Volume 31, Number 7
April 2021

CALIFORNIA WATER™
LAW & POLICY Reporter

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT FEDERAL DECISIONS

RECENT CALIFORNIA DECISIONS

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/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

FEATURE ARTICLE

THE PITFALLS OF WATER RIGHTS REPORTING TO THE STATE WATER RESOURCES CONTROL BOARD

By Jeanne Zolezzi

If you divert and use water from a surface water source, California law requires you to report your diversion and use to the State Water Resources Control Board, Division of Water Rights (SWRCB or State Board). While this has historically been a requirement for most water rights, it was seldom complied with, as there was no penalty for noncompliance. That all changed in 2015 with the passage of Senate Bill (SB) 88, which required that all water right holders who have previously diverted or intend to divert more than ten acre-feet per year (riparian and pre-1914 claims included), or are authorized to divert more than ten acre-feet per year under a permit, license, or registration, measure and report the water they divert. Compliance with these requirements is now a condition of every registration, permit, or license, and the new law imposes civil fines in an amount not to exceed $500 per violation, per day.

The SWRCB argues that having a Statement on file is beneficial for several reasons.

The information collected from the Statements helps the State Board to protect the rights of existing and known diverters, and to evaluate whether there is a reasonable likelihood that water is available for appropriation for new applications.

If the State Board has a record of an active Statement with your contact information, the law requires the State Board to notify you about applications to appropriate water that might affect your supply.

Water use reported on Statements and in reports required under the appropriation process will also help the SWRCB to ensure the proper allocation of the state's water resources.

If the water user meets the following three criteria: 1) diversions and filings are in compliance with the Water Code; 2) diversions occur under a valid water right; and 3) Statements includes accurate monthly diversion amounts, then Statements create official documentation of compliance with water right laws. (*See:* https://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/)

Some of this is actually true; however, reporting water use also provides public information about your water right that can be used against you in the future.

Annual Reporting Requirements

Water use reports must be filed on an annual basis, and must document diversions made during the prior calendar year. Water use reports for permits, licenses, registrations and certificates must be filed annually before April 1, while Statements of Water Diversion and Use must be filed annually before July 1.

Monthly Reporting Requirements

During the 2011-2015 drought, the SWRCB also adopted emergency regulations that required California's largest water suppliers—collectively representing the state's 400 largest water suppliers that serve approximately 90 percent of the state's population—to track and report monthly water usage. In May 2018, the Governor signed into law water efficiency legislation that authorized the State Board to issue permanent mandatory monthly water use requirements on a non-emergency basis. In dry years the State Board may require monthly or more frequent reporting from all water users.

Forfeiture Concerns

Aside from avoiding fines, the best reason to file annual reports is to document your water use. The Water Code provides that if a water right holder fails

to beneficially use all or a portion of a water right for a period of five years, "that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water." Water Code § 1241. Under the Water Code, forfeiture of a water right and the reversion of that water to the public is not automatic—the SWRCB has the discretion to find that the holder of a water right has valid justification for its nonuse of water; therefore, the State Board may choose not to revoke the right. As stated in Order WR 81-17:

> A right to appropriate water obtained from this board or its predecessor does not expire merely from the passage of the prescribed time. A permit or license remains in effect until revoked in the manner prescribed by the Water Code.

Historically however, the SWRCB has stated that Water Code § 1241 applies only to an appropriative right acquired after December 19, 1914. The application of forfeiture to pre-1914 water rights is unsettled. The State Board has opined that the five-year period applicable to forfeiture of pre-1914 rights occurs, by operation of law, stating in Order 2002-10:

> Based on the plain language of Water Code section 1240 and former Civil Code section 1411, interpreted in Smith v. Hawkins, forfeiture occurs by operation of law. . . . Accordingly, a court can confirm whether forfeiture has occurred, but a court does not effectuate forfeiture.

The SWRCB's historical opinion, therefore, is that forfeiture of pre-1914 rights occurs automatically upon non-use, while post-1914 rights continue to be valid until the State Board actually determines there has been a forfeiture. In several Orders the SWRCB has confirmed that forfeiture of a post-1914 water right pursuant to Water Code § 1241 is discretionary with the State Board.

Two recent appellate court opinions, however, have held that in order to establish forfeiture of a pre-1914 right the challenger must prove that the water user failed to use some portion of its water entitlement over the five-year period immediately prior to the plaintiff's challenge. In *Millview County Water District v. State Water Resources Control Board*, 229 Cal.App.4th 879 (2014), the Court of Appeal found that what is required for forfeiture is not merely nonuse by the rights holder but also "the presence of a competing claim" by a rival diverter who is prepared to use or is using the water.

While the law governing forfeiture is far from certain, continued reporting of water use provides a water user with a defense to forfeiture.

Defenses to Forfeiture Requiring Documentation

There are also several exceptions to forfeiture for non-use that depend upon accurate water right reporting.

Water Code Section 1011

Water Code § 1010(a) provides that a right to the use of water will not be lost due to the cessation in use of water under an existing right as the result of water conservation efforts. However, Section 1010(a) also provides:

> The board may require that any user of water who seeks the benefit of this section file periodic reports describing the extent and amount of the reduction in water use due to water conservation efforts. To the maximum extent possible, the reports shall be made a part of other reports required by the board relating to the use of water. Failure to file the reports shall deprive the user of water of the benefits of this section.

Since 1980 the Reports of Licensee forms have included the following specific questions related to Water Code § 1011:

> 21. Describe any water conservation efforts you may have started:
>
> 30. If credit toward beneficial use of water under this license for water not used due to a conservation effort is claimed under Water Code Section 1011, please show the amount of water conserved (acre feet or mg):

The 2020 statement of water diversion and use form has added questions regarding conservation efforts. For example, the 2020 form states that if you want to credit the amount of conserved water to-

wards the water use authorized under a water right, you have to report monthly conservation amounts in acre-feet. Additionally, the 2020 form now asks for a description of the baseline water use and time period that provides the basis for how amounts conserved were determined, the methodology and associated calculations used, and lastly, whether the conserved water was applied to another beneficial use.

In order to take advantage of the exemption to forfeiture, the water use must properly document its use of reclaimed water. In Order 99-12 the State Board discussed these reporting requirements with regarding to a forfeiture challenge against Natomas Central Mutual Water Company:

> DWR and the State Water Contractors argued that Natomas failed to comply with the reporting requirements that are contained in section 1011. The Report of Licensee forms originally submitted by Natomas did not report its conservation. Natomas later amended its Report of Licensee forms to reflect information concerning its conservation efforts. The SWRCB finds that, under the circumstances of this case, the reporting requirement has been satisfied by the amended reports and the substantial documentation in the record confirming that Natomas reduced its diversions by approximately 17,200 ac-ft due to deliberate conservation efforts. At p. 6.

The SWRCB noted the importance of accurate reporting:

> It also merits note that Natomas's failure to report conservation efforts in a timely manner called into question the credibility of its claim to have conserved water. Late reporting raises the question whether the nonuse of water was in fact due to conservation efforts, or if the water user is attempting to characterize nonuse that occurred for some other reason as water conservation in order to obtain the protections of section 1011. Conversely, reporting water conservation in a timely manner, while insufficient in itself to prove water conservation, would tend to support a claim that the nonuse of water was the result of water conservation efforts. For this reason, it is in every water user's best interest to report water conservation efforts in a timely manner. In this case, however, Natomas has overcome the credibility problem posed by its failure to timely report its conservation efforts by submitting convincing evidence in a public hearing that it has in fact conserved water due to water conservation efforts. Id. at pp. 6-7.

If a water user has not properly documented its use of reclaimed water, it will have a heavy burden to overcome its failure to properly complete the Report of Licensee forms. However, a water user should put this information together and 1) file amended forms, and 2) make sure that all reports filed in the future include information required by this section.

Water Code Section 1010

Water Code § 1010(a) provides that a right to the use of water will not be lost due to the cessation in use of water under an existing right as the result of the use of reclaimed or polluted water. Again, however, § 1010(a) also provides:

> . . .the board may require any user of water who seeks the benefit of this section to file periodic reports describing the extent and amount of the use of recycled. . .water.

Since 1980 the Reports of Licensee forms have included the following specific questions related to Water Code § 1010:

> 27. Are you now or have you been using reclaimed water from a wastewater treatment facility or water polluted by waste to a degree which unreasonably affects such water for other beneficial sues? YES [ ] NO [ ]
>
> 28. Are you now or have you been reclaiming or reusing any of the water appropriated under this right? YES [ ] NO [ ]
>
> 29. What is present availability or current potential for using reclaimed water from a wastewater treatment plant or polluted water in place of the appropriated water to satisfy all or part of your water needs?

The language in Order WR 99-012 applies equally to meeting the requirements of § 1010, and the importance of: 1) documenting water conserved and 2) filing that information with the State Board on the reports of licensee. Without completion of these sections, a water user will have a heavy burden to overcome its failure to properly complete the Report of Licensee forms. Again, a water user should put this information together and: 1) file amended forms, and 2) make sure that all Reports of Licensee filed in the future include information required by this section.

Delta Reporting

Water use reporting, and measurement, in the Sacramento-San Joaquin Delta is inherently problematic: much of the water that is diverted is drained back into Delta waterways, and measuring both diversions and drainage can be costly. Some landowners and managers in the Sacramento-San Joaquin Delta have significant technologic and hydrologic barriers to the application of conventional measuring devices, data collection equipment, and telemetry specified in SB 88. To address these issues, in the fall of 2016, the State Board Office of the Delta Watermaster initiated sponsorship of the Delta Measurement Experimentation Consortium to develop a path toward the implementation of SB 88. The Freshwater Trust has developed a Remote Sensing-Based Measurement Method that would fulfill reporting requirements through the development and validation of a new measurement method for determining water diversion in the Delta. This method employs participant-supplied crop, irrigation, and management data; local weather data; and remotely-sensed spatial data, and applies multiple analyses for the calculation of water diversion for each program participant.

Duplicative Reporting

There is a serious problem with duplicative reporting, described by the Delta Watermaster as follows:

> Because most pre-1914 claims have also never been adjudicated, many diverters claim that parcels patented before December 19, 1914 and continuously irrigated since then have "overlapping" pre-1914 water rights and riparian water rights. Because annual diversion and use under riparian and pre-1914 claims are both reported in the same "Supplemental Statement" form, there is no double counting of this water. The issue of double counting the diversion and use of the same water—often from the same points of diversion (PODs), for the same use, on the same POUs—arises because the same water is reported both in Reports of Licensee and in one or more Supplemental Statements. (Consensus Strategy for Avoiding Duplicative Reporting of Water Diversion and Use in the Delta February 1, 2021)

While some water users with overlapping rights do not indicate that fact on their reports, many water right holders do, thus putting the State Board on notice of the duplication. The law provides that an existing valid riparian or appropriative right will be neither strengthened nor impaired by a permit to appropriate water issued to the owner of such right. *Barr v. Branstetter,* 42 Cal.App. 725, 184 (1919). The SWRCB suggests that an application to appropriate water may be filed by such owner, however, in the following instances: 1) to initiate a right to additional unused water where water is available for further appropriation in excess of that covered by the existing right; and 2) to establish a new right to water already in use by applicant where the validity of the existing right has not been adjudicated or is in doubt.

California Code of Regulations, Title 23 § 731, requires that an applicant for a permit list all claims to existing rights for the use of all or part of the water sought by the application. A permit, if issued, will limit the water to be appropriated so that existing rights, combined with the permit will not yield a right to use an unreasonable quantity of water. In 1985 the State Board made some observations about the interrelationship between pre and post-1914 water rights:

> To prevent the establishment of water rights in excess of available water and in excess of the reasonable needs of the user, diverted water is credited to the senior right to the limit of that right. See Water Code §1201; Cal.Const. Art. X, Section 2. Only diversion in excess of the senior right can be credited to the junior right. Order 85-4 at p. 5.

Therefore, the fact that a water right holder files an application for a permit with the State Board does

not itself have an adverse effect on its prior rights. State Board Standard Permit Term 21B is to be used:

> . . .[i]f applicant claims an existing right (e.g., riparian, pre-1914, or prescriptive) for the same place of use but the right has not been adjudicated or otherwise finally determined.
>
> The term states in relevant part:
>
> During the season specified in this permit, the total quantity and rate of water diverted and used under this permit and under permittee's claimed existing right for the place of use specified in the permit shall not exceed the quantity and rate of diversion and use specified in this permit. If the permittee's claimed existing right is quantified at some later date as a result of an adjudication or other legally binding proceeding, the quantity and rate of diversion and use allowed under this permit shall be the net of the face value of the permit less the amounts of water available under the existing right.

Therefore, the SWRCB should be able to identify overlapping rights, determine which right is senior, and then follow its own rules to determine total water use. However, the State Board is apparently not able to utilize that approach, and instead has developed the following preferred approach to address duplicative reporting in the Delta:

> •Water users in the Delta agree to voluntarily report water diversion and use under the most senior claim before reporting diversion under any available more junior right (usually a license).
>
> •If all water diversions for use within a place of use can be accommodated within the senior claim (usually a riparian or pre-1914 claim), then licensees will report a nominal '1' acre-foot diverted for the junior licensed right covering the same place and purpose of use.
>
> •Water users individually, voluntarily and without waiving any rights, agree to adopt this method for Reports of Licensee due on or before April 1, 2021 and for Supplemental Statements of Diversion and Use due on or before July 1, 2021. Reporting under this method will require coordination between license holders and constituent senior water right claimants.
>
> •Following submission of reports of water diversion and use for calendar year 2020, this consensus approach to avoiding duplicative reporting will be reevaluated based on experience.
>
> •If this method of reporting proves beneficial in addressing the problem of duplicative reporting, the Delta water user community, in association with the Office of the Delta Watermaster and the Division of Water Rights, may seek State Water Resources Control Board action to assure that reporting under this method over multiple years will not be construed as evidence of abandonment or forfeiture of licensed rights.

There are problems with this proposed solution. First, it is inherently risky for a water right user to not report water users under a right, or to report a nominal "1" acre foot of diversion. For the reasons discussed above, forfeiture of water rights is a real issue. While this can be accommodated for a one-year trial period, it will not be valid as a long-term solution to the duplicative reporting problem because water users will not risk forfeiture of a water right simply to make the State Board's job easier. There has been discussion of the State Board adopting an order stating that it will not pursue forfeiture against a water right holder that uses this approach to prevent duplicative reporting; however, if this is not done property, and quickly, the SWRCB's preferred method will not be voluntarily followed by water users. Second, applying this proposed solution to duplicative reporting only in the Delta does not solve the instances of this same issue throughout the state.

Water Reporting and Curtailments

The major shortcoming of the SWRCB's water right curtailments in 2015 was that they were based upon inaccurate data and assumption about water availability and water use. Improved water reporting was intended to remedy that shortcoming, but there is no evidence that has occurred. The State Board recently issued its Water Rights Drought Effort Review, in which it reported on a series of interviews

with water users and managers to gather input on actions during the last drought. Some key points in the WARDER report reveal that despite the State Board's efforts to gather more data, not much has improved regarding real time water user and forecasting. Some take-aways from the report:

- Participants consistently indicated the need to improve the data systems used to collect, manage, and share water right and reporting data. Technology should be leveraged to simplify, clarify, and improve the quality of electronic data submissions. Participants unanimously recommend the Division collaborate with stakeholders to develop transparent statewide methods to estimate and display water supply conditions, define environmental flow needs, and estimate water availability in near real-time.

- The Division generally does not verify the validity of riparian and pre-1914 appropriative water right claims (or accuracy of claimed quantities, among other details). As a result, the volume of water that may be diverted pursuant to these most senior claims can be highly uncertain. This uncertainty can make estimating water availability and implementing the priority system challenging, particularly in watersheds where diversions made pursuant to riparian and pre-1914 claims represent a large portion of demand.

- There are significant challenges with the Division's data management. Most of the state's water right records still only exist in paper format and can only be accessed by retrieving the file from storage at the State Water Board's headquarters in Sacramento, and as a result staff and the public cannot easily access water right files or information. In addition, RMS and eWRIMS do not have features found in many modern data management tools that would prevent submittal of clearly erroneous or poor-quality data.

- The Division relies on annual diversion and use data reported by water right holders to develop estimates of water demand. These reports include the volume and rate of water diverted each month, and additional information may be required based on the type of right, permit conditions, or beneficial use of water. Reporting and interpreting these data can be challenging because right-holders may divert water from a single location for multiple types of rights or sources and a single water right may use multiple points of diversion.

Conclusion and Implications

The practice and procedure of water use reporting is far from perfect. The State Water Resources Control Board has requested annual, and in some cases monthly, data to be reported, yet it does not have the staff to make meaningful use of this data. The legal process for determining water rights is uncertain, and water right holders should take all action necessary to preserve their rights, including duplicative reporting. Nevertheless, reporting water use to the State Board is a requirement of law and a condition of all water use. Water users should take advantage of that requirement to document their water use, including protecting against forfeiture by accurate reporting use of reclaimed water and conservation efforts.

Jeanne M. Zolezzi is a Partner at the law firm of Herum | Crabtree | Suntag. Jeanne is a recognized expert in California Water Rights. This expertise is acknowledged by her leadership role in the American Bar Association and Association of California Water Agencies. Her practice includes counseling, administrative matters and water rights litigation. For nearly 30 years she has represented public agency and private clients in the acquisition and confirmation of water rights. She handles state and federal litigation against the State Water Resources Control Board and the U.S. Bureau of Reclamation.

Jeanne has appeared as amicus curie before the Nevada Supreme Court, arguing that the public trust doctrine should be affirmatively applied to Nevada water rights adjudication matters and has represented parties in water right adjudications, both surface water and groundwater, in both northern and southern California.

CALIFORNIA WATER NEWS

NEW RESEARCH STUDY ATTEMPTS TO QUANTIFY THE COST OF CLIMATE CHANGE AND FLOOD RISK IN THE UNITED STATES—FOR THE INDIVIDUAL HOMEOWNER

A new study, undertaken by First Street Foundation has been released in which the foundation attempts to quantify just how financially detrimental the ongoing risk of flooding—due to climate change—is within the United States.

Background

First Street Foundation (First Street) is a not-for-profit research and technology group which focuses on "America's Flood Risk." First Street finds that the financial toll of flood damage from climate change is and would continue to be enormous, and further finds that while:

> Institutional real estate investors and insurers have been able to privately purchase flood risk information, the same cannot be said for the majority of Americans.

First Street goes on to detail the problem as follows:

> Flooding is the most expensive natural disaster in the United States, costing over $1 trillion in in inflation adjusted dollars since 1980. . . .the majority of Americans have relied on Federal Emergency Management Agency (FEMA) maps to understand their [flood] risk. However, FEMA maps were not created to define risk for individual properties. This leaves millions of households and property owners unaware of their true risk.

In addressing the issue, First Street's mission statement is to fill the need for:

> . . .accurate, property-level publicly available flood risk information. . . via a team of leading modelers, researchers and data scientists to develop the first comprehensive, publicly available flood risk model. . .[which is]. . .peer reviewed. . . .(https://firststreet.org/mission/)

Study: 'Defining America's Flood Risk'

In the new research study, issued by First Street on February 22, 2021, it analyzes the "underestimated flood risk to properties throughout the United States." First Street emphasizes that while the insurance industry, for example, has access to risk assessment, the private real property owner generally does not. That theme is key to First Street: providing the tools for informed decision-making at the individual property owner level. It also suggests that at the city or county level, land use planning to assess risk from flood can benefit from its Study.

Methodology

First Street applies its "Flood Model" and marries that information to an "analysis of the depth-damage functions from the U.S. Army Corps of Engineers" in order to estimate "Average Annual Loss" for residential properties throughout the United States and "into the climate-adjusted future." The Flood Model of 2020 Methodology is available online at: https://firststreet.org/flood-lab/published-research/flood-model-methodology_overview/

The analysis referred to above, is to a scientific abstract done in the fall of 2020, entitled "Assessing Property Level Economic Impacts of Climate in the US, New Insights and Evident from a Comprehensive Flood Risk Assessment Tool" and is available online at: https://www.mdpi.com/2225-1154/8/10/116

Expanded Mapping of Economic Risk Associated with Flood Risk

First Street has found that a "great deal of flood risks exists outside of Federal Emergency Management Agency's designated Special Flood Hazard Areas (SFHAs)." This current First Street Study provides a:

> . . .vastly expanded mapping of economic risk associated with flood risk, and demonstrates the extent to which information asymmetries on flood risk contribute to financial market asymmetries, specifically in the form of under-estimations of financial and personal risk to property owners. (https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/)

What the Study Revealed

The Study found that for the long-term impact of climate change, there were nearly 4.3 million homes (defined as 1-4 units) across the U.S. with *substantial* flood risk that would result in financial loss. The Study also found that if these homes were to insure against flood risk, the estimated risk through FEMA's National Flood Insurance Program (NFIP), the rates would need to increase 4.5 times to cover the estimated risk in 2021, and 7.2 times to cover the growing risk by 2051.

First Street found that the average estimated loss for the 5.7 million properties that have *any* flood risk and an expected loss from that flooding represents $3,548 per home. Using climate modelling projection for 30 years hence, yields a 67 percent increase in the average estimated loss per household. (*Ibid*)

Conclusion and Implications

The First Street Study contains a lot of fascinating and useful information including interactive models. In the end, the Study hopes to provide accurate and comprehensive estimated, to the general public, of annual flood damage in order to improve risk management and "cost-effective hazard mitigation planning." Emphasis is on the Study's availability to individual property owners, renters and communities—think city planners—to make informed decisions about risk reduction. For more information, with a wealth of information and inner statistical and methodology links, *see:* https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/
(Robert Schuster)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA LEGISLATION INTRODUCED TO IMPROVE DROUGHT RESILIENCY IN SMALL AND RURAL COMMUNITIES

In response to California's recent record-breaking drought and current statewide drought conditions, California Senate Majority Leader Bob Hertzberg (D-18) recently introduced Senate Bill 552 (SB 552), the Drought Resilient Communities Act. SB 552 aims to improve drought resilience for small and rural communities throughout California, which are often disproportionately impacted by drought conditions.

Background

California's historic 2012-2016 drought left many small and rural communities vulnerable to water shortages, as well as water quality and access issues. 2020 was also reported as one of the driest years on record. As of the date of this writing, drought monitoring reports indicate that approximately 85 percent of California is currently experiencing at least moderate drought conditions. Climatologists predict that droughts will continue to grow in severity and frequency.

Under existing law, small water suppliers and rural communities are typically not subject to mandates imposed during water shortage conditions. The California Department of Water Resources (DWR), in consultation with the State Water Resources Control Board (SWRCB) and other relevant state and local agencies and stakeholders, was charged with identifying small water suppliers and rural communities that may be at risk of drought and water shortage vulnerability. DWR was tasked to propose to Governor Newsom and the California Legislature, by January 1, 2020, recommendations and guidance relating to the development and implementation of countywide drought and water shortage contingency plans to address the planning needs of small water suppliers and rural communities.

Senate Bill 552—Drought Planning for Small Water Suppliers

In introducing SB 552, the Senate Majority Leader stated:

> Access to water is a fundamental human right… every Californian should be able turn on their tap and expect clean water to flow—it is unacceptable this was not the case for thousands of Californians during the last drought.

SB 552 aims to protect vulnerable communities from extended periods of water shortages by making changes to local drought and water shortage contingency plan requirements, and by enhancing coordination between local and state governments, small water suppliers, and rural communities.

SB 552 specifically requires that small water suppliers and certain non-transient, non-community water systems (primarily schools), are required, no later than December 31, 2022, to develop and submit to the SWRCB Division of Drinking Water an Emergency Response Plan that includes specified drought-planning elements.

These water systems must report specified water supply condition information to the SWRCB through its Electronic Annual Reporting System, and to include water system risk and water shortage information in the water systems' Consumer Confidence Reports.

The SWRCB, in partnership with the DWR, and no later than December 31, 2022, must conduct an assessment of drought and emergency water shortage resiliency measures for small water systems and certain non-transient, non-community water systems (primarily schools).

Counties are required to establish a standing county drought and water shortage task force to facilitate drought and water shortage preparedness for state small water systems and domestic wells within their jurisdictions. Those actions must address potential drought and water shortage risk and propose interim and long-term solutions as an element in an existing county plan.

DWR is required to take specified actions to support implementation of the recommendations from each county's drought advisory group. The bill would

require DWR to form a standing inter-agency drought and water shortage task force to facilitate proactive planning and coordinating, for pre-drought planning and post-drought emergency response, which shall consist of various representatives, including representatives from local governments.

As of the date of this writing, SB 552 has been referred to the Senate Natural Resources and Water Committee, where it awaits committee review. Once it makes its way out of committee, it must be approved on the Senate and Assembly floors, before proceeding to the Governor for signature.

Conclusion and Implications

There were many lessons learned from California's most recent drought. SB 552 finds that small and rural communities faced significant water quality, water supply and access issues, due in part to inadequate planning and regulations. The proposed legislation seeks to mitigate those issues, create increased involvement and accountability for local water suppliers and increase the state's oversight role. The bill can be tracked online at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB552 (Chris Carrillo, Derek R. Hoffman)

BILL INTRODUCED IN THE CALIFORNIA SENATE SEEKS TO FUND WATER INFRASTRUCTURE REPAIRS

In February 2021, State Senator Melissa Hurtado introduced the State Water Resiliency Act of 2021 (Act), which seeks to address repair needs for several California water infrastructure projects. Specifically, the bill seeks to create the Canal Conveyance Capacity Restoration Fund in order to fund repairs to the Friant-Kern Canal, Delta-Mendota Canal, San Luis Canal, and California Aqueduct. [State Water Resiliency Act of 2021, SB 559, California Legislature, 2021–2022 Regular Session (Cal. 2021).]

Background

The Friant-Kern Canal is an aqueduct managed by the U.S. Bureau of Reclamation to convey water to augment irrigation capacity in Fresno, Tulare, and Kern counties. Currently, a 33-mile stretch of the canal has lost about half of its original capacity to convey water due to subsidence, which is the sinking of earth due to groundwater extraction.

During the last legislative session, State Senator Hurtado authored Senate Bill 559 (SB 559), which would have invested $400 million to restore the Friant-Kern Canal to its designated capacity. The bill was amended in the State Assembly to require the California Department of Water Resources to report on a proposal for the state to pay a share of the cost to fix the canal. After spending a year in the State Legislature, SB 559 was approved on a bipartisan basis, but was ultimately vetoed by Governor Gavin Newsom on September 28, 2020. In a communication released alongside the veto, Governor Newsom recognized the need for added infrastructure repair to California's major canal systems, but called for holistic funding for a variety of projects instead of the single project focus as presented in the bill.

Not long after Governor Newsom's veto, the federal government authorized nearly $5 million to study and begin pre-construction work on repairing the Friant-Kern Canal, seeking to significantly augment irrigation capacity in Fresno, Tulare, and Kern counties. In addition to this study, on December 21, 2020, Congress passed the "Consolidated Appropriations Act of 2021" (HR 133) which provides funding for several California water projects. Under HR 133, $206 million in federal funding is being set aside for repairs for the Friant-Kern Canal, covering almost half of the costs of the estimated repairs.

In February 2021, State Senator Hurtado introduced the Act, seeking to address Governor Newsom's response and to provide funding for repairs for several California water infrastructure projects.

The Act in More Detail

The Act identifies four major water conveyance infrastructures, specifically the Friant-Kern Canal, Delta-Mendota Canal, San Luis Canal, and California Aqueduct. According to the bill, these four conveyance structures are among the state's main state and regional water conveyance infrastructure that delivers water for agricultural, municipal, and

industrial use, refuge water supplies, and groundwater recharge in the San Joaquin Valley and southern California. Subsidence has impacted the ability of state and regional water conveyance infrastructure to reliably deliver water to the San Joaquin Valley and southern California. In order to address the negative impacts caused by subsidence, these four conveyance structures need significant repairs.

The Act would create the Canal Conveyance Capacity Restoration Fund (Fund) to be established in the State Treasury and administered by the Department. All moneys deposited in the Fund would be required to be expended in support of subsidence repair costs, which includes environmental planning, permitting, design, and construction, and necessary road and bridge upgrades required to accommodate capacity improvements. Additionally, money expended from the Fund for each individual project specified in the bill cannot exceed one-third of the total cost of each individual project. The Act also provides a ceiling of $785,000,000 on the total amount expended from the Fund for all of the projects specified in the bill. The Act breaks down this total amount per project as follows:

- $308,000,000 for a grant to the Friant Water Authority to restore the capacity of the Friant-Kern Canal;

- $187,000,000 for a grant to the San Luis and Delta-Mendota Water Authority to restore the capacity of the Delta-Mendota Canal;

- $194,000,000 to restore the capacity of the San Luis Field Division of the California Aqueduct; and

- $96,000,000 to restore the capacity of the San Joaquin Division of the California Aqueduct.

Conclusion and Implications

It remains to be seen if the Act will be able to move forward. The bipartisan support for similar efforts in the last legislative session may provide some indication of how the Act will proceed. Given that the Act appears to address Governor Newsom's concerns, it is also possible that the legislation will receive his support. With the federal funds provided by HR 133, the additional funds provided by the Act may be able to substantially fund Friant-Kern Canal repairs as well as provide significant capital to move forward with other needed infrastructure repairs. SB 559 can be tracked online for progress at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB559
(Miles Krieger, Geremy Holm, Steve Anderson)

.

REGULATORY DEVELOPMENTS

STATE WATER RESOURCES CONTROL BOARD SETS INITIAL HEARING REGARDING COMPETING KINGS RIVER WATER RIGHTS CLAIMS

The State Water Resources Control Board (SWRCB or Board) recently conducted a pre-hearing meeting regarding a request to revise the Kings River's fully appropriated stream status (Order WR 98-08). The meeting included reference to a proposal from Semitropic Water Storage District to move a portion of Kings River water south into Kern County for potential use for recharging the aquifer(s) underlying the Semitropic service area and irrigating agriculture. In response, the Kings River Water Association (KRWA) opposed the proposal, and three of its members, the Fresno Irrigation District, Alta Irrigation District, and Consolidated Irrigation District, also filed a joint water-right application and petition to revoke or revise the fully appropriated stream status for the Kings River. An initial hearing on the matter before the State Water Resources Control Board Office of Administrative Hearings has been set for June 2, 2021. While dispute centers on Semitropic's proposed project, resolution of the matter could have lasting effects on water issues across the southern Central Valley and beyond.

The Kings River Adjudication

At issue is a request by Semitropic Water Storage District (Semitropic) to divert Kings River floodwater that it asserts runs unclaimed to the ocean in certain year types. Semitropic's proposal, if approved, would convey that water 70 miles south to its Kern County agricultural district in order to help alleviate a groundwater deficit of roughly 120,000 - 220,000 acre-feet a year in the Kern Subbasin. In 2015, Semitropic initially sought to build a water storage facility to capture Kings River floodwater and planned to move the captured water south through the California Aqueduct to the existing Semitropic water bank. In preparation for implementation of this project, Semitropic paid $40 million for an easement on lands near Kettleman City as a location to construct its water capture facility.

The KRWA challenged Semitropic's right to divert the floodwater. In the dispute, Semitropic argues that the floodwater is going to waste; therefore, Semitropic is lawfully planning to develop new and utilize existing facilities to provide for increased groundwater banking and beneficial use of Kings River water in Kern and Kings Counties. However, Kings River water interests (primarily, Alta, Consolidated and Fresno irrigation districts) (Alta group) claim that floodwater is only available in extreme flood years and, in any event, those three agencies already have the right and plans to construct recharge basins to capture those flows upstream.

A Call for Order—The Alta Group's Petition

Semitropic and the Alta group, briefly, but unsuccessfully negotiated the sale of some floodwater to Semitropic. However, these negotiations broke down in 2017, leading the Alta group to file a joint water rights application, claiming that the Kings River has no excess water. Alta pointed to State Board Decision (D-1290) which determined that the Kings River is fully appropriated (meaning there is no surface water available for diversion). But, if the SWRCB were to decide in the future that there is excess water, Alta asserted that the right to divert excess water should be granted to the upstream irrigation districts to facilitate their compliance with the Sustainable Groundwater Management Act (SGMA) in Kings County area subbasins. The Alta group also asserted that Fresno, Kings and Tulare counties intend to construct additional groundwater recharge projects that would also lawfully utilize any excess river flows.

Request to Revise—Semitropic Petition and Complaint

Shortly after the water appropriation application was submitted by the Alta group, Semitropic filed its own application seeking the right to divert up to 1.6 million acre-feet of Kings River floodwater. In its application, Semitropic provided data obtained from the U.S. Geological Survey demonstrating that during periods of high flows, large quantities of Kings

River flows have historically not been beneficially used and instead flowed out of the KRWA service area(s). The petition also asks the Board to determine whether it is proper to revoke and/or revise the Fully Appropriated Stream System Declaration for the Kings River System in light of evidence that there is Kings River water available for appropriation. Additionally, Semitropic's petition seeks the right to divert any unappropriated Kings River water, if the SWRCB determines in the future that any river water is available.

Later, in 2018, Semitropic also filed a complaint with the Board claiming the KRWA had forfeited two of its river licenses by not using the associated water. In 1967, SWRCB Water Rights Decision D-1290 granted appropriative water right permits to the Kings River Association and its member units. In 1984, these permits were converted into two licenses (Tulare Lake Licenses), which authorized the KRWA to divert, store, and beneficially use Kings River water in the bed of Tulare Lake. The complaint alleges that the KRWA failed to abide by the terms and conditions of the Tulare Lake Licenses by consistently and repeatedly directing Kings River water to areas outside of the places of use and storage authorized by the licenses. Semitropic maintains that these diversions to outside areas, particularly into the James Bypass (a flood control channel that conveys water out of the Kings River Watershed), constitutes a forfeiture, abandonment, and failure to perfect the right to divert and use Kings River water under the Tulare Lake Licenses. Additionally, the complaint asserts that members of the Kings River Association cannot make full use of water available under the Tulare Lake licenses without either flooding nearby farmland or constructing new facilities for water storage.

Who Controls the Floodwater? Kings River Water Association Answer to Complaint

In 2019, the Kings River Water Association filed an answer to Semitropic's complaint, claiming Semitropic's forfeiture argument was factually and legally without merit. According to the answer, the Pine Flat Dam and Reservoir was constructed in 1944 for flood control and other purposes for the Kings River and Tulare Lake Basin. KRWA's answer avers that the U.S. Army Corps of Engineers (Corps), pursuant to the "Manual" (the "water control plan" for Pine Flat Dam and Reservoir, and the Kings River), manages flood control on the Kings River, specifically by mandating flood flow to the North Fork via the James Bypass, rather than Tulare Lake. The KRWA asserts that the claims in the Semitropic complaint are factually inaccurate because the Corps, acting pursuant to federal flood control law and the Manual, directed flood flows away from the Kings River and Tulare Lakebed, not the respondent Kings River agencies. Second, the KRWA argues Semitropic's claims are legally deficient because there can be no forfeiture of water rights where water was not available for diversion. The Association asserts that flood flows that were routed at the direction of the Corps were not "available for diversion" because federal flood control law is superior to state law, thus respondents had no legal authority to usurp the Corps' flood control powers.

Current Status

In May 2020, the SWRCB Office of Administrative Hearings determined there was reasonable cause to conduct a hearing on the question of whether the fully appropriated status of the Kings River System should be revoked or revised. In January 2021, Administrative Hearing Officer Nicole Kuenzi met with representatives of the KRWA, Semitropic, and others for a pre-hearing conference to hash out procedures and next steps. An initial hearing has been set for June 2, 2021.

Conclusion and Implications

The State Water Resources Control Board's ultimate resolution of the competing Kings River water rights applications, the potential water rights forfeiture issue, and the related question of whether the stream has been fully appropriated are likely to have implications for water issues in the southern Central Valley and, potentially, for related legal issues statewide.
(Megan Kilmer, Steve Anderson)

STATE WATER RESOURCES CONTROL BOARD RELEASES A REPORT: 'RECOMMENDATIONS FOR EFFECTIVE WATER RIGHTS RESPONSE TO CLIMATE CHANGE'

In February, the State Water Resources Control Board (SWRCB or State Water Board), Division of Water Rights released a report titled, "Recommendations for an Effective Water Rights Response to Climate Change" (Report). In the Report, board staff make recommendations for incorporating climate change into California water rights permitting policies, procedures, and methodologies.

Background

The State Water Resources Control Board administers California's body of water rights law, which is intended to ensure that California's water resources are put to beneficial use to the fullest extent to which they are capable in the interest of the people and for public welfare. (Cal. Const., art. X, § 2.) In California, any person or entity that seeks to take water from a lake, river, stream, or creek for beneficial use must have some type of water right. A party seeking to obtain an appropriative water right—a right to divert water for beneficial use—must file an application with the SWRCB for a water right permit. (Report at 6.)

A water right permit application must demonstrate a reasonable likelihood that unappropriated, or unclaimed, water is available to supply the applicant. (Water Code, § 1260 (k).) In order to make this showing, parties conduct water availability analyses that generally rely on historical data sets, including historic stream gage and precipitation data, to measure unimpaired stream flow against the demand of more senior diversions and instream needs. (Report at 5-7.)

Over the past several years, the state of California has increased its focus on actions to build resilience and meet water needs through the 21st century. In 2017, the board adopted Resolution No. 2017-0012 "Comprehensive Response to Climate Change," which directed its staff to embed climate change consideration into all programs and activities, including water availability analyses. (State Water Resources Control Board Resolution No. 2017-0012.) In 2020, California's Water Resilience Portfolio recommended incorporating climate change forecasts into water permitting processes. (Water Resilience Portfolio, Governor's Executive Order N-10-19, July 2020.) This Report comes in wake of the growing effort to build resilience, and provides recommendations for an effective response to climate change within California's existing water rights framework.

Recommendations for an Effective Water Rights Response to Climate Change

The Report begins with a broad overview of California's water rights system and permitting water availability analyses. The Report then summarizes projected climate change impacts on California's water resources, including how resources might be effected by a continued warming trend, greater precipitation volatility, earlier snowmelt, shifting of the timing and nature of runoff, and increased frequency of drought and flood events. The Report also identifies California's Fourth Climate Change Assessment as confirming that California's climate is changing rapidly, and that past conditions are no longer a reliable guide for future conditions. (*See,* California's Fourth Climate Change Assessment, 2018.)

The Report then discusses how climate change complicates water availability analyses. Specifically, permitting water availability analyses rely on historic data as the basis for estimating future water supply, yet climate science suggests past conditions are no longer a reliable guide for future conditions. The Report describes long-term shifts in hydrologic trends, changing runoff patterns, and amplified hydrologic extremes as making it increasingly difficult to predict future water supply based upon the observed historical record.

State Water Board Staff Recommendations

The Report concludes with a suite of State Water Board staff recommendations to make water rights permitting analyses more robust, and to support applicants in developing projects that will remain feasible in the future. Twelve in total, these recommendations include 1) leveraging existing climate change data in permitting water availability analyses, 2) including adaptive permit terms in new permits, 3) implementing tiered requirements for climate change analysis,

4) developing a fact sheet for water right applicants to incorporate climate change, 5) strengthening the minimum period of record requirement for streamflow data, 6) requiring more rigorous analytical methods to extrapolate data to similar geographic areas, 7) expanding the existing network of stream and precipitation gages, 8) reevaluating the existing instream flow metrics and criteria, 9) revising the Fully Appropriated Stream list, 10) preparing for and capitalizing on capturing flood flows and storing them underground, 11) planning for droughts, and 12) coordinating with other agencies and partners. Each recommendation could be implemented on a case-by-case basis, or through broad regulation.

The Report provides additional detail for each recommendation. For example, under the first recommendation, the State Water Board would require water availability analyses for new water right permits to account for the impacts of climate change—specifically projected changes to runoff patterns and hydrology—by requiring that applicants use existing climate change data to explore the potential impacts of climate change on their projects. Under the second recommendation, staff would develop climate change-related permit terms that are triggered by the occurrence of certain hydrologic conditions. For instance, an adaptive permit could restrict municipal and domestic beneficial uses to only human health and safety needs during declared drought emergencies.

Conclusion and Implications

SWRCB Division staff presented the report at the Board Meeting on February 16, 2021. All recommendations are preliminary and the State Water Board encourages stakeholder feedback. The Report notes that recommendations will require further exploration, possible regulatory changes, and additional staff resources to fully implement. The full text of the Water Rights Response to Climate Change Report can be found at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/climate_change/docs/water_rights_climate_change_report_feb2021.pdf (Holly E. Tokar, Meredith Nikkel)

STATE WATER RESOURCES CONTROL BOARD SEEKS STAKEHOLDER RECOMMENDATIONS FOR PROPOSED CHANGES TO DROUGHT ACTIONS

On the heels of a dry 2020 and continuing dry conditions, California water regulators are reassessing actions taken during the last drought as they anticipate how to more effectively manage the next one. After conducting interviews with individuals, urban water suppliers, irrigation districts, advocacy groups, non-governmental organizations, tribal governments, and others, the California State Water Resources Control Board, Division of Water Rights (SWRCB or State Water Board) recently released a Water Rights Drought Effort Review report (Warder Report). The Warder Report seeks recommendations on how to improve regulation of water use—and water rights—during dry years. Topics such as urban water conservation, drinking water supply, and funding for replacement water are not addressed and will likely be addressed in different reports.

Background

The years 2012 through 2014 were the driest years on record in California, and occurred during the drought that spanned from 2011 through 2016. Over 9,000 Notices of Water Unavailability (or curtailment notices), were issued from 2012 to 2016, which required either reduction or complete cessation of diversion of surface water. These notices impacted thousands of square miles of property and thousands of diverters, and were often provided with short notice to water users. The SWRCB also used emergency regulations to protect minimum instream flows. These actions not surprisingly drew significant opposition and reaction from water users, many of whom found that the short notice for curtailment meant that rights holders had limited ability to protest or to alter the State Water Board's determination by providing alternative data. The board also faced critical data limitations during the drought, including limited data for locally available water supplies, and limitations that initially rendered the board unable to collect yearly water use information from certain users. Data limitations contributed to communication and curtailment inefficiencies.

Warder Report Recommendations Regarding Previous Drought Actions and Possible Modifications for Future Drought Actions

Participants in the Warder Report identified previous drought actions and provided comments regarding actions that could improve drought management. Those comments were organized into four primary categories, including: Communication, Law and Policy, Data and Collaboration. A summary of the Warder Report comment and recommendations for each of those categories as summarized below.

Communication Recommendations

The SWRCB should communicate with water users earlier and more frequently in periods leading up to and during drought.

Communication quality should be improved by means of visual tools, graphics, and narratives regarding water availability estimates and reasoning for curtailment. Communications should also take into consideration the type of diverter receiving the communication.

In addition to improving communication quality and relationships, Participants recommended that the Board should communicate watershed conditions earlier and more thoroughly so that diverters could have time to anticipate and make adjustments.

Law and Policy Recommendations

Regulatory policies should be developed prior to the implementation of regulations, and SWRCB regulatory processes should involve stakeholders. Participants desired clear dry year procedures, which should be known well *before* times of drought.

More legal certainty and predictability regarding riparian and pre-1914 appropriative rights, including a uniform SWRCB validation process for pre-1914 and riparian claims. As for federal reserved rights, the Board should acknowledge and validate these rights as well.

With respect to the priority system, local area needs should be evaluated together with downstream needs, and participants suggested that the Board should spread shortages across junior upstream diverters.

The review and approval of water transfers and permitting processes should have greater efficiency and simplification, as well as shorter time frames. However, the SWRCB should not permit new water diversions without at least accounting for existing water rights.

Surface water and groundwater management should be integrated, treating them as a single resource. A statewide centralized water accounting system for water rights, SGMA, environmental flows, *etc*. should be developed, with databases and procedures that are unified across agencies.

Curtailment notices and emergency regulations should not be used as they create conflicts with the due process protections water right holders are entitled to and do not include stakeholder input. However, if used, participants suggested modifications including the following: the notices should be refined based on area; junior diverters should not be curtailed for water from a point of diversion that a senior could never access; and triggers for response actions should be included.

Data Recommendations

Diverters should annually report water use for each water right each year.

The State Water Board's system for collecting, managing, and sharing water right and reporting data should be simpler and clearer.

In collaboration with stakeholders, the SWRCB should develop statewide methods of estimating watershed initial supply and determining water demand.

Water availability for users and the environment should be determined.

Collaboration Recommendations

The State Water Board should partner with other tribal, state and federal agencies, NGOs, academia, and the regulated community to more effectively manage water rights system and bridge data, resource, and experience gaps.

State agencies should develop coordinated procedures and regulations for drought periods so that they can be more effective during the next drought.

Conclusion and Implications

California's recent dramatic drought remains fresh in the memories of many water users who endured those conditions. The recommendations in the Warder Report reflect significant time and effort dedicated to improving future responses to drought. The Warder

Report provides the State Water Resources Control Board with needed perspective and input from stakeholders who were at the receiving end of curtailment notices and emergency regulations during the last drought. With another multi-year drought possibly on the horizon (if not already occurring), the Warder Report provides the board with increased awareness of potential improvements needed to more efficiently and effectively manage droughts. At the same time, some of the recommendations are more aggressive and controversial than others and may draw opposition from water rights holders who perceive such recommendations to be similarly overreaching as the actions taken during the last drought.
(Gabriel J. Pitassi, Derek R. Hoffman)

LAWSUITS FILED OR PENDING

U.S. DISTRICT COURT PUSHES FEDERAL GOVERNMENT FOR SCHEDULE ON COMPLETING ENDANGERED SPECIES ACT REVIEW ON THE YUBA RIVER

The Yuba River is home to three fish species that are listed as either threatened or endangered under the federal Endangered Species Act (ESA). In 2016, Friends of the River brought an action in the U.S. District Court for the Eastern District of California against the National Marine Fisheries Service (NMFS) and the U.S. Army Corps of Engineers (Corps) to challenge the federal defendants' efforts to address impacts to those species in the operation of two federally owned dams on the Yuba River. On February 1, 2021, District Court Judge John A. Mendez ordered the federal defendants to commit to a timeline for taking action to address the impacts on the three species. The federal defendants subsequently announced a schedule extending through November 2021. [*Friends of the River v. National Marine Fisheries Service, et al.*, Case No. 2:16-cv-00818-JAM-EFB (E.D. Cal.).]

Background

The Yuba River, a major tributary of the Sacramento River, is a habitat for spring-run chinook salmon, steelhead, and green sturgeon. The spring-run chinook salmon and the steelhead are listed as threatened under the ESA, and the green sturgeon is listed as endangered. The Corps operates two dams on the Yuba River, Daguerre Point and Englebright dams. The dams were built in 1910 and 1941, respectively. Both dams were constructed for the purpose of capturing mining debris, which contain significant amounts of mercury. Unlike other federal dam projects, the two dams were not designed to generate hydroelectric power. But two privately owned hydroelectric facilities are located downstream of Englebright Dam. Each hydroelectric facility has an easement to operate on the Corps' land, and each facility operates pursuant to a Federal Energy Regulatory Commission (FERC) license. Several entities divert water at or near Daguerre Point Dam.

Section 7 of the ESA requires an agency taking certain actions to first consult with a "consulting agency"—here, NMFS—before taking any action that will jeopardize the existence of a threatened or endangered species. In 2009, such a consultation process began for Englebright and Daguerre Point dams. In 2012, NMFS issued a Biological Opinion regarding the Corps' operation of Daguerre Point dam, finding that the Corps' proposed operations would jeopardize the survival and recovery of the three listed fish species. NMFS' analysis was based in part on a finding that "agency action" by the Corps included the activities of the hydroelectric facilities near Daguerre Point dam.

In 2014, NMFS issued a new Biological Opinion finding of no jeopardy to the survival and recovery of the three listed species. At the same time, NMFS also issued a Letter of Concurrence agreeing with the Corps' assessment that the contemplated operations of Englebright Dam were not likely to have an adverse effect on the three listed species. The 2014 Biological Opinion and associated LOC reversed course from the 2012 Biological Opinion by finding that neither the independently operated hydroelectrical projects associated with Daguerre Point dam nor the diversion works associated with Englebright dams constituted "agency actions" subject to review under Section 7 of the ESA.

The 2016 Federal Lawsuit

In 2016, Friends of the River filed an action in the U.S. District Court for the Eastern District of California against NMFS and the Corps on the grounds that the 2014 Biological Opinion and Letter of Concurrence were issued in violation of the Administrative Procedure Act (APA) and the ESA. Among other grounds, Friends of the River asserted that NMFS acted arbitrarily and capriciously by finding that the hydroelectrical facilities and diversion works were not "agency actions" that required analysis in the 2014 Biological Opinion and LOC. In February 2018, Judge Mendez denied Friends of the River's motion for summary judgment and granted summary judg-

ment in favor of the federal defendants. The Ninth Circuit Court of Appeals reversed Judge Mendez' order, finding that NMFS' decision to adopt the 2014 Biological Opinion was arbitrary and capricious. The Ninth Circuit remanded to the District Court and ordered NMFS provide a more detailed explanation of why it reversed its position from the 2021 Biological Opinion that the hydroelectrical facilities and diversion works were not "agency actions."

District Court Orders Additional Information from Federal Defendants

On remand, in November 2020, Judge Mendez clarified that NMFS could either provide a reasoned explanation for its changed position or undertake an entirely new agency action. Judge Mendez refused the request by Friends of the River to impose a deadline for NMFS to take action. Pursuant to the District Court's order on remand, the parties submitted a joint status report on January 29, 2021. The federal defendants stated in the joint status report that they had hired a third-party contractor to review and analyze the available data to assist the federal defendants in making a decision whether to provide a reasoned explanation for the changed position or to reinitiate consultation. The federal defendants did not provide a date or a timeline for when such a decision would occur.

On February 1, 2021, Judge Mendez ordered the federal defendants to clarify within the next ten days whether and when it would either provide a more reasoned explanation for the disputed findings in the 2014 Biological Opinion or reinitiate consultation.

In a press release, Friends of the River touted the order as:

> . . .critical of [NMFS'] continued delay in making a decision that could seal the fate of the Yuba River's threatened fish species.

Friends of the River also indicated optimism that, with the new Biden administration, NMFS and the Corps will take on a more active role in managing the Yuba River.

On February 11, 2021, the federal defendants filed a supplemental status report reiterating their statement from the earlier status report that they had not yet made a decision on reinitiation and that they had hired a third-party contractor to assist in their review of the issue. The federal defendants further specified that they expected to make a decision by October 2021 for Englebright dam and November 2021 for Daguerre Point Dam.

Conclusion and Implications

After over a decade since initiating the consultation process for Englebright and Daguerre Point dams, the U.S. District Court is pressing the federal defendants to complete the process or undertake a new agency action. Friends of the River has expressed optimism with the change in federal administration. However, the federal defendants are not expected to take further action until the fall of this year. (Brian Hamilton, Meredith Nikkel)

U.S. EPA DISMISSES ITS APPEAL OF U.S. DISTRICT COURT'S MORE NARROW JURISDICTIONAL DELINEATION OF SALT PONDS ADJACENT TO SAN FRANCISCO BAY

On February 26, 2021, the U.S. Environmental Protection Agency (EPA) filed a motion to voluntarily dismiss the agency's earlier appeal of a decision by the U.S. District Court for the Northern District of California rejecting a jurisdictional delineation in which the agency determined that a salt production complex adjacent to the San Francisco Bay was not jurisdictional and therefore not subject to federal Clean Water Act (CWA) § 404. The District Court's October 2020 decision found that EPA failed to consider whether salt ponds associated with the Redwood City Salt Plant fell within the regulatory definition of waters of the United States (WOTUS), and instead erroneously applied case law to reach a determination that the salt ponds were "fast lands," which are categorically excluded from CWA jurisdiction. "Fast lands" are those areas formerly subject to inundation, which were converted to dry land prior to enactment of the CWA. [*San Francisco Baykeeper, et al. v. EPA, et al.*, Case No. 20-17359 (N.D. Cal).]

By voluntarily dismissing the appeal, EPA appears to have conceded to the court's holding that the true measure of the jurisdictional extent of a WOTUS is the natural extent of such waters, absent any artificial components that limit the reach of an adjacent jurisdictional water body. Moreover, given the court's reliance on the "significant nexus" analysis, established by the *Rapanos* Supreme Court decision, in reaching its conclusion, EPA's decision to dismiss the appeal appears to be consistent with President Biden's January 20, 2021 Executive Order titled, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."

Background

The Redwood City Salt Plant continuously operated as a commercial salt-producing facility since at least 1902, with facility operations largely unchanged since 1951, prior to the adoption of the federal Clean Water Act in 1972. The facility's salt ponds were created by reclaiming tidal marshes in San Francisco Bay through dredging, and construction of a system of levees, dikes, and gated inlets, permitted by the U.S. Army Corps of Engineers (Corps) in the 1940s. Since the 1940s, Cargill, Incorporated (Cargill), the current facility owner, and its predecessors made a handful of improvements to the facility, which included construction of a brine pipeline (1951), and new intake pipes to bring in seawater and improve brine flow at the facility (2000-2001). In the absence of these improvements, some of the facility's salt ponds would be inundated with the San Francisco Bay's jurisdictional waters.

In 2012, Cargill requested that EPA evaluate the jurisdictional status of the salt ponds. In response, EPA Region IX developed a draft jurisdictional determination in 2016, which indicated that only 95 acres of the Redwood City facility had been converted to "fast land" prior to enactment of the CWA. According to Region IX, the remaining 1,270 acres of the facility's salt ponds were jurisdictional under the CWA. Ultimately, in March 2019, EPA headquarters issued a significantly different final determination, which found that the entire Redwood City facility was *not* jurisdictional based on Ninth Circuit case law regarding the scope of CWA jurisdiction, spurring a challenge by environmental organizations.

The District Court's Decision

In evaluating the challenge, the court found that: 1) EPA was bound to apply its regulatory WOTUS definition, rather than Ninth Circuit case law; 2) headquarters improperly applied judicial precedent on the issue of "fast lands"; and 3) the headquarters delineation was inconsistent with a 1978 Ninth Circuit Court of Appeals case that evaluated the jurisdictional status of the Redwood City Salt Plant ponds, and concluded differently than the March 2019 EPA jurisdictional determination. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (*Froehlke*). In *Froehlke*, the Ninth Circuit determined: 1) that CWA jurisdiction still extended at least to those waters no longer subject to tidal inundation merely by reason of artificial dikes; and 2) the fast lands jurisdictional exemption applies only where the reclaimed area was filled prior to adoption of the CWA.

On December 3, 2020, EPA timely appealed the decision of the U.S. District Court for the Northern District of California.

The Biden Administration's Executive Order

On January 20, 2021, President Biden signed an Executive Order titled, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (the Order), which directed federal agencies to review regulatory actions taken by the prior Trump administration. In addition to directing agency heads to consider revision, rescission, or suspension of regulations adopted between January 20, 2017, and January 19, 2021, the Order repeals and revokes Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule), suggesting that a revision of the Navigable Waters Protection Rule, which became effective on June 22, 2020 (2020 WOTUS Rule), may be underway.

Conclusion and Implications

EPA's dismal of the appeal of the District Court's decision in *San Francisco Baykeeper v.U.S. EPA* likely signals that the agency will publish a new WOTUS definition in the near future. The court suggested that although operations at the Redwood City Salt Plant had remained largely unchanged since 1951, any

evaluation of the facility's jurisdictional status should be updated to account for the three major U.S. Supreme Court decisions regarding the appropriate scope of CWA jurisdiction: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). According to the District Court's October 2020 decision, the fact that the salt ponds "enjoyed a water nexus to the Bay" was dispositive, thus triggering revision of the headquarters' delineation, and suggesting that the *Rapanos* decision's significant nexus analysis largely influenced the court's decision. However, the 2020 WOTUS Rule entirely eliminated the significant nexus framework from the WOTUS definition. Consequently, the dismissal may signal a tacit agreement by the Biden administration that application of the significant nexus analysis remains appropriate, and may foreshadow future rulemakings pertinent to the scope of CWA jurisdiction.
(Meghan A. Quinn, Hina Gupta)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT FINDS FOIA'S DELIBERATIVE PROCESS EXEMPTION PROTECTED DRAFT BIOLOGICAL OPINIONS FROM PUBLIC DISCLOSURE

United States Fish & Wildlife Service v. Sierra Club, 592 U.S.___, 141 S.Ct. 777 (Mar. 4, 2021).

The Sierra Club brought a Freedom of Information Act (FOIA) action against the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), challenging their denial of a request for certain draft Biological Opinions generated during a rule-making process by the U.S. Environmental Protection Agency (EPA). After the Ninth Circuit Court of Appeals found that the documents should be produced, on March 4, 2021, the U.S. Supreme Court reversed, finding that the deliberative process privilege protected the documents from disclosure.

Factual and Procedural Background

In 2011, the EPA proposed a rule regarding the design and operation of "cooling water intake structures," which withdraw large volumes of water to cool industrial equipment. Because aquatic wildlife can become trapped in these structures and die, the EPA was required to "consult" with the FWS and NMFS (together: Services) under the Endangered Species Act (ESA) before proceeding. Generally, the goal of consultation is to assist the Services in preparing a Biological Opinion on whether an agency's proposal would jeopardize the continued existence of threatened or endangered species. Typically, these opinions are known as "jeopardy" or "no jeopardy" opinions. If the Services find that the action will cause "jeopardy," they must propose "reasonable and prudent alternatives" that would avoid harming the threatened species. If a "jeopardy" opinion is issued, the agency either must implement the alternatives, terminate the action, or seek an exemption from the Endangered Species Committee.

After consulting, the EPA made changes to the proposed rule, which was submitted to the Services in 2013. Staff members at the Services completed draft Biological Opinions, which found the proposed rule was likely to jeopardize certain species. Staff sent these drafts to the relevant decisionmakers within each agency, but decisionmakers at the Services neither approved the drafts nor sent them to the EPA. The Services instead shelved the drafts and agreed with the EPA to extend the period of consultation. After further discussions, the EPA sent the Services a revised proposed rule in March 2014 that significantly differed from the 2013 version. Satisfied that the revised rule was unlikely to harm any protected species, the Services issued a joint final "no jeopardy" Biological Opinion. The EPA issued its final rule that same day.

The Sierra Club submitted FOIA requests for records related to the Services' consultations with the EPA. The Services invoked the deliberative process privilege to prevent disclosure of the draft "jeopardy" Biological Opinions analyzing the EPA's 2013 proposed rule. The Sierra Club brought suit to obtain those records. The U.S. District Court agreed with the Sierra Club, and the Ninth Circuit affirmed in part. Even though the draft Biological Opinions were labeled as drafts, the Ninth Circuit reasoned, the draft "jeopardy" opinions constituted the Services' final opinion regarding the EPA's 2013 proposed rule and must be disclosed. The U.S. Supreme Court then granted *certiorari*.

The Supreme Court's Decision

Generally, FOIA mandates the disclosure of documents held by a federal agency unless the documents fall within certain exceptions. One of those exceptions, the deliberative process privilege, shields from disclosure documents reflecting advisory opinions and deliberations comprising the process by which governmental decisions and policies are formulated. The privilege aims to improve agency decisionmaking by encouraging candor and blunting the chilling effect that accompanies the prospect of disclosure.

The privilege distinguishes between predecisional, deliberative documents, which are exempt from

disclosure, on the one hand, and documents reflecting a final agency decision and the reasons supporting it, which are not, on the other hand. As the Supreme Court observed, however, a document does not represent an agency's final decision solely because nothing follows it; sometimes a proposal dies on the vine or languishes. What matters is if the document communicates a policy on which the agency has settled and the agency treats the document as its final view, giving the document "real operative effect."

Draft Biological Opinions Reflected a Preliminary View of the Proposed Rule

Applying those general principles, the Supreme Court found that the draft Biological Opinions were protected from disclosure under the deliberative process privilege because they reflected a preliminary view—as opposed to a final decision—regarding the EPA's proposed 2013 rule. In addition to being labeled as "drafts," the Supreme Court explained, the administrative context confirmed that the draft opinions were subject to change and had no direct legal consequences. Because the decisionmakers neither approved the drafts nor sent them to the EPA, they were best described not as draft Biological Opinions but as drafts of draft Biological Opinions. While the drafts may have had the practical effect of provoking EPA to revise its 2013 proposed rule, the Supreme Court reasoned, the privilege still applied because the Services did not treat the draft Biological Opinions as final. The Supreme Court thus reversed the Ninth Circuit decision and remanded the case for further proceedings consistent with its holding.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the deliberative process privilege, particularly in the context of the U.S. Endangered Species Act—and by a Supreme Court shaped in part by the Trump administration appointees. The decision is available online at: https://www.supremecourt.gov/opinions/20pdf/19-547_new_i42k.pdf (James Purvis)

NINTH CIRCUIT REVERSES PARTIAL STAY OF CEQA CLAIMS IN ACTION CONCERNING THE STATE WATER BOARD'S AMENDMENTS TO THE WATER QUALITY CONTROL PLAN

United States v. California State Water Resources Control Board, 988 F.3d 1194 (9th Cir. 2021).

In *United States v. California State Water Resources Control Board*, the Ninth Circuit Court of Appeals reversed the U.S. District Court for the Eastern District's order partially staying state law claims under the California Environmental Quality Act (CEQA) in a parallel federal action brought by the United States against the California State Water Resources Control Board (SWRCB or Board). The Ninth Circuit held that under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the District Court erred in staying the state law claims, while allowing the federal intergovernmental immunity claim to proceed in federal court.

Factual and Procedural Background

The California State Water Resources Control Board manages the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay Delta) pursuant to a water quality control plan initially adopted in 1978. The Bay Delta includes the New Melones Dam, which is operated by the U.S. Bureau of Reclamation (Bureau). The Bureau must adhere to California state law while operating the dam.

In December 2018, the Board adopted an amended water quality control plan for the Bay Delta. The Amended Plan made numerous changes, including altered flow objectives and salinity levels, which would adversely affect operation of the New Melones Dam. On March 28, 2019, the United States filed two simultaneously lawsuits against the SWRCB—one in federal court and one in state court. The United States asserted the same three causes of action in both suits—namely, that the SWRCB violated CEQA in adopting the Amended Plan. After the Board moved to dismiss the federal suit, the United States filed an amended complaint in the federal action to assert a federal claim that the Board discriminated against the

United States under the constitutional intergovernmental immunity doctrine.

The United States respectively informed the state and federal courts of the other concurrent suit. The United States acknowledged that its preferred forum was in federal court, but that it brought the state court action out of an abundance of caution in the event the federal action could not be adjudicated on the merits. The SWRCB asked the U.S. District Court to either abstain from hearing the case pursuant to *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941), or stay the federal court proceedings pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The District Court denied abstention under *Pullman*, but considered whether to issue a partial stay under the *Colorado River* decision.

The Supreme Court's *Colorado River* decision contemplated the propriety of issuing a partial stay of proceedings where some, but not all of a federal plaintiff's claims are pending in a parallel state action. In conducting its *Colorado River* analysis, the District Court examined the CEQA and intergovernmental immunity claims separately. The court ultimately decided that the *Colorado River* stay factors weighed against staying the federal intergovernmental immunity claim, but weighed in favor of staying the state CEQA claims. As such, the District Court stayed the CEQA claims until further notice, but permitted the federal intergovernmental immunity claim to proceed. The United States appealed the *Colorado River* stay. The Board did not cross-appeal the denial of abstention under *Pullman*.

The Ninth Circuit's Decision

On appeal, the Ninth Circuit reversed the District Court's issuance of a partial stay of the CEQA state law claims. The Court of Appeal held that the Supreme Court's decision in *Colorado River* only permits a partial stay under exceptional circumstances, none of which were present here.

Analysis under the *Colorado River* Decision

The Ninth Circuit conducted its analysis under a *de novo* standard review. The appellate court first considered the stay doctrine promulgated by *Colorado River.* There, the Supreme Court held that there are rare cases where, in the interest of "wise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation," a district court may dismiss or a stay a federal suit due to the presence of a concurrent state proceeding. The instances where such a stay is appropriate are limited—the court must consider eight factors, including whether the state court proceedings will resolve all issues before the federal court. A partial stay under *Colorado River* is not appropriate where the state court proceedings will not resolve the entire case before the federal court, thereby failing to provide relief for all of the parties' claims.

Under this lens, the Ninth Circuit observed that the United States' state and federal court suits contained the same three CEQA causes of action. The claims related to how the SWRCB analyzed evidence in arriving at its conclusions in the Amended Plan, and how the Board described details of the Plan in light of its evidentiary analysis. However, the amended federal complaint also contains the additional intergovernmental immunity cause of action. The United States claims that the SWRCB's imposition of a more stringent salinity requirement on the Bureau's operation of the New Melones Dam improperly discriminates against the federal government. Thus, although the federal and state actions alleged the same three CEQA claims, the Ninth Circuit noted that a partial stay would note further *Colorado River* doctrine's purpose of "conserving judicial resources." Because a stay would cease all activity in the case, the District Court would be unable to adjudicate the federal intergovernmental immunity claim—a claim that fell under its jurisdiction, rather than the jurisdiction of the state court.

The Ninth Circuit also considered whether the United States had engaged in forum-shopping, which would justify issuance of a partial stay under *Colorado River*. "Clear-cut evidence" must exist to issue a partial stay based on forum-shopping—it must be clear that the party filing the federal claim did so to avoid state court adjudication. Though the United States could have filed its intergovernmental immunity claim in its initial federal complaint—and only added it after the Board filed a motion to dismiss—there was no "clear-cut evidence" that the United States engaged in the type of forum shopping necessary to justify a partial stay under *Colorado River.* The United States informed the state and federal courts of its concurrent suits, and indicated it preferred the

federal forum to resolve the disputes. To this end, the Board failed to establish how the state proceeding would resolve the United States' intergovernmental immunity claim, as the United States had not raised the claim in its state court proceedings. For these reasons, the United States did not improperly "forum shop." Because federal courts have "a virtually unflagging obligation to exercise the jurisdiction given [to] them," a partial stay would have improperly precluded the District Court from resolving the United States' separate federal claim.

Abstention Claim under the *Pullman* Decision

Finally, the Ninth Circuit considered the SWRCB's claim that the abstention doctrine under *Pullman* provides an alternate ground for upholding the District Court's stay order. Pursuant to the abstention doctrine, federal courts may refrain from hearing cases where the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law. *Pullman* requires the federal court to abstain from deciding the federal question while it waits for the state court to decide the state law issues. Here, the Ninth Circuit explained that the District Court did not stay the federal constitutional claims—it only stayed the state CEQA claims—and it declined to abstain pursuant to *Pullman*. Contrary to the Board's assertion, issuance of a stay under *Pullman* would require the court to stay the federal intergovernmental immunity claim while the state court decided the CEQA claims. This, in turn, would in appropriately "enlarge" the rights the Board obtained under the District Court's judgment. For these reasons, the Ninth Circuit held that it could not affirm the District Court's stay on the basis of *Pullman* abstention.

Conclusion and Implications

The Ninth Circuit's opinion provides helpful guidance for parties to actions involving overlapping state and federal claims. Importantly, the opinion clarifies the partial stay doctrine promulgated under the *Colorado River* decision. In concurrent federal and state actions, issuance of a partial stay is only permissible in very limited circumstances, namely where there is strong evidence of forum shopping. A party must establish forum shopping by proving that the state court can adjudicate all claims brought in the federal action. Where a party asserts a federal claim that cannot be decided by the state superior court, the federal court retains jurisdiction, such that a partial stay should not issue. Finally, a federal court cannot abstain from adjudicating an action under the *Pullman* decision if doing so will enlarge the rights of the party requesting abstention. The Ninth Circuit's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/02/24/20-15145.pdf (Bridget McDonald)

NINTH CIRCUIT REMANDS PUBLIC TRUST CASE TO DETERMINE ALTERNATIVE REMEDIES IN WALKER RIVER DECREE LITIGATION

United States v. Walker River Irrigation District, 986 F.3d 1197 (9th Cir. Jan. 28, 2021).

In a decades-long litigation, initiated by the United States and Walker River Paiute Tribe over contested water rights in the Walker River Basin, Nevada's Mineral County sought to intervene in the dispute, requesting the court to recognize the rights of the County and public under the public trust doctrine to have minimum levels of water maintained in Walker Lake—the terminus of the basin's flows. After dismissal by the U.S. District Court for Nevada and an appeals process involving the Ninth Circuit Court of Appeals and Nevada Supreme Court, Mineral County's appeal has come full circle to have its public trust questions resolved once and for all.

Mineral County's Public Trust Claim and the Nevada Supreme Court's Clarifications

The Walker River Basin spans more than 4,000 square miles between California and Nevada. Beginning in the Sierra Nevada Mountains in California and running north into Nevada, the interstate basin turns south outside Yerington, Nevada before reaching its end at Walker Lake. Running along Highway 95, Walker Lake is about 13 miles long, five miles wide, and 90 feet deep. While these numbers certainly indicate that Walker Lake is still a large lake by most standards, its size and volume have been rapidly

deteriorating, with reports indicating the lake sat at a mere 50 percent of its 1882 surface area and 28 percent of its 1882 volume.

In seeking to protect this crown-jewel of Mineral County (County), the County filed a motion to intervene in the Walker River litigation, which was granted in 2013. The County's complaint alleged that roughly 50 percent of Mineral County's economy is attributable to the presence and use of Walker Lake. Under this preface, the County urged the court to exercise its continuing jurisdiction over the 1936 Walker River Decree—adjudicating the rights to appropriate water from the Walker River Basin—to recognize the County's public trust claims. The District Court dismissed the County's complaint for lack of standing.

On appeal, the Ninth Circuit held that Mineral County had standing with respect to its public trust claim, but certified two questions to the Nevada Supreme Court:

> [1] Does the public trust doctrine permit[s] reallocating rights already adjudicated and settled under the doctrine of prior appropriation?
> [2] If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

In answering these questions, the Nevada Supreme Court held that the public trust doctrine is applicable to prior appropriative water rights, but that reallocation of such rights was an improper remedy and was inconsistent with Nevada state law. (*See: Mineral County v. Lyon County*, 473 P.3d 418, 425, 430 (Nev. 2020) (*en banc*).)

The Ninth Circuit's Decision

Following the Nevada Supreme Court's decision, the parties agreed that Mineral County's request for reallocation of water rights adjudicated in the Walker River Decree was foreclosed. Mineral County, however, identified two legal theories that would not require a reallocation of rights.

The first of these theories was rejected by the Ninth Circuit—that being the argument that the 1936 Walker River Decree itself violates the public trust doctrine. Having brought this challenge more than 80 years after the Decree was finalized, the Court held this first theory as untimely.

The court did, however, agree with Mineral County's second theory—that its public trust claim remains viable because the County can seek remedies that would *not* involve a reallocation of adjudicated water rights. Under this theory, the County argued that the Walker River Decree Court, having continuing jurisdiction over the water rights adjudication, also has a continuing affirmative duty to manage the resource for the benefit of future generations, albeit using remedies other than reallocation.

These alternative remedies, the County argued, could include: 1) a change in how surplus water is managed in wet years and how flows outside of the irrigation season are managed; 2) mandating efficiency improvements with a requirement that water saved thereby be released to Walker Lake; 3) curtailment of the most speculative junior rights on the system; 4) state issued funding mandates to fulfill the public trust duty to Walker Lake; and/or 5) mandating the creation of a basin management plan.

While appellee Walker River Irrigation District contended the viability of and authority of the District Court to implement these remedies, the Ninth Circuit left these issues for the District Court to address on remand. In sum, the Ninth Circuit found as follows:

> The district court properly dismissed Mineral County's public trust claim to the extent it seeks a reallocation of water rights adjudicated under the Decree and settled under the doctrine of prior appropriation. The County, however, may pursue its public trust claim to the extent that the County seeks remedies that would not involve a reallocation of such rights. The judgment of the district court, therefore, is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

Conclusion and Implications

While the Ninth Circuit's remand puts the case back in the U.S. District Court for Nevada, the court's decision nonetheless leaves an important public trust question left to be answered by the U.S. District Court. In hearing this case on remand,

the District Court will be offered an opportunity to provide further guidance in defining the scope of public trust issues and remedies available thereunder, particularly for water rights holders in the state of Nevada, but also as potentially persuasive authority in other states which use an appropriative or hybrid water system such as California. The Ninth Circuit's published Opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/01/28/15-16342.pdf
(Kristopher Strouse, Wes Miliband)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT UPHOLDS REGIONAL WATER BOARD ORDERS REGARDING VIOLATIONS AT WETLAND MARSH ISLAND IN THE SUISUN MARSH

Sweeney v. California Regional Water Quality Control Board, San Francisco Bay Region, 61 Cal.App.5th 1 (1st Dist. 2021).

A landowner filed petitions for peremptory writs of mandate contesting the Regional Water Quality Control Board, San Francisco Bay Region's (RWQCB or Regional Board) cleanup and abatement order and an administrative civil liability order regarding a levee that had been reconstructed on Point Buckler, a wetland marsh island. The Superior Court granted the petitions and the RWQCB appealed. The First District Court of Appeal reversed, finding the trial court improperly set aside the orders.

Factual and Procedural Background

Point Buckler is a 39-acre tract located in the Suisun Marsh. John Sweeney purchased the island and subsequently transferred ownership to Point Buckler Club, LLC (together: Sweeney). For months, Sweeney undertook various unpermitted development projects at the site, including but not limited to the restoration of an exterior levee surrounding the site that had been breached in multiple places. He began operating the site as a private recreational area for kiteboarding and also wanted to restore the site as a duck hunting club.

This case pertains to two administrative orders issued by the RWQCB against Sweeney. The first order was a cleanup and abatement order (CAO), which found that Sweeney's various development activities were unauthorized and had adverse environmental effects. These included, among other things, impacts on tidal marshlands, estuarine habitat, fish migration, the preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing. The order directed Sweeney to implement actions to address the impacts of the work. The second order imposed administrative civil liabilities (ACL Order) and required Sweeney to pay about $2.8 million in penalties for violations of environmental laws.

At the Superior Court

Sweeney successfully challenged both orders in the Superior Court, which set aside the orders on multiple grounds. Regarding the CAO, the Superior Court found the Regional Board violated Water Code § 13627, the order failed to satisfy criteria for enforcement actions contained in the Porter-Cologne Water Quality Control Act, and the order conflicted with the Suisun Marsh Preservation Act. For the ACL Order, the Superior Court found, among other things, that the order violated the Eighth Amendment's prohibition against excessive fines, conflicted with the Suisun Marsh Preservation Act, and was the result of a vindictive prosecution. Throughout its analysis, it also found that the Regional Board's findings were not supported by the evidence. The RWQCB appealed.

The Court of Appeal's Decision

The Cleanup and Abatement Order

The Court of Appeal first addressed the Regional Board's arguments under Water Code § 13267, which generally authorizes a Regional Board to investigate the quality of the "waters of the state" within the region subject to its authority. This investigative power includes the right to ask anyone who has discharged waste to provide technical or monitoring program reports under penalty of perjury. The Superior Court set aside the CAO on the grounds that the CAO did not include a written explanation or otherwise explain why the burden of preparing technical reports would bear a reasonable relationship to the need. The Court of Appeal disagreed, finding that the CAO explained the need for the reports and identified the evidence supporting the demand. The court also found that the RWQCB was not required to conduct a formal

cost-benefits analysis of the burdens in obtaining such reports, contrary to Sweeney's claim.

The Court of Appeal next considered enforcement under Water Code § 13304(a), which establishes a Regional Board's authority to issue a cleanup and abatement order to any person who has caused or permitted waste to be discharged. Upon order, the discharger must clean up the waste or abate the effects of the waste or take any other necessary remedial action. The Superior Court found the conditions for issuing a CAO were not satisfied, finding, among other things, that Sweeney did not "discharge waste" as defined in the Water Code, and that waste had not been discharged into "waters of the state." The Superior Court also found that Sweeney's activities did not create a "condition of pollution" at the site under the law.

Regarding "waste," the Court of Appeal found that the Superior Court employed an overly restrictive interpretation of the term, and that no rational fact finder could have reached a decision that the fill materials did not result in harm to beneficial uses. The evidence of harm associated with the fill used to repair the levee made it "waste." The court also rejected the argument that the fill constituted a "valuable improvement to the property," noting that even though a fill material may have commercial value, that does not preclude it from being waste under the relevant statutory provisions. Regarding "discharge," the Court of Appeal found that the Superior Court erred factually. Numerous activities not addressed by the Superior Court qualified as discharges, including the placement of fill for the levees. Regarding "waters of the state," the Court of Appeal found that there was no real dispute that a significant portion of the discharges occurred in such waters. Finally, regarding a "condition of pollution," the Court of Appeal found that the Superior Court made certain factual errors and construed the "condition of pollution" element far too narrowly.

The Suisun Marsh Preservation Act

The Court of Appeal next addressed the Suisun Marsh Preservation Act. The Superior Court found that the RWQCB undermined the policy and intent of the Suisun Marsh Protection Plan to preserve and protect duck hunting clubs as a legitimate use for wetlands, and thus the CAO was invalid. The Court of Appeal disagreed, finding that the Preservation Act has no impact on the regulatory authority of the Regional Board over wetlands, and it should not have been relied upon by the Superior Court to invalidate the CAO. Even if Sweeney was correct that the RWQCB's enforcement was subject to the Preservation Act, however, the Court found there still would be no violation. Nor does the Preservation Act, the Court found, otherwise direct state agencies to carry out activities in a manner favorable to duck hunting clubs.

The Administrative Civil Liability Order

The Court of Appeal next addressed the ACL Order, which was premised on discharges in violation of the Regional Board's Basin Plan and the federal Clean Water Act. Among other things, the Superior Court found that the ACL Order violated the Eighth Amendment's prohibition against excessive fines, conflicted with the Suisun Marsh Preservation Act, and was the result of a vindictive prosecution. Throughout its analysis, the Superior Court also found that the Regional Board's findings were not supported by substantial evidence.

The Court of Appeal first addressed the RWQCB's findings, concluding that those findings were supported by substantial evidence. Many of the same errors made with respect to the Superior Court's consideration of the CAO (*e.g.*, whether fill was discharged into waters of the state) also were made with respect to the ACL Order.

The Court of Appeal then addressed the Eighth Amendment, which generally prohibits excessive fines, noting that the "touchstone" of constitutional inquiry under the excessive fines clause is proportionality. The Superior Court found the penalty was "grossly disproportional" based on the court's own consideration of Sweeney's culpability as low. The Court of Appeal disagreed, finding there was substantial evidence in the record to support the Regional Board's findings. Regarding culpability, for example, it found there was evidence that, among other things, Sweeney had past experience with governmental agencies with jurisdiction over Suisun Marsh at another property, and his levee work there had resulted in illegal discharges of fill and direction from the relevant agencies. Regarding the relationship between the harm and the penalty, the Court of Appeal

found there was ample evidence that Sweeney's levee construction converted the site from tidal marshland and adversely impacted beneficial uses at the site. The court also found evidence that the $2.8 million penalty was not disproportionately high. Finally, the Court of Appeal found that there was substantial evidence supporting the conclusion that Sweeney could pay the fine.

The Court of Appeal also disagreed with the Superior Court's conclusion that the Board's penalties were imposed for vindictive reasons. In particular, the Superior Court found the penalties were imposed in retribution for Sweeney's lawsuit challenging an earlier order. The Court of Appeal first noted that the vindictive prosecution doctrine has not yet been held to apply to proceedings before administrative bodies. Even assuming it would apply, the court found there was substantial evidence that rebutted any finding of vindictive prosecution. The RWQCB, for example, had contemplated imposing civil liability months before Sweeney filed a lawsuit, and the court found that the evidence was sufficient to dispel the appearance of vindictiveness.

Fair Trial Issue

Finally, the Court of Appeal reversed the trial court's finding that Sweeney had not received a fair trial. The Court of Appeal found it had no reason to conclude Sweeney received an unfair hearing. The Regional Board, for instance, separated functions (*e.g.*, advisory, prosecutorial, *etc.*), it was not required to respond in writing to every issue raised, there is no requirement that hearings last for any particular amount of time, the Board adhered to procedures governing adjudicatory hearings, and the Regional Board's expert did not evidence any particular bias against Sweeney.

Conclusion and Implications

The case is significant because it contains a substantive discussion of numerous issues pertaining to administrative orders, in particular cleanup and abatement orders and administrative civil liability orders issued by a Regional Water Quality Control Board. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A153583M.PDF

(James Purvis)

CALIFORNIA WATER™
LAW & POLICY Reporter

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

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