Volume 26, Number 11
October 2022

WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

FEATURE ARTICLE

WESTERN WATER NEWS

LEGISLATIVE DEVELOPMENTS

REGULATORY DEVELOPMENTS

PENALTIES AND SANCTIONS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

JUDICIAL DEVELOPMENTS

Federal:

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222, schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

WWL

FEATURE ARTICLE

U.S. SUPREME COURT RULES MAJOR QUESTIONS DOCTRINE PROHIBITS BROAD DELEGATION OF CONGRESSIONAL AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS SYSTEMS

By Deborah Quick and Lucille Flinchbaugh

The United States Supreme Court has considered whether the "best system of emission reduction" identified by the U.S. Environmental Protection Agency (EPA) in its Clean Power Plan (Plan) was within the authority granted to the EPA by § 111(d) of the federal Clean Air Act (CAA or Act). Analyzing the question under the "major questions doctrine," the Court concluded that the emissions shifting building blocks of the Plan lacked any clear congressional authorization, and therefore exceeded the EPA's regulatory authority under the Act. [*West Virginia v. Environmental Protection Agency*, ___U.S.___, 142 S.Ct. 2487 (2022).]

Background

In 2015, the EPA promulgated the Plan, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. *West Virginia*, 142 S. Ct. at 2592. The EPA cited the scarcely utilized Section 111 of the Act as its source of authority, which directs the EPA to: (1) determine, considering various factors, the best system of emission reduction which has been adequately demonstrated, (2) ascertain the degree of emission limitation achievable through the application of that system, and (3) impose an emissions limit on new stationary sources that reflects that amount. 42 U.S.C. §7411(a)(1); *see also* 80 Fed. Reg. 64510, 64538 (Oct. 23, 2015); *West Virginia*, 142 S. Ct. at 2601. Under this provision, the States have authority to set the enforceable rules restricting emissions from sources within their borders, while the EPA decides the amount of pollution reduction that must ultimately be achieved. *Id.* at 2601–02. That standard may be different for new and existing plants, but in either case, it must reflect the "best system of emission reduction" or "BSER" that the EPA has determined to be "adequately demonstrated" for the category. §§7411(a)(1), (b)(1), (d). 142 S. Ct. at 2602.

In its Plan, the EPA determined that the BSER for existing coal-fired power plants included three types of measures which the EPA called "building blocks." *Id.* at 2602–03; *see* 80 Fed. Reg. 64662, 64667 (Oct. 23, 2015). The first building block consisted of "heat rate improvements" that coal-fired plants could undertake to burn coal more efficiently. 142 S. Ct. at 2693; 80 Fed. Reg. at 64727. This type of source-specific, efficiency improving measure was similar to those that the EPA had previously identified as the BSER in other Section 111 rules. However, in this case, the EPA determined that this measure would lead to only small emission reductions because coal-fired power plants were already operating near optimum efficiency. 142 S. Ct. at 2603; 80 Fed. Reg. at 64727. The EPA explained, in order to control carbon dioxide from affected plants at levels necessary to mitigate the dangers presented by climate change, it could not base the emissions limit on measures that only improve power plant efficiency. 142 S. Ct. at 2611; 80 Fed. Reg. at 64728.

As such, the EPA included two additional building blocks in its Plan. The second building block would shift electricity production from existing coal-fired power plants to natural-gas-fired plants (*Id.*) and the third building block would shift from both coal- and gas-fired plants to new low- or zero-carbon generating capacity, mainly wind and solar. *Id.* at 64729, 64748; 142 S. Ct. at 2603. In other words, both measures would involve what the EPA called "generation shift-

ing from higher-emitting to lower-emitting" producers of electricity as a means of reducing carbon emissions. *Id.*; 80 Fed. Reg. at 64728. The EPA explained that such methods for implementing this shift may include reducing the plant's own production of electricity, building a new natural gas plant, wind farm, or solar installation, investing in an existing facility, or purchasing emissions allowances. *Id.* at 64731–32; 142 S. Ct. at 2603.

In determining "the degree of emission limitation achievable through the application" of the system, as required under the Act, the EPA settled on what it regarded as a "reasonable" amount of shift, projecting that by 2030, it would be feasible to have coal provide 27 percent of national electricity generation, down from 38 percent in 2014. 80 Fed. Reg. at 64665, 64694; 142 S. Ct. at 2604. From these projections, the EPA determined the applicable emissions performance rates, which were so strict that no existing coal plant would have been able to achieve them without engaging in one of these three methods of generation shifting discussed above. *Id.*

Following a stay on the Plan in 2016, the EPA repealed the Plan in 2019 following a change in administration, concluding that the EPA had exceeded its own jurisdiction under the Act. *Id.* On January 19, 2021, the D.C. Circuit reviewed the EPA's actions and determined that the EPA had misunderstood the scope of its authority under the Act. The court vacated the EPA's repeal of the Plan and remanded to the EPA for further consideration. *Id.* at 2605–06 (citing *Am. Lung Ass'n v. EPA*, 985 F. 3d 914, 995 (D.D.C. 2021, *rev'd and remanded by West Virginia*, 142 S. Ct. 2587). The court's decision was followed by another change in administration, and the EPA moved the court to partially stay its mandate. 142 S. Ct. at 2606. Westmoreland Mining Holdings LLC., North American Coal Corporation, and the States filed petitions for certiorari defending the repeal of the Plan. *Id.*

The Supreme Court's Decision-Majority Opinion

The Court explained that the main issue under consideration in this case was whether restructuring the nation's overall mix of electricity generation, to transition from 38 percent coal to 27 percent coal by 2030, can be the BSER within the meaning of Section 111. *Id.* at 2595. In analyzing this issue, the Court looked to a variety of cases where agencies were found to have exceeded their regulatory power because, under the circumstances, common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue, made it very unlikely that Congress had actually intended to do so. *Id.* at 2609. The Court explained that extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]," *Whitman v. Am. Trucking Ass'ns*, 531 U. S. 457, 468 (2001), and the Court presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Ass'n v. FCC*, 855 F. 3d 381, 419 (D. D.C. 2017); 142 S. Ct. at 2609. Accordingly, the Court determined that this question must be analyzed under the body of law known as the "major questions doctrine." *Id.*

The Major Questions Doctrine

In arguing that Section 111(d) empowered it to substantially restructure the American energy market, the EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air Regul. Grp. v. EPA*, 573 U. S. 302, 324 (2014). 142 S. Ct. at 2610. Prior to 2015, the EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, but it had never previously devised a cap by looking to a "system" that would reduce pollution simply by shifting polluting activity from dirtier to cleaner sources. 80 Fed. Reg. at 64726. 142 S. Ct. at 2610. Under its prior view of Section 111, the EPA's role was limited to ensuring the efficient pollution performance of each individual regulated source, and if a source was already operating at that level, there was nothing more for the EPA to do. *Id.* at 2612.

In contrast, the Court argued that under the Plan, the EPA was able to demand much greater reductions in emissions based on its own policy judgment that coal should make up a much smaller share of national electricity generation. *Id.* The EPA would be able to decide, for instance:

> . . .how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably 'exorbitant.' *Id.*

The Court asserted that under this view, the EPA could go even further, perhaps forcing coal plants to "cease making power altogether." *Id.* The Court explained that Congress:

> . . .certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. . .[and and the]. . .last place one would expect to find it is in the previously little-used backwater of Section 111(d). *Id.* at 2613.

As such, the Court determined it would be highly unlikely that Congress intended to leave to agency discretion the decision of how much coal-based generation there should be over the coming decades.

Under the major questions doctrine, to overcome the Court's skepticism, the Government must point to "clear congressional authorization" to support its assertion of regulatory power. *Utility Air*, 573 U. S., at 324. 142 S. Ct. at 2614. The Government looked to other provisions of the Act for support, such as where the word "system" or similar words to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution are used, such as in the Acid Rain program or Section 110 of the NAAQS program. *Id.* at 2614–15. However, the Court rejected the Government's argument, differentiating these sections and finding that the references to "system" in other provisions do not equate to the kind of "system of emission reduction" referred to in Section 111. *Id.* at 2615. The Court concluded that these provisions do not provide adequate support to make a finding of clear congressional authorization. *Id.* at 2615–16. Notably, however, the Court refused to answer the question of whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. *Id.* at 2616.

Congress Had Not Intended to Give EPA Such Broad Authority

In total, the Court determined that while capping carbon emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day," based on the language of the statute and the lack of any other clear congressional directive, it is not plausible that Congress intended to give the EPA the authority to adopt a regulatory scheme of such magnitude in Section 111(d). The Court reversed the D.C. Circuit's decision and remanded for further proceedings.

The Concurrence

Justice Gorsuch's concurrence, joined by Justice Alito, builds on Gorsuch's prior opinions in *Gundy v. United States*, 139 S. Ct. 2116 (2019) (dissenting) and *Nat'l Fed. of Ind. Bus. v. OSHA*, 595 U.S. ___ (2022) (concurrence) (*NFIB*), in which Gorsuch has argued for an expansive application of the major questions doctrine.

In *Gundy*, Gorsuch traced the asserted deterioration of the "intelligible principle" doctrine by which courts determine "whether Congress has unconstitutionally divested itself of its legislative responsibilities." *Gundy* (Gorsuch, dissenting), Slip Op. at 15, quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("[A] statute 'lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform' satisfies the separation of powers."). Gorsuch identifies the "traditional" separation of powers test as providing that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details." *Gundy* (Gorsuch, dissenting), Slip Op. at 10 (citing *Wayman v. Southard*, 10 Wheat. 1, 46 (1825). Subsequent cases were consistent with the:

> . . .theme that Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed. *Gundy* (Gorsuch, dissenting), Slip Op. at 11 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944).

However, beginning in the 1940s, according to Gorsuch, the intelligible principle doctrine "mutated" far from its origins in the constitutional principle of separation of powers into a toothless box-ticking exercise, so that it was relied on "to permit delegations of legislative power that on any other conceivable account should be held unconstitutional." *Gundy* (Gorsuch, dissenting), Slip Op. at 17.

In both *Gundy* and *NFIB*, Gorsuch proposed utilizing the major questions doctrine as a corrective

to shore up the intelligible principle doctrine where an agency relies on a "statutory gap" concerning "a question of deep 'economic and political significance' that is central to the statutory scheme." *Gundy* Gorsuch, dissenting), Slip Op. at 20 (quoting *King v. Burwell*, 576 U.S. ___, ___ (Slip Op. at 8). In *NFIB*, Gorsuch concurrent champions the major questions doctrine as "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power," in contrast with the nondelegation doctrine's rule "preventing Congress from intentionally delegating its legislative powers to unelected officials." *NFIB* (Gorsuch, concurring), Slip Op. at 5.

In *West Virginia*, Gorsuch cited to his opinions *Gundy* and *NFIB* and then articulated his understanding of the "good deal of guidance" provided by prior opinions of the Courts on application of the major questions doctrine. *West Virgina v. EPA* (Gorsuch, concurring), Slip Op. at 9. The doctrine is to be applied when:

> . . .an agency claims the power to resolve a matter of 'great political significance,' or end an 'earnest and profound debate across the country.'

Further, the major question doctrine requires:

> . . .that an agency. . .point to clear congressional authorization when it seeks to regulate 'a significant portion of the American economy.' *Id.* at 10.

And the doctrine "may apply when an agency seeks to 'intrud[e] into an area that is a particular domain of state law." *Id.* at 11. This list of "triggers" for application of the major questions doctrine is, per Gorsuch, not exclusive, but in any event are all present when considering the constitutionality of the Plan. A history of Congressional failure to regulate greenhouse gas emissions from coal-fired plants, the dominance of the electricity sector in the national economy, and that the regulation of utilities is a matter traditionally left to the states, all support, in Gorsuch's view, application of the doctrine here.

The Dissent's Argument

Justice Kagan's dissent, joined by Justices Breyer and Sotamayor, relies on traditional principles of statutory interpretation and points to the purposefully broad delegation of authority in the Act allowing EPA to define a "system," characterizing this grant of broad authority as typical, but noting that while broad the delegation is not vague:

> Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there. *West Virginia v. EPA* (Kagan, dissenting), Slip Op. at 8 (internal citations omitted).

The dissent also notes that the Court has previously described cap and trade schemes to regulate acid rain and greenhouse gases as "systems," in the course of affirming their constitutionality. *Id.* at 9.

The dissent argues that the Court's statutory interpretation precedents have typically found an impermissible delegation of legislative authority "an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience," and where "the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design."

> In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design. *Id.* at 15.

Criticizing the majority and concurrence for their reliance on the major question doctrine, the dissent argues that Congress appropriately relies on delegation to expert agencies in order to implement complex policies across an advanced industrial economy

in a rapidly evolving world. Congress, in the dissent's view, appropriately looks to expert agencies staffed with "people with greater expertise and experience" to implement broad policy goals, including "to keep regulatory schemes working over time." *Id.* at 30.

The Inflation Reduction Act

In mid-August, Congress passed and President Biden signed the Inflation Reduction Act of 2022. The Act defines various greenhouse gases as pollutants under the Clean Air Act in the course of authorizing numerous subsidies and incentive programs to support moving away from reliance on fossil fuels. Widespread commentary to the contrary, nothing in the Inflation Reduction Act nullified the Court's central holding in *West Virginia v. EPA* that Congress cannot delegate to EPA the authority to mandate generation shifting away from fossil fuels.

It remains to be seen whether the Inflation Reduction Act's minute specification of numerous, specific subsidy and incentive programs will illustrate or undercut Justice Kagan's observation of the necessity for Congress to delegate broad and continuing authority to expert agencies in order to meet evolving challenges with appropriately evolving regulations.

Conclusion and Implications

The Court's embrace of the major questions doctrine as a robust constraint of Congressional delegation raises questions as to whether the Securities and Exchange Commission's proposed climate-related disclosure rules are at risk (see https://corpgov.law.harvard.edu/2022/08/03/west-virginia-v-epa-casts-a-shadow-over-secs-proposed-climate-related-disclosure-rule/), and further afield casts doubt on evolving agency regulation in numerous technical fields not related to climate change, such as healthcare (see https://oneill.law.georgetown.edu/unpacking-west-virginia-v-epa-and-its-impact-on-health-policy/).

The Inflation Reduction Act—adopted on a party-line vote in the House of Representatives—illustrates the path forward for federal regulation: minute, specific and explicit direction to agencies to implement detailed legislatively-mandated programs. The disadvantages of this approach include that it requires an enormous expenditure of political capital, is vulnerable to repeated reversals on the House's two-year election cycle, and cannot be expected to keep pace with the pace of social, economic and scientific change that is an inevitable consequence of a modern, advanced economy. Individual states, meanwhile, may choose to delegate broadly to expert agencies and thereby exceed the federal regulatory threshold, perpetuating a patchwork approach.

Climate change is the paradigmatic collective action problem writ a global scale. *West Virginia v. EPA* throws into stark relief the question of whether there is a constitutionally sound and politically viable path to collective action sufficient to meet the demands of moment?

Deborah Quick, Esq. is Senior Counsel at the law firm, Perkins Coie, LLP, resident in the firm's San Francisco. Debbi represents clients seeking land-use and resource permits and entitlements and compliance with environmental laws, including the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), before administrative agencies. She defends those entitlements in litigation at both trial and appeal courts. Her practice also includes representing clients in complex civil appeals and trial court litigation in anticipation of possible appeals. Debbi sits on the Editorial Board of the *Environmental, Energy and Climate Change Law & Regulation Reporter*.

Lucille Flinchbaugh, Esq. is an Associate at Perkins Coie, LLP, San Francisco. Lucy focuses her practice on land use entitlements, site selection, permitting, and environmental compliance, representing major developers in all stages of the development process for mixed-use, commercial, and residential development projects. Her experience covers a variety of programmatic areas of environmental and land use laws and policy, from the local to state level. Specifically, she has helped businesses navigate complex matters implicating the California Environmental Quality Act (CEQA), Subdivision Map Act, National Environmental Policy Act (NEPA), redevelopment law, and California housing laws.

WESTERN WATER NEWS

GOVERNOR NEWSOM RELEASE 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)

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 (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 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)

LEGISLATIVE DEVELOPMENTS

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 improve 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)

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)

IDAHO DEPARTMENT OF WATER RESOURCES DETERMINES THAT THE GROUNDWATER APPROPRIATORS BREACHED CONJUNCTIVE MANAGEMENT-BASED SETTLEMENT AGREEMENT WITH THE SURFACE WATER COALITION

On September 8, 2022, the Idaho Department of Water Resources (Department) issued its *Final Order Regarding Compliance With Approved Mitigation Plan*(Order), determining, in part, that the Idaho Ground Water Appropriator's, Inc. (IGWA) breached a 2015 settlement agreement between it and a coalition of surface water users known as the Surface Water Coalition (SWC) concerning conjunctively-managed ground and surface water rights located within the administrative boundaries of the Eastern Snake River Plain Aquifer (ESPA) in southern Idaho. The 2015 agreement largely put an end to several years of delivery call/curtailment-based litigation between junior groundwater users and senior surface water users on the ESPA. The Department determined that IGWA members failed to comply with pumping reduction targets during the 2021 irrigation season.

Conjunctive Management and the ESPA

Generally speaking, the vast majority of surface water rights in Idaho were developed and perfected prior to more junior groundwater rights. This was largely a simple function of the fact that historically-available technology and implements were better suited economically to the simple diversion and flood irrigation use of surface water as opposed to the need to drill and pump wells. Also, not surprisingly, as surface water sources neared full (or over) appropriation, the next logical source for further water right development was groundwater. Groundwater development on the ESPA increased exponentially beginning during World War II and thereafter—encouraged by the state of Idaho fostering an ever-growing agricultural economic engine and fed by cheap hydropower and other incentives provided by Idaho Power Company.

During the heyday of groundwater development on the ESPA, many thought (or assumed) that the vast aquifer stretching from roughly Twin Falls in the West to Idaho Falls in the east along the Snake River Plain was largely separate from surface water flows in the Snake River and other tributaries. And, even if not entirely separate, so abundant that any interconnection-based interference would be negligible. For better or worse, this led to overdevelopment of the aquifer to the point where depletions in springs and other surface water flows

in the Snake River were not only noticeable, but measurable. These surface water flow depletions sparked decades of litigation between senior surface water users and junior groundwater pumpers.

The 2015 Settlement Agreement and Its Supplements

Decades of delivery call litigation largely came to an end in 2015 with the execution and implementation of a settlement agreement between a vast majority of groundwater users (who are members of IGWA) and surface water users (who are members of the SWC). The settlement agreement included IDWR approval of a "mitigation plan" which would allow IGWA member groundwater pumpers to continue pumping regardless of priority provided that groundwater use reduction targets contained in the mitigation plan were met. The settlement agreement and related mitigation plan entailed more agreements between the parties than just groundwater pumping reduction targets, but the plan's annual 240,000 acre-foot reduction target is (and remains) key to the resolution.

The Petition Alleging Failure to Comply

On July 21, 2022, the SWC filed a petition with IDWR alleging IGWA member failure to comply with the 240,000 AF reduction volume during the 2021 irrigation season. The plan-based steering committee members consisting of ground and surface water users disagreed that the plan had been breached. By operation of the parties' various agreements, determining a breach was then left to the Director of IDWR.

The Determination of Breach

Ultimately, the Director disagreed with various IGWA arguments suggesting that breach did not occur. To the contrary, the Director determined that IGWA breached the plan in the amount of 126,620 AF during the 2021 irrigation season. Fortunately (or unfortunately depending upon which group you fall in), not all IGWA member groundwater districts missed their proportionate share of the 240,000 AF reduction target. Those members who did exceed the reduction targets were Aberdeen Falls-Aberdeen (24,826 AF); Bingham (55,951 AF); Bonneville-Jefferson (18,185 AF); Jefferson-Clark (20,796 AF); Magic Valley (2,590 AF); and North Snake (4,272 AF).

Because IGWA as a whole breached the approved mitigation plan, its members were targeted for curtailment in September 2022. Ultimately, IDWR determined that the 2022 surface water user demand shortfall caused by junior groundwater pumping amounted to 132,100 AF (74,000 AF lost to Twin Falls Canal Company and 58,100 AF lost to American Falls Reservoir District No. 2). Consequently, IDWR issued a curtailment order requiring all groundwater users to cease pumping groundwater rights with a March 25, 1981 priority date or junior. Absent breach of the mitigation plan, IGWA members would not have been curtailed under the order. But because of the 2021 breach, IGWA members were no longer sheltered under an approved mitigation plan and they were, therefore, subject to curtailment just as all other groundwater users not covered by and approved mitigation plan.

Last Minute Resolution

Prior to curtailment under the Department's August 18, 2022 order (requiring curtailment beginning September 6, 2022), IGWA and the SWC reached a deal whereby IGWA members restored the cover of the breached mitigation plan. IGWA restored the plan by agreeing to provide additional mitigation water during the 2023 and 2024 irrigation season above and beyond the baseline 240,000 AF requirement. Under the deal, IGWA must provide an additional 30,000 AF during the 2023 irrigation season, and an additional 15,000 AF during the 2024 irrigation season.

Conclusion and Implications

While IGWA avoided curtailment for its members in 2022, how its membership will share in the additional requirements during the 2023 and 2024 irrigation seasons will likely lead to some infighting within the group. Those members who met their reduction targets during the 2021 irrigation season will likely look to those who did not to shoulder the additional burdens in 2023 and 2024.
(Andrew J. Waldera)

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)

JUDICIAL DEVELOPMENTS

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 40 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 proceed-

ings, 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-resub-

mission 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). The court must engage in a three-part inquiry. It first examines whether the absent party must be joined under Rule 19(a). It next determines whether joinder of that party is feasible. Finally, if joinder is infeasible, it 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)

Western Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108