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WWL

FEATURE ARTICLE

COLORADO SUPREME COURT AFFIRMS WATER COURT'S JURISDICTION OVER DISPUTE INVOLVING LAND DEVELOPER'S ALLEGED DITCH MODIFICATIONS

By John Sittler and Jason Groves

On November 15, 2021, the Colorado Supreme Court upheld the Division 1 Water Court's decision in a ditch modification case that spiraled into complex litigation challenging the Water Court's subject matter jurisdiction and notice requirements, ultimately resulting in attorney fee awards at both the trial and appellate level. In the opinion, the Colorado Supreme Court clarified the scope of the Water Court's subject matter jurisdiction while further strengthening its stance on several ancillary matters. [*Glover v. Serratoga Falls LLC*, 2021 CO 77 (Colo. 2021).]

Background and Procedural History

In 2014, Resource Land Holdings LLC and Serratoga Falls LLC (collectively: Serratoga) began a residential development project near Timnath, Colorado. An open ditch owned by Robert Glover and Gerald Kiefer (collectively: Glover) crossed the Serratoga property, so Serratoga began negotiations to pipe the ditch (KG Lateral) as part of its development plans.

Meanwhile, Serratoga installed several subdrains on its property during the project. Glover owned rights in the Paige Brothers Seepage Ditch and Paige Brother Reservoir and later claimed the new subdrains injured Glover's water rights. During construction adjacent to the KG Lateral, a portion of the ditch collapsed and Serratoga quickly repaired the damage.

The negotiations on the KG Lateral piping continued unsuccessfully for several years, at which point Glover's attorney suggested Serratoga file a *St. Jude's* declaratory judgment action. In Colorado, ditch easement modifications are governed by *Roaring Fork Club L.P. v. St. Jude's Company,* 36 P.3d 1229 (Colo. 2001) [*St. Jude's*]. That case adopted the "accommodation doctrine" in Colorado and held that a property owner burdened by a ditch easement may not unilaterally move or alter the easement without first obtaining the easement owner's consent or a court order allowing the alteration. If the burdened property owner cannot obtain the ditch owner's consent, they may file what is now known as a *St. Jude's* action to seek a declaratory judgment, typically from a district court. Courts should allow the proposed modification if the alteration 1) does not significantly lessen the utility of the easement, 2) increase the burdens on the: easement owner in its use and enjoyment, or 3) frustrate the purpose for which the easement was created. *Id.* at 1237. This three-party test that the Colorado Supreme Court adopted comes from the *Restatement (Third) of Property (Servitudes)* § 4.8(3).

Before the Water Court

However, before Serratoga could file its complaint under *St. Jude's,* Glover filed its own civil complaint in the Division 1 Water Court alleging numerous claims, including trespass to a water right, unilateral alternation of a ditch easement, nuisance, and several other tort and statutory claims. In its answer to the Complaint, Serratoga counterclaimed for a *St. Jude's* declaratory judgment. Upon Serratoga's motion, the Water Court dismissed seven of Glover's claims finding them "speculative and devoid of any factual support."

At trial, Serratoga moved for dismissal after Glover's case in chief. The Water Court then dismissed

Glover's claims for trespass to water right and other tort claims, leaving only claims for special damages and declaratory relief to determine the scope of Glover's ditch easement in the KG Lateral and whether Serratoga's proposed modifications satisfied the *St. Jude's* test. In a rare move, the Water Court issued an oral ruling after trial, finding in favor of Serratoga on all counts and finding Glover and its attorney jointly and severally liable for statutory attorney fees for the dismissed claims.

Glover's Post-Trial Motions

After trial, Glover filed C.R.C.P. 59 and 60 motions. In the Rule 59 motion, Glover asked the court to make further findings related to the trespass to water rights claims and clarify the findings related to the award of attorney fees. In the Rule 60 motion, Glover asserted, for the first time, that the Water Court lacked subject matter jurisdiction because none of the claims involved "water matters" within the Water Court's exclusive jurisdiction. The Water Court denied both motions, ruling that it had already made "detailed findings" and that the non-water claims were "inextricably intertwined" with the water matters within the Water Court's jurisdiction. Glover then appealed to the Colorado Supreme Court.

The Colorado Supreme Court's Decision

On appeal, the Colorado Supreme Court considered three principal issues: 1) whether the Water Court had subject matter jurisdiction over the claims, 2) whether the Water Court correctly dismissed on the merits, and 3) whether the Water Court abused its discretion awarding attorney fees.

Water Court Subject Matter Jurisdiction

In Colorado, Water Courts "retain jurisdiction over all water matters." *Kobobel v. Colo. Dep. of Nat. Res.*, 249 P.3d 1127, 1132 (Colo. 2011). Whether a claim constitutes a water matter then turns on the distinction between "actions involving the use of water and those involving the ownership of a water right." *Id.* The Colorado Supreme Court has previously held that actions involving the use of water include applications for water rights decrees, plans for augmentation, changes of decreed water rights, and matters concerning the scope of decreed water rights, such as abandonment and adverse possession. *Allen v. State*, 433 P.3d 581, 584 (Colo. 2019). Claims 1, 4, and 5 of Glover's complaint included requests to determine the quality, quantity, and timing of flows in the KG Lateral, and the right to use water associated with decrees in the Paige Brothers Seepage Ditches and Reservoir. The Supreme Court found those claims were all "water matters" squarely within the Water Court's jurisdiction.

The Supreme Court then addressed the well-established doctrine of Water Court "ancillary jurisdiction." This doctrine allows Water Courts to decide non-water matter claims (such as trespass or damage claims) when those issues are:

> . . .interrelated with the use of water or…directly affect the outcome of water matters within the exclusive jurisdiction of the Water Court. *Kobobel*, 249 P.3d at 1132.

Here, the Supreme Court concluded that because the Water Court properly exercised jurisdiction over the three water matter claims, the court's ancillary jurisdiction extended over the water-related tort and statutory claims.

Importantly, the Supreme Court then further clarified Water Court jurisdiction over *St. Jude's* cases, stating:

> . . .when a [*St. Jude's*] dispute requires initial determinations as to the scope of a decreed water right or any other water matters as a precursor to ensuring that the same quantity, quality, and timing is provided, then the dispute falls within the exclusive jurisdiction of the Water Court.

This finding confirmed that, although *St. Jude's* cases are typically brought in state District Court, there are certain circumstances where a preliminary water matter determination is necessary for the Water Court to decide. In those cases, the Water Court properly has jurisdiction over both the water matter claims and the ancillary claims, including the *St. Jude's* analysis.

Resume Notice in Colorado

The second part of the Supreme Court's review of Water Court jurisdiction focused on "resume notice." In Colorado, the applicant in a Water Court case is typically required by statute to publish notice of the

application in local newspapers. The purpose of the resume notice is to alert potentially interested parties within the same stream system of activity on the stream. In some circumstances, such as a *St. Jude's* declaratory judgment between specifically named parties, personal service is appropriate and resume notice is not required. *S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1235 (Colo. 2011). Here, Glover argued—for the first time on appeal—that the case should have been published under resume notice procedures, and because it was not, the Water Court lacked jurisdiction. The Supreme Court ruled that this case, and *St. Jude's* cases more broadly, are "precisely the type of water matter for which personal service is appropriate, rather than resume notice."

Water Court Decision on the Merits

The Supreme Court confirmed the Water Court correctly dismissed Glover's claim for trespass to its water right because Serratoga did not "unilaterally alter" the KG Lateral. Glover argued that Serratoga's damage to the KG Lateral, and subsequent repair, constituted intentional "self-help" intended to move or alter Glover's ditch easement. However, the evidence at trial showed that Serratoga promptly repaired the KG Lateral "in its existing location…to the same capacity and dimensions." The Court reiterated that a non-exclusive easement does not prevent the burdened property owner from using its property altogether. Serratoga was within its rights to begin construction work adjacent to the ditch. The Court did not view the prompt repair of a damaged ditch to the same capacity and manner as a unilateral ditch modification under *St. Jude's*.

Additionally, the Supreme Court upheld the Water Court's denial of Glover's claim regarding the subdrain installation. Evidence at trial showed the Paige Brothers Reservoir "continued to fill to capacity" even after installing the subdrains. Thus, Glover could not claim trespass to water rights without first showing that Serratoga interfered with the water rights.

Attorney Fees

The Supreme Court upheld the Water Court's award of attorney fees for all the dismissed claims. In the Court's view, under no theory of law could unintentional damage and prompt repair of a ditch constitute a unilateral ditch alteration. Thus, the Court affirmed that Glover's trespass claim lacked substantial justification. The claim related to the subdrain interference was similarly without justification because Glover presented no evidence of injury to its water rights.

Finally, the Court awarded appellate attorney fees against Glover for, among other reasons, pursuing claims on appeal that the Water Court pointed out lacked any evidence or support at multiple points during the earlier proceedings. Additionally, the Court ruled that Glover's new argument regarding a lack of resume notice was frivolous because it disregarded well-established principles of Colorado water law.

Conclusion and Implications

In sum, although this case did not necessarily make new law in Colorado, it is informative for the Court's resounding affirmation of several established principles. A Water Court's jurisdiction is limited to water matters but may encompass sufficiently related ancillary issues, including a *St. Jude's* review when the analysis first requires determinations as to the scope of a decreed water right. The Supreme Court confirmed resume notice is not required for Water Court matters explicitly between two named parties, including *St. Jude's* declaratory judgment actions. Additionally, the Supreme Court determined that accidental damage to a ditch, followed by prompt restoration, is not a unilateral ditch modification under *St. Jude's*.

Lastly, the award of attorney fees, both at the Water Court level and again at the Supreme Court, further solidifies established principles of Colorado water law. Above all, the *Glover* decision stands out as a cautionary tale for parties considering overly-aggressive litigation strategies. The Supreme Court's slip opinon is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2020/20SA278.pdf.

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WESTERN WATER NEWS

ARIZONA TAKES STEPS UNDER COLORADO RIVER PLAN TO SUPPORT LAKE MEAD LEVELS

In December 2021, water agencies from California, Arizona, and Nevada, as well as the U.S. Bureau of Reclamation, executed a memorandum of understanding (MOU) to increase the amount of water stored in Lake Mead on the Colorado River by 500,00 acre-feet in both 2022 and 2023. In support of the so-called "500 + Plan," the MOU provides for a funding commitment from non-federal and federal parties totaling $200 million to participate in additional water projects that will result in a minimum of 1,000,000 acre-feet of water in Lake Mead by 2023. (*See:* 32 *Cal Water L & P'lcy* Rptr 88 (Jan. 2021).) The MOU contemplates semi-annual consultations among the parties to consider changing hydrological conditions within the Colorado River basin. Arizona recently took initial steps to meet target reductions in consumptive use through compensated conservation agreements with several tribal and irrigation district entities.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the United States Bureau of Reclamation (Bureau). The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In response, Reclamation, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

In 2014, to support maintaining the elevation of Lake Mead, the Bureau and certain other lower and upper basin state participants funded a pilot system conservation program to reduce diversions from the Colorado River system through the voluntary, compensated, and temporary use reductions. Also that year, lower basin parties agreed to generate protection volumes through conservation measures to support Lake Mead elevations.

In 2019, the parties entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and Reclamation must consult and determine what additional measures will be taken by the Bureau of Reclamation and the lower basin states if lake levels are forecast to be at or below 1,030 feet during the

succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. the Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, Bureau of Reclamation releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

As a result of the programs and agreements between the various parties, approximately 4.0 million acre-feet has been added to Lake Mead over the years, resulting in a 50-foot increase in Lake Mead's elevation at the end of 2020 than would have otherwise occurred. Despite the substantial efforts of the parties, Lake Mead levels are projected to continue to decline. The Bureau's August 2021 24-Month Study projected Lake Mead's elevation would be below 1,075 feet on January 1, 2022, and as provided for in the 2007 Interim Guidelines, a shortage declaration limiting deliveries of Colorado River water to Arizona and Nevada is in effect for 2022. In addition, the August 2021 24-Month Study projected Lake Mead would fall below 1,030 feet in July of 2023—a projection that remained unchanged in the September and October 2021 24-Month studies using the minimum probable inflow. Accordingly, the parties entered into discussions and formed technical working groups to determine how to protect against lake level declines to 1,020 feet or below, arriving at the conclusion that a minimum of 500,000 acre-feet would need to be conserved each year to support lake levels from dropping to 1,020 feet. This amount was memorialized in the MOU.

Memorandum of Understanding

At its core, the MOU provides that the parties will work together to establish appropriate means and methods to identify, consider, select, fund, administer, and validate additional water projects, with the key considerations being the total quantity of additional water that can be created in support of Lake Mead elevations, the cost of such water quantities, and the timing of implementation of any projects for additional water. The MOU defines "additional water" to mean water remaining in Lake Mead that is either 1) not attributable to shortage volumes under the 2007 Guidelines or any DCP contributions required in the LBOps; or 2) a net positive change in Intentionally Created Surplus (ICS) behavior assumed in the Bureau of Reclamation's June 2021, 24-month study Most Probable projection. ICS water is water that is made available by extraordinary conservation efforts, such as land fallowing. In short, "additional water" is water that is not the result of existing efforts or requirements under the 2007 Guidelines, the DCP, or the LBOps, The MOU expressly does not obligate any party to any specific contribution of funds or otherwise support any particular additional water project.

In the MOU, the parties agreed to fund participation in additional water projects up to $100 million. Additionally, target amounts of conserved water from the parties to meet the 500,000 acre-foot minimum in 2022 are as follows: 223,000 acre-feet from Arizona, 215,000 acre-feet from California, and 62,000 acre-feet from the Bureau of Reclamation. According to the Central Arizona Water Conservation District (CAWCD), which operates the Central Arizona Project (CAP) that diverts Colorado River water for delivery to urban and agricultural users in the center and south of the state, 193,000 acre-feet of Arizona's 223,000 acre-foot target would come from CAP users, and the remaining 93,000 would come from on-river users, including tribal entities.

Arizona Takes Initial Step

Arizona recently took the initial step of issuing letters of intent to negotiate compensated conservation agreements with various tribes and irrigation districts located along the Colorado River, including the Colorado River Indian Tribes, Mohave Valley Irrigation and Drainage District, Wellton Mohawk Irrigation and Drainage District, and Yuma Mesa Irrigation and Drainage District. These agreements would, in effect, compensate on-river and Central Arizona Project users for reducing the amount of water each entity consumptively uses, as well as reduce historical consumptive use, totaling between 50,000 and 60,000 acre-feet. According to CAWCD, key terms of the agreements would provide that the agreements are voluntary and temporary, compensated (at $261.60 per acre foot in 2022 and $268.80 per acre-foot in 2023), and reductions in water use must be made against recent historical consumptive use. To date, agreements have not yet been reached.

Conclusion and Implications

The 500 + Plan is designed to achieve the short-term objective of keeping Lake Mead levels above 1,020 feet. It remains to be seen whether the plan will achieve that goal, and whether such efforts will be renewed in the future or if additional measures become necessary to support Lake Mead elevation levels. The Central Arizona Water Conservation District, Agenda Item 7a, 7b, is available *at*: https://civicclerk.blob.core.windows.net/stream/CAPAZ/c2a2d547-e73b-4001-b2df-62bd75d6b649.pdf?sv=2015-12-11&sr=b&sig=bqUiOGCSYyyEfctONWK7rHRPdZB%2F8c3T8S0yupenb54%3D&st=2022-01-19T22%3A28%3A27Z&se=2023-01-19T22%3A33%3A27Z&sp=r&rscc=no-cache&rsct=application%2Fpdf.
(Miles Krieger, Steve Anderson)

GOVERNOR INSLEE PROPOSES WASHINGTON STATE SUPPLEMENTAL BUDGET INCLUDE FUNDING TO 'MODERNIZE' THE WATER CODE

On January 10, 2022, the Washington State Legislature convened for a regular session. In Washington, the regular session in odd years is 105 days and in even years is 60 days (often referred to as a short session year). Washington state operates under biennium budgets that are adopted in odd years. This year, as in other even year sessions, the Legislature may adopt a supplemental budget.

Background to the Proposed Budget

Discussions around implementing a supplement budget are often influenced by revenue reports and policy priorities. The Washington State Economic and Revenue Forecast Council (Council) has found that state revenues are higher than expected when the existing budget was adopted in 2021. In November 2021, the Council estimated an increase of $898 million for the 2021-2023 biennium. Available online at: https://erfc.wa.gov/. In response to the revenue increase and policy priorities, Governor Inslee developed and proposed a supplemental budget.

Governor Inslee's proposed supplemental budget includes new state funding for actions to address the COVID-19 health crisis, homelessness, poverty, salmon recovery, climate and transportation. The Governor also published a summary report on the proposed supplemental budget. Proposed 2022 Supplemental Budget and Policy Highlights, pg. 63 available online at: https://ofm.wa.gov/budget/state-budgets/gov-inslees-proposed-2022-supplemental-budgets/highlights-gov-inslees-proposed-2022-budget. The proposed supplemental budget was a pre-filed bill in both the House and Senate. House Bill 1816; Senate Bill 5693. This article will address the Governor's proposed funding for water resource management issues.

The Proposed Budget: Endangered Species, Natural Resources and the Water Code

The Governor's proposed budget increases state funding for projects and actions to protect and restore salmon and steelhead populations throughout Washington including considering changes to the state's Water Code. The Governor's summary report notes that 70 percent of the state's salmon and steelhead populations listed as threatened or endangered under the Endangered Species Act are not meeting recovery goals. Proposed 2022 Supplemental Budget and Policy Highlights, pg. 60. The proposed supplemental budget includes funding for projects to improve riparian area protection and function, water quality, fish passage and reintroduction programs. The proposed supplemental budget funds monitoring and management programs relating to salmon and steelhead harvest and other watershed protection efforts.

Additionally, the proposed budget funds the Washington State Department of Ecology (Ecology) to develop recommendations for changes in water resource management statutes. As part of that effort, Ecology shall establish a new water code advisory group.

Formation of an Advisory Group on Water Law

The Governor's proposed supplemental budget provides $709,000 in funding for Ecology to "[e]stablish an advisory group to recommend how to modern-

ize the state water law to include salmon needs for adequate stream flows and cool water." Proposed 2022 Supplemental Budget and Policy Highlights, pg. 63. Ecology is directed to "convene and facilitate meetings of stakeholders, water law experts and tribes . . ." HB 1816, § 302(43)(b); SB 5693, § 302(43)(b). The advisory committee is directed:

> . . .to assess changes needed to standardize and update the laws that govern the department [of Ecology]'s water right permitting and compliance actions. HB 1816, § 302(43)(b); SB 5693, § 302(43)(b).

Department of Ecology Recommendations about the Water Code

By November 1, 2023, Ecology must make recommendations to the Legislature about potential changes to the code that includes protecting senior water rights from impairment, providing incentives for water conservation and use of reclaimed water, addressing water management issues caused by climate change, and strengthening:

> . . .linkages between water right permitting and compliance with growth management obligations to protect instream resources. HB 1816, § 302(43)(e); SB 5693, § 302(43)(e).

Ecology's Budget Summary

Ecology's budget summary to support the Governor's proposed supplemental budget asserts that the current Water Code limits Ecology's ability to balance water needs. Ecology's budget summary posted on the Governor's website states, in pertinent part:

> Washington's water laws have not been adapted to the increasing demands for water in the context of climate change and population growth. Various water code impediments prevent effective water and water right management necessary to balance the needs for fish, farms, and people. Funding is provided for the department to convene an advisory group to develop recommendations for how to modernize state water law to include salmon needs for adequate stream flows and cool water. (*See:* https://ofm.wa.gov/budget/state-budgets/gov-inslees-proposed-2022-supplemental-budgets/agency-recommendation-summaries/461)

Conclusion and Implications

The Washington State Economic and Revenue Forecast Council's next revenue forecast will be submitted to Governor Inslee and state Legislature on or before February 20, 2022. The Legislature will need to pass the budget by the end of the legislative session on March 10, 2022. The budget will then need to be signed by the Governor.
(Jessica Kuchan)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA TO RECEIVE EXTENSIVE BENEFITS FROM FEDERAL INFRASTRUCTURE INVESTMENT AND JOBS ACT

With the United States as a whole still looking for ways to springboard out of the COVID era, Congress was able to assemble and pass a once-in-a-generation bipartisan infrastructure bill. Aptly named the Infrastructure Investment and Jobs Act [HR 3684], the bill was signed into law on November 15. The $1.2 trillion bill puts into motion historic federal investments for the nation's physical and cybersecurity infrastructure and aspires to create 2 million jobs per year over the course of a decade in doing so.

The need for such improvement in California is clear and the Infrastructure Investment and Jobs Act could address many problems throughout the Golden State. Infrastructure in California has suffered from a systemic lack of investment. Moreover, the state was recently given a grade of C- on its infrastructure report card, according to the American Society of Civil Engineers:

> The state has made progress in recent years to close the infrastructure investment gap, but much work remains to prepare the infrastructure to support the state's economy and preserve Californians quality of life. . . . Much of California's infrastructure needs significant investments to reverse the decades of underinvestment and help the built systems withstand climate change. Ports, for example, are presently in satisfactory condition, but require approximately $10.7 billion over the next 10 years to protect themselves against the impacts of earthquakes and sea-level rise. Dams and levees are increasingly providing protection against extreme precipitation whiplash, but many of these structures are aging and past their design lives. (*See:* https://infrastructurereportcard.org/asce-gives-california-infrastructure-a-c/)

While many sections of the new legislation simply authorize Congress to appropriate funding for fiscal years 2022 through 2026 for both current and newly created programs, other sections of the bill provide supplemental appropriations over that time period for many of the programs in the bill, above and beyond funding normally provided to such programs in Congress's annual spending bills.

An Upgrade to California's Water Resilience

With historic drought conditions ravaging the state over the last decade, the Infrastructure Investment and Jobs Act prioritizes water resilience for California.

In terms of water storage improvements, California will receive more than $1.5 billion in funding. Of this, over $1 billion will be utilized to improve water storage in California, potentially benefitting storage enhancement projects such as the B.F. Sisk Dam, Sites Reservoir, Los Vaqueros Reservoir, and Del Puerto Canyon Reservoir expansions. As for the remainder, an additional $500 million has been appropriated for repairs to aging dams, such as the San Luis Reservoir.

In furtherance of increasing California's water supply sustainability and resilience is an additional $250 million in funding, which will be directed to the state to bolster water desalination, a critical innovation needed to increase our supply as California deals with cycles of drought.

Among the chief concerns addressed in the bill's appropriations, there is also heavy investment in drinking water infrastructure. In response to the nationwide crisis regarding the lack of safe drinking water, California can expect to receive $3.5 billion over the next five years to improve its water infrastructure across the state and to ensure that clean, safe drinking water is available in all Californian communities.

Federal Level Appropriations

At the federal level, several other major appropriations are laid out in the Infrastructure Improvement and Jobs Act. Notably, $1.15 billion has been appropriated for surface and groundwater storage, and water conveyance projects, with $100 million reserved

for small surface and groundwater storage projects. Another $1 billion has also been appropriated for Water Recycling including $450 million for a new large water recycling project grant program authorized via the act. On the Colorado River side of the state, the federal appropriations have also included $300 million for the implementation of the Colorado River Drought Contingency Plan, as well as an additional $50 million for Colorado River Endangered Species Recovery and Conservation Programs.

Conclusion and Implications

With the new year well under way, the provision of funds has already begun and will continue over the course of the next five years. With the proper utilization of these funds, Californians can look forward to seeing advances in the state's water resilience in addition to other critical management areas of the state as a whole such as air quality, transportation, and wildfire management. While achieving the goal of modernizing the state's infrastructure has been a slow and ongoing process, the Infrastructure Investment and Jobs Act will provide an opportunity to boost this effort and bring statewide infrastructure up to twenty-first century standards. The Infrastructure Investment and Jobs Act's full text and history is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684.
(Wesley A. Miliband, Kristopher T. Strouse)

UTAH 2022 LEGISLATIVE PREVIEW OF WATER-RELATED BILLS

The 2022 Utah General Legislative Session commenced on January 19, 2022, and adjourns on March 5, 2022. The Utah Legislature is set to address a number of water-related bills. These bills address a number of varied topics including water quality, water distribution, and instream flows, among other topics. The remainder of this article provides a brief summary of the proposed bills (in numerical order) but does not opine on text of the bills, which are still in flux.

House Bill 21—School and Child Care Center Water Testing [Rep. Stephen G. Handy]

House Bill 21 mandates that all schools and child-care centers in Utah test their water taps for lead by December 31, 2023. All samples are to be submitted to a certified laboratory, that is approved by the Division of Water Quality. Facilities that have been tested within the past six years are exempt from this regulation and need only continue scheduled testing. This bill calls for the Division to pay the laboratory for the costs of the testing, provided that funds are appropriated for this purpose.

Those facilities that return actionable levels of lead must take appropriate steps to use an alternative source or reduce the levels of lead below actionable levels. This bill directs the Division of Water Quality to draft rules setting forth the procedures and standards for reducing the lead levels. Additionally, the bill seeks to create a grant program to pay for the costs associated with remediation actions. Finally, a portion of the American Rescue Plan funds will be allocated to pay for the testing.

House Bill 33—Instream Flow Amendments [Rep. Joel Ferry]

House Bill 33 seeks to amend Utah Code § 73-3-30 to loosen the current requirements for water rights to be used as instream flows, specifically for the benefit of the Great Salt Lake and other state lands. This bill would add the Utah Division of Forestry, Fire, and State Lands to the list of state agencies that can file change applications for in-stream flows, which currently includes the Divisions of Wildlife Resources and the Division of State Parks.

The present statute limits in-stream flows to stream channels, whereas this bill would expand the permissible uses to the Great Salt Lake and other state lands. This use of water, however, must meet one of three criteria: 1) contributes to the propagation or maintenance of wildlife; 2) the management of state parks; or 3) the reasonable preservation or enhancement of the natural aquatic environment. Notably, this bill would provide the opportunity for right holders and their lessees to file change applications for the above instream flows purposes for one to ten years. Finally, the Division of Water Rights would be granted to permission to administer the in-stream right based upon its underlying priority date, which

would ensure the water remains available to meet the in-stream purposes.

House Bill 37—State Water Policy Amendments [Rep. Keven J. Stratton]

House Bill 37 is primarily a policy modification. Specifically, HB 37 adds additional language to Utah Code § 73-1-21, Utah's water policy to add additional conversation and science-based directives.

House Bill 64—Drinking Water Amendments [Rep. Christine F. Watkins]

House Bill 64 addressed how to fund necessary increases in drinking water capacity and distribution throughout the state. The proposed solution is an imposition of an annual fee on retail water suppliers. This fee will be collected by the State Treasurer and placed into a dedicated account. The predicted revenues ($1.6 million or more) would be used to improve compliance with the Utah Safe Drinking Water Act.

House Bill 95—Landscaping Requirements Prohibition [Rep. Raymond P. Ward]/and House Bill 121—Water Conservation Modifications [Rep. Robert M. Spendlove]

House Bill 95 and House Bill 121 are primarily targeted at improving conservation of water in Utah. The key target is the reduction of ornamental lawns throughout the state. Many municipalities in Utah currently have ordinances that require lawns. HB 95 is targeted at city and counties, whereas HB 121 targets multi-unit residential properties. Essentially, these bills would amend the land use code to eliminate lawn requirements. However, neither bill prohibits individuals from planting nor maintaining lawns.

HB 115—Water Distribution Efficiency [Rep. Melissa G. Ballard]

House Bill 115 is targeted towards reducing water loss throughout Utah's various water distribution systems with at least 500 connections (and water conservancy districts). The key component requires these entities to ascertain what is an acceptable amount of water loss in their system. Once this annual water loss figure is identified, these entities will need to conduct annual audits and file annual reports outlining the system losses in the past year. If the actual system losses exceed the acceptable losses, the entity will need to adopt a process to remedy the unacceptable loss. Finally, the Division of Water Resources must also post annual summaries of the water loss data.

Senate Bill 31—Water Rights Proofs on Small Amounts of Water [Sen. Scott Sandall & Rep. Joel Ferry]

Senate Bill 31 is an effort to address the reality that many water rights are not being utilized exactly as set forth in their approved water rights. This bill would allow the Division of Water Rights to issue certificates of beneficial use in such cases. There are several criteria for the issuance of such certificates. First, the actual use may not impair the existing right. Second, the actual point of diversion in the proof of beneficial use must be located within 660 feet of approved point of diversion. Third, the actual point of diversion is located on the same parcel as the approved point of diversion. Fourth, the actual place of use must be located in a quarter-quarter section or lot that is adjacent to the authorized place of use. Finally, the actual use of water does not in any way exceed the authorized amount of water.

SB 73—Flow Rates or Quantity for Plumbing Fixtures [Sen. Jani Iwamoto]

Senate Bill 73 is a modification of the residential plumbing code. This bill would require the installation and use of water efficient water fixtures for all new construction in the State. In general, the flow rates and pressure for common fixtures would be limited to more water efficient standards.

Senate Bill 89—Water Amendments [Sen. Jani Iwamoto]

Finally, Senate Bill 89 would amend Utah Code § 73-10-32, which relates to the adoption of water conservation plans by water providers (including water conservancy districts and entities with 500 connections). The bill would require the Division of Water Resources to adopt regional water conversation goals, which must be reevaluated every ten years. The water providers in a specific region must adopt conservation goals that are at least as strict as the

regional plan. These plans would be publicly available. If for any reason a water provider cannot comply with the regional plan a reasonable explanation must be provided.

Conclusion and Implications

Bills and their passage can be a fickle process. It would be difficult to predict the outcome of any of the bills addressed above but it is encouraging to see so many proposed bills addressing natural resources within the state.
(Jonathan Clyde)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS REISSUES AND MODIFIES NEW CLEAN WATER ACT SECTION 404 NATIONWIDE PERMITS

On December 27, 2021, the United States Army Corps of Engineers (Corps) finalized 40 nationwide permits and issued a new nationwide permit for water reclamation and reuse facilities. The 40 newly finalized nationwide permits follow 12 that were reissued and four new nationwide permits that were finalized in January 2021. The nationwide permits will go into effect on February 25, 2022 and all of the current nationwide permits will expire March 14, 2026. [U.S. Army Corps of Engineers, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73,522 (December 27, 2021).]

Factual and Procedural Background

Nationwide permits are general permits under Section 404 of the federal Clean Water Act authorizing placement of dredge or fill material into waters of the United States for recurring types of projects that have only minimal individual and cumulative adverse environmental effects. They also authorize activities that require Corps permits under Section 10 of the Rivers and Harbors Act of 1899, which regulates the placement of any structure in or over a navigable "water of the United States." Section 404(e) of the Clean Water Act authorizes the Corps to issue nationwide or regional general permits for up to five years for activities that are similar in nature and have minimal individual and cumulative adverse environmental effects. The Corps has issued nationwide permits at regular intervals since 1977.

Nationwide Permits expedite permitting and reviews for the projects that they cover by allowing an applicant to avoid the requirement for an individual Section 404 or Section 10 permit and the associated reviews under the National Environmental Policy Act (NEPA). Nationwide permits are used to authorize approximately 70,000 projects in a typical year. The Corps stated that the newly finalized Nationwide Permits support effective implementation of the recently passed bipartisan Infrastructure Investment and Jobs Act by providing infrastructure permit decisions with minimal delay and paperwork.

More on the Army Corps' Recent Actions

The Corps released a proposed rule in September 2020 to reissue the nationwide permits issued in 2017. In January 2021, the Corps published a final rule which reissued 12 nationwide permits, finalized four new nationwide permits, and made some adjustments to the general conditions and definitions for the nationwide permit program.

Reissuance of the 2017 Nationwide Permits

During the process of reissuance, the Corps made a relatively small number of changes to the 2017 permits. One of the most significant changes, which drew criticism from environmental groups, removed a 300-linear-foot limit for losses of streambed from ten nationwide permits that were finalized in January 2021, during the closing days of the Trump administration:

- *Nationwide Permit 21*, Surface Coal Mining; *Nationwide Permit 29*, Residential Developments; *Nationwide Permit 39*, Commercial and Institutional Developments; *Nationwide Permit 40*, Agricultural Activities; *Nationwide Permit 42*, Recreational Facilities; *Nationwide Permit 43*, Stormwater Management Facilities; *Nationwide Permit 44*, Mining Activities; *Nationwide Permit 50*, Underground Coal Mining; *Nationwide Permit 51*, Land Based Renewable Energy Generation Facilities; and *Nationwide Permit 52*, Water-Based Renewable Energy Generation Pilot Projects.

The Corps also took steps to expand three additional 2017 permits:

- *Nationwide Permit 27*, Aquatic restoration, enhancement, and establishment activities: The Corps added "releasing sediment from reservoirs to restore or sustain downstream habitat" and "coral restoration or relocation" to the list of examples of activities authorized by the permit;

•*Nationwide Permit 41*, Reshaping existing drainage ditches: The Corps expanded the nationwide permit to include reshaping of existing irrigation districts;

•*Nationwide Permit 48*, Commercial shellfish mariculture activities: The new permit changes its name from "aquaculture" to "mariculture" to more precisely reflect that it permits activities in coastal waters. It also removes a prior prohibition against new commercial shellfish mariculture activities directly affecting more than 1/2-acre of submerged aquatic vegetation.

New Nationwide Permits Issued in January 2021

In January 2021, the Corps also promulgated four new nationwide permits, described below:

•*Nationwide Permit 55*, Seaweed mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of seaweed mariculture activities and also allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 56*, Finfish mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of finfish mariculture activities. Similar to Nationwide Permit 55, this permit allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 57*, Electric utility line and telecommunications activities: this new permit allows activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States. These activities were previously covered by Nationwide Permit 12, which also permits oil and natural gas pipelines, but which was enjoined from use for a period in 2020 in litigation challenging the Keystone XL pipeline. By creating a separate nationwide permit for electric utility lines and telecommunications lines, the Corps will allow these projects to avoid oil and gas pipeline litigation impacts;

•*Nationwide Permit 58*, Utility lines for water and other non-hydrocarbon substances: this new permit allows activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. The new permit also allows associated utility line facilities, such as substations, access roads, and foundations for above-ground utility lines, in waters of the United States. These activities were previously covered by Nationwide Permit 12. Creating a separate nationwide permit for water utility activities avoids potential impacts from challenges to oil and gas pipelines, and also removes conditions that were focused on other types of pipelines or utilities.

New Nationwide Permit Issued in December 2021

In December 2021, the Corps reissued the remaining 40 nationwide permits and finalized a fifth new nationwide permit:

•*Nationwide Permit 59*, Water reclamation and reuse facilities: this new nationwide permit will help expedite and provide clarity for smaller water recycling, reuse, and groundwater recharge projects. The Corps limited its scope to projects that impact less than one half of an acre of waters, which will preclude its use for medium or large scale water recycling or recharge projects.

In its discussion of the new Nationwide Permit, the Corps cited the climate resilience and conservation benefits of water reclamation and reuse projects:

> Water reclamation and reuse facilities can be an important tool for adapting to the effects of climate change, such as changes in precipitation patterns that may affect water availability in areas of the country. Water reclamation and reuse facilities help conserve water, which may

be beneficial as water availability changes or increases in water demand occur.

In response to comments filed by public water agencies and their representatives, the final rule's preamble includes language stating that the Corps will not consider the source of water when applying nationwide permits to water reclamation or reuse projects. It states:

> For water reclamation and reuse facilities, the Corps regulates discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of those facilities. In general, the Corps does not have the authority to regulate the operation of these facilities after they are constructed, expanded, or maintained through discharges of dredged or fill material into waters of the United States authorized by this nationwide permit. The Corps does not have the authority to regulate releases of water to recharge or replenish groundwater, to regulate the mixing of water from various sources, or to regulate the movement of water between watersheds.

This language clarifies that the Corps does not plan to withhold or condition this new nationwide permit in response to concerns about the water that will be used for the project – such as imported or recycled water.

Conclusion and Implications

The U.S. Army Corps of Engineers' new nationwide permit for water reclamation and reuse projects will expedite groundwater recharge projects that impact less than one-half an acre of waters or wetlands. The new permit and its discussion also demonstrate that the Biden administration views water recharge, reuse, and recycling as important tools for increasing water reliability and adapting to the impacts of climate change. The reissuance of existing nationwide permits provides continuity until March 2026 for a program that expedites permitting for infrastructure and other projects that have minor impacts on waters and wetlands regulated under the Clean Water Act. For more information on the general permits, *see:* https://www.federalregister.gov/documents/2021/12/27/2021-27441/reissuance-and-modification-of-nationwide-permits.
(Lowry Crook, Ana Schwab, Rebecca Andrews)

GREAT LAKES, COASTAL BEACHES, AND CERTAIN COASTAL WATERS FURTHER PROTECTED BY NEW FEDERAL PIPELINE RULE

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) published a new pipeline safety interim final rule (Rule) on December 27, 2021 that increases environmental protections to the Great Lakes, coastal beaches, and certain coastal waters. (86 Fed. Reg. 73173.) The Rule implements mandates from the Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016, as amended by the PIPES Act of 2020. Specifically, the Rule designates the three categories above as "Unusually Sensitive Areas" (USAs) and requires stricter pipeline Integrity Management Programs (IMPs) for nearby hazardous liquid pipelines in order to decrease spills. These more rigorous IMPs will implement measures like increasing standards for inspections, repairs, and safety protocols, as well as analyzing serious threats like corrosion.

Background

PHMSA's pipeline regulations set the safety requirements for pipelines that carry hazardous liquids, including crude oil and carbon dioxide. (49 C.F.R. § 195.) The regulations include enhanced requirements for pipelines in High Consequence Areas (HCAs) or in areas where a release could impact an HCA. Specifically, pipelines in or affecting HCAs are required to implement an IMP. HCAs are defined to include commercially navigable waterways, high population areas, other populated areas, and USAs. USAs were further defined as USA drinking water resources and USA ecological resources.

In the PIPES Act of 2016, Congress ordered PHMSA to include the Great Lakes, coastal beaches, and certain coastal waters as USAs. In the PIPES Act of 2020:

> Congress clarified that 'certain coastal waters' means the territorial sea of the United States, the Great Lakes, and marine and estuarine waters up to the head of tidal influence.

The Interim Final Rule Defining Unusually Sensitive Areas

In the December 27, 2021 interim final rule (IFR), PHMSA adopts the new USA definition as ordered by Congress in the PIPES Act of 2020. Thus, operators of hazardous liquid pipelines located in areas where a release may impact a territorial sea of the United States, the Great Lakes, and marine coastal estuaries must adopt an IMP. In addition, operators of onshore hazardous liquid pipelines submerged more than 150 feet below the surface of water that could affect an HCA must also comply with the more stringent requirements for submerged pipelines. Overall, an estimated 2,905 additional miles of hazardous liquid pipelines, largely in states along the Gulf of Mexico, will be covered under the Rule:

> This estimate reflects segments located within 1/4 mile of any of the newly defined USAs but are not located within 1/4 mile of the location of existing HCAs. . . . Based on this analysis, PHMSA anticipates that most affected operators have an existing IM program and will be able to extend that plan to include the newly covered segments. (86 Fed. Reg. 73181.)

Hazardous liquid IMP requirements work to lower the risks if a pipeline spill were to occur where it would have significant consequences. The ramifications of a pipeline spill can be extremely serious, as:

> . . .[a]ny release of petroleum, petroleum products, or other hazardous liquids can adversely affect human health and safety, threaten wildlife and habitats, impede commercial navigation, or damage personal or commercial property. Spills into bodies of water present increased risk because the water and water currents act as conveyances to increase the spread of the spill. . . . Major oil spills within the Great Lakes, shorelines, or coastal waters would have extreme, negative, and persistent impacts on shoreline ecology, benthic communities at the base of the ecosystem, fisheries, human health, and the economy of coastal communities. (86 Fed. Reg. 73177.).

"The Great Lakes are more than an economic engine and ecological treasure for Michigan—they provide drinking water for over 40 million people and are simply part of who we are as Michiganders," said Michigan Senator Gary Peters, a member of the Senate Commerce, Science, and Transportation Committee:

> We know a pipeline spill in the Great Lakes would be catastrophic. That's why I applaud PHMSA for formally implementing my provision subjecting the Great Lakes to higher standards for pipeline operators.

The comment period for the Rule ends on February 25, 2022, which is also its effective date. An IFR, such as this one, is a rule published without first receiving public comment, upon an agency finding cause to issue a final regulation:

> The Administrative Procedure Act (APA, 5 U.S.C. 551 *et seq.*) permits an agency to issue a final rule without first publishing a proposed rule for public comment when it demonstrates 'good cause' that notice and comment is 'impracticable, unnecessary, or contrary to the public interest.' 5 U.S.C. 552 (b)(3)(B). This exception is narrow, and PHMSA [proceeded] with an IFR only in light of the specific instructions from Congress in the PIPES Act of 2020 that render comment both unnecessary and impracticable. (86 Fed. Reg. 73176.)

While the Rule states the number of disasters it will prevent is unknowable, it lists past spills in the areas meant to be protected by the Rule, including a 2018 anchor strike that dented Enbridge Energy's Line 5 pipeline in Michigan.

Conclusion and Implications

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration's Rule that increases environmental protections to the Great Lakes, coastal beaches, and marine coastal waters recognizes the potential impacts that the release of a hazardous liquid could cause in such high consequence environments. "The Great Lakes and our coastal waters are natural treasures that deserve our most stringent protections," said Tristan Brown, the PHMSA Deputy Administrator. "This rule strengthens and expands pipeline safety efforts in these sensitive areas." The stricter pipeline IMPs to nearby hazardous liquid pipelines required by the Rule will assist to decrease spills in a variety of ways. While the estimated 2,905 additional miles of hazardous liquid pipelines affected by this Rule is not a small change, it appears that most affected operators already implement IMPs and should be able to extend these programs to the newly affected lines.

Although many are excited by the Rule's environmental potential, it may be cause for concern for corporations that operate pipelines effected by the Rule, like Enbridge Energy, a Canadian company. Enbridge Energy's Line 5 pipeline transports roughly 23 million gallons a day of crude oil and natural gas liquids between Wisconsin and Ontario. Line 5 is effected by the Rule and Enbridge states its goal is to protect the Great Lakes while also safely delivering energy to the region, and the pipeline's integrity management program meets the new requirements put in place by the Rule. Line 5 is also the subject of a lengthy legal battle in which a Michigan lawsuit currently seeks to shut down the pipeline. While corporations like Enbridge may find this Rule to be an obstacle, and some environmentalists find there is still a fight to be had in this pipeline arena, overall, the Rule is an additional step to ensure the protection of the Great Lakes, coastal beaches, and marine coastal waters. (Megan Unger, Darrin Gambelin)

CALIFORNIA STATE WATER BOARD AND DWR RELEASE REPORT OUTLINING NEW GROUNDWATER MANAGEMENT PRINCIPLES AND STRATEGIES FOR DRINKING WATER

The California Department of Water Resources (DWR), in coordination with the State Water Resources Control Board (SWRCB), recently released a plan (Plan) detailing new management principles and strategies for state action in supporting communities and individuals that depend on groundwater wells for drinking water.

Background

As California continues to grapple with frequent and intensifying droughts, groundwater becomes ever more important to supplement less-predictable supplies from precipitation, snowpack, and other surface water. The Plan reports that in some areas, domestic and community drinking water wells are particularly at risk of going dry during droughts due to overdraft and because many domestic wells tend to be relatively shallow. The Plan estimates that during the 2012 to 2016 drought, more than 3,500 domestic wells went dry, and that another 900 wells were similarly impacted from January to October 2021. The management principles published by the State of California in the Plan are intended to increase water supply reliability for those dependent on groundwater for domestic uses.

Groundwater Management Principles and Strategies

The state's Plan is organized into six overall principles, each of which is supported by several specific strategies. The principles are: 1) achieve drinking water resilience; 2) integrate principles of equity; 3) address underlying challenges; 4) lead with the best available data; 5) build trusted relationships; and, 6) implement lasting solutions.

Principle 1: Drinking Water Resilience

The first principle is focused on pre-drought planning and preparedness and post-drought emergency response. This principle focuses on coordination

with other agencies, from federal emergency response agencies, to counties and water systems developing drought contingency plans, to local and regional agencies, tribes, and non-governmental organizations (NGOs) that engage directly with drinking water well users. Another focus is implementing the Sustainable Groundwater Management Act (SGMA) in a way that helps minimize the impacts of future droughts on drinking water well users. The Plan calls for establishing a standing inter-agency task force to lead a proactive approach to implement this principle.

Principle 2: Equity

According to the Plan, the state recognizes that integrating principles of "equity" in drinking water management must be both practical in providing access to drought assistance, and procedural in maximizing participation in drought-related planning processes to inform positive outcomes. The strategies to implement this principle include outreach, education, and translation goals; guidance to consider impacts on water users before "red-tagging" homes for water quality or quantity issues; flexibility for groundwater trading; application of the "polluter pays" principle, to the extent possible and appropriate, so that the costs of solutions to benefit domestic well users are not borne by those users but by those who caused the issues; and aligning various state and local funding sources to maximize support for domestic well users.

Principle 3: Address Underlying Challenges

This principle provides guidance related to a wide range of matters that could potentially impact drinking water well users, including: best practices in well permitting; crop conversion, farming and land practices; energy impacts of time-of-use pumping practices; and local and regional land use planning. It also encourages counties to regulate and enforce efficient and appropriate water use during droughts. This principle further addresses certain financial impacts on domestic well users, and aims to improve contracting and procurement processes related to repair and rehabilitation of wells as well as providing assistance for capacity building where there are economic impacts on communities or domestic well users related to changes in groundwater conditions.

Principle 4: Best Available Data

To improve the "best available" data, the state focuses on improving both the data collected and access to that data. The state plans to improve its own monitoring of groundwater level, subsidence, and water quality; encourage others to increase their frequency of monitoring; promote metering of wells and collection of evapotranspiration data to capture groundwater use; and encourage Groundwater Sustainability Agencies (GSAs) and counties to collect data from drinking water well users. The state also plans to develop an information management system and to increase access to existing data platforms most relevant to drinking water well users, as well as working with local entities to publicly disclose well and water quality information, including during real estate transfers.

Principle 5: Relationship Building

The state recognizes benefits of effective coordination, communication, and decision-making and the free flow of knowledge and skills between groups. The state plans to engage drinking water well users in the development of solutions in the local communities, and, in turn, the state plans to offer training resources on testing water quantity and quality and to help connect users with local emergency services for drought response. The state also plans to engage government-to-government with Tribes and with the federal Indian Health Services to develop drought preparedness and response plans and assist drinking water well users.

Principle 6: Lasting Solutions

The final principle in the Plan is based on a recognition that no single solution will address every drinking water well challenge and that to be lasting, solutions need to be specific, effective, and supported with local engagement. The state proposes using funding incentives to encourage mitigation of water quality issues; encouraging regionalization and consolidation of drinking water systems; piloting alternative water supply projects, such as source cleanup or recycled water; and incentivizing recharge projects, among other things. The state also plans to report on progress made under existing regulatory state and federal water quality management programs.

Conclusion and Implications

The principles and strategies outlined in the Plan encompass a wide variety of action items, require coordination with a number of agencies beyond DWR and SWRCB, and build on a number of existing programs. As a result, they may impact water users beyond those dependent on drinking water wells. The Plan's principles and strategies will be further developed and implemented in the coming months and years. For the complete Plan document, including an implementation matrix, *see:* https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/DrinkingWater/Files/Final-Principles-and-Strategies-with-the-Implementation-Matrix.pdf.
(Jaclyn Kawagoe, Derek Hoffman)

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

•December 21, 2021 - The United States and Commonwealth of Pennsylvania, Department of Environmental Protection (DEP), filed a civil lawsuit against the Bucks County Water and Sewer Authority (Authority), alleging violations of the federal Clean Water Act and Pennsylvania Clean Steams Law. The violations primarily consist of sanitary sewer overflows—typically in the form of wastewater overflowing from manholes—and operation and maintenance violations under its state-issued permits. At the same time the civil suit was filed, the United States and Commonwealth of Pennsylvania also filed a proposed consent decree that would resolve the lawsuit subject to the district court's approval. The Authority will pay a $450,000 penalty and will be obligated to devote substantial resources to evaluate and upgrade its sewer systems as part of the decree. The Authority owns and operates hundreds of miles of sewer pipes and associated treatment plants and wastewater collection and conveyance systems, largely situated in Bucks County. The Authority's service areas have historically suffered from sanitary sewer overflows, including over 100 that have occurred in Plumstead Township since 2014. In that timeframe, multiple overflows have also occurred in Bensalem, Richland, Doylestown Borough, Middletown, Upper Dublin and New Hope/Solebury. Along with the financial penalty, the Authority has agreed to evaluate its collection system and adopt extensive measures to ensure compliance with the federal and state requirements. These include monitoring water flow; modelling the collection system; conducting inflow and infiltration evaluations; identifying and remedying hydraulic capacity limitations; addressing illegal sewer connections; and improving its overall operation and maintenance program.

•December 28, 2021 - EPA has issued three emergency orders under the Safe Drinking Water Act to different mobile home park public water systems located on the Torres Martinez Desert Cahuilla Indian Tribe's Reservation in California. The orders require the owners of Mora Mobile Home Park, Valladares Mobile Home Park, and Toledo Mobile Home Park to comply with federal drinking water requirements and to identify and correct problems with their drinking water systems that present a danger to residents. Under the terms of the agency's emergency orders, the owners of the Mora Mobile Home Park, Valladares Mobile Home Park, and Toledo Mobile Home Park water systems are required to: 1) Inform all residents of EPA's sampling that identified high levels of arsenic in the systems' drinking water and instruct all residents to immediately stop consuming the drinking water; 2) Provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; 3) Submit a long-term compliance plan for EPA approval; and 4) Properly monitor the systems' water and report findings to the EPA.

•January 6, 2022—EPA announced that Gardner-Gibson, Inc. has paid a $650,000 penalty to resolve violations of the federal Clean Water Act related to the release of 60,000 gallons of hot, liquid asphalt from its Gardner-Fields, Inc. facility in Tacoma. Washington. EPA cited the company for the release of petroleum products and for significant violations of the Clean Water Act's Spill Prevention, Control, and Countermeasures requirements discovered during follow-up inspections at the facility. The $650,000 penalty was deposited into the Oil Spill Liability Trust Fund, a fund used by federal agencies to respond to discharges of oil and hazardous substances. The requirements apply to all facilities where a potential

spill could reach waters of the United States and that maintain above-ground oil storage capacity of greater than 1,320 gallons of oil or total below-ground storage capacity of greater than 42,000 gallons of oil. When EPA inspected the facility, total storage capacity was 4,234,275 gallons.

•January 12, 2022 - West Penn Power of Greensburg, Pennsylvania will pay a $610,000 penalty under a settlement to resolve water discharge violations at two coal ash impoundment landfills in southwestern Pennsylvania. According to the settlement, West Penn Power exceeded boron limits in discharges from the Mingo Landfill in Union Township, Washington County, and Springdale Landfill in Frazer Township, Allegheny County. Along with the penalty, the consent decree with EPA and PADEP requires West Penn Power to construct new gravity pipelines to new outfall locations in a new receiving waters for each landfill (Peters Creek for the Mingo pipeline and the Allegheny River for the Springdale pipeline). West Penn will also be required to collect data on instream boron levels in Peters Creek. The settlement addresses alleged violations of the federal Clean Water Act and Pennsylvania Clean Streams Law that threaten to degrade receiving streams, impact public health, and harm aquatic life.

•January 18, 2022—EPA is recognizing Lebanon, New Hampshire for completely eliminating all of its Combined Sewer Overflow (CSO) outfalls, therefore eliminating the need for the Consent Decree established between EPA and the City in 2009. CSO outfalls discharge a combination of wastewater and stormwater to nearby surface waters when the combined sewer system does not have the capacity to transmit all the flow of wastewater and stormwater to the treatment plant. On November 19, 2021, the U.S. District Court for the District of New Hampshire terminated the Consent Decree between the United States, the State of New Hampshire, and the City of Lebanon because the City satisfied the prerequisites for termination by eliminating all its CSO outfalls.

•January 19, 2022—EPA and Barber Valley Development, Inc. have settled a case the agency brought after the company illegally discharged sand, gravel, and rocks into wetlands adjacent to Council Spring Creek in Boise. In EPA orders issued in May and June 2021, EPA alleged the company failed to apply to the U.S. Army Corps of Engineers for a Clean Water Act permit for flood control work it was conducting on a transmission line corridor owned by Idaho Power. Council Spring Creek and its wetlands are connected to and provide flows to the Boise River. Barber Valley agreed to remove the unauthorized fill material, restore the site, and enhance important forested wetland habitat adjacent to the Boise River and Alta Harris Creek, and to pay a $7500 penalty. This work will support diverse and abundant wildlife, such as raptors, small mammals, deer, coyote, elk, and possibly the endangered yellow-billed cuckoo which may use the Snake River Valley for breeding purposes. The restoration work at the site and at the forested wetland will be completed by December 2022.

Indictments, Sanctions, and Sentencing

•December 22, 2021 - Taylor Energy Company LLC (Taylor Energy), a Louisiana oil and gas company, has agreed to turn over all its remaining assets to the United States upon liquidation to resolve its liability for the oil spill at its former Gulf of Mexico offshore oil production facility—the source of the longest-running oil spill in U.S. history, ongoing since 2004. Under the proposed consent decree, Taylor Energy will transfer to the Department of the Interior (DOI) a $432 million trust fund dedicated to plugging the subsea oil wells, permanently decommissioning the facility, and remediating contaminated soil. The consent decree further requires Taylor Energy to pay over $43 million for civil penalties, removal costs and natural resource damages (NRD). The State of Louisiana is a co-trustee for natural resources impacted by the spill and the NRD money is a joint recovery by the federal and state trustees. Under the settlement, Taylor Energy will pay over $43 million—all of the company's available remaining assets—allocated as follows: $15 million as a civil penalty, $16.5 million for NRD, and over $12 million for Coast Guard removal costs. Likewise, Taylor Energy may not interfere in any way with the Coast Guard's oil containment and removal actions. Taylor Energy will turn over to DOI and the Coast Guard all documents (including data, studies, reports, etc.) relating to the site to assist in the decommissioning and response efforts. The settlement also requires the company to dismiss three lawsuits it filed against

the United States, including two cases in the Eastern District of Louisiana.

•January 11, 2022 - Princess Cruise Lines Ltd. (Princess) has pleaded guilty to a second violation of probation imposed as a result of its 2017 criminal conviction for environmental crimes because it failed to establish and maintain an independent internal investigative office. Under the terms of a plea agreement, Princess was ordered to pay an additional $1 million criminal fine and required to undertake remedial measures to ensure that it and its parent Carnival Cruise Lines & plc establish and maintain the independent internal investigative office known as the Incident Analysis Group (IAG). Princess was convicted and sentenced in April 2017 and fined $40 million after pleading guilty to felony charges stemming from its deliberate dumping of oil-contaminated waste from one of its vessels and intentional acts to cover it up. Beginning with the first year of probation, there have been repeated findings that the Company's internal investigation program was and is inadequate. In November 2021, the Office of Probation issued a petition to revoke probation after adverse findings by the CAM and TPA. Failure to meet deadlines in the plea agreement will initially subject the defendant to fines of $100,000 per day, and $500,000 per day after ten days.
(Andre Monette)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT GRANTS CLEAN WATER ACT PETITION FOR REVIEW AND REMANDS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

Food & Water Watch v. U.S. Environmental Protection Agency, 20 F.4th 506 (9th Cir. 2021).

The U.S. Court of Appeals for the Ninth Circuit recently granted a petition to review a National Pollutant Discharge Elimination System (NPDES) permit (Permit) issued by the U.S. Environmental Protection Agency (EPA) to govern Concentrated Animal Feeding Operations (CAFOs) in Idaho under the federal Clean Water Act (CWA). The Court of Appeals determined the Permit was arbitrary, capricious, and in violation of the law, and remanded the Permit to the EPA.

Factual and Procedural Background

On May 13, 2020, EPA issued a general NPDES permit for CAFOs in Idaho, with an effective date of June 15, 2020. The Permit was based on findings that improper management of CAFO waste had resulted in serious water quality issues in Idaho. The Permit prohibited discharges from production areas unless they were designed, constructed, operated and maintained to contain all manure, litter, process wastewater and the runoff and direct precipitation from the 25-year, 24-hour storm event for the location of the CAFO. It required CAFOs to perform daily inspections of the production areas. The Permit also prohibited all discharges from land application areas during dry weather. Dry weather discharges from land application areas were known to occur during irrigation of fertilized CAFO fields. The Permit, however, contained no monitoring provisions for dry weather discharges from land-application areas.

Petitioners Food & Water Watch and Snake River Waterkeeper argued that issuance of the Permit was arbitrary, capricious, and in violation of the law because it did not require monitoring that would ensure detection of unpermitted discharges, and thus lacked sufficient monitoring provisions necessary to ensure compliance with its discharge limitations. EPA argued the monitoring provisions were sufficient, and that the petition was untimely.

The Court of Appeals' Decision

Timeliness

The court first considered and rejected EPA's argument that the petition was untimely. EPA argued the petition was untimely because the Permit and incorporated existing regulations adopted in 2003, and thus the petition needed to be brought within 120 days of that rule's issuance. The court disagreed, holding that the petitioners were challenging the monitoring requirements of the Permit itself, and not any provision of the 2003 rule. The petition was determined to be timely.

Production Areas

The court next considered whether the Permit contained sufficient monitoring provisions for discharges from production areas. Permits must assure compliance with permit limitations by including requirements to monitor the:

> . . .mass (or other measurement specified in the permit) for each pollutant limited in the permit, the volume of effluent discharged from each outfall, and other measurements as appropriate.

EPA argued the Permit contained sufficient monitoring requirements to ensure compliance, and that the court must defer to its expertise.

The court reasoned that the Permit's inspections requirements were sufficient to ensure compliance with the limitation on above-ground discharges from production areas. However, the court found that the Permit contained no monitoring provisions for underground discharges from production areas, despite the record before the EPA showing that leaky containment structures are sources of groundwater pollution and groundwater flow from agriculture is a primary

contributor of nitrate in surface water. The court noted that the EPA had rejected a proposal to include a requirement to monitor underground discharges in the 2003 rule because it believed that site-specific variables meant that requirements in local permits, rather than uniform national requirements, were the best means to address underground discharges. The court concluded there was no way to ensure that production areas complied with the Permit's prohibition on underground discharges because the Permit failed to include a requirement that CAFOs monitor waste containment structures for underground discharges. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they were in compliance with the Permit.

Land-Application Areas

Finally, the court considered whether the Permit contained sufficient monitoring provisions for land application areas. The record before EPA showed that such discharges can occur during irrigation of fertilized CAFO fields. The court noted that the Permit assumed irrigation-produced runoff of pollutants would never occur from land application areas because the Permit required CAFOs to implement a nutrient management plan providing for the application of manure, litter, and process wastewater at agronomic rates. The court found that the record did not support this assumption, and concluded that, without monitoring, there was no way to ensure a CAFO complied with the Permit's dry weather zero-discharge requirement for land application areas. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they are in compliance with the Permit.

Conclusion and Implications

The Ninth Circuit Court of Appeals granted the petition and remanded the Permit to the EPA for further proceedings, holding that the issuance of the Permit was arbitrary, capricious, and a violation of law because the Permit did not require monitoring of underground discharges from production areas and dry weather discharges from land-application areas that would ensure compliance with its effluent limitations. This case demonstrates that NPDES permits must contain monitoring provisions sufficient to ensure compliance with their terms. Where a permit contains no requirements to monitor discharges expressly prohibited by the permit, and the record before the EPA shows that such discharges occur and cause pollutants to enter waters of the United States, the issuance of the permit will likely be found to be arbitrary, capricious, and in violation of law. The court's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/12/16/20-71554.pdf. (David Lloyd, Rebecca Andrews)

FIRST DISTRICT COURT FINDS CEQA DOES NOT APPLY TO STATE WATER BOARD REVIEW OF SMALL DOMESTIC WATER USE PERMITS

Mission Peak Conservancy v. State Water Resources Control Board, 72 Cal.App.5th 873 (1st Dist. 2021).

Mission Peak Conservancy *et al.* (collectively: Mission Peak) brought suit against the State Water Resources Control Board (SWRCB), in Alameda County Superior Court alleging that the SWRCB violated the California Environmental Quality Act (CEQA) by granting a small domestic water use registration without first conducting an environmental review. The SWRCB demurred to Mission Peak's complaint. The trial court sustained the demurrer holding that the SWRCB's registration process for small domestic water use permits is ministerial and thus exempt from CEQA. The First District Court of Appeal affirmed the trial court decision.

Background

CEQA (Pub. Resources Code, § 21000 *et seq.*) requires public agencies to consider the environmental consequences of their actions which often includes the preparation of an Environmental Impact Report (EIR). However, CEQA only applies to "discretionary" projects and not "ministerial" projects. A project is discretionary when an agency is required to exercise

judgment or deliberation in deciding whether to approve an activity. In contrast, a project is ministerial when it involves little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. Like a checklist, the public official applies standards to the facts as presented. The theory behind exempting ministerial projects is that review of the ministerial project's environmental impacts would be useless because the public agency has no discretion to reduce the project's environmental damage by requiring changes.

The Process for Obtaining a Small Domestic Water Use Permit

The process for acquiring a right to appropriate small amounts of water for domestic use is set forth in the California Water Rights Permitting Reform Act of 1988 (Act), Wat. Code §§ 1228-1229.11. Under the Act, a person may divert up to ten acre-feet of water per year from a stream into a storage facility, such as a pond or tank. The process requires a diverter to register the use with the SWRCB, pay a specific fee, and subsequently put the water to reasonable and beneficial use.

As a part of the SWRCB's registration process, the registrant must provide information regarding its water use to the California Department of Fish and Wildlife (CDFW) and comply with conditions that may be imposed by CDFW. Importantly, CDFW's review is performed before SWRCB's registration process is completed. SWRCB must accept any conditions set by CDFW.

SWRCB applies a set of fixed criteria to determine whether a registration is compliant. The criteria include items such as: 1) completing a registration form containing the required information; 2) the stream from which water will be appropriated must not already be fully appropriated; 3) confirming CDFW has been notified and given an opportunity to impose conditions; and 4) confirming the specified fee has been paid.

Completing the registration process allows the registrant to take and use the amount of water stated on the registration form with a priority date as of the date of the completed registration. Once registered, the right remains in effect unless forfeited or revoked under specified circumstances.

The Court of Appeal's Decision

Upon reviewing SWRCB's permitting process, the Court of Appeal found that the registration process is ministerial because the SWRCB has no discretion to require changes that would lessen environmental effects of the registrant's use. Rather, the SWRCB process of applying what is essentially a checklist of fixed criteria requires no exercise of judgment or deliberation. As such, the court found the process exempt from CEQA requirements.

Mission Peak's Arguments

The Court of Appeal rejected Mission Peak's primary argument that CEQA applies to the SWRCB's permitting process because CDFW has discretion to impose conditions that could ameliorate the project's environmental impacts. Despite this fact, the court observed that the SWRCB has no authority to modify or shape the conditions imposed by CDFW, and that CDFW's discretion cannot be imputed to SWRCB.

Mission Peak also argued that because the registration contained incorrect statements about the size of the pond and other features involved in the water diversion, SWRCB had discretion, "in a colloquial sense," to deny the project or require changes to meet the permit's requirements. However, the court found that the SWRCB still did not satisfy the test for CEQA's application by having legal authority to impose environmentally beneficial changes as conditions on the project.

Lastly, Mission Peak argued that the SWRCB's approval of the permit in question violated CEQA because the SWRCB misapplied its own fixed criteria and the project did not meet the actual requirements for a small domestic use of water. The court rejected this argument finding that an erroneous ministerial decision is not a basis for a CEQA claim. The court emphasized:

> CEQA does not regulate ministerial decisions–full stop even if those ministerial decisions are erroneous and reflect a misapplication of the fixed criteria to the facts.

Conclusion and Implications

Ultimately, the First District Court of Appeal determined that the permitting process for obtaining

a small domestic water use permit from the SWRCB does not require the SWRCB to comply with CEQA. The issues raised in the case regarding CDFW's review of proposed small domestic uses and its ability to exercise discretion in imposing conditions suggests this case could potentially pave the road for future litigation examining whether CDFW's review might be separately subject to CEQA. The court's opinion[s] are available online at: https://www.courts.ca.gov/opinions/documents/A162564.PDF; and at https://www.courts.ca.gov/opinions/documents/A162564M.PDF.
(Byrin Romney, Derek Hoffman)

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