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WESTERN WATER NEWS

IDAHO WATER USERS CONCERNED WITH INSLEE-MURRAY REPORT CONCERNING POTENTIAL BREACHING OF THE FOUR LOWER SNAKE RIVER DAMS TO SPUR LISTED SALMON RECOVERY

On June 9, 2022, Governor Jay Inslee and Senator Patty Murray of Washington State released a draft report—*Lower Snake River Dams: Benefit Replacement Draft Report* (Report)—addressing the topic of potential dam breaching to aid regional salmon recovery efforts in the Pacific Northwest. The Report followed the approximately $30 billion Columbia Basin Initiative proposal of Idaho Congressman Mike Simpson, launched in early 2021. The Simpson plan proposed breaching four dams on the Lower Snake River (Ice Harbor, Lower Monumental, Little Goose, and Lower Granite—the LSRD)) and using the estimated funds to replace lost power production, improve transportation corridors to mitigate lost barging, and to mitigate environmental effects of dam breaching, among other activities.

The Inslee-Murray Report

In late 2021, Governor Inslee and Senator Murray announced their intention to wade deeper into the dam breaching debate circulating over Congressman Simpson's Columbia Basin Initiative announcement. The purpose of their process/Report is to review and discuss whether there are reasonable means for replacing the benefits provided by the LSRD as a practical matter, and what those replacement alternatives are likely to cost. Senator Murray in particular has consistently stated that she is not inclined to discuss dam breaching (and the Congressional action needed to accomplish such a path) unless and until a benefits replacement plan is in place and substantially funded.

At this juncture, the *draft* Report was released to provide public comment and input opportunity for purposes of creating the final version. Public comments are due July 11, 2022.

The core benefits provided by the LSRD (completed between 1955 and 1975) include hydroelectricity generation (approximately 1,000 average MW annually and up to 3,033 MW at peak load) and roughly 100 miles of river/barge navigability for commodities shipping between Lewiston, Idaho and the Tri-Cities region of Washington State, continuing downstream on the Columbia River to Columbia River ports and the Pacific Ocean. The LSRD also support irrigation water withdrawal (including groundwater through elevated local groundwater tables caused by the reservoirs/higher river elevations), and slack water recreational opportunities.

Though the LSRD were designed with fish ladders and other juvenile fish passage infrastructure has been added over time, many point to the dams and their operations as a critical bottleneck stunting (if not negating) salmon recovery opportunity in the lower Snake River Basin. Not surprisingly, environmentalists and local Native American Tribes (particularly the Nez Perce Tribe) have long pushed for breaching the four LSRD.

The latest Columbia River System Operations Final Environmental Impact Statement (EIS) issued by the united states Army Corps of Engineers (Corps) in July 2020 identified a preferred operations alternative that did not include dam breaching, but opted instead for ongoing power generation and spill regime modifications intended to aid migrating salmonids during certain periods of the year. The Nez Perce Tribe, State of Oregon, and 11 fishing and conservation groups filed suit in United States District Court challenging the adequacy of the Environmental Impact Statement (EIS).. In October 2021, the parties to the litigation agreed to pause the same to pursue alternative settlement frameworks spurred by Congressman Simpson's Columbia Basin Initiative announcement earlier that year.

In terms of river navigation and commodities shipping, the Report notes that barge transportation rates are the most economical averaging 30-45 cents per bushel of wheat barged. The next cheapest mode of transportation is rail, ranging between 50-75 cents per bushel. Consequently, the Report anticipates the need to improve and expand rail-based transportation infrastructure, and trucking/highway corridors after that to replace lost barging opportunity.

Lost irrigation water delivery opportunity would have to be mitigated by deepening wells in response to the lowering of the local groundwater table, and modifying surface water diversion infrastructure/pumps to adjust surface water diversion elevations in the absence of the reservoirs.

Lost electricity generation would require equally "green" (with the exception of fish passage) replacements in terms of wind, solar, and other sources. The Report stresses that replacement energy sources would need be online and deemed reliable by actual operation before breaching of the dams could occur to avoid regional energy needs deficits.

Finally, the report notes that waterfront redevelopment, particularly in Lewiston, Idaho and Clarkston, Washington would need be done to accommodate the shift from a reservoir-based waterfront to one consistent with a free-flowing river. The redevelopment efforts would include considerations for changing recreational regimes and opportunities.

All told, the Report estimates benefits replacement costs could range between $10.3 and $27.2 billion. And, the report acknowledges that these numbers are underinclusive because several anticipated costs are still unknown with respect to various necessary replacement actions. In sum, the Report acknowledges that it is essentially a thumbnail sketch subject to more careful refinement based upon dedicated technical analyses of the needed replacement actions.

Why Idaho Water Users Care

Setting aside agricultural interests and the need to market and transport Idaho-grown commodities, Idaho water users are concerned that the Report and any future discussions of dam breaching be cognizant and respective of the Snake River Water Rights Act of 2004 (known as the Nez Perce Agreement), codified as Public Law 108-447 (Dec. 8, 2004)—118 Stat. 3431— 3441. The 30-year settlement resolved the Tribe's pursuit of a myriad of water right claims in the comprehensive Snake River Basin Adjudication.

The Nez Perce Tribe received an on-reservation consumptive use water right to 50,000 acre-feet of water with a priority date of 1855; establishment of a $50 million water and fisheries resources trust fund; $23 million for the design and construction of water supply and sanitary sewer infrastructure on-reservation; transfer of management authority of the Kooskia National Fish Hatchery to the Tribe; and transfer of approximately $7 million of Bureau of Land Management-administered lands within the reservation to the Tribe. The Tribe also received commitment from the State of Idaho concerning minimum streamflow establishment and habitat conservation funding and planning for Endangered Species Act-listed fish species in the Salmon and Clearwater River Basins.

Idaho water users received finality regarding, and the adjudication of, their water right claims in the Snake River Basin Adjudication, and protections from flow augmentation obligations of the United States Bureau of Reclamation for downstream "fish flush" purposes. Bureau acquisition of flow augmentation water (up to 487,000 acre-feet) occurs on a willing lessor-willing lessee basis through Idaho basin-based water supply banks—as opposed to more unilateral takings attempts lacking compensation in return. The flow augmentation component is also an important part of the biological opinions authorizing Upper Snake River dam operations—many of which are used to store and deliver irrigation water to Idaho's agricultural economic engine.

Conclusion and Implications

What potential LSRD dam breaching may mean to U.S. Bureau of Reclamation flow augmentation obligations and combined flood control operations of the Bureau and Corps arising upstream remains to be seen. But, the 2004 resolved a variety of water user issues and competing claims in Idaho and Idaho water users have no interest in seeing that settlement upset. The *Lower Snake River Dams: Benefit Replacement Draft Report* is available online at: https://www.murray.senate.gov/wp-content/uploads/2022/06/LSRD-Benefit-Replacement-Draft-Report_20220609.pdf. (Andrew J. Waldera)

SAN DIEGO COUNTY WATER AUTHORITY RECEIVES PATENT FOR NEW PIPELINE INSPECTION SYSTEM

Utility pipelines are present all throughout the state and have historically been inspected physically by a person. These types of inspections, however, are costly, time consuming, and can present safety issues depending on the terrain through which the pipelines run. Now, in an innovative move to help make the inspection of such utility pipelines more efficient, cost effective, and safer, the San Diego County Water Authority (Water Authority) has been awarded a utility patent for a new autonomous pipeline inspection system.

The Water Authority operates and maintains a vast system of water conveyance facilities that includes about 310 miles of pipelines, capable of delivering water in excess of 900 million gallons per day. The Water Authority's water conveyance system also includes roughly 1,600 aqueduct-related structures and 100 metering and flow control facilities, a water treatment plant, hydroelectric facilities, pump stations, flow regulating structures, and water storage reservoirs.

The Water Authority particularly prides itself in its Asset Management Program, which includes proactive searches for any weaknesses present in pipelines that are intended to identify any potential issues before they become larger, more costly problems. In furtherance of this program, the Water Authority's Operations and Maintenance Manager, Martin Coghill, designed the newly patented inspection system to help save time, reduce costs and improve safety during inspections.

The Pipeline Inspection System

The Water Authority applied for the patent on June 13, 2019, and for almost three years the Water Authority worked towards completing the complex process before the U.S. Patent and Trademark Office finally awarded the patent on April 5, 2022. The patented pipeline inspection system, which comprises a body, cameras, support members and light sources to capture high-resolution images of pipeline walls, was primarily designed in response to the Water Authority's need to improve safety while inspecting steeper portions of its aqueduct.

According to the patent document:

> .. .the pipeline inspection may comprise a body, one or more cameras, one or more support members, one or more light sources, and/or other components.

The patent also includes similar but varying iterations of this description.

How the System Functions

More specifically, the patent describes how the system comes together to function. The cameras are first attached to the central body of the system and directed in such a way so as to capture imaging information relating to the interior surfaces of the pipe. The support members extend outwards from the body, similarly to how spokes on a wheel extend outward from the hub, and contact the inner surface of the pipe with wheels at the end to facilitate movement through the pipe and support the main body. Lastly, the light sources are positioned along the outer ends of the support members in a way that adequately illuminates the interior surface of the pipe. According to the patent documents, this body and spoke system utilizes a "leading" end—comprising the body outfitted with cameras—and a "trailing" end—utilized for added support and oriented in a way that ends up looking like a vehicle axle designed to move through the pipe long-ways, or parallel, to the pipe.

Ultimately, the system comes together to create a dual-bodied vehicle of sorts, outfitted with cameras and lights, that is capable of moving through pipes four to nine feet in diameter and capturing images of a pipe's interior surfaces. The system allows for high-resolution imaging of much higher quality than traditional closed-circuit television, and the system's unique design keeps the cameras properly oriented while moving through the pipe. The camera array also provides operators with the ability to stitch the imaging files together and create a 360-degree virtual view of the interior sections of the pipe.

Conclusion and Implications

California is home to a monolithic network of utility pipelines that help deliver vital resources to homes and business all across the state. As these networks grow larger and larger, it will only become more difficult to timely and efficiently maintain the many thousands of miles of pipelines that weave their way throughout the state. Innovative developments like San Diego County Water Authority's newly patented pipeline inspection system are thus becoming all the more necessary in maintaining the infrastructure required to fuel Californians while keeping costs to ratepayers reasonable. Systems like this help utilities like the Water Authority stay on top of the problems associated with aging infrastructure and it is always refreshing to see new ideas brought to the table on how we can more efficiently manage our state's water supply systems.

(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

U.S. SENATORS INTRODUCE FINANCIAL ASSISTANCE BILL TO PROVIDE ADDITIONAL FUNDING FOR WATER PROJECTS IN THE WEST

In May 2022, U.S. Senators Feinstein (D-CA), Kelly (D-AZ), and Sinema (D-AZ) introduced Senate Bill 4231, the Support to Rehydrate the Environment, Agriculture, and Municipalities Act or *STREAM Act*. The bill's purpose is to increase water supply and update water infrastructure in the West by providing funding for new water projects.

Background

California and the West have been dealing with years of unprecedented drought. The *STREAM Act* attempts to address the issues of historic drought, climate change, and aging water infrastructure by providing financial assistance to new water projects that improve water resiliency in the West. (*See,* Press Release, Dianne Feinstein, United States Senator for California, Feinstein, Kelly, Sinema Introduce Bill to Increase, Modernize Water Supply (May 18, 2022), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=1783E95E-F02C-4CFC-9E81-AEFF7AAAC3AF#:~:text=yesterday%20introduced%20S.,California%20and%20throughout%20the%20West.

In introducing the bill, Senator Feinstein expressed concern about the ongoing drought by stating that "… the past two years have painfully demonstrated, severe and prolonged drought exacerbated by climate change is the stark reality for the West." (*Id.*) She also said:

> . . .if we don't take action now to improve our drought resilience, it's only going to get worse. We need an 'all-of-the-above' strategy to meet this challenge, including increasing our water supply, incentivizing projects that provide environmental benefits and drinking water for disadvantaged communities, and investing in environmental restoration efforts. (*Id.*)

The introduction of the *STREAM Act* is also part of an ongoing effort to provide financing for future infrastructure projects in the West. Senator Kelly said:

> As Arizona continues to navigate this historic drought, it's more important than ever to build infrastructure that promotes a secure water future. Combined with the investments made in the bipartisan infrastructure law, this legislation will help Arizona and the West expand drought resiliency projects, increase groundwater storage, and better manage and conserve our water resources. (*Id.*)

The Bill's Proposed Funding and Appropriations

The *STREAM Act* provides funding for water storage, water recycling, and water desalination projects. (Support to Rehydrate the Environment, Agriculture and Municipalities Act, S 4231, 117th Cong. (2022).) The bill also provides financial incentives for storage and conveyance projects that enhance environmental benefits and expand drinking water access to disadvantaged communities.

The *STREAM Act's* largest appropriation would provide $750 million for the Secretary of the Interior to spend on eligible water storage and conveyance projects from 2024 to 2028. Section 103 of the bill establishes a competitive grant program for non-federal projects. Entities eligible to obtain grant funding include any state, political subdivision of a state, public agency, Indian tribe, water users' association, agency established by an interstate compact, and an agency established under a state's joint exercise of powers law.

To qualify for grant funds, a project proposed by an eligible entity must involve either a surface or groundwater storage project, a facility that conveys water to or from surface or groundwater storage, or a natural water retention and release project as defined by the proposed law. Other requirements include that the federal cost-share cannot exceed $250 million,

the project must be in a Bureau of Reclamation state, the eligible entity must construct, operate, and maintain the project, and there must be a federal benefit.

A federal benefit is defined as public benefits provided directly by a project. These public benefits can be fish and wildlife benefits that provide excess water to environmental mitigation or compliance efforts, flood control benefits, recreational benefits, or water quality benefits.

The Secretary of the Interior may provide a grant to an eligible entity for an eligible project under the program "for the study of the eligible project… or for the construction of a non-federal storage project that is not a natural water retention project." (*Id.*) However, for the Secretary to provide a grant for the construction of a non-federal storage project, the eligible entity must conduct a feasibility study, and the Secretary must concur that the eligible project is technically and financially feasible, provides a federal benefit, and is consistent with applicable federal and state laws. The Secretary must also determine that the eligible entity has sufficient non-federal funding to complete the project and is financially solvent. Lastly, the governor, a member of the cabinet of the governor, or the head of a department in the Bureau of Reclamation state where the proposed project is located must support the project or federal funding of the project.

Prioritizing Projects

The *STREAM Act* would prioritize funding projects that meet two or more of the following criteria: 1) provides multiples benefits, such as water reliability for states and communities that are frequently drought-stricken, fish and wildlife benefits, and water quality improvements; 2) reduces impacts on environmental resources from water projects owned and operated by federal or state agencies; 3) advances water management plans across a multi-state area; 4) is collaboratively developed or supported by multiple stakeholders; 5) the project is within a watershed where there is a comprehensive watershed management plan that enhances the resilience of ecosystems, agricultural operations, and communities.

Conclusion and Implications

Senator Feinstein introduced the STREAM Act in the Senate on May 17, 2022, and the bill was referred to the Senate Committee on Energy and Natural Resources. On May 25, 2022, before the Senate Committee on Energy and Natural Resources Subcommittee on Water and Power, Senator Feinstein testified in support of the bill and introduced letters supporting the bill. Supporters of the bill in its current form include the Association of California Water Agencies and the Nature Conservancy. The Committee of Energy and Natural Resources will consider the bill in its current form and make changes it deems necessary before deciding whether to release the bill to the Senate floor. To track updates and changes to the bill, *see:* https://www.congress.gov/bill/117th-congress/senate-bill/4231.

(Jake Voorhees; Meredith E. Nikkel)

REGULATORY DEVELOPMENTS

U.S. ENVIRONMENTAL PROTECTION AGENCY AGREES TO PAY NEW MEXICO AND NAVAJO NATION $63 MILLION FOR GOLD KING MINE SPILL

On June 16, 2022, the U.S. Environmental Protection Agency (EPA), the State of New Mexico and the Navajo Nation announced that the EPA will pay $63 million in accordance with settlement agreements reached among the parties. New Mexico will receive $32 million and the Navajo Nation will receive $31 million. The announcement of the settlement comes almost seven years after the Gold King Mine spill near Silverton, Colorado. The spill occurred on August 5, 2015, when EPA personnel and federal contractors breached a containment wall in an abandoned and plugged mine causing 3 million gallons of wastewater containing high levels of heavy metals and elements such as lead, cadmium, and arsenic to flow into the Animas and San Juan rivers.

The effects of the spill were devastating and immediate. Over 880,000 pounds of metal was released into the Cement Creek tributary of the Animas River. A mustard-colored plume flowed down the Animas River into the San Juan River and through Navajo Nation lands. The plume traveled down the San Juan River into Utah, reaching Lake Powell within a week of the "blowout." The metal concentrations in the water exceeded both federal and state drinking water standards affecting New Mexico residents, tourism, livestock, agriculture, and the local environment. The effects were felt by those in Colorado, New Mexico, and Utah including the Navajo Nation and Southern Ute Indian Reservations. A federal report issued in April 2016 concluded the spill was the EPA's fault. Multiple lawsuits followed.

Background

There are thousands of inactive mines in the western United States that are leaking or have the potential to leak toxic wastewater. One of these mines is the Gold King Mine located near the Animas River at Silverton, Colorado. The Animas River is a tributary of the San Juan River running from the San Juan Mountains of Colorado through Silverton and Durango, Colorado until it reaches the San Juan River in Farmington, New Mexico.

Sometime after the Gold King Mine closed, toxic wastewater began leaking from the mine. The EPA hired a contractor to use an excavator to cover the portal entrance of the mine, while being supervised by EPA and Colorado employees. According to Colorado Division of Reclamation Mining and Safety records and EPA's work plan, the risk of "blowout" was known by the crew. The excavator destroyed the plug blocking the toxic water and over several days, 3 million gallons of wastewater flowed out of the mine and into the Animas River.

The Spill

The effects of the spill were devastating and immediate. Over 880,000 pounds of metal was released into the Cement Creek tributary of the Animas River. A mustard-colored plume flowed down the Animas River into the San Juan River and through Navajo Nation lands. The plume traveled down the San Juan River into Utah, reaching Lake Powell within a week of the "blowout." The metal concentrations in the water exceeded both federal and state drinking water standards affecting New Mexico residents, tourism, livestock, agriculture, and the local environment. The effects were felt by those in Colorado, New Mexico, and Utah including the Navajo Nation and Southern Ute Indian Reservations. New Mexico contends that the long-term impacts are significant because rainfall and snowmelt can "re-suspend" the metals in the riverbed. The Gold King Mine spill resulted in the creation of the Bonita Peak Mining District Superfund Site that includes the Gold Mine area.

The EPA's response to the Gold King Mine spill into the Animas River was highly criticized by the media and local residents, in part, because the EPA did not alert the public to the spill for 24 hours. The EPA has since taken responsibility for the cleanup

creating drainage impoundments and expending more than $6 million dollars in reimbursements to state, federal, and local entities.

The Supreme Court's Decision

In June 2016, New Mexico filed suit against Colorado in the U.S. Supreme Court for damages caused by Colorado's participation in the spill including, inter alia, Colorado's alleged failure to property oversee the contamination. New Mexico claimed that Colorado was liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(a) and CERCLA 42 U.S.C. § 9613(g)(2) for costs New Mexico incurred while responding to the spill. *State of New Mexico v. State of Colorado, Mot. For Leave to File Bill of Complaint*, No. 220147, Orig. (June 22, 2016). New Mexico also claimed Colorado was in violation of the Resource Conservation and Recovery Act's (RCRA) "imminent and substantial endangerment provision," 42 U.S.C. § 6972(a)(1). Complaint at 43-44. New Mexico further claimed that Colorado had caused a public nuisance through its "past, present and ongoing conduct" regarding the contamination. Complaint at 47. Finally, New Mexico claimed that Colorado was negligent or grossly negligent in its actions by "failing to investigate or test the hydraulic pressures within the Gold King Mine despite knowing the mine was holding back significant quantities of water." Complaint at 49.

On June 26, 2017, the U.S. Supreme Court rejected New Mexico's lawsuit against Colorado over damages incurred from the Gold King Mine spill. The Court ruled 8-1 in favor of denying a motion to hear the case. Order, *New Mexico v. Colorado*, No. 220147, Orig. (June 26, 2017) (denying Motion For Leave to File a Bill of Complaint). No reason was provided for the Court's decision.

Conclusion and Implications

The announcement of the settlement signals closure of multiple claims and issues among the parties. Some officials note that the Animas and San Juan Rivers have undergone significant healing since spill polluted waterways for miles. New Mexico and Navajo Nation applauded this latest settlement. Portions of the settlement will fund cropland rehabilitation, aquatic habitat and long-term water quality monitoring. New Mexico officials noted that a significant portion of the settlement monies will be used to fund outdoor recreation activities in northwest New Mexico. This latest settlement is one of many. In 2021, New Mexico and the Navajo Nation reached a settlement with the Sunnyside Gold Corporation mining company for $21 million. With thousands of abandoned mines scattered throughout the western United States, there is a need for clear legal precedent to ensure that any future environmental accidents involving mine clean-ups are met with the proper response and reimbursement.
(Christina J. Bruff)

CALIFORNIA COASTAL COMMISSION DENIES PERMIT TO BUILD DESALINATION PLANT IN HUNTINGTON BEACH DUE TO ENVIRONMENTAL RISKS

At the May 2022 meeting of the California Coastal Commission, the Commission denied Poseidon Water's application for a Coastal Development Permit (CDP) to build and operate a desalination plant in Huntington Beach (City), California. The proposed project would draw in up to 106.7 million gallons per day of seawater and produce up to 50 mgd of potable water, with the remaining high-salinity brine discharged back into the ocean. Commission staff found there were significant issues related to protecting marine life, water quality, environmentally sensitive habitat areas, naturally occurring hazards, and environmental justice considerations. The Commission followed staff's recommendation and denied Poseidon the permit, officially rejecting the project.

Background

Poseidon first proposed to build a desalination plant in both Huntington Beach and Carlsbad in 1998. The Carlsbad desalination plant was ultimately approved and began operating in 2016. The City of Huntington Beach (City) ultimately approved Poseidon's Coastal Development Permit in 2010, which was appealed to the Commission. The Commission heard the appeal in 2013, and staff recommended approving the project with conditions, including conditions to mitigate the project's impact on adjacent wetlands as well as address seismic, flooding, and other hazards. However, Poseidon withdrew its application before the vote for further study. Since Poseidon withdrew its application, the appeal has been held in abeyance as Poseidon obtained permits from the State Lands Commission and the Regional Water Quality Control Board (Regional Board).

Poseidon's proposed desalination facility would have drawn in up to 106.7 million gallons per day (mgd) of seawater and produce up to 50 mgd of potable water, with the remaining 57 mgd of high-salinity brine discharged back into the ocean. Poseidon planned to operate the facility for 50-60 years. The facility would have operated on 12 acres in the 54-acre site of the Huntington Beach Generating Station, a power plant located in the City. The facility would be nestled in a low-lying area of Huntington Beach in a seismically active region within the Newport-Inglewood Fault Zone. In order to construct the facility, Poseidon would have needed to demolish and remove the infrastructure no longer used by the power plant, clean up soil and groundwater contamination, and construct a water supply reservoir in addition to the desalination facility in order to provide an emergency water supply.

After 2013—the last time the Commission reviewed Poseidon's proposed desalination facility—the State Water Resources Control Board amended its water quality control plan for marine waters (Ocean Plan), which included limitations on the site, design, and technology available for use by desalination facilities, as well requiring new mitigation requirements to protect marine life. In response to those changed circumstances, Poseidon revised its proposal to address the amended Ocean Plan and the City's Local Coastal Program (LCP)—a basic planning tool used by the City, in partnership with the Commission, to guide development in a coastal zone.

Issues Impacting the Denial

In denying Poseidon's proposed desalination facility, the Commission upheld staff's concerns with the project as defined by three main categories: 1) conflicts with the Coastal Act (enforced by the Commission) and LCP; 2) potential harm to marine life and water; and 3) extent of the burden on environmental justice communities.

LCP and Coastal Act Issues

For Coastal Act and LCP issues, staff identified certain issues related to the proposed location of the project, where new research estimated an increase in the severity and frequency of coastal hazard events. This research is reflected in the current Coastal Act and LCP policies regarding sea level-rise adaptation and risk-avoidance planning. Staff concluded that Poseidon's chosen location has

> . . .little to no adaptive capacity to address increased hazards. . .[and could]. . .limit the City's ability to upgrade the adjacent flood control panel or otherwise adapt this portion of the City to rising sea levels.

Thus, staff found the project conflicted with the LCP and Coastal Act.

Marine Life and Water Quality

Second, staff made findings that Poseidon's proposed facility would harm marine life and water quality. Staff found that the discharge of approximately 57 million gallons per day of high-salinity brine would need to be diffused so as not to concentrate and create a "dead zone," yet the diffusion process discharges brine with enough velocity to kill marine life in about 100 billion gallons of seawater annually. The Regional Water Quality Control Board estimated the impact to marine life would be equal to a loss of productivity from 423 acres of nearshore and estuarine waters each year. Commission staff noted that such substantial losses to the marine ecosystem would require significant mitigation but determined that Poseidon's proposed mitigation was substantially less than needed to conform to Coastal Act provisions. Staff further found that, because most of the proposed mitigation would not be implemented before the facility starts operating, a mitigation deficit would be created that

could to grow to more than four square miles of lost ocean productivity within the first ten or 15 years of facility operations. Staff further recommended against imposing additional mitigation measures as inappropriate, as the scale of the project's impact would be so large that few mitigation options existed to offset the impacts of the project.

Additionally, staff found that the planning, permitting, and construction of the large-scale restoration projects necessary to mitigate project impacts would add complexity and time to the overall project timeline. Staff found the scale of risk of harm to marine life and water quality needed a "well defined and thoroughly evaluated mitigation in place" that was reasonably timed with the start of the facility's operations. Staff concluded that Poseidon's proposed mitigations did not meet that standard.

Inconsistency with Environmental Justice Policy

Finally, staff determined that Poseidon's proposed facility was inconsistent with the Commission's Environmental Justice Policy. Adopted in March 2019, the Environmental Justice Policy created a framework to include underserved communities, including the households that have often been burdened by industrial development. In addition to the environmental risks of the proposed facility's location, there are environmental justice issues raised by the desalination facility being built in an area with concentrated industrial development. Currently, the site was proximate to "a nearby wastewater treatment plant, power plant, partially remediated Superfund site, former oil tank farm, and former dump." Moreover, staff determined that the costs for Poseidon's water would be higher than other current and planned sources of water. Staff highlighted multiple studies that concluded Poseidon's water would result in higher system rates. Although Poseidon had not secured a buyer and therefore it was unknown to which communities in the Orange County Water District (OCWD) the water would be delivered, staff found that such rate hikes would disproportionately impact low-income residents in OCWD's service area. Therefore, staff found such a project to raise environmental justice issues.

The Option to Override Issues with the Coastal Act and LCP Provisions

Commission staff noted that the Commission could approve a coastal dependent industrial facility despite its purported inconsistencies with Coastal Act and LCP provisions. Coastal Act § 30260 puts forth a three-part test to determine if the Commission should exercise its option to override the issues with LCP or Coastal Act policies and approve the project: 1) alternative locations are infeasible or more environmentally damaging; 2) denial of the permit would adversely affect the public welfare; and 3) the project's effects are mitigated to the maximum extent feasible.

The staff report indicated, however, that under the LCP, the Commission's override would not apply to the land-based portion of the desalination plant, which is within the City's permit jurisdiction. In any event, Commission staff did not agree that Poseidon's project met the three-part test. Staff stated that due to a lack of a near-term need for the project, the likelihood that other water projects would be more reliable and cost-effective, the variety of uncertainties associated with the project, the project's unmitigated harms to marine resources and sensitive habitat, and its siting in a hazardous location, denial would actually serve, not harm, the public interest. Staff could not reach a decision as to the other two tests as there was insufficient information to determine whether an alternative location would be infeasible or more environmentally damaging, or whether the project's adverse effects have been mitigated as much as is feasible.

Conclusion and Implications

The Coastal Commission's denial of Poseidon's proposed desalination facility reflects the complicated regulatory environment governing desalination projects. It remains to be seen whether future desalination projects will win Commission approval. The Coastal Commission Staff Report for Poseidon Water is available online at: https://documents.coastal.ca.gov/reports/2022/5/Th9a10a/Th9a10a-5-2022-staffreport.pdf.

(Miles Krieger, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•June 1, 2022 - EPA announced that Space Age Fuel, Inc. of Clackamas, Oregon has agreed to pay a $135,000 penalty for Clean Water Act violations following the release of oil from an overturned tanker into the North Santiam River. On February 16, 2020, a Space Age Fuel, Inc. tanker truck carrying approximately 10,700 gallons of gasoline and diesel fuel rolled over on Oregon Highway 22 and released an estimated 7,800 gallons of oil onto the highway and the surrounding area, which is adjacent to the North Santiam River. Most of the released oil collected in a ditch on the side of the highway and a portion flowed directly into the North Santiam River. The oil in the ditch seeped into the soil and moved into the riverbank, eventually reaching the river. Water quality sampling indicated elevated levels of petroleum in the river from February 17 through March 11, 2020, and sheen was visible on the river for over three months. The river is home to federally endangered and threatened steelhead and salmon. The North Santiam River provides drinking water to the City of Salem and other communities. The spill threatened, but ultimately did not affect, drinking water. In addition to the $135,000 Clean Water Act penalty the company also agreed to pay a $72,000 penalty to the Oregon Department of Environmental Quality and agreed to a requirement that it develop an inclement weather safety program.

•June 2, 2022—EPA announced a settlement with California's Imperial Irrigation District (IID) for violations of the Clean Water Act related to polluting of local wetlands. Under the settlement, Imperial Irrigation District will pay a $299,857 penalty and provide mitigation to offset the harm to the environment. On November 5, 2020, inspectors from EPA's Pacific Southwest Region and the U.S. Army Corps of Engineers inspected IID's construction of drain banks in the area and found that activities resulted in the discharge of sediment to approximately 1 acre of wetlands. This discharge also impacted approximately 20 acres of wetlands by severing the connection with Morton Bay, which drains to the Salton Sea. In addition to paying the penalty, IID will develop a plan for the removal of the sediment in question and the restoration of the water connection to Morton Bay. If they are unable to restore the impacted site, IID would need to reestablish 63 acres of wetlands at an alternative location.

•June 14, 2022—EPA and the Department of Justice filed a motion to terminate the consent decree with the Knoxville Utilities Board (KUB) citing concurrence and completion of work by KUB in the agreement. In February 2005, the EPA, DOJ, the Tennessee Department of Environment and Conservation (TDEC), the City of Knoxville and the Tennessee Clean Water Network (TCWN) entered into a comprehensive Clean Water Act settlement with KUB. The purpose of the settlement was to ensure the proper management, operation, and maintenance of KUB's sewer system including measures to prevent overflows of untreated sewage and to accomplish three primary goals: 1) Eliminate Unpermitted Discharges from the wastewater collection system. "Unpermitted Discharges" are sanitary sewer overflows (SSOs) that reach waters of the U.S.; 2) Develop and implement Management, Operation, and Maintenance (MOM) programs to ensure well maintained publicly owned treatment works into the future.

In addition, the KUB consent decree required the development and implementation of comprehensive management, operation, and maintenance

programs to prevent future overflows; respond to overflows when they occur, including cleaning up building backups; to continuously analyze the causes of overflows and propose specific corrective action plans to abate such causes; comprehensively review the performance of its treatment plants; and institute a comprehensive water quality monitoring program.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•May 23, 2022—EPA announced a first-of-its-kind settlement under the Agency's Coal Combustion Residuals (CCR) program at the Public Service Company of Colorado's ("PSCo's") Comanche power station in Pueblo, Colorado. The settlement commits PSCo to address groundwater contamination issues and to ensure the proper closure of CCR surface impoundments under the Resource Conservation and Recovery Act (RCRA). Under the agreement, PSCo agrees to return to compliance with the CCR program and to pay a civil penalty of $925,000. Produced primarily from the burning of coal in coal-fired power plants, CCR is a large industrial waste stream by volume and can contain harmful levels of contaminants like mercury, cadmium, and arsenic. Without proper management, contaminants from CCR can pollute waterways, groundwater, drinking water, and the air. The administrative settlement was approved by the Regional Judicial Officer for EPA Region 8 on In the agreement EPA alleges that PSCo did not meet certain requirements under the CCR program, including failure to: 1) Monitor groundwater under the facility and prepare corrective action reports; 2) Conduct statistical analysis of groundwater data and establish groundwater background contaminant concentrations; 3) Cease using a CCR surface impoundment after the "cease receipt" date; and 4) Provide access to documents that were required to be posted on a publicly-accessible website.

The settlement requires PSCo to design a groundwater monitoring system that meets CCR program requirements. PSCo will also develop a corrective measures plan, a remedy implementation plan, and a closure plan for the impoundment. The EPA will oversee all work, including planning for closure of the CCR landfill at the facility. PSCo is an operating utility engaged primarily in the generation, purchase, transmission, distribution, and sale of electricity in Colorado and is a wholly-owned subsidiary of Xcel Energy Inc., which is headquartered in Minnesota. The company has worked cooperatively with the Agency to address the issues in the agreement. The civil penalty is due 30 days after the effective date of the agreement.

•May 24, 2022—EPA has issued an enforcement order under the Clean Water Act to ALV Development LLC to address untreated sewage discharges coming from a residential development in Peñuelas, Puerto Rico, that are flowing into Los Cedros Creek. On April 5, 2022, EPA inspected the Parque Miramonte residential development's pump station after the agency received a series of complaints alleging that sewage overflows were reaching a nearby creek and impacting water quality and ecosystems. EPA determined that ALV Development LLC violated the Clean Water Act for its discharges of untreated sewage from the development's pump station without a National Pollutant Elimination Discharge System permit. Discharges of untreated sewage through a pump station without the appropriate permit are a violation of the Clean Water Act. The order requires ALV Development LLC to cease to discharge any pollutant, including untreated sewage, into waters of the United States, except with authorization under a permit. ALV Development LLC must also develop and submit for EPA's review a compliance plan to repair the development's pump station and related infrastructure to prevent sanitary sewer overflows from occurring. The plan must be completed within 45 days of the company's receipt of the order. The EPA order also requires ALV Development LLC to develop a preventive maintenance program for the development's pump station and its sanitary sewer collection system and to submit monthly status reports documenting actions taken pursuant to the order.

•June 7, 2022—EPA and the State of Delaware have reached an agreement, reached under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), with 21 defendants on completing a $41.6 million cleanup plan for the 27-acre Delaware Sand & Gravel Landfill Superfund Site in New Castle County, Delaware. Between 1969 and 1976, approximately 550,000 cubic yards of industrial waste and construction debris,

including at least 13,000 drums containing hazardous substances, were disposed of at the industrial waste landfill that was formerly a sand and gravel quarry. EPA and the Delaware Department of Natural Resources and Environmental Control (DNREC) confirmed the presence of several hazardous substances in the site's soil and groundwater, and in 1981, EPA added the site to the "National Priorities List" of the most contaminated sites nationwide.
(Andre Monette)

JUDICIAL DEVELOPMENTS

TENTH CIRCUIT DETERMINES POINT SOURCE'S STATUTE OF LIMITATIONS APPLIES TO STATE CLAIMS IN FEDERAL COURT DIVERSITY ACTIONS UNDER THE CLEAN WATER ACT

Allen, Jr., et al. v. U.S. Environmental Restoration, 32 F.4th 1239 (10th Cir. 2022).

The U.S. Court of Appeals for the Tenth Circuit, on May 3, 2022, held that a point source's state statute of limitations applies to state-law claims preserved under the federal Clean Water Act (CWA).

Factual and Procedural Background

On August 5, 2015, while excavating the Colorado Gold King Mine, the U.S. Environmental Protection Agency (EPA) triggered the release of over three million gallons of contaminated water into Cement Creek, the Animas River and San Juan River. Affected states, New Mexico and Utah, and the Navajo Nation separately sued the EPA, mine owners, and EPA contractors for violation of the Clean Water Act. In the suits, each plaintiff filed civil actions against the defendants and the cases were transferred to New Mexico as requested by EPA clean-up contractor, Environmental Restoration LLC. After the suits were transferred to New Mexico, individual farmers along the Animas and San Juan rivers (Allen plaintiffs) filed state law claims of negligence against the defendants in New Mexico. These cases were added to the larger multidistrict lawsuit.

The CWA preserved state law claims against illegal dischargers, and made it clear that the substantive law of an affected state, including the forum, is subordinate to the point source. However, the CWA did not clearly distinguish whose procedural law would apply to state law claims.

Environmental Restoration LLC, moved to dismiss the Allen plaintiffs' complaint, arguing the Allen plaintiffs did not file their complaint within Colorado's two-year statute of limitations and therefore they failed to state a claim. The Allen plaintiffs argued their complaint was timely under New Mexico's three-year statute of limitations.

The U.S. District Court denied the motion to dismiss, reasoning that New Mexico's longer statute of limitations applied.

Environmental Restoration LLC, filed an interlocutory appeal of the District Court's decision, arguing that Colorado's procedural laws applied to the Allen plaintiffs' state law claims because the point source at issue was located in Colorado. The Tenth Circuit accepted the interlocutory appeal to determine what statute of limitations applies to state law claims preserved under the CWA.

The Tenth Circuit's Decision

The Court of Appeals first noted that the U.S. Supreme Court has already determined that a point source's state substantive law applies to state actions preserved under the CWA. The court then considered and rejected the Allen plaintiffs' argument that the forum state's statute of limitations applies, even though the forum state's procedural laws typically apply in diversity cases where plaintiffs and defendants reside in different states.

The court rejected the general rule for three reasons. First, the court reasoned that application of general rule (application of the forum state's statute of limitations) would result in different statutes of limitations being applied to state laws claims emanating from a single water-polluting event, depending on where the case was filed. This result would be inconsistent with Congress's purposes and objectives in passing the CWA—those being efficiency, predictability, and certainty in determining liability for discharging pollutants into an interstate body of water.

Second, the court noted that without a uniform statute of limitations, a defendant could be exposed to lawsuits indefinitely. Statutes of limitations encourage prompt filing of claims and remove uncertainty about legal liabilities. The Allen plaintiffs' argument would allow a forum state law to govern procedural issues and point source state law to govern substantive issues, which would lead to little uniformity and less predictability for the same polluting event. Thus frus-

trating the purpose of the CWA's regulatory scheme and overall purpose.

Third, the court considered and rejected the Allen plaintiffs' alternative argument that the five-year federal "catch all" statute of limitations should apply to the state law claims. The court noted that the catch all statute of limitations applies only to claims arising under the CWA and not to state law claims preserved by the CWA.

Ultimately, the court reversed the District Court's holding, ruling that the point source state's law applies to procedural and substantive matters.

Conclusion and Implications

The Allen plaintiffs' petition for *en banc* rehearing was recently denied, which will leave this decision in place. Contrary to the rule governing most diversity cases in federal court, the Tenth Circuit Court of Appeals determined that a point source state's procedural law applies to state law claim preserved under the CWA. By relying on U.S. Supreme Court precedent the court implies that its reasoning could be followed nationally. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca10/19-2197/19-2197-2022-05-03.html.
(Elleasse Taylor, Rebecca Andrews)

NINTH CIRCUIT FINDS U.S. FOREST SERVICE ACTED ARBITRARILY AND CAPRICIOUSLY IN APPROVING PLAN OF OPERATIONS FOR COPPER MINE

Center for Biological Diversity v. U.S. Fish and Wildlife Service, 33 F.4th 1202 (9th Cir. 2022).

Environmental conservation organizations and Native American tribes brought actions against the U.S. Forest Service (Forest Service), challenging its approval of an open-pit copper mining operation under the National Environmental Policy Act (NEPA), the federal Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), the Mining Law of 1872, and related statutes. The U.S. District Court granted summary judgment on some claims and the Forest Service and intervenor appealed. The Ninth Circuit affirmed, finding among other things that the Forest Service's approval of the mining operation without considering whether the claimant held a valid mining claim to certain areas was arbitrary and capricious.

Factual and Procedural Background

Rosemont Copper sought to dig a large open-pit copper mine in the Santa Rita Mountains, south of Tucson, Arizona. The mining operation would be partly within the Coronado National Forest. The proposed pit would be 3,000 feet deep and 6,500 feet wide, and it would produce over 5 billion pounds of copper. There was no dispute that Rosemont holds valid mining rights on the land where the copper pit itself would be located.

In connection with this use, Rosemont proposed to dump 1.9 billion tons of waste rock near its pit, on 2,447 acres of National Forest land. The pit itself would occupy just over 950 acres. When operations cease after 20 to 25 years, waste rock on the 2,447 acres would be 700 feet deep and would occupy the land in perpetuity.

The Forest Service approved Rosemont's proposed mining plan of operations (MPO) on two grounds. First, it found that § 612 of the Surface Resources and Multiple Use Act of 1955 (Multiple Use Act) gave Rosemont the right to dump waste rock on open National Forest land, without regard to whether it has any mining rights on that land, as a "use[ ] reasonably incident" to its operations at the mine pit. Second, the Forest Service assumed that under the Mining Law of 1872 (Mining Law) Rosemont had valid mining claims on the 2,447 acres it proposed to occupy with its waste rock.

Relying on these grounds, the Forest Service approved the MPO, finding under § 612 of the Multiple Use Act and under the Mining Act it only had the authority contained in its "Part 228A" regulations to regulate Rosemont's proposal to occupy its mining claims with its waste rock. The Forest Service suggested that if it had greater regulatory authority than

that provided by its Part 228A regulations, it might not have approved the MPO in its proposed form.

Environmental organizations and Native American tribes brought suit and the separate cases were consolidated. The U.S. District Court found that neither ground supported the Forest Service's approval of the MPO. It found that § 612 grants no rights beyond those granted by the Mining Law. It also held that there was no basis for the Forest Service's assumption that Rosemont's mining claims were valid under the Mining Law; to the contrary, it found that the claims actually were invalid. The U.S. District Court therefore found the Forest Service acted arbitrarily and capriciously in approving the MPO and vacated the Final Environmental Impact Statement and Record of Decision. Both the Forest Service and Rosemont appealed.

The Ninth Circuit's Decision

The Ninth Circuit first agreed with the District Court's holding that § 612 grants no rights beyond those granted by the Mining Law. It also noted that, although the Forest Service had defended this position during the U.S. District Court proceedings, the Forest Service ultimately abandoned this argument on appeal. Rosemont also did not rely on § 612 on appeal.

The Ninth Circuit also agreed with the U.S. District Court holding that the Forest Service improperly assumed Rosemont's mining claims were valid under the Mining Law, rejecting the Forest Service's claim that it was not required to assess the validity of the claims. Although its reasoning differed from the District Court, the Ninth Circuit also agreed that the claims themselves were invalid. Where the District Court found that no valuable minerals exist on the claims, however, the Ninth Circuit found the claims invalid because no valuable minerals have yet been found on the claims. This distinction, however, the Ninth Circuit noted, was legally irrelevant, as the relevant question was whether valuable minerals have been "found."

The Ninth Circuit further noted that it did not know what the Forest Service would have done if it had understood that Se§ction 612 grants no rights beyond those granted by the Mining Law and that Rosemont's mining claims were invalid under the Mining Law. These were decisions, the Ninth Circuit found, that must be made in the first instance by the Forest Service. Accordingly, it remanded to the Forest Service for such further proceedings as the Forest Service may deem appropriate, informed by the conclusions of the Ninth Circuit's opinion.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the Mining Law, including the validity of claims made thereunder. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/12/19-17585.pdf.
(James Purvis)

CALIFORNIA COURT OF APPEAL FINDS BUMBLE BEES MAY BE CLASSIFIED AS 'FISH' UNDER THE STATE ENDANGERED SPECIES ACT

Almond Alliance of California v. Fish & Game Commission,
___Cal.App.5th___, Case No. C093542 (3rd Dist. May 31, 20

In May, the Court of Appeal for the Third District of California held that the meaning of "fish" under the California Endangered Species Act (CESA) extends to terrestrial invertebrates, such as certain species of bumble bee, and thus are eligible for listing as endangered or threatened under the CESA. The Court of Appeal also affirmed a prior holding that the general definition of "fish" in the California Fish and Game Code supplies the meaning of that term in the CESA, despite invertebrates not being specifically listed in the act.

Background

The California Endangered Species Act is intended to conserve, protect, restore, and enhance any endangered species or any threatened species and its

habitat. (Fish & Game Code, § 2052.) Threatened or endangered species under the CESA include a "bird, mammal, fish, amphibian, reptile, or plant." The CESA became law in 1984 and is codified in Fish and Game Code § 2050 *et seq*. The Fish and Game Code provides general definitions for terms used within the code, including "fish" as set forth in § 45. Prior to 1969, § 45 defined fish as "wild fish, mollusks, or crustaceans, including any part, spawn or ova thereof." In 1969, the California Legislature amended § 45 to add invertebrates and amphibia to the definition of fish. The definition remained unchanged until 2015, when the Legislature made stylistic changes to the definition to read "a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." (Stats. 2015, ch. 154, § 5.)

Prior to the CESA, the Fish and Game Commission (Commission) had listed several species of invertebrates as endangered or rare under existing state law that prohibited the importation, possession, or sale of "any endangered or rare bird, mammal, fish, amphibian, or reptile." While the Office of Administrative Law had previously rejected the Commission's attempt to codify certain snails and butterflies (terrestrial invertebrates) as endangered because it did not view terrestrial invertebrates as fish—a position the Attorney General agreed with regarding inspects in an opinion in 1998—certain of those species and other vertebrates were subsequently listed as endangered or rare.

The CESA repealed and replaced existing state law related to endangered or rare animals. Specific inclusion of "invertebrates" in the act's legislation had been proposed but subsequently eliminated from the text of the bill. Nonetheless, in support of the CESA, the Department of Fish and Wildlife (Department—the bureaucratic parent of the Commission), submitted a bill analysis indicating that the inclusion of the term "invertebrate" in the act was unnecessary. The Department reasoned that the definition of "fish" in the Fish and Game Code already includes the term "invertebrates," and thus including the term "invertebrates" in the CESA could create confusion by necessitating amending other provisions of the Fish and Game Code to include that class of animal, where necessary. The Department noted that it had already included invertebrates to be endangered or rare prior to the CESA.

Listing Endangered and Threatened Species

The CESA directs the Fish and Game Commission to establish a list of endangered and threatened species, and to add or remove species from either list if it finds, upon receipt of sufficient scientific information, that the action is warranted.

Under the act, any interested person may petition the Commission to add a species to, or to remove a species from, the Commission's lists. A multi-step process applies to such petitions. First, the Department evaluates a petition on its face and in relation to other relevant information the Department possesses or receives, and prepares a written evaluation report that includes a recommendation as to whether the Commission should reject the petition or accept and consider it, depending on whether there is sufficient information to indicate that the petitioned action may be warranted. During this evaluation, any person may submit information to the Department relating to the petitioned species.

Second, the Commission, after considering the petition, the Department's written report, and written comments received, determines whether the petition provides sufficient information to indicate that the petitioned action may be warranted. Upon finding that the petition does not provide such information, the Commission rejects it. Upon finding that the petition does

provide such information, the Commission accepts it for consideration.

Third, as to an accepted petition, the Department then conducts a more comprehensive review of the status of the petitioned species and produces a written report, based upon the best scientific information available to the Department, which indicates whether the petitioned action is warranted. Finally, after receiving the Department's report, the Commission determines whether the petitioned action is warranted or is not warranted.

2018 Petition to List Four Species of Bumble Bee

In 2018, several public interest groups petitioned the Commission to list the Crotch bumble bee, the Franklin bumble bee, the Suckley cuckoo bumble bee, and the Western bumble bee as endangered species under the act. The Commission ultimately deter-

mined that the four species of bumble bee qualified as candidate species for listing purposes.

In 2019, various agricultural associations and interest groups (petitioners) challenged the Commission's decision by filing a writ of administrative mandate, which the trial court granted. The trial court determined that the word "invertebrates" in § 45's definition of "fish" extended only to aquatic invertebrates, and that the legislative history of the Act supported its conclusion that the legislature did not intend to protect invertebrates categorically. The Court of Appeal reviewed the trial court's ruling *de novo*.

The Court of Appeal's Decision

On appeal, petitioners argued that the definition of "fish" in § 45 of the Fish and Game Code does not supply the meaning of that term in the CESA because the language of the act indicates the legislature intentionally included amphibians but did not include invertebrates. Including invertebrates within the purview of the act would, according to petitioners, render the inclusion of amphibians and other specified types of animals meaningless, which is disfavored by the rule of statutory construction against surplusage.

The Court of Appeal rejected petitioners' argument in part because the court had previously ruled in an earlier case that § 45's definition of fish supplies the meaning of that term within the act, and the court did not deem it necessary to depart from that prior decision. The court also reasoned that the Legislature amended § 45 of the CESA in 2015 and took no action in changing the statute, meaning that § 45 of the act expressly included invertebrates within the definition of "fish."

The court also rejected the petitioners' argument that legislative history of the CESA supports the exclusion of invertebrates. According to the court, the legislature could have disagreed with the Department's bill analysis that the Department had authority to list invertebrates under the act but instead took no action against that position. As the court explained, the legislature believed that invertebrates were already included in the definition of "fish" by application of § 45 and did not feel the need to have the Department report on including invertebrates. The court concluded that the balance of the CESA's legislative history did not indicate the legislature intended to exclude invertebrates from coverage under the act. The court also determined that the Attorney General opinion of 1998 was not persuasive since it was issued after the CESA was adopted, made no mention of § 45, and did not recognize that the Commission had already listed several species of invertebrates before 1984.

The court also held that terrestrial invertebrates may be listed as an endangered or threated species under the CESA, thus rejecting the trial court's conclusion that the definition of "fish" under § 45 only extended to aquatic invertebrates. The Court of Appeal determined that a liberal, *i.e.* more expansive, interpretation of the CESA was appropriate; the legislative history and prior listings by the Commission supported including terrestrial species under the purview of the act; and the express language in § 2067 supported a determination that the term "fish" is not limited to solely aquatic species. Instead, the court concluded that as a term of art—as opposed to common parlance—a terrestrial invertebrate may be considered as an endangered or threatened species under the CESA. Thus, the Court of Appeal held that the four bumble bee species are considered to be fish and thus capable of being protected under the CESA.

Conclusion and Implications

Under this decision, invertebrates like the species of bumble bee at issue in the case are eligible to be listed as endangered or threatened under the California Endangered Species Act. Presumably, additional petitions for listing other species of terrestrial invertebrates will be submitted to the Commission for potential protection under the CESA, although it is not clear whether any of the petitioned species will ultimately be listed. The court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093542.PDF.
(Miles B. H. Krieger, Steve Anderson)

NEVADA SUPREME COURT CHANGES THE LANDSCAPE ON GROUNDWATER MANAGEMENT IN OVER-DRAFTED BASINS

Diamond Natural Resources Protection & Conservation Association v. Diamond Valley Ranch, LLC, 138 Nev. Adv.Op. 43 (2022).

On June 16, 2022, the Nevada Supreme Court issued a narrow 4-3 ruling that may dramatically change the way Nevada manages groundwater in areas experiencing severe overdraft. The opinion marks a significant shift in the way Nevada's high court applies the doctrines of prior appropriation and beneficial use as applied to senior water rights holders in basins that are subject to regulation under state law.

Background

Diamond Valley is an arid farming district in Eureka County, Nevada. The valley has been found to be over-appropriated and pumped at rates exceeding its perennial yield for many years. In 2015, the Nevada State Engineer designated Diamond Valley as a Critical Management Area (CMA) due to the extent of pumping and conditions in the basin.

The Groundwater Management Plan

Once a basin has been designated a CMA, Nevada law permits the majority of water rights holders to petition the State Engineer to approve a Groundwater Management Plan (GMP) to implement steps to remove a basin from CMA designation.

Following CMA designation, a majority of its water rights holders in the valley submitted a GMP to the State Engineer for approval. The GMP laid out a 35-year plan to reduce groundwater pumping in Diamond Valley and remove the basin's CMA designation. In 2019, the State Engineer approved the proposed GMP. Notably, the approved GMP required all water rights holders—not just junior rights holders—to reduce water use. In addition to mandating cutbacks across the board, the GMP created a water-banking system allowing appropriators to buy, sell, or lease their water rights to other users, regardless of whether water was determined to have been put to beneficial use.

Senior Rights Holders Seek Judicial Review

A group of senior water rights holders petitioned for judicial review, arguing that the GMP deviated from Nevada's long-established water law principles. The district court agreed and invalidated the GMP on the grounds that it: 1) forced senior rights holders to reduce water use in violation of the doctrine of prior appropriation; 2) violated Nevada's beneficial use statute by allowing for the banking and trade of unused groundwater; and 3) improperly allowed appropriators to change the point or manner of diversion.

The Supreme Court's Decision—Upholds the GMP

In a narrow, 4-3 majority opinion written by Chief Justice Hardesty, the Nevada Supreme Court reversed the district court and held that the GMP may be implemented as approved by the State Engineer. The Court found that the Nevada Legislature had granted the State Engineer broad authority to curtail water use when implementing a GMP in a basin designated as a CMA. The Court rejected the senior rights holders' argument that the State Engineer is required to strictly comply with the doctrine of prior appropriation. Instead, the Court held that Nevada Revised Statutes (NRS) §§ 534.110(7) and 534.037 allow the State Engineer to approve a GMP that:

> (1) sets forth the necessary steps for removal of the basin's designation as a CMA … and (2) is warranted under the seven factors enumerated in NRS 534.037(2). (alterations omitted).

The Court reasoned that the Legislature may impair what it referred to as nonvested water (*i.e.* rights appropriated after 1913). As a result, the:

> Legislature may create a regulatory scheme that modified the use of water appropriated after 1913 in a manner inconsistent with the doctrine of prior appropriation.

Because these senior water rights were appropriated after 1913, the Court found that the Legislature could impair these rights.

Two separate dissenting opinions asserted the GMP impermissibly deviated from the doctrines of prior appropriation and beneficial use and constituted an impermissible taking under the Fifth Amendment.

Doctrine of Prior Appropriation

Traditionally, Nevada has followed the doctrine of prior appropriation, a rule commonly known as "first in time, first in right." Under this rule, in times of drought, senior water rights holders are generally protected from curtailment and the burden of cutbacks falls to junior rights holders. The majority held that NRS 534.110(7) unambiguously permits the State Engineer to issue a GMP that is inconsistent with the doctrine of prior appropriation. The Court observed that when issuing a GMP, the State Engineer must only consider if curtailment is warranted under the seven factors listed in NRS 534.037(2). The majority determined that reading NRS 534.110(7) and NRS 534.037 together also clearly exempts a GMP from other statutory requirements in Nevada's water law scheme. The Court found that the language in NRS 534.110(7) stating "that the State Engineer shall order curtailment *unless* a GMP has been approved for the basin" meant a GMP could, but is not required to conform to the doctrine of prior appropriation. (emphasis in original). The Court therefore found that where a GMP is in place, the State Engineer may deviate from the doctrine of prior appropriation to mandate water reduction for both senior and junior water rights holders.

Both dissenting opinions highlighted what they describe as the majority's departure from over 150 years of water law precedent in Nevada. They view NRS 534.110 and NRS 534.032 do not unambiguously exempt a GMP from existing water law structure. Rather, the dissents considered the statutes to be ambiguous at best and the legislative history and the doctrine disfavoring implied repeal would not support a position that a GMP may depart from existing water law doctrines.

The dissenting Justices further content that the GMP violates the doctrine of reasonable and beneficial use because it permits unused water to be banked and traded rather than conditioning allocations based upon actual beneficial use. The majority did not expressly address the beneficial use doctrine in the body of its opinion but did indicate in a footnote that the beneficial use arguments lack merit.

The Takings Clause

The dissents would have also found that the mandatory reductions for senior rights holders in the GMP constitutes a taking under the Fifth Amendment and the impacted senior rights holders would be entitled to just compensation. The majority declined to reach this constitutional question because it observed that the senior rights holders failed to identify whether they lost any water rights under the GMP. The majority clarified that its ruling would not preclude the senior rights holders from seeking future relief on the takings issue, setting the table for further litigation over the water rights in Diamond Valley.

Conclusion and Implications

It is important to note that this opinion addressed a GMP approved by the State Engineer in a basin that has been designated a CMA. However, the implications of the opinion are likely to be far-reaching and could significantly shape the manner in which Nevada water regulators will implement GMPs moving forward. While Diamond Valley is currently the only basin in Nevada designated as a CMA, Chief Justice Hardesty is correct that this "opinion will significantly affect water management in Nevada." Equally important will be the Court's inevitable decision on the takings issues raised by the senior rights holders and the dissenting justices. Whether or not the state will be required to pay just compensation for reducing these senior rights will be an important development going forward.
(Scott Cooper, Derek Hoffman)

WASHINGTON SUPERIOR COURT REJECTS DEPARTMENT OF ECOLOGY'S DENIAL OF MUNICIPAL CHANGE—UPHOLDS COUNTY WATER CONSERVANCY BOARD RECOMMENDATION

Burbank Irrigation District No. 4 v. State, Department of Ecology,
Case No. 22-2-50015-11. (Franklin Co. Super. Ct. May 2, 2022).

Background

The case involves a transfer of excess water rights from one municipal entity to another. Burbank Irrigation District #4 holds municipal water rights in excess of its anticipated need. Franklin County Water Conservancy Board (Conservancy Board or Board) issued a Report of Examination and Recommendation to the Washington Department of Ecology (Ecology), authorizing the change of a portion of Burbank's municipal water right portfolio for use within the City of Pasco Service area. Ecology rejected the Board's recommendation, determining that the proposed change would result in an enlargement of the municipal water right. The Pollution Control Hearings Board (PCHB) upheld Ecology's rejection of the Board's Recommendation. Burbank Irrigation District #4, City of Pasco, Franklin County Water Conservancy Board, and Columbia-Snake River Irrigators Association appealed Ecology's reversal. Franklin County Superior Court on Summary Judgment reversed the PCHB decision, upholding the Conservancy Board recommendation as the appropriate final change authorization. The Superior Court's ruling highlights two separate issues: municipal-to-municipal transfers of inchoate water rights and the relationship between the County Water Conservancy Boards and Ecology.

Municipal-to-Municipal Transfers

Burbank Irrigation District #4 (Burbank) proposed to sell a portion of their municipal water right to the nearby City of Pasco. The Conservancy Board recommended approval of the transfer, as meeting the four-part test under state law for approving a transfer. Ecology rejected the Board's recommendation on the grounds that the transfer would result in an enlargement of the water right. The Pollution Control Hearings Board upheld Ecology's denial. At issue here is whether the transfer as proposed constitutes an enlargement of Burkbank's water right. The Superior Court sided with the appellants and against Ecology, determining that the water right could be transferred without enlargement.

Burbank owned three certificated water rights for a total withdrawal authorization of 750 gpm, 616 AFY, when it applied for an additional water right in 1980 to increase its total pumping rate. The amount of water available to Burbank would remain the same, 616 AFY, only the pumping rate would increase from 750 gpm to 1,250 gpm. Ecology issued the permit in 1982 for 616 AFY "minus all the water withdrawn under their existing three certificated water rights."

In 2019, Burbank agreed to sell a portion of its 1982 water right to the nearby City of Pasco. Burbank applied for the change authorization to the Franklin County Water Conservancy Board. Pasco is approximately five miles from Burbank and accesses the same body of groundwater as required by statute. Under the agreement, Pasco would receive 320 AFY. The Conservancy Board conditionally approved Burbank's application, authorizing Pasco to utilize Burbank's groundwater right in a quantity of "616 AFY, LESS all the water withdrawn from the original three water right certificates" consistent with the limitations on the subject water right. The Conservancy Board found that at peak use, Burbank used 250 AFY of their allocated water right, and the proposed transfer would not be detrimental to the public interest.

Ecology reversed the Conservancy Board's decision thus denying Burbank's requested change and the sale to Pasco. Ecology determined that the proposed transfer would result in a prohibited "enlargement" citing *Schuh v. State*, 100 Wn.2d 180, 667 P.2d 64. In *Schuh*, the Court looked to the context of the permit and upheld Ecology's decision that the transfer would enlarge the water right because the permit was "supplemental" to the federal water right, and most of the water under that right could not be transferred outside of the originally permitted area. However, *Schuh* can be easily distinguished from Burbank, as the transfer in *Schuh* was a transfer of a water right outside of a Federal Water Project which the right

was contingent upon. Here the facts support this being in the same body of groundwater, and that it would not be an enlargement of the portfolio of water rights as certificated by Ecology. Ecology's arguments are drawn narrowly on a limited reading of the 4th of Burbank's water rights without reference to the authorization and recognition of the implications of the full portfolio.

The PCHB, in their Order Granting Summary Judgment, states:

> While the record shows the Certificate was issued to provide Burbank flexibility…that flexibility did not grant Burbank an annual quantity to be transferred to another municipality.

The record shows that Burbank does not use all their allotted water under their portfolio of certificated water rights. "Pumps and pipes" municipal certificates are common with municipal water suppliers in Washington. Prior to 1998, these certificates were issued based on a system capacity measure, rather than based on actual beneficial use. These water rights include inchoate quantities that have not yet been exercised. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582,957 P.2d 1241 (1998). Ecology is not authorized to revoke or diminish water rights for municipal supply purposes documented by such "pumps and pipes" certificates, except under narrow circumstances. RCW 90.03.330(2).

Under the relinquishment protections for municipal water rights, inchoate quantities remain available to the originally permitted entity, however, sharing these with other municipal entities has seen repeated obstacles like the arguments about enlargement seen here. In the PCHB's decision granting Ecology's Motion for Summary Judgment, they sided with Ecology's highly technical reading of situational specifics of why the water right was originally granted instead of the grant itself as the basis for enlargement and denied the transfer of water to Pasco. This highly technical reading could be seen as an attempt to limit municipal-to-municipal transfers of these inchoate quantities, thereby trapping the unused quantities with the original applicant regardless of the regional balancing of water needs among municipal water users.

The Superior Court's Decision

County Water Conservancy Boards and Ecology

The Superior Court's decision indicates a certain amount of frustration with Ecology. The Superior Court granted Summary Judgment, ruling against Ecology and the PCHB, but rather than remanding to the PCHB for further consideration as requested by Ecology, the Franklin County Superior Court instead reinstating the Conservancy Board's recommendation to approve the transfer.

Water Conservancy Boards were established by statute to expedite the administrative process for water right transfers under RCW 90.80.005. Conservancy Boards are units of local government consisting of three commissioners appointed by the county to provide *recommendations* to Ecology. Conservancy Board decisions do not stand alone. Ecology must review the Conservancy Board decision for compliance with water law and may affirm, reverse, or modify the water conservancy board's decision. Chapter 90.80 RCW does not authorize the water conservancy boards to conduct any manner of quasi-judicial adjudicative proceedings; a water conservancy board merely makes a tentative determination that is reviewed by another agency.

Conclusion and Implications

In the case at hand, the Superior Court has ruled to reinstate the Conservancy Board's decision rather than as a decision of Ecology. By statute, the Board's ruling is merely a recommendation to Ecology and does not stand alone as an independent ruling. Ecology is expected to appeal either or both issues to the Court of Appeals.
(Jamie Morin, Alisa Royem)

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