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EASTERN WATER NEWS

ENBRIDGE MACKINAC PIPELINE CONTROVERSY INVOLVES GREAT LAKES FEDERALISM

A significant controversy over lakebed easement rights in the Straits of Mackinac appears to pose a classic question of the scope of state authority over interstate lake beds when in conflict with federal law. The pipelines on the lake bed of the Straits of Mackinac have been operated since the 1950s by a company controlled by Enbridge Inc., a Calgary based major North American pipeline conglomerate, to transport petroleum product between Canada, the State of Michigan and elsewhere in the United States. According to the Michigan Governor's office, in April 2018, the so-called "Line 5" pipelines were damaged by an anchor inadvertently dropped and dragged by a commercial vessel. Then, in June 2020, Enbridge disclosed that the pipelines had again been struck sometime in 2019 by anchors or cables deployed by other vessels, damaging pipeline coatings and damaging a pipeline support. Several of the vessels suspected of the damage were operated by Enbridge's own contractors. However, reportedly the pipelines have been inspected by federal pipeline authorities since the incidents, and the company maintains and cites subsequent federal inspection reports that there is no significant safety problem for the pipelines at present.

After the reports of the problems with the lines, in November 2020 Michigan Governor Gretchen Whitmer ordered the company to cease operation of the pipelines, revoking an easement that the state granted in 1953 to use the lake bed route. The state alleges violations of conditions of operation under the easement that it asserts apply to the pipeline and a breach of the public trust to justify the ordered abandonment. Operations were to cease 180 days from the state's directive in November 2020, or by mid-May, 2021. At this writing, operations are continuing.

The Lawsuit

The Enbridge company has filed suit in U.S. District Court to contest the directives of the State of Michigan, and the state also has a suit pending there. (Cf. Enbridge Energy, LP v Whitmer, USDC, WD Mich. Nos. 1:20CV-1141,1142). In a letter responding to the state's November 13 notice, Vern Yu, Enbridge Executive Vice President and President, Liquids Pipelines, wrote, "Our dual lines in the Straits are safe and in full compliance with the federal pipeline safety standards that govern them." His letter asserted both lines were reviewed and approved for operation by the Pipeline and Hazardous Materials Safety Administration (PHMSA) back in June and September of 2020.

Mr. Yu further stated that Enbridge has no intention of shutting down the pipelines based on the state's unspecified allegations and its inaccurate alleged violation of federal law.

The company has requested that the U.S. District Court dismiss the State of Michigan›s action because the revocation of the easement is contrary to federal law and it asserts pipeline safety is governed exclusively by the federal Pipeline Safety Act and its enforcement is the responsibility of an expert federal agency (PHMSA). According to the company, repeated offers by Enbridge over the pasc year to meet with state officials to discuss pipeline issues of concern to the state, provide technical information and discuss matters that might be helpful to the state's review of the easement were consistently ignored and dismissed.

The state, in its companion suit is seeking removal to state courts, but there has been extensive opposition to removal, including filings from provincial governments in Canada, Attorneys General of Ohio and Louisiana, American and Canadian labor unions, other states, environmental groups, and others.

The company has requested that the United States District Court dismiss the State of Michigan's action in that the revocation of the easement is contrary to federal law and that pipeline safety resides with the federal Pipeline Safety Act and its enforcement is the responsibility of an expert federal agency (PHMSA).

The State of Ohio as intervenor is alleging that the shutdown of Line 5 would inflict billions of dollars of catastrophic economic damage on Toledo area refineries and on populations there and in other states dependent on products ranging from jet fuel to propane.

Conclusion and Implications

At this writing there is no published court opinion dealing with the resolution of the federal constitutional and public trust issues. States are undoubtedly vested with police power that generally includes the ability to provide for safe practices in commerce. However, limits on such power have been refined in numerous cases dealing with subjects ranging from traffic and truck regulation to interstate water pollution. Although a state could arguably enforce terms of an express two-party easement as a matter of contract, the company appears to be contending that the State of Michigan has misrepresented the current terms of easement and the facts.

There is a long-term solution that the Company asserts it will accept, which is a tunnel under the Straits that would segregate any spill from the waters of the Great Lakes. Initial federal permissions have been issued for the tunnel. However, its construction is not assured and would be some years of time to be completed. Meantime, the issue is also laced with accusations of politics and phony environmentalism concerning pipeline safety.
(Harvey M. Sheldon)

NEWS FROM THE WEST

In this month's News from the West, first we report on an administrative decision of the Idaho Department of Water Resources considering the water-rights implications of water reuse. This is an important issue throughout the nation as states and municipalities desire more water reuse. After cleanup, is that water owned by the agency that cleaned it up or by the source owner? Lastly, we report on a settlement that was approved in the form of a judgment, over precious water in a hotly-contested groundwater basin in California.

Idaho Agency Director Issues Contested Administrative Decision Considering Water Right Implications of Municipal Wastewater Reuse under State Law

On May 3, 2021, the Director of the Idaho Department of Water Resources (IDWR) issued his *Order on Petition for Declaratory Ruling* (Order) addressing whether municipalities or their contracting agents need obtain a new and separate water right to land apply treated wastewater effluent to lands outside traditional municipal (domestic/potable) service areas. The question arose from a contractual arrangement between Nampa, Idaho and Pioneer Irrigation District whereby Nampa intends to discharge Class A Recycled wastewater from its publicly owned wastewater treatment plant (WWTP) to the District's Phyllis Canal for Pioneer landowner irrigation use (land application) within Pioneer's boundaries. Pioneer's boundary also overlaps, in significant part, with Nampa's municipal boundaries (including the city's area of impact).

The Nampa-Pioneer Relationship

Currently, Nampa discharges its treated WWTP effluent (approximately 18 cfs at present) to nearby Indian Creek pursuant to a federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit. Future constituent treatment compliance schedules under the permit require increased treatment of Phosphorus and temperature, in turn necessitating costly WWTP upgrades that can be avoided in part via redirection of Nampa's WWTP discharge to Pioneer's nearby Phyllis Canal instead of Indian Creek. Anticipated savings to Nampa's sewer utility ratepayers is estimated at roughly $20 Million.

Nampa and Pioneer entered into a contract where Nampa will deliver and Pioneer will accept up to 41 cfs of WWTP effluent (treated to Class A Recycled Water standards) annually over the life of the agreement. In furtherance of the agreement, Nampa obtained, with Pioneer's support, a recycled water Reuse Permit from the Idaho Department of Environmental Quality (DEQ) in January 2020. The 10-year permit

authorizes the discharge of up to 31 cfs of Nampa WWTP effluent to the Phyllis Canal through 2030.

Pioneer has long provided irrigation water to Nampa and its citizens given their overlapping landmasses. Among other Nampa-related deliveries from Pioneer, Nampa owns and operates a municipal pressurized irrigation system, roughly 3,000 acres of which is served by deliveries from Pioneer Irrigation District. From a mass balance perspective, Nampa's Pioneer-based delivery entitlement (60 cfs for the irrigation of 3,000 acres) exceeds the permitted 31 cfs discharge under the Reuse Permit (and the up to 41 cfs discharge contemplated in the future under the parties' reuse agreement).

Regardless, concern over the redirection of Nampa's WWTP effluent from Indian Creek to Pioneer's Phyllis Canal led to IDWR's review of the matter under a petition for declaratory ruling filed by downstream Indian Creek water user Riverside Irrigation District, Ltd. (Riverside). Riverside alleged injury based on the Nampa-Pioneer project given its (Riverside's) reliance on Indian Creek flows for its own irrigation activities downstream of Pioneer.

The Declaratory Petition Contentions: Is a New Water Right Necessary?

Riverside's petition raised questions over traditional wastwater principles under Idaho's prior appropriation doctrine and the ultimate scope and flexibility of the more modern attributes of municipal water rights under Idaho's Municipal Water Rights Act. The petition also sought what is now IDWR's first formal agency decision under the 2012 enactment of Idaho Code § 42-201(8) relating to the disposal of WWTP effluent by municipalities and other WWTP-owning and operating entities in response to federal or state environmental regulatory requirements.

Nampa, Pioneer and several other municipal intervenors contended that neither Pioneer nor Nampa need obtain a new and separate water right to implement the recycled water reuse authorized under the DEQ permit. Riverside contended that Pioneer, at the least, required a new water right to accept and use Nampa's WWTP effluent to avoid an illegal enlargement of Nampa's municipal water rights (additional consumptive use of what would otherwise discharge to the creek) and to avoid an illegal diversion of "groundwater" (the source of Nampa's potable system water rights, the residual of which is treated at by the Nampa WWTP) by Pioneer. Riverside also asserted that Pioneer's failure to proceed through the water right application process circumvented the senior water right injury analysis that is required under such proceedings.

Nampa, Pioneer, and the municipal intervenors argued otherwise based on prior IDWR administrative authority recognizing that municipal water rights are considered wholly consumptive as a threshold matter (thus there can be no enlargement in use); one (Riverside) cannot compel others to waste water for their downstream benefit under Idaho's prior appropriation doctrine; and, most specifically, Idaho Code § 42-201(8) governs in the context of WWTP effluent land application in response to federal or state environmental regulations and the statute makes clear that no new water right is necessary.

Pioneer and Nampa further contended that Pioneer cannot perfect a new water right even if one was applied for because Pioneer fails the first prong of Idaho's two prong perfection requirement: 1) physical diversion of water from a natural source; and 2) application of the water diverted to a recognized beneficial use. The parties all agree that the "source" of Nampa's WWTP effluent is "groundwater" first diverted by Nampa under its existing potable system groundwater-based water rights. But, those diversions (wellheads) are under the sole ownership, control, and maintenance of Nampa—Pioneer has no access to them or right to compel the diversion of water from them. Thus, while Pioneer landowner end irrigation use of the WWTP effluent is certainly a qualifying beneficial use under Idaho law, whether Pioneer is "diverting" that water by accepting the WWTP effluent via pipeline discharge to the Phyllis Canal was an open question under the IDWR petition.

The Director's Order

None of the parties to the proceeding requested a hearing on the matter, opting instead to submit the matter to the Director (as hearing officer) on the briefing which was, in turn, based on a joint stipulation of facts submitted by Nampa, Pioneer, and Riverside. The Director did not request oral argument either, and the matter was decided accordingly.

The Director determined that neither Pioneer, nor Nampa, need obtain a new water right to: (a) direct WWTP effluent to the Phyllis Canal (in the case of Nampa); or (b) accept and use (i.e., land apply) that

WWTP effluent (in the case of Pioneer). The Director decided the matter almost entirely on application of Idaho Code § 42-201(8).

Though all-involved noted and conceded that Pioneer, itself, was not an entity capable of exercising any rights under § 42-201(8) (*e.g.*, Pioneer is not a municipal water provider, sewer district, or other qualifying entity named in the statute), there was equally no question that Nampa is an eligible entity. The Director ultimately found the contractual relationship between Nampa and Pioneer sufficient to bring Pioneer under the authority of the statute as an extension of Nampa—that "Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer." Order, p. 4. The Nampa-Pioneer reuse agreement expressly obligates both parties to perform various functions and tasks for the benefit of one another, and Nampa would not have access to Pioneer's Phyllis Canal for discharge purposes and Pioneer would, likewise, have no right to Nampa's WWTP effluent but for the contract between them.

The Director also found the DEQ Reuse Permit as a basis to bring Pioneer under the statute. The permit authorizes Nampa and Pioneer to recycle and reuse the WWTP effluent upon satisfaction of a variety of regulatory conditions shared by Nampa and Pioneer as a further outgrowth of their underlying contract. Order, pp. 4-5.

Finding that Pioneer was, essentially, an extension of Nampa and its authority under Idaho Code § 42-201(8), the Director held that subsection (2) of the statute relied upon by Riverside (that which requires one to obtain a water right before water is diverted and applied to land) did not apply. This is because subsection (8) is an express exception to the typical water right requirement, stating in relevant part: "Notwithstanding the provisions of subsection (2) of this section . . ."

Last, the Director upheld subsection (8) of the statute as constitutional because as pointed out by Pioneer, Nampa, and the other municipal intervenors, Riverside has no right to compel Nampa to waste water into Indian Creek for Riverside's downstream benefit. Order, p. 5. Though Riverside might be impacted in the future when Nampa redirects its WWTP effluent to the Phyllis Canal (owing to decreased flows in Indian Creek):

> Riverside is not entitled to Nampa's wastewater. . .Without that entitlement, there is no injury to Riverside. . .Without injury, there isn't a violation [of] the constitution. *Id.*

Conclusion and Implications

It remains to be seen if Riverside appeals the Director's Order to district court. In the meantime, Nampa and Pioneer continue their preparations under the DEQ Reuse Permit in hopes to be discharging WWTP effluent to the Phyllis Canal no later than 2025.
(Andrew J. Waldera)

California Superior Court Charged with Basin-Wide Authority Approves Stipulated Judgment in the *Borrego Valley Groundwater Adjudication* Case

Borrego Water District v. All Persons Who Claim A Right To Extract Groundwater in the Borrego Valley Groundwater Subbasin No. 7.024-1, 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)

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—Air Quality

•April 20, 2021—EPA announced a settlement with N&D Transportation Company, Inc. under which the company agreed to has correct alleged violations of chemical safety regulations and will pay a settlement penalty of $314,658 to settle claims that the company violated chemical accident prevention laws at its facility in North Smithfield, Rhode Island. The settlement resolves EPA claims that the company violated chemical accident prevention provisions of the Clean Air Act and chemical inventory reporting requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA). EPA alleged that between 2015 and 2020, the company violated the Clean Air Act by failing to comply with chemical and process hazard safety requirements under both "general duty clause" (GDC) and "risk management program" (RMP) provisions, and violated EPCRA by failing to properly prepare and submit EPCRA chemical inventory reports for numerous chemicals present at its 100 Industrial Drive facility. "Extremely hazardous substances" (EHS) requiring reporting at the facility included formaldehyde, toluene diisocyanate (TDI), peracetic acid, and sulfuric acid. The N&D facility is situated near a tributary of the Blackstone River as well as many businesses and residences, the closest of which is under a tenth of a mile away. Significant allegations included the failure to ensure incompatible chemicals were stored separately and to keep water-reactive chemicals away from the sprinkler system, failure to submit a Clean Air Act risk management plan, failure to conduct a process hazard analysis for the warehouse operation, and failure to submit complete, timely EPCRA "Tier II" reports with all state and local planning and response authorities. The case is part of an EPA Chemical Accident Risk Reduction National Compliance Initiative.

Civil Enforcement Actions and Settlements—Water Quality

•April 21, 2021—The EPA announced a settlement with the U.S. Navy under which the Navy has agreed to make more than $39 million in repairs at the Newport Naval Station in Rhode Island to 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 the agreement, 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.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•April 15, 2021—EPA announced a settlement with Nichols Portland, LLC under which the company agreed to pay a settlement penalty of $36,943 to resolve claims by EPA that it violated the federal Emergency Planning and Community Right-to-Know Act (EPCRA). (The EPCRA requires companies to file reports in EPCRA's Toxic Release Inventory (TRI) database.) EPA alleged that the company failed to timely submit TRI reports for both copper and nickel processed at its Portland, Maine facility in 2018. The facility uses powdered metals to manufacture small parts and pump components. Nichols Portland was required to file 2018 TRI reports for copper and nickel by July 1, 2019. The company filed the reports for their facility ten months later in April 2020 after being contacted by EPA.

•April 19, 2021—EPA announced a settlement with announced Univar Solutions USA, Inc. of

Portland, Oregon under which the company will pay a $165,000 penalty for violating federal pesticide laws when it failed to properly label its "Woodlife 111" pesticide which is used as a wood preservative. EPA cited the company for 33 violations of the Federal Insecticide, Fungicide, and Rodenticide Act when Univar sold and distributed the misbranded pesticide via bulk shipments.

•May 6, 2021—EPA announced a settlement with Bear River Supply Inc., based in Rio Oso, California, under which the company has agreed to pay a $50,578 penalty to resolve claims that the company produced pesticides in an unregistered establishment, distributed and sold misbranded pesticides and failed to maintain equipment properly. The violations were discovered during a series of inspections conducted by the California Department of Pesticide Regulation (DPR) and EPA at two separate facilities in Rio Oso. Inspectors found that "Vistaspray 440 Spray Oil" and "Roundup PowerMax" were being repackaged and distributed with improper labeling. In addition, inspectors determined that Bear River Supply was producing pesticides in a facility that was not registered with EPA. While at the facilities, inspectors also found that a secondary containment unit and loading pad, both used to contain potential spills, were inadequate.

Indictments, Sanctions, and Sentencing

•April 21, 2021—a federal grand jury in the Eastern District of New York unsealed the indictment of one fisherman, a wholesale fish dealer, and two of its managers for conspiracy to commit mail and wire fraud and obstruction in connection with a scheme to illegally overharvest fluke and black sea bass. All four defendants are from Montauk.

Christopher Winkler, 61, Bryan Gosman, 48, Asa Gosman, 45, and Bob Gosman Co. Inc. were charged with one count of conspiracy to commit mail and wire fraud as well as to unlawfully frustrate the National Ocean and Atmospheric Administration's (NOAA) efforts at regulating federal fisheries. Winker and the corporate defendant each face substantive fraud charges. In addition, each of the defendants was charged with obstruction.

The indictment alleges that between May 2014 and July 2016, Winkler, as captain of the New Age, went on approximately 70 fishing trips where he caught fluke or black sea bass in excess of applicable quotas.

Under federal law, a fishing captain is required to accurately detail his catch on a form known as a Fishing Vessel Trip Report (FVTR), which is mailed to NOAA. Similarly, the first company that buys fish directly from a fishing vessel is termed a fish dealer, and fish dealers are required to specify what they purchase on a federal form known as a dealer report, which is transmitted electronically to NOAA.

•May 14, 2021—The president and owner of Oil Chem Inc. was sentenced today to 12 months in prison for violating the Clean Water Act stemming from illegal discharges of landfill leachate — totaling more than 47 million gallons—into the city of Flint sanitary sewer system over an eight and a half year period.

Robert J. Massey, 70, of Brighton, Michigan, pleaded guilty on Jan. 14, to a criminal charge of violating the Clean Water Act. According to court records, Oil Chem, located in Flint, Michigan, processed and discharged industrial wastewaters to Flint's sewer system. The company held a Clean Water Act permit issued by the city of Flint, which allowed it to discharge certain industrial wastes within permit limitations. The city's sanitary sewers flow to its municipal wastewater treatment plant, where treatment takes place before the wastewater is discharged to the Flint River. The treatment plant's discharge point for the treated wastewater was downstream of the location where drinking water was taken from the Flint River in 2014 to 2015.

Oil Chem's permit prohibited the discharge of landfill leachate waste. Landfill leachate is formed when water filters downward through a landfill, picking up dissolved materials from decomposing trash. Massey signed and certified Oil Chem's 2008 permit application and did not disclose that his company had been and planned to continue to receive landfill leachate, which it discharged to the sewers untreated. Nor did Massey disclose to the city when Oil Chem started to discharge this new waste stream, which the permit also required. Massey directed employees of Oil Chem to begin discharging the leachate at the close of business each day, which allowed the waste to flow from a storage tank to the sanitary sewer overnight. From January 2007 through October 2015,

Massey arranged for Oil Chem to receive 47,824,293 gallons of landfill leachate from eight different landfills located in Michigan. One of the landfills was found to have polychlorinated biphenyls (PCBs) in its leachate. PCBs are known to be hazardous to human health and the environment.
(Andre Monette)

LAWSUITS FILED OR PENDING

U.S. DISTRICT COURT CONSIDERS 2019 SETTLEMENT AGREEMENT MODIFICATION OF THE COURT'S ORDERS IN THE ADJUDICATION OF THE CHAMOKANE WATERSHED—*UNITED STATES V. ANDERSON*

Chamokane Creek originates north of the Spokane Indian Reservation and flows south to its confluence with the Spokane River. In 1972, the United States, for itself and on behalf of the Spokane Tribe of Indians, filed for a water rights adjudication of the watershed. *United States v. Anderson*, *et al*, Case No. 2:72-cv-03643-SAB (E.D. Wash.). The defendants include the State of Washington and all other parties having an interest in the water use of Chamokane Creek and its tributaries. The adjudication of the Chamokane Creek Watershed proceeded through the 1970s and concluded in a number of decisions, including the adjudication of the reserved rights of the Spokane Tribe of Indians within the Chamokane Creek Watershed. The U.S. District Court retained continuing jurisdiction in the matter. The court's last modification to its Judgment was in 1988. At issue now 40 years later, is primarily the Court's prior holdings that the withdraw of water from the aquifer underlying the Upper Chamokane Creek basin did not impact Chamokane Creek flows at the gauge and that uses for domestic and stock water purposes were de minimis and not incorporated into the regulatory framework of the Decree.

Background

Over the past forty years, new groundwater wells have proliferated in the watershed. In addition, the understanding of the impacts of groundwater withdrawal on the surface water flows in Chamokane Creek has improved. In 2006, the court ordered the Spokane Tribe of Indians, State of Washington and the U.S. Bureau of Indian Affairs (referred to herein as the Government Parties) to study the potential impacts of groundwater withdrawals on surface water availability. Docket No. 600. The Government Parties engaged the U.S. Geological Survey (USGS) to develop a hydrogeologic framework and water budget including a numerical model to consider the impact of water use within the Chamokane Creek watershed. USGS Scientific Investigations Reports 2010-5165 (2010) and 2012-5224 (2012). The USGS found that domestic and stock water uses can in fact impact surface water flows in Chamokane Creek. And further, that groundwater withdrawals from the Upper Chamokane Creek basin can impact flows at the gauge on Chamokane Creek.

Settlement Discussions Ensue

Following the studies completed by the USGS and an order of the court directing the parties to address the USGS' findings, the Government Parties began discussions amongst themselves of a potential settlement agreement to address the future administration of water rights in the Chamokane Creek Watershed. Specifically, the Government Parties focused on the impacts of existing domestic and stock water uses, which are largely exempt from permitting under state law, and how to address the impacts of these uses which the adjudication considers de minimis, in the context of both current and future permit-exempt groundwater uses.

An Agreement is Reached

On April 25, 2019, the Spokane Tribe of Indians, United States and State of Washington (through its Department of Ecology) reached the "Agreement on a Program to Mitigate for Certain Permit-Exempt Well Water Uses in Chamokane Creek under *U.S. v. Anderson*," available online at: https://appswr.ecology.wa.gov/docs/WaterRights/wrwebpdf/Chamokane-agreement.pdf (referred to herein as the "Settlement Agreement: *see:* https://appswr.ecology.wa.gov/docs/WaterRights/wrwebpdf/Chamokane-agreement.pdf)

The Settlement Agreement establishes a mitigation program to protect senior water users and address the use of domestic and stock water uses through flow supplementation and water right enforcement. The mitigation project will mitigate for stock water uses consistent with the "carrying capacity of the land" and groundwater use that "does not exceed one acre-foot per year" for domestic and irrigation purposes.

The Settlement Agreement states that the mitigation well will have the capacity to pump additional water to Chamokane Creek to lower streamflow temperature in certain reaches. The State of Washington also commits to fund the cost for the federal Water Master to serve as the state water master pursuant to the terms of the Settlement Agreement and monitor and manage the mitigation project.

Conclusion and Implications

Because of the District Court's continuing jurisdiction and the mitigation being designed to address impairment to senior water rights under the court's decree, implementation of the Settlement Agreement requires an order of the court.

On June 21, 2019, the Government Parties filed a joint motion for the court to issue an order to show cause for why the court should not modify its prior orders in the case as agreed to by the Government Parties in their Settlement Agreement. Docket No. 913. The motion requested the court to modify its previous orders to recognize the hydraulic continuity within the watershed and impact from domestic and stock water use as identified in the USGS report. The Government Parties assert that the adjudication of the domestic and stock water rights are not required because the mitigation project will offset the impact so long as the use is consistent with the Settlement Agreement. Approximately half a dozen objections were filed to the Settlement Agreement. Objections included challenges to the proposed change to court orders that would allow the water master to enforce use limitation based on the mitigation project, and the lower quantity of water limitation of one acre-foot for domestic and irrigation purposes. Due to COVID-19 restrictions, the hearing on the objections was delayed for over a year. The hearing occurred on April 29, 2021. At the end of the hearing, the court informed the parties that it was taking the matter under advisement and would issue a ruling.

The proceedings in the Court in *U.S. v. Anderson et al* may prove to be precedential as the effects of pumping junior or otherwise permit exempt groundwater on senior decree surface water rights becomes more apparent.
(Jessica Kuchan)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT REVERSES DISMISSAL OF NAVAJO NATION COMPLAINT, ALLOWS TRIBE TO MOVE FORWARD ON BREACH OF TRUST CLAIM FOR MANAGEMENT OF COLORADO RIVER

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

On April 28, 2021 the Ninth Circuit Court of Appeals reversed the U.S. District Court of Arizona, reviving the Navajo Nation's breach of trust claim against the U.S. Department of the Interior. Navajo's claim—that the federal government must consider its unquantified water rights in developing management guidelines for the Colorado River—could have significant implications for future management of the drought-stricken Colorado River basin.

Background and Navajo's Original Appeal

A brief history of the law of the Colorado River is helpful to understand the dispute leading to Navajo's case and its implications. The 1922 Colorado River Compact allocated water between the "Upper Basin" (Colorado, Utah, Wyoming, and New Mexico) and the "Lower Basin" (California, Arizona, Nevada). However, it did not allocate water within each basin and, importantly, did not "affect the obligations of the United States of America to Indian tribes." 1922 Compact art. VII. The Lower Basin could not agree to allocate water between the three states, eventually resulting in Arizona suing California in 1952. In that case, *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*), the United States asserted claims to various water rights on behalf of 25 tribes, including the Navajo Nation. However, the federal government only asserted Colorado River mainstem claims on behalf of five tribes, omitting Navajo. *Arizona I* also determined the federally reserved rights of five tribes, which did not include Navajo.

Lake Mead and Lake Powell are operated as one unit to coordinate Colorado River policy and allocate water during times of shortage and surplus. In 2001, and again in 2008, the Department of the Interior adopted surplus and shortage guidelines addressing how Colorado River water will be managed during surplus and shortage protocols.

The 2001 guidelines prompted Navajo's complaint, which alleged that the federal government violated the National Environmental Policy Act (NEPA) and breached its trust obligations by failing to consider Navajo's as-yet-undetermined reserved water rights when enacting the 2001 guidelines. The complaint named the Department of the Interior, Secretary of the Interior, U.S. Bureau of Reclamation, and Bureau of Indian Affairs as defendants (Federal Appellees). Numerous other parties, including states and local entities, intervened to protect their interests in the Colorado River during the litigation. The U.S. District Court dismissed the complaint for lack of standing and on sovereign immunity grounds. The Ninth Circuit affirmed the District Court's dismissal of the NEPA claims and remanded.

On remand, Navajo attempted to amend its complaint to clarify its breach of trust claims. The District Court denied the amendment based on futility grounds and dismissed Navajo's complaint, leading to the present appeal.

The Ninth Circuit's Decision

The Ninth Circuit's decision involved three main questions: 1) whether Navajo's breach of trust claim falls within the Supreme Court's retained jurisdiction in *Arizona I*, and if so, whether that jurisdiction is exclusive; 2) whether Navajo's claim is barred by *res judicata*; and 3) whether Navajo could properly state a breach of trust claim such that the requested amended complaint is not futile.

The Ninth Circuit resolved all three questions in favor of Navajo, eventually remanding the case back to the District Court. Analysis of all three claims, and the Ninth Circuit's reasoning, provides insight into the future of this litigation.

The Supreme Court's Retained Jurisdiction under the 1964 Decree

As part of the 1964 Decree in *Arizona I*, the Supreme Court explicitly:

> . . .retains jurisdiction of [that] suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. *Arizona I*, 376 U.S. at 353.

Both at the District Court and on appeal, the Federal Appellees argued the Supreme Court's jurisdiction was exclusive. Although the District Court agreed with this argument, the Ninth Circuit found Navajo's argument more persuasive. According to Navajo, the nation was not seeking a specific quantification of its water rights in the case. Instead, it requested an injunction ordering the Federal Appellees to:

> . . .determine the extent to which the Navajo Nation requires water…to develop a plan to secure the water needed….and adopt appropriation mitigation measures.

The Ninth Circuit concluded that Navajo's claimed relief did not require judicial quantification of Navajo's water rights or a modification of *Arizona I* and, therefore, did not fall within the U.S. Supreme Court's retained jurisdiction. Because Navajo's claim did not seek an adjudication of its water rights in the Colorado River, the Ninth Circuit declined to resolve the question of whether the Supreme Court's retained jurisdiction is exclusive.

The *Res Judicata* Defense

The Federal Appellees also argued that, because the federal government could have asserted Colorado River claims on behalf of Navajo in *Arizona I*, any future claims are barred by *res judicata*. The Ninth Circuit rejected this argument, again siding with Navajo that the present case is merely a breach of trust action and not a claim to quantify Navajo's federally reserved water rights. According to the Ninth Circuit, "the federal government's fiduciary duty to the Navajo Nation was never at issue in *Arizona v. California*." Accordingly, Navajo prevailed on both the jurisdictional and *res judicata* issues for the same reason—the present action concerns a breach of trust claim that was never previously determined nor barred by *Arizona I*.

Navajo's Breach of Trust Claims

The Federal Appellee's argued that Navajo's amended complaint would be futile because Navajo could not point to any specific treaty provision, statute, or regulation that imposed an affirmative trust duty on the federal government to ensure that Navajo has an adequate water supply. The Ninth Circuit disagreed and acknowledged that Navajo's various treaties and related statutes and executive orders establish the Navajo Reservation. The *Winters* doctrine gives rise to implied water rights to make the reservation viable.

Additionally, the court acknowledged that the water subject of Navajo's breach of trust claim is located entirely within the reservation and "appurtenant to the Nation." The court went on to quote *Arizona I* in concluding that the reservation cannot exist as a viable homeland without an adequate water supply:

> It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised. 373 U.S. at 598-99.

The Ninth Circuit held that, under the *Winters* Doctrine, the Federal Appellees have a particular duty to protect Navajo's water supply. The court noted that the same guidelines that gave rise to this litigation acknowledge that the federal government impliedly "reserved water in an amount necessary to fulfill the purposes" of the Navajo reservation. The environmental impact statement accompanying the shortage guidelines went a step further, stating that Navajo's unquantified rights are, in fact, an Indian Trust Asset.

Additionally, Navajo's claims were strengthened by the Federal Appellees' "pervasive control over the

Colorado River." Within the general allocation of the 1922 Compact, the Secretary of the Interior has the power:

> . . .both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water.

That control, coupled with Navajo's 1868 Treaty and its *Winters* rights, creates a duty for the Federal Appellees to protect and preserve Navajo's water rights.

Conclusion and Implications

The Ninth Circuit's reversal paves the way for Navajo to proceed with its breach of trust claim. Given the timeline in this case so far and the possibility of future appeals, it could take many more years before the case is finally resolved. However, the Ninth Circuit's analysis of the legitimacy of the breach of trust claims gives credence to Navajo's arguments and could have far-reaching effects for not only the Navajo Nation but other tribes in the West with unquantified reserved water rights claims.

The Ninth Circuit decision and the Navajo Nation's experience during the COVID-19 pandemic expose the Colorado River basin's water security challenges as drought intensifies in the region. Meanwhile, the seven basin states, the Department of the Interior, and the 30 tribes within the Colorado River Basin prepare for negotiations on new operating guidelines for the Colorado River. With this decision, policymakers now have additional incentives to address tribal reserved water rights in future operating guidelines and the amounts that may be needed to meet the government's treaty obligations. 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
(John Sittler, Jason Groves)

D.C. CIRCUIT ADDRESSES PETITION CHALLENGING FERC DECISION ON HYDROPOWER LICENSE AND RELATED ENDANGERED SPECIES ACT CLAIMS

Shafer & Freeman Lakes Environmental Conservation Corporation v. Federal Energy Regulatory Commission, 992 F.3d 1071 (D.C. Cir. 2021).

The D.C. Circuit Court of Appeals has granted in part, denied in part, and dismissed in part a petition challenging the Federal Energy Regulatory Commission's (FERC) decision on an amended hydropower license for the Oakdale and Norway Dams in Indiana, and the related Biological Opinion from the U.S. Fish and Wildlife Service (FWS or the Service). The amended license increases flow below the Oakdale Dam during periods of drought, in order to protect threatened and endangered species of mussels. Petitioners challenged the scientific basis for mandating increased flows, which have the effect of lowering water levels in the lakes behind the dams. In line with petitioners, FERC would have required water levels in the lakes to be maintained, in line with the multiple-use considerations detailed in the Federal Power Act under which the dam license is issued. However, the FWS directed in its Biological Opinion on the amendment that flows below the dam meet certain minimum levels, as a reasonable and prudent measure to minimize incidental take.

The Court of Appeals found that the Service provided a reasoned and thorough justification for its conclusions in the Biological Opinion, supported by substantial evidence, but held that neither FERC nor the Service had adequately considered whether this reasonable and prudent measure was more than a "minor" change to FERC's proposed license amendment and therefore in violation of Service regulations. Accordingly, the Court of Appeals remanded the case to FERC for further proceedings on that issue, without vacating the amended license or Biological Opinion.

Factual and Procedural Background

Northern Indiana Public Service Company (NIPSCO) operates the Oakdale and Norway Dams, built in the 1920s on the Tippecanoe River. The Oakdale Dam creates Lake Freeman, and further upstream, the

Norway Dam creates Lake Shaffer. With more than four thousand private lakefront properties, the lakes have a significant recreational and economic nexus with the surrounding communities. NIPSCO's 2007 FERC license required operation of the dams in an instantaneous run-of-river mode. The license did not allow the water level of the lakes to fluctuate more than three inches above or below a specified elevation.

During a drought in 2012, the Service found several species of threatened or endangered mussels were dying downstream from the Oakdale Dam, at least in part from low water flows. At the Service's direction, NIPSCO increased water flow out of Oakdale Dam to avoid liability under the federal Endangered Species Act (ESA). NIPSCO concurrently obtained variances from FERC to lower water levels in the lake below the elevation dictated in the license.

The FWS issued a Technical Assistance Letter, outlining procedures for NIPSCO to avoid ESA liability by mimicking natural run-of-river flow. While both the FERC license and the Technical Assistance Letter required "run-of-river" operations, the FWS defined this differently than FERC. Using a linear scaling methodology to determine that the natural water flow directly below Oakdale Dam would be 1.9 times the flow measured above Lake Shaffer, the Service advised NIPSCO to meet this flow requirement and cease electricity generation during low-flow events. NIPSCO sought an amendment of its FERC license to implement the Technical Assistance Letter.

Carroll and White Counties and the City of Montecello, which border Lake Freeman, and the non-profit that owns much of the land beneath the lakes, Shafer & Freeman Lakes Environmental Conservation Corporation (together: Coalition) intervened in the FERC proceeding to oppose the license amendment, objecting to the Service's formula for calculating river flow. The environmental assessment prepared by FERC under the National Environmental Policy Act (NEPA) analyzed NIPSCO's proposed alternative to operate in accordance with the Service's guidance and FERC's preferred alternative to cease diversion of water for the generation of electricity during periods of low flow, but maintain Lake Freeman's target elevation. FERC cited its obligation under the Federal Power Act to balance wildlife conservation with other interests.

After a contentious formal ESA consultation, the Service published a Biological Opinion which concluded that FERC's alternative was not likely to jeopardize threatened or endangered mussel species. However, the Incidental Take Statement included a "reasonable and prudent measure" to minimize incidental take that required NIPSCO to maintain water flows below the Oakdale Dam measuring 1.9 times that of the average daily flow above the dams. The Coalition objected to this measure, which would draw down lake levels, and NIPSCO expressed concern about the clear conflicts between the Biological Opinion and FERC's alternative, which required a minimum lake elevation. While FERC disagreed with the Service, it treated the Service's reasonable and prudent measure as "nondiscretionary" and issued an amended license consistent with NIPSCO's application and the Service's Biological Opinion. The Coalition brought suit to challenge the amended FERC license and the Biological Opinion.

The D.C. Circuit's Opinion

Challenges to the Biological Opinion

The Coalition raised numerous challenges to the scientific foundation of the Biological Opinion and argued that these errors required invalidation of both the Biological Opinion and the amended FERC license that incorporated the reasonable and prudent measure Biological Opinion. The court rejected each of these arguments.

The Court of Appeals considered whether the Service's issuance of the Biological Opinion, or FERC's licensing decision incorporating the Biological Opinion, were arbitrary and capricious or unsupported by substantial evidence. The court noted that under the ESA, the Service and FERC are required to use the best scientific and commercial data available when making decisions. But, the court reviews scientific judgments of an agency narrowly, holding agencies to certain "minimal standards of rationality," and vacating a decision only if the agency:

> . . .relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The Court of Appeal rejected the Coalition's argument that the Service's scientific conclusions did not deserve deference because the Service personnel who worked on the Biological Opinion lacked hydrological expertise. As the Service consulted hydrologists as part of its decision-making process, the court found that the Service' judgment merited the deference traditionally given to an agency when reviewing a scientific analysis within the agency's area of expertise.

The Coalition's arguments against the Biological Opinion centered on the Service's calculations of river flow using linear scaling methodology. Acknowledging the method's imperfections, the Service determined that this was the soundest available method for guaranteeing that water flow out of Oakdale Dam represented the natural flow of the river during low-flow periods. The court found that the Service provided a reasoned and thorough justification for its approach to managing the river's flow, explaining the scientific basis for its decision, identifying substantial evidence in the record buttressing its judgment, and responding to the Coalition's concerns. The court found the Service's analysis "comfortably passes" review under the standards of the Administrative Procedure Act.

Since the court found that the Service had acted reasonably in using the linear scaling methodology, it held that FERC had acted reasonably in relying on the Service's corresponding scientific judgments FERC's reliance on the determination that additional flows were needed to protect listed species of mussels, despite certain critiques of the methodology, was not arbitrary or capricious.

On other counts, the court held that it lacked jurisdiction because the Coalition had not raised the issues in its petition for rehearing before FERC. The Coalition had sufficiently raised the validity of the Biological Opinion itself on rehearing, but did not raise several specific objections it brought before the court. Because of this failure to exhaust its administrative remedies under the Federal Power Act with regards to these objections, they could not be considered by the court.

The Service's 'Reasonable and Prudent Measure' and Minor Changes to the FERC License

ESA regulations provide that any reasonable and prudent measures the Service proposes to reduce incidental take cannot involve more than a minor change to the proposed agency action for which the Service prepared the incidental take statement. A reasonable or prudent measure that would alter the basic design, location, scope, duration, or timing of the agency action is prohibited. Service guidance provides that substantial design changes are inappropriate in the context of an incidental take statement issued under a no jeopardy biological opinion. With a finding of no jeopardy, the project, as proposed by the action agency, would be in compliance with the statutory prohibition against jeopardizing the continued existence of listed species.

Here, the Service required a level of flow through Oakdale Dam that could materially reduce the water level in Lake Freeman during drought. The Coalition contended that this reasonable and prudent measure was not a minor change, and therefore a violation of ESA regulations. The Court of Appeals found that the Service and FERC had acted in an arbitrary manner, having failed to adequately explain why the Biological Opinion's reasonable and prudent measure qualified as a minor change.

FERC's proposed alternative for the NIPSCO license amendment provided that during low-flow periods, NIPSCO would cease electricity generation, but would continue to operate the Oakdale Dam to maintain a constant water elevation in Lake Freeman. The Service concluded this alternative would not jeopardize threatened and endangered mussels, yet established a reasonable and prudent measure that required NIPSCO to draw down Lake Freeman during low-flow periods, in direct conflict with the terms of the license as proposed by FERC. The court found that the Service had failed to analyze whether it's reasonable and prudent measure complied with its own regulations on the scope of reasonable and prudent measures.

The Service argued that its proposal should be compared with NIPSCO's application, which incorporated the Service's requirement to provide downstream flows, rather than FERC's alternative. Against NIPSCO's application, the Service's reasonable and prudent measure did not represent a change. However, the court found that the alternative with which to compare the Service's proposal was FERC's proposed action, not NIPSCO's application. It was FERC's alternative that was analyzed in the Biological Opinion, and considered in formulating reasonable and prudent measures. Given the conflict between its alternative and the Incidental Take Statement, FERC

adopted the NIPSCO alternative, reasoning that it considered implementation of the Service's reasonable and prudent measure as nondiscretionary. The court noted that FERC's treatment of the measure as nondiscretionary would be sensible in the normal course. But here, the Service's failure to address an important issue was apparent on the face of the Biological Opinion and infected FERC's license amendment as well.

With this flaw, the court remanded the case to FERC for further proceedings consistent with the opinion, without vacating the license amendment or the Biological Opinion and Incidental Take Statement, given that vacatur would leave NIPSCO again with conflicting directives in the original FERC license and the Service's Technical Advice Letter.

Conclusion and Implications

This case highlights the potentially contradictory mandates among federal environmental and energy laws that agencies and facilities must navigate. The Federal Power Act's provisions for hydropower licensing has a multiple use doctrine at its core, as we see in other federal laws governing the use of federal lands and resources. The ESA, on the other hand, has a focus on the protection of species and habitat, with incidental take permits available where consistent with conservation of the species. In this case, FERC felt unable to reject the Service's reasonable and prudent measure in the Incidental Take Statement for Oakdale Dam. NIPSCO itself urged the agencies to not saddle it with contradictory directives, preferring flow and generation restrictions in the FERC license to the prospect of ESA liability. With this opinion, the Court has hinted that the agencies may not have struck the right balance between the dictates of the ESA and the Federal Power Act, and reminded the Service that where it has found an agency action will result in no jeopardy to a protected species, it must consider whether further would amount to a substantial change in the proposed action itself.
(Allison Smith)

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

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 thesSteelhead was considered and not included as "a rejected 'other purpose.'"

Section 9 of 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)

MARYLAND STATE COURT OF SPECIAL APPEALS UPHOLDS CLEAN WATER ACT, MS4 PERMIT AGAINST CHALLENGE TO BROAD SCOPE OF REQUIREMENTS

Maryland Small MS4 Coalition, et al. v. Maryland Department of the Environment, Case No. 1865 (Md. Ct. Spec. App. Apr. 29, 2021).

The Maryland Court of Specials Appeal recently upheld, in part, a final determination of the Maryland Department of the Environment (Department) to issue a general storm water discharge permit to several operators of small municipal separate storm sewer systems (MS4s). In issuing the permit, the Department designated geographic areas outside the urbanized area and imposed surface restoration, mapping, outfall screening, and good housekeeping requirements.

Background

Section 1311(a) of the federal Clean Water Act (CWA) generally prohibits the discharge of pollutants from a point source into a navigable water. However, the U.S. Environmental Protection Agency (EPA) or an EPA-approved state agency can issue permits exempting operators from this prohibition under the CWA's National Pollutant Discharge Elimination System (NPDES) program. In Maryland, the EPA has charged the Department with administering the NPDES program and thereby issuing general discharge permits.

Generally, NPDES permits include "effluent limitations" which are limits on the type and quantity of pollutants that can be released into the water. But, for a point source discharge like MS4s, where the quantity and quality of storm water that is transferred into a waterway varies and where the many discharge points make it difficult to determine the amount of pollutant that an operator contributes, permits generally provide for flexible management programs as opposed to effluent limitations. The CWA mandates controls for storm water permits that include "management practices, control techniques and system, design and engineering methods" to "reduce the discharge of pollutants to the maximum extent practicable[.]"

Small MS4s

Small MS4s are required to obtain an NPDES permit to discharge storm water only if: 1) the small MS4 is located within an "urbanized area"; 2) the storm water discharge associated with the small MS4 is determined to "result in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts"; or 3) the storm water discharge associated with the small MS4 is determined to contribute:

> . . .substantially to the pollutant loadings of a physically interconnected municipal separate storm water sewer that is regulated by the NPDES storm water program.

If the Department tentatively determines to issue a permit, it is required to comply with certain procedures. Those procedures entail published notice of permit applications, informal meetings, and publication of the Department's tentative determination. In the event that the Department receives comments adverse to its tentative determination, then the Department is required to publish a notice of its final determination.

Procedural Background

On December 22, 2016, the Department notified the County of its tentative determination to issue an NPDES general permit for discharges from small MS4s. Subsequently, the County participated in the public hearing and submitted written comments. On April 27, 2018, the Department issued a final determination to issue the general permit and provided a separate explanation for its actions and responding to public comments regarding the tentative determination.

Appellant Queen Anne's County (County) objected to the scope of permit, the delegated responsibility for nonpoint sources and third-party direct discharges, as well as the requirements imposed beyond the maximum extent practicable in the permit. The County filed a petition for judicial review of the Department's final determination. The circuit court

affirmed the Department's decisions to issue the Small MS4 NPDES permit.

The Court of Special Appeals' Decision

The threshold issues on appeal pertain to: 1) the designation of the area subject to regulation:; the County argued that such a designation exceeded the Department's authority, was procedurally deficient, and was not supported by substantial evidence; 2) the requirement to commence restoration efforts for twenty percent of impervious acreage within the urbanized area: the County argued that this requirement unlawfully makes it responsible for third-party and nonpoint source storm water discharge;: and 3) whether the Department had authority to impose conditions that exceed the "maximum extent practicable standard": the County argued that the Department lacked such authority, therefore making the restoration requirement and any other permit conditions that exceeded this standard, invalid.

Designation of Area Subject to Regulation

In determining whether the County had ample opportunity to raise concerns regarding the area of designation subject to regulation, the court examined the justification proffered by the Department in its tentative determination. When the Department issued its tentative determination and published the draft general permit for public comment, it cited as grounds for designating all County-operated MS4s for regulation under the permit that all such MS4s were "located within an urbanized area." But, in the Department's final determination, its justification for designating all County-operated MS4s for regulation under the general permit was that:

> . . .[s]torm water discharges inside and outside of the County's urbanized area contribute to. . .water quality impairments[,] and future MS4 discharges have the potential to cause significant water quality impacts.

The court found that the County was not put on notice of the Department's determination that MS4s outside the County's actual urbanized area were subject to regulation. The court determined that remand was required to allow the County an opportunity to comment.

Responsibility for Nonpoint Source Runoff and Third-Party Discharge

In analyzing whether the Department unlawfully made the County responsible for discharges from independent third-parties and nonpoint source runoff that do not flow into or discharge from the applicable MS4s, the court examined prior case law involving a similar requirement. In the prior case, the court of appeals rejected the same argument made by the County regarding the Department's authority and upheld the requirement. Similarly, the court here found that the requirement to commence restoration efforts on twenty percent of the impervious surface in the urbanized area was within the Department's authority because the general permit was an:

> . . .authorized water quality-based effluent limitation that represents a valid reallocation of pollutant loads from nonpoint sources to point sources and that implements a storm water waste load allocation in the Bay TMDL.

Conditions in Excess of the Maximum Extent Practicable

Addressing the Department's mapping requirement, outfall screening provision, and good housekeeping provision, the court determined that the Department did not act unreasonably or without a rational basis in exercising its discretionary authority to identify the minimum elements of a pollution prevention and good housekeeping program for property owners owned or operated by permittees. Because these mandates were previously explained by the Department as necessary, citing several reasons for their necessity, the court found that the Department supplied a rational basis for the requirements that exceeded the federal standards.

Conclusion and Implications

This case demonstrates the broad authority authorized states have to impose conditions in an MS4 that reach beyond federal law and beyond the operation of the MS4 itself. The court's opinion is available online at: https://mdcourts.gov/data/opinions/cosa/2021/1865s19.pdf
(McKenzie Schnell, Rebecca Andrews)

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