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WESTERN WATER NEWS**EEL RIVER 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)

LEGISLATIVE DEVELOPMENTS

**IDAHO GOVERNOR SIGNS LANDMARK IRRIGATION
 INFRASTRUCTURE FUNDING BILL**

On March 28, 2022, Idaho Governor Brad Little signed House Bill 769 into law. While the primary purpose of the bill was to approve the administrative budget of the Idaho Department of Water Resources, the bill also earmarked \$325 million for water infrastructure improvement projects with funds from a blend of federal (\$250 million-American Rescue Plan Act) and state (\$75 million-General Fund) sources. Upon signing, Governor Little stated that he could not:

...think of a better investment for our children and grandchildren than ensuring clean, abundant water, especially here in the arid desert.

House Bill 769 passed the Idaho House on March 15, 2022 on a vote of 59-10-1, and the bill passed the Idaho Senate on March 21, 2022 on a vote of 31-2-2.

Irrigation Infrastructure Projects

Of obvious importance to Idaho water users is the earmarked funding for irrigation infrastructure projects. Man-made dams, ditches and canals are the lifeblood of Idaho’s economy, supplying irrigation water to the agricultural industry (Idaho’s largest economic sector) and urbanized areas alike (watering lawns, parks, golf courses, schoolyards, and other residential and municipal amenities). As Governor Little noted:

Idaho leads the nation in conjunctive management of its water resources . . . we’ve done a great job of managing the resource, but we need to do more as our state grows and continually faces water scarcity.

Much of Idaho’s irrigation infrastructure is roughly a century old, and while it has been maintained and improved over that time, major components still wear out and need replacement over time. In the Treasure Valley alone (the Boise Metropolitan Statistical Area—Idaho’s most populous region with approximately 750,000 inhabitants) a handful of irrigation

delivery entities identified upwards of \$47 million in aging infrastructure replacement projects that could be done if adequate funding was available.

While \$325 million seems a large number, House Bill 769 specifically identifies three large projects—two of which could consume roughly half of that funding: (a) the raising of Anderson Ranch Dam on the South Fork of the Boise River to yield an additional 29 kAF of storage space (~\$100 million); and (b) water delivery and treatment systems serving the Mountain Home Air Force Base from the Snake River (~\$50 million). Other projects specifically mentioned in the bill include: the continued study and implementation of aquifer recharge projects on the Eastern Snake Plain, studies addressing water supply sustainability and additional development opportunities, aging water infrastructure rehabilitation and replacement, and flood control/management.

Of the state General Fund monies, no more than one-third can be used for grant purposes; the remainder must be used on a loan basis. The Idaho Water Resource Board is charged with developing the competitive grant process review criteria and cost-share percentages. At a minimum, the bill directs that consideration be given to proposed project public benefits protecting existing water rights, hydropower generation potential/value, and whether proposed projects provide environmental, safety or additional recreational benefits.

Despite the likely Anderson Ranch Dam raise, Mountain Home Air Force Base, and aquifer recharge expenditures, several federal agencies also received significant budget bumps from COVID relief funds. Idaho water users are working closely with the U.S. Bureau of Reclamation, and the U.S. Department of Agriculture National Resources Conservation Service to identify additional grant and loan assistance availability and how state and federal programs may be further leveraged in combination to fund larger, more ambitious projects. Unfortunately, many of the state and federal program procedures are a work in progress—what opportunities eventually materialize

and what projects ultimately receive funding remains to be seen. But, at least some substantial funds are available for water infrastructure projects.

Conclusion and Implications

As noted above, much of the House Bill 769 dealt with approving the administrative budget for the Idaho Department of Water Resources (Department). The Department received its full budget request of \$129,984,300. The bill included approval of an FTP authorization of 168 full time-equivalent employees for the year (July 1, 2022 thru June 30, 2023). The

Department also received approximately \$6 million for aquifer planning and management activities and another \$1 million for flood risk evaluation and protections related studies and projects.

Also included in the Department's overall budget is funding to hire personnel and fund capability for prosecuting the long-awaited Bear River Basin General Stream Adjudication in southeast Idaho. The Bear River Basin and neighboring Malad Valley are the last remaining sizable areas of the state to undergo a general stream adjudication of all water rights (surface and ground) in the systems.

REGULATORY DEVELOPMENTS

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-xxx.)

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 Management 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)

U.S. BUREAU OF RECLAMATION DECLARES CENTRAL VALLEY PROJECT INITIAL 2022 ALLOCATION OF ZERO PERCENT FOR IRRIGATION—CALIFORNIA DEPARTMENT OF WATER RESOURCES REDUCES STATE WATER PROJECT ALLOCATIONS 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 Federal 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 SWP and CVP shortfalls.

(Jaclyn Kawagoe, Derek Hoffman)

JUDICIAL DEVELOPMENTS

DISTRICT COURT UPHOLDS EPA'S 'REASONABLE AVAILABILITY'
ANALYSIS IN THE ESTABLISHMENT OF WASHINGTON STATE
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 unreasonable 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 attributable 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)

DISTRICT COURT REJECTS PRELIMINARY INJUNCTION AGAINST HYDROELECTRIC DAMS ON THE KENNEBEC RIVER UNDER THE FEDERAL ENDANGERED SPECIES ACT

Atlantic Salmon Federation U.S., et al. v. Merimil Limited Partnership, et al., ___F.Supp.4th___, Case No. 21-CV-00257-JDL (D. Me. Feb. 24, 2022).

The U.S. District Court for the District of Maine recently denied a request for preliminary injunction by conservation groups seeking to require operators of hydroelectric dams on Maine’s Kennebec River to make seasonal changes to dam operations to reduce unauthorized take of endangered Atlantic salmon.

Factual and Procedural Background

The National Marine Fisheries Service (NMFS) has designated as endangered the Gulf of Maine Distinct Population Segment of salmon (Maine Salmon) under the federal Endangered Species Act. The Endangered Species Act makes it unlawful to “take” species or distinct population segments of a species that are listed as endangered without authorization, such as by harming the protected fish or wildlife.

Harm is defined as:

. . .an act which actually kills or injures fish or wildlife. . .[and]. . .may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Conservation groups, Atlantic Salmon Federation U.S., Conservation Law Foundation, Maine Rivers, and the Natural Resources Council of Maine, commenced a citizen suit against the licensees of four hydroelectric dams on the Kennebec River, alleging unauthorized take of endangered Maine Salmon by

the dam operators and licensees: Merimil Limited Partnership, Hydro-Kennebec LLC, Brookfield White Pine Hydro LLC, Brookfield Power US Asset Management LLC, and Brookfield Renewable US (Dam Operators). Plaintiffs alleged that the Dam Operators' incidental take authorization had expired such that the continued take of juvenile and adult salmon migrating upstream and downstream on the Kennebec River—and passing through the Lockwood, Hydro-Kennebec, Shawmut, and Weston hydroelectric facilities—violated the Endangered Species Act.

Plaintiffs requested a preliminary injunction mandating certain changes to dam operations for the purpose of increasing the number of Maine Salmon surviving migration on the Kennebec River. Plaintiffs requested that Dam Operators be required to increase water flows at certain facilities during particular seasons for Maine Salmon migration by running gates and spillways at maximum discharge and turning certain turbines off at specified intervals to allow for safe passage. After evaluating the parties' competing evidence, the court denied the plaintiffs' request for preliminary injunction principally because of insufficient evidence showing how the proposed operations changes would benefit Maine Salmon as an endangered population.

The District Court's Decision

In deciding whether to grant the plaintiffs' requested preliminary injunction to stop the unlawful taking of endangered Maine Salmon, the District Court considered the following four elements: 1) likelihood of success on the merits; 2) irreparable harm in the absence of a preliminary injunction; 3) that the balance of equities tips in favor of the requester; and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

First, the court evaluated the plaintiffs' likelihood of success on a theory of unlawful harm under the Endangered Species Act. In doing so, the court emphasized the need for evidence showing not just a probability of harm but actual injury to the endangered species or population segment. The court analyzed expert testimony and concluded there was sufficient evidence that the hydroelectric dams caused actual harm, and not just a probability of harm. Although the parties' experts reached different conclusions as

to the precise mortality rate of Maine Salmon passing through each dam, the court found that the hydroelectric dams caused actual harm to Maine Salmon because even Dam Operators' expert concluded as many as 17 percent of juvenile salmon some adult salmon did not survive passage through the dams. Based on this evidence of mortality and the expiration of Dam Operators' incidental take authorization, the court held that the plaintiffs were likely to succeed on their claim that Dam Operators violated the Endangered Species Act by taking endangered Maine Salmon without authorization.

Irreparable Harm

Next, the court considered whether there would be irreparable harm in the absence of a preliminary injunction. The court applied the rule that irreparable harm is not synonymous with harm to an individual and is something more than negligible harm to the species or population segment as a whole. In turn, the court considered whether the proposed injunction would prevent irreparable harm to Maine Salmon as an endangered population segment. The court acknowledged the plaintiffs presented some evidence showing that modifying dam operations would reduce the unauthorized take of Maine Salmon passing through the dams, *i.e.* would reduce harm to individuals within the Maine Salmon population. But the court critiqued the plaintiffs' evidence as lacking specificity about how a reduction in take at the four dams would provide a benefit to Maine Salmon as a whole, including data and a rationale supporting each expert's interpretation of the data. Additionally, the court found the evidence insufficient to establish the efficacy of the proposed operational changes.

Balancing of Equities and the Public Interest

Finally, the court considered the third and fourth factors: the balancing of equities and the public interest. The court observed that due to the very enactment of the Endangered Species Act, the balance of equities and public interest will often weigh heavily in favor of an injunction protecting a listed endangered species. Despite this observation, the court determined that the evidence was insufficient to support a conclusion that the preliminary injunction would benefit the public interest. The court reasoned that because it could not determine that the preliminary

injunction would benefit Maine Salmon as a whole for the purpose of the irreparable harm inquiry, it similarly could not conclude without speculation that the injunction would be in the public interest.

Conclusion and Implications

The court denied the plaintiffs' request for preliminary injunction. Although the court evaluated four criteria in reaching this decision, the dispositive issue common to several of the criteria was the lack of detailed evidence showing the proposed changes to dam operations would effectively prevent irreparable harm to Maine Salmon as a whole population segment.

This case highlights the importance of presenting detailed and specific expert testimony on the population-level impacts of proposed injunctive relief in a citizen suit under the Endangered Species Act. Courts may not view the particular harm or cause of mortality to an individual member of the species or population as identical to the cumulative harm to the endangered species or population as a whole. The court's ruling is available online at: https://casetext.com/case/atl-salmon-fedn-us-v-merimil-ltd-pship?q=1:21-CV-00257&PHONE_NUMBER_GROUP=P&sort=relevance&p=1&type=case.
(Megan Beshai, Rebecca Andrews)

DISTRICT COURT FINDS CLEAN WATER ACT'S PARTIAL WAIVER OF SOVEREIGN IMMUNITY DID NOT IMPLIEDLY REPEAL FEDERAL DISTRICT COURT'S JURISDICTION OVER ENFORCEMENT ACTIONS

United States v. Bayley, ___F.Supp.4th___, Case No. 3:20-cv-05867-DGE (W.D. Wash. Mar. 14, 2022).

The U.S. District Court for the Western District of Washington State has held that by enacting a partial waiver of sovereign immunity as an amendment to the federal Clean Water Act (CWA), Congress did not impliedly repeal the general jurisdictional statute that allows the Department of Justice to bring enforcement actions in federal District Court. That partial waiver also did not require the Department of Justice to participate in local permitting procedures in order to establish standing to bring a Clean Water Act § 404 enforcement action on the basis of the permitted activity.

Background

Philip Bayley obtained a permit from Mason County, Washington, for a "bulkhead construction project," but neglected to obtain a Section 404 permit pursuant to the Clean Water Act. The Department of Justice pursued an enforcement action against Bayley in District Court. Bayley sought to have the enforcement action dismissed on the basis, *inter alia*, that the federal government lacks jurisdiction to bring an enforcement action in District Court under the Act, and when dismissal was denied sought reconsideration of the jurisdictional issue.

Enforcement Actions by the DOJ

When it brings enforcement actions against private parties under the Clean Water Act, the Department of Justice relies on 28 U.S.C. § 1345 to establish jurisdiction in federal District court:

Except as otherwise provided by Act of Congress, the District Courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

When enforcement is sought against a federal agency, though, reliance on this generally-applicable jurisdictional provision runs up against the doctrine of sovereign immunity, which provides that:

. . . where Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free from regulation. *Hancock v. Train*, 426 U.S. 167, 179 (1979).

Thus, in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 227 (1976), the

U.S. Supreme Court:

. . . held that federal facilities were not subject to the permitting requirements under the Federal Water Pollution Control Act Amendments of 1972.

Congress promptly amended the Clean Water Act to add 33 U.S.C. § 1323(a), entitled “Compliance with pollution control requirements by Federal entities”:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution ... to the same extent as any nongovernmental entity[.]

Section 1323(a) acts as a limited waiver of sovereign immunity, subjecting federal agencies to enforcement for violations of the Clean Water Act, whether the act is being implemented by federal, state or local agencies.

The District Court’s Decision

Argument of ‘Implied’ Repeal of 28 U.S.C. Section 1345’s Conferral of Jurisdiction

Bayley argued that by requiring federal agencies to “adhere” to state and local requirements, § 1323(a) “impliedly” repeals 28 U.S.C. § 1345’s conferral of jurisdiction over enforcement action on federal District Court. Citing *United States v. Com. of Puerto Rico*,

721 F.2d 832, 840 (1st Cir. 1983), the District Court rejected this argument.

Argument of DOJ’s ‘Assumption of Jurisdiction’ by Alleging Discharges in WOTUS

The court further rejected Bayley’s related argument that the Department of Justice:

. . . assumed jurisdiction over [Bayley’s] private property by alleging that the discharges at issue occurred in the waters of the United States [WOTUS] and because the U.S. Army Corps of Engineers issued a stop work order to [Bayley].

This argument was made apparently in support of an argument that the Department of Justice was required to participate in the local Mason County permitting process and:

Plaintiff to have objected to Mason County’s determination that Mr. Bayley’s proposed bulk-head repair did not have a probable significant adverse impact on the environment.

The court held that § 1323(a) or any other provision in the CWA “impose[s] limits or contingencies on [the Department of Justice’s] standing to bring an action against” Bayley in federal District Court.

Conclusion and Implications

Congress’ dedication to cooperative federalism resulted in the Clean Water Act complex architecture by which significant implementation responsibilities are devolved to state, regional and local authorities. Section 1323(a) preserved the integrity of this system even as applied to federal agencies. However, it did not displace the generally-applicable grant of jurisdiction to federal District Courts to hear enforcement actions brought by the federal government. (Deborah Quick)

DISTRICT COURT DENIES MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL ON THE MEANING OF ‘WATERS OF THE UNITED STATES’

United States v. Mashni, ___F.Supp.4th___, Case No. 2:18-CV-2288-DCN (D. S.C. Jan. 19, 2022).

The United States District Court for the District of South Carolina recently rejected a motion to certify an interlocutory appeal that would address the meaning of “waters of the United States.” (WOTUS) The District court found there was no substantial ground for difference of opinion regarding the meaning of “waters of the United States,” and that allowing an interlocutory appeal would not materially advance the litigation. It concluded that the legal standard for certifying an order for interlocutory appeal was not met.

Factual and Procedural Background

On August 17, 2018, the United States of America filed a complaint pursuant to Sections 301, 309, and 404 of the Clean Water Act to obtain injunctive relief and impose civil penalties against Paul Edward Mashni and other corporate defendants. Mashni owned two multi-parcel sites on John’s Island, South Carolina, near the Stono and Kiawah rivers. According to the government, the corporate defendants were entities involved in the development projects, each of which was owned and operated by Mashni. The government alleged that in preparing the sites for construction, defendants violated the federal Clean Water Act by discharging pollutants into the Kiawah and Stono watersheds and redistributing soil to fill federally protected waters.

The Clean Water Act applies to “navigable waters,” defined as “waters of the United States.” Effective June 2020, the United States Army Corps of Engineers and the U.S. Environmental Protection Agency promulgated the “Navigable Waters Protection Rule” (NWPR), which provided a new, narrower regulatory definition for “waters of the United States” than the definition in the 1986 Regulations.

On July 1, 2021, the court entered an order denying defendants’ motion for partial summary judgment and motion for judgment on the pleadings (July Order). In the July Order, the issue was whether the government’s suit should be governed by the 1986 definition of waters of the United States—the law

at the time of the government’s claim—or whether the NWPR’s definition—which was still in effect at the time of the July Order—should be retroactively applied. The court concluded that the language contained within the rule “manifests an undeniable directive for the NWPR to apply prospectively.”

After the July Order, a separate court order, executive order, and federal rulemaking process indicated the *vacatur* of the NWPR and reissuance of the regulatory definition of “waters of the United States.” On July 19, 2021, defendants filed a motion for certification of an interlocutory appeal, seeking the court’s leave to appeal the July Order’s findings on the meaning of “waters of the United States.”

The District Court’s Decision

In order for the federal District Court to certify an interlocutory order for appeal, three criteria must be met. The order at issue must present: 1) a controlling question of law, 2) over which there is a substantial ground for difference of opinion, and 3) an immediate appeal will materially advance the ultimate termination of the litigation. The court addressed each prong and concluded that none of the three prerequisites for certification of the definitional question were met and denied the motion for interlocutory appeal.

A Controlling Question of Law

To be a “controlling” question of law, the issue must be one of law the appellate court can review *de novo*. It must be controlling in the sense of resolving a significant portion of the case. It must be efficient to have the appellate court resolve the issue now, in a piecemeal fashion, rather than waiting until the other issues are ready to be reviewed.

The court conceded that the question of which definition of ‘waters of the United States’ is applicable in this case was a pure question of law, but resolution was not completely dispositive of the litigation. The court explained that the government alleged a violation of the CWA regardless of which WOTUS definition applied. Therefore, the first prong for certi-

fication was not met because there was no completely dispositive controlling question of law.

Substantial Ground for Difference of Opinion

The court likewise found that the second prong for certification—substantial ground for difference of opinion—was not satisfied. Courts have traditionally found a substantial ground for difference of opinion exists where circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.

Defendants asserted that there was no controlling authority in the circuit on the question of whether the 2020 rule applied and that this case presented an issue of first impression in the circuit. The District Court disagreed and indicated that defendants' argument ran directly contrary to caselaw indicating that the mere existence of a question of first impression is an insufficient basis for interlocutory appeal. The court added that there was no dispute among the circuits on the question of whether the NWPR definition applied, because the NWPR did not suggest

retroactive application. The court concluded that defendants failed to prove there was a more novel or difficult question beyond the court's purview.

Material Advancement of the Ultimate Termination of Litigation

Finally, the court briefly considered whether an immediate appeal of the July Order would materially advance the ultimate termination of the litigation. As the court explained, interlocutory appeal would only prolong the litigation on the issue of whether new legislation may be retroactively applied and also what regulation is supposed to be retroactively applied.

Conclusion and Implications

Despite the significant uncertainty regarding the scope and meaning of the CWA jurisdictional term "waters of the United States," litigants may not be able to obtain review of an interlocutory order that relies on a pre-2015 regulatory definition of the term. The court's opinion is available online at: <https://casetext.com/case/united-states-v-mashni> (Tiffany Michou, Rebecca Andrews)

CALIFORNIA COURT OF APPEAL 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 struc-

ture 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 the California Environmental Quality Act, 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 hydrologic 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)

CALIFORNIA COURT OF APPEAL UPHOLDS EIR FOR IRRIGATION DISTRICT'S 'UPPER MAIN DITCH' WATER TRANSMISSION PIPELINE PROJECT

Save the El Dorado Canal v. El Dorado Irrigation District, ___Cal.App.5th___, Case No. C092086 (3rd Dist. Feb. 16, 2022).

The Third District Court of Appeal in *Save the El Dorado Canal v. El Dorado Irrigation District* rejected a challenge under the California Environmental Quality Act (CEQA) to the El Dorado Irrigation District's (District) approval of the Upper Main Ditch piping project and Blair Road Alternative, finding that substantial evidence supported the District's determination that the project and approved alternative would have less than significant impacts. The court rejected petitioner's claims that the Environmental Impact Report's (EIR) project description and analyses of hydrological, biological, and wildfire impacts were insufficient.

Factual and Procedural Background

The El Dorado Irrigation District operates a primarily surface-water system in El Dorado County to meet the region's potable water demands. The system contains more than 1,250 miles of pipe and 27 miles of earthen ditches that connect the system's facilities and treatment plants. The Upper Main Ditch (UMD) is the system's main conveyance feature and is comprised of a three-mile open and unlined ditch that connects the system's Forebay Reservoir to the Reservoir 1 Water Treatment Plant (WTP).

The Upper Main Ditch Conversion Project

In June 2015, the District issued an initial study and notice of preparation for a proposed project that would convert the UMD in to a buried 42-inch pipeline that spanned the length of the existing ditch. The upstream end of the new pipeline would connect to the Forebay Reservoir and the downstream end would connect to a new metering and inlet structure at the Reservoir 1 WTP. After placing the pipeline, the District would backfill the pipe and reshape the ditch to allow for the passage of stormwater flows up to the current ten-year storm event capacity. Ultimately, the project would improve water conservation by reducing the amount of water currently lost to seepage and evaporation (approximately 11-33 percent), as well as water quality by reducing infiltration of contaminants that subsequently overburdened the system's water treatment plants.

The Blair Road Alternative

In addition to the proposed project, the District considered three alternatives. The Blair Road Alternative would also convert the UMB into a buried 42-inch pipeline, but instead of running the pipe along the existing ditch, the pipe would be placed across approximately 400 feet of District-owned property from the Forebay Reservoir to Blair Road, continue along the road until it reached the UMD crossing, then travel across private property to the Reservoir 1 WTP. The upstream and downstream connections would remain the same and the alternative would construct the project in the same manner.

The CEQA Process and Litigation

Between June 2015 and June 2018, the District engaged in an extensive public engagement process to seek comments and feedback on the scope of the project and EIR. In June 2018, the District circulated a draft EIR. The DEIR's project description described the location of the UMD and the setting's history of storm flows and drainage. The DEIR also described the Blair Road Alternative's setting and noted that, should it be adopted, the District would no longer use the existing ditch—instead reverting the land back to private landowners.

After an extended public comment period, the District issued the final EIR in January 2019. In April 2019, the District's board of directors (Board) adopted

a resolution approving the Blair Road Alternative, certified the FEIR, and adopted a mitigation monitoring and reporting program. While the Board found that the initial project would achieve the project's objectives, the original project would have greater potential impacts to residents along the ditch from the resulting construction and eminent domain proceedings. The Board thus concluded the Blair Road Alternative would be feasible under CEQA because it would involve less construction activity near residents, require the removal of fewer trees, and reduce the number of easements across private property.

In May 2019, petitioner, Save the El Dorado Canal, filed a petition for writ of mandate alleging the project violated CEQA. The trial court denied each of petitioner's ten contentions. Petitioner timely appealed.

The Court of Appeal's Decision

On appeal, petitioner re-alleged that the project violated CEQA because the EIR contained an inaccurate project description and failed to adequately analyze potential impacts to hydrology, biological resources, and wildfire hazards. Under an abuse of discretion standard, the Third District Court of Appeal rejected each claim, finding that substantial evidence supported the District's determination and petitioner failed to demonstrate otherwise.

Adequacy of Project Description

Petitioner alleged the EIR failed to adequately describe the project by omitting the "crucial fact" that the ditch that would soon be abandoned was the "only drainage system" for the watershed. In advancing this argument, petitioner's briefing not only alleged deficiencies with the project's description, but also the EIR's environmental setting and impact analyses. The court of appeal noted that compounding these arguments under one heading was "problematic" and needed to be under a "separate heading" in order to properly raise these issues.

Notwithstanding this, the Third District Court considered whether the EIR provided an "accurate, stable, and finite" description of the project's location, boundaries, objectives, and technical, economic, and environmental characteristics. In so doing, the court rejected petitioner's assertion that the EIR "failed to disclose the true nature of the Upper Main

Ditch.” Rather, the EIR provided a detailed description of the UMD’s size, history, and location, and explained how the UMD passively intercepts stormwater runoff that would otherwise naturally flow down slope. With respect to the Blair Road Alternative, the EIR explained that the ditch would continue to passively receive and convey stormwater flows during storm events, even after the District abandoned its maintenance easement over it. The court concluded this evidenced an adequate, complete, and good faith effort at full disclosure about the Main Ditch and its relationship to the watershed’s drainage system, as well as the District’s intent to abandon the ditch should it adopt the Blair Road Alternative.

Impacts to Hydrology

Petitioner claimed the EIR inappropriately concluded that the Blair Road Alternative would not significantly impact watershed drainage because abandonment would permit “the underlying property owners to do with [the ditch] as they please.” Citing a comment letter submitted by the County of El Dorado, petitioner claimed the EIR failed to mitigate foreseeable impacts to watershed drainage that will result when the abandoned ditch becomes clogged with vegetation and debris.

The court disagreed, citing the FEIR’s response to the County’s comment letter, which explained that private action or inaction will ensure the abandoned ditch retains its current capacity to convey stormwater across their property thereby reducing any risk of significant flooding. Moreover, unlike the District, the County can regulate private fill activities via administrative and civil penalties to ensure such activities do not yield significant environmental effects. For these reasons, it would be too speculative to predict landowners’ particular actions or inactions and the ensuing potential effects to the ditch’s stormwater conveyance capacity. Petitioner failed to point to any substantial evidence in the record to suggest otherwise to explain how the EIR’s drainage analysis is inadequate.

Impacts to Biological Resources

Petitioner also alleged the EIR inadequately analyzed the project’s potential impacts to biological resources by failing to mitigate impacts to riparian habitats and sensitive natural communities, and by

conflicting with local policies and ordinances that protect such resources. The court noted that the EIR found the Blair Road Alternative would result in less potential biological impacts because it would be located within an existing road corridor devoid of riparian habitat and require less trees to be removed. As with the initial project, any impacts to vegetation communities—including those resulting from tree removal—would be mitigated to less than significant levels through permit acquisition and compliance. In turn, the Alternative would be consistent with the General Plan’s biological resources management plan, the County’s tree mortality removal plan, and CALFIRE’s tree removal procedures. And, contrary to petitioner’s assertion, compliance with these plans via mitigation measures would not increase the spread of bark beetle populations, thereby resulting in significant impacts.

The court also rejected petitioner’s assertion that the County ignored comments submitted by the California Department of Fish and Wildlife (CDFW). Petitioner claimed CDFW’s comment directed the County to obtain a streambed alteration agreement and consult with the U.S. Army Corps of Engineers, should construction implicate Waters of the United States (WOTUS). The County’s response noted that the project and Alternative were specifically designed to avoid WOTUS, but nevertheless would be required to mitigate any such impacts. The EIR explained that the riparian habitat affected by the project is not a naturally occurring waterbody, thus, plant and wildlife species are not dependent on water in the ditch. The court concluded this response was more than adequate to address CDFW’s comment.

Finally, the court was not swayed by petitioner’s claim that the EIR failed to adequately analyze and mitigate impacts to tree mortality. The court pointed to the EIR’s explanation that trees surrounding the project site are not native riparian species, and thus, are not dependent on water conveyed through the ditch. To the contrary, most of the adjacent tree species are stress-tolerant and can withstand climatic variation and changes in water seepage. Thus, the EIR provided facts, reasonable assumptions, and expert opinion to satisfy the District’s substantial evidence burden.

Wildfire Hazards Analysis

The Third District Court rejected petitioner’s final contention that the EIR failed to adequately consider the entirety of the project’s fire risks, and instead only considering construction-related impacts. Petitioner asserted the project would have potentially significant impacts by removing a water source that could be used as a firefighting tool. The court disagreed by noting that the EIR specifically debunked petitioner’s claim—water in the ditch is intended as a drinking water supply and does not supply water for firefighting. Contrary to petitioner’s claim and related comment letter, water from the ditch had never been used to fight prior fires and the CALFIRE Strategic Fire Plan did not include the UMD as a potential firefighting resource. Absent substantial evidence to the contrary, petitioner had not carried its burden of demonstrating the EIR’s analysis was unsupported.

Conclusion and Implications

The Third District Court of Appeal’s opinion offers a straightforward analysis of well-established CEQA tenants that govern a legally sufficient EIR and project alternatives. The court reiterated that CEQA does not mandate perfection, but rather a good faith effort at full disclosure of the project’s description and impact analysis. To this end, an EIR may make some assumptions about future scenarios, but need not consider indirect impacts that are too speculative to predict. Finally, the opinion underscores the procedural and evidentiary burdens a CEQA challenger must satisfy to avoid forfeiting their arguments: a brief must raise separate and distinct issues under separate headings, and must lay out substantial evidence favorable to the agency and explain why it is lacking. The court’s opinion is available at: <https://www.courts.ca.gov/opinions/documents/C092086.PDF>.
 (Bridget McDonald)

COLORADO COURT OF APPEALS ALLOWS ‘FREEDOM TO WADE’ CASE TO ADVANCE TO TRIAL ON THE MERITS

Hill v. Warsewa, 20CA1780 (Colo.App. 2022).

On January 27, 2022, the Colorado Court of Appeals overturned a state District Court’s dismissal of a fisherman’s declaratory judgment claim that could have wide-reaching implications for Colorado stream access laws. The decision allows Roger Hill to pursue his claim that a portion of the Arkansas River was “navigable” for title at the time of statehood and therefore is not private property from which he and the public can be excluded from fishing. The outcome of this case may open the door for additional cases challenging ownership and access to the bed and banks of river segments long thought to be private property throughout Colorado.

Background and Procedural History

Roger Hill is a fly fisherman who frequently wades in the Arkansas River near Cotopaxi, Colorado. Beginning in at least 2012, Hill repeatedly attempted to fish at his favorite spot on the Arkansas, on land

claimed to be owned by Mark Everett Warsewa and Linda Joseph (collectively: Warsewa). Warsewa believed that Hill was trespassing, as the bed and banks of “non-navigable” waterbodies in Colorado belong to the underlying landowner under current Colorado law and policy. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (“[T]he land underlying non-navigable streams is in the subject of private ownership and is vested in the proprietors of the adjoining lands.”); *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905) (“[T]he owner of lands along a nonnavigable fresh water stream, as an incident of such ownership, owns the bed of the stream...”; see also, *In re German Ditch and Reservoir Co.*, 139 P. 2, 9 (Colo. 1913) (“The natural streams of the state are nonnavigable within its limits.”). Although no rivers in Colorado have yet been declared navigable for title, the General Assembly seemed to leave the door open in response to the *Emmert* case, by amending the definition of “premises” in the criminal trespass statute to mean “real property,

buildings...and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.” C.R.S. 18-4-504.5 (2021) (emphasis added). Hill’s dispute with Warsewa eventually led to threats and violence. Hill claims that Warsewa threw rocks at him, threatened him with arrest, and eventually shot at his friend while they were fishing. Warsewa was charged and pled guilty to menacing for the shooting incident.

Yet, the ownership dispute in this stretch of river continued. In 2018, Hill filed a complaint in the Fremont County District Court seeking a declaratory judgment that Warsewa does not own the bed and banks in this stretch, and therefore has no right to exclude Hill. The complaint also sought to quiet title to confirm that the State of Colorado owns the disputed riverbed in trust for the public.

The case has a complex procedural history. After Hill filed the complaint in 2018, Warsewa removed the case to the federal District Court based on federal question jurisdiction, specifically related to the request to quiet title in favor of the State of Colorado. All defendants (including the State of Colorado who Hill added in federal court) moved to dismiss for lack of prudential standing, lack of Article III standing, and failure to state a claim for relief. The federal District Court granted the motions to dismiss, prompting an appeal by Hill to the Tenth Circuit. The Tenth Circuit Court of Appeals reversed and remanded the case for a determination of whether Hill had Article III standing. On remand, the District Court found that Hill lacked constitutional standing because Hill asserted a “generalized grievance.” The District Court remanded the case back to the Fremont County District Court, where it began two years earlier. On remand to state court, the defendants immediately filed motions to dismiss for lack of standing and for failure to state a claim for relief. The District Court agreed with both theories and dismissed Hill’s claims on September 14, 2020.

The Court of Appeals’ Decision

Hill claims that Warsewa does not own the disputed portion of the riverbed because the State of Colorado acquired ownership to it under the equal footing doctrine when Colorado became a state in 1876. Under the equal footing doctrine, when a state enters statehood, it “gains title within its borders to the beds of waters then navigable.” *PPL Montana*,

LLC v. Montana, 565 U.S. 576, 591 (2012). Federal case law defines navigability for title purposes as rivers that were “used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *Id.* at 591-92. Alternatively, if the waterway was non-navigable at the time of statehood, then title remained with the United States and could be sold to private landowners. Hill’s complaint alleges that Warsewa’s chain of title to the disputed land traces back to a federal patent that was issued *after* Colorado became a state.

Hill Lacks Standing to Quiet Title

The court first examined whether Hill has standing to bring both his quiet title and declaratory judgment claims. In his complaint, Hill requested the court declare that “the State of Colorado holds title to the subject real property in trust for the public.” However, Colorado law provides that a party seeking to quiet title must have a personal interest in the property—a party cannot merely attempt to capitalize on another’s weakness of title. Hill attempted to use the equal-footing and public trust doctrines to get around this barrier by arguing that the State of Colorado took title to the Arkansas riverbed at statehood and now holds it in trust for the public. As a member of the public, Hill asserted, he essentially has an easement across the state land. Hill also argued that Colorado courts have historically allowed private individuals to bring suits to enforce public easements.

The Court of Appeals rejected this argument and upheld the District Court’s dismissal for a lack of standing. The court agreed with Warsewa and the State of Colorado that:

Hill himself has no claim to title and has not shown that his claim to public access rises to the level of an easement.

To reach this conclusion, the court relied on the United States Supreme Court’s opinion in *PPL Montana*, which clarified that, after states took title to the beds of navigable waters:

...the States retain residual power to determine the scope of the public trust over waters within their borders. *Id.* at 604.

Because there is no Colorado statute or case law establishing a public right to use this type of public land that rises to the level of a property interest, the court said, Hill lacked any legally enforceable right and therefore the District Court properly dismissed the quiet title claim for lack of standing.

The court quickly differentiated Hill's requests for a declaratory judgment and injunctive relief to prevent Warsewa from "threatening, assaulting, or battering" him. If in fact the bed of the Arkansas River is owned by the State, the Court reasoned, Hill cannot be a trespasser vis-à-vis Warsewa and therefore he is asserting a right specifically for himself. Warsewa countered Hill's argument by claiming that, even if the Arkansas in this location was navigable for title purposes, Hill still would not have a right of access because there is no public trust doctrine in Colorado. The Court of Appeals specifically left the issue open, noting that this claim "may (or may not) be the case." In 1979, the Colorado Supreme Court declined to adopt the public trust doctrine for *non-navigable* streams in *People v. Emmert*. But, according to the Court of Appeals, there is:

. . .no Colorado appellate decision that has addressed the issue of whether—and if so, how—the public trust doctrine applies to the beds of navigable waters.

Because the court found that Hill brought a specific declaratory judgment claim on behalf of himself to prevent threats of violence and future prosecution, the court reversed the District Court's dismissal of the declaratory judgement claim.

Failure to State a Claim

Having determined that Hill has standing to bring his declaratory judgment claim, the Court of Appeals confirmed that Hill also stated a plausible claim for relief. As such, it reversed the trial court's dismissal under C.R.C.P. 12(b)(5). As the court explained, the rule does not require a finding that a plaintiff is likely to succeed at trial, only that, when viewed in the light most favorable to the plaintiff, the claim is plausible. The court said:

If, as Hill alleges, the relevant segment of the river was navigable at statehood, then the

Warsewa defendants do not own the riverbed and would have no right to exclude him from it.

To support his claim, Hill alleged that beaver pelts, logs, and railroad ties were floated down this stretch of the Arkansas as early as 1813 and continuing through statehood in 1876. The court summarized its ruling as follows:

We certainly cannot, at this early stage, know whether Hill will be able to establish that the river segment was navigable at statehood. But we cannot say it is not plausible.

Therefore, the court remanded the case back to the District Court for trial on the declaratory judgment claim and a specific finding of whether this stretch of the Arkansas was navigable at statehood.

Conclusion and Implications

This case, which is likely to end up in the Colorado Supreme Court, could have widespread ramifications for public river access throughout the state. As the Court of Appeals noted in its decision, "the question of whether, and to what extent, the public trust doctrine should apply to the bed of a navigable river has never been resolved—or, as far as we can tell, even addressed—in Colorado." If Hill is successful in proving that the Arkansas River was navigable at statehood, this stretch of the river could end up in a unique legal purgatory where the State of Colorado is not officially declared the owner (the state does not claim to own the disputed riverbed and contends that it's private property), but Warsewa is determined to not own this property. This situation, particularly if expanded across the state, could potentially invite a legislative effort to create some form of a public trust doctrine for river access throughout the state. Additionally, even if Hill is not successful, the Court of Appeals' decision opens the door for similar lawsuits throughout the state, particularly on larger rivers such as the lower sections of the Colorado or South Platte that likely have evidence of navigability prior to 1876.

(John Sittler, Jason Groves)

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