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WWL

FEATURE ARTICLE

THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD APPROVES EMERGENCY REGULATIONS FOR WATER RIGHT CURTAILMENT ORDERS IN SCOTT AND SHASTA RIVERS

By Austin C. Cho

On August 17, 2021, the State Water Resources Control Board (State Water Board) approved Emergency Regulations for the Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath Watershed (Emergency Regulations), authorizing curtailments of water rights on the Scott and Shasta rivers in Siskiyou County, to meet minimum instream flows for fish while allowing for necessary livestock watering and minimum human health and safety needs. The Emergency Regulations are part of the state's ongoing efforts to address one of California's worst drought on record. Along with establishing minimum stream flow requirements for fish and setting forth State Water Board enforcement authority, the Emergency Regulations also provide opportunities for local cooperative solutions and voluntary efforts that may reduce the need for direct curtailment orders.

Background

The Scott and Shasta rivers are tributary to the Klamath River, the second largest river in the state, and supply water necessary for agriculture, domestic uses, tribes, and recreational activities. The tributaries also provide spawning habitats and nurseries for the threatened coho salmon, culturally significant chinook salmon, and steelhead trout. Klamath Basin tribes have historically relied on the chinook and coho salmon for sustenance and spiritual wellbeing. However, dry conditions and low natural flows in the Klamath watershed for the past two years, further exacerbated by water demands in the system, have impaired the ability of newly hatched fish fry to emerge from their gravel beds and reach their summer rearing habitats. Worsening drought conditions across California have prompted the State Water Board to evaluate what measures can be taken to protect the state's water supplies and the species and communities that depend on them.

Under existing law, the State Water Board is authorized to take enforcement actions to prevent unauthorized diversions of water or other violations of water right permits or licenses on an individual basis. Diversion of water in excess of a water right is considered a trespass against the State, with potential fines of up to $1,000 per day of violation and $2,500 per acre-foot of water diverted in excess of the diverter's rights. (Wat. Code, § 1052.) With a large-scale drought emergency and supplies dwindling, the State Water Board has utilized its emergency powers to limit diversions regionally. (*See*, Wat. Code, § 1058.5 [granting the State Water Board authority to adopt emergency regulations to prevent the unreasonable use of water, to require curtailment of diversions when water is unavailable, and to require related monitoring and reporting].)

In May of this year, Governor Gavin Newsom issued a drought emergency proclamation for most of California, including Siskiyou County. The proclamation directed the State Water Board and the California Department of Fish and Wildlife (CDFW) to analyze what level of minimum flows are needed by salmon, steelhead trout, and other native fish, and determine what protective steps could be taken to protect those species and their habitats through emer-

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gency regulations or other voluntary measures. Under the Governor's drought proclamation, the State Water Board considered and adopted emergency regulations for the Russian River watershed on June 15, 2021, and for the Sacramento-San Joaquin Delta watershed on August 3, 2021. On August 17, 2021, the State Water Board adopted the Emergency Regulations for the Scott and Shasta Rivers to respond to the severe drought conditions that may continue into 2022.

Curtailment Authority Under Emergency Regulations

The Emergency Regulations were adopted for the Klamath River watershed to authorize curtailments in the Scott and Shasta rivers when natural flows are insufficient to support the commercially and culturally significant fall-run chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon. (Emergency Regulations, § 875.) Upon a determination that flows in the Scott or Shasta rivers are likely to fall below minimum stream flows specified in § 875(c), the Deputy Director of the State Water Board is authorized to issue curtailment orders based on diverter priority, in which water users subject to the order must cease diversions immediately. (Emergency Regulations, §§ 875, 875.5.) Similarly, curtailment orders may be issued upon a finding that flows in the Klamath River watershed are insufficient to support all water rights, under the provisions of § 875. (Emergency Regulations, § 875.4(b).) Where flows are found to be sufficient to support some but not all diversions, curtailment orders shall be issued, suspended, reinstated, and rescinded in order of priority as set forth in § 875.5. In deciding to subject some diversions to curtailment, the Deputy Director must consider "the need to provide reasonable assurance that the drought emergency flows will be met." (Emergency Regulations, § 875(b).)

Curtailments are to be issued in the Scott River and Shasta River based on respective grouped priority levels, as established in § 875.5 of the Emergency Regulations, taking into account the classes of diverters and diversion schedules established in various court decrees for surface water and groundwater adjudications, and the relative priorities of other water rights not contemplated in those decrees. (Emergency Regulations, § 875.5(a)-(b).)

Rescission of Curtailment Orders

To the extent that curtailment of fewer than all diversions in the priority groupings listed in § 875.5 would reliably result in sufficient flow to meet the minimum fisheries flows for the drought emergency, the Deputy Director is authorized to issue, suspend, reinstate, or rescind curtailment orders for partial groupings, based on the priorities set forth in the relevant decrees or by appropriative priority date. (*Id.* at subd. (a)(1)(D); § 875.4(c).)

For the purpose of rescinding curtailment orders, the Deputy Director must determine the extent to which water is available under a particular diverter's priority of right, including consideration of monthly demand projections based on annual diversion reports, statements of water use for riparian and pre-1914 water rights, and judicial decrees of water right systems, and decisions and orders issued by the State Water Board. (Emergency Regulations at § 875.4(c)(1).) Precipitation forecast estimates, historical periods of comparable temperatures, precipitation, and surface flows, and available stream gage data are used to calculate water availability projections. (*Id.* at subd. (c)(2).) The Deputy Director may issue informational orders to some or all diverters or water right holders in the Scott River and Shasta River watersheds related to water use to support those determinations, taking into account the need for the information and the burden of producing it. (Emergency Regulations, § 875.8(a).)

Exceptions to Curtailments

Notwithstanding the issuance of curtailment orders, diversion under any valid basis of right may continue without further approval from the Deputy Director if the diversion and use does not act to decrease downstream flows. (Emergency Regulations, § 875.1.) Such non-consumptive use, such as diversion for hydropower generation, dedication to instream use for the benefit of fish and wildlife, or diversions in conjunction with approved releases of stored water, is not affected by the curtailment orders.

Like the other emergency regulations adopted this summer, the Emergency Regulations for the Shasta and Scott rivers provide an exception for diverters to draw water necessary for minimum human health and safety needs, despite the existence of curtailments. Section 875.2 provides certain water uses may qualify

for this exception where there is no feasible alternate supply. Such human health and safety needs include domestic water uses for consumption, cooking and sanitation, energy sources necessary for grid stability, maintenance of air quality, wildfire mitigation such as preventing tree die-off and maintaining ponds or other sources for firefighting, immediate public health or safety threats, and other water uses necessary for human health and safety as determined by a state, local, tribal, or federal health, environment, or safety agency. (Emergency Regulations, § 875.2.) Such human health and safety diversions may be authorized to continue after receipt of a curtailment order.

Livestock Watering

The Emergency Regulations find that inefficient livestock watering—diverting more than ten times the amount of water needed to reasonably support the number of livestock—during the fall migration of fall-run chinook salmon and coho salmon results in "excessive water diversion for a small amount of water delivered for beneficial use," and declares such diversion unreasonable during those conditions. (Emergency Regulations, § 875.7.) However, limited diversions will still be allowed, upon self-certification that the water is necessary to provide adequate water to the diverter's livestock based on established standards, and is conveyed without seepage. (Emergency Regulations, § 875.3.)

Voluntary Actions that May Mitigate the Need for Curtailments

The Emergency Regulations also include provisions for voluntary actions that may mitigate the need for curtailments of water use for certain diverters. Benefits to fisheries such as cold-water safe harbors, localized fish passage, strategic groundwater management, or the protection of redds (the depressions in gravel stream beds fish create to lay eggs) may be proposed to the State Water Board's Deputy Director through a petition for cooperative solution. (Emergency Regulations, § 875(f).)

Petitions, supported by reliable evidence, may propose:

> (a) watershed-wide solutions that provide assurances that minimum flows for fish will be achieved for specified periods;
>
> (b) tributary-wide solutions that a pro-rata flow for a tributary will be satisfied or CDFW finds sufficient in-tributary benefits to anadromous fish;
>
> (c) individual solutions where a water user has agreed to cease diversions in a specified time frame or has entered into a binding agreement with CDFW to provide benefits to anadromous fish equal or greater than the protections provided by their contribution to flow for that time period;
>
> (d) groundwater-basin-wide solutions of continued diversions in conjunction with measures would result in a net reduction (of 15 to 30 percent) of water use during the irrigation season compared to the prior year and other assurances are adopted; or
>
> (e) voluntary reductions to more senior rights in favor of continuing diversion under a more junior right otherwise subject to curtailment. (*Id.* at § 875(f)(4)(A)-(E).)

The Emergency Regulations were partially amended prior to the State Water Board's approval, in response to public requests to add increased flexibility for local solutions and an opportunity for CDFW and the National Marine Fisheries Service to revise the minimum instream flow recommendations if lower flows will be protective of fish.

Submission of a Certification for Water Rights Subject to Curtailment Orders

A water right user subject to a curtailment order is required to submit within seven calendar days of receipt of the order, a certification that water diversion under the curtailed right has ceased, or alternatively, continues to the extent that it is non-consumptive use, instream use, or is necessary for minimum human health and safety needs or necessary for minimum livestock watering as defined and limited in the Emergency Regulations. (Emergency Regulations, § 875.6.) Reporting on diversions during curtailment periods must provide sufficient information to ensure water is being used only to the extent necessary and consistent with the Emergency Regulations' constraints.

Conclusion and Implications

On August 20, 2021, the State Water Resources Control Board submitted its Emergency Regulations for the Klamath River watershed to the California Office of Administrative Law (OAL), commencing a brief comment and review period. Before curtailment orders can be issued in the Scott or Shasta rivers, the State Water Board must obtain approval by OAL and file the Emergency Regulations with the Secretary of State. The Emergency Regulations, as well as information and updates on the State Water Board's Scott River and Shasta River watersheds drought response, are available at: https://www.waterboards.ca.gov/drought/scott_shasta_rivers/.

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WESTERN WATER NEWS

COLORADO UPDATE OF PHYSICAL WATER TRANSFERS: THORNTON PIPELINE PROJECT MOVES FORWARD IN WELD COUNTY, BUT REMAINS STALLED IN LARIMER COUNTY

The City of Thornton's pipeline project recently moved forward when the Thornton city council overrode Weld County to allow consruction of its municipal water pipeline. But the project's construction in other areas is currently on hold as Thornton appeals a Larimer County decision before the Colorado Court of Appeals. The project's construction, and lengthy legal battles, may foreshadow the future of municipal water projects on Colorado's Front Range.

Background

Thornton began this specific project almost 40 years ago when it purchased approximately 100 farms in Larimer and Weld counties. These purchases included rights and shares in the Water Supply and Storage Company. Created in the 1890s, the Water Supply and Storage Company operates numerous ditches, canals, and reservoirs to supply water to users throughout northeast Colorado. Thornton's water rights, once fully utilized, will total approximately 14,000 acre-feet per year, roughly 48 percent of all shares in the Water Supply and Storage Company. Because Thornton's rights were mostly decreed for irrigation use, the city filed several Water court cases in the 1980s seeking changes to the water Cights. The four cases, 86CW401, 86CW402, 86CW403, and 87CW332, were eventually consolidated and tried. After more than a decade of litigation, the Division 1 Water Court entered a final decree in 1998, officially changing the water rights to allow for Thornton's municipal use.

Thornton, a suburb on the northside of Denver, currently has 140,000 residents, although that number is expected to grow to more than 250,000 in the upcoming decades. Therefore, in 2015 Thornton began the process to construct and operate a pipeline from the Cache la Poudre River northwest of Fort Collins down to the city. The water will be diverted into several reservoirs owned by the Water Supply and Storage Company before entering the pipeline and flowing southeast to Thornton. The proposed pipeline will be a 70-mile long, 42-inch diameter buried steel pipe.

The pipeline project is opposed by several environmental groups, including No Pipe Dream and Save the Poudre. These groups want to keep water in the Poudre River. As a potential solution, the groups are asking Thornton to run water through the Poudre to a diversion point lower on the river. Although the water was historically taken higher up, above Fort Collins, the environmental groups see the pipeline project as a way to increase stream flows in the Poudre and thereby provide benefits to Larimer County.

The proposed pipeline will cross Larimer and Weld counties, requiring Thornton to acquire separate county approvals to construct and operate the pipeline. Thornton has two options when planning the location of the pipeline: the city may build underneath county roads, in the public right-of-way, or build adjacent to roads on private property. It's been reported that Thornton generally prefers the latter option, as building in the right-of-way may cause road delays and potential traffic risks. To that end, Thornton began acquiring easements from private landowners, through contract and eminent domain.

In 2019, the Weld County planning commission reviewed Thornton's application and recommended the board of county commissioners (BOCC) approve the application. The following year brought several continuations, further reviews, and a second hearing in July 2020. In the interim, Thornton acquired 98 percent of the required easements in Weld County. At that hearing, the planning commission reversed course and recommended denial of Thornton's application.

In May 2021, the Weld County BOCC unanimously voted to deny Thornton's application to build 34 miles of pipeline in Weld County. Specifically, the BOCC found that the application was inconsistent with Weld County's comprehensive growth plan and didn't show that all reasonable efforts had been made

to avoid an alignment irrigated cropland or minimize negative impacts to the county's agriculture. These last points were important to Weld County, which is Colorado's largest producer of beef and dairy cattle, grain, and sugar beets.

Thornton responded by suing the Weld County BOCC in June 2021, alleging that the county's denial exceeded its jurisdiction and was arbitrary and capricious. however, the lawsuit is a fallback strategy, because the Thornton city council used a Colorado statute to override the Weld County BOCC's denial and allowed a portion of the pipeline construction to proceed.

Meanwhile in Larimer County, the Larimer BOCC denied pipeline approvals through the county 1041 review process, finding that the Thornton pipeline application failed to meet seven of the 12 review criteria. Specifically, the BOCC took issue that Thornton focused on physical and temporary effects of pipeline construction, while failing to consider the broader and longer-term effects of the "buy and dry" water project. Thornton also sued the Larimer BOCC in district court, but the county's denial was upheld on February 16, 2021. The District Court Judge agreed with the Larimer BOCC that Thornton's pipeline failed to meet three review criteria because it is not consistent with the county master plan, did not provide reasonable design and location alternatives, and did not provide adequate mitigation for negative environmental impacts.

The City's Override and Status of Current Litigation

Weld County

On June 29, 2021, the Thornton city council unanimously voted to override the Weld County BOCC denial. Thornton managed to do this under C.R.S. § 30-28-110(1)(c) which allows a constructing government to overrule a regulating government when the constructing government is the one financing and constructing the project. According to reporting in the Denver Post, Thornton Mayor Jan Kulmann indicated that Thornton tried to go through all the proper channels in Weld County:

> . . .[b]ut at the end of the day we have to use every option that we can to make sure that the pipeline is constructed, and the water arrives here in Thornton.

The decision was not well received by many Weld County residents who protested at the meeting. But, because the city council vote was expected, Weld County was able to work out terms and conditions with Thornton before the official override on June 29. Those terms include a requirement that Thornton apply for road construction permits in areas where the pipeline will cross streets, regular communications with Weld County staff throughout the construction process, and stringent dust control measures.

Weld County BOCC Chairperson Steve Moreno agreed that Thornton has the statutory authority to override their decision but said in a written statement during the June 29 meeting that he "trust[s] that Thornton will continue to deal with Weld County's citizens fairly." Thornton's override means that construction can now begin on the sections of pipeline in unincorporated Weld County. There is six miles of pipeline already built, principally in the towns of Windsor and Johnstown, under previous agreements between Thornton and those municipalities.

Larimer County

The constructing government override statute cannot be used in Larimer County because that review occurred under the county's 1041 review process. Briefly, the 1041 process originated when the Colorado General Assembly enacted House Bill 1041 in 1974. The law allows counties to develop "1041" regulations to oversee a variety of developmental activities. Counties have leeway in developing their specific 1041 regulations. To qualify for 1041 review, a county must designate certain projects as "activities of state interest." Such projects then must align with the county's stated development and environmental goals. A constructing government (Thornton) may not override a regulating government's (Larimer County) denial under their 1041 review power.

Instead, the only recourse is appeal to the Larimer County District Court. After the District Court found in favor of the Larimer County BOCC, Thornton appealed the decision to the Colorado Court of Appeals on March 29, 2021. Because the District Court found that Thornton met more of the criteria than originally determined by the BOCC, Larimer County filed a cross-appeal on April 8.

However, the Court of Appeals will review the BOCC decision *de novo*, meaning it will examine all aspects of the criteria, the cross-appeal was later dismissed on motion by Thornton. Thornton filed its opening brief on September 1.

Conclusion and Implications

As the population on Colorado's Front Range continues its rapid growth, more municipalities are likely to consider large-scale water projects like Thornton's. In the aftermath of the Thornton override, Weld County is now exploring revamped 1041 regulations for water pipeline projects within Weld County. Although any new regulations cannot be retroactively applied to the Thornton project, the county is expecting other projects in the future and hopes that stronger regulations will give it more authority to regulate new projects.

The Colorado Court of Appeals decision in the Larimer County case, although likely to be appealed to the Colorado Supreme Court, could offer insights for other proposed projects throughout the state. If the Court upholds the Larimer BOCC decision, municipal water providers will face an uphill battle when constructing future projects through other jurisdictions.

Thornton hopes to complete construction of the entire pipeline by 2025.
(John Sittler, Jason Groves)

LEGISLATIVE DEVELOPMENTS

BIPARTISAN U.S. SENATE INFRASTRUCTURE BILL INCLUDES $2.3 BILLION TO IMPROVE OR REMOVE DAMS

On August 10, 2021, the Senate adopted a $1 trillion infrastructure bill that includes over $2.3 billion for the rehabilitation, retrofit, or removal of America's dams. The $2.3 billion proposal comes less than four months after a $63.17 billion proposal submitted by a diverse group of non-governmental organizations, companies, trade associations, and academic institutions.

Background

There are more than 90,000 dams across America, of which only 2,500 currently generate electricity. Dams throughout the nation provide flood control, electricity generation, navigation, irrigation, water supply, and recreation. However, where dams are improperly maintained or exist beyond their useful life, they can also pose safety hazards.

In the last few years, the U.S. hydropower industry and environmental and river conservation organizations have convened to address the nation's dams. The coalition has focused on the role U.S. hydropower plays as a renewable energy resource, and to integrate variable solar and wind power into the U.S. electric grid. The group has also focused on the need to maintain the nation's waterways, and the biodiversity and ecosystem services they sustain.

On October 13, 2020, a group of organizations, companies, government agencies, and universities issued the "*Joint Statement of Collaboration on U.S. Hydropower: Climate Solution and Conservation Challenge*" (Joint Statement). The Joint Statement provides a commitment by the group to chart hydropower's role in a U.S. clean energy future, while also supporting healthy rivers. The Joint Statement focused on what it terms the "3Rs" of U.S. dams: rehabilitation for safety; retrofit for power; and removal for conservation. Driven to address the dual challenges of climate change and river conservation, the parties identified seven areas for joint collaboration and invited other key stakeholders, including tribal governments and state officials, to join the collaboration and address implementation priorities, decision-making, timetables, and resources.

'Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress'

About six months after the Joint Statement was issued, on April 23, 2021, a group of non-governmental organizations, companies, trade associations, and academic institutions released a proposal entitled the "Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress," which builds on the Joint Statement by providing specific spending recommendations for the federal infrastructure package and related legislation. The spending recommendations aim to advance both the clean energy and electricity storage benefits of hydropower, and the environmental, safety, and economic benefits of healthy rivers. The recommendations do not focus on any particular U.S. dam, river, or region, but rather aim to accelerate the "3Rs" across all of America's 90,000 dams.

If enacted in whole, the proposal would result in $63.17 billion in spending over ten years for what it classifies as four, tightly-related U.S. infrastructure needs. The first need is federal financial assistance to improve dam safety. This includes building on existing state regulatory oversight capacity, expanding funding for the rehabilitation of existing dams, mapping the potential consequences of dam failure, and reimagining the National Dam Safety Program. The proposal recommends $19.46 billion for this first category of spending over ten years.

The second category of spending focuses on leveraging the federal tax code to incentivize investments in dam safety, environmental improvements, grid flexibility and availability, and dam removals. The proposal suggests a 30 percent tax credit for investment at qualifying facilities in dam safety, environ-

mental improvements, grid flexibility and availability, and dam removals, with a direct pay alternative. This program would cost $4.71 billion over ten years.

The third category of spending focuses on creating a public source of climate resilience and conservation funding for the removal of dams that have reached the end of their useful life. The proposal recommends that Congress authorize a mandatory annual grant that would fund the removal of 2,000 U.S. dams over a decade. The proposal further recommends that the Biden Administration issue an executive order establishing an inter-agency and stakeholder advisory committee to coordinate agency assistance in dam removal planning and funding, harmonize agency permitting to ensure a predictable regulatory process, and serve as a forum to address programmatic challenges. This program would cost $15 billion over ten years.

Finally, the fourth category of spending focuses on investing in existing federal dams and relevant research programs to accelerate decarbonization, increase renewable power generation, enhance environmental performance, improve dam safety, and leverage innovative technologies. This program would cost $24 billion over ten years.

Senate Adopts Amended Infrastructure Bill HR 3684

Less than four months after the proposal, on August 10, 2021, the Senate adopted its $1 trillion infrastructure bill by amendment to the House Bill HR 3684. As amended, the bill includes over $2.3 billion to improve and remove dams. The bill includes $753 million for safety and environmental improvements at existing hydropower facilities, adding hydropower generation to dams that currently do not produce power and for "pumped storage" projects; $800 million for rehabilitation and repair of high hazard dams and safety projects; and $800 million for the removal of dams in the interest of safety and the environment. While $2.3 billion is only a fraction of the $63.17 billion proposed by the coalition of stakeholders, the parties to the proposal are encouraged by this "federal down payment" to address the nation's dams. (*See:* $2.3 billion to improve or remove U.S. dams included in new federal infrastructure bill in wake of a Stanford Uncommon Dialogue agreement, *Stanford News* (Aug. 30, 2021).)

Conclusion and Implications

The Senate Infrastructure Bill is currently being considered in the House of Representatives and was scheduled for a vote on September 27, 2021. Meanwhile, in July of 2021, the bipartisan Twenty-First Century Dams Act was introduced in by Senator Dianne Feinstein (D-Calif.), Representative Annie Kuster (D-NH), and Representative Don Young (R-Alaska). This bill would invest over $25 billion for the rehabilitation, retrofit, and removal of America's dams.

The full text of the Senate Infrastructure Bill can be found at: https://www.congress.gov/bill/117th-congress/house-bill/3684/text?r=1&s=2. The full text of the proposal entitled "Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress" can be found at: hydropower-proposal.pdf (documentcloud.org). The full text of the Twenty-First Century Dams Act, as introduced in the Senate can be found at: Text - S.2356 - 117th Congress (2021-2022): Twenty-First Century Dams Act | Congress.gov | Library of Congress.

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION DECLARES FIRST-EVER WATER SHORTAGE FOR THE COLORADO RIVER, MANDATING REDUCED DELIVERIES TO THE STATES OF ARIZONA, NEVADA AND TO MEXICO

Due to historically low water levels in Lake Mead due to punishing drought, on August 16, 2021, the U.S. Bureau of Reclamation (Bureau) declared a first-ever water shortage for the Lower Colorado River Basin. Starting in January, Lake Mead will operate in what is known as a Level 1 Shortage Condition, significantly reducing the amount of water that will be delivered to Arizona, Nevada and Mexico. Additional cuts will ensue should Lake Mead's water level continue to decline.

This article focuses particularly on the impacts to Nevada.

The Historic Drought

Most of the Colorado River's flow originates in the Rocky Mountains. As the river makes its way to Mexico, its water is stored in Lake Powell and Lake Mead.

Since the early 2000s, the Colorado River Basin has faced its worst drought in recorded history. The water level of Lake Mead, which serves as the source of most of the Las Vegas area's drinking water, has dropped more than 130 feet since January 2000. To address the ongoing conditions, in 2019, after lengthy negotiations, the seven states that use Colorado River water—California, Nevada and Arizona in the lower basin, and New Mexico, Utah, Colorado and Wyoming in the upper basin—developed Drought Contingency Plans for the Upper and Lower Basins.

Thereafter, the drought worsened, and the Upper Basin experienced an exceptionally dry spring in 2021. April-to-July runoff into Lake Powell totaled just 26 percent of average despite near-average snowfall last winter. Researchers attributed this decline to a warming climate. Soils are so dry that they soak up melting snow before it reaches the river.

As of August 2021, the Bureau projected that for the 2021 water year (which ends September 30), unregulated inflow into Lake Powell—the amount that would have flowed to Lake Mead without the benefit of storage behind Glen Canyon Dam—was approximately 32 percent of average. Total Colorado River system storage as of August was 40 percent of capacity, down from 49 percent at the same time in 2020.

In August, the Bureau issued its study of the Colorado River's water outlook for the ensuing 24 months. That forecast showed that by the end of 2021, Lake Mead would reach a level of 1,066 feet above sea level, a level not seen since the reservoir began to fill after completion of Hoover Dam in the 1930s. At that level, the lake will be at 34 percent of capacity. A shortage can be declared at an elevation of 1,075 feet.

The Tier 1 Shortage Declaration

Lake Mead's low water levels and the dismal forecast prompted the Bureau to issue a first-ever water shortage declaration for the Lower Basin, referred to as Tier 1. The required shortage reductions, which begin in January 2022, are:

- Arizona: 512,000 acre-feet, which is approximately 18 percent of the state's annual apportionment;

- Nevada: 21,000 acre-feet, which is 7 percent of the state's annual apportionment; and

- Mexico: 80,000 acre-feet, which is approximately 5 percent of the country's annual allotment.

What the Shortage Declaration Means for Nevada

Southern Nevada gets about 90 percent of its water supply from the Colorado River. In some respects, it has been planning for this moment for the last two decades.

In 2002, the Colorado River experienced its lowest recorded flows on record. Yet that same year, Southern Nevada used more water than it ever had

before. Recognizing the need to reduce water use, the Southern Nevada Water Authority (SNWA) implemented an aggressive water conservation program that resulted in significant water reductions.

Mandatory conservation measures adopted in 2003 included seasonal watering restrictions, golf course water budgets, a grass replacement program in which customers are paid to remove grass, water waste penalties, and changes to municipal development codes that significantly reduced the impact of new development on the water supply.

As a result of these measures, the Las Vegas area used 23 billion gallons less water in 2020 than in 2002, despite a population increase of more than 780,000 residents during that time. This represents a 47 percent decline in per capita water use since 2002.

Adding to these efforts, in the 2021 legislative session, the Nevada Legislature passed AB 356, which prohibits the use of Colorado River water to irrigate nearly 4,000 acres of "nonfunctional" turf by the end of 2026. This includes grass in medians, roundabouts, business centers, homeowners association entrances and along parking lots and streets. In that decorative grass consumes about 10 percent of the Las Vegas Valley's annual water supply, the legislation is projected to save nearly 9.5 billion gallons (or 30,000 acre-feet) of water annually.

In addition to these conservation measures, SNWA's 2020 Integrated Resource Planning Advisory Committee (IRPAC) recommended specific actions to achieve further reductions in water use. Key focus areas include:

- Reducing non-functional turf and limiting turf installation in new development;
  Limiting cool-season turf installation in public spaces and expediting conversion to warm-season turf in public facilities;
- Enhancing landscape watering compliance through implementation of smart controller technology;
- Speeding repairs of leaks through implementation of advanced metering infrastructure;
- Reducing consumptive water losses associated with evaporative cooling, primarily in commercial and industrial buildings;
- Encouraging water-efficient development and discouraging consumptive use by new large water users; and
- Making infrastructure investments.

The Las Vegas Valley Water District has urged its customers to dial back their irrigation clocks in the fall and winter to ensure watering only occurs on assigned water days. According to a statement on the Water District's website, customer compliance with cool weather watering days would result in a 7-billion-gallon savings, which is the entire reduction required under the shortage declaration.

Conclusion and Implications

Nevada's existing conservation measures will likely allow it to achieve the reductions mandated by the Tier 1 declaration. The bigger question is what comes next. Will the Tier 1 cuts be enough to halt Lake Mead's decline, even as climate change continues to affect the river's hydrology? Bureau projections suggest that additional tier-level shortage declarations could go into effect. Even a robust Rocky Mountain snowpack this year may not be enough to reverse the current downward trend.
(Debbie Leonard)

THE WATER RIGHT IMPLICATIONS AND SCOPE OF MUNICIPAL WASTEWATER REUSE UNDER IDAHO CODE SECTION 42-201(8)—A JUDICIAL QUESTION OF FIRST IMPRESSION ON APPEAL

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

The underlying petitioner, Riverside Irrigation District, Ltd. (Riverside), has historically benefitted from Nampa's WWTP discharge as a downstream water user on Indian Creek (the waterbody into which Nampa's WWTP effluent is currently discharged). Riverside alleged that redirection of Nampa's WWTP effluent away from Indian Creek would diminish Indian Creek flows and, therefore, injure Riverside's Indian Creek-sourced water rights.

Idaho Department of Water Resources Order

IDWR's Order held that: (a) Pioneer does not need a water right as contended by Riverside by operation of Idaho Code § 42-201(8); (b) any Pioneer failure to first obtain a water right does not violate applicable Idaho law; and (c) § 42-201(8) is constitutional as applied because downstream water users (*i.e.*, Riverside) cannot compel others upstream to continue wasting water for the downstream water user's benefit; in other words, Riverside lacks a legally cognizable injury absent any legitimate entitlement to Nampa's WWTP effluent.

Riverside appealed IDWR's Order, seeking judicial review under its Notice of Appeal and Petition for Judicial Review of Agency Action (May 28, 2021). Riverside filed its Petitioner's Opening Brief on August 31, 2021. IDWR's response in defense of the Order, and those of intervenors Nampa, Pioneer, and the cities of Pocatello, Boise, Jerome, Post Falls, Rupert, Nampa, Meridian, Caldwell, and Idaho Falls, as well as intervenor Association of Idaho Cities, is due October 4, 2021. The matter is set for oral argument on judicial review on November 10, 2021.

The Intersection of Idaho Code Section 42-201(8) and General Idaho Wastewater Principles

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

Though all-involved noted and conceded that Pioneer, itself, was not an entity capable of exercising any rights (particularly the water right exemption) under § 42-201(8) if operating in a vacuum (*e.g.*, Pioneer is not a municipal water provider, sewer district, or other qualifying entity named in the statute), there was equally no question that Nampa is an eligible entity. The IDWR Director ultimately found the contractual relationship between Nampa and Pioneer sufficient to bring Pioneer under the authority of the statute as an extension of Nampa—that "Nampa and Pioneer are so intertwined in this matter that Subsection 8's exemption applies to Pioneer." Order, p. 4.

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

Issues on Appeal

Riverside disagrees, and primarily contends that the Director committed reversible error by applying § 42-201(8) in a manner allowing Pioneer to come under the water right exemption contained within it. Essentially, Riverside asserts that the statute is one of exclusion; that absent reference to "agents," "third parties," or "irrigation districts" those non-enumerated entities cannot come under operation of the statute. Concluding that subsection (8) does not apply to Pioneer, Riverside then asserts that Pioneer must obtain a separate water right in Nampa's WWTP effluent before it can accept and deliver the same to district landowners pursuant to Idaho Code § 42-201(2).

Riverside also challenges the Director's determination that § 42-201(8) is constitutional as applied against Riverside in this matter. Riverside believes IDWR's "no injury" determination to be premature and impermissibly preemptory, effectively divesting Riverside a proper opportunity to present evidence and be heard on the injury question.

The short of IDWR's determination is that Riverside has no legally protectable property interest in the wastewater of others because Idaho law provides that one cannot compel others to continue wasting water for one's benefit no matter the duration of the use/benefit period. *See*, *e.g.*, *Colthorp v. Mountain Home Irrigation District*, 66 Idaho 173, 179, 157 P.2d 1005, 1007 (1945).

Absent a vested property interest or legitimate entitlement there can be no constitutional injury or prejudice to any substantial rights under Idaho's Administrative Procedure Act.

Though enacted in 2012, the scope and application of Idaho Code § 42-201(8) is a judicial question of first impression now pending in district court. The Court will likely have to determine whether the statute contains any ambiguity leaving room for agency interpretation and deference.

Conclusion and Implications

Practically speaking, the scope of the statute and the solution flexibility it seemingly provides to WWTP owners and operators concerning effluent disposal options is an important question of avoided cost opportunity. In the case of Nampa, discharge of WWTP effluent to Pioneer's Phyllis Canal during the irrigation season (roughly April through early October) has the potential of saving it many millions of dollars in WWTP upgrades by avoiding the need for additional temperature and nutrient mitigation equipment, in addition to the ongoing operating expenses associated with that equipment.

As illustrated by the intervenor status of the Association of Idaho Cities, the regulated WWTP community is watching this matter closely.
(Andrew J. Waldera)

WASHINGTON STATE DEPARTMENT OF ECOLOGY DENIES APPLICATION TO RELY ON MUNICIPAL WATER RIGHTS AS MITIGATION

Recently the Washington State Department of Ecology (Ecology) denied an application US Golden Eagle to mitigate the new use by leasing a water right from the Town of Darrington to transfer a portion of the town's water rights into the state trust water right program.

Background

Most new water right permits in Washington are mitigated. Typically, applicants offset potential impairment for new uses of water by transferring (or relying upon) a water right currently held in the state's trust water right program as mitigation. RCW 90.03.290 requires the Washington State Department of Ecology to make four determinations before issuing a water right permit: 1) that water is available for appropriation, 2) withdrawal and use of water will not cause impairment of existing water rights, 3) the new water use is beneficial and 4) is not detrimental to the public interest. RCW 90.44.060. RCW 90.42.100 authorizes Ecology to use the state's trust water right program for "water banking purposes" including the use of water rights held in the trust water right program to:

> . . .mitigate for water resource impacts, future water supply needs, or any beneficial use under . . . . [the State Water Code]." RCW 90.42.100(2)(a).
>
> RCW 90.42.040(4)(a) states that:
>
> Exercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired.

Although many different types of new water uses have been authorized by relying on a water right held by the state trust water right program, lately there is increased scrutiny on whether certain authorizations would impair the public interest.

Ecology recently proposed a policy statement on the administration of the trust water right program. In the draft policy statement, Ecology proposed a lengthy definition of "Public Interest." The new definition proposes that Ecology should consider:

> . . .environmental impacts, with an emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational and economic effects; and impacts on publicly owned resources and facilities. Policy and Interpretative Statement, Administration of the Statewide Trust Water Rights Program, pg. 2 (draft dated July 19, 2021) available online at: https://apps.ecology.wa.gov/publications/SummaryPages/2111017.html.

The public comment period for Ecology's Policy Statement ended on September 19, 2021. The next day, Ecology denied an application for a new groundwater right, concluding that the proposed new use of water will impair the public interest.

Denial of Application to Mitigate a New Water Use

On September 20, 2021, Ecology denied US Golden Eagle's application No. G1-28878. Protested Report of ExaminationDenial No. G1-28878, available online at: https://appswr.ecology.wa.gov/waterrighttrackingsystem/ROE/wrroe_final.aspx?region_cd=NWRO.

The application proposed to irrigate blueberries near the Skagit River. The applicant proposed to mitigate the new use by leasing a water right from the Town of Darrington. The lease agreement between US Golden Eagle and the Town of Darrington proposed to transfer a portion of the town's water rights into the State trust water right program to serve as mitigation for US Golden Eagle's proposed new use. The town's water right was previously used for the industrial purposes for steam locomotives and lumber mills. The town had not used the water rights for a long period of time. However, the water right is not subject to relinquishment because it is considered a water right held for municipal water supply purposes.

Opposition to the Application

The Washington State Department of Fish and Wildlife (WDFW) and the Swinomish Indian Tribal Community raised numerous concerns about the application and potential impacts on salmon. WDFW recommended denying the application because the mitigation plan would not sufficiently offset impacts to fish. WDFW stated that the application would be a new impact on fish and the mitigation source from the town would not provide a new benefit to fish. The Tribal Community asserted that the use of the town's water right as mitigation for the new use would impair instream flows, harm fish, and impair the Tribal Community's federally reserved water rights and the public interest.

Proposed Mitigation Would Impair the Public Interest

In its review, Ecology determined that the mitigation plan provided a sufficient offset so that water was available for appropriation and withdrawal would not cause impairment of existing rights. Ecology also determined that the proposed new use for irrigated agricultural was beneficial under the Water Code. However, Ecology concluded that the use of the town's water rights for water banking purposes to mitigate for the new application would impair the public interest. Ecology cited long term efforts to support salmon habitat and the impact of reduced salmon runs on Southern Resident killer whales,

listed as endangered under the Endangered Species Act. Ecology explained that the:

> . . . new use of water by US Golden Eagle, to be mitigated by [the Town of] Darrington's long-unused water right, will reduce actual flows in the Skagit Basin that will have negative impacts on fish, including endangered species. At page 18.

Conclusion and Implications

At the time of this publication, the appeal period for this decision is still open. If this decision is appealed, it may provide a review of Ecology's authority to consider the "public interest" under the Water Code. For more information on the denial by Ecology, *see:* https://appswr.ecology.wa.gov/waterrighttracking-system/ROE/wrroe_final.aspx?region_cd=NWRO. (Jessica Kuchen)

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

•August 31, 2021—The U.S. Department of Justice (Justice Department) and the U.S. Environmental Protection Agency (EPA) announced a settlement with the Northern Cheyenne Utilities Commission (NCUC) resolving alleged violations of the federal Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES) regulations at the Lame Deer Wastewater Treatment Facility (facility) in the Northern Cheyenne Reservation in Lame Deer, Montana. The settlement, set forth in a consent decree lodged in the U.S. District Court for the District of Montana, requires the NCUC to make significant physical and operational improvements to the facility, some of which have already been implemented, and to improve the financial capacity of the NCUC to ensure sustained public health and environmental compliance. The settlement also includes a civil penalty to address past violations, adjusted downward to $1,500 based on an inability to pay determination, and stipulated penalties to resolve any future violations during the five-year minimum effective period of the consent decree.

•September 2, 2021—The United States, together with the State of Indiana, announced that the U.S. District Court for the Northern District of Indiana has approved the revised consent decree requiring U. S. Steel Corporation (U.S. Steel) to address alleged violations of the Clean Water Act and other federal and Indiana laws by undertaking substantial measures to improve wastewater treatment and monitoring systems at its steel manufacturing and finishing facility in Portage (known as its Midwest Plant) and to strengthen and broaden U.S. Steel's public and stakeholder notification procedures in the event of a spill or release to ground, soil or water. The consent decree approved by the court also requires U. S. Steel to pay $601,242 as a civil penalty, to be split evenly between the United States and the State of Indiana, and to reimburse the U.S. Environmental Protection Agency ($350,653) and the National Park Service ($12,564) for response costs incurred as a result of an April 2017 spill of wastewater containing pollutants that flow into Lake Michigan. In addition, the decree requires U.S. Steel to pay the National Park Service's calculation of damages ($240,504) resulting from beach closures along the Indiana Dunes National Park shoreline, and the National Oceanic and Atmospheric Administration's natural resource damage assessment costs ($27,512).

•September 15, 2021—EPA settled an enforcement action with the Union Pacific Railroad for Clean Water Act violations near the Columbia River in Oregon. The violations allegedly occurred when a UPRR train derailed and released approximately 47,000 gallons of Bakken crude oil in Mosier, Oregon. Most of the released oil discharged to the Mosier wastewater treatment plant. An estimated ten gallons of the Bakken Crude oil passed through the treatment plant and caused a sheen on the Columbia River. Final estimates of environmental impact included: 47,000 gallons of oil released, with 16,000 gallons burned or vaporized. Federal, state and UPRR clean-up actions included installing several wells to monitor and treat contaminated shallow groundwater. A total of 2960 tons of oil-contaminated soil was excavated and transported off-site for disposal. As part of the agreement, UPRR will pay a civil penalty of $52,500 to the U.S. Treasury. UPRR will also pay a $30,000 civil penalty to the State of Oregon for discharging oil to the Columbia River according to a settlement agreement with Oregon DEQ. In addition, UPRR has

also reimbursed cleanup costs for Oregon DEQ, the Washington Department of Ecology and EPA.

•September 15, 2021—EPA issued a new emergency drinking water order to the Oasis Mobile Home Park, located on the Torres Martinez Desert Cahuilla Indians Reservation in California. This order requires the current management of Oasis, as well as the U.S. Bureau of Indian Affairs (BIA) land allotment trustees, to comply with federal drinking water requirements by correcting ongoing problems with Oasis' drinking water system that endanger residents.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 16, 2021—EPA penalized Owens-Brockway Glass Container, Inc. $38,900 for violating the Emergency Planning and Community Right-to-Know Act's Toxic Release Inventory provisions when it failed to report information about toxic chromium compounds at its Portland facility. Owens-Brockway Glass Container uses iron chromite to make green glass at the facility. When super-heated in a furnace, iron chromite produces new chromium compounds which are then incorporated into green glass bottles. Under TRI, facilities that store, process, or manufacture certain toxic chemicals above threshold amounts must file annual reports of their chemical releases and transfers with EPA and appropriate state agency. In this case, EPA found that in 2017 and 2018 Owens-Brockway Glass Container failed to file required reports indicating it manufactured and processed chromium compounds in quantities that exceeded the threshold reporting amounts of 25,000 pounds. (Andre Monette)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT CONTINUES TO UPHOLD THE SIGNIFICANT NEXUS TEST FOR NAVIGABLE WATERS UNDER THE CLEAN WATER ACT

Sackett v. U.S. Environmental Protection Agency, et al., 8 F.4th 1075 (9th Cir. 2021).

For the last 13 years, the U.S. Environmental Protection Agency (EPA) and the Sacketts, Michael and Chantell, have been engaged in what can only be described as a federal Clean Water Act (CWA) saga, that has generated largely procedural CWA case law. For instance, in 2012, upon hearing one of the Sacketts' cases, the U.S. Supreme Court determined that issuance of a jurisdictional determination by the U.S. Corps of Engineers (Corps), that identifies jurisdictional "Waters of the United States" (WOTUS), constituted final agency action subject to challenge in federal court. (*Sackett v. U.S. Environmental Protection Agency*, 566 U.S. 120 (2012).) In the most recent case, the Ninth Circuit Court of Appeals primarily considered whether the Sacketts' Idaho property contained wetlands subject CWA Section 404 dredge and fill permitting requirements. (*Sackett v. U.S. Environmental Protection Agency*, (9th Cir. 2021); 33 U.S.C. § 1344.) To reach a conclusion, the Ninth Circuit examined which of the now-many WOTUS definitions controlled the character of wetlands in this case, as well as which opinion, in the notoriously fractured *Rapanos v. United States*, (547 U.S. 715 (2006)), applies. Ultimately, the Ninth Circuit found that the WOTUS definition in place at the time of agency action controls the analysis, and that, pursuant to the holding in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), Justice Kennedy's significant nexus test is the controlling case law in the Circuit.

Factual Background of the Sacketts' Case

In 2004, the Sacketts purchased a residential lot near Priest Lake in Idaho, which they intended to develop. In 2007, after obtaining county building permits, the Sacketts placed sand and gravel fill on the property, prompting EPA to issue a compliance order requiring restoration of the property's jurisdictional wetlands, and spurring a challenge by the Sacketts, which has been winding through the federal courts in a myriad of ways ever since. Moreover, in 2008, the Corps issued a jurisdictional determination (JD) indicating that the property contained wetlands subject to regulation under the CWA and supporting the compliance order.

On the eve of a 2020 EPA briefing deadline, which the court had twice extended, EPA issued a letter to the Sacketts withdrawing the amended compliance order issued 12 years prior. Consequently, EPA moved to dismiss the case as moot. However, the court did not find EPA's mootness arguments persuasive in light of the agency's ongoing modification of the WOTUS definition, among other issues. The Ninth Circuit explained that one EPA administration's decision not to enforce a compliance order did not bind the agency in the future under different leadership. Ultimately, the court determined the case was not moot, as enforcement of the compliance order could resume with a new administration, and proceeded to hear oral argument.

Background of the WOTUS Definition

As the Sacketts' case made its way through the federal courts, the EPA and Corps (Agencies) modified the WOTUS definition on a number of occasions: in 2015, under the Obama Administration, the Agencies issued the Clean Water Rule (80 Fed. Reg. 37054); in 2019, the Agencies, under the Trump administration, restored the pre-2015 WOTUS definitions as a part of its repeal and replace effort (84 Fed. Reg. 56626); in 2020, the Agencies, again under the Trump administration, issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250); and most recently, a U.S. District Court in Arizona vacated the Navigable Waters Protection Rule, (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*,

___F.Supp.4th___,Case No. CV-20-00266-TUC-RM (D. Ariz. 2021)), prompting the Agencies' to issue a statement that the earlier pre-2015 regime applies once again for the time being. The Agencies, under the Biden administration, also intend to place their stamp on the WOTUS definition; however, the timing of a new WOTUS definition is uncertain. (86 Fed. Reg. 41911.)

In addition to the Agencies' ongoing modification of the WOTUS definition, Supreme Court case law has shaped the interpretation of WOTUS over the years. In 1985, the Court held that wetlands abutting traditional navigable waterways were considered WOTUS in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In 2001, the Court clarified that "non-navigable, isolated, intrastate waters" did not constitute WOTUS subject to regulation, and effectively eviscerated the "migratory bird rule" in *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001). And perhaps most famously, in 2006, the Supreme Court issued a notoriously fractured opinion in *Rapanos v. United States*, which articulated no clear majority interpretation of the WOTUS definition. Justice Scalia, writing for the plurality, articulated that jurisdictional wetlands are confined to those with a "continuous surface connection" to "relatively permanent, standing or flowing bodies of water." While, Justice Kennedy issued a separate concurrence, establishing the "significant nexus test," which turns on whether wetlands, "alone or in combination with similarly situation lands" would "significantly affect the chemical, physical, and biological integrity" of more traditional navigable water bodies.

The Ninth Circuit's Decision

The Sacketts argued that the Scalia plurality opinion set forth in the *Rapanos* case is the governing standard; because their property does not have a continuous surface connection to a navigable water, it is not subject to regulation under the CWA. However, the Ninth Circuit disagreed, finding that *Northern California River Watch v. City of Healdsburg*, which applied Justice Kennedy's significant nexus test, is the controlling law of the Circuit. The Sacketts argued that when the Ninth Circuit held Justice Kennedy's significant nexus test was controlling law for the Ninth Circuit, the court failed to apply a reasoning-based approach for determining which opinion applies under a fractured case with no prevailing majority, as required by *United States v. Davis*, (825 F.3d 1014 (9th Cir. 2016) (*en banc*)). However, the court rejected the Sacketts' argument and upheld *Healdsburg* and the significant nexus test, paving the way for a determination that the Sacketts' property contained wetlands subject to the CWA.

Conclusion and Implications

The 2020 Navigable Waters Protection Rule attempted to do away with the significant nexus test, initially making *Sackett v. EPA* notable for the continued application of the significant nexus test in the Ninth Circuit. However, the import of *Sackett v. U.S. EPA*, in terms of applying the significant nexus test despite adoption of the Navigable Waters Protection Rule, has likely been diminished by the Agencies' purported return to the pre-2015 WOTUS definition, which includes application of the significant nexus standard. Additionally, in *Sackett*, the Ninth Circuit Court of Appeals found that the WOTUS definition in place at the time of the challenged agency action (here, issuance of the compliance order and JD) controlled, allowing the court to apply the significant nexus test without controversy, to determine the status of Sacketts' property. Taken together, recent developments confirm that the significant nexus test is likely the law of the land in the Ninth Circuit, at least for now. The Ninth Circuit's opinion of August 18, 2021 is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-ca9-19-35469/pdf/USCOURTS-ca9-19-35469-0.pdf.

(Meghan A. Quinn, Alexandra L. Lizano, Darrin Gambelin)

U.S. DISTRICT COURT IN ARIZONA VACATES AND REMANDS THE NAVIGABLE WATERS PROTECTION RULE: PRE-2015 WOTUS RULES SPRING BACK INTO EFFECT

Pascua Yaqui Tribe v. U.S. Environmental Protection Agency, ___F.Supp.4th___, Case No. CV-20-00266-TUC-RM (D. Ariz. Aug. 30, 2021).

On August 30, 2021, a U.S. District Court judge in Arizona vacated the 2020 Navigable Waters Protection Rule (NWPR), which defines what constitutes "waters of the United States" (WOTUS) under the federal Clean Water Act (CWA) and remanded the rule to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) for further review.

Clean Water Act Background and History of Recent WOTUS Regulation

The CWA was enacted for the specific purpose of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Importantly, the CWA regulates discharge of pollutants into "navigable waters." Navigable waters are in turn defined as "waters of the United States, including the territorial seas"—WOTUS. 33 U.S.C. § 1362(7). However, the text of the CWA does not further define WOTUS and as such, the EPA and Corps (collectively: Federal Agencies) are tasked with creating regulations to define WOTUS. Whether certain water bodies fall within the definition of WOTUS determines whether the EPA and Corps can regulate those water bodies under the Federal Agencies' CWA authority, or whether regulation is left to the relevant state and its own region-specific water protection rules.

Since the late 1980s, project stakeholders and potential permittees relied upon the 1986/1988 regulations and associated guidance issued by the Federal Agencies to determine what constitutes a WOTUS, as further interpreted through relevant evolving case law (*e.g.*, more recently, the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 716 (2006), among others). Differing interpretation and application of that evolving case law became a lightning rod for controversy. Responding to stakeholder demands for more clarity as to what constitutes a WOTUS, in 2015, the Obama-era Federal Agencies promulgated the "Clean Water Rule," which broadly redefined the term "navigable waters," so as to become the unified rule. In 2020, the Trump-era Federal Agencies repealed the Clean Water Rule and replaced it with the NWPR, which again redefined navigable waters into more narrowed, enunciated categories, largely based on Justice Scalia's plurality opinion in *Rapanos*.

On Inauguration Day in 2021, the Biden administration issued Executive Order 13990 (*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*), directing the Federal Agencies to review Trump administration regulations, including the NWPR. Thereafter, on June 9, 2021, the Federal Agencies announced their intention, through two separate rulemakings, to again revise the definition of WOTUS.

Factual Premise of *Pascua Yaqui Tribe* Case

Plaintiffs are Native American Tribes relying on waters subject to CWA regulation and protection. Plaintiffs had challenged two federal rules: 1) the 2019 rule enacted during the Trump administration that repealed the Obama administration's 2015 Clean Water Rule; and 2) the 2020 NWPR enacted under the Trump administration, arguing that both rules were arbitrary and capricious because they were contrary to scientific and technical evidence before the Federal Agencies. Instead of defending either rule in response to motions for summary judgment, and because the Federal Agencies already indicated their intent to revise the NWPR, the Federal Agencies sought voluntary remand of the NWPR. Importantly, the Federal Agencies did not seek *vacatur* of the NWPR (meaning, the NWPR would remain in effect during that period) so as to avoid further regulatory upheaval.

Remand of the NWPR with *Vacatur*

The plaintiff tribes argued that remand should include *vacatur* in order to prevent "significant, irrevers-

ible harms." The Ninth Circuit Court of Appeals will generally remand challenged rules without *vacatur* in circumstances in which there is a risk of environmental harm stemming therefrom, or the agency could offer better reasoning and adopt the same rule to moot the challenge. The inquiry of whether *vacatur* is appropriate is also a function of the seriousness of the agency's errors.

Agency action is deemed arbitrary and capricious if the agency: 1) relied on factors Congress did not intend it to consider; 2) failed to consider an important aspect of the problem; 3) relies on reasoning contrary to evidence before it; or 4) is so implausible it is not the product of agency expertise.

The District Court's Decision

Plaintiffs argued that the Federal Agencies' adopted the NWPR in a manner that disregarded established science and the Federal Agencies' own expertise, resulting in serious error arising to the level of arbitrary and capricious, and the U.S. District Court was persuaded. The court also found telling that the Federal Agencies in their papers agreed there were "substantial concerns about certain aspects of NWPR." As such, the District Court reasoned that the errors involved "fundamental, substantive flaws that cannot be cured without revising or replacing" the NWPR. The District Court explained that the combination of the Federal Agencies' error and potential for serious environmental harm if the NWPR remains in place warranted *vacatur*. *Pascua Yaqui Tribe*, 2021 WL 3855977, at *5.

Defendant-Intervenors' Objection to *Vacatur*

Defendant-Intervenors (comprised of individuals and affected businesses) did not object to the remand (with one exception related to adjacent wetlands), but did object to *vacatur* because of the alleged regulatory uncertainty that would result. The District Court rejected that argument, reasoning that regulatory uncertainty is present any time a rule is vacated. The District Court also noted that the Federal Agencies' are familiar with implementing the pre-2015 WOTUS regime, and would simply return to that approach.

Conclusions and Implications

This District Court decision was the first to remand and vacate the NWPR, and its immediate implications were murky as to its regional or national effect. In an effort to eliminate any uncertainty, within days of the District Court's decision, on September 3, 2021, the Federal Agencies publicly announced that they are halting implementation of the NWPR nationwide, and directed stakeholders and regulatory agencies to resort to the pre-2015 regulatory regime until further notice (*See* https://www.epa.gov/wotus/current-implementation-waters-united-states). As such, jurisdictional determinations as to whether a water or wetland is a WOTUS will be based on the 1986/1988 rules and guidance, and relevant case law such as the *Rapanos* decision.
(Nicole E. Granquist, Alexandra L. Lizano, Meredith Nikkel)

DISTRICT COURT DENIES CLEAN WATER ACT DEFENDANTS' MOTIONS TO DISMISS INDICTMENT COUNTS FOR INSUFFICIENT PLEADINGS

United States v. Bruce Evans, and Bruce Evans, Jr.,
___F.Supp.4th___, Case No. 3:19-CR-009 (M.D. Pa. Aug. 19, 2021).

The U.S. District Court for the Middle District of Pennsylvania recently denied the motions of two criminal defendants charged with multiple violations of the federal Clean Water Act (CWA), who had separately moved to dismiss several charges filed against them. At issue was whether the government sufficiently made its charging allegations against each defendant.

Factual and Procedural Background

Father, Bruce Evans, Sr. (Evans Sr.), and his son, Bruce Evans, Jr. (Evans Jr.), operated a waste treat-

ment facility. The facility discharged treated effluent under a CWA permit issued under the National Pollutant Discharge Elimination System (NPDES) program. Father and son were charged under an initial indictment in 2019, and a superseding indictment the following year, with violations of the CWA for failing to comply with terms of the facility's NPDES permit. Evans Sr. was charged with 35 counts, and Evans Jr. was charged with five counts.

Under the CWA, a "knowing" violation of the CWA's discharge prohibition in § 301 may be prosecuted as a felony. In addition, the CWA criminalizes acts and omissions beyond the direct act of discharging pollutants into water: permit conditions require that holders, for example, "properly supervise, operate and maintain . . . treatment facilit[ies]," and failure to do so may give rise to criminal liability under CWA § 301.

Evans Sr. moved to dismiss six counts on the grounds that: 1) the government failed to establish the "knowing" element for each contested charge, 2) the government failed to allege his conduct of "intentionally pumping the contents" of a waste tank onto the ground and nearby grass during a tank cleaning implicated the "navigable waters" element, and 3) the counts related to his alleged failure to submit various reports prior to 2014 were barred by the CWA's five-year statute of limitations. Further, Evans Sr. argued these failures did not adequately inform him of the nature of the charges against him or allow him to adequately defend himself.

Evans Jr. moved to dismiss five of his counts on similar grounds that 1) the government failed to allege he was an "operator" of the facility and 2) the government failed to establish he committed the alleged violations "knowingly." Evans Jr. separately demanded a bill of particulars in the alternative, that the government must provide him additional "factual or legal information for him to prepare his defense . . . ."

The District Court's Decision

'Knowing' Element

The District Court first considered whether the indictments sufficiently alleged "knowing" violations of the CWA. The court relied on a Ninth Circuit case which reasoned that:

> . . .for a defendant to 'knowingly' add a pollutant in violation of the [CWA], he must know that he discharged an enumerated substance from a conveyance, and that the substance was 'discharged into water . . . .'

The government is not required "to prove [] that a defendant knew he discharged a substance [into "waters of the United States"] but "into water.'"

Applying the Ninth Circuit's reasoning, the District Court denied the motions to dismiss. The court noted the indictment alleged that defendants knowingly violated permit conditions by failing to properly supervise, operate and maintain the treatment facility, by knowingly allowing waste materials to not be properly treated and to accumulate below the outfall of the sewage treatment plant in an unnamed tributary. In addition, the court determined the indictment against Evans Sr. alleged his extensive involvement with the facility dating back to 1996 as a board member and facility manager. The court reasoned that even though Evans Sr. was not the operator, the indictment alleged his role as manager made him responsible for overseeing the operations of the facility, for dealing with the facility's engineering and environmental contractor on a day-to-day basis for approximately 26 years, and for regularly dealing with the state environmental department. In addition, the indictment alleged Evans Sr. signed the renewal of the facility's NPDES permit. Based on these allegations related to Evans Sr.'s long history with the facility, the court determined the indictment sufficiently alleged "knowing" violations to withstand a motion to dismiss.

'Navigable Waters' Element

The court next evaluated and rejected Evans Sr.'s contention that the government failed to allege he polluted "navigable waters," because the indictment alleged Evans Sr. merely allowed pollutants to spill onto soil and grass. The court reasoned that the "waters of the United States" language merely implicated the statute's jurisdictional element under the Commerce Clause. It further reasoned that CWA § 1319(c)(2)(A) makes it "a felony to knowingly violate 'any permit condition or limitation implementing' the CWA." As a result, the court concluded an allegation of intentionally dumping pollutants on the ground sufficiently stated a "knowing" violation of a

permit condition, sufficient to withstand a motion to dismiss.

'Operator' Element

The court also considered and rejected Evans Jr.'s argument that the government failed to allege he was an "operator" under the CWA. The court observed that the indictment alleged Evans Jr. submitted a notarized application for certification as a wastewater treatment plant operator and that Evans Jr. was certified as an operator. Thus, the court concluded there was no merit to Evans Jr.'s claim the indictment failed to allege he was an operator of the facility.

Evans Sr.'s Statute of Limitations Defense

The court granted in part and denied in part Evans Sr.'s motion to dismiss several counts against him for nondisclosures more than five years before the indictment. The government argued Evans Sr.'s reporting violations were a continuing offense that tolled the statute of limitations. The court rejected the government's argument, reasoning that each failure to provide a report was its own complete violation of the CWA. As such, Evans Sr.'s conduct prior to January 8, 2014 was time-barred.

Evans Jr.'s Alternate Request for a Bill of Particulars

Finally, the District Court denied Evans Jr.'s request in the alternate for a more detailed bill of particulars from the government, noting that the government's:

> 52-page Superseding Indictment, viewed in its entirety, contains more than enough factual allegations to put both defendants on notice of the charges against them, [and] contains charging paragraphs that track the language of [the applicable statute] . . . .

Ultimately, the court denied Evans Jr.'s motion to dismiss in its entirety, and only granted Evans Sr.'s motion to dismiss with regard to his statute of limitations defense.

Conclusion and Implications

This case reaffirms the traditional principle that a criminal indictment is a mere accusation; the government need only allege sufficient facts that, if true, establish each element of each offense. An indictment need not prove every element outright. The court's opinion is available online at: https://www.casemine.com/judgement/us/612341e94653d00b2d598a95. (Carl Jones, Rebecca Andrews)

DISTRICT COURT IN OREGON DECLINES TO DISMISS ENDANGERED SPECIES ACT 'TAKE' CLAIM—FINDS CASE NOT BARRED BY THE DOCTRINE OF 'PRIMARY JURISDICTION' OR STATUTE OF LIMITATIONS

Waterwatch of Oregon v. Winchester Water Control District, ___F.Supp.4th___, Case no 3:20-cv-01927-IM (D. Or. Sept. 22, 2021).

The U.S. District Court for the District of Oregon denied Defendant Winchester Water Control District's (WWCD or District) motion to dismiss environmental groups' claim that the District's Winchester Dam is resulting in illegal "take" of threatened Oregon Coast coho salmon in violation of the federal Endangered Species Act (ESA), rejecting arguments that the claim is barred both by the doctrine of "primary jurisdiction" because Oregon agencies possess primary regulatory authority over the core resource issues underlying the claim as well as by the applicable limitations period.

Background

Defendant Winchester Water Control District owns and operates the Winchester Dam (Dam) that was originally constructed in 1890 and completely spans the North Umpqua River near Roseburg, Oregon. Originally constructed to provide power for potential industrial development in the area and

sometime later to also supply drinking water to Roseburg, the Dam eventually was purchased by a series of utilities, and it was during this time that a fish ladder was added in 1945. The last utility to own the Dam, Pacific Power & Light, ultimately abandoned it as a source of power generation in the mid-1960s due to its relatively low output and in 1969 transferred ownership to the District, which area property owners had formed primarily to utilize the Dam's reservoir for recreational purposes. In the mid-1980s, however, WWCD shortly recommenced use of the Dam for power generation that led it to make a series of improvements to the Dam, including its fish ladder, which remains the only means for migrating fish to pass over it.

Pursuant to the federal Endangered Species Act, the National Marine Fisheries Service (NMFS) has designated the portion of the North Umpqua River that runs over the Dam as critical habitat of the Oregon Coast coho salmon (OCC), which is listed as a threatened species under the Act.

Plaintiffs' Complaint and WWCD's Ensuing Motion to Dismiss

In November 2020, plaintiff Waterwatch of Oregon and three other organizations dedicated to fish conservation filed a citizen suit against WWCD under the ESA, alleging that the District's ongoing operation of the Dam violates the prohibition against "take" of listed threatened species in the ESA and NFMS' implementing regulations set forth in 16 U.S.C. § 1538(a)(1) and 50 C.F.R. § 223.203. The ESA defines the actions that constitute a prohibited "take" under its terms as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct," 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 222.102 (NMFS' regulation offering a more specific definition of "harm" for purposes of an ESA take).

In this context, plaintiffs more specifically allege in their complaint that WWCD has caused, and is continuing to cause, take of OCC salmon:

> . . .by failing to remove the Dam or provide adequate fish passage at the Dam as required by Oregon law, which failure has caused and continues to cause harm, harassment, injury and death [to the species].

In support of their allegations that the Dam violates state law, plaintiffs assert that the Dam's fish ladder does not meet the direction to provide adequate safe, timely, and efficient fish passage set forth in applicable regulations of the Oregon Department of Fish and Wildlife (ODFW), OAR 635-412-005 *et seq.*, and that WWCD does not hold a valid storage water right for the Dam's reservoir that is recognized or certificated by the Oregon Water Resources Department (OWRD). To remedy these alleged takes, plaintiffs requested that the District Court issue a declaratory judgment to that effect and to enjoin operation of the Dam in a manner that that will preclude any future takes by requiring either its removal or retrofitting it to provide adequate fish passage and thereby prevent further harm to OCC salmon.

In response to the complaint, WWCD filed a motion to dismiss plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that the Court lacks subject-matter jurisdiction over it. More specifically, the District set forth two grounds in support of its motion. First, WWCD contended that the court should dismiss plaintiffs' take claim under the doctrine of "primary jurisdiction" because it is heavily predicated on alleged violations of state law within the exclusive provinces of ODFW, as the agency charged with regulating fish passage, and OWRD, as the agency charged with regulation of water rights and non-federal dams in Oregon. Second, WWCD contended that the claim should also be dismissed because plaintiffs brought their take claim well after the period prescribed by the applicable statute of limitations. More specifically, the District argued that the claim accrued in 1997, when OCC salmon was listed as threatened under the ESA and thus, any take of the species caused by operation of the Dam about which plaintiffs are concerned was triggered, or no later than 2006 when ODFW last updated its fish passage criteria.

The District Court's Decision

Primary Jurisdiction

In ruling on WWCD's motion to dismiss, the U.S. District Court first clarified that the "primary jurisdiction" doctrine, notwithstanding its title, does not actually go to the issue of whether federal courts have subject matter jurisdiction. *Waterwatch of Oregon v.*

Winchester Water Control Dist., No 3:20-cv-01927-IM, 2021 WL 4317150, at *5 (D. Or. Sept. 22, 2021). Rather, it explained, the doctrine is a prudential one designed to promote efficiency whereby courts can determine that an otherwise cognizable claim:

> . . .'implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch' *Id.* (quoting *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 910 (9th Cir. 2019)).

Thus, if a court determines the doctrine's use appropriate in a given situation, it may exercise its discretion to either stay proceedings or dismiss the complaint without prejudice pending resolution of the issues it finds fall within the special competence of an administrative agency. *Id.*

The Take Claim and The Issue of Dismissal

In applying the doctrine to plaintiffs' take claim in light of this clarification, the court found that the core issue on which it turns, whether WWCD has violated or is violating the ESA's take prohibition, "does not raise any technical or particularly complicated issues outside of this court's competency and experience," and indeed, was expressly anticipated by the Congress to be resolved by the judiciary under that statute's citizen-suit provision. *Id.* Moreover, the court explained, given the standard of review appropriate for a 12(b)(1) motion to dismiss, it could not determine that no set of alleged facts in the complaint could be proved that would be able to establish an ESA take wholly irrespective of its assertions of state law violations and thereby avoid implicating the doctrine altogether. *Id.* at *6. The court therefore ruled it would not dismiss or stay the case based on the "primary jurisdiction" doctrine, at least at that stage of the proceedings. *Id.* at *7.

The Statute of Limitations Claim

Turning to WWCD's statute-of-limitations argument, the Disrict Court initially explained that it would utilize the general six-year limitations period applicable to civil actions in federal court for which a more specific period is not prescribed in 28 U.S.C. § 2401(a). *Id.* In also rejecting this argument, the court relied heavily on its previous opinion in Institute for *Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, Case No. 07-cv-358-PK (D. Or. Nov. 16, 2007). Determining that case to be largely synonymous with plaintiffs', the court first found that, even if plaintiffs were relying on a "continuing violation" theory, salient factors pointed against finding their claim barred by the statute of limitations, including a lack of concern over potential "staleness" of the claim given allegations that WWCD is continuing to engage in prohibited ESA take; the fact that a judgment on the claim would serve the interest in finality by resolving questions about whether ongoing Dam operations are causing such take; and the complaint's focus on what WWCD has yet to do to avoid such take from occurring in the future. *Id.* at *8. The court went on to conclude that plaintiffs' claim was not barred by the limitations period even absent reliance on a "continuing violations" theory given that the ESA prohibits each discrete take of a listed species. *Id.*

Conclusion and Implications

The District Court's opinion means that plaintiffs will likely continue to be able to rely on the ESA citizen-suit provision to bring claims alleging take of listed species even if they substantially rely on or involve actions that are directly regulated by state agencies, at least in the District of Oregon. Moreover, given the reasoning on which the court relied to turn back WWCD's statute-of-limitations argument (and the fact that it doubled down on the reasoning in one of its previous cases), the opinion also means that it will likely be extremely difficult to ever get an ESA take claim dismissed as being outside the applicable statute of limitations, at least where the complaint plausibly alleges that such takes have not ceased at some definite point in the past and are ongoing. The next step in the case itself, of course, will be to see if plaintiffs can prove the allegations of ESA take in their complaint at either summary judgment or, potentially, a trial on the merits.

The District Court's opinion is available at the following link: https://ecf.ord.uscourts.gov/doc1/15118169389 (PACER registration required). (Stephen J. Odell)

CALIFORNIA COURT OF APPEAL FINDS SUFFICIENCY OF WATER SUPPLY NECESSARY FOR EMINENT DOMAIN ACTION SUBJECT TO CEQA

Los Angeles Department of Water and Power v. County of Inyo, ___Cal.App.5th___, Case No. F081389 (5th Dist. Aug. 17, 2021).

In August, the California Court of Appeal for the Fifth Appellate District affirmed a lower court ruling determining that the County of Inyo's (County) attempt to condemn in fee simple certain parcels of land owned by the Los Angeles Department of Water and Power (LADWP), which the County leased for landfill sites did not comply with the California Environmental Quality Act (CEQA). In upholding the lower court's ruling, the Court of Appeal determined that the County had not, among other deficiencies, adequately considered the sources of water for continued operation of the landfills if the County were to succeed in its condemnation effort, including the potential development of new groundwater rights. The court's opinion was certified for *partial publication*.

Background

The City of Los Angeles, acting through the Los Angeles Department of Water and Power leases land to the County of Inyo for waste management purposes. The three landfills that are the subject of the lawsuit are located on sites the County leases from LADWP. Each landfill is unlined.

The landfills are operated by Inyo County Recycling and Waste Management. Landfill operations are subject to regulatory oversight and permits issued by several state agencies, including the California Department of Resources Recycling and Recovery (CalRecycle) and the Regional Water Quality Control Board for the Lahontan Region (Regional Board or RWQCB). Each landfill is subject to conditions imposed by CalRecycle, including the type and daily maximum tonnage of waste, the landfill's area, design capacity, maximum elevation, maximum depth, and the estimated closure year. The Regional Board is required under the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 *et seq.*) to review and classify operating waste disposal sites within its region. By 2001, the RWQCB had issued waste discharge permits for the three landfills.

In 2015, the County prepared an application for revisions to its operating permit with CalRecycle seeking, among other changes, to increase peak daily tonnage by 33 percent, increase average daily tonnage by 25 percent, increase capacity by approximately 50 percent, and accelerate the closure date by nearly 40 percent from 2097 to 2064. The County submitted an updated application in 2017 seeking similar changes, which were based on prior CEQA review the County had conducted in 1999 and 2012 related to updated operating permit applications. The County's prior CEQA review concluded that the operation of the landfills, with implementation of recommended mitigation measures, would not result in significant environmental effects and thus the County was not required to prepare an Environmental Impact Report (EIR) for any of the landfills.

In July 2017, the County provided LADWP notice of its intent to adopt a resolution of necessity to acquire the landfill sites by eminent domain. A prominent feature of the County's rationale for seeking condemnation was alleged uncertainty about the County's ability to provide long-term waste management services in light of lease negotiations with LADWP, which included rent terms and termination rights in LADWP that the County found objectionable, as well as restrictions on importing waste from neighboring counties for disposal at the County's landfills. Accordingly, County staff proposed acquiring fee title to the landfill sites, including its water rights.

LADWP objected to the County's proposed taking of the landfill sites, including by asserting that the County did not need fee simple ownership of its proposed continued operation of the landfill and that there was no public necessity for the County to acquire ownership of appurtenant water rights. LADWP specifically asserted that the County had historically been lax in its landfill operations and, without adequate oversight, the County's operations would likely pose a significant threat to the Owens Valley watershed and groundwater that supplies the Owens River

and the Los Angeles Aqueduct. LADWP also asserted that compliance with CEQA was required before the County could condemn the landfill sites, including an adequate description of the proposed project and analysis of its potential environmental effects.

The County board of supervisors proceeded to unanimously adopt separate resolutions of necessity authorizing the condemnation of the three landfill sites for continued landfill purposes. Specifically, the resolutions stated that the County intended to continue to use and operate the landfills, and in connection with such use and operation, to acquire interests in certain real property. The County collectively defined such use, operation, and acquisition of additional interests as the "project."

At the Superior Court

LADWP filed a petition for writ of mandate in Inyo County Superior Court in February 2018 alleging that the County failed to property identify the true nature and scope of the "project" as that term is used in CEQA. LADWP also alleged that the County improperly determined its approval of the three resolutions of necessity were categorically exempt from CEQA. The County contended that it did not need to conduct CEQA review of future changes that the County had not yet proposed, such as digging new groundwater wells, and that substantial evidence supported the County's conclusion that acquisition of the landfill sites will not itself result in any environmental changes.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (§ 21080, subd. (a).) CEQA broadly defines a "project" as:

> . . .an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is […] [a]n activity directly undertaken by any public agency. (§ 21065.)

In its petition, LADWP argued that the County inaccurately described the project by omitting several integral parts, including critical information about: 1) the nature and extent of the project; 2) the development of new groundwater rights; 3) the acquisition of property with existing and threatened soil and groundwater contamination; 4) the expansion of permitted daily tonnage and site capacity; 5) the import of waste; and 6) the remaining operational life of the landfills. The trial court ruled that the County's description of the project impermissibly omitted reasonably foreseeable consequences of the project, including the development and use of groundwater below the three landfills.

The Court of Appeal's Decision

The Court of Appeal first reviewed the trial court's finding related to water for the project, including its source and use. According to the court, the fee interest the County sought to acquire "plainly establishe[d]" that the County intended to acquire ownership of the land and the appurtenant water rights, which the County acknowledged were critical for the operation of the landfills. However, the County omitted identifying the sources of water for continued operation of the landfills. The Court of Appeal deemed this significant because the largest landfill relies on water from a domestic well on an adjacent parcel leased from LADWP, but which was not certain to remain available to the County if it acquired the landfill site in fee. Similarly, the court observed that the County's approval of acquiring the land in fee, including water rights, established that the development of the water rights being acquired was reasonably foreseeable. Accordingly, the court concluded that continued operation of the largest landfill was dependent on securing a water source, which in turn constituted part of the "project" under CEQA. However, the County did not include securing a source of water for the continued operation of the largest landfill in its description of the project nor include the development of groundwater rights at the other sites. The court therefore determined that the County failed to proceed in the manner required by CEQA when it described the project.

Conclusion and Implications

It remains to be seen whether Inyo County will continue to pursue acquiring the LADWP, owned landfill sites by eminent domain in compliance with the Court of Appeal's affirmance of the trial court's ruling. However, the court's decision is instructive because it holds that transfers of ownership in property via eminent domain may constitute projects under

CEQA that require review and analysis of water sources for the project, even if the project currently has access to an adequate supply of water. Thus, careful consideration of available water supplies in supporting or opposing an action to acquire property in eminent domain may be crucial to the viability of such actions. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F081389.PDF.
(Miles Krieger, Steve Anderson)

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