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CALIFORNIA WATER™
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CALIFORNIA WATER NEWS

POTTER VALLEY HYDROELECTRIC PROJECT FUTURE IN LIMBO IN WAKE OF PG&E ANNOUNCEMENT TO BRING PROJECT BACK TO FULLY OPERATIONAL STATUS

Over the last few years, Pacific Gas and Electric Co. (PG&E) has been looking to offload the Potter Valley Project, located along the Eel River, due to its high cost of operation and relatively low yield. In a recent turn of events, however, PG&E announced that it will be moving forward with plans to bring the Potter Valley Project back to fully operational status, and has done so just one month before the Project's Federal Energy Regulatory Commission (FERC) license is set to expire.

The Two-Basin Takeover

When PG&E initially decided to withdraw its application to relicense the Project back in 2019, the Two Basin Partnership was formed in the hopes of taking over the Project and reworking it in an environmentally and economically sound manner. The Partnership, made up of five local entities including Sonoma County Water Agency, Mendocino County Inland Water & Power Commission, Humboldt County, the Round Valley Indians Tribes, and California Trout, filed a proposal to acquire the Project in May 2020 with the intent to remove the Scott Dam and restore fish passage to hundreds of miles of historical habitat.

In September 2021, the Partnership requested an application extension for the FERC relicensing deadline to provide additional time to work out a water plan and to develop strategies for dam removal and restoration of the Eel and Russian river basins but the extension was denied. Although the Partnership continued to work towards a solution for the takeover of the Project, in early March the Partnership announced that it would be halting its effort to renew the license for the Project. According to its members, the Two-Basin Partnership was unable to come close to raising the estimated $12-18 million needed to conduct the studies required by various regulatory agencies and to file for re-licensing.

The Future of the Project

With neither PG&E nor the Two-Basin Partnership willing and/or able to submit an application to have the Project relicensed, the current FERC license is set to expire on April 14, 2022.

When the license expires, FERC will issue PG&E an annual license and PG&E will continue to own and operate the Potter Valley Project under the existing license conditions until FERC either authorizes a transfer of the project to a new licensee "consistent with the current relicensing effort underway by the (notice of intent) parties" or issues a final license surrender and decommissioning order. In the meantime, PG&E's announcement that it would restore the Project back to fully operational status gives at least some indication as to the Project's future.

The Potter Valley powerhouse has been offline since July 2021 when PG&E discovered a blown transformer during a routine inspection. Complicating matters regarding the necessary repairs is PG&E's characterization of the Project, noting that it has been "non-economic" for years. In fact, this reasoning was a major factor for the company in its initial decision to bow out of the ongoing operational and maintenance costs. Despite this characterization, PG&E reportedly conducted an evaluation of whether to replace the transformer and concluded that it would be beneficial to proceed with the work necessary to return the powerhouse to full operational status and added that repairs could be completed in the next couple of years. PG&E is estimating that it will be able to recoup the costs of the repair within five years, during which time the company plans to continue operating under annual licenses from FERC.

Conclusion and Implications

The Potter Valley Project serves as a significant water supply source for Mendocino and Sonoma counties water users. The Project's current FERC license requires PG&E to deliver approximately 58,000

acre-feet of water to the East Branch Russian River in a normal water year, and approximately 45,000 acre-feet in a dry water year which will continue consistent with license requirements. Since 2007, PG&E has also diverted an annual average of approximately 12,000 acre-feet of so-called "discretionary" water for electric generation to the Russian River when conditions at Lake Pillsbury allow. In total, this water averages about 30 percent of the 235,000 acre-feet that flows into Lake Mendocino annually.

So, while PG&E will like continue its operations of the Project business-as-usual for the time being, a permanent solution balancing the environmental needs of the Eel River and the water needs of Mendocino and Sonoma counties water users is still needed. Despite the Two-Basin Partnership's inability to raise sufficient funding in time for the relicensing deadline, the coalition has not expressed that it would be giving up on the endeavor entirely. If anything, the current indication is that the Partnership will continue to assess its options moving forward. Just looking back at this very same Project, PG&E operated under annual licenses for eleven years during the previous relicensing process, so the group will likely have plenty time to address any issues it still has. Even still, the future of the Potter Valley Project is very much uncertain, and only time will tell whether the Two-Basin Partnership will be able to continue its efforts with any success.
(Wesley A. Miliband & Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION DECLARES CVP INITIAL 2022 ALLOCATION OF ZERO PERCENT FOR IRRIGATION—DWR REDUCES SWP ALLOCATIONS REDUCED TO FIVE PERCENT

In response to an historically dry end to the winter season and a seemingly unrelenting lack of precipitation, the U.S. Bureau of Reclamation (Bureau) recently announced initial allocations of zero percent for Central Valley Project (CVP) contractors for irrigation, and the California Department of Water Resources (DWR) slashed initial State Water Project (SWP) allocations from 15 percent down to 5 percent.

Background

California's precipitation and runoff tend to be concentrated during the winter months and in the north of the state, while much of the water use and need, particularly for agriculture, occurs during the summer and in the central and southern portion of the State. The federal Central Valley Project and California State Water Project are large water infrastructure systems that were designed to store and transport water to mitigate this mismatch between supply and demand. CVP and SWP water is delivered to water agencies who have longstanding contracts for a certain volume of water each year. Due to variability of annual water supply, only a percentage of the contracted allocation amounts is typically delivered each year. Initial allocations are calculated based upon the amount of precipitation in the wet first half of the water year, which begins October 1.

Record Low Precipitation in January and February 2022

January and February of 2022 saw the lowest precipitation on record in California. This was particularly concerning as it affected many of the typically wetter northern parts of the state. Despite strong precipitation in December 2021, the shortfall in January and February 2022— normally the wettest months of the year—bodes ill for the remainder of this water year, indicating that California is currently-headed for a third consecutive year of drought. As of this writing, precipitation in March was insufficient to make up for the dry start to 2022 or to bring rainfall and snowpack back to normal levels.

Central Valley Project Initial Allocations

The CVP, which is managed by the Bureau, announced its initial allocations on February 23, 2022. In addition to the low precipitation in early 2022, The Bureau noted that the December storms did not fall evenly across headwater areas and that Lake Shasta, a major CVP reservoir, received only minimal recharge from December precipitation. Furthermore, CVP reservoirs were already low at the start of the water year due to a dry 2021.

Consequently, the Bureau has announced that CVP 2022 initial allocations for irrigation contractors both north-of-Delta and south-of-Delta are zero percent of contracted supplies. Municipal and industrial (M&I) contractors north-of-Delta serviced from the Sacramento River will receive only water for public health and safety, while M&I contractors serviced directly from the Delta and those south-of-Delta will receive 25 percent. Friant Division contractors are allocated 15 percent of their Class 1 supply and zero percent of their Class 2 supply.

State Water Project Allocations Slashed

In December 2021, the California Department of Water Resources (DWR) announced an initial SWP allocation for health and safety water only, with no further deliveries, marking the first-ever SWP zero percent initial allocation. Previously, the lowest initial allocations were 5 percent in 2010 and 2014. After December rainfall, SWP allocations were raised to 15 percent; but, on March 18th, following the dry December and January, DWR slashed allocations to just 5 percent for almost all contractors. Following an analysis of precipitation through March, SWP allocations may be adjusted again. DWR typically announces its final allocations in April or May.

Conclusion and Implications

The extremely low Central Valley Project and State Water Project allocations will, of course, present challenges for California water users who rely on those supplies. Both entities may still update the percentages in their final allocations, but this currently seems unlikely as the "wet" season is rapidly drawing to a close. Typically, in a low water year, water users would increase groundwater pumping to offset shortage of surface supplies. However, that option has become less reliable, more expensive—or both—in many areas as a result of recently adopted Groundwater Sustainability Plans and related management actions imposed by Groundwater Sustainability Agencies. Consequently, some water users may find themselves increasingly "squeezed" if they are unable to pump enough groundwater to offset the impacts of

FEDERAL ENERGY REGULATORY COMMISSION ISSUES DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE DECOMMISSIONING OF FOUR KLAMATH RIVER DAMS

On February 25, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Environmental Impact Statement (DEIS) evaluating the effects of the surrender, decommissioning, and removal of four dams along the Klamath River in Klamath County in south-central Oregon and Siskiyou County in north-central California. The DEIS analyzes the effects of decommissioning the dams on consumptive water issues, flooding, aquatic biota, revegetation, dewatering, and recreation, among other matters. The DEIS recommends that the parties surrender their license and decommission the dams pursuant to the staff alternative, which includes mitigation measures and state- and federally- mandated conditions.

Background

The Lower Klamath Hydroelectric Project (Project) involves four hydroelectric facilities (dams) located on the Klamath River in Oregon and Northern California. They include J.C. Boyle (Oregon), Copco No. 1 (California), Copco No. 2 (California), and Iron Gate (California). (DEIS at 1-1; *In the Matter of WQC for Klamath River Renewal Corporation Lower Klamath Project License Surrender*, California State Water Resources Control Board WQC 202000408-025 at p. 5.) The Project spans over 390 acres of federal lands and an additional 5.75 acres for transmission line right-of-way. (DEIS at 1-1.) The dams "currently generate approximately 686,000 megawatt-hours (MWh) annually." (*Id.* at ES-xxxi.)

In 2004, PacifiCorp, the owner of the Project, applied to relicense the Project. (DEIS at 1-2.) In response thereto, FERC issued an environmental impact statement, which recommended a new license with considerable mandatory conditions and operation changes. (*Id.* at 12-3.) PacifiCorp concluded that such conditions were cost-prohibitive, and PacifiCorp, FERC, Tribes, and other interested parties began negotiations to decommission the Project. (*Ibid.*)

In 2010, 47 parties reached an initial settlement regarding the Project's license surrender. (DEIS at 1-3.) Six years later, in 2016, PacifiCorp, California, Oregon, the Department of the Interior, the National Marine Fisheries Service (NMFS), the Yurok Tribe, the Karuk Tribe, local governments, irrigators, and conservation and fishing groups, among other parties, reached an amended settlement, the Klamath Hydroelectric Settlement Agreement. (*Ibid*; Klamath River Renewal Corporation, "FERC Releases Draft Environmental Impact Statement for Klamath Dam Removal Project" (Feb. 25, 2022) [River Renewal Corporation Press Release], https://klamathrenewal.org/ferc-releases-draft-environmental-impact-statement-for-klamath-dam-removal-project/)

The Klamath Hydroelectric Settlement Agreement formed the Klamath River Renewal Corporation (River Renewal Corporation), a nonprofit organization, formed to take ownership of the dams. (River Renewal Corporation Press Release.) To this end, FERC approved an application for transfer of the Project from PacifiCorp to River Renewal Corporation, the State of Oregon, and the State of California.

(DEIS at ES-xxx.) And in November 2020, River Renewal Corporation and PacifiCorp submitted an amended application to surrender the Project license and begin deconstruction and decommissioning of the Project. (*Ibid.*) As a result, FERC produced the DEIS in accordance with its obligations under the National Environmental Policy Act of 1969 (NEPA).

Summary of the DEIS

Pursuant to NEPA's requirements, the DEIS analyzes three alternatives: 1) River Renewal Corporation and PacifiCorp's proposed action as set forth in the surrender application; 2) the proposed action with Commission staff modifications; and 3) no action. (DEIS at 2-1.) The DEIS compares the alternatives' effects starting from a baseline of preserving the status quo, i.e., based on existing conditions at the time that the DEIS is developed. The DEIS analyzes the extensive tradeoffs affecting FERC's decision.

The action alternatives both involve the decommissioning and destruction of the dams and connected facilities. (DEIS at 2-1.) The action alternatives' objectives are to "[a]dvance the long-term restoration of the natural fish populations in the Klamath River Basin," improve the long-term water quality conditions, address the conditions causing high disease rates among Klamath River salmonids, and "[r]estore anadromous fish passage to viable habitat." (DEIS at 1-6.) The proposed action includes 16 environmental measure plans, each with various subparts. The more detailed plans pertain to reservoir drawdown and diversion, water quality monitoring and management, and aquatic resources. Under the water quality monitoring and management plan, the parties will have to work with the California State Water Resources Control Board (State Board) and the Oregon Department of Environmental Quality (Oregon DEQ) to address agencies' Water Quality Certifications' (WCQ) requirements and conditions. (*Id.* at 2-3-4.) The most extensive plan is the aquatic resources management plan, which corresponds with the action alternatives' objectives and provides plans for the following aquatic matters: spawning habitat, listed sucker salvage, fish presence monitoring, tributary mainstream connectivity, juvenile salmonid and Pacific Lamprey rescue and relocation, and the hatcheries management and operations. (DEIS at 2-15-16.)

Decommissioning and deconstructing the dams will result in permanent beneficial effects to, among other resources, water right transfers, water quality, and Tribal trust resources, in particular, aquatic and terrestrial resources. (DEIS at ES-lxiii-lxiv.) Most significantly, River Renewal Corporation's proposed alternative will improve aquatic resource habitat for the federally protected coho salmon, chinook salmon, steelhead, and Pacific lamprey, although the deconstruction also will result in short-term, significant, and unavoidable adverse effects. (DEIS at ES-lix-lx.) In addition, although the deconstruction of the hydropower facilities will result in a loss of renewable hydropower, PacifiCorp will offset the negative effects through a:

> . . .power mix at a rate that more than covers the loss from the baseline condition to comply with the California Renewable Portfolio Standard. (DEIS at ES-lxvii.)

The Modified Action

FERC recommends that River Renewal Corporation and PacifiCorp implement the modified action. The modified action includes all of the proposed action's mitigation measures and plans, as well as the conditions set forth in California Water Board's and the Oregon DEQ's WQCs, and NMFS' and U.S. Fish and Wildlife Service's (FWS) [Biological Opinions'] (BiOps) requirements. (*Id.* at ES-xxxv.) The staff modifications prohibit any surface disturbance until the relevant parties complete all "consultations, final management plans, delineations, pre-drawdown mitigation measures, agreements, and wetland delineations." (DEIS at ES-xxxv.) The modifications also require that River Renewal Corporation: 1) adopt specified measures to minimize effects of deconstruction activities on air quality and purchase carbon offsets; 2) create measures in the California Slope Stability Monitoring Plan for the repair and replacement of structural damage to private properties abutting Copco No. 1 Reservoir, 3) develop measures for its translocation of freshwater mussels; 4) create an eagle conservation plan; 5) add criteria in its Terrestrial Wildlife Management Plans for "potential removal of structures containing bats between April 16 and August 31"; 6) prepare a supplemented Historic Properties Management Plan "to incorporate the pre- and post-drawdown requirements for cultural resources inspections, surveys, evaluations, mitigation, and management"; and 7) modify its Fire Man-

agement Plan, in coordination with the California Department of Forestry and Fire Protection, Oregon Department of Forestry, and the Fire Safe Council of Siskiyou County, to address issues raised by stakeholders. (DEIS at ES-xxxv-xxxvii.)

The No Action Alternative

The no action alternative, were FERC to adopt it and if PacifiCorp or River Renewal Corporation intended to continue hydropower generation, would require proceeding with relicensing the Project. (DEIS at ES-xxxviii, 2-1.) Until relicensing proceedings finished, operations would continue with no changes. (*Id.* at ES-xxxviii.) Thus, the existing conditions would persist. However, the existing conditions and continued operation of the facilities would result in long-term, significant, adverse effects to, inter alia: 1) sediment transport; 2) special status plan species; and 3) threatened and endangered species. (*Id.* at ES-x1ii-iii.) For example:

> . . .the no-action alternative would not address the water quality and disease issues which, when combined with the ongoing trend of increased temperatures, poses a substantial risk to the survival of one of the few remaining [chinook] salmon populations in California that still sustain important commercial, recreational, and Tribal fisheries. (DEIS at ES-xxxviii.)

The recommended course of action and the dams' deconstruction inevitably will lead to substantial changes in the ecosystem of the Klamath River. (*See*, DEIS at 2-22.) These changes will attempt to restore the ecosystem to the benefit of natural vegetation and fish populations, as well as water quality and terrestrial wildlife preferring upland habitats. However, the changes also will have significant adverse effects on flood management and habitat for wildlife that prefer reservoir habitats, and it will result in short-term less than significant adverse effects while deconstruction takes place and the vast changes resulting therefrom occur. As dam decommissioning and destruction becomes more commonplace, appealing to a variety of stakeholders and citizens, the Klamath River Project DEIS provides a resource for considerations and relevant tradeoffs in large scale decommissioning projects.

Conclusion and Implications

Comment period is set to end on April 18, 2022. Thereafter, FERC will consider the comments received and issue a final environmental impact statement. The final Environmental Impact Statement is expected in September 2022.
(Tiffanie Ellis, Meredith Nikkel)

DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION SUBMIT TEMPORARY URGENCY CHANGE PETITION TO STATE WATER RESOURCES CONTROL BOARD

In March, the California Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Bureau) submitted a temporary urgency change petition (TUCP) to the State Water Resources Control Board requesting the modification of certain terms of the water rights permits for the federal Central Valley Project (CVP) and State Water Project (SWP) provided in Water Rights Decision 1641 (D-1641) during the period from April 1 through June 30, 2022. DWR and the Bureau submitted the petition due to extremely low precipitation levels in January and February that reversed precipitation gains in December.

Background

The SWP is comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more than 700 miles from northern to southern California. Water from rain and snowmelt is stored in SWP conservation facilities—for instance, Lake Oroville—before flowing through the Sacramento-San Joaquin Delta (Delta) and being delivered by way of SWP transportation facilities, including the 444-mile California Aqueduct that runs through the Central Valley. According to DWR, the SWP supplies water to more than 27 million people across California,

and irrigates roughly 750,000 acres of farmland. The SWP is capable of delivering roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipitation and snowpack, operational conditions, as well as environmental and other legal constraints.

According to the Bureau, the CVP spans roughly 400 miles from the Cascade Mountains near Redding in the north to the Tehachapi Mountains near Bakersfield in the south. CVP facilities include reservoirs on the Trinity, Sacramento, American, Stanislaus and San Joaquin rivers. In particular, the CVP takes water from the Trinity River and stores it in Clair Engle Lake, Lewiston Lake, and Whiskeytown Reservoir. The water is then diverted through a system of tunnels and powerplants into the Sacramento River for the Central Valley. Additionally, water is stored in Shasta and Folsom lakes. In total, the project consists of 20 dams and reservoirs, 11 power plants, and 500 miles of major canals, as well as conduits, tunnels and related facilities. System-wide, the CVP manages approximately 9 million acre-feet of water, delivers roughly 7 million acre-feet of water annually to various CVP contracts, and generates 5.6 billion kilowatt hours of electricity annually. The CVP was initially designed to protect the Central Valley from substantial water shortages and floods. However, the CVP is operated today in ways that increase the Sacramento River's navigability, provides domestic and industrial water supplies, generates electric power, and helps regulate environmental conditions.

The CVP and SWP are operated jointly. DWR and the Bureau have been assigned responsibility by the State Water Resources Control Board (State Board) to operate the projects in a way that implements water quality objectives in the Delta that are set by the State Board. The objectives are designed to protect beneficial uses related to municipal and domestic activities, environmental protection, and agricultural activities. The requirements are set forth in State Board Decision 1641 (D-1641).

The December Temporary Urgency Change Petition

On December 1, 2021, the Bureau and DWR submitted a temporary urgency change petition for the period of February through April 2022. That TUCP was based on extremely low storage levels in CVP and SWP reservoirs at the end of the 2021 water year. However, October and December 2021 storms significantly boosted Oroville and Folsom storage levels. According to DWR and the Bureau, those storage levels indicated that SWP and CVP reservoirs would be able to meet Delta outflow requirements under D-1641 without a TUCP, even under very dry conditions. The Bureau and DWR thus withdrew the December TUCP request in January. However, according to the recently submitted TUCP, the conditions in January and February 2022 were the driest on record, causing the projected inflows to SWP and CVP reservoirs for the January through March 2022 period to drop significantly below the driest conditions analyzed at the time the December TUCP was withdrawn. Accordingly, DWR and the Bureau have determined that key reservoirs can no longer support Delta outflows under D-1641, and that there is not adequate storage in other CVP/SWP reservoirs to meet critical water supply needs absent the requested TUCP.

The March TUCP

According to their March TUCP, the Bureau and DWR are requesting that the State Board modify certain terms of D-1641, as SWP/CVP storage and inflow may not be sufficient to meet D-1641 requirements. The Bureau and DWR are also requesting additional operational flexibility of the SWP/CVP to operate those projects to provide for minimum health and safety supplies (defined as minimum demands of water contractors for domestic supply, fire protection, or sanitation during the year); preserve upstream storage for release in the summer to control saltwater intrusion in the Delta; preserve cold water in Shasta Lake and other reservoirs to manage river temperatures for chinook salmon and steelhead runs; maintain protections for state and federally endangered and threatened species and other fish and wildlife resources; and meet other critical water supply needs. In support of its TUCP, DWR and the Bureau submitted a biological review evaluating the environmental impacts of the proposed modifications and operational changes requested in the TUCP. According to DWR and the Bureau, that biological review is informed by the biological review submitted with the December TUCP.

The TUCP proposes several modifications to D-1641 requirements related to Delta outflows. For instance, for the period April 1-April 30, the TUCP proposes that Delta outflows for habitat protection be reduced from a range of 7,100 cubic feet per second (cfs) - 29,200 cfs to 4,000 cfs averaged over a 14-day period. According to DWR and the Bureau, the 14-day averaging period is shorter than what was previously analyzed for the December TUCP, suggesting that flows of 4,000 cfs would occur more consistently than if averaged over a longer time period. At the same time, the TUCP proposes that maximum exports for the SWP/CVP during that period would be 1,500 cfs when DWR and the Bureau were not meeting D-1641 requirements. In addition to proposing specific modifications to D-1641 requirements, DWR and the Bureau also indicate that they have been meeting with applicable state and federal agencies and would coordinate with the State Board on project operations and management from April 1 through June 30.

Conclusion and Implications

It is unclear whether the State Water Resources Control Board will grant the Department of Water Resources and the U.S Bureau of Reclamation's petition, pending a comment period that ends April 6, 2022, or if it will require changes to DWR and the Bureau's proposed changes to D-1641 requirements on a temporary basis. Given significant shortfalls in late winter and spring precipitation, impacts on a variety of water uses are likely to continue. The Notice of Temporary Urgency Change Petition is available online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_notices/2022/20220318_tucpnotice.pdf. (Miles Krieger, Steve Anderson)

DEPARTMENT OF WATER RESOURCES BEGINS PREPARATION OF ENVIRONMENTAL IMPACT REPORT FOR WEST FALSE RIVER DROUGHT SALINITY BARRIER

On February 23, 2022, the California Department of Water Resources (DWR) published a Notice of Preparation of the Environmental Impact Report for the West False River Drought Salinity Barrier Project (Notice). As the "lead agency" under the California Environmental Quality Act (CEQA), DWR will prepare an Environmental Impact Report (EIR) to assess the potential environmental effects of the proposed project. The Notice is to solicit the views of interested persons, organizations, and agencies regarding the scope and content of the environmental information for the proposed project.

Background

DWR has constructed a drought salinity barrier in the West False River in the past. Most recently, in mid-2021, DWR constructed a temporary emergency drought barrier in the West False River in response to worsening drought conditions and Governor Newsom's Emergency Drought Proclamation. According to DWR, the barrier helps:

> . . .slow the movement of saltwater into the central Delta and prevent contamination of water supplies for Delta agriculture and municipal supplies for millions of Californians. (Department of Water Resources, *Construction Begins on Emergency Drought Barrier in Sacramento-San Joaquin Delta* (June 3, 2021) available at: https://water.ca.gov/News/News-Releases/2021/June-21/Emergency-Drought-Barrier-Construction-Delta)

DWR credits the temporary barrier's effectiveness during the 2012-2016 drought for "reducing the intrusion of salt water into the central and south Delta," as well as helping to "preserve fresh water supplies for future critical uses including drinking water and the environment." (Department of Water Resources, *Construction Begins on Emergency Drought Barrier in Sacramento-San Joaquin Delta* (June 3, 2021) available at: https://water.ca.gov/News/News-Releases/2021/June-21/Emergency-Drought-Barrier-Construction-Delta)

The Proposed Project

The proposed project consists of a temporary barrier and water quality monitoring stations. (Notice, at p. 1) The temporary barrier will be constructed in the West False River, approximately four-tenths of a mile east of the West False River's confluence with the San Joaquin River, within the Sacramento-San Joaquin River Delta. (*Id.*) DWR may install the temporary barrier:

> . . .up to two times between 2023 and 2032, including consecutive years, if drought conditions occur, for a period of up to 20 months. (*Id.*)

Concurrent with the next construction of the temporary barrier, DWR will install three new water quality monitoring stations in the Delta—one in Woodward Cut and two in Railroad Cut. (*Id.*) The water quality monitoring stations will be left in place after the barrier's removal, however. (*Id.* at p. 2)

The temporary barrier and water quality monitoring stations will be installed if DWR, in cooperation with other state and federal agencies, determines that drought conditions impact on State Water Project and Central Valley Project water storage such that the projected Delta outflow would be insufficient to control salinity intrusion in the Delta. (Notice, at p. 1) DWR believes the temporary barrier "would be an effective tool to protect the beneficial uses of the interior Sacramento-San Joaquin Delta water by reducing saltwater intrusion while preserving the use of critically needed reservoir water." (*Id.*) Indeed, the project's objective is to

> . . .minimize the impacts of salinity intrusion on the beneficial uses of water in the Delta, consistent with *The Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region: The Sacramento River Basin and the San Joaquin River Basin* (May 2018), during persistent drought conditions. (*Id.* at p. 2)

According to the Notice, the temporary barrier will be approximately 800 feet long, spanning the West False River from Jersey Island north to Bradford Island. (Notice, at p. 1) The temporary barrier will be constructed of approximately 84,000 cubic yards of embankment rock sourced from a commercially operated rock quarry in San Rafael, DWR's own Rio Vista stockpile in Solano County, or the Weber stockpile in San Joaquin County. (*Id.*)

If the drought conditions warrant leaving the temporary barrier in place for a subsequent year, DWR may cut a notch in the middle portion of the temporary barrier in January of the subsequent year to permit fish passage and vessel navigation through the West False River. (Notice, p. 1) The cut would then be filled as early as the first week of April. (*Id.*)

DWR anticipates some of the probable environmental effects to include:

- Decreased air quality during construction;
- Biological resources from potential effects to special-status species or their habitat, migratory fish species, and state or federally protected wetlands during construction and presence of the barrier in the West False River;
- Potential effects to archeological and historical sites and tribal cultural resources during construction;
- Hydrology and water quality from potential erosion, scour, siltation, and water quality effects during construction and presence of the barrier; and
- Recreation from presence of the barrier.

Conclusion and Implications

Pursuant to CEQA, the Department of Water Resources circulated the Notice among the responsible and trustee agencies. The responsible and trustee agencies must provide DWR with specific details regarding the scope, significant environmental issues, reasonable alternatives, and mitigation measures within the responsible or trustee agencies' area of statutory responsibility. DWR will consider these comments and measures in its Environmental Impact Report.

DWR circulated the notice for a 30-day period beginning Wednesday, February 23, 2022 and ending Friday, March 25, 2022, at which point written com-

ments on the scope of the EIR were due. DWR will then consider all written comments received from interested persons, organizations, and agencies when preparing the forthcoming EIR.
(Nicolas Chapman, Meredith Nikkel)

LAWSUITS FILED OR PENDING

SIERRA CLUB FILES LAWSUIT AGAINST CITY OF SAN JOSE OVER LARGE DEVELOPMENT ALONG THE GUADALUPE RIVER

With settlement talks having come and gone regarding the Sierra Club's lawsuit against the City of San Jose over a new office and commercial development along the Guadalupe River, the case appears to be set to move forward later this year.

The lawsuit was initially filed in October 2021 and has since acted as a potentially significant delay, at the very least, to the project's current schedule. Settlement talks were held in December following the filing of the lawsuit but these talks failed to bring any meaningful resolutions into the foreground. On March 1, 2022, the judge handling the civil case, Superior Court of Santa Clara County Judge Sunil Kulkarni, issued a notice directing the litigants to appear in August to begin case management hearings. [*Sierra Club v. City of San Jose*, Case No. 21CV388201, Santa Clara County Superior Court.]

The Development at Issue

Slated to rest on the banks of the Guadalupe River between the San Jose Convention Center and the Children's Museum of Discovery at 235 Woz Way near Almaden Boulevard, the Boston Properties project would occupy a 3.6-acre site and feature a pair of towers connected by a podium and rise. Once completed, the project would boast nearly 1.73 million square feet of office space with an additional 37,600 square feet of ground level retail space among the 16-story towers. Stretching upwards into the skyline at nearly 300 feet in height, the project is no small undertaking to say the least.

City of San Jose (City) officials believe the offices and associated complex would provide significant economic benefits to the City and its downtown area, including 7,700 construction jobs and $777 million in construction wages over the life of the construction period. Once the project is completed, an estimated 6,400 people would be able to work in the new campus as well.

The key piece of the project creating the item of the Sierra Club's attention, however, is the precise location of these towers: the west side of the project is designed to hug the banks of the Guadalupe River.

The Lawsuit

The Sierra Club's lawsuit against the City alleges that the city council violated its own existing riparian waterway policy when it approved the project back in September of 2021. The policy cited to by the Sierra Club establishes setbacks for new construction on riverbanks.

City officials have claimed that the open spaces and river areas near the project are unimportant as wildlife habitats. "This stretch of the Guadalupe River is highly fragmented with very little pristine habitat due to a heavily urbanized environment and human-related disturbance," Chris Burton, the City's director of planning, wrote in a staff report. "The coastal corridor adjacent to the project is extremely limited in value and habitat impact." Despite this characterization of the nearby riparian habitat, the Environmental Impact Report (EIR) for the project did conclude that it would cause "cumulative significant and unavoidable impacts to the Guadalupe [R]iver."

Challenging the City's approval of this project, the Sierra Club stated in the lawsuit that the environmental hazard is real and serious. Chief among the environmental concerns alleged by the Sierra Club is that the office campus would significantly degrade existing coastal habitat through physical encroachment and shading, and that the large glass towers would endanger native and migratory birds, increasing risk of collisions.

Conclusion and Implications

The City of San Jose has been working to reinvigorate the downtown area for years now, and with approval of developments such as the one at issue here and Google's massive complex by SAP Center it seems like the City has a vision in mind. The challenge that remains, however, is realizing this vision

without destroying what little natural habitat remains along the Guadalupe River.

The Sierra Club's lawsuit won't begin its case management hearings until August of 2022, so it is already expected that this case will at minimum cause significant delays for the project moving forward. What's more, if the Sierra Club's claims hold up, the project could be required to take another look at its current plans, causing even further delay and frustration while the project is restructured to more adequately preserve the natural environment along the banks of the Guadalupe River.
(Wesley A. Miliband, Kristopher T. Strouse)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT DENIES REHEARING REQUEST OPPOSING TRIBAL BREACH OF TRUST CLAIM IN COLORADO RIVER WATER RIGHTS DISPUTE

Navajo Nation v. U.S. Department of the Interior, et al., ___F.4th___, Case No. 19-17088 (9th Cir. 2022).

In February 2022, the Ninth Circuit Court of Appeals denied a petition for a rehearing *en banc* filed by the U.S. Department of the Interior, Bureau of Indian Affairs, and Bureau of Reclamation (collectively: Federal Agencies), as well as intervening parties including certain California water agencies and the States of Arizona, Nevada, and Colorado, related to the court's 2017 decision allowing the Navajo Nation to allege breach of trust claims against the United States pertaining to water rights in the Colorado River. It is not clear whether the Federal Agencies and others will file a petition for a writ of *certiorari* with the U.S. Supreme Court, but the deadline to do so runs in May.

Background

The Navajo Nation (Nation) is a federally recognized tribe whose reservation includes portions of Arizona, New Mexico, and Utah. The Nation's reservation was established by treaty in 1868, and was later expanded by executive orders and acts of Congress. The Colorado River defines part of the Reservation's western border.

The Colorado River is governed by an array of laws known as the "Law of the River." A 1922 compact, conditionally approved through the Boulder Canyon Project Act in 1928, divides the Colorado River basin into an Upper and Lower Basin, consisting of Colorado, New Mexico, Utah, and Wyoming in the Upper Basin, and Arizona, California, and Nevada in the Lower Basin. Each Basin is apportioned 7.5 million acre-feet of water per year. A 1964 decree by the U.S. Supreme Court adjudicated water rights in the Colorado River, including for five Indian tribes to the mainstem of the Colorado River (Decree). The Decree did not, however, adjudicate the rights of the Navajo Nation to the mainstem of the Colorado River or its tributaries.

Each year, the Department of the Interior (Interior) determines whether there will be a surplus or shortage of water in the Lower Basin. In 2001 and 2007, Interior adopted guidelines to clarify how it determines the existence of a shortage or surplus. Interior's final environmental impact statement prepared prior to Interior's adoption of the 2001 guidelines identified the Nation's unquantified water rights as Indian trust assets.

The Procedural History

In 2003, the Nation challenged Interior's 2001 surplus guidelines, alleging that its approval of the guidelines violated the National Environmental Policy Act (NEPA) and breached the federal government's trust obligations to the Nation in the management of the Colorado River. In particular, the Nation alleged that Interior, the Bureau of Reclamation, and the Bureau of Indian Affairs failed to consider or meet the Nation's unquantified water rights and water needs on the reservation. A U.S. District Court in Phoenix had previously dismissed the Nation's complaint on the grounds that the Nation lacked Article III standing to bring its NEPA claim and that sovereign immunity barred the Nation's breach of trust claim.

The Ninth Circuit reversed as to the latter ruling in 2017. The U.S. District Court again dismissed the Nation's breach of trust claim on the grounds that it lacked jurisdiction to adjudicate the Nation's breach of trust claim because it implicated the Supreme Court's reservation of jurisdiction over Colorado River water rights claims under the Decree and the Nation failed to identify a statute, treaty, or regulation imposing a trust duty on the Federal Agencies that could be enforced in federal court. Accordingly, the District Court denied the Nation's request to amend its complaint as futile. The Ninth Circuit reversed and remanded the breach of trust claim to

the District Court for full consideration of the merits of that claim, including as the Nation may seek to amend it. The Federal Agencies and intervening parties filed a petition for re-hearing en banc.

Appeals of *En Banc* Orders and Opinions

A party or parties may seek a rehearing before an *en banc* panel following the issuance of a three-judge panel order or opinion. Under Federal Rules of Appellate Procedure Rule 35(a):

> . . . a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a)(1)-(2).

If a majority of the active, non-disqualified (*i.e.* non-recused) judges vote in favor of a rehearing *en banc*, then the case is reheard by the *en banc* court. If so, the *en banc* court assumes control over the case. In the Ninth Circuit, the *en banc* court consists of the Chief Judge and ten non-disqualified judges drawn at random. However, if the vote to rehear a case *en banc* fails, the three-judge panel retains control of the case. According to the Ninth Circuit, there are approximately 1,500 requests by parties for rehearing *en banc* each year, but only 15-25 cases are heard.

The Ninth Circuit's Decision

In its order of February 17, 2022, the Ninth Circuit denied the Federal Agencies and intervenors' request for rehearing *en banc*. According to the court, the full court had been advised of the petitions for rehearing *en banc* and no judge requested a vote on whether to rehear the matter *en banc*. Accordingly, the petitions for rehearing *en banc* were denied, and the court indicated that no future petitions would be entertained. However, under Supreme Court Rule 13.1 and 13.3, the parties have 90 days from the date of a rehearing denial to file a petition for *certiorari*. Thus, the parties have until May 18 to file a petition with the Supreme Court.

Conclusion and Implications

It is not clear whether the Federal Agencies or intervening defendants will file a petition for writ of *certiorari*. However, a ruling on this issue would be of significant importance because it could determine how claims related to tribal water rights are required to be resolved—by litigation or administratively as a function of federal trust responsibilities. Given the length and complexity of tribal water rights claims, administrative resolution of such claims could provide new opportunities—and new challenges—for resolving those claims. The court's February ruling is available online at: https://cases.justia.com/federal/appellate-courts/ca9/19-17088/19-17088-2022-02-17.pdf?ts=1645120936.
(Miles Krieger, Steve Anderson)

DISTRICT COURT UPHOLDS EPA'S 'REASONABLE AVAILABILITY' ANALYSIS IN THE ESTABLISHMENT OF CLEAN WATER ACT 'NO DISCHARGE ZONE'

American Waterways Operators v. Regan,
___F.Supp.4th___, Case No. 18-CV-2933 (APM) (D. D.C. Feb. 14, 2022).

The U.S. District Court for the District of Columbia recently upheld a U.S. Environmental Protection Agency (EPA) final determination under the federal Clean Water Act (CWA) against a facial challenge by petitioner trade association. EPA made a final determination under the CWA that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available

in Puget Sound, such that the State of Washington could establish Puget Sound as a no-discharge zone (NDZ).

Factual and Procedural Background

In 2016, the State of Washington started designating the Puget Sound as a "no-discharge zone" under the Clean Water Act, which would prohibit commercial and recreational vessels from discharging their sewage into the Puget Sound. As part of the designation, Washington petitioned EPA to make a determination as to the reasonable availability of adequate sewage-removal and sewage-treatment facilities in the Puget Sound. In 2017, EPA made the determination, allowing the Puget Sound NDZ to go into force.

The American Waterways Operators (AWO) challenged EPA's determination under the Administrative Procedure Act (APA). EPA voluntarily requested remand of its determination, and the court ordered EPA to redo its reasonable-availability determination as to certain issues, including considering compliance costs and assessing the reasonable availability of adequate treatment facilities. On remand, EPA requested information from plaintiffs and intervenors regarding average annual operating costs for plaintiff's member vessels in Puget Sound, pumpout locations and state regulation of pumpout facilities, and capacity of treatment facilities. Based on this new information and the prior record, EPA reaffirmed its reasonable-availability determination and concluded that Puget Sound has ample capacity to treat all of its vessel sewage, such that adequate treatment facilities are reasonably available in Puget Sound.

AWO again challenged EPA's determination under the APA, claiming EPA ignored retrofit costs, arbitrarily concluded the costs associated with using pumpout facilities were reasonable, and failed to provide any reasoned explanation as to its conclusions regarding the reasonable availability. Plaintiff further argued that EPA violated the court's prior order which required EPA to consider "all relevant factors," including the costs of accessing adequate facilities, which plaintiffs believed to include capital and upfront costs.

Plaintiffs filed a motion to enforce the first summary judgment order and a second motion for summary judgment, and EPA and intervenors filed cross-motions for summary judgment.

The District Court's Decision

The Motion to Enforce

AWO raised three arguments that EPA violated the court's prior order when EPA did not consider retrofit costs: first, the omission was directly contrary to the order; second, EPA's actions on remand violated the law-of-the-case doctrine and the rule of mandate; and third, waiver and estoppel doctrines preclude an argument that EPA did not need to consider retrofit costs.

The court first considered and rejected plaintiff's argument that EPA's failure to consider retrofit costs was directly contrary to the order. The court held that EPA did not violate the order because the order did not specify which costs the agency was required to consider—it only required EPA to consider costs relevant to reasonable availability of adequate removal and treatment facilities. The court stated that EPA was only required to consider costs relevant to the reasonable availability of disposal and treatment facilities, and not the costs of creating an NDZ as a whole. The court determined the terms "reasonably available" and "relevant" provided EPA with flexibility to determine which costs are relevant in the context of its determination.

Second, the court held that, the law-of-the-case doctrine and the rule of mandate did not did not require EPA to consider retrofit costs, because the prior order did address whether EPA had to consider these costs. The order directed EPA to assess relevant costs but left it to EPA to determine which costs were relevant.

Third, the court held waiver and judicial estoppel did not preclude EPA from making an argument regarding retrofit costs during the second summary judgment proceedings. The court determined EPA's request for remand in the original proceedings did not constitute a waiver of any arguments in the second summary judgment proceedings. Treating a request for remand as a waiver would force agencies in the future to raise or otherwise risk conceding merits arguments when seeking remand.

Summary Judgment

In their second motion for summary judgment, plaintiffs asked the court to find that: 1) EPA's decision not to retrofit costs was based on an unreason-

able interpretation of the CWA and violated the APA; 2) the cost analysis EPA conducted was arbitrary and capricious; and 3) EPA's reasonable-availability determination as to treatment facilities lacked reasoned decision-making. The court disagreed with each of the plaintiff's arguments.

Retrofit Costs

The court determined EPA was not required to consider retrofit costs when making a reasonable availability determination. The court found that "availability," as used in the CWA, centers on whether attributes of the facilities themselves make them accessible or usable, not whether the user has the ability to use the facilities. The court concluded that retrofit costs are not attributable to the reasonable availability of treatment and disposal facilities, and thus not among the costs EPA must consider. The court found that although some vessels would need to incur retrofit costs to install tanks to hold sewage for transport to treatment and disposal facilities, these costs did not stem from the particular attributes of Puget Sound's pumpout facilities. Thus, while a state may consider such costs when establishing an NDZ, the court held that these costs were not relevant to EPA in determining whether there are reasonably available disposal and treatment facilities to service those retrofitted vessels.

EPA's Cost Analysis

Plaintiff argued that EPA's cost evaluation was flawed because it: 1) did not consider how pumpout costs would affect vessels and operators, 2) reached conclusions contradicted by the evidence, and 3) relied on faulty evidence. The court disagreed, holding that EPA's consideration of costs and its explanation of its reasoning were adequate.

The court noted that standard for such review of EPA's "reasonably available" analysis is deferential to the agency and determined EPA's consideration of costs and reasoning were adequate. Here, EPA found the relevant costs for determining facilities' reasonable availability were: use costs, pumpout time costs, travel costs, and wait-time costs. EPA compared these costs to vessel revenues, and concluded that pumpout costs constituted a small fraction of vessel revenues such that pumpout facilities were reasonably available. The court found it was reasonable for EPA to construct a methodology that assessed how facilities' availability affected the cost structure of vessels doing business in the Puget Sound overall, and it was not required to conduct a vessel-by-vessel analysis of their ability to absorb pumpout costs based on their actual margins. The court determined the record as a whole indicated that vessels can afford pumpout costs, and that while an incremental cost can be a small percentage of overall costs while still causing a vessel's margins to diminish past the point of viability, the record did not demonstrate that to be true in this instance.

The court next considered and rejected plaintiff's arguments, which claimed the publicly available revenue data EPA relied on was inaccurate, and that it was improper for EPA to rely estimates in the data rather than more detailed findings. The court noted that EPA invited stakeholders to submit information relevant to its consideration of costs on remand and that plaintiff had provided no evidence the publicly available revenue data was unreliable or inaccurate. The court then held that EPA's determination was not unreasonable on the basis of the data's level of specificity or reliance on public records for revenue estimates, and that its reliance on the data was not improper as imperfection alone in a dataset relied on by an agency does not amount to arbitrary decision-making.

EPA's Analysis of Treatment Facilities

Finally, the court considered and rejected plaintiff's argument that EPA failed to engage in reasoned decisionmaking on the topic of the reasonable availability of sewage treatment facilities. The court noted that perfect availability of adequate treatment facilities is not required - only reasonable availability – and that EPA's determination considered the quantity of treatment facilities and their capacity, along with the frequency and impacts of overflows on treatment capacity, and explained how it analyzed those factors.

Conclusion and Implications

This case affirms that EPA must consider costs relevant to the reasonable availability of disposal and treatment facilities when making a determination on a state's application for an NDZ, but qualifies it by providing that EPA need not consider the costs of creating an NDZ as a whole—only those that are at-

tributable to the reasonable availability of treatment and disposal facilities. This is an important distinction, as it affirms EPA's discretion to determine which costs are relevant and the methodology for accounting for those costs, such that EPA is not required to consider costs which will directly arise from the establishment of an NDZ, such as retrofit costs, but which have no bearing on the accessibility of facilities. The court's lengthy opinion is available online at: https://casetext.com/case/the-am-waterways-operators-v-regan.
(David Lloyd, Rebecca Andrews)

FEDERAL CLAIMS COURT DETERMINES FEDERAL GOVERNMENT IS NOT REQUIRED TO PAY LOCAL FEES TO ABATE WATER POLLUTION

City of Wilmington v. United States, ___F.Supp.4th___, Case No. 16-1619C (Fed. Cl. 2022).

The Court of Federal Claims recently determined the federal government was not required to pay local charges for water pollution abatement activities under the federal Clean Water Act because the charge was not based on the proportionate contribution of the property to storm water pollution.

Factual and Procedural Background

The U.S. Army Corp of Engineers (the government) owns five properties in Wilmington, Delaware (Properties). The Clear Water Act requires federal property owners to comply with local water pollution laws, including requirements to pay reasonable service charges imposed by local governments to recover costs of storm water management. In 2007, the City of Wilmington, Delaware (City) implemented a charge on the owners of all properties within its corporate boundaries to recover the costs "related to all aspects of storm water management," including capital improvements, flooding mitigation, and watershed planning.

In 2021, the City filed the operative complaint seeking to recover service charges for the control and abatement of water pollution against the Properties for a time period from January 4, 2011 to the present. The City claimed that the government owed $2,577,686.82 in principal charges and $3,360,441.32 in interest for storm water fees assessed to the government's Properties for the approximate ten-year period.

The City offers a limited appeal process for storm water charges in which an owner can file a fee adjustment request if they believe there was an error in calculation, the assigned storm water class, the assigned tier, and the eligibility for credit. The appeal process applies only to future charges and provide no adjustment to prior billing periods. Further, an owner must pay all fees before the City will consider an appeal. The government did not pay the storm water charges or associated interest, nor did it appeal the charges assigned via the City's appeal process.

On April 20, 2021, following the close of Wilmington's case-in-chief, the court suspended trial to permit the government to file a motion for judgment on partial findings pursuant to Rule 52(c) of the Rules of the United States Court of Federal Claims.

The Court of Federal Claims Decision

The government first argued that the City did not demonstrate the storm water charges it assessed against the government Properties were "reasonable services charges" under the Clean Water Act. A "reasonable service charge" is defined as: 1) "any reasonable nondiscriminatory fee, charge, or assessment" that is 2) "based on some fair approximation of the proportionate contribution of the property or facility to storm water pollution (in terms of quantities of pollutants, or volume or rate of storm water discharge or runoff from the property or facility)" and 3) is "used to pay or reimburse the costs associated with any storm water management program."

The court reasoned that the statutory phrase "proportionate contribution of the property or facility to storm water pollution" required some link between the charges the City sought to impose and the Properties' storm water pollution relative to total pollution. To establish charges, the City relied upon county tax records and runoff coefficients. The court, however, found that the City did not present

any evidence linking the Properties to any particular amount of storm water pollution, nor did the tax record categories and runoff coefficients yield a fair approximation for computing the charge. Because the "specific physical characteristics" of the Properties were not taken into account and the coefficients may not reflect the percentage of a particular property generating runoff, the court held the government was not liable for these charges.

The court next addressed whether the government was required to follow the City's fee adjustment process. The City argued that the government could not contest the City's storm water charges because the government did not challenge the charges through the City's appeal process. The court, however, was unpersuaded. In particular, the court reasoned that the City's administrative appeal process was permissive and was not a substantive "requirement" relating to the control or abatement of water pollution which the Clean Water Act requires federal property owners to follow. Further, the appeal process authorized only the appeal of future charges, after all assessed fees—no matter how unreasonable—have been paid. The appeal process did not provide retroactive adjustment of past charges, which were at issue in the present case.

Finally, the court considered the City's claim that the government owed interest accrued due to the government's refusal to pay the City's outstanding storm water charges. The government argued that the Clean Water Act section requiring compliance with water pollution control and abatement requirements did not waive sovereign immunity to recover interest. Here, the court declined to address the government's argument as because it raised a "thorny issue of first impression." Instead, the court reasoned that federal law only authorized the court to award interest "under a contract or an Act of Congress expressly providing for payment thereof." In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. Because the Clean Water Act section at issue contained no such express Congressional consent, the court held that the government would not be liable for interest, even if it were entitled to the principal charges.

Conclusion and Implications

This case is a reminder that a local agency must be cautious in crafting local water pollution fees pursuant to the Clean Water Act. As seen above, the federal government will only be liable for reasonable service charges linked to the physical characteristics of the federal property. Additionally, the United States cannot be liable for interest accrued on unpaid charges. This case is also informative for local agencies in a state that imposes similar proportionality requirements for fees imposed on all payers, such as California. The court's opinion is available online at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv1691-124-0.
(Megan Kilmer, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT FINDS WATERMASTER, NOT AGGRIEVED PARTY, DISMISSES APPEAL OF TRIAL COURT ORDERS INTERPRETING WATER RIGHTS DECREE

Dow v. Lassen Irrigation Co., ___Cal.App.5th___, Case No. C091965 (3rd Dist. Feb. 23, 2022).

A recent opinion of the California Third District Court of Appeal (Court) is catching the attention of stakeholders in adjudicated basins and stream systems where "Watermasters" are in place to implement court judgments and physical solutions. Where the Superior Court accepted a party's interpretation of a water rights decree and rejected the local watermaster's interpretation, the Third District Court of Appeal dismissed the watermaster's appeals, finding that the watermaster was not an aggrieved party and that the watermaster's interest in administering and implementing the decree was not injuriously affected by the interpretive orders.

Background

In 1940, the Lassen County Superior Court entered the Susan River Water Right Decree (Decree) and an order providing for a watermaster to administer and implement the Decree (Order). The Decree and the Order were upheld by the California Supreme Court in 1941 in *Flemming v. Bennett*, 18 Cal.2d 518 (1941). In 2007, Honey Lake Valley Resource Conservation District was appointed as watermaster (Watermaster).

Later, in 2019, Jay Dow, as trustee for the Dow-Bonomini 2013 Family Trust (Trust) submitted two requests to the Watermaster. The first request was to allow the Trust to divert a certain amount of surface water pursuant to water rights assigned to the Trust's predecessor in interest via an earlier, 1931 judgment that the Trust claimed was not affected by the Decree. The Watermaster denied this request, finding insufficient evidence supporting the 1931 rights as separate from the Decree. Second, the Trust requested permission to divert water pursuant to its rights under the Decree but at properties located downstream from the points of diversion identified in the Decree. The Watermaster also denied this request, finding that the proposed change in the point of diversion would injure and interfere with other water right holders. Both requests and the Watermaster's decisions relied upon an interpretation of language in the Decree.

At the Trial Court

The Trust sought to overturn the Watermaster decisions through proceedings in the Court, which ultimately accepted the Trust's interpretation of the Decree and issued two orders effectively granting the Trust's two original requests. The first order recognized that the 1931 judgment established separate water rights that were exempt from and not superseded by the Decree. The second order found that the change in points of diversion would not result in any negative impact or injury to other water users and allowed the change so long as the maximum quantity of water diverted did not exceed the Trust's allotment.

The Court of Appeal's Decision

The Watermaster appealed the court's orders to the Third District Court of Appeal. The Trust filed a motion to dismiss, arguing that the Watermaster was not an aggrieved party, citing California Code of Civil Procedure § 902, which provides that only a party aggrieved by the challenged order has standing to appeal, meaning that its rights or interests must be injuriously affected by the order. On appeal, the threshold issue was whether the Watermaster had the right to appeal the court's orders.

The Trust argued that the Watermaster was not an aggrieved party for the following reasons:

> (1) the Watermaster is not a party to the litigation and is instead a servant of the court without authority to appeal the court's orders;
>
> (2) the Watermaster is not aggrieved since "[i]t has no interests of its own in the matter -- its

sole interest in the matter is to follow the instructions of the Superior Court";

(3) the Watermaster, deemed a judge pursuant to the Code of Judicial Ethics, cannot assert the rights of others; and

(4) "the Watermaster's argument is disingenuous."

Conversely, the Watermaster argued that it was indeed an aggrieved party for the following reasons:

(1) it was a party of record in the court, it formally opposed the Trust's motion, and it "objected to the orders entered against [it] that are the subject of this appeal";

(2) it is aggrieved by the orders because it "will be forced to incur substantial costs and devote substantial resources to implementation if the erroneous orders are not overturned";

(3) the Trust's cited case law was inapposite and/or supports standing; and,

(4) the Trust's 'special master' and 'judge' arguments should be rejected.

The Watermaster Was Not the Aggrieved Party

The Court of Appeal concluded that the Watermaster was not an aggrieved party and thus had no right to appeal the trial court's orders. The Court of Appeal reasoned that the Watermaster acts in an appointed capacity as an arm of the court. Its role is impartial and unbiased and its interest in the Decree is in administering and implementing its terms by distributing water in accordance with the stated rights and priorities. The Watermaster does not champion the rights of some water users over others. It found that the ultimate authority to control and exercise the water rights belongs to the owners, not the Watermaster. It further found that any increase in the Watermaster's administrative costs associated with the trial court's orders are not borne by the Watermaster and are instead borne by the water users subject to the Decree. The Court of Appeal accordingly granted the Trust's motion to dismiss the Watermaster's appeal. The Lassen Irrigation Company also appealed the orders, and the merits of its appeal will be considered in a separate, forthcoming opinion.

Conclusion and Implications

Parties and Watermasters in adjudicated groundwater basins and stream systems should take notice of this appellate opinion. Though each adjudication and judgment (or decree) is unique and often prescribes specific authorities and limitations applicable to the local watermaster, the opinion could have broader implications in cases or enforcement motions that test the extent of those authorities and limitations. The court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/C091965.PDF.
(Byrin Romney, Derek Hoffman)

SECOND DISTRICT COURT UPHOLDS EIR FOR KERN WATER BANK AUTHORITY'S WATER BANK RECHARGE PROJECT

Buena Vista Water Storage District v. Kern Water Bank,
___Cal.App.5th___, Case No. B309764 (2nd Dist. Feb. 23, 2022).

In a decision filed on February 23, and ordered published on March 22, 2022, the Second District Court of Appeal reversed a trial court decision setting aside the Kern Water Bank Authority's (KWBA) Environmental Impact Report (EIR) and approval of a project to divert remaining water from the Kern River in unusually wet years towards its Kern Water Bank (KWB). The decision, which upheld the KWBA's EIR and reinstated its approval of the project, includes a discussion of the adequacy of the EIR's project description, discussion of baseline conditions, and environmental impact analysis.

Factual and Procedural Background

The Kern River begins in the southern Sierra Nevada and flows southwest to the San Joaquin Valley. The upper segment of the river flows into the Lake Isabella Reservoir and Dam, which is used as a storage and regulation reservoir by the U.S. Army Corps of Engineers (Corps) and Kern River rights holders. The Kern River Watermaster manages water stored in the Isabella Reservoir and directs releases from it for water control purposes or to satisfy needs of Kern River water rights holders.

The Kern River is typically dry when it runs through Bakersfield but in some wet years flows through Bakersfield before reaching a physical structure named the "Intertie" through which flood waters are diverted to the California Aqueduct. Under California's appropriative water rights model, water rights to the Kern River are allocated into three groups, first point rights, second point rights, and third point rights. First and second point water rights holders receive water rights allocations on a daily basis, and any water not stored or diverted by first or second point rights holders belongs to lower rights holders. Typically, lower rights holders only receive water allocations in wet years. The City of Bakersfield and Kern Delta Water District have first point rights, petitioner Buena Vista Water Storage District has second point rights, and the Kern County water agency holds lower river rights.

In 2010, the State Water Resources Control Board ordered the Kern River's previous "fully appropriated stream" designation be removed based on evidence that some unappropriated water, that exceeded water rights holders' claims, was available in certain wet years, allowing for new appropriation applications to be processed.

The Kern Water Bank Authority Conservation and Storage Project was designed to divert up to 500,000 acre-feet-per-year from the Kern River for recharge, storage, and later recovery through existing diversion works to recharge the KWB. The KWBA acted as the lead agency, and prepared an EIR to evaluate environmental impacts of the Project. The EIR addressed appropriation of high flow Kern River water that is only available in wet years and after the rights of senior Kern River water right holders have been met. The EIR evaluated various environmental impacts, including impacts on hydrology and groundwater resources, and used the environmental settings from 1995 to February 2012 as baseline conditions. The EIR further discussed the hydrological impacts that would occur if the project was implemented.

The EIR noted that the project would only divert available Kern River water that cannot be used or stored by existing water rights holders and would not divert surplus flows in normal or dry years. Thus, the EIR concluded that the project would not have a significant impact on available water supply.

The EIR also discussed the project's impacts on groundwater and found that such impacts would be less than significant because the project would only increase water available for recharge and storage and not change recovery operations in dry years and would not result in significant impacts on groundwater recharge or local groundwater elevations.

Petitioner Buena Vista Water Storage District filed an action for writ of mandate seeking to set aside approval of the project and the related EIR. The trial court granted the writ, finding the EIR inadequate. Specifically the trial court found that: 1) the definitions of project water and existing water rights were inadequate because they were "inaccurate, unstable, and indefinite," 2) the baseline analysis was inadequate because "it fail[ed] to include a full and complete analysis, including quantification of competing existing rights to Kern River water," and 3) the analysis of environmental impacts with respect to potentially significant impacts on senior rights holders and on groundwater during long-term recovery operations.

The Court of Appeal's Decision

On appeal KWBA contended: 1) the project descriptions of project water and existing rights complied with California Environmental Quality Act (CEQA), 2) a complete quantification of existing Kern River water rights was not required, and 3) the EIR properly evaluated the environmental impacts of long-term recovery operations on existing rights and groundwater levels. The appellate court agreed.

The Project Description

The court began by noting that the KWBA's project description was adequate. Here, the project description adequately and consistently described the project water as "high flow Kern River Water" which would only be available under relatively wet hydro-

logic conditions and after senior water rights holders rights had been met. Even though the EIR described in different words the conditions under which project water had historically flowed, these different descriptions still adequately described project water.

The Baseline / Environmental Setting

The court also concluded that the EIR provided an adequate description of the environmental conditions in the vicinity of the project by relying on historical measurements of water to determine how the existing physical conditions without the project could most realistically be measured. The court disagreed with the trial court that an exhaustive quantification of existing water rights was necessary. Here, historical use could determine the quantitative limits on the amount of water that a pre-1914 water appropriator could divert, and the KWBA had the discretion to rely on historical measurements to determine how existing physical conditions without the project can most realistically be measured.

Environmental Impacts Analysis

The court found that the EIR adequately discussed potential impacts on existing water rights and groundwater levels.

Regarding the first impact listed above, the project only sought to use unappropriated water, which excluded water being used pursuant to existing water rights, meaning that no significant impacts would occur to existing water rights. The EIR's conclusion that no mitigation was required because the project was not expected to have a significant impact on the existing water supply was supported by substantial evidence.

The court also overturned the trial court by finding that the EIR adequately assessed the impacts of long-term recovery operations on groundwater levels. The EIR determined that even maximum recovery volumes during a three to six year drought would not change substantially because no new recovery facilities would be built. The EIR further noted that even extended recovery periods would not exceed banked water quantities or result in changes to ground water levels. Substantial evidence supported the EIR's conclusion that there would not be significant impacts on groundwater levels because the project would not increase long-term recovery beyond historical operations.

Conclusion and Implications

In rejecting the petitioner's arguments under the California Environmental Quality Act and the lower trial court decision, the Second District Court of Appeal reiterated the principle that an Environmental Impact Report need not include a fully exhaustive environmental analysis nor perfection. With regard to the project it is enough that a local agency make a good faith effort in an EIR disclose that which it reasonably can based on information that is reasonably available. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B309764.PDF.

(Travis Brooks)

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