Volume 25, Number 5
March 2021

# WESTERN WATER LAW & POLICY REPORTER™

CONTENTS



*Continued on next page*



WWW.ARGENTCO.COM

ARGENT COMMUNICATIONS GROUP

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) $875.00. 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, Gala Argent; Vice-President and Secretary, Robert M. Schuster.



WWL

## WESTERN WATER NEWS

# U.S. BUREAU OF RECLAMATION REPORT SUMMARIZES FACTORS IMPACTING WATER RESOURCES IN THE WESTERN 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 increase between 4-6 degrees Fahrenheit in the 2070s. 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)

## LEGISLATIVE DEVELOPMENTS

# 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)

## CALIFORNIA LEGISLATION INTRODUCED TO ADDRESS THE IMPACTS OF AGRICULTURAL LAND FALLOWING UNDER THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT

California Assembly Bill 252 (AB 252 or Bill) was recently introduced by Assemblymembers Robert Rivas (D-Hollister) and Rudy Salas (D-Bakersfield). The Bill declares that the Sustainable Groundwater Management Act of 2014 (SGMA) is imperative to the state's future in managing water resources, but that implementation of SGMA will result in significant changes to the rural landscape, placing additional burdens on rural communities and economies. The Bill proposes that coordinating "land repurposing" at a regional scale presents an opportunity to maximize use and multiple benefits of converted lands. AB 252 seeks to create a pilot program, designed to sunset in 2032, to incentivize multibenefit land repurposing.

### Background

SGMA is designed to achieve long-term sustainability of the state's groundwater basins by as early as 2040. The law promotes local sustainable groundwater management by Groundwater Sustainability Agencies (GSAs), which are required to prepare, adopt and implement Groundwater Sustainability Plans (GSPs) that are designed to achieve groundwater sustainability over a 20-year period. A failure or refusal to establish a GSA or adopt and implement an effective GSP can result in direct management by California's State Water Resources Control Board.

Under the Sustainable Groundwater Management Act GSAs are authorized to manage groundwater through various means, including regulating, limiting, or suspending groundwater extractions. GSAs are also authorized to implement voluntary fallowing programs for agricultural lands or validate existing fallowing programs. Some experts have estimated that 500,000 to 750,000 acres of agricultural land could be

taken out of production to balance water supply and demand and to meet SGMA mandates.

### Assembly Bill 252

AB 252 would require the California Department of Conservation (DOC) to establish and administer a program named the "Multibenefit Land Repurposing Incentive Program" (Program). The Program would provide grants to GSAs, counties, or agencies or nongovernmental organizations designated by GSAs or counties, to develop and implement local programs supporting or facilitating reduced use of groundwater and multibenefit land repurposing at the basin scale.

AB 252 defines "multibenefit" as providing more than one benefit including:

> . . .improving water quality, increasing water supplies or water supply reliability, reducing groundwater demand, preserving, enhancing, or restoring wildlife habitat, improving flood protection, improving soil health and carbon storage, supporting jobs, local communities, and economies, including disadvantaged communities, and preserving or enhancing recreational opportunities.

"Land repurposing" is defined in the Bill as converting previously irrigated agricultural land to new uses through any of the following methods:

- Restoring upland habitat;
- Creating pollinator habitat;
- Restoring floodplains;
- Creating dedicated wildlife-friendly recharge areas;
- Dryland farming or planting cover crops;
- Switching from irrigated agriculture to rangeland; or
- Creating parks or community recreation areas.

If enacted, the Bill would establish procedures the DOC to administer the Program and would require the DOC to create Program implementation and funding eligibility guidelines. Program funds would only be available for local programs that satisfy certain criteria, including: 1) limiting implementation to critically overdrafted basins; that special consideration be given to providing incentive payments to farms and ranches of 500 acres or less and to socially disadvantaged farmers and ranchers, as defined in § 512 of the Food and Agricultural Code; and 2) that input must be received from local stakeholders and community members during the development of the local program.

Applicants would need to satisfy a number of requirements including agreeing to use funds received from the DOC pursuant to the Program for land repurposing to implement one or more of the following purposes:

- Habitat restoration;
- Maintaining habitat;
- Converting to rangelands;
- Constructing wildlife-friendly groundwater recharge facilities;
- Restoring floodplains;
- Planting cover crops; or
- Dust control measures.

To facilitate accountability and oversight, the Bill would require Program participants to prepare and submit annual reports on the implementation of local programs and use of Program funds.

### Conclusion and Implications

SGMA has already begun to dramatically reshape groundwater management in California. Many agricultural water users and GSAs are grappling with the challenges of meeting SGMA requirements. Groundwater Sustainability Plans for critically overdrafted basins are currently under review by the California Department of Water Resources. Those GSPs contain a wide range of projects and management actions pertaining to agricultural water uses within their local groundwater basins, including controversial fallowing programs that have already ignited litigation. Assembly Bill 252 was referred to committee on January 28, 2021, and is expected to be heard in the Spring. If it becomes law, the Bill could potentially provide some relief and flexibility to GSAs and landowners in implementing GSPs. To track the progress of AB 252, go to the state's legislative website at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB252

(Gabriel J. Pitassi, Derek R. Hoffman)

# NEW MEXICO LEGISLATURE GRAPPLES WITH PLACING RESTRICTIONS ON THE STATE'S WATER-USE LEASING ACT

The 55th New Mexico Legislative Session convened in mid-January for its extended 60-day session. In the midst of ongoing extreme drought conditions, proposed water legislation was at the forefront of the 2021 Legislative Session with the introduction of Senate Bill 16 and House Bill 30. Both bills seek to place comparable restrictions on New Mexico Water-Use Leasing Act, NMSA 1978, § 72-6-1 *et seq*. New Mexico's Water-Use Leasing Act is aimed at allocating water in water-low times by allowing owners of valid water rights to lease all or part of the water use due them for an initial term not to exceed ten years. Id.

## Background

Many states require use of produced water for the fracking process in the production of oil and gas. The term "fracking" is the shortened term describing the process of injecting water under pressure into wells to break loose the oil from underground sandstone structures so that more oil can be recovered. The most common method of fracking is drilling approximately a mile vertically into the ground and then gradually turning to the horizontal and drilling several thousands of feet further. Water is produced in the normal processes of extraction of the oil from groundwater reserves, and once it has been used in the normal processes of oil recover, it is generally not usable for other purposes such as irrigation of for consumption.

Once the fracking processes start, the question is raised why should oil companies not be required to re-use the already contaminated water? The contaminated water is the water that is removed from the well and otherwise extracted to obtain access to the oil itself. This remaining water is commonly known as "produced water."

New Mexico's Southeastern Permian Basin includes substantial oil and gas reserves. The available supplies have dramatically increased in recent years. There are also substantial water rights in the Permian Basin owned by private water users. Some are surface water users and some own groundwater, such as the Pecos Valley Artesian Conservancy District, south of Roswell, New Mexico. The surface water users contend that the surface water diverted from the Pecos River for other purposes such as agriculture or potash refining should be made available for fracking. The production of oil and gas provides substantial revenues for the State of New Mexico education, wages, taxes, and related business sales. Oil and gas revenues in New Mexico amount to much more than agriculture-based revenue. Pecos River surface water users further argue the surface waters are a renewable resource, and therefore, there is no net loss the State of New Mexico from leasing that water to oil and gas producers rather that growing agricultural products.

However, proponents pressing the use of produced water contend that the use of native water for the generation of oil and gas is a waste of water because it degrades water quality making is unusable for other purposes.

## The Debate at Hand in the Legislature

The foregoing debate arose this past month in the New Mexico Legislature. For decades, New Mexico State Engineers have allowed persons who lease water for agriculture and for use in oil and gas fields to place the water to immediate beneficial use. *See*, NMSA, § 72-6-3. On its face, the statutory provision states that the water under lese can be put to use in an "immediate" manner, or at a later date. The Office of the New Mexico State Engineer has interpreted this to mean that if the State Engineer conducts a complete and conservative analysis and concludes the water rights are valid and there is no impairment affecting other water users for the period of the lease, then the State Engineer can issue a preliminary approval letter allowing immediate use of the water. Protestants of such leases insist that these preliminary approvals are illegal because the New Mexico Water Leasing statute and procedural due process entitles them to a hearing before the State Engineer allows the use of the water under a lease. These parties will receive a hearing, however, in the interim, they are obligated to rely on the State Engineer's findings of no impairment.

## Eliminating the Possibility of the Immediate Use of Water—Even if the Water Rights Are Deemed Valid

Senate Bill 16 and House Bill 30 seek to address the forgoing debate. Each Bill proposes to eliminate

the possibility of the immediate use of water even if the Office of the New Mexico State Engineer has concluded the water rights are valid, completed an impairment analysis and found no impairment. The statutory language is straightforward. It precludes the State Engineer from allowing the use of the water until after a full hearing on the merits. Oil and gas producers and others argue that they have relied upon the provisions of the New Mexico Water-Use Leasing Act for years and that prohibiting the use of the water would bring oil and gas production to a halt because the producers would have to wait for up to a year, perhaps more, to complete the hearing process prior to commencing production. Irrigators contend that to survive, they have to trade their water rights with others who may not be growing a crop in a water short year and they reply on the immediate approvals under the Water-Use Leasing Act to make these transfers possible. Irrigators point out that if they had to wait the typical two-year period, their crops would die and they would lose the value of their farms. Others argue that the Water-Use Leasing Act's preliminary approvals are essential for the protection of endangered species as the species would potentially be extirpated by the hearing date.

Supporters of the proposed legislation contend that while the water user is being allowed to divert surface water, other water users are being impaired. Even if they were not, they argue they should have been allowed the right to a hearing prior to the State Engineer's decision to allow the interim pumping. In support, they reference the multiple cases permitting the right to a hearing prior to the loss of the use of property, such as wages (*Sniadach v. Family Finance Corp.*, 395 U.S. 397 (1969), welfare benefits (*Goldberg v. Kelly*, 397 U.S. 254 (1970), and personal property (*Fuentes v. Shevin*, 407 U.S. 67 (1972). The Office of the New Mexico State Engineer references the broad discretion provided under its Active Resource Management Program (AWRM), 19.25.13.1-50, NMAC (12/30/2004) and *Tri-State Generation & Transmission Ass'n. v. D'Antonio*, 289 P.3d 1232 (N.M. 2012), which confirmed the State Engineer's right to establish priorities among water users.

## Conclusion and Implications

There are clear equities on both sides of these arguments, but the central question is the extent of trust in the staff at the New Mexico Office of the State Engineer. The State Engineer points out that none of the preliminary approvals have been overruled by a court. However, opponents point to examples where New Mexico entities were allowed to move water rights above acequias based upon preliminary approvals under New Mexico's Water-Use Leasing Act. The focus of this latest legislative debate is an attempt to force the use of produced water by eliminating preliminary approvals. However, if the New Mexico State Engineer lacks legal authority to issue preliminary approvals, then proponents of the proposed legislation argue the approvals must cease. Hopefully, the parties can reach a compromise that places limits upon preliminary approvals under the Water-Use Leasing Act without eliminating all such approvals, which would result in an adverse impact on irrigators and proponents of in-stream flows. The link to information about Senate Bill 16 is available here: https://nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=16&year=21. The link online to House Bill 30 is available here: https://nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=30&year=21

(Christina J. Bruff)

## REGULATORY DEVELOPMENTS

# CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS NEW ORDER ESTABLISHING STATEWIDE WASTE DISCHARGE REQUIREMENTS FOR WINERIES

On January 20, 2021, the State Water Resources Control Board (SWRCB or Board) voted unanimously in favor of the adoption of a resolution that will establish waste discharge requirements for wineries throughout the state. With the adoption of this new Winery Order, the SWRCB is seeking to protect California's surface and ground water sources while streamlining and improving permitting consistency, but the Order has so far seen a mixed reception by industry members.

### Statewide General Waste Discharge Requirements for Wineries

Up until the adoption of the Winery Order, waste discharge requirements and permitting has been handled by Regional Water Quality Control Boards (RWQCBs) on a case-by-case basis. Because of this, many large wineries spanning multiple counties had been subject to the permitting and discharge requirements of multiple RWQCBs.

Furthermore, the utilization of the regional water boards in handling these matters led to most wineries remaining outside the purview of the Board's permitting requirements. Of California's roughly 3,600 bonded wineries, only 589 wineries held permits from RWQCBs to protect water quality.

The new system—adopted in the Board's Winery Order—would implement statewide rules for waste discharge from wineries. Specifically, the SWRCB developed general Waste Discharge Requirements for winery process water for wineries and similar facilities that generate winery waste and discharge it to land for reuse or disposal.

### A Tiered System by Size

Classifying wineries by size, the Winery Order uses a tiered system which exempts wineries generating less than 10,000 gallons of processed water discharge annually and imposes the most stringent requirements on wineries producing over 1,000,000 gallons annually.

Among the requirements introduced by the Winery Order, winery operators can expect to see reporting requirements established or increased for process water discharges and new requirements for water treatment systems and ponds. Winery operators will also see caps to the amount of processed water they can dispose of through land applications and subsurface disposal. Additionally, the state's largest wineries—those producing more than 1,000,000 gallons in processed water discharges annually—will also be subject to groundwater monitoring requirements.

Over 2,000 wineries that apply winery process water to land for reuse and disposal will be affected by the new regulation once implementation by regional water boards begins, which will likely occur sometime after the state board adopts a fee schedule for the statewide order at its meeting scheduled for March 9.

### Conclusion and Implications

The State Water Resources Control Board has given wineries a three-year window for permitting under the Winery Order, with an additional five-years to come into compliance, meaning the ultimate aim of this new system won't fully come to fruition for nearly a decade.

With that said, critics on both sides have issues with the Order at the outset. On one side of the aisle, smaller winery owners have expressed concerns that the implementation of more strict discharge and reporting requirements will impose a financial burden these wineries are not in the position to endure—especially in a time like now where wineries are seeing increased challenges from both Covid-19 and California's increasingly common wildfires.

On the other hand, the Order has been attacked as not going far enough. The California Coastkeeper Alliance, in a recent news release on the Winery Order, expressed their concerns with the Order's limited groundwater monitoring and absence of stricter spill prevention requirements. Just last January, for example, Sonoma County had one of the worst spills in

state history when a local winery's tank failed, spilling nearly 97,000 gallons of wine into Reiman Creek, a tributary to the Russian River.

For better or worse, the new statewide system will at least serve as a step in the for seeking to protect California's groundwater and surface water resources.

The final Resolution and Winery Order documents will be available soon on the State Water Resources Control Board's website at: https://www.waterboards.ca.gov/water_issues/programs/waste_discharge_requirements/winery_order.html
(Wesley A. Miliband, Kristopher T. Strouse)

## 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 formalizing 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

# UPDATE ON *ECOLOGY V. ACQUAVELLA*: 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 Res-

ervation 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 Supreme 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

# U.S. DISTRICT COURT 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)

## CALIFORNIA COURT OF APPEAL FINDS CALIFORNIA WATER BOARDS APPROPRIATELY CONSIDERED ECONOMIC FACTORS WHEN ISSUING CLEAN WATER ACT MS4 PERMIT

*City of Duarte v. State Water Resources Control Board*,
___Cal.App.5th___, Case No. G058539 (4th Dist. Jan. 28, 2021).

The California Court of Appeal for the Fourth District recently upheld a federal Clean Water Act (CWA) municipal stormwater discharge permit issued to 86 entities in Los Angeles County, reversing a lower court decision. The court of appeal determined that the State Water Resources Control Board (SWRCB or Board) and Los Angeles Regional Water Quality Control Board (RWQCB) acted within their discretion when analyzing the economic considerations of issuing the permit.

### Factual and Procedural Background

In 2012, the RWQCB for the Los Angeles Region, issued a Clean Water Act, National Pollutant Discharge Elimination System (NPDES) discharge permit to 86 municipal entities that own or operate municipal separate storm sewer systems (MS4s) in Los Angeles County, including the City of Duarte (City). In June 2015, the SWRCB upheld the permit with modifications (Permit). The Board's decision upholding the Permit noted that noted that, while all MS4 discharges must reduce pollutants to the maximum extent practicable, as required by federal law, strict compliance with water quality standards by imposing numeric effluent limitations is at the discretion of the permitting agency.

In July 2015, the City challenged the Permit, alleging that the Regional and State Boards (collectively: Water Boards) abused their discretion by imposing numeric effluent limitations in excess of federal law requirements without considering factors, including "economic considerations," set forth in the California Water Code. At trial, the City argued that the numeric effluent limits in the Permit were more stringent than what was required under the CWA, and therefore the Water Boards were required to consider the Water Code factors. The trial court agreed, finding that the Permit's numeric effluent limitations

were more stringent than required by federal law and concluding that the Water Boards did not comply with the Water Code in adopting the numeric effluent limitations. Specifically, the trial court found that the Water Boards failed to sufficiently take into account the economic considerations factor before issuing the Permit because it did not include any reference to or estimate of the possible cost or range of costs of compliance with the numeric effluent limitations. Under the trial court's reasoning, economic consideration without some kind of estimate of cost was insufficient. The trial court thus issued a writ of mandate and judgment ordering the Water Boards to set aside all Permit provisions pertaining to numeric effluent limits and to reconsider the Permit. The Water Boards appealed.

## The Court of Appeal's Decision

The parties to the appeal agreed that the issue on appeal was two-fold: 1) did the numeric effluent limitations in the Permit require more that federal law required? 2) If so, did the Water Boards sufficiently consider the economic considerations factor required by the Water Code?

The Court of Appeal first determined that it did not need to rule on whether the Permit was more or less stringent than federal law. The court assumed, without deciding, that the numeric effluent limitations were more stringent than federal law.

### Consideration of Economic Factors

The court next considered whether the Water Boards sufficiently considered the economic considerations factor as required under the Water Code. As an initial matter, the court of appeal observed that while a regional board must consider the cost of compliance when setting effluent limitations in a wastewater discharge permit, case law does not define "economic considerations" or describe how an agency may comply with statutory requirements. Rather, the Water Boards may consider and comply with the Water Code requirements within the bounds of their discretion. The court thus examined whether the Water Boards acted within their discretion.

In this case, the court focused on what facts the Water Boards considered in the process of issuing the Permit. The court noted that the Permit included findings analyzing the economic considerations of both regulating and not regulating MS4 discharges. In particular, the court found that the Water Boards explained that the cost of regulating the MS4 discharges was highly variable among the permittees, provided ranges and cost data averages, considered how much more the permittees' costs could be under the Permit's terms, identified potential funding sources to cover such costs, and determined that lack of regulation would increase health-related expenses. Based on this review, the court concluded that the Water Boards had explained their reasoning and that analysis of these economic considerations was well within their discretion. The court thus found that the Regional Board developed an economic analysis of the Permit's requirements that satisfied statutory requirements.

### Cost Consideration for Each Permittee

The Court of Appeal also disagreed with the City's argument that the Water Boards abused their discretion as a matter of law by failing to analyze cost considerations for each permittee in more detail. On this point, the court noted that there was no precedent supporting the City's contention. The court further stated that, with regard to implementation of total maximum daily load requirements, estimated costs of several types of compliance methods and a cost comparison of capital costs and cost of operation and maintenance is adequate.

### Covid-19 Economic Impacts

Finally, the Court of Appeal addressed an argument by *amici curiae* that the economic situation caused by the Covid-19 pandemic establishes the need for the Water Boards to consider the cost to permittees. While acknowledging the exceptional financial downturn suffered throughout the country as a result of the Covid-19 pandemic, the court nonetheless rejected this argument. Specifically, the court concluded that the Water Boards are required to take into account economic considerations and not merely costs of compliance. The court further opined that later developments in the global economy is not relevant to the question of whether the Water Boards abused their discretion in 2012 and 2015. Having concluded that the Water Boards complied with their statutory obligations with regard to the Permit, the court of appeal reversed the trial court's ruling.

### Conclusion and Implications

This opinion is significant in that it offers some direction for analyzing the economic considerations factor for permit requirements that exceed federal law, which was previously undefined in case law. Under the court's approach, a court looks at what facts were considered in issuing a permit to determine whether the Water Boards acted within their discretion. While the opinion provides an example of the extent of this discretion, the court was careful to caution that every case will differ as to what economic considerations must be evaluated and that such discretion is not unlimited and remains subject to judicial review. See, https://www.courts.ca.gov/opinions/documents/G058539.PDF
(Heraclio Pimentel, Rebecca Andrews)

## 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 alleged 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*, 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)

# OREGON COURT OF APPEALS RULES THAT KLAMATH BASIN GENERAL STREAM ADJUDICATION IS THE ONLY VIABLE AVENUE FOR JUDICIAL REVIEW OF WATER RIGHTS ISSUES WITHIN THE BASIN

*TPC, LLC v. Oregon Water Resources Department*, 308 Or.App. 177 (Or.App. Dec. 30, 2020).

The Oregon Court of Appeals ruled that water rights holders could not independently secure judicial review, outside the statutory process prescribed for general stream adjudications, of administrative orders curtailing their rights issued in response to calls the Klamath Tribes made on the basis of senior water rights determinations that the Oregon Water Resources Department (OWRD or Department) had reached in the ongoing Klamath Basin Adjudication.

## Background

OWRD initiated the process for a general stream adjudication of the Klamath River Basin (Basin) in 1975 by issuing notices that it would begin an investigation for a proper determination of claims to water rights within the Basin. The administrative portion of that process culminated some forty years later when, in 2013, the Department issued Findings of Fact and an Order of Determination resolving the adjudication of some 730 surface water right claims within the Basin (KBA Order).

Included within the scope of the KBA Order is Claim 33, at and near the headwaters of the Williamson River with a priority date of 1864, as well as various claims of the Klamath Tribes and United States, both for instream flows in the river and its tributaries and to maintain minimum water levels in Klamath Marsh, all of which have a priority date of "time immemorial" pursuant to the Tribes' 1864 Treaty. 308 Or.App. at 181-82. In 2005, to settle contests to Claim 33 that the United States and Klamath Tribes had brought in the Klamath Basin Adjudication, both of those parties, Claimants (the Hydes), and OWRD entered into an agreement (Hyde Agreement). In formulating the KBA Order, OWRD incorporated portions of the Hyde Agreement into its terms, but notably, declined to incorporate its "No-Call Provision." That provision expressly provides that the Hydes's ability to use their water right may not be curtailed in favor of any senior water right held by the United States or Klamath Tribes and that neither of those parties may place a call on Williamson River water that would result in the curtailment of such use, so long as the Hydes's exercise of their water right maintains a flow of at least one-half of the total flow in the river upstream of their property. *Id.* at 182-83. The OWRD Adjudicator demurred from incorporating the Hyde Agreement's No-Call Provision into the KBA Order based on his determination that it is "not pertinent to the determination of a water right claim." *Id.* at 184-85.

Pursuant to the Oregon General Stream Adjudication statute, ORS Chapter 539 (GSA Statute), many claimants filed exceptions to the KBA Order, including the Hydes, Klamath Tribes and United States. *Id.* at 182, All of these exceptions are currently undergoing judicial review in the Klamath County Circuit Court per the process laid out in the GSA Statute. *Id.* Notwithstanding these exceptions, because the GSA Statute provides that OWRD is to enforce its administrative determinations made in the course of a general stream adjudication pending judicial review and resolution of such determinations, the District is implementing its KBA Order, including only those provisions of the Hyde Agreement that were expressly adopted into that order, which, as noted above, does not include the No-Call Provision. *Id.* at 190-91 (citing ORS § 539.170).

As a result, in 2016 and 2017 the Klamath Tribes placed a call on the OWRD watermaster in reliance on the KBA Order to enforce their senior water rights in the upper Williamson River and Klamath Marsh given that water levels in those years were below or projected to fall below what was necessary to fulfill the Tribes' claims as determined in that order. *Id.* at 185. These calls in turn led to OWRD orders that curtailed the use of the Hydes's water right. The Hydes responded by filing petitions seeking judicial review of those curtailment orders in Marion County Circuit Court pursuant to the Oregon Administrative Procedure Act. ORS §§ 183.484 & 536.075.

## The Circuit Court Ruling

In addressing the Hydes's petitions for review, the first and most salient issue before the Marion County Circuit Court was whether it lacked subject-matter

jurisdiction over them and to review the curtailment orders because the issues they raise fall within the exclusive subject-matter jurisdiction of the KBA under the GSA Statute. The court found it did have jurisdiction under the Oregon Administrative Procedure Act (APA) to review the curtailment orders. 308 Or.App. at 187-88. On the merits, the court then ruled that the curtailment orders violated the terms of the Hyde Agreement and, on that basis, remanded them to the Department with instructions to comply with the agreement. *Id.* at 188. Both OWRD and the Tribes appealed from the court's judgment, and the United States was granted leave to participate as an *amicus curiae* in the appeal. *Id.* at 182.

### The Court of Appeals' Opinion

Appropriately, as did the Circuit Court, the Oregon Court of Appeals commenced its analysis by examining the issue of subject-matter jurisdiction. *Id.* at 188-91. In this regard it first noted that all of the parties properly acknowledged that, pursuant to the GSA Statute, the Klamath County Circuit Court has exclusive jurisdiction to perform judicial review of the KBA Order, but differed as to whether review of the curtailment orders for compliance with the separate Hyde Agreement entered into incidental to that adjudication fell within the ambit of that review. *Id.* at 192. The Appeals Court explained that it viewed its task as drawing a jurisdictional line:

> . . .between the exclusive review process for stream adjudications under ORS chapter 539 and review of orders in other than contested cases under ORS 536.075, such as the curtailment orders in this case. *Id.* at 193.

### Analogizing to Land Use Statutes

To help inform its analysis, the court first looked to a rough analogue it found exists in the context of Oregon Land Use Law statutes that differentiate between matters to be determined exclusively by the Land Use Board of Appeals (LUBA) and those that otherwise fall within the jurisdiction of the county Circuit Courts of the state. *Id.* at 192-94.

The Appeals Court then trained its focus on "the allegations and requested relief in the [Hydes's] petitions as viewed through the lens of Oregon's water law." *Id.* at 194. In doing so, the court framed the core claim in those petitions as asserting that OWRD was legally precluded from issuing the challenged curtailment orders to satisfy the United States' and Klamath Tribes' water rights as determined by the Department in its KBA order, but rather was required to enforce such rights in accordance with the No-Call Provision of the Hyde Agreement, to which OWRD was also a party. *Id.* at 197. Upon examining that claim and the relief the Hydes sought, the Appeals Court determined that they were inextricably bound up with the KBA Order because they put the Marion County Circuit Court in a position where it was called upon to decide whether the Hyde Agreement placed a limitation on the Klamath Tribes' KBA-determined water right claims. *Id.* As a result, the Appeals Court determined that the Hydes's petitions sought to have the Marion County Circuit Court "interject itself into the water right determination process under ORS chapter 539," which runs afoul of the exclusive jurisdiction the GSA Statute confers on the court specifically prescribed to review such determinations, the Klamath County Circuit Court. *Id.*

### Issue of Enforcement of the Hyde Agreement as a 'Rotation Agreement'

Having resolved the gravamen of the matter regarding whether the Hydes's petitions fell within the exclusive jurisdiction of the Klamath County Circuit Court under the GSA Statute, the Appeals Court turned to the subsidiary issue of whether the Hyde Agreement nevertheless should be separately enforced as a "rotation agreement." *Id.* at 198-99. These agreements, authorized by ORS § 540.150, allow "water users owning lands to which are attached water rights [to] rotate in the use of the supply to which they may be collectively entitled," and OWRD is then called upon to regulate the distribution of water in accordance with their terms. The Appeals Court made short shrift of this argument, concluding that, regardless of whether the Hyde Agreement qualifies as a Rotation Agreement under the statute, it is not segregable from the KBA Order, and therefore, any efforts to enforce it outside the exclusive judicial review process prescribed by the GSA Statute in Klamath County Circuit is improper as a jurisdictional matter. *Id.*

Finally, circling back to where it began its analysis, the Appeals Court was influenced by precedent arising in the context of Oregon's Land-use statutes

holding that attempts to seek review of claims in Oregon Circuit Courts that raise issues regarding the validity of a specific land use proposal that is still pending in the land-use decision and review process were subject to dismissal because they fell exclusively within LUBA's jurisdiction. *Id.* at 200 (citing *Flight Shop, Inc. v. Leading Edge Aviation, Inc.*, 277 Or.App. 638 (2016)).

### Conclusion and Implications

In summary, the Appeals Court held that the Hydes' petitions asking the Marion County Circuit Court to independently enforce the No-Call Provision of the Hyde Agreement effectively reflect an attempted end run around the ongoing KBA proceedings in the Klamath County Circuit Court in which exceptions to the KBA Order, including those related to Claim 33, are undergoing judicial review.

Although approximately two-thirds of Oregon waters are adjudicated, the Klamath Basin is the only major basin to undergo an adjudication under the GSA Statute in around the last half-century. As a result, the Appeals Court's jurisdictional ruling can be viewed as largely discrete and limited to its particular facts. At the same time, it may make water rights holders even more leery of having their rights determined as part of a general stream adjudication, given that it establishes rather definitively that they will have no recourse to secure review of whatever determinations OWRD makes in its administrative orders other than the singular process prescribed by the GSA Statute, which the KBA proceedings have shown can prove to be rather protracted and cumbersome.

The Appeals Court opinion is at the following link: https://ojd.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/27943/download#page=1&zoom=auto
(Stephen Odell)

*Western 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