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WESTERN WATER LAW & POLICY REPORTER™

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WESTERN WATER NEWS

FEDERAL COLUMBIA POWER SYSTEM UPDATE: ENDANGERED SPECIES ACT-LISTED SALMON ISSUES STARTING TO RECONVERGE FOR IDAHO WATER USERS

As discussed last month, Idaho Congressman Mike Simpson surprised many with the release of his Columbia Basin Fund Concept plan—an approximately $34 Billion proposal attempting to end decades of salmon-related Endangered Species Act (ESA) litigation through the breaching of four dams located on the Lower Snake River: Lower Granite, Little Goose, Lower Monumental, and Ice Harbor dams (the lower Snake River Dams; (LSRD)). Part of the impetus behind the "Simpson Plan" is the desire to buy peace through brokered litigation moratoria throughout the region. At the same time, an April 19, 2021 deadline passed in the U.S. District Court for the District of Oregon in the Federal Columbia River Power System (FCRPS) salmon litigation seeking confirmation from existing parties on whether and in what capacity they intend to participate going forward, as well as closing out opportunity for additional intervention by others.

The Simpson Plan in Brief

Congressman Simpson seeks to tap anticipated Biden administration energy and infrastructure spending initiatives to secure approximately $34 Billion for a funding package that would breach the LSRD and replace lost power generation and barge transportation with new clean power generation sources and significantly expanded rail and highway infrastructure improvements. Central to the plan is required, regional litigation moratoria, the scope of which remains to be seen (ESA litigation only, or other Clean Water Act/water quality-related litigation as well?).

The Simpson Plan sparked numerous conversations and media responses. For Idaho, both the Governor's Office and the Idaho Water Users Association are against dam breaching, but are ready and willing to participate in regional discussions about alternatives and potentially available funding to investigate and implement alternatives. Various environmental and conservation groups are leery of signing onto any litigation moratoria. But all-involved seem attracted to the potential of a highly-funded account from which various forms of progress on salmon issues could be made and paid for.

Regardless of the sides' positions, Congressman Simpson continues to voice two requirements of his plan: breaching of the four LSRD one the one hand, in exchange for long-term litigation moratoria on the other. There is no in between, or there is no Simpson Plan.

The FCRPS Litigation and Idaho's Status

The Columbia River is approximately 1,200 miles long, flowing from the Canadian Rockies to the Pacific Ocean near Astoria, Oregon. The river drains approximately 258,000 square miles. The Snake River is the largest tributary to the Columbia, flowing approximately 1,000 miles and draining approximately 108,000 square miles between its headwaters near Yellowstone, Wyoming and its confluence with the Columbia River near the Tri-Cities region of Washington State. There are currently 13 species or populations of salmonids listed as either threatened or endangered under the ESA in the drainages.

The FCRPS consists of eight multi-purpose dams and reservoirs located on the mainstem Columbia and Snake rivers operated cooperatively by the U.S. Army Corps of Engineers (Corps), the U.S. Bureau of Reclamation (Bureau) and the Bonneville Power Administration. In short shrift, the dams are obstacles to salmonids migrating between freshwater and the Pacific Ocean, and back to freshwater again to spawn—the fish are entrained by power generating turbines and the dams (and their slack-water reservoirs) alter flow regimes and water temperatures. The FCRPS dams are not entirely to blame for species declines, salmonids are also sensitive to ocean conditions and predation, overharvest of commercial fisheries, climate change/warming waters, and water quality on working rivers in general.

The so-called "FCRPS litigation" began in 2001 with complaints from fishing treaty Native American

tribes and environmental/conservation groups over FCRPS coordination and operations under § 7(a)(2) of the ESA—the requirement that actions taken by federal agencies not:

> . . .jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of" designated "critical habitat."

At the center of the ESA's consultation requirement is NOAA Fisheries (National Marine Fisheries Service) and the Biological Opinions it issues attempting to balance FCRPS operations against listed species survival and recovery. Biological Opinions concerning FCRPS operations issued in 2000, 2004, 2008, and 2014—all of which have been challenged by, and repeatedly rewritten in response to, the FCRPS litigation. Coordinated spill of water (flow augmentation through the dam system) and other fish passage mitigation measures have been the subject of ongoing injunctive relief requests. Flow augmentation, in particular, reaches into and affects dam operations in Idaho through the spill of Idaho water into the system for flow augmentation purposes downstream.

On April 19, 2021, the State of Idaho provided notice to the court of its continued participation in the FCRPS as a defendant-intervenor. Idaho's participation largely centers on flow augmentation-related arguments and practices, as well as salmonid reintroduction efforts throughout the region. Currently, much of the Snake River and its tributaries throughout southern Idaho are blocked by various dams and water quality-limited for reintroduction purposes. Idaho elected officials and agencies oppose ill-fated reintroduction efforts that are financially and scientifically unjustifiable. Montana also confirmed its continuation in the matter, like Idaho, as a defendant-intervenor for many of the same reasons.

Washington State, however, seeks a change in status from full party defendant-intervenor to one of more limited, and unaligned, amicus curiae. The court is expected to grant the status change requested. What Washington State's more "neutral" status means going forward in terms of alignment, if any, with Idaho and Montana remains to be seen. If nothing else, the status change will allow Washington to more freely pick and choose to comment upon those litigation components most important to it without having to play a more active, full party role.

Conclusion and Implications

Can the Simpson Plan put an end to over two decades of FCRPS litigation? Is $34 Billion enough, assuming it can be appropriated in the first place? Is this all nothing more than a house of cards ultimately to topple under the weight of climate change both in terms of river and ocean conditions? Asking questions is easy, it's the answers that are difficult.
(Andrew J. Waldera)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE BILL 223 UPDATE: RESIDENTIAL WATER SHUT OFF MORATORIUM NEARS ITS END

Originally, Senate Bill (SB) 998 made changes to policies to discontinue residential water service due to nonpayment, requiring that all public water systems with more than 200 service connections have a written policy on discontinuation of residential water service due to nonpayment, include provisions for not shutting off water for certain customers that meet specified criteria, prohibits the shutoff of water service until the residential water bill has been delinquent for 60 days, and cap the reconnection fees for restoring water service. On April 2, 2020, however, Governor Newsom issued Executive Order N-42-20 setting a moratorium on water disconnections. The California Public Utilities Commission (CPUC) has since extended the moratorium on suspension of discontinuation of service due to nonpayment through June 30, 2021, with the option to continue to extend the moratorium.

Senate Bill 223

Senate Bill 223, expands provisions from SB 998 to "very small community water systems" (those with fewer than 200 service connections), expands the conditions prohibiting discontinuation of residential water service, and requires the CPUC to establish arrearage management plans for CPUC-regulated water utilities.

With the timing of COVID-19 and the subsequent moratorium on discontinuation of residential water service, SB 998 has yet to have an effect on residential customers or water service providers. Prior to the COVID-19 crisis, the Pacific Institute April 2020 report showed that nearly 200,000 single-family households had their water shut off for nonpayment in 2018, affecting over 500,000 California residents. Since then, the issue of nonpayment has only become more significant. The State Water Resources Control Board (SWRCB) estimates that there is roughly $1 billion in household debt from nonpayment of water bills amongst Californians as of January 2021. Although some of this figure comes from the fact that many of these debts include bills that combine water with sewer, energy, and other expenses on one bill, the SWRCB nonetheless estimates that drinking-water specific debt is somewhere in between $600 and $700 million.

Revisions to Conditions When Discontinuance of Service Permitted

Notably of SB 223 are the revisions made to the conditions under which public water systems (including urban, community, and very small community water systems) may discontinue service to residential customers for nonpayment. Under this new bill, the conditions under which a public water system will be prohibited from discontinuing residential service include:

- Until delinquency of payments has reached at least 90, rather than 60, days or the total amount of the delinquency, exclusive of late charges and interest, is at least $250;

- When a residential customer makes payments on a utility bill that includes water service in amount exceeding the cost of such water service;

- To a master-metered multifamily residence with at least four units or to a master-metered mobile-home park;

- If a residential customer self-certifies that they do not have a primary care provider and that discontinuation of residential service will pose a serious threat to a resident of the premises, which includes the presence of a resident younger than 18 year of age; or

- During a state or local emergency when the area of the declared state or local emergency encompasses the customer's residence.

Arrearage Management Plans

In addition to these added or changed conditions, the bill also requires the written policy on discontinuation of residential service for nonpayment (as noted in SB 998) to include an arrearage management plan, and, for those systems that provide water use audits or have the capacity to do so, to include a free water use audit for low-income households. Furthermore, the bill requires the State Water Resources Control Board to assist very small community water systems with compliance and requires all public water systems to waive fees for disconnection and reconnection of service for low-income customers.

Conclusions and Implications

With the moratorium on water service shut-offs potentially coming to an end in the coming months, future protections on residential customers will become increasingly important for struggling households. On the other hand, public water systems will also be facing a significant challenge in handling the coming surge of overdue accounts. Finding a balance between protecting customers and maintaining effective functioning water systems will be the sweet spot for the state to find moving forward, so these and future amendments to SB 223 will be worth keeping an eye on. The bill can be tracked online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB223
(Wes Miliband)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES DRAFT BULLETIN-118 UPDATE 2020—DEFINING THE STATE'S GROUNDWATER BASINS

The California Department of Water Resources (DWR) recently released its much-awaited report, *California's Groundwater Update 2020* (Update 2020). Update 2020 is the most recent version of Bulletin 118, the state's official publication on the occurrence and nature of groundwater in California. Bulletin 118 defines the state's groundwater basins and summarizes information for each of the state's ten hydrologic regions. Update 2020 synthesizes the latest groundwater data—including new information derived from implementation of the Sustainable Groundwater Management Act of 2014 (SGMA)—to bring current the state's comprehensive inventory and analysis of groundwater information.

Background

California Water Code § 12924 requires DWR to update Bulletin 118 every five years to report timely information on the conditions of California's groundwater basins, patterns of groundwater extraction and recharge, and the current groundwater basin boundaries and priorities. Update 2020 is the first complete Bulletin 118 Update since SGMA took effect in January 2015. California water policy increasingly requires greater transparency, data, and detail regarding groundwater information, as well as the concentration of that information into fewer, comprehensive databases accessible to the public. Update 2020 aims to achieve these objectives.

Update 2020

The primary purposes of Bulletin 118 are to: 1) inform local water providers, statewide elected officials, decision-makers, and the public at-large about the condition of California's groundwater resources; 2) provide an updated inventory and analysis of the conditions, use, and management of groundwater statewide; and 3) identify recommendations for better understanding and more sustainable management of groundwater resources.

Update 2020 includes a Highlights document, which summarizes the state's groundwater conditions and management, and an extensive statewide report document, which provides detailed information on statewide and regional groundwater conditions and management activities.

Update 2020 states that SGMA provides the foundation to bolster groundwater management in response to climate change, which is predicted to significantly decrease water supply to California. It provides that California's groundwater basins must be leveraged to provide the flexibility needed to manage this future impact. Update 2020 reports that groundwater has historically been over utilized, resulting in overdraft conditions in groundwater basins comprising approximately one-fifth of total groundwater basin areas of the state.

Update 2020 clarifies that while California's groundwater occurs mostly within its 515 defined basin aquifers (94 percent), it also occurs in non-basin areas (6 percent).

Summary of Key Findings

Key findings in Update 2020 are summarized as follows.

California's Groundwater

New technology, such as airborne electromagnetic (AEM) surveying, is being deployed to help improve understanding of basin hydrogeologic characteristics.

The state's high- and medium-priority basins supply approximately 98 percent of groundwater pumping.

Update 2020 provides an enhanced characterization of the non-basin areas, finding that while approximately 60 percent of California's total land area covers non-basin areas, groundwater extraction in these areas accounted for just 6 percent of the total groundwater extraction in 2014. That percentage is expected to grow.

Groundwater Use

Groundwater supplies over 40 percent of the state's total water supply during average years and nearly 60 percent in dry years.

Currently, groundwater use data by sector is not available at the local groundwater basin scale. Update 2020 indicates that this limits the ability to effectively manage groundwater basins.

SGMA annual reporting is expected to fill data gaps in local groundwater use information for all high- and medium priority basins.

A lack of accurate measurement of groundwater use throughout the state creates difficulty in accurately quantifying total groundwater use.

Groundwater Management

Update 2020 finds that local groundwater management efforts have progressed through SGMA implementation. Many basins, including all 20 basins that DWR designated as subject to critical conditions of overdraft, have submitted their Groundwater Sustainability Plans (GSPs) or statutorily authorized Alternatives to GSPs.

More than 250 Groundwater Sustainability Agencies (GSAs) have been formed for nearly 150 basins in California, including all of the high- and medium-priority basins.

Update 2020 indicates that water markets and water transfers are emerging as an effective tool for achieving basin sustainability by providing flexibility in the allocation and use of water resources. Nearly half of the GSPs submitted include groundwater market activities. It references the California Water Resilience Portfolio, which identified actions to improve water markets, primarily needed regulatory and policy reforms and improved access to accurate data and trading platforms.

Update 2020 summarizes DWR's local assistance activities include planning, financial, and technical assistance services for GSAs and other stakeholders. Since 2010, DWR has provided $342.3 million in grants for groundwater projects. DWR has also developed an assortment of tools to facilitate access and transparency and to allow local agencies, GSAs, and watermasters to submit, modify, and view the information required by SGMA. Update 2020 notes, however, that state and local agencies need more assistance in building capacity to support the development and use of advanced technical tools that are necessary to implement SGMA.

Groundwater Monitoring and Conditions

Update 2020 explains that DWR's California Statewide Groundwater Elevation Monitoring (CASGEM) program has substantially improved the collection, analysis, and reporting of groundwater level data.

As SGMA monitoring and reporting efforts continue to expand, water managers anticipate a significant increase in the number of monitoring stations and data.

Groundwater monitoring is occurring in nearly 50 percent of groundwater basins that produce 99.5 percent of total annual groundwater use in the state.

Over 1,300 new groundwater level monitoring wells and over 100,000 groundwater level measurements have been included as part of the 46 GSPs that were submitted by January 2020.

Since 1998, groundwater elevations have been generally declining in most areas. Groundwater storage in California has also been declining. However, estimates of changes in storage require accurate data on groundwater pumping, which are not widely available or measured.

Update 2020 also addresses conditions regarding water quality, land subsidence, sea water intrusion, and surface water depletion in each region.

Moving Forward to Sustainable Groundwater Management

Update 2020 observes that sustainable groundwater management is not a one-size-fits-all issue. Instead, locally-developed, comprehensive GSPs that implement monitoring and measuring programs and effective projects and management actions will enable longterm, adaptive management practices that will lead to sustainable groundwater management.

Update 2020 provides four categorical recommendations to achieve sustainable groundwater management: 1) advance data-driven decision-making; 2) maintain momentum for sustainability; 3) engage, communicate, educate; and 4) invest, innovate and incentivize.

Conclusion and Implications

The Update 2020 Final Draft is expected to be released in Summer 2021. A 45-day public comment period on the draft occurred and accepted comments through April 26, 2021. Update 2020 aims to improve access to essential groundwater data and analysis statewide and at the regional level. Some recommendations can be implemented immediately, while others require longer implementation timelines as they depend upon achieving various SGMA implementation milestones.

Update 2020 delivers a significant update to the Bulletin 118 series. Future updates may be even more robust as DWR and water managers throughout the state garner data, insight and experience from SGMA implementation. Update 2020 can be found on the DWR website at: https://water.ca.gov/Programs/Groundwater-Management/Bulletin-118
(Gabriel J. Pitassi, Derek R. Hoffman)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•March 18, 2021 - The U.S. Department of Justice, EPA and Bureau of Land Management (BLM) announced that they have reached a proposed settlement with John Raftopoulos, Diamond Peak Cattle Company LLC and Rancho Greco Limited LLC (collectively, the defendants) to resolve violations of the federal Clean Water Act (CWA) and the Federal Land Policy and Management Act (FLPMA) involving unauthorized discharges of dredged or fill material into waters of the United States and trespass on federal public lands in northwest Moffat County, Colorado. On October 22, 2020, the United States filed suit in federal district court alleging that beginning in approximately 2012, and as recently as approximately 2015, the defendants discharged dredged or fill material into Vermillion Creek and its adjacent wetlands in order to route the creek into a new channel, facilitate agricultural activities and construct a bridge. These alleged unauthorized activities occurred on private land owned by the defendants and on public land managed by BLM, constituting a trespass in violation of the FLPMA. Vermillion Creek and its adjacent wetlands are waters of the United States and may not be filled without a CWA Section 404 permit from the U.S. Army Corps of Engineers (Corps), which was not obtained. Under a proposed settlement filed in the U.S. District Court for the District of Colorado to resolve the lawsuit, the defendants agreed to: pay a $265,000 civil penalty for CWA violations; pay $78,194 in damages and up to $20,000 in future oversight costs for trespass on public lands managed by BLM; remove the unauthorized bridge constructed on public lands; restore approximately 1.5 miles of Vermillion Creek to its location prior to defendants' unauthorized construction activities; restore the 8.47 acres of wetlands impacted adjacent to the creek; and plant dozens of cottonwood trees to replace those previously removed from federal lands. Additionally, under the terms of the proposed settlement, the defendants will place a deed restriction on their property to protect the restored creek and wetlands in perpetuity.

•March 22, 2021 - The EPA has ordered Detry Pumping Services, Inc. to adopt environmentally responsible practices for disposing and storing of fats, oils and grease (FOG) and upgrade its facility to address Clean Water Act violations at their Piti-Santa Rita facility. An EPA inspection in 2017 found that Detry had not prepared an adequate Spill, Prevention, Control, and Countermeasure Plan (SPCC) to prevent discharge of oil to surface waters nor implemented all requirements of the Clean Water Act. Furthermore, the inspection found the facility mixed FOG with powdered-lime mineral to create a slurry and then dumped it on the facility grounds, 300 feet from the Antantano river. In 2019, a second site visit by EPA found no significant improvements. According to the Guam Water Authority, FOG blockages cost Guam residents over $500,000 annually and cause raw sewage spills. Installing grease traps or grease interceptors and/or collecting used FOG in containers for proper disposal at facilities designed and operated to manage this waste can reduce impacts to the environment.

•March 24, 2021 - The EPA recently reached an agreement with LKQ Northeast, Inc., a national owner and operator of auto salvage yards, to bring its three Massachusetts salvage yards into compliance with the Clean Water Act and pay penalties for alleged violations of the federal storm water requirements at the facilities. Under the agreement, LKQ Northeast paid the following penalties for the alleged storm water noncompliance: $129,425 for its Web-

ster facility, $83,000 for its Leominster facility, and $81,000 for its Southwick facility. All of the facilities had either not identified or incorrectly identified stormwater conveyance paths and/or discharge points (outfalls). Additionally, the facilities had conducted inadequate corrective actions to try and mitigate the monitored pollutants as required. Discharge of stormwater associated with industrial activities, including auto salvaging, is regulated under the Clean Water Act's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Discharges (MSGP) and state water protection laws.

•March 24, 2021 - In a settlement agreement with the United States and the Commonwealth of Pennsylvania, Chesapeake Appalachia LLC (CALLC) has resolved a federal-state lawsuit, alleging Clean Water Act violations disclosed by CALLC at 76 locations in Pennsylvania. In a consent decree, lodged in the U.S. District Court for the Middle District of Pennsylvania, CALLC has agreed to pay a $1.9 million penalty for violating federal and state clean water laws, and to restore or mitigate harm to the impacted water resources. Under Clean Water Act Section 404, as well as state permit requirements, permits from the U.S. Army Corps of Engineers (Corps) and the Pennsylvania Department of Environmental Protection (PADEP) are required before dredged or fill material may be discharged into wetlands or waterways. In 2014, CALLC informed EPA, the Army Corps and PADEP that an internal audit had identified potential unauthorized discharges of fill material without applicable permits at multiple sites in the Commonwealth. Following lengthy negotiations and multiple site visits by EPA, PADEP and the Corps, the company ultimately disclosed potential unauthorized discharges at a total of 76 sites across Pennsylvania, impacting about 26 acres of wetlands and 2,326 linear feet of streams. As part of the settlement, CALLC (or its successor) will either seek after-the-fact authorization from the Army Corps and/or PADEP as appropriate to leave the fill in place, or CALLC will restore the impacted wetlands or waterways. In all cases, the impacted water resource either will be restored or the environmental harm will be offset through off-site compensatory mitigation.

•March 30, 2021 - The EPA ordered the City of New York to construct and operate two Combined Sewer Overflow (CSO) retention tanks to control contaminated solids discharges at the Gowanus Canal Superfund site in Brooklyn, New York, which is a key component of the Gowanus Canal cleanup. The EPA's order follows previous orders that EPA issued in 2014 and 2016 to require the city to find a location for and design the two tanks.

The 2013 cleanup plan for the Gowanus Canal Superfund site includes dredging to remove contaminated sediment from the bottom of the canal, which has accumulated because of industrial activity and CSO discharges. More than a dozen contaminants, including polycyclic aromatic hydrocarbons, polychlorinated biphenyls, and heavy metals, including mercury, lead, and copper, are present at high levels in the Gowanus Canal sediments.

•April 5, 2021 - EPA announced a Clean Water Act settlement with Burlington Northern Santa Fe Railway Company (BNSF) in which the company has agreed to pay $140,000 for alleged Clean Water Act violations associated with a discharge of oil into the North Platte River near Guernsey, Wyoming. The discharges occurred on February 4, 2019, in Wendover Canyon, northwest of Guernsey; due to a derailment of three locomotives and five rail cars owned by BNSF. The sources of the diesel and oil were two of the derailed locomotives. BNSF reported the spill to the National Response Center (NRC) and an EPA On-scene Coordinator was dispatched to the spill site. BNSF worked with the State of Wyoming and EPA to clean up the spill.

•April 12, 2021 - EPA announced a proposed Clean Water Act (CWA) settlement with Texas-based Arrow Midstream Holdings, LLC (Arrow Midstream) in which the company has agreed to pay $106,500 for alleged Clean Water Act violations associated with two releases of produced water from pipelines into tributaries of Lake Sakakawea near Mandaree, North Dakota on the Fort Berthold Indian Reservation. The company has also taken action to reduce the likelihood of similar releases in the future, by removing the pipeline material involved in the releases from other pipelines on the Reservation.

•April 21, 2021 - The US Navy has agreed to make more than $39 million in repairs at the Newport Naval Station in Rhode Island that will ensure

the facility is in compliance with laws regulating the discharge of stormwater into Coddington Cove, an embayment of Narragansett Bay. Under the terms of a recent agreement with the EPA, the Navy will complete stormwater discharge infrastructure improvements by 2030 at the former Derecktor Shipyard, settling EPA allegations that the facility was in violation of the Clean Water Act. The repairs include seven specific projects along the bulkhead, a retaining wall along the waterfront. The Naval Station, located in the Rhode Island towns of Newport, Portsmouth, Middletown, and Jamestown, operates under a municipal storm water permit issued by Rhode Island Department of Environmental Management. The facility includes the former Derecktor shipyard, a Superfund site. The inspection focused on the presence of sinkholes and the condition of stormwater infrastructure covered under the site's stormwater permit. The Navy has also identified numerous holes in the bulkhead wall. The Navy is collecting soil and sediment samples in the area to assess the potential risks to human health and the environment from soil exposed by the sinkholes or from soil erosion into Coddington Cove.

Indictments, Sanctions, and Sentencing

• April 14, 2021 - The Algoma Central Corporation (Algoma), headquartered in St. Catharines, Ontario, was fined $500,000 after pleading guilty to dumping wastewater into Lake Ontario. Algoma operated a fleet of dry and liquid bulk carriers on the Great Lakes. One of the vessels in the defendant's fleet was the M/V Algoma Strongfield (Strongfield). Built in China, the Strongfield was delivered to Canada on May 30, 2017, by a crew from Redwise Maritime Services, B.V. (Redwise), a vessel transport company based in the Netherlands. During the Strongfield's delivery voyage, while manned by a Redwise crew, the oily water separator and oil content monitor malfunctioned or failed on multiple occasions, which resulted in an accumulation of unprocessed oily bilge water. Because Algoma had negligently failed to inform the 3rd officer and the captain what the wash water tank contained, approximately 11,887 gallons of unprocessed oily bilge water were released into Lake Ontario. The discharge was stopped when another Algoma employee learned of the discharge and informed the 3rd officer and captain that the wash water tank contained unprocessed oily bilge water and instructed them to stop the discharge immediately. After the incident, Algoma contacted Canadian and U.S. authorities to report the discharge. In addition to the fine, Algoma was put on probation for a period of three years during which it must implement an environmental compliance plan.
(Andre Monette)

JUDICIAL DEVELOPMENTS

SECOND CIRCUIT DETERMINES CLEAN WATER ACT, SECTION 401, DEADLINE CANNOT BE MODIFIED BY AGREEMENT

New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission, ___F.3d___, Case No. 19-1610 (2nd Cir. Mar. 23, 2021).

The U.S. Court of Appeals for the Second Circuit recently determined that the one-year time period for issuing a federal Clean Water Act, Section 401 water quality certification is mandatory, and a certifying agency cannot enter into an agreement or otherwise coordinate with an applicant to alter the time period. If the certifying agency does not act within the provided statutory time period the authority is waived.

Factual and Procedural Background

Section 401 of the Clean Water Act requires an applicant for a federal permit to obtain a certification that the proposed project complies with state water quality standards and other requirements of state law. It also requires the state to "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," or their certification authority is waived. If a state denies certification within the statutory time period, then no license or permit shall be granted. If a state issues a certification contingent on the applicant's satisfaction of various conditions, the appropriate federal agency must incorporate those conditions into the final license.

National Fuel proposed to construct a 99-mile long natural gas pipeline from western Pennsylvania to upstate New York known as the Northern Access 2016 Project. Before proceeding with this type of project, the Natural Gas Act required a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC). Because construction and operation of the pipeline could result in discharges into New York waterways, National Fuel was also required to obtain a Section 401 water quality certification.

Accordingly, in March 2015, National Fuel applied to FERC for a certificate of convenience and necessity and, the following year, applied to the New York Department of Environmental Conservation (DEC) for a Section 401 water quality certification. At some point after National Fuel was asked to supplement the second time, it became clear that the DEC would not be able to make a final determination within one year of the date of the initial application because it had not completed the notice-and-comment process required by the Clean Water Act and by state regulations.

In an attempt to extend the one-year deadline, the DEC and National Fuel entered into an agreement revising the date on which the application was deemed received by the DEC to April 8, 2016, extending the deadline for the DEC to issued or deny the required certification by 36 days. Subsequently, DEC denied National Fuel's application and National Fuel petitioned for review. While the petition was pending, National Fuel filed with FERC a motion for expedited action. FERC concluded that Section 401 established a deadline that could not be extended by private agreement. DEC petitioned for review of FERC's decision as well.

The Second Circuit's Decision

The threshold issue for the petitions is whether a state and a project applicant may extend the one-year deadline for acting on a Section 401 water quality certification application. The circuit court previously determined that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision. The court determined that Section 401's one year deadline is mandatory in that it does not merely "spur" the agency to action but it bars untimely action by depriving the agency of its authority after the prescribed time limit.

The court next considered whether DEC's denial

of National Fuel's certification request should be regarded as untimely because the agreement to change the receipt date must be deemed void. To make this determination, the court examined the legislative history of Section 401. In examining the legislative history the court concluded "with a good deal of clarity" that limiting a certifying state's discretion and eliminating a potential source of regulatory abuse was what the one-year limit in Section 401 was intended to achieve. The original version of the House Bill did not set any time limit for state action, but was later amended to require affirmative state action "within a reasonable period of time" in order to prevent delay due to a certifying state's passive refusal or failure to act. Eventually, that language was refined and the one-year time limit was included in the final version of the bill after the Senate bill was combined with the House bill. The legislative history, the court determined, showed that Congress was not primarily concerned with protecting the rights of individual applicants. Rather, Section 401's time limit was meant to protect the regulatory structure, particularly in situations involving multiple states: in other words, to guard against one state "sitting on its hands and doing nothing" at the expense of other states that are also involved in a multi-state project.

Accordingly, the court held that it was bound by Congress' intention expressed in the text of Section 401 and reinforced in its legislative history to reduce flexibility in favor of protecting the overall federal licensing regime. The court therefore held that Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period, and that the DEC waived its certification authority by failing to act within one year of the actual receipt of the application.

The court upheld the FERC's conclusion that the DEC waived its authority under Section 401.

Conclusion and Implications

This case provides that the one-year deadline for a state to act on an application for a Clean Water Act Section 401 water quality certification cannot be extended by agreement with a project applicant. Such an agreement may waive a state's authority to review and act on such an application. The Second Circuit's opinion is available online at: https://casetext.com/case/ny-state-dept-of-envtl-conservation-v-fed-energy-regulatory-commn-1
(Henry Castillo, Rebecca Andrews)

U.S. DISTRICT COURT FOR MONTANA DENIES PRELIMINARY INJUNCTION AGAINST BIG SKY WATER AND SEWER DISTRICT FOR ALLEGED CLEAN WATER ACT VIOLATIONS

Cottonwood Environmental Law Center, Montana Rivers, and Gallatin Wildlife Association v. Edwards and Big Sky Water and Sewer District, ___F.Supp.3d___, Case No. 2:20-cv-00028-BU-BMM (D. Mt. Mar. 23, 2021).

The U.S. District for the District of Montana, Butte Division, denied the three nongovernmental organizations' (plaintiffs) request for a preliminary injunction against Big Sky Water and Sewer District's (BSD) discharging practices within the West Fork of the Gallatin River. After carefully reviewing the circumstances, the court held that a preliminary injunction would be inappropriate based on the record before the court, allowing BSD to continue these discharge practices until further proceedings.

Factual and Procedural Background

BSD provides wastewater and sewer services by collecting water from district water users within the resort community at Big Sky, Montana. This water is collected for treatment at its Water Resources Recovery Facility (WRRF), which removes debris and grit, treats nitrogen through aerobic and anaerobic conditioning, filters the water, and finally disinfects the water. After treating this water and placing it in holding ponds at the WRRF, BSD disposes all of its treated effluent water through irrigation – primarily by irrigating the neighboring Meadow Village Golf Course during the summer months.

Plaintiffs allege that BSD over-irrigated the Meadow Valley Golf Course, allowing for nitrogen

and other pollutants to flow downhill and leach into the groundwater. The groundwater is hydrologically connected to the West Fork of the Gallatin River. If groundwater rises too high, the holding pond liners may float, which leads to effluent spillover from the holding pond. BSD diverts groundwater under its holding ponds into the West Fork of the Gallatin River using an underdrain pipe system to prevent such spillover. Plaintiffs argued that BSD must obtain a permit under the federal Clean Water Act (CWA) for the discharge of nitrogen originating in its holding ponds and entering the West Fork of the Gallatin River via the underdrain pipe system. In doing so, Plaintiffs requested a preliminary injunction to halt these discharge practices.

The U.S. District Court's Decision

In order to obtain a preliminary injunction, a court considers and balances four elements: 1) the likelihood of success on the merits; 2) the likelihood of irreparable harm in the absence of preliminary relief; 3) the balance of equities; and 4) the public interest served by the injunction.

First, BSD argued that plaintiffs were unlikely to succeed on the merits on two grounds: 1) the court lacks subject matter jurisdiction because plaintiffs failed to provide adequate notice of suit under the CWA, and 2) plaintiffs failed to allege a valid CWA violation. Turning to the first argument, the court held Plaintiffs provided adequate notice by providing the appropriate 60-day notice. Furthermore, the court reasoned that BSD had superior access to information regarding the violation, specifically on the hydrology of the area. As to the second argument, the court determined that the mere conveyance of pollutants from one part of a hydrologically interconnected system to another is not a clear violation of the CWA and that the path of pollutants from the ponds, to a golf course, to groundwater and then to the river was not the functional equivalent of a direct discharge. The court thus agreed with BSD in holding that plaintiffs were unlikely to succeed based on the record since Plaintiffs did not present strong enough evidence to show that BSD's practices were "additions" of pollutants from a "point source" to "navigable waters" within the meaning of the CWA.

Second, plaintiffs argued that an injunction is necessary to prevent harm to the waters of the West Fork of the Gallatin River, specifically with the potential for algal blooms. However, the court noted there was factual uncertainty regarding whether pollutants from the WRRF holdings ponds reach the Wet Fork of the Gallatin River. Plaintiffs' member impact statements were useful for a standing analysis but failed to point to irreparable harms that would warrant extraordinary and drastic injunctive relief requested.

Third, BSD argued that the public has a strong interest in maintaining a functional waste treatment and sewage system. Plaintiffs responded that the public retains a strong interest in preserving the water quality of the river. The court determined the public interest did not favor either party.

Finally, the court noted that a preliminary injunction represents an extraordinary remedy—one that should not be awarded as a matter of right, but only upon a clear showing that the plaintiff is entitled to such relief. Based on the above analysis, the court held that a preliminary injunction would be inappropriate since serious questions remained regarding the success of plaintiffs' case.

Conclusion and Implications

This case demonstrates that a high showing on the likelihood of success on the merits is required to obtain a preliminary injunction to stop alleged discharges from the operation of a publicly owned wastewater treatment plant. A preliminary injunction will only be awarded in extraordinary circumstances. The District Court's opinion is available online at: https://casetext.com/case/cottonwood-envtl-law-ctr-v-edwards

(Megan Kilmer, Rebecca Andrews)

CALIFORNIA COURT OF APPEAL LIMITS DORMANT OVERLYING RIGHTS IN ONGOING ANTELOPE VALLEY GROUNDWATER CASES

Antelope Valley Groundwater Cases, ___Cal.App.5th___, Case No: F082469 (5th Dist. Apr. 6, 2021).

In response to a challenge of the "Physical Solution" crafted for the critically overdrafted Antelope Valley Groundwater Basin, California's Fifth Appellate District issued an opinion subordinating future uses by dormant overlying rights holders to existing uses by other holders of equivalent priority. The opinion of the court addressed for the first time the power of the court to limit overlying landowners' right to extract groundwater from a basin they have never before extracted from.

Background

The court laid out the long procedural background of these cases and issues raised, as follows:

> Over 20 years ago, the first lawsuits were filed that ultimately evolved into this proceeding known as the Antelope Valley Groundwater Cases (AVGC). Numerous parties asserted that, without a comprehensive adjudication of all competing parties' rights to produce water from and a physical solution for the aquifer, the continuing overdraft of the basin would negatively impact the health of the aquifer. After the Judicial Council ordered all then-pending lawsuits coordinated into this single adjudication proceeding, the trial court embarked on an 11-year process, employing phased proceedings, to adjudicate how to accommodate the rights and needs of competing users while protecting the threatened alluvial basin. The parties asserting competing usufructuary claims to pump water from the alluvial basin included numerous entities or agencies that pumped water to supply their thousands of customers (for largely domestic use) within the Antelope Valley Adjudication Area (AVAA), the federal government, and scores of owners of overlying lands who pumped water primarily to use for agricultural, industrial, commercial and domestic uses on their overlying properties. . . .By 2009, the litigation had evolved into a complex array of dozens of separately filed actions and cross-actions, with thousands of Doe and Roe defendants. The litigation was eventually tried in six separate phases. The third phase of trial had bifurcated and scheduled for decision the issues of the basin-wide annual safe yield and whether the aquifer was in overdraft. Shortly before the "Phase 3" trial, the court consolidated all the then-pending actions.

The Court of Appeal summarized the key issue before it as follows:

> [all the actions]. . .involved the primary core common issue—the competing claims to draw groundwater from the aquifer—which required an *inter se* adjudication of all claims by all parties to the available groundwater.

The Court of Appeal's Decision

In reaching its conclusions in this recently published opinion, the Court of Appeal applied water law principles from the cases of *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224 (2000) and *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (1979).

Analysis under the *Barstow* Decision

In the first instance, the Court of Appeal used the authority in *Barstow* to uphold the lower court's employment of equitable apportionment principles to allocate available supply among competing claimants with equivalent priorities. Citing to *Barstow*, the Court wrote that:

> *Barstow* appears to uphold (at least by negative implication) the use of equitable apportionment principles when considering how to apportion water among correlative rights holders." *Willis v. LA County Waterworks District No. 40*, F082469, JCCP No. 4408 (Cal.App. 5th Mar. 16, 2021) at 43.

Analysis under the *Long Valley* Decision

Furthermore, the court upheld the subordination of dormant overlying rights in the Antelope Valley Physical Solution on the grounds that *Long Valley* is aptly analogous to a comprehensive groundwater adjudication. In reaching this conclusion, the court elaborated that:

> *Long Valley* court held that prospective future uses of significant unexercised correlative water rights may be conditioned and subordinated to protect existing uses and reliance interests as part of a comprehensive water rights adjudication that allocated a limited water supply among competing claimants. *Id.* at 45.

Equitable Apportionment May Be Used in Determining Allocations

Accordingly, the Court of Appeal concluded that under *Barstow* and *Long Valley*, such equitable apportionment principles may be used in determining allocations for competing claimants with equal priority rights as part of a Physical Solution for an overdrafted basin. It is from this line of reasoning that the Court of Appeal ultimately concluded that those cases permit a Physical Solution to subordinate future uses by dormant rights holders to existing uses by other holders of equivalent priority.

Conclusion and Implications

The implications this case may have on unexercised overlying rights to groundwater are profound, particularly now that this case has been certified for publication. The court's subordination of one co-equal right over another presents serious questions for overlying rights holders in a time where effective groundwater management has become increasingly prioritized. While the opinion takes care to preclude such Physical Solutions from "wholly disregarding" the rights of overlying landowners who have yet to extract groundwater, the opinion sets a precedent moving forward that dormant overlying rights can be treated differently currently exercised rights for purposes of determining groundwater allocations. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F082469.PDF (Wes Miliband)

CALIFORNIA SUPERIOR COURT FINDS L.A. DEPARTMENT OF WATER AND POWER MUST CONDUCT ENVIRONMENTAL REVIEW BEFORE REDUCING PASTURELAND ALLOCATIONS

County of Mono v. City of Los Angeles, Case No. RG18-923377 (Alameda Super Ct. Mar. 8, 2021).

On March 8, the Alameda County Superior Court granted a writ of mandate in favor of Mono County (County) requiring the Los Angeles Department of Water and Power (LADWP) to conduct appropriate environmental review under the California Environmental Quality Act (CEQA) for proposed changes to the use of water by ranchers on leased land owned by LADWP in the County.

Background

LADWP owns 6,4000 acres in Mono County, and owns the water rights associated with that land. The land itself is ranch land that is also habitat for the Bi-State Sage Grouse. Historically, LADWP provided approximately 3.9 acre-feet of water annually to each acre on the ranch for habitat management and wildlife, for the maintenance and restoration of native vegetation, and for agricultural irrigation. During the 2013-2018 period, however, LADWP only provided 1.9 acre-feet per acre, which was below the ten-year average of 2.9 acre-feet per acre. The amount of water provided to the acreage depended each year on variations in precipitation, runoff, and other factors.

In 2010, LADWP began leasing the land to several ranchers. The leases included provisions for water supply and irrigation water. For instance, the leases provided for up to five acre-feet per year for irrigation water, although the leased water was subject to the paramount rights of LADWP, and the availability of water under the terms of the lease was determined solely by LADWP.

In 2013, LADWP adopted a conservation strategy to protect sage grouse. The conservation strategy set LADWP water policy for the pastures used by sage grouse, and recognized that lessees of pasturelands received a water allotment of up to five acre-feet of water per acre for irrigation. Minimum flows were required to be maintained in creeks to maintain aquatic life, and no irrigation was allowed when creek flows were at or below such minimums. Importantly, with respect to irrigated agriculture, the conversation strategy indicated that LADWP did not expect surface water management practices to change from current practices regarding pasturelands. This included pasture acreage receiving up to five acre-feet of water per acre in some years, while in other years irrigation might be prohibited due to minimum flow requirements in creeks. Under the terms of the leases, lessees were required to maintain irrigated pastures in good to excellent condition, and a drop-in pasture rate (as scored by an official scoring system) below 80 percent would require changes to pasture management.

In 2018, LADWP issued new proposed five-year leases to existing lessees. The new lessees provided that "at no time shall water taken from the well(s) be used for irrigation or stockwater purposes," and that LADWP "shall not furnish irrigation water" to lessees or the leased lands, and lessees "shall not use water supplied to the leased premises as irrigation water." In correspondence between the County and the City of Los Angeles following LADWP's proposal of the new leases, the City indicated that water allocations for 2018 would likely be similar to those in 2016, *i.e.* 0.7 acre-feet per acre.

The Superior Court's Ruling

The central issue in this case is whether LADWP approved a "project" without first conducting an environmental review under CEQA. The County argued that LADWP was required to conduct environmental review before it proposed the new leases in 2018, which included the change in water use and simultaneously implemented water allocations consistent with the provisions of the new leases, *i.e.* reduced water allocations. The Superior Court concluded that LADWP was required to conduct environmental review under CEQA but had not done so.

Proposing 2018 Leases and Announcement Was a Project

The Superior Court found that when LADWP proposed the 2018 leases, and announced the 2018 water allocations, it committed to a definite course of action that triggered environmental review. For instance, the Superior Court found that LADWP had revised the terms of the leases to change the water use on LADWP's land when it sent the proposed leases, and set a short timeframe of less than a month for the proposed lessees to negotiate the new leases. Additionally, the court observed that a May 2018 letter from the mayor of Los Angeles to the County indicated the amount of water allocated that year under the existing leases would be similar to a prior dry year's allocation of 0.7 acre-feet. The court reasoned that this figure reflected the first year of a plan to decrease water allocations that the proposed leases would implement on a multi-year basis.

While the court weighed the evidence that LADWP was only proposing the new leases—as opposed to approving them—and that the low water allocation represented only a single year's allocation, the court found on balance that the proposed leases and the actual water allocation for 2018 demonstrated that LADWP was committed to a definite course of action and therefore had approved an action to significantly reduce or eliminate water deliveries.

Reductions in Water Allocations Was a Project

The Superior Court also found that LADWP's proposed reductions in water allocations under the new leases constituted a "project" subject to CEQA. CEQA defines a project as:

> . . .an activity which may cause either direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) an activity directly undertaken by a public agency […]. (Pub. Res. Code § 21065.)

In finding that the proposed change in water use under the new leases was a project, the Superior Court relied on several pieces of relevant evidence: the amount of water previously released for irrigation

purposes from 1992 to 2018, averaging 1.9 acre-feet per acre to 3.9 acre-feet per acre; LADWP's conservation strategy to protect sage grouse by keeping irrigated pastures in good condition; the provisions of the proposed leases largely eliminating irrigation water; and LADWP's 2018 allocation of 0.7 acre-feet per acre. According to the Superior Court, the water use changes in the proposed leases altered the historical irrigation water baseline that provided significant environmental benefits. The Superior Court found that the 5-year historical average of 1.92 acre-feet per acre, which existed at the time LADWP proposed the changes to the lease terms and reduced the water allocation for 2018, was appropriate.

Conclusion and Implications

It is not clear whether LADWP will appeal the Superior Court's ruling, and whether the court's ruling would be upheld on appeal. However, this decision may indicate that reliance interests arising from long-standing water use practices or environmental benefits accruing from such practices may be more difficult to modify than is otherwise provided for under the terms of a contract, because even proposing modifications could trigger environmental review requirements that did not previously apply.
(Miles Krieger, Steve Anderson)

UPON PETITION OF CHIEF JUSTICE HARDESTY, THE NEVADA SUPREME COURT ESTABLISHES A COMMISSION TO STUDY WATER RIGHTS CASES AND DETERMINE IF A WATER COURT SYSTEM IS ADVISABLE

Nevada Supreme Court Administrative Docket No. 0576, Mar. 9, 2021.

On March 9, 2021, the Nevada Supreme Court issued an order that established a commission to study the adjudication of water law cases. The stated purpose for the commission is "to improve education, training, specialization, timeliness, and efficiency of Nevada's District Courts in the judicial review process."

The court's order offered few specifics to guide the commission's work other than to provide a list of stakeholders who should be represented, require that the commission's meetings be public, and set an April 2022 deadline for submitting a final report of findings and recommendations. The commission plans to explore how water matters go through agency determination and judicial review, identify shortcomings in the process, and provide suggestions for how to create greater predictability, consistency, and efficiency.

Current Nevada Process for Determining Water Matters

In Nevada, the Division of Water Resources (DWR), headed by the State Engineer, is generally the first stop for all water-related matters. By statute, DWR adjudicates pre-statutory rights and renders decisions on post-statutory water rights applications. DWR has a hearings section by which a hearings officer, supported by technical staff, conducts regulatory hearings to hear exceptions to preliminary orders of determination and protests to applications. Generally, only contested matters are set for administrative hearings. DWR employs engineers, hydrologists and hydrogeologists to address key technical issues, including surface-groundwater interactions, evapotranspiration, and modeling.

Judicial review of the State Engineer's decisions occurs first in Nevada's District Courts before general jurisdiction judges:

> [A]ny person feeling aggrieved by any order or decision of the State Engineer … affecting the person's interests, … may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal…. NRS 533.450(1).

The action to seek judicial review must be initiated in the county in which the affected water rights are situated.

For the adjudication of pre-statutory rights, following an administrative hearing on objections to a

preliminary order, the State Engineer must file a final order of determination in the District Court for the county in which the pertinent water source is located. The District Court hears exceptions to the final order and may employ experts on technical information. The District Court may also refer matters back to the State Engineer to hear further evidence. Thereafter, the District Court enters a final decree and judgment. District Courts maintain jurisdiction to enforce any water decree they enter.

The State's general jurisdiction judges have varying degrees of knowledge and experience in the area of water law, from none to considerable. They must consider technically complex water law cases that have sizeable administrative records along with all other matters that appear on their docket. The result has been sometimes variable and inconsistent decisions and long delays in case dispositions.

Genesis of the Water Commission

In 2017, the Nevada Legislature passed legislation that imposed a December 31, 2027 deadline by which claimants of pre-statutory rights must file proofs of claims. NRS 533.087. Because of this cut off, the State Engineer anticipates a flood of filings, along with the resulting demand for adjudications to determine the respective rights on various unadjudicated water sources. The predicted increase in complex water cases, along with the growing number of disputes between surface and groundwater users, created a sense of urgency that Nevada should explore the creation of a specialty Water Court.

To that end, the State Engineer submitted a bill draft request in the 2021 legislative session that proposed to amend the Nevada Constitution to give the state's Court of Appeals original jurisdiction over certain cases relating to water. The idea was to make the Court of Appeals a *de facto* specialty court with expertise in the highly technical and somewhat arcane field of water disputes.

Before the Legislature completed its first day of the session, the State Engineer scrapped the request, indicating, instead, that his office was working with the Nevada Supreme Court's Chief Justice James Hardesty to request that the Supreme Court appoint a commission to evaluate whether a specialty court for water-related disputes might be appropriate.

Chief Justice Hardesty then petitioned the Nevada Supreme Court to create such a commission. The petition noted, "Water law is a unique and complex area of the law and judicial review of water cases frequently involves, among other matters, an assessment of lengthy records, geologic and hydrologic concepts, conflicting expert testimony, and years of relevant Nevada history. And just as frequently, water cases take years to adjudicate, which adversely delays water law decisions in our state."

Observing that four of the 16 western states surveyed have implemented some form of specialized water court, including three states by rules adopted by their supreme court and a fourth that provides for the appointment of water judges and staff by its Supreme Court, a study of what is being done elsewhere could inform Nevada regarding the potential creation of a water specialty court. The petition suggested that the proposed commission consider the authority of the Chief Justice under § 19 of Article 6 of the Nevada Constitution and NRS 3.040 to designate duly trained District judges to serve on water cases throughout Nevada. It also could identify education and training needs.

After holding a hearing to receive public comment, the court created the commission.

Commission Membership

The court appointed 24 members to the commission. They include a Deputy Administrator from the Division of Water Resources (DWR), a retired state engineer and retired chief hydrologist from the agency, representatives of municipal water purveyors, farmers and ranchers, mining interests, environmental/NGO's, tribes, irrigation districts, and rural counties. Four of the commission members are District Court judges. Chief Justice Hardesty is serving as Commission Chair and is joined by Associate Chief Justice Ron Parraguirre as a commission member.

Public Process

The commission held its first meeting on April 16, 2021, at which Chief Justice Hardesty emphasized that the commission is prioritizing public participation in the process. Although the commission is not subject to the Nevada Open Meeting Law, it is emulating that law's requirements by making its meetings public, inviting public comment, and posting on the court's website its agendas, meeting materials and meeting recordings.

First Steps

The initial meeting included introductions, a presentation by the Acting State Engineer that summarized the agency's primary water resource management challenges, a discussion of water specialty courts in other states and input from members regarding the potential direction of the commission. The group also discussed a 2016 article by John E. Thorson in the Idaho Law Review titled, *A Permanent Water Court Proposal for a Post-General Stream Adjudication World.*

Chief Justice Hardesty indicated that he shares the view that the area of water law could warrant the appointment of specialized judges and wants the commission to address that concept. He noted that there is considerable precedent in Nevada for specially trained judges in certain cases in that the State already has specialized family courts, business courts, and drug courts.

He also asked the commission to consider what education should be demanded of District Court judges in that water law involves engineering, hydrology, the environment, and the law, among other topics. Chief Justice Hardesty expressed concern that a judge's lack of information and knowledge could cause the parties to incur unnecessary costs for experts to help explain concepts.

Chief Justice Hardesty emphasized "This is not a commission that is designed to rewrite Nevada water law." The commission might identify gaps in existing law and procedure and make recommendations to the supreme court and the legislature, but its focus will be on how to make DWR and judges better able to process water rights matters in an effective, timely and efficient manner. Noting that water law cases often raise issues of first impression, he queried whether some could be fast tracked so that a State Engineer's decision could be appealed directly to the State's supreme court, thereby bypassing the District Courts.

The commission noted that the Dividing the Waters program at the National Judicial College in Reno is a resource that could be useful on the issue of education. Chief Justice Hardesty plans to have representatives from that program present to the commission at future meetings.

A written public comment that was submitted to the court resonated with Chief Justice Hardesty and other members, which suggested that the commission take a close look at existing water cases to evaluate the issues they raise, the time it has taken to wend their way through the agency and court proceedings, and whether they present any common themes that need to be addressed.

Another public commenter observed that the commission membership does not reflect the demographics of Nevada, suggesting that members of the Legislature should be involved. The same commenter also criticized the commission composition as underrepresenting environmental interests because there is no purely environmental group representative on the commission.

Conclusion and Implications

Chief Justice Hardesty tasked certain members and the State Engineer to gather additional data and information to presented at future meetings of the commission. The meetings will be held every other month, with the next ones scheduled for June 25 and August 27.

Although the court is making a laudable effort to engage many stakeholders, the size of the commission may be somewhat unwieldly. It remains to be seen whether the commission can engage in a robust dialogue on the important issues with which it is tasked and cohere around agreed-upon findings and recommendations. For more information online, see the Nevada Supreme Court's website link at: https://nvcourts.gov/AOC/Templates/NewsArticle.aspx?id=328713 and https://nvcourts.gov/AOC/Committees_and_Commissions/Water_Law/Overview/ (Debbie Leonard)

NEW MEXICO SUPREME COURT QUASHES WRITS OF *CERTIORARI* IN SAN JUAN RIVER ADJUDICATION APPEAL THAT UPHELD THE NAVAJO NATION SETTLEMENT DECREES

State of New Mexico ex rel. State Engineer v. United States of America,
Case No. S-1-SC-37068 (N.M. Supreme Ct. April 13, 2021).

On March 29, 2021, the New Mexico Supreme Court issued an Order quashing the writs of *certiorari* it previously granted on August 13, 2018 regarding review of a New Mexico Court of Appeals' Decision upholding the Settlement Agreement between the Navajo Nation, the United States and the State of New Mexico relating to the Navajo Nation's claims to water in the San Juan River Basin. *State ex rel. State Engineer v. United States*, 2018-NMCA-053, 425 P.3d 723 (2018 Opinion). The 2018 Opinion held, *inter alia*, that the federal government, and not the State of New Mexico, controls the public waters of New Mexico. The Office of the State Engineer, the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) and the City of Gallup filed Motions For Reconsideration on April 13, 2021. The ABCWUA and the City of Gallup both receive water through the San Juan Chama diversion project. The City of Gallup also serves areas of the Navajo Nation.

Background

The Settlement Agreement was executed on April 19, 2005 representing the culmination of many years of negotiations between the Navajo Nation, United States, State of New Mexico and others. Congress passed legislation to approve and implement the Settlement Agreement as part of the Omnibus Public Land Management Act of 2009, Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11 § 10301, 123 Stat. 991 (2009) (Settlement Act). Further negotiations among the parties were held to conform various provisions of the Settlement Agreement to the new legislation before a final Settlement Agreement was signed in December, 2010. On August 16, 2013, the presiding judge overseeing New Mexico's San Juan River Adjudication entered his Order granting the Settling Parties Settlement Motion, in effect approving a multi-million-dollar settlement approved by Congress. *State of New Mexico ex rel. State Engineer v. United States*, D-1116-CV-75-184 (N.M. 11th Dist. Ct., August 16, 2013).

The Settlement Agreement provides increased certainty regarding water rights in New Mexico's San Juan River Basin while paving the way for the Navajo Nation to expand its agricultural operations. The Agreement aims to satisfy of all the Navajo Nation's water rights claims in the San Juan River Basin by providing for an additional 130,000 acre-feet over the Nation's current water entitlement of 195,000 acre-feet. The Settlement Agreement provides the Navajo Nation with a degree of certainty regarding its water rights entitlement and supply from the San Juan Basin, which quantification existed in legal theory, but was an unknown, and therefore, uncertain quantum.

Before the New Mexico Supreme Court

The 2018 Opinion states:

> . . .[f]irst, water is a commodity that can move in interstate commerce, and does so as the San Juan River crosses several state boundaries. Thus, it is ultimately subject to the control of the federal, not the state, government. *See Oneida Indian Nation v. City of Oneida*, 414 U.S. 661, 667, 670 (1974); *cf. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 597 F.Supp. 694, 704 (D. N.M. 1984). Although the state has an interest in regulating water within its boundaries, it lacks any ownership claim in such water. 2018 Opinion at 8.

The pending Motions For Reconsideration argue that the 2018 Opinion did not adhere to New Mexico's long-established water law precedents regarding the state's ownership and regulatory control over New Mexico's surface and groundwater. Movants contend that if the 2018 Opinion stands, its language will result in confusion over New Mexico's permitting authority and adversely affect water managers' administration of water rights.

Movants argue that the 2018 Opinion conflicts with New Mexico law and the New Mexico Consti-

tution. Under the prior appropriation system, water rights are generally quantified by present use. Most western states that have adopted the doctrine of prior appropriation have the principal codified in their constitutions. In New Mexico, for example, "beneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3.

The State of New Mexico also argues that it will be prevented from obtaining federal funding for critical water supply projects in Indian water rights settlements if the 2018 Opinion's faulty preemption analyses stands. The State of New Mexico notes that:

> . . .[w]hile the [2018 Opinion] upheld entry of the Navajo Nation Settlement Decrees, its rationale improperly eviscerates the primacy of the State over its water resources, in the face of 150 years of unwavering federal deference to State authority. *See* State of New Mexico's Motion to Reconsider Order Quashing Writ of *Certiorari*, *State of New Mexico ex rel. State Engineer v. United States of America*, No. S-1-SC-37068 (N.M. Sup. Ct. April 13, 2021).

According to the pending Motions For Reconsideration, resolution of the conflicts in the 2018 Opinion's reasoning with state law precedent is necessary in order for the state and the judiciary to adjudicate and administer water rights in New Mexico.

Conclusion and Implications

The moving parties request that the New Mexico Supreme Court reconsider its Order quashing the writs of *certiorari* it previously issued and subsequently quashed as "improvidently granted" so that the legal and policy ramifications of the case can be fully evaluated. Oral argument on the motions for reconsideration has been requested.
(Christina J. Bruff)

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