court for the District of Wyoming, involves six separate discharges of crude oil and produced water from Fleur de Lis operated facilities into waters of the United States and their adjoining shorelines; inadequate Spill Prevention Control and Countermeasure (SPCC) Plans for five facilities; inadequate Facility Response Plans (FRP) for three facilities; and no FRP for one facility. EPA alleges Fleur de Lis oil and gas operations were responsible for spills of oil and produced water to surface waters in Wyoming between October 5, 2016, through May 29, 2018, including one spill in the Linch Complex Field in Johnson County and five spills in the Salt Creek Field in Natrona County. Each of the spills impacted adjoining shoreline and/or caused a sheen on tributaries to Salt Creek, a tributary of the Powder River. Discharges from these facilities have the potential to impact tributaries to Salt Creek in the Salt Creek Field and Indian Draw, a tributary to Salt Creek in the Linch Complex Field. In addition, EPA alleges that Fleur de Lis failed to prepare adequate FRPs, or had no FRPs in place, from April 2015 through December 2017 at four facilities and failed to develop and implement a facility response training and drill/exercise program. The planning distance for these four facilities, which represents the extent of potential impacts associated with a worst-case spill scenario, extends over 90 miles to the Powder River. The Clean Water Act prohibits discharges of oil to waters of the United States that violate applicable water quality standards; or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. The Oil Pollution Prevention requirements of the Clean Water Act are intended to prevent and facilitate the response to the discharge of oil from non-transportation-related onshore facilities. All facilities with 1,320 gallons of oil that have the potential for a spill to reach waters of the United States are required to have an SPCC Plan. Facilities with storage capacity of one million gallons or more and have the potential to impact fish, wildlife and sensitive environments are also required to meet FRP requirements. The $1.9 million penalty will be deposited into the Oil Spill Liability Trust Fund, a fund used by federal agencies to respond to discharges of oil and hazardous substances.

•February 11, 2021 - EPA announced it has settled a Clean Water Act case it brought against KAG West, LLC, a petroleum transport and delivery facility in Tacoma, Washington for violations of the Washington Industrial Stormwater General Permit. The company agreed to pay a penalty of $133,225. In the agreement, the agency noted that between March 2017 and March 2019 KAG West did not comply with its permit when it failed to: 1) install and/or maintain Best Management Practices to reduce stormwater pollution; 2) immediately cleanup spills; 3) use secondary containment to contain spills; 4) follow sampling and monitoring procedures; 5) file required annual reports, and 6) train its employees on the company's stormwater pollution prevention plan.

EPA estimates the company's failure to comply with its permit requirements resulted in 14,000 pounds of pollutants to annually enter Blair Waterway and Commencement Bay, a Superfund site. This settlement is the latest in a series of enforcement actions taken by EPA Region 10 to address stormwater violations from industrial facilities and construction sites throughout the Pacific Northwest and Alaska.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•January 19, 2021—EPA and the U.S. Department of Justice (DOJ) announced a settlement with U.S Magnesium (USM) to resolve violations of the Resource Conservation and Recovery Act (RCRA) and require response actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at its Rowley, Utah facility. The settlement includes extensive process modifications at the facility that will reduce the environmental impacts from its production operations and will ensure greater protection for its workers. This settlement includes construction of a barrier wall around 1,700 acres of the operating portions of the facility to prevent leaks or breaches of hazardous materials to the Great Salt Lake; construction of a filtration plant to treat all wastewater; and provides for financial assurance to ensure cleanup and closure of the facility. The company will also spend at least $37 million to implement the terms of the settlement and will pay a civil penalty of $250,000. A consent decree formal-

izing the settlement was lodged in the U.S. District Court Central Division Utah and is subject to a 30-day public comment period and approval by the federal court.

•February 9, 2021 - The Seattle office of EPA announced that it has issued a "stop sale" order to Amazon.com to prevent sales on the platform of potentially dangerous or ineffective unregistered pesticides and pesticide devices making illegal and misleading claims, including multiple products that claimed to protect against viruses. This action adds 70 products to a June 6, 2020 EPA order which contained over 30 illegal products. This is the third pesticide stop-sale order issued by the agency to Amazon in the last three years. The agency advises consumers who have purchased an unregistered pesticide product or a misbranded pesticidal device to safely dispose of it in accordance with local, state, and federal laws. This is especially important for consumers seeking to protect against SARS-CoV-2, the virus that causes COVID-19. EPA recommends that consumers only purchase products on EPA's "List N of Disinfectants for Coronavirus (COVID-19)." EPA expects all products on this list to kill the coronavirus SARS-CoV-2 (COVID-19) when used according to the label directions. (Andre Monette)

LAWSUITS FILED OR PENDING

THE YAKIMA RIVER SURFACE WATER ADJUDICATION—WASHINGTON STATE SUPREME COURT ACCEPTS DIRECT REVIEW

Washington's longest running surface water right adjudication is headed to the Washington State Supreme Court for a fifth time. *Dep't of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983); *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 850 P.2d 1306 (1993); *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997); *Dep't of Ecology v. Acquavella*, 177 Wn.2d 299, 296 P.3d 835 (2013). This appeal is considering issues relating to the Yakima County Superior Court's Final Decree.

Background

The Yakima River Surface Water Right Adjudication was initiated in 1977 to consider water rights within the 6,062 square mile watershed. The Adjudication involves thousands of parties. The case has produced many seminal decisions for Washington's water law. Starting in 1983, when the Washington State Supreme Court upheld the Washington State Department of Ecology's (Ecology) notice by publication of its summons for the case. *Dep't of Ecology v. Acquavella*, 100 Wn.2d 651, 659, 674 P.2d 160, 165 (1983). In 1989, the trial court established procedural pathways for the case: 1) federal reserved right for Indian claims, 2) federal reserved rights for non-Indian claims, 3) state-based rights of major claimants, and 4) state-based rights for other claimants, by subbasin. Each pathway culminated in a Conditional Final Order. In 1993, the Court considered issues relating to the quantification of the federal reserved water rights for the Yakama Nation. *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 850 P.2d 1306 (1993). In 1997, the Court considered issues relating to the use and quantification of an irrigation district's water rights. *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997). In 2002, the Court of Appeals, Division III, upheld the trial court's denial of a water right based on the failure to state a claim in a previous water adjudication for the same source. *Dep't of Ecology v. Acquavella*, 112 Wn. App. 729, 51 P.3d 800 (2002). In 2013, the Court considered issues relating to the water rights confirmed in the Ahtanum Creek Subbasin proceeding. *Dep't of Ecology v. Acquavella*, 177 Wn.2d 299, 296 P.3d 835 (2013).

The Final Decree and Appeals Which Followed

On May 9, 2019, 42-years after the case was initiated, Judge F. James Gavin of the Yakima County Superior Court, signed the Final Decree. Yakima County Superior Court Cause No. 77-2-01484-5. The Final Decree addresses administration of the water rights confirmed by the Court and a Schedule of Rights identifying each water right confirmed by the Court. The Ahtanum Irrigation District, Rattlesnake Ditch Association, Yakama Nation, Yakama Reservation Irrigation District, the United States, and Bill F. Zilliox, separately appealed the Final Decree to the Washington State Court of Appeals, Division III. The appeals raised by the Ahtanum Irrigation District, Rattlesnake Ditch Association, Yakama Nation, Yakama Reservation Irrigation District, and the United States were consolidated by the Washington State Court of Appeals, Division III.

The Issues on Appeal

The issues on appeal range from challenges to the quantification of specific appellants' water rights to limits on the use of federal reserved water rights for the Yakama Nation. The Ahtanum Irrigation District asserts issues relating to the court's restrictions of use of water for its patrons, use of natural flows of water outside the irrigation season, and its claim for conveyance water. Rattlesnake Ditch Association asserts issues relating to the court's quantification of its water rights and confirmation of a water right for another party based on the Association's water right claim. Mr. Zilliox raised issues specifically related to the review of his water right claim. The United States asserts that the court erred by proscribing the location and number of acres within the Yakama Indian Reservation boundaries the federal reserved water rights

may be used. The United States asserts that once the water is diverted from the Yakima River, it is administered under federal law and federal law does not cap the number of acres for which a reserved water right can be used. The Yakama Nation also asserts that once surface water is diverted from the Yakima River onto the Reservation it is allocated and managed pursuant to federal law.

The Washington State Department of Ecology, responded that the issues brought by the parties are untimely. Ecology asserts that the parties should have raised the issues following the entry of the respective conditional final order, not following the Final Decree. Ecology also argues, that if the court finds the United States and Yakama Nation's issues to be timely, Ecology does not dispute that the administration of the water right once it is diverted from the Yakima River is subject to the requirements of federal law.

Conclusion and Implications

On December 30, 2020, the Court of Appeals of the State of Washington, Division III, certified the consolidated cases to the Washington Supreme Court to consider: 1) whether federal treaties, such as the Treaty of 1855, reserve water for use on a reservation as a whole, rather than on particular parcels; 2) whether Congress has limited the use of rights reserved by the 1855 Treaty to particular parcels; and 3) whether the Superior Court's schedule of water rights incorrectly interpreted and applied federal law concerning the use of the surface water rights diverted from the Yakima River through the Wapato-Satus Unit.

On January 4, 2021, the Washington State Supreme Court accepted direct review of the consolidated case, in its entirety. The Washington State Supreme Court set oral argument for June 22, 2021. (Jessica Kuchan, Jamie Morin)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT VACATES FEDERAL EASEMENT AWARDED TO DAKOTA ACCESS PIPELINE, FINDING U.S. ARMY CORPS VIOLATED NEPA BY FAILING TO PREPARE AN EIS

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 985 F.3d 1032 (D.C. Cir. 2021).

In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the U.S. Court of Appeals for the D.C. Circuit found that the U.S. District Court did not abuse its discretion in vacating an easement granted by the U.S. Army Corps of Engineers (Corps) for the Dakota Access oil Pipeline to cross under a federally-regulated reservoir that provided Native American tribes with water resources. The appellate court agreed that the Tribes' concerns about the pipeline's oil leak detection system presented an unresolved controversy that required the Corps to prepare an environmental impact statement, but reversed the District Court's order directing the pipeline to shut down and be emptied of oil.

Facts and Procedural Background

In 1958, the Corps constructed Lake Oahe and the Oahe Dam on the Mississippi River, between North and South Dakota. To construct the dam and reservoir, the Corps flooded over 160,000 of lands owned by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe. Since its creation, Lake Oahe provides successor tribes of the Great Sioux Nation with water for drinking, agriculture, industry, recreation, and sacred religious and medicinal practices.

The Dakota Access Pipeline (DAPL) stretches nearly 1,200 miles and moves more than half a million gallons of crude oil per day from North Dakota to Illinois. In June 2014, pipeline operator, Dakota Access, sought an easement from the Corps under the Mineral Leasing Act to construct a portion of the pipeline's pathway under the federally-owned Lake Oahe. In December 2015, the Corps published a draft Environmental Assessment (EA) for the easement, which found that it would yield no significant environmental impacts. Tribes and federal agencies submitted comments on the EA, which contended the Corps insufficiently analyzed the risks and consequences of an oil spill on water resources.

In July 2016, the Corps published its Final EA and a Mitigated Finding of No Significant Impact (FONSI), concluding that with mitigation measures, the Lake Oahe crossing would not significantly affect the quality of the human environment. Several Tribes sued for declaratory and injunctive relief under the National Environmental Policy Act (NEPA). Though the court did not enjoin the project, the Departments of Justice, Interior, and Army immediately issued a joint statement in September 2016, explaining the Corps would not issue the easement and that construction could not move forward until the Army reconsidered its previous decisions.

In January 2017, the Corps published a notice of intent to prepare an EIS for the pipeline easement. Two days later, the Trump administration took office and directed the Corps to expedite the DAPL approvals and consider whether to rescind the notice of intent. The Corps ultimately decided not to prepare an Environmental Impact Statement (EIS), and granted the DAPL easement in early February 2017. After the District Court denied their renewed requests for a preliminary injunction and temporary restraining order, the Tribes moved for summary judgment. The District Court remanded the Corps' easement decision to address deficiencies in its NEPA analysis, including whether the project's effects were likely to be "highly controversial."

In February 2019, the Corps completed its remand analysis and maintained an EIS was unnecessary. The Tribes again moved for summary judgment on grounds that the Corps failed to remedy its NEPA violations. In March 2020, the District Court concluded that, in light of comments pointing to serious gaps in the Corps' analysis, the easement's effects were likely to be highly controversial. The court directed the Corps to complete an EIS, and finding that vacatur was

warranted, ordered Dakota Access to shut down the pipeline and empty it of all oil by August 2020. Both parties appealed.

The D.C. Circuit's Decision

The D.C. Circuit Court of Appeals partially upheld the District Court's decision that the Corps violated NEPA by failing to prepare an EIS and affirmed the vacatur of DAPL's easement, but reversed the lower court's injunction ordering Dakota Access to shut down and empty the pipeline of oil.

The Court of Appeals first considered whether the District Court abused its discretion in finding the Corps violated NEPA. Under the statute, consideration of a project's potentially significant impacts depends on its "context" (regional, locality) and "intensity" (severity of impact). In assessing a project's "intensity," NEPA's operative regulations set forth ten factors that should be considered—triggering any one of the ten requires preparation of an EIS. Here, the Corps' easement grant concerned whether the "degree to which the effects on the quality of the human environment are likely to be highly controversial."

'Highly Controversial' Agency Decisions and the *National Parks* Decision

Per the District Court's separate opinion in *National Parks Conservation Association v. Semonite*, an agency's decision is "highly controversial" if "a substantial dispute exists as to the size, nature, or effect of the major federal action." For example, extensive and repeated criticism from specialized government agencies and organizations suggests a "substantial dispute" exists. In such circumstances, the lead agency must resolve, rather than merely confront, outside criticism; failure to do so will leave a project's effects uncertain, and thus warrant preparation of an EIS.

The Corps and Dakota Access argued that the District Court applied the wrong legal standard by relying on *National Parks*. The Corps also contended that it adequately addressed comments that had rendered its easement decision "highly controversial." The D.C. Circuit rejected both claims. Contrary to the Corps' summation, the appellate court properly looked at only at whether the agency succeeded in resolving the controversies raised. Here, the Corps' responses to comments failed to materially address and resolve serious objections to its analysis. The appellate court also rejected the Corps' position that opposition to the project only came from Tribes and their consultants, rather than from disinterested public officials. Because Tribes are sovereign nations that possess stewardship responsibility over the natural resources implicated by the Corps' analysis, they are not merely "quintessential…not-in-my-backyard neighbors." Tribes' unique role and their "government-to-government" relationship with the United States demands that their criticism be treated with appropriate solitude. For these reasons, the District Court appropriately applied the legal standard set forth in *National Parks*.

Unresolved Scientific Controversies

Under this lens, the appellate court considered whether four disputed facets of the Corps' analysis involved unresolved scientific controversies that triggered NEPA's "highly controversial" factor: 1) DAPL's leak detection system; 2) DAPL's operator safety record; 3) impacts of winter conditions on oil spills; and 4) the worst-case-discharge estimate used in DAPL's spill-impact analysis.

As to each issue, the Tribes had submitted credible expert reports that raised concerns about the efficacy of the Corps' analysis. Agreeing with the District Court, the D.C. Circuit found that the Corps had failed to adequately respond to the Tribes' criticism in a manner that actually resolved the controversies raised. For example, by claiming that leaks would "eventually be found," the Corps failed to adequately address the Tribes' expert report that found the detection system DAPL intended to use would not detect "pinhole leaks," which can result in substantial oil spills. Similarly, the appellate court found that the Corps failed to validly explain why it relied on general pipeline safety data, rather than DAPL's operatory safety record, which Tribes noted was significantly worse than industry averages. As such, the court held that several serious scientific disputes existed, thereby rendering the effects of the Corps' easement decision "highly controversial."

The Remedy and Requisite Findings

As to the remedy, the D.C. Circuit agreed that the District Court properly ordered the Corps to prepare an EIS. The appellate court rejected the appellants' contention that the District Court abused its discre-

tion in vacating the pipeline's easement in the interim. The Court of Appeals explained that a *vacatur* was appropriate because the Corps was unlikely to resolve the controversies on remand, having failed to do so on previous remands without *vacatur*. The District Court also properly considered the disruptive nature of the *vacatur*, but reasoned that vacating the easement did not yield the same effect as shutting down the project.

While vacating the easement was proper, the D.C. Circuit found that the District Court failed to make requisite findings to issue an injunction ordering the pipeline be shut down and emptied of oil. The District Court's characterization that an injunction is simply a "consequence of vacatur" subverts Supreme Court precedent requiring an injunction to issue under the traditional test. Here, vacating the easement did not necessitate the shutdown of the pipeline. For these reasons, the appellate court affirmed the order vacating DAPL's easement and directing the Corps to prepare an EIS, but reversed the District Court's order directing the pipeline be shutdown.

Conclusion and Implications

Notwithstanding the controversial nature of the Dakota Access Pipeline, coupled with a new administration, the D.C. Circuit's opinion reaffirms an agency's responsibilities under NEPA, particularly when a project is "highly controversial." An agency that receives significant criticism from highly specialized agencies and interested parties must do more than simply responding. Rather, the agency must make concerted efforts to resolve the controversies by amply explaining its decision and the information upon which it relied. The court's opinion also reaffirms the appropriate remedy for a NEPA violation—an order directing preparation of an EIS and, in certain cases, a *vacatur* of the agency's decision. However, a *vacatur* does not automatically necessitate injunctive relief. For an injunction to issue, the court must employ the traditional test to determine whether such relief is appropriate. The D.C. Circuit's opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/3FEF9DA2426A1904852586690056212 1/$file/20-5197-1881818.pdf
(Bridget McDonald)

DISTRICT COURT IN GEORGIA DISMISSES CLEAN WATER ACT CITIZEN SUIT FOR FAILURE TO SHOW AN ENVIRONMENTAL INJURY TO ESTABLISH STANDING

Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC, ___F.Supp.3d___, Case No. 2:2019-cv-00050 (S.D. Ga. Jan. 29, 2021).

The U.S. District Court for the Southern District of Georgia recently granted a motion to dismiss a Clean Water Act citizen suit. The ruling held that plaintiffs failed to establish Article III standing due to the failure to plead a specific injury-in-fact.

Factual and Procedural Background

On February 20, 2013, the U.S. Army Corps of Engineers (Corps) authorized defendant Sea Island, LLC to fill 0.49 acres of wetland (Subject Wetland) located on St. Simons Island, Georgia. Plaintiffs, the Glynn Environmental Coalition (GEC) and Center for a Sustainable Coast (CSC), initially filed suit against Sea Island on April 17, 2019 for alleged violations of the federal Clean Water Act (CWA), alleging that defendant failed to construct a commercial structure on the Subject Wetland in violation of their Nationwide Permit. Plaintiffs further alleged that defendant was required to obtain an individual § 401 certification and § 404 permit to fill the Subject Wetland, requiring a more stringent permitting process. By filling the Subject Wetland, plaintiffs contended that defendant harmed the surrounding vegetation and habitat as well as the aesthetic and recreational uses of Dunbar Creek, a body of water downstream of the Subject Wetland.

The U.S. District Court found that the plaintiffs failed to show standing and granted leave to amend their complaint. On March 23, 2020, the plaintiffs

filed an amended complaint, joining Jane Fraser (Fraser) as a plaintiff to the suit. According to the amended complaint, Fraser is a member of GEC and CSC who owns interests in real property in the immediate vicinity of the Subject Wetland. Fraser further alleged that she recreates in and enjoys the aesthetics of the Subject Wetland. In response to the amended complaint, defendant moved to dismiss the amended complaint for lack of standing and failure to state a claim.

The District Court's Decision

To establish standing under Article III of the United States Constitution, plaintiffs have the burden to show: 1) they have suffered an "injury in fact" that is actual or imminent; 2) the injury is traceable to the challenged action of the defendant; and 3) it is likely that the injury will be redressed by a favorable decision. An organization has standing to sue on behalf of its members when: 1) one of its members would have standing to sue individually; 2) the member's interests at stake in the suit are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit. Plaintiffs asserted standing was proper in this action because Fraser had standing to sue in her individual capacity and GEC and CSC had associational standing.

Issue of Individual Standing

Based on the elements of Article III standing and organizational standing, the District Court reasoned that the motion to dismiss turned on whether Fraser had individual standing to sue. As a result, the District Court analyzed whether Fraser suffered an "injury in fact." In the amended complaint, Fraser alleged that she suffered environmental and procedural injuries.

With regards to environmental injuries, the plaintiffs generally alleged that the filling in of the Subject Wetland allowed non-point source pollutants to make their way into Dunbar Creek. The District Court found that plaintiffs offered no specific factual allegations that the fill of the Subject Wetland has caused pollution in Dunbar Creek. While there may be a possibility of an increase in pollution, the mere possibility is not an "actual or imminent" injury. Fraser also claimed that she owns real property that adjoins and is located in the immediate vicinity of the Subject Wetland. She asserted that filling the Subject Wetland disturbed habitats surrounding the Subject Wetland, impacting her real property. Again, the District Court found these allegations to be conjectural and conclusory because Fraser do not allege that any specific disturbance to her property interest had or will occur. The allegations merely speculated the type of harm generally associated with the fill of wetlands.

While generalized harm will not support standing alone, environmental plaintiffs can adequately allege injury in fact when the aver that they use the affect area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. Fraser alleged that she regularly recreated in and enjoyed the aesthetics of the Subject Wetlands. The District Court found that Fraser failed to allege a specific recreation, distinguishing Fraser's allegations from the body of case law providing for a recreational injury. Fraser also alleged that while driving, she noticed a significant difference in the water quality in Dunbar Creek. However, the District Court again found this allegation to be broad and conclusory because Fraser failed to establish how this allegation led to an environmental injury suffered by Fraser.

Conclusion and Implications

As a result, Fraser failed to show an environmental injury sufficient to confer standing. Because the District Court found that Fraser failed to show standing, GEC and CSC did not have organization standing, and the motion to dismiss was granted.

It remains to be seen if this matter will be appealed. However, this case highlights the importance of pleading with particularity in order to avoid a motion to dismiss. For environmental cases, potential plaintiffs should take care to avoid merely stating conclusory statements in allegations in order to establish a specific injury.
(Geremy Holm, Rebecca Andrews)

Eastern Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108