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EWL

FEATURE ARTICLE

SCOTUS LIMITS WOTUS: JURISDICTIONAL WATERS AND WETLANDS UNDER THE CLEAN WATER ACT MUST BE RELATIVELY PERMANENT, STANDING, OR CONTINUOUSLY FLOWING BODIES OF WATER

By Nicole Granquist and Jaycee Dean

On May 25, 2023, the U.S. Supreme Court released its highly anticipated opinion in *Sackett v Environmental Protection Agency* (*Sackett*), delineating the appropriate standard to determine waters of the United States (WOTUS) under the federal Clean Water Act (CWA). The Supreme Court significantly reduced the reach of WOTUS from earlier jurisprudence by holding that under the CWA, the word "waters" refers only to geographical features that are described in ordinary parlance as "streams, rivers, oceans, and lakes" and adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection. The ruling is a critical blow to the "significant nexus" standard originally penned by Justice Kennedy in *Rapanos v. United States,* 547 U.S. 715 (2006) and recently memorialized by the Biden administration's Revised Definition of Waters of the United States. The "significant nexus" standard set a controversially expansive definition of WOTUS and required in-depth, arduous, and often expensive consultant and legal analysis for applicability.

Regulatory Background and Jurisprudence to Date

Historically, the regulation of water pollution was achieved through common law nuisance suits against dischargers with state's gradually shifting to enforcement by regulatory agencies. Federal regulation was limited to interstate waters that were either *navigable in fact* and used in commerce or readily susceptible to use in commerce. (Rivers and Harbors Act of 1899, 20 Stat. 1151). In 1948, Congress enacted the Federal Water Pollution Control Act as an effort to directly regulate water pollution. (62 Stat. 1156.)

In 1972, Congress enacted the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1252, subd. (a).) The CWA extends to all navigable waters, defined as "waters of the United States, including the territorial seas" and prohibits those without a permit from discharging pollutants into those waters. (*Id.* §§ 1362(7), 1311(a).) Those in violation of the CWA potentially face criminal and civil penalties. (*Id.* §§ 1319(c), 1319(d).) The term "waters of the United States" is not defined further within the CWA thereby leaving federal agencies, through regulation and policy guidance, to attempt to define the what constitutes a WOTUS—including what wetlands are WOTUS. Courts have then been tasked, and rarely reached consensus, on identifying the boundaries of the geographic reach of "waters of the United States" to guide the scope of regulatory jurisdiction under the CWA.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), (collectively: Agencies) jointly enforce the CWA and have modified the WOTUS definition more than a handful of times. Upon initial enactment of the CWA, the Corps adopted the traditional judicial term for navigable waters—that the waters must be "navigable in fact." (39 Fed. Reg. 12115, 12119 (Apr. 3, 1974).) In 2008, after the U.S. Supreme Court decision in *Rapanos*, the Agencies released guidance for the CWA asserting jurisdiction over "wetlands adjacent to traditional navigable waters." (EPA and Corps, Memorandum on Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in *Rapanos v. U.S.* (2008).) In 2015, under the Obama administration, the Agencies issued

the Clean Water Rule that amended the WOTUS definition to include eight categories of jurisdictional waters, including non-adjacent wetlands and other non-navigable water bodies. (80 Fed. Reg. 37054 (June 29, 2015).) In 2019, under the Trump administration, the Agencies repealed the 2015 rule and restored the pre-2015 WOTUS definitions. (84 Fed. Reg. 56626 (Dec. 23, 2019).) Then, in 2020, the Agencies under the Trump administration issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250 (Apr. 21, 2020)), which narrowed the conditions upon which non-adjacent wetlands would be considered WOTUS, but this rule was vacated in 2021 by a federal District Court in Arizona (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, Case No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. 2021)), thereby prompting the Agencies' re-implementation of the pre-2015 WOTUS definitions. On March 20, 2023, under guidance from the Biden administration, the Agencies most recent regulation, the "Revised Definition of Waters of the United States" went into effect. (88 Fed. Reg. 3004 (Jan. 18, 2023).) The 2023 WOTUS Rule relies heavily on the pre-2015 regulatory framework and associated case law, while simultaneously reinvigorating the "significant nexus" standard delineated by Justice Kennedy in *Rapanos*.

Contemporaneous to the Agencies' various iterations of the WOTUS definition, the Supreme Court has, over the years, provided parallel jurisprudence guiding the interpretation of WOTUS. In 1985, the Court held that wetlands actually abutting traditional navigable waterways were considered WOTUS. (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).) In 2001, the Court held that WOTUS does not include "nonnavigable, isolated, intrastate waters" in its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 (2001). Most relevant here, in 2006, the Court issued its fragmented opinion in *Rapanos v. United States*, holding that the CWA does not regulate all waters and wetlands, but failing to provide a majority approach to determining WOTUS jurisdiction. Justice Scalia, writing for the plurality, argued that wetlands that have a contiguous surface water connection to regulated waters "so that there is no clear demarcation between the two" are adjacent and may then be regulated as WOTUS. (574 U.S. at 742.) The concurring opinion, authored by Justice Kennedy, advanced a broader "significant nexus" test that would allow regulation of wetlands as WOTUS if wetlands "alone or in combination with similarly situated lands…significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." (*Id.* at 780.)

The Sacketts

In 2004, near Idaho's Priest Lake, the Sacketts purchased a residential lot that they planned to develop. In 2007, shortly after the Sacketts began filling the lot with sand and gravel, the EPA issued an administrative compliance order stating that the property contained wetlands subject to CWA protection. According to EPA the wetlands on the Sackett's lot are "adjacent to" an unnamed tributary on the other side of a 30-foot road. The unnamed tributary feeds into a non-navigable creek, which feeds into Priest Lake (an intrastate body of water that the EPA designated as traditionally navigable). In 2008, the Sacketts initially brought suit against the EPA asserting that the agency's jurisdiction under the CWA did not extend to their property. Various aspects of the case have been slowly making their way up and down the federal court system. In 2021, the Ninth Circuit Court of Appeals considered whether the Sackett's Idaho property contained wetlands subject to CWA jurisdiction. (*Sackett v. U.S. Envtl. Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021).) The Sacketts argued that Justice Scalia's reasoning in *Rapanos* controlled because their property does not have a continuous surface connection to a navigable water. The Ninth Circuit disagreed and ultimately upheld Justice Kennedy's "significant nexus" test as the controlling authority in the Ninth Circuit. On September 22, 2021, the Sacketts submitted their petition for writ of certiorari to the Supreme Court requesting that the Court revisit its decision in *Rapanos* and on January 24, 2023, the petition was granted. (595 U.S. __ (2022).)

The May 25, 2023 Supreme Court Opinion

The Supreme Court granted the Sackett's petition to consider whether the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under CWA § 502(7). In its May 25, 2023 ruling, the Supreme Court reversed and remanded the matter for further proceedings, consistent with

the holding that the CWA extends only to waters or wetlands with a continuous surface connection with WOTUS - *i.e.*, relatively permanent, standing or continuously flowing bodies of water connected to a traditional interstate navigable water - such that it is difficult to determine where the traditionally navigable water ends and the adjacent wetland begins.

In striking down the Ninth Circuit's reliance on Justice Kennedy's "significant nexus" test, the Supreme Court provided that, in order to assert jurisdiction over an adjacent wetland under the CWA, a party must establish that the wetland: (1) is adjacent to a WOTUS and (2) has a continuous surface connection with that WOTUS. The majority opinion was delivered by Justice Alito with Justices Barrett, Gorsuch, Roberts, and Thomas joining. Justices Thomas, Kagan, and Kavanaugh each filed concurring opinions. In the majority decision, Justice Alito considered: (1) the extent of the CWA's geographical reach and (2) whether the Court should defer to the Agencies' interpretation of WOTUS in the 2023 Revised Definition.

Extent of the CWA's Geographical Reach

In considering the geographical reach of the CWA, the Supreme Court in *Sackett* held that "waters" encompasses only relatively permanent, standing, or continuously flowing bodies of water for several reasons. First, the Supreme Court looked to the plural use of "waters" in Section 502(7) of the CWA, with the Court stating such use typically refers to bodies of water like streams, oceans, rivers, and is difficult to reconcile with classifying "lands" (wet or otherwise) as waters. (*Sackett* at 14; 33 U.S.C.§ 1362(7).) The Supreme Court also noted that use of the word "navigable" signals that the definition principally refers to navigable bodies of water. Second, the use of the term "waters" in other portions of the CWA (*e.g.*, CWA section 117) confirmed for the Supreme Court that the term refers to "bodies of open water" (*Sackett* at 16 and 33 U.S.C. §1267(i)(2)(D) pertaining to the waters of the Chesapeake Bay). Third, the CWA expressly "protects the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and the Supreme Court found that the state's role would not remain primary if the "EPA had jurisdiction over anything defined by the presence of water." (*Sackett* at 17 and 33 U.S.C. § 1251(b).)

Moreover, in determining CWA jurisdiction, the Supreme Court noted that while the ordinary meaning of "waters" might seem to exclude all wetlands, statutory context shows that some wetlands qualify as WOTUS. (*Sackett* at 18.) For example, Congress amended the CWA in 1977 to add CWA section 404(g)(1),) which authorizes state permitting programs to regulate discharges into any waters of the United States, except for traditional navigable waters, including wetlands adjacent thereto. (33 U.S.C.§1344(g)(1)) Justice Alito opined that while some wetlands are WOTUS, the above cited provision must be harmonized with CWA section 502(7) "water of the United States" language. (33 U.S.C. §1362(7); *Sackett* at 19) Because "adjacent wetlands" are included within water of the United States, Justice Alito found that these wetlands must qualify as WOTUS in their own right, *i.e.*, the wetlands must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. (*Id.*) Therefore, the Supreme Court concluded wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

As it now stands, the jurisdictional reach of the CWA extends to only those waters or wetlands that are "indistinguishable" from traditionally defined WOTUS, which must be relatively permanent, standing or continuously flowing bodies of water. As the Supreme Court noted, it must be difficult to determine where the "water" ends and the "wetland" begins. (*Sackett* at 22.)

Impacts to the 2023 Biden Administration's Definition of WOTUS

Justice Alito's majority opinion directly addresses the current Agencies' definition of WOTUS, and the majority of Justices agreed that finding jurisdiction based on a "significant nexus" to traditional navigable waters "lacks merit." (*Sackett* at 22-27.) Given the number of legal actions challenging the Agencies' new definition of WOTUS, alleging many of the same theories used by Justice Alito to criticize the new rules, the Supreme Court's opinion is likely to reverberate through the judicial system. (*See State of Texas v. U.S. EPA*, No. 3:23-cv-0007 (S. D. Tx. 2023); *Kentucky Chamber of Commerce v. U.S. EPA*, No. 3:23-cv-00008-GFVT (E. D. K.); *West Virginia, et al v. U.S. EPA*, No. 3:23-cv-00032-ARS (DS. N. D.).) Whether the Biden administration will act to

modify the Agencies' definition of WOTUS consistent with the *Sackett* decision remains to be seen.

First, the majority found that the Agencies' interpretation is inconsistent with the CWA because Congress was not clear that it wanted to alter the federal/state balance of power over private property when it enacted the CWA. (*Sackett* at 23.) The Supreme Court enunciated its standard that Congress must enact exceedingly clear language if it wishes to alter that balance, which it did not do here. (*Id.*) They concluded that an overly broad interpretation of the CWA's reach would impinge on state authority to regulate land and water use—the core of traditional state authority. (*Id.*)

Second, the Agencies' use of the "significant nexus" test to determine jurisdictional waters present a due process issue, as it gives rise to serious vagueness concerns in light of statutorily authorized criminal penalties. (*Sackett* at 24.) Due process requires Congress to define penal statutes "with sufficient definiteness that ordinary people can understand what conduct is prohibited." (*Id.*) The Court noted that the only thing preventing the Agencies from interpreting WOTUS to cover every water in the country is the "significant nexus" test, and the boundary between significant and insignificant is far from clear. (*Id.*) Further, the Court observed the "significant nexus" test takes another step into vagueness by introducing "similarly situated waters" in the aggregate that are subject to CWA jurisdiction. (*Id.*) The majority found that these inquiries "provide little notice to landowners of their obligations under the CWA" and the Agencies lack "the clear authority from Congress" to create such an indeterminate standard. (*Id.* at 25.)

Third, the Court rejected the Agencies' argument that Congress ratified the regulatory definition of "adjacent" when the CWA was amended to include reference to "adjacent" wetlands in CWA section 404(g)(1), finding that adjacency cannot include wetlands that are merely "nearby" covered waters, existing jurisprudence repeatedly recognizes that CWA section 404 does not conclusively determine construction of other CWA provisions, and the Agencies failed to provide enough evidence to support their interpretation in the face of Congress's failure to amend CWA section 502(7). (33 U.S.C. § 1362(7)).

The Concurring Opinions

Justice Thomas filed a concurring opinion and was joined by Justice Gorsuch, ultimately arguing for an even narrower construction of the CWA. (*Sackett*, Thomas, J concurring at 1.) Thomas argues that the majority opinion focused on "waters" without determining the extent how the terms "navigable" and "of the United States" limit the reach of the statute. (*Id.* at 2.) The concurrence argues that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters.

Justice Kagan filed a concurring opinion and was joined by Justice Sotomayor and Justice Jackson, agreeing that textual construction is most important but arguing that "adjacent" is not only touching but includes nearby. (*Sackett*, Kagan, J concurring at 1.) Kagan argued a broader reading of adjacent would ultimately protect wetlands "separated from a covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like" that have been regulated by the Agencies for decades. Kagan opined the majority's "continuous surface connection" test disregards the ordinary meaning of adjacent and narrows the CWA as Congress drafted it.

Justice Kavanaugh also filed a concurring opinion and was joined by Justice Kagan, Justice Sotomayor, and Justice Jackson essentially arguing similarly to Justice Kagan that the continuous surface connection test "departs from the statutory text, from 45 years of consistent agency practice, and from [the Supreme] Court's precedent," and that adjacency should include wetlands separated from a covered water by a man made barrier. (*Sackett*, Kavanaugh, J concurring at 2.) Kavanaugh argued that failing to include those wetlands will have "significant repercussions for water quality and flood control throughout the United States." (*Id.*)

Conclusion and Implications

While the *Sackett* decision provides clarity to the regulated community, which has faced uncertainty with regard to the scope of federal CWA permitting and project approval(s) because of historic WOTUS ambiguity, the full ramifications of this ruling on project permitting remain to be determined. For example, in California, the regulated community will now have to more fully contend with the "State Wetland Definition and Procedures for Discharges of

Dredged or Fill Material to Waters of the State," (the "Procedures," effective May of 2020), for wetlands and waters that now fall outside the federal CWA's scope (losing the exemption the Procedures offered if the wetlands or waters were regulated under CWA section 404). This circumstance may increase, not lessen, regulatory permitting burdens. Project proponents should carefully evaluate (or re-evaluate) project features to determine the appropriate scope of federal and/or state requirements, and watch for guidance from the Agencies as to how projects that are in a current process of securing approvals (or recently approved but not yet commenced) might be handled in the face of shifting jurisdiction.

The now-defunct "significant nexus" test played a prominent role in the Agencies' 2023 Revised Definition of WOTUS. How the *Sackett* decision will procedurally and substantively impact the Agencies' recent rulemaking in the near term is still unclear, though the U.S. Supreme Court provided plenty of specific input as to the Agencies' rule's likely demise if the Biden administration does not take action and current judicial actions challenging the rule proceed. If there is anything the last three decades of WOTUS jurisprudence and regulatory rulemakings has taught, is not to get too comfortable with a defining "rule." Change in this arena is inevitable. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

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EASTERN WATER NEWS

LOWER COLORADO RIVER BASIN REPRESENTATIVES COME TO AGREEMENT ON CONSENSUS-BASED SYSTEM CONSERVATION PROPOSAL FOR NEAR-TERM RIVER OPERATIONS

With just over a week remaining until the original deadline to submit comments on the draft Supplemental Environment Impact Statement for Near-term Colorado River Operations (Draft SEIS) the Department of the Interior announced that a significant development would be putting the review process on hold. In furtherance of the continued efforts to curb the effects of the persistent drought being experienced in the southwestern United States, representatives from the Lower Colorado River Basin States have come together in submitting a proposal for what they are now calling the Lower Basin Plan (Plan). The Plan, as outlined by the representatives in a letter to the US Bureau of Reclamation, would utilize a consensus-based approach to increase voluntary conservation measures throughout the Colorado River Basin.

A Consensus-Based System for Conservation

The consensus-based conservation proposal, agreed upon by the Lower Colorado River Basin States of California, Arizona, and Nevada, establishes a minimum system conservation requirement of at least 3 million acre-feet (MAF) by the end of calendar year 2026. The Lower Basin Plan further demands that at least half of that total be met by the end of 2024.

As for how exactly this will be done, the Lower Basin Plan outlines that up to 2.3 MAF of system conservation will be federally compensated under the Inflation Reduction Act's funding provisions for Drought Mitigation in the Reclamation states. The remaining 0.7 MAF of system conservation would then be left open to compensated reductions funded by state or local entities or simply left up to voluntary, uncompensated reductions by the Lower Basin States. If any system conservation is federally funded with "non-Bucket 1" funding under the Inflation Reduction Act—*e.g.* through "Bucket 2" funding or funding under the Bipartisan Infrastructure Law—the Plan would allow for that system conservation to offset up to 0.2 MAF of the remaining 0.7 MAF in required system conservation. The Lower Basin Plan would also allow for any portion of the remaining required system conservation beyond that offset to be further offset with ICS created in 2023-2026 *and* for any such ICS that the creator cannot order delivery of, transfer, or assign by the end of 2026.

Contingency Plan

As a contingency in the event that Lake Mead water levels fall to critically low elevations, the Lower Basin Plan also outlines a process for the Lower Basin States to take responsive action. Under this contingency, if the April 24-month Study "Minimum Probable" model indicates that the end of year elevation of Lake Mead will fall below 1,025 feet, the Lower Division States will have 45 days to come up with a proposal for the Bureau of Reclamation to protect Lake Mead from reaching an elevation of 1,000 feet. If the Lower Basin States cannot come up with an acceptable proposal, the Bureau of Reclamation would then be able to take independent action to maintain Lake Mead's water levels above 1,000 feet.

DOI Withdraws Its Draft SEIS

In response to the Lower Basin States' submission of the Plan, the Department of the Interior withdrew the Draft SEIS that was published in April so that it can fully analyze the potential impacts of the Plan under the National Environmental Policy Act. From there, an updated version of the Draft SEIS can be published to reflect the inclusion of the consensus-based system conservation as an action alternative, which is expected to occur later this year.

Conclusion and Implications

With the purpose of the Draft SEIS being to modify the guidelines for the operation of the Glen Canyon and Hoover dams in order to address historic drought conditions, low reservoirs, and low runoff conditions throughout the Colorado River Basin,

it is looking like the Lower Basin States have come together with an approach that may yet fulfill that purpose. Utilizing a combination of compensated and voluntary reductions to reach the prescribed three MAF in system conservation over the next three years, the Lower Basin Plan would not require the exercise of authority by the Department of the Interior to implement the reductions and does so without the waiver such authority to protect the Colorado River system in the future if worsened drought conditions require such action.

Looking forward to the future of Colorado River operations, the Department has also formally initiated the process for the development of new operating guidelines to replace the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead at the end of 2026.

As of June 15, the Bureau of Reclamation published its Notice of Intent for the Environmental Impact Statement related to the post-2026 guidelines. The public comment period on the Notice of Intent is currently set to run through August 15, 2023. The Bureau of Reclamation will also be hosting three virtual public meetings to provide information and receive oral comments on the post-2026 guidelines with those dates currently set for Monday, July 17, Tuesday, July 18, and Monday, July 24.
(Wesley A. Miliband, Kristopher T. Strouse)

NEWS FROM THE WEST

In this month's News from West we depart from our normal pattern of posting two or three summary updates from various portions of the arid West—Instead, we present, in treatise feature style, an article covering a survey of flowing waters public ownership throughout the West.

A Brief Surview of Public Ownership of Flowing Waters in the West

The following article provides a brief survey of public ownership of flowing waters in the West commonly associated with stream access. The legal issues regarding increasingly embattled streambed access involve beneficial use of water, public and private property rights, trespass, and Western state statutory and constitutional provisions. In state constitution codifications of public use reflect the use of streambed access for any lawful activities, *inter alia*, free streambed access for fishing and other recreational activities. In many states, the presumption that one could walk freely to a river or streambed access without fear of prosecution as long as they remained in the stream was commonplace. Over the last several decades, the presumption of free access has gradually shifted with court challenges from river front private property and easement owners. The caselaw developments from these challenges to historic walk-and-wade access to streambeds through private properties continue to emerge throughout the West.

Background

While at the turn of the last century water rights in the West were defined by the quasi-economic principle that the first person to use a water right became the owner of that water right provided the water right continues was put to beneficial use. This principle of prior appropriation is the bedrock of Western water law. To be the owner of the water right, one must place it to beneficial use: "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water" in New Mexico. N.M. Const. art. XVI, § 3.

However, the values in water have long since extended beyond the basic principle that the value of water can only be measured by pareto optimal outcomes or the optimal use of water that generates the most income from the resource. These shifts are manifested not only in the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1973) (preserving water for species that would be extirpated without water), the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1972) (preservation of wetlands), but also the multiple actions within States to allow *in situ* use of water to be considered a beneficial use. *See generally Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709 (1983). A further manifestation of the expansion of values of water recognized by Western legislatures is the inclusion of the requirement that any transfer of a water right must be measured by the benefit it will provide to the "public welfare." *See* NMSA 1978, § 72-5-7 (1985).

This national trend to recognize that water used in streams grants a right to use of those streams, even on another's private property, reflects Western states and legislatures conclusion that there are values in water other than just for economic development. Some Western states have constitutionally enshrined such rights. *See* Montana State Const. Art. IX, § 3. (All surface, underground, flood, and atmospheric waters within the boundaries of the state are property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.), Utah State Const. Art. XVII, § 1. (All existing rights to the use of any of the waters in the State for any useful or beneficial purpose, are hereby recognized and confirmed.), Wyoming State Const. Art. VIII, § 1. (Water is state property. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state).

Analysis of Stream Access

Whether the public has a right to fish or float on streams and other waterways that flow through private property has been an ongoing debate in the West for decades. The New Mexico Supreme Court joined the conclusions reached by other courts in recent years including Montana, Wyoming, Idaho, Oregon, and Utah. Colorado stands out as an exception to this trend as the debate continues. A brief survey of highlights regarding public ownership of and access to flowing waters is set out below.

New Mexico

In New Mexico, the issue of whether the public has unlimited access to a stream when that access can be reached without committing a trespass on the lands of a private owner that abuts the stream was resolved in 1945 in the historic case of *State ex rel. State Game Commission v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945). This case involved the construction of Conchas Dam by the then-referred to Engineers of the War Department. The construction of Conchas Dam, which holds approximately 100,000 acre-feet of water, caused the inundation of two valleys that previously were the sources of two perennial rivers, the Canadian River and its tributary the Conchas River. The parties to this case were the heirs of the Pablo Montoya Land Grant, who contended that the Land Grant had the right to preclude access to those portions of the water that were backed up by the Dam, because they held title to the land covered by the reservoir water. The State Game Commission argued that the waters backed up by Conchas Dam was not tied to the land, was public water, and further, the act of fishing and recreation were beneficial uses under the laws of New Mexico. *State Game Commission*, 51 N.M. at 217, 182 P.2d at 427.

The case turned largely on the language of Article 16, § 2 of the New Mexico Constitution, which provides that:

> . . .[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public. . . . *See* N.M. Const. art. XVI, § 2.

Relying on this New Mexico Constitutional provision and Article 16, § 3, which requires that water must be continually placed to beneficial use, the *Red River* court held that the New Mexico Constitution makes clear that the public at large owns the water within its streams, and therefore, being public water that belongs to the public of New Mexico, this water cannot be reduced to private ownership. Finally, it held that fishing and recreation are legitimate beneficial uses. Because the land being inundated has been conveyed to the Pablo Montoya Grant by a United States patent, the Court had to evaluate the law of Mexico prior to the Treaty of Guadalupe Hidalgo. *See* Opinion of Justice Brice on Motion for Rehearing, *State Game Commission*, 51 N.M. at 264-65, 182 P.2d at 457 (1945). The Court evaluated, *inter alia*, Las Sieta Partidas and the rules that controlled Mexican law, and concluded that under Mexican law, as with New Mexico law, the people had the right to utilize the reservoir water fishing and recreation. Relying on the New Mexico Constitution, the Court issued a holding that reflects the current trend today as to access to public waters:

> . . .[w]e hold that the waters in questions, were and are, public waters and that the appellee (land grant) has no right of recreation or fishery, distinct from the right of the general public . . . The right of the public, the state, to enjoy the use of the public waters in question cannot be foreclosed by any circumstances relied upon.

State Game Commission, 51 N.M. at 228, 182 P.2d at 434.

This issue lay dormant for 77 years until an opinion was handed down by the Supreme Court on September 1, 2022 addressing this issue. On March 2, 2022, the New Mexico Supreme Court issued a unanimous ruling finding that the New Mexico Game Commission's rule allowing landowners to restrict access to water flowing through their private property is unconstitutional. *See* Order, *Adobe Whitewater Club of New Mexico v. State Game Commission*, No. S-1-SC-38195 (N.M. Sup. Ct. March 2, 2022). The ruling is a victory for broad recreational rights such as flyfishing and kayaking. Ranchers and landowner groups who supported the rule contended that it prevented trespassing and preserved sensitive streambeds. The Court heard oral arguments for an hour before taking 15 minutes to reach its unanimous ruling. The ruling, in effect, declares New Mexico river access a constitutional right. *Adobe Whitewater Club of New Mexico v. New Mexico State Game Commission*, 2022-NMSC-020, 519 P.3d 46.

In its *Adobe Whitewater* analysis, the New Mexico Supreme Court cited cases from Montana, Idaho, Minnesota, North Dakota, Oregon, Utah, Wyoming and South Dakota for the same proposition established by the New Mexico Supreme Court. That principle holds that the ownership of bed and banks of a stream is not relevant to the publics' right to access the water in the stream for fishing and recreation. Even though there is a right to fish in the public waters of New Mexico, the *Adobe Whitewater* Court emphasized that "we stress that the public may neither trespass on privately owned land to access public water, nor on privately owned land from public water." However, the *Adobe Whitewater* Court cited with approval the holding in *Conatser v. Johnson*, 2008 UT 48, ¶ 26, 194 P.3d. 897, and stated that:

> . . .[w]alking and wading on the privately owned beds beneath public water is reasonably necessary for the enjoyment of many forms of fishing. *Adobe Whitewater*, 2022-NMSC-020, ¶ 23, 519 P.3d at 53.

The *Adobe Whitewater* court relying on *Red River* for the proposition that:

> . . . ownership in the banks and beds of a body of water may be private but emphasized that such ownership does not change the fact that the water, next to the banks and above the beds, is public water.

The *Adobe Whitewater* court, relying on *Red River*, also held that whether or not a stream is navigable, under modern jurisprudence is irrelevant on the issue of the public's right of access to water in a stream. The *Adobe Whitewater* Court cited *PPL Mont. LLC v. Montana*, 565 U.S. 576, 604 (2012) for the proposition that each state has authority to establish a public trust with respect to its waters, and also for the proposition that, while the English Crown may have held title to the bed and banks of tidal waters, ". . . the public retained the right of passage and the right to fish in the stream." Importantly, the *Adobe Whitewater* Court squarely ruled that the issue of whether there is a public trust over water:

> . . . is a matter of state law subject only to governmental regulation by the United States under the Commerce Clause and admiralty power. *Adobe Whitewater*, 2022-NMSC-020, ¶ 18.

Montana

The origin of Montana stream access law begins with Article IX, § 3 of Montana Constitution. Article IX, § 3 states:

> . . .[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Statutorily, Montana allows wading access to the "high water mark" or the point to which the river flows at seasonal flood stages. Mont. Code Ann. § 87-2-305. In 1984, the Supreme Court of Montana concluded that:

> . . .under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. *See Montana Coalition for Stream Access*

v. Curran, 210 Mont. 38, 53, 682 P.2d 163, 171 (1984); *see also Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 684 P.2d 1088.

Wyoming

The origin of Wyoming stream access derives from the Wyoming State Constitution, which states:

> Water is state property. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state. *See* WY Const. art. VIII, § 1.

In 1961, the Wyoming Supreme Court clarified the scope of the public's right to access waterways and streams by stating that a "right of flotation" existed and that touching of the streambed as "as a necessary incident to" flotation accompanies that right. In *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), a member of the public sought a declaration that the public had a right to fish "either from a boat floating upon the river waters, or while wading the waters, or walking within the well-defined channel of" the North Platte River where it crossed privately owned land. *Id.* at 140. The Court declined to interpret the scope of the public's right to include activities such as walking and wading on the bed of a river for fishing. *Id.* at 146.

However, the Wyoming Supreme Court held that the public could fish while floating. *Id.* The *Day* Court reasoned that because the right of flotation had long since been enjoyed by the public through floating logs and timber, it "was but a right of passage" for floating in a craft. *Id.* at 146-47. The right to hunt, fish, and engage in other lawful activities were all modified by the right to float, meaning they could be done as long as the person was floating and only with "minor and incidental use of the lands beneath" water. *Id.*

Idaho

The Idaho State Constitution provides that:

> . . .[t]he use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution; also, of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law. ID Const. art. XV, § 1.

The Idaho Supreme Court has provided clarification as to the access the public has to the waterways belonging to the state. In *City of Coeur d'Alene v. Mackin* (*In re Ownership of Sanders Beach*), 143 Idaho 443, 147 P.3d 75 (2006), the Idaho Supreme Court held that a littoral owner on a navigable lake or riparian owner of a waterway takes title only down to the ordinary high water mark as it existed in 1890 when the State was admitted into the union, but the title to the lakebed below the ordinary high water mark is held by the State in trust for the use and benefit of the public. *Id.* at 85. The Court noted that granting the Lakeshore Owners the right to exclude the public from this portion of state land would be "inconsistent with the public trust doctrine." *Id.* The Court then reaffirmed an earlier decision, citing, "the state holds the title to the beds of navigable lakes and streams below the natural high-water mark for the use and benefit of the whole people." *Callahan v. Price*, 26 Idaho 745, 754, 146 P. 732, 735 (1915).

Oregon

The Oregon Constitution, unlike other Western states, does not explicitly incorporate public rights to streams and waterways within its Constitution. There is no constitutional reservation for public use of water; however, in *Morse v. Or. Div. of State Lands*, 34 Or.App. 853, 866, 581 P.2d 520, 527 (Or. Ct. App. 1978), *aff'd*, 590 P.2d 709, (Or. 1979), the state's public trust doctrine is codified.

Utah

The State of Utah provides for the protection of useful or beneficial use of public waters within its Constitution. The Utah State Constitution provides:

> [a]ll existing rights to the use of any of the waters in the State for any useful or beneficial purpose, are hereby recognized and confirmed. *See* UT Const. art. XVII, § 1.

This provision, however, was not clear pertaining to recreational use.

The Utah Supreme Court has held that the scope of the public's easement to access waterways included the right of the public to engage in all recreational activities that utilize the water. *Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897 (2008). The plaintiffs in *Conatser* sought a declaration that the public's easement allows the public to walk and wade on the beds of public waters. *Id.* ¶¶ 1-2. The District Court held that the public's easement was like that in the Wyoming *Day v. Armstrong* case, and that the public only had a right to be "upon the water." *Id.* ¶ 2.

The Utah Supreme Court reversed the District Court's ruling, reasoning that where Wyoming's *Day* decision limits the easement's scope, Utah had expanded the scope to recreational activities. *Id.* ¶¶ 2, 13-16. The Court wrote:

> . . .[t]hus, the rights of hunting, fishing, and participating in any lawful activity are coequal with the right of floating and are not modified or limited by floating, as they are in *Day*." *Id.* ¶ 14.

The *Conatser* Court went on to conclude that:

> In addition to the enumerated rights of floating, hunting, and fishing, the public may engage in any lawful activity that utilizes the water . . . [and] touching the water's bed is reasonably necessary for the effective enjoyment of those activities. *Id.* ¶ 25.

Colorado

Colorado, like several other Western states, provides for public rights to waterways and streams within its Constitution, stating:

> . . .[t]he water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided. CO Const. art. XVI, § 5.

However, in *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979), the *Emmert* Court held that the constitutional provision was primarily intended to preserve the historical appropriation system of water rights on which the irrigation community in Colorado was founded. *Id.* at 1028. The Colorado Supreme Court declined to extend a recreational right to the public in waters on private lands, citing the common law rule that one who owns the surface of the ground has exclusive right to everything above it. *Id.* at 1030.

Conclusion and Implications

Public ownership of flowing waters and Western stream access issues highlight the important, and yet sometimes complicated, intersection of outdoor recreation, stream access and private property rights. Over the last several decades, the presumption of ownership, and therefore, by extension, access to public waters has gained momentum in virtually every case considering the issue. For the reasons discussed above, there is no reason to presume legal refinements to this trend will not continue.

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LEGISLATIVE DEVELOPMENTS

PROPOSED U.S. SENATE BILLS WOULD EXPAND FUNDING AND ELIGIBILITY FOR ENVIRONMENTAL PROTECTION PROGRAMS

In anticipation of the upcoming 2023 Farm Bill, two bipartisan groups of U.S. Senators have set forth two significant proposals: the Headwaters Protection Act and the Conservation Reserve Program Improvement Act. These bills take aim at fixing and modernizing outdated conservation programs that were established in previous Farm Bills. If adopted, these bills would greatly increase the amount of federal funding and the number of eligible participants for the Water Source Protection Program and the Conservation Reserve Program.

The Headwaters Protection Act

On June 7, 2023, U.S. Senators Michael Bennet (D – Colorado) and Mike Crapo (R – Idaho), along with their colleagues, introduced a bipartisan bill dubbed the Headwaters Protection Act of 2023 (HPA). This bill would reauthorize and expand the purpose, eligibility, and funding of the Water Source Protection Program (WSPP) adopted in the 2018 Farm Bill.

The WSPP was established with the goal of rehabilitating and protecting watersheds through a partnership between the Secretary of Agriculture (Secretary) and public and private entities. This program was, and is, designed to maintain the watersheds in the National Forest System, which provide water to "end water users," such as a state, a municipal water system, a nonprofit organization, or a corporation. The WSPP enables the Secretary to enter into "water source investment partnership agreements" with the end water users and provide them with federal funds to repair and protect the watershed. To participate, the end water users are required to match the amount of federal funding they received with their own investment. In addition, the WSPP also allows the Secretary to conduct forest management activities within National Forest System land if it is necessary to protect or enhance the water quality of the watersheds. This maintenance activity must have the primary purpose of protecting the municipal water system and restoring the health of the forest from insect infestation and diseases. Lastly, the WSPP authorizes the Secretary to annually spend $10,000,000 from 2019 to 2023 for the purpose of this program.

Regardless of its innovative approach to foster collaboration between the federal government and other entities for the conservation of national watersheds, the WSPP was not all that effective and was never fully appropriated; hence, the HPA was introduced. One of the key improvements of the HPA is the expansion of the program's purpose. Unlike the WSPP, which focused solely on maintaining watersheds in the National Forest System and the federal forest surrounding them, the HPA would also extend its conservation effort to any non-federal lands that are adjacent to the watersheds and National Forest System land. Under the HPA, the Secretary and the end water users could conduct activities even on certain private lands. Furthermore, the HPA would recognize the protection of forests from insect infestation, diseases, and forest fires as standalone objectives of the program. As a result, forest maintenance activities need not be exclusively linked to ensuring the water quality of watersheds as was required by the WSPP. Also, the HPA proposes some minor procedural changes, such as adopting funding priorities that favor historically disadvantaged communities and expanding the definition of eligible end water users.

Another key change proposed by the HPA is the overall expansion of funding. Under the HPA, the annual budget of the program would be $30,000,000, a $20,000,000 increase from the WSPP's annual budget. Moreover, the HPA would no longer require the end water users to equally match the federal contribution with their own investment. Instead, they would only need to invest an amount of at least 20 percent of the federal funding to be eligible for the program. The Secretary can also waive this 20 percent contribution requirement based on the Secretary's discretion.

The Conservation Reserve Program Improvement Act

Since its implementation in the 1985 Farm Bill, the Conservation Reserve Program (CRP) has been a crucial initiative for environmental conservation in the United States. Under the CRP, private landowners may enter into a contract with the Department of Agriculture (Department) to cease agricultural use of their lands deemed environmentally sensitive for ten to 15 years. Such a practice allows the restoration of soil, water, and wildlife resources on these lands. The participating landowners are required to perform "management activities," such as tilling, grazing, and prescribed burning, which ensure the biodiversity of these lands. As compensation, the landowners receive a rental payment of up to $50,000 per year.

Currently, the CRP protects about 22 million acres of environmentally sensitive land, successfully creating many wild life habitats with healthy water and soil. However, the program has not been significantly updated since its adoption in 1985. As a result, the total acreage of CRP-enrolled land has dropped by 37 percent since its peak in 2007.

The recently proposed Conservation Reserve Program Improvement Act (Improvement Act) by U.S. Senators Klobuchar (D – Minnesota) and Rounds (R – South Dakota) aims to remedy the problem of aging CRP provisions. First and foremost, the Improvement Act increases the maximum annual rental payment from $50,000 to $125,000. If adopted, this would be the first time the maximum annual rent amount would be updated since the adoption of the CRP almost forty years ago. In addition, the Improvement Act would also subsidize 50 percent of the cost of installing fencing and water infrastructure for grazing if the land meets certain qualifications. Similarly, the Improvement Act would also share the cost of performing some management activities other than haying and grazing.

Conclusion and Implications

Many conservation groups, such as Trout Unlimited and the Nature Conservancy, supported the introduction of HPA as a way of reducing the financial and procedural hurdles to participating in the program established by the WSPP. The provisions in the HPA are certainly more concrete and extensive than the provisions in the WSPP, but it is still uncertain whether the federal government could create the unique environmental partnership it envisioned in the WSPP through this new program. As for the CRP, it has existed as a popular program for many farmers and ranchers who want to retire some of their lands for additional income while protecting the environment and wildlife. Despite the gradual decrease in participating agricultural lands, the CRP is still one of the largest single conservation programs. If this proposed bill is adopted, there will be significant financial and environmental incentives for the landowners to participate in the CRP again, which may restore the program to its former glory.

Although these two bills offer vastly different approaches for protecting our water resources, they both present unique and practical ways in which we can make an impact on the overall strain our system has experienced in the ongoing drought and otherwise. The Improvement Act takes a more traditional approach to conservation, cutting back on irrigation and other agricultural related water uses. By contrast, the HPA takes a more indirect approach by emphasizing the need for healthy watersheds to meet the needs of downstream water users. As the 2023 Farm Bill nears in time we may yet see more initiatives looking to enhance and protect our water supplies, but the HPA and Improvement Act represent worthwhile efforts towards this goal.

For more information on the Headwaters Protection Act, *see:* https://www.congress.gov/bill/118th-congress/house-bill/4018/text?s=1&r=13. For more information on the Conservation Reserve Program Improvement Act, *see:* https://www.congress.gov/bill/118th-congress/senate-bill/174?q=%7B%22search%22%3A%5B%22Conservation+Reserve+Program+Improvement+Act%22%5D%7D&s=1&r=1.
(Wesley A. Miliband, Kristopher T. Strouse, Andrew J. Hyun)

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

•June 29, 2023—The U.S. Environmental Protection Agency announced a settlement with the City of Las Vegas to address deficiencies and non-compliance with its federal Clean Water Act (CWA) pretreatment program. The City of Las Vegas operates the Las Vegas Water Pollution Control Facility (WPCF) and the Durango Hills Water Resource Center (WRC), which discharge treated wastewater into the Las Vegas Wash, which feeds into Lake Mead.

During an October 2022 pretreatment compliance inspection, EPA found that the City of Las Vegas' pretreatment program was not as stringent as the federal regulations of the Clean Water Act. The City has agreed to rectify non-compliance with federal regulations, including submitting a new Local Limits study and a revised sewer use ordinance to EPA for review by December 31, 2023.

In an administrative order on consent (AOC) issued June 9, 2023, EPA states that this facility did not rectify legal authority violations of CWA pretreatment regulations, that were first identified in a 2017 pretreatment compliance audit. Further, the City is required to revise its local limits and industrial user wastewater discharge permits.

•June 28, 2023—The U.S. Environmental Protection Agency (EPA) has settled with two shipping companies over claims of violations of EPA's Vessel General Permit issued under the Clean Water Act. Under the terms of the settlements, Swire Shipping Pte. Ltd. will pay $137,000 in penalties and MMS Co. Ltd. will pay $200,000 in penalties for claims of ballast water discharge, inspection, monitoring, and reporting violations.

Swire Shipping is a privately-owned company headquartered in Singapore. Two of Swire Shipping's vessels cited, the Papuan Chief and the New Guinea Chief, exclusively visited the Port of Pago Pago in American Samoa. The third vessel, Lintan, has visited the Ports of San Francisco and Long Beach in California as well as other U.S. ports. Swire Shipping failed to: treat ballast water prior to discharging it into the ocean in a manner consistent with the compliance deadline; conduct annual comprehensive inspections; conduct annual calibrations of a ballast water treatment system; monitor and sample discharges from ballast water treatment systems; and report complete and accurate information in annual reports. The settlement includes penalties of $67,075 for the Papuan Chief, $19,906 for the New Guinea Chief, and $50,019 for the Lintan.

MMS Co. is a privately-owned company headquartered in Tokyo, Japan. MMS Co. failed to: meet ballast water limitations for biological indicators and biocide residuals in discharges at U.S. ports, including the Port of Richmond in California; conduct annual calibrations of ballast water treatment systems; monitor and sample discharges from ballast water treatment systems; and report complete and accurate information in annual reports. The settlement includes penalties of $110,509 for the St. Pauli and $89,491 for the Centennial Misumi.

In addition, it is important that such discharges by ships be monitored to ensure that aquatic ecosystems are protected from discharges that contain pollutants. Invasive species are a persistent problem in U.S. coastal and inland waters. Improper management of ballast water can introduce invasive species or damage local species by disrupting habitats and increasing competitive pressure. Discharges of other waste streams regulated by the Vessel General Permit (e.g., graywater, exhaust gas scrubber water, lubricants, etc.) can cause toxic impacts to local species or contain pathogenic organisms.

EPA's settlement with the two shipping companies resolves claims of Clean Water Act violations and are subject to a 30-day public comment period prior to final approval.

•June 23, 2023—The U.S. Environmental Protection Agency (EPA) announced that Messer LLC has agreed to pay a $1.9 million civil penalty for federal Clean Water Act permit violations at its air products manufacturing facility in New Cumberland, West Virginia.

Along with the financial penalty, Messer has agreed to take actions to eliminate ongoing National Pollutant Discharge Elimination System (NPDES) permit violations and prevent future violations. This includes constructing a new treatment system at the facility and conducting enhanced stormwater discharge inspections to ensure compliance with the Clean Water Act and parallel West Virginia laws. The facility exceeded permit limits for copper, aluminum, residual chlorine, phenolics and iron.

The penalty will be divided equally between the United States and West Virginia, who are co-plaintiffs in this consent decree. The West Virginia Department of Environmental Protection assisted EPA in the investigation, litigation and settlement. The settlement addresses alleged federal and state environmental law violations, which threaten to degrade receiving streams and impact public health and harm aquatic life and the environment.

The facility is bordered by the Ohio River and discharges into the river.

The proposed consent decree, filed in the federal district court for the Northern District of West Virginia, is subject to a 30-day public comment period and approval by the federal District court.

•June 20, 2023—The U.S. Environmental Protection Agency (EPA) has entered into Expedited Settlement Agreements with Hawaii Gas, Sunbelt Rentals, and Pacific Biodiesel Technologies for failing to comply with Spill Prevention, Control, and Countermeasure (SPCC) requirements at their Honolulu facilities. The SPCC requirements prevent oil from reaching navigable waters, shorelines, and requires plans to contain oil spills.

EPA found that:

•Hawaii Gas failed to conduct regular inspections of their tanks and containment;

•Sunbelt Rentals did not have an SPCC plan in place;

•Pacific Biodiesel Technologies did not have a fully compliant SPCC Plan (certified by a professional engineer).

Failure to implement measures required by the SPCC Rule can threaten public health or the welfare of fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources. Specific prevention measures include developing and implementing spill prevention plans, training staff, and installing physical controls to contain and clean up oil spills.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

•June 14, 2023—The U.S. Environmental Protection Agency (EPA) announced that Hecla Mining Company's Greens Creek Mine, located on Admiralty Island near Juneau, Alaska, was fined $143,124 for violating hazardous waste management and disposal requirements under the Resource Conservation and Recovery Act (RCRA).

Following an August 2019 inspection, EPA cited the mining company for the following violations:

•disposal of hazardous waste containing lead without a permit;

•failure to conduct a weekly inspection of a hazardous waste storage area;

•failure to determine if waste from mining operations was hazardous;

•failure to properly label a used oil container.

The settlement agreement acknowledges that the company will continue to clean up lead contaminated soil.

RCRA was enacted to protect public health and the environment and help prevent long and expensive cleanups by requiring the safe and environmentally sound management and disposal of hazardous waste.

(Robert Schuster)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT DENIES NAVAJO NATION A COURT-MANDATED SOLUTION TO WATER ACCESS

Arizona et al. v. Navajo Nation, et al, ___U.S.___, Case No. 21-1484 (June 22, 2023).

The Supreme Court has issued its decision, in a 5 to 4 vote, in which the majority found that the 1868 Treaty and under the *Winters* doctrine:

> . . . do not support the claim that in 1868 the Navajos would have understood the Treaty to mean that the United States must take affirmative steps to secure [already scarce] water for the Tribe.

The majority opinion was penned by Justice Kavanaugh,and joined by Justices Roberts, Thomas, Alito and Barrett. Justice Gorsuch issued a dissenting opinion joined by Justices Sotomayor, Kagan and Jackson which would have had the Court allow the Navajo Nation's claims to move forward—akin to the decision of the Ninth Circuit Court of Appeals.

Background

The Navajo Tribe is one of the largest in the United States, with more than 300,000 enrolled members, roughly 170,000 of whom live on the Navajo Reservation. The Navajo Reservation is the geographically largest in the United States, spanning more than 17 million acres across the States of Arizona, New Mexico, and Utah. To put it in perspective, the Navajo Reservation is about the size of West Virginia.

In 1849, the United States entered into a Treaty with the Navajos. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974 (ratified Sept. 24, 1850). In that 1849 Treaty, the Navajo Tribe recognized that the Navajos were now within the jurisdiction of the United States, and the Navajos agreed to cease hostilities and to maintain "perpetual peace" with the United States. *Ibid.* In return, the United States agreed to "designate, settle, and adjust" the "boundaries" of the Navajo territory.

Two treaties between the United States and the Navajo Tribe led to the establishment of the Navajo Reservation.

For the next two decades, however, the United States and the Navajos periodically waged war against one another. In 1868, the United States and the Navajos agreed to a peace treaty. In exchange for the Navajos' promise not to engage in further war, the United States established a large reservation for the Navajos in their original homeland in the western United States. Under the 1868 Treaty, the Navajo Reservation includes (among other things) the land, the minerals below the land's surface, and the timber on the land, as well as the right to use needed water on the reservation. [Majority Opinion]

The 1868 Treaty was to put an end to "all war between the parties." The United States "set apart" a large reservation "for the use and occupation of the Navajo tribe" within the new American territory in the western United States. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667–668 (ratified Aug. 12, 1868). Importantly, the reservation would be on the Navajos' original homeland, not the Bosque Redondo Reservation. The new reservation would enable the Navajos to once again become self- sufficient, a substantial improvement from the situation at Bosque Redondo. The United States also agreed (among other things) to build schools, a chapel, and other buildings; to provide teachers for at least ten years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn. [Ibid]

Under the 1868 Treaty, the Navajo Reservation includes not only the land within the boundaries of the reservation, but also water rights. Under this Court's longstanding reserved water rights doctrine, sometimes referred to as the *Winters* doctrine, the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use

needed water from various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation. [Ibid]

The Navajo Reservation lies almost entirely within the Colorado River Basin, and three vital rivers—the Colorado, the Little Colorado, and the San Juan—border the reservation. To meet their water needs for household, agricultural, industrial, and commercial purposes, the Navajos obtain water from rivers, tributaries, springs, lakes, and aquifers on the reservation. [Ibid]

Over the decades, the Federal Government has taken various steps to assist tribes in the western States with their water needs. The Solicitor General explained that, for the Navajo Tribe in particular, the Federal Government has secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation.

Nature of the Legal Dispute

In the Navajos' view, however, those efforts did not fully satisfy the United States' obligations under the 1868 Treaty. The Navajo Nation sued the U. S. Department of the Interior, the Bureau of Indian Affairs, and other federal parties. As relevant here, the Navajos asserted a breach-of-trust claim arising out of the 1868 Treaty and sought to "compel the Federal Defendants to determine the water required to meet the needs" of the Navajos in Arizona and to "devise a plan to meet those needs." App. 86. The States of Arizona, Nevada, and Colorado intervened against the Tribe to protect those States' interests in water from the Colorado River.

According to the Navajos, the United States must do more than simply not *interfere* with the reserved water rights. The Tribe argued that the United States also must *take affirmative steps* to secure water for the Tribe— including by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure. [Ibid]

At the District Court and Ninth Circuit Court of Appeals

The U. S. District Court for the District of Arizona dismissed the Navajo Tribe's complaint. In relevant part, the District Court determined that the 1868 Treaty did not impose a duty on the United States to take affirmative steps to secure water for the Tribe.

The U. S. Court of Appeals for the Ninth Circuit reversed, holding in relevant part that the United States has a duty under the 1868 Treaty to take affirmative steps to secure water for the Navajos. *Navajo Nation* v. *United States Dept. of Interior*, 26 F.4th 794, 809–814 (2022). The Supreme Court granted *certiorari*. 598 U. S. ___ (2022) [Ibid]

The Majority Opinion

With this backdrop of the history of the formation of the Navajo Nation's Reservation land, the Treaties, and the *Winters* doctrine, in an arid West, the Court found that the United State's obligations did not go so far as to include the duty to take affirmative steps to secure water supply:

> Of course, it is not surprising that a treaty ratified in 1868 did not envision and provide for all of the Navajos' current water needs 155 years later, in 2023. Under the Constitution's separation of powers, Congress and the President may update the law to meet modern policy priorities and needs. To that end, Congress may enact—and often has enacted—legislation to address the modern water needs of Americans, including the Navajos, in the West. Indeed, Congress has authorized billions of dollars for water infrastructure for the Navajos. . .But it is not the Judiciary's role to update the law. And on this issue, it is particularly important that federal courts not do so. Allocating water in the arid regions of the American West is often a zero-sum gain ituation. . . And the zero-sum reality of water in the West underscores that courts must stay in their proper constitutional lane and interpret the law (here, the Treaty) according to its text and history, leaving to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water.

The Court went on the emphasize its interpretation of the Treaty and in the end, it's conclusion as to implications of a duty on the part of the United States to supply water to the Tribe:

> The 1868 treaty granted a reservation to the Navajos and imposed a variety of specific obligations on the United States—for example, building schools and a chapel, providing teachers, and supplying seeds and agricultural implements. The reservation contains a number of water sources that the Navajos have used and continue to rely on. But as explained above, the 1868 treaty imposed no duty on the United States to take affirmative steps to secure water for the Tribe.

The Dissenting Opinion

In the Dissent, Justice Gorsuch, along with Justices Sotomayor, Kagan and Jackson found that the Navajo Nation's claims should move forward, along the lines of the Ninth Circuit's decision:

> This case is not about compelling the federal government to take "*affirmative steps* to secure water for the Navajos." *Ante*, at 2. Respectfully, the relief the Tribe seeks is far more modest. Everyone agrees the Navajo received enforceable water rights by treaty. Everyone agrees the United States holds some of those water rights in trust on the Tribe's behalf. And everyone agrees the extent of those rights has never been assessed. Adding those pieces together, the Navajo have a simple ask: They want the United States to identify the water rights it holds for them. And if the United States has misappropriated the Navajo's water rights, the Tribe asks it to formulate a plan to stop doing so prospectively. Because there is nothing remarkable about any of this, I would affirm the Ninth Circuit's judgment and allow the Navajo's case to proceed.

Looking to the "promises" made pursuant to the Treaty and establishment of a "homeland," Justice Gorsuch went on to state:

> The Treaty of 1868 promises the Navajo a "permanent home." Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, Art. XIII, 15 Stat. 671 (ratified Aug. 12, 1868) (Treaty of 1868). That promise—read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights.

But Justice Gorsuch opined why quantifying those water rights by this Court was repugnant to the Majority, especially in light of the *Winters* and *McGirt* decisions

> Yet even today the extent of those water rights remains unadjudicated and therefore unknown. What is known is that the United States holds some of the Tribe's water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner. . . . It is easy to see the purchase these rules have for reservation-creating treaties like the one at issue in this case. Treaties like that almost invariably designate property as a permanent home for the relevant Tribe. See *McGirt* v. *Oklahoma*, 591 U. S. ___, ___ (2020) (slip op., at 5). And the promise of a permanent home necessarily implies certain benefits for the Tribe (and certain responsibilities for the United States). One set of those benefits and responsibilities concerns water. This Court long ago recognized as much in *Winters* v. *United States*, 207 U. S. 564 (1908). . . . For these reasons, the agreement's provisions designating the land as a permanent home for the Tribes necessarily implied that the Tribes would enjoy continued access to nearby sources of water. . . because the Treaty of 1868 must be read as the Navajo "themselves would have understood" it, *Mille Lacs Band*, 526 U. S., at 196, it is impossible to conclude that water rights were not included. Really, few points appear to have been *more* central to both parties' dealings. What water rights does the Treaty of 1868 secure to the Tribe? Remarkably, even today no one knows the answer. But at least we know the right question to ask: How much is required to fulfill the purposes of the reservation that the Treaty of 1868 established?

Conclusion and Implications

In the West and especially amongst the Lower Basin States, competition for Colorado River water is fully in play with scarcity forming the basis for a voluntary agreement for water sharing [and conservation efforts]. With this as a backdrop, the Navajo Nation claims water rights and ongoing water *supply*, with a duty imposed on the U.S. to assist in this, pursuant to trust theory, the 1868 Treaty and the Supreme Court's *Winters* decision. The Supreme Court, while recognizing the Treaty's obligations, including water, found duties on the part of the United States only extended so far—that those obligations did *not* apply to affirmative actions to secure ongoing water supply in an arid West with, as the Court states, classifies as a "zero-sum gain." The Court looked to the four-corners of the Treaty and found no affirmative duty to provide water supply and further, found that under the U.S. Constitution's, only the President and Congress may change the U.S. obligations relating to water—but the courts are not the vehicle to achieve this result. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-1484_aplc.pdf.
(Robert Schuster)

FIFTH CIRCUIT DETERMINES CITY STORMWATER MANAGEMENT FEES ARE NOT 'REASONABLE SERVICE CHARGES' ON FEDERAL FACILITIES

City of Wilmington v. United States, 68 F.4th 1365 (5th Cir. 2023).

The Fifth Circuit Court of Appeals, on May 31, 2023, denied the assessment of stormwater management fees by the City of Wilmington, Delaware against the U.S. Army Corps of Engineers (Corps) because the fees were not a "reasonable service charge" under Clean Water Act section 313.

Factual and Procedural Background

The Corps owns five properties in Wilmington, Delaware, which occupy nearly 11,888,000 square feet. The properties are used for dredge material disposal in support of Corps' work dredging waterways near Wilmington. Stormwater runs off the properties into a nearby river, but none of the properties discharges into the city's stormwater system.

As part of its water pollution management program, Wilmington charges its residential and non-residential property owners a stormwater management fee. The fee is based on a formula comprised of four variables: (1) gross parcel area; (2) the runoff coefficient between 0 and 1 based on a property's approximate imperviousness; (3) impervious area, calculated by multiplying the property's total area by the assigned runoff coefficient; and (4) an equivalency stormwater unit, derived from the size of the median single-family home.

For the runoff coefficient, the city relied on the county tax assessment categorization of properties into 200 sub-categories. Then, the city grouped several types of sub-categories into broader categories and designated runoff coefficients for the categories. The runoff coefficients were assigned based on a 1962 study, which specified the runoff coefficients for various types of land uses and the work of an engineering firm, Black Veatch. The city did not provide further evidence on how the land use categories from the 1962 study and the county's tax assessment categories were similar or related. The city's code established a process for appealing determinations of the four factors.

Wilmington designated all five Corps properties as "vacant," which had a runoff coefficient of 0.3, meaning that nearly 30 percent of rainwater would runoff and carry any contaminants into the stormwater system. Based on the 0.30 runoff coefficient and Wilmington's methodology for calculating fees, the city assessed the Corps $2,577,686.82 in fees for the properties between January 4, 2011, and April 16, 2021. The Corps never paid the assessed service charges or pursued the city's appeal process.

Section 313 of the Clean Water Act (CWA) requires federal facilities to adhere to federal, state, local, and interstate requirements related to water

pollution abatement, including payment of "reasonable service charges." In the absence of this provision, federal facilities would have sovereign immunity from the local fees. Congress thus provided a broad waiver of this federal sovereign immunity under the CWA to ensure federal facilities comply with local pollution requirements.

In 2016, Wilmington sued the Corps to recover $2,577,686.82 in unpaid stormwater management fees and $3,360,441.32 in accrued interest between January 4, 2011, and April 16, 2021. The Corps moved for judgment on partial findings, which the trial court granted. Wilmington appealed.

The Fifth Circuit's Decision

On appeal, the Fifth Circuit considered whether the storm management fees assessment process met the "reasonable service charge" requirements of the CWA to waive sovereign immunity for federal facilities. The court began by clarifying that the general approach used by the city is allowed. At least three-quarters of cities use a similar category and runoff coefficient approach when assessing similar fees. However, it was the specific manner of application by the city which the court determined did not adhere to the statutory definition of "reasonable service charges."

First, the court pointed to the lack of evidence connecting the runoff coefficient from the 1962 study to the county tax assessor property categories. The court reasoned that while the county definitions and categories of property may accurately reflect the nature of the properties for tax purposes, there was no further evidence that those definitions accurately reflected the nature of the properties for stormwater runoff. The city assumed that definitions used in the 1962 stormwater study correlated to similar meanings as the tax assessor categories without providing evidence of such a connection.

Second, the court highlighted the wide variance of potential runoff attributed to the "vacant" property category, which had an automatic coefficient of 0.30 and attributed to all of Corps' properties. In doing so, the court rejected the city's arguments that size differences allow charges on a class containing 'totally different properties' to remain proportional to runoff while retaining similar land use characteristics and that use of runoff units normalized each property's estimated impervious area. In rejecting these arguments, the court noted that city witnesses testified that "marshes or wetlands" could be included in the "vacant" stormwater class together with "wooded areas," "regular grass," "loose gravel," "concrete and asphalt," and "different kinds of soils." The city also agreed that "properties with completely different land covers could be included in the vacant stormwater class." Additionally, the appeal process for fees also implicitly admits that it subjects property owners to unfair fees, where due to "site specific variances," "in some situations, the resulting measure of imperviousness may differ from the actual imperviousness that exists in a specific property." Taken together, the court stated that the vacancy designation "says nothing about the other physical characteristics of the land that would impact stormwater runoff."

Finally, the court noted that the city's appeal process is permissive, not mandatory, and is solely forward looking. As a result, the appeal would not provide the retroactive relief sought by the Corps. The Corps was not required to exhaust the appeal process before refusing to pay the assessed fees.

Conclusion and Implications

The court emphasized that the holding in this case is limited to the specific facts of the case. The court even reiterated that there was "nothing necessarily problematic about a stormwater fee methodology that uses a multifactor formula, or a formula that includes impervious area or runoff coefficients as variables." However, the case emphasizes the need to provide evidence regarding how a methodology that relies on land use codes or classes of property, which is used by three-quarters of cities, fairly captures variability within the land use code or property class. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/cafc/22-1581/22-1581-2023-05-31.html.
(Uriel Saldivar, Rebecca Andrews)

ELEVENTH CIRCUIT DISMISSES CLEAN WATER ACT CITIZEN SUIT BASED ON DILIGENT PROSECUTION BAR

South River Watershed Alliance, Inc. v. Dekalb County, Georgia, 69 F.4th 809 (11th Cir. May 31, 2023).

The United States Court of Appeals for the Eleventh Circuit, on May 31, 2023, dismissed a federal Clean Water Act (CWA) citizen suit because the government was already diligently prosecuting the party allegedly in violation.

Factual and Procedural Background

In 2010, the United States EPA and Georgia Department of Natural Resources (GDNR) sued Dekalb County, Georgia for violating the CWA. The parties entered into a consent decree in 2011 to resolve the suit. The consent decree included the goals of full compliance with the CWA, the Georgia Water Quality Control Act, and the elimination of all sanitary sewer overflows. The consent decree included a one-time penalty, remedial measures, and large fines for failing to meet specified deadlines. Additionally, the consent decree stated that the court would retain jurisdiction over the case until the consent decree was terminated. In 2020, the EPA and GDNR moved to reopen the litigation against Dekalb County and agreed to modifications of the consent decree, including an extension of some of the original deadlines.

South River Watershed Alliance, Inc. (South River) is a non-profit that advocates for protecting the South River and Chattahoochee River watersheds. South River filed a complaint against Dekalb County in 2019, alleging discharges in violation of sections 301 and 402 of the Clean Water Act, and seeking civil penalties, fees, and costs. Dekalb County moved to dismiss the complaint arguing that suit was barred under the diligent prosecution bar by the consent decree itself and the EPA's enforcement of the consent decree.

Under the diligent prosecution bar, if the state or federal government has commenced and is diligently prosecuting a civil or criminal action in a court of the United States to require compliance with a standard, limitation, or order under the Clean Water Act, no citizen suit may be commenced. The District Court determined that South River's claims addressed the same violations that formed the basis of the 2010 government suit, which resulted in the consent decree, and held that the diligent prosecution bar precluded South River's action. The court granted Dekalb County's motion to dismiss. South River appealed.

The Eleventh Circuit's Decision

On appeal, the Circuit Court applied a two-step test for determining whether a citizen suit is precluded by the diligent prosecution. First, the court determined whether an action by the government enforced the same "standard, order, or limitation" and was pending on the date that the citizens suit commenced. Second, a court determined whether the pending action was being "diligently prosecuted" by the government at the time the citizens suit was filed.

In analyzing the first step, the court noted that South River did not argue that the EPA and GDNR were not prosecuting their action against Dekalb County. Nevertheless, the court determined South River's claims overlapped with the issues the consent decree sought to remedy.

In analyzing the second step, the court first determined that "diligence" should be analyzed with at least some deference to the EPA and GDNR. This is because citizen suits are meant to "supplement rather than supplant government action." If a court fails to defer to an agency when that agency chooses to enforce the CWA through a consent decree, the court could undermine the agency's strategy.

Next, the court looked at the terms in the consent decree itself and whether the EPA and GDNR had been diligent in overseeing the consent decree. The express goal of the consent decree was for Dekalb county to achieve "full compliance with the CWA." Furthermore, the provisions in the consent decree were calculated to reach this goal, specifically it imposed penalties on Dekalb County and requirements to implement programs to stop future overflows and rehabilitate affected areas from past overflows. When looking at the EPA and GDNR's enforcement actions, the court found that the most important factor in showing the government's diligence was the fact that "each year, from 2012 to 2018, the EPA

and GDNR have assessed penalties totaling nearly one million dollars" against Dekalb County for its reported spills. This showed that the government had been diligent in monitoring Dekalb County's progress and using fines to compel the county to comply with the consent decree.

Continuing Jurisdiction and the Consent Decree

The court also examined the terms in the consent decree that provided for the court to retain jurisdiction. South River argued that the government's modifications to the consent decree in 2020 showed a lack of diligence. However, the court came to the opposite conclusion, determining that the modification was evidence of diligence. In order to speed up the process of compliance, the EPA and GDNR made certain tradeoffs in the modified consent decree, and that is the exact type of agency decision that courts are meant to defer to in citizen suits.

The court found that the EPA and GDNR had met the diligence threshold, and upheld the District Court's decision that South Water's suit was precluded by the diligent prosecution bar.

Conclusion and Implications

This case upholds the rule that the creation and use of a consent decree between the government and a party in violation of the CWA can serve as evidence of diligent prosecution under the diligent prosecution bar of a citizen suit. The court's opinion is available online at: https://casetext.com/case/s-river-watershed-all-v-dekalb-cnty.
(Cara Vincent Williams, Rebecca Andrews)

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