Volume 16, Number 6
July 2021

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California Corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

EWL

EASTERN WATER NEWS

BIDEN ADMINISTRATION FISCAL YEAR 2022 PROPOSED BUDGET PRIORITIZES U.S. BUREAU OF RECLAMATION WATER PROJECTS

The Biden administration (Administration) recently submitted a proposed budget for Fiscal Year 2022 to Congress (Proposed Budget), which includes a $1.5 billion investment for the United States Department of the Interior, Bureau of Reclamation (Bureau) to combat widespread drought in the West. The Proposed Budget supports the Administration's goals of ensuring reliable and environmentally responsible delivery of water and power for farms, families, communities and industry, while providing tools to confront widening imbalances between water supply and demand throughout the West.

Background

The National Oceanic and Atmospheric Administration (NOAA) recently reported 47 percent of the contiguous United States is experiencing drought conditions due to lack of precipitation and higher than average temperatures. NOAA reports that in 2020, drought conditions broadened and intensified throughout the western United States, particularly in California, the Four Corners region and western Texas.

Earlier this year, the Administration announced the formation of an Interagency Working Group (Working Group) to address worsening drought conditions in the West and to support farmers, tribes, and communities impacted by water shortages. The Working Group is tasked to coordinate resources across the federal government, working in partnership with state, local, and tribal governments to address the needs of communities suffering from drought-related impacts.

The Proposed FY 2022 Budget

The Proposed Budget includes four key components to manage water resources in the West, including: water reliability and resilience, racial and economic equity, conservation and climate resilience, and infrastructure modernization.

Specifically, the Proposed Budget would provide the following funding to the Bureau.

Increase Water Reliability and Resilience

The Proposed Budget includes $1.4 billion for the Bureau's Water and Related Resources Operating Account, which funds planning, construction, water conservation, management of Bureau lands, and efforts to address fish and wildlife habitat needs. The Proposed Budget also supports the operation, maintenance and rehabilitation activities-including dam safety-at Bureau facilities. It includes $33 million to implement the California Bay-Delta Program and to address California's current water supply and ecological challenges, while $56.5 million is allocated for the Central Valley Project Restoration Fund to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins.

Support Racial and Economic Equity

The Proposed Budget seeks to address what it describes as racial and economic equity in relation to water by supporting underserved communities and tribal areas. It proposes allocating $92.9 million to advance the construction and continue the operations and maintenance of authorized rural water projects. Additionally, the Proposed Budget includes a total of $157.6 million for Indian Water Rights Settlements. Finally, it allocates $20 million for the Native American Affairs Program, which provides technical support and assistance to tribal governments to develop and manage their water resources.

Enhance Water Conservation and Climate Resilience

The Proposed Budget requests Congress fund: $45.2 million for the Lower Colorado River Operations Program, including $15 million to build on the work of the Bureau, Colorado River partners and stakeholders to implement drought contingency plans; $3.3 million for the Upper Colorado River Operations Program to support Drought Response Operations; $184.7 million to find long-term, com-

prehensive water supply solutions for farmers, families and communities in California's Central Valley Project; and, $54.1 million for the WaterSMART Program to support the Bureau's collaboration with non-federal partners to address emerging water demands and water shortage issues in the West. A total of $27.5 million would continue the Bureau's research and development investments in science, technology, and desalination research in support of prize competitions, technology transfers, and pilot testing projects.

Modernize Infrastructure

The Bureau's dams and reservoirs, water conveyance systems, and power generating facilities continue to represent a primary focus area of organizational operations. The Proposed Budget allocates $207.1 million for the Dam Safety Program, including $182.5 million for modification actions, while $125.3 million is requested for extraordinary maintenance activities across the Bureau as a strategy to improve asset management and address aging infrastructure to ensure continued reliable delivery of water and power.

Next Steps

With the release of the President's Proposed Budget, Congress will now begin drafting spending bills. The House Appropriations Subcommittees were, as of this writing, expected to begin the process of voting on Fiscal Year 2022 spending bills in late June, with full committee votes to be held through mid-July and voting in the Senate in August. Congress has until September 30, 2021—when Fiscal Year 2021 funding levels lapse—to pass new spending bills to avert partial government shutdown on October 1, 2021.

Conclusion and Implications

With the Proposed Budget and the establishment of the Working Group, the Biden administration aims to take a proactive and heavily-funded federal approach in combatting worsening drought conditions in the western United States. The ball is now in Congress' court to present an approved budget for Presidential signature. Whether the Biden Administration's unprecedented $6 trillion Proposed Budget will be approved remains to be seen and will likely face legitimate concern and opposition. When it comes to prioritizing funding for new water projects and maintaining aging infrastructure, the most significant long-term risk may be under—not over—spending. (Chris Carrillo, Derek R. Hoffman)

NEWS FROM THE WEST

In this month's News from the West, first we address a case out of Nevada that could have profound effects on how the state will manage over-appropriated groundwater basins into the future. The case is currently before the Nevada Supreme Court. The issues before the Supreme Court boiled down to three primary questions: 1) Did new state legislation create an exception to the prior appropriation doctrine such that a groundwater management plan (GMP) can require all water users to reduce their pumping according to the priority factor?; 2) Does the GMP's 35-year time window before the basin is projected to come into balance impair vested surface rights?; and 3) Does the GMP violate the beneficial use doctrine by assigning shares to water rights that were not being exercised at the time the GMP went into effect?

Finally, we report on the California Department of Water Resources and the U.S. Bureau of Reclamation's joint Drought Contingency Plan for the State Water Project and federal Central Valley Project—The two major water systems that transport water from the north of the state to the central and south parts of the state. California is experiencing one of the worst droughts in in its recent history.

Nevada Supreme Court Hears Oral Argument in Case Challenging First-Of-Its-Kind Groundwater Management Plan

On June 2, 2021, the Nevada Supreme Court heard oral argument in a case that could have profound effects on how the State will manage its overappropriated groundwater basins into the future. The case turns on the interpretation of legislation passed in 2011, Assembly Bill (AB) 419, which

authorized the Nevada State Engineer to designate as a Critical Management Area (CMA) any basin in which groundwater withdrawals consistently exceed recharge. The CMA designation then mandates that, within ten years, the State Engineer must restrict withdrawals to conform to majority rights unless a majority of the local water users have developed a groundwater management plan (GMP) that meets certain statutory criteria and receives approval from the State Engineer. [*Diamond Natural Resources Protection & Conservation Association, et al. v. Diamond Valley Ranch, LLC, et al.*, Case No. 82224 (Nevada Supreme Court).]

Background

In 2015, The Diamond Valley basin in Central Nevada became the first (and still only) to receive a CMA designation pursuant to AB 419 [*see:* https://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB419_EN.pdf.] After an exhaustive process to devise a GMP adapted to local conditions and needs, a majority of groundwater users petitioned the State Engineer in 2018 for its approval. The State Engineer issued an order approving the GMP.

Three water users petitioned for judicial review of that decision. Finding that the GMP violated the doctrines of prior appropriation, non-impairment of vested rights, and beneficial use, the district court vacated the State Engineer's order. The GMP proponents and the State Engineer appealed to the Nevada Supreme Court.

The Problem the Nevada Legislature Sought to Solve

Nevada follows the doctrine of prior appropriation for both surface water and groundwater. To use groundwater, a would-be appropriator must apply for a permit from the State Engineer, with the priority date being the date of the application. Once the groundwater permit holder proves beneficial use, the State Engineer issues a certificate.

The State Engineer determines how much groundwater is available for appropriation by establishing the perennial yield for each basin based on hydrogeologic, climatic, and other technical factors. Perennial yield is the amount of water that can be sustainably pumped over the long term. Under the prior appropriation doctrine, a shortage exists in a basin when the appropriated rights exceed the perennial yield.

In basins throughout the state, previous State Engineers issued more permits than groundwater basins could sustain because, historically, not all appropriators were successful with their farming efforts. Improved well technology and access to electricity made farming more viable, resulting in overappropriation of aquifers. Many groundwater basins are also overpumped, resulting in mining of the resource, land subsidence, and in some instances, impacts to spring flows.

Were the State Engineer to strictly enforce priorities to limit pumping to the perennial yield, large swaths of water users would be curtailed, resulting in grave social and economic consequences for Nevada's groundwater-dependent communities. For that reason, the State Engineer has been hesitant to take any heavy-handed actions. As a result, overpumping of basins has gone largely unchecked for many decades.

Assembly Bill 419

Acknowledging the seemingly intractable problem of protecting groundwater resources while avoiding the draconian consequences that occur from strict enforcement of priorities, the Legislature passed AB 419 (which is now codified in NRS 534.037 and NRS 534.110(7)) to put problem solving in local hands. In pertinent part, the legislation provided:

> [I]f a basin has been designated as a critical management area for at least 10 consecutive years, the State Engineer shall order that withdrawals, including, without limitation, withdrawals from domestic wells, be restricted in that basin to conform to priority rights, *unless a groundwater management plan has been approved for the basin pursuant to NRS 534.037*. NRS 534.110(7) (emphasis added).

NRS 534.037, in turn, contained a non-exhaustive list of seven criteria the State Engineer must consider before approving a GMP:

> (a) The hydrology of the basin;
> (b) The physical characteristics of the basin;
> (c) The geographic spacing and location of the withdrawals of groundwater in the basin;
> (d) The quality of the water in the basin;
> (e) The wells located in the basin, including,

without limitation, domestic wells;
(f) Whether a groundwater management plan already exists for the basin; and
(g) Any other factor deemed relevant by the State Engineer. NRS 534.037(2).

A petition for approval of a GMP:

. . .must be signed by a majority of the holders of permits or certificates to appropriate water in the basin that are on file in the Office of the State Engineer and must be accompanied by a groundwater management plan which must set forth the necessary steps for removal of the basin's designation as a critical management area. NRS 534.037(1).

Background on Diamond Valley

Diamond Valley is a groundwater-dependent farming community in Eureka County, Nevada. There are approximately 26,000 acres of irrigated land, which primarily produce premium-quality alfalfa and grass hay. Based on a 2013 estimate, approximately 110,000 tons of hay are produced annually for a total farming income of approximately $22.4 million.

Many of the Diamond Valley farmers are from families who settled the area and started to work the land in the 1950's and early 1960's. During that time, the drilling and pumping of wells greatly expanded. Hundreds of applications to appropriate groundwater were filed in that time period.

On paper, about 126,000 acre-feet of irrigation groundwater rights are appropriated in Diamond Valley. As of 2016, however, groundwater pumping was approximately 76,000 acre-feet per year. The discrepancy between the permitted rights and the actual pumpage is largely due to farmers having installed more efficient center pivots.

The State Engineer currently estimates 30,000 acre-feet per year as the perennial yield of the Diamond Valley Basin. Annual groundwater pumping has exceeded the perennial yield of Diamond Valley for over 40 years, and prior to implementation of the GMP, groundwater levels had declined on average two feet per year since 1960.

If the State Engineer were to limit pumping in Diamond Valley to 30,000 acre-feet per year, any appropriations for any use with priority dates more recent than May 12, 1960 would need to cease. That amounts to nearly 300, or 81 percent, of duly issued permits in the basin, many of which have priority dates within days, weeks or months of this cut-off date. Any groundwater rights that have a priority date on or before the May 12, 1960 cut-off are deemed "senior" and any groundwater rights that have a priority date more recent than May 12, 1960 are deemed "junior."

While the primary groundwater usage is irrigation, nearly two-thirds of Eureka County's residents receive their domestic water needs from groundwater, including most of the water needed by the town of Eureka to serve numerous businesses and the Eureka County schools, two General Improvement Districts, and domestic wells. Groundwater also supplies water needs for mines and other commercial and industrial uses and stock watering.

Key Components of the Diamond Valley GMP

The core goals of the GMP are to: 1) Remove the basin's CMA designation within 35 years by stabilizing groundwater levels; 2) Reduce consumptive use to not exceed the perennial yield; 3) Increase groundwater supply; 4) Maximize the number of groundwater users committed to achieving GMP goals; 5) Preserve economic outputs from Diamond Valley; 6) Maximize viable land uses of private land; 7) Avoid impairment of vested rights; and 8) Preserve the socio-economic structure of Diamond Valley.

Under the GMP, water users may continue to use water in proportion to their rights and seniority.

Priority is honored in the GMP using a formula that converts the rights to a set amount of shares, as follows: [WR x PF = SA].

WR = Total groundwater right volume as recognized by the Division of Water Resources, accounting for total combined duty (i.e., overlapping places of use) (measured in acre feet)
PF = Priority factor based on seniority (which contains a 20% spread)
SA = Total groundwater shares

Using this formula, shares are set for each water right and do not change over time. The shares are used on a year-to-year basis to calculate the volume of water (the annual allocation in acre-feet per share) allowed to be used, sold, traded and banked in that year. Annual allocations are reduced each year to

satisfy basin-wide benchmark pumping reductions. Although junior rights holders bear the greatest reductions, an important attribute of the GMP that avoids the detrimental impacts of curtailment is that senior rights holders also must reduce their pumping in proportion to the priority factor.

The GMP applies to groundwater rights that serve an irrigation purpose and mining or milling rights that have an irrigation base water right. The GMP does not apply to water rights that vested prior to the enactment of Nevada's water statute (including groundwater rights issued to vested rights holders to mitigate reduced flows from springs), municipal, industrial, stockwater, or existing domestic wells.

There is already an extensive network of monitoring wells in Diamond Valley, and a crucial component of the GMP is the mandated installation of smart meters on production wells to create an even more robust system for data collection and reporting.

The Legal Dispute Over the GMP

The issues before the Supreme Court boiled down to three primary questions: 1) Did AB 419 create an exception to the prior appropriation doctrine such that the GMP can require all water users to reduce their pumping according to the priority factor?; 2) Does the GMP's 35-year time window before the basin is projected to come into balance impair vested surface rights?; and 3) Does the GMP violate the beneficial use doctrine by assigning shares to water rights that were not being exercised at the time the GMP went into effect?

As to the first question, the justices understandably queried counsel on legislative intent. The GMP proponents argued that the Legislature deliberately provided reprieve from the seniority system by expressly authorizing the State Engineer to not "conform to priority rights" as long as all factors set forth in NRS 534.037 are considered. The GMP opponents countered that had the Legislature intended to depart from the prior appropriation doctrine, it would have done so more explicitly.

Both sides agreed that the GMP could not impair rights that vested prior to enactment of Nevada's water statute. The GMP opponents argued, however, that because the GMP allows for continued overpumping for 35 more years, it impairs vested spring rights that are no longer expressed on the land surface as a result of the lowered groundwater table. The GMP proponents responded that there was no evidence in the record to create a causal connection between the GMP and reduced spring flows because those who hold vested spring rights have drilled wells in or near their springs, preventing the springs from ever again flowing from the surface. Moreover, AB 419 anticipated that overpumping could continue even after the CMA designation because, in the absence of an approved GMP, it creates a 10-year period before the State Engineer had to start curtailment by priority.

Regarding beneficial use, the GMP opponents contended that the State Engineer should have undergone forfeiture and abandonment proceedings prior to approving the GMP so that only currently exercised rights would be converted to shares. As the State Engineer noted in the order approving the GMP, initiating such proceedings would have the perverse effect of encouraging additional pumping, which would be harmful to the resource and contrary to the purpose of the CMA designation. It also would create a morass of administrative and legal proceedings that would take years to resolve, which might not be completed within the Legislature's ten-year deadline for commencing curtailment following CMA designation. In any event, because the GMP's starting point was current pumping levels, the fact that some paper rights might be deemed forfeited or abandoned would not make a difference for the resource.

Conclusion and Implications

The Nevada Supreme Court clearly deemed this case to be a matter of statewide public importance, scheduling the argument for twice the amount of time normally allotted. The justices were engaged and inquisitive, thoughtfully probing the strength and weaknesses of each side's position. It was readily apparent that the justices appreciate the profound impacts that their decision will have for groundwater-dependent communities throughout Nevada.

The court has no deadline for issuing its final disposition, but based on past experience, a published opinion is likely to issue by the end of the year.

Editor's Note: The author represents the GMP proponents in the matter described in this article. (Debbie Leonard)

California Department of Water Resources and the U.S. Bureau of Reclamation Release the State Water Project and Central Valley Project Drought Contingency Plan

In connection with the state's current drought conditions, the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) released the Drought Contingency Plan (Drought Plan) for the State Water Project (SWP) and the Central Valley Project (CVP). The Drought Plan contains important data and operational criteria for addressing the state's water shortage, including current hydrological conditions, a drought monitoring plan, and species status updates.

Background

DWR manages the SWP, a water delivery and storage system that supplies water to municipal, industrial, and agricultural users across the state. The SWP serves more than 27 million people and irrigates roughly 750,000 acres of farmland. The Bureau manages the CVP, a federal water delivery and storage system in California operated in coordination with the SWP. The CVP delivers enough water to irrigate approximately 3 million acres of farmland and supply nearly 1 million households with water.

The current water year, Water Year (WY) 2021, is one of the driest years on record; in conjunction with data from last year, WY 2020 and WY 2021 constitute the second driest two-year period in California history. Additionally, reservoir storage is far below average going into the summer months. For example, at the end of April, Lake Oroville was at 42 percent capacity, Lake Shasta was at 50 percent capacity, and Folsom Lake was 37 percent capacity. In light of these dry conditions, water quality is also of concern. Salinity in the Sacramento-San Joaquin Delta (Delta) is expected to rise through the fall months. Consequently, DWR and The Bureau project that a slightly higher outflow of water to the Delta is necessary to maintain low salinity.

In May of 2021, Governor Gavin Newsom issued an Emergency Proclamation on the state's drought conditions. This Emergency Proclamation expanded the state of emergency to include the Delta, among other watersheds, and a total of 41 counties.

In response to the Emergency Proclamation and the state's extremely dry conditions, DWR and The Bureau released the Drought Plan to provide an important update on water supplies and information on potential areas of concern. In addition to this report, DWR and The Bureau will continue providing weekly water condition and hydrology updates.

The Drought Contingency Plan

The Drought Plan includes a May operational forecast that runs through December 31, 2021. The forecast is based on a 90 percent exceedance forecast from DWR's Hydrology and Flood Operations Office's May 1 Bulletin 120 forecast. The 90 percent exceedance forecast represents a 90 percent chance that the inflow of water will be greater than the forecasted value and a 10 percent chance that inflow will be less than the forecasted value. In simpler terms, there is a 10 percent or less chance that California's conditions will be equally dry or drier moving forward this year. DWR and The Bureau designed the forecast to account for multiple water uses, manage the potential risk of the drought continuing into WY 2022, and meet various regulatory requirements. The Drought Plan discusses three goals for the SWP and the CVP with the operational forecast: 1) meet CVP and SWP service area health and safety requirements; 2) preserve upstream water storage; and 3) meet water right and regulatory obligations.

In light of the 90 percent exceedance operations forecast, DWR and The Bureau identified multiple areas of potential concern in the SWP and CVP. First, meeting State Water Resources Control Board Decision 1641 water quality standards for the Delta. Other areas of concern include, but are not limited to, water storage levels and temperature management on the Sacramento and Trinity River systems; meeting the minimum health and safety requirements in the American River basin; and reduced carryover storage of the New Melones Reservoir into WY 2022.

To deal with the water shortage, DWR and The Bureau implemented various drought actions. The Drought Plan first discusses the development of the Drought Toolkit. The Toolkit outlines a coordination process with other agencies and provides actions and measures that can be implemented during droughts. In addition, The Bureau has coordinated with the Sacramento River Settlement Contractors (SRSC) regarding solutions to address demand reductions and water temperature management.

In an action to address concerns with meeting Decision 1641 standards, DWR and The Bureau filed a Temporary Urgency Change Petition (TUCP) in May for approval by the State Water Resources Control Board (SWRCB). The TUCP requested a reduction of outflow requirements for both June and July, changed the combined maximum SWP and CVP exports for June and July to 1,500 cubic feet per second, and petitioned to modify one salinity compliance location to meet critical year Delta salinity standards. To satisfy Decision 1641 outflow requirements in the month of May, The Bureau also made increased releases from the New Melones Reservoir. Similar releases are anticipated over the summer months to continue supporting water quality and outflow in the Delta.

As part of drought actions made in conjunction with the SWRCB, DWR and The Bureau expect the SWRCB will issue curtailment orders to water users located in the Central Valley and Delta. On June 15, 2021, the SWRCB sent notices of water unavailability to all post-1914 water right holders in the Sacramento-San Joaquin watershed. Additionally, SWP and CVP contractors across the state are individually taking actions to reduce their water use and increase flexibility for water operations across the state. The Drought Plan includes a list of those contractors and agencies and the measures they are taking to address the water shortage.

DWR and The Bureau are also considering avoiding water releases from Friant Dam while using the SWP's share of the San Luis Reservoir to supply or support water deliveries to The Bureau's senior water rights holders.

Conclusion and Implications

The Drought Plan emphasizes the overall shortage of water in California. The Drought Plan lists multiple proposals and actions aimed at addressing the water shortage across the state. Like those discussed in this article, the remainder focus on water quality, wildlife management, and water supply management. The Department of Water Resources and the U.S. Bureau of Reclamation will continue updating this plan as conditions change.
(Taylor Davies, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•May 17, 2021—In a recent settlement with the EPA and the U.S. Department of Justice, a group of related companies have agreed to perform wetland restoration and pay a fine as the result of EPA and DOJ allegations that the companies illegally filled wetlands on a 22-acre site in Scarborough, Maine in violation of the federal Clean Water Act (CWA). Maietta Enterprises, Inc., Maietta Construction, Inc., and M7 Land Co. LLC will perform approximately $850,000 worth of wetland restoration and mitigation and pay a $25,00 penalty under a proposed Consent Decree. Starting in the 1960s, the companies continuously used the site as a material staging and reprocessing area for Maietta Construction Inc.'s earthwork operations. Maietta Construction filled approximately ten wetland acres falling under the jurisdiction of the CWA on the site. Prior to disturbance, these wetlands were mainly forested freshwater wetlands with a mixture of coniferous and hardwood trees and were adjacent to an unnamed tributary to the Spurwink River, a navigable waterway that runs through the Rachael Carson National Wildlife Refuge. Converting large areas of natural wetlands to other uses can profoundly alter natural flood mitigation properties and undermine the pollutant-filtering abilities of wetlands while reducing important habitat. The restoration will involve removing fill and restoring about five acres of previously forested wetlands, creating a plant buffer between areas of remaining fill and restored areas, restoring and enhancing 1.2 wetland acres by managing invasive species and removing fill, mitigating some 7.7 adjacent acres of forested wetlands, in part by plugging drainage ditches and managing invasive species, and establishing a 14.5 acre conservation easement to preserve the wetlands in perpetuity.

•May 25, 2021—EPA has settled a series of Clean Water Act violations by ZWJ Properties, LLC for its Win Hollow Subdivision construction site in Boise, Idaho that discharges to Crane Creek, a tributary of the Boise River. ZWJ Properties agreed to pay a civil penalty of $62,000 to resolve EPA's allegations. Managing stormwater at construction sites prevents erosion. Uncontrolled stormwater runoff can cause serious problems for the environment and people, including sediment choked rivers and streams; flooding and property damage; impaired opportunities for fishing and swimming, and in some extreme cases, threats to public drinking water systems.

•May 28, 2021—Under a settlement with the EPA, Patriot Stevedoring & Logistics, the port operator at Brayton Point in Somerset, Massachusetts has changed its system for loading scrap metal in order to avoid illegally discharging scrap metal into Mt. Hope Bay, in violation of the Clean Water Act. Patriot Stevedoring & Logistics also agreed to pay a $27,000 penalty to settle the alleged violations by EPA's New England office that it discharged without a permit between Feb. 25 and Oct. 30 of 2020. Patriot Stevedoring changed its metal stevedoring process in September 2020 to load scrap metal onto a dumpster-like carrier that is hoisted directly into the ship's cargo bay for unloading. This avoids metal being dropped into the water during loading. The company agreed to phase out the use of the mechanical claws it had used before. Patriot Stevedoring leases the port at 1 Brayton Point Road, the location of a coal power plant that is no longer operating. This port area discharges stormwater from one outfall into the bay. Eastern Metal Recycling is a deliverer of up to 50 truckloads of shredded scrap metal to the port daily and after about a month, enough is stockpiled to call in a ship to pick it up.

•June 2, 2021—EPA has reached a settlement with Thomas Robrahn and Skillman Construction LLC of Coffey County, Kansas, to resolve alleged violations of the federal Clean Water Act (CWA) that occurred within the Neosho River. Under the settlement, the parties will pay a $60,000 civil penalty. According to EPA, Robrahn and Skillman Construction placed approximately 400 cubic yards of broken concrete into the river adjacent to Robrahn's property in an attempt to stabilize the riverbank. The work impacted about 240 feet of the river and was completed without first obtaining a required CWA permit. As part of their settlement with EPA, the parties also agreed to remove the concrete and restore the impacted site to come into compliance with the CWA. Under the CWA, parties are prohibited from discharging fill material into water bodies unless they first obtain a permit from the U.S. Corps of Engineers. If parties place fill material into water bodies without a permit, the Corps may elect to refer an enforcement case to EPA.

•June 8, 2021—EPA recently reached an agreement with Emhart Teknologies LLC, a manufacturer of precision screw-thread wire and screw-lock inserts based in Danbury, Conn., to settle alleged violations of the Clean Water Act. Under the settlement, Emhart Teknologies agreed to pay a penalty of $29,658 for allegedly discharging a mixture of water and coolant, used to keep the facility's cutting machines from overheating during their operations, into the Sympaug Brook located near Danbury, Connecticut. The mixture contained oil and toxic metals, such as copper and lead, which were left over from machining operations. Emhart Teknologies' facility performs screw machine operations that generate used coolant containing oil and toxic metals from machining brass. An automatic sump pump operated by the facility displaced 1,800 gallons of dilute metal cutting coolant from an aboveground storage tank into nearby storm basins, which subsequently discharged into the Sympaug Brook. The facility reported that 15 barrels (or 630 gallons) of dilute cutting coolant reached the brook. The company completed the cleanup of the brook shortly after the spill was discovered and was cooperative with EPA during the enforcement investigation and case settlement negotiations. The Clean Water Act prohibits the discharge of oil or hazardous substances to waters of the United States in quantities that may be harmful to public health or the environment.

•June 9, 2021—The U.S. Attorney's Office and the EPA New England regional office has entered into a consent decree with the City of Quincy, Massachusetts. to resolve violations of the Clean Water Act regarding the City's stormwater and sanitary sewer systems. Water sampling indicated untreated sanitary sewage discharging from numerous Quincy stormwater outfalls, including outfalls discharging at beach areas. The settlement requires Quincy to implement extensive remedial measures to minimize the discharge of sewage and other pollutants into Quincy Bay, Dorchester Bay, Neponset River, Hingham Bay, Boston Harbor and other water bodies in and around Quincy. The cost of the remedial measures is expected to be in excess of $100 million. The City will also pay a civil penalty of $115,000. Under the proposed consent decree, Quincy will implement a comprehensive and integrated program to investigate, repair and rehabilitate its stormwater and sanitary sewer systems. The proposed settlement is also consistent with EPA directives to strengthen enforcement of violations of cornerstone environmental statutes in communities disproportionately impacted by pollution, with special focus on achieving remedies with tangible benefits for the community. The proposed consent decree establishes a schedule for Quincy to investigate the sources of sewage being discharged from its storm drains. Quincy will first complete its investigations of drainage areas discharging to beach areas, including Wollaston Beach and the Adams Shore area. Quincy will prioritize the rest of the investigations according to the sensitivity of receiving waters and evidence of sewage. The proposed consent decree also requires Quincy to remove all identified sources of sewage as expeditiously as possible. In addition, Quincy is required to conduct frequent and enhanced monitoring (in both dry and wet weather) of its stormwater outfalls. Some portions of Quincy's sanitary sewer system are over 100 years old. Numerous studies conducted by Quincy have identified significant and widespread defects in the sanitary sewer system, including cracks that allowed sewage to leak. While Quincy has made some repairs to the sanitary sewer system, the proposed consent decree will require future work to be conducted on a fixed schedule and coordinated with its stormwater investigations. The proposed consent

decree requires the City to conduct all investigations and complete remedial work by December 2034.

•June 10, 2021—EPA announced a settlement with Karl and David Lamb to remedy environmental impacts associated with alleged Clean Water Act (CWA) violations in Duchesne County, Utah. The Administrative Order on Consent (AOC) between EPA and the Lambs remedies unpermitted dredge and fill activities, and associated discharges, to the Duchesne River and its adjacent floodplain on the Uintah and Ouray Reservation. Under the terms of the AOC, the Lambs have agreed to submit and implement a restoration plan to remedy the impacts of the earthmoving activities on the Duchesne River. EPA is working collaboratively with the Ute Indian Tribe and the Lambs to oversee the completion of all actions required by the order. EPA and the U.S. Army Corps of Engineers (Corps) conducted a site visit at the Lamb's property in September of 2019, and confirmed the activities listed above had taken place. These activities resulted in discharges of dredged and fill material into and along approximately 0.96 acres of the Duchesne River and floodplain, increasing the potential for erosion and sedimentation within the river. To ensure there are no disproportionate environmental impacts in this area, local community members should contact EPA with any information about activities that could degrade the river and the associated watersheds and environment in this historically underserved area.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•June 2, 2021—Alliant Techsystems Operations LLC will pay a $350,000 penalty to settle several alleged environmental violations at the U.S. Navy-owned Allegany Ballistics Laboratory in Keyser, West Virginia. Alliant Techsystems, a subsidiary of the Northrup Grumman Corporation, operates the laboratory under a lease with the Navy. There, Alliant Techsystems manufactures military products that include solid fuel rocket motors, explosive warheads, solid fuels and propellants. The cited violations were related to hazardous waste storage and treatment operations, the facility's Clean Air Act permit, water discharge requirements under the facility's National Pollution Discharge Elimination System (NPDES) permit, and the facility's Spill Prevention Control and Countermeasures Plan. The company allegedly violated the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. Along with the $350,000 penalty, Alliant Techsystems must ensure it is in full compliance with state and federal environmental requirements.

•June 8, 2021—EPA announced a settlement with Hawaii Fueling Facilities Corporation (HFFC) and Signature Flight Support, LLC, also known as Signature Flight Support Corporation (SFSC), to resolve violations of the Oil Pollution Act. The violations are related to the bulk fuel storage facility on Sand Island, in Honolulu, that is owned by HFFC and operated by SFSC. The facility stores and distributes jet fuel to the Honolulu International Airport. The settlement includes a commitment from HFFC and SFSC to make improvements at the facility to come into compliance with oil spill prevention requirements. The two companies will also pay a penalty. The Sand Island facility has 16 bulk aboveground storage tanks. In January 2015, the former operator noticed an inventory discrepancy in one of the tanks and estimated that 42,000 gallons of jet fuel had been released through the tank's bottom. Approximately 1,944 gallons of fuel were recovered outside of the facility boundaries.

Failure to implement measures required by the SPCC Rule can result in an imminent and substantial threat to public health or the welfare of fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources. (Andre Monette)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT DETERMINES CONTRIBUTION ACTION UNDER CERCLA SECTION 113(F) REQUIRES SETTLEMENT OF CERCLA LIABILITY—NOT CLEAN WATER ACT LIABILITY

Territory of Guam v. United States, ___U.S.___, 141 S.Ct. 1608 (May 24, 2021).

The U.S. Supreme Court recently held that a party may seek contribution under Subsection 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) only after settling a CERCLA-specific liability. The Court's holding reverses the U.S. Court of Appeals for the District of Columbia Circuit's earlier ruling that the Territory of Guam's (Guam) settlement of alleged federal Clean Water Act (CWA) violations triggered the statute of limitations on Guam's ability to seek contribution against the United States under CERCLA subsection 113(f)(3)(B).

Factual and Procedural Background

In 2004, Guam and the U.S. Environmental Protection Agency (EPA) entered into a consent decree regarding the Ordot Dump (Site) after the EPA sued Guam for alleged violations of the CWA. The site had originally been constructed by the United States Navy, who had deposited toxic military waste at the site for decades prior to ceding control of it to Guam. Guam's compliance with the consent decree, which included a civil penalty, would constitute full settlement and satisfaction of the claims against it under the CWA.

Thirteen years later, Guam sued the United States under CERCLA for its earlier use of the site, alleging the United States was liable under CERCLA §§ 107(a) and 113(f)(3)(B). Section 107(a) allows a state, including a territory, to recover:

> . . .all costs of [a] removal or remedial action' from 'any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

Section 113(f)(3)(B) provides that a:

> . . .person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement.

Actions for contribution under § 113(f)(3)(B) are subject to a three year statute of limitations.

On appeal, the D.C. Circuit determined that Guam could not bring an action under Section 107(a) because it could have brought a contribution claim under § 113(f) as a result of settling its CWA liability in the 2004 consent decree. However, because the three-year statute of limitations had expired, Guam could no longer proceed with its contribution action either. The Supreme Court granted Guam's petition for writ of *certiorari*.

The Supreme Court's Decision

Guam presented two arguments challenging the D.C. Circuit's decision, however the Court only needed to address Guam's first argument to resolve the issue. In its first argument, Guam contended that it never had a viable contribution claim under § 113(f) because this section only applies when a settlement resolves liability under CERCLA, and it should therefore be able to pursue a recovery action under § 107(a). The Supreme Court agreed, holding that a settlement must resolve a CERCLA liability to trigger a contribution action under Subsection 113(f)(3)(B).

The Supreme Court's analysis focused on the totality of § 113(f), which, the Court explained, governs the scope of a contribution claim under CERCLA. Reading § 113(f) as a whole, the Court determined that the provision is concerned only with distribution of CERCLA liability. The Court reasoned that be-

cause a contribution suit is a tool for apportioning the burdens of common liability among responsible parties, the most obvious place to look for the threshold liability in this case was CERCLA. The Court noted that this approach was consistent with the principle that a federal contribution action is almost always a creature of a specific statutory regime.

According to the Court, this interpretation is confirmed by the language of Subsection 113(f)(3)(B), which provides a right to contribution in the specific circumstance where a person has resolved liability through settlement. This right to contribution, the Court stated, exists within the specific context more broadly outlined in § 113(f). Further, the Court explained that a predicate CERCLA liability is apparent in § 113(f) when its provisions are read in sequence as integral parts of a whole. The Court pointed out that Subsection 113(f)(1), the "anchor provision," is clear that contribution is allowed during or following any civil action under CERCLA §§ 106 or 107. The Court concluded that the context and phrasing of Subsections 113(f)(2) and (3) also presume that the right to contribution is triggered by CERCLA liability, and that these provisions are best understood only by reference to the CERCLA regime, including Subsection 113(f)(1). On this point, the Court noted that Subsection 113(f)(3)(B) ties itself to Subsection 113(f)(2), which in turn mirrors Subsection (f)(1)'s anchor provision requiring a predicate CERCLA liability. The Court further noted that Subsection 113(f)(3)(B) used the term "response action," which is used in several places throughout CERCLA.

Remedial Actions under CERCLA are Not the Same as Remedial Actions under the Clean Water Act

Addressing the United States arguments, the Court opined that while remedial measures taken under another environmental statute might resemble action taken in a formal CERCLA response action, applying Subsection 113(f)(3)(B) to settlement of environmental liability that might have been actionable under CERCLA would stretch the statute beyond its statutory language. The Court was similarly unpersuaded by United States' argument that there was a lack of express demand of a predicate CERCLA action in Subsection 113(f)(3)(B), focusing instead on Subsection 113(f)(3)(B)'s use of the phrase "response action," an express cross-reference to another CERCLA provision, and placement in the statutory scheme. Finally, the Court dismissed the United States argument that interpreting Subsection 113(f)(3)(B)'s as only allowing a party to seek contribution after settling a CERCLA liability would be redundant in light of Subsection 113(f)(1). To this, the Court stated that it was interpreting Subsection 113(f)(3)(B) according to its text and place within a comprehensive statutory scheme rather than trying "to avoid surplusage at all costs." The Court thus held that the "most natural" reading of Subsection 113(f)(3)(B) is that a party may seek contribution under CERCLA only after settling a CERCLA-specific liability.

Conclusion and Implications

The importance of the Court's opinion to parties who may seek cost recovery or contribution from other responsible parties under CERCLA after entering a settlement agreement to discharge potential environmental liability under federal law cannot be understated. In particular, as the Court points out in the final footnote of the opinion, this case has the added benefit of providing clarity as to the application of the three-year statute of limitations for contribution actions under Subsection 113(f)(3)(B). Beyond this specific holding, the Court's view of contribution provisions in general is useful precedent for courts and interested parties in interpreting contribution provisions in other statutes. The Supreme Court's opinion is available online at:
https://www.supremecourt.gov/opinions/20pdf/20-382_869d.pdf.
(Heraclio Pimentel, Rebecca Andrews)

FIRST CIRCUIT RULES MASSACHUSETTS WETLANDS PROTECTION ENFORCEMENT BARS CLEAN WATER ACT CITIZEN SUITS WHERE WATER QUALITY STANDARDS ARE ENFORCED

Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., 995 F.3d 274 (1st Cir. 2021).

Section 309(g)(6)(A)(ii) of the Federal Clean Water Act (CWA, or Act), codified at 33 U.S.C. § 1319(g)(6)(A)(ii), bars an otherwise permissible citizen suit under the Act from going forward if a state government has already commenced and is diligently prosecuting a related enforcement action under a state law comparable to § 309(g) of the Act.

The U.S. Court of Appeals for the First Circuit recently determined that an enforcement action brought by the Massachusetts Department of Environmental Protection (Department) against a developer for sediment-laden stormwater discharges barred a citizen suit under the federal Clean Water Act for the same violations. The court also determined that all operators on the project site were required to obtain a National Pollutant Discharge Elimination System (NPDES) CWA permit to discharge from the site. The First Circuit held that two Massachusetts statutes could be viewed as comparable laws and would serve to bar Clean Water Act citizen suits on proper facts.

Background

A construction firm and its officers had since 2006 allegedly proceeded with development at a site that needed a Construction General Permit governing stormwater. A citizen group filed suit in Massachusetts federal district court alleging failure to have the permit and alleging continued operations without the permit as ongoing violations of the Clean Water Act. After cross motions for judgment, the U.S. District Court ruled that since the actual development, Arboretum Village LLC, possessed a permit, there was not a substantive violation of the requirement to possess a permit by the other defendants. The District Court also found that a process of administrative hearings and orders to the Defendants by the Massachusetts Department of Environmental Protection (MassDEP) that invoked state water quality violations and standards sufficed to bar the prosecution of the citizen plaintiffs' complaint.

The bar to prosecution contained in section. That Section (33 U.S.C.S. § 1319(g)(6) (B)) provides any violation:

> (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
> *(ii)* with respect to which a State has commenced and is diligently prosecuting an action under a *State law comparable to this subsection, or*
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or § 311(b) or § 505 of this Act [33 USCS § 1321(b) or 1365].

The First Circuit's Decision

Even though the state in 2014 reach a full and formal settlement with the defendants, in 2016 the citizen suit was filed. After their case was dismissed by the District Court, the citizens filed an appeal to the First Circuit Courts of Appeals.

That court engaged in a very thorough discussion of the four various arguments by which the citizens hoped to avert the § 309 (g) bar. *Blackstone Headwaters Coalition, Inc. v Gallo Builders, Inc.* 995 F.3d 274; 2021 U.S. App. LEXIS 12340 (April 26,2021).

First, plaintiffs disputed: 1) whether the prior enforcement action by the MassDEP was commenced and prosecuted "under a State law comparable" to § 309(g) of the federal CWA; 2) whether, insofar as the MassDEP's enforcement action was commenced and prosecuted under such a comparable law, it sought to enforce the same violation that Blackstone claims in its suit under the federal CWA; 3) whether, if those first two requirements of the Federal CWA's preclusion bar were satisfied, the MassDEP was "diligently

prosecuting" the enforcement action when the citizens' group filed its complaint; and (4) whether Blackstone's suit is "a civil penalty action."

As to the comparability of laws question, the Massachusetts is one of very few states that do not have an authorized NPDES program under the federal Clean Water Act. The state does however have a "Clean Waters Act." and the Court of Appeals in an earlier decision had found that it was a law "comparable" to the Clean Water Act for Section 309 purposes. The court's opinion affirms and reinforces the comparability holding as to the state's Clean Waters Act.

However, the Court of Appeals noted that the main source of prosecutorial authority used by the state was in fact its Wetlands Protection Act. It found that in many respects that statute *not* clearly in parallel or comparable to the federal CWA. However, since the charges, relief and orders governing settlement of the matter by the state with the Blackstone defendants invoked the Water Quality Standards of the state, and since these standards derive directly from the state's Clean Waters Act, the Court of Appeals found that the prosecution should be considered in part to have been under the Clean Waters act and held there is comparability and parallelism sufficient to provide a defense against the citizens' suit.

Conclusion and Implications

The court went on to deal with contentions that the violations involved and remedy that the state exacted from the defendants are not the same. In essence, after reviewing the details, the court held that the state is not required to follow the citizen plaintiff's specific charges, so long as its results are substantively designed to address the same problem. In this case the remedy is found to fit the criteria for a bar to citizen enforcement. This case supports a diligent prosecution bar to citizen suits, as long as the state enforcement action was brought, at least in part, pursuant to a comparable state law. The case also appears to support a contention that every operator on a construction site may be required to obtain individual permit coverage to discharge from the site. The First Circuit's opinion is available online at: : https://casetext.com/case/blackstone-headwaters-coal-inc-v-gallo-builders-inc-2.
(Harvey M. Sheldon)

NINTH CIRCUIT FINDS U.S. FISH AND WILDLIFE SERVICE FAILED TO EXPLAIN WHY IT REVERSED PREVIOUS LISTING DECISION REGARDING PACIFIC WALRUS

Center for Biological Diversity v. Haaland, ___F.3d___, Case No. 19-35981 (9th Cir. June 3, 2021).

The Center for Biological Diversity brought an action challenging a decision by the U.S. Fish and Wildlife Service (FWS or Service) to reverse its previous decision that the Pacific walrus qualified for listing as an endangered or threatened species under the federal Endangered Species Act (ESA). The U.S. District Court had granted summary judgment for the Service, but the Ninth Circuit Court of Appeals reversed, finding that the FWS did not sufficiently explain its change in position.

Factual and Procedural Background

In 2008, the Center for Biological Diversity petitioned the FWS to list the Pacific walrus as threatened or endangered under the ESA, citing the claimed effects of climate change on walrus habitat. In February 2011, after completing a special status assessment, the FWS issued a decision finding that listing of the Pacific walrus was warranted, finding that: the loss of sea-ice habitat threatened the walrus; subsistence hunting threatened the walrus; and existing regulatory mechanisms to reduce or limit greenhouse gas emissions to stem sea-ice loss or ensure that harvests decrease at a level commensurate to predicted population declines were inadequate. Although the Pacific walrus qualified for listing, however, the need to prioritize more urgent listing actions led the Service to conclude that listing was at the time precluded.

The FWS reviewed the Pacific walrus's status annually through 2016, each time finding that list-

ing was warranted but precluded. In May 2017, the Service completed a final species status assessment. Among other things, that assessment concluded that while certain changes, such as sea-ice loss and associated stressors, continued to impact the walrus, other stressors identified in 2011 had declined in magnitude. The review team believed that Pacific walruses were adapted to living in a dynamic environment and had demonstrated the ability to adjust their distribution and habitat use patterns in response to shifting patterns of ice. The assessment also concluded, however, that the walrus' ability to adapt to increasing stress in the future was uncertain.

In October 2017, after reviewing the assessment, the FWS issued a three-page final decision that the Pacific walrus no longer qualified as threatened. Like the 2011 decision, this decision identified the primary threat as the loss of sea-ice habitat. Unlike the earlier decision, however, the 2017 decision did not discuss each statutory factor and cited few supporting studies. Mainly, it incorporated the May 2017 assessment by reference, finding that, although there will likely be a future reduction in sea ice, the Service was unable to reliably predict the magnitude of the effect and the behavioral response of the walrus to this change. Thus, it did not have reliable information showing that the magnitude of the change could be sufficient to put the species in danger of extinction now or in the foreseeable future. The decision also found that the scope of any effects associated with an increased need for the walrus to use coastal haulouts similarly was uncertain. The 2017 decision referred to the 2011 decision only in its procedural history.

The Center for Biological Diversity filed its lawsuit in 2018, alleging that the 2017 decision violated the Administrative Procedure Act (APA) and the ESA. In particular, the Center for Biological Diversity claimed that the Service violated the APA by failing to sufficiently explain its change in position from the earlier 2011 decision. The U.S. District Court granted summary judgment to the USFWS, and the Center for Biological Diversity in turn appealed.

The Ninth Circuit's Decision

The Ninth Circuit reversed the grant of summary judgment, finding that the "essential flaw" in the 2017 decision was its failure to offer more than a cursory explanation of why the findings underlying the 2011 decision no longer applied. Where a new policy rests upon factual findings contradicting those underlying a prior policy, the Ninth Circuit explained, a sufficiently detailed justification is required. The 2011 decision had contained findings, with citations to scientific studies and data, detailing multiple stressors facing the Pacific walrus and explained why those findings justified listing. The 2017 decision, by contrast, was "spartan," simply containing a general summary of the threats facing the Pacific walrus and the agency's new uncertainty on the imminence and seriousness of those threats. The Ninth Circuit found that more was needed.

The Ninth Circuit also found that the 2017 decision's incorporation of the final species status assessment did not remedy the deficiencies. The assessment did not purport, for example, to be a decision document, and while it provided information it did not explain the reasons for the change in position. The assessment itself also reflected substantial uncertainty and, while it did provide at least some new information, it did not identify the agency's rationale for concluding that the specific stressors identified as problematic in the 2011 decision no longer posed a threat to the species within the foreseeable future.

Ultimately, the Ninth Circuit noted, the FWS may be able to issue a decision sufficiently explaining the reasons for the change in position regarding the Pacific walrus. But the 2017 decision was not sufficient to do so, and the Ninth Circuit found that it could not itself come up with the reasons from the large and complex record. It therefore reversed the grant of summary judgment with directions to the U.S. District Court to remand to the Service to provide a sufficient explanation of the new position.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the standards of judicial review that apply when an administrative agency alters a previous policy and a general discussion of the listing process under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/03/19-35981.pdf.
(James Purvis)

NINTH CIRCUIT ADDRESSES HYDROELECTRIC PROJECT, INDISPENSABLE PARTIES, AND TRIBAL SOVEREIGN IMMUNITY IN THE CONTEXT OF A CLEAN WATER ACT CITIZEN SUIT

Deschutes River Alliance v. Portland General Electric Company, et al.,
___F.3d___, Case No. 18-35867 (9th Cir. June 23, 2021).

The U.S. Court of Appeals for the Ninth Circuit ruled that an environmental group's federal Clean Water Act citizen suit brought to challenge a hydroelectric project's compliance with its Section 401 Water Quality Certificate had to be dismissed because the Native American Tribes who co-own the project were necessary parties who could not be joined because of sovereign immunity.

Background

Efforts to develop hydropower on the Lower Deschutes River at the site of the Pelton Round Butte Hydroelectric Project (Project) began almost a century ago when the Columbia Valley Power Company applied in 1924 for a federal license to develop Pelton Project No. 57 near the confluence of the Deschutes, Crooked, and Metolius Rivers. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 438 n.3 (1955). Although that effort was abandoned, Portland General Electric Company (PGE) resuscitated it and ultimately saw it to fruition in the early 1950s, and now serves as the Project's co-owner and -operator along with the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS or Tribes). The Project comprises three dams: Round Butte, which formed the Lake Billy Chinook Reservoir; Pelton, behind which lies the Lake Simtustus Reservoir; and a re-regulating dam used to balance river flows for the purpose of meeting peak-power demands.

Essentially from the time it was originally conceived, building a hydroelectric facility at the Project site was hotly contested, largely by fishing interests who argued that it would cut off migration of salmonids above any such dam and serve to further reduce their populations beyond the losses they had already sustained to that point from construction of hydropower facilities on the Columbia River. As originally designed, the dams created a total barrier to migration by resident and anadromous fish in the Deschutes River, thereby preventing anadromous and resident salmonids from reaching historical spawning and rearing areas.

In 1951, the Federal Power Commission (FPC), predecessor to the Federal Energy Regulatory Commission (FERC), issued PGE a 50-year license, authorizing construction of the Pelton and Reregulating Dams. In 1960, the FPC amended the license to authorize PGE to construct the Round Butte Dam. PGE and the Tribes later filed a joint application seeking further amendment of the license to authorize the Tribes to construct power generation facilities at the Reregulating Dam, which was granted, and FERC also designated PGE and the Tribes joint Project licensees.

As the original Project license neared expiration, PGE and the Tribes jointly applied to FERC for a new one. At the same time, they filed applications for water-quality certifications for the Project pursuant to Section 401 of the federal Clean Water Act (CWA) with both the CTWS Water Control Board (WCB) and Oregon Department of Environmental Quality (DEQ). In June 2002, WCB and DEQ respectively granted the requested water quality certifications, each of which incorporates a Water Quality Management and Monitoring Plan (WQMMP) and various other more detailed plans setting forth measures the applicants are to take as conditions to remaining in compliance with the certificates. In June 2005, FERC approved a Relicensing Settlement Agreement into which PGE and the Tribes had entered in support of their renewal license application and issued them a renewed 50-year license for the Project.

Litigation in the U.S. District Court

In August 2016, Plaintiff Deschutes River Alliance (DRA) filed a citizen suit against PGE under the CWA, alleging that its ongoing operation of the Project is violating various provisions of the Project's Section 401 Certification from DEQ. FERC made compliance with this certification a condition of the 2005 renewal license. More specifically, DRA alleged that PGE's operation of the Project is causing discharges in the Lower Deschutes River that exceed

water-quality standards for pH levels and temperature as specified in the WQMMPs that are incorporated into the Project's Section 401 CWA Certificate, as well as such plans' requirements that PGE adaptively manage the Project to avoid violating applicable water quality standards adopted pursuant to the CWA.

PGE's initially filed a motion to dismiss the case for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), premised on the argument that the CWA's citizen-suit provision does not authorize a civil action to challenge compliance with conditions contained in a water quality certificate issued under Section 401 of that statute. Instead, PGE contended, only the licenser itself (FERC) or the state (Oregon) is authorized to enforce a failure by a hydropower licensee to comply with such conditions if, as is the case for the 2005 Project license, they have been incorporated into the underlying license. The U.S. District Court rejected this interpretation in favor of taking a broad view of the CWA citizen-suit provision that swept the "entirety of section 401, and not just the section requiring procurement of such certification" into its scope, on the basis of which it concluded that citizens may bring civil actions either to require a facility to obtain a requisite water-quality certificate under Section 401 in the first place or, as DRA did in this case, to ask a federal court to enforce conditions in a certificate that is already issued and in effect.

Shortly after this ruling, CTWS filed and was granted leave to participate in the case as *amicus curiae*. Then, in the midst of the parties' briefing on cross-motions for summary judgment, PGE and the Tribes both filed a second round of motions to dismiss the case on the ground that DRA had failed to join the Tribes who they contended are necessary and indispensable parties.

In resolving this motion, the District Court addressed the tripartite framework the Ninth Circuit has established for such scenarios that turns on answers to the three following queries: 1) Is the absent party necessary (*i.e.*, required to be joined if feasible) under Fed. R. Civ. 19(a)?; 2) If so, is it feasible to order that the absent party be joined?; and 3) If joinder is not feasible, can the case proceed without the absent party, or is the absent party indispensable such that the action must be dismissed? In addressing the first two of these, the District Court ruled, first, that the Tribes were in fact necessary parties to the case and, second, that it was feasible to join them as Defendants. To resolve this latter inquiry, it had to determine whether the CWA citizen-suit provision serves to abrogate the sovereign immunity to which the Tribes ordinarily are entitled in the absence of a congressional override.

The District Court rested its conclusion that the CWA's citizen-suit provision does abrogate the sovereign immunity of Indian tribes on its determination to follow the rationale of several other courts that have reasoned that, where a statute defines "person" to include "tribes," and allows citizen suits against "persons," the Congress has manifested an express intent to effectuate a waiver of tribal sovereign immunity. The District Court therefore ordered that the Tribes be added as Defendants, whereupon the parties concluded briefing on cross-motions for summary judgment.

In resolving those cross-motions, the District Court declined DRA's contention that any and all exceedances of water-quality criteria in the various underlying plans that DEQ incorporated into the Section 401 Project certificate, which the record unequivocally showed had occurred, sufficed to establish violations of the certificate itself. The court did so principally on the strength of certain language in the certificate providing that the plans so incorporated were to set forth the measures PGE and CTWS are required to take to *reduce* the Project's contribution to exceedances of the applicable water-quality criteria and that, if followed, would be designed to eventually lead to daily compliance with such criteria. The court acknowledged that the certificate contained other language supporting DRA's strict-compliance interpretation, but concluded that it needed to construe the certificate as a whole, and felt as if its more flexible approach to the matter was more in keeping with that hermeneutic approach. The court then went on to find that the undisputed evidence in the record did not show, as DRA alleged, that PGE and CTWS had failed to comply with the measures identified in the respective plans incorporated into the Project's Section 401 certificate for temperature, Dissolved Oxygen, or pH levels. In reaching this conclusion, the court may well also have been influenced by the fact that DEQ took the position as an amicus in the case that PGE and CTWS are in compliance with its Section 401 Certificate for the Project.

The Ninth Circuit's Decision

Standing

Before turning to the issue of whether the District Court erred in declining to dismiss DRA's case because the Tribes were necessary and indispensable parties who could not, and should not, have been joined as defendants, the Ninth Circuit addressed PGE's argument challenging whether DRA had standing to bring its claims. *Deschutes River Alliance v. Portland Gen. Elec.*, Slip Op., No. 18-35867, et al., Slip Op. at 12-13, 2021 WL 2559947 (9th Cir. June 23, 2021). The court dispensed with this jurisdictional challenge in a scant two paragraphs, focusing its analysis on the "redressability" element of article III, and finding a substantial likelihood that the injunction DRA sought to require PGE and CTWS to comply with the water-quality criteria it alleges they are violating in operating the Project "would redress DRA's alleged injury by improving the water quality of the lower Deschutes River. *Id.* at 13 (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 185–86 (2000); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318 (1982)).

Rule 19 Motion, Tribal Sovereign Immunity, Indispensable Parties and Clean Water Act Citizen Suits

The court then turned to reviewing the District Court's ruling denying the Rule 19 indispensable party motions to dismiss. *Id.* at 13-22. As an initial matter, it almost in passing disposed of DRA's argument that CTWS had "waived" their sovereign immunity to the citizen suit by entering into an Implementation Agreement for the Project that authorizes suits against CTWS to challenge that agreement. The court first noted DRA failed to raise this argument in district court and also found it lacked merit because DRA is not a party the Implementation Agreement. *Id.* at 13-14.

The court then trained its focus on the major legal issue on appeal, which turned on whether the CWA citizen-suit provision abrogates Tribal sovereign immunity. *Id.* at 14-20. The court rejected the District Court's conclusion that the statute did so, largely on the strength of the principle enunciated by the Supreme Court in this context that, in order for a federal statute to effectuate such an abrogation, the Congress must use language that "unequivocally express[es] that purpose," a rule of construction that it characterized as "an enduring principle of Indian law." *Id.* at 14 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). The Ninth Circuit discerned no such unequivocal purpose manifested in the language of the CWA primarily because the citizen-suit provision itself, 33 U.S.C. § 1365, explicitly deals with sovereign immunity by authorizing suits against the United States and other State instrumentalities or agencies (to the extent consistent with the Eleventh Amendment to the Constitution), while making no mention of Native American Tribes or Tribal sovereign immunity. *Id.* at 14-15.

In this context, the court deemed the mere fact that the definitional section of the CWA defines "person" to include the term, "municipality," and then, in turn, defines that term to include "an Indian tribe or an authorized Indian tribal organization," to reflect well too attenuated of an interpretive relay race to constitute the requisite unequivocal congressional purpose to abrogate Tribal sovereign immunity. *Id.* at 15-17. The court also was unconvinced by the trio of federal appellate opinions on which the District Court relied to come to the opposite finding in this regard. It first expressly stated its belief that the Eighth Circuit erred in reaching a finding of abrogation on the basis of similar language in the citizen-suit and definitional sections of the Resource Conservation and Recovery Act (RCRA) in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989). *Id.* at 17-19. Next, the court rejected any reliance on *Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dep't of Labor*, 187 F.3d 1174 (10th Cir. 1999), because that case dealt with enforcement of the Safe Drinking Water Act, the enforcement provisions of which are distinct from those in the CWA. *Id.* at 19-20. Lastly, the court found that its reference to the *Blue Legs* and *Osage* opinions in *Miller v. Wright*, 705 F.3d 919 (9th Cir.

2013), for the purpose of distinguishing them, was of little or absolutely no import when it comes to evaluating its precedent on the issue of abrogation of Tribal sovereign immunity. Id. at 20.

Having determined that the Tribes were necessary parties who were infeasible to join due to the sovereign immunity they enjoy, the court was confronted with the third inquiry in the context of a Rule 19(b) motion to dismiss, which is whether the case can pro-

ceed in their absence. *Id.* at 21-22. The court easily followed what it has called its "wall of circuit authority" that virtually has always concluded that such cases should not proceed without Tribes who are found to be necessary and indispensable, and cannot be joined. *Id.* at 22. It therefore made quick work of DRA's argument that PGE could adequately represent the Tribes were the suit to proceed in CTWS's absence given its determination that the stakes of the case for the Tribes extend well beyond the fate of the Project "and implicate sovereign interests in self-governance and the preservation of treaty-based fishing rights throughout the Deschutes River Basin." *Id.*

The court therefore declined to reach the merits of DRA's claims, reversed the District Court's grant of summary judgment on the merits, and remanded the case to the District Court with instructions to vacate the judgment and to dismiss the suit for its failure to join the Tribes.

Conclusion and Implications

The most direct implication of the Ninth Circuit's opinion is that private citizens or non-governmental organizations will not be able to bring civil actions to challenge compliance with the Project's Section 401 Water Certification. Beyond that, the reach of the opinion to other projects may not be all that extensive given that the Project is touted as the only hydroelectric project jointly owned by a Native American Tribe and utility in the country. At the same time, as recently as 2015, the Confederated Salish and Kootenai Tribes acquired the former Kerr Dam (now known as the Salish Kootenai Dam), on the Flathead River in Montana, and thereby became the first Tribes to own a major U.S. hydroelectric facility, which may portend greater ripple effects if that type of acquisition were to become a trend.

The Ninth Circuit's opinion is available at the following link on its website: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/23/18-35867.pdf. (Steve Odell)

NINTH CIRCUIT FINDS RULE REQUIRING 30-DAY NOTICE OF INTENT TO STATES FOR LISTING PETITIONS UNDER THE ENDANGERED SPECIES ACT WAS INVALID

Friends of Animals v. Haaland, 997 F.3d 1010 (9th Cir. 2021).

Friends of Animals brought an action challenging the U.S. Fish and Wildlife Service's (FWS or the Service) summary denial of its petition to list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the federal Endangered Species Act (ESA). The U.S. District Court granted summary judgment for the FWS. The Ninth Circuit reversed, finding the rule requiring that private parties seeking to list species provide affected states 30-day notice of their intent to file a petition was invalid, and thus the FWS' summary denial of the organization's petition was arbitrary and capricious.

Factual and Procedural Background

There are two ways to list species as threatened or endangered under the federal ESA: 1) the Secretary of the United States Department of the Interior and delegated agencies, the FWS and the National Marine Fisheries Service (collectively: the Services), may identify species for protection; 2) or interested persons may petition the Secretary of the Department of the Interior and the FWS to list a species as threatened or endangered. In September 2016, the Services promulgated a rule requiring any petitioner to "provide notice to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs" at least 30 days prior to submitting a petition.

The Services stated that the new rule would give affected states the opportunity to submit data and information in the 30-day period before a petition is filed, which the Services could then rely on during their 90-day review of the petition. Although the Services acknowledged that the use of state-supplied information in its 90-day review was a change from prior practice, it found that the change would expand

the ability of the states and any interested parties to take the initiative of submitting input and information to the Services to consider, thereby making the petition process both more efficient and thorough.

In 2017, Friends of Animals filed a petition requesting that the FWS list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the ESA. The FWS in turn notified Friends that the submission did not qualify as a petition because it did not include copies of required notification letters or electronic communications to state agencies in affected states. The FWS did not identify any other deficiencies with the petition.

Friends filed an action in federal court, requesting a declaration that the FWS violated the ESA and Administrative Procedure Act (APA) by impermissibly requiring that the 30-day notice be made to affected states and refusing to issue a finding on Friends' petition within 90 days. Friends also sought vacatur of the 30-day notice requirement and issuance of a finding on the Pryor Mountain wild horse petition within 60 days. Friends then moved for summary judgment. A magistrate judge found that the notice provision contravened the ESA and recommended granting summary judgment to Friends. The U.S. District Court, however, found that the pre-file notice requirement was a permissible construct of the ESA and therefore granted summary judgment to the FWS.

The Ninth Circuit Opinion

Because the pre-file notice requirements were enacted through formal "notice and comment" rulemaking procedures, the Ninth Circuit reviewed the rulemaking under the two-step *Chevron* framework. Under this framework, a court first determines whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that will end the matter. If the statute is silent or ambiguous, however, the question for a court is whether the agency's answer is based on a permissible construction of the statute. With respect to the first step, the Ninth Circuit first found that Congress had not spoken to the precise issue. Although the ESA includes guidance on when to involve the states, it does not prohibit the Services from providing notice to states and does not directly address procedures prior to filing a petition.

Accordingly, the Ninth Circuit considered whether the Services' construction of the rule was reasonable. The FWS contended that Congress had explicitly left a gap for the agencies to fill with regard to petition procedure, that the pre-file rule was based on a permissible construction of the statute, and that the rule imposed only a small burden on petitioners. The Ninth Circuit noted, however, that courts have "repeatedly admonished" the Services for soliciting information from states and other third parties during the 90-day finding period, noting that the ESA requires that the 90-day finding determine whether the petition itself presents sufficient information to warrant a 12-month review, and that the Services' solicitation or consideration of outside information not otherwise readily available is contrary to the ESA.

The FWS tried to distinguish the pre-file notice rule, claiming the rule did not mandate that states submit any information or that the Services consider any information submitted by a state, and thus did not rise to the level of soliciting new information from states. The Ninth Circuit found this a distinction without practical effect, concluding that the rule provided an avenue for the Services to consider factors it was not intended to consider during the 90-day finding and thus ran afoul of the ESA's plain directive that the Services' initial assessment be based on the contents of the petition. It also found that the pre-file notice rule created a procedural hurdle for petitioners that did not comport with the ESA. That is, the Services' authority to establish rules governing petitions does not extend to restrictions that frustrate the ESA by arbitrarily impeding petitioner's ability to submit—or the Services' obligation to review—meritorious petitions.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding review of agency decisions under the two-step *Chevron* framework as well as a general discussion of the petition process under the Endangered Species Act. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/17/20-35318.pdf.
(James Purvis)

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

CHANGE SERVICE REQUESTED

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