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CALIFORNIA WATER™ LAW & POLICY Reporter

CONTENTS

Continued on next page

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CALIFORNIA WATER NEWS

METROPOLITAN WATER DISTRICT PROJECTS 2023 WATER DEMANDS WILL EXCEED AVAILABLE SUPPLIES FROM THE COLORADO RIVER AND THE CALIFORNIA STATE WATER PROJECT

The Metropolitan Water District of Southern California (Metropolitan) supplies water to a substantial region of southern Californians living and working in the Los Angeles and San Diego metropolitan areas. Metropolitan's 2023 water demand is projected to be approximately 1.71 million acre-feet (MAF). However, it projects supplies from the Colorado River and the California State Water Project (SWP) to be approximately 1.22 MAF, leaving a projected supply deficit of 483 thousand acre-feet (TAF) for 2023. Metropolitan is implementing conservation efforts to reduce projected demand and relying on water purchases and storage withdrawals to supplement supply.

Background

Metropolitan is responsible for supplying water to 26 public water agencies who then deliver water directly or indirectly to approximately 19 million people in southern California. Metropolitan's service territory includes areas within Los Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura counties. To meet the water demands of these communities, Metropolitan relies on local supplies but also primarily upon imported water from the Colorado River and the SWP. Both of these sources are now constrained by the continued, historic drought conditions in the Western States.

Colorado River Supply

On a monthly basis, the U.S. Bureau of Reclamation (Bureau) publishes 24-Month Study Report presenting hydrological descriptions and projected operations for the Colorado River system reservoirs for the next two years. It is a key planning tool for states dependent upon Colorado River water. Based upon the data presented in the August update to the Bureau's 24-Month Study Report, the Bureau declared the first-ever level 2A shortage for the calendar year 2023. The Bureau reports indicate this means supplies delivered to Arizona, Nevada, and Mexico would be reduced by approximately 21 percent, 8 percent, and 7 percent respectively. Based upon current projections, the Bureau indicates supplies delivered to California would not be reduced. However, if drought conditions continue or worsen, supplies to California may be reduced in 2024. Metropolitan's supply from the Colorado River for 2023 is expected to be just under 1 MAF.

In June 2022, the Bureau Commissioner directed the Colorado River basin states to form a unified plan to supplement Colorado River reservoirs, such as Lake Mead and Lake Powell, with an additional 2-4 MAF in order to stabilize water levels. Though there were several meetings among the basin states, no unified plan was produced.

State Water Project Supply

The SWP is a water storage and delivery system spanning two-thirds the length of California. It is operated by the California Department of Water Resources (DWR) and serves water to 27 million Californians and 750,000 acres of farmland. In March 2022, DWR substantially reduced SWP allocations. A portion of Metropolitan's northern-most water agencies have limited access to Colorado River water and are therefore more dependent upon SWP water.

In April of 2022, Metropolitan declared a Water Shortage Emergency for SWP dependent areas, requiring drastic water-use reductions. In June 2022, affected member agencies implemented mandatory local conservation measures. One such conservation measure is that outdoor watering is limited to one day per week. In November, if enough water is not conserved, outdoor watering could be prohibited entirely and volumetric limits may come into effect in December. The emergency water conservation programs are scheduled to continue through, at least, June 30, 2023. In addition, DWR is seeking to supplement SWP supplies by acquiring transfer supplies from users in the Central Valley. Metropolitan's supply from the SWP is expected to be about 250 TAF in 2023.

Drawing from Storage to Meet Demands

Metropolitan currently expects to end the calendar year with approximately 2.1 MAF of region-wide storage; 1.4 MAF from the Colorado River, 460 TAF from the SWP, and 290 TAF from in-region storage. At first glance, it appears there is enough stored water to satisfy the supply deficit. However, due to operational limits and expected Colorado River Drought Contingency Plan contributions, only a portion of this storage will be accessible in 2023. Metropolitan estimates that its maximum take capacity for stored water will be 410 TAF from the Colorado River, 86 TAF from the SWP, and all 290 TAF from in region storage. This adds up to 786 TAF which, from a region-wide perspective, will be sufficient to meet the current estimated supply deficit.

Conclusion and Implications

In the coming months it is expected that Metropolitan may ramp up its conservation efforts to further reduce water demands within its service territory. This is especially true for the northern-most water agencies that are dependent upon SWP water. It is also expected that DWR will look to purchase additional water supplies supplementing the SWP. (Byrin Romney, Derek Hoffman)

LEGISLATIVE DEVELOPMENTS

FEDERAL DRAFT WATER INFRASTRUCTURE BILL INTRODUCED WHICH AIMS TO IMPROVE CALIFORNIA CENTRAL VALLEY'S LONG-TERM WATER SUPPLY AND REGULATORY RELIABILITY

On September 29, U.S. Representative David Valadao (CA-21) introduced House Resolution (HR) 9084 that would address funding and regulation of California's water storage infrastructure. Titled the Working to Advance Tangible and Effective Reforms (WATER) for California Act, HR 9084 is cosponsored by the entire California Republican delegation.

Background

The proposed legislation arrives amidst a historic drought roiling California. In a statement, Rep. Valadao introduced the bill in order to provide "water to the farmers, businesses, and rural communities" in the Central Valley, the state's agricultural hub, which Rep. Valadao represents [https://valadao.house.gov/news/documentsingle.aspx?DocumentID=446]. *See:* Faith Mabry, *Congressman Valadao Introduces Sweeping California Water Legislation*, Office of U.S. Congressman David G. Valadao (Sept. 29, 2022) [https://valadao/house.gov/news/documentsingle.aspx?DocumentID=446].

House Resolution 9084

The proposed legislation has three different areas of focus: operations, infrastructure, and allocations.

This bill's proposed changes to operations would require the management and long-term operations plans of the Central Valley Project (CVP) and State Water Project (SWP) to be consistent with the 2019 Biological Opinions (BiOps). (HR 9084, 117th Cong. § 104 (2022).) Issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, the 2019 BiOps determined that increased water diversions from the Bay-Delta would not jeopardize threatened or endangered species under the Endangered Species Act [https://wwd.ca.gov/wp-content/uploads/2021/05/about-the-2019-biological-opinions.pdf] and *see: About the 2019 Biological* Opinions, Westlands Water District (May, 2021), https://wwd.ca.gov/wp-content/uploads/2021/05/about-the-2019-biological-opinions.pdf.

If passed, provisions of the new bill would halt the current administration's attempt to revisit the findings of the 2019 BiOps following criticism from environmental groups [https://www.nrdc.org/experts/doug-obegi/trumps-bay-delta-biops-are-plan-extinction].

Regarding infrastructure, HR 9084 would make available funding to advance several water storage projects, including the Shasta Dam and Reservoir Enlargement Project. (HR 9084 at § 301.)

The bill would also require the Commissioner of the Bureau of Reclamation to develop a "water deficit report" that would include a list of infrastructure projects or actions to reduce projected water supply shortages. (*Id.*) Moreover, this bill would amend the 2018 Water Infrastructure Improvements for The Nation (WIIN) Act regarding eligible funding recipients. Current law permits only a state or public agency to receive federal funding for certain water-storage projects. (S 612, 114th Cong. § 4007 (2016).) This bill would expand the types of eligible entities to allow "any stakeholder" to receive federal funding. (HR 9084 at § 304.)

Lastly, the proposed bill addresses CVP water allocations. The bill aims to increase the water quantity that CVP stakeholders receive, because, as the statement from Rep. Valadao notes, the "South-of-Delta agricultural repayment and water service contractors have received zero percent of their allocation" for the past two years. The bill ties the minimum water quantity allocations of the CVP's agricultural water service contractors to a percentage of the contracted amount, with a majority of the provisions requiring "100 percent of the contract quantity" of water allocations to be provided. (HR\ 9084 at § 202.)

Conclusion and Implications

House Resolution 9084 is before the House Committee on Natural Resources. If passed, the bill could cement the substantial increases in the levels of water diverted in the Bay-Delta initially authorized by the 2019 BiOps. Moreover, the bill would expand the list

of eligible applicants for federal funding for certain water storage projects as well as generate additional data and administrative actions to increase California's water storage. Finally, the proposed legislation would protect the contractual expectations of CVP stakeholders from the fluctuating water allocations caused by California's historic drought. To track the status and text of the bill, *see:* https://valadao.house.gov/uploadedfiles/water_for_california_act_valada_044_xml.pdf.
(Miles Kreiger, Steve Anderson)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES ANNOUNCES STEPS TO SUPPORT CALIFORNIA IN WATER CONSERVATION EFFORTS AMID SEVERE DROUGHT AND FUTURE CLIMATE CHANGE

As of October 2022, over 90 percent of California residents live in areas subject to severe drought, with over 37 million people affected statewide. *California Drought Monitor*, NIDIS, https://www.drought.gov/. Within the past four months, Governor Newsom presented the California Water Supply Strategy Plan and signed Assembly Bill (AB) 2142 and Senate Bill (SB) 1157 to, according to the state, help improve water conservation efforts in urban, residential, and commercial areas throughout California. In support of his plan, the Department of Water Resources (DWR) has announced efforts to implement and support actions that lower outdoor and indoor water usage, fund turf installation, and support tax-exemptions for financial assistance for turf transitions throughout California.

Background

DWR manages water resources throughout the state and works with water agencies to enhance water quality, efficiency, and restoration. One of DWR's goals is to help ensure long-term water supply and sustainability throughout the state. Recently, DWR began recommending policy, standards, and land use changes to reduce water usage during the current drought. *Mission*, Cal. Dep. Water Resources, https://water.ca.gov/about.

In September 2022, the Department of Water Resources made several recommendations to the State Water Resources Control Board (State Water Board) to lower urban water usage in outdoor residential and commercial industry areas, as well as changes to indoor residential water use standards, in conjunction with Assembly Bill 1668.

Proposed by Assembly Member Friedman in 2018, AB 1668 aimed to revamp the state's commitment to water conservation by advancing urban water use efficiency and creating new water use standards and special land use allowances, along with heightened performance measures for urban water suppliers. The goal of the legislation was to investigate and provide guidelines for water suppliers to abide by to receive state funding. This was intended to reduce water usage where possible. The bill went into effect in 2018 and its goals were supplemented this year with the announcement of Governor Newsom's water plan.

In June 2022, Governor Newsom released the California Water Supply Strategy plan, which describes efforts to advance water efficiency and make long-term changes to water conservation in the state. This plan includes several actions and policies to aid Californians in adapting to a hotter and drier future, including four proposals supported by DWR: outdoor water use recommendations, indoor water use legislation, financial assistance a transition to conservation, and turf tax exemptions.

These plans mirrored recent legislation including AB 2142: Turf Replacement and Water Conservation Program, and SB 1157: Urban Water Use Objectives. AB 2142 revised the California tax code to allow for gross income tax exceptions for funds paid by local government, state agencies and public water systems, for turf replacement water conservation program. This provided financial incentives to reduce consumption of water and improve the management of water. SB 1157 is designed to reduce urban retail goal water usage rates for 2025 from 52 gallons to 47 gallons per capita. These changes reflect DWR recommendations to increase water conservation, and the department doubled down on these plans in its most recent suggestions to the State Water Board. Now, DWR plans to implement and support further actions falling within noted categories of Governor Newsom's water plan.

New Standards and Frameworks

First, DWR recently submitted outdoor water use recommendations to the State Water Resources Control Board. The recommendations outline new

standards and frameworks to help retail water suppliers, particularly in urban areas, decrease outdoor residential water usage and improvements to irrigation systems in large commercial and industrial landscapes. Among the highlighted recommendations are new outdoor residential water use efficiency standards (ORWUS) that phase in lower water use allowances for residential landscaping and construction zones. Additionally, DWR recommended changes to variances for unique water uses, to limit significant water use in horse corrals and animal exercise arenas, while expanding use during all major emergencies.

Second, DWR claims that SB 1157, along with its other outdoor use recommendations could save enough water to supply about 1.6 million homes or 4.7 million residents to meet annual indoor and outdoor water needs. When Governor Newsom signed SB 1157 into effect, the Legislature aimed to ensure California could preserve more water and improve water use efficiency during the ongoing drought, which is one of the major focuses of DWR.

Third, DWR proposed funding programs to better assist communities in their turf transition and water conservation projects. These programs provide grants to help finance turf installation and strengthen conservation efforts of underserved communities and local water agencies. DWR hopes these programs can provide a sense of security and equity among communities, and financially support urban water suppliers' conservation programs and residential and commercial landscapes turf transition.

Fourth, DWR endorsed the signing of AB 2142 and bringing its mandates into action, namely, grants, rebates, and other financial assistance awarded for turf transitions as exempt from state income tax through 2027. DWR views this exemption and the associated funding programs as useful aids to Californians in conserving water during and after the current drought, without the associated financial burden or obligation.

Conclusion and Implications

Following, DWR's recommendations, the State Water Resources Control Board will meet to evaluate and analyze the plan, as well as allow for public comment on the recommendations before giving a final decision on the matter. For more information, *see: DWR Takes Actions to Support State's Future Water Supply Strategy*, CA Dept. Water Resources (Sept. 29, 2022) https://water.ca.gov/News/News-Releases/2022/Sep-22/DWR-Takes-Actions-to-Support-Future-Water-Supply-Strategy.
(Elleasse Taylor, Steve Anderson)

CENTRAL VALLEY IRRIGATED LANDS REGULATORY PROGRAM SEES SIGNIFICANT UPDATES

Central Valley Regional Water Quality Control Board (Regional Board) staff recently engaged with State Water Resources Control Board (State Water Board) representatives to discuss updates to the Irrigated Lands Regulatory Program (ILRP). The updates were specifically related to implementing the State Water Board's General Order WQ 2018-02, which was the first irrigated lands general order adopted in the Central Valley Region. The State Water Board's order focuses on the East San Joaquin Water Quality Coalition, which consists of around 700,000 acres and 3,000 members.

Background

The Irrigated Lands Regulatory Program was initiated by the State Water Board 2003. The purpose of the ILRP was originally to prevent and mitigate agricultural runoff from affecting surface water quality. In 2012, regulations were added to the ILRP to also protect groundwater. ILRP is implemented by regulating irrigated agricultural lands through nine general water discharge requirements (WDRs). Growers in the Central Valley are organized through 14 agricultural water quality coalitions (Coalitions).

The Coalitions act effectively as intermediaries between the growers and the State Water Board, but they do not enforce the WDRs. The Coalitions provide data to the State Water Board to help determine its members' compliance with the ILRP.

Updates to Central Valley ILRP

Enrollment in the ILRP

To determine who should be enrolled in the ILRP, State Water Board staff use data from the Department of Water Resources (DWR) to determine which areas in the region are used for agriculture. Regional Board staff recently reported that there are approximately 6.2 million acres of commercial irrigated lands in the Central Region, of which 5.5 million acres are currently enrolled. Regional Board staff further indicated that the remaining 700,000 acres are spread over 40,000 parcels that would require inspection.

External Review of Surface Water Monitoring Framework

To address ILRP implementation, Regional Board and State Water Board staff are exploring conducting an expert review of the Central Valley Surface Water Monitoring Framework. In 2019, the Southern California Coastal Water Research Project facilitated a review of the East San Joaquin Water Quality Coalition's surface water monitoring framework. Before developing its findings and final report, it formed a stakeholder advisory group, held public meetings, and visited monitoring locations.

ILRP staff reported the findings of the review of the water monitoring framework, which was that the surface water monitoring program is appropriately designed and implemented to meet the overarching program goals.

Update on Monitoring of Pesticides

Another topic recently discussed between Regional Board and State Water Board staff is methods for monitoring certain widely used pesticides. The Regional Board has been working with the Environmental Laboratory Accreditation Program to obtain accreditation for several methods to analyze one such pesticide, imidacloprid. These methods are meant to provide a lower minimum detection level for the pesticide which would trigger tighter regulation of its use and mitigation requirements.

Further, Regional Board staff recently updated the pesticide evaluation protocol by updating the list of pesticides registered for agricultural use. Moving forward, staff intend to review the protocol on an annual basis.

Management Practice Evaluation Program

ILRP update discussions also addressed the management practice evaluation program. The management practice evaluation program includes three components: (1) management practice assessments; (2) groundwater protection values and targets; and (3) groundwater quality management plans. Management practice assessments are used to determine whether the existing and new practices serve to protect groundwater quality. The groundwater protection values provide the current estimated loading to groundwater, while the targets provide the loading rate that is necessary to achieve compliance. The groundwater quality management plans provide information on the actions needed to achieve compliance, and the timelines for implementing those actions.

Public Comments

The Regional Board also provided an opportunity for public comment on the presented updates. Some expressed concern over the groundwater protection targets, asserting that the targets will not, for example, reduce nitrogen loading rates and do not comply with the State Water Board general order in order to adequately protect groundwater supplies. Others, including representatives for some Coalitions, expressed support for the program and a commitment to continue its implementation.

Conclusion and Implications

The Central Valley ILRP is intended to regulate water quality through management and reduction of agricultural runoff to surface water and groundwater sources. The recent ILRP updates are designed to utilize broader and more detailed data sets to better inform management processes. Successful implementation will, of course, require not only input from but also implementation through the Coalitions, growers and other stakeholders. Additional ILRP program and updated information is available on the Regional Water Quality Control Board website at: https://www.waterboards.ca.gov/centralvalley/water_issues/irrigated_lands/.

(Christina Suarez, Derek Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HOLDS THAT NATIVE ALASKAN TRIBE HAS AN IMPLIED RIGHT TO FISH OFF THE TRIBE'S RESERVATION

Metlakatla Indian Community v. Dunleavy, 48 F.4th 963 (9th Cir. 2022).

In *Metlakatla Indian Community v. Dunleavy*, the United States Court of Appeals for the Ninth Circuit reversed the U.S. District Court of Alaska's order dismissing the Metlakatla Indian Community's (Community) suit against the State of Alaska for failure to state a claim. The Ninth Circuit panel found an 1891 federal law, and the U.S. Supreme Court's interpretation of that law, provides the Community with the right to fish in certain off-reservation waters, therefore the Community was not subject to Alaska's statutory "limited entry program" for regulating commercial fishing.

Background

The Ninth Circuit summarized the long history of the Community. The Community members are descendants of the Tsimshian people indigenous to the Pacific Northwest. Tsimshian fisherman historically followed fish runs along the coast and rivers of what is now British Columbia, fishing as far north as 50 miles from the Annette Islands in modern-day Alaska. In the mid-1800s, a group of Tsimshian people, joined by a missionary, "Father Duncan," established a coastal community in Metlakatla, British Columbia. There, they began a communal commercial fishing operation and established a cannery in the late 1800s. They also sought judicial recognition of their aboriginal territorial rights and attendant resource rights before the Canadian provincial court, but were denied. In response, the Metlakatlans authorized Father Duncan to travel to Washington D.C. to secure land for the Metlakatlans in what was then the Territory of Alaska.

In 1887, five Metlakatlans ventured to the Territory of Alaska in search of a new home, and selected the Annette Islands because of the islands' proximity to waters with abundant fish. Later that year, President Cleveland invited the remaining 823 Metlakatlans to join the five on the Annette Islands. The Metlakatlans established themselves on the Annette Islands, after which Congress passed the 1891 Act, recognizing the Community and establishing the Annette Islands as their reservation. After establishing the Community, the Metlakatlans continued to fish in their traditional fishing areas—both in the waters surrounding the reservation and in waters miles away—to supply a cannery that they established in 1891. Community members also relied on fishing for cultural and ceremonial practices.

In 1916, shortly before President Wilson proclaimed the waters 3,000 feet out from the Annette Islands part of the Community's reservation, non-Indians placed a fish trap 600 feet offshore. The United States sought and received an injunction to remove the trap in the Alaskan Territory District Court. The U.S. District Court found that in passing the 1891 Act, "Congress must be held to have known (what everyone else knew) that the Indians of Alaska are fisher folk and hunters and trappers, and largely, if not entirely, dependent for their livelihood upon the yield of such vocations." *U.S. v. Alaska Pac. Fisheries*, 5 Alaska 484, 486–81 (D. Alaska 1916). The U.S. Supreme Court affirmed, holding that the 1891 Act establishing the reservation granted the Community members an exclusive right to fish in the "fishing grounds" "adjacent" to the Annette Islands. *Alaska Pac. Fisheries v. U.S.*, 248 U.S. 78, at 89 (1918). The court did not, however, define the scope of these adjacent fishing grounds. The Community members continued to fish as they always had.

Fifteen years after Alaska gained statehood, Alaskans adopted a constitutional amendment that authorized Alaska to limit new entries to Alaskan commercial fisheries. Alaska instituted a "limited entry" program to regulate commercial fishing within its waters. Over time, changing conditions threatened the Community members' ability to fish. Migratory salmon routes shift, and sometimes these salmon are intercepted by state managed fisheries before they return to the communities' exclusive zone. Addi-

tionally, the Community members fish for herring, and when the herring leaves the Community's zone, Alaska's limited entry program restricts their access. The Community sued Alaska, seeking declaratory and injunctive relief against enforcement of Alaska's limited entry regulations preventing them from fishing in specific disputed areas. The U.S. District Court granted Alaska's motion to dismiss, holding that the 1891 Act did not reserve off-reservation fishing rights for the Community Members.

The Ninth Circuit's Decision

The Ninth Circuit panel reversed. Relying on the "Indian Canon of Construction" and the U.S. Supreme Court's decisions in *Winters v. United States* and *Alaskan Pacific Fisheries v. U.S.*, the court held that Congress impliedly granted the Community a non-exclusive right to fish in the disputed areas. A long line of Ninth Circuit case law provides that statutes that touch upon federal Indian law:

> . . .are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *Metlakatla*, 48 F.4th at 970.

And, under *Winters*, the court will infer a right when the right supports a purpose for which the reservation was created. *Winters v. United States*, 207 U.S. 564, 574–77 (1908). Noting that the Supreme Court already determined that the 1891 Act included implied fishing rights in *Alaskan Pacific Fisheries v. U.S.*, the Ninth Circuit determined the scope of these implied rights. In doing so, the court considered the central purpose of the reservation in the light of the Community's history. The opinion discusses at length the contemporaneous historical records discussing the Metlakatlan's fishing tradition along the Pacific Northwest coastline, noting how Congress passed the 1891 Act fully expecting the Metlakatlans to continue to fish as they had "time immemorial," because "fishing was intended to satisfy the future as well as the present needs of the Community." *Metlakatla*, 48 F.4th at 967–70, 971–73 (internal citations and quotations omitted). The areas in which the Metlakatlans traditionally fished included off reservation waters, but Alaska's limited entry regulation restricted their access in certain areas. As such, the application of Alaska's limited entry regulation was incompatible with the 1891 Act, and the Ninth Circuit reversed and remanded the case to the District Court for further proceedings. *Id.* at 976.

Conclusion and Implications

The Ninth Circuit did not define the Community's non-exclusive right in geographic terms. Instead, the court's holding focused on the application of Alaska's limited entry program in specific disputed areas. The court also did note that going forward, any regulation by Alaska of off-reservation fishing by the Community must be consistent with such rights. As *Metlakatla* demonstrates, this will be a very fact-specific determination. The Ninth Circuit's opinion may be found online here: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/08/21-35185.pdf
(Nico Chapman, Meredith Nikkel)

NINTH CIRCUIT REVERSES DISTRICT COURT BY FINDING CONGRESSIONAL AUTHORIZATION ALLOWS DISCRETIONARY RELEASES FROM TWITCHELL DAM FOR SPECIES PROTECTION

San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District, et al., 49 F.4th 1242 (9th Cir. 2022).

On September 23, 2022, the Ninth Circuit reversed the U.S. District Court for the Central District of California's grant of summary judgment to the U.S. Bureau of Reclamation and Santa Maria Valley Water Conservation District (collectively: Agencies) because the Ninth Circuit found that releases from Twitchell Dam to prevent take of Southern California steelhead are within the discretion of the Agencies.

Factual and Procedural Background

In 1954, Congress authorized construction of the Twitchell Dam under Public Law (PL) 774 "for irrigation and the conservation of water, flood control, and for other purposes . . . substantially in accordance with" a specific Secretary of Interior Report (Report). The Report detailed recommended flow rates and water releases from Twitchell Dam. The Report further identified the "primary purpose" of the project as recharging the Santa Maria River Valley's groundwater aquifer and eliminating threat of extensive flood damage.

Congress passed the federal Endangered Species Act (ESA) in 1973 to conserve endangered and threatened species. Under Section 9 of the ESA, it is unlawful for persons to "take" endangered species. "Take" is defined to include killing, harming, and significantly modifying habitat that results in injury or death due to impairing essential behavioral patterns. Since 1997, Southern California steelhead are considered a "distinct population segment" and in danger of extinction due to reproductive isolation.

In 2018, San Luis Obispo Coastkeeper and Los Padres Forestwatch (collectively: plaintiffs) filed a lawsuit alleging that the Agencies' management of Twitchell Dam resulted in the unlawful take of Southern California steelhead under ESA. In granting summary judgment in favor of the Agencies, the Central District of California examined whether PL 774 allowed the Agencies to authorize releases from Twitchell Dam for preservation of the Southern California steelhead. District Court Judge Birotte, Jr. found that Congress authorized Twitchell Dam's operation for specific enumerated purposes and species conservation was not included in those purposes. U.S. District Court Judge Birotte reasoned that without such discretion, the Agencies lacked authority make additional releases of water for the Southern California steelhead and could not be held liable for take. Plaintiffs filed an appeal and the Ninth Circuit considered whether the Agencies have discretion to operate Twitchell Dam in a way to prevent take of Southern California steelhead.

The Ninth Circuit's Decision

'Expansive' Language of the Authorizing Statute Includes Adjustments for Statutes like ESA

The Ninth Circuit primarily focused on the language in PL 774 allowing Twitchell Dam to be operated "for other purposes" beyond irrigation, conservation, and flood control. *Id.* at 1246–47. Where statutory language is clear, it must be followed. The Ninth Circuit reasoned that PL 774's "expansive language" expressed congressional intent to allow the Agencies discretion to operate Twitchell dam for a number of purposes, including to accommodate new statutory schemes like the ESA. Furthermore, the Secretary's Report containing a recommendation for flow rate for water releases is consistent with the slight deviation needed a few times during the year to avoid take of Southern California steelhead. PL 774's substantial compliance requirement explicitly allows for the Agencies to adjust dam flow rates in order to comply with ESA.

Authorizing Statute and the ESA Can be Read in Harmony

The Ninth Circuit further explained that principles of statutory construction namely reading two statutes in harmony strengthen the logic that PL 774 and ESA can be read together, giving effect to both. *Id.* at 1247–49. First, Congress did not explicitly preclude operation of the dam to avoid take of the Southern California steelhead. Instead, PL 774 directly authorized the dam to be used for other purposes. Second, the Secretary's Report identified some secondary operational purposes but did not suggest that those were the exhaustive list of permissible purposes. On those bases, the Ninth Circuit "easily" read PL 774 and ESA in harmony to allow Twitchell Dam to be operated with modest releases for species conservation while satisfying the primary purpose of conserving water for consumptive use.

Judge Bea's Dissenting Opinion

Judge Bea's dissent argued the majority's analysis "fundamentally misread[]" both the Secretary's Report and PL 774. Judge Bea interpreted the Secretary's Report differently from the majority concluding that the Secretary's Report carefully enumerated specific

purposes like conservation, flood prevention, and those other purposes similar or incidental to irrigation, conservation, and flood control. *Id.* at 1251–55. Additionally, release of water to maintain fish populations were "specifically considered and rejected" by Congress, with knowledge that the Southern California steelhead would be affected by the construction and operation of the dam in enacting PL 774.

Conclusion and Implications

Given the language of PL 774, the Ninth Circuit held that the Agencies have discretion to operate Twitchell Dam for other purposes, including potential adjustments to water discharges that support the Southern California steelhead. However, the Ninth Circuit specifically declined consideration of questions raised under California water law and how the Agencies might be required to exercise their discretion under PL 774. The case was remanded to the U.S. District Court for consideration of those issues consistent with this opinion. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/23/21-55479.pdf.

(Alexandra Lizano, Meredith Nikkel)

TENTH CIRCUIT REFUSES EXCLUSIVE JURISDICTION ON FERC-LICENSED PROJECT BECAUSE PETITION, INSTEAD, CHALLENGED THE CORPS' SECTION 404 PERMIT

Save the Colorado, et al. v. Spellmon, et al., ___F.4th___, Case No. 21-1155 (10th Cir. Sept. 30, 2022).

The U.S. Court of Appeals for the Tenth Circuit found on a claim-by-claim basis that conservation organizations' challenges to a municipality's application for a Section 404 permit to dredge fill material issued by the U.S. Army Corps of Engineers (Corps) and consideration by the U.S. Fish and Wildlife Service (FWS) did not inhere in the controversy of the Federal Energy Regulatory Commission's (FERC) decision granting the municipality an amended license to operate a larger dam. The court applied a narrow interpretation of the Federal Powers Act that gives appellate courts exclusive jurisdiction over FERC orders. The claims did not attack the merits of FERC's approval of an amended license. Therefore, the U.S. District Court erred in dismissing the petition for lack of subject-matter jurisdiction.

Background

The Denver Board of Water Commissioners (municipality) needed to complete two federal applications for permission to implement a project intended to boost the City of Denver's water supply: (1) an amendment to its existing license with FERC to operate an expansion of the Gross Reservoir and Dam in Boulder County, Colorado; and (2) a discharge permit from the Corps to discharge fill materials during construction. To issue the discharge permit, the Corps had to comply with the National Environmental Policy Act (NEPA), the Endangered Species Act, and to consult with FWS. FERC cooperated with the Corps in reviewing the municipality's compliance with federal laws; FERC helped it draft an environmental impact statement and participated in consultations with the FWS regarding endangered species. The Corps issued the discharge permit.

FERC later issued an amendment to the municipality's existing license, finding that the project would not cause significant environmental damage. Meanwhile, the conservation organizations filed a petition in federal District Court, arguing the Corps violated several federal laws when it issued the discharge permit: the NEPA, the federal Clean Water Act, the federal Endangered Species Act, and the Administrative Procedure Act.

After FERC granted the municipality's license amendment, the municipality sought to dismiss the petition in District Court, arguing the appeals court had exclusive jurisdiction. Federal courts of appeal have exclusive jurisdiction to hear challenges to decisions made by FERC under 16 U.S.C. § 825*l*(b). U.S. District Courts have jurisdiction to hear challenges to decisions made by Corps. Despite the conservation organizations' framing of their petition as a challenge

to a Corps-issued permit, the District Court granted the municipality's motion to dismiss, concluding that jurisdiction lay exclusive in the federal courts of appeal. The conservation organizations' appealed the dismissal.

The Tenth Circuits' Decision

On appeal, the court first considered whether the grant of exclusive jurisdiction under 16 U.S.C. § 825*l*(b) extended beyond FERC orders to any issue "inhering in the controversy" or "sufficiently related" to a FERC order. The municipality, Corps, and FWS urged the court to adopt a broad reading of the statute. They argued that because both Corps and FERC developed an environmental impact statement and because FERC weighed in on its environmental impact statement, that the analyses were intertwined and therefore subject to the jurisdictional statute.

The Court of Appeals rejected a broad application of the jurisdictional statute, reasoning that statute only restricted jurisdiction to the courts of appeal to actions that challenge FERC orders, not collateral attacks on those orders.

The court next considered whether, under the narrow reading of the jurisdictional statute, the District Court had jurisdiction to hear the conservation organizations' claims. The court's analysis proceeded on a claim-by-claim basis.

Clean Water Act Claim

Beginning with the conservation organizations' Clean Water Act claim, the court found that the conservation organizations' claims were unrelated to FERC's approval of the amended license for two reasons. First, FERC does not have the authority to review Corps permits under FERC precedent. Second, while both agencies analyzed the project under the Clean Water Act, their tasks differed. The Corps was tasked with selecting the least environmentally damaging practical alternative and properly evaluate the project's costs, whereas FERC only had to consider whether reasonable alternatives existed. The conservation organizations only challenged the Corps' tasks, which were not inherent in the controversy of considering reasonable alternatives. The court further reasoned, that even if the jurisdictional statute otherwise applied, it could not cover the claims at issue because FERC lacked authority to decide those issues.

NEPA Claim

Turning next to the conservation organizations' NEPA claim, the court noted that FERC's supplemental environmental assessment disavowed consideration of Corps' environmental analysis involving expansion of the reservoir and that the environmental issues facing FERC were narrower than the issues facing the Corps. The court noted that FERC's cooperation with the Corps and the FWS in drafting the Environmental Impact Statement was separate and apart from FERC's license amendment process. Further, FERC's decision did not incorporate the Corps' findings. The Court of Appeals again pressed the nature of the conservation organizations' claims—that they only filed claims against the Corps' permitting process—not FERC's analysis in its decision regarding the license amendment. As a result, the jurisdictional statute did not extend to the Corps' action.

Endangered Species Act Claims

When addressing the conservation organizations' Endangered Species Act claims, the court noted that FERC did not incorporate the FWS decisions into the terms of FERC's amended license. The differences between the Corps and the FWS and FERC in their application of the Endangered Species Act to the project meant that even though all agencies reviewed the project's compliance with the statute, that the issue did not inhere in the controversy. FERC neither solicited nor adopted opinions from the other agencies on the effects of the project on an endangered species. As a result, the court of appeal concluded it lacked exclusive jurisdiction over challenges to FWS's opinions.

Issue of Exclusive Jurisdiction

Finally, the Corps and FWS argued the petition itself invoked the court's exclusive jurisdiction, because relief would interfere with the FERC-licensed project. The court rejected the attempt to lump all of the administrative actions together because they involve the same general project. It found that on a claim-by-claim basis, the challenges to the permit did not impact FERC's decision regarding the license, even where the result of the petition might impact the municipality's FERC-licensed project.

Therefore, the U.S. District Court erred when it dismissed the petition for lack of subject-matter juris-

diction because it did not invoke the Federal Power Act's exclusive jurisdiction provision. Specifically, the petition failed to raise any issues inhering in the controversy of FERC's order regarding the municipality's license amendment because the conservation organizations' claims only challenged the Corps and FWS decisions.

Conclusion and Implications

This case clarifies that an appellate court's exclusive jurisdiction over FERC orders under the Federal Powers Act is limited to FERC decisions and issues inhering in the controversy of those decisions. A party aggrieved by a FERC order must challenge the merits of FERC's decision in its petition for relief. This case provides a helpful in-depth factual analysis of the application of an exclusive jurisdiction statute where multiple agencies and multiple analyses are involved. The Tenth Circuit's opinion is available online at: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110747304.pdf.
(Amanda Wells, Rebecca Andrews)

NINTH CIRCUIT AFFIRMS JUDGMENT FOR FISH AND WILDLIFE SERVICE BASED ON CLAIM PRECLUSION IN A CHALLENGE UNDER THE ENDANGERED SPECIES ACT

Save the Bull Trout v. Williams, ___F.4th___, Case No. 21-35480 (9th Cir. Sept. 28, 2022).

In a September 28, 2022 decision, the United States Court of Appeals for the Ninth Circuit affirmed the U.S. District Court in Montana's judgment in favor of the U.S. Fish and Wildlife Service (USFW) in a federal Endangered Species Act (ESA) action brought by plaintiff environmental groups. The court held that claim preclusion barred the claim, because plaintiffs had previously brought the same fundamental challenge in the U.S. District Court in Oregon, and the claim had been dismissed.

Statutory Background

The Endangered Species Act is a comprehensive statutory scheme intended to protect endangered and threatened species. The ESA requires the U.S. Fish and Wildlife Service to develop recovery plans for listed species within their jurisdiction. A recovery plan generally must describe management actions to achieve conservation and survival of the species, criteria for delisting species, and estimates of the time and costs required to achieve the plan's goals. The ESA contains a citizen-suit provision, which provides a private cause of action for a party seeking to enforce nondiscretionary duties established by the ESA.

Factual and Procedural Background

The Oregon Litigation

Pursuant to the ESA, USFW released the Bull Trout Recovery Plan (Plan) in 2015. The Plan focused on managing primary threats to the endangered bull trout populations across the United States. Two of the plaintiff environmental groups, Friends of the Wild Swan and Alliance for the Wild Rockies (collectively: Friends) brought suit in the District Court of Oregon to challenge the Plan under the ESA's citizen suit provision.

The Oregon District Court determined that Friends failed to state a claim for violation of a nondiscretionary duty. As a result, the court determined that it lacked jurisdiction over the citizen-suit claim. The court therefore dismissed the claim but granted Friends leave to amend. When Friends did not amend the complaint, the court entered judgment.

Friends appealed the dismissal to the Ninth Circuit, arguing for the first time that USFW had omitted required statutory elements from the Plan, constituting a failure to perform a nondiscretionary duty. The Ninth Circuit affirmed the dismissal without considering the merits of Friends' argument

and noted that Friends had chosen to appeal instead of amending their complaint in the district court to include the new argument.

Friends filed a motion in the District Court under Federal Rules of Civil Procedure 60(b) and 15, seeking relief from the judgment and to amend the complaint. The court adopted the magistrate judge's recommendation to deny the motion and declined to affirm the magistrate judge's suggestion that Friends could replead their claims to survive a motion to dismiss and be heard on the merits. Friends did not appeal the court's denial of the motion to amend.

The Montana Litigation

Friends added Save the Bull Trout as a plaintiff and challenged the Plan in the U.S. District Court for Montana, again under the ESA's citizen-suit provision. USFW moved to dismiss based on claim preclusion, but the court concluded that the Oregon dismissal was not a final judgment on the merits, and thus declined USFW's motion. However, the court granted summary judgment on the merits in favor of USFW, and the plaintiffs appealed the judgment to the Ninth Circuit.

The Ninth Circuit's Decision

Standing

The Ninth Circuit first held that the plaintiffs had standing to challenge the Plan. Because members of the plaintiff environmental groups demonstrated aesthetic, recreational, and conservation interests in bull trout, and because the ESA's procedures serve to protect those interests, the plaintiffs established that they had suffered a procedural injury caused by USFW. Additionally, the court concluded that the plaintiffs had met their burden of showing that the revisions to the Plan that they were seeking could influence USFW's bull trout conservation actions, thus redressing the plaintiffs' alleged harm.

Claim Preclusion

Contrary to the Montana District Court, the Ninth Circuit did not reach the merits of the new claims. Instead, the court held that the claim preclusion doctrine barred the plaintiffs' claim. First, the Court of Appeals explained that the litigation in both the Oregon and Montana District courts involved the same issue—whether USFW's Plan complied with the ESA. Although the plaintiffs added new claims alleging that USFW had violated a nondiscretionary duty, the court reasoned that the plaintiffs could have amended their complaint to include those claims in the Oregon litigation.

Second, the court found that the Oregon and Montana cases involved "identical parties or privies," because two of the three plaintiffs were parties to the Oregon litigation, and all three plaintiffs shared a common interest in wildlife and habitat conservation. Thus, the court determined that Save the Bull Trout was in privity with the plaintiffs who had been parties to the prior suit.

Finally, the court concluded that the suit in Oregon had ended with a final judgment on the merits. It explained that, for the purposes of claim preclusion, dismissal for failure to state a claim is a judgment on the merits. The court also noted that, although the plaintiffs could have amended the Oregon complaint to bring the new claims, they declined to do so and instead appealed the judgment. Thus, the Court of Appeals held that the plaintiffs were "not entitled to a do-over."

Conclusion and Implications

This opinion demonstrates that a U.S. District Court's determination that it does not have jurisdiction over a challenge brought under the ESA's citizen-suit provision due to lack of allegations of a failure to perform a nondiscretionary duty reaches the merits of the suit. In this case, determining whether the District Court had jurisdiction necessarily required consideration of the merits. Friends abandoned their suit after it was dismissed for failure to state a claim in the U.S. District of Oregon; this strategic decision ultimately prevented the plaintiffs from bringing additional related claims in the District of Montana. Thus, in affirming the district court judgment for USFW, the Ninth Circuit passed no judgment on the merits of the plaintiffs' new claims. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/21-35480.pdf.
(Bridget McDonald)

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

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

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

Factual and Procedural Background

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

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

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

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

The Cleanup Coalition appealed.

The Third Circuit's Decision

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

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

The court did not end its analysis there, however, the court next considered whether the notice provided enough information to enable the recipient to identify the specific effluent discharge limitation which has been violated, including the parameter violated. The court reasoned that a notice is not necessarily deficient under if it fails to cite a specific section of the Clean Water Act. However, because

the Cleanup Coalition's notice was prepared by counsel and referred to the entire Clean Water Act, as well as, many unrelated New Jersey Statutes and regulations, the court determined the notice was not "enough" to permit the defendants to identify the specific standard, limitation, or order alleged to have been violated.

The Concurring Opinion

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

Conclusion and Implications

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

DISTRICT COURT VACATES CADIZ PIPELINE RIGHTS-OF-WAY FOLLOWING BLM'S RECONSIDERATION OF APPLICATIONS

Center for Biological Diversity, et al. v. U.S. Bureau of Land Management, et al., ___F.Supp.4th___, Case No. CU-21-2507 (S.D. Cal Sept. 13, 2022).

In the waning days of the Trump administration, the U.S. Bureau of Land Management (BLM) granted a set of right-of-ways to Los Angeles based Cadiz, Inc. for its water project seeking to transport water from an aquifer in the Mojave to the California Aqueduct outside of Bakersfield. As of September 13, 2022, however, U.S. District Court Judge George Wu, in *Center for Biological Diversity, et al. v. U.S. Bureau of Land Management, et al.*, granted BLM's Motion for Voluntary Remand and vacated the rights-of-way following BLM's reconsideration of Cadiz's application.

Background

With planning for the Cadiz water project beginning as long as two decades ago, the ultimate plan for Cadiz has been to extract water from an aquifer underlying its land in California, located near the Mojave National Preserve and Mojave Trails National Monument, and transport it to the California Aqueduct to sell to urban areas near Los Angeles. The current vision involves the water being transported through a northern route which passes through the federal lands mentioned above. Cadiz approached the BLM in July of 2020 about the possibility of taking an existing right-of-way held by El Paso Natural Gas Company (EPNG) that was previously used for a natural gas pipeline and convert that to use for water transport. This pipeline extends from the community of Cadiz all the way to Wheeler Ridge, just south of Bakersfield, where the pipeline would link up with the California Aqueduct.

In July of 2020, Cadiz applied to BLM for a right-of-way to convey water through the EPNG pipeline. Following some back and forth with Cadiz on how to proceed, BLM chose to process the application by breaking it up into two steps: first, by handling the reassignment of the existing Mineral Lease Act (MLA) right-of-way for oil and gas transportation; and second, by granting a new right-of-way for water transportation under the Federal Land Policy and Management Act (FLPMA). For each of these steps, BLM prepared categorical exclusions from review under the National Environmental Policy Act (NEPA).

With respect to the MLA right-of-way, BLM cited to a categorical exclusion applying to renewals of rights-of-way where no additional rights are conveyed beyond those granted by the original authorizations. As for the FLPMA right-of-way, BLM relied on a categorical exclusion that applies to grants of rights-

of-way that are wholly within the boundaries of other compatibly developed rights-of-way.

On December 21, 2020, BLM issued its decision authorizing the transfer of a portion of the MLA right-of-way to Cadiz and granting a new FLPMA right-of-way to Cadiz coextensive with the MLA right-of-way. Since both the transfer and the grant were determined to be covered by categorical exclusions, BLM did not prepare any environmental analyses.

In response to this, the plaintiffs in this case filed lawsuits challenging BLM's approvals, alleging that BLM rushed past the review process and granted Cadiz's request for the rights-of-while side skirting the necessary compliance with NEPA. Furthermore, as the BLM underwent the transition from the old Trump administration to the new administration under President Joe Biden since approving these rights-of-way, the BLM and joining federal defendants (collectively: Federal Defendants) submitted their own Motion for Voluntary Remand to reconsider the applications.

The District Court's Decision

At the outset, the District Court acknowledged the Federal Defendants argument that the case should be remanded to BLM because they did not perform the requisite environmental analyses. As the Federal Defendants stated:

> . . .this is not a case where BLM conducted an appropriate level of analysis, in which the court might find some technical legal errors. Instead, BLM failed to prepare the required analyses altogether.

In a lengthy decision the court ultimately relies on the broad discretion afforded to it in granting such requests for reconsideration:

> Voluntary remand is consistent with the principle that administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance with it the power to reconsider. . . .In general, the Court should defer to that authority. The BLM here is telling the Court that it erred in its decision not to undertake a full NEPA. . .review when the issue was presented to it in 2020.

As for the tangential issue of whether the rights-of-way should be vacated upon remand, the District Court concluded that the presumption that vacatur should accompany remand had clearly not been surmounted. In its analysis on this issue, the court explained that vacatur is typically only denied where the action is complex, expensive, and already underway, and only when those disruptive consequences outweigh the seriousness of the agency's errors. Given that the issue here was with the lack of any extensive NEPA review and an accompanying administrative record, the court found it clear that the potential legal errors could very well be both serious and numerous:

> In a case such as this, where these statutory processes were bypassed almost entirely, the Court would conclude that vacatur is even more appropriate then in cases where fulsome NEPA. . .reviews were completed.

Conclusion and Implications

While the case itself does not present any grand new analyses, it does address a situation where administrative turnover may have prompted a rushed approval process in order to push a project past the finish line without proper NEPA review, as the timing of the approvals was doubtless a coincidence. And despite the applications being remanded to BLM for further review, Cadiz, Inc. is confident that this remand won't have any substantial impacts on the completion of the water project. The court's ruling itself even acknowledged that "it is perfectly possible that, on remand, the BLM will determine that the rights-of-way at issue are permissible under the relevant statutory frameworks, and it will confirm that the rights-of-way were properly issued." Since the ruling, in fact, Cadiz has stated that work on the water transfer project was proceeding as planned and without any delays.

So ultimately, while the court's order remanding the rights-of-way applications to BLM for further NEPA review may only come as a speed bump for the Cadiz water project, this particular speed bump will at a minimum serve as a "better safe than sorry" approach for a project with much work left to be done. (Wesley A. Miliband, Kristopher T. Strouse)

DISTRICT COURT REJECTS TAKINGS CLAIM BROUGHT BY DEVELOPERS STEMMING FROM THEIR REJECTION OF APPLICATION FOR WATER AND SEWER SERVICES

Windeler v. Cambria Community Services District,
___F.Supp.4th___, Case No. CV 19-6325 DSF (C.D. Cal. Sept. 6, 2022).

With water becoming more and more scarce throughout the state, communities throughout the state have been forced to implement moratoria on new development within their jurisdictions. Highlighting the seriousness of the situation that many locales face, the U.S. District Court for the Central District of California just settled the dispute of several landowners within the Cambria Community Services District (Cambria CSD) asserting that they had suffered a taking as a result of their rejected efforts to obtain water service. The landowners, none of whom are California residents, alleged that Cambria CSD and San Luis Obispo County wrongly deprived them of access to water and sewer services, therefore denying their right to build on their properties. The District Court, however, rejected this claim and found in favor of Cambria CSD's actions, concluding that no taking had occurred from any denial of water service or development permits to the landowners.

Background

This case came as a consolidation of several lawsuits filed by five landowners within Cambria CSD's service area. As for the properties at issue that would have necessitated additional water supply, all of the properties in question are well under half-an-acre with several of the lots sitting very steep grades. Plaintiffs provided no evidence that any water existed beneath their lots or that installing a well or water tank could be accomplished without violating any state or local laws. All plaintiffs had owned their properties since at least the 1980s, with their properties sitting for decades before any plans to develop them had materialized. All the plaintiffs, according to the court, were aware of and refused to seek inclusion on Cambria CSD's wait list for water connections when it was open from 1986-1990.

Also relevant was the fact that Cambria was experiencing critical drought conditions such that it was in question whether the area could even sustain its current population. The community of Cambria boasts a modest population of roughly 5,000 residents. Cambria's sole source of water comes from well fields that divert groundwater from the nearby San Simeon and Santa Rosa creeks. In wet years, Cambria CSD's licenses allow it to divert up to 799 acre-feet per year (AFA) from San Simeon Creek and up to 218 AFA from the Santa Rosa Creek. In dry years, however, which have seemed more common than not as of late, Cambria CSD's licenses only allow for a maximum diversion—not factoring in other limitations on their production rights—of just 270 AFA from San Simeon and 155.3 AFA from Santa Rosa Creek.

In November of 2001, Cambria CSD was forced to declare a Drought Emergency pursuant to California Water Code § 350 and establish a moratorium on all new residential permits as its existing water supply was unable to accommodate its expanding population. This Drought Emergency has remained in effect ever since.

Cambria CSD's water supply struggles, the Santa Rosa Creek experienced MTBE contamination in 1999 and forced the closure of two wells along the creek, which seriously disrupted Cambria CSD's efforts to explore additional and alternative water sources. Even once Cambria CSD was able to recover from this contamination event, its efforts to investigate a $10 million desalination plant at the beachhead of either the San Simeon or Santa Rosa Creeks were halted by the California Coastal Commission (CCC).

The District Court's Decision

With all the foregoing covered in its findings, the U.S. District Court acknowledged that:

> The shortage of water claimed by Defendants is not a mere pretext to prevent growth, as suggested by Plaintiffs. There are legitimate public concerns about the ability of [Cambria CSD] to continue to provide sufficient water consistently

> to its current users, let alone any significant number of new users.

The court went on to continue this acknowledgement later in its findings as well, explaining that Cambria CSD had taken significant steps over the past decades to seek new sources of water and to find ways to reduce consumption.

The Takings Claims

Of all the topics addressed and ruled on, the court paid particular attention to plaintiffs' taking claims and spent much of its time rejecting the claim that a taking had occurred.

First, the court explained how plaintiffs' do not hold a compensable right in any potential connection to a government-controlled water supply source (citing *McMillan v. Goleta Water District*, 792 F.2d 1453 (9th Cir. 1986) and *Gilbert v. State of California*, 218 Cal.App.3d 234 (1990): "California law does not recognize potential water use as a compensable property right.").

Additionally, the court explained how plaintiffs:

> . . .have no protectable property interest in a County development permit to build a house on a waterless vacant lot because they failed to obtain a water and sewer connection, be placed on the [Cambria CSD] wait list, or obtain a [Cambria CSD] intent to serve letter, during the times that those avenues were available to plaintiffs, and because they did not, and cannot, present proof of 'adequate water and sewage disposal capacity available to serve the proposed development' required by County Code … and other state and local laws.

Next, the court rejected the plaintiffs' takings claims as being insufficient to meet the standards required by *Penn Central Trans. Co. v. City of New York*, 438 US 104 (1978). Under the *Penn Central* doctrine, a court must consider three factors in determining whether a regulatory taking has occurred: (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with distinct investment-back expectations; and (3) the nature of the governmental action.

In addressing these factors, the District Court's conclusion that plaintiffs had no compensable right, as explained above, could well have immediately halted the conversation at point number one. Addressing point number two, however, the court focused not only on the lack of historical evidence of the plaintiffs' intent to develop their properties, but more distinctly on the unreasonableness of any expectation to an absolute right of water and sewer connections in Cambria.

In addition to the natural circumstances showcasing the severity of Cambria's water shortage, the court also pointed out the CCC's continuous and vehement refusal to authorize any future development in the area. Finally, as for the nature of the governmental action, the court determined that plaintiffs were treated identically to all other similarly situated landowners in the area—*i.e.* landowners with properties not connected to water and sewer utilities and that were never placed on the wait list for such connections.

Conclusion and Implications

In ruling on the claims at issue, the court's comprehensive decision ruled for Cambria CSD on virtually all other fronts in the dispute as well, with the court finding that: (1) the statute of limitations for claims such as the plaintiffs' expired long ago, (2) the CCC would not allow any new development in Cambria, meaning any harm to plaintiffs was not necessarily the result of Cambria CSD's actions, and (3) Cambria CSD had taken reasonable steps to both acquire new water sources and reduce existing water demand.

The idea that humans need water in order to develop and grow communities is far from a novel concept. Yet California has been expanding at light speed for decades now in an arid, drought ridden climate. The court's ruling in this case showcases how California's extraordinarily limited water supply can function as a hard cap on just how rapidly and densely the state is able to grow. While isolated communities such as Cambria are certainly more prone to reaching crisis-levels of water supply deficits—at least when it comes to urban and residential water use—even larger communities, such as those in Marin County, are being forced to implement significant restrictions on new development as a result of insufficient water supply. The legal issues of this case may seem to focus on classic 1L related topics a la regulatory takings under the *Penn Central* case, but it also provides an up-close look into how Californians are

continually attempting to meet the state's insatiable demand for new development while simultaneously managing our relatively finite sources of water. For more information on the court's decision, *see:* https://www.documentcloud.org/documents/22345162-win-deler-judgment_findings-of-fact-and-conclusions-of-law_final?responsive=1&title=0.
(Wesley A. Miliband, Kristopher T. Strouse)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT UPHOLDS COASTAL COMMISSION'S FINDING THAT FEE-TO-TRUST LAND TRANSFER BETWEEN FEDERAL GOVERNMENT AND TRIBE WAS CONSISTENT WITH THE COASTAL ACT

Humboldt Alliance for Responsible Planning v. California Coastal Commission, Unpub., Case No. A162602 (1st Dist. Sept. 16, 2022).

In an *unpublished* opinion filed on September 16, 2022, the First District Court of Appeal affirmed judgment denying a petition that challenged the California Coastal Commission's ruling that the transfer of tribal coastal land into federal trust was consistent with the California Coastal Act.

The Indian Reorganization Act of 1934

Section 5 of the Indian Reorganization Act of 1934 (25 U.S.C. § 5108) authorizes the U.S. Secretary of the Interior to acquire lands in federal trust for an Indian tribe. This type of transfer is known as "fee to trust" and is intended to promote tribal self-determination.

The Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) coordinates regulation between federal and state agencies in their regulation of land practices that affect the coast. If a federal agency commences an activity with foreseeable coastal effects, the agency must determine whether the activity will be undertaken in a manner fully consistent with the enforceable policies of the state's approved management programs. If the agency finds the activity is consistent, it must submit its determination to the state agency for review, after which the state agency will either concur or object.

The California Coastal Act

The Coastal Commission (Commission) is the state agency responsible for reviewing matters that invoke the CZMA in California. The Commission also implements the Coastal Act, which constitutes the state's coastal zone management program. The state's coastal zone does now, however, include lands that the federal government holds in trust.

Factual and Procedural Background

The Cher-Ae Heights Indian Community of Trinidad Rancheria owns in fee a ten-acre property site located within the California Coastal between Trinidad Bay and the City of Trinidad in Humboldt County. The property offers public access to the pier and other support functions at the pier, Trinidad Beach State Park, Launcher Beach, and a restaurant.

In connection with a project to construct a 1,300-square-foot public visitor center and related stormwater improvements, the Trinidad Rancheria applied to the U.S. Bureau of Indian Affairs (BIA) to have the property transferred into federal trust with record title in the name of the United States and the tribe holding beneficial interest.

In December 2018, BIA notified the Coastal Commission that it had determined under the CZMA that the Project was consistent with the Coastal Act. With respect to public access, BIA found that the tribe would continue to maintain public access to the pier and beach through a tribal ordinance, and would coordinate any future changes with Commission staff to protect public recreational uses at the site.

In March 2019, the Commission held a hearing on BIA's consistency determination, and ultimately voted to concur, finding the Project was consistent with the applicable Coastal Act policies, including public access.

At the Trial Court

Humboldt Alliance for Responsible Planning (HARP) filed a petition for writ of administrative mandamus challenging the Commission's concurrence in BIA's approval. HARP alleged the tribe's commitments to public access were inadequate and the fee to trust transfer would eliminate the Com-

mission's ability to protect public access because the Commission would only retain "a small sliver of jurisdiction that is subject to several preconditions which the Tribe [could] easily avoid."

In January 2021, the trial court denied the petition, finding that the Commission's decision was supported by substantial evidence.

The Court of Appeal's Decision

On appeal, HARP argued that: (1) the Commission's decision must be reviewed for the weight of the evidence rather than substantial evidence; and (2) the transfer of coastal tribal land into federal trust status improperly limited the Commission's ability to enforce Coastal Act policies in the area, thereby potentially threatening public access to the beach.

The Independent Standard of Review Does Not Apply

HARP urged the appellate court to review the Commission's decision under the independent judgment standard rather than for substantial evidence. Because HARP claimed the Commission's findings were not supported by evidence, the court must take one of two approaches: (1) in cases where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the findings are not supported by the weight of the evidence; or (2) in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record. The court is only authorized to exercise its independent judgment, and therefore consider the weight of the evidence, if the underlying administrative decision affects a vested, fundamental right.

Here, the Court of Appeal explained that the trial court was not required to subject its review to independent judgment because, contrary to HARP's claim, public access to Launcher Beach is not a fundamentally vested right. Notwithstanding its failure to cite to any legal authority to support this contention, HARP's reliance on the California Constitution's public access and trust provisions is no more availing. Here, there is no evidence that the Trinidad Rancheria's proposed project would limit public access, therefore, article X, § 4 of the California Constitution does not apply.

Nor does the public trust doctrine vest the public with an unfettered right to access navigable waters. In fact, the Coastal Act recognizes that "maximum access" is only provided "consistent with" public safety and private property interests. HARP also fails to cite to any authority that the doctrine requires heightened judicial review. To the contrary, 40 years ago the court in *Sierra Club v. California Coastal Zone Conservation Com.*, 58 Cal.App.3d 149 (1976), expressly held that the Coastal Act did not establish a present possessory interest of the public in property lying within the coastal zone.

Judicial precedent also demonstrates that courts routinely apply the substantial evidence standard when reviewing a Coastal Commission decision that substantially affects the public's access to the shoreline. The cases HARP relies on are distinguishable because none of them involved an effort by the public to use the doctrine as a preexisting right to require public access to the beach. To the contrary, the cited cases held that private parties' title to property was subject to the doctrine.

For these reasons, HARP failed to establish that the Commission's decision involved or substantially affected a fundamental right. Therefore, the trial court correctly reviewed the Commission's decision for substantial evidence.

Substantial Evidence Supports the Commission's Decision

Because the trial court correctly applied the substantial evidence standard, the First District would apply the same standard to review the Commission's decision.

Under the CZMA, the Commission was tasked with deciding wither to concur with or object to BIA's assessment that the Tribe's project would be consistent with the Coastal Act's public access policies. The act requires public access from the nearest public roadway to the shoreline and along the coast, except as specified. Public access, however, shall be implemented in a manner that considers the need to regulate the time, place, and manner of the access, particularly depending on the facts and circumstances of each case, so that access policies can be carried out in a reasonable and well-balanced manner.

Here, the Commission found the Project, which includes the new visitor center, stormwater improvements, and fee to trust transfer, were consistent with

these policies. Based on its review of the record, the Court of Appeal held that substantial evidence supported the Commission's determination. Notably, the Tribe's Project did not entail any reduction in public access to Launcher Beach. To the contrary, the Tribe would maintain access to the open space by continuing to allow the public to access and use the beaches. The Tribe also expressed its intent to adopt a Tribal Resolution that recognizes the importance of and commitment to maintaining the site's open space and public access. The Tribe also agreed to a condition that it would coordinate with BIA on any future, unanticipated development proposals that would harm public access.

Finally, the Tribe has a longstanding history of protecting public access to the site. Upon purchasing the site in 2000, the Tribe granted the City an easement and tidelands lease allowing public access to the pier by foot. The Tribe also entered into an agreement with the State Coastal Conservancy that guarantees public pier access until 2032, and placed the pier on the National Tribal Transportation Facility Inventory, which requires it to remain open and available for public use, subject to temporary federal public health regulations. Finally, the Tribe's 2011 Comprehensive Community-Based Plan for land holding explicitly commits to allowing recreational boat access at Launcher Beach.

Though the Commission recognized that the "fee-to-trust" action reduces the Commission's enforcement authority over the property, the Commission would still retain federal CZMA authority to perform any future consistency reviews. Moreover, if the BIA's consistency determination were ever significantly changed, the Commission could invoke the "reopener" provision prescribed by CZMA's regulations, which would allow the Commission to reconsider whether the project would have adverse impacts on coastal resources.

Based on the foregoing evidence, including the lack of any obstruction to public access, coupled with the avowed commitment to maintaining such access, it was not unreasonable for the Commission to find that the proposed activity was consistent with the Coastal Act.

Sufficiency of the Evidence

As the petitioner and appellant, HARP bore the burden of demonstrating that the evidence supporting the Commission's findings was inadequate. HARP argued that the Tribe's 2000 coastal access easement was irrelevant because it applied to the pier rather than the beach, and to foot traffic rather than to trailering small boats. HARP also contended the reopener provisions were inadequate because they only provided for mediation between BIA and the Commission.

The court rejected both of HARP's arguments. Though the easement refers to the pier, it is not unreasonable to conclude that the Tribe would continue its efforts to protect other aspects of the site, including Launcher Beach. And although the reopener provisions prescribe mediation, HARP fails to establish that mediation is an unsuitable dispute resolution mechanism. HARP's reliance on an unsworn letter to the Commission penned by the former owner of the property is further unavailing. The letter which stated that, in 2000, the then-chair of the Tribe orally told the property owner that the tribe would never seek to place the property in trust, hardly shows that the Tribe cannot be trusted or that it will "renege" on its current written promises to the state and federal government.

The Commission's Retention of Authority

HARP also contended the property transfer was inconsistent with the Coastal Act's public access policies because the Commission would retain little enforcement over the site once it is transferred into trust and no longer part of the Coastal Zone.

The court rejected this, noting that the Coastal Act does not state that the Commission must maintain all enforcement authority in order to concur with BIA's consistency determination. The Commission appropriately concluded that federal oversight coupled with the reopener provisions was sufficient. HARP failed to demonstrate substantial evidence did not support this conclusion.

Waiver of Sovereign Immunity

HARP argued that the Commission abused its discretion in not requiring the Tribe to waive its sovereign immunity, which shielded the Tribe from future suits, even if it eventually interferes with access to the beach.

Unpersuaded, the court explained that nothing in the Coastal Act's public access provisions required

the tribe to waive its immunity; nor did HARP present any evidence that resorting to the courts will be necessary. Moreover, the Commission is not required to speculate what the tribe *might* do. The question is not whether requiring the tribe to waive its immunity would have better protected public access; the question is whether the Commission could have reasonable concluded, based on the evidence before it, that even without the waiver, the Project was consistent with the Coastal Act. Ample evidence supports that conclusion.

Conclusion and Implications

The First District's *unpublished* opinion reiterates the requisite standard of review that courts must employ when considering whether the Coastal Commission abused its discretion under the Coastal Act. Where the Commission presents findings and evidence in support thereof, the court must review the decision for substantial evidence. If the determination affects a fundamental vested right, the court must independently weigh the evidence. Here, the fee-to-trust transfer ostensibly invoked the substantial evidence standard, as public access to coastal resources does not constitute a fundamental vested right. The court also reiterated the collaboration between state and federal agencies, emphasizing the roles they play in regulating and managing coastal properties. The court's opinion is available at: https://www.courts.ca.gov/opinions/nonpub/A16260.
(Bridget McDonald)

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