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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 thirteen 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 Judicial and Legislative Roles in Administering Public Trust Doctrine: The *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 in 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.

WESTERN WATER NEWS

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)

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)

LEGISLATIVE DEVELOPMENTS

BILL INTRODUCED IN THE CALIFORNIA SENATE SEEKS TO MODERNIZE STATE'S NETWORK FOR COLLECTING AND MEASURING SURFACE WATER FLOWS

On February 8, 2023, Senator Bill Dodd (D-Napa) introduced Senate Bill (SB) 361 to add §§ 145, 145.1, and 145.2 to the California Water Code. If enacted, the bill would require the California Department of Water Resources (DWR), the State Water Resources Control Board (SWRCB), and other state agencies to modernize the state's network for collecting water and ecological data, specifically focusing on the state's network of stream gages for measuring surface water flows. This bill builds off the 2019 Open and Transparent Water Data Act, which directed state agencies to inventory and prioritize California's steam gage network.

Current Monitoring Efforts under Existing Law

A stream gage is an instrument that measures the elevation, or "stage," of a water surface. Stream gages typically measure the stage every fifteen minutes, but the intervals may be shorter when higher rainfall or runoff are expected. A stream gage transmits the data it collects on a regular interval, typically by satellite. When combined with detailed hydrologic information about the dimensions of the streambed, continuous stage data over time can be used to infer streamflow.

Federal, state, and local agencies rely on this streamflow data to manage water rights, water supplies, water quality, flood risk, and ecosystems on both long-term and short-term horizons. The range of uses for streamflow data is varied. The data may be used by the SWRCB to determine the amount of water available to water-right holders as a result of long-term climate trends or by local emergency responders to monitor river flood stages in almost-real time during intense rainfall events. As a further example, streamflow data in the Sacramento-San Joaquin River Delta is essential for determining whether water can be extracted from the Delta for export throughout California while protecting the Delta from seawater intrusion and ensuring sufficient flows for ecosystems, species, and use by water rights holders in the Delta.

Various agencies operate networks of stream gages throughout California. There are approximately 1000 stream gages in California that report public data. Of these, approximately 60 percent are operated by the United States Geological Survey. The remaining gages are operated by state or local agencies. In addition, there are numerous privately operated stream gages that do not publicly report their data on state-wide databases or do not report sufficiently reliable data.

Experts have identified significant gaps in the number, location, and condition of California's stream gages. Over 70 percent of California's 4,500 sub-watersheds have no publicly reported stream gage data. Among historically gaged watersheds, half do not have currently active, publicly reported data.

The OTWDA Requires DWR and the State Water Board to Develop a Network of Gages

The Open and Transparent Water Data Act, encoded in Water Code § 144 and enacted in 2019, requires the DWR and SWRCB to develop a plan to deploy a network of stream gages. DWR and SWRCB are required to consult with the California Department of Fish and Wildlife, California Department of Conservation, the Central Valley Flood Protection Board, and other interested stakeholders.

Executive Order N-10-19 and the Water Resilience Portfolio

Shortly after coming into office in 2019, Governor Gavin Newsom issued Executive Order N-10-19, which directed state agencies to prepare a portfolio approach to water resilience in California. The following year, the Newsom Administration released the final Water Resilience Portfolio. Among other actions, the Water Resilience Portfolio includes a recommendation to "[m]odernize water data systems to inform real-time water management decisions and

long-term planning." As part of this effort, the Water Resilience Portfolio recommended assessment of California's statewide stream gage network, consistent with the Open and Transparent Water Data Act.

Stream Gaging Prioritization Plan

Since 2020, DWR, SWRCB and other California agencies have prepared a California Stream Gaging Prioritization Plan pursuant to Water Code § 144 and the Governor's Water Resilience Portfolio. Each annual plan inventories and analyzes the current state of stream gages, recommends the prioritization of the stream gage modernization efforts, and addresses the funding, operation, and management of California's stream gage network.

SB 361 Seeks to Expand Current Monitoring Efforts

Senator Dodd introduced SB 361 on February 8, 2023. SB 361 is intended to advance the efforts initiated by Water Code § 144, the Water Resilience Portfolio, and the California Stream Gaging Prioritization Plans. SB 361 itself is not an appropriations bill. If enacted, and upon an appropriation of funds, SB 361 would direct DWR and SWRCB to undertake a number of actions set forth in the 2022 California Stream Gaging Prioritization Plan. This would include requirements to reactivate a number of historical gaging sites, upgrade existing gaging sites, and install new gaging sites. DWR and SWRCB would further be required to develop a plan for the long-term operation of the stream gage sites. Beyond stream gages, SB 361 would require DWR and SWRCB to identify gaps in other weather- and water-data-collecting infrastructure.

The day after introducing SB 361, Senator Dodd issued a press release, stating:

> Water is the lifeblood of California and we must ensure it is managed correctly . . . . Unfortunately, you can't manage what you don't measure, and our stream monitoring systems need help. My bill would help upgrade our equipment, improving our ability to track where our water is going as we deal with the continuing effects of climate.The bill has been referred to the Senate Natural Resources Committee, which held its first hearing on SB 361 on March 28, 2023.

Conclusion and Implications

Experts and relevant agencies agree that robust, statewide stream gage monitoring is an essential component of water management in a time of climate change and increasing weather variability. The proponents of SB 361 seek to improve the availability and quality of California's stream gage network in support of those efforts. SB 361 is still early in the legislative process. The bill's final form—and the consequences of its enactment—remain to be seen. For more information on Senate Bill 361, *see:* https://sd03.senate.ca.gov/news/20230209-sen-dodd-bill-would-improve-california-stream-management

(Brian E. Hamilton, Sam Bivins)

REGULATORY DEVELOPMENTS

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 overflow 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)

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 full 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).

Conclusion 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 pun-

ished 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/united-states-v-doe-corp
(Caroline Martin, Rebecca Andrews)

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

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)

CALIFORNIA COURT OF APPEAL HOLDS REASONABLE USE FINDING NOT REQUIRED FOR WASTEWATER DISCHARGE PERMITS

Los Angeles Waterkeeper v. State Water Resources Control Board,
___Cal.App.5th___, Case No. B309151 (2nd Dist. Feb 27, 2023).

The Second District of the California Court of Appeal released its opinion in *Los Angeles Waterkeeper v. State Water Resources Control Board*, deciding the question of whether the State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards (Regional Boards) have a duty to review the reasonableness of wastewater discharge permits prior to their approval. The trial court initially ruled that the State Water Resources Control Board did have a duty to review these permits to determine whether the amount of wastewater being discharged was reasonable before the permits could be issued. Conversely, the trial court held that the Regional Water Quality Control Board of Los Angeles did *not* have such a duty. In reaching this conclusion, the trial court explained that the assessment of whether the permitted use is reasonable occurs at the state level whereas the Regional Water Board is limited to assessing water quality.

On appeal, the Second District Court *reversed* the trial court's judgment as to the State Water Board, however, concluding that they did *not* have a duty to assess the reasonableness of the discharges. Neither court held that review under the California Environmental Quality Act (CEQA) was triggered by the issuance of the permits since wastewater permits are exempted from CEQA review in the Water Code.

The Court of Appeal's Decision

No Duty to Assess Reasonableness of Wastewater Discharges

In its analysis of the issue, the Second District determined at the outset that the LA Waterkeeper failed to adequately plead entitlement to *mandamus* against the State Water Board, so the trial court should have sustained the State Water Board's demurrer in the first place.

Turning to the question of reasonable use, the court wrote that, even assuming a duty to prevent unreasonable use of water exists, such a duty is:

> . . .highly discretionary, and nothing in article X, section 2 or the Water Code requires the State Board to take action against any particular instance of unreasonable use or category of unreasonable use.

The opinion also notes that the trial court correctly explained how mandamus cannot compel an agency to exercise its discretion in a particular way but then criticizes the trial court's inconsistency in ordering the State Water Board to investigate particular instances of unreasonable use, as identified by the LA Waterkeeper. The trial court justified its decision on the basis that the discharges from the publicly-owned treatment works in question were "unique," but the Second District rejected this justification, explaining that this was not based on a workable legal standard nor was it supported by the language of the Constitution or the Water Code.

Ultimately, the court of appeal concluded this part of its discussion by writing that the:

> Legislature has opted not to include a reasonable use assessment as part of the wastewater discharge permitting process, and we will not override that determination.

Wastewater Discharge Permitting Process Exempt from CEQA Procedures

The court of appeal also briefly addressed CEQA claims brought by the LA Waterkeeper with respect to the issuance of wastewater discharge permits. The court declined to decide broadly whether Water Code § 13389 fully exempts the Regional Water Board from CEQA review when issuing wastewater discharge permits. Instead, the court held that Public Resources Code section 21002, the specific provision pleaded by the LA Waterkeeper, does not impose any environmental review requirements and only states a general policy in implementing CEQA's environmental review procedures. Because Water Code section 13389 exempts the wastewater discharge permitting process from those CEQA procedures," the court wrote, "Public Resources Code section 21002 is inapplicable, and the trial court properly sustained the demurrer to the CEQA causes of action.

Conclusion and Implications

Los Angeles Waterkeeper v. State Water Resources Control Board affirms that regional water boards have no duty to assess the reasonableness of wastewater discharge permits, and while the State Water Board does have a duty to avoid wasteful uses of water where possible, the opinion makes clear that the State Water Board still maintains a high level of discretion in exercising that duty. As for the California Environmental Quality Act issues addressed in the opinion, the court explains that Public Resources Code § 21002 is exempted by Water Code § 13389, but the court refused to discuss the full extent to which the regional boards are exempted from CEQA review when issuing wastewater discharge permits.

This opinion helps to clarify the State and Regional Water Boards' respective roles in assessing reasonable uses of water, particularly in that this assessment is not meant to occur when reviewing wastewater discharge. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B309151.PDF

(Wesley A. Miliband, Kristopher T. Strouse)

UTAH COURT OF APPEALS HOLDS CLAIM OF INTERFERENCE WITH WATER RIGHT IS NOT BARRED BY THE EXISTENCE OF A GENERAL ADJUDICATION

Second Big Springs Irrigation Co. v. Granite Peak Properties LC, 2023 UT App 22 (Ut.App. 2023).

The Utah Court of Appeals clarified that a claim of interference with a water right is not barred by the existence of a general adjudication. A general adjudication is not the same as a claim of interference and thus, existence of general adjudication could not deprive trial court from exercising subject matter jurisdiction.

Background and General Information

This case has a bit of a convoluted procedural history. However, despite its convoluted history, the matter on appeal is straightforward: Is this a tort case or is this a case more appropriately addressed in a general adjudication pursuant to the adjudication provisions of Utah's Water and Irrigation Code? *See generally*: Utah Code §§ 73-4-1 to -24. And if this is a matter for general adjudication, should it be part of an already pending general adjudication in another district?

This case involves a suit by a senior owner of water rights (Second Big Springs) against junior owner of water rights (Granite Peak), alleging interference with water rights and seeking declaratory and injunctive relief. Granite Peak moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. It argued that because Second Big Springs' action was "squarely aimed at reducing or eliminating" Granite Peak's water rights, it was not an interference claim but, rather, a claim that required an adjudication of rights under Utah's water law statutes. Granite Peak also argued that its Nevada water rights were implicated in the dispute and that Utah courts lack jurisdiction to adjudicate Nevada water rights. The District Court rejected the argument that Second Big Springs was claiming something other than interference with its water rights, and because the complaint alleged a tort committed in Utah, the court found jurisdiction proper here.

Nearly two years after the action began, Granite Peak filed a Third-Party Complaint naming twenty-five additional parties. These included businesses and corporations, individuals, and government entities including the U.S. Bureau of Land Management (BLM), Millard County, and the Millard County School District (the school district). It alleged that to the extent each defendant with a junior water right caused harm to Second Big Springs, curtailment and fault should be allocated proportionately.

Many of the newly joined parties filed motions to dismiss for various reasons. In late October 2019, the District Court orally announced a ruling on the motions to dismiss, which it granted with regard to the damages claim but not as to curtailment. It agreed to classify the action as a general adjudication because Granite Peak's joinder of so many additional potential claimants "ha[d] by statutory definition transformed [the] case." It did not agree that dismissal was appropriate but noted that the "[p]arties are well aware there is a pending general adjudication addressing the [a]ffected area already filed in Tooele County."

The District Court's Earlier Rulings

The court therefore determined that the best course of action would be to seek to consolidate this matter with the general adjudication pending in Tooele County.

The same day, the court held that the watershed at issue in this matter was part of the Tooele County general adjudication. Accordingly, the court directed the parties to move for consolidation with that case. However, none of the parties did this until several months later, when Millard County filed a motion to consolidate this action with the Tooele County general adjudication; Granite Peak filed a joinder, but Millard County withdrew its motion and Granite Peak filed no independent motion. Then there were motions to reconsider, which the District Court denied.

The next series of events brought the matter to this court. Granite Peak filed another motion to dismiss, which the District Court granted, without prejudice, in late March 2021. Granite Peak pointed to the court's earlier determination that it lacked jurisdiction to proceed and argued that although the

court directed the parties to seek consolidation, that solution "only works if the parties comply," which Second Big Springs had not done.

The court granted this motion to dismiss, stating that it lacked subject matter jurisdiction and, further, that:

> . . .[t]he respective claims of the parties to the use of water in the Aquifer may be determined in the General Adjudication, which has subject matter jurisdiction to determine the parties' respective claims to the right to the use of water under Title 73 Chapter 4 of the Utah Code.

Given the existence of the Tooele County general adjudication and the parties' failure to seek consolidation with that case, the court found it "appropriate" to dismiss the case for lack of subject matter jurisdiction. That order is the subject of this appeal.

General Adjudications

With respect to water law cases, a general determination, alternatively referred to as a general adjudication, is a statutory proceeding that "determine[s] and settle[s] water rights which have not been adjudicated or which may be uncertain or in dispute." *Green River Adjudication v. United States*, 17 Utah 2d 50, 404 P.2d 251, 252 (1965); *see also,* Utah Code §§ 73-4-12(1)(a), -15. General adjudications "prevent piecemeal litigation regarding water rights" by gathering into a single action all the claimants to water rights. *See EnerVest, Ltd. v. Utah State Eng'r,* 2019 UT 2, ¶ 5, (quotation simplified).

Conversely, an interference action is a way to enforce one's water rights against obstruction and hinderance. *See Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 48; *see also, Wayment v. Howard*, 2006 UT 56, ¶ 13. "Generally, a cause of action for interference lies where a junior appropriator's use of water diminishes the quantity or quality of the senior appropriator's existing water right." *Arave v. Pineview West Water Co.*, 2020 UT 67, ¶ 30. When this principle of priority is violated, a senior water right holder may seek relief, commonly in the form of an injunction and damages. *See Stauffer v. Utah Oil Refining Co.*, 85 Utah 388, 39 P.2d 725, 732 (1935).

But "[b]efore plaintiffs are entitled to" a remedy:

> . . .they must establish by a preponderance of the evidence that they are not receiving the water to which they are entitled, and that the defendant by the acts complained of has wrongfully deprived them of such water. *See Stauffer*, 39 P.2d at 732.

Water Right Interference Actions vs. General Adjudications

Water right interference actions are thus distinct from general adjudications. Where the latter must proceed pursuant to statute, with its prescribed procedures, interference actions do not.

Further still, an interference action and a general adjudication have different ends. As noted, general adjudications determine and settle unknown, uncertain, or disputed claims. *See Green River Adjudication v. United States*, 17 Utah 2d 50, 404 P.2d 251, 252 (1965). From a claimant's perspective, the goal of the process is to avoid abandonment of one's water right. *See,* Utah Code § 73-4-9(1). That differs from a plaintiff's objectives in filing an interference action, which are to enforce a water right, stop the prevailing harm, and be reimbursed for it. *See Bingham*, 2010 UT 37, ¶ 6, 235 P.3d 730. Likewise, a litigant's role in each action is not the same. In a general adjudication, a water user must prove "the extent, limits, and nature" of a water claim. *See* Utah Code § 73-4-5(1)(j). But in an interference action, a plaintiff must prove obstruction or hinderance to an existing water right. *See Bingham*, 2010 UT 37, ¶ 48, 235 P.3d 730.

A general adjudication proceeding can, however, in some instances, bar courts from exercising concurrent jurisdiction. *See, Smith v. District Court*, 69 Utah 493, 256 P. 539, 542 (1927). In Smith, the Utah Supreme Court declared that a pending general adjudication could "entire[ly] exclu[de]" another court from exercising its jurisdiction. *See id.* (quotation simplified). But it "confined" this exclusive jurisdiction "to instances where both suits are substantially the same." *See id.* That is, only where both suits are "nearly identical"—as to "parties" and "interests represented," "relief" and "purposes sought," and "rights asserted"—is a court barred from exercising concurrent jurisdiction. *See id.*

Relying on this exclusive jurisdiction doctrine, the District Court dismissed Second Big Springs' claims. It found the Tooele County general adjudication divested it of jurisdiction.

The Court of Appeals Decision

To determine whether the District Court was correct in that respect, the court conducts a two-step analysis. First, the court decides the nature of the action before the District Court and whether it is an interference action or a general adjudication. Only in the latter case can the Tooele County general adjudication affect the Fourth District Court's jurisdiction. But even then, the Tooele County general adjudication bars the Fourth District Court's involvement only if that suit and the one before us are "substantially the same." *See id.* (quotation simplified). Evaluation of this substantial sameness is the second step, and only where it exists can we uphold the District Court's decision to dismiss Second Big Springs' claim on subject matter jurisdiction grounds.

With that said, "all suits involving water rights [are] not necessarily general adjudications." *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, 637 (1943). And it is not necessary "to force" a private suit "through the statutory procedure for a general adjudication." *See id.* "In many instances," doing so "would complicate rather than simplify litigation." *See, Mitchell v. Spanish Fork West Field Irrigation Co.*, 1 Utah 2d 313, 265 P.2d 1016, 1019 (1954). And in instances in which the action is "clearly" of one nature, it is an abuse of discretion to proceed otherwise. The nature of a water law action is determined by the pleadings and, specifically, by what the request for relief seeks to accomplish.

Damages Sought

Both Second Big Springs and Granite Peak asked the court for three things: (1) monetary damages, (2) injunctive relief, and (3) declaratory relief. The Court of Appeals evaluated these claims for relief and ultimately held that "[n]one of Second Big Springs' or Granite Peak's requests implicate an adjudication of rights. Instead, these requests for relief reveal the non-statutory nature of the action, sounding only in tortious interference." Accordingly, the court held that District Court abused its discretion in proceeding otherwise. The Tooele County general adjudication does not—and indeed, cannot—bar the Fourth District Court from exercising jurisdiction over the matter.

Substantial Sameness

The Court of Appeals also considered the issue of what constitutes substantial sameness. The Utah Supreme Court provided the following guidance:

> There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded as a former adjudication of the same matter between the same parties. *See Smith v. District Court*, 69 Utah 493, 256 P. 539, 542 (1927).

A pending adjudication bars a subsequent case "when, and only when, all the relief sought in the second action is obtainable in the first." *Id.* at 544 (quotation simplified).

In *Smith*, the Supreme Court considered whether "the two cases [were] so nearly identical ... as to bring the cases within" Weber County's exclusive jurisdiction. *See id.* at 542. It determined they were not. *See id.* at 543. Specifically, the Court found a lack of substantial identity in the remedies sought within the suits, pointing in part to the fact that both parties sought monetary damages. *See id.* Because that remedy is not available in statutory proceedings, the court reasoned that "neither plaintiff nor defendant ... could, in the Weber [C]ounty action, obtain the full relief prayed for in their respective pleadings." *Id.* Thus, the suits were not substantially the same. *See id.*

Second Big Springs and Granite Peak Could Not Obtain Full Relief in a General Adjudication

Likewise, in the case before us, neither Second Big Springs nor Granite Peak could in the Tooele County general adjudication "obtain the full relief prayed for in their respective pleadings." Second Big Springs and Granite Peak both ask for an award of damages. But a District Court presiding over a general adjudication is not empowered to grant such relief. Accordingly, if the action before us were consolidated with the Tooele County general adjudication, both parties

would be barred from full relief. Because not "all the relief sought in the second action is obtainable in the first," we cannot say that the action before us is "substantially the same" as the one pending in the Third District Court. Thus, the Tooele County general adjudication cannot deprive the Fourth District Court of exercising jurisdiction over these proceedings. It was error for the court to hold otherwise.

Conclusion and Implications

Because none of the parties' requests for relief implicate a general adjudication of water rights, the Court of Appeals found that District Court abused its discretion in converting the action into a statutory suit. Further, because neither party can receive full relief in the general adjudication, that action cannot, under the exclusive jurisdiction doctrine, deprive the District Court of jurisdiction. For either reason, the court erred in dismissing the action without prejudice. A copy of the court's opinion may be found at: https://legacy.utcourts.gov/opinions/appopin/Second%20Big%20Springs%20v.%20Granite%20Peak20230302_20210207_22.pdf
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