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FEATURE ARTICLE

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

By Brian E. Hamilton and Holly Tokar

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

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

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

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

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

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

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

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

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

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

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

Hoopa Valley and FERC's Efforts to Restrict State Authority

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

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

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

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

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

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

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

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

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

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

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

Application of *Hoopa Valley* in Other Cases

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

Actions by California and the EPA to Bolster State Control

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

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

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

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

Conclusion and Implications

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

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

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WESTERN 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)

STEAMFLOW RESTORATION ACT UPDATE— SALMON RECOVERY FUNDING BOARD BEGINS PROCESS OF TECHNICAL REVIEW AND RECOMMENDATIONS TO ECOLOGY ON WATERSHEDS

Washington State continues to address the impacts of domestic permit exempt groundwater users on senior water rights and instream flow resources.

Background

Under RCW 90.44.050, landowners in many parts of the state can develop groundwater supplies for new residential uses without needing a permit from the Washington State Department of Ecology (Ecology). Under Washington's Water Resources Act, Ecology is authorized to set instream flow rates to protect instream resources. Once created, an instream flow is a water right and enjoys priority as of the date of formal adoption. Ecology has developed instream flow rates for 25 watersheds throughout the state.

The *Hirst* Decision

A seminal issue in Washington water law over the past decade has been considering the impact of permit exempt groundwater uses on senior water rights, including instream flow rates set by state rule.

In 2016, the Supreme Court of Washington in *Whatcom County vs. Hirst et al.*, considered whether the county could issue permits for new residences that relied on permit-exempt groundwater use when the state's instream flow rates for the watershed were repeatedly unmet. 186 Wn.2d 648, 381 P.3d 1 (2016).

Under the Growth Management Act (GMA), counties must consider and address water resource issues in land use planning to ensure an adequate water supply before granting a building permit or land division application. RCW 36.70A.070(1). The Court in *Hirst* explained, "the GMA explicitly assigns that task to local governments." *Whatcom Cnty. v. Hirst*, 186 Wn.2d at 685–86. In *Hirst*, the Washington Supreme Court specifically considered Whatcom County's land use development regulations that allowed new permit exempt uses in areas not expressly closed to new appropriations by Ecology's instream flow rule. *Id.* At 665. The county stated that it was complying with GMA because it relied on Ecology's rule to designate where new water uses were prohibited. The Court rejected the argument and held that " . . . GMA places an independent responsibility to ensure water availability on counties . . . ." Id. The Court held that local jurisdictions planning under the GMA have a duty to determine legal and physical water availability for development and cannot simply defer to Department of Ecology.

In *Hirst's* Wake

The *Hirst* decision left many local governments wondering how or whether they could continue to issue development permits that rely on permit-exempt wells in areas subject to instream flow rules. Specifi-

cally, there are 15 instream flow rules in the state that are similar to the rule considered in *Hirst*. In 2017, a number of different bills were introduced to address the implications of the *Hirst* decision. Due to a stalemate on this issue, the Washington Legislature did not adopt a capital budget. In January 2018, shortly after the session began, the Legislature adopted Engrossed Substitute Senate Bill 6091.

Senate Bill 6091

Under ESSB 6091, codified in part as Chapter 90.94 RCW, the legislature established a new permitting and watershed planning requirement for the 15 WRIAs subject to instream flow rules adopted before 2001. Pursuant to the Streamflow Restoration Act, in WRIAs with pre-2001 instream flow rules with adopted watershed plans a local government must: collect a $500 fee from applicant for development relying on permit-exempt well, $350 of which would go to Ecology; and limit withdrawal to 3,000 gallons per day (gpd) (no metering required). In WRIAs with pre-2001 instream flow rules with no watershed plan a local government must: collect the same $500; and limit withdrawal to 950 gpd (no metering required). Under the Streamflow Restoration Act, local planning units were required to develop plans to quantify the total annual consumptive use of 20 years of growth relying on domestic permit-exempt groundwater uses and develop a list of policies and projects that would achieve a net ecological benefit (NEB). Under Chapter 90.94 RCW:

> A Net Ecological Benefit determination means anticipated benefits to instream resources from actions designed to restore streamflow will offset and exceed the projected impacts to instream resources from new water use.

In 2018, the Legislature also established a Streamflow Restoration Grant program to fund projects to restore and enhance streamflows.

Watershed Plans Completed in Eight Watersheds

Almost five years after the passage of ESSB 6091, watershed plans have been completed in eight watersheds. In the Nooksack Watershed, at issue in *Hirst*, the local planning effort was unable to adopt a watershed plan addendum to address the requirements of RCW 90.94.020. In accordance with RCW 90.94.020(7)(c), Ecology amended the Nooksack instream flow rule to meet the requirements of the Streamflow Restoration Act. The rule amendments established domestic permit-exempt groundwater withdrawal limits for new users and added flexibility for projects that retime high flows for instream resource benefits. Planning efforts continue in five other watersheds because the local planning committee was unable to adopt an approved watershed plan by June 30, 2021. Under RCW 90.04.030(h), the Director of Ecology is required to submit a final plan to the Salmon Recovery Funding Board (SRFB).

Conclusion and Implications

The SRFB will now provide a technical review and provide recommendations to Ecology on the plan by October 1, 2023. Ecology shall then consider the SRFB recommendations and may amend the plan without the planning committee's approval. After Ecology adopts the plan, it shall have six months to initiate rulemaking to amend the instream flow rule. To date, Ecology has awarded approximately $70 million in grants under the Streamflow Restoration Grant program.
(Jessica Kuchan)

LEGISLATIVE DEVELOPMENTS

FEDERAL DRAFT WATER INFRASTRUCTURE BILL INTRODUCED WHICH AIMS TO IMPROVE CALIFORNIA'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 Krieger, Steve Anderson)

IDAHO WATER USERS ASSOCIATION LEGISLATIVE COMMITTEE CONSIDERING PIECES OF GROUNDWATER-RELATED LEGISLATION

Heading into the 2023 Idaho legislative session, the Idaho Water Users Association Legislative Committee is considering groundwater-related legislation being proposed in hopes of preventing the mining of the resource. The legislation work groups are discussing and reviewing the Idaho domestic use exemption under Idaho Code §§ 42-111 and 42-227, and the possible addition of a new statute, § 42-204A, preferring the use of surface water over groundwater for irrigation purposes.

Idaho's Domestic Use Exemption

Starting in 1963, Idaho enacted legislation requiring that water users participate in a mandatory administrative application for permit process concerning the use of groundwater. Domestic uses are exempt from these administrative process requirements by operation of Idaho Code §§ 42-111 and 42-227.

The domestic exemption allows one to drill a groundwater well and divert up to 13,000 gallons per day for "domestic" uses. Those uses include in-home potable, culinary, bathing and washing uses, and out of home livestock watering (up to 50 head) and up to one-half acre of irrigation use. "Domestic" uses also include "any other uses" provided that the use does not exceed an instantaneous diversion rate of 0.04 cfs and a diversion volume of no more than 2,500 gallons per day.

Calculated over the span of a year, 13,000 gallons per day is a significant quantity of water—upwards of 4,745,000 gallons per year, or 14.5 acre-feet per year. Multiply those quantities and volumes over the many thousands of largely undocumented domestic use rights across the state, and domestic use groundwater demand is significant.

The statute (§ 42-111) does contain some sideboards precluding use of the domestic exemption for multiple ownership residential subdivisions, mobile home parks, and commercial and business establishments unless the use is restricted to the instantaneous diversion rate of 0.04 cfs and a diversion volume of no more than 2,500 gallons per day. However, those restrictions on use are only as good as one's ability to monitor and enforce those restrictions. The same is true of the domestic use quantities and volumes as well.

Though domestic uses were (and remain) exempt from the administrative permit process, many (likely a majority) of domestic-exempt water rights will be documented and catalogued as part of general stream adjudications pending across the state. The largest general stream adjudication—the Snake River Basin Adjudication (SRBA)—deferred the filing and adjudication of "de minimis" domestic and stockwater rights. However, the deferral was just that, not a permanent or perpetual exemption to the adjudication process. Idaho and the federal government are currently arguing in court over when the "deferral" period should end. Understandably, *de minimis* domestic and stockwater uses were deferred so that the volume of those claims did not overwhelm the adjudication process for purposes of adjudicating all other classes of water rights. But now that the adjudication is complete for those other classes of rights, the need to circle back to the de minimis rights remains. But it is a balancing act; the SRBA machinery (administrative staff and court personnel) has been transitioned to use in other general stream adjudications pending in the Idaho panhandle, and will soon also be adjudicating the Bear River Basin in far southeastern Idaho. A flood of deferred domestic and stockwater claims

would likely overwhelm the capabilities of the system until the remaining adjudications are complete.

At this point, the introduction of legislation during the 2023 session regarding the domestic exemption seems unlikely. The work group is largely gathering data and sharing ideas, particularly regarding the current 13,000 gpd statutory quantity. Folks perceive the concern over the potential over-appropriation of groundwater, especially with continuing population growth occurring in unincorporated regions of counties across the state where larger acreage subdivisions (2-5, or more acre parcels) tend to proliferate outside the reach of municipal services (including water supplies).

The Surface Water for Irrigation Use Preference

For decades Idaho legislative policy has pushed a preference for the use of existing surface water supplies for irrigation purposes, rather than the use of groundwater. Perhaps oddly, the surface water use preference statutes have existed outside of Idaho Code Title 42 (Idaho's Water Code) and within Idaho's land use planning statutes only (Title 67, Chapter 65). This statute location discrepancy has not been much of an issue historically; the Idaho Department of Water Resources (Department) has for years routinely imposed a "standard" water right condition on groundwater rights mandating the use of available surface water as the primary source of irrigation supply, and using groundwater only as a supplemental irrigation source.

Recently, however, Idaho's Water Court had reason to review a challenge from a residential subdivision developer over the Department's authority to require the use of available surface water as the preferred source for irrigation purposes. In the case, the subdivision developer desired to leave the issue of domestic and irrigation water supply to the wells of individual lot owners rather than constructing and installing a centralized pressurized irrigation system serving the subdivision. The local surface water irrigation delivery entity (ditch company) opposed the development plan as contrary to the local land use planning statutes (preferring the use of available surface water for irrigation purposes), and contrary to the Department's long-standing use of the "supplemental use" groundwater right condition.

The Director of the Department agreed with the ditch company, and the developer appealed the administrative decision to Idaho's Water Court. On appeal, the district judge overturned the Director's decision largely on the grounds that the legislative preference resides within Idaho Code Title 67, and beyond the purview and authority of the Director under Title 42. In response, water users and the Department of Water Resources are considering surface water preference-confirming legislation for insertion into Idaho Code Title 42—new Idaho Code § 42-204A.

Interestingly, though the statute contains a general preference for the use of available surface water supplies for irrigation purposes as expected, it also contains exceptions where the Department could determine whether the opposite is true—where the use of groundwater for irrigation purposes could be preferred over surface water in areas of the state where groundwater supplies are sufficient and surface water supplies may be more limited due to other constraints (*e.g.*, endangered species requirements or other stream dewatering concerns). As consideration of the proposed legislation continues, others in the work group are raising additional legitimate examples where the general preference for surface water may not make sense—so much so that some are left wondering if the exceptions are going to swallow the rule.

Conclusion and Implications

As with the domestic exemption discussed above, growing development pressure in unincorporated areas heightens the concern over groundwater mining and the need to meet local potable water demand. The surface water irrigation use preference is sound policy, but work group members are well aware that one size rarely fits all.
(Andrew J. Waldera)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES ANNOUNCES STEPS TO SUPPORT STATE 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)

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—Air Quality

•October 6, 2022—EPA and the Department of Justice announced a settlement with the Stony Brook Regional Sewerage Authority (SBRSA). The settlement was filed in the U.S. District Court for the District of New Jersey resolves violations of Clean Air Act and New Jersey Air Pollution Control Act regulations at SBRSA's wastewater treatment plant in Princeton, N.J. Under the proposed settlement, SBRSA will bring the facility into compliance with federal and state laws that protect clean air by reducing pollution from sewage sludge incinerators. SBRSA will also pay a $335,750 civil penalty. The State of New Jersey joined the federal government as a co-plaintiff in this case.

Civil Enforcement Actions and Settlements—Water Quality

•September 19, 2022—EPA issued Emergency Administrative Orders under the authority of the federal Safe Drinking Water Act to two mobile home parks located in the Eastern Coachella Valley on the Torres Martinez Desert Cahuilla Indians Tribe's Reservation in California. EPA discovered that the mobile home parks are serving residents drinking water with naturally occurring, elevated levels of arsenic that exceed federal standards. The Gamez Mobile Home Park and Desert Rose Mobile Home Park serve predominantly agricultural workers. The EPA emergency orders require the parks to provide safe alternative drinking water to residents, install treatment for arsenic, and comply with all federal regulatory requirements for water systems.

•September 27, 2022—EPA announced a cease-and-desist order issued to a New Strawn, Kansas, man and his excavating company directing them to cease dumping materials into wetlands adjacent to a tributary to the Neosho River. According to the order, Michael Skillman, who owns Victory Excavating LLC, placed debris into at least 3.7 acres of wetlands in violation of the federal Clean Water Act (CWA). The Agency says the illegal fill continued even after a cease-and-desist order was issued by the U.S. Army Corps of Engineers in October 2021. Skillman has a history of CWA violations, according to EPA. Last summer, he paid a $60,000 civil penalty to the federal government for the unauthorized placement of broken concrete into the Neosho River. The Compliance Order requires Skillman and Victory Excavating to remove the debris from the wetlands and submit a plan to restore the site. Failure to comply with the order could subject the parties to further enforcement, including penalties.

•October 6, 2022—EPA announced a settlement with Seaport Refining & Environmental, LLC, the owner and operator of a petroleum refinery in Redwood City, California, over claims of violations of the Clean Water Act and the Resource Conservation and Recovery Act. The refinery, which receives and processes waste fuel including gasoline, diesel and jet fuel, is located near Redwood Creek and First Slough, which flow to the San Francisco Bay and the Pacific Ocean. Seaport Refining produces approximately 2,200 pounds of hazardous waste per month. As a result of EPA's findings, the company will pay $127,192 in civil penalties and implement compliance tasks, including developing an air emission monitoring plan, submitting quarterly air emission monitoring results, and inspecting and repairing the facility's tanks.

•October 7, 2022—EPA issued an administrative order under its Clean Water Act authority to the East Chicago Sanitary District in East Chicago, Indiana, to stop an ongoing discharge of untreated wastewater

to the Grand Calumet River following the rupture of a major sewer line. The agency urges residents and visitors to the area to avoid contact with the river until further notice. On September 28, a semi-truck fell through a sinkhole and ruptured a 42-inch sewer pipe carrying raw wastewater to the East Chicago wastewater treatment plant. The incident caused raw sewage to flood the wastewater treatment plant site and Indianapolis Boulevard, which was temporarily blocked. Discharges are also flowing out of a combined sewer overflow point (located on the west side of the Cline Avenue frontage road) into the east branch of the Grand Calumet River at a rate of about 8 million gallons per day. EPA's order requires East Chicago Sanitary District (ECSD) to stop discharges of untreated sewage to the Grand Calumet River by October 11. ECSD will install bypass piping and begin repairs to the ruptured sewer pipe, which carries almost 80 percent of the system's wastewater to the treatment plant. EPA's order also requires ECSD to improve communication with the public by supplementing a public service advisory that was previously issued about the combined sewer overflow and posting results of daily sampling in the river online.

•October 11, 2022—EPA announced a settlement with the Asphalt Sales Company in Olathe, Kansas, under which the company will pay $82,798 in civil penalties and improve pollution controls to resolve alleged violations of the federal Clean Water Act. According to EPA, the company failed to adequately control stormwater runoff from its asphalt production and demolition landfill facility. EPA says these failures led to illegal discharges of pollutants into Cedar Creek.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 28, 2022—EPA announced a settlement with wholesale chemical distributor Univar Solutions USA Inc. over claims of improper management of hazardous waste at its facility in Commerce, California. The company has agreed to pay a $134,386 civil penalty. Univar is a large chemical company headquartered in Downers Grove, Illinois. Its facility in the city of Commerce engages in wholesale distribution of chemical raw materials, among other activities. The facility is classified as a large quantity generator of hazardous wastes under the Resource Conservation and Recovery Act (RCRA). On May 6, 2021, EPA conducted an inspection at the Commerce facility as part of a national initiative focused on reducing hazardous air toxic emissions at hazardous waste facilities. Inspectors found the company violated federal RCRA regulations and California's hazardous waste air emission regulations.

•September 30, 2022—EPA announced a settlement with the Atlantic Richfield Company (AR) under which the company has agreed to complete its cleanup of the Anaconda Smelter Superfund Site (Site) in Deer Lodge County, Montana. The State of Montana, on behalf of the Department of Environmental Quality, is also a signatory to the consent decree that was filed in the U.S. District Court in Butte, Montana. Decades of copper smelting activity at the town of Anaconda polluted the soils in yards, commercial and industrial areas, pastures and open spaces throughout the 300-square-mile Anaconda Site. This pollution has in turn contributed to the contamination of creeks and other surface waters at the Site, as well as of alluvial and bedrock ground water. The closure of smelting operations in 1980 left large volumes of smelter slag, flue dust and hazardous rock tailings that have had to be secured through a variety of remediation methods. Under the settlement, AR—a subsidiary of British Petroleum—will complete numerous remedial activities that it has undertaken at the Anaconda Site pursuant to EPA administrative orders since the 1990s. Among other actions, AR will finish remediating residential yards in the towns of Anaconda and Opportunity, clean up soils in upland areas above Anaconda and eventually effect the closure of remaining slag piles at the Site. The estimated cost of the remaining Site work, including operation and maintenance activities intended to protect remediated lands over the long term, is $83.1 million. AR will pay $48 million to reimburse the EPA Superfund Program for EPA and Department of Justice response costs and will pay approximately $185,000 to the U.S. Forest Service for oversight of future remedial activities on Forest Service-administered lands at the Site.
(Andre Monette)

JUDICIAL DEVELOPMENTS

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 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)

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 jurisdiction 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)

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 IN IDAHO GRANTS MOTION FOR REMEDIES, ISSUES INJUNCTION, BUT LIMITS CIVIL PENALTIES IN CLEAN WATER ACT CLAIMS

Idaho Conservation League v. Shannon Poe,
___F.Supp.4th___, Case No. 1:18-CV-353-REP (D. Id. Sept. 28, 2022).

The U.S. District Court for the District of Idaho recently granted environmental organization's motion for remedies. The court granted a permanent injunction barring a defendant from suction dredge mining on the South Fork Clearwater River (River) unless the defendant acquires and complies with a National Pollutant Discharge Elimination System (NPDES) permit. The court also imposed a $150,000 civil penalty for 42 instances of suction dredge mining on the River without an NPDES permit.

Factual and Procedural Background

Defendant Shannon Poe suction dredge mined the River on 42 separate days during 2014, 2015, and 2018 without obtaining an NPDES permit under Section 402 of the Clean Water Act (CWA). Plaintiff brought a citizen-suit enforcement action to enjoin the defendant's mining activities in the state of Idaho and impose a civil penalty on the defendant for violations of the CWA. The case was bifurcated into a liability phase and a remedial phase. During the liability phase, the court found that: (1) the defendant's suction dredge mining discharged pollutants into the River, thus requiring an NPDES permit under § 402 of the Clean Water Act; and (2) the material discharged from the defendant's mining operation was a pollutant requiring an NPDES permit under § 402.

The plaintiff then filed a motion for remedies requesting that the court order (1) an injunction barring the defendant from suction dredge mining in Idaho unless he obtains and complies with an NPDES permit under the CWA, and (ii) civil penalties against the defendant in an amount of at least $564,924. The Clean Water Act authorizes a court to order that relief it considers necessary to secure prompt compliance with the Act.

The District Court's Decision

Injunctive Relief

The court first considered plaintiff's request for injunctive relief. To demonstrate a permanent injunction should issue, a plaintiff must establish that: (1) the plaintiff has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) a remedy in equity is warranted, considering the balance of hardships between plaintiff and defendant; and (4) the public interest would not be disserved by a permanent injunction. Defendant did not dispute that the plaintiff failed to meet these elements; instead, the defendant argued that the injunction was unnecessary and moot because he was not currently mining and had not since 2018, and a civil penalty would deter future violations.

The court concluded that an irreparable injury occurred as a matter of law when defendant's dredge mining added pollutants to the River. Based upon this and other facts in the record, the court found that that the dredge mining caused environmental harm by degrading water quality and potentially threating endangered species in the waterway, sufficient to amount to an irreparable injury. Additionally, the court dismissed the defendant's argument that his alleged compliance with state permits with best practices that somewhat overlapped with those of an NPDES permit meant that no irreparable injury occurred, stating that such a conclusion would render the CWA without purpose and found this position unsupported by the law.

The court next found that legal remedies were inadequate, noting that the U.S. Supreme Court has recognized, in most instances, environmental harms are not readily compensable by money damages. The court further noted that money damages were not available to the plaintiff, because civil penalties are paid to the U.S. Treasury.

The court concluded that the balance of hardships favored issuing an injunction, finding that there was no counterweight to the irreparable injury caused by defendant's permitless suction dredge mining. The court noted that any burden from complying with the CWA by securing a legally-required NPDES permit is not a hardship, let alone one sufficient to outweigh

the proven environmental harms caused by the defendant.

The court also reasoned that an injunction would be in the public interest, as courts have recognized that the public interest is served by protecting the environment and ensuring compliance with and strict enforcement of the CWA.

Turning to the defendant's arguments that an injunction would be unnecessary and moot, the court disagreed, stating that the defendant's lack of CWA violations since 2018 was due to the fact he had not mined in the River since then rather than because he had secured an NPDES permit as required. Voluntary cessation of a challenged practice in response to pending litigation does not moot a case. Further, the court dismissed the defendant's contention that the availability of civil penalties precluded injunctive relief, affirming that the CWA authorizes courts to impose one, either, or both of the potential remedies, and that, regardless, the factors in this case independently supported granting injunctive relief.

Finally, the court determined that an injunction against suction dredge mining in the River was sufficiently narrow and specifically tailored to fit the dispute giving rise to its issuance. The scope of the issued injunction was narrower than the entire state as requested by the plaintiff.

Civil Penalties

The court then considered plaintiff's request for civil penalties in the amount of $564,924. The CWA permits courts to apply any appropriate civil penalties for violations in order to provide restitution, punish the violator, and deter similar conduct by the violator and others in the future. The court explained that civil penalties in CWA cases involve highly discretionary calculations in which the court must take into account the following factors: (1) the seriousness of the violations; (2) the economic benefit, if any, resulting from the violations; (3) any history of such violations; (4) any good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) any other matters as justice may require. Defendant argued the requested penalties were excessive and unduly burdensome, proposing that a $60,924 penalty more accurately addressed his conduct and the surrounding circumstances.

Courts either employ a "top-down" or "bottom-up" approach when calculating civil penalties under the CWA. In a top-down approach, a court first calculates the maximum penalty, and then adjusts the penalty downward in consideration of the six statutory factors. In a bottom-up method, the court begins by calculating the economic benefit realized by the defendant as a result of non-compliance, and then adjusts that amount upward or downward based on the court's evaluation of the remaining factors.

The court employed a bottom-up approach here, noting that the defendant chose not to pull an NPDES permit largely due to advice from his legal counsel not to do so, as well as their correspondence with the U.S. Environmental Protection Agency, to which the EPA never replied, in which counsel disagreed with the EPA's assertion that an NPDES permit was needed for the defendant's suction dredge mining activities.

First, the court determined that that economic benefit to the defendant was $10,524—the value of the minerals extracted from the River by the defendant, as conceded by him—and set the initial cost of the penalty at that amount. Next, the court examined the seriousness and history of the defendant's CWA violations, acknowledging that Congress has flatly prohibited the discharge of any pollutant by any person except in compliance with the CWA. The defendant violated this clear prohibition in the CWA 42 times, and the court found that such violations were unquestionably serious. In determining the relative seriousness of the defendant's violations, the court declined to compare the environmental impacts of the defendant's mining activities against permitted suction dredge mining, stating that it is a false equivalence given that the defendant should not have been mining without a permit at all, and that if he had not illegally mined, he would not have discharged any pollutants into the waterway. The court concluded that all 42 incidents were serious CWA violations which, together, warranted an upward adjustment of the penalty amount.

Third, the court noted that good faith efforts to comply with applicable permit requirements may reduce civil penalties, and that this factor turned on whether the defendant took any actions to decrease the number of violations or made efforts to mitigate the impact of violations on the environment. The

court explained that the defendant had not only steadfastly maintained his position that suction dredge mining does not require an NPDES permit and that his activities were not in opposition to the EPA, but also claimed that his opinions were protected by the First Amendment. The defendant also argued that his compliance with state permit requirements demonstrated that he still respected the conditions that are in place to minimize and eliminate the environmental impacts of his operations. The court dismissed the First Amendment argument, stating that whatever protections exist thereunder do not excuse CWA violations and do not amount to good faith efforts to comply with the CWA. The court acknowledged that the defendant's insistence against acquiring an NPDES permit appeared to arise from his attorneys' advice, but noted that this does not establish a good faith effort to comply with the CWA, and that short of actually acquiring an NPDES permit before mining, the proper course of action in this instance was to administratively engage to resolution or proactively seek relief from the courts. Ultimately, the court found that the defendant purposely chose not to seek an NPDES permit, ignored violation noticed, and repeatedly mined without a permit, and justifying an upward adjustment of the penalty.

Fourth, the court stated that it may reduce the civil penalty against a party if the maximum statutory penalty would work an undue hardship, which is established by the defendant showing that the penalty will have a ruinous effect. The court noted that the record did not support a finding that the defendant had significant funds to pay the $564,924 penalty sought by the plaintiffs, instead finding that such a penalty would have a more drastic effect on than necessary to account for his CWA violations and ensure future compliance. However, the court held that the defendant failed to establish a basis for the significantly lower amount he suggested, or explain how a higher penalty would be ruinous to him, and thus it was not limited to his proposed penalty of $60,925.

Conclusion and Implications

In light of the factors discussed above, the court assessed a civil penalty of $150,000, the sum of the economic benefit to the defendant and $3,320.86 per violation. The court explained that this penalty was 8 percent of the maximum possible penalty and consistent with the penalties imposed in analogous cases. Furthermore, the court concluded that the penalty accounts for the serious nature of the defendant's violations over three years while acknowledging that suction dredge mining is allowed on the River when properly permitted and the defendant was acting as an individual and has limited resources.

This case affirms well-established guidelines for providing remedies in the form of injunctive relief and civil penalties for violations of the Clean Water Act. Of particular note is the court's unequivocal reliance on attempts—or lack thereof—to obtain and comply with an NPDES permit. The court's opinion is available online at: https://scholar.google.com/scholar_case?case=8667808127392641 66&q=Idaho+Conservation+League+v.+Poe&hl=en&as_sdt=2006. (Rebecca Andrews)

COLORADO COURT OF APPEALS UPHOLDS LARIMER COUNTY DENIAL OF THORNTON PIPELINE PROJECT

City of Thornton v. Board of County Commissioners of Larimer County, Case No. 21CA0467 (Colo.App. Sept 1, 2022).

On September 1, 2022, the Colorado Court of Appeals upheld the Larimer County Board of County Commissioners' (BOCC) decision denying the City of Thornton a permit to construct an 80-mile domestic water pipeline. Although the Court of Appeals found that the BOCC exceeded its regulatory powers in several respects, it nevertheless affirmed the BOCC's ruling. This decision highlights the scope of Colorado counties' regulatory powers under the 1041 review process and confirms counties' wide-ranging authority to permit or deny large-scale domestic water infrastructure projects within their boundaries.

Background and Procedural History

A comprehensive background of Thornton's proposed water pipeline project previously appeared in the October 2021 edition of Western Water Law and Policy Reporter. *See, Colorado Update of Physical Water Transfers: Thornton Pipeline Project Moves Forward in Weld County, But Remains Stalled in Larimer County*, 25 W. Water L. & P'lcy Rptr. 303, 303-04 (Oct. 2021). To briefly recap, Thornton is a large suburb north of Denver, currently home to 140,000 residents. Thornton owns approximately 14,000 acre-feet per year of water rights decreed to divert from the Cache La Poudre River north of Fort Collins, Colorado.

From its diversion points, Thornton plans to construct an 80-mile long, 48-inch domestic water pipeline (the Thornton Water Project or TWP) to deliver the water. The proposed pipeline will cross Adams, Larimer, and Weld Counties and has faced significant opposition from local governments and special interest groups.

The Larimer County BOCC rejected Thornton's application in 2019 under its 1041 review powers. Briefly, the state's 1041 review process originated in 1974 when the Colorado General Assembly enacted House Bill 1041, allowing counties to develop "1041 regulations" to oversee various developmental activities. To trigger a 1041 review, a proposed project must involve "activities of state interest." Relevant here, one example of an activity of state interest includes site selection and construction of major new domestic water systems. Such projects then must align with the county's stated development and environmental goals to qualify for a permit. In this case, the BOCC's review focused on twelve criteria codified in the Larimer County Land Use Code to evaluate 1041 projects.

After the BOCC's denial, Thornton appealed to the Larimer County District Court under C.R.C.P. 106(a)(4), which focuses the court's review on whether the governmental body abused its discretion. The state District Court found that several of the BOCC's conclusions constituted an abuse of discretion. But three concerns—criteria 1, 2, and 4—were supported by competent evidence. Because Thornton's application needed to satisfy all 12 criteria under the Larimer County 1041 review process, the court affirmed the BOCC's decision to deny the permit. Thornton then appealed to the Colorado Court of Appeals, which also focused on the BOCC's decision under C.R.C.P. 106(a)(4).

The Colorado Court of Appeals' Decision—Affirmation of Larimer County BOCC's Decision to Deny the Permit

A fatal flaw in Thornton's plan that was discussed throughout the court's opinion was Thornton's use of a "corridor approach" when siting the TWP. Under the corridor approach, Thornton designated a 500-foot-wide pathway in which it could locate the TWP. After several miles of the 500-foot corridor (principally through neighborhoods), the corridor expanded to one-quarter of a mile wide as it crossed rural Larimer County. Unfortunately for Thornton, it relied on the corridor approach at the suggestion of the Larimer County Planning Commission. However, both Thornton and the Planning Commission believed that the corridor approach would give Thornton flexibility in working with landowners and eventually locating easements for the TWP.

The Court of Appeals agreed with the BOCC's conclusion that the corridor's flexibility made the final location of the TWP uncertain and prevented the BOCC from adequately evaluating potential impacts. Thus, the Court of Appeals upheld the BOCC's denial of Thornton's application and agreed that, because the BOCC could not assess the specific impacts of the project, its finding that the proposal did not meet the 1041 standards was not an abuse of discretion.

Criterion #1: TWP Lacked Consistency with the Larimer County Master Plan

Larimer County's first criterion under a 1041-review requires a proposal to be "consistent with the master plan and applicable intergovernmental agreements affecting land use and development." The Larimer County Master Plan, like most Colorado counties' plans, is a useful, but complex document. The BOCC found that Thornton's application conflicted with six themes throughout the Master Plan. The BOCC did not specify why Thornton's plan was inconsistent with those themes but rather focused on Thornton's corridor approach. The Court of Appeals agreed and found that the lack of specificity "deprived the [BOCC] of the ability to assess the specific impacts to private property owners." *City of Thornton*, 21CA0467 at 19.

However, the court also held that the BOCC did abuse its discretion on two other matters under Criterion #1. First, the BOCC faulted Thornton for failing to analyze the "cumulative impacts of irrigated farmland turning to dryland" because of the TWP. The concern over "buy and dry," a process in which growing municipalities purchase senior agricultural water rights and then change the water rights for municipal use while leaving the ag land fallow, is widespread throughout Colorado. But the court held that such a consideration was beyond the BOCC's jurisdiction to regulate "siting and development" of domestic water pipelines under their 1041 review powers. More importantly, the court confirmed that:

> Colorado law prohibits such master plans from being used to 'supersede, abrogate, or otherwise impair…the right to beneficially use water pursuant to decrees.' *Id.* at 22 (quoting C.R.S. § 30-28-106(3)(a)(IV)(E)).

Because Thornton already possessed water rights decrees changing the water rights from irrigation to municipal use, the BOCC could not now consider the TWP's effects of utilizing those decreed rights in reviewing Thornton's application.

Second, the BOCC further took issue with the application because Thornton would likely have to use eminent domain to acquire rights-of-way for the TWP. According to the BOCC, eminent domain is "a process generally disfavored by landowners." *Id.* at 17. The court found this critique by the BOCC to be an abuse of discretion and cited to the Colorado Constitution Article 16, § 7, which guarantees municipalities "the right-of-way across public, private, and corporate lands…for the purpose of conveying water for domestic purposes…upon payment of just compensation." Colorado law further prohibits a local government from using its 1041 powers to "diminish the rights of owners of property as provided by the state constitution." C.R.S. § 24-65-106(1)(a). Thus, the Court of Appeals held that a county may not consider potential use of eminent domain during a 1041 review.

Criterion #2: TWP's Siting and Design Alternatives

The second criterion requires the applicant to present "reasonable siting and design alternatives" or explain why such alternatives do not exist. Again, the court generally agreed with the BOCC's finding that the corridor approach created too much ambiguity such that it prevented the BOCC from evaluating the impacts, and thus Thornton failed to provide reasonable citing alternatives. The Court of Appeals found that, because the corridors were so vague, that was sufficient to render the alternatives "unreasonable."

Similar to Criterion #1, the court found that the BOCC's analysis of Criterion #2 was in some ways too broad. During the initial review, the BOCC took issue with Thornton's failure to analyze the "Shields Street Concept." This plan, also called the Poudre River Alternative, would entail Thornton running its water through Fort Collins, and then diverting from the Poudre River at a point further downstream than initially contemplated. This option was supported by many special interest groups who would like to see more water left in the Poudre River for as long as possible. But Thornton rejected this plan because it claims this would significantly degrade the water quality and require additional treatment. The court found that requiring such an alternative exceeded the BOCC's regulatory power because it would diminish Thornton's water rights.

Criterion #4: TWP's Impacts on Natural Resources

The final criterion in the Larimer County Code analyzed by the Court of Appeals requires an applicant to provide that its proposal:

> . . .will not have a significant adverse affect [sic] on or will adequately mitigate significant adverse affects [sic] on the land or its natural resources.

The BOCC listed numerous reasons why Thornton did not meet this standard, before again falling back on the corridor issue, stating "the sheer size of the proposed 500 feet to ¼ mile wide corridor prevents the Board and private property owners from reasonably considering all impacts. This uncertainty is, in itself, a significant impact of this project."

The court agreed, finding that it did not matter whether any potential impacts would be temporary or permanent, but instead:

> . . .what matters is that the width of the corridor clouds the ability of the Board to analyze those impacts (or lack thereof). This opacity, in and of itself, is sufficient to qualify as a 'significant adverse [e]ffect. *City of Thornton*, 21CA0467 at 33.

Conclusion and Implications

This decision from the Court of Appeals highlights the difficulties certain Colorado municipal water providers face when planning, permitting and constructing large-scale domestic water projects through multiple jurisdictions. Colorado's 1041 review process generally grants counties wide latitude and discretion in their review. However, the Court of Appeals' opinion underscores that such discretion is not unlimited and a county's decisions must be strictly confined to the county's regulatory powers. A county cannot use the 1041 process to restrict rights previously vested under the Colorado Constitution or other statutory authority, such as a water right owner's ability to use their decreed water right, or to condemn a ditch or pipeline easement pursuant to the water right.

Thornton recently announced through a press release that it will not appeal this decision but will work toward "an agreed upon solution between Thornton and Larimer County." Any future piping in Larimer County will likely require a new application and 1041 approval from the Larimer County BOCC. The Court of Appeals decision made clear that Thornton must refine its pipeline plans and not rely on the corridor approach, as such a proposal is not detailed enough to survive 1041 review.

Thornton continues to construct the TWP outside Larimer County and hopes to complete the project in its entirety by 2025.
(John Sittler, Jason Groves)

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