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FEATURE ARTICLE

IDAHO WATER USERS FEAR ENCROACHMENT OF REGIONAL MATTERS ON THE SNAKE RIVER WATER RIGHTS ACT OF 2004— THE 'NEZ PERCE AGREEMENT'

By Andrew J. Waldera

Ongoing discussions in the Pacific Northwest region concerning continuing salmon recovery efforts, dam breaching, and the renegotiation of the Columbia River Treaty with Canada are topics of interest for Idaho Water Users even when each is viewed in a vacuum. But, with each of discussions bleeding into the others on at least some level, Idaho Water Users are growing more concerned over how these discussions may affect the water rights and federal dam operations respite provided under the Nez Perce Agreement.

The Nez Perce Agreement

The Snake River Water Rights Act of 2004 (known as the Nez Perce Agreement), codified as Public Law 108-447 (Dec. 8, 2004)—118 Stat. 3431 – 3441, ended (for the time being anyway) major water rights litigation pending between the Nez Perce Tribe (Tribe), the state of Idaho, and individual Idaho water users during the comprehensive Snake River Basin Adjudication (SRBA). The United States Department of the Interior filed water right claims to, essentially, all Snake River natural flow at Lewiston, Idaho with priority dates of time immemorial at best, and the early to mid-1800s at worst based on various federal treaties negotiated with the Tribe. Interior also filed water right claims on behalf of the Tribe to numerous springs and fountains located on reservation lands, federal lands, and on private lands. The landmark Nez Perce Agreement halted litigation over the claims for a 30-year period, and with only 12 years remaining, Idaho water users are smartly beginning to dust the Agreement off again to begin discussing what may come of it in Year 30—discussions complicated by the retirements and passings of many key players from the late 1990s and early 2000s. Will the Agreement be renewed as-is; will it be renegotiated to reflect changed circumstances of 30 years; or will it be left to expire, thereby reviving the now dormant tribal water right claims still-pending in the SRBA?

At the time, the United States and the Nez Perce Tribe tabled the Tribe's water right claims in exchange for the Tribe's receipt of an on-reservation consumptive use water right to 50,000 acre-feet of water with a priority date of 1855; establishment of a $50 Million water and fisheries resources trust fund; $23 Million for the design and construction of water supply and sanitary sewer infrastructure on-reservation; transfer of management authority of the Kooskia National Fish Hatchery to the Tribe; and transfer of ~$7Million of BLM-administered lands within the reservation to the Tribe. The Tribe also received commitment from the State of Idaho concerning minimum streamflow establishment and habitat conservation funding and planning for Endangered Species Act (ESA)-listed fish species in the Salmon and Clearwater River Basins.

Idaho water users received (at least some temporary) finality regarding, and the adjudication of, their water right claims in the Snake River Basin Adjudication, and protections from flow augmentation obligations of the United States Bureau of Reclamation for downstream "fish flush" purposes. The U.S. Bureau of Reclamation's acquisition of flow augmentation water (up to 487,000 acre-feet) occurs on a willing lessor-willing lessee basis through Idaho basin-based water supply banks—as opposed to more unilateral takings attempts lacking compensation in

return. In other words, Idaho water users secured contractual commitments from the United States, ratified by Congress, that they (Idaho water users) would not and could not wind up in a Klamath Project-like situation where irrigators are cut off from federal project water supply with the water, instead, being used for ESA purposes.

The willing lessor-willing lessee flow augmentation component is also an integral part of the Biological Opinions authorizing Upper Snake River dam operations—many of which are used to store and deliver irrigation water to Idaho's agricultural economic engine. Like the Agreement, the biological opinions provided security for 30-year terms.

The Columbia Basin Treaty

The Columbia River Treaty (Treaty) between Canada and the United States was largely a product of historic floods in the spring of 1948. The flooding damaged towns throughout the Columbia River valley, and effectively wiped the town of Vanport, Oregon off of the map. At the time, Vanport was the second largest city in Oregon (population approximately 30,000), and 50 lives were lost. In addition to Columbia River flood control concerns, both Canada and the United States were interested in increasing hydroelectric power generation potential in the Columbia River Basin. Thus, when signed in 1961, the Treaty addressed the two issues of the day: flood control and hydropower generation, both addressed through the construction of a number of dams in the United States and Canada.

A total of four Treaty dams were constructed; three in British Columbia, Canada (Duncan, Mica, and Keenleyside), and one in the United States (Libby) located in Montana. The Canadian facilities alone added 15.5 million acre-feet of storage to the system—doubling the amount of storage that existed prior to their completion. The United States paid Canada roughly $64 million to cover the construction of the Canadian dams, and to fund coordinated flood control operations for 60 years (through 2024) under the Treaty. In essence, the United States funded the construction of, and paid for, a means of Columbia River flood control that it could not otherwise accomplish as efficiently within its borders.

Regarding hydropower generation, Canada and the United States agreed to share those benefits equally. However, when the Treaty was signed in 1961, Canada did not have the use/demand for the extra power generated. Thus, Canada sold the first 30 years-worth of its hydropower entitlement to a consortium of utility companies in the United States for $254 million in 1964. That same entitlement is valued at approximately $250 - $350 million per year today. With population growth in western Canada, Canada seeks greater control over, and use of, the hydropower generation potential of the Canadian dams, which power generation operations adversely impacts flood control capabilities.

The guaranteed flood control space in Canadian reservoirs that the United States purchased in 1964 expires in 2024. Under the Treaty, the flood control obligation is, therefore, poised to convert from a "guaranteed" to a "called upon" basis. This shift in obligations is significant. Under the "called upon" regime, the United States could only "call upon" Canada to provide flood control space/assistance in those years when U.S.-based flood control space is insufficient to meet projected needs. Under the "called upon" regime, the United States is required to pay Canada for the costs of operating the Canadian facilities for flood control purposes, including lost power generation capacity as a consequence of maintaining flood control space.

The United States believes that Canadian space can be called upon once space in the U.S. Treaty-related dams is exhausted (space in John Day, Hungry Horse, Dworshak, Brownlee, Kerr, Albeni Falls, and Grand Coulee). Canada disagrees. Under the Treaty terms "effective use," Canada contends that the United States cannot "call upon" Canadian flood control space unless and until the United States makes full "effective use" of *all* reservoirs in the Basin with the ability to control flows at the Dalles Dam in Oregon—those with a Treaty connection, and those that do not. Idaho Water Users are concerned that if the Canadian position prevails, major irrigation storage facilities throughout the Upper Snake River Basin could be implicated under an "effective use" regime, even though those dams were not referenced in the original Treaty. This is because flood control and irrigation storage operations inherently conflict with one another—irrigation storage would ideally "fill and spill," while flood control operations would rather "spill and fill" (*i.e.*, evacuate water to make flood water space, and fill that space, hopefully, after the spring flood risk passes). Flood control operation

regime changes could also impact flow augmentation water availability under the Nez Perce Agreement and separately required under the existing 30-year biological opinions governing Upper Snake River Basin Dam operations.

Idaho water users also question how more modern "ecological considerations" might impact Idaho dam and reservoir operations. Rightly or wrongly, environmental/ecosystem-based considerations were not part of the original Treaty in 1961; rather the chief concerns of the day, flood control and hydropower generation potential, were. Ecological considerations (*i.e.*, increased flow augmentation obligations in particular) potentially undermine flood control and hydropower generation operations—the two express purposes of the original Treaty. Ecological considerations could also erode state-based sovereignty over various water rights agreements and settlements such as the Nez Perce Agreement.

Lower Snake River Dam-Breaching Discussions

In early 2021, Idaho Congressman Mike Simpson announced the approximately $30 Billion Columbia Basin Initiative proposal in hopes of putting an end to the treadmill of ESA-salmon recovery-related litigation in the Columbia River Basin. The proposal called for breaching four dams on the Lower Snake River (Ice Harbor, Lower Monumental, Little Goose, and Lower Granite—the LSRD)) and using the estimated funds to replace lost power production, improve transportation corridors to mitigate lost barging, and to mitigate environmental effects of dam breaching, among other activities.

In late 2021, Washington State Governor Inslee and Senator Murray announced their intention to wade deeper into the dam breaching debate circulating over Congressman Simpson's Columbia Basin Initiative announcement. They sought review and discussion of whether there are reasonable means for replacing the benefits provided by the LSRD as a practical matter, and what those replacement alternatives are likely to cost. Senator Murray in particular has consistently stated that she is not inclined to discuss dam breaching (and the Congressional action needed to accomplish such a path) unless and until a benefits replacement plan is in place and substantially funded. Ultimately, Governor Inslee and Senator Murray issued a report on August 25, 2022 that breaching the LSRD was not "feasible or responsible option" until the economic and hydropower generation benefits of the dams were/are readily replaceable—which is not possible at this time particularly with green energy production mandates in the region and the significant cost differences between current commodities barging and the far more expensive alternatives of rail and trucking.

Conclusion and Implications

What potential LSRD dam breaching may mean to U.S. Bureau of Reclamation flow augmentation obligations and combined flood control operations of the Bureau and ACE arising upstream remains to be seen. But the Nez Perce Agreement resolved a variety of water user issues and competing SRBA water right claims that Idaho and Idaho water users have no interest in upsetting.

Though the Nez Perce Agreement, by its terms, spans another 12 years in the protections it provides to Idaho water users, many wonder what changes broader, more regional discussions may bring about. Idaho and its water users did well to largely insulate themselves from many of these issues in 2004, but rivers and their tributaries flow downhill and they, unfortunately, do not lend themselves to easy compartmentalization—if any compartmentalization at all.

Andrew J. Waldera is a Partner at Sawtooth Law Offices, PLLC where he practices in the areas of water, land use, environmental/natural resources, and agricultural law. He represents clients in judicial, administrative, and local government proceedings regarding water rights and land use matters under state and federal law, including under the Idaho Local Land Use Planning Act and the federal Clean Water Act, Endangered Species Act, and hazardous waste management and defense matters under the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act. Andy serves on the Editorial Board of the *Western Water Law & Policy Reporter*.

WESTERN WATER NEWS

FEDERAL GOVERNMENT TO PROVIDE $250 MILLION IN FUNDING TO LOCAL AGENCIES FOR SALTON SEA RESTORATION PROJECTS

In late November, southern California's Imperial Irrigation District (IID) officially announced that they would be partnering with the U.S. Department of the Interior, the California Natural Resources Agency, and the Coachella Valley Water District in an effort to clean up the dilapidated Salton Sea (Sea).

The Salton Sea has been hit particularly hard by the effects of climate change and persistent drought, so much so that the nearby communities have even experienced health problems caused by algae blooms and dust storms due to wins kicking up drying sediment along the Sea's widening shores. The new partnership plans to alleviate some of these problems with $250 million in funding from the federal government. These funds will go towards environmental restoration projects, including air quality improvements, public health programs, and ecosystem restoration projects, with the local agencies providing the land necessary for the implementation of such projects and the California Natural Resources Agency assisting in the permitting processes.

The State of the Salton Sea

Occupying nearly 350 square miles of southern California's Riverside and Imperial counties, the Salton Sea is California's largest lake by surface area, dwarfing even Lake Tahoe—California's largest *fresh water* lake—which has a surface area just under 200 square miles. The Sea's formation is also an anomaly itself, as it was originally formed over an old and empty lakebed in 1905 when Colorado River floodwaters breached an irrigation canal being constructed in the Imperial Valley. This flooding filled the area then known as the Salton Sink, and the Sea has since been maintained by irrigation runoff from the Imperial and Coachella valleys—largely fueled by Colorado River water—and local rivers.

As the Salton Sea is a terminal lake, meaning there are no outflows from the lake, the Sea has faced increasing salinity and other water quality issues, including temperature extremes, eutrophication, and related anoxia and algal productivity. Salinity levels in the Sea have reached such high levels that they exceed those of the Pacific Ocean by 50 percent. In fact, salt levels are so high that the Sea's sole native fish is the desert pupfish, a fish known for its capacity to resist the changing salinity levels in the Salton Sea and now classified as a federally endangered species.

Furthermore, climate change, water-conservation measures, and water transfer agreements shifting the use of Colorado River water have all led to a decrease in irrigation runoff that previously fed the Sea. With less irrigation runoff, the Salton Sea has experienced increased evaporation, exposing dry lakebed saturated in contaminants such as pesticides and farming byproducts. These contaminants are then kicked up into the air as toxic dust clouds and the communities surrounding the Sea have suffered disproportionately from negative health effects as result, including asthma and other respiratory conditions, allergies and nosebleeds.

Funding for Restoration Projects

The multi-agency partnership will take aim at addressing these concerns and will also focus on meeting the contingency placed on the funding—namely that the state must conserve 400,000 acre-feet of Colorado River water each year starting in 2023.

The first $22 million will be provided by the Department of the Interior's Bureau of Reclamation between now and the end of the summer of 2023 for restoration projects around the Salton Sea, research on current and future cleanup projects, and to hire two representatives from the Torres Martinez Desert Cahuilla Indian Tribe to help implement those projects. The rest of the funding, $228 million in total, will be contingent on the state following its commitment to conserve 400,000 acre-feet of Colorado River water annually. Per the terms of the partnership's agreement, this will require IID to conserve 250,000 acre-feet of Colorado River water per year as part of the state's larger goal.

Conserving that much water, however, will only exacerbate the problems the partnership seeks to

remediate. An IID projection shows that by 2027, the required conservation measures will expose an additional 8,100 acres of dry shoreline. It is the aim of the partnership, however, for the additional $228 million in funding to not only mitigate these impacts, but to help restore the Salton Sea beyond any mitigation efforts. The agreement involves expanding and expediting existing projects that will flood portions of the lakebed to protect human health by limiting dust emissions while also providing increased aquatic habitat.

Additionally, the California Natural Resources Agency agreed to accelerate any permitting processes. Although most lakes fall under the jurisdiction of their state, the Salton Sea's lakebed is broken up into a large puzzle of separate landowners, creating the need for expedited land access as land access issues have historically popped up as an obstacle in the way of restoration efforts. To this end, both IID and Coachella Valley Water District have also pledged that they would provide expedited land access for the projects.

Conclusion and Implication

The Salton Sea's condition has grown worse and worse over the past decade and is well on its way to becoming nothing more than a toxic cesspool of agricultural waste. Furthermore, the state's persistent drought is accelerating that process, making it all the more important to get these restoration projects going in any fashion. Even if more can be done—or needs to be done—to keep the Salton Sea from becoming a wasteland, the efforts undertaken by the Department of the Interior, Imperial Irrigation District, Coachella Valley Water District, and the California Natural Resources Agency in this agreement put pen to paper and creatively combine two of the region's major efforts in one agreement: water conservation efforts and restoration projects in and around the Salton Sea. Although most of the funding is conditioned on IID's conservation of 250,000 acre-feet of water each year, assuming this goal is met and the funding is provided, the partnership's efforts could result in impactful projects to clean up the Salton Sea and at least slow the decline of the health of both the lake and its surround communities.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

WASHINGTON STATE JOINT LEGISLATIVE TASK FORCE ISSUES REPORT ON WATER RESOURCE MITIGATION

This article serves as an update on the continuing discussion of water right mitigation standards in Washington State. Specifically, this article will provide an overview of the seminal *Foster* case decided by the Washington Supreme Court in 2015, mitigation strategies utilized by the Washington Department of Ecology (Ecology) stemming from that decision, and an update to the Joint Legislative Task Force on Water Resource Mitigation established by Engrossed Substitute Senate Bill No. 6091, Sec. 301 (ESSB 6091) following the *Foster* decision.

Background

Due to historical demands coupled with increasing population and diminishing supply, in many parts of Washington, water is not available for appropriation. Under RCW 90.03.290 Ecology is required to make four determinations prior to the issuance of a water right permit: one, what water, if any, is available for appropriation; two, what beneficial uses the water is to be applied; three, will appropriation impair existing water rights; and four, will the appropriation detrimentally affect the public welfare. For parts of the state in which water is not available for appropriation or impairment is possible because of existing water rights, including instream flows, mitigation is needed to establish a new use of water. Mitigation can be in-kind, such as another water right transferred to the State Trust Water Right Program. Unlike in-kind, or water-for-water mitigation, out-of-kind water right mitigation relies on habitat restoration projects, or monetary payments for such projects, to offset the stream-depleting impacts of a new water right.

The adequacy of mitigation for new uses of water was before the Supreme Court of Washington in *Foster v. Department of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015) (*Foster*). Under the decision the Supreme Court reversed the lower court's decision to approve Ecology authorization of a water right for the City of Yelm that would impair the minimum flows of waterways connected to the Deschutes and the Nisqually Basins.

The *Foster* Decision

In *Foster*, the City of Yelm proposed a water right permit based on an extensive mitigation package. The proposed water right included offsetting the total quantity of new water use through both "in-kind" mitigation, including plans to retire existing irrigation water rights and an aquifer recharge project, and "out-of-kind" mitigation, that included a variety of habitat improvements. Ecology accepted out-of-kind mitigation to offset the impacts of the new appropriation water rights issued under the Overriding Considerations of Public Interest (OCPI) under RCW 90.54.020(3)(a) because having found that public benefits arising from the mitigation package would far outweigh any adverse impacts on stream flows. In the decision, the Washington Supreme Court rejected Ecology's reasoning that out-of-kind mitigation was an acceptable method to offset impacts to senior rights, including instream flows, saying "The [out-of-kind] mitigation plan does not mitigate the injury that occurs when a junior water right holder impairs a senior water right. The water code, including the statutory exemption, is concerned with the legal injury caused by impairment of senior water rights—water law does not turn on notions of "ecological injury." *Foster,* at 963 . The Court held that the prior appropriation doctrine does not allow for any impairment, even de minimis impairment, of senior water rights, in accordance with the Court's earlier decision in *Postema v. Pollution Control Hearings Board,* 142 Wn.2d 68, 11 P.3d 726 (2000). Under the *Foster* decision, the Court reasoned that water is not interchangeable with habitat and permanent water rights cannot be issued in exchange for ecological improvements. *Foster*, at 963.

The Legislative Task Force

In January 2018, the Washington Legislature established the Joint Legislative Task Force on Water Resource Mitigation (Task Force) as a part of ESSB 6091, codified under RCW 90.94.090. The Legisla-

ture directed the Task Force to address the impacts of the *Foster* decision; review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat; required Ecology to issue up to five permit decisions using a mitigation sequencing process; and to establish five pilot projects which would be used to inform the Task Force process created by ESSB 6091 and enable the processing of water right applications that address water supply needs. The original legislation directed the Task Force to submit recommendations to the Legislature by November 15, 2019.

Ecology received applications from the City of Sumner, Spanaway Water Company, City of Port Orchard, City of Yelm, and the Ag Water Board of Whatcom County that met the criteria for eligibility specified under RCW 90.94.090(10). The Legislature outlines a mitigation sequence that the pilot participants must follow when creating a mitigation plan to offset impacts from the proposed projects which are: avoidance, minimization, and compensation. RCW 90.94.090(8). Avoidance means complying with prescribed mitigation set forth within an instream flow rule; or through conditions on water right approvals in which the water use would be interrupted when flows in affected water bodies fall below instream flow levels. Minimization means applicants would provide "water-for-water" mitigation by transferring a valid water right into Ecology's Trust Water Right Program or by finding other means to supply replacement water to the affected water body. And finally, if an applicant can show that avoidance and minimization are not reasonably attainable, the mitigation approach can move onto the next step: compensation. Under compensation, applicants may use other approaches that provide net ecological benefits to fish and related aquatic resources. Applicants may use in-kind or out-of-kind mitigation (or a combination of both), provided that the mitigation improves the function and productivity of affected fish populations and related aquatic habitat. Ecology provided the Task Force with information on conceptual mitigation plans for each pilot projects on November 15, 2018, based on the mitigation sequencing of avoidance, minimization, and compensation as outlined above. As of July 2020, Ecology states "The Task Force issued an initial report on progress from the pilot projects, but work continues" (Ecology Pub 20-11-083).

The Task Force was comprised of two members each from the largest caucuses of the Senate and House of Representatives as appointed by the President of the Senate and the Speaker of the House, additionally, there was one representative from each department of Ecology, Fish and Wildlife, and Agriculture, appointed by their respective agency directors, and finally, several members appointed by consensus of the Task Force co-chairs representing a variety of interested parties including people from: the farming industry, cities, municipal water purveyors, business interests, environmental organizations, and two federally recognized Indian tribes, one invited by recommendation of the Northwest Indian Fisheries Commission and the other invited by recommendation of the Columbia River Intertribal Fish Commission. In total there were 11 voting members of the Task Force. The state agency representatives are not eligible to vote on Task Force recommendations. The Task Force was reauthorized through the passage of Substitute House Bill No. 1080, Sec. 7024 (SHB 1080) in 2021, and the deadline for Task Force recommendations to the Legislature was extended to November 15, 2022. During the period from November 16, 2019, through December 31, 2022, the work of the Task Force was limited to a review of any additional information that may be developed after November 15, 2019, as a result of the pilot projects, and an update of the Task Force's November 15, 2019, recommendations. Recommendations were developed through comments by various Task Force members. Comments were complied from letters and emails from the Task Force members and grouped into Majority Recommendations, supported by 60 percent majority of Task Force members, Minority Recommendations, supported by at least five of the appointed voting members of the Task Force members, and Other Topics Discussed, where not enough votes were obtained to reach the threshold of minority recommendations.

The Mitigation Report

All participants voted in favor of Majority Recommendations in four categories: (1) Conservation, (2) Source Switch, (3) OCPI, and (4) Modeling.

Under Conservation, Legislature should consider new conservation standards for water systems served by water rights utilizing mitigation, the state should seek ways to reuse wastewater, and legislation should be developed to require high consumptive users to reduce leakage below five percent.

Members believe that Ecology should help facilitate continued discussion among stakeholders on the subject of "source switch" to see if agreement can be reached on a streamlined approach for approving transfers from surface water to ground water, as long as instream flows are not impaired. Many members generally supported the Legislature revisiting its intent in the term "overriding considerations of the public interest."

All voting members believe that hydrogeologic modeling is in the best interest of managing water resources, but they disagreed on whether the legislature should, or should not, be involved with managing the appropriate level of modeling.

Conclusion and Implications

The full report, issue by the Joint Legislative Task Force, along with the letters from the member of the Task Force, comments, summaries of meetings, and recommendations, can be found at: https://leg.wa.gov/JointCommittees/WRM/Pages/default.aspx.
(Jessica Kuchan, Jamie Morin)

REGULATORY DEVELOPMENTS

IN A MAJOR REGULATORY STEP, FERC APPROVES REMOVAL OF FOUR DAMS ON THE KLAMATH RIVER

On November 17, 2022, the Federal Energy Regulatory Commission (FERC) issued an order approving the surrender of license and removal of project facilities for four dams on the Klamath River. The four dams—the J.C. Boyle Dam, Copco Dam No. 1, Copco Dam No. 2 and Iron Gate Dam—restrain the lower reaches of the Klamath River. Owned and operated by PacifiCorp, a subsidiary utility company of Berkshire Hathaway Energy, the dams were built to provide hydroelectric power to customers in California and Oregon. Stakeholders in the effort to remove the dams include PacifiCorp, the states of California and Oregon, and the Yurok and Karuk tribes, and a number of environmental interest groups, including American Rivers, California Trout, Northern California Council Federation of Fly Fishers, Salmon River Restoration Council, Sustainable Northwest, Trout Unlimited, and Pacific Coast Federation of Fishermen's Association.

Background

The Klamath River runs through southern Oregon and northern California before emptying into the Pacific Ocean near the town of Klamath, California. Prior to the arrival of European settlers during the California Gold Rush in the 1840s and the construction of the dams in the following century, the Yurok and Karuk tribes populated the region and fished the Klamath River. The salmon from the Klamath River was a primary food source for the Tribes and holds great cultural significance. Between 1903 and 1964, a number of dams were built on the Klamath River as part of the Klamath River Hydroelectric Project (Klamath Project). Both Tribes—already decimated and displaced by European settlement—were severely impacted by the damming of the Klamath River. In addition to blocking the passage of anadromous fish to the upper reaches of the Klamath River, the dams slow the flow of the river, which results in higher water temperatures that increase the mortality of fish eggs and the growth of toxic algae blooms. A massive die-off of salmon in the lower reaches of the Klamath River in 2002 has been attributed to these effects.

FERC Relicensing Leads to Decision to Allow Removal of Klamath Dams

FERC has responsibility for licensing and inspecting hydroelectric projects such as the Klamath Project. FERC issued the original license for the Klamath Project in 1954, and the license expired in 2006. PacifiCorp has been operating the Klamath Project under an annual license since that time. In 2004, PacifiCorp filed an application to relicense the Klamath Project. The final Environmental Impact Statement (EIS) for the relicensing of the Klamath Project issued in 2007. The EIS recommended issuing a new license, but recommended that the new license include mandatory conditions from the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to mitigate environmental impacts. PacifiCorp determined that the costs of complying with such conditions would be cost-prohibitive. PacifiCorp thereafter asked FERC to put the relicensing application in abeyance and commenced negotiations with federal, state, and tribal authorities to consider alternatives to relicensing the four lower dams of the Klamath Project.

A number of parties reached an agreement to remove the four dams in February 2010. In April 2016, the states of California and Oregon, the U.S. Department of the Interior, PacifiCorp, NMFS, and the Yurok and Karuk Tribes entered an amended settlement agreement whereby PacifiCorp would seek permission from FERC to transfer the four dams to a new entity called the Klamath River Renewal Corporation (Renewal Corporation), a nonprofit established to oversee dam removal and river restoration. The Renewal Corporation is funded by contributions from the states of California and Oregon, as well as rate surcharges on PacifiCorp customers. The Renewal Corporation's board of directors are appointed by various stakeholders, including the states of Califor-

nia and Oregon, the Karuk and Yurok Tribes, and a number of environmental interest groups.

FERC required PacifiCorp to remain a co-licensee to assure sufficient funding and responsibility for the surrender and removal process and any impacts therefrom. PacifiCorp resisted this requirement, fearing the effect of such continued, open-ended involvement on its rate-payers. Following further negotiations, the states of California and Oregon agreed to step in as the co-licensee with the Renewal Corporation in place of PacifiCorp. While the parties negotiated the co-licensee issue, PacifiCorp and the Renewal Corporation submitted a new application to surrender the license.

FERC approval of the license surrender has involved a litany of approvals from and coordination with other federal and state regulators. FERC prepared an EIS with cooperation from the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency. The final EIS was issued on August 26, 2022. In consultation with FWS and NMFS, FERC prepared a Biological Assessment pursuant to Section 7 of the federal Endangered Species Act. FERC also engaged in consultation with NMFS to review adverse effects on Essential Fish Habitat under Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act. The Renewal Corporation received water quality certifications from the Oregon Department of Environmental Quality and the California State Water Resources Control Board pursuant to the federal Clean Water Act (CWA). In February 2022, the California Coastal Commission has determined that the dam removal would not have a substantial effect on California's coastal zone. The National Park Service, U.S. Forest Service, and the U.S. Bureau of Land Management determined that dam removal was consistent with Section 7 of the Wild and Scenic Rivers Act. The Renewal Corporation has also applied to the Corps for a dredge-and-fill permit pursuant to Section 404 of the CWA. That application remains under consideration.

Based on these regulatory actions, as well as review and analysis of other federal, state, and local requirements, FERC found that dam removal is in the public interest. FERC granted the license surrender application and approved the removal of the four dams. Although the Section 404 permit application remains under consideration with the Corps, dam removal is expected to start in summer 2023, with Copco Dam No. 2 the first dam scheduled to be razed. Renewal Corporation expects the removal of all four dams to be completed by the end of 2024.

Opposition to the Projects

Removal of the dams is not without opposition. Farmers and municipalities that rely on the Klamath River for irrigation and drinking water expressed concerns about the effect of dam removal on water deliveries. Others have expressed concern with the loss of flood control and fire protection, the release of downstream sediments and toxic material as a result of the removals (including potential Clean Water Act violations), the impacts on recreation, and the potential destruction of wildlife habitat.

On December 3, 2022, the Siskiyou County Water Users Association (SCWUA) filed a complaint in the Siskiyou County Superior Court seeking an injunction against the State of California to stop the dam removal project on the basis that removal will result in sedimentation and channel modifications in violation of the federal Wild and Scenic River Act. At this early stage of the litigation, it is unclear what effect it may have on the removal effort.

Conclusion and Implications

The removal of the four dams on the lower reach of the Klamath River is seen by many as an important and long-sought victory for salmon and the Tribes that depend on them. Others remain skeptical about the consequences of removing the dams. A few hurdles remain, including local permitting, the pending Section 404 application, and a pending lawsuit. But many view FERC approval of the license surrender application as the final significant regulatory obstacle before dam removal can proceed.
(Brian E. Hamilton, Meredith Nikkel)

U.S. BUREAU OF RECLAMATION UTILIZES HYDROLOGIC SCENARIOS TO PREDICT INFLOW AT LAKE POWELL AND LAKE MEAD

In November 2022, the U.S. Bureau of Reclamation (Bureau) conducted an analysis to determine a possible range of reservoir elevations at Lake Mead and Lake Powell on the Colorado River. The Bureau predicted a significant drop in surface water elevation from the October 2022 reports to the November 2022 reports, suggesting potentially unprecedented low surface water elevations.

Background

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

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, the Bureau, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

The Bureau periodically models lake elevations at Lake Mead and Lake Powell to facilitate water management activities on the river. To predict the potential impact that reducing the Glen Canyon Dam annual releases will have on Lake Mead and Lake Powell, the Bureau created three hypothetical hydrologic scenarios through model runs. The model runs consisted of the October 2022 24-Month Study Probable Maximum inflow and the November 2022 24-Month Study Probable Minimum inflow. An additional model run was conducted in November to determine a possible range of reservoir elevations.

The Probable Minimum inflow scenario reflects a dry hydrologic condition which statistically would be exceeded 90 percent of the time. The Most Probable inflow scenario reflects a median hydrologic condition which statistically would be exceeded 50 percent of the time. The Probable Maximum inflow scenario reflects a wet hydrologic condition which statistically would be exceeded 10 percent of the time. It is approximately 80 percent likely that future elevations will fall within the range of the predicted minimum and maximum inflow scenarios.

The Department of the Interior implemented an action plan pursuant to the 2007 Interim Guidelines reducing the Glen Canyon Dam annual releases. The reduction of releases from Lake Powell resulted in a reduced released volume that would normally have been released from Glen Canyon Dam to Lake Mead consistent with routine operations under the 2007 Interim Guidelines. The reduction of releases from Glen Canyon resulted in increased storage in Lake Powell and did not affect the operating determinations for 2023 and was accounted for as if the volume

of water had been delivered to Lake Mead for operating condition purposes.

More on the Predictive Modelling

The hydrologic scenarios reflect the projected physical elevations at each reservoir after implementing the above action plans. The November 2022 Probable Minimum 24-Month Study's water year (WY) 2023 unregulated inflow into Lake Powell in the Probable Minimum inflow scenario is 51 percent of average. Under the Probable Minimum scenario, Lake Powell's physical elevation is projected to be 3,489.33 feet on December 31, 2023. Including intervening flows between Lake Powell and Lake Mead, Lake Mead's physical elevation is projected to be 1,018.12 feet on December 31, 2023.

Under the November 2022 Most Probable 24-Month Study, the WY 2023 unregulated inflow into Lake Powell in the Most Probable inflow scenario is 83 percent of average. Under the Most Probable scenario, Lake Powell's physical elevation is projected to be 3,529.49 feet on December 31, 2023. Including intervening flows from Lake Powell and Lake Mead, Lake Mead's physical elevation is projected to be 1,021.77 feet on December 31, 2023.

Lastly, the October 2022 Probably Maximum 24-Month Study indicates that the WY 2023 unregulated inflow into Lake Powell is 161 percent of average. Under the Probable Maximum scenario, Lake Powell's physical elevation is projected to be 3,581.67 feet on December 31, 2023. Including intervening flows between Lake Powell and Lake mead, Lake Mead's physical elevation is projected to be 1,062.28 feet on December 31, 2023.

Conclusion and Implications

The prediction models created by the Bureau of Reclamation shows what can be expected months or even years ahead. After a historic drop of water levels which have steadily been declining, the Bureau has identified a possible solution which may maintain and restore a consistent surface water elevation in Lake Mead and Lake Powell. For more information, *see:* U.S. Bureau of Reclamation, *November 2022 24-Month Study Projections Lake Powell and Lake Mead: End of Month Elevation Charts*, https://www.usbr.gov/lc/region/g4000/24mo/2022/November-Chart.pdf.

(Miles Krieger, Steve Anderson)

COLORADO ADOPTS NEW REGULATION TO ALLOW DIRECT POTABLE REUSE OF PUBLIC WATER SUPPLIES

The Colorado Department of Public Health and Environment (CPDHE) recently modified its existing drinking water regulations to allow direct potable reuse for public water systems. The new regulation places strict requirements on suppliers but is intended to allow public water systems to use and reuse their water to serve more customers across the growing state more efficiently.

Background On Domestic Potable Reuse And Other Reuse Systems

Direct potable reuse (DPR) is a process through which wastewater can be treated and directly returned to a drinking water supply. This process differs from indirect potable reuse, in which wastewater effluent is first filtered through an environmental buffer, such as a river or wetland, before returning to the drinking water system. Before this new regulation, only Ohio, South Carolina, and New Mexico had regulated DPR systems, although California, Florida, and Arizona are working on similar programs.

Indirect potable reuse is currently implemented across the country, including larger municipalities such as San Diego. Indirect potable reuse systems, particularly in geographic regions like Colorado, suffer inefficiencies from transit, seepage, and evaporation losses. Therefore, while indirect potable reuse may increase a supplier's water supply, DPR is potentially a more efficient process by removing environmental losses inherent in arid climates. In Colorado, the city of Aurora has long used an indirect potable reuse system via the South Platte River. Aurora's system is a textbook example of indirect reuse in that it treats wastewater effluent and discharges that water to the river system. The natural environment then filters

the water as it descends through an alluvial aquifer before Aurora pumps it back out for subsequent treatment, blending, and ultimately, domestic reuse.

Many suppliers also utilize nonpotable reuse. In this system, wastewater is reclaimed and used for non-drinking water uses, such as irrigation of parks or golf courses. However, in a DPR system wastewater is filtered through a more complex treatment facility such that the water then reenters the drinking water supply. DPR systems, which are attracting more attention in water-scarce regions, allow multiple successive reuses of a drinking water supply source, thus increasing the total water available to end users. According to some DPR proponents, an advanced DPR system may allow total domestic water supplies to be increased as much as 90 percent through successive reuses.

For all of its advantages, DPR has historically struggled to gain traction partly because of public perception. Without sufficient technological advancements and public education, consumers have understandably been hesitant to obtain their drinking water supply from treated wastewater effluent. Yet, the ever-increasing population growth and demand for drinking water in Colorado, coupled with finite supplies, has led the state to pursue new options. Indeed, the Colorado Water Conservation Board's 2015 Colorado Water Plan and Draft 2023 Water Plan Update both include expanded reuse as a stated goal, and the 2023 Water Plan Update specifically includes the development of a water reuse progress report.

Water Quality Control Commission Study, Testing and Rules

To that end, the Colorado Water Quality Control Commission (WQCC), a division of CDPHE, undertook a years-long study and testing process to promulgate rules and regulations for DPR systems in Colorado. The WQCC voted unanimously to approve the new rules on October 11, 2022 and the changes were formally adopted on November 14, 2022.

Rule 11 DPR Changes

WQCC Regulation 11 contains the primary drinking water rules for Colorado. The new rules add section 11.14, the Direct Potable Reuse Rule (DPR Rule). Although the DPR Rule does not require any Colorado suppliers to begin DPR programs, it outlines specific requirements that must be followed for implementing those systems. The DPR Rule supplements the existing regulations for drinking water quality found elsewhere in Rule 11.

Suppliers interested in pursuing DPR must first apply for WQCC approval to assess their technical, managerial, and financial capacity to operate a DPR system. The application must be filed prior to submitting any plans or specifications for the system. Prior to the application, the supplier must also monitor its treated wastewater for at least one year. Those results will be part of the application and help determine whether a DPR system is possible for the supplier.

The DPR Rule also contains specific communication and public outreach requirements. WQCC acknowledged that public opinion may be the most difficult hurdle in creating new DPR systems, so this section is designed to ensure public participation, knowledge, and involvement. The DPR Rule specifically requires at least one public meeting and mailing information to all consumers within its service area. The notification must include an explanation of DPR in general, a description of the proposed system, and the supplier's reasons for the proposed implementation, among other technical information.

Practically, the DPR Rule contains numerous technical requirements, including a mandate for an enhanced source water control program, operations requirements, treated wastewater control parameters, and specific levels of pathogen and chemical reduction. These hyper-specific requirements work to ensure that wastewater reused through any DPR system sufficiently eliminates contaminants to safe or non-detectable levels. The WQCC and supporters of the DPR Rule believe these provisions may allay public concerns over drinking treated wastewater.

Conclusion and Implications

The DPR Rule will create more flexibility for growing municipalities and other public water providers throughout Colorado to firm up their water supplies. However, the DPR Rule—as a drinking water regulation—does not alter Colorado's prior appropriation system for water rights administration purposes. Colorado's tributary water rights are often limited to an initial use. Return flows generated by the initial use are typically required to be relinquished to the stream system and, in turn, form the water supply available for downstream users within the water rights priority

system. In contrast, non-tributary, trans-mountain, and certain trans-basin water rights (*i.e.*, water that is hydraulically disconnected from the surface stream in the basin of use) allows the water right owner to reuse the water outside of the state's typical priority administration. Thus, DPR systems are more likely to be implemented by water providers with the type of water rights that inherently allow for reuse and successive use. Front Range municipalities, such as Aurora and others, which rely on supplies that already include a significant portion of trans-mountain or non-tributary water, are prime candidates for future DPR projects. However, the DPR Rule—at least from a water quality permitting standpoint—also opens the door to other public water suppliers across the state to consider how they too might deploy DPR to bolster their municipal water supplies in the face of prolonged drought.

DPR is praised by many conservation groups, including the boulder-based Western Resource Advocates, who believe that reuse, particularly through DPR, will be critical for water-stressed western states. Ever increasing demand combined with decreasing and finite water supplies throughout the West compels water providers to find creative solutions to water supply challenges. DPR is not a comprehensive solution to these issues, but the recent changes to WQCC Rule 11 now allow water suppliers to consider and plan for DPR as a new potential tool in their arsenal to obtain and provide sustainable water supplies for their customers.
(John Sittler, Jason Groves)

CALIFORNIA COASTAL COMMISSION APPROVES SUBSTANTIAL DESALINATION PROJECT

The California Coastal Commission (Commission) recently approved a consolidated Coastal Development Permit (CDP) to support the construction of a desalination plant in Marina, California and its source water wells located beneath the Monterey Bay seafloor. Approval of the permit was conditioned on limiting the harm to dunes and wetlands, groundwater stores and local communities.

Background

Western states continue to face an extended period of drought conditions, which increasingly impacts available drinking water supplies. For the past three years, California has faced some of the driest years on record with another dry year currently anticipated in 2023. In an effort to bolster local drinking water supplies, water suppliers and stakeholders continue to explore and advance construction of desalination plants. There are currently just four desalination facilities providing drinking water in the state.

Two proposed plants recently received Commission approval. One of the facilities is the California-American Water Company (Cal-Am) development located in Marina, California. Cal-Am intends to use this plant to bolster local supplies following recent directives from the California State Water Resources Control Board to cease diverting excess water from the Carmel River.

The Project Summary

Cal-Am proposes to construct and operate desalination components of its overall Monterey Peninsula Water Supply Project that would consist of a desalination facility, a well field, water transmission pipelines, pump station and other related infrastructure. The desalination facility will be located inland in the City of Marina with slant wells located partially in the CEMEX sand mining facility and produce initially about 4.8 million gallons of water per day (mgd). At full scale, the facility would produce 6.8 mgd. The intake wells will be located beneath the Monterey Bay seafloor. The brine will be discharged through an existing outfall after modification. Ratepayers in the Monterey Peninsula (Carmel-by-the-Sea, Pacific Grove and Pebble Beach) and the City of Castroville would receive the desalinated water.

Discussion and Differing Views

Elected officials, state agencies and local businesses have expressed support the approval of the desalination facility in order to develop drought-resistant water supplies. The Monterey Peninsula relies

exclusively on groundwater, the Carmel River, and highly treated wastewater for its supplies. Additionally, regulators believe the new source will assist with easing housing shortages in the region. Because of the area's limited water supply, parts of the peninsula have been under a moratorium for new water connections for over a decade.

While the project aims to resolve water security issues, project opponents have voiced concerns. First, opponents assert the project raises environmental justice issues for designated disadvantaged neighborhoods within the City of Marina and that city residence should receive water from the facility. Opponents also assert that construction and operation of the facility may cause environmental impacts including to sensitive species, wetlands and vernal pools, and that the intake wells could degrade groundwater supplies and cause saltwater intrusion into the aquifer.

Project estimates peg the cost of the desalinated water supplies to be approximately $6,000 per acre-foot. Project proponents point to the reliability of and need for these additional supplies. Opponents assert that additional recycled water should instead be pursued.

Coastal Commission Approval

Commission staff (Staff) recommended approval of the permit based on the addition of 20 special conditions. Staff found that uncertainty surrounding the groundwater, environmental and environmental justices concerns can be addressed through a number of prior-to-issuance conditions. To address the sensitive species concerns, Staff required closure of areas during certain periods of the year, biological and habitat monitoring, compensatory mitigation for habitat, and establishment of conservation easements for dune habitat. Regarding protection of water resources, Staff required the production of a groundwater monitoring plan and a wetlands and vernal pool adaptive management plan. Staff further required Cal-Am to annually produce an environmental justice report providing the status of project-related measures to reduce costs to low income-ratepayers and a community engagement plan for the residents and representatives of the City of Marina.

During the public hearing for consideration and approval of the permit, the Commissioners modified some of the conditions and imposed additional obligations. Per the Commission, Cal-Am must update plans for assisting low-income ratepayers and cap monthly water rate increases for eligible customers. Additionally, the Commission requires Cal-Am to pay $3 million to the City of Marina and fund employment of persons to oversee a public access and amenities plan.

Conclusion and Implications

Cal-Am originally proposed a larger desalination plant in 2020. At the time, Coastal Commision Staff recommended denial of the permit for the larger facility as Staff had identified the expansion of the water recycling facility as a feasible alternative. However, three years later, Staff have found that updated supply and demand models reasonably demonstrate the need to supplement existing supplies in the current 20-year planning period, with desalination comprising an integral component.

As drought conditions continue in California, it is likely that additional coastal cities will reevaluate their existing demand and supply models. While water recycling is an alternative, it is often inextricably linked to surface water supplies that vary from year to year. Cities facing water supply constraints will likely look to the development of new sources such as desalination. The Commission will continue to face complex environmental, resource, and environmental justice issues as demand for desalination likely increases. Future developers can glean some insight from the Cal-Am permit process as to what the Commission will require for the construction of additional desalination facilities.

(Christina Jovanovic, Derek Hoffman)

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

•Nov. 9, 2022—The City of Elyria, Ohio provides wastewater collection and treatment for approximately 55,000 residents. Elyria owns and operates a municipal wastewater treatment plant (WWTP) and a sewage collection system that is comprised of a separate sanitary sewer system and a combined sewer system. Elyria is permitted to discharge treated wastewater and combined sewage from its WWTP and combined sewer system under the terms and conditions of its National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Ohio.

The United States alleges that Elyria violated terms and conditions of its National Pollutant Discharge Elimination System permit, which set limits for how much of a certain pollutant an entity can discharge into a waterbody. The alleged violations include unauthorized discharges of pollutants into the Black River or its tributaries from sanitary sewer overflows (SSOs), repeated discharges of untreated sewage into the Black River from combined sewer overflows (CSOs) during wet weather periods, and bypasses of wastewater treatment facilities at its WWTP into the Black River, in violation of its permit.

The proposed settlement includes specific requirements to address SSOs, CSOs and bypasses of wastewater treatment. The consent decree requires completion of the construction and full implementation of all projects and pollution control measures by no later than December 31, 2044. The total cost of implementing these measures is estimated to be approximately $248 million:

(1) SSOs – Elyria shall complete sewer system improvements designed to eliminate SSOs. Specifically, the storage and sewage conveyance project known as the East Side Relief Sewer will consist of large diameter sewer measuring nearly five miles in length. The city will also complete various pump station improvements, and construction and rehabilitation of sanitary and storm sewers to reduce inflow and infiltration.

(2) CSOs – Along with the construction of the East Side Relief Sewer the city will construct outfall specific storage projects sized up to 110,000 gallons to control CSOs to no more than 4 events with a total annual volume of less than six million gallons of discharge during the typical year.

(3) Bypasses – Construct and implement improvements at the WWTP to expand peak treatment capacity at the WWTP from 30 million gallons per day to 40 million gallons per day. Additionally, Elyria will construction a chemically enhanced primary treatment and high-rate disinfection (CEPT/HRD) facility to treat combined sewage wet weather flows above the expanded secondary treatment capacity.

The proposed settlement, lodged in the U.S. District Court for the Northern District of Ohio, Eastern Division, is subject to a 30-day public comment period and final court approval. Information on submitting comment is available at the Department of Justice website

•Nov. 29, 2022—The United States has filed a proposal in federal court that—if approved by the court—would appoint an Interim Third Party Manager to stabilize the city of Jackson, Mississippi's public drinking water system, and build confidence in the system's ability to supply safe drinking water to the system's customers. The city and the Mississippi State Department of Health (MSDH) have signed this order and agreed to its terms. At the same time, the Justice Department, on behalf of U.S. Environmental Protection Agency (EPA), filed a complaint against the city alleging that the city has failed to

provide drinking water that is reliably compliant with the Safe Drinking Water Act (SDWA) to the system's customers.

The proposal, which was called a "proposed stipulated order" in court filings, is meant to serve as an interim measure while the United States, the city, and MSDH attempt to negotiate a judicially enforceable consent decree to achieve long-term sustainability of the system and the city's compliance with the SDWA and other relevant laws.

"Today the Justice Department is taking action in federal court to address long-standing failures in the city of Jackson's public drinking water system," said Attorney General Merrick B. Garland. "For many years now, the people of Jackson have lived in uncertainty—uncertainty about whether, on any given day, the water that flows from their taps will be safe to drink. With our court filings today, we have taken an important step towards finally giving the people of Jackson the relief they so desperately deserve."

The proposal seeks the court's appointment of an Interim Third Party Manager that would have the authority to, among other things:

(1) Operate and maintain the city's public drinking water system in compliance with SDWA, the Mississippi Safe Drinking Water Act, and related regulations;

(2) Take charge of the Water Sewer Business Administration, the arm of the city responsible for billing water users;

(3) Implement capital improvements to the city's public drinking water system, in particular, a set of priority projects meant to improve the system's near-term stability, including a winterization project meant to make the system less vulnerable to winter storms; and

(4) Correct conditions within the city's public drinking water system that present, or may present, an imminent and substantial endangerment to the health of the city's residents.

This court filing marks the latest efforts to address Jackson's drinking water crisis, but there is much work still to be done to solve the myriad problems plaguing Jackson's public drinking water system. On July 29, MSDH issued a boil-water notice for Jackson's public drinking water system. The next month, the city proclaimed an emergency after excessive rainfall and extreme flooding prevented the system from delivering any water to the approximately 160,000 persons living within the city and in certain areas of nearby Hinds County who rely on the system. That meant that many of those residents had no running water to drink, or to use for basic hygiene and safety purposes like washing hands, showering, flushing toilets, fighting fires, or washing dishes. The water pressure was not restored until Sept. 6, and the boil-water notice remained in effect until Sept. 15.

•Dec. 13, 2022—The U.S. District Court for the Eastern District of California granted the request of the Justice Department to direct John Sweeney and his company, Point Buckler Club LLC, to restore sensitive tidal channels and marsh they unlawfully harmed. The court's decision follows an earlier order dated Sept. 1, 2020, when the court found defendants committed "very serious" violations of the Clean Water Act associated with the construction of a nearly mile-long levee without a permit.

The defendants' violations occurred on Point Buckler Island, an island in the greater San Francisco Bay that Sweeney had purchased in 2011. The Island's tidal channels and marsh are part of the Suisun Marsh, the largest contiguous brackish water marsh remaining on the west coast of North America. The Island is located in a heavily utilized fish corridor and is critical habitat for several species of federally protected fish.

When Sweeney acquired the Island, nearly all of it functioned as a tidal channel and tidal marsh wetlands system. Beginning in 2014, without a permit, Sweeney excavated and dumped thousands of cubic yards of soil directly into the Island's tidal channels and marsh. This unlawful conduct, the court found, eliminated tidal exchange, harmed aquatic habitat and adversely impacted water quality.

In its detailed remedial decision, the court concluded that restoration is the appropriate goal, and an injunction is necessary to achieve it.

•Dec 16, 2022—The Department of Justice and the Environmental Protection Agency (EPA) announced today a proposed consent decree with 85 potentially responsible parties, requiring them to pay a total of $150 million to support the cleanup work and resolve their liability for discharging hazardous substances into the Lower Passaic River, which is part

of the Diamond Alkali Superfund Site in Newark, New Jersey.

The Justice Department and EPA alleged that these 85 parties are responsible for releases of hazardous substances into the Lower Passaic River, contaminating the 17-mile tidal stretch, including the lower 8.3 miles. The proposed consent decree seeks to hold the parties accountable for their share of the total cost of cleaning up this stretch of the river.

"This agreement holds responsible parties financially accountable for the legacy of pollution in the Lower Passaic River," said Assistant Attorney General Todd Kim of the Justice Department's Environment and Natural Resources Division. The settlement will advance the cleanup of the river for the benefit of those communities living alongside it who have been historically overburdened by pollution.

On behalf of EPA, the Justice Department lodged the consent decree with the U.S. District Court for the District of New Jersey. If and when the settlement becomes final, EPA expects to use the settlement funds to support ongoing efforts to clean up the site, specifically the lower 8.3 miles and the upper nine miles which make up the entire 17-mile Lower Passaic River Study Area. In addition to the proposed consent decree, EPA has reached several related agreements, including one whereby many parties investigated the 17-mile Lower Passaic River, another whereby Occidental Chemical Corporation, a potentially responsible party, is designing the cleanup chosen for the lower 8.3 miles, and several cost recovery agreements that resulted in payments to EPA of millions of dollars.

This consent decree is subject to a 45-day public comment period and is available for public review on the Justice Department website.
(R. Schuster)

JUDICIAL DEVELOPMENTS

GEORGIA MUNICIPAL IMMUNITY DOES NOT SHIELD WASTEWATER TREATMENT UTILITY FROM PFAS LIABILITY

Johnson v. 3M Company, ___F.4th___, Case No. 21-13663 (11th Cir. Dec. 21, 2022).

As the vast wave of "forever chemical" litigation breaks across state and federal courts, ensnaring wastewater treatment and disposal utilities, the precise contours of state and municipal liability are coming under scrutiny. In this case, the Eleventh Circuit Court of Appeals considered whether Georgia municipal immunity shielded a wastewater treatment utility from personal injury nuisance liability and abatement relief.

Background

Per- and polyfluoroalkyl substances (PFAS) have made multiple appearances in these pages in the context of litigation targeting manufacturers, distributors and retailers of these remarkably useful, and equally persistent, industrial chemicals. Claims alleging liability for drinking water contamination are inevitably also being brought against utilities responsible for treating, disposing of, and/or distributing wastewater and drinking water.

"[M]ore than ninety percent of the world's carpet comes from manufacturers in and around Dalton, [Georgia.]" PFAS are used in carpet manufacture for their oil and water repellent properties that render carpets stain resistant. As alleged by the plaintiff in this case, the resulting process wastewater "containing dangerously high levels of the chemicals" is discharged "directly into Dalton's wastewater treatment system." Following treatment (that does not remove PFAS), the wastewater is discharged via spraying onto the surface of the land at the Dalton Utilities' "Land Application System." The accumulation of PFAS in the Land Application System flows:

> . . .into the neighboring Conasauga River and its tributaries. After that, they travel downstream to the Oostanaula River, the primary source of Rome, Georgia's drinking water, exposing its residents to 'dangerously high levels' of the chemicals.

In 2016, the City of Rome (City) installed an emergency filtration process to remove some PFAS from tis water supply. To cover the cost of this emergency filtration system and to pay for a new, permanent one, the City imposed a surcharge the price of water for all ratepayers. The City estimates that the rate will increase by at least 2.5 percent each year for the foreseeable future.

Plaintiff Johnson is a resident of Rome and is the name plaintiff in a class action suit. He stated claims against a variety of defendants, including Dalton Utilities for nuisance, alleging personal injury and seeking abatement.

The litigation was removed to federal court under the Class Action Fairness Act. Dalton Utilities sought to dismiss the nuisance claims on that basis of municipal immunity. The district court denied the motion, and Dalton Utilities brought this interlocutory appeal.

The Eleventh Circuit's Decision

The Eleventh Circuit concluded it had jurisdiction over the appeal under the collateral order doctrine:

> Under the collateral order doctrine, an order denying state sovereign immunity 'is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability.' [*Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1367 (11th Cir. 2016).] Under Georgia law state sovereign immunity is immunity from suit, and an order denying state sovereign immunity is immediately appealable. *Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir. 1992).

Here, because like Georgia state sovereign immunity, Georgia municipal immunity is immunity from suit, the collateral order doctrine applies 'even though a reviewing court must consider the plaintiff's

factual allegations in resolving the immunity issue.' *Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985). (Parallel citations omitted.)

Municipal Immunity and Georgia Common Law

Turning to the issue of municipal immunity, Dalton Utilities argued that the exception to municipal immunity under Georgia law is limited to nuisance claims alleging a taking of property seeking monetary damages, so that Johnson's personal injury-based nuisance claim seeking abatement is barred.

The Court of Appeals analysis focused on the development of Georgia's common law prior to a 1974 amendment to the state constitution "to constitutionalize the common law doctrine of sovereign immunity and the decisions involving it" while removing from the judiciary the "authority to expand (or contract) the sovereign immunity doctrine's scope in the future, effectively freezing in place Georgia sovereign immunity law."

Thus:

> . . .while a municipality's nuisance liability was traditionally limited to injuries to the physical condition of the plaintiff's property or his use and enjoyment of it, the Georgia Supreme Court abandoned that limitation in 1968 in *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968).

Phillips allowed a nuisance claim "against a city for its failure to fix a faulty traffic light, which caused the plaintiff's injuries." *Phillips* represents the common law state of play when Georgia's constitution was amended to halt common law evolution of municipal immunity.

Dalton Utilities relied on *Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 755 S.E.2d 184 (2014), as limiting the holding in *Phillips* by disallowing any judicially-created "exception" to state sovereign immunity. *Sustainable Coast* observed that the:

> . . .longstanding principle that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property … [is] not an exception at all, but instead, a proper recognition that the [Georgia] Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases.

Subsequent to *Sustainable Coast*, however, Georgia's Supreme Court issued *Gatto v. City of Statesboro*, 312 Ga. 164, 860 S.E.2d 713 (2021), recasting the "nuisance exception" as the "nuisance doctrine." Reviewing the history of the doctrine, the *Gatto* opinion affirmed that in *Phillips* it had "abandoned" the limitation on municipal liability "to injuries to the physical condition of the plaintiff's property or his use and enjoyment of it." Characterizing *Gatto* as "the latest word" on municipal immunity, the court denied the appeal.

Conclusion and Implications

This case illustrates the piecemeal, case-by-case litigation that, in the absence of a highly unlikely universal federal legislative disposition, will keep issues of utility liability for PFAS claims in a state of high-stakes uncertainty for many years to come. The Eleventh Circuit's opinion is available online at: https://media.ca11.uscourts.gov/opinions/pub/files/202113663.pdf.

(Deborah Quick)

DISTRICT COURT FINDS COLORADO MINE VIOLATED THE CLEAN WATER ACT

Stone v. High Mountain Mining Company, LLC, et. al., ___F.Supp.4th___, Case No. 19-CV-1246 (D. Colo. 2022).

The United States District Court for the District of Colorado recently ruled against High Mountain Mining Company, LLC (High Mountain) in a challenge pursuant to the citizen suit provision of the federal Clean Water Act.

Factual and Procedural Background

High Mountain owns and operates the Alma Pacer Mine (Mine), which is an active mining site directly adjacent to a stretch of the South Platte River, called the Middle Fork. The mining process begins with digging a hole and transporting the material to the processing plant where it is sifted out by size and weight. The materials not sifted out are discharged into four settling ponds. The ponds are designed to allow water to leak out, so as to prevent a significant water problem on site. The Mine did not utilize the industry standard or typical methods for preventing pond leakage, such as a synthetic or clay liner. As a result, water was allowed to seep into the ground and travel through groundwater into the Middle Fork.

Plaintiffs Pamela Stone, M. Jamie Morrow, and Doris LeDue, all residents of towns near the river, alleged that High Mountain and James Murray, one of five managing members of the Mine, violated the Clean Water Act by discharging pollutants from the Mine into the Middle Fork without the proper NPDES permit. Plaintiffs requested that the defendants receive a civil penalty of one million dollars and that the court issue a permanent injunction prohibiting defendants from operating the Mine in violation of the Clean Water Act.

The District Court's Decision

High Mountain conceded that they did not have an NPDES permit or the state equivalent, and that the Middle Fork is a navigable water of the United States. The threshold issue, therefore, was whether the Mine was discharging a pollutant from a point source.

The Settling Ponds

First, the court determined the settling ponds were point sources under the Clean Water Act. A point source is "any discernible, confined and discrete conveyance…from which pollutants are or may be discharged. The court reasoned that the settling ponds were "discrete conveyances" that collected and channeled pollutants into the Middle Fork through groundwater. The court further reasoned that liquid escaped from a supposedly confined system. Thus, the settling ponds were point sources.

Next, the court determined the material discharged into the Middle Fork was a pollutant under the act. A pollutant is "…industrial, municipal, and agricultural waste discharged into water." The court reasoned that the water in the settling ponds was a byproduct of the mining process and therefore considered industrial waste. The water in ponds 3 and 4 also contained high concentrations of calcium, potassium, magnesium, and sodium than the water in the Middle Fork. Thus, the material discharged into the Middle Fork was a pollutant.

Last, the court determined the Settling Ponds discharged the polluted water, even though the water was carried to the Middle Fork through groundwater, a nonpoint source. To determine whether a discharge to groundwater is the functional equivalent of a direct discharge, the court considered the factors articulated by the U.S. Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution has maintained its specific identity. Time and distance are the most important factors in most cases.

The court found that the 'distance traveled' factor weighed heavily in favor of the plaintiffs because the ponds were not much farther than 100 feet from the Middle Fork. This distance is remarkably shorter than the 50 miles that the *Maui* court gave as dicta for when the Act would not apply. The court also found that the 'transit time' factor weighed heavily in favor of the plaintiffs. The court contrasted the finding in *Maui* where a transit time of "many years" would weigh against applying the Act, and reasoned that a transit time of two days in this case, even if miscalculated by a factor of ten, is "but a tiny fraction of 'many years.'" The court gave little to no weight to the remaining *Maui* factors because neither party presented sufficient evidence. Thus, leaks from the settling ponds were the functional equivalent of a direct discharge and the court found in favor of the plaintiffs on their claim against High Mountain with respect to the settling ponds.

Personal Liability and Relief

The court went on to find that plaintiffs waived their claim against James Murray when they failed to present any argument in support. However, he would not have been found personally liable under the Clean Water Act because he did not have the final say on important decisions at the Mine, did not manage day-to-day operations, and plaintiffs failed to establish that he acted knowingly.

The court calculated the civil penalty against High Mountain using the "bottom-up" method where the court first determines the economic benefit the defendant realized by failing to comply with the act and adjusts the penalty upward or downward based on various factors. Based on reliable expert testimony, High Mountain avoided paying roughly $500,000 to install competent liners in the ponds. After a brief analysis of various factors, the $500,000 penalty was imposed on High Mountain. Plaintiffs' request for injunctive relief was denied because they failed to offer any meaningful arguments in support.

Conclusion and Implications

This case provides an example of the *Maui* factors in action and may be a trend towards encompassing more activities as violations of the Clean Water Act. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-cod-1_19-cv-01246/pdf/USCOURTS-cod-1_19-cv-01246-6.pdf.
(Christina Lee, Rebecca Andrews)

Editors' Note: On Friday 30 December, the U.S. Environmental Protection Agency released its latest definition of the Clean Water Act—the timing of which is of note as the U.S. Supreme Court may be close to a decision which would likely establish a test to be used to determine the "reach" of the act.

WASHINGTON SUPREME COURT HOLDS GUIDANCE PROVIDING FOR BROAD DISCRETION IN DEVELOPING NPDES TESTING REQUIREMENTS NOT SUBJECT TO NOTICE-AND-COMMENT RULEMAKING PROCEDURES

Northwest Pulp & Paper Association v. State of Washington, Department of Ecology, Case No. 100573-3 (Wash. Sup. Ct. Dec. 8, 2022).

The Washington State Administrative Procedures Act does not impose notice and comment procedures when individual regulators are provided with agency guidance directing them to exercise broad discretion in developing individualized testing programs for water pollutant dischargers. Such was held recently by the Washington Supreme Court.

Background

Although the use of polychlorinated biphenyls (PCBs) was banned by the U.S. Environmental Protection Agency (EPA) in 1976, "due to their toxicity, ubiquity, persistency, and tendency to bioaccumulate," they remain an actively regulated pollutant under the federal Clean Water Act (CWA), the discharge of which is prohibited in the absence of a permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES). 40 C.F.R. § 129.4(f); 33 U.S.C. §§ 1311(a), 1342(a)(1).

Washington State's Department of Ecology (Ecologyt) establishes water standards under the CWA and administers the state's NPDES program. A NPDES permit for a discharger must include effluent limits for any pollutant for which there is a "reasonable potential" water quality standards will be violated. 40 C.F.R. § 122.44(d)(1)(iii).

In 2018, Ecology issued a revision to its *Water Quality Program Permit Writer's Manual* (Manual) to add a new Section 4.5 "address[ing] methods permit writers can use to identify and measure" PCBs. While EPA's regulations currently only approve of the use of Method 608.3, which "has a detection limit for PCBs of .065 µg/L (micrograms per liter)," the state's "water quality standards set a much lower numeric effluent limit for concentrations of PCBs at 0.00017

µg/L. WAC 173-201A-240." The revised Manual therefore added two additional test methods, 1668C and 8082A, that "may be sued for permitting purposes to evaluate sources, but not for numeric effluent limit compliance."

Plaintiff business associations challenged the revised Manual, and Section 4.5 in particular, as the promulgation of a rule without compliance with Washington's Administrative Procedure Act (APA).

The Supreme Court's Decision

A "rule" under the Washington APA is defined under a two-prong test. First, an "agency order, directive, or regulation" must be one "of general applicability." If this first criterium is met then it must "fall into one of five enumerated categories." *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wash.2d 488, 494, 886 P.2d 147 (1994). Here, the Supreme Court focused on the first criterium—whether Section 4.5 is an order, directive or regulation of general applicability?

Failor's established that "[a]n action is of general applicability if it applies uniformly to all members of a class." *Ibid.* That case dealt with a challenge to changes in the reimbursement schedule for Medicaid prescription service providers. Those schedules were applied to all providers without discretion, although the application of the schedule resulted in a different payment amount for each provider and each provider could chose to "accept or reject the amount in their individual contract." Due to the general applicability and lack of discretion, the first criterium under the APA was met.

Section 4.5, however:

> . . .does not impose a uniform numeric standard or schedule because permit writers have discretion to choose the type of monitoring necessary based on the circumstances of the facility.

Before requiring any monitoring for PCBs, permit writers "should evaluate their facility and the potential for exceeding the water quality standard." In fact, PCB monitoring may not be necessary at all. Permit writers are cautioned to:

> . . .only include monitoring requirements when necessary for the facility and its specific discharge situation" and to "consider the value and purpose of requiring PCB monitoring.

This discretion to choose a method on a case-by-case basis was totally absent in *Failor's*.

(Record citations omitted.) In contrast to this wide discretion to be employed based on the particularities of each discharging facility, in *Failor's* "the same reimbursement schedule was applied to all members of the community, which made the standards generally applicable. Here, different monitoring requirements apply depending on the circumstances of the facility, so no standard for testing is applied uniformly to all dischargers" and Section 4.5 is not a rule subject to APA standards.

Having determined that the first criterium under the APA was not met, the Supreme Court concluded its analysis.

Conclusion and Implications

The notice and comment protections typical of administrative procedures for the adoption of generally-applicable agency orders, rules and directives are clearly a poor fit with the wide discretion wielded by individual regulators in the creation of individualized monitoring programs for PCB dischargers. The hyper-specific process contemplated by the *Manual* is perhaps best illustrated by Section 4.5 counsel to permit writers that they could "discuss alternative processes," *i.e.*, other than that prescribed by Section 4.5 itself, "with their supervisors." The Supreme Court's opinion is available online at: https://www.courts.wa.gov/opinions/pdf/1005733.pdf.
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