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EASTERN WATER LAW™

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EASTERN WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we report on efforts by the State of Arizona to plan for extreme drought in a state where Colorado River water is in dire short supply. Groundwater remains a vital source of water and the state is forming a council to advise on groundwater use. Next we address efforts in California to more efficiently and effectively deal with urban waste discharges in the form of sanitary sewer systems reforms. Finally, we report on the ongoing tension in the Eastern Snake Plain aquifer in the face of Idaho's 'trust water rights.'

Arizona Governor Hobbs Forms Water Council to Advise on Groundwater and Other Supply Issues

In early January 2023, newly sworn-in Governor Katie Hobbs issued an executive order creating the Governor's Water Policy Council. The Council is intended to recommend updates, revisions, and additions to Arizona's Groundwater Management Act and related water legislation, and will be comprised of representatives from a variety of government and non-government entities with expertise in water and policy matters.

Background

Arizona adopted its Groundwater Management Act (GMA) in 1980. The GMA created four active management areas (AMAs) for Phoenix, Pinal County, Prescott, and Tucson, with specific management goals and requirements to address groundwater overdraft. A fifth AMA was approved by voters in 2022 for the Douglas basin in Cochise County.

Groundwater overdraft can create significant problems for both water users and water managers, including increased costs for drilling and pumping and loss of water supply. Water quality can also suffer because groundwater pumped from greater depths typically contains more salts and minerals. In areas of severe groundwater depletion, the earth's surface may sink, or "subside," causing cracks or fissures that can damage roads, building foundations, and other underground structures.

The GMA, as codified, is intended to control severe overdraft occurring in many parts of the state; provide a mechanism to allocate limited groundwater resources to most effectively meet changing needs; and augment groundwater through water supply development. To accomplish these goals, the GMA set up a comprehensive management framework and established the Arizona Department of Water Resources (ADWR) to administer its provisions. Accordingly, the GMA established three levels of water management to respond to different groundwater condition. The lowest level of management includes general provisions that apply statewide. The next level of management applies to Irrigation Non-Expansion Areas (INAs). The highest level of management, with the most extensive provisions, is applied to AMAs where groundwater overdraft is most severe. The boundaries of AMAs and INAs generally are defined by groundwater basins and sub-basins rather than by the political boundaries of cities, towns, or counties.

The GMA also contains a number of provisions and administrative programs to manage groundwater supplies. For instance, the GMA establishes a program of groundwater rights and permits; prohibits irrigation of new agricultural lands within AMAs; prepares a series of five water management plans for each AMA designed to create a comprehensive system of conservation targets and other water management criteria; requires developers to demonstrate a 100-year assured water supply for new growth; requires water pumped from all large wells to be metered or measured; and establishes a program for annual water withdrawal and use reporting.

Governor Hobb's order follows similar executive orders issued by the Governor's predecessors. In 2019, then-Governor Doug Ducey issued an executive order, Executive Order 2019-02, creating the Governor's Water Augmentation, Innovation, and Conservation Council. That council replaced the Governor's Water Augmentation Council created under Governor Jan Brewer.

Executive Order 2023-4

Executive Order 2023-4 does several things. First, it creates the Governor's Water Policy Council (Council) to analyze and recommend updates, revisions and additions to the GMA and related water legislation, which includes analysis and recommendations for groundwater management outside current Active Management Areas. Under the order, the Council will also build on the work of former-Governor Ducey's Water Augmentation, Innovation, and Conservation (WAIC), which the order dissolves. The WAIC considered a range of water augmentation strategies, including weather modification, forest management, phreatophyte (groundwater-dependent vegetation) management, and water importation strategies, such as desalination of ocean water from the Sea of Cortez and moving water from the Missouri or Mississippi Rivers to offset Colorado River diversions. The WAIC also considered a number of pressing issues moving forward, such as un-replenished groundwater withdrawals in AMAs, storage and recovery challenges in hydrologically disconnected areas within AMAs, the lack of renewable water supplies and infrastructure in groundwater-dependent areas subject to development, and replenishment supplies for the Central Arizona Groundwater Replenishment District for some assured water supplies in AMAs.

The Director of the Department of Water Resources will serve as chair of the Council. In addition, the Council will be composed of members from the Arizona Departments of Water Resources, Agriculture, Environmental Quality, Forestry and Fire Management, State Land Department, and Commerce Authority. Additional membership will include members from the state Legislature, Governor's Office, Salt River Project, Central Arizona Project, local government, Arizona Municipal Water Users Association, Arizona State University, University of Arizona, and Northern Arizona University. Further, Council membership will include various tribal representatives, including from two tribal communities within current active AMAs, one tribal community outside current active AMAs, and the Navajo Nation. Additional membership will include members from the agricultural and ranching industry, the development community, non-governmental conservation organizations, and private water companies.

Conclusion and Implications

While it remains to be seen which water supply management issues the Council will focus on specifically, the issues studied and reported on by the WAIC will likely continue to present pressing concerns as water supplies become increasingly stressed due to drought conditions in the Colorado River basin ad continuing development in the state. *See:* Executive Order 4, available at https://azgovernor.gov/office-arizona-governor/executive-order/4
(Miles Krieger)

California State Water Resources Control Board's New Sanitary Sewer Systems Waste Discharge Requirements to Take Effect This Summer

Late in 2022, the California State Water Resources Control Board (State Water Board) unanimously adopted and reissued a revamped version of its Sanitary Sewer Systems General Waste Discharge Requirements Order (SSS WDR), which takes effect on June 5, 2023. (State Water Board Order No. 2022-0103-DWQ.) The SSS WDR regulates sanitary sewer systems designed to convey sewage longer than one mile in length, and sets forth related reporting and response requirements for sanitary sewer overflows (SSOs). The new SSS WDR contains several immediate and long-term compliance requirements, and public agencies subject to the SSS WDR are highly encouraged to start preparing for the new requirements as soon as possible.

Background

The State Water Board adopted its original SSS WDR General Order in 2006. (State Water Board Order No. 2006-0003-DWQ.) The State Water Board's intent with the SSS General Order was to provide a consistent, statewide regulatory approach to address SSOs. All public agencies that own or operate a sanitary sewer system that is longer than one mile in length and conveys wastewater to a publicly owned treatment works facility must apply for coverage under the SSS General Order. In general, the SSS General Order also requires public agencies subject to the Order to develop and implement sewer system management plans (or SSMPs) and report all SSOs to the State Water Board's online sanitary sewer over-

flow database.

The State Water Board began public outreach for the reissuance process in 2018, and issued an informal Draft Order in February 2021. The original draft outlined several more prescriptive requirements than what appeared in the prior permit. Significant concerns from the regulated community largely regarding feasibility and cost of compliance were expressed to State Water Board staff, which necessitated further input from stakeholders before additional revisions were released in October 2022.

After nearly four years of negotiations between State Water Board staff, members of the public, and key stakeholders, on December 6, 2022, the State Water Board considered and unanimously adopted the new SSS WDR. Continued public comment and guidance from stakeholders also resulted in the release of two "change sheets" at the State Water Board's adoption hearing, as well as a third change sheet, which incorporated changes to mitigate concerns raised in oral comments. The revised version of the SSS WDR will become effective on June 5, 2023, and will serve as the new regulatory mandate for operation and maintenance of sanitary sewer systems, superseding the State Water Board's previous SSS WDR General Order, State Water Board Order No. 2006-0003-DWQ.

New Key Requirements

There are several new immediate and long-term compliance requirements adopted in the SSS WDR, which public agencies should know about and take steps to review and implement as soon as possible. Immediate compliance requirements include uploading any existing SSMP to the State Water Board's California Integrated Water Quality Systems (CIWQS) database, updating and ensuring compliance with revised Legally Responsible Official eligibility requirements, and updating the enrollee's Spill Emergency Response Plan to reflect several changes and updates including different spill categories for SSOs. The SSS WDR also revises water body sampling requirements for 50,000+ gallon spills to surface waters. Such samples should be conducted no later than 18 hours after the enrollee's knowledge of a potential discharge to a surface water.

Long-term compliance requirements include submitting an updated and fully revised SSMP to CIWQS, which must include several key elements in order to provide a plan and schedule to: (1) properly manage, operate, and maintain all parts of the enrollee's sanitary sewer system(s); (2) reduce and prevent sewer spills; and (3) contain and mitigate spills that do occur.

Finally, the SSS WDR expands existing regulation to protect waters of the State (*e.g.*, expanding the prohibition on discharge from a sanitary system to include waters of the State and requiring SSMPs to identify deficiencies in addressing spills to waters of the State). Specifically, any discharge from a sanitary sewer system, discharged directly or indirectly through a drainage conveyance system or other route, to waters of the state is prohibited. Waters of the State means any surface waters or groundwater within boundaries of the state as defined in California Water Code § 13050(e), in which the State Water Board and Regional Water Boards have authority to protect beneficial uses. Per the SSS WDR, waters of the State include, but are not limited to, groundwater aquifers, surface waters, saline waters, natural washes and pools, wetlands, sloughs, and estuaries, regardless of flow or whether water exists during dry conditions. Waters of the State also include waters of the United States.

Conclusion and Implications

The SSS WDR will become effective on June 5, 2023. Those public agencies regulated by the SSS WDR should carefully review the revised permit to begin undertaking appropriate action to ensure compliance with new or revised terms. Attending regulatory training or trade association workshops also is highly recommended given the detailed changes in the new revised version of the SSS WDR. For more information, *see:* https://www.waterboards.ca.gov/water_issues/programs/sso/

(Patrick Veasy, Hina Gupta)

Eastern Snake Plain Aquifer Declines Putting Pressure on Idaho's 'Trust' Water Rights

With the 2015 settlement agreement between the Surface Water Coalition (SWC) and the Idaho Ground Water Appropriators, Inc. (IGWA) member groundwater districts mired in agency litigation concerning disagreements over interpretation and application, and with water table levels in the Eastern

Snake Plain Aquifer (ESPA) continuing to decline, those owning "Trust" water rights are growing concerned over their future utility as curtailments loom on the horizon. Fortunately, this winter has been kind in terms of snowpack throughout most of the Snake River Plain (and most of Idaho for that matter), but the ongoing, future vulnerability of the "Trust" water rights is becoming top of mind.

Creation of the Trust Water Rights

After World War II, the state of Idaho and Idaho Power Company incentivized large-scale agricultural development on the fertile Snake River Plain, accomplished almost entirely by the development of groundwater sources given the earlier and nearly full appropriation of surface water supplies under the Carey Act and the Reclamation Act. Groundwater right development occurred essentially unchecked into the 1970s when a group of Idaho Power rate payers filed suit against the Company asserting that it failed to adequately protect and enforce its senior hydropower generation rights at Swan Falls Dam on the Snake River. The ratepayers contended that lost hydropower generation potential resulted in higher billing rates than would otherwise be necessary through the increased expense associated with alternative generation sources.

Ultimately, the Idaho Supreme Court determined that while the Company's hydropower generation water rights for the downstream Hells Canyon Complex were subordinated to the development of other junior uses, the Company's rights at Swan Falls Dam were not. Based on this determination, Idaho Power filed suit against approximately 7,500 water rights upstream of Swan Falls Dam seeking curtailment of junior water rights. Recognizing that widespread curtailment of water use on the Snake River Plain upstream of Swan Falls Dam would prove catastrophic, the Company and state entered into negotiations trying to resolve the litigation and curtailment risk.

Based on an analysis of historic flows in the river present at Swan Falls Dam, the parties worked out seasonal minimum stream flow targets at the Murphy Gage (approximately four miles downstream of the dam) of 3,900 cfs from March to November, and 5,600 cfs the rest of the year. These flows stabilized hydropower production potential and in return Idaho Power agreed to subordinate its otherwise senior water rights at Swan Falls Dam (totaling 8,400 cfs at the dam) and ten other facilities to upstream junior rights existing as of the time of the Swan Falls Agreement. The Company also agreed to state's creation and administration of the "Trust Water Rights," those developed after the agreement falling in between the Murphy Gage minimum stream flows and Idaho Power's 8,400 cfs entitlement at Swan Falls Dam. Thus, "Trust" water rights are those developed after October 25, 1984 (surface and ground) using the 4,500 cfs lying between the 3,900 cfs irrigation season minimum flow target and Idaho Power's upper limit 8,400 cfs right. While there are some different gradations of "Trust" water rights, many are subject to periodic review in 20-year increments and potential cancelation (let alone junior priority-based curtailment) depending upon river conditions and compliance with the Swan Falls Agreement terms.

The Trust water area overlaps much of the ESPA—the health of which plays a significant role in Snake River flows needed to satisfy senior surface water rights of the SWC and Idaho Power Company (at least in terms of meeting the minimum streamflow targets at Murphy Gage).

Increasing Pressure and Vulnerability

While IGWA and the SWC are interested in stabilizing, if not reversing, ESPA declines for their own reasons (*i.e.*, to keep as much junior groundwater pumping as possible without detriment to senior surface water users), the state of Idaho is also heavily invested in ESPA health for purposes of protecting the Trust water rights and the economic production they support.

The fact of the matter is that minimum stream flows in the Snake River at Murphy Gage have been historically low the last couple of irrigation seasons. Absent approved mitigation plans under the 2015 SWC-IGWA settlement agreement, straight priority-based curtailment is approaching levels where the Trust priority date (October 25, 1984) is routinely reached just in the context of the SWC delivery call. Breaching the Swan Falls Agreement minimum stream flows adds another layer of exposure and complication highlighting the increasing vulnerability of the utility of the Trust water rights.

Conclusion and Implications

Some IGWA member groundwater districts are more accepting of straight curtailment of the Trust

water rights than are others. In a perfect world, the state would like to see continued SWC-IGWA settlement and mitigation at least stabilize ESPA levels in hopes that large-scale state managed aquifer recharge can nudge the ESPA into a recovery trend over time. Both would take at least some pressure off of the Trust water rights. The Swan Falls Agreement bought the state of Idaho and the further development of the Trust water rights approximately 40 years of peace. The question is whether time is nearly up? (Andrew J. Waldera)

REGULATORY DEVELOPMENTS

NEW MEXICO'S ATTORNEY GENERAL ISSUES OPINION ON OFFICE OF THE STATE ENGINEER PRELIMINARY APPROVALS UNDER NEW MEXICO'S WATER-USE LEASING ACT

On January 30, 2023, the Office of the New Mexico Attorney General issued an Opinion (Opinion No. 23-01) concluding that the Office of the State Engineer's (OSE) practice of issuing "preliminary approvals" or "preliminary authorizations" of proposed water right leases under New Mexico's Water-Use Leasing Act (WULA or Act), NMSA 1978, §§ 72-6-1 to -7, are practices not explicitly or implicitly supported by New Mexico law. The legal analysis and conclusions reached by the office of the New Mexico Attorney General revolve around the OSE practices not being statutorily permitted, the practices being in direct contradiction to existing OSE regulations, OSE's actions not being part of any exception to statutory procedure, and such OSE practices being in violation of Due Process.

Background

The New Mexico State Engineer has for many years allowed preliminary approvals in circumstances where irrigators are attempting to lease their water rights to another irrigator. If the transferor were to have to wait until the full time had expired for an administrative hearing, rather than receiving a preliminary approval, that irrigation season would have long expired. The same would be true in subsequent years. The requirement of a full administrative hearing before the lease can be approved would essentially preclude this practice.

The New Mexico State Engineer has also used this preliminary approval process to allow oil and gas users to lease water for "fracking." Time is also of importance to both the lessor of the water rights and the lessee, and the oil and gas company. The time required for the administrative process to be completed would once again cost both the lessor, the lessee and the oil and gas company to lose money that they would have made in the absence of this requirement.

Preliminary approvals, when issued, are always accompanied by an opinion by the New Mexico State Engineer that the granting of the preliminary approval would not impair the water rights of water users in the area. If after an administrative hearing there is a finding of impairment to other water users, then the New Mexico State Engineer will immediately withdraw the preliminary approval.

The recent Attorney Opinion, Opinion No. 23-01, was prepared by the office of the New Mexico Attorney General at the request of State Representative Miguel Garcia (D) of Bernalillo. The questions Representative Garcia raised were: 1. Is the State Engineer's practice of "preliminary approval" or "preliminary authorization" of proposed leases of water rights lawful under state law? And 2. Is the State Engineer's practice of "preliminary approval" or "preliminary authorization" of proposed leases of water rights permitted under State Engineer regulations, and, if so, are such regulations lawful?

The AG's Opinion

New Mexico's WULA serves as a guide to allocate and conserve water in drought-stricken and climate challenged times by allowing owners of valid water rights to lease all or any part of the water rights belonging to them for an initial term not to exceed ten years. NMSA 1978, § 72-6-1 *et seq*. The Act aims to alleviate increasing pressure for reallocation of waters in New Mexico due to climate change, population growth and environmental pressures. To participate in water leasing in New Mexico, a person must file an Application to Transfer Point of Diversion, Purpose and/or Place of Use with the Office of the State Engineer detailing the proposed lease. Such lease arrangements ensure water is put to beneficial use in areas of greatest need, thereby ensuring the efficient use of water in low-water situations around the state. This goal is supported by the Act not requiring the lessee to show an absence of impairment and that the lease is consistent with conservation and public welfare as contrasted with applications to transfer water rights.

Despite these clear functions of the WULA, concerns over unclear aspects of the Act, such as the OSE Preliminary Approval practices, were front

and center during this year's New Mexico Legislative Session. On January 19, 2023, House Bill 121, titled "WATER RIGHT LEASE EFFECTIVE DATE" was introduced. The Bill aimed to put an end to the OSE practices of engaging in providing preliminary approvals involving water leases. Only 11 days later, the Office of the New Mexico Attorney General provided some guidance to legislators on the legality and permissibility of OSE's preliminary approval practices.

'Opinion Regarding Preliminary Approvals Under the Water Use Leasing Act'

The Attorney General's Opinion, titled "Opinion regarding Preliminary Approvals Under the Water Use Leasing Act," provided legislators with some answers. The opinion confirmed that there is neither a statutory nor a regulatory authority for the OSE to provide preliminary approvals for water leases, as well as the fact that OSE may be in violation of Due Process while engaging in such practices. The Attorney General's opinion begins its analysis by diving into statutory interpretation of WULA, where the Attorney General found that

> . . .there is no process to follow in the WULA, no use of the word "preliminary" in the applicable law, and no express authority for the State Engineer to circumvent the hearings that are explicitly required by § 72-6-6. (of WULA).

The Opinion then provides case law supporting their stance, such as *Fancher v. Board of Comm'rs*, 1921-NMSC-039, ¶ 11, finding that "when the legislature prescribes a mode of procedure the rule is exclusive of all others and must be followed."

The Opinion then goes on to confirm that there is no basis for such OSE practices under relevant New Mexico Code. The Opinion notes that not only does relevant regulation not support the idea of preliminary approvals by OSE, it outright opposes such an action. The Opinion cites NMAC 19.26.2.18, "Prior to the use of water pursuant to a lease, if the proposed use differs in any respect, a permit must be obtained." The Opinion continues to cite other relevant regulation, such as NMAC 19.26.2.12(F)(2) which states:

> . . .the state engineer may approve a protested application after holding a hearing and may impose reasonable conditions of approval.

The Opinion notes that the existence of such regulatory provisions should resolve any lingering ambiguity or confusion regarding the legal authority the state engineer has to issue preliminary approvals. N.M. Att'y Gen., No. 23-01 (Jan. 30, 2023), pg. 4.

The Opinion also clarifies that the phrase used by OSE to justify such actions, the phrase "immediate use" located in section three of the WULA, does not relate to any procedural requirements outlined by the Act, which are all located in section six. The Opinion states that such a phrase is therefore not subject to any statutory exceptions that may permit such preliminary approval actions by OSE. N.M. Att'y Gen., No. 23-01 (Jan. 30, 2023), Pg. 5 *et seq*. Lastly, the Opinion notes that such practices by the OSE may constitute violation of due process:

> The numerous and explicit requirements, procedures, and protections created by the legislature in the WULA demonstrate a clear policy interest to protect substantive and procedural rights and prevent State Engineer from developing processes not expressly authorized by statute.

The Opinion states that by refusing to follow the necessary procedural requirements, the OSE is jeopardizing the property interests of others if no clear procedural protections exist.

Conclusion and Implications

Despite the Opinion by the New Mexico Attorney General being given to legislators, and House Bill 121 being introduced, not much has changed since the start of the 2023 New Mexico Legislative Session. The bill passed the House Environment and Natural Resources Committee but met its end in the House Judiciary Committee. The House Judiciary Committee reported the bill with a Do Not Pass recommendation—but with a Do Pass Recommendation on Committee Substitution. It is unclear whether the State Engineer will heed the Attorney General's warnings, or if the agency will continue to grant such preliminary authorizations when considering water leases. This issue is one that will undoubtedly face legal and political tensions in the years to come, and whether it can be resolved by the legislature, the courts, or inner agency practices remains to be seen. (Christina J. Bruff)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•March 31, 2023—On behalf of the U.S. Environmental Protection Agency (EPA) and in coordination with the U.S. Attorney's Office for the Northern District of Ohio, the Environment and Natural Resources Division of the U.S. Department of Justice filed a complaint against Norfolk Southern Railway Company related to the Feb. 3, 2023, derailment in East Palestine, Ohio. The complaint seeks penalties and injunctive relief for the unlawful discharge of pollutants, oil, and hazardous substances under the Clean Water Act, and declaratory judgment on liability for past and future costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This action follows EPA's issuance on Feb. 21, 2023 of a Unilateral Administrative Order under CERCLA to Norfolk Southern requiring the company to develop and implement plans to address contamination and pay EPA's response costs associated with the order.

On February 3, 2023, a Norfolk Southern Railway Company train carrying hazardous materials, including hazardous substances, pollutants and oil derailed in East Palestine, Ohio. The derailment resulted in a pile of burning rail cars, and contamination of the community's air, land, and water. Residents living near the derailment site were evacuated. Based on information Norfolk Southern provided, the hazardous materials contained in these cars included vinyl chloride, ethylene glycol monobutyl ether, ethylhexyl acrylate, butyl acrylate, isobutylene, and benzene residue. Within hours of the derailment, EPA and its federal and state partners began responding to the incident, including providing on-the-ground assistance to first responders and conducting robust testing in and around East Palestine.

The fire caused by the derailment burned for several days. On Feb. 5, monitoring indicated that the temperature in one of the rail cars containing vinyl chloride was rising. To prevent an explosion, Norfolk Southern vented and burned five rail cars containing vinyl chloride in a flare trench the following day, resulting in additional releases.

Since EPA's issuance of the Unilateral Administrative Order to Norfolk Southern, EPA has been overseeing Norfolk Southern's work under the order. As of March 29, 2023, 9.2 million gallons of liquid wastewater has been shipped off-site, and an estimated 12,932 tons of contaminated soils and solids have been shipped off-site.

EPA and other federal agencies continue to investigate the circumstances leading up to and following the derailment. The United States will pursue further actions as warranted in the future as its investigatory work proceeds.

•March 30, 2023—EPA on-scene coordinators (OSCs) from Region 7 continue to remain on-scene at the site of the pipeline rupture and oil discharge into Mill Creek near Washington, Kansas.

Since the spill occurred, EPA Region 7 has deployed 18 OSCs; EPA Region 6 has deployed five OSCs; and the U.S. Coast Guard has deployed three Atlantic Strike Team members to provide technical advice and assistance to support EPA response oversight. In addition, EPA has utilized contractor resources to provide on-scene and remote technical support to the responding OSCs.

Response crews have made significant progress over the last few months. The installation of a temporary water diversion system in January produced two results: (1) A reduction in oil-related contaminants impacting surface water downstream of the oil-impacted segment of Mill Creek; (2) the ability to conduct submerged oil assessments and perform cleanup of submerged oil from the creek bed, sediment, and shoreline of Mill Creek.

As response crews work to continue removing oil and oil-impacted soil, sediment, shoreline, and debris from Mill Creek, additional personnel working on-scene have constructed a higher-capacity diversion system (Phase 2 Diversion) and two surface water treatment impoundments. These impoundments allow for the separation of oil and water to occur on-scene. The separated water is then treated and tested to ensure that it meets discharge limits established by Kansas Department of Health and Environment (KDHE) prior to being discharged back to Mill Creek, downstream of the oil-impacted segment.

The response is being performed by TC Energy and overseen by EPA, pursuant to a consent agreement signed by the parties on Jan. 6, 2023. KDHE is also providing oversight of the response actions taken at the scene. Currently, the work being performed on-scene is following a phased-project approach. The phased-project approach has established goals, and response crews work to achieve milestones that correlate to the goals set forth in the workplan.

•March 22, 2023—EPA, The Justice Department, and The Commonwealth of Massachusetts have entered into a consent decree with the City of Holyoke, Massachusetts, to resolve the Clean Water Act and Massachusetts state law. The proposed consent decree calls for Holyoke to take further remedial action to reduce ongoing sewage discharges into the Connecticut River from the city's sewer collection and stormwater systems.

As detailed in the consent decree, Holyoke discharges pollutants from combined sewer overflow (CSO) into the Connecticut River in violation of its federal and state wastewater discharge permits. A combined sewer system collects rainwater runoff, domestic sewage, and industrial wastewater into one pipe. Under normal conditions, it transports all of the wastewater to a sewage treatment plant for treatment, before discharging to a waterbody. However, during periods of heavy rain the wastewater volume can exceed the carrying capacity of the sewer system or the treatment facility, resulting in the discharge of untreated wastewater to the Connecticut River. CSO discharges contain raw sewage and are a major water pollution concern.

In full cooperation with federal and state environmental agencies, the city has taken steps in recent years to address these unlawful discharges, including finalizing a long-term overflow control plan, separating sewers and eliminating overflows in the Jackson Street area. The consent decree will require the city to undertake further sewer separation work that will eliminate or reduce additional CSO discharges, as well as requiring a $50,000 penalty for past permit violations resulting in illegal discharges to the Connecticut River.

The city will also conduct sampling of its storm sewer discharges, work to remove illicit connections, and take other actions to reduce pollution from stormwater runoff. The total cost to comply with the proposed consent decree is estimated at approximately $27 million.

This settlement is part of EPA's continuing efforts to keep raw sewage and contaminated stormwater out of our nation's waters. Raw sewage overflows and inadequately controlled stormwater discharges from municipal sewer systems introduce a variety of harmful pollutants, including disease causing organisms, metals and nutrients that threaten our communities' water quality and can contribute to disease outbreaks, beach and shellfish bed closings, flooding, stream scouring, fishing advisories and basement backups of sewage.

•March 22, 2023—The U.S. Environmental Protection Agency (EPA) announced settlements with six California companies for claims they failed to comply with Spill Prevention, Control, and Countermeasures requirements for handling oil under the Clean Water Act. The payments to the United States under these settlements range from $1,050 to $175,000.

The six companies are: AAK USA Richmond Inc. in Richmond; Baker Commodities Inc. in Vernon; Imerys Filtration Minerals Inc. in Lompoc; Marborg Industries, Liquid Waste Division in Santa Barbara; Mission Foods in Hayward; and Penny Newman Grain Company in Stockton. These firms store, process, refine, transfer, distribute or use animal fats or vegetable oils.

EPA's spill-related requirements help facilities handling animal fats and vegetable oils (AFVO) prevent discharges into navigable waters or onto adjoining shorelines. While AFVO are governed under EPA's federal oil pollution prevention regulations, California's Aboveground Petroleum Storage Act does not extend to this industry sector. It is important that

AFVO facilities are aware of their obligations to comply with federal regulations.

The six companies that are settling with EPA have certified that they have corrected their violations and are now in compliance with the spill-related requirements under the Clean Water Act.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

•March 29, 2023—The U.S. Environmental Protection Agency (EPA) announced that it reached an agreement with Guanica-Caribe Land Development Corporation (G-C), a subsidiary of W. R. Grace & Co., to remove soil contaminated with polychlorinated biphenyls (PCBs) from 19 residential and commercial properties that are part of the Ochoa Fertilizer Co. Superfund site in Guánica, Puerto Rico.

Under the agreement, the company will remove PCB-contaminated soil from the 19 identified properties and will investigate other properties for potential contamination and if necessary, find a method to control stormwater runoff from the fertilizer manufacturing property. The estimated cost of the work is $10 million. EPA will monitor and oversee G-C's cleanup and compliance with the agreement. EPA has informed the community, residents, and property owners and has engaged with them at a community meeting.

In September 2022, EPA added the Ochoa Fertilizer Co. Superfund site to the National Priorities List. The former facility operators produced fertilizers using ammonia, ammonium sulfate, and sulfuric acid starting in the 1950s. The site includes a 112-acre eastern lot and a 13-acre western lot. While the eastern lot, which included an electric substation, was demolished in the 1990s, fertilizer manufacturing on the western lot continues. G-C is the current owner of the eastern lot. Past operations at the site resulted in releases of untreated waste at and from the eastern lot, contaminating soil and causing environmental degradation to Guánica Bay. There is a potential risk of exposure to nearby residents from soil contaminated with PCBs. PCBs are potentially cancer-causing in people and build up in the fat of fish and animals. The potential risk posed to nearby residents by PCBs in soils is currently being addressed through a short-term action plan outlined in the current agreement. The possibility of further investigation and cleanup efforts in the long-term will be considered once the initial work outlined in the agreement has been completed.
(Robert Schuster)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT RULES 2020 EPA RULE ON SECTION 401 CERTIFICATION TO REMAIN IN EFFECT DURING AGENCY RECONSIDERATION

In re Clean Water Act Rulemaking, ___F.4th___,
Case Nos. 21-16958, 21-16960, 21-16961 (9th Cir. Feb. 21, 2023).

The Ninth Circuit has overruled a U.S. District Court order that set aside a Trump-era U.S. Environmental Protection Agency (EPA) rule that severely limited state's authority in the Section 401 water quality certification process, and required states to take final action on certification requests no later than one year from the initial application.

Background

The federal Clean Water Act (33 U.S.C. § 1251 *et seq*., CWA) delegates to the states the duty to set their own water quality standards and requires state certification, known as Section 401 certification, that the applicable standards have been complied with prior to issuance of "a Federal license or permit to conduct any activity … which may result in any discharge to into the navigable waters" of the United States. 33 U.S.C. § 1341(a)(1). States are required to act on certification requests "within a reasonable period of time (which shall not exceed one year) after the receipt of such request" then "the certification requirements … shall be waived." *Ibid.*

The certification process can be complex. In order to allow state regulators sufficient time to complete the certification process, a practice had developed in which states would request that applicants withdraw and resubmit their applications in order to extend the one-year deadline to act on an application.

In 2020, EPA promulgated the Clean Water Act Section 401 Certification Rule (85 Fed. Reg. 42210 (July 13, 2020), 40 C.F.R. pt. 121 (2021), the 2020 Rule). The 2020 Rule narrowed the substantive scope of Section 401 certification by providing that:

> . . .certification is 'limited to assuring that a *discharge* from a Federally licensed or permitted activity will comply with water quality requirements [as defined in the 2020 Rule.'(Emphasis in opinion.)

This change was intended "to focus the certification on 'discharges' affecting water quality, not 'activities' that affect water quality more generally." With respect to the timing of the Section 401 certification process, the 2020 Rule provided that:

> . . .a state 'is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time' beyond one year from the date of receipt.

Several states, environmental groups and tribes challenged the 2020 Rule; other states and energy industry groups intervened to defend the Rule. Before the district court could decide any dispositive motions, newly-elected President Biden directed federal agencies to review regulations concerning the protection of public health and the environment that were enacted under the previous Administration. EPA first asked the district court to stay the litigation, and then announced its intent to revised the 2020 Rule. It then moved for remand of the 2020 Rule for agency reconsideration, requesting that the court leave the Rule in effect during the pendency of the remand. The plaintiff-challengers asked that the court either deny remand and decide the merits of their challenge, or, if remand were granted, vacate the 2020 Rule, arguing that:

> . . .keeping the 2020 Rule in place during a potentially lengthy remand would severely harm water quality by frustrating states' efforts to limit the adverse water quality impacts of federally licensed projects.

The District Court remanded and vacated the 2020 Rule.

The intervenors obtained a stay of the vacatur rule from the Supreme Court pending this appeal.

The Ninth Circuit's Decision

At issue in this appeal is whether the District Court has authority under the Administrative Procedure Act (5 U.S.C. § 561 *et seq*., the APA) to vacate a rule on remand without having decided on the merits of the challenge to the rule.

The APA:

> . . .instructs courts to 'set aside' (*i.e*., to vacate) agency actions held to be unlawful. 5 U.S.C § 706(2) (instructing courts to 'set aside' those actions 'found to be,' for example, 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.')

The Court of Appeals applied the:

> . . .basic canon of construction establishing that an 'explicit listing' of some things 'should be understood as an *exclusion of others*' not listed—even when a statute 'does not expressly say that *only*' the listed things are included.

Under this interpretative rubric, courts are authorized to vacate only those agency actions held to be unlawful.

The court relied as well on the APA's definition of "rulemaking"—the "agency process for formulating, amending or *repealing* a rule" (5 U.S.C. § 551(5)), held to require that "agencies use the same procedures within they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

Endorsing the practice of voluntary-remand-with-*vacatur* where there is no merits ruling would essentially turn courts into the accomplices of agencies seeking to avoid this statutory requirement, as it would allow agencies to repeal a rule merely by requesting a remand with *vacatur* in court. Because Congress set forth in the APA a detailed process for repealing rules, we cannot endorse a judicial practice that would help agencies circumvent that process.

The court rejected various equitable and policy arguments urged by the plaintiffs, holding that federal courts' equitable powers can only be exercised against "*illegal* executive action," and that neither equitable nor policy considerations cannot "trump the best interpretation of the statutory text." *Patel v. Garland*, 142 S.Ct. 1614, 1627 (2022).

Conclusin and Implications

In light of the Supreme Court's stay of the *vacatur* order, plaintiffs would be unwise to seek *certiorari* and provide the Court with an opportunity to definitively foreclose consideration of their equitable and policy arguments in a different factual context. The new Section 401 rule is anticipated to be released in Spring 2023.

(Deborah Quick)

SEVENTH CIRCUIT ALLOWS SUBPOENA SEEKING VIDEO FOOTAGE OF SEARCH DURING CLEAN WATER ACT CRIMINAL INVESTIGATION

United States v. Doe Corporation, 59 F.4th 301 (7th Cir. 2023).

The United States Court of Appeals for the Seventh Circuit recently reversed a U.S. District Court's decision to quash a subpoena issued by a federal grand jury that was investigating an alleged violated of the Clean Water Act by the Doe Corporation. The Seventh Circuit held that there was a "reasonable possibility" that the corporation's video footage showing law enforcement officers conducting a search of the corporation's headquarters was relevant to the grand jury's task of deciding whether to issue an indictment in the case, and that a request for such information was neither unreasonable nor oppressive.

Factual and Procedural Background

In this case a federal grand jury was investigating suspected criminal violations of toxic and pretreatment effluent standards under the federal Clean Water Act by the Doe Corporation. Under the CWA, any person who "knowingly violates" certain sections of the Act could be held criminally liable and punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or by both. The government sent federal law enforcement agents to search the corporation's headquarters. During the course of the search, the agents requested that the corporation turn off their security cameras.

At the District Court

After the search was completed, the corporation accused the agents of conducting the search "in a dangerous and threatening manner in violation of the corporation's Fourth Amendment rights," and filed a motion to unseal the affidavit that had been used by the federal government to obtain the search warrant. Along with that motion, the corporation filed images taken from video footage captured during the search which appeared to show the law enforcement agents pointing their guns at the corporation's employees. After the corporation refused the government's request for the video footage, the grand jury issued a subpoena seeking the video footage.

The corporation moved to quash the grand jury's subpoena. The District Court granted the motion to quash, finding that the video was not relevant to the grand jury investigation because (1) even if the government conducted an illegal or unfair search, that would not affect whether the corporation should be indicted; and (2) the court did not believe that the agents would have ordered the security cameras to be turned off if the footage was important or relevant to the investigation. The government appealed the district court's order, and the seventh circuit granted review.

The Seventh Circuit's Decision

The court first noted that federal grand juries are vested with broad investigatory powers so that they can investigate potential crimes and return indictments if wrongdoing is uncovered. One of the grand jury's tools is the subpoena, which can help the grand jury uncover information relevant to its investigation. However, if a subpoena is too broad in scope such that it is unreasonable or oppressive, the Federal Rules of Criminal Procedure provide that a trial court may quash the subpoena. The court further noted that it can be difficult to determine before trial whether information will be relevant or admissible, and so a trial court only grants a motion to quash a subpoena if "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject" of the grand jury's investigation.

The court then addressed the issue of whether there was any reasonable possibility that the subpoena in this case, which sought video footage of the law enforcement officer's search, was "relevant to the general subject of the grand jury's investigation," and held that it was "well within the legitimate purview of the grand jury to inquire about the manner in which evidence was collected, including whether any government misconduct occurred in the process." The court noted that the grand jury possessed broad discretion in determining whether to indict the subject of the investigation and what degree of offense to charge, and that there was a reasonable possibility

that the video footage could be related to the grand jury's decision, especially if the government misconduct was as serious as the corporation alleged. If the government misconduct was "so outrageous that the grand jury [was] convinced that the government harbor[ed] improper animus against the target of the investigation," that might factor into the grand jury's decision as to issue an indictment.

Conclusion and Implications

The Seventh Circuit's decision in this case demonstrates the broad discretion afforded to federal grand juries tasked with investigating crimes under the Clean Water Act, and the seriousness of allegations involving government misconduct. The court's decision clarified that searches conducted during Clean Water Act criminal investigations will be deemed relevant in determining whether an indictment should be issued, and that a request for such information is neither unreasonable nor oppressive. The court's order is available online at: https://casetext.com/case/

DISTRICT COURT FOR NEW MEXICO AWARDS DEFENDANTS THEIR COSTS IN THE GOLD KING MINE RELEASE

In re Gold King Mine Release in San Juan Cnty., Colorado, ___F.Supp.4th___,
Case No. 18-CV-744-WJ-KK (D. N.M. Feb. 21, 2023).

The U.S. District Court for New Mexico awarded costs to defendants in the Gold King Mine release case against plaintiffs who filed their case more than 2 years after the state statute of limitations on state law claims.

Factual and Procedural Background

In 2015, Environmental Restoration, LLC, a contractor for Environmental Protection Agency, released contaminated water from the King Gold Mine into Cement Creek, a tributary of the Animas and San Juan Rivers in southwest Colorado. The rivers continue into New Mexico. Multiple federal Clean Water Act lawsuits were centralized in multidistrict litigation in the District of New Mexico.

In 2019, farmers and livestock raisers brought a state law nuisance claims against Environmental Restoration. Their action was consolidated with the multidistrict litigation in New Mexico. In a 2022 decision, the Tenth Circuit Court of Appeals determined that Colorado's two-year statute of limitations, and not the Clean Water Act's five-year statute of limitations, applied to the state law negligence claims. The district court then dismissed plaintiffs' state law claims because they fell outside of the two-year statute of limitations.

Environmental Restoration moved to recover their costs against the farmers and livestock raiser plaintiffs under Federal Rule of Civil Procedure Rule 54. Under Rule 54, costs are generally allowed to the "prevailing party." To deny a prevailing party its costs is considered a severe penalty. As a result, a district court can only deny costs under one of six circumstances: (1) the prevailing party is only partially successful, (2) the prevailing party was obstructive and acted in bad faith during the course of the litigation, (3) damages are only nominal, (4) the non-prevailing party is indigent, (5) costs are unreasonably high or unnecessary, or (6) the issues are close and difficult.

The District Court's Decision

Environmental Restoration asserted that, as the prevailing party, it was entitled to an award of approximately $70,000 in costs for filing fees and deposition costs. Plaintiffs argued the court should deny Environmental Restoration's costs because: (1) the legal issues were close and difficult and the claim was brought in good faith; and (2) Environmental Restoration was only partially successful. In the alternative, the plaintiffs contended the court should deny deposition costs that were not reasonably necessary to defeat the claims.

The court first considered whether the legal issues were close and difficult. Plaintiffs argued the statute of limitations question raised an issue of first impression. The court rejected this argument, reasoning that the Tenth Circuit Court of Appeals applied existing law that the point source's state law applies to state actions brought as part of a federal diversity action in federal court.

The court next considered whether Environmental Restoration was only partially successful. Plaintiffs argued that the defendants may still be found liable in the larger multi-district litigation. The court rejected this argument because the state law action was centralized with the multi-district litigation only "for coordinated or consolidated pretrial proceedings" but otherwise the actions were separate.

Finally, the court considered whether certain deposition costs should be denied and determined that because Environmental Restoration agreed to deduct approximately $10,000 in deposition costs, the total award of costs would be reduced by that amount. The court awarded approximately $60,000 in costs against the plaintiffs.

Conclusion and Implications

This case reminds potential plaintiffs of the risks of bringing an unsuccessful action in federal court. Statutes of limitations questions can be challenging in environmental actions, and as this case demonstrates, a late filing may result in more than just a dismissal of the action. Under Rule 54 of the Federal Rules of Civil Procedure, a successful defendant may receive costs, and if the underlying substantive law allows it, a successful defendant may also receive attorneys' fees. The District Court's opinion is available online at:https://cases.justia.com/federal/district-courts/new-mexico/nmdce/1:2018cv00744/397922/648/0.pdf (Rebecca Andrews)

TEXAS WINS PRELIMINARY INJUNCTION AT THE U.S. DISTRICT COURT AGAINST EPAS NEW WATERS OF THE UNITED STATES RULE

Texas v EPA, ___Fed.Supp.4th___, Case No. 3:23-cv-17 (S.D. Tx. March 19, 2023).

One day before the effective date of the new U.S. Environmental Protection Agency (EPA) interpretation of "Waters of the United States" (WOTUS), a U.S. District Court in Galveston, Texas has enjoined the new rule (2023 Rule) within the borders of Texas and Idaho. At the same time, the court denied a nationwide injunction sought by various trade and business advocate organizations.

Challenge to the EPA Promulgated WOTUS Rule

The two state plaintiffs asserted rights to sue and standing under the Administrative Procedure Act, on grounds of the 2023 Rule being arbitrary and capricious, and contrary to or in excess of constitutional powers. They also alleged violations of the U.S. Constitution, viz. the Commerce Clause, the Tenth Amendment, and the Due Process clause. The court found that the States alleged and filed documentation of likely multi-million-dollar annual costs and losses of their inherent sovereignty to decide questions about their in-state commerce and land and water resources. The District Court differentiated the plaintiff state interests as being directly affected by the 2023 Rule, unlike the situation that arose in the 1970s under the then new Surface Coal Mining statute, where the U.S. Supreme Court found that the regulations challenged were of private activity that was in interstate commerce.

The District Court's Decision

Judge Jeffrey Vincent Brown's opinion includes a short discussion of the history of the WOTUS definition as it has come before the United States Supreme Court in several key decisions. In particular he notes the important concurring opinion of Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715, 765-66, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (Kennedy, J., concurring). He focused on two aspects of the 2023 Rule for purposes of rendering his decision: "First, the Rule codifies a modified version of Justice Kennedy's significant-nexus test. Compare [88 Fed Reg.] at 3006, with *Rapanos*, 547 U.S. at 780. Second, the Rule imposes jurisdiction on all "interstate waters, regardless of their navigability." 88 Fed. Reg. at 3072."

The court's discussion of the 2023 Rule's statement of what EPA declares is a "significant nexus" of given waters with traditionally navigable waters is a key element of the court's decision. In short, Judge Brown found that the EPA had gone beyond what Justice Kennedy's concurrence in *Rapanos* says. To quote the Court:

> The Agencies' construction of the significant-nexus test ebbs beyond the already uncertain boundaries Justice Kennedy established for it. Specifically, by extending the significant-nexus test to 'interstate waters,' and not just to those 'waters . . . understood as 'navigable,' the Rule disregards the Act's "central requirement"—'the word 'navigable.'

In reaching its conclusion, the court was expressly persuaded that the 2023 Rule includes waters of a type not mentioned or intended by Justice Kennedy's concurrence, "such as ephemeral drainages, many ditches, and non-navigable interstate waters." These differences persuaded the court that the plaintiffs have a likelihood of success on the merits, and that they are deserving of a preliminary injunction on that basis.

Judge Brown then noted that the 2023 Rule has a provision that automatically includes and applies to any waters that are "interstate, regardless of navigability." Such waters are deemed jurisdictional automatically by their being in more than a single state. The court declared that provision plainly beyond the reach of the Act's intended regulatory program, and a plain violation of state sovereignty over its internal non-navigable water resources.

EPA Must Construe the Statute It Relied on to Promulgate the Rule

The Agency defendants argued that statutes that regulated water in the United States before the passage of the Clean Water Act in the 1970s were a basis for creating the new automatic inclusion provision of the 2023 Rule. The court found that reasoning unconvincing, because its job is to construe the statute used to promulgate the rule being challenged, not extraneous ones. Moreover, the court noted that the holdings of the Supreme Court where federalism principles are involved stand for the proposition that where an administrative interpretation of a statute would raise serious constitutional problems, the court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent, citing *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 162, 174 (2001).

Conclusion and Implications

Having found that the states have convinced him of their likelihood of success on the merits, and that the damages to their interests and economy would otherwise not be readily calculable if an unlawfully adopted rule were put into effect, the court granted the preliminary injunction that stays application of the 2023 Rule *within* the borders of Texas and Idaho. The court went on to *deny* such a preliminary injunction nationwide, because not all states would agree with Texas and Idaho. He notes that those who do have the right to go to court, just as Texas and Idaho have done.
(Harvey M. Sheldon)

DISTRICT COURT FINDS FEDERAL ENDANGERED SPECIES ACT PREEMPTS STATE AGENCY ORDER ON KLAMATH PROJECT OPERATIONS

Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al., ___F.Supp.4th___, Case No. 19-cv-04405-WHO (N.D. Cal. Feb 6, 2023).

The U.S. District Court for the Northern District of California has issued a decision in *Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al.*, (*Yurok Tribe*) finding that the federal Endangered Species Act (ESA) preempted an order from the Oregon Water Resources Department (OWRD) prohibiting the U.S. Bureau of Reclamation (Bureau) from releasing water from Upper Klamath Lake except for irrigation purposes. The District Court found that the OWRD order presented an obstacle to the Bureau's compliance with the ESA and therefore could not be enforced. The ruling resolved four motions for summary judgment in favor of the United States, as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources.

Factual Background

The Klamath River originates in the high desert of Oregon, flowing southwest into California and eventually the Pacific Ocean. The Klamath River drains into the Klamath Basin, where its waters are relied on by numerous stakeholders including Native American tribes, fish and wildlife, and irrigators.

The Reclamation Act of 1902 (43 U.S.C. § 391 *et seq.*) authorized the Secretary of the Interior to construct and operate works for the storage, diversion, and development of water in the western United States. In 1905, the Secretary of the Interior authorized the Klamath Project (Project) pursuant to the Reclamation Act. Today the Project consists of an extensive series of canals, pumps, diversion structures, and dams capable of routing water to approximately 230,000 acres of irrigable land in the upper Klamath River Basin.

The Bureau is in charge of operating the Project, which includes managing water levels and distribution from Upper Klamath Lake. Upper Klamath Lake is the Project's primary storage facility with a capacity to store approximately 562,000 acre-feet of water. The Bureau's operations of Upper Klamath Lake are influenced by Oregon state law, Tribal water rights, and the federal ESA.

Litigation involving the Klamath Project has a long and complex history. Although the case as a whole originated as a challenge to 2019 biological opinion for the Project, this ruling stems from the Bureau's management of Upper Klamath Lake amid severe drought conditions in 2020. In 2020, the Bureau did not fully allocate Project water to irrigators. But the Bureau continued to release water from the Upper Klamath Lake pursuant to the ESA, which requires that federal agencies ensure their actions are "not likely to jeopardize" the continued existence of a listed species or destroy or modify its habitat. (16 U.S.C. § 1536(a)(2) (ESA Section 7(a)(2)).) On April 6, 2021, the OWRD issued an order that the Bureau "immediately preclude or stop the distribution, use or release of stored water from the UKL" except for water that would be used by irrigators. The United States then filed a crossclaim against OWRD and the Klamath Water Users Association seeking to overturn the OWRD order.

The District Court's Decision

In its February 6, 2023 order in *Yurok Tribe*, the court granted summary judgment in favor of the United States as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources. The court denied summary judgment motions filed by OWRD, Klamath Water Users Association, and Klamath Irrigation District. The central issue in the case was whether the ESA preempted the OWRD order, making it invalid in violation of the Supremacy Clause.

The Bureau and the ESA

The court first addressed the threshold question of whether the Bureau must comply with the ESA in operating the Project. Section 7(a)(2) of the ESA only applies to discretionary agency actions, and does not apply to actions that "an agency is required by statute to undertake once certain specified triggering events have occurred." (*National Association of Home*

Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007).) The court held that here "Congress gave [the Bureau] a broad mandate in carrying out the Reclamation Act, meaning it has discretion in deciding how to do so." Therefore, section 7(a)(2) applies and the Bureau must comply with the ESA when releasing stored water from Upper Klamath Lake.

Federal Preemption

Finding that the ESA applies to the Project, the court then addressed the issue of preemption. The Supremacy Clause of the U.S. Constitution grants Congress "the power to preempt state law." (*Arizona v. United States*, 567 U.S. 387, 399 (2012).) One form of preemption occurs where a state law "stands as an obstacle to the accomplishment and execution" of the federal law. (*Id.* at 399-400.) This is referred to as "obstacle preemption." (*United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019).)

The court found that the OWRD order stood as an obstacle to the accomplishment and execution of Congress' intent in enacting the ESA to "halt and reverse the trend toward species extinction, whatever the cost." The OWRD order prohibited the Bureau from releasing water from Upper Klamath Lake except for irrigation purposes, which prevented release of water to avoid jeopardizing endangered species. The District Court granted summary judgment in favor of the United States on preemption grounds, concluding that the OWRD is preempted by the ESA and therefore invalid.

Conclusion and Implications

The court declined to opine on other arguments related to the OWRD order, including an argument based on the doctrine of intergovernmental immunity. At the time of this writing, it remains unclear whether any parties will appeal the court's ruling. The court's ruling highlights the ongoing challenges associated with balancing the needs of different stakeholders in times of drought.
(Holly E. Tokar, Sam Bivins)

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