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FEATURE ARTICLE

AS THE CLIMATE CHANGES, SO WILL NATURAL RESOURCE DAMAGE CLAIMS

By Steve Goldberg, Darrin Gambelin, and Holly Tokar

The effects of climate change present new challenges to the government and private sector. This will mean new policies and regulations, particularly at the federal level. Rejoining the Paris Climate Accord, renewed emphasis on evaluating greenhouse gas (GHG) emission impacts and potential changes to the Securities and Exchange Commission Environmental, Social and Governance reporting for public companies are just a few examples. There are also well-established existing regulatory frameworks and related policies that are, and will increasingly need to adapt to the effects of climate change. This article examines the impacts of climate change on Natural Resource Damages (NRD)—an established regulatory program at the intersection of climate change science, economics, planning and their application to the legal remedies provided by the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)—to recover damages for injuries to natural resources from oil spills and releases of hazardous substances.

CERCLA NRD claims have increased in recent years and creative remediation projects are looking at restoration of injured resources as a remedial component at federal Superfund sites. Examples of CERLCA sites with NRD include sediment contamination in a river or bay or discharges from inactive mining sites. Evaluating the effects of climate change at CERCLA sites is complicated by multiple factors. Injuries to resources from hazardous substance releases at these sites typically occur over extended periods of time with changes in the climate impacting baseline conditions—increasing the difficulty of differentiating the injury to resources that were caused by climate change from the effects of exposure and injury caused by the release of hazardous substances. Contrast this with the effects of an oil spill, covered by OPA, which are typically sudden events of shorter duration with impacts to resources from climate change, as well as the spill, more easily measurable. Accordingly, while this article focuses on the effects of climate change as applied to NRD for oil spills, similar NRD concepts apply to NRD claims under CERCLA.

First, we provide an overview of climate change impacts and the key legal and regulatory concepts of NRD that invoke climate change considerations. Next we provide examples from recent NRD settlements that considered the effects of climate change in the selection and planning for restoration projects—a key component of NRD discussed further below. Last, we consider how climate change factors will be a more substantial factor in future NRD settlements and the selection, planning and implementation of restoration projects.

Climate Change Background

There is scientific consensus that "human interference with the climate system is occurring, and climate change poses risks for human and natural systems." Field et al., *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*, Intergovernmental Panel on Climate Change, 3 (2014) https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf. Climate change includes changes to the climate system that are evolving over a longer period of time (*e.g.*, sea level rise or gradual increases in ocean temperature), as well as an increase in the frequency of extreme

weather events. These climate change effects complicate NRD claims arising from oil spills because they may impact the same resources. For example, coastal wetlands ecosystems and marine life may be impacted by an oil spill, but they may also be impacted by climate change. Indeed scientists predict with very high confidence that, throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion due to sea level rise. Further, sea level rise, ocean warming, and ocean acidification impact marine ecosystems. For example, warmer ocean temperatures can raise the metabolism of species exposed to the higher temperatures, and in some cases can be fatal. It is these climate changes and impacts—including the increased frequency and intensity of extreme weather events—that may harm the same wetland ecosystems and marine life injured by an oil spill. This complicates both the injury assessment and restoration planning components of NRD claims.

Key Legal and Regulatory Concepts of NRD

The goal of NRD is to make the public whole for injuries to natural resources and services resulting from an incident involving a discharge of oil (OPA 1002(a)) or from injuries caused by the releases of hazardous substances. (CERCLA 107(a)(4)(c)). The NRD process involves two important steps: 1) determination of the nature, degree, and extent of any injury to natural resources and services, the NRD Assessment or NRDA; and 2) development of a suite of cost-effective projects to restore any lost resources or services to baseline, *i.e.* pre-incident conditions, and to compensate for interim losses to the damaged resources. 15 C.F.R. § 990.50-990.53; *see also,* Injury Assessment, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Injury Assessment*), p. 1-4, *available at*: https://darrp.noaa.gov/sites/default/files/Injury%20assessment.pdf; Restoration Planning, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Restoration Planning*), p. 1-5, *available at*: https://darrp.noaa.gov/sites/default/files/Restoration%20Planning.pdf.

Various environmental statutes designate federal and state agency trustees to bring NRD claims on behalf of the public. Federal agency trustees typically include the National Oceanic and Atmospheric Administration (NOAA) and the Department of the Interior U.S. Fish & Wildlife Service. In California, the lead agency is generally the California Department of Fish & Wildlife, however other agencies also serve in trustee roles depending on the jurisdiction for the state resources affected by the incident. Examples include the California Department of Parks and Recreation and the State Lands Commission.

Causal Link Between the Incident Injuries to Natural Resources

The effects of climate change on the affected resources should be a critical factor in assessing whether, and to what extent, a resource has been injured. A successful NRD claim requires a causal link between the injury to a natural resource and the release of oil or hazardous substances. *See, e.g.*, *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 777 (D.C. Cir. 1997). What is considered injury to a natural resource? Injury is "an observable or measurable adverse change in a natural resource or impairment of a natural resource service." 15 C.F. R § 990.30. Natural resource damages assessment then involves "collecting and analyzing information to evaluate the nature and extent of injuries *resulting from* an incident." *Id.* (emphasis added). Implicit in that analysis is that the adverse change in a natural resource or impairment of services is not attributable to another cause—for example, a climate change related event. 15 C.F.R. § 990.51. Injuries attributable to natural causes are not compensable under NRD.

Determination of the causal link between the release and injury to resources may be complicated by climate change and related extreme weather events. Climate related changes, including changes in temperature, precipitation, and sea level rise are causing rapid changes to habitat. Often there are data gaps on the abundance of a species or the health of a habitat resulting from these changes. Thus when an incident occurs, it is difficult to determine whether degradation to habitat or species results from the incident or climate change.

Injuries Are Measured Against the Baseline

Even where a causal link is found between resource injury and the incident, damages are only found and measured against the injury to resources above "baseline." Baseline is the condition of natural resources and services that would have existed if the incident had not occurred. 15 C.F.R. §§ 990.30, 990.52. NRDA allows compensation for total injury in relation to baseline. This is a function of the magnitude of the injury and the time it takes for the resource to recover to baseline.

Climate change events also make it more difficult to determine the extent and duration of the injury. First, the magnitude of the injury may be difficult to determine when the baseline may have recently shifted due to climate change. For example, determination of the baseline for marine mammals injured in the Refugio Beach Oil spill was effected by an anomalous stranding year for California sea lion pups, tied to reduced prey availability and climate events.

Second, if the baseline is not well known or is changing, it is difficult to determine when the resource has recovered to baseline. In addition, if the resource was in a vulnerable condition such that the incident was the tipping point, the resource may not recover or recovery to baseline may be extended for a longer period.

Restoration Planning and Climate Change

Following the determination of injury, the Trustees must develop a suite of restoration projects to restore the injured resources and services. 15 C.F.R. § 990.53(a). The Trustees develop a range of feasible alternative projects and evaluate each for several key factors. 15 C.F.R. § 990.54. These projects may be primary, which return the resource to its pre-incident condition, and compensatory, which compensate for interim losses pending recovery to baseline. 15 C.F.R. § 990.53

In comparing alternative restoration projects, the trustees evaluate several key factors in accordance with NRD regulations. Factors relevant to climate change, in particular, include (i) the cost to carry out the projects, (ii) the extent to which each alternative is expected to return the injured natural resources and services to baseline and compensate for interim loss, (iii) the likelihood of success of each alternative, and (iv) the nexus between the project and the injured resource, including location. *See:* 15 C.F.R. § 990.54.

Climate change can affect the selection and potential success of restoration projects. For example, following an oil spill, sea level rise and coastal erosion may make shoreline habitat restoration projects a less preferred alternative. Considering the key factors, such as likelihood of success, trustees may determine that there are greater long-term benefits in engaging in more inland projects.

NEPA and CEQA

Federal and state law and guidance directing trustee actions in implementing restoration plans for NRD also require consideration of climate. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 C.F.R. Chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. 15 C.F.R. § 990.23 (a). As trustees develop restoration plans, they must also prepare an Environmental Assessment or Environmental Impact Statement. 15 C.F.R. § 990.23 (c). Federal courts have held that NEPA requires federal actors to disclose and consider climate impacts in their environmental reviews. *See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). In 2016, the CEQ issued guidance to help federal agencies consider greenhouse gas emissions and climate change in such reviews. 81 Fed. Reg. 51866 (Aug. 5, 2016). Although this guidance was withdrawn in 2017, on January 20, 2021, President Biden issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which in part directed CEQ to review, revise, and update its 2016 Greenhouse Gas Guidance. 86 Fed. Reg. 7037 (Jan. 25, 2021). It can be expected that in the near future all restoration alternatives will be evaluated for climate impacts through the environmental review process.

Similarly, California agencies evaluating restoration projects must consider both the impact of the project on climate change and the impacts of climate change on the project under the California Environmental Quality Act (CEQA). 14 Ca. Code Regs. § 15064.4. The analysis must reasonably reflect evolving scientific knowledge of climate change.

The Trustees publish the results of their assessment of the injuries to natural resources as well as the selection of restoration projects for each incident, in a Damage Assessment and Restoration Plan (DARP) which typically includes an assessment of the selected restoration projects under NEPA and, for California incidents, under CEQA.

Climate Change and NRD Claims

The regulations governing the NRD process do not mention climate change. When OPA was passed, the focus was on preventing and responding to oil spills. At the time, climate change was perhaps not an obvious consideration. *See, Summary of the Oil Pollution Act*, United States Environmental Protection Agency (last updated July 28, 2020) https://www.epa.gov/laws-regulations/summary-oil-pollution-act. But, as discussed above, the effects of climate change on NRD can affect both the assessment of injury to resources as well as restoration projects.

There is little evidence to date that climate change has played a significant role in injury assessment. Most DARP's will include a discussion of baseline as required by OPA and the NRD regulations, but little to no discussion of the effects of climate change on the injured resources. Although there is scant evidence in published DARPs of the effects of climate change, it is possible that this has been, (and if not, will be), a topic discussed by technical experts for the Trustees and the responsible parties in evaluating the extent of injury.

In contrast to the lack of evidence of climate change effects on the injury assessment component of NRD, it appears climate change is being considered more frequently when evaluating restoration projects.. We expect this will only become more common as climate change studies, data and policies become more prevalent.

Recent Restoration Plans Considering Climate Change

Several NRD claims and related DARPs from the last few years illustrate the increasing consideration of the effects of climate change on restoration planning and implementation.

Below we discuss three oil spill incidents, including two in California, and one chemical release site in Michigan that involved NRD claims and illustrate how climate changes are being considered in the assessment of resource injuries (very few with minimal consideration) and in the selection and implementation of restoration projects (still few but increasing).

Deepwater Horizon

The Deepwater Horizon oil spill resulted in a NRD settlement of $8.8 billion, the largest settlement of an NRD claim under OPA or CERCLA. Deepwater Horizon also has influenced other NRD claims in the past decade. Restoration projects have and will continue to be implemented over many years. The impact of climate change on restoration projects remains to be considered and studied, but still merits discussion here. The scientific studies and the magnitude of the settlement and restoration project efforts are precedents being considered by trustees and responsible parties at all other NRD related incidents. As the restoration projects are designed and implemented, the effects of climate change and extreme weather events on such efforts must be watched.

On April 20, 2010, the *Deepwater Horizon* mobile drilling unit exploded, caught fire, and sank in the Gulf of Mexico. This incident resulted in a massive oil spill, as 3.19 million barrels of oil were released into the Gulf. During the injury assessment and restoration planning stages, the Trustees determined that injuries caused by the spill were so widespread that the entire Northern Gulf of Mexico ecosystem was injured.

The Trustees identified five overarching goals to address the suite of injuries that occurred at both local and regional scales: restore and conserve habitat, restore water quality, replenish and protect living coastal and marine resources, provide and enhance recreational opportunities, provide for monitoring adaptive management, and administrative oversight to support restoration implementation. Several public comments raised the issue of climate change. For example, one comment urged implementation of both habitat restoration plans with a shorter lifespan and long-term adaptation plans. In their response, the Trustees acknowledged "the systemic threats of climate change" and said they would consider key ecological factors such as connectivity, size, and distance between projects, as well as factors such as resiliency and sustainability in project selection, design, and implementation. The Trustees further explained that restoration planning, project development, and an "appropriate level of tiered NEPA analysis" would

"consider climate change and resiliency planning." *Deepwater Horizon Oil Spill:* Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement, https://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan.

Kalamazoo River (Michigan)

From the late 1950s to the 1970s, releases of polychlorinated biphenyls from Kalamazoo-area paper mills caused the contamination of sediments, floodplain soils, water, and living organisms in and near Portage Creek and the Kalamazoo River in Michigan. During the restoration planning process, the Trustees considered which projects would provide maximal benefits overtime. The Trustees gave preference to projects that incorporated resiliency to the impacts of climate change, and therefore provided longer-term benefits.

In the Environmental Impact Statement (EIS) for Restoration Resulting from the Kalamazoo River NRDA, there was a particular focus on climate change. The EIS examined how climate change might interact with proposed restoration projects. It notes increases in temperatures, shifts in timing and intensity of precipitation events, increases in the duration of the growing season, and decreases in the amount and duration of snow cover and lake ice formation. The analysis further discusses greenhouse gas emissions, and the uncertainty in underlying relationships and feedback loops. The Trustees, while identifying the various aspects of climate change, also recognized the high degree of uncertainty regarding the effects of climate change on restoration. The Trustees considered climate change adaptation principles such as prioritizing habitat connectivity, reducing existing stressors, protecting key ecosystem features, and maintaining diversity to lessen the compounding effects of climate change. *See Final Restoration Plan and Programmatic Environmental Impact Statement for Restoration Resulting from the Kalamazoo River Natural Resource Damage Assessment*, August 2016, https://www.fws.gov/midwest/es/ec/nrda/KalamazooRiver/pdf/RestorationPlanPEISKalRiverAugust2016Final.pdf.

Castro Cove (Richmond, California)

From 1902 to 1987, Chevron USA Inc. (Chevron) owned and operated a petroleum refinery in Richmond, California that discharged hazardous substances in Castro Cove, a portion of San Pablo Bay in northern California. A Final DARP/EA was released in 2010. After estimating the total resource injury caused by contamination in Castro Cove, the Trustees analyzed a suite of alternative restoration projects. In making their project selections, the Trustees considered the future effects of global sea level rise on coastal resources in the San Francisco Bay, recognizing that climate change could affect the long-term success of restoration projects.

The Trustees devoted a subsection of the Final DARP/EA to uncertainties behind global sea level rise and how this affected project alternatives. The Trustees acknowledged the 2007 Intergovernmental Panel on Climate Change (IPCC) report that projected estimated global average sea level rise between 0.6 and 2 feet, and the Pacific Institute report projecting a 1.4 meter average sea level rise along the California Coast, by the end of the 21st century. The Trustees considered the effects of sea level rise on coastal flooding, wetland habitats, salinity of estuaries and freshwater aquifers, tidal ranges in rivers and bays, transport of sediment and nutrients, and contamination patterns in coastal areas. Ultimately, the Trustees selected the preferred restoration projects with an eye to these climate uncertainties. *Castro Cove/Chevron Richmond Refinery Damage Assessment and Restoration Plan/Environmental Assessment*, June 2010, https://repository.library.noaa.gov/view/noaa/3874.

Refugio (Santa Barbara, California)

In May 2015, an underground oil pipeline running parallel to Highway 101 accidentally released approximately 2,900 barrels of crude near Refugio State Beach in Santa Barbara County, California. About 20 percent of the released oil reached the Pacific Ocean and adjoining shorelines. Eighty percent of the released oil remained in the upland area between the oil pipeline and the ocean, where it evaporated, biodegraded in the soil, or was recovered by responders. Although only a draft DARP/EA has been released, there is some consideration of climate change in both the injury assessment and the selection of restoration projects.

In the 2020 Draft DARP/EA, the Trustees noted that the injury analysis may be complicated by the 2015 El Nino event and the presence of a warm water mass, known as "the blob." These events took place

within the same time frame as the oil spill, and had their own distinct impact on marine life and resource health. The blob, as an atmospheric anomaly, impacted ocean productivity and food availability for marine species, while El Nino conditions were associated with warmer sea surface temperatures.

In the restoration planning section of the draft DARP/EA, the Trustees identified "[m]ajor anthropogenic stressors" that effect the shoreline environment as a factor when considering shoreline restoration projects. These stressors include sediment deficit, coastal armoring, beach nourishment, beach grooming, invasive species, and changing environmental conditions. The Trustees noted that future climate scenarios predict rising sea levels, which results in increased overall coastal erosion, as well as ocean acidification and large storms. The shoreline restoration projects proposed by the Trustees aim to reverse and portion of the negative effects of these stressors, and have long-term beneficial effects. https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=178526&inline.

The Future of Climate Change in NRD

Consideration of climate change is likely to become more prominent in future NRD analyses and settlements. Determining causation of resource injury—as a result of the release of oil or hazardous chemicals or linked to climate change—will become more difficult in areas impacted by climate change. For example, it may be difficult to determine whether and to what extent coastal habitat is damaged by an oil release versus a recent storm event, such as a hurricane. Determining when resources have recovered also may become more difficult where climate change has impacted habitat. Areas subject to prolonged drought may no longer support habitat requiring frequent precipitation, so this habitat may not recover to pre-incident conditions. Developments in climate change science and development of more comprehensive baseline data should assist with the determination of causation and when a resource has recovered.

More flexibility on the selection of restoration projects also will be necessary for many incidents. Typically, Trustees will select restoration projects closely linked to the type of resources damaged and in close physical proximity to the incident. However, another factor that must be considered in the selection of projects, likelihood of success, may force Trustees to consider other projects. Where climate change has impacted habitat such that a damaged resource or species is no longer viable in the area of incident, Trustees must either consider projects that restore habitat or species other than those damaged by the incident, or projects located outside the area of the incident.

Conclusion and Implications

As studies about climate change become more widespread, the existing regulatory framework for NRD claims will need to adapt. Currently, the regulations governing NRD claims do not mention climate change, but this also may change. Nevertheless, even within the existing regulatory framework, we expect technical experts engaged in the NRDA process will focus more on climate change evaluating the extent of injury to resources. Climate change has already been a factor in the selection and implementation of restoration projects, particularly within the last decade. We can expect climate changes and the effects of extreme weather events will get more attention in future NRD assessments, settlements, and the selection, planning and implementation of restoration projects, particularly with additional study on the effectiveness and resiliency of restoration projects in the fact of climate change and extreme weather events.

**Editor's Note:* Steve Goldberg and Darrin Gamblin served as counsel for Plains Pipeline, L.P. during the Refugio NRD. The views expressed in this article are those of the authors and do not reflect the views of Plains Pipeline, L.P.

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WESTERN WATER NEWS

CALIFORNIA 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

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

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 com-

plex 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 FOR INDOOR RESIDENTIAL WATER USE

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

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)

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*" (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 creted 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 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 Did Not 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.'"

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)

CALIFORNIA 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, 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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