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# WESTERN WATER LAW & POLICY REPORTER™

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## JUDICIAL DEVELOPMENTS



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## WESTERN WATER NEWS

# SIGNIFICANT SUMMER RAINS AVERT NEW MEXICO WATER CRISIS CAUSED BY HISTORIC WILDFIRES—BUT IMPACTS TO WATER QUALITY, PROPERTY AND IRRIGATION SYSTEMS FOLLOW

New Mexico's continuing severe drought conditions entering 2022 and lasting through much of the year contributed to two separate federal prescribed burns in northern New Mexico. The prescribed burns unintentionally led to the largest and most destructive wildfire in New Mexico's history. The large fire formed by the merging of two individual wildfires, each initially caused by United States Forest Service employees attempting forest fire prevention via prescribed burns. The Hermits Peak Fire began on April 6, 2022, and the Calf Canyon Fire began on April 19, 2022. These fires merged into the larger devastating fire that scorched northern New Mexico from April to August 2022. The Calf Canyon/Hermits Peak Fire burned a total of 341,471 acres. InciWeb Incident Overview, Calf Canyon, https://inciweb.nwcg.gov/incident-information/nmsnf-calf-canyon (last visited November 30, 2022). While the fire and its destruction was immensely destructive on its own, the consequences of such a large fire were exacerbated by large amounts of summer monsoon rainfall, which lead to landslides and water quality issues throughout the region.

### Background

A few months after the fire was finally extinguished, relentless summer monsoons, which would normally be a cause for elation, pushed hillsides of dirt, debris and soot into the City of Las Vegas (City), New Mexico's watershed, rendering much of the water untreatable and undrinkable. City of Las Vegas, New Mexico, water utility officials believed that the fire was going to have minor effects on the City's watershed. Unfortunately, the direction of the wind shifted a few days into the Wildfire's existence, and the City then found itself in a direct pathway towards disaster. Once the 340,000-acre fire had finally eased, the fragile Gallinas River watershed felt direct impacts. The unusually wet monsoon rains brought carbon-rich dirt and debris into the City's main water source, the Gallinas River, as well as one of two primary reservoirs. The water flowing into the treatment facility became too contaminated to treat. Officials began planning to build a temporary pretreatment system and use some water from the City's quickly depleting reservoir, to ease the strain on the treatment facility.

In August, 2022, the City of Las Vegas came only days away from running out of drinking water for its residents. Luckily, the strain on the City's water supply eased in part due to the planning and installation of a pretreatment system. The system was installed at the base of Storrie Reservoir Dam. By doing this, the system helped remove the ash and sediment from the water before pumping the water back up to the drinking water plant, where the oversaturation of contamination proved superior to the ability of the treatment facility. As the summer monsoon season waned, the water quality levels in the Las Vegas region returned to pre-fire levels. Additionally, the City is now in the process of bringing in a more permanent water treatment structure further upstream that will produce more water. That system could help provide clean water for everyone in Las Vegas area. The City has applied for more than $100 million dollars in state and federal funding for the permanent water shed treatment facility. To many residents of the region, providing this assistance and beyond is the government's responsibility.

In June, approximately two months after the two separate United States Forest Service-caused fires merged into one, President Joe Biden visited New Mexico to meet with state leadership to discuss the state of emergency in the State due to the Wildfire's effects. During his visit, President Biden stated:

> I think we have a responsibility as a government to deal with the communities who are put in such jeopardy. And today I am announcing that the federal government is covering 100% of the cost.

President Biden acknowledged the federal government's role in starting the fire and clarified that the State of New Mexico would not incur any portion of the economic costs related to the destruction the fires caused. On September 30, 2022, President Biden signed the Hermit's Peak/Calf Canyon Fire Assistance Act, Pub. L. No. 117-180, 136 Stat. 2114, 2168-2176 (2022). The Act provides $2.5 billion to compensate New Mexicans and Tribal Nations impacted by the Hermit's Peak/Calf Canyon Fire. The funding covers any and all eligible losses including personal injury, loss of property, business loss, or other forms of financial loss.

### Impact of Wildfires

The Hermit's Peak/Calf Canyon Wildfire's impact cannot be understated and was far-reaching. New Mexico's irrigation community dates back to irrigation by pre-historic indigenous peoples and to more "modern" community ditch systems that were first introduced by settlers in the 1500s. In the Las Vegas area, these ditch systems are called acequias, and are considered State historic landmarks. *See, e.g.*, Wikipedia, Acequia Madre (Las Vegas, New Mexico), https://en.wikipedia.org/wiki/Acequia_Madre_(Las_Vegas,_New_Mexico) (last visited November 30, 2022). Protection of acequias is enshrined in New Mexico statutes. *See* NMSA 1978, § 73-2-1 through 73-2-68; *see also Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914). Destruction of acequias is akin to destruction of priceless pieces of art to the centuries old agricultural communities who depend on acequia culture and who see themselves as being stewards of acequia traditions. Thus, the response by both federal and state governments to the damage caused by the Wildfire is critical.

### Water Treatment, Property Damage and Irrigation Challenges

Despite the progress in the water treatment systems and property damage compensation for the residents impacted by fires, some notable problems relating to the Hermit's Peak/Calf Canyon Fire linger on. The Hermit's Peak/Calf Canyon Wildfire, alongside the sudden summer downpours, directly affected approximately 70 acequias in northern New Mexico. These direct impacts threaten the irrigation communities' ability to irrigate next year and perhaps beyond. The majority of the damage to acequias occurred when the sudden summer monsoon rainstorms sent flood waters flowing over Wildfire burn scars, leading to cascading landslides filling irrigation ditches with silt, ash and debris and, in some cases completely blocking ditch headgates and diversion dams. Each affected acequia's situation is different, some are fully blocked by the erosion brought by flooding, others are only partially blocked. Acequias are political subdivisions of state government, governed by elected officers. NMSA 1978, § 73-2-12 (1987); NMSA 1978, § 73-2-28 (2001). The New Mexico Acequia Association (NMAA) has encouraged acequias to apply for every form of available aid, including Federal Emergency Management Agency (FEMA) Public Assistance, Individual Assistance funds, and to file notices of loss to get a portion of the $2.5 billion procurable through the Hermits Peak Fire Assistance Act signed in September. The issue for some acequias isn't access to funds, but time. There is concern that there isn't enough time for some acequias to clear debris blocking the ditch, plus complete any necessary structural fixes necessary for a functional community ditch system to continue, by next year.

### Conclusion and Implications

The Hermits Peak/Calf Canyon Wildfire exploded into New Mexico's worst wildfire in the state's history. Since the fire was caused by the United States Forest Service, the federal government took full responsibility for the disaster that ensued and committed to cover the costs of the damages related to the incident. The City of Las Vegas, at one point being only days away from running out of drinking water, worked through the crisis to install temporary pre-treatment systems to aid the water treatment facility that was being overwhelmed by the highly polluted water it was attempting to treat. Now, the affected communities are taking advantage of the federal assistance available after the Hermit's Peak Fire Assistance Act was signed into law in late September. Despite this, issues relating to the wildfire linger. Specifically, some communities that rely on acequias find themselves unsure of their ability to clear debris and fix damage to fixtures in time for next year's irrigation season. The impacts of this wildfire will continue to be felt by northern New Mexico acequias, water users and landowners for years to come.
(Christina J. Bruff, James Grieco)

# NEW TECHNICAL STUDY ASSESSES COSTS AND PRACTICAL CONSIDERATIONS IN MOVING WATER FROM THE MISSISSIPPI TO FUEL DROUGHT STRIKEN COLORADO RIVER BASIN

The concept of shipping Mississippi River water to dry western states has been in drought discussions for many years now. Despite the popularity of this idea, there has been a surprising lack of information available to the public to weigh the practical aspects of such a proposal. In response to this, and specifically in response to the recent discussion on the subject in the Arizona state legislature, a trio of researchers led by environmental scientist and professor at Western Illinois University Roger Viadero took a deeper look at the costs associated with such a project. The resulting technical report covers some of the major constraints that such a project would face, including the how and how much for moving water from the Mississippi to refill Lake Powell and Lake Mead.

## A Look into How Much Water is Available

Using data from the US Geological Survey (USGS), the researchers started the report with some preliminary problems pervasive in any proposal to move water westward. The USGS has collected water level and flowrate data at a gage station in Lees Ferry, Arizona, dating back to 1921. From 1921 to August 2022, the average measured flowrate at Lees Ferry was 14,457cfs, or 10.5 Million Acre-Feet per year (MAF/yr). The U.S. Bureau of Reclamation, however, reported the average annual natural flowrate in the same timeframe as 14.2 MAF/yr. The report does note that this discrepancy is largely the result of differences in terminology and data reduction methods, but regardless of the of the different measurements the main takeaway from this was that neither number is sufficient to satisfy the 15 MAF annual allocation assigned to the Upper and Lower Colorado River Basins.

Despite the differences in data noted above, the report takes specific aim at the assertion that roughly 4.5 million gallons per second flow past the Old River Control Structure (ORCS) on the Mississippi. To assess this number, the report looked at the low, average, and high water discharge data for the Mississippi River just above the ORCS from 2002 to 2022. Over the two decades reviewed, however, the 4.5 million gallons per second was never even hit – the highest flowrate over the 20-year period occurred in 2019 where it reached 4,488,000 gallons per second. Furthermore, the average flowrate over that period was just 3.2 million gallons per second.

Now with the total flowrate of the Mississippi River in mind, the report next moved on to assess the proposed diversion rate of 250,000 gallons per second to refill Lake Powell and Lake Mead. When comparing this figure to the flowrate of the Mississippi, this proposed diversion is just under 8 percent of the total average flow. While this figure may seem relatively small, in dryer years the 250,000 gallons per second figure occupies nearly 17 percent of the river's total flow—a not insignificant amount of water. To put this figure into perspective, the Colorado River will soon face a 21 percent reduction in diversions as a result of a Tier 2 water shortage.

## The Absolute Scale of Moving So Much Water to the West

Even assuming the Mississippi River could withstand the withdrawal of 250,000 gallons per second, the researchers expressed serious skepticism as to the feasibility of transporting so much water. In moving water, the flowrate directly relates to the velocity of the water as well as the cross-sectional area of the diversion facilities used to move the water. Water conveyance systems can typically move water at a rate of three to eight feet per second while operating pumps at reasonable efficiencies and minimizing mechanical wear. Taking the median of this range, the researchers assumed that in this case a cross-sectional area of roughly 6,100 feet would be needed to meet the proposed flow requirement of 250,000 gallons per second.

For an open channel conveyance system, the researchers explained that this would necessitate a channel that is 100 feet wide and 61 feet deep, or 1,000 feet wide and 6.1 feet deep. By comparison, the State Water Project's California Aqueduct varies from 12 to 85 feet in width and averages 30 feet in depth. Using this average depth, the proposed flowrate of 250,000 gallons per second would still necessitate a channel that is 200 feet wide and 30.5

feet in depth—a channel that would be twice the size of California's own monumental conveyance system. Furthermore, in digging such a channel, over 1.9 billion cubic yards of excavated material would be created in the process.

Using a pipeline to move the water isn't much better an idea either. The piping required to move the proposed flowrate would need to be around 88 feet in diameter—or about the same height as a seven-story building.

The cross-sectional area alone creates a significant barrier for the conveyance by itself, but two other factors pose major roadblocks as well: distance and elevation. The shortest distance between the Mississippi and the Colorado spans a little less than 1,200 miles, but a straight shot from river-to-river is a pipe dream at best. A more realistic route running along established highways and interstates would run nearly 1,600 miles. The vertical distance would also be immense. Looking at the direct route from the ORCS to Lake Powell, the maximum elevation would reach just over 11,000 feet outside Santa Fe, New Mexico. In any case, the water would need to move from the ORCS with an elevation of about 30 feet, all the way up to Lake Powell which sits at an elevation of 4,620 feet. The California Aqueduct, by comparison, traverses the relatively flat Central Valley before being lift over the Tehachapi Mountains where 14 pumps lift water about 1,900 feet—less than half of the elevation difference between the ORCS and Lake Powell.

## Conclusion and Implications

The idea of moving water from the relatively wet eastern side of the United States to the arid west has always been a tempting proposition. Tempting as it is, however, it is simply too large an undertaking to be feasibly accomplished. In the words of the researchers, "time, space, ecology, finances, and politics aren't on the side of this proposal." The researchers even assessed this massive project at a mere $0.01 per gallon of water moved, but even at this cost the researchers concluded it would cost at least $135 billion to refill Lakes Powell and Mead. Furthermore, even when looking beyond the sheer scale of the project and its associated cost, the diversion would likely require the coordination and cooperation of a dozen-or-so states. Despite the pessimistic view of such a proposal, the researchers' report did not purport to dissuade readers from the idea of moving water westward, it served to inform readers that no one solution exists that can save western states from persistent drought. Instead, these states will need to continue to implement smaller scale projects while improving conservation efforts in order to maintain adequate water supply through this and future drought. For more information on the study, *see:* https://www.researchgate.net/publication/364353761_Meeting_the_Need_for_Water_in_the_Lower_Colorado_River_by_Diverting_Water_from_the_Mississippi_River_-A_Practical_Assessment_of_a_Popular_Proposal
(Wesley A. Miliband, Kristopher T. Strouse)

## LEGISLATIVE DEVELOPMENTS

# RESOLVING INTERSTATE FLOW ISSUES— INTERSTATE AGREEMENTS IN THE MODERN ERA: THE WALLA WALLA INTEGRATED WATER RESOURCE PLAN

The Washington State Legislature will be considering legislation during 2023 which could finally lead to an interstate governance structure for the Walla Walla Basin.

### Basin Context

The headwaters of the Walla Walla River lie in the Blue Mountains of northeastern Oregon and drains into the Columbia River on the east side of the Cascade Mountains, spanning the state boundary of Oregon and Washington. Approximately two-thirds of the physical watershed lies in Washington, with the remaining one-third in Oregon, including the headwaters of the Walla Walla River. The watershed represents part of the ancestral home of the Umatilla, Cayuse, and Walla Walla Tribes (now called the Confederated Tribes of the Umatilla Indians (CTUIR)) as well as ceded lands of the Nez Perce Tribe.

Water resources in the Walla Walla River Basin are available from deep basalt aquifers (Columbia River Basalt Group), the overlying basin-fill aquifer, streams, and springs. Groundwater is well connected to streams in the basin, and groundwater declines result in streamflow decreases during the dry summers. Irrigated agriculture accounts for the largest groundwater use but groundwater also supplies industrial, municipal, domestic, and livestock needs. Surface water is over appropriated, and groundwater declines reduce summer streamflow required for fish populations, including several listed as threatened under the federal Endangered Species Act (ESA). Over appropriation in the basin means that if all water-rights holders used their full allotments, streams would run dry (Walla Walla Watershed Management Partnership, 2018).

### How Did We Get Here?

Transboundary rivers, and their associated hydraulic continuity, present unique challenges. In 2019, the Washington Legislature funded an ongoing strategic planning effort, known as Walla Walla Water 2050 Plan (WW 2050), with the directive to improve streamflows and water supplies throughout the bi-state watershed over the course of the next 30 years. Finding basin solutions involves the Washington State Department of Ecology's Office of Columbia River, working collaboratively with the Walla Walla Partnership, Confederated Tribes of the Umatilla Indian Reservation, Oregon Department of Water Resources, local governments in both states, environmental non-profits, irrigators, and basin stakeholders representing a diverse representation of water users and the interested public.

WW 2050 extends and builds on decades of work done by the tribes, the partnership, and others that focused on water rights, flow issues, and a bi-state flow study supporting restoration of ecological functions to support spring chinook salmon and ESA-listed steelhead and bull trout. WW 2050 focuses on five critical areas within the Walla Walla Basin: (1) floodplains, critical species, habitat and water quality; (2) water supply, streamflows and groundwater; (3) land use and flood control; (4) quality of life; and (5) monitoring and metering.

The WW 2050 Plan, finalized in June of 2021, calls for a combination of strategies designed to improve stream flows and riparian health while supporting agriculture, and municipal and industrial water users. No small task anywhere in the west. Strategies such as these tend to stretch the limits of available local funding and generic state laws around water and water rights but become even more difficult to implement when state lines intercede in management efforts. In order to keep the stakeholders together with creative and comprehensive solutions, both sides of the basin will need to bring their state legislative authorities along.

### Implementation Legislation

Washington and Oregon are now in the process of formal adoption of the provisions of the WW 2050

Plan. On the Oregon side, this requires recognition of the WW 2050 Plan as an "Integrated Water Resource Strategy" by the Oregon Water Resources Commission. On the Washington side, the Department of Ecology has developed legislation it anticipates as Governor request legislation.

Washington's legislation (Z-0110.1/23) for authorization to implement the WW 2050 Plan includes:

- New authorities under the Office of the Columbia River (RCW 90.90), to recognize the WW 2050 Plan as an integrated water resource strategy, which would then require Ecology to consider the Plan when making decisions in the basin;

- Formal recognition of the relationship between Ecology and the Walla Walla Advisory Committee as an obligatory advisor to further agency actions to maintain local control and commitment;

- Direction to Ecology to evaluate the development of "a bi-state legal regulatory framework" for the allocation of new water resources, in consultation with affected tribes and in collaboration with the State of Oregon. This directive includes a report back to the Legislature for a framework designed to provide for the equitable allocation and management of developed water resources from new infrastructure (the beginning of a compact process);

- Grant of authority to Ecology to recognize increased flows from Oregon efforts as instream flow under the trust water program to limit the availability of those waters for use by existing water users. This is key to upstream investments by Oregon and the tribes;

- Grant of authority to Ecology to use Washington funds to build projects in Oregon provided those projects benefit Washington waters;

- Recognition of agreements entered between Washington, Oregon, and the tribes, when apportioning water supplies developed under the Plan, designed to support both instream flows and multiparty engagement with projects to support local water uers; and

- Funding restrictions that no more than 50 percent of aggregate project costs for implementation of the WW 2050 Plan come from the State of Washington. Note, this restriction applies on an aggregate basis, which means individual projects may be funded in whole or in part provided the total Plan investments by Washington remain at or less than 50 percent.

### Conclusion and Implications

Despite sharing significant watershed boundaries with the States of Oregon and Idaho, Washington is the only state in the west without any Interstate Compacts or Agreements in place. (*See,* Interstate Council on Water Policy, A Primer Interstate Water Resource Management Agreements, and Organizations, Dec. 2020.) Without a coordinated solution, both in-stream and out-of-stream water needs will suffer as climate change and the prior appropriation place pressure on an already limited water supply. Keeping all parties at the table has required adaptation and trust locally, the test of those locally built strategies will be in selling the need and the faith in those solutions outside the basin. The question remains in how far the auspices of Olympia and Salem will be willing to stretch the general rules of state water law where the locals are seeking recognition of new local customs.
(Jamie Morin, Alisa Royem)

## REGULATORY DEVELOPMENTS

# U.S. DEPARTMENT OF THE INTERIOR ANNOUNCES $210 MILLION FOR DROUGHT RESILIENCE PROJECTS IN THE WEST

On October 17, 2022, the United States Department of the Interior announced that $210 million from President Biden's Bipartisan Infrastructure Law will be allocated to drought resilience projects in the West. The funding is aimed at bringing clean drinking water to western communities through various water storage and conveyance projects. These projects are anticipated to add 1.7 million acre-feet of storage capacity to the West, which can support around 6.8 million people for an entire year. In addition to these projects, the allocation will fund two feasibility studies on advancing more water storage capacities.

### Background

On November 15, 2021, President Joe Biden signed the Bipartisan Infrastructure Law, also known as the Bipartisan Infrastructure Investment and Jobs Act, into law. This is a different funding source for drought resilience projects than the Inflation Reduction Act that President Biden signed into law in August 2022. The overall focus of the Bipartisan Infrastructure Law is to rebuild the country's infrastructure, create good jobs, and grow the economy. There are six main priorities guiding the law's implementation: (1) investing public funds efficiently with measurable outcomes in mind; (2) buy American and increase the economy's competitiveness; (3) create job opportunities for millions of people; (4) invest public dollars equitably; (5) build infrastructure that withstands climate change impacts; and (6) coordinate with state, local, tribal, and territorial governments to implement these investments.

President Biden's Executive Order for the Bipartisan Infrastructure Law also established a Task Force to help coordinate its effective implementation. Members of the Task Force include the following agencies: Department of the Interior; Department of Transportation; Department of Commerce; Department of Energy; Department of Agriculture; Department of Labor; Environmental Protection Agency; and the Office of Personnel Management. The Office of Management and Budget, Climate Policy Office, and Domestic Policy Council in the White House are also on the Task Force.

For its part under the Bipartisan Infrastructure Law, the Bureau of Indian Affairs, U.S. Geological Survey, Bureau of Reclamation (Bureau), Office of Wildland Fire, U.S. Fish and Wildlife Service, and the Office of Surface Mining Reclamation and Enforcement submitted spend plans to Congress detailing how the funds, in creating new programs and expending existing ones, will meet the Bipartisan Infastructure Law's overall goals and priorities. The Department of the Interior also submitted a spend plan outlining how it would restore ecosystems, protect habitats, and plug and reclaim orphaned gas and oil wells.

The Bureau's spending plan outlined in detail what programs the Bipartisan Infrastructure Law will fund. This includes $8.3 billion set aside for water and drought resilience across the country. The water and drought resilience programs are aimed at protecting water supplies for both the natural environment and people. The funds will support water recycling and efficiency programs, rural water projects, dam safety, and WaterSMART grants.

The Bureau's spend plan also provide $1.5 billion for wildfire resilience, with investments aimed at federal firefighters, forest restoration, hazardous fuels management, and various post-wildfire restoration activities. Further, the spend plan outlines a $1.4 billion investment in ecosystem restoration and resilience, with funding allocated to stewardship contracts, invasive species detection and prevention, ecosystem restoration projects, and native vegetation restoration efforts.

Finally, the spend plan allocates $466 million to tribal climate resilience and infrastructure. This includes investment in community-led transitions for tribal communities, such as capacity building and adaptation planning. The funds will also help the construction, repair, improvement, and maintenance of irrigation systems.

### Drought Resilience Projects in the West

The Bipartisan Infrastructure Law's allocation of $8.3 billion to drought resilience will help important water infrastructure projects across the United States. Of the $8.3 billion, $210 million is set aside for projects in the West. The money will support various groundwater storage, water storage, and conveyance projects. In particular, it will help secure dams, finalize rural water projects, repair water delivery systems, and protect aquatic ecosystems. The selected projects in the West are scattered throughout Arizona, California, Colorado, Montana, and Washington. The projects receiving funding in California include the B.F. Sisk Dam Raise and Reservoir Expansion Project; the Sites Reservoir Project; and Phase II of the Los Vaqueros Reservoir Expansion Project.

$25 million is allocated to the San Luis and Delta Mendota Authority to pursue the B.F. Sisk Dam Raise and Reservoir Expansion project. The project would add an additional ten feet of dam embankment across the entire B.F. Sisk Dam crest to increase the storage capacity of the San Luis Reservoir. It is estimated that this project will create around 130,000 acre-feet of additional water storage.

The Sites Reservoir Project will receive $30 million for its off-stream reservoir project on the Sacramento River system, just west of Maxwell, California. This project is capable of storing 1.5 million acre-feet of water. The reservoir uses existing and new facilities to pump water into and out of the reservoir, with ultimate water releases into the Sacramento River system through a new pipeline near Dunnigan, existing canals, and the Colusa Basin Drain.

Finally, the Bipartisan Infrastructure Law allocates $82 million to the Los Vaqueros Reservoir Expansion Phase II, which will add roughly 115,000 acre-feet of additional water storage. The Los Vaqueros Reservoir, located in Contra Costa County, will expand from 160,000 acre-feet to 275,000 acre-feet. Increased capacity in the Los Vaqueros Reservoir will help improve Bay Area water supply and quality, increase water supplies for the Central Valley Project Improvement Act refuges, add flood control benefits, increase recreational opportunities, and provide additional Central Valley Project operational flexibility.

### Conclusion and Implications

The Biden administration's Bipartisan Infrastructure Law will allocate much needed funds to important water infrastructure projects throughout the West, especially in California. However, similar to the Inflation Reduction Act, it is unclear whether this funding will offset any current drought impacts. The Bipartisan Infrastructure Law, P.L. 117-58 is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684/text.
(Taylor Davies, Meredith Nikkel)

## CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS WATER CONSERVATION STANDARDS FOR URBAN SUPPLIERS

On October 19, 2022, the State Water Resources Control Board (State Water Board) adopted new regulations (Cal. Code Regs., tit. 23, §§ 980-986) that establish water loss performance and monitoring standards for urban retail water suppliers (Urban Suppliers), as part of California's conservation efforts amid ongoing drought. Urban Suppliers that are unable to demonstrate minimal system losses by July 1, 2023 will need to provide information to a statewide leak registry, and starting January 1, 2028, comply with volumetric real water loss standards.

### Background

Urban Suppliers—defined as entities that serve more than 3,000 service connections or 3,000 acre-feet of potable water per year—supply water for approximately 90 percent of California's population. Improved monitoring and reduced urban water system leaks have been targeted by the Legislature and the State Water Board as means to improve the state's water resiliency. Since October 2017, Urban Suppliers have submitted annual water loss audits to the Department of Water Resources (DWR). That data showed some Urban Suppliers in 2019 losing over 100 gallons per connection, per day, and annual statewide water losses of 261,000 acre-feet. Sections 10608.34 and 10609.12 of the Water Code direct the State Water Board to develop and adopt regulations that will reduce water loss in urban water systems and achieve more efficient water use in California.

### New Regulatory Requirements for Water Loss Performance

The regulations address the state's need for comprehensive information on water losses in individual systems by requiring Urban Suppliers to supply information on metering practices, pressure management, infrastructure failures and repairs, and costs for reducing water losses. (Cal. Code Regs., tit. 23, § 983.) That information is to be used to determine each Urban Supplier's water loss baseline and volumetric water loss standard, which caps the amount of water that may be lost through leaks, metering gaps, or other forms of waste. By monitoring and reducing leaks in their distribution systems, the State Water Board anticipates Urban Suppliers can collectively save 88,000 acre-feet per year, or enough water to meet the needs of more than 260,000 additional households.

Under Section 982(d) of the regulations, Urban Suppliers with highly efficient systems may provide documentation by July 1, 2023 that sufficiently demonstrates their systems lose a baseline of 16 gallons per connection per day or less. If consistent low water loss can be established through high quality metering and measurement data, then the 16 gallons per connection per day standard will apply, and the utility will not be subject to the additional questionnaires and reporting required by Section 983. If low water loss cannot be demonstrated, or if the data is found by the State Water Board to be deficient, the Urban Supplier must respond to a number of questionnaires that will be used to develop an appropriate volumetric "real water loss standard." (Id. at § 983.) Responses regarding water loss data quality are due on July 1, 2023, while responses regarding pressure management, systematic management, and supplier costs that affect real loss reduction are due on July 1, 2024. All questionnaires must be updated three years after the initial deadline.

A utility's real water loss standard is calculated as the "sum of annual reported leakage plus annual background leakage plus unreported leakage over 2027." (Id. at § 982(b)(1).) Section 981 of the regulations provides that by January 1, 2028, each Urban Supplier shall reduce its system losses to comply with its applicable real water loss standard and, thereafter, standards are assessed every third year based on average real losses reported in the Urban Supplier's annual audits. A utility's failure to meet a real water loss standard may prompt the State Water Board's executive director to issue conservation orders that mandate certain actions to bring the supplier into compliance, or require additional information for an enforceable conservation agreement. (Id. at § 986.)

Recognizing a need for flexibility, the regulations contemplate several variances and exceptions for unexpected adverse circumstances, and for suppliers that serve disadvantaged communities. Section 984 provides that an Urban Supplier may submit a request to the State Water Board to adjust its real water loss standard based on conditions that affect its operations or system. Any request submitted after July 1, 2023, however, must be supported by an explanation that the supplier did not have access to necessary measurement data prior to that date. Variances from real water loss standards are available under Section 985, for Urban Suppliers who have encountered unexpected adverse conditions out of their control, such as physical damage to infrastructure or significant changes to the utility's financial situation, though drought conditions, on their own, are inadequate justification. For the first compliance period, Urban Suppliers will not be considered out of compliance if their water loss audits show progress from their baseline, and they have submitted a request for an exception by January 1, 2028. (Id. at § 981(i).) Finally, Urban Suppliers that serve disadvantaged communities with median household incomes below 80 percent of the state's median have until January 1, 2031 to comply with their real water loss standards. (Id. at § 981(h).)

### Conclusion and Implications

With increasingly unreliable precipitation patterns, and an expected 10-percent reduction of traditional water supplies due to climate change, water conservation remains a core component of Governor Newsom's "all of the above" Water Resilience Portfolio. The State Water Board's water loss performance standards go into effect on April 1, 2023, giving Urban Suppliers a small window of time before the July 1, 2023 deadline to respond to questionnaires on the quality of their water loss data.

Information on the regulations and the state's water conservation efforts is available at: https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/rulemaking.html.
(Austin Cho, Meredith Nikkel)

## PENALTIES & SANCTIONS

# RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

### Civil Enforcement Actions and Settlements—Water Quality

•October 19, 2022—EPA announced it reached a settlement with Guam Shipyard to meet pollutant discharge requirements under the Clean Water Act to protect Apra Harbor. The facility is authorized to discharge industrial stormwater through a Clean Water Act permit. In 2019 EPA issued an order to Guam Shipyard on stormwater discharge permitting and pollution requirements. Two years later the Shipyard and EPA reached a settlement regarding the same set of issues. In 2022, EPA inspectors observed the facility had a large accumulation of waste materials throughout the site, including debris, blasting grit, paints and oil which may discharge directly into Apra Harbor. Additionally, the facility failed to conduct monitoring and failed to submit required reports to EPA. EPA is requiring the facility to clean the site, implement best practices, train employees, submit reports to EPA, and update its Stormwater Pollution Prevention Plan.

•October 20, 2022—EPA announced that it has reached a settlement with Goguen Transportation, Inc. of Gardner, Mass., resolving alleged violations of the Clean Water Act associated with two tanker truck accidents in Revere and Athol, Mass. that resulted in oil discharges to local waters. On two separate occasions, fuel oil was spilled from tanker trucks owned and operated by Goguen Transportation, polluting local waters and violating the Clean Water Act. The company will pay a $35,354 penalty. EPA estimates that the company has spent over $570,000 to clean up the Revere spill, and that remediation for the Athol spill will be no less than $300,000 based on the distance oil traveled and amount of oil spilled.

•October 20, 2022—EPA announced an enforcement action to close two illegal large capacity cesspools (LCCs) at the Wailuku Professional Plaza in Hilo and one cesspool at the SKS Management LLC self-storage business in Kailua-Kona. Under the Safe Drinking Water Act, EPA banned LCCs in 2005. The Wailuku Professional Plaza is located about 100 feet from the Wailuku River in Hilo. In July 2021, EPA conducted an inspection of the Plaza and found two unlawful cesspools serving the multi-tenant commercial office building. Wailuku Professional Plaza, LLC agreed to close the illegal cesspools and pay a $43,000 penalty on May 4, 2022. EPA also found that the self-storage business has a restroom that is served by a large capacity cesspool. The facility's operator settled the case, agreeing to pay a $28,780 penalty and close the illegal cesspool by September 1, 2023.

•October 25, 2022—EPA and DOJ announced a consent decree with Flexsteel Industries Inc. under which the company has agreed to pay $9.8 million for the cleanup of contamination at the Lane Street Ground Water Contamination Superfund site in Elkhart, Indiana, and to reimburse EPA for a portion of its past costs incurred at the site. According to the complaint filed simultaneously with the proposed consent decree in the Northern District of Indiana, Flexsteel is liable for the cleanup because its former manufacturing operations contributed to contamination at the site. Previously, EPA entered into administrative settlements with two other potentially responsible parties for their alleged contributions to the contamination at the site. The consent decree is subject to a 30-day public comment period and final court approval and will be available for public review on the DOJ website.

•October 27, 2022—EPA announced a settlement with Petroff Trucking Company, Inc., for an alleged violation of the Clean Water Act. The company has agreed to purchase and secure 15.5 wetland acres to compensate for wetlands it destroyed in East St. Louis, Illinois. The settlement is memorialized in

a proposed consent decree that the United States lodged with the U.S. District Court for the Southern District of Illinois on October 25, 2022. In 2020, the United States, on behalf of EPA, alleged in a complaint that from 2016 through 2019, Petroff Trucking Company, Inc., dredged, filled, and excavated 15.5 acres of wetlands without a permit in clear violation of the Clean Water Act. The operation discharged pollutants into the wetlands which led to their complete destruction. Petroff Trucking Company, Inc., will not pay a civil penalty because a financial analysis revealed it was formally dissolving and no longer had an ability to pay a civil penalty. However, Petroff has agreed to find and expend $259,000 to buy compensatory wetlands to resolve this action.

•November 1, 2022—The EPA announced a settlement with the city of Lakewood, Ohio, under which the City has agreed to perform work that will significantly reduce discharges of untreated sewage from its sewer system into Lake Erie and the Rocky River. The settlement is set forth in an interim partial consent decree that was filed today in federal court in the Northern District of Ohio. The decree requires Lakewood to complete construction of a high-rate treatment system that will treat combined sewer overflows and build two large storage basins that will hold millions of gallons of wastewater until it can be sent to the wastewater treatment plant. Under the decree, Lakewood will spend about $85 million to improve its sewer system and will pay a civil penalty of $100,000, split evenly between the United States and Ohio. The decree would partially resolve the violations alleged in the underlying complaint filed by the United States and the state of Ohio. The complaint alleges that Lakewood discharged untreated sanitary sewage into the Rocky River or directly into Lake Erie on at least 1,933 occasions from January 2016 through the present, and on numerous occasions from January 2016 through the present, Lakewood discharged water from combined sewer outfalls that violated the effluent limitations included in its National Pollutant Discharge Elimination System permit. Lakewood will be required through a subsequent, enforceable agreement with the United States and the state of Ohio to implement a plan that addresses the remaining permitted and unpermitted overflows in Lakewood's sewer system and to demonstrate compliance with the Clean Water Act.

•November 7, 2022—EPA announced an administrative order directing Michael Zahner of Bollinger County, Missouri, to take immediate steps to comply with the federal Clean Water Act. According to EPA, both Zahner and his company, Zahner Management Company LLC filled federally protected streams without obtaining required Clean Water Act permits. EPA also filed administrative complaint on October 7, 2022 pursuing $171,481 in penalties for the alleged Clean Water Act violations.

•November 7, 2022—EPA announced an administrative order directing Mark Schmidt of Lancaster County, Nebraska, to comply with the federal Clean Water Act. According to EPA, Schmidt and his company, Evergreen Development Inc., filled federally protected streams without obtaining required Clean Water Act permits. EPA alleges that Schmidt and his company channelized a stream; removed in-stream vegetation; and placed fill material into a stream and abutting wetlands, as part of a 16.5-acre residential development project. Further, EPA alleges that Evergreen Development let its Clean Water Act stormwater permit authorization lapse during construction. The order requires Schmidt and his company to submit a plan to EPA to restore the site or to mitigate for lost stream and wetland functions, as well as ordering Evergreen to reinstate its Clean Water Act permit.

•November 8, 2022—EPA announced a settlement under the Agency's Coal Combustion Residuals (CCR) program with Evergy Kansas Central Inc. at the company's retired Tecumseh Energy Center coal-fired power plant in Tecumseh, Kansas. In the settlement, Evergy will take certain actions to address potential groundwater contamination from a CCR impoundment at the Tecumseh site, under the federal Resource Conservation and Recovery Act (RCRA). The settlement requires Evergy to assess the nature and extent of CCR contamination at a CCR impoundment at the Tecumseh site. EPA alleges Evergy failed to adequately prepare groundwater monitoring and corrective action reports, comply with groundwater monitoring system requirements, comply with groundwater sampling and analysis requirements, complete an assessment monitoring program, and comply with CCR impoundment closure and post-closure reporting requirements. Evergy will install additional monitoring wells, conduct groundwater

sampling and analysis, and update closure plans for the facility's CCR impoundment. If Evergy determines that remediation is necessary, then it will meet with EPA to discuss next steps. The company will also pay a civil penalty of $120,000.

•November 9, 2022—EPA announced a settlement with the city of Elyria, Ohio, and the State of Ohio, under which the City will complete a series of capital projects designed to eliminate discharges of untreated sewage from its sewer system into the Black River, 10 miles upstream from Lake Erie. Elyria is expected to spend nearly $250 million to improve its sewer system. It will also pay a civil penalty of $100,000 to the United States and pay $100,000 to Ohio's Surface Water Improvement Fund. The consent decree would resolve the violations alleged in the underlying complaint filed by the United States and the state of Ohio. Under the proposed consent decree, Elyria will construct various projects within its sewer system to be completed by Dec. 31, 2044.

•November 14, 2022—EPA and the Department of Justice announced a settlement with four separate solar farm owners to resolve alleged violations of the Clean Water Act. The project owners shared the same contractor, and the alleged violations were construction permit violations and stormwater mismanagement at large-scale solar generating facilities: a site near LaFayette, Alabama, owned by AL Solar A LLC (AL Solar); a site near American Falls, Idaho, owned by American Falls Solar LLC (American Falls); a site in Perry County, Illinois, owned by Prairie State Solar LLC (Prairie State); and a site in White County, Illinois, owned by Big River Solar LLC (Big River). The states of Alabama and Illinois joined in the Alabama and Illinois settlements. Together, the four settlements assessed a total of $1.34 million in civil penalties.

### Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•November 9, 2022—EPA announced a settlement with January Environmental Services, Inc., January Transport, Inc., and company-owner Cris January under which the company will pay civil penalties of $1.9 million and perform comprehensive corrective measures to resolve allegations that they violated the Resource Conservation and Recovery Act (RCRA) through their used oil transportation and processing operations in Oklahoma City, Oklahoma. In a complaint filed on November 30, 2020, EPA, DOJ, and the Oklahoma Department of Environmental Quality (ODEQ) alleged that the companies and Cris January committed multiple violations of RCRA's used oil and hazardous waste regulations. This settlement requires JES and JTI to institute a number of company-wide changes to come into compliance with RCRA used oil and hazardous waste regulations, many of which the companies have already undertaken. Compliance requirements include training staff on using proper manifest forms to track the handling of hazardous waste, develop a written waste management plan, and update emergency preparations such as coordinating with local emergency responders and hiring an independent engineer to review the facilities' spill-containment and contingency plans.

•November 10, 2022—EPA announced a settlement with Ampac Fine Chemicals, LLC to resolve violations of the Resource Conservation and Recovery Act and related state laws at its pharmaceutical manufacturing facility in Rancho Cordova, California. EPA determined that Ampac failed to comply with legal requirements that govern hazardous waste management and will pay a fine of $69,879. EPA determined that Ampac did not: perform required calibration testing; mark equipment subject to air emission standards for equipment leaks; develop a monitoring plan for valves that are difficult or unsafe to monitor; separate incompatible hazardous waste during accumulation; have a qualified professional engineer assess the integrity of an existing tank; list emergency equipment capabilities in a contingency plan; and properly label hazardous waste containers.

### Indictments, Sanctions, and Sentencing

•November 2, 2022—Ionian Management Inc. (IONIAN M), a New York-based company that commercially manages three vessels, including the M/T Ocean Princess, was sentenced yesterday in the District of the Virgin Islands before U.S. District Court Judge Wilma A. Lewis in St. Croix, after pleading guilty to a violation of the Act to Prevent Pollution from Ships. IONIAN M was sentenced to pay a fine of $250,000 and placed on probation for one year. While vessels are operating within the U.S. Caribbean Emissions Control Area (ECA), they must not use

fuel that exceeds 0.10 percent sulfur by weight to help protect air quality. Between Jan. 3, 2017, and July 10, 2018, the M/T Ocean Princess entered and operated within the ECA using fuel that contained excessive sulfur on 26 separate occasions. The fuel was petroleum cargo that had been transferred to the fuel tanks as authorized by IONIAN M. Once authorized, the crew of the M/T Ocean Princess transferred the higher sulfur fuel from the cargo tanks into the bunker tanks and use it to fuel the vessel, even though it exceeded the 0.10 percent sulfur by weight maximum. U.S. Coast Guard inspectors boarded the M/T Ocean Princess on July 10, 2018, to conduct an inspection and discovered the vessel's use of fuel with an excessive sulfur content. These two companies previously pleaded guilty to felony violations related to the use of non-compliant fuel and falsification of records and were sentenced to pay a combined criminal fine of $3,000,000, serve a three-year period of probation, and implement an Environmental Compliance Plan. The sentencing of Ionian M is the final chapter in this multi-year investigation and prosecution of the companies and individuals involved in the use of non-compliant, high-sulfur fuel in the operation and management of the M/T Ocean Princess.
(Andre Monette)

## LAWSUITS FILED OR PENDING

# U.S. SUPREME COURT TO ADDRESS COLORADO RIVER WATER RIGHTS FOR THE NAVAJO NATION

In November, the United States Supreme Court granted petitions for *certiorari* by the United States Department of the Interior and the States of Arizona, Nevada, and Colorado to review the Navajo Nation's (Nation) claim that the federal government breached its fiduciary duty to the Nation by failing to provide an adequate water supply for the Nation from the Colorado River. The U.S. District Court hearing the matter had dismissed the claim but the Ninth Circuit reversed. The Department of the Interior and states appealed the Ninth Circuit's decision to the Supreme Court for review. [*Arizona v. Navajo Nation*, No. 21-1484 (U.S. Nov. 4, 2022).]

### Background

The Navajo Nation was established under the terms of an 1868 Treaty between the United States and the Navajo Tribe. Treaty with the Navajo, 188, June 1, 1868, 15 Stat. 667. The terms of the treaty contemplated an agricultural purpose for the reservation. The he reservation's boundaries expanded significantly over time, and the Colorado River forms a significant segment of the reservation's western boundary. *Id.*; *Navajo Nation v. U.S. Dep't of the Interior*, 26 F.4th 794, 809-10 (9th Cir. 2022).

During the 1950s, the federal government asserted claims to various water sources on behalf of multiple tribes. *Id.* at 800. However, the government did not assert claims to mainstream Colorado River water for the Nation. Currently, the Nation has water rights to two tributaries of the Colorado River, but does not have judicially adjudicated rights to the mainstream of the Colorado River.

In 2003, the Nation sued the federal government for failing to assert water rights for the Nation to the mainstream of the Colorado River. The Nation's claims were based on the National Environmental Policy Act (NEPA) and the federal government's alleged fiduciary duty to the Nation, the water rights for which are held by the federal government in trust for the Nation. The Nation argued that the Department of the Interior was obligated to develop a plan to provide an adequate water supply for the Nation in the event the Nation's existing rights to the Colorado River tributaries were not sufficient to meet the needs of the Nation.

After ten years of unsuccessful settlement negotiation during which the case was stayed, the case was tried in the U.S. District Court in Arizona in 2014. Arizona, Nevada, and other water and agricultural interests intervened in the case to protect their water rights. *Id.* at 799. The District Court dismissed both claims, finding that the Nation lacked standing for its NEPA claim and that the government had sovereign immunity regarding its alleged fiduciary duties to determine the Nation's quantity of water rights. *Id.* at 804. The Ninth Circuit partially reversed, holding that a breach-of-trust claim was not barred by sovereign immunity. *Id.* On remand, the District Court dismissed the Nation's claim for lack of jurisdiction because the "Supreme Court reserved jurisdiction over allocation of rights to the Colorado River." (*Navajo Nation v. U.S. Dep't of Interior*, 996 F.3d 623, 628 (9th Cir. 2021). The Nation appealed, and the Ninth Circuit decided the case on February 17, 2022.

### The Issues at Hand

The Ninth Circuit again reversed the District Court's decision, allowing the breach of trust claim to proceed. Specifically, the court held that there was (1) jurisdiction over the breach of trust claim, (2) that the claim was not barred by res judicata, and (3) that the claim was adequately stated.

#### Jurisdictional Question

Regarding the jurisdictional question, the Ninth Circuit held that the Nation was not seeking a judicial quantification of water rights to the Colorado River and thus the Supreme Court's exclusive jurisdiction over Colorado River water rights under *State of Arizona v. State of California*, 376 U.S. 340, 353 (1964) (Arizona Decree) did not bar the Nation's breach of trust claim. The Ninth Circuit distin-

guished a judicial quantification of water rights from the Nation's request for an injunction for the federal government to "develop a plan to secure the water needed" to address the Nation's needs. *Navajo Nation*, *supra*, 26 F.4th at 806.

The Ninth Circuit also rejected the intervenors' *res judicata* argument for similar reasons. The states of Nevada, Arizona, and Colorado, as well as a number of agricultural and water districts intervened in support of the government, arguing that the Nation was seeking additional water rights. The intervenors argued that the federal government had asserted the tribes' water rights, including for the Nation, in the Arizona Decree, and thus the Nation could not relitigate its rights to the Colorado River on *res judicata* grounds. *Id.* at 807. Similar to its reasoning regarding the jurisdictional question, the Ninth Circuit held that the Nation's breach of trust claim was distinct from a claim for a judicial determination of the Nation's water rights and therefore was not barred by res judicata. The court reasoned that the Nation was not seeking a different amount of water rights previously adjudicated but instead sought a determination that the federal government had a fiduciary duty to provide an adequate water supply for the Nation. *Id.* In sum, according to the Ninth Circuit, the issue of the appropriate quantity of water, as opposed to the government's alleged fiduciary duty to provide an adequate supply of water, was not the object of the Nation's breach of trust claim and therefore was not barred by res judicata under the Arizona Decree.

### Leave to Amend to Assert Breach of Trust Claims

Similarly, the Ninth Circuit reversed the District Court's ruling that the Nation's motion for leave to amend its complaint to assert a breach of trust claim was not "futile." *Id.* The District Court had previously rejected the Nation's motion to amend and dismissed its claim, finding that the Nation did not point to a specific treaty, statute, or regulation that could impose an enforceable fiduciary duty on the federal government. In reversing the District Court's ruling, the Ninth Circuit relied on the *Winters* doctrine, which holds that the federal government impliedly reserved an amount of water sufficient to satisfy the purpose of a reservation when the reservation was created, whether by treaty as in the case of the Nation, executive order, or by legislation. The Ninth Circuit reasoned that the federal government, as trustee of the reservation and related rights on behalf of the Nation, is charged with ensuring that reservation lands remain livable. The Ninth Circuit also determined that the federal government exercised "pervasive control" over the Colorado River under the Bolder Canyon Project Act and other laws regulating the river, thus providing additional statutory bases for amending the complaint to assert a breach of trust claim. *Navajo Nation*, *supra*, 26 F.4th at 812. According to the Ninth Circuit, the combination of these factors gave rise to a cognizable claim that the federal government had a fiduciary duty to the Nation to provide an adequate water supply to the reservation, which it could breach by failing to assert rights to the mainstream of the Colorado River on behalf of the Nation.

### Conclusion and Implications

On November 4, 2022, the Supreme Court granted the petitions for *certiorari* and will review the Ninth Circuit's decision.

The Supreme Court's ruling on whether the Navajo Nation can assert a claim for breach of trust against the federal government for failure to provide an adequate water supply for the Nation, including from the mainstream of the Colorado River, will have important consequences for the allocation of Colorado River water and other waters in the western United States. If the Court affirms the Ninth Circuit's decision, it could open the door for judicial actions asserting breach of trust claims that could result in the reallocation of water supplies to tribes to satisfy the federal government's trust obligations. Whether such reallocations would lead to takings or other claims by existing water rights holders remains to be seen.

(Miles Krieger, Steve Anderson)

# CALIFORNIA'S PFAS LAWSUIT CASTS A WIDE NET

Beginning in the early 2010, state Attorneys General have filed a series of lawsuits based on damages allegedly caused by per- and polyfluoroalkyl substances, collectively known as "PFAS" aka "forever chemicals." Those suits originally focused on natural resource damages, like that filed by Minnesota, but have expanded in breadth to encompass claims of damage to residents' health. California's recently-filed litigation may be the broadest brought to date, potentially breaking new ground in this vast and complex litigation landscape. [*The People of the State of California, Ex Real. Rob Bonta v. 3M Company, et al.*, Case No. 22CV021745 (Superior Court for Alameda County).]

## Background

On November 10, 2022, California's Attorney General Rob Bonta filed suit in Alameda Superior Court against 3M, Dupont and more than a dozen other manufacturers of PFAS. The suit alleges the defendants knew or should have known that PFAS are harmful to humans and the environment, nevertheless continued to manufacture, distribute and market PFAS while concealing from the public their harms.

PFAS are a class of chemicals developed post-World War II with heat, oil, and water resistant properties. For decades they were incorporated into a very wide array of industrial and consumer processes and products. The same attributes that make PFAS useful also mean that they take a long time to break down, so that they are very persistent in the environment and the human body. A common environmental pathway for human exposure is via drinking water.

Research has linked exposure to PFAS to, *e.g.*, diminished liver function, kidney and testicular cancer, elevated risk of cardiovascular disease, diminished antibody response to vaccines, various birth defects, developmental delays and elevated risk of miscarriage.

Several multi-district litigation actions in federal court are adjudicating or have adjudicated a very large number of claims against PFAS manufacturers, distributers and marketers by individuals, property owners and water providers, increasingly stringent regulatory proposals and final actions by the Environmental Protection Agency continue apace, and multi-district litigation regarding PFAS exposure linked to the use of fire-fighting foams on military bases continues. Beginning in the 2010s, state Attorneys General began to file suits alleging harms to their states' environment and, in later-filed suits, residents' health. Minnesota and Delaware have since settled their claims, while those of 13 other states remain pending.

## The State's Claims

California's lawsuit states a wide array of claims and seeks broad remedies, pushing the envelope established in suits filed by other states' Attorneys General.

The suit identifies numerous sources of contamination beyond the typical industrial manufacturing and disposal sites, including wastewater treatment plants and landfills, alleging that PFAS have been detected in the blood of 99 percent of the California residents who have been tested, as well as being ubiquitous in the state's lakes, rivers, drinking water, and wildlife, including an allegation that PFAS have been detected in 146 public water systems serving 16 million residents of the state. This contamination is, the state asserts, due to the manufacture, distribution, marketing and disposal of PFAS by defendants. The state further alleges that its two-year investigation established that the manufacturers continued to produce, distribute and market PFAS within the state despite knowing or when they should have known of the chemicals' deleterious environmental and human health effects, and while failing to warn of those dangers.

The complaint states causes of action for public nuisance, strict product liability (failure to warn and defective/ultra-hazardous product), unlawful business practices, and negligence *per se*. The remedies sought are particularly broad and include funding for and equitable relief requiring abatement across the state by *e.g.*, the treatment of drinking water from private and public systems as well as wastewater treatment. Compensatory and restitution damages are also sought, including to fund mitigation efforts such as medical monitoring, public noticing, the provision of replacement water prior to the provision of treatment, and safe disposal and destruction.

### Conclusion and Implications

The sweeping nature of the state's suit along with California's disproportionate population and economic importance makes its outcome particularly high stakes for the named defendants, and will impact as well as plaintiffs and defendants in other California state court PFAS cases. It remains to be seen whether the California courts' treatment of this case has a wider impact on the fate of PFAS litigation before the federal and other state courts.
(Deborah Quick)

## JUDICIAL DEVELOPMENTS

# D.C. CIRCUIT ISSUES EXTRAORDINARY WRIT RELIEF COMMANDING EPA TO COMPLY WITH THE ENDANGERED SPECIES ACT

*In re: Center for Biological Diversity*, ___F.4th___, Case No. 21-1270 (D.C. Cir. Nov. 22, 2022).

Taking unusually aggressive action under the All Writs Act, the D.C. Circuit Court of Appeals issued a writ of *mandamus* directing the U.S. Environmental Protection Agency (EPA) to complete an effects determination under the federal Endangered Species Act (ESA, 16 U.S.C. § 1531 *et seq*.) in connection with the agency's registration of a pesticide. The order was issued in the context of EPA's longtime, flagrant flouting of its clear statutory duties under the ESA, including in this case five solid years of failure to take any action in compliance with the Court of Appeals previous order regarding the pesticide registration at issue.

### Background

In 2014, EPA registered cyantraniliprole, a pesticide that "provides protection from pests that feast on citrus trees and blueberry bushes," under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. § 136 *et seq*.). FIFRA provides that "[n]o pesticide may be sold in the United States unless it is first registered with EPA." 7 U.S.C. § 136a(a). The statutory standards for registration provide that "EPA must approve the application if it meets composition and labeling requirements" and will "perform its intended function without unreasonable adverse effects on the environment" if used in accordance with widespread practices. 7 U.S.C. § 136a(c)(5)."

EPA's Environmental Fate and Ecological Risk Assessment for the registration of the new chemical *Cyantraniliprole* at the time of registration:

> . . .indicate[d] that it is 'slightly to very highly toxic to freshwater invertebrates; moderately to highly toxic to estuarine/marine invertebrates[;] highly toxic to benthic invertebrates; [and] highly to very highly toxic to terrestrial insects.'. . . [Nonetheless]. . . EPA classified cyantranilipole as a 'Reduced Risk' pesticide, a special category for pesticides it determines have a lower risk to human health and many non-target organisms.

EPA did not, prior to the 2014 registration, carry out an initial review or make an effects determination of the registration, let alone consult with the National Marine Fisheries Service or the Fish and Wildlife Service, to "insure that [the registration] … is not likely to jeopardize the continued existence of any endangered or threatened species or result in [their habitat's] destruction," pursuant to the ESA. 16 U.S.C. § 1536(a)(2)).

The Center for Biological Diversity and the Center for Food Safety (Centers) in 2017 obtained from the D.C. Circuit Court an order remanding the registration to EPA with instructions:

> . . .to replace the registration order with. . .a new registration order signed after an effects determination and any required consultation.

In those initial proceedings, EPA freely admitted it had not complied with the ESA. In the ensuing five years:

> EPA made no progress toward completing cyantraniliprole's effects determination--that is, no progress until earlier this year. Only then did EPA schedule cyantraniliprole's effects determination, thought it took no steps to complete it.

The Centers therefore returned to the Circuit Court, seeking relief under the All Writs Act, 28 U.S.C. § 1651.

### The D.C. Circuit's Decision

The bar petitioners must meet to obtain *mandamus* relief is set extremely high:

> A petitioner seeking *mandamus* must first estab-

lish that the agency has violated "a crystal-clear legal duty." *In re National Nurses United*, 47 F.4th 746, 752 (D.C. Cir. 2022).

A *mandamus* petitioner must show that it "has no other adequate means to attain the relief it desires." *In re Core Communications*, 531 F.3d 849, 860 (D.C. Cir. 2008) (internal quotation marks and alteration omitted). Moreover, a court may grant *mandamus* relief only when it also "finds compelling equitable grounds." *In re Medicare Reimbursement Litigation*, 414 F.3d 7, 10 (D.C. Cir. 2005) (internal quotation marks and alteration omitted). On the equities, the central question is "whether the agency's delay is so egregious as to warrant mandamus." *Core Communications*, 531 F.3d at 855 (internal quotation marks omitted).

The Circuit Court noted as well that:

> . . .this case arises from relatively unique circumstances that implicate two distinct sources of *mandamus* jurisdiction under the All Writs Act: our power to compel unreasonably delayed agency action and our power to require compliance with our previously issued orders.
>
> Specifically with the respect to the latter issue:
>
> . . .[w]hen an agency ignores a court order. . .[i]t nullifie[s] [the court's] determination that its [action is] invalid and 'insulates its nullification of our decision from further review.'

In that circumstance, the equitable inquiry may be satisfied on a "lesser showing" by the petitioner.

Applying this test, the Court of Appeals easily found that EPA has a clear statutory duty to discharge its duties under the ESA prior to registering cyantraniliprole. EPA did not contest that the Centers have no adequate alternative remedy. Thus:

> . . .[t]he sole question, then, is whether EPA's delay in undertaking an effects determination is 'so egregious as to warrant mandamus.'

This equitable question is generally subject to analysis under the "'hexagonal *TRAC* factors" articulated in *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984):

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. (Internal quotation marks and citations omitted.)

Here, Congress has "set a plain deadline" (factor 2), and the Court found that the human health and welfare interests sought to be protected by the ESA (*e.g.*, "'it is in the best interests of mankind to minimize the losses of genetic variations.'") would prejudiced by further delay, satisfying factors 3 and 5.

**Factors 1 and 4**

Focusing on factors 1 and 4, the Court of Appeals examined EPA's "fraught relationship with the ESA," during which the agency "has made a habit of registering pesticides without making the required effects determination." "EPA has faced at least twenty lawsuits covering over 1,000 improperly registered pesticides," a failure to comply with statutory mandates so flagrant that since 2014 EPA and the U.S. Fish and Wildlife Service have been subject to regular Congressional committee reporting requirements. In that context, EPA's assurances to the Court in this case that it would proceed with the required effects determination by September 2023 rang hollow, particularly given those assurances were undermined by the agency's recent statement that until 2030 it will only make effects determinations for pesticide registrations when subject to a court order requiring it to do so. Therefore, the Court of Appeals issued the requested relief, mandating that the effects determination and replacement of the registration order be completed by September 2023 and adding "bite" by

retaining jurisdiction to monitor EPA's progress by requiring that progress reports be submitted by the agency every 60 days.

### Conclusion and Implications

This case provides a useful illustration of the lengths to which an executive agency must go in defying Congressional and judicial commandments before a court will issue a writ of mandamus of this breadth. The court's retention of jurisdiction and interim progress report elements are particularly unusual. Nonetheless, in this polarized era examples of such stark executive defiance may well become more common.
(Deborah Quick)

## D.C. DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF PIPELINE PROJECT

*Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*,
___F.Supp.4th___, Case No. 20-3817, No. 21-0189 (D. D.C. Oct. 7, 2022).

The United States District Court for the District of Columbia recently granted summary judgment in favor of the United States Army Corps of Engineers (Corps) against challenges to their Environmental Assessment (EA) for an underwater oil pipeline project that allegedly violated the National Environmental Policy Act (NEPA) and the federal Clean Water Act (CWA). The Corps sufficiently assessed the environmental consequences associated with granting Enbridge, an oil pipeline and energy company, a permit to discharge dredged and fill material into waters of the United States.

### Factual and Procedural Background

Enbridge Energy, LP sought a CWA section 404 permit that authorized the discharge of dredged or fill materials into waters of the United States and a permit to cross waters protected by the Rivers and Harbors Act in an effort to replace 282 miles of existing crude oil pipeline with 330 miles of new pipeline, crossing 227 waterways (Project). The Corps, after preparing an EA, granted Enbridge the permit to discharge material and concluded that issuing the permit would not significantly affect the environment.

Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and Sierra Club argued that issuing the permits violated various sections of NEPA, CWA, and the Rivers and Harbors Act. Separately, Friends of the Headwaters challenged the permits as well, arguing that the Corps violated NEPA and the CWA. The cases against the Corps were consolidated and the parties' cross-motions for summary judgment are before the court.

The court's analysis focused on the NEPA and CWA claims.

### The District Court's Decision

#### The NEPA Claims

The court first considered plaintiffs' argument that the Corps arbitrarily and capriciously limited the scope of the EA to the construction-related activities authorized by the permit, rather than the construction and operation of the entire pipeline. The court found that the Corps was only required to consider the environmental impacts associated with the specific activity requiring a permit: the discharge of fill material into wetlands. In addition, the Corps did not have sufficient control and responsibility over the entire project, because the Corps does not regulate the siting of pipelines or any substance being transported within a pipeline.

The court next considered plaintiffs' argument that the Corps improperly relied on an environmental impact statement prepared under Minnesota state law instead of conducting an independent analysis. However, evidence showed that the Corps coordinated with various Minnesota state agencies during the entire project review. Moreover, the Corps was free to evaluate and incorporate the state's Environmental Impact Statement (EIS) findings into their own assessment and was not required to duplicate studies or analyses already completed by the state.

The court next considered plaintiffs argument that the Corps failed to take a "hard look" at all aspects of

the project, including climate change and reasonable alternatives. In response to the argument that the Corps failed to consider the project's contribution to climate change, the court concluded the Corps were not required to consider the effects on climate change arising from the construction of the entire pipeline and its operation. They were only required to review the effects with a reasonably close causal relationship with the discharge of dredged or fill materials, and the Corps EA satisfied this standard. In addition, the Corps' decision to limit its discussion of reasonable alternatives to a route previously designated by the State of Minnesota was appropriate. The state already considered numerous alternatives and the proposed route was the only one in which Enbridge was legally authorized to construct the project under Minnesota law, so the Corps' failure to consider routes that were rejected by the state made little practical sense.

The final challenge to the NEPA review was that the Corps' finding of "no significant impact," and consequently not preparing an EIS, was arbitrary and capricious because the Project was highly controversial and its impacts remained uncertain. To be "highly controversial," "something more" must exist. The court refused to equate "something more" with simply any criticism of the proposed project, or the fact that some people might be highly agitated. On the other hand, criticism of scientific methodologies by experts in the respective fields may be sufficient. The court found that the various criticisms of the Project that the plaintiffs relied on did not rise to the level of scientific and methodological criticism

Thus, the Corps did not act arbitrarily and capriciously in its NEPA review and did not violate NEPA.

### The CWA Claims

Plaintiffs argued the Corps' analysis of alternatives, potential "degradation" of waters of the United States, and its public interest review was insufficient under the CWA.

The court first considered plaintiffs' argument that the Corps violated the CWA by failing to consider "status quo" or "no alternative" alternatives or less environmentally damaging route alternatives. The "no action" alternative in this case would have been to decommission the existing pipeline completely or continue using the pipeline. The court reasoned that the Corps' EA sufficiently discussed both of the "no action" alternatives and concluded neither would be practicable because the pipeline was deteriorating and risked greater environmental harm if it was left in its current condition. Regarding route alternatives, the Corps was only required to consider practicable routes, which did not include routes that the state agency previously rejected.

The court next considered plaintiffs' argument that a potential oil spill from pipeline operation would violate CWA prohibitions against significant degradation. The court reasoned that the EA's discussion of potential degradation was appropriately tailored to the effects arising from the specific dredge and fill activities being permitted, not a potential oil spill caused by the operation of the new pipeline.

Finally, the court considered plaintiffs' argument that the Corps failed to conduct a sufficient "public interest" review under the CWA. The plaintiffs challenge the discussion of economics, energy needs, climate change and greenhouse gas emissions, wetlands, and the risk of an oil spill. The court rejected plaintiffs' arguments, reasoning the Corps' sufficiently discussed economics because there was no evidence they should have considered out of pocket costs for consumers. There was also sufficient evidence that the project was needed because there was a demand for oil. Further, the Corps adequately limited the discussion of climate change to the proposed activity, and adequately addressed the effects on wetlands because the EA discussed the measures to avoid and mitigate impacts to wetlands and short-and long-term effects of the activity on the wetlands.

Finally, the Corps sufficiently evaluated the risk of an oil spill because the EA discussed the effects on aquatic life, birds, and mammals, and coordinated with Tribes to mitigate any effects on tribal resources. Therefore, the Corps did not violate the CWA and summary judgment was appropriate.

### Conclusion and Implications

This case provides a reminder of the proper scope and tailoring of NEPA and CWA analyses as well as the importance of taking a hard look at a project's impacts. The court's opinion is available online at: http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20221007_docket-120-cv-03817_memorandum-opinion.pdf
(Christina Lee, Rebecca Andrews)

# COLORADO COURT OF APPEALS ALLOWS 'RELOCATION' DAMAGES RELATED TO INTERFERENCE WITH PIPELINE

*Ute Water Conservancy District v. Rudolph Fontanari, Jr.; Ethel C. Fontanari; and Rudolph Fontanari, Jr. and Ethel Carol Fontanari Revocable Trust*, 20CA2132 & 21CA0135

On October 27, 2022, the Colorado Court of Appeals upheld a state District Court decision awarding "relocation" damages to Ute Water Conservancy District after a landowner unreasonably interfered with Ute Water's pipeline easement. This decision expands on existing ditch easement law by affirming these types of damages for the first time in Colorado. Although the Court of Appeals specifically focused on Ute Water's status as a domestic water utility and its specific written easements, this decision may have wider-reaching effects throughout the state.

## Background and Procedural History

Ute Water Conservancy District (Ute Water) serves more than 80,000 customers near Grand Junction, Colorado. Approximately two-thirds of that water is delivered via the buried pipeline at issue in this case. The pipeline crosses two parcels owned by the defendants (collectively: Fontanari) including a 121-acre "road parcel" and 1.3-acre "residence parcel." Prior to construction of the pipeline, Fontanari's predecessor granted Ute Water an easement across each property for the pipeline. Ute Water then constructed the pipeline in 1981. At the time of construction, the pipeline was buried approximately four feet deep across both parcels.

In 2014, Ute Water learned that Fontanari had expanded the building pad on the residence parcel by adding fill within the pipeline easement, thereby increasing the depth of the pipeline by 12 feet. Fontanari also began expanding the existing private road across the road parcel to accommodate heavy mining equipment to access a nearby mine. Fontanari placed concrete culverts on top of the road (four feet above the pipeline) and added 10-12 feet of fill dirt to the road, thereby further increasing the pipeline depth. Fontanari did not contact Ute Water before conducting the work within the pipeline easement.

Ute Water believed that Fontanari's improvements to its properties negatively impacted Ute Water's access to the pipeline, increased the likelihood of damage, and made detection and location of leaks more difficult. Ute Water originally attempted to negotiate a solution with Fontanari, but eventually sued for breach of contract under its written easements, among other claims. While the case was pending, Ute Water continued to work with Fontanari on a mutually agreeable solution to no avail. After negotiations broke down, Ute remained concerned about the safety and structural integrity of its affected pipeline, so it preemptively constructed a new section of pipeline bypassing the Fontanari property. Ute Water then severed the Fontanari portion of the pipeline and plugged both ends with concrete.

## At the Trial Court

At trial, the District Court found that Fontanari unreasonably interfered with Ute Water's easement, which Fontanari did not dispute, and thus was liable for breach of contract. Most importantly, the District Court granted Ute Water $557,790.31 in "relocation damages" – that is, the cost Ute Water had spent to reroute the pipeline around the Fontanari property.

## The Colorado Court of Appeals Decision

Fontanari raised numerous issues on appeal, including arguing that, because Ute Water preemptively relocated the pipeline, the breach of contract claim was moot. Fontanari also argued on appeal that Ute Water had abandoned its easements across the Fontanari property by electing to reroute the pipeline. The Colorado Court of Appeals disagreed and affirmed the District Court's judgment. Specifically, regarding the abandonment claim, the court noted that "the issue is not whether an easement is being actively used, rather, the issue is whether the easement holder evidences an intent to abandon the easement." *Id.* at 4.

The requirement of an easement holder's intent to abandon the easement has long been the law in Colorado. However, Fontanari argued that Ute Water's rerouting the pipeline and plugging the old sections on the Fontanari property should be construed as evidence of intent to abandon. The Court of Appeals

noted conflicting testimony at trial, with some Ute Water employees testifying that Ute Water could reopen the pipeline or replace the section across the Fontanari property in the future. Given the conflicting testimony, and logical conclusion that Ute Water could reopen or replace the pipeline in the future, the Court of Appeals could not find clear error in the trial court's findings, and thus upheld the decision that Ute Water did not abandon its easement by rerouting the pipeline around Fontanari's property.

### Relocation Damages May Be Proper for an Unreasonable Interference

The heart of the appellate case focused on the trial court's award of relocation damages. On appeal, Fontanari argued that Colorado law only allows for injunctive, declaratory, and restorative relief for these types of claims, and that an award of relocation damages promotes self-help measures, which the law disfavors. The Court of Appeals disagreed on both points.

The Court of Appeals first acknowledged that Colorado law affords "injunctive, declaratory, and restorative relief" for unreasonable interference with an easement. *Id.* at ¶ 68, citing *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1238 (Colo. 2001). However, in reviewing the case law cited in the District Court's judgment, the Court of Appeals only found examples of remedies a court *may* grant for unreasonable interference, with no reference to the type of damages a court *cannot* award. *Id.* ("Indeed, none of the cited authorities, nor any other authority of which we are aware, holds that a court cannot award relocation damages under the circumstances presented in this case."). The court further relied on *Roaring Fork Club* which allows a trial court "to fashion a remedy at law or in equity." *Id.* at ¶ 58, citing *Roaring Fork Club*, 36 P.3d at 1238.

The court acknowledged *Roaring Fork Club*'s direction to fashion an equitable remedy to address "competing uses between two interested owners," but went on to hold, "[t]his doctrine, however, does not apply where either owner seeks unreasonable uses." *Id.* at ¶ 59, citing *Roaring Fork Club*, 36 P.3d at 1235. Because Fontanari did not dispute that they unreasonably interfered with Ute Water's easement, the court reasoned, there was no need to balance the parties' interests and grant equitable relief. Instead, the Court of Appeals held that the trial court property fashioned a remedy at law to compensate Ute Water.

Fontanari next argued that an award of relocation damages promotes self-help measures, which are disfavored under *Roaring Fork Club*. *Id.* at ¶ 66-67, citing *Roaring Fork Club*, 36 P.3d at 1237-38 ("[W]e do not support the self-help remedy that [the burdened owner] exercised here. When a dispute arises between two property owners, the court is the appropriate forum for the resolution of that dispute…"). The Court of Appeals took this opportunity to clarify that, while self-help is generally disfavored, *Roaring Fork Club* does not prevent self-help measures, nor does it:

> . . .stand for the proposition that an owner of a dominant estate that resorts to self-help when the owner of the servient estate unreasonably interferes with an easement is precluded from obtaining a damage award. *Id.* at ¶ 68.

Instead, the court held, self-help is an option available to any party willing to accept the potential legal consequences of its actions.

### The Trial Court's Findings Upheld

In sum, the Court of Appeals agreed with the trial court's findings that Fontanari's actions threatened the integrity of the pipeline and decreased Ute Water's ability to access, operate, and repair the pipeline. Although Fontanari was not required to negotiate with Ute Water to relocate the pipeline, the court found that Fontanari knew or should have known that his actions would force Ute Water to relocate the line. The court focused several times on the fact that Ute Water is a water utility providing water to necessary public services such as schools, hospitals, residences, and fire departments. Thus, the failure of the Ute Water pipeline could have far-reaching negative effects for Ute Water's customers. Given those facts, the court found that Fontanari's unreasonable interference left Ute Water with no other option but to resort to self-help and reroute the pipeline to ensure a reliable water supply for its customers, and therefore Ute Water could recover its costs as relocation damages.

### Conclusion and Implications

This case presents a new expansion of an express easement owner's rights and potential remedies for a breach of the underlying easement instrument.

Additionally, the case clarifies that the seminal ditch easement case in *Roaring Fork Club* does not bar this type of relocation damage award. However, the impact of the court's ruling may be constrained by its focus on the unique facts at issue, including the nature of the written easement, Ute Water's status as a domestic water utility, and Fontanari's admission of its unreasonable interference with the easement. Therefore, while future litigants in ditch easement cases might look to assert the court's holdings in this case, it remains unclear, for now, if a different court would award relocation damages when presented with a different set of facts. Additionally, Fontanari has indicated that they plan to appeal this ruling to the Colorado Supreme Court.
(John Sittler, Jason Groves)

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