Volume 25, Number 9
July 2021

WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

WESTERN WATER NEWS

LEGISLATIVE DEVELOPMENTS

REGULATORY DEVELOPMENTS

PENALTIES AND SANCTIONS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

LAWSUITS FILED OR PENDING

JUDICIAL DEVELOPMENTS

Federal:

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) $875.00. 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, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

WWL

WESTERN 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)

CALIFORNIA TO STOP ISSUING FRACKING PERMITS BY 2024 AND PHASE OUT OIL EXTRACTION BY 2045

California Governor Gavin Newsom has directed the responsible state agencies to stop issuing new hydraulic fracturing (fracking) permits by January 2024 and phase out all oil extraction in the state by 2045. The announcement comes just months after Newsom unveiled an ambitious executive order that would put the state on the path to carbon neutrality by mid-century.

Fracking Permit Ban

On April 23, Newsom directed the California Department of Conservation's Geologic Energy Management Division (CalGEM) to stop issuing new permits for hydraulic fracturing by January 2024. As a result, CalGEM is expected to issue new regulations to wind down permits in the coming months.

"As we move to swiftly decarbonize our transportation sector and create a healthier future for our children, I've made it clear I don't see a role for fracking in that future and, similarly, believe that California needs to move beyond oil," Newsom said in an April 23 press release.

The fracking permit ban is being celebrated as a major victory for environmental groups in the state. While fracking accounts for just two percent of California's oil production according to the California Department of Conservation, banning the practice has been a flashpoint among environmental groups who raised concerns over chemical spills, groundwater contamination and water waste near fracking sites.

In recent years, legislative and administrative efforts to restrict fracking have resulted in a decline in fracking activity, but this is the first time that the

state has issued a permanent ban on the practice. According to the Governor's office, fracking in the state is at its lowest level since stringent regulations were put in place by the legislature back in 2014. The Newsom administration had also imposed a temporary moratorium on fracking permits in 2019, but lifted the moratorium in 2020 following independent scientific review.

Despite mounting pressure from environmental groups to stop fracking operations, Newsom had initially balked at an outright ban and instead sought an incremental approach meant to address economic effects on the geographic regions most dependent on the petroleum industry. Newsom had also previously claimed that he lacked the executive authority to ban fracking and called on the legislature last year to instead pass a ban of its own.

An anti-fracking bill introduced by State Senators Scott Wiener (D-San Francisco) and Monique Limon (D-Santa Barbara) earlier this year was, however, met with fierce opposition from the oil industry and a number of petroleum industry trade unions. As proposed, the legislation would not only ban fracking but also impose stringent restrictions on oil extraction in the state, including a ban on wells within 2,500 feet of homes, schools and other populated areas beginning as early as January 2022. Similar bills had previously failed in the legislature in 2014 and again in 2020. With the April 23 announcement, Newsom is apparently reversing his stance in deciding to use his regulatory authority to phase out fracking activity in the state.

Oil Extraction Ban

Newsom has also ordered the California Air Resources Board (CARB) to begin planning for a complete phase out of oil extraction in the state by no later than 2045. The phase-out will now officially be included in the state's Climate Change Scoping Plan, which was set up to promote cross-sector and cross-agency collaboration focusing on benefits in disadvantaged communities, opportunities for job creation and economic growth on the path to carbon neutrality. The governor's latest announcement comes on the heels of his September 2020 executive order, which called, among other things, for the phase-out of new fossil fuel-powered passenger vehicles by 2035.

"This would be the first jurisdiction in the world to end oil extraction," California Secretary of Environmental Protection Jared Blumenthal told *The Los Angeles Times* following the governor's announcement:

> It's a big deal. I think it really helps frame all the other activities that we're doing something really important and it's a clear signal that we need to build a just transition for that industry.

The latest announcement drew criticism from the oil industry and a number of trade unions, including pipe fitters and electrical workers, who argue that the measure will cost thousands of union jobs and hollow out economies in the state's major oil-producing regions, including the economically depressed Central Valley. Meanwhile, environmental groups in large part lauded the announcement as the next step in the state's efforts to cut greenhouse gas emissions and target climate change, with some groups calling for an accelerated timeline on the fracking and oil extraction ban.

Conclusion and Implications

Newsom's directives may constitute a major inflection point in Sacramento's willingness to tackle the oil and gas industry as well as union interests that had previously opposed an outright ban on fracking. Nevertheless, both the fracking ban and the oil extraction phase-out are expected to spawn litigation and continue to be a major point of contention in the state for years to come. A link to Governor's Announcement is available online at: https://www.gov.ca.gov/2021/04/23/governor-newsom-takes-action-to-phase-out-oil-extraction-in-california/.
(Travis Kayla)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE PASSES BILL TO HELP REPAIR THE STATE'S WATER INFRASTRUCTURE

Droughts in California have led the State Legislature to invest in improving water facilities. Senate Bill 559, The State Water Resiliency Act of 2021, authorizes state funding to help restore the Friant-Kern Canal, Delta-Mendota Canal, San Luis Field Division of the California Aqueduct, and the San Joaquin Division of the California Aqueduct. On May 28, the California Senate passed the bill and it awaits Governor Newsom's approval.

Background

The U.S. Bureau of Reclamation constructed and operates the federal Central Valley Project (CVP), which distributes almost seven million acre-feet of water yearly to agricultural and other contractors in the Central Valley and other areas. The CVP begins at the Cascade Range in Northern California and runs over 400 miles south to the Kern River in Southern California. The CVP provides on average 5 million acre-feet of water each year to farms and cropland, 600,000 acre-feet to urban and industrial users, 410,000 acre-feet to wildlife refuges, and 800,000 acre-feet for environmental purposes. In addition to conduits, tunnels, and other storage and distribution facilities, the CVP includes 20 dams and reservoirs, 11 power plants, and 500 miles of canals.

The CVP is operated in close coordination with the State Water Project (SWP), which is managed by the California Department of Water Resources (DWR). The Projects deliver water to over 25 million California citizens as well as millions of acres of farmland across the state. The SWP is the largest state-built water storage and delivery project in the United States.

The U.S. Bureau of Reclamation manages the Friant-Kern Canal, which transports water to augment irrigation capacity in Fresno, Tulare, and Kern counties. The Friant-Kern Canal is 152 miles long, delivering water to more than 1 million acres and 18,000 individual family farms. As a result of subsidence, the Friant-Kern Canal has suffered, in some places, a 60 percent loss of its carrying capacity, limiting the amount of water delivered. The federal government approved approximately $5 million in November 2020 to study and begin pre-construction work on rehabilitating the Friant-Kern Canal.

The Delta-Mendota Canal is a 117-mile-long canal in central California that distributes fresh water to consumers downstream of the San Joaquin River. The Delta-Mendota canal, like the Friant-Kern Canal, is affected by subsidence induced by groundwater production.

The San Luis Reservoir is jointly owned and maintained by the Bureau of Reclamation and the California Department of Water Resources, stores water from the San Joaquin-Sacramento River Delta. This reservoir faces issues with low water levels causing algae growth that makes the water unfit for municipal and industrial use.

Senate Bill 559

Senate Bill 559, the State Water Resiliency Act of 2021 would provide up to $785 million to restore some of California's crucial water delivery infrastructure and repair declining roads and bridges. Senator Melissa Hurtado first introduced the bill two years ago. The bill was initially vetoed by Governor Gavin Newsom last September. The second version of the bill includes four major canals instead of just the Friant-Kern Canal. Senate Bill 559 was developed with the assistance of Hurtado's Valley colleague, current Senate Agriculture Committee chairman Senator Andreas Borgeas (R–Fresno). On May 28, 2021, Senate Bill 559 passed with overwhelmingly support from California State Senators 34-1.

Senate Bill 559 will create a ten-year Canal Conveyance Capacity Restoration Fund to Repair State Water Project and Central Valley Project Infrastructure. The bill establishes the Fund in the State Treasury to be administered by the Department of Water Resources. The funds deposited into the account will support subsidence repair costs. These repair costs include environmental planning, design, permitting, and necessary road and bridge upgrades.

Senate Bill 559 would help create a government approach to droughts with short and long-term solutions. The bill includes improving the Valley's two largest canal systems from subsidence-driven damage. Senate Bill 559 authorizes the Department of Water Resources to expend from the fund: 1) $308 million for a grant to the Friant Water Authority to restore capacity of the Friant-Kern Canal, 2) $187 million for a grant to the San Luis and Delta-Mendota Water Authority to restore capacity of the Delta-Mendota Canal, 3) $194 million ($19 million to restore capacity in the San Luis Field Division of the California Aqueduct, and 4) $96 million to restore capacity of the San Joaquin Division of the California Aqueduct. These canals have degraded and are losing water conveyance capacity due to subsidence. Money expended for each of these individual projects cannot exceed one-third of the total costs of each project. Further, the total amounts of these four projects cannot exceed $785 million.

Currently, the Friant-Kern Canal, Delta-Mendota Canal, San Luis Field Division of the California Aqueduct, and the San Joaquin Division of the California Aqueduct have significant impairment to their capacity. The chronic over drafting of groundwater has damaged the canals' conveyance capacity. bill intends to restore the lost capacity along the entire canal. Beyond financial assistance anticipated to be provided by the federal government, water users are expected to cover the remaining costs.

Conclusion and Implications

Senate Bill 559 will help repair vital water delivery systems that provide water for millions in California and help sustain the agricultural economy. The second version of Senate Bill 559 responds to Governor Newsom's veto last year and now addresses four major water conveyance facilities. Senate Bill 559—The State Water Resiliency Act of 2021, is available online at:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB559.
(Miles Krieger, Steve Anderson)

WASHINGTON STATE'S 2021 LEGISLATIVE SESSION—LEGISLATING THROUGH BUDGET PROVISO

After almost no water legislation to speak of this session, the real action took place behind the scenes and outside of the committee process in the final Budget negotiations.

Water Bills

As reported in the March 2021 edition of the *Western Water Law & Policy Reporter*, the water bills we did see this year were hyper local. Two place-based pieces of legislation passed—HB 1143 Authorizing the placement of water rights banked through the Walla Walla Pilot Local Water Management Program to be accepted into the Trust Water Rights Program pending further review; and SB 5230 allowing for the allocation of groundwater resulting from the Columbia Basin Project, which affects groundwater only in the south-central portion of the state. Given the constraints of operating a virtual legislative session during a global pandemic, it did not seem unreasonable that more ambitious water legislation should wait while the Legislature grappled with environmental justice and climate change.

Department of Ecology and Budget Provisos

Apparently, pent-up demand for action on water in the state could not be ignored. In addition to the usual appropriations for agency operations, the Department of Ecology saw two significant water activities funded through Budget Provisos outside of any substantive bill processes: funding to initiate two new basin adjudications and funding to establish public water banks in rural headwater counties.

Water Rights Adjudications

The Department of Ecology received $1 million to prepare for and file new water rights adjudications in two subbasins of the state, the Nooksack Basin in the northwestern corner of the state, and Lake Roosevelt in the northcentral part of the state. New adjudications are not without controversy, and neither of these proposals are being welcomed by the water user communities. In an attempt to address the controversy in Whatcom County, where the Nooksack Basin is located, the legislature appropriated $250,000 for the

County to pursue a collaborative process among local water users and water right holders to "complement" the adjudication process. The bones of the Adjudication Proviso was proposed with the Governor's request budget. The final budget as adopted wasn't too far from the original proposal.

Water Banking

Unlike the Adjudication Proviso, the Water Banking Provisos came wholly from behind the scenes. Water Banking has increasingly become the tool of choice in Washington to address the needs for new residential, commercial and agricultural development, often downstream, in ways that are also protective of instream flows and other water users. This too is not without controversy. The 2020 Legislature saw multiple proposals to provide greater oversight and consistency in Ecology's regulation of Water Banks. Following the 2020 Legislative Session, Ecology convened an "Advisory Group on Water Trust, Banking, and Transfers." (*See*, April 2020 edition of *Western Water Law & Policy Reporter*.) After a summer of meetings and work sessions, Ecology's prepared and submitted its findings and recommendations to the 2021 Legislature. Ecology findings included the following: Out of basin water right transfers generally—Downstream, out-of-basin transfers of water rights can be a valuable tool for providing water for new uses while also boosting instream flows, providing flexibility for water management. That the needs of each basin are unique. That there are downsides to transferring water out of the basin of origin, but that those downsides should be balanced against the burden on farmers seeking to capitalize on a major asset. And that additional investment in local banking programs is needed to support headwater basins to compete in an open marketplace.

Water Right Sales and the Trust Water Rights Program

Tweaks in the public notice and other regulatory processes could be helpful; limiting who can buy water rights would not be.

Current statutory guidance used in Washington for setting up water banks and Ecology's role in the process is flexible, which is both good and too good.

Water Banking generally plays a critical role in reallocating water to beneficial uses, including streamflows, but the in all there is plenty of room for improvement.

Ecology's recommendations identified areas where statutory changes were necessary, but Ecology and the Governor's office ultimately decided not to propose legislation for the 2021 legislative session. For a review of the full recommendations, *see:* https://apps.ecology.wa.gov/publications/documents/2011091.pdf.

Needs, Actions and the Operating Budget

The Legislature did what legislatures do when they see a problem they think needs to be addressed, whether or not the Governor's office and the responsible agency asks, or concurs, and directed money in both the Operating Budget and the Capital Budget toward solving the problem.

The Operating Budget for FY 2022-23 includes roughly $10.165m for water banking and related purposes, including:

> $40,000 for Ecology to continue the efforts started with the Advisory Committee process and to develop report back to the legislature;
>
> $1 million for Ecology to establish and administers a pilot grant program for implementing water banking strategies to meet local water needs, including reviewing water banking grant applications and developing water banking agreements;
>
> $9 million provided "solely for [Ecology] to administer the pilot grant program." To be eligible for these funds, the grants must be awarded to qualified applicants (public entities or public / private partnerships). Awards for not more than $2m per applicant to be used for: development of water banks in rural counties that have the headwaters of a major watershed, limited to water banking strategies in the county of origin; and the acquisition of water rights appropriate for use in a water bank including all costs necessary to evaluate the water right for eligibility. The needs to be met by the water banks include, but are not limited, to agricultural use and instream flows for fish and wildlife and must preserve water rights for use in the county of origin. One-third of any water rights acquired for banking purposes under this provision must

have its purpose of use changed permanently to instream flow benefiting fish and wildlife; and

$125,000 for the Conservation Commission to enter into an agreement with Ecology for a water bank in Okanogan County, focused solely on retaining agricultural water rights for use by agricultural producers in the watershed of origin.

In addition, the Capital Budget for FY 2022-23 includes an additional $5 m in funding, $2m of which is provided solely for qualified applicants located within the Methow River Basin (Okanogan County).

Conclusion and Implications

The appropriation through the Operating Budget is especially interesting. Whereas the Capital Budget funds can be held over in future budget cycles, the Operating Budget appropriations reset each Biennium. Ecology expects to have guidance out for applicants requesting these funds in short order. There are public water banks operating is some counties which qualify for this funding, but by no means all areas, and not in all the areas most affected by downstream water transfers. In the meantime, those areas with qualifying water banks, or who want water banks, have an equally short time frame in which to find qualifying projects to bring to the table.
(Jamie Morin)

REGULATORY DEVELOPMENTS

CALIFORNIA STATE WATER BOARD SEEKS CURTAILMENT OF WATER RIGHTS AS RUSSIAN RIVER WATERSHED DROUGHT CONDITIONS WORSEN

The Russian River watershed has been hit particularly hard by the current drought. On April 21, 2021 the Russian River watershed—including Sonoma and Mendocino counties—was the first to be placed under a regional drought state of emergency by California Governor Gavin Newsom. In the following months, however, the drought has only worsened, causing 41 of California's 58 counties to be placed under such a drought emergency and threatening Lake Mendocino to run completely dry. From all this, the California State Water Resources Control Board (SWRCB or State Water Board) has taken several drastic actions recently and curtailments can be expected in the immediate future.

Notices of Water Unavailability Issued

As of May 25, 2021, the SWRCB issued notices of water unavailability to water rights holders in the Russian River watershed upstream of the Dry Creek confluence (Upper Russian River basin). These notices were sent out to 930 junior water rights holders in the Upper Russian River basin, notifying them that there is not enough water in the system and that diversions must be reduced immediately to protect the community's water supply for the future.

Rainfall in 2021 has been lacking in the Russian River watershed compared to previous years, with rainfall in the Santa Rosa and Ukiah areas sitting at less than 40 percent of long-term averages. As for storage, as of April 30, Lake Mendocino was at 43 percent of water supply capacity and Lake Sonoma was at 62 percent, both figures being historical lows for that date.

The notice issued on May 25 was distributed to all post-1914 appropriative water rights holders in the Upper Russian River basin, stating that effective immediately there was insufficient water supply for water rights holders with priority dates after January 28, 1949, and that by June 1 the same would be true for all post-1914 appropriative rights. Water rights holders who continue diversions following this notice can be subject to enforcement actions, including fines of up to $1,000 per day.

Adoption of Emergency Regulation Authorizing Issuance of Curtailment Notices

Since the mailing of the May 25th Notices of Water Unavailability, the SWRCB further sent letters to pre-1914 appropriative water rights holders and riparian rights holders in the Upper Russian River basin to warn them of the exceedingly dry conditions, encourage water conservation, and inform them that the State Water Board is developing emergency regulations that may affect their water rights.

At the State Water Board's June 15, 2021 meeting, such an emergency regulation was adopted authorizing the Division of Water Rights to issue curtailment notices to water rights holders throughout the entirety of the Russian River watershed in order to safeguard the community's drinking water availability later this year and next. Under the emergency regulation, curtailment notices would be issued once water levels fall below specified storage targets for Lake Mendocino or when demands in the Lower Russian River basin cannot be met.

The emergency regulation is currently under review by the Office of Administrative Law, and is now slated to undergo a public comment period, review, and finally approval. If approved, the regulation could affect nearly 2,400 water rights holders in the Russian River watershed, ordering them to stop diversions as soon as early July, when water availability is expected to worsen, and will remain in effect for up to one year, unless extended by the State Water Board due to ongoing drought conditions.

Conclusion and Implications

As of May 28, 2021, conditions at Lake Mendocino and Lake Sonoma has continued to decline, with Lake Mendocino sitting at merely 40-percent of its water supply capacity and Lake Sonoma dropping to 58-percent, continuing the trend of historically low storage figures for this time of year. Current fears for the two lakes should diversions continue without additional rainfall or a cutback on diversions include

a complete draining of Lake Mendocino. These fears are not without merit either, as projections are now indicating that Lake Mendocino could run dry by the end of the 2021 if current conditions persist.
With drought conditions continuing their downward trend, curtailments appear to be imminent for water rights holders in the Russian River watershed. In addition to this, local entities including cities and the Sonoma County board of supervisors have asked their constituents to voluntarily reduce water use by 20-percent. If voluntary efforts don't cut it, mandatory conservation measures may be considered as well. (Wesley A. Miliband, Kristopher T. Strouse)

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT PREVIEWS DRAFT LEGISLATION FOR STATE-RUN DREDGE AND FILL PERMIT PROGRAM

The Colorado Department of Public Health and Environment (CDPHE) recently circulated draft legislation to establish a dredge and fill permitting program in Colorado. The proposed program would fill what the state views as a permitting gap by regulating discharges into state waters that are no longer considered federal jurisdictional Waters of the United States (WOTUS) under current federal law. CDPHE proposed similar legislation last year, but did not introduce it due to a then-existing injunction preventing the Trump-era Navigable Waters Protection Rule from taking effect in Colorado. A recent Tenth Circuit Court of Appeals decision overturned the injunction, causing CDPHE to renew its effort to establish a state-run dredge and fill permit program.

Background

The draft legislation cannot be understood without a brief background on the federal Clean Water Act (CWA) and WOTUS. The Clean Water Act prohibits discharging pollutants into "navigable waters" without a permit. 33 U.S.C. §§ 1311, 1362(12). The CWA defines "navigable waters" to mean "waters of the United States." *Id.* § 1362(7). The precise meaning of the term WOTUS has given rise to an ever-growing body of U.S. Supreme Court opinions, U.S. Environmental Protection Agency (EPA) rules, and regulatory guidance.

In 2006, the Supreme Court's plurality opinion in *Rapanos v. United States* stated that WOTUS means "relatively permanent, standing or continuously flowing bodies of water" and not occasional, intermittent, or ephemeral flows. *Rapanos v. United States*, 547 U.S. 715 (2006). In the same case, Justice Kennedy's concurring opinion said that wetlands, the main issue in *Rapanos*, only need a "significant nexus" to a navigable water to be considered a WOTUS. The *Rapanos* Court never reached a majority opinion on how to define WOTUS. In 2015, the Obama administration attempted to define WOTUS by largely adopting Justice Kennedy's significant nexus test with additional detail. The 2015 Rule's definition included all waterways with physical features of flowing water (such as a bed, banks, and high-water mark) and all wetlands within 100 feet, or within the 100-year floodplain, of a navigable waterway.

The 2015 Rule faced significant criticism as regulatory overreach, particularly from agricultural and industry groups. In 2020, and with the change in administration, the EPA repealed and replaced the 2015 Rule with the Navigable Waters Protection Rule (NWPR). The NWPR narrowed the definition of WOTUS compared to the 2015 Rule, removing significant portions of formerly protected waters

The NWPR was set to go into effect nationwide on June 22, 2020. However, three days before the NWPR took effect, Colorado obtained a preliminary injunction against the EPA and U.S. Army Corps of Engineers (Corps), halting implementation of the rule within Colorado. On April 23, 2021, the Tenth Circuit reversed the injunction allowing the NWPR to take effect after finding that Colorado failed to show imminent, irreparable injury as a result of the NWPR. *State v. U.S. Environmental Protection Agency*, 989 F.3d 874 (10th Cir. 2021). The case was remanded to the U.S. District court for further proceedings on the merits.

With the District Court case still pending, CDPHE conducted stakeholder workgroups throughout 2020 to identify anticipated impacts to "gap waters" that

were previously protected under the 2015 Rule but not under the NWPR. Shortly before the repeal of the preliminary injunction, CDPHE circulated a proposed bill to create a new state dredge and fill permit program to address the recent changes in federal law.

Colorado Department of Public Health and Environment's Draft Bill

CDPHE estimates that 25 to 50 percent of Colorado waterways could fall into a category it calls gap waters that no longer require federal permitting under the NWPR. To address this, the proposed bill would create a dredge and fill permitting program:

> . . .to protect wetlands and streams and to ensure continued permitting of crucial projects for flood control, stream restoration, water distribution, underground utilities, road and bridge work, and residential and commercial development.

The permitting program would only cover gap waters without expanding into waters not previously protected before the NWPR took effect.

The bill would direct the WQCC to promulgate rules establishing details of the permit program. The program would look to existing federal general and nationwide permits and would incorporate elements of those permitting processes.

If a permit applicant already has an unexpired jurisdictional determination, that determination will be used to determine the scope of the new state permit if the determination was made prior to the NWPR. If a determination is required from CDPHE, there would be a $5,000, one-time fee. The issued permits would be separated into two categories. Small scale projects—estimated at 98 percent of all permits—would have a $750 annual fee. The remaining two percent of large projects would have a $10,000 annual fee to account for the more significant technical and administrative work for those projects. According to CDPHE, the proposed bill includes almost $800,000 from funds in the construction sector cash reserve to start the program. Beginning July 1, 2022, additional fees would cover ongoing permitting costs, estimated at $451,000 annually.

The permitting program will be entirely separate from the federal permitting process, meaning applicants with a federal permit will not be required to get a Colorado permit or incur additional fees. Like the federal permitting program, the Colorado permits are expected to include similar exemptions for ranching and farming, maintenance of existing water infrastructure and drainage ditches, construction or maintenance of farm and stock ponds, irrigation ditches, and certain temporary road construction.

According to CDPHE, the bill is not just an environmental protection effort, but is also an economic booster. Colorado law prohibits discharging pollutants into all state waters without a permit. Currently, the State relies on the federal government to issue dredge and fill permits for projects within Colorado. Even though the NWPR has narrowed the scope of federal jurisdiction, the State's discharge law remains more restrictive than the NWPR. Certain gap water projects may now lack a permitting mechanism or are now at risk if constructed without a permit. CDPHE also touts that, in addition to future projects, the bill would allow an estimated 200-500 critical construction activities to continue within the state.

Conclusion and Implications

The response to the CDPHE proposed legislation has so far been mixed, and the bill has yet to be formally introduced. With the NWPR now the law of the land in Colorado, there is an incentive, at least from some groups, for Colorado to establish its own state-level dredge and fill permitting program for gap waters. Additionally, the EPA under the Biden administration recently announced its intent to replace the NWPR. However, the new federal rule is likely years away and sure to invite more litigation. As a result, regulatory uncertainty surrounding WOTUS will likely persist for the foreseeable future. The political nature of WOTUS at the federal level may yet be another incentive for Colorado to implement its own program, which could (in theory) offer predictability to the regulated community. If the Colorado program is implemented and is successful, it could create a roadmap for other western states to follow suit.
(John Sittler, Jason Groves)

NEW MEXICO GAME COMMISSION HOLDS SPECIAL MEETING PURSUANT TO FEDERAL COURT ORDER TO ISSUE FINAL AGENCY DECISION ON APPLICATIONS FOR NON-NAVIGABLE WATERWAY CERTIFICATIONS

On June 18, 2021, the New Mexico Game Commission held hearings on five pending applications from private landowners whose property abuts waterways seeking state certifications and signage that the waterway is non-navigable and closed to the public. The special meeting before the Game Commission was scheduled in response to a federal court Memorandum Opinion and Order Granting Motion for Partial Summary Judgment. [*Rancho del Oso Pardo, Inc. v. New Mexico Game Commission*, Case No. 1:20-cv-00427-SCY-KK (as consolidated with Case No. 1:20-cv-00468 SCY/KK (D. N.M. Mar. 9, 2021).]

Background

The New Mexico Game Commission promulgated rule 19.31.22 NMAC, which provides a definition of "navigable in fact" to ascertain whether a waterway is navigable in New Mexico for the purpose of the Department of Game and Fish providing a private landowner a certification of non-navigable water. Such certification recognizes that within the landowner's private property is a segment of riverbed or streambed deemed non-navigable and closed to access without written permission of the landowner. Pursuant to the rule, "navigable in fact" is defined as follows:

That a watercourse is navigable in fact when it is was used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel. A navigable-in-fact determination shall be made on a segment-to-segment basis. 19.31.22.7(F) NMAC.

In some cases before the New Mexico Game Commission, opponents of access restrictions move to intervene to have the Commission hold a public evidentiary hearing in support of denial of the application. The June 18, 2021 Commission hearing was initiated in this manner.

The New Mexico Constitution states that:

> . . .unappropriated water of every natural stream, perennial or torrential . . . belong to the public. N.M. Const. art. XVI, Section 2. In 1907, New Mexico's Territorial Legislature declared that '[a]ll natural waters in streams and water courses . . . belong to the public.' NMSA 1978, § 72-1-1 (1907).

In tandem with the public ownership of all waters in New Mexico is the current central debate over the manner in which the public can access those waters. For decades, a New Mexico Department of Game and Fish regulation allowed persons to fish on stream banks or in rivers where bounded on both sides by private land provided they had written permission of the landowner. Generations of New Mexicans grew up freely accessing riverbanks for fishing and recreation. In 2014, New Mexico's then Attorney General issued a non-binding legal opinion that "walking, wading or standing in a stream bed is not trespassing." N.M. Att'y Gen. Op. 14-04 (2014). The Attorney General opinion spurred many landowners and organizations such as the New Mexico Council of Outfitters and Guides to support legislation that would codify the Game and Fish regulation into law. In 2017, the Department of Game and Fish established a procedure under which landowners could apply to have segments of waterways abutting their land certified as "non-navigable," and thereby, closed to access without written permission from the landowner. The procedure was later adopted as a Game and Fish regulation, effective January 22, 2018. 19.31.22.7(G) NMAC; 19.31.22.8(B)(4) NMAC. The ensuing conflict between New Mexico's Constitution and the Department of Game and Fish regulation prompted multi-party litigation in both the state and federal courts.

The Proposed Final Agency Decision

Environmental advocates contend the Game and Fish regulation aimed at stopping trespassing on private land by making sections of water off limits to the public is unconstitutional. They argue that in New Mexico the use of water is considered public under long-standing historic practices and legal precedent. In 1945, the New Mexico Supreme Court ruled the

public may fish, swim and use waterways even if they run on private property as long as people do not trespass on private land upon leaving the waterways. *See: State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, ¶ 48 ("'The small streams of the state are fishing streams to which the public have a right to resort as long as they do not trespass on the private property along the banks.'" (quoting with approval *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 228 N.W. 144, 147 (1929)). This decision has become known and relied upon as the *Red River Valley* rule.

Proponents of the regulation argue, *inter alia*, that having segments of New Mexico's waterways off-limits to the public prevents habitat damage. Many large ranch owners contend they have invested heavily in conservation efforts and habitat restoration initiatives in response to increased foot traffic to stream banks. They also argue that their private property rights trump public access over their lands.

Conclusion and Implications

Across the American West, the question of public stream access is clearly not yet decided; stream access in the West varies among the states. For example, Montana residents are allowed full stream access. Wyoming water users can float down rivers, but are prohibited from anchoring into the ground beneath the water.

The New Mexico Game and Fish Commission is expected to issue its decision shortly. The debate between private property owners and people hunting, fishing or recreating on public waters has been going on for decades. The issues reflect the complex intersection of water rights, fishing rights, water way access, ecosystem stewardship and public versus private land use.

(Christina J. Bruff)

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)

LAWSUITS FILED OR PENDING

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].

Where:
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 percent 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)

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 (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)

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 listing 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 FWS, 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 cita-

tions 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 Ninth Circuit 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 Ninth Circuit 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 proceed 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 Ninth Circuit 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)

Western 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