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FEATURE ARTICLE

NINTH CIRCUIT FINDS NO WAIVER OF STATE WATER BOARD'S SECTION 401 CERTIFICATION AUTHORITY— THE LATEST IN THE BATTLE OF AUTHORITY TO REGULATE FEDERAL HYDROPOWER PROJECTS

By Brian E. Hamilton and Holly Tokar

In passing the federal Clean Water Act in 1972, Congress contemplated a system of cooperative federalism, whereby states would be essential partners in protecting water quality. Toward that end, federal licenses for activities resulting in discharges into navigable waters require a water quality certification from the affected state, including licenses from the Federal Energy Regulatory Commission (FERC) to operate hydropower projects. The inconsistent priorities of state governments, the federal government, project proponents, and other stake-holders guarantees tension in this process. In the hydropower licensing context, tension over the application of the one-year deadline for states to make a decision on a water quality certification has boiled over into litigation and a string of federal appellate cases throughout the United States.

Most recently, on August 4, 2022, a panel of the Ninth Circuit Court of Appeals issued a decision concluding that California did not waive its authority under the Clean Water Act to issue water quality certifications to parties applying to FERC for licenses to operate three dam projects. [*California State Water Resources Control Board v. FERC*, 43 F.4th 920 (9th Cir. 2022).]

This case is only the latest in a series of cases concerning FERC's position on state authority to regulate water quality standards as part of the federal hydropower licensing regime that FERC administers. The Clean Water Act allows up to one-year deadline for state certification, but this deadline can be infeasible due to state environmental review requirements. In these circumstances, parties have avoided the one-year deadline for certification by withdrawing and resubmitting applications. FERC attempted to limit this practice by deeming California to have waived its authority by coordinating with the three applicants to withdraw and resubmit. The Ninth Circuit vacated FERC's waiver order because evidence in the record did not support a conclusion that the California State Water Resources Control Board (State Water Board) formally coordinated with applicants and because such a waiver could result in the issuance of licenses with 40-year terms without adequate environmental review.

Summary of State Water Quality Certification under Section 401 of the Clean Water Act

FERC administers the licensing of hydropower projects on the nation's navigable waters. FERC's authority stems from the Commerce Clause, which gives the federal government authority to regulate the construction and operation of hydropower projects located on the nation's navigable waters.

Section 401 of the Clean Water Act requires that an applicant for a license to operate a hydropower project obtain state water quality certification wherever there is a potential for discharge, including release of water from hydroelectric turbines into a river. 33 U.S.C § 1341; *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 386-387 (2006). States are the "prime bulwark in the effort to abate water pollution." *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011).

> The certification authority granted States is '[o]ne of the primary mechanisms' through which they may exercise this role, as it provides them with 'the power to block, for environmental reasons, local water projects that might otherwise win federal approval.' *Id.* (citing *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991)).

Because states may have water quality laws that are more stringent than federal law, Section 401 allows states to impose conditions on licenses to ensure compliance with applicable state water quality standards. 33 U.S.C. § 1341(a)(1). However, to prevent a state from "indefinitely delaying" federal licensing proceedings, Section 401 provides that if the state:

> . . .fails or refuses to act on a request for certification, within a *reasonable period of time* (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection *shall be waived* with respect to such Federal application. *Id.* (emphasis added).

FERC, through regulations governing hydropower licensing and agency adjudications, has interpreted Section 401 to allow states one year to act on an application. 19 C.F.R. §§ 4.34(b)(5)(iii), 5.23(b)(2); Const. Pipeline Co., 162 FERC ¶ 61,014, at P 16 (Jan. 11, 2018). Because federal licenses for hydropower projects can last up to 50 years, a state's failure to act within one year and consequent waiver of authority can result in projects operating out of compliance with state water quality laws for decades.

The State Water Board has jurisdiction over water quality certifications in California. However, California's criteria for granting water quality certifications often make it impracticable for certification to occur within one year. The California Environmental Quality Act (CEQA), for instance, requires that the State Water Board receive and consider an analysis of the project's environmental impact before granting Section 401 certification. Because of the time required to comply with the state environmental review process, a practice has developed—both in California and in other states—whereby project applicants withdraw their certification request before the end of the one-year review period and resubmit it as a new request. This "withdrawal-and-resubmission" practice re-starts the one-year clock, affording the project applicant more time to comply with the procedural and substantive prerequisites to certification. California regulations actually contemplate this scheme, providing that an application for certification will be denied without prejudice if CEQA review cannot be completed within one year "unless the applicant in writing withdraws the request for certification." Cal. Code Regs. tit. 23, § 3836(c).

Hoopa Valley and FERC's Efforts to Restrict State Authority

FERC accepted the withdrawal-and-resubmission practice for many years until the D.C. Circuit held, in 2019, that California and Oregon engaged in a "coordinated withdrawal-and-resubmission scheme" with certain project applicants and waived Section 401 certification authority. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 650 (2019). In 2019 the D.C. Circuit Court of Appeals concluded that California and Oregon waived their certification authority for certain hydroelectric projects on the Klamath River. There, California and Oregon had entered into a formal written agreement with an applicant whereby the applicant would withdraw its certification requests annually to avoid a waiver of the state's licensing authority. The D.C. Circuit characterized this agreement as a "coordinated withdrawal-and-resubmission scheme" that was a "failure" or "refusal" to exercise its certification authority under section 401 of the Clean Water Act. *Id.* at 1104-04.

Following the *Hoopa Valley* decision, FERC changed its standard for waiver. FERC drew a line between an applicant's "unilateral" decision to withdraw-and-resubmit—which would not trigger waiver—and a state's "coordinated" scheme with a project applicant aimed at affording itself more time to act on a certification request—which would trigger waiver.

The Fourth Circuit Pushes Back, and the Ninth Circuit Comes Along

Following the D.C. Circuit's decision, FERC found waivers in a number of cases. The Fourth Circuit Court of Appeals addressed one instance in *North Carolina Department of Environmental Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021). In 2017, the operator of a dam and hydropower project located in

North Carolina applied to relicense the project. Pursuant to Section 401, the operator also sought a water quality certification from the North Carolina Department of Environmental Quality (NCDEQ) in April 2017. *Id.* at 662. By December 2017, FERC had still not completed its Environmental Assessment (EA) pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. *Id.* To avoid the one-year deadline for making a decision on the water quality certification, NCDEQ emailed the operator and recommended that the operator withdraw and resubmit its application, which the operator did in February 2018. FERC completed its EA in October 2018. *Id.* NCDEQ informed the operator that although it received the EA from FERC, state law notice and comment requirements would prevent NCDEQ from approving the application before the expiration of the one-year deadline. *Id.* at 662-63. The operator again withdrew and resubmitted its application. *Id.* The following year, in September 2019, NCDEQ issued a certification that included conditions for compliance with state water quality standards. On the same day, FERC issued a license. *Id.* at 663. But FERC's license order stated that NCDEQ had waived its certification authority and did not include NCDEQ's conditions in the license. *Id.* Relying on *Hoopa Valley*, FERC concluded that the "one-year clock" on the water quality application commenced when the original application was filed in April 2017 and never restarted when the operator withdrew and resubmitted its application in February 2018 and again in October 2018. *Id.* The Fourth Circuit disagreed, holding that "FERC's key factual findings underpinning its waiver determination are not supported by substantial evidence." *Id.* at 671. The Fourth Circuit found that no evidence in the record that NCDEQ initiated or directed the applicant's withdrawal-and-resubmissions. *Id.* at 673-75 ("it must take more than routine informational emails to show coordination.").

Most recently in *State Water Resources Control Board v. FERC*, 43 F.4th 920 (9th Cir. 2022) (hereinafter *SWRCB v. FERC*), FERC again found waiver of state water quality certification, this time by California. FERC determined that California (through the State Water Board) waived its Section 401 certification authority for three dam relicensing applications: (1) the Yuba-Bear Project operated by Nevada Irrigation District; (2) the Yuba River Project operated by the Yuba County Water Agency; and (3) the Merced River and Merced Falls Projects operated by the Merced Irrigation District. In each case, the applicants had withdrawn and resubmitted numerous applications. For each waiver determination, FERC held that the State Water Board engaged in "coordinated" schemes with the project applicants to avoid the one-year deadline.

FERC's primary evidence of coordination were State Water Board comments—on CEQA documents or in email exchanges—predicting that project applicants would withdraw-and-resubmit their water quality certification requests, and indicating that the State Water Board would deny each application without prejudice if the applicants failed to withdraw-and-resubmit their applications. FERC also pointed to the applicants' serial withdrawals-and-resubmissions and California regulations recognizing the practice. *SWRCB v. FERC*, 43 F.4th 920, 935 (9th Cir. 2022) (citing Cal. Code Regs. tit. 23, § 3836(c)).

The Ninth Circuit found this evidence insufficient to support a finding that the State Water Board engaged in a coordinated scheme to avoid the one-year deadline. The Ninth Circuit disagreed that the circumstances identified by FERC established coordination in the same manner as the contractual arrangement in *Hoopa Valley*. *See id.* at 935-36. Instead, the informal communications from State Water Board staff were merely in anticipation of what was, prior to *Hoopa Valley*, "a standard practice employed by project applicants who had not yet complied with CEQA." *Id.* at 934. In each case, the State Water Board indicated that, had the applications not been withdrawn, the State Water Board would have denied the applications without prejudice. *Id.* at 935.

Important to the court's analysis were the consequences of waiver. The term for a federal license for a hydropower project can be up to 50 years, and most licenses are for 40 years. *See id.* at 924. The Ninth Circuit expressed concern that a project could receive a 40- or 50-year license without proper environmental review or appropriate water quality license conditions being imposed, all based on an informal email from staff regarding upcoming deadlines in anticipation of applicants' withdrawal-and-resubmission action that, at the time, was a "common and long-accepted" practice. *Id.* at 935-36.

For these reasons, the court found that FERC's finding of waiver was not supported by substantial evidence. *Id.* According to the court, "a state's mere

acceptance of a withdrawal-and-resubmission is not enough to show that the state engaged in a coordinated scheme to avoid its statutory deadline for action. Accordingly, FERC's orders cannot stand." *Id.* at 936. The Ninth Circuit vacated the orders and remanded for further proceedings. *Id.*

Application of *Hoopa Valley* in Other Cases

FERC and the State Water Board have not been at odds regarding state water quality certification authority in all instances. In *Turlock Irrigation District v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022), Turlock and Modesto Irrigation Districts sought water quality certifications from the State Water Board in January 2018. Just two days before the one-year deadline, the State Water Board denied the requests "without prejudice" because FERC had not completed its NEPA analysis for the projects and the districts had not begun the CEQA process. *Turlock Irrigation District v. FERC*, 36 F.4th 1179, 1181 (D.C. Cir. 2022), *reh'g en banc denied*, No. 21-1120, 2022 WL 4086378 (D.C. Cir. Sep. 6, 2022). The districts filed a second request for water quality certification in April 2019, and the State Water Board repeated this process and denied the second request also without prejudice on the eve of the one-year deadline. *Id.* The districts submitted a third request in July 2020 and, less than three months later, filed a petition to FERC for a declaratory order asserting that the State Water Board waived its Section 401 certification authority. *Id.* at 1182. The districts argued that the State Water Board's denials were "invalid" as a matter of federal law because they were on non-substantive grounds rather than on the technical merits of the certification requests. *Id.* at 1182-83. FERC denied the petition for declaratory order, reasoning that Section 401 requires only "action" within a year to avoid waiver, and the State Water Board "acted on" the petitions by denying the applications without prejudice. *Id.* The D.C. Circuit agreed, holding that FERC's ruling is not contrary to *Hoopa Valley* wherein the state agencies took "*no action at all*" on the certification requests. *Id.* at 1183 (emphasis in original). The court also agreed with FERC that, if denial had to be "on the merits" to qualify as "action" under Section 401, the state would be forced to either (a) grant certification without the necessary information, or (b) waive its power to decide. *Id.* at 1184. Holding that FERC's judgment was rational, the D.C. Circuit rejected the irrigation districts' petitions for judicial review. *Id.*

Actions by California and the Federal Environmental Protection Agency to Bolster State Control

The United States Environmental Protection Agency (EPA) is in the rulemaking process to clarify when waivers occur in light of *Hoopa Valley* and subsequent cases. As the Ninth Circuit noted in *SWRCB v. FERC*, the EPA is charged with administering the Clean Water Act, including Section 401, so the EPA's interpretations—rather than FERC's—are entitled to deference. *SWRCB v. FERC*, 43 F.4th 920, 932 n.11 (9th Cir. 2022) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The EPA promulgated a final rule in 2020 interpreting the Section 401 waiver provision, and the EPA has proposed a new rule on June 9, 2022 that would revise and replace the 2020 rule. *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35318.

The EPA's 2020 rule (85 Fed. Reg. 42210) prohibited state and tribal certifying authorities from *requesting* that project applicants withdraw and resubmit a certification request. 40 CFR 121.6(e). In the proposed 2022 rule, the EPA will not take a position on the legality of withdrawal-and-resubmission of certification requests. 87 Fed. Reg. 35318, 35342. The EPA explained that neither the text of Section 401 nor *Hoopa Valley* categorically precludes withdrawal-and-resubmission, and that there might be factual situations that justify such action. *Id.* Because the EPA is not confident it can create regulatory "bright lines" to address all factual scenarios, the proposed 2022 rule would allow the courts and state and tribal certifying authorities to make case-specific decisions or issue their own regulations on the withdrawal-and-resubmission practice. *Id.*

California has also responded to this issue of Section 401 waiver. In 2020, the California Legislature enacted California Water Code § 13160, which provides that the State Water Board can issue a water quality certification prior to completing CEQA review where "there is a substantial risk of waiver of the state board's certification authority." Cal. Wat. Code § 13160(b)(2); *see also* 2020 Stat. Ch. 18 (AB 92) (enacting Cal. Wat. Code § 13160). Such a

certification under § 13160 must also include a condition that the State Water Board retains the authority to reopen and revise the certification, if necessary, on completion of CEQA review. California Water Code § 13160 was enacted after the withdrawal-and-resubmission events underlying the Ninth Circuit's decision in *SWRCB v. FERC*, and therefore it did not impact the court's analysis in that case. Going forward, this statutory provision gives the State Water Board flexibility to comply with the one-year deadline while environmental review remains pending. It remains to be seen whether federal authorities such as FERC and EPA will allow the State to retain authority to revise a certification after a federal license is issued and whether project proponents will challenge such actions.

Conclusion and Implications

The decisions in *Hoopa Valley*, *North Carolina Department of Environmental Quality*, *Turlock Irrigation District v. FERC* and *California State Water Resources Control Board* can be read in harmony inasmuch as the respective facts of each case provide the boundaries of what actions by a state regulatory authority constitute impermissible coordination such that it has waived certification authority under the Clean Water Act. However, there remains some distance between the approach of the D.C. Circuit in *Hoopa Valley* decision where a coordinated scheme resulted in waiver and the approaches of the subsequent Courts of Appeals where the facts were not found to rise to the level of such a scheme. Although the Supreme Court of the United States declined to review *Hoopa Valley* at the time it was decided in 2019, the parties in either *Turlock Irrigation District v. FERC* or *California State Water Resources Control Board* may still decide to seek review from the Supreme Court.

At the state level, California's enactment of Water Code § 13160 will allow quick certification by the State Water Board while preserving the state's ability to regulate water quality, consistent with the letter of the one-year deadline. Such actions may help California steer clear of the specific issues raised in *Hoopa Valley*, but will likely only increase the tension between California's exercise of authority under Section 401 and FERC's efforts to exert greater control and streamline the licensing process. The regulated operators of hydropower projects will also surely seek to limit efforts by states to extend their regulatory authority beyond a limited and narrow one-year certification window, if not seeking outright waivers of states' authority.

Brian E. Hamilton is Counsel at the law firm of Downey Brand, LLP, resident in the firm's Sacramento office.

Brian represents clients in all stages of litigation and before administrative proceedings. Brian's practice focuses on water rights law and environmental litigation, but his background includes commercial, real estate, and employment litigation. Brian's litigation practice brings him before courts throughout California on a range of matters. Brian is a frequent contributor to the *California Water Law & Policy Reporter*.

Holly Tokar is an Associate at Downey Brand, LLP. Holly's practice encompasses a broad range of matters including surface and groundwater rights, flood liability and protection, endangered species issues, and CEQA and NEPA compliance. Holly represents both public and private clients, and is a frequent contributor to the *California Water Law and Policy Reporter*.

WATER NEWS

MODERNIZING THE COLUMBIA RIVER TREATY—WHAT'S TO COME?

The Columbia River is the fourth-largest river in the U.S. by volume according to Wikipedia©. At 1,243 miles in length, the river and its tributaries touch seven states and one Canadian province. (As impressive as this is, it still comes in second to the Colorado River at 1,450 miles touching seven states and *two* Mexican states.) The Columbia River Treaty is an international agreement between the United States and Canada entered in 1961 with one-third of the water in the Columbia River coming from the Canadian headwaters. Designed for the joint development, regulation, and management of the Columbia River, to coordinate flood control and optimize hydroelectric energy production on both sides of the border, the Columbia River Treaty has profound effects on Columbia River flows. September 16th, 2024, marks the 60th Anniversary of the Columbia River Treaty (Treaty), and the beginning of what could be either the end of cooperation or an entirely new paradigm.

History of Negotiations

Coordination between the sovereigns began in 1944, when the Canadian and U.S. governments agreed to explore options for the joint development of dams in the Columbia River Basin. In 1948, a flood on the Columbia River caused extensive damage from Trail, British Columbia to Vanport, Oregon. Vanport, the second largest city in Oregon at the time, was completely destroyed and was not rebuilt after the devastation caused by the flood. This event galvanized the U.S. to offer incentives to ensure Canada would negotiate a treaty to mitigate the waters of the Columbia River in its upper reaches.

After being signed in 1961, the Treaty was not implemented until 1964, due to the funding of the construction of the Canadian dams and the marketing of the electrical power owed to Canada, which was surplus to Canadian power demand at that time. A Treaty Protocol and a Canada-British Columbia agreement were signed in January 1964 that limited and clarified many treaty provisions, defined rights and obligations between the British Columbia and Canadian governments, and allowed for the sale of the Canadian Entitlement (CE) to downstream U.S. power authorities.

Under the Treaty, Canada built three storage dams: Hugh Keenleyside, Duncan and Mica; the U.S. built the Libby Dam in Montana, which created a reservoir that flooded back into Canada. Unless otherwise agreed, the three Canadian dams are required to operate for flood protection and increased power generation at-site and downstream in both Canada and the U.S., although the allocation of water storage operations among the three projects is at Canadian discretion.

Negotiations at the time of the ratification of the Treaty recognized that the factors influencing the agreement would change over time. The Treaty is a 60-year agreement with key flood control protection guaranteed through 2024, with modifications thereafter. Critically important to the Treaty were power provisions to share the downstream power benefits, with the U.S. set to return hydropower capacity and energy to Canada for 60 years, after which there would be an opportunity to rebalance based on value to each country of coordination operations. Committing to a decades-long economic Treaty brought benefits and risks to both parties.

While the Treaty has no official expiry date, either party may terminate most* Treaty provisions after the 60th Anniversary date with ten-years written notice. This unilateral right for both countries was designed by the Treaty framers to allow a renegotiation based on the realization of actual benefits. If the Treaty terminates, responsibility for flood control will shift from Canada to the U.S., affecting major operational changes in a system which is already under pressure for declining fish populations and increasing power demands. *[The On Call Flood Control provisions designed to be used during periods of very high inflows will remain in effect as long as the dams exist, even if the Treaty is terminated.]

Current Negotiations

Negotiations to modernize the Columbia River

Treaty have been underway since May 2018. Since then, Canada and the U.S. have discussed a wide range of issues from the Treaty's original purposes of enhancing flood risk management and hydroelectric power, to incorporating ecosystem function, increasing bilateral coordination of Libby Dam operations, and expanding operational flexibility to meet Canadian interests, the countries are exploring how the Treaty can be improved to reflect their needs today and into the future.

In 2020, each country put forward a framework for a modernized Treaty outlining their thinking on the main issues. The Canadian team, consisting of Canada, B.C. and the Ktunaxa, Secwepemc and Syilx Okanagan Nations, continues collaborative projects to strengthen Canada's negotiating positions. This includes a modeling initiative that will examine a variety of hydroelectric system operations to determine how Treaty dams could be managed differently to meet Canadian Basin interests, including ecosystems, Indigenous cultural values, flood-risk management, hydro power, and social and economic objectives.

In August 2022, the parties convened for a 13th round of negotiations. The negotiating teams reviewed proposals developed by both countries to reach an agreed-upon, modernized framework that incorporating flood risk management, hydropower coordination, ecosystem function, and increased Canadian operational flexibility.

After this last round of discussions between the U.S. and Canada, Katrine Conroy, the Canadian Minister Responsible for the Columbia River Treaty, issued a statement saying:

> Discussions toward a modernized Columbia River Treaty progressed last week….The aim of each proposal is to find agreement on an updated treaty framework that includes not only flood-risk management and hydropower coordination but also cooperation on ecosystems and increased flexibility for Canadian operations…. The fact that we are exchanging and reviewing proposals is, I believe, a sign that we are getting closer to finding alignment of our objectives… There is no deadline to complete negotiations, but I have every confidence that both countries are committed to finding common ground and reaching an agreement in a timely manner.

Conclusion and Implications

The U.S. has been less forthcoming in communication about the Treaty negotiation process. In September of 2022, 32 Pacific Northwest-based entities sent a joint letter to the State Department urging the U.S. to involve citizens and tribes in the U.S. negotiation process. According to the press release, the U.S. Negotiation Team has not held a public meeting in more than 2.5 years and has provided only minimum context to the public.
(Jamie Morin, Alisa Royem)

NEWS FROM THE WEST

In this month's News from the West we report on a plan by California Governor Gavin Newsom to address water supply in the state in light of severe drought. We also report on the status of water related bills in the State of Colorado.

Governor Newsom Releases California's Water Supply Strategy

As the summer of 2022 has now passed, Governor Gavin Newsom has unveiled a new strategic plan titled California's Water Supply Strategy. The nearly 20-page document contains a surprisingly concise walkthrough of the pressing issues the state faces on the water supply side of things and outlines California's strategy and priority actions to adapt and protect water supplies in an "era of rising temperatures." With a heavy emphasis on enhancing resiliency in the future to withstand the impacts of climate change—thus the subtitle Adapting to a Hotter, Drier Future—the Water Supply Strategy showcases recent highlights in improving the state's water infrastructure and sets a series of goals and milestones for the state in the years to come and how we can work towards them.

Developing New Water Supplies

The first milestone addressed in the Water Supply Strategy focuses on increased utilization of wastewater recycling and desalination as well as increased stormwater capture and conservation, generally. Specifically, this section proposes two main goals moving forward.

First, the Water Supply Strategy sets a short-term goal to increase recycled water use that would utilize at least 800,000 acre-feet (AF) of recycled water annually by 2030. Currently, recycled water offsets about 9 percent of the state's water demand, right around 728,000 AF annually, and with over $1.8 billion invested in recycled water projects statewide over the last five years, the state has already laid the groundwork for reaching this goal as those projects are expected to generate an additional 124,000 AF of new water supply. To meet the proposed long-term goal, however, the state will need to redouble its efforts as the goal more than doubles that 800,000 figure, jumping to a whopping 1.8 million AF annually in recycled water use throughout the state.

The second specific goal discussed in this section is two-part in nature, focusing on an increase in yield and in the efficiency of doing so. To meet this second goal, the state would expand brackish groundwater desalination production by 28,000 AF per year by 2030 and 84,000 AF per year by 2040. The kicker to this goal comes in its second part, however, as the state will also work to help guide the placement of seawater desalination projects where they are cost effective and environmentally appropriate, an issue that has stood in the way of many proposals.

Expanding Water Storage Capacity

While admitting that creating more space to store water in reservoirs and aquifers does not create more precipitation, the Water Supply Strategy addresses expanding the water supply storage side of things, looking at efforts both above ground and below.

Above ground, the strategic plan highlights seven locally-driven projects supported by Proposition 1 that would create an additional 2.77 million AF of water storage statewide. Also discussed is the opportunity—or even need—to improve water storage infrastructure throughout the state by rehabilitating dams in need to regain storage capacity and even expanding the San Luis Reservoir by 135,000 AF.

Below ground, the strategic plan endeavors to expand annual groundwater recharge by at least 500,000 AF. Local efforts have been a huge part of the increased utilization of groundwater reservoirs, and by the end of next year the state will have invested around $350 million in local assistance for recharge projects. To help bolster these local efforts, the Water Supply Strategy proposes a coordinated, state-level approach to provide for orderly, efficient disbursement of rights to high winter flows by providing incentives to local agencies emphasizing such projects and by streamlining regulatory roadblocks and speedbumps that may be hindering the expansion of such projects.

Reducing Demand

At this point, many Californians are tired of hearing the "C" word—conservation. But reducing demand has simply become a continuing effort of the state and conservation efforts won't be slacking up any time soon. Without beating the dead horse for too long, the Water Supply Strategy reiterates the importance, and importantly the success, of our conservation efforts statewide, especially with a potential fourth dry-year on the horizon.

Improving Conveyance Systems and Modernizing Water Rights

The final section of the Water Supply Strategy tackles two distinct auxiliary issues relating to water supply management: the movement of water throughout the state and the management of water rights.

California depends upon—to an undesirable extent—aging, damaged, or increasingly risk-prone infrastructure to transport water between different areas of the state. It comes as no surprise then that the strategic plan discusses plans to both repair damaged facilities in the San Joaquin Valley—specifically those of the federal and state water projects—and modernize existing conveyance facilities by getting the ball rolling with respect to the Delta Conveyance Project.

Closing out the final section, the strategic plan expresses the state's desire "to make a century-old water rights system work in this new era" of aridification in the west. Calling out how other western states such as Washington, Oregon, Nevada, and Idaho manage water diversions much more "nimbly" than California, the strategic plan looks at what it can do to get the California State Water Resources Control

Board more accurate and timely data, modern data infrastructure, and increased capacity to halt water diversions when the flows in streams diminish.

Conclusion and Implications

The Water Supply Strategy covers a lot of forward-facing information—far too much to cover this concisely. Many of the issues and proposed solutions addressed are the same we see broadcasted on an almost daily basis—aging infrastructure, the need for increased storage capacity, heightened conservation efforts—but other areas stand out and illicit a closer look into the topic—such as the how part in how the state plans to modernize its Gold Rush era water rights system. With the main topics noted herein, and with the full publication being a comparatively short read for a statewide strategic plan, the Water Supply Strategy may not be the most revolutionary publication the state has released, but it at least provides Californians with a bit of transparency as to the pet projects the state will focus on in the years to come. For more information, *see:* https://www.gov.ca.gov/2022/08/11/governor-newsom-announces-water-strategy-for-a-hotter-drier-california/
(Wesley A. Miliband, Kristopher T. Strouse)

2022 Colorado Legislative Update

The Colorado General Assembly adjourned its legislative session earlier this summer with several water-related bills making it to the Governor's desk for signature, while two notable bills did not. Thanks to significant federal COVID relief aid and a healthy state budget, the legislature passed major spending measures directed towards state water plan projects, wildfire mitigation and restoration, and water conservation measures.

State Water Plan Project Funding

House Bill 22-1316 (Passed)

House Bill 1316 appropriates $8.2 million for the 2022-23 fiscal year from the water plan implementation cash fund for use by the Colorado Water Conservation Board for grants toward projects that help implement the state's water plan. A portion of this appropriation derives from a sports betting tax that voters approved in 2019 under Proposition DD. The 2019 ballot measure legalized sports betting in Colorado and specifically set aside tax revenue generated to fund state water projects.

Wildfire Mitigation, Prevention, and Watershed Restoration Bills

Senate Bill 22-114 (Passed)

Senate Bill 114 creates a process for Colorado counties to identify and designate certain eligible ponds as fire suppression ponds. Under the bill, a county may consult with its fire protection district or local fire authority and apply to the State Engineer for the special pond designation. If designated by the State Engineer, the fire protection ponds are entitled to a rebuttable presumption that they do not cause material injury to other vested water rights, and they are exempt from most administrative enforcement orders that would otherwise require the ponds to be drained or backfilled. However, fire suppression ponds are still subject to dam safety regulations and designations are only valid for 15 years. Counties may only designate up to 30 surface acres of fire protection ponds in each county across the state, and no single pond can exceed six acres in size.

The bill also makes clear that the fire suppression designation: (1) does not confer a water right, (2) does not establish a priority date within Colorado's prior appropriation system, and (3) cannot be adjudicated in Water Court as a water right. The bill further directs the Division of Fire Prevention and Control to promulgate rules establishing criteria for counties to use to identify and evaluate potential fire suppression ponds.

House Bill 22-1379 (Passed)

House Bill 1379 directs $20 million funding from the American Rescue Plan Act (ARPA) for wildfire mitigation and prevention and post-wildfire watershed restoration. Specifically, the bill allocates $3 million to the Healthy Forests and Vibrant Communities Fund to assist communities to reduce wildfire risks by implementing risk mitigation efforts that focus on promoting watershed resilience. Additionally, the bill transfers $2 million to the Wildfire Mitigation Capacity Development Fund for wildfire mitigation and fuel reduction projects and $15 million to the Colorado Water Conservation Board Construction Fund for watershed restoration and flood mitigation grants.

Groundwater Compact Compliance and Water Conservation Bills

Senate Bill 22-028 (Passed)

In a 2016 effort to reduce groundwater use in the Republican River Basin, Colorado signed a stipulation with Kansas and Nebraska, which requires Colorado to retire 25,000 acres of irrigated acreage in the Republic River Basin by 2029. Additionally, under certain aquifer sustainability standards set in Colorado's groundwater laws approximately 40,000 irrigated acres in the Rio Grande River basin are also required to be retired by 2029. To date, only about 3,000 irrigated acres in the Republican River basin and 13,000 acres in the Rio Grande River basin have been fallowed.

Senate Bill 28 appropriates $60 million of the state's ARPA funds to create the Groundwater Compact Compliance and Sustainability Fund to provide financial incentives and assistance for the buying and retiring of irrigation wells and irrigated acreage and to help promote conservation and sustainability of groundwater resources in the Republican River and Rio Grande River basins. The new fund will be dispersed by the Colorado Water Conservation Board, with input from two local water conservation districts, and aims to achieve the 2029 targets without the need for mandatory curtailment by the State Engineer if the targets are not met.

House Bill 22-1151 (Passed)

In response to prolonged drought and increased water demand throughout the state, the General Assembly passed House Bill 22-1151. The bill aims to promote water conservation by incentivizing drought tolerant landscaping and by creating a state program overseen by the Colorado Water Conservation Board to finance the voluntary replacement of irrigated turf and non-native grasses with water-wise landscapes.

The legislature appropriated $2 million to be used by the Colorado Water Conservation Board to develop a state turf replacement program that incentivizes voluntary replacement of irrigated turf on residential properties and commercial, institutional, or industrial properties through financial compensation or in-kind or subsidized goods or services. The replacement program will provide an eligible entity with matching money in an amount of up to 50 percent for the direct and indirect costs and any third party it contracts with developing or implementing a turf replacement program. Money distributed under the program cannot be used to replace turf with impermeable concrete, artificial turf, water features such as fountains, or invasive plant species.

Investment Water Speculation Bill

Senate Bill 22-029 (Not passed)

One bill the General Assembly notably did not pass was Senate Bill 29. Proponents saw the bill as a necessary measure to strengthen Colorado's anti-speculation doctrine as a new wave of hedge funds and institutional investors began amassing holdings in productive, irrigated ag land across western Colorado. Critics, on the other hand, viewed the bill as government overreach and unnecessary based on other existing laws designed to accomplish the same ends.

The bill sought to prohibit a purchaser of agricultural water rights from engaging in "investment water speculation." The introduced bill defined investment water speculation to mean an intent at the time of purchase to profit from an increase in the water's value in a subsequent transaction, such as a sale or lease of the water, or by receiving payment from another person for nonuse of all or a portion of the water subject to the water right.

Had Senate Bill 29 passed, the State Engineer would have been entitled to investigate a proposed or completed sale or transfer of agricultural water rights and levy fines, up to $10,000 for a violation. In addition to the fine, any violator would also have been subject to a two-year probationary period requiring the State Engineer's approval for any attempted agricultural water right transaction involving the same buyer. Senate Bill 29 did not advance beyond the Senate Committee on Agriculture and Natural Resources.

South Platte Water Storage Priority Funding Bill

Senate Bill 22-126 (Not passed)

Senate Bill 126 sought to increase the beneficial consumptive use of the state's undeveloped water entitlement under the South Platte River Compact while reducing front range water providers' reliance on transmountain diversions. The bill would have required the Colorado Water Conservation Board to prioritize funding for projects that increase or im-

prove the water storage capacity in the South Platte River Basin. The measure passed in the Senate but was postponed indefinitely in the House.

Conclusion and Implications

The 2022 legislative session in Colorado was highlighted by a several major spending bills designed to fund water projects and programs identified in the state's water plan. Significant funds were also allocated toward wildfire mitigation and restoration, and water conservation measures. Much was accomplished on the legislature's water agenda during the 2022 session. However, with an impending election cycle, persistent drought, and ongoing shortage declarations on the Colorado River, plenty of challenges remain on the horizon for 2023.
(Lisa Claxton, Jason Groves)

LEGISLATIVE DEVELOPMENTS

FEDERAL INFLATION REDUCTION ACT PROVIDES ADDITIONAL FUNDING FOR DROUGHT RELIEF EFFORTS

In August, President Biden signed the Inflation Reduction Act that included $4 billion for the United States Bureau of Reclamation (Bureau) to mitigate the impacts of drought in the western United States, with priority given to the Colorado River Basin and others experiencing similar levels of drought. The funds are available to public entities and Indian tribes until 2026.

Background

The Bureau of Reclamation was established in 1902 and manages and develops water resources in the western United States. The Bureau is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial uses. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

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

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

> California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In 2019, lower basin states entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. However, in August of this year, the Bureau announced additional reductions in releases from Lake Mead for 2023 following first-ever cutbacks in Colorado River allocations to Arizona and Nevada this year. The cutbacks were necessary despite significant investment in western water infrastructure beginning last year.

Under the Bipartisan Infrastructure Law of 2021, the Bureau became eligible to receive roughly $30.6 billion over five years. The 2021 law provided a total of $8.3 billion for Western programs and activities, with an initial $1.66 billion allocated to the Bureau in fiscal year 2022. Funding included $250 million for implementation of the DCP and could be used for projects to establish or conserve recurring Colorado River water that contributed to supplies in Lake Mead and other Colorado River water reservoirs in the Lower Colorado River Basin, or to improve the long-term efficiency of operations in the Lower Colorado River Basin. Despite these investments, Congress recently determined that additional drought

funding relief was necessary in the form of the Inflation Reduction Act (Act).

The Inflation Reduction Act

The Act appropriates $4 billion for the Bureau to make available to public entities and Indian tribes until September 30, 2026. Funding is available via grants, contracts, and other financial assistance agreements. Eligible States include Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.

There are a variety of drought mitigation activities for which funding is available. These activities include temporary or multiyear voluntary reduction in diversion of water or consumptive water use, voluntary system conservation projects that achieve verifiable reductions in use of or demand for water supplies or provide environmental benefits in the Lower Basin or Upper Basin of the Colorado River, and ecosystem and habitat restoration projects to address issues directly caused by drought in a river basin or inland water body. Regarding the Colorado River, the Act provides temporary financial assistance to farmers who voluntarily fallow their lands to adjust to reduced levels of river flow, coupled with funding for water conservation and efficiency projects intended to keep more water in the river system. Efficiency projects for which funding is available could include turf and lawn removal and replacement, and funding for drought-resilient landscaping programs.

The Act also provides $12.5 million in emergency drought relief for tribes. Funding is intended for near-term drought relief actions to mitigate drought impacts for tribes that are impacted by Bureau water projects, including direct financial assistance for drinking water shortages and the loss of tribal trust resources held on behalf of tribes by the federal government. Recently, the Bureau awarded $10.3 million to 26 tribes for drought response water projects in various Colorado River Basin states including Arizona, California, Colorado, Nevada, and Utah.

The Act also provides $550 million for disadvantaged western communities to fund up to 100 percent of the cost of planning, designing, or constructing water project the primary purpose of which is to provide domestic water supplies to communities or households that do not have reliable access to domestic water supplies.

Finally, the Act provides for up to $25 million for the design, study, and implementation of projects to cover water conveyance facilities with solar panels to generate renewable energy, including those that increase water efficiency and assist in implementing clean energy goals.

Conclusion and Implications

The Inflation Reduction Act is another substantial effort to provide adequate funding to redress drought impacts. However, as drought conditions in the west worsen, it is unclear if funding for drought mitigation activities will offset ongoing drought impacts. Moreover, it is not clear if funding is available for the development of alternative water supplies, like desalination. The Inflation Reduction Act, P.L. 117-169 is available online at https://www.congress.gov/bill/117th-congress/house-bill/5376/text
(Miles B. H. Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. ENVIRONMENTAL PROTECTION AGENCY ANNOUNCES UPDATES TO DRINKING WATER HEALTH ADVISORIES FOR 'FOREVER CHEMICALS' PFAS

On June 15, 2022, the United States Environmental Protection Agency (EPA) announced updates to its drinking water health advisories for chemicals considered to be "forever chemicals." The update to drinking water health advisories for per- and polyfluoroalkyl substances (PFAS) is part of the Biden administration's action plan to deliver clean water and EPA Administrator Regan's 2021-2024 PFAS Strategic Roadmap.

This update strengthens the EPA's PFAS guidance issued in 2016. While research on the harms of PFAS is still ongoing, exposure to PFAS has been linked to higher cholesterol levels, developmental effects or delays in children, changes to your immune system, thyroid problems, higher chances of kidney, prostate, or testicular cancers, increased cholesterol levels, and higher blood pressure during pregnancy.

Background

PFAS are chemicals that have been used in a variety of industry and consumer products worldwide since the 1950s, such as nonstick cookware, water-repellent clothing, stain resistant fabrics and carpets, cosmetics, some firefighting foams, and products that resist grease, water, and oil. PFAS in many instances move to our soil, water, and air and cause concerning and dangerous pollution. Most PFAS cannot break down, so they remain in the environment as "forever chemicals." Because of their widespread use and their persistence in the environment, PFAS are found in the blood of people and animals all over the world and are present at low levels in a variety of food products and in the environment. PFAS are very dangerous because they can build up in humans' and animals' bodies with repeated exposure.

In New Mexico, several communities have been struggling to control PFAS contaminants for years. The eastern part of the state, specifically the city of Clovis, has dealt with PFAS due to contamination near Cannon Air Force Base. The chemicals were within firefighting foam which was used on base as part of firefighting training exercises. *See*, Theresa Davis, EPA updates toxic PFAS chemical advisories (Albuquerque Journal, June 15, 2022). Ultimately, the PFAS within the firefighting foam used in training migrated to the groundwater. A neighboring dairy farm, Highland Dairy, had no choice but to euthanize thousands of contaminated cows and filter water for daily use.

The Clovis water utility, EPCOR, discovered that these same toxic substances linked to the groundwater contamination from Cannon Air Force Base were also in the city's water supply in 2020. Laura Paskus, Clovis City Water Tests Find Toxic 'Forever Chemicals' Linked to Cannon Air Force Base (NMPBS February 8, 2020). After the discovery, EPCOR informed its customers that trace amounts of PFAS were found in 10 percent of the company's 82 intake wells. The challenge to clean and control PFA pollution is only exacerbated by the fact that there is no legally enforceable policy or regulation. Without a federal regulatory limit provided by enforceable law, New Mexico and the rest of the states cannot mandate water quality controls over PFAS.

In 2018, the U.S. Air Force notified the New Mexico Environment Department (NMED) that wells at Cannon Air Force Base had PFAS concentrations more than 370 times what federal regulators consider safe for a lifetime of exposure, and nearby private drinking wells were also tainted. Other regions of New Mexico with military presence are also suffering because of PFAS. For example, Air Force testing also revealed levels of PFAS up to 1,294,000 parts per trillion—more than 27,000 times the advisory level—in waters below Holloman Air Force Base near the city of Alamogordo. Because of the lack of power to enforce any limits on these pollutants, State Environment Secretary Jim Kenney has long encouraged the EPA to move quickly on finalizing regulations, which would mean the state can then enforce the regulations by law. By providing legally enforceable poli-

cies, or as Secretary Kenney stated, "putting teeth to policy," this would enable the federal government and the states to require PFAS cleanup and PFAS pollution prevention.

Regulating PFAS

The EPA is actively preparing PFAS regulations that will be more than just policy suggestions. The current head of the EPA, Administrator Michael S. Regan, established the EPA Council on PFAS which ultimately lead to the creation of the EPA's 2021-2024 PFAS Strategic Roadmap. Within the roadmap, EPA commits to "leveraging the full range of statutory authorities to confront the human health and ecological risks of PFAS." See 2021-2024 PFAS Strategic Roadmap. The EPA also details its integrated approach to PFAS, which is focused on three central directives:

- Research. Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.

- Restrict. Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.

- Remediate. Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems. 2021-2024 PFAS Strategic Roadmap at 5.

The EPA's plan is to use existing statutory authorities to implement regulations and address PFAS pollution under specific circumstances. For example, the EPA is currently developing a national PFAS testing strategy. Id. at 12. This will aid the EPA in identifying and selecting which PFAS the Agency will require testing under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq*. (1976) (TSCA).

Additionally, EPA is anticipating providing legal enforcement to PFAS pollution control and prevention through the Safe Drinking Water Act of 1974, §§ 1411, 1448(a)(2), 42 U.S.C.A. §§ 300g, 300j–7(a)(2) (SDWA). Under the SDWA, the EPA has authority to set legally enforceable National Primary Drinking Water Regulations (NPDWRs) for drinking water contaminants. Further, the EPA can require monitoring of public water supplies through NPDWRs which would directly help states like New Mexico that have been impacted by pollution to drinking water, but have dealt with having no tools for legal enforcement. The EPA has regulated more than 90 drinking water contaminants, but has yet to established national drinking water regulations for any PFAS. The deadline EPA has set to establish national primary drinking water regulation for PFAS in the form of an initial proposed rule is expected to be this upcoming Fall of 2022. The EPA expects that the final rule will be implemented by Fall 2023. The EPA is also planning on proposing rules affecting PFAS in the contexts of other effective statutory authorities such as the federal Clean Water Act, 33 U.S.C. §1251 *et seq*. (1972) (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq*. (1980) (CERCLA).

Conclusion and Implications

The EPA is committed to tackling the PFAS pollution issue head-on by providing a strategic roadmap that outlines when and how the agency plans to implement legally enforceable regulations to PFAS. This commitment likely comes as an urgently welcome action to many states and state leaders, such as New Mexico Environment Secretary Jim Kenney, who not long ago called for the EPA to provide "teeth to its policy." By finally tying PFAS policy to statutory enforcement mechanisms, states will have the power to further protect households and businesses from the dangers PFAS may pose to communities across the country. For more information, *see*, United States Environmental Protection Agency, PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024 (October 2021) (2021-2024 PFAS Strategic Roadmap), https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024
(Christina J. Bruff, James Grieco)

REVERSAL OF CRITICAL HABITAT EXCLUSION REGULATION UNDER ENDANGERED SPECIES ACT BECOMES FINAL

The U.S. Fish & Wildlife Service (FWS or Service), on July 21, issued a final rule rescinding a rule previously adopted in December 2020 that changed the process for excluding areas from critical habitat designations under the federal Endangered Species Act (ESA). (87 Fed. Reg. 43,433.) Under the final rule, the Service will resume its previous approach to exclusions. The final rule became effective on August 22.

Background

When a species is listed under the ESA, Section 4(b)(2) requires that the Service designate critical habitat for the species. Critical habitat designations identify areas that are essential to the conservation of the species. The FWS may also exclude areas from designation based on a variety of factors. Critical habitat designations affect federal agency actions or federally funded or permitted activities. Federal agencies must ensure that actions they fund, permit, or conduct do not destroy or adversely modify designated critical habitat.

When designating critical habitat, the FWS considers physical and biological features that the species needs for life processes and successful reproduction, including, but not limited to: cover or shelter, food, water, air, light, minerals or other nutrients, and sites for breeding. The Service must also take into account several practical considerations, including the economic impact, the impact on national security, and any other relevant impacts. Section 4(b)(2) further provides that the Service may exclude areas from critical habitat if the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," provided that exclusion will not result in the extinction of the species concerned.

2020 Critical Habitat Exclusions Rule

In September 2020, under the previous administration, the FWS proposed "Regulations for Designating Critical Habitat," which provided a process for critical habitat exclusions partially in response to the U.S. Supreme Court's opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* (2018) 139 S. Ct. 361. In *Weyerhaeuser*, the Court held that the Service's decision to exclude areas from critical habitat is subject to judicial review under the arbitrary and capricious standard.

The 2020 rule was meant to provide guidelines for the FWS in weighing the impacts and benefits of critical habitat exclusions, with the aim of providing transparency in the process. (85 Fed. Reg. 82,376.) The rule provided a non-exhaustive list of impacts that can be considered "economic," including the economy of a particular area, productivity, jobs, opportunity costs arising from critical habitat designation, or possible benefits and transfers, such as outdoor recreation and ecosystem services. The rule further provided a non-exhaustive list of "other impacts" the Service may consider, including impacts to tribes, states, and local governments, public health and safety, community interests, the environment, federal lands, and conservation plans, agreements, or partnerships.

The 2020 rule provided a process for how exclusion determinations under section 4(b)(2) were to be made. If an exclusion analysis was conducted, the rule explained how the information was to be weighed and assessed. The Service's judgement controlled when evaluating impacts that fell within the agency's scope of expertise, such as species biology. With respect to evaluating impacts that fell outside of the Service's expertise, outside experts' judgment controlled.

Rescission of 2020 Critical Habitat Exclusions Rule

In a July 2022 press release the Service announced it was rescinding the 2020 critical habitat exclusion rule "to better fulfill the conservation purposes" of the ESA. [https://www.fws.gov/press-release/2022-07/service-rescinds-endangered-species-act-critical-habitat-exclusion]

This decision was in accordance with Executive Order 13990, which directed all federal agencies to review and address agency actions to ensure consistency with the current administration's objectives.

The final rule, gives three main points of rationale supporting the rescission. First, the 2020 rule potentially undermined the Service's role as the

expert agency responsible for administering the ESA by giving undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations. Second, the rule employed a set process in all situations, regardless of the specific facts, as to when and how the Secretary would exercise the discretion to exclude areas from critical habitat designations. Finally, the rule was inconsistent with National Marine Fisheries Service's critical habitat exclusion process and standards, which could confuse other federal agencies, tribes, states, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations.

Conclusion and Implications

Effective August 22, the Service will resume its previous approach to exclusions of critical habitat under regulations at 50 C.F.R. § 424.19 and a joint 2016 Policy with the National Marine Fisheries Service. [https://www.federalregister.gov/documents/2016/02/11/2016-02677/policy-regarding-implementation-of-section-4b2-of-the-endangered-species-act]

The Service decided to rescind the critical habitat exclusions rule because it found the rule unnecessary and confusing. Now, the Service will resume its previous approach to exclusions. Although rescinding the critical habitat exclusions rule, the Service recognizes the impact of the *Weyerhaeuser* holding and reiterated a commitment to explaining its decisions regarding critical habitat exclusions in the final rule. The Final Rule is available online at: https://www.federalregister.gov/documents/2022/07/21/2022-15495/endangered-and-threatened-wildlife-and-plants-regulations-for-designating-critical-habitat
(Breana Inoshita, Darrin Gambelin)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

• August 18, 2022—EPA announced a settlement with residential developer Heartland Development LP, pursuant to which Heartland will pay a $51,690 civil penalty to resolve alleged violations of the Clean Water Act (CWA). According to EPA, the company failed to adequately control stormwater runoff from the Covington Creek and Covington Court construction developments in Olathe, Kansas. Specifically, EPA alleged that Heartland failed to construct and/or maintain required stormwater controls; failed to take actions when stormwater control deficiencies were identified; and failed to conduct required inspections of the construction sites.

• August 19, 2022—EPA announced a settlement with Asphalt manufacturer Shilling Construction Company Inc. under which the company will pay $71,324 in civil penalties to resolve alleged violations of the CWA. According to the EPA, the company failed to adequately control stormwater runoff from its Manhattan, Kansas, facility. EPA alleged that Shilling Construction failed to comply with its CWA permit, including failure to develop an adequate plan to reduce pollutants in stormwater runoff; failure to construct and/or maintain adequate stormwater controls; and failure to conduct and/or document required inspections and monitoring of the facility. The Agency also cited violations of regulations intended to prevent spills from oil stored at the company's facility. In addition to paying the penalty, Shilling Construction agreed to submit reports to EPA and the Kansas Department of Health and Environment outlining the steps it has taken to return to compliance, as well as sampling stormwater runoff from the facility to ensure stormwater controls and management practices are functioning as intended.

• August 23, 2022—EPA announced a settlement with announced a settlement with Amalie Oil Company USA (AOCUSA) for violations of the Clean Water Act and its regulations related to oil pollution prevention at the company's Vernon, Calif. facility. Under the settlement, AOCUSA will pay a $132,590 penalty. The facility, which stores and distributes oil, is located approximately one mile from the Los Angeles River, which flows into the Pacific Ocean. During an October, 2021 inspection, EPA found that the company violated the Clean Water Act's Oil Pollution Prevention Regulations.

• September 8, 2022—EPA announced a settlement with the Conservation Law Foundation (CLF) and the New Hampshire Fish and Game Department that will require the Department to reduce phosphorus discharges from its Powder Mill Fish Hatchery, located in New Durham, N.H., and study the water quality impacts of historic pollution on downstream waters. The state-owned and operated Powder Mill Fish Hatchery is located at the Merrymeeting Lake Dam in New Durham, N.H. The hatchery supports recreational fishing in the state and discharges wastewater to the Merrymeeting River, pursuant to a federally issued permit under the Clean Water Act. In October 2020, EPA re-issued a permit for the hatchery, which included, for the first-time specific limits, for phosphorus discharges, based on EPA's determination that the hatchery's discharge of phosphorus negatively impacts downstream water quality, including contributing to the growth of toxic algae blooms and cyanobacteria. In 2018, the Conversation Law Foundation sued officials of the New Hampshire Fish and Game Department under the citizen-suit provisions of the Clean Water Act. CLF alleged, among other claims, violations of the permit's prohibition against water quality violations caused by its phosphorus

discharges and, in an amended complaint, violations of the new numeric phosphorus limits. After successful settlement negotiations, the U.S. Department of Justice, on behalf of EPA, filed a motion to intervene in the CLF action and filed its own complaint against the New Hampshire Fish and Game Department.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 13, 2022—EPA announced an agreement with General Electric Company (GE) under which the company will investigate the Lower River portion of the Hudson River PCBs Superfund site to determine next steps for addressing contamination. Under the terms of the agreement, GE will immediately develop a plan for extensive water, sediment, and fish sampling between the Troy Dam and the mouth of the New York Harbor. While polychlorinated biphenyls (PCBs) will be a focus of the data collection in the Lower Hudson River, other contaminants will be evaluated as well. The new data is needed to determine from a scientific standpoint the best path forward, even in advance of a potential formal set of studies that would be required to develop a plan or plans for cleanup. The agreement requires data collection to begin in early 2023. GE will also pay EPA's costs to oversee the work.

Indictments, Sanctions, and Sentencing

•August 31, 2022—Kirill Kompaniets, the Chief Engineer of a foreign flagged vessel, was sentenced to prison for deliberately discharging approximately 10,000 gallons of oil-contaminated bilge water overboard in U.S. waters off the coast of New Orleans last year, and for obstructing justice. The illegal conduct was first reported to the Coast Guard by a crew member via social media. The Honorable Nannette Jolivette Brown sentenced Kompaniets to serve a year and a day in prison, pay a $5,000 fine and $200 special assessment and serve six months of supervised release. Repair operations to correct a problem with the discharge of clean ballast water resulted in engine room flooding. After the leak was controlled, Chief Engineer Kompanietes and a subordinate engineer dumped the oily bilge water overboard while the ship was at an anchorage near the Southwest Passage off the Louisiana coast. The ship's required pollution prevention devices—an oily-water separator and oil content monitor—were not used, and the discharge was not recorded in the Oil Record Book, a required ship log. Kompaniets was also charged with obstruction of justice based on various efforts to conceal the illegal discharge. In a joint factual statement filed in Court with his guilty plea, Kompaniets admitted to: (1) making false statements to the Coast Guard that concealed the cause and nature of a hazardous condition, and concealing that the engine room of the vessel had flooded and that oil-contaminated bilge water had been discharged overboard; (2) destroying the computer alarm printouts for the period of the illegal discharge that were sought by the Coast Guard; (3) holding meetings with subordinate crew members and directing them to make false statements to the Coast Guard; (4) making a false Oil Record Book that failed to disclose the illegal discharge; (5) directing subordinate engine room employees to delete all evidence from their cell phones in anticipation of the Coast Guard inspection; and (6) preparing a retaliatory document accusing the whistleblower of poor performance as part of an effort to discredit him.

•September 12, 2022—U.S. District Court Judge John T. Fowlkes Jr. of the Western District of Tennessee today sentenced DiAne Gordon, 61, of Memphis, Tennessee, to 36 months in prison followed by two years' supervised release in connection with her fabrication of discharge monitoring reports required under the Clean Water Act and the submission of those fraudulent documents to state regulators in Tennessee and Mississippi. The court further ordered Gordon to pay restitution in the amount of $222,388. On the fraud count, Gordon was sentenced to 26 months in prison, and she received an additional 10 months' incarceration on the related probation revocation for having engaged in the criminal conduct while on supervision. According to court documents and information in the public record, Gordon was the co-owner and chief executive officer of Environmental Compliance and Testing (ECT). ECT held itself out to the public as a full-service environmental consulting firm and offered, among other things, sampling and testing of stormwater, process water and wastewater. Customers, typically concrete companies, hired ECT to take samples and analyze them in a manner consistent with Clean Water Act permit requirements. Gordon claimed to gather and send the samples to a full-service environmental testing laboratory. The alleged

results were memorialized in lab reports and chain of custody forms submitted to two state agencies, Mississippi Department of Environmental Quality (MDEQ) and the Tennessee Department of Environment and Conservation (TDEC), to satisfy permit requirements. In reality, Gordon fabricated the test results and related reports. She even forged documents from a reputable testing laboratory in furtherance of her crime. Gordon then billed her clients for the sampling and analysis. Law enforcement and regulators quickly determined that Gordon created and submitted, or caused to be submitted, at least 405 false lab reports and chain of custody forms from her company in Memphis to state regulators since 2017.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT LIMITS WAIVERS OF CLEAN WATER ACT SECTION 401 CERTIFICATIONS

California State Water Resources Control Board v. FERC, 43 F.4th 920 (9th Cir. 2022).

The United States Court of Appeals for the Ninth Circuit recently vacated and remanded several decisions by the Federal Energy Regulatory Commission (FERC)/U.S. Environmental Protection Agency (EPA) holding that the California State Water Resources Control Board (State Water Board) waived its certification authority for certain hydroelectric projects. The court held that FERC's findings that the State Water Board participated in coordinated schemes with applicants to delay certification and to avoid making a decision on certification requests was unsupported by substantial evidence.

Factual and Procedural Background

Under Section 401 of the Clean Water Act (CWA), states are required to provide a water quality certification before a federal license can be issued for activities that may result in discharge into intrastate navigable waters. States can adopt water quality standards that are stricter than federal laws—an effective tool in addressing the broad range of pollution. Accordingly, states may impose conditions on federal licenses for hydroelectric projects to make sure that that those projects comply with state water quality standards. Section 401 provides for a one-year deadline by which states must act on request for certification. If states do no act on a request for water quality certification within one year of receipt, their Section 401 certification is waived.

Waiver of Section 401 certification authority can have significant consequences. If a state waives their authority to impose conditions through Section 401's certification procedure, projects run the risk of being noncompliant with a state's water quality standards for significant periods of time. Federal licenses for hydroelectric projects can last for decades; the default term is forty years.

California's requirement under the California Environmental Quality Act (CEQA) poses an obstacle for a certification to be issued within one year of a project applicant's submission. Under CEQA, the State Water Board must receive and consider a project's environmental impact prior to granting a certification request. If materials required by CEQA are submitted late in the State Water Board's review period, the State Water Board is unlikely to be able to issue a certification within the one-year deadline. Consequently, California's regulations would require the State Water Board to deny the certification without prejudice unless the applicant in writing withdraws the request for certification. Given the infeasibility of the State Water Board issuing a 401 certificate within the one-year deadline, it became common for project applicants to withdraw their certification requests before the one-year deadline and resubmit them as new request—avoiding having their original request denied.

In 1963, the Federal Energy Regulatory Commission issued three 50-year licenses for three hydroelectric projects: (1) Nevada Irrigation District's (NID) Yuba-Bear Hydroelectric Project; (2) Yuba County Water Agency's (YCWA) Yuba River Development Project; and (3) Merced Irrigation District's (MID) Merced River Hydroelectric Project. Before each of these licenses expired, each licensee submitted a request for a Section 401 Certification to the State Water Board.

In each case, the licensee failed to complete the environmental review requirements under CEQA. Each agency filed a letter with the State Water Board withdrawing and resubmitting its application for water quality certification. NID and MID continued to withdraw and resubmit their certification requests annually between 2014 and 2018, and the State Water Board continued to issue new deadlines for certification action.

In 2019, the United States Court of Appeals for the District of Columbia found that that California and Oregon had entered into a formal contract with a project applicant to delay federal licensing proceedings, via continual withdrawal-and-resubmission, and

held that the states had waived their Section 401 certification authority. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). After *Hoopa Valley*, the State Water Board ultimately denied without prejudice NID, YCWA, and MID's requests for certification, relying on their failure to begin the CEQA process.

Each licensee then sought a declaratory order from FERC that the State Water Board had waived its Section 401 certification authority. Relying on *Hoopa Valley*, FERC took the position that even without an explicit contractual agreement, the State Water Board coordinated with NID, YCWA, and MID on the withdrawal-and- resubmission of Section 401 certification requests. As evidence of coordination, FERC pointed to: (1) MID withdrawing and resubmitting its applications for four-years; (2) its assertion that California's regulations "codify" the withdrawal-and-resubmission practice; and (3) the State Water Board's failure to "request additional information regarding the Section 401 requests. Because of that alleged coordination, FERC held that the State Water Board had failed or refused to act on the certification requests and therefore, waived its Section 401 certification authority under the CWA.

The State Water Board submitted a petition for review on all three orders, alleging the decisions were no supported by substantial evidence.

The Ninth Circuit's Decision

The court first considered but did not determine whether FERC's standard for waiver was consistent with the text of Section 401. FERC argued that a waiver exists under *Hoopa Valley* when a state coordinates with a project applicant to afford itself more time to decide a certification request. The court did not determine whether this test is consistent with the text of Section 401 because it held that FERC's findings of coordination were not supported by substantial evidence in the record.

The court then discussed the sufficiency of the evidence to conclude that the State Water Board only acquiesced in the applicants' own decisions to withdraw and resubmit their applications rather than have them denied. The court noted that FERC's ruling against NID relied almost entirely on comments that the State Water Board submitted in response to FERC's draft environmental impact statement, which provided that the CEQA process had not yet started and that the most likely action would be that NID would withdraw and resubmit is certification request, because otherwise, the State Water Board would deny certification without prejudice. Similarly, the court noted that FERC's rulings against YCWA and MID relied on an email from a State Water Board staff member to each applicant reminding them that the final CEQA document had not been filed and that a "deny without prejudice" letter may be the consequence.

For all three projects, the court found the State Water Board's anticipation or prediction that the applicants would withdraw and resubmit their certification applications did not amount to coordination. There was nothing to indicate that the State Water Board was working to engineer that outcome but rather, the evidence showed only that the State Water Board acquiesced in the applicants' own unilateral decisions to withdraw and resubmit their applications rather than have them denied. The court further reasoned that the State Water Board's mere acquiescence in the applicants' withdrawals-and-resubmissions could not demonstrate that the State Water Board was engaged in a coordinated schemed to delay certification.

The court went on to reason that FERC wrongly concluded California's regulations codified withdrawal-and-resubmission practice, providing that the regulations just acknowledge applicants' longstanding practice—accepted by FERC for decades—of withdrawing and resubmitting Section 401 certification requests to avoid having them denied for failure to comply with state environmental-review requirements. Finally, the court found that FERC incorrectly relied on statements by the applicants that the State Water Board had all of the information it needed or to request additional information. According to the court, the State Water Board continually reminded NID, YCWA, and MID that the board did not have the information it would need to grant a request—namely, the CEQA evaluation that California law required.

Conclusion and Implications

This case limits the holding of *Hoopa Valley* and clarifies that the long-standing withdrawal-and-resubmission process for a Section 401 certification does not amount to coordination if states merely acquiescence in a project applicant's actions.

The court's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/04/20-72432.pdf
(McKenzie Schnell, Rebecca Andrews)

NINTH CIRCUIT FINDS FAILURE TO JOIN KLAMATH TRIBES IN SUIT AGAINST THE BUREAU OF RECLAMATION FATAL TO LAW SUIT

Klamath Irrigation District v. United States Bureau of Reclamation, ___F.4th___, Case No. 20-36009 (9th Cir. 2022).

The United States Court of Appeals for the Ninth Circuit affirmed that the failure by the Klamath Basin irrigation districts (Districts) to join the Hoopa and Klamath tribes (Tribes) in their suit against the United States Bureau of Reclamation (Bureau) constituted grounds for dismissal. The court reasoned that the tribes were required parties to the suit and that tribal sovereign immunity prevented the Tribes from joined. Accordingly, dismissal was appropriate.

Background and General Information

This case revolves around the operations and water levels of the Klamath Lake and the flows of the Klamath River in southern Oregon and northern California. The plaintiff Districts in this case are irrigation companies or districts that divert project water from the Klamath project, specifically the Upper Klamath Lake (UKL). UKL is controlled and operated by the Bureau, which has adopted operations plans to manage the water resources of UKL and the Klamath River to meet a wide variety of needs and interests. However, the Bureau has a "nearly impossible" task in managing its responsibilities, particularly in times of shortage. 2022 WL 4101175, at 4.

"Reclamation maintains contracts with individual irrigators and the irrigation districts that represent them, under which the United States has agreed to supply water from the Klamath Project to the irrigators, "subject to the availability of water." *Id.* Additionally, as a federal agency, "the Bureau also responsible for managing the Klamath Project in a manner consistent with its obligations under the ESA." *Id.* Since the early 2000s, the Bureau has incorporated operating conditions developed through consultation with federal fish and wildlife agencies to ensure that its operations do not jeopardize the existence of fish species protected by the federal Endangered Species Act (ESA)These conditions require the Bureau to balance the maintenance of minimum lake levels in UKL and minimum stream flows in the Klamath River downstream from the lake to benefit the fish. *Id.* Finally, the Bureau must operate the Project consistent with the federal reserved water and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes that predated the Project and any resulting Project rights. *Id.*

In 2018 and 2019 the Bureau issued (and amended) Biological Assessments following consultation with the Fish and Wildlife Service and the National Marine Fisheries Service pursuant to section 7(c) of the ESA:

> In the [2019] Amended Proposed Action, [the Bureau] confirmed that it would continue using the water in UKL for instream purposes, including to fulfill its obligations under the ESA and to the Tribes, necessarily limiting the amount of water available to other water users who hold junior rights to the Klamath Basin's waters. *Id.* at 5.

On March 27, 2019, or soon thereafter, the Districts and other water users filed this action for declaratory and injunctive relief against the Bureau and its officials:

> The [Districts] sought a declaration that [the Bureau's] operation of the Klamath Project pursuant to the 2019 Amended Proposed Action based on the Services' biological assessments was unlawful under the Administrative Procedure Act (APA). *Id.*

The Districts also sought to enjoin the Bureau from using water from UKL for instream purposes and limiting the amount of water available to the irrigation districts. The Tribes successfully moved to intervene as of right, arguing that they were required

parties to the suit. The Districts then filed Second Amended Complaints (SACs) seeking declaratory relief only.

The Districts asked the court to "[d]eclare Defendants [sic] actions under the APA unlawful" and

> . . .for declaratory relief setting forth the rights of the parties' rights [sic] under the [administrative findings in the ongoing Klamath Basin Adjudication known as the ACFFOD], the Bureau Act and the Fifth Amendment. . . *Id.*

Specifically, the Districts' alleged that the Bureau's 2019 Amended Proposed Action was improper because the Bureau intended to use water stored in UKL for its own instream purposes without a water right or other authority under the laws of the State of Oregon, in violation of the APA and Section 8 of the Bureau Act. *Id.*

> The Districts also alleged that the Bureau's actions violated the APA and Section 7 of the Reclamation Act, which requires the Bureau to acquire property rights, such as the right to use water under Oregon law, through Oregon's appropriation process or 'by purchase or condemnation under judicial process,' using the procedure set out by Oregon law. . . .Although the Districts' claims are framed as procedural challenges, their underlying challenge is to the Bureau's authority and obligations to provide water instream to comply with the ESA, an obligation that is coextensive with the Tribes' time immemorial treaty water and fishing rights. *Id.*

The Tribes moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party under Federal Rule of Civil Procedure 19, arguing that tribal sovereign immunity barred their joinder. In a well-reasoned opinion, the magistrate judge recommended that the district court grant the Tribes' motions and dismiss this case, and on September 25, 2020, the district court adopted the magistrate's decision in full. This timely appeal followed.

The Ninth Circuit's Decision

Failure to join a party that is required under Federal Rule of Civil Procedure 19 is a defense that may result in dismissal under Federal Rule of Civil Procedure 12(b)(7). A court engages in a three-part inquiry. The court first examines whether the absent party must be joined under Rule 19(a). The court next determines whether joinder of that party is feasible. Finally, if joinder is infeasible, the court must "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

A party is a "required party" and must be joined under Federal Rule of Civil Procedure 19 if:

> (A) in that [party's] absence, the court cannot accord complete relief among existing parties; or (B) that [party] claims an interest relating to the subject of the action and. . .disposing of the action in [their] absence may: (i) as a practical matter impair or impede the person's ability to protect the interest ... or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1). . . .Although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted.

The Districts advanced several arguments that the Tribes were not required parties. First, the Districts argued that:

> Reclamation has neither a right nor any other legal authorization to use water stored in the UKL reservoir for instream purposes, a claim that, 'as a practical matter,' would impair the Bureau's ability to comply with its ESA and tribal obligations. *Id.* at 6.

The court noted that its case law establishes that the Tribes' water rights are "at a minimum coextensive with the Bureau's obligations to provide water for instream purposes under the ESA." *Id.* Thus, it held a suit, like this one, that seeks to amend, clarify, reprioritize, or otherwise alter the Bureau's ability or duty to fulfill the requirements of the ESA implicates

the Tribes' long-established reserved water rights. Accordingly, the Districts' invocation of the APA does not alone render this suit merely procedural. Put simply, if the Districts are successful in their suit, the Tribes' water rights could be impaired, so the Tribes are required parties under Federal Rule of Civil Procedure 19(a)(1)(B)(i). *Id.*

Second, the Districts asserted that the Bureau adequately represented the Tribes interests in this matter. Whether an existing party may adequately represent an absent required party's interests depends on three factors: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments;" and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id*, *citing Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs*., 932 F.3d 843, 852 (9th Cir. 2019), *cert. denied*, ___U.S.___, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020).

Analysis under the *Dine Citizens* Decision

In *Dine Citizens*, this court previously held that:

> . . .although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted. *Dine Citizens*. at 852.

The court ultimately concluded in *Dine Citizens* that:

> . . .[a]lthough Federal Defendants ha[d] an interest in defending their decisions, their overriding interest ... must be in complying with environmental laws such as ... the ESA. This interest differs in a meaningful sense from [the tribe's] sovereign interest in ensuring [continued access to natural resources]. Id. at 855.

The court also explained why it distinguished *Dine Citizens* from *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998), which held that the Bureau adequately represented the tribes. That court reasoned that:

> . . .while Federal Defendants [in Dine Citizens had] an interest in defending their own analyses that formed the basis of the approvals at issue, [ ] they [did] not share an interest in the outcome of the approvals. *Dine Citizens*, 932 F.3d at 855 (emphasis omitted).

The court held that the present action is analogous to that in *Dine Citizens*, explanting that:

> . . .while Reclamation has an interest in defending its interpretations of its obligations under the ESA in the wake of the ACFFOD, it does not share the same interest in the water that is at issue here. 2022 WL 4101175, at 8.

Finally, the Districts argue that the Bureau is an adequate representative of the Tribes arising from the relationship of the federal government as a trustee for the federal reserved water and fishing rights of Native American tribes. Thus, the Districts contend that this relationship results in a "unity of interest" sufficient to allow the Bureau to adequately represent the Tribes' interests. However, a unity of some interests does not equal a unity of all interests. In this matter the Bureau and the Tribes share an interest in the ultimate outcome of this case for very different reasons. Further, case law has firmly rejected the notion that a trustee-trustor relationship alone is sufficient to create adequate representation. *Id.*

The McCarran Amendment

Alternatively, the the Districts argue that even if the Tribes are required parties under Rule 19, the suit should proceed because the McCarran Amendment waives the Tribes' sovereign immunity. The McCarran Amendment waives the United States' sovereign immunity in suits:

> (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is

a necessary party to such suit. (*Id.* at 9, *citing* 43 U.S.C. § 666(a).)

While the McCarran Amendment clearly "reach[es] federal water rights reserved on behalf of Indians," (*see*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811–12, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)), the Amendment only controls in cases "adjudicati[ng]" or "administ[ering]" water rights. 43 U.S.C. § 666(a). The court held that "even assuming the McCarran Amendment's waiver of sovereign immunity extends to tribes as parties the Amendment does not waive sovereign immunity in every case that implicates water rights." *Id.* at 9.

An "administration" of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a "prior adjudication of relative general stream water rights." *See, South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). However, not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment. *Id.*

In this case the parties disagree as to whether this case is an administration of that general stream adjudication within the meaning of the McCarran Amendment. The Districts argue that this case is an enforcement action to ensure that the Bureau complies with the terms of the ACFFOD. The Bureau argues this suit is not an administration because the Klamath Basin Adjudication is ongoing and the present suit is not one to administer rights that were provisionally determined in the administrative phase of that adjudication. The court agreed with the Bureau and held that that this lawsuit is not an administration of previously determined rights but is instead an APA challenge to federal agency action. Thus, the Tribes sovereign immunity has not been waived.

Finally, the Districts argued that despite the foregoing conclusions, the case should proceed without the required parties. To determine if the case can proceed in equity and good conscience the court evaluated the (i) potential prejudice, (ii) possibility to reduce prejudice, (iii) adequacy of a judgment without the required party, and (iv) adequacy of a remedy with dismissal. Fed. R. Civ. P. 19(b). *Id.* at 10. The court cited a "a wall of circuit authority" requiring dismissal when a Native American tribe cannot be joined due to its assertion of tribal sovereign immunity and affirmed the decision to dismiss the case.

Conclusion and Implications

This decision severely limits the ability of the Districts to see APA review of the Bureau of Reclamation's final orders. In holding that the Tribes are a required party, but that sovereign immunity is not waived, the Districts cannot challenge the Bureau operating/action plans absent the Tribes consent. A copy of the Ninth Circuit's opinion may be found at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/08/20-36009.pdf
(Jonathan Clyde)

THIRD CIRCUIT AFFIRMS DISMISSAL OF CLEAN WATER ACT CITIZEN SUIT FOR INSUFFICIENT PRE-SUIT NOTICE WRITTEN BY ATTORNEY

Shark River Cleanup Coalition v. Township of Wall, 47 F.4th 126 (3rd Cir. Aug. 24, 2022).

On August 24, 2002, the United States Court of Appeals for the Third Circuit affirmed the United States District Court for the District of New Jersey's dismissal of the Cleanup Coalition's citizen suit. The Court of Appeals found that the Cleanup Coalition's pre-trial notice was deficient because it did not include sufficient information to permit the defendants to identify the specific standard, limitation, or order alleged to have been violated.

Factual and Procedural Background

In 2015, a hiker on the Estate of Fred McDowell, Jr. (Estate) discovered that portions of an underground sewer line no longer remained underground. The sewer line was located within a sewer easement held by the Wall Township (Township). The hiker informed Shark River Cleanup Coalition (Cleanup Coalition) of the exposed sewer line.

In 2016, the counsel for the Cleanup Coalition prepared and served the Estate and the Township with a notice of intent to commence suit under the Clean Water Act's citizen-suit provision. The notice alleged "historic and continuing" erosion of the ground surrounding the buried sewer line released "large areas of sand" into the nearby Shark River Brook, a tributary of the Shark River, and that the release violated the Clean Water Act. The notice did not specify which section of the Clean Water Act had been violated. The notice also did not provide the exact or approximate location of the sewer line's exposed condition. Consequently, the Township and the Estate were unable to locate the site in question and took no further action.

One-year after notice was served, the Cleanup Coalition sued the Township and the Estate in federal court, alleging a Clean Water Act violation relating to the same sewer line condition it complained of in its notice. Litigation between the parties primarily concerned the merits of the Cleanup Coalitions' claim, as well as, the sufficiency of the Cleanup Coalition's notice.

In 2020, the parties briefed cross- motions for summary judgment on both notice and merits issues and the district court granted summary judgment for the defendants. The U.S. District Court's decision only addressed the adequacy the Cleanup Coalition's notice finding it defective in failing to identify the complained-of site's location along the over three-mile easement. The district court dismissed the Cleanup Coalition's Clean Water Act claim for failure to provide sufficient notice and the Cleanup Coalition appealed shortly thereafter.

The Cleanup Coalition appealed.

The Third Circuit's Decision

Under federal law, a Clean Water Act notice must contain sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. At issue here on appeal was whether the notice provided enough information to enable the recipient to identify the components of an alleged violation.

The court first considered whether the description of the location of the alleged violation included sufficient information to identify the location of the alleged violation. The court noted that the notice made reference to public records of the easement and that within weeks of the Cleanup Coalition filing suit, the Township found the location. The court went on to make the distinction that while additional information describing the location would have been courteous, it was not needed to satisfy minimum requirements. The Township's own conduct was strong evidence of the notice's sufficiency with respect to notice.

The court did not end its analysis there, however, the court next considered whether the notice provided enough information to enable the recipient to identify the specific effluent discharge limitation which has been violated, including the parameter violated. The court reasoned that a notice is not

necessarily deficient under if it fails to cite a specific section of the Clean Water Act. However, because the Cleanup Coalition's notice was prepared by counsel and referred to the entire Clean Water Act, as well as, many unrelated New Jersey Statutes and regulations, the court determined the notice was not "enough" to permit the defendants to identify the specific standard, limitation, or order alleged to have been violated.

The Concurring Opinion

In the concurring opinion Judge Hardiman agreed with the court that Cleanup Coalition's notice failed to describe the standard violated, but disagreed that the notice provided sufficient information as to the location of the alleged violation. Citing omissions in the notice as to the location and the availability of photos of the sewer line condition, the concurring opinion was of the position that had these been provided, the Township and the Estate could have remedied the erosion issue years ago, rendering unnecessary this citizen suit.

Conclusion and Implications

This case upholds the standard of sufficient pre-lawsuit notice the Clean Water Act. It suggests that when an attorney prepares the pre-lawsuit notice, the adequacy of the notice may be construed in favor of the recipient. The Court of Appeals' opinion is available online at: http://www2.ca3.uscourts.gov/opinarch/212060p.pdf
(McKenzie Schnell, Rebecca Andrews)

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