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CALIFORNIA WATER LAW & POLICY Reporter™

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CALIFORNIA WATER NEWS

GOVERNOR NEWSOM ISSUES DROUGHT PROCLAMATIONS

On April 21, 2021, Governor Gavin Newsom issued a State of Emergency Proclamation for Mendocino and Sonoma counties due to extremely dry conditions in the Russian River Watershed. Less than a month later, on May 10, 2021, Governor Newsom issued an expanded drought emergency proclamation to include the 39 additional counties that encompass the Klamath River, Sacramento-San Joaquin Delta and Tulare Lake watersheds. While Governor Newsom stopped short of declaring a statewide drought emergency, he directed state agencies to take immediate action to bolster drought resilience and prepare for impacts on communities, businesses, and ecosystems should dry conditions continue into the coming years.

Background

Much of the West is experiencing severe to exceptional drought and California is in a second consecutive year of dry conditions. Governor Newsom issued the emergency proclamation for Mendocino and Sonoma counties while standing in the bottom of Lake Mendocino, describing his location as what "should be 40 feet underwater" but for the historic drought. (Governor Newsom's Drought Update, April 21, 2021.) Recent warm temperatures and extremely dry soils have depleted expected runoff water from the Sierra-Cascade snowpack resulting in a historic and unanticipated estimated reduction of 500,000 acre-feet of water supply—or the equivalent of supplying water for up to one million households for one year—from reservoirs and stream systems. Upon issuing the expanded drought emergency proclamation, Governor Newsom said:

> . . .[w]ith the reality of climate change abundantly clear in California, we're taking urgent action to address acute water supply shortfalls in northern and central California while also building our water resilience to safeguard communities in the decades ahead. (Governor Newsom Expands Drought Emergency to Klamath River, Sacramento-San Joaquin Delta and Tulare Lake Watershed Counties (May 10, 2021) Office of Governor Gavin Newsom.)

The drought emergency declarations follow a series of actions that California has taken since the 2012-2016 drought to strengthen drought resilience. The actions include investment in water management systems, establishment of the Safe and Affordable Fund for Equity and Resilience Program, and development of the Newsom Administration's Water Resilience Portfolio. Statewide urban water use is 16 percent less than it was at the beginning of the last drought and yet, according to the declarations, extreme drought conditions this year "present urgent challenges" including the risk of water shortages in communities, greatly increased wildfire activity, diminished water for agricultural production, degraded habitat for many fish and wildlife species, threats of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Delta, and additional water scarcity if drought conditions continue into next year. Governor Newsom's proclamations declare that:

> . . .to protect public health and safety, it is critical the State take certain immediate actions without undue delay to prepare for and mitigate the effects of, the drought conditions statewide.

The Drought Emergency Proclamations

The drought emergency proclamations each contain a series of orders directing state agencies to take immediate action to bolster drought resilience across California. The proclamations encourage state agencies to take action as swiftly as possible by providing flexibility in complying with certain regulatory requirements, such as the California Environmental Quality Act and certain provisions of the California Water Code.

Among other things, the proclamations direct the State Water Resources Control Board to consider modifying requirements for reservoir releases and diversion limitations to conserve water upstream later

in the year to maintain water supply, improve water quality and protect cold water pools for salmon and steelhead. They direct state water officials to expedite review and processing of voluntary transfers in order to foster water availability where it is needed most.

The proclamations direct state agencies to work with local water districts and utilities to make all Californians aware of the drought, and encourage actions to reduce water usage by promoting the Department of Water Resources' Save Our Water campaign. They also direct state agencies to engage in consultation, collaboration, and communication with California Native American tribes to further existing partnerships and coordination, and assist tribes in necessary preparation and response to drought conditions.

The proclamations direct the State Water Resources Control Board, Department of Water Resources, the Department of Fish and Wildlife, and the Department of Agriculture to consult with the Department of Finance in order to accelerate funding for water supply enhancement, water conservation, and species conservation projects, as well as to identify unspent funds that can be repurposed to assist in drought projects and recommend additional financial support for certain groundwater substitution pumping. The proclamations further direct action to maintain critical instream flows, proactively prevent community drinking water shortages, support our agricultural economy and food security, and generally increase resilience of California's water supplies and water systems.

Conclusion and Implications

Governor Newsom officially issued the Proclamation of a State of Emergency for Mendocino and Sonoma counties on April 21, 2021. The full text can be found at: https://www.gov.ca.gov/wp-content/uploads/2021/04/4.21.21-Emergency-Proclamation-1.pdf. The expanded Proclamation of a State of Emergency including an additional 39 counties was issued on May 10, 2021. Its full text can be found at: https://www.gov.ca.gov/wp-content/uploads/2021/05/5.10.2021-Drought-Proclamation.pdf. On May 17, 2021, the Department of Water Resources and U.S. Bureau of Reclamation filed a temporary urgency change petition to modify certain water quality requirements and will continue to develop an operations plan in a final Drought Plan for 2021.

(Holly Tokar, Meredith Nikkel)

LEGISLATIVE DEVELOPMENTS

WATER PROJECT STREAMLINED IMPROVEMENTS BILL ADVANCES THROUGH CALIFORNIA LEGISLATURE

Proposed California legislation aiming to expedite improvements and streamline water projects to California's decades-old water delivery system recently cleared a key hurdle when it passed the Senate Natural Resources and Water Committee. California Senate Bill 626 (SB 626, Dodd, D-Napa) could, if enacted, significantly impact processes and timelines to construct water supply projects throughout the state.

Background

California's landmark, 60-year-old water delivery system—the State Water Project—serves more than 27 million people and 750,000 acres of farmland through its 700 miles of aqueducts, canals and pipelines. It is the largest State-owned and operated water system in the world. The California Department of Water Resources (DWR) is pursuing many projects to improve the system. Selection of contractors is a critical initial step in that process.

Senate Bill 626—Design-Build Versus Traditional Project Delivery

Senate Bill 626 would authorize DWR to employ the design-build procurement process for construction projects where it was largely prohibited before. In a traditional project delivery, the owner must manage two separate contracts with the designer and the general contractor. SB 626 proponents observe that these arrangements harbor potential to create adversarial relationships resulting in litigation, project delays, and increased project costs.

Under the design-build approach, the owner manages one contract with a single entity that represents the designer and contractor. The designer and contractor collaborate from the beginning of the project, providing unified project recommendations to fit the owner's schedule and budget. Changes throughout the design and construction are addressed by the entire team, potentially leading to collaborative problem-solving, reduced project costs and improved timely project completion.

SB 626 proponents assert that the design-build approach is the fastest growing and most popular method used to deliver construction projects in the country. They further state that the design-build procurement method would enable DWR to obtain the most qualified experts at the lowest cost.

Senate Bill Highlights

Senate Bill 626 would also specifically accomplish the following:

- Existing law authorizes DWR to use the design-build procurement process only for those projects at the Salton Sea. The bill would remove that limitation and allow DWR, until January 1, 2033, to utilize the design-build method for no more than seven projects.

- The bill would require DWR to prepare and submit to the Legislature an interim report that describes each design-build project approved under these provisions no later than July 1, 2025, as provided, and would require DWR to submit a final report providing specified data by July 1, 2028.

- Existing law requires agencies authorized to use the design-build project delivery method to notify the State Public Works Board before advertising the design-build project (except that for projects at the Salton Sea, for which the Director of Water Resources is required to notify the California Water Commission). This bill would exclude construction projects undertaken by DWR from the requirement that the Director of Water Resources provide notification to another entity.

Next Steps

SB 626 is supported by State Water Contractors, a nonprofit organization representing 27 public water agencies throughout the state. The bill recently passed the Natural Resources and Water Committee 9-0. As of the date of this writing, SB 626 would re-

turn to the Senate Appropriations Committee where it was re-referred for hearing. If passed out of that committee, it would then move to the Senate floor for a vote.

Conclusion and Implications

Senate Bill 626 aims to invoke the benefits of a design-build procurement method for many DWR projects throughout the State. Those projects are intended to improve the decades-old State Water Project and its related infrastructure, which supplies water to millions of residents and hundreds of thousands of acres of irrigated lands. With California apparently re-entering significant drought conditions, the ability of the State Water Project to maximize delivery of available water resources weighs heavily on water managers' minds—and budgets. SB 626 could potentially facilitate faster and more cost-efficient delivery of needed water delivery improvement projects—characteristics not commonly associated with large infrastructure projects in California. To track SB 626, *see:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB626. (Chris Carrillo, Derek R. Hoffman)

PROPOSED LEGISLATION WOULD ALLOW CALIFORNIA GROUNDWATER BASINS TO REQUEST AN EXTENSION FOR THE DEADLINE TO SUBMIT GROUNDWATER SUSTAINABILITY

As of January 31, 2020, all Groundwater Sustainability Agencies (GSAs) subject to critical conditions of groundwater basin overdraft under the California Sustainable Groundwater Management Act (SGMA) were required to submit and be managed under a Groundwater Sustainability Plan (GSP). All other GSAs in basins designated as high- or medium-priority basins are likewise required to be managed under a GSP. For these GSAs in high- and medium-priority basins, the deadline to submit a GSP is currently set at January 31 of 2022. With California Assembly Bill 754 (AB 754) in the works, however, these GSAs may soon be able to request an extension to this deadline.

Deadline Extension Requests under Assembly Bill 754

Section 10720.7(a)(2) of the California Water Code is clear in its mandate at this time: all basins designated as high- or medium-priority must be managed by a groundwater sustainability plan come January 31, 2021. The proposed legislation, AB 754, would add a new subsection here, allowing GSAs to request an extension to this deadline.

DWR Authority to Grant Extensions

In its current state, AB 754 would authorize the California Department of Water Resources to grant extensions of up to an additional 180 days for GSAs in high- or medium-priority basins to complete a groundwater sustainability plan for its basin. In order for GSAs to obtain such an extension, requests must be submitted to the Department of Water Resources no later than January 3, 2022. In turn, the Department of Water Resources would then be required to respond to each submitted request by January 10, 2022—three weeks before the current deadline for groundwater sustainability plan submissions.

The primary effect of AB 754 will be this provision granting the Department of Water Resources the authority to grant extensions to the January 31, 2022 deadline, but this effect will also impact the authority of the State Water Resources Control Board (SWRCB or State Board) to designate a high- or medium-priority basin as a probationary basin.

Under the existing provisions of SGMA, the State Board may designate basins as probationary if one of several circumstances is applicable. Two of those circumstances can be met when a basin has failed to implement a groundwater sustainability plan by the January 31, 2022 deadline. If a basin is designated as probationary, all effected GSAs will have 180 days to remedy the deficiency leading to the probationary status. At the conclusion of this period, if a groundwater sustainability plan has not yet been implemented—or the deficiency otherwise persists – the State Board may develop an interim plan for the probationary basin. As part of AB 754, the authority of the State

Board to designate basins as probationary will be amended accordingly to reflect the ability of the Department of Water Resources to extend the January 31, 2022 deadline for GSAs.

Conclusion and Implications

AB 754's proposed legislation is quite concise, only seeking to add in the provision allowing for extensions and the associated housekeeping on probationary designations, but these limited provisions may offer substantial relief to GSAs who are struggling to meet the existing deadline of January 31, 2022. On the previous deadline for submitting groundwater sustainability plans, the Department of Water Resources saw a flood of groundwater sustainability plans in the days leading up to the deadline for critically overdrafted basins. By allowing GSAs to obtain relief in the form of deadline extensions, the Department of Water Resources is both alleviating—to some extent—the rush of submissions that would have come with a single deadline, and is offering GSAs some breathing room to complete the exceedingly complex groundwater sustainability plans they have been working towards over the last several years.

While the bill has not been signed into law as of this writing, there does not appear to be any significant pushback. GSAs hoping to take advantage of this extension should keep the January 3, 2022 deadline to submit a request marked prominently on their calendars. Assembly Bill 754 may be tracked online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB754.
(Kristopher Strouse, Wes Miliband)

CALIFORNIA ASSEMBLY BILL SEEKS TO HEIGHTEN WATER CONSERVATION EFFORTS BY DECREASING URBAN WATER USE OBJECTIVES

Assembly Bill 1434 was introduced by Assembly Member Friedman on February 19, 2021 and referred to the Assembly Committee on Water Parks and Wildlife. Recently, the bill was amended on April 19, 2021. If passed, the bill would amend § 10609.4 of the Water Code, relating to water

Assembly Bill 1434

Under existing § 10609 of the California Water Code, the California Legislature establishes a method to estimate the aggregate amount of water that would have been delivered in the previous year by an urban retail water supplier if all water actually used was used efficiently. In order to do this, the Legislature established Urban Water Use Objectives for several use types, including Indoor and Outdoor Residential uses. These Urban Water Use Objectives do not set any hard-limits on the amount of water urban retail water suppliers may actually provide. Instead, by comparing the amount of water actually used in the previous year with the urban water use objective, the idea is that local urban water suppliers will be in a better position to cut back on unnecessary or wasteful uses of water.

For Indoor Residential Water Use, the standard set by the Urban Water Use Objectives is currently 55 gallons per day per capita. This standard is slated to last through January 1, 2025 where the standard will then be dropped to 52.5 gallons per day per capita, then dropped again to 50 gallons per day per capita come January 1, 2030.

What the Bill Seeks to Change

While AB 1434 does not plan on making any radical changes to Urban Water Use Objectives as a general scheme, the proposed reduction for Indoor Residential Water Use may very well be a drastic enough change itself.

In its current state, AB 1434 looks to drop the Indoor Residential Water Use standards by up to 20 percent and implement a more staggered timeline for reducing the standard. The first change under AB 1434 would come January 1, 2023, where the Indoor Residential Water Use standard would be dropped to 48 gallons per day per capita. In 2025, this standard would drop again to 44 gallons per day per capita, and by 2030, the standard would be reduced to a mere 40 gallons per day per capita.

The first reduction, currently planned for January 1, 2023 under AB 1434, would lower the present standard from 55 gallons per day per capita to 48—a reduction of nearly 13 percent. Come 2025, when existing law would commence the lowering of Indoor Residential Water Use standards from 55 to 52.5 gallons per day per capita, AB 1434 would further lower this standard to 44 gallons per day per capita—a 16 percent decrease from the existing law's standards. Finally, by 2030, AB 1434 proposes to cut the existing law's standard for that same year by 20 percent, lowering the currently planned standard of 50 gallons per day per capita to only 40.

Conclusion and Implications

As noted above, these Urban Water Use Objectives do not set hard-caps on urban retail water suppliers when it comes to providing water for Indoor Residential Water Uses. What it does do, however, is keep the pressure on such urban retail water suppliers to engage their customers to achieve these standards. Further, the Legislature maintains that Local urban retail water suppliers should have primary responsibility for meeting standards-based water use targets, and that they are to retain the flexibility to develop their water supply portfolios, design and implement water conservation strategies, educate their customers, and enforce their rules.

What Assembly Bill 1434 proposes is an expedited schedule towards efficient water use for Indoor Residential uses. By cutting these standards so drastically with only a ten-year planning horizon, the Legislature will be making clear its expectations for the future of water conservation and efficiency from water users across the state. The bill can be tracked online at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1434.
(Kristopher Strouse, Wes Miliband)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES AWARDS MILLIONS IN GRANT FUNDING FOR SUSTAINABLE GROUNDWATER MANAGEMENT GRANT PROGRAM

The California Department of Water Resources (DWR) recently awarded $26 million through the Sustainable Groundwater Management Grant Program (SGM Program) to fund groundwater sustainability projects in critically overdrafted (COD) basins. The grant funding is directed toward projects that improve groundwater quality, reduce subsidence and flood risk, and increase drought resiliency and groundwater reliability during drought conditions.

Background

California's Sustainable Groundwater Management Act (SGMA) was signed into law in 2014 (and DWR Regulations were promulgated in 2016) to achieve long-term sustainability for the State's groundwater basins. SGMA vastly and dramatically altered the framework for groundwater management in California. With SGMA, new projects and management actions became inevitable, as did their associated costs.

The Sustainable Groundwater Management Grant Program

The purpose of the Sustainable Groundwater Management Grant Program is to financially assist Groundwater Sustainability Agencies (GSAs) and others in achieving successful SGMA compliance and implementation. The SGM Grant Program provides funding for sustainable groundwater planning and implementation projects through a competitive grant solicitation process. These funds will help achieve groundwater sustainability, especially for communities deemed to be at high risks of drought impacts.

Upon DWR's announcement of the awards, DWR Director Karla Nemeth said:

> California's current drought conditions following a second consecutive dry year speak to the importance of managing our groundwater for long-term reliability. Today's funding awards further the state's support for local leaders as they manage their groundwater supplies, particularly supporting communities at risk of drought impacts.

The SGM Grant Program will provide a minimum of $103 million in grants for projects that:

- address drought and groundwater sustainability through recharge with surface water, stormwater, and recycled water;
- prevent or decontaminate groundwater that is used for drinking water;
- improve water supply reliability, water conservation, and water use efficiency; and
- support water banking, exchange, and reclamation.

Funding for the SGM Grant Program is provided through Proposition 68 and Proposition 1. Proposition 1 was approved in 2014 and authorized $100 million in grants for the development and implementation of groundwater plans and projects. Proposition 68 was approved in 2018 and authorized the California Legislature to appropriate funds for certain groundwater sustainability related projects.

To date, DWR has awarded $139.5 million in planning grants for development of Groundwater Sustainability Plans (GSPs) and related projects. All Proposition 1 funds have been awarded. Approximately $103 million remain in the Proposition 68 funds. Of the remaining Proposition 68 implementation funds, the first round of grants is now completed, for which $26 million were made available for six (6) projects in critically overdrafted basins.

$26 Million Grant Funds Awarded

DWR awarded the full $26 million to six projects designed to achieve regional sustainability, water

supply security, domestic well reliability, and improve water quality and affordability, with investments in groundwater recharge in COD basins. Each project benefits underrepresented communities that suffer from limited access to safe and affordable drinking water.

The six awarded projects are comprised of 16 specific construction projects. Each project is located in Central Valley COD basins and will assist communities deemed by DWR to be underrepresented and with limited access to safe and affordable drinking water. One project will construct 60 wells to replenish depleted groundwater aquifers with stormwater. Three projects will develop infrastructure on 45,000 acres of agricultural land in Madera County for Flood Managed Aquifer Recharge (Flood-MAR), which redirects flood water onto agricultural land, working landscapes, and managed natural lands to recharge aquifers.

Conclusion and Implications

Sustainable Groundwater Management Act compliance is costly. As drought conditions appear to re-emerge throughout much of the state, water managers and agencies are becoming even more focused on managing and improving long-term water supplies. The SGM Grant Program aims to assist basins and communities that face extreme challenges in achieving groundwater sustainability both in terms of managing water resources and obtaining the funds needed to implementing groundwater sustainability projects. The selection process for a second round of grants is anticipated to occur in the spring of 2022. It is anticipated to offer approximately $77 million in grant funding for other medium- and high-priority (including COD) basins, thereby expanding the benefits of the SGM Grant Program. Needless to say, competition for those funds will be fierce. For more information on the Program, *see:* https://water.ca.gov/Work-With-Us/Grants-And-Loans/Sustainable-Groundwater.

(Gabriel J. Pitassi, Derek R. Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REVIVES NAVAJO NATION TRUST CLAIM BASED ON UNQUANTIFIED COLORADO RIVER RIGHTS

Navajo Nation v. U.S. Department of the Interior, ___F.3d___, Case No. 19-17088 (9th Cir. Apr. 28, 2021).

In April 2021, the Ninth Circuit Court of Appeals reversed a U.S. District Court ruling dismissing a breach of trust claim by the Navajo Nation (Nation) against the Department and Secretary of the Interior (Interior), the U.S. Bureau of Reclamation (Bureau), and the U.S. Bureau of Indian Affairs (BIA). The Nation's complaint alleged that the various federal agencies breached their fiduciary duty to the Nation by failing to consider the Nation's unquantified water rights in the management of the Colorado River.

Background

The Navajo Nation is a federally recognized tribe whose reservation includes portions of Arizona, New Mexico, and Utah. The Nation's reservation was established by treaty in 1868, and was later expanded by executive orders and acts of Congress. The Colorado River defines part of the Reservation's western border.

The Colorado River is governed by an array of laws known as the "Law of the River." A 1922 compact, conditionally approved through the Boulder Canyon Project Act in 1928, divides the Colorado River basin into an Upper and Lower Basin, consisting of Colorado, New Mexico, Utah, and Wyoming in the Upper Basin, and Arizona, California, and Nevada in the Lower Basin. Each Basin is apportioned 7.5 million acre-feet of water per year. A 1964 decree by the United States Supreme Court adjudicated water rights in the Colorado River, including for five Indian Tribes to the mainstem of the Colorado River. The Decree did not, however, adjudicate the rights of the Navajo Nation to the mainstem of the Colorado River or its tributaries.

Each year, the Department of the Interior determines whether there will be a surplus or shortage of water in the Lower Basin. In 2001 and 2007, Interior adopted guidelines to clarify how it determines the existence of a shortage or surplus. Interior's final environmental impact statement prepared prior to Interior's adoption of the 2001 guidelines identified the Nation's unquantified water rights as Indian trust assets.

In 2003, the Nation challenged Interior's 2001 surplus guidelines, alleging that its approval of the guidelines violated the National Environmental Policy Act (NEPA) and breached the federal government's trust obligations to the Nation in the management of the Colorado River. In particular, the Nation alleged that Interior, the Bureau, and the BIA (collectively: Federal Agencies) failed to consider or meet the Nation's unquantified water rights and water needs on the reservation. The District Court dismissed the Nation's complaint on the grounds that the Nation lacked Article III standing to bring its NEPA claim and that sovereign immunity barred the Nation's breach of trust claim. The Ninth Circuit affirmed in part and reversed in part, remanding the breach of trust claim to the district court for full consideration of the merits of that claim, including as the Nation may seek to amend it.

The Ninth Circuit's Decision

The Nation sought to amend its complaint twice, with the third amended complaint alleging that the Federal Agencies failed to: 1) determine the quantities and sources of water required to make the Nation a permanent homeland for the Navajo people, and 2) protect the sovereign interests of the Nation by securing an adequate water supply to meet those homeland purposes. The District Court denied both motions to amend and dismissed the Nation's complaint with prejudice on the grounds that the Nation failed to identify a specific trust-creating statute, regulation or other law that the Federal Agencies violated, and that a determination of any water rights to the mainstem of the Colorado River under the *Winters* doctrine was jurisdictionally barred by the Supreme Court's reservation of jurisdiction under the Decree. The Ninth Circuit reversed, holding that the

Nation's breach of trust claim did not implicate the Supreme Court's reservation of jurisdiction in the Decree and that the *Winters* doctrine establishes an enforceable trust duty.

Jurisdiction

With respect to the jurisdictional question, the Ninth Circuit held that the Nation's complaint did not seek a quantification of its rights in the Colorado River. Instead, the Nation sought an injunction requiring the Federal Agencies to determine the extent to which the Nation requires water, to develop a plan to secure the water needed, to exercise authority to manage the Colorado River in a manner that does not interfere with the plan to secure the water needed, and to require the Federal Agencies to analyze and mitigate any adverse effects of those actions. In effect, the Nation sought a judicial order requiring the Federal Agencies, as opposed to the court, to determine the appropriate quantity of water necessary to satisfy the water needs of the Nation as a homeland for the Navajo, and to account for those needs in the shortage guidelines. According to the Ninth Circuit, granting the Nation's requested relief would not require a *judicial* quantification of the Nation's rights to water in the Colorado River, and therefore fell outside the scope of the Decree. Similarly, because the Ninth Circuit determined that the Nation's breach of trust claim was not a claim seeking judicial quantification of its water rights, the Ninth Circuit held that the Nation's claim was not barred by res judicata as a claim that could have been adjudicated in the Decree, as argued by intervener states and agencies.

The Ability to Amend the Complaint

With respect to whether the Nation could plead a substantive breach of trust claim, the Ninth Circuit held that the Nation identified specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on the Federal Agencies by basing its claim on the Nation's unquantified water rights that were impliedly created when the Nation's reservation was created as a homeland for the Navajo people. Thus, the Ninth Circuit concluded that the District Court should have allowed the Nation to amend its complaint.

As explained by the Ninth Circuit, under the *Winters* doctrine the federal government reserves appurtenant, unappropriated water necessary to accomplish the purpose of a reservation if the treaty (in this instance) creating the reservation is silent about water. The Ninth Circuit observed that the 1868 treaty creating the Nation's reservation contemplated farming by members of the reservation, thus encouraging a transition to agrarian society. Accordingly, the creation of the Nation's reservation impliedly reserved water for the purpose for which it was created, which included farming. Moreover, the Ninth Circuit observed that the Federal Agencies exercised pervasive control over the Colorado River under the Law of the River, and that Interior's guidelines expressly recognized unquantified *Winters* rights as Indian Trust Assets. The Ninth Circuit therefore held that the Nation had identified a specific duty to protect and preserve the Nation's right to water. The Ninth Circuit also noted that the long-standing, unquantified nature of the Nation's reserved water right was due to the federal government having never sought to quantify those rights, and the Nation should not be prevented from doing so as a result. Accordingly, the Ninth Circuit held that the Nation should have been allowed to amend its complaint, and that doing so would not be futile.

Conclusion and Implications

While the Ninth Circuit's holding appears to be limited to allowing the Nation to amend its complaint to substantiate its breach of trust claim against the Federal Agencies, the Ninth Circuit's reasoning in reaching that decision may have broader implications for the role unquantified *Winters* rights may play in federal and even state policy governing the management of water resources. The Ninth Circuit's opinion also introduces the prospect of non-judicial quantifications of federally reserved rights through federal water management efforts as a consequence of federal trust duties to tribes and tribal assets, such as water rights. The Ninth Circuit's opinion of April 28, 2021 is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/28/19-17088.pdf. (Miles B. H. Krieger, Steve Anderson)

U.S. ARMY CORPS OF ENGINEERS' CLEAN WATER ACT SECTION 408 REQUIREMENTS UPHELD BY THE DISTRICT COURT

Russellville Legends, LLC v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. 4:19-CV-00524-BSM (E.D. Ark. Mar. 31, 2021).

The U.S. District Court for the Eastern District of Arkansas recently granted a motion for summary judgment by the U.S. Army Corps of Engineers (Corps) and denied a motion for summary judgment by the Russellville Legends, LLC (Russellville) in a federal Clean Water Act (CWA) Section 408 case. The District Court's ruling determined when a project proponent is required to obtain Section 408 review and approval.

Factual and Procedural Background

Section 408 of the Clean Water Act requires anyone seeking to alter, use, or occupy a civil works project built by the United States for flood control to obtain permission from the Corps. This permission can come in the form of a "consent." Section 408 policies provide that a consent is a written agreement between the holder of an easement and the owner of the underlying property that allows the owner to use their land in a particular manner that will not interfere with the easement holder's rights. The Corps has guidelines providing that if any Corps project would be negatively impacted by a requestor's project, the evaluation should be terminated.

Russellville bought land located near a university from Joe Phillips (Phillips) in order to build student housing. Since 1964, the Corps held an easement over the land below the 334-foot elevation line that prevented structures from being constructed on the easement due to flooding risks. While Phillips owned the land, the Corps had given two consents for work within the easement: one to a nearby city, to remove dirt from within the easement, and one to Phillips, to replace the dirt that was removed.

After Russellville acquired the property, the Corps gave Russellville conflicting messaging about whether the consent the Corps gave to Phillips was still in effect such that Russellville could replace the dirt that had yet to be replaced by Phillips. The Corps first told Russellville that the consent was still in effect, but that Russellville could not build structures within the easement. Months later, the Corps told Russellville that the consent was only applicable to Phillips, so Russellville could not use it to replace any dirt.

Russellville submitted a Section 408 request, working with the Corps to provide environmental modeling satisfactory to the Corps, to determine the impacts Russellville's desired construction activity could have on water elevation and velocity in the Corps' easement. The Corps denied Russellville's request, pursuant to Corps' guidelines, because it determined the construction would negatively impact Corps projects. The Corps also denied the request because of an Executive Order that requires federal agencies to avoid modification of "support of floodplain development" when there is any practicable alternative.

Russellville sought judicial review of the Corps' denial and filed a motion for summary judgment. The Corps filed a cross-motion for summary judgment.

The District Court's Decision

The District Court began its analysis by explaining the relevant legal standards. It explained that summary judgment is appropriate when there is no genuine dispute of material fact, and that in the context of summary judgment, an agency action is entitled to deference. It also explained that the relevant standard for reviewing agency action under the federal Administrative Procedure Act (APA) is whether the agency action was arbitrary, capricious, or an abuse of discretion. An agency action is not arbitrary and capricious if the agency examined relevant data, stated a satisfactory explanation for its action, and included a rational connection between the facts and the decision made.

Declaratory Judgment Act Claim

Russellville first argued the consent the Corps granted to Phillips was reviewable as a contract under the Declaratory Judgment Act (DJA), such that the court could declare the rights granted under the consent. The court decided the consent was not a contract because it lacked consideration—a necessary element for every contract. Therefore, the court held

the DJA did not apply, and did not allow the court to undertake such an interpretive review of the consent.

Corps Consent to Predecessor in Interest Didn't Apply to Successor in Interest

Russellville then argued that the consent the Corps granted to Phillips was still in effect to allow Russellville to undertake its desired construction, without any need for a new Section 408 consent. The court held that it did not matter whether the consent the Corps granted to Phillips was still in effect because Russellville's construction would impact Corps projects. As a result of this impact, the court held Russellville had to obtain Corps approval under Section 408 and Russellville could not use the old consent even if it were in effect.

Rational Basis/Analysis

The court then reviewed the Corps' decision under the APA standard for agency actions to determine whether the denial was valid. Ultimately, the court held that the Corps' actions had a rational basis and were not arbitrary and capricious because the Corps examined relevant data, stated a satisfactory explanation for its action, and included a rational connection between the facts and the decision made.

The court first determined that the Corps examined relevant data. The court pointed out that the Corps examined Russellville's memorandum accompanying its request for consent, which used hydraulic models to determine the impacts in the easement area and on the Corps' projects, and determined that Russellville's construction would increase flood heights and water channel velocities. Russellville tried to argue that the Corps should have included some of its own studies and models to support its decision, but the court concluded that the Corps has no obligation to conduct its own studies, therefore its examination of Russellville's memorandum was sufficient.

The court next determined that the Corps stated satisfactory explanations to support its denial. The Corps had explained that its denial was because: 1) the project would increase flood risks to people and property, 2) the project would impair the usefulness of other Corps projects, and 3) the project would obstruct the natural flow of floodwater into a sump area that was an integral part of a Corps project. Taken together, the court found these specific explanations to be satisfactory.

Lastly, the court determined there was a rational connection between the Corps' factual findings and its ultimate decision. The Corps has an obligation to avoid adverse impacts associated with floodplain modification, and here the Corps denied Russellville's request for floodplain modification because the Corps found it would present an adverse impact.

Therefore, because the Corps' actions had a rational basis, and were not arbitrary and capricious, the court denied Russellville's motion for summary judgment and granted the Corps' cross-motion for summary judgment.

Conclusion and Implications

Section 408 cases are not very common. This case shows that a project proponent must go through the Section 408 request process if the project would impair Corps projects, regardless of whether consent was granted to a prior property owner. It also demonstrates that a project proponent carries the full burden of presenting all studies and analysis, and the Corps has no obligation to conduct its own studies or analysis. The District Court's opinion is available online at: https://casetext.com/case/russellville-legends-llc-v-us-army-corps-of-engrs.

(William Shepherd, Rebecca Andrews)

DISTRICT COURT FINDS CONGRESSIONAL AUTHORIZATION LIMITS DAM MANAGEMENT AND DOES NOT ALLOW DISCRETIONARY RELEASES FOR SPECIES MANAGEMENT

San Luis Obispo Coastkeeper, et al. v. Santa Maria Valley Water Conservation District, ___F.Supp.3d___, Case No. CV-19-08696 (C.D. Cal. April 15, 2021).

On April 15, 2021, the U.S. District Court for the Central District of California granted summary judgment for the Santa Maria Valley Water Conservation District, U.S. Department of the Interior, and U.S. Bureau of Reclamation (collectively: defendants), finding that management of Twitchell Dam was limited by Congressional authorization and did not permit additional releases for species conservation

Factual and Procedural Background

In 1954, Public Law 774 (PL 774) authorized the construction of the Twitchell Dam (originally named Vaquero Dam and Reservoir), situated on the Cuyama River, a few miles upstream of the confluence of the Cuyama and Sisquoc rivers. PL 774 authorized Twitchell Dam "for irrigation and the conservation of water, flood control, and for other purposes . . . substantially in accordance with" a specific Secretary of Interior Report (Report). The defendants manage and operate Twitchell Dam, using the U.S. Bureau of Reclamation's Standard Operating Procedures (SOP) for Twitchell Dam to limit the timing and volume of releases from the Dam.

San Luis Obispo Coastkeeper and Los Padres Forestwatch (collectively: plaintiffs), alleged that the defendants' management of Twitchell Dam resulted in the unlawful take of Southern California steelhead under the federal Endangered Species Act (ESA). Particularly, plaintiffs argued that defendants' adherence to the SOP created insufficient pathways for migratory fish and reduced opportunities for spawning, resulting in decline of steelhead. The key issue in this case was whether wildlife conservation fell within the scope of those "other purposes" authorized by Congress in PL 774.

The defendants filed motions to dismiss for lack of standing and failure to state a claim. However, the U.S. District Court previously denied these motions because at that stage there were potentially relevant complex issues of California water law and the evidentiary record needed to be developed. After a year of development, the defendants filed motions for summary judgment on the basis that their limited discretion did not allow them to adjust Twitchell Dam's releases such that additional releases for species management were permissible under PL 774. For the reasons discussed below, the court granted defendants' motions for summary judgment.

The District Court's Decision

Congressional Authorization Limited Defendants' Discretion to Make Additional Releases from Twitchell Dam

The court explained that where Congress has identified limitations, especially in the context of project water, the defendants cannot provide water for uses outside of those limits. The court engaged in a comprehensive analysis of PL 774's legislative history to determine whether "other purposes" included plaintiffs' proposed releases. Ultimately, the court concluded that operating the Twitchell Dam in the manner requested by plaintiffs would have been so "foreign to the original purpose of the project" that it would "be arbitrary and capricious."

Crucially, PL 774's language limited Twitchell Dam's authorization "for other purposes . . . substantially in accordance with the recommendations of the Secretary of the Interior" provided in the Report. The Report identified that a fundamental function of Twitchell Dam was to salvage water that would otherwise be "wasted to the ocean" by storing flows in excess of percolation capacity behind the Dam and underground. The additional flows that plaintiffs requested for the species are the types of flows PL 774 sought to conserve and store. The legislative history including the House Debate Record and Senate discussion, expressly contemplated storage of water that would otherwise "go out to sea" and set releases of water at a rate "not greater than percolation capacity." Therefore, the releases plaintiffs requested were

beyond the defendants' Congressionally-authorized authority and conflicted with the express purpose of the project.

The Report further specifically considered the impact of the project on the steelhead and expected a "small fishing loss." A comment letter from the California Department of Fish and Wildlife (formerly Department of Fish and Game) incorporated into the Report explained that the small quantity of the steelhead present in the river combined with unstable runs, and generally unsuitable conditions led to the conclusion that water releases to maintain a stream fishery were not feasible. The court reasoned that the effect of the project on the steelhead was considered and not included as "a rejected 'other purpose.'"

The Endangered Species Act Does Not Impose Liability on Agencies Without Discretion

In order for an ESA Section 9 claim to succeed, a defendant must be the proximate cause of the alleged take. Where an agency has no ability to prevent a certain effect of its actions, it cannot be considered a legally relevant cause. The District Court reasoned that because PL 774 did not provide defendants with discretion to operate Twitchell Dam to avoid take of a species, the defendants could not be liable under ESA.

Conclusion and Implications

Where Congress authorized Twitchell Dam to be operated for specific purposes, and species conservation was not included in those purposes, defendants had no discretion to make additional releases of water for the steelhead trout. Further, where an agency has no discretion to control the effect of its actions on species, it cannot be held liable for take under the Endangered Species Act Section 9. Plaintiffs filed a notice of appeal and the Ninth Circuit Court of Appeals set a briefing schedule through September 16, 2021. The District Court's opinion is available online at: https://www.courtlistener.com/docket/16314724/101/san-luis-obispo-coastkeeper-v-santa-maria-valley-water-conservation/.
(Alexandra Lizano, Meredith Nikkel)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS SUPPLEMENTAL EIR PREPARED BY STATE LANDS COMMISSION PURSUANT TO CEQA FOR LEASE AMENDMENT PERTAINING TO DESALINATION PLANT

California Coastkeeper Alliance v. State Lands Commission, ___Cal.App.5th___, Case No. C088922 (3rd Dist. Apr. 8, 2021).

The California State Lands Commission prepared a supplemental Environmental Impact Report (EIR), as a California Environmental Quality Act (CEQA) responsible agency, to a 2010 subsequent EIR that had been prepared by the City of Huntington Beach for a desalination plant, certain components of which would be located offshore. Plaintiffs sued, claiming that the State Lands Commission had failed to assume lead agency status, which resulted in an unlawful piecemealing of the environmental review. The trial court rejected plaintiffs' claims, who then appealed. The Court of Appeal in turn affirmed.

Factual and Procedural Background

Since 1999, real party in interest Poseidon Resources (Surfside) LLC (Poseidon) has been seeking to establish a desalination plant at a site in Huntington Beach. The site itself consists of approximately 11.78 acres including tide and submerged lands in the Pacific Ocean offshore of Huntington Beach. In 2005, Huntington Beach, serving as the lead agency performing environmental review of the proposal under the California Environmental Quality Act, certified an Environmental Impact Report. In 2006, Huntington Beach granted the project's conditional use permit and coastal development permit, although the project did not move forward. A few years later, Poseidon submitted a modified application, which was evaluated in a subsequent EIR prepared by Huntington Beach in 2010 as a result of changed circumstances and new information. Huntington Beach certified the subsequent EIR in 2010.

Following additional changes in circumstances, including regulatory changes, Poseidon proposed modifications to certain offshore project components, which it addressed via a lease modification with defendant State Lands Commission. The State Lands Commission, as a CEQA responsible agency, determined that it needed to prepare a supplemental EIR to Huntington Beach's 2010 subsequent EIR to evaluate the potential impacts associated with the lease modification project. The scope of the supplemental EIR was limited to evaluating the changes to the 2010 lease and the incremental effects of those modifications and was intended to be read in conjunction with the 2010 subsequent EIR. In late 2017, the Lands Commission certified its supplemental EIR.

Plaintiffs filed a petition for a writ of mandate asserting that the State Lands Commission failed to comply with CEQA. Among other things, plaintiffs claimed the State Lands Commission violated CEQA by failing to assume the role of lead agency in undertaking additional CEQA review. They also claimed that, in light of substantial changes to the project, substantial changes to the surrounding circumstances, and new information of substantial importance, the State Lands Commission should have performed a full EIR as lead agency. According to plaintiffs, the manner in which the Commission proceeded led to unlawful segmentation of the environmental review process. The trial court denied the petition and plaintiffs appealed.

The Court of Appeal's Decision

The Court of Appeal first addressed the State Lands Commission's decision to proceed with a supplemental EIR, as opposed to a subsequent EIR, finding that substantial evidence supported the Commission's determination that only minor additions or changes would be required to the previous EIR. The Court of Appeal noted, however, that plaintiffs did not argue that it was an abuse of discretion to proceed by supplemental EIR. Rather, they claimed that the election to prepare a supplemental EIR did not re-

lieve the State Lands Commission of a responsibility to assume the role of lead agency. According to plaintiffs, when the original lead agency has completed its statutory obligations, but project changes or new information require additional review, the next public agency to take discretionary action on the project "shall" step into the role of lead agency. The State Lands Commission's failure to do so, plaintiffs contended, was a legal error that resulted in the unlawful segmentation of the updated CEQA analysis.

The Court of Appeal rejected this argument, first noting that the CEQA Guidelines only require a responsible agency (such as the State Lands Commission in this case) to assume lead agency status where, among other things, a subsequent EIR is required under CEQA Guidelines § 15162. Because substantial evidence supported the State Lands Commission's decision to instead prepare a supplemental (rather than a subsequent) EIR, the Commission therefore was not required under the CEQA Guidelines to assume lead agency status. Accordingly, the Court of Appeal concluded, there was no legal error in this respect.

Piecemealing Claim

The Court of Appeal also rejected plaintiffs' piecemealing claim ("piecemealing" refers to the process of attempting to avoid full environmental review by splitting a project into several smaller projects that appear more innocuous than the total planned project). The court first noted that the 2010 subsequent EIR prepared by Huntington Beach had never been challenged, and thus was presumed to be legally adequate. Thus, the State Lands Commission only was required to analyze those changes to the project since 2010, as it did.

Upholding the supplemental EIR, the Court of Appeal found that the State Lands Commission undertook the procedures expressly authorized by statute and the CEQA Guidelines that were appropriate under the circumstances. The impetus for the changes was regulatory changes that were not foreseeable in 2010. Under these circumstances, the State Lands Commission did not improperly piecemeal the analysis. As required, it supplemented the previous 2010 subsequent EIR analysis, adding only that information necessary to make the previous EIR adequate for the project as revised in light of the changing regulatory landscape. It was not, the Court of Appeal concluded, required to create a plenary, stand-alone, all-inclusive EIR for the project.

Conclusion and Implications

The case is significant because it contains a substantive discussion of CEQA's subsequent review provisions, in particular the distinctions between subsequent and supplemental review, as well as a discussion regarding "piecemealing" claims under CEQA. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C088922.PDF.
(James Purvis)

SECOND DISTRICT COURT UPHOLDS MULTI-MILLION DOLLAR PENALTY AGAINST HOMEOWNER BLOCKING PUBLIC ACCESS TO THE COAST

Lent v. California Coastal Commission, 62 Cal.App.5th 812 (2nd Dist. 2021).

In April, California's Second District Court of Appeal upheld the California Coastal Commission's (Commission) over $ 4 million penalty assessed against homeowners who refused to remove a gate, deck, and stairway that encroached into an easement dedicated to the California Coastal Conservancy (Conservancy). This penalty was upheld even though the offending structures were constructed by a previous owner of the property and had been in place for decades. The plaintiffs challenged the fine, which was much higher than the $950,000 penalty recommended by Commission staff on multiple grounds, including inadequate notice of the penalty amount, abuse of discretion on the part of the Commission in imposing the penalty, and constitutional grounds, among other arguments.

Background

At issue is a beachfront property in Malibu, California. A prior owner applied for a coastal development permit with the Commission in order to build a home in 1978. The Commission issued a permit, but required that the owner dedicate a five foot wide easement to the Conservancy. Such an easement was dedicated in 1980 and accepted by the Conservancy two years later. The prior owner built a deck and a stairway that encroached into nearly half of the five-foot easement. While the Commission approved a deck and stairway, it did not approve these specific structures.

Informal enforcement action began with a letter from the Conservancy to the owners of the property in 1993, which informed the owners of the encroachment and requested that the owners remove the structures and the gate blocking public access. Then in 2007, after the plaintiffs purchased the property, the Commission informed the plaintiffs that the offending structures were inconsistent with the easement and violated the California Coastal Act. The Commission asked the plaintiffs to remove the structures, but no agreement on removal was reached.

Finally, in 2015 the Commission notified the plaintiffs that it intended to issue a cease and desist order and impose penalties related to the offending structures. Two weeks before the hearing, Commission staff submitted a report with findings and recommendations for consideration by the Commission. With respect to penalties, the report noted that the Coastal Act authorizes penalties of up to $11,250 per day for 744 days, which yielded a maximum penalty of over $8 million. The report recommended a penalty in the $800,000 to $1.5 million range, and specifically recommended $950,000. Both the Commission staff and plaintiffs presented at the hearing on this matter. Ultimately, the Commission determined that the plaintiffs' actions were egregious and warranted a higher penalty than was recommended. The Commission settled on a penalty of $4,150,000.

The Court of Appeal's Decision

Due Process Claims

The plaintiffs argued that the hearing process before the Commission violated their due process, the fines were unconstitutional as excessive, and that the Commission abused its discretion in imposing the penalty. The court rejected all of the plaintiff's arguments, finding that substantial evidence supported the Commissions actions and that the plaintiffs failed to demonstrate how additional hearing procedures would be more protective of their rights.

The court held that the Commission did not violate the plaintiffs' due process rights because the plaintiffs had sufficient notice of the alleged violations and the hearing procedures, had an opportunity to present a defense and evidence, and had notice of the Commission staff's recommendations—including the potential range of penalties that could be assessed. While these procedures are not equivalent to a trial-like procedure, this is enough to satisfy due process requirements. Additionally, notice of the exact penalty amount to be imposed is not required, particularly in this situation where the range of penalties and formula for calculating such penalties was disclosed.

Penalty Was Constitutionally Appropriate

The court also held that the penalty was not unconstitutionally excessive. This was based on the Commission's and trial court's findings that the penalty was not "grossly disproportionate" to the plaintiff's conduct. The misconduct, according to this court, was the continued delay in the Conservancy's ability to construct a public access to the shoreline, and blocking public access generally. The court noted that there was no public access to the beach within at least a mile from the property.

Abuse of Discretion Claims

The court rejected the plaintiffs' arguments that the Commission abused its discretion in taking enforcement against the plaintiffs, primarily based on an argument that the plaintiffs had not "undertaken, or [were] threatening to undertake any activity. . ." without a permit or that is inconsistent with a previously issued permit. (Pub. Res. Code § 30810.) The court rejected the position that a subsequent owner who purchases property that contains structures inconsistent with previous permits is absolved of liability for those structures. The court held that a person who maintains an offending structure "undertakes activity," and thus is subject to Commission enforcement.

Claim of Bias

The court also rejected the plaintiffs' arguments that the Commission members are biased adjudicators, but the court did so in part based on the fact that the plaintiffs failed to properly provide necessary evidence to show that there was an impermissible institutional interest on the part of the Commission. In a lengthy footnote, the court explained that if evidence, properly provided, showed that penalties directly fund the Commission's operations, there could be a concern about bias in favor of imposing higher penalties.

Conclusion and Implications

This case is the newest in a growing line of enforcement cases dealing with the California Coastal Act and coastal resources. The Lent case also shows that million-dollar plus civil penalties are being upheld even in the face of arguments that such high penalties are disproportionate to the alleged violation. The court's April 16, 2021 opinion is available online at: https://www.courts.ca.gov/opinions/documents/B292091M.PDF.
(Brenda Bass, Hina Gupta)

ORANGE COUNTY SUPERIOR COURT APPROVES STIPULATED JUDGMENT IN THE *BORREGO VALLEY GROUNDWATER ADJUDICATION*

Borrego Water District v. All Persons Who Claim A Right To Extract Groundwater in the Borrego Valley Groundwater Subbasin No. 7.024-1 Whether Based On Appropriation, Overlying Right, Or Other Basis of Right, et al., Case No. 37-2020-00005776 (Orange County Super Ct. Apr. 8, 2021).

A group of groundwater pumpers, including the local public water provider, Borrego Water District (BWD), entered into a settlement agreement in January 2020 to adjudicate the groundwater rights of the critically-overdrafted Borrego Valley Groundwater Subbasin No. 7.024-01 (Subbasin). The settlement agreement included a proposed "physical solution" and Groundwater Management Plan (GMP) intended to assure the Subbasin reaches sustainability no later than 2040. The negotiations that resulted in the settlement agreement were prompted by BWD's and the County of San Diego's efforts to prepare a groundwater sustainability plan under the Sustainable Groundwater Management Act (SGMA).

Consistent with the terms of the settlement agreement, in January 2020 BWD filed a "friendly" adjudication lawsuit naming the other settling parties as well as other pumpers of groundwater in the Subbasin. As required by the comprehensive groundwater adjudication statute (Code of Civil Procedure, § 830 *et seq.*), notice of the action was served on the owners of approximately 5,000 parcels across the Borrego Valley. Very limited opposition was expressed to the terms of the proposed judgment. As a result, on April

8, 2021, Orange County Superior Court Judge Peter Wilson issued judgment in the action.

Background

The Subbasin underlies a small valley located in the northeastern part of San Diego County. Groundwater is the sole source of water for the valley, providing water for the unincorporated community of Borrego Springs and surrounding areas, including hundreds of acres of citrus farms and golf courses.

In 2014, the State of California adopted the Sustainable Groundwater Management Act to provide for the sustainable management of groundwater basins. Under SGMA, the Borrego Subbasin was designated by the California Department of Water Resources (DWR) as high priority and critically overdrafted. BWD and the County of San Diego (County) jointly opted to become the Borrego Valley Groundwater Sustainability Agency for the Borrego Subbasin (GSA).

A final draft Groundwater Sustainability Plan (GSP) for the Borrego Subbasin was prepared and circulated for public review and comment in late 2019. That GSP determined that the sustainable yield for the Subbasin was 5,700 acre-feet, that the Subbasin had been overdrafted for decades, and that then-current pumping levels of approximately 20,000 acre-feet per year could not be sustained. The GSP also contained an allocation plan and a rampdown schedule to reach sustainability by 2040.

Under SGMA, GSA's in critical basins were required to adopt a final GSP and submit it to DWR no later than January 31, 2020, or submit an alternative plan to the DWR by the same deadline.

A number of interested parties submitted comments during the three-year process culminating in the issuance of the draft final GSP. Those comments ultimately led to extended negotiations regarding the potential to adjudicate the groundwater rights of the Subbasin.

In January 2020, BWD and a group of major pumpers in the Borrego Subbasin entered into a written settlement agreement, which included a proposed stipulated judgment (Stipulated Judgment). The proposed Stipulated Judgment intended to comprehensively determine and adjudicate all rights to extract and store groundwater in the Subbasin. The Stipulated Judgment also intended to establish a physical solution for the sustainable groundwater management of the Borrego Subbasin. That same month, BWD filed the adjudication action seeking the Superior Court's adoption of the Stipulated Judgment. Additionally, BWD also filed the Stipulated Judgment with the DWR in January 2020 for review as a GSP alternative under SGMA. After a significant noticing period, Orange County Superior Court Judge Peter Wilson approved the adoption of the Stipulated Judgment on April 8, 2021.

The Stipulation and Judgment

As part of its approval, the court will continue to oversee the administration and enforcement of the Stipulated Judgment. To assist the court in the administration, the judgment establishes a Borrego Watermaster to administer and enforce on a day-to-day basis the provisions of the Stipulated Judgment and any subsequent instructions or court orders. The Watermaster Board of Directors is comprised of five members: 1) a BWD representative; 2) a County representative; 3) a community representative; 4) an agricultural representative; and 5) a recreational (golf course) representative. The Watermaster Board is responsible for overseeing the implementation of the physical solution and the Stipulated Judgment.

Given the lack of viable methods to address overdraft in the Borrego Subbasin through artificial recharge under current conditions, the physical solution includes a reduction in cumulative authorized pumping over time. The physical solution takes into consideration the unique physical and climatic conditions of the Subbasin, the use of water within the Subbasin, the character and rate of return flows, the character and extent of established uses, and the current lack of availability of imported water. In order to reduce pumping, the Stipulated Judgment establishes the initial sustainable yield of the Subbasin as 5,700 acre-feet per year. This sustainable yield may be refined as determined by the Watermaster by January 1, 2025, and periodically updated thereafter through input from a Watermaster Technical Advisory Committee (TAC).

In addition, the Stipulated Judgment assigns a Baseline Pumping Allocation (BPA) to identified parcels (BPA Parcels) based upon pumping volumes between 2010 and 2014, as primarily calculated by the County as part of the development of the GSP. The

BPA will be used to determine the maximum allowed pumping quantity allocated to the BPA Parcels in any given Water Year (known as the Annual Allocation). In order to monitor usage, the Watermaster has required the installation of meters and will require each pumper to use a meter with telemetry capable of being read remotely by Watermaster staff or to file a verifiable report showing the total pumping by such party for each reporting period rounded to the nearest tenth of an acre-foot, and such additional information and supporting documentation as Watermaster may require. De minimis producers pumping less than two acre-feet per year are largely exempt from the Judgment.

Pumpers will be allowed to pump up to their Annual Allocation and will pay pumping fees based on the amount of water pumped. In addition, pumpers will be allowed to carry over water if they underpump allocation in any given year, so long as they timely pay Watermaster assessments. However, a pumper's carryover account can never exceed two times its BPA and any carryover must be the first water used in the following Water Year. Additionally, BPA transfers within the Borrego Subbasin will be allowed, subject to certain restrictions outlined in the Stipulated Judgment. Permanent water rights transfers will require specific fallowing standards to be satisfied such as: destroying all agricultural tree crops; stabilizing fallowed land through mulching, planting cover crops and/or other dust abatement measures; abandoning all non-used irrigation wells or converting these to monitoring wells; permanently removing above-ground irrigation lines; and removing all hazardous materials.

Annual Allocations will be ramped down over time based upon the Sustainable Yield for the Borrego Subbasin. The rampdown rate is 5 percent per year for the first ten years, which is faster than that proposed under the GSP. The rampdown is anticipated to materially reduce pumping levels in the Subbasin year over year for the first ten years. Further rampdowns are scheduled to occur from 2030 to 2040 to reach sustainable yield pumping by 2040.

Pumpers will initially be permitted to pump up to 120 percent of their Annual Allocation in Years 1 to 3, to allow for a transitional period provided that they underpump or purchase/lease water in Years four to five to make up for any over pumping in the first three years. Any pumping in excess of Annual Allocation will be subject to an administrative penalty of at least $500 per acre-foot, as set by the Watermaster, if not made up by underpumping or purchase/lease of make-up water.

Conclusion and Implications

The *Borrego Adjudication* and judgment appear to represent a positive method for parties to work together to meet SGMA goals, while also determining groundwater rights. Whether the Borrego case will be used as an example for other basins around California will be revealed in time. The proposed judgment and stipulation is available online at: https://www.borregowaterlawsuit.com/admin/services/connectedapps.cms.extensions/1.0.0.0/asset?id=32b597ab-a083-4d8a-b802-78134160c370&languageId=1033&inline=true. (Miles Krieger, Geremy Holm, Steve Anderson)

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