

CALIFORNIA WATERTM

L A W & P O L I C Y

Reporter

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FEATURE ARTICLE

THE PUBLIC TRUST DOCTRINE:
DIVERGENT INTERPRETATIONS BY DIFFERENT STATES

By Roderick E. Walston

The public trust doctrine—a legal doctrine rooted in the English common law and traceable to ancient Roman law—holds that the state has sovereignty over its navigable waters and underlying lands, and that the state holds the waters and lands in trust for the public for certain uses, such as navigation, commerce and fisheries. The U.S. Supreme Court—although defining the doctrine in its seminal decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892)—has held that the doctrine is a state law doctrine and not a federal one, and therefore each state is responsible for adopting and interpreting its own doctrine.

Although many state courts have interpreted their public trust doctrines similarly, some state court interpretations have diverged, particularly on the judicial and legislative roles in administering the doctrine. The question is whether the courts, in interpreting the public trust doctrine, may adopt public trust standards that apply to and limit the legislative statutory systems regulating water and water rights, or instead whether the courts should defer to the statutory systems on grounds that the legislatures are responsible for determining the state’s public policy in regulation of water. These divergent views are reflected in the California and Nevada Supreme Courts’ respective decisions in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), and *Mineral County v. Lyon County, et al.*, 478 P.3d 418 (Nev. 2020).

This article will describe the origin and development of the public trust doctrine, the state courts’ interpretations of the doctrine, and how the state court interpretations have converged in some respects but diverged in others, and in particular how they have diverged on the roles of the judicial and legislative branches in establishing public trust standards that apply to the state’s regulation of water.

Origin and Development of Public Trust Doctrine

Under the English common law that prevailed in America during the pre-Revolutionary period, the British Crown possessed sovereignty over all navigable waters and underlying lands in the American colonies, subject to the “common rights” of the public, such as the right of free passage and fishing. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589-590 (2012). The Supreme Court has held that, as a result of the American Revolution, the Crown’s sovereignty over the waters and lands was transferred to the 13 original states, subject to the federal government’s constitutionally-delegated powers, and also subject to the public’s “common use.” *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The Supreme Court has also held that new states are admitted to the Union on an equal footing with the original thirteen states, and thus acquire the same sovereignty over their navigable waters and underlying lands as the original states—a principle known as the equal footing doctrine. *Pollard v. Hagan*, 44 U.S. 212 (1845); see *Shively v. Bowlby*, 152 U.S. 1, 26-27, 49-50 (1894). The equal footing doctrine, the Supreme Court has held, rests on a constitutional foundation rather than a statutory one; the states’ sovereignty over its navigable waters and underlying lands “is conferred not by Congress but the Constitution itself.” E.g., *Oregon v. State Land Bd.*, 429 U.S. 363, 374 (1977).

In *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the Supreme Court described more fully the nature of the public’s common rights in navigable waters and underlying lands. The Court held that the Illinois Legislature—which had granted a fee interest in the Chicago waterfront to a private railroad com-

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pany—could revoke the fee grant in order to develop the waterfront for other commercial purposes. The Court reasoned that Illinois held its navigable waters and underlying lands in trust for the public, for purposes of navigation, commerce and fisheries, and that Illinois could not alienate the public interest in the waters and lands except in limited circumstances. *Id.* at 452-453. The Court stated that Illinois could “no more abdicate” its trust responsibility than it could “abdicate its police powers in the administration of government and the preservation of the peace. *Id.* This principle is known as the public trust doctrine, and *Illinois Central* is the seminal decision establishing the doctrine in America.

Later, the Supreme Court held that the public trust doctrine, as established in *Illinois Central*, is a state law doctrine and not a federal one. *Appleby v. New York*, 271 U.S. 364, 395 (1926). Although federal law applies in determining whether waters were navigable when the state was admitted to the Union, and thus whether the state has sovereignty over them, state law applies in determining the nature of the state’s trust responsibilities, once it is determined that the waters were navigable and the state has sovereignty over them. *PPL Montana*, 565 U.S. at 604. Thus, there is no uniform public trust doctrine that applies in all states and defines the states’ public trust duties. Rather, each state is responsible for adopting its own public trust doctrine and defining its own trust duties.

State Court Interpretations of the Public Trust Doctrine

Many state courts have adopted their own public trust doctrines, and have generally followed the principles established in *Illinois Central*. Generally, the state courts have held that the waters of the state belong to the state, which holds the waters in trust for the public, and that the state cannot dispose of its trust responsibilities, at least unless the disposal is in the public interest or the resources are no longer capable of serving public trust uses. *E.g.*, *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983); *Mineral County v. Lyon County, et al.*, 478 P.3d 418 (Nev. 2020); *Kootenai Env’l Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094-1096 (Id. 1983); *United Plainsman Ass’n v. North Dakota State Water Conservation Comm’n*, 247 N.W.2d 457, 463 (N.D. 1976); *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 169-171 (Mont. 1984).

Some states have codified the doctrine in their constitutions and statutes, by providing, for example, that the waters within the state belong to or are owned by the public. *E.g.*, Colorado Const., art. XVI, § 5; Cal. Water Code § 102; Nev. Rev. Stat. § 533.025.

Some state courts have expanded the public trust doctrine, by holding that the doctrine not only restrains the state’s authority to alienate the public interest in its waters but also ensures that the public has access to the waters for certain purposes, such as recreation and fishing. *E.g.*, *United Plainsman*, 247 at 463 (North Dakota); *Montana Coalition for Stream Access*, 682 P.2d at 170 (Montana); *Kootenai Env’l Alliance*, 671 P.2d at 1094-1096 (Idaho). For example, the Montana Supreme Court has held that the public trust doctrine provides that any surface waters, whether navigable or not, that are capable of use for recreational purposes may be used by the public regardless of who owns the stream bed. *Montana Coalition for Stream Access*, 682 P.2d at 170. On the other hand, the Colorado Supreme Court has held that the public trust doctrine does not preclude the owner of a non-navigable stream bed of the exclusive right to control everything above the stream bed, including the right to fish. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

The state court interpretations have diverged on whether the public trust doctrine applies to both navigable and nonnavigable waters, or only to navigable waters. Some state courts have held that the doctrine applies to both navigable and nonnavigable waters. *E.g.*, *Mineral County*, 478 P.3d at 425-426 (Nevada). Others have held that the doctrine applies only to navigable waters. *E.g.*, *Cernaik v. Brown*, 475 P.3d 68, 71-72 (Or. 2020). The California Supreme Court has held that the doctrine applies to nonnavigable tributaries of navigable waters, because activities in the tributaries can affect public trust uses in the main stream. *National Audubon*, 658 P.2d at 720-721.

The state court interpretations have also diverged on whether the public trust doctrine applies to groundwater. The Minnesota Supreme Court has held that the doctrine does not apply to groundwater, because groundwater is not navigable. *White Bear Lake Restoration Ass’n v. Minn. Dep’t of Natural Resources*, 946 N.W.2d 373, 376-377 (Minn. 2020). A California appellate court, following *National Audubon*, has held that the doctrine applies to groundwater if activities in groundwater affect public trust uses in navi-

gable surface waters. *Env'l Law Found. v. State Water Res. Cont. Bd.*, 26 Cal.App.5th 844 (Cal. 2018).

These divergent interpretations of the public trust doctrine demonstrate, as the Supreme Court has held, that there is no uniform doctrine that applies in all states, and that each state is responsible for adopting and interpreting its own doctrine. *PPL Montana*, 565 U.S. at 604

Divergent Interpretations of the Legislative Roles in Administering Public Trust Doctrine: *National Audubon* and *Mineral County* Decisions

The most consequential divergence of the state court interpretations of the public trust doctrine concerns the judicial and legislative roles in administering the doctrine. The state courts are responsible for interpreting the law, which includes the public trust doctrine. The state legislative bodies are responsible for establishing the state's public policy in regulation of the state's resources, which include public trust resources. The issue, then, is whether the courts can properly adopt public trust standards that apply to and limit the legislative statutory systems regulating water, or should instead defer to the legislative systems as an integration of public trust principles in the regulatory context. There is a seeming conflict between the judicial and legislative roles in administering the public trust doctrine.

This conflict is heightened in the context of the state's regulation of water rights. The western states, through their legislative processes, have enacted comprehensive statutory systems regulating appropriative water rights, which establish specific standards for acquiring and exercising the rights. *E.g.*, Cal. Water Code §§ 1200 *et seq.*; Nev. Rev. Stat. §§ 533.005 *et seq.* The statutory systems often inculcate public trust principles—although not by name—by providing that the water right is subject to “beneficial use” and “public interest” requirements. *E.g.*, Cal. Water Code §§ 1253, 1255, 1257; Nev. Rev. Stat. §§ 533.030(1), 533.370(2). The question is whether the public trust doctrine applies—and if so, how—in the context of these statutory water rights systems, and whether the courts may establish public trust standards that apply to the regulated rights or should instead defer to the statutory systems' regulation of the rights.

This question was directly addressed in two notable state supreme court decisions—the California

Supreme Court's decision in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), and the Nevada Supreme Court's recent decision in *Mineral County v. Lyon County, et al.*, 478 P.3d 418 (Nev. 2020)—and the Courts reached divergent conclusions. The decisions serve as lodestars for opposite views of the public trust doctrine.

In *National Audubon*, the California Supreme Court in 1983 held that an environmental organization was authorized under the public trust doctrine to challenge the City of Los Angeles' (City) right to divert water from the tributaries of Mono Lake, located in northern California, through a canal to southern California in order to provide water for the people of Los Angeles. The Court held that the state or its designated agency is required to *consider*—although not necessarily *preserve*—public trust uses in issuing water rights permits, and that the state's water rights agency had failed to consider public trust uses in issuing a permit to the City in 1940 authorizing the diversions. *National Audubon*, 658 P.2d at 727-728. The Court stated that—although as a matter of “current and historical necessity” the state may issue permits for appropriation of water that may harm public trust uses—the state has various duties in deciding to do so: an “affirmative duty” to consider public trust uses in issuing the permits, a duty to protect public trust uses if “feasible” and not inconsistent with the “public interest,” and a duty of “continuing supervision” over the permits after they are issued. *Id.* The Court rejected the City's argument that it had a “vested right” to divert the water under its permit, stating that no one has a “vested right” to divert water that impairs public trust uses. *Id.* at 727, 729.

The *National Audubon* Court indicated that the courts are responsible for determining the state's public trust duties, and that the legislature is bound by the court-established duties. Although the California Legislature had enacted a statute providing that “domestic use” is the highest priority of water use, Cal. Water Code §§ 106, 1254, the Court held that public trust uses—if “feasible” and not inconsistent with the “public interest”—are the highest priority. *National Audubon*, 658 P.2d at 728. The Court stated that the public trust doctrine exists independently of the legislature's statutory authority, and precludes the legislature from reducing statutory protections for public trust uses. *Id.* at 728 n. 27. The Court appeared to depart from its earlier decisions holding that the

legislature is responsible for administering the public trust doctrine and that its judgments are “conclusive.” *City of Long Beach v. Mansell*, 476 P.2d 423, 437 n. 17 (Cal. 1970); *Mallon v. City of Long Beach*, 282 P.2d 481, 486 (Cal. 1955); see *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971).

In *Mineral County*, the Nevada Supreme Court in 2020 held that the public trust doctrine did not authorize reallocation of water rights in the Walker River—an interstate river originating in California and flowing into Nevada—that had been adjudicated in a judicial decree, where the claimed purpose of the reallocation would be to provide additional inflows of water into Mineral Lake, the river’s terminus, for the benefit of public trust uses in the lake. The Court held that—while the public trust doctrine *applies* to all water rights, including the rights adjudicated in the decree—the doctrine does not authorize *reallocation* of the adjudicated rights. *Mineral County*, 473 P.3d at 423-427. The Court stated that the public trust doctrine requires the Nevada legislature to regulate water rights in the public interest, and that the legislature had fulfilled its trust duty by enacting a statutory water rights system in the public interest; the statutory system provides, for example, that water belongs to the people and that a water right is subject to the “public interest.” *Id.* at 426-427. The Court stated that Nevada is a highly arid state, and that the legislature had properly determined that finality and certainty of water rights serves Nevada’s public interest by ensuring availability of water for the state’s many public needs, such as irrigation, power, municipal supply, mining, storage, recreation, and other purposes. *Id.* at 429. The Court deferred to the legislature’s judgment that finality and certainty of water rights is in the public interest, stating that it cannot “substitute [its] policy judgment for the Legislature’s.” *Id.* at 430. The Court concluded that the statutory water rights system “codified,” “incorporates” and is “consistent with” the public trust doctrine. *Id.* at 424, 429, 431. The Court rejected the view of the California Supreme Court in *National Audubon*, stating that the decision undermined “the stability of prior allocations.” *Id.* at 430 n. 10.

Thus, while *National Audubon* established public trust standards that apply to and limit the legislature’s statutory system regulating water rights, *Mineral County* deferred to the legislature’s statutory system in regulating the rights. While *National Audubon* held

that the public interest is served by preservation of public trust resources if “feasible,” *Mineral County* held that the public interest is served by finality and certainty of water rights, because finality and certainty ensures availability of water supplies. While *National Audubon* viewed the public trust doctrine as a separate body of law that conflicts with, and must be reconciled with, the statutory water rights laws, *Mineral County* viewed the public trust doctrine as an integral part of the statutory laws. The decisions reflect fundamentally different views of the public trust doctrine, and of the judicial and legislative roles in administering the doctrine.

Indeed, the decisions even diverge concerning the nature and location of public trust uses themselves. *Mineral County* held that the state is authorized under the public trust doctrine to allocate water for various public uses—including not only environmental uses but also economic uses such as the agricultural, municipal and power uses that were in issue—and even though some of these uses were located far from the water source. *Mineral County*, 473 P.3d at 428. *National Audubon*, on the other hand, held that the public trust doctrine protects only “uses and activities in the vicinity of” the water source, which are generally instream environmental uses such as recreation and fisheries. *National Audubon*, 658 P.2d at 723. Thus, *Mineral County* applied the public trust doctrine as a basis for protecting myriad public uses of water, including both economic and environmental uses, whether located in the source stream or elsewhere, and *National Audubon* applied the doctrine primarily as a basis for protecting environmental uses in the source stream.

Other State Court Interpretations of Judicial and Legislative Roles

Other state courts have also addressed the judicial and legislative roles in administering the public trust doctrine, and their decisions have often mirrored the divergent views of *National Audubon* and *Mineral County*.

Some state courts have interpreted the public trust doctrine relatively narrowly, by holding that the doctrine does not authorize the courts to interfere with or override legislative and executive policy judgments. The Iowa Supreme Court has held that the doctrine does not require the state to reduce pesticide use by farmers on grounds that pesticides cause harmful ef-

fects in navigable waters, because the responsibility for regulating pesticide use rests with elected bodies. *Iowa Citizens for Community Improvement v. Iowa*, 962 N.W.2d 780 (Iowa 2021). The Court stated that the public trust doctrine does not authorize the courts “to weigh different uses, that is, to second-guess regulatory decisions made by elected bodies.” *Id.* at 789 (original emphases). The Court also held that the political question doctrine—which precludes judicial review of the legislature’s policy judgments—precludes judicial review of state and local decisions regulating use of pesticides. *Id.* at 796-798.

Similarly, the Minnesota Supreme Court has held that the public trust doctrine did not preclude a state agency’s issuance of a water right permit for use of groundwater interconnected with a navigable lake, because the state has adopted a comprehensive statutory system governing rights in surface waters and groundwater, which provides that “domestic water supply” is the highest priority of use. *White Bear Lake Restoration Ass’n ex rel. State of Minn. v. Minn. Dep’t of Natural Resources*, 946 N.W.2d 373, 376-377 (Minn. 2020). The Oregon Supreme Court has limited the scope of the public trust doctrine, holding that the doctrine does not apply to non-navigable waters; does not apply to fish and wildlife; and does not impose fiduciary duties that private trustees owe to their beneficiaries. *Cernaik v. Brown*, 475 P.3d 68, 76 (Or. 2020).

Other state courts have interpreted the public trust doctrine more broadly, and have held that the courts may adopt public trust standards that apply to and limit legislative statutory systems regulating water—although these courts have generally upheld the statutory systems as a proper integration of public trust principles.

For example, in *Kootenai Env’l Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Id. 1983), the Idaho Supreme Court considered whether the public trust doctrine precludes a state agency from leasing docketing facilities on the bay of a navigable lake to a private entity. The Court stated that the “final determination” of whether the state and its agencies have violated their public trust duties “will be made by the judiciary,” but this does not mean that the Court “will supplant its judgment for that of the legislature or agency”; rather, the Court will take a “close look” at the legislative or executive action to determine whether it complies with the public trust doctrine,

and “will not act merely as a rubber stamp for agency or legislative action.” *Id.* at 1092. After taking a “close look” at the facts, the Court concluded that the state agency had fulfilled its public trust duty in leasing the docketing facilities, because the agency was acting pursuant to its statutory authority. *Id.* at 1095-1096. Thus, the Court held that the agency had fulfilled its trust duty because it had acted pursuant to the legislative command.

Similarly, in *Water Permit Use Applications (Waiahole Ditch)*, 9 P.3d 409 (Haw. 2000), the Hawaii Supreme Court considered whether a state agency had violated the public trust doctrine in issuing water rights permits and adopting water quality standards. The Court, following *National Audubon*, held that Hawaii’s public trust doctrine exists independently of the legislature’s statutory authority, and limits the legislature’s statutory authority in regulating water and water rights. *Id.* at 444-445. In determining whether the state agency had violated its public trust duty in issuing the permits and adopting the standards, however, the Court held that the agency had not violated its trust duty because it had acted pursuant to its statutory authority under the state’s water code. *Id.* at 456-498. Like the Idaho Supreme Court in *Kootenai*, the Hawaii Supreme Court held that the agency had not violated its public trust duty because it had acted pursuant to the legislative command. Both the Idaho and Hawaii Supreme Courts appeared reluctant to overturn legislative and executive actions regulating water, at least absent an egregious violation of court-established public trust standards.

Indeed, even the California Supreme Court’s decision in *National Audubon*—although interpreting the public trust doctrine more broadly than any other state court decision—contained passages limiting the doctrine as applied to the legislature’s statutory system regulating water rights. The Court held that the state may issue appropriative water rights permits even though this may harm trust uses in source streams, *National Audubon*, 658 P.2d at 727, and that the state is required only to consider public trust uses but not necessarily preserve them. *Id.* at 727. Most importantly, the Court held that—while public trust uses must be protected if “feasible”—such “feasible” trust uses must be protected only if they are consistent with the “public interest,” *id.* at 728, which is the constitutional and statutory standard that applies to all water rights in California. Cal. Const., art. X,

§2; Cal. Water Code §§ 1255, 1257. Thus, *National Audubon*, notwithstanding its broad interpretation of public trust doctrine, limited the doctrine as applied to the legislature's statutory system for regulation of water. Notably, no California court, subsequently to *National Audubon*, has overturned a legislative enactment or executive action on grounds that the enactment or action violates the public trust doctrine.

In an interesting postscript to the Idaho Supreme Court's decision in *Kootenai*, which as noted above held that the courts play a significant role in administering the public trust doctrine, the Idaho Legislature in 1996 enacted a statute that significantly limits the judicial role in administering the doctrine. The statute provides that the public trust doctrine is "solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters," and the doctrine does not apply to the "appropriation or use of water" or the "adjudication of water or water rights," or the "protection or exercise of private property rights within the state of Idaho." Id. Code § 58-1203. Thus, the statute defines the state's public trust duties, and defines these duties as applicable only to the state's regulation of the beds of navigable waters, and not to the regulation of the waters themselves. The Idaho Supreme Court, if presented with the issue, may be called on to consider the judicial role in administering the public trust doctrine in light of the legislative enactment.

Conclusion and Implications

Many state courts, following *Illinois Central*, have adopted and interpreted their own public trust doctrines. Although the state court interpretations have converged in many respects, they have diverged in other respects, particularly on the roles of the judicial

and legislative branches in administering the doctrine—that is, whether the courts may adopt public trust principles that apply to and limit the legislative statutory systems regulating water and water rights, or instead should defer to the legislative systems on grounds that the regulation of water and water rights lies within the legislative province. Stated differently, the issue is whether the public trust doctrine establishes separate principles that must be integrated into the statutory systems, or instead whether the statutory systems already implicitly integrate these principles although not by name.

The goal of the public trust doctrine is to protect the public interest in the state's regulation of water. The legislative branch of government is directly elected by and accountable to the public, and thus, by definition, is the appropriate branch to determine the public interest in regulation of water. The judicial branch may properly ensure that the legislative regulation is in the public interest as legislatively defined, in that the regulation serves the public needs depicted in the regulation, and was not enacted simply to serve the private needs of water users who may benefit from the regulation (and who, arguably, may even have constitutional protections against the taking of their rights). But in terms of the specific standards that apply in regulation of water, including the standards that apply in acquiring and exercising a water right, the responsibility for establishing these standards rests with the legislative branch, which is responsible for determining the state's public policy in regulation of resources, including water and the right to its use. This responsibility derives from constitutional principles separating the legislative and judicial powers, which are unchanged by the public trust doctrine.

Roderick Walston, a member of the Best Best & Krieger law firm in Walnut Creek, California, has spent virtually his entire career handling cases in the natural resources and water law fields. He has been involved in the two main cases described in this article that provide divergent interpretations of the public trust doctrine; he represented the State of California in *National Audubon Society v. Superior Court* in the California Supreme Court, and Lyon County in *Mineral County v. Lyon County, et al.*, in the Nevada Supreme Court. A fuller explanation of Mr. Walston's views concerning these Courts' divergent interpretations can be found in his law review article, *The Public Trust Doctrine: The Nevada and California Supreme Courts' Divergent Views in Mineral County and National Audubon Society*, 58 *Ida. L. Rev.* 158 (2022). The views herein are those of Mr. Walston.

CALIFORNIA WATER NEWS

GOVERNOR NEWSOM SUSPENDS DELTA OUTFLOW REGULATIONS TO BOLSTER WATER STORAGE, UPDATES PRIOR RESTRICTIONS ON NEW AND REPLACEMENT WELLS

On February 13, 2023, California Governor Gavin Newsom issued Executive Order N-3-23 (Order) designed to help California adapt to rapidly changing environmental conditions. The Order allows the State Water Resources Control Board (SWRCB) to waive environmental regulations setting minimum outflows for the Sacramento-San Joaquin Delta (Delta) in order to provide for greater storage.

Background

Following the heavy precipitation and severe flooding that California experienced in January 2023, Governor Newsome faced growing criticism that too much of this water was allowed to flow out of the Delta instead of being stored in the state's reservoirs. Over the past three years, periods record breaking wet and dry periods have made water and drought resilience planning increasingly difficult.

Building Water Resilience

Governor Newsom cited the need to protect California's water supplies from the increasingly extreme weather patterns facing the state. The Governor acknowledged that recent storms have helped bolster California's water supply, but observed that the state needs to be prepared for longterm resilience. The Order is designed to expand the state's ability during wet periods to capture storm runoff and to recharge groundwater aquifers. The Order includes directives addressing: (1) ongoing collaboration among state agencies to expedite permitting for groundwater recharge projects; (2) Delta outflow requirements; (3) new well permitting; and (4) soliciting recommendations from state agencies regarding further actions that may be necessary to address future drought conditions.

Suspension of Environmental Regulations

The Order directs the State Water Resources Control Board (SWRCB) to:

...consider modifying requirements for reservoir releases or diversion limitations in the federal Central Valley Project or state Water Project facilities.

This would allow the SWRCB to release less water through the Delta and store more water in California reservoirs such as Lake Oroville and Lake Shasta. The Order would allow the SWRCB to suspend environmental requirements that mandate minimum outflow requirements from the Delta into the San Francisco Bay.

To facilitate this directive, the Order suspends California Water Code § 13247 and applicable provisions of the California Environmental Quality Act (CEQA). Section 13247 requires state agencies to comply with certain water quality rules. CEQA sets forth environmental review and protection standards.

State Water Board Decision

Eight days after Governor Newsom issued the Order, the SWRCB approved a petition filed by the U.S. Bureau of Reclamation and the California Department of Water Resources (DWR) to reduce Delta outflows and allow water to be diverted to expand inland water supplies. Currently, the minimum outflow requirement for the Port Chicago Delta is 29,200 cubic feet per second. By granting the petition, the SWRCB effectively removed the outflow requirement for the remainder of February and March 2023.

In making this decision, the SWRCB determined that these changes: (1) would not operate to the injury of any other lawful user of water; (2) would not have an undesirable effect upon fish, wildlife, or other instream beneficial; and (3) are in the public interest. The SWRCB order will remain in effect until March 31, 2023. This is not the first time the SWRCB has waived Delta flow standards; however, historically such waivers have been utilized in response to severe drought conditions.

Updated Restrictions on Well Permits

The Order also directs changes to well permitting processes throughout the state. Under a previous executive order, N-7-22, well permitting agencies are prohibited from approving permits for new wells or to alter existing wells in “high-” and “medium-priority” regulated under the Sustainable Groundwater Management Act (SGMA) absent written findings from the local groundwater sustainability agency that the new or altered well will not negatively impact achieving sustainability.

The new Order replaces and expands the exemptions previously contained in Section 9 of N-7-22. The new Order exempts from these requirements: (1) domestic wells that provide less than two acre-feet per year of groundwater; (2) wells that exclusively provided groundwater to public water supply systems; and (3) wells that are replacing existing, currently permitted wells with new wells that will produce an equivalent quantity of water as the well being

replaced when the existing well is being replaced because it has been acquired by eminent domain or acquired while under threat of condemnation.

Conclusion and Implications

The Order and subsequent State Water Resources Control Board decision signal an increased focus on fortifying the state’s reservoirs and ability to recharge groundwater supplies. The timing of the Order has occurred in the midst of an extremely wet winter with extensive snowpack. It may open the door for welltimed projects and management actions to divert valuable stormwater and runoff for the benefit of groundwater basins. The Order’s expanded exemptions from well-permitting restrictions provide some additional relief in certain circumstances, but the ongoing restrictions will likely continue to draw concerns from well operators and inconsistent regulation at the intersection of well permitting agencies and groundwater sustainability agencies.

(Scott Cooper, Derek Hoffman)

HEALDSBURG CITY COUNCIL HEARS PROPOSAL FOR FORMATION OF ALEXANDER VALLEY WATER DISTRICT

At a Healdsburg City Council meeting held in late January, a group of northern Sonoma County landowners put forward a proposal for a new locally governed water district. The presentation, as prepared by the Russian River Property Owner’s Association (RRPOA), called for the formation of a new Alexander Valley Water District (AVWD or Water District) that would take aim at protecting agricultural water users in the area.

Background

The Alexander Valley, once a hot spot for prune, pear, and grain crops, has transitioned like many of the regions in the Sonoma and Napa counties to host renowned wineries such as Francis Ford Coppola’s and Rodney Strong. Historically, this area has been fueled by water from its aquifer and from the Russian River and Lake Mendocino via the Potter Valley Project. As with many other regions in the state, however, continuous drought coupled with industry growth has strangled these once plentiful sources.

Formation and Purpose of the Water District

The presentation put on by the RRPOA detailed the efforts of the Alexander Valley based group in representing the region’s interests. Chief among these, aside from the stated goal of getting the AVWD up and running, is the pursuit of increased water supply reliability and resilience to combat the persisting drought conditions, potential limitations on water supply from the Russian River and Eel River derived from the Potter Valley Project, and State regulations on local groundwater supplies.

Principally, the new Water District would have several other specific purposes for agricultural property owners upon its formation according to the RRPOA’s proposal. First and foremost, the Water District would seek to gain the official legal standing to participate in regional water supply discussions and projects, focusing on joining in on the disposition of the Potter Valley Project and the Eel River’s inter-basin transfer in coordination with State and federal agencies, the Sonoma County Water Agency, other

county agencies, nearby cities, tribes, non-governmental organizations, and other affected water users.

Furthermore, the Water District would develop and maintain additional infrastructure that both expands and conserves water supplies. The RRPOA's proposal including specific actions in mind to further this goal including monitoring water use, pricing and water transfers, increasing local water storage and groundwater recharge projects, and expanding the use of recycled water and water conservation measures. The new Water District would also focus on participating in local groundwater sustainability efforts, coordinating with other local agencies exercising authority over land or water use in the Alexander, engaging in river and tributary restoration and habitat conservation projects, and importantly on protecting existing agricultural water rights.

As part of its efforts in representing the interests of Alexander Valley growers, the new Water District will have to work closely with existing government agencies and entities involved in water use, supply, and management in the area. This includes coordination with agencies such as the Sonoma County Water Agency, the City of Healdsburg, the City of Cloverdale and other municipal water providers in the Valley, and the Lytton and Dry Creek Band of Pomo Indians. It is also anticipated that the new Water District will need to work with Mendocino County and its water users in order to handle topics ranging from project funding and allocations to the distribution and sharing of the water resources.

While the proposed purpose and operation of the Water District was discussed in the RRPOA's proposal as nauseum, the formation of the AVWD itself was also outlined. Namely, the proposal covered three options in which the Water District might come into existence, which essentially boil down to two varia-

tions on special State legislation. First would be formation through a petition of the local landowners to initiate an application to the Sonoma County Local Agency Formation Commission (LAFCO). Second, the new Water District could be formed through an amendment to the California Water District Act (California Water Code § 34000 *et seq.*) making changes to certain powers and procedures following a petition of agricultural landowners to LAFCO based on those changes. Finally, the landowners could also seek a special act from the State Legislature that would create the Water District directly.

Conclusion and Implications

The Sonoma County wine industry is renowned worldwide for its superb quality and the Alexander Valley is home to many of the growers in that bunch. The region provided such growers with ample opportunity to take advantage and grow the industry to where it is today, but just as the agricultural industry across the state has suffered from the ongoing drought, so too are the Alexander Valley growers and those in the greater Sonoma areas. Though still some ways out, the disposition of the Potter Valley Project will also have significant ramifications on water supply south of Lake Mendocino. A newly formed Alexander Valley Water District will certainly be able to hold greater sway over occurrences that might impact the interests of those in the region. Coming in as another entity in the long line to make its own voice heard in the Russian River watershed, however, the stated goal of maintaining close coordination with other local agencies will be of great importance if the new Water District hopes to effectively represent the interests of its landowners.

(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA LEGISLATURE INTRODUCES BILLS IMPACTING ELEVATED STATUS OF PRE-1914 AND RIPARIAN WATER RIGHTS

The California Legislature recently introduced two bills, Assembly Bill 460 and Senate Bill 389, aimed at modifying administrative processes pertaining to pre-1914 and riparian surface water rights and to align them more closely with water rights established post-1914. These bills introduce two primary changes: (1) creating a parallel administrative system for pre-1914 and riparian rights to challenge them on the basis of water quality, permit terms, or § 5937 of the California Fish and Game Code; and (2) allowing an expedited hearing process to extinguish pre-1914 water rights.

Background

California water law is a complex system developed over more than a century. One aspect of this system is that pre-1914 water rights and riparian water rights are generally considered senior to all other surface water rights and are not subject to the same level of regulation as more recently developed water rights. These bills aim to narrow this gap by regulating pre-1914 water rights and riparian water rights in the ways similar to as newer water rights.

Current Administrative Process for Pre-1914 and Riparian Water Rights

Currently, the administrative process used by the California State Water Resources Control Board (SWRCB) to determine water rights is complex and often contentious. Under existing law, the SWRCB has jurisdiction to regulate all diversions of water, including pre-1914 and riparian rights, under Article X, Section 2 of the California Constitution, the reasonable and beneficial water use standard, and the public trust doctrine. However, post-1914 appropriate water rights are subject to additional regulations, such as complying with the terms of each permit or license, water quality objectives, and § 5937 of the Fish and Game Code.

The SWRCB enforces compliance with these requirements through an administrative hearing

process. However pre-1914 and riparian water rights are not conditioned on compliance with water quality objectives, § 5937 of the Fish and Game Code, or permit terms, unlike most other California water rights. This results in SWRCB's inability to regulate pre-1914 and riparian rights similarly because most enforcement actions are taken under the three aforementioned categories. These bills attempt to chip away at this crucial difference by instituting a similar administrative process for pre-1914 and riparian rights.

AB 460 Ability to Challenge Pre-1914 and Riparian Rights Based upon Water Quality Objectives

AB 460 would significantly expand existing opportunities for the SWRCB and interested members of the public to investigate whether a particular water right holder is violating: (1) Section 2 of Article X of the California Constitution; (2) the public trust doctrine; (3) Water quality objectives; (4) the terms of post-1914 water rights permits, licenses, certificates, and registrations; or (5) § 5937 of the Fish and Game Code.

AB 460 would significantly expedite the timeframe and simplify the process for SWRCB to bring enforcement actions against pre-1914 and riparian rights for perceived violations of water quality objectives, the terms of post-1914 water rights permits, licenses, certificates, and registrations, or § 5937 of the Fish and Game Code. SWRCB's current authority for such enforcement measures requires lengthy enforcement processes or even lengthier regulations processes.

Via expedited hearings, AB 460 would enable the SWRCB to issue relief orders where the SWRCB could demand that the diverter "cease all harmful practices," mitigate harm, fund technical and environmental studies, and reimburse the SWRCB for the cost of preparing any required documentation.

This legislation would provide the SWRCB with authority to issue a curtailment order to an individual diverter and require that the diverter fund studies and

other mitigation or face penalties. This is a marked difference from the current authority where the SWRCB must develop regulations or initiate enforcement proceedings in order to regulate diversions. The significant costs associated with participating in a hearing process on short notice and complying with an interim relief order may cause many right holders to first consider settling claims outside the hearing process.

SB 389 Expedited Process to Extinguish Pre-1914 and Riparian Right Claims

SB 389 creates authority for SWRCB to investigate the basis for any water rights. Additionally, it requires that a diverter provide information or technical reports regarding the characteristics of its water right before a hearing is held regarding the validity of the water right.

This is a marked difference from existing law. Currently, a riparian or pre-1914 right holder must file initial statement of diversion and use and supplemen-

tal annual statements generally describing the characteristics of their riparian or pre-1914 right.

Under SB 389, the SWRCB could require hearings requiring any diverter to prove the elements of their claimed water right. This requirement creates a potentially significant hurdle because this showing is factually intensive and often requires extensive historical research. Failure to demonstrate this historical right could result in an order depriving the owner of its claimed water right or orders for curtailment.

Conclusion and Implications

The proposed Bills would provide powerful new tools and oversight authority to the SWRCB. The Bills would further the goal of many lawmakers to have all water rights regulated in the same fashion. That goal, however, will draw objections and concerns from many riparian and pre-1914 water right holders that have exercised, relied upon and carefully preserved their rights—in some cases for many generations.

(Darien Key, Derek Hoffman)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES 2023 FLOW SCHEDULE FOR SAN JOAQUIN RIVER SPECIES

In January, the U.S. Bureau of Reclamation (Bureau) released its default flow schedule for releases from Friant Dam on the San Joaquin River for the benefit of San Joaquin River fish species, particularly spring-run chinook salmon. According to the Bureau, 2023 is deemed a wet year, and the Bureau allocated 556,542 acre-feet for salmon restoration flows, measured over 30 miles downstream of the dam.

Background

The San Joaquin River Restoration Program (SJRRP) is a long-term collaborative program to restore flows in the San Joaquin River from Friant Dam to the confluence of the Merced River in Central California. One of the SJRRP's two primary goals are to restore a self-sustaining spring-run chinook salmon population. The second goal is to reduce or avoid negative impacts on the water supply for all Friant Division long-term contractors.

The Friant Dam is a concrete gravity dam located on the San Joaquin River in central California. Its construction was completed in 1942 by the U.S. Bureau of Reclamation for the purpose of flood control and providing agricultural irrigation water to the southern San Joaquin Valley. According to the Bureau, before the completion of Friant Dam, the San Joaquin River supported the southernmost populations of Central Valley spring-run chinook salmon and fall-run chinook salmon, where hundreds of thousands of chinook used to return each year. After Friant Dam was completed, parts of the San Joaquin River began to run dry as more and more water was diverted into canals for agricultural irrigation, disconnecting salmon from their habitat in the upper San Joaquin River. Currently, according to the Bureau, the tributaries of the lower San Joaquin River still support populations of fall-run chinook salmon but spring-run chinook salmon have been absent from the mainstem San Joaquin River for over 60 years.

The requirement for water flows to be released from the Friant Dam into the San Joaquin River

for the benefit of salmon is a result of a lawsuit that spanned nearly two decades. In an unpublished federal court case, *Natural Resources Defense Council, et al. v. Rodgers, et al.*, United States District Court, Eastern District of California, Case No. CIV-S-88-1658-LKK/GGH, plaintiffs Natural Resources Defense Council, et al., brought suit against the Bureau and others alleging violations of the federal Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, California Fish and Game Code, § 5937, and § 8 of the Reclamation Act of 1902. The alleged violations were a result of the reduction of the natural water flows used by salmon for spawning runs on the San Joaquin and Merced rivers. Ultimately the litigation ended with the a settlement agreement (Settlement) between the parties, the adoption of federal legislation enacted to facilitate the Settlement, structural changes to the Friant Dam and associated facilities, and an ongoing obligation on the Bureau to release water into the San Joaquin River in an effort to re-establish salmon runs.

There are two main goals that came out of the Settlement (which later became the goals of the San Joaquin River Restoration Program): (1) the Restoration Goal, which is to restore and maintain fish populations in "good condition" in the mainstem San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish; and (2) the Water Management Goal, which is to reduce or avoid negative water supply impacts on all of the Friant Division long-term contractors that may result from the Interim and Restoration flows provided for in the Settlement.

Restoration Flows and the Settlement

To meet the Restoration Goal, the Bureau is required to release water pursuant to the terms of section 13 of the Settlement. Section 13, "Restoration Flows," identifies ongoing requirements of the Bureau to source and release water from the Friant Dam to

the confluence of the Merced River. The amount of water to be released is defined in the Settlement pursuant to hydrograph flows, also known as the “Base Flows.” Up to an additional 10 percent of the applicable hydrograph flows, or “Buffer Flows,” may be released as needed. Together the Base Flows, Buffer Flows, and any additional water acquired by the Bureau from willing sellers to meet the Restoration Goal are collectively referred to as the “Restoration Flows.” (Settlement, section 13(a), pp. 10-11.)

In addition to releasing sufficient volumes of water to restore the salmon runs, the Friant Dam must release water for flood control purposes. While dry climate in California limits the needs to flood control from season to season, flood control is nonetheless one of the primary purposes of the Friant Dam. California has recently experienced a season of heavy rain, as such the Friant Dam will release flood flows into the San Joaquin River as part of its flood control operations. These flood flows may accomplish some or all of the Restoration Flows required by this Settlement.

However, nothing in the Settlement is intended to limit, affect, or interfere with the ability to carry out flood control operations. (Settlement, section 13(d), p. 13.) Although flood control flows may lead to more water being released than the Restoration Flows require, the excess flood control flows do not create an additional obligation of the parties. In other words, times of heavy rain and the need for flood control operations have a positive benefit for the purposes and terms of the Settlement. For example, the Settlement contemplates the use of excess waters. These provisions allow for the Bureau to enter in agreements

with either the long-term contractors or third parties to bank, store, or exchange the flood flow water for future supplemental Restoration Flows, or to arrange for the transfer of or to sell such water and deposit the proceeds into a Restoration Fund that has been created by the Settlement. Further, the Settlement allows Friant Dam to release the water during times of the year other than those specified by the Settlement. (Settlement, Section 13(i), p. 16.)

Conclusion and Implications

The report released January 20, 2023 entitled, “Initial 2023 Restoration Allocation & Default Flow Schedule” is part of the annual and ongoing requirements of the Settlement, and sets the default flow schedule for releases—this year, totaling 556,542 acre-feet—unless hydrological or operations change are warranted to modify the releases.

Increased rains in California have resulted in additional water flowing to the Friant Dam and the San Joaquin River. While it remains to be seen whether the wet year designation for 2023 and corresponding releases will encourage or support salmon spawning more than releases have in dryer years, the additional water from the winter storms appears to add flexibility in meeting current and possibly future flow releases pursuant to the Settlement. For more information, see: Initial 2023 Restoration Allocation & Default Flow Schedule, January 20, 2023, available at https://www.restoresjr.net/?wpfb_dl=2707; Settlement Agreement available at https://www.restoresjr.net/?wpfb_dl=9.

(Miles Krieger, Steve Anderson)

DEPARTMENT OF WATER RESOURCES APPROVES NEW GROUNDWATER SUSTAINABILITY PLANS FOR NORTHERN CALIFORNIA BASINS

In January 2023, the California Department of Water Resources (DWR) approved Groundwater Sustainability Plans (GSPs) for four northern California groundwater basins pursuant to the Sustainable Groundwater Management Act (SGMA): Napa Valley Subbasin, Santa Rosa Plain Subbasin, Petaluma Valley Basin, and Sonoma Valley Subbasin. The Groundwater Sustainability Agencies (GSAs) for each subbasin adequately demonstrated to DWR

that the GSPs would achieve sustainability for each subbasin as required by SGMA, but DWR identified several corrective actions the GSAs should consider moving forward.

Background

Due to the constant changes in drought conditions and flood water levels, groundwater management is of the utmost importance to water agencies throughout

the state. By capturing the groundwater and storing it, agencies can keep water available during drought periods. But to do so, local Groundwater Sustainability Agencies must implement groundwater management plans in accordance with the Sustainable Groundwater Management Act (SGMA).

In 2014, then-Governor Jerry Brown signed SGMA into law. SGMA emphasizes local agencies' expertise of local groundwater conditions and ability to manage those basins, either singly or jointly. Among other things, SGMA requires local agencies to form GSAs for basins experiencing moderate to severe overdraft, which occurs when groundwater withdrawal exceeds recharge and can lead to negative impacts like subsidence (sinking of land), poor groundwater quality, and insufficient water supplies for beneficial uses. GSAs are required under SGMA to develop and implement Groundwater Sustainability Plans to achieve sustainability in overdrafted groundwater basins within a 20-year time horizon. Each GSP has its own goals specific to the covered groundwater basin and must be accomplished within the 20-year period. To achieve the sustainability goal for the Subbasin, the GSP must demonstrate that implementation of the Plan will lead to sustainable groundwater management, which means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results, such as subsidence, water quality degradation, and lowering of groundwater levels. Undesirable results must be defined quantitatively by the GSAs.

To date, the Department of Water Resources, which is tasked with reviewing GSPs, has approved several GSPs but has also deemed many to be inadequate, thus requiring additional plan development to achieve sustainability. Many more GSPs are still under review. DWR's review considers whether there is a reasonable relationship between the information provided and the assumptions and conclusions made by the GSA, including whether the interests of the beneficial uses and users of groundwater in the Subbasin have been considered; whether sustainable management criteria and projects and management actions described in the GSP are commensurate with the level of understanding of the Subbasin setting; and whether those projects and management actions are feasible and likely to prevent undesirable results. To the extent overdraft is present in a subbasin,

DWR evaluates whether a GSP provides a reasonable assessment of the overdraft and includes reasonable means to mitigate the overdraft. DWR also considers whether a GSP provides reasonable measures and schedules to eliminate identified data gaps. DWR is also required to evaluate whether the GSP will adversely affect the ability of an adjacent basin to implement its GSP or achieve its sustainability goal.

GSAs are required to evaluate their GSPs at least every five years and whenever a GSP is amended, and to provide a written assessment to DWR. Accordingly, DWR will evaluate approved GSPs and issue an assessment at least every five years. To that end, SGMA provides a process for local GSAs to follow to ensure water data is gathered and stored properly to facilitate adaptation of groundwater management based on climate and water level changes, which in turn allows local agencies to better curate plans for their specific region as conditions shift. The process helps ensure groundwater management accounts for uncertainties resulting from climate changes and drought shifts.

The Approvals

DWR approved GSPs for the Santa Rosa Plain Subbasin, Petaluma Valley Subbasin, Napa Valley Subbasin, and Sonoma Valley Subbasin. A single GSP was submitted by the applicable GSA for each subbasin. Each approval was based on DWR's determination that the GSP satisfied the objectives of SGMA and substantially complied with GSP regulations. Specifically, DWR issued a statement of findings for each GSP. Notably, DWR found that the Santa Rosa Plain Subbasin GSP would be closely coordinated with the neighboring GSAs in Petaluma Valley and Sonoma Valley, and that the GSP did not appear to adversely affect the ability to implement the GSPs for those subbasins or impede achievement of sustainability goals in those adjacent basins. DWR also recognized that the eight member agencies of the Santa Rosa GSA historically implemented numerous projects and management actions to address problematic groundwater conditions in the subbasin, and that the GSA reasonably demonstrated it had the legal authority and financial resources to implement the GSP. DWR made similar findings for the other GSPs.

However, DWR also recommended a number of corrective actions for each GSP and strongly encouraged each GSA to consider and implement those

actions. For instance, DWR recommended that each GSA: (1) identify certain surface water imports; (2) provide additional details and discussion related to specific components the GSA used to establish chronic lowering of groundwater levels sustainable management criteria; (3) continue to fill in data gaps, collect additional monitoring data, coordinate with resource agencies and interested parties to understand beneficial uses and users that may be impacted by depletions of interconnected surface water caused by groundwater pumping, and potentially refine sustainable management criteria; and (4) provide additional details related to monitoring networks. DWR's recommendations, while different for each GSP, are focused on obtaining increasingly detailed information about the relationship between surface water availability and groundwater use (e.g., from the Russian River), operational responses to chronic lowering of groundwater levels exacerbated by prolonged periods of drought, and impacts on interconnected surface and groundwater related to pumping.

DWR emphasized that this type of information be captured and made available to assist DWR in its five-year review of the GSPs to ensure that the

GSPs are on target for achieving sustainability of the groundwater basins within the time horizon set under SGMA. In sum, DWR approved the GSPs but clearly indicated its focus on detailed hydrological information demonstrating whether sustainability would be achieved moving forward as required by SGMA.

Conclusion and Implications

The Department of Water Resource's approval of the four GSPs in northern California are a positive sign for groundwater sustainability management in the region. However, DWR's continuing oversight role in actually achieving sustainability is clear in its approval of the GSPs. It remains to be seen to what extent the GSAs will pursue or satisfy the corrective actions recommended by DWR, and what role accomplishing those actions will play in DWR's subsequent review of the GSPs in five years. For more information, see: *DWR Approves GSPs For Four Northern California Basins* (Jan. 26 2023) <https://water.ca.gov/News/News-Releases/2023/Jan-23/DWR-Approves-Groundwater-Sustainability-Plans-for-Four-Northern-California-Basins/>.

(Elleasse Taylor, Steve Anderson)

DEPARTMENT OF WATER RESOURCES RELEASES UNDERGROUND AQUIFER MAPPING DATA FOR ENTIRE CENTRAL VALLEY AS PROGRESS CONTINUES FOR STATEWIDE AIRBORNE ELECTROMAGNETIC SURVEY PROJECT

With the release of new data covering the entirety of California's Central Valley, the Department of Water Resources (DWR) has hit another major milestone for its Statewide Airborne Electromagnetic Survey Project (AEM Survey Project or AEM). Since its commencement in the summer of 2021, the AEM Survey Project has been able to provide data for 8 of its 9 planned survey areas covering a vast number of California's groundwater aquifers. Now that such mapping has been completed and the data has been released for Survey Area 7, covering the northernmost portions of the Sacramento Valley, the AEM Survey Project has officially finished its scheduled coverage for much of central and northern California, providing data for the Sacramento and San Joaquin valleys, the Salinas Valley, the Santa Rosa

and Petaluma valleys, the Sonoma and Napa valleys, and other significant aquifers in the State's northern counties including Humboldt, Modoc, Lassen, and Siskiyou counties.

AEM Survey Project: Mapping the State's Aquifers

DWR's AEM Survey Project began back in the summer of 2021 with the aim of providing visual mapping data for the State's high- and medium-priority groundwater basins where such mapping data collection is feasible. This data, as DWR explains, is intended to assist local water managers as they implement the Sustainable Groundwater Management Act (SGMA) to manage groundwater for long term sustainability. More specifically, the AEM Survey

Project provides stakeholders in California's groundwater management with basin-specific and cross-basin geophysical data, tools, and analyses.

The process for collecting this data involves numerous flyovers of the targeted regions utilizing geophysical instruments attached to what is essentially a giant hula-hoop towed beneath a helicopter. AEM measures the electromagnetic response of the subsurface by generating a current in the hoop which sends an electromagnetic signal into the subsurface. The response of the subsurface materials is then measured in a receiver that is mounted to the helicopter.

The data gathered using this methodology relates to the electromagnetic properties of the subsurface materials. These electromagnetic properties are then interpreted to provide insights as to the general makeup of the subsurface materials. Materials that are electrically conductive are typically interpreted as being fine-grained (e.g. silts and clays) or as high salinity waters. Conversely, materials that are electrically resistive are usually interpreted as coarse-grained (e.g. sands and gravels). These interpretations are backed by historical data on physical characteristics of different geological components gathered from well completion reports, electromagnetic geophysical resistivity logs, water quality reports, and water level reports. The resulting data gathered from these AEM flyovers can then be used to create continuous images of the subsurface areas to depths as low as 1,000 feet depending on the geological makeup of the subsurface materials.

Data collected as part of the AEM Survey Project is made publicly available on the California Natural Resources Agency Open Data Portal anywhere from six to twelve months after surveys are completed. The data provided includes the full AEM datasets, including raw, processed, inverted, and interpreted AEM data, as well as supporting datasets such as digitized lithology and geophysical logs and data on water levels and total dissolved solid concentrations.

The most recent data released from Survey Area 7 rounds out most of the scheduled data collection for

California's central and northern counties and the release of data for Survey Area 8 will look to complete the coverage for these areas of the State. Survey Area 8 will cover areas in and around the Gilroy-Hollister Valley as well as the Salinas Valley and the data collection for this zone was completed in November of 2022. According to the DWR's website, this data can be expected for public release at some point in the third quarter of 2023.

The last remaining scheduled survey area for the AEM Survey Project is that of Survey Area 9 covering the Santa Maria River Valley and other areas between Morro Bay and Lompoc. Flyovers are set to commence as early as April of 2023 with data to follow in early 2024. While currently designated as "Not Yet Scheduled," the DWR has listed several other groundwater basins as targets for future AEM mapping including San Jacinto, Borrego Springs, the Coachella Valley, Indian Wells Valley, and the upper portion of the San Luis Rey Valley.

Conclusion and Implications

Data collection is one of the most important tools Californians will need to utilize moving forward in order to maximize the efficiency of our increasingly limited water supplies. The information collected through DWR's AEM Survey Project should provide California water managers with a standardized, state-wide dataset that helps improve our understanding of aquifer structures in many regions of the State. This data can also lead to further development or refinement of existing hydrogeological model and can assist water managers in identifying aquifers that may be ripe for the implementation of groundwater recharge projects. In any case, the AEM Survey Project's data gathered on the state's groundwater basins will only help bolster the information currently available to water managers statewide and comes as a welcome addition to the library of resources already available to the public.

(Wesley A. Miliband, Kristopher T. Strouse)

STATE WATER RESOURCES CONTROL BOARD ISSUES TEMPORARY GROUNDWATER RECHARGE PERMIT TO MERCED IRRIGATION DISTRICT

On January 6, 2023, the State Water Resources Control Board (State Water Board) issued a 180-day temporary water right permit (T033344) to Merced Irrigation District (MID) for the diversion of excess flows from Mariposa Creek to recharge groundwater supplies in the Merced Subbasin. The temporary permit was issued under a streamlined permitting process for groundwater recharge projects that can make use of winter rains and improve the State's water security in the face of climate change and drought.

Background

The Merced Subbasin (identified as Subbasin 5-022.04 in the Department of Water Resources' (DWR) Bulletin 118) is a high-priority groundwater subbasin in a critical condition of overdraft within the San Joaquin Valley Groundwater Basin. It is situated below the San Joaquin Valley, bounded by the Merced River to the north, the San Joaquin River to the west, the Merced-Madera county line to the south, and the Sierra Nevada foothills to the east. Leading up to the enactment of the Sustainable Groundwater Management Act (SGMA) in 2014, groundwater levels in the Merced Subbasin were in notable decline due to unsustainable consumptive use. Recent drought years only worsened conditions, threatening the disadvantaged communities that rely on the subbasin as their primary source of water. Mariposa Creek is a tributary stream to the San Joaquin River that experiences large peak winter flows and low summer flows.

On March 28, 2022, Governor Newsom issued Executive Order N-7-22 to address ongoing drought and climate change impacts. In recognition of the long-term importance of groundwater replenishment, the Governor directed state agencies to facilitate and expedite basin recharge projects to improve sustainable groundwater management. Executive Order N-7-22 also suspended environmental review requirements under the California Environmental Quality Act for projects that enhance the ability of local or state agencies to capture high flow events for storage and groundwater recharge, so long as those projects are consistent with fish and wildlife protections and existing water right priorities.

A temporary water right permit may be issued when an applicant has demonstrated an urgent need for the water to be diverted and used, and the diversion does not injure other lawful users of water or have unreasonable effects on fish and wildlife. Entities seeking to divert water to underground storage may seek a 180-day or a five-year permit. The State Water Board has implemented a streamlined process for issuing temporary water right permits for recharge projects (the 90/20 method) which is intended to be faster than the normal water right application process. To remain protective of fisheries, applicants who wish to utilize the expedited process must limit diversions to periods when flows in the source stream are equal to or greater than the 90th percentile of flows for that day. Diversions under a temporary permit may not exceed 20 percent of the total streamflow based on a 30-year historical average.

MID's Temporary Permit for Groundwater Recharge

MID applied for a temporary permit on December 23, 2022 to implement a pilot groundwater recharge project in Merced County that would take advantage of high creek flows brought by winter precipitation events. As a state agency charged to help implement local initiatives under SGMA, DWR served as a co-applicant for the project, helped MID prepare the permit application, and coordinated consultation meetings with the State Water Board and California Department of Fish and Wildlife.

The temporary permit allows MID to divert up to 18,000 acre-feet from Mariposa Creek during a 180-day period from December 1, 2022 to March 31, 2023. In compliance with the 90/20 method, diversion may only occur during periods of high precipitation, when 90th percentile flows are present in Mariposa Creek. MID will spread the diverted surface water across fallowed or dormant private lands within the district, which will then infiltrate to the Merced Subbasin and become available for extraction via landowners' private wells for irrigation later in the year.

The Water Availability Analysis submitted with the permit application compiled daily data from 1932

to 2019 to determine the frequency of days when high flows in Mariposa Creek exceeded the 90th percentile. In at least 75 percent of the water years evaluated, 90th percentile flows were available for at least one day in the 180-day permit period, with an average of 13 days in any given water year. Relying on the Water Availability Analysis and water right data from its electronic water rights management system, the State Water Board concluded that diversions under a temporary permit would comply with the 90/20 requirements and would not injure downstream users. To track groundwater recharge and extraction activities, MID is directed to use a “last in, first out” accounting method that requires the stored groundwater to be used before other sources of water during the 2023 irrigation season.

Conclusion and Implications

MID’s temporary permit was issued and effective on January 6, 2023, while notice remained pending for written objections until February 8. On February 13, 2023, Governor Newsom issued Executive Order N-3-23, which reaffirmed the objectives of Executive Order N-7-22 and directed state agencies to continue collaborating and expediting permitting processes to maximize the extent to which winter precipitation events can be harnessed to augment the state’s groundwater aquifers.

A copy of Temporary Permit T033344 and the underlying application materials is available at: <https://ciwqs.waterboards.ca.gov/ciwqs/ewrims/DocumentRetriever.jsp?appNum=T033344&wrType=Temporary%20Permit>.

(Austin Cho, Sam Bivins)

RECENT FEDERAL DECISIONS

TENTH CIRCUIT FINDS BLM NEEDS TO TAKE A HARD LOOK UNDER NEPA FOR NEW MEXICO FRACKING PERMITS

Diné Citizens Against Ruining Our Environment et al. v. Bernhardt et al.,
___F.4th___, Case No. 21-2116 (10th Cir. Feb. 1, 2023).

On February 1, 2023, the Tenth Circuit for the United States Court of Appeals barred the United States Department of the Interior’s Bureau of Land Management (BLM) from issuing fracking permits in New Mexico’s Mancos Shale formation in *Diné Citizens Against Ruining Our Environment et al. v. Bernhardt et al.* because BLM failed to adequately examine climate change and air pollution impacts of these permits under the National Environmental Policy Act (NEPA). The Court found that the BLM analysis, preceding its drilling permit approvals, was “arbitrary and capricious” because it failed to take a hard look at the environmental impacts from greenhouse gas (GHG) emissions and hazardous air pollutant emissions.

Background

NEPA “requires agencies to consider the environmental impact of their actions as part of the decision-making process and to inform the public about these impacts.” (*Citizens’ Committee to Save Our Canyons v. U.S. Forest Services* (10th Cir. 2002) 297 F.3d 1012, 1021.) Specifically, NEPA requires agencies to “take a hard look at environmental consequences” of a proposed action by considering the direct, indirect, and cumulative environmental impacts of the proposed action. (40 C.F.R. §§ 1502.16 (environmental consequences), 1508.7 (cumulative impact), 1508.8 (direct and indirect effects).) When an agency is unsure if an action will significantly affect the environment, it prepares an Environmental Assessment (EA) to determine whether an Environmental Impact Statement (EIS) is necessary. (*See* 40 C.F.R. § 1501.5.) But if the EA determines that a proposed project will not significantly impact the human environment, the agency issues a Finding of No Significant Impact (FONSI), and the action may proceed without an EIS. (*Id.*; see also *Citizens’ Committee to Save Our Canyons*, 297 F.3d at 1022–23.)

In 2003, BLM prepared a Resource Management Plan Amendment and an Associated Environmental Impact Statement (RMP/EIS) that considered the New Mexico’s Mancos Shale and Gallup Sandstone zones in the San Juan Basin to be “a fully developed oil and gas play.” (79 Fed. Reg. 10548, 10548 (Feb. 25, 2014).) Since then, advanced hydraulic fracturing technologies, “made it economical to conduct further drilling for oil and gas in the area,” and BLM started issuing applications for permits to drill (APDs) in the shale formation using individual, site-specific EAs tiered to the 2003 RMP/EIS. But in 2019, several citizen groups challenged the site-specific EAs for hundreds of APDs approved by BLM from 2012 through 2016. (*See Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).) While most of the EAs were affirmed by the Tenth Circuit, the Court of Appeals remanded to the lower court “with instructions to vacate five EAs analyzing the impacts of APDs in the area because BLM had failed to consider the cumulative environmental impacts as required by [NEPA for APDs associated with these EAs],” by failing to consider the water needs of new oil and gas wells from fracking in the shale formation.

Following that decision, BLM prepared an EA Addendum to correct the deficiencies in those five EAs and the potential defects in 81 other EAs supporting the approvals of 370 APDs in the shale formation. BLM allowed the previously approved APDs to remain in place while it conducted additional analysis in EA Addendum to consider the air quality, GHG emissions, and groundwater impacts of issuing the APDs. Based on the EA Addendum analysis, BLM then certified the 81 EAs and the EA Addendum and issued the FONSI. But the citizens groups sued BLM again for these 81 EAs and the EA Addendum alleging NEPA violations:

...because BLM (1) improperly predetermined the outcome of the EA Addendum [by approving APDs before completing the EA Addendum and failing to suspend approvals while gathering additional information] and (2) failed to take a hard look at the environmental impacts of the APD approvals related to [] GHG [] emissions, water resources, and air quality.

The District Court affirmed BLM's action determining: (1) citizen groups' claims based on APDs that had not been approved were not ripe for judicial review, (2) BLM did not unlawfully predetermine the outcome of the EA Addendum, and (3) BLM took a hard look at the environmental impacts of the APD approvals. The citizen groups appealed.

The Tenth Circuit's Decision

In *Dine Citizens*, the Tenth Circuit panel affirmed the District Court ruling that out of the 370 APDs considered by BLM, 161 APDs were in non-final status and were not ripe for judicial review. The Court also agreed with the District Court in holding that BLM did not improperly predetermine the outcome of the EA Addendum when it did not withdraw the prior approved APDs because BLM acted in good-faith by maintaining status quo and taking no new actions on the APDs pending the completion of its voluntary EA addendum analysis. The petitioners here did not meet the high burden of showing that agency engaged in unlawful predetermination by irreversibly and irretrievably committing itself to the action "that was dependent upon the NEPA environmental analysis producing a certain outcome."

The Analysis in the EA Addendum was Arbitrary and Capricious

But, the Tenth Circuit reversed the District Court to hold that BLM's analysis in the EA Addendum and 81 EAs was arbitrary and capricious because it failed to take a hard look at the environmental impacts from GHG emissions and hazardous air pollutant emissions. The Court found the BLM's decision to use the estimated annual GHG emissions from the construction and operations of the drilling wells to calculate the estimated direct emission emissions for all 370 wells over 20 year lifespans was unreasonable, arbitrary and capricious. BLM unreasonably used one

year of direct emissions from the wells to represent twenty years' worth of total emissions of the well in the EA Addendum. BLM's justification for not calculating the direct GHG emissions over the lifetime of the wells that it was not possible to estimate the total lifespan of an individual well or "to incorporate the decline curve into results from declining production over time," was inconsistent with the record.

Cumulative Impacts Analysis Defective

Furthermore, the Court found BLM's cumulative impacts analysis of GHG emissions tied to the APDs was defective because "[t]he deficiencies identified in the EAs and EA Addendum necessarily render any new APDs based on those documents invalid." The BLM's cumulative analysis of comparing the wells' emissions to all New Mexico and U.S. emissions rather than comparing the wells' total GHG emissions to the global carbon budget—a widely accepted method of analysis—rendered the EA and EA Addendum to conclude the cumulative GHG impacts as relatively small. The court found that this comparative analysis only showed that:

...there are other, larger sources of [GHG emissions], and did not show that these APDs, 'which [are] anticipated to emit more than 31 million metric tons of carbon dioxide equivalents, will not have a significant impact on the environment.'

While the BLM need not use a particular methodology:

...it is not free to omit the analysis of environmental effects entirely when an accepted methodology exists to quantify the impact of GHG emissions from the approved APDs.

The Tenth Circuit also found that BLM similarly failed to sufficiently consider the cumulative impacts of the wells' hazardous air pollutant emissions on air quality and human health by only accounting for short-term emissions from a small number of wells, and not the multiyear reality. However, the Court held that BLM's analysis of the cumulative impacts to water resources and methane emissions was sufficient under NEPA.

Conclusion and Implications

As a result of the court's findings, the Tenth Circuit reversed the District Court and remanded the case back to them to consider the appropriate remedy, including if vacatur and injunction is necessary moving forward. The panel also blocked the BLM from issuing any further APDs until the District Court renders a decision.

This NEPA decision provides a good overview of how the courts apply the hard look doctrine to the agency's decision and the record supporting the

agency decision, and how a court's analysis can vary based on the record. The decision also underlines the importance for the agencies to carefully select the methodologies used to analyze the GHG and hazardous air pollutants emissions, as well as ensuring the record includes proper evidence to support the agency conclusions, particularly for fossil fuels-related projects. The court's opinion is available online at: <https://ca10.washburnlaw.edu/cases/2023/02/21-2116.pdf>.

(Hina Gupta)

RECENT CALIFORNIA DECISIONS

**SECOND DISTRICT COURT REJECTS CHALLENGE TO EIR
PREPARED FOR PROJECT TO CONNECT THE CITY OF BUENAVENTURA
TO THE STATE WATER PROJECT**

California Water Impact Network v. City of San Buenaventura, Unpub., Case No. B315362 (2nd Dist. Jan. 4, 2023).

In an *unpublished* decision filed on January 4, 2023, the Second District Court of Appeal rejected a wide range of claims raised by an environmental group that challenged an Environmental Impact Report (EIR) prepared for a water pipeline project to connect the City of San Buenaventura's water supply to the California State Water Project (SWP). The project's primary objective was to make up for growing shortages in the city's locally sourced water supply. Ultimately, the court found that the EIR provided sufficient information and analysis to allow the city and the public to make an informed decision on the project.

Factual and Procedural Background

The City of Buenaventura has a contractual right to water from the SWP, however the city was never able to use the SWP because of a lack of infrastructure to deliver water allocations to the city. The project sought to remedy this by constructing a pipeline to connect to the SWP. The project, termed the State Water Interconnection Project (SWI Project) was necessitated by diminishing local water resources that it sought to replace. The project proposed a pipeline approximately seven miles long. The city prepared an EIR for the SWI Project that concluded that with mitigation measures, the project would not have any significant environmental impacts.

The city was concurrently working on a parallel project, called the Ventura Water Supply Projects (Water Supply Projects), that sought to develop a "supplemental" supply of water from local resources such as wastewater and groundwater treatment. Whereas the SWI Project was intended to replace diminishing local water sources, the goal of the Water Supply Projects was to increase the overall supply of potable water in the city. The city prepared a separate EIR for the Water Supply Projects.

An environmental organization called the California Water Impact Network (CWIN) challenged

the adequacy of the EIR for the SWI Project and filed petition for writ of mandate. The trial court denied the petition.

The Court of Appeal's Decision

In its appeal, CWIN reiterated its myriad claims that the SWI Project EIR was inadequate. The Second District court rejected each of them.

The SWI Project EIR Did Not Exclude Essential Analysis'

Petitioners argued that the SWI Project EIR improperly excluded a separate environmental review of the Water Supply Project. Specifically, petitioners alleged that the city should have included a separate environmental review of the Water Supply Projects in the SWI Project EIR. The court noted that the EIR for the Water Supply Projects discussed the SWI Project and the variability of its water supply. The court found that the SWI Project's discussion of the amount of SWP water each year, and acknowledgment that it would vary each year, was sufficient to inform the city and the public about the reliability of the SWP water. It was not necessary for the SWI Project EIR to explicitly state that that the SWP project is not a reliable supply of water, sufficient information was provided in the EIR for the city to make that determination.

Petitioners also claimed that the SWI Project EIR violated the California Environmental Quality Act's (CEQA) prohibition on piecemealing single project into multiple projects because it did not discuss the Water Supply Projects in the same EIR. Here, although both projects concerned the city's water, each project involved a different source of water, different infrastructure, and neither project is dependent on the completion of the other. As the court noted:

...different projects may properly undergo separate environmental review when the projects can be implemented independently.

Petitioners also challenged some of the project objectives discussed in the EIR as a “fait accompli.” However, the court noted that CEQA does not restrict an agency’s discretion to identify and pursue a particular project designed to meet a particular set of objectives.

Petitioners also argued that the EIR did not consider project alternatives that include other local sources of water. Local sources were insufficient to meet the city’s water supply and the court noted that an EIR does not need to consider alternatives that cannot achieve the basic goal of the project.

The SWI Project EIR’s Discussion of the No Project Alternative Was Sufficient

Petitioners also alleged that the EIR’s no project alternative “evaded the foreseeable need to reduce

reliance on the Sacramento River Delta and protect public trust resources.” However, as the court noted, the purpose of the no project alternative is to provide a “factually based forecast of the environmental impacts of preserving the status quo.” The SWI Project EIR did this. Moreover, because there is not enough SWP water for every entity entitled to it, if the city did not use its allocation, the allocation would be used by another entity as a result the Delta would not be aided if the city decided not to build the pipeline.

Conclusion and Implications

The decision in *California Water Impact Network* helps highlight the principle that an EIR need not be perfect, it only needs to provide the important and pertinent information to allow a local agency to make an informed decision on a project. A copy of the court’s *unpublished* opinion can be found here: <https://www.courts.ca.gov/opinions/nonpub/B315362.PDF>. (Travis Brooks)

MADERA COUNTY SUPERIOR COURT ISSUES PRELIMINARY INJUNCTION TO ENJOIN THE MADERA COUNTY GSA’S PROJECT FEE

Valley Groundwater Coalition vs. County of Madera, Case No. MCV087677 (Madera County Sup. Ct.).

On December 6, 2022, Judge D. Lynn Collett of the Madera County Superior Court issued a preliminary injunction in *Valley Groundwater Coalition vs. County of Madera*. The preliminary injunction prohibits the Madera County Groundwater Sustainability Agency (Madera County GSA) from imposing its Groundwater Sustainability Plan’s (GSP) Project Fee. Without the injunction, the first installment of the annual fee would have been due on December 12, 2022.

Background

The Sustainable Groundwater Management Act (SGMA) was signed into law in 2014. The objective of SGMA is “to provide for the sustainable management of groundwater basins.” (Wat. Code § 10720.1.) To reach this goal, each groundwater subbasin is managed by one or more Groundwater Sustainability Agencies pursuant to either a single GSP or multiple

coordinated GSPs. (Wat. Code §§ 10721, 10725, 10727.2.) SGMA aims for its subbasins to reach sustainability within 20 years of adopting their individual or coordinated GSPs. (Wat. Code § 10727.2.)

The Madera County Board of Supervisors serves as the board of the Madera County GSA. Madera County contains three subbasins: the Madera Subbasin, the Chowchilla Subbasin, and the Delta-Mendota Subbasin, each of which the Department of Water Resources designated as “high priority” under SGMA. (See, Water Code., § 10722.4(a)(1).) The Madera County GSA serves as the exclusive GSA for the areas within all three Subbasins’ that do not receive surface water from another entity. The County is involved in joint GSPs with other GSAs for the Madera Subbasin, Chowchilla Subbasin, and Delta-Mendota Subbasin.

Under Proposition 218, impacted landowners must approve any increased or new fees and assessments on their property. (Cal. Const. art. XIII D, § 4.) SGMA

explicitly requires that groundwater extraction fees be adopted pursuant to the requirements of Proposition 218. (Wat. Code § 10730.2.) Proposition 218 mandates certain procedures for enacting new or increased fees and charges related to property. (Cal. Const. art. XIID, § 4.) This includes mailing written notice to each parcel owner summarizing the fee and stating the date and time of the public hearing on the proposed fee. (Cal. Const. art. XIID, § 4.) At the mandatory public hearing, the agency imposing the fee must consider all protests against the fee. (Cal. Const. art. XIID, § 4.) If a majority of landowners file written protests, the agency cannot impose the fee. (Cal. Const. art. XIID, § 4.)

California voters approved Proposition 26 in 2010. Proposition 26 aims to stop local governments from disguising taxes as fees to gain revenue while avoiding various constitutional voting requirements. (Proposition 26, § 1(e).) To meet this objective, Proposition 26 defines “tax” as “any levy, charge, or exaction of any kind imposed by the State,” but includes a list of exceptions that state and local governments can meet. (Cal. Const. art. XIII A § 3.) One such exception is for special benefits conferred that are:

. . . granted directly to the payor that is not provided to those not charged. . . [and do]. . . not exceed the reasonable costs to the State of conferring the benefit. (Cal. Const. art. XIII A § 3.)

In May of 2022, pursuant to Proposition 218, the Madera County GSA sent out notices of a proposed fee to identified affected property owners in the three Subbasins. (County of Madera’s Opposition to Motion for Preliminary Injunction (Opp.) at 7.) The rates were applicable to all property owners located on “enrolled acres,” which were defined on the notice as “an acre within a farm unit that receives an allocation by the GSA.” (Memorandum of Points and Authorities in Support of petitioner’s Motion for Preliminary Injunction (MPAs) at 3.) The allocation refers to groundwater pumping allocations from the GSA to the farming entity, regardless of whether the allocated water is pumped from the property. (*Id.*)

Following the notices, on June 21, 2022, the Madera County GSA held a public hearing under Proposition 218 to calculate the protests against the fee for each Subbasin. (*Id.* at 4.) The Chowchilla Subbasin was the only subbasin that received a major-

ity protest, so the fee was not adopted for that subbasin. (Opp. at 8.) The Madera County GSA then adopted Resolution Nos. 2022-086 and 2022-087 for the Madera Subbasin and the Delta-Mendota Subbasin respectively, imposing an annual per-acre fee on the agricultural property owners within those areas. The fee for the Madera Subbasin was set at \$246, while the fee for the Delta-Mendota Subbasin was set at \$138. (MPAs at 3-4.)

The Preliminary Injunction

The Valley Groundwater Coalition (Coalition) filed a petition for writ of mandate and complaint for declaratory and injunctive relief (Petition) against Madera County (County) challenging the adoption of Resolution Nos. 2022-086 and 2022-087 on September 13. On October 4, 2022, the Coalition filed its Motion for Preliminary Injunction, which sought to enjoin the County from imposing and collecting the Project Fees, the first installments of which were scheduled to come due on December 12, 2022. (MPAs at 2.)

In its preliminary injunction motion, the Coalition argued that the County violated Proposition 218 and Proposition 26. Under its Proposition 218 argument, the Coalition argued that, among other violations, many landowners did not receive the Proposition 218 Notification, the Notice did not state that tenants in the Subbasins could submit protests, the County did not count every protest submitted, and the services that the fees are funding are not readily available to the property owners paying the fee. (MPAs at 1.)

Under its Proposition 26 argument, the Coalition argued that, among other violations, the County cannot show that the allocation of costs on landowners has a fair and reasonable relationship to their burdens on or benefits from the projects the fee will fund, and the County cannot show the fee is no higher than necessary for the reasonable costs of the projects. (MPAs at 2.) Under this argument, the fee would be considered a tax, and the County would need to meet the constitutional voting requirements for imposing taxes.

On December 6, 2022, Judge Collet granted the preliminary injunction against Madera County, restraining it from “[i]mposing and/or collecting any “fees,” “rates,” and/or “GSP Project Fees” enacted under Madera County Resolution Nos. 2022-086 and 2022-087 against landowners in the Madera Subbasin

and delta-Mendota Subbasin beyond any fees that have already been voluntarily paid.” (Order Granting Preliminary Injunction at 2.) The court’s order written order did not provide a further explanation of the reasoning behind its decision.

Conclusion and Implications

With Judge Collet granting the preliminary injunction, Madera County cannot impose groundwater

fees under Resolution Nos. 2022-086 and 2022-087 against the property owners in its role as the Madera County GSA. This preliminary injunction will prevent the fees from being imposed until a final judgment is entered. The next item for this case is a Case Management Conference scheduled with Judge Collet on March 13, 2023.
(Taylor Davies, Sam Bivins)

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