Volume 27, Number 9
July 2023

WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

FEATURE ARTICLE

WESTERN WATER NEWS

LEGISLATIVE DEVELOPMENTS

REGULATORY DEVELOPMENTS

PENALTIES AND SANCTIONS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

JUDICIAL DEVELOPMENTS

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222, schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $955.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

WWL

FEATURE ARTICLE

A BRIEF SURVIEW OF PUBLIC OWNERSHIP OF FLOWING WATERS IN THE WEST

By Christina J. Bruff and James Greico

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.

Christina J. Bruff is the founding attorney and firm managing attorney, and **James Grieco** an associate at the law firm of Law & Resource Planning Associates, P.C., in Albuquerque, New Mexico. The firm represents clients across a variety of practices areas, covering water rights, water quality, energy and environmental law amongst its many fields of representation. Christina's practice focuses on water and environmental law, real estate transactions, real property, civil litigation, business law and drone law. Christina has been a long-serving member of the Editorial Board of the *Western Water Law & Policy Reporter*.

WESTERN 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)

CALIFORNIA GOVERNOR NEWSOM SIGNS EXECUTIVE ORDER THAT MAY BENEFIT WATER STORAGE AND INFRASTRUCTURE PROJECTS

In May, 2023 Governor Newsom signed Executive Order N-8-23 (Order), which calls for the streamlining and expediting of administrative processes related to various infrastructure projects in California, including water projects. The Order creates a Strike Team to identify projects that could benefit from the Executive Order's directives and helps prioritize important infrastructure projects for streamlining purposes. Executive Department State of California, *Executive Order N-8-23* (May, 19, 2023).

Background

California Governor Gavin Newsom signed Executive Order N-8-23 on May 19, 2023 in an effort to streamline and expedite permitting, construction, and ultimately operation of a variety of critical infrastructure projects throughout the state. Specifically, by facilitating and streamlining project approvals and completions, the Order is intended to maximize California's share of federal infrastructure funds and implement projects intended to advance the state's various clean energy and other large infrastructure goals in the future. California intends to invest up to $180 billion over the coming decade to advance clean energy projects.

Areas for improvements to California's ability to meet its infrastructure goals targeted by the Order include the following: (1) construction, (2) judicial review, (3) permitting, (4) CEQA procedures, and (5) the maximizing of federal funds. The Order directs the Senior Counselor on Infrastructure to convene an Infrastructure Strike Team (Strike Team), and directs the Strike Team to identify projects on which to focus streamlining efforts, to support coordination between agencies and governments, and to support infrastructure. The Order further directs working groups created by the Strike Team, one of which focuses on water, to prioritize funding projects that achieve multiple benefits. This funding is identified in the Order as coming from both the state of California and the federal government through the Infrastructure Investment and Jobs Act (IIJA)and the Inflation Reduction Act (IRA).

With respect to water, the Order specifically calls for adaption and innovation to diversity water supplies, expand water resources, efficiently use existing water resources, strengthen California's water resiliency, and modernize our water infrastructure.

Streamlining Projects

In tandem with the Order, Governor Newsom's office identified several examples of projects that could be streamlined. These included water storage projects funded by Proposition 1 and the Delta Conveyance

Project. Notably, many of these such projects are identified in California's Water Resilience Portfolio. In 2020, state agencies developed the Water Resilience Portfolio in response to the Executive Order N-19-20, which directed state agencies to develop recommendations to meet California's challenges of rising temperatures, over drafted groundwater, aging infrastructure, and water security. In particular, the Water Resilience Portfolio identifies four broad approaches to support water systems in California, which are: (1) maintain and diversify water supplies; (2) protect and enhance natural systems; (3) build connections; and (4) be prepared. Each of these then have detailed recommendations and actions that fall underneath one of the approaches. Furthermore, the portfolio also breaks down each action by the agency that should pursue or perform the action. In sum, the Water Resilience Portfolio contains more than 100 separate detailed actions to be implemented to the extent resources are available. The 2023 Order presents an opportunity for more resources to be made available to implement these identified actions.

Proposition 1—Six New Water Storage Projects

For instance, under Proposition 1, six new water storage projects eligible for $2.7 billion in state water bond funding advancing their projects. This includes the Sites Reservoir, Harvest Water Program, the Kern Fan Project, Los Vaqueros Reservoir Expansion Project, Pacheco Reservoir Expansion Project, and the Willow Springs Water Bank Conjunctive Use Project. Since the publication of the Water Resilience Portfolio, all the projects were deemed feasible and if completed they would together expand the state storage capacity of water by nearly 2.8 million acre-feet. Such storage could address the concerns of rising temperatures, drought, aging infrastructure, and water security —all of which are challenges that need to be met according to the Order. Thus, these projects could benefit from the streamlining that the Order calls for as well as the funding and could likely be projects that the Strike Team identifies and focuses on.

Strike Team to Identify Changes to Facilitate Streamline Project Approval

In addition to Proposition 1 projects, the working groups created by the Strike Team are also directed to:

> . . .[i]dentify potential statutory and regulatory changes to facilitate and streamline project approval and completion, and elevate propose changes to the Strike Team for consideration.

Proposals for such changes include authorizing expedited judicial review to avoid delays on the back end of projects without reducing environmental and governmental transparency provided for under the California Environmental Quality Act. Similarly, changes to accelerate permitting for certain projects, reduce delays, and reduce project costs are also being proposed. If implemented, such statutory and regulatory changes could facilitate completion of water-related projects that are delayed by administrative obstacles or legal challenges.

Conclusion and Implications

Projects for water storage and groundwater storage, such as those funded by Proposition 1, will likely be identified by the Strike Team as projects where federal and state funding opportunities can be maximized to increase water infrastructure and resiliency. Thus, they may benefit from not only additional funding, but from processes to streamline and expedite the projects. It remains to be seen what regulatory or other changes will be made to streamline and expedite proper review of such projects and whether those projects will move forward.
(Miles Krieger, Steve Anderson)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA DROUGHT AND FLOOD STREAMLINING TRAILER BILL: FLOODWATER DIVERSION EXCEPTION AND DROUGHT CONTROL MEASURES

As California reckons with the likelihood of ongoing issues relating to flooding and drought, Governor Newson has put forward a trailer bill attached to the 2024 budget that would amend existing sections of the Fish and Game Code and the Water Code to streamline flood and drought responses. One of the central facets of the bill is an amendment to the Water Code that seeks to streamline water projects with an eye toward helping the state meet its climate goals.

Background

The Drought and Flood Streamlining Trailer Bill (Drought and Flood Bill) was included as an amendment to the state budget. Such "trailer bills" are passed as part of the adoption of the state's budget in June without going through the typical committee process. A number of other measures aimed at advancing water policy have been included as trailer bills as part of the 2023-2024 budget process, including an infrastructure bill that would overhaul permitting and litigation for the Delta Conveyance Project. The use of trailer bills to implement substantive policy is controversial because such bills give lawmakers less opportunity to consider, amend, or challenge proposed policy.

Floodwater Diversion and Drought Control Measures

The Drought and Flood Bill includes a number of amendments aimed at streamlining floodwater diversion measures by excluding such activities from the usual restrictions included in Chapter 6 of the Fish and Game Code. The chapter provides for fish and wildlife protection and conservation by implementing the Lake and Streambed Alteration Program. The program requires that the Department of Fish and Wildlife review whether a proposed activity will substantially adversely affect an existing fish and wildlife resource and provides for steps an entity must take to proceed with the project while protecting those resources. Section 1610 includes an exemption for emergency work or projects. The Drought and Flood Bill would expand Section 1610's exemptions to include activities undertaken pursuant to Section 1242.2 of the Water Code, which concerns the diversion of flood flows for groundwater recharge. This amendment would therefore classify such diversions as emergency actions under Section 1610 that are exempt from the review and mitigation procedures otherwise required under Chapter 6. By exempting qualifying projects from California Department of Fish and Wildlife review, the Drought and Flood Bill is intended provide for faster project approval and implementation.

The Drought and Flood Bill would also amend Water Code section 1242 to clarify existing law to state that the diversion of flood flows for groundwater recharge is a beneficial use. The amendments to Water Code section 1242 would further provide that the beneficial use of such groundwater is not limited to only uses requiring subsequent extraction of the recharged water; protection of water quality may also be a beneficial use.

The Drought and Flood Bill would add section 1242.2 to the Water Code. If adopted, Water Codes section 1242.2, subdivision (a), would provide that the diversion of flood flows for groundwater recharge would not require an appropriative water right if a local or regional flood control agency, city, or county has alerted the public that flows downstream of the point of diversion are at immediate risk of flooding. To ensure that the diversion's purpose is confined to flood control, section 1242.2, subdivision (b) would provide that the diversions must cease when the flood conditions have abated. Section 1242.2, subdivision (c) would forbid the diversion of water to the following areas: (1) animal waste generating facilities, (2) agricultural fields where pesticides have been applied within 30 days, (3) areas where the release of water could cause infrastructure damage, and (4) areas that have not been actively irrigated for agricultural culti-

vation within the past three years, unless there is an existing facility on the land for groundwater recharge or managed wetlands. Section 1242.2, subdivision (c) would also forbid diversions to the Sacramento-San Joaquin Delta for the purposes of meeting flow requirements for achieving water quality or protecting endangered species in the Delta. Section 1242.2, subdivision (e) would address the use of existing infrastructure to facilitate diversions by requiring the use of existing facilities or temporary infrastructure where none is available. Section 1242.2, subdivision (e) would also emphasizes the temporary nature of the diversion by forbidding the person or entity making the diversion from claiming any water right based on that diversion. Last, section 1242.2, subdivision (g) would provide that preliminary and final reports must be filed by the party making the diversion. The ostensible purpose of exempting such diversions of floodwaters from the requirements for establishing or exercising appropriative water rights is to allow parties to capture floodwaters for recharge (perhaps with little warning) without first having to undertake the time-consuming permit application process otherwise required by the State Water Resources Control Board (SWRCB).

The Drought and Flood Streamlining Trailer Bill also amends a number of other Water Code provisions to include references to Section 1242.2. Specifically, Water Code section 1831d, subdivision (7) would provide that the SWRCB may issue a cease and desist order in response to a violation or threatened violation of a condition or reporting requirement for the diversion of floodwaters for groundwater recharge under Section 1242.2. Likewise, Water Code section 1846 would be amended to read that a person or entity may be subject to a maximum $500 fine for violating a condition or reporting requirement under Section 1242.2.

The Drought and Flood Bill would also amend Water Code section 13198 to provide the definitions for the provisions relating to drought relief in Article 6 of the Water Code. The amendment would add the phrase "water use reduction and efficiency equipment" to Water Code section 13198, subdivision (c)(1)(G) to define "interim or immediate relief" to include construction or installation of water use and efficiency equipment. The amendment would also add Section 13198, subdivision (c)(1)(K) to include groundwater recharge projects pursuant to the proposed Section 1242.2 as additional tools for drought relief.

Last, the Drought and Flood Control Bill would amend Water Code section 1398.2 to exempt information related to drought emergency activities from the public posting and notice requirements of Government Code sections 7405 and 11546.7. State agencies would alternatively be required to post an accessible version of any materials related to the emergency response as soon as practicable.

Conclusion and Implications

If adopted as currently drafted, the Drought and Flood Bill will have potentially broad implications for the capture and use of floodwaters for groundwater recharge and for drought response more generally. The use of a trailer bill to bring this measure before the Legislature as part of the budget process remains controversial, and the nature of the trailer bill may obscure a careful analysis of the bill's impacts or the extent of opposition to the substance of the bill. For example, it remains to be seen whether the bill will affect pending water rights petitions for flood flows pursuant to existing rules for appropriating water. The full text of the Drought and Flood Bill is available online at: https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/910.
(Brian Hamilton, Sam Bivins)

REGULATORY DEVELOPMENTS

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD TO TAKE CRITICAL STEPS TOWARD PLACING GROUNDWATER BASINS ON PROBATION AND ON PATH TO INTERVENTION

Following multiple attempts to submit and revise Groundwater Sustainability Plans (GSPs), Groundwater Sustainability Agencies (GSAs) responsible for managing six large basins may soon be placed in probationary status and potentially subject to intervention from the California State Water Resources Control Board (State Water Board). Such intervention would be costly in many respects. The State Water Board is beginning the intervention process now, beginning with probationary hearings.

Background

California's Sustainable Groundwater Management Act of 2014 (SGMA) prioritizes local groundwater management. The law requires formation of groundwater sustainability agencies to develop and implement groundwater sustainability plans and to take related actions to avoid long-term "undesirable results." GSPs musts be submitted to DWR for review. GSPs that do not substantially comply with statutory requirements and DWR emergency regulations must be corrected until they achieve compliance.

A failure of compliance may result in the loss of local control, through which the State Water Board intervenes and imposes direct basin management. Such management would likely comprise blunt pumping reductions and imposition of hefty groundwater pumping fees. SGMA provides that even after State Water Board intervention, local GSAs must prioritize achieving compliance in order to achieve and regain local management responsibilities. In other words, intervention is intended to be a temporary rather than permanent status.

GSPs Deemed Inadequate

In March 2023, DWR deemed six groundwater sustainability plans to be inadequate, placing those plans on a pathway toward potential intervention by the State Water Board. The six basins include: (1) Delta Mendota, (2) Chowchilla, (3) Kaweah, (4) Tulare Lake (5) Tule and (6) Kern County.

The inadequate designation follows prior attempts to remedy previously incomplete GSPs. Basins designated by the Department of Water Resources (DWR) as being subject to conditions of critical overdraft were required to adopt and submit GSPs by January 2020. DWR is statutorily required to review submitted plans within two years. GSPs for these basins were deemed incomplete in January 2022, and given six months to submit revisions. Revised plans were submitted in the summer of 2022 but ultimately found inadequate by DWR, citing primarily failures to sufficiently address chronic and continuing overdraft, accelerating land subsidence and impacts on domestic wells.

Probationary Status

When a GSP is deemed inadequate by DWR, the State Water Board considers whether to place the basin into probation. During the probationary period, GSAs may be allowed time to address and correct issues. If they remain uncorrected, the State Water Board may proceed with developing and implementing an Interim Plan, which is most likely to be characterized by significant reductions in pumping and the imposition of expensive fees. Probationary basins are generally provided one year to attempt to make necessary corrections. The process of entering and exiting probation must be open and transparent, including through public State Water Board meetings.

State Water Board Prioritization for Probationary Basins

At a recent board meeting, the State Water Board received a staff presentation outlining factors to consider in determining a potential probationary status. Staff identified and recommended prioritizing the six basins into two groups. The "first priority basins" include Kaweah, Tulare Lake, Tule and Kern

County. These basins were described by State Water Board staff as continuing to see groundwater declines without a clear or reliable path to correction.

The "second priority basins" include Delta Mendota and Chowchilla, which State Water Board staff describe as basins that, though experiencing severe challenges, may be correctable in a shorter timeframe.

Based upon those priority levels, probationary hearings could begin as early as December 2023 and continue through October 2024. This timeline is subject to change.

Basin probationary hearings before the State Water Board must be publicly noticed. Cities and counties must receive at least 90 days' notice. Known pumpers must be notified at least 60 days in advance. State Water Board staff must present, prior to the hearing, a list of deficiencies in a public report. Local stakeholders and others may comment on the report. Staff then consider public comments and must issue a revised report, if needed, and a proposed probationary order for consideration at the public hearing.

In the interim, GSAs are expected to continue working hard to avoid and/or exit probationary status.

Conclusion and Implications

SGMA implementation has presented significant challenges throughout much of the State. A significant number of basins with GSPs that DWR deemed complete remain subject to legal challenges and comprehensive groundwater basin adjudications to determine water rights under the "streamlined groundwater adjudication" law. The six basins now facing potential probation and intervention may still, technically, avoid that status and retain local management responsibilities. However, the timeline and effort to do so becomes more complicated and intensive as the State Water Board contemplates assuming that control. State Water Board intervention and an interim plan directed and implemented from Sacramento would likely see dramatic pumping reductions and hefty groundwater management fees—not including creative and tailored solutions that local stakeholders could otherwise potentially advance. (Derek Hoffman)

SURFACE WATER COALITION DELIVERY CALL POST-HEARING BRIEFING COMPLETE—PARTIES AWAITING FINAL ORDER FROM THE IDAHO DEPARTMENT OF WATER RESOURCES

The parties in the Surface Water Coalition delivery call proceedings (IDWR Docket No. CM-DC-2010-001) completed a four-day evidentiary hearing (June 6-9, 2022) concerning IDWR updates to its curtailment date methodology modeling and calculations under the agency's *Fifth Amended Final Order Re Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (Apr. 21, 2023) (Order). The Order formulae are used to conjunctively manage ground and surface water supplies within the Eastern Snake Plain Aquifer (ESPA) administrative boundary—attempting to balance typically junior-priority groundwater use against that of senior surface water users under Idaho's version of the prior appropriation doctrine. Arguably, the Order's modeling shift from steady state to transient modeling is the largest change to the Department's curtailment analysis. Under the past decade-plus of steady state modeling, groundwater use curtailment typically affected priorities ranging from the later 1970s to the mid-to-late 1980s. Under transient modeling, the current projected curtailment date is December 30, 1953, to mitigate for a projected surface water flow shortfall of approximately 75,000 acre-feet. Can Idaho's Conjunctive Management Rules adequately bridge the reasonable administration of interconnected ground and surface water supplies?

Surface Water and Groundwater Supplies (and Their Development) Are Different

Idaho's prior appropriation doctrine, and its Conjunctive Management Rules face a seeming immediate legal and policy divide regardless of practical application-related questions in the field. While Idaho's prior appropriation doctrine is rooted in the concept of "first in time is first in right" as with nearly

all other western states, it is tempered by the maximum (or optimum) use and development doctrine.

In the context of surface water use, one's use is measured against a reasonableness standard—wasteful senior users (in the contexts of diversion methods, conveyance losses, and end application) are not entitled to curtail junior users to perpetuate their wasteful ways. In the groundwater regime, Idaho Code § 42-226 implements the concept of reasonable pumping levels—a senior user with a shallow well does not get to effectively handcuff the future development of an aquifer with their shallow well; rather, the senior can be required to drill deeper so that additional development of the aquifer can occur (provided that the same is not over-drafted and mined).

More practically speaking, surface water is typically easier to administer because it can be seen and its flows readily adjusted accordingly. On the other hand, groundwater (depending on the depth of one's well) is almost always available to pump—the overall availability is unseen and the effects of pumping (or over-pumping) extend in all directions and typically takes time (weeks, months, and oftentimes years) to manifest.

At bottom it seems that Idaho's Conjunctive Management Rules are (or will likely be) destined to be shaped more by policy than by strict application of the prior appropriation doctrine. As the Idaho Supreme Court has already noted in the context of reviewing application of the rules:

> Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public interest in this valuable commodity, lies an area for the exercise of discretion by the Director [of the Idaho Department of Water Resources]. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* 143 Idaho 862, 880 (2007).

While Idaho is still largely dominated by agriculture, population growth in urban areas and constantly evolving socio-economic values are seeping into Idaho's water rights administration calculus. What is "reasonable" is a very subjective question, and largely depends on who you talk to.

What is Material Injury—Peak Flow, Consumptive Requirement, or Something Else?

In light of the overarching "reasonableness" standard, groundwater users subject to a potential curtailment priority date of December 30, 1953 are questioning what constitutes material injury to senior surface water users—injury rising to the level requiring curtailment or mitigation to correct and abate. There seems that there may be some disconnect between IDWR's ESPAM model (used under the Order) on paper and conditions on the ground. For example, of the Surface Water Coalition member irrigation water delivery entities, the Twin Falls Canal Company (Company) is typically the most oft-"injured" member of the group in terms of modeling. And this year (2023), the ESPAM model predicts that the Company will be the only injured party, projected to suffer an in-season demand shortfall of approximately 75,000 acre-feet of surface water supply lost to junior groundwater pumping on the ESPA. But is that 75,000 acre-feet of loss critical on paper, or critical on the ground in terms of wet water delivery? Groundwater users contend that the injury is paper-based on not material on the ground.

They argue as much because according to water delivery records and hearing-based testimony of Company personnel, Company stock shares (water delivery entitlements) are set to the field headgate delivery of 5/8 of a miner's inch to the acre of continuous flow through the irrigation season. That delivery entitlement equals roughly 3.7 acre-feet of water application per acre over the course of a five-month irrigation season. The most water-intensive crop typically grown within the Company's service area is alfalfa with a general ET rate (water consumptive use requirement) of roughly 3.0 acre-feet per acre (when harvested in multiple cuttings per season). In sum, so long as the Company delivers 5/8 inches to the acre, its shareholders are able to grow all types of crops typically grown within its service area—shareholders are not injured and have no need to fallow ground or grow less-valuable crops.

Based on this and other data provided by the Company at hearing, groundwater users assert that there were only five years from 1990 to 2022 (32 years) where the Company was unable to deliver at least 5/8 inches (3.7 acre-feet) per acre to the field headgate of its shareholders. By contrast, the Department's modeling of demand shortfall from

2000-2022 (22 years) under a steady state model predicted shortfalls in twelve of 22 years. Accordingly, groundwater users contend that there is an injury disconnect between paper and reality—a disconnect that is further skewed against them in the transition from steady state modeling to transient modeling (recall the curtailment priority date shift from the 1970s and 1980s to 1953 presently).

And when does modeled curtailment intersect with the "maximum use and development" doctrine? At what point does modeled curtailment become unreasonable? For example, and on paper, the Order methodology predicts a Company demand shortfall of 75,200 acre-feet (*see Final Order Re April 2023 Forecast Supply (Methodology Steps 1-3* (Apr. 21, 2023)). Arriving at the 1953 curtailment date is the modeled requirement to curtail approximately 1.8 million acre-feet of groundwater pumping to yield 75,200 acre-feet of additional surface water flow in the Snake River in the Blackfoot to Neeley reach for TFCC use. Further extrapolation, again on paper, suggests the need to curtail the irrigation of approximately 700,000 acres to mitigate for the predicted demand shortfall. These are sobering numbers and ratios for sure.

Conclusion and Implications

These are the types of issues and arguments now pending before the Director in a matter that will almost assuredly be appealed at least to district court, if not further. It remains to be seen in the context of the ESPA just how sharp the edges of the prior appropriation doctrine remain.
(Andrew J. Waldera)

WASHINGTON STATE DEPARTMENT OF ECOLOGY IMPLEMENTS GUIDANCE AND ADMINISTRATION OF THE WATER BANKING PILOT PROGRAM

Approximately two years ago, the *Western Water Law & Policy Reporter* we published an article about the Washington State Department of Ecology's (Ecology) effort to update its guidance and policy for the administration of the Trust Water Rights Program (TWRP) Chapter 90.42 RCW. Originally established in 1994, the TWRP was developed to allow water rights to be placed in trust to meet unmet needs including instream flows, mitigation for senior water rights and existing water systems. *See* SL 1991, Ch 347. The use of the TWRP was expanded in 2003 to allow "Water Banking" to provide a productive method to facilitate the voluntary transfer of water rights to achieve various water resource management objectives. In 2021, after a news article on a controversial water banking proposal, [Bush, Evan, "Wall Street spends millions to buy up Washington State Water," November 19, 2019, available at: https://www.seattletimes.com/seattle-news/environment/wall-street-spends-millions-to-buy-up-washington-state-water/], the Legislature directed Ecology to: (1) improve transparency for water banks, (2) refine recommendations to address concerns about out of basin water right transfers, water banking and use of the TWRP and (3) establish a water banking grants pilot program. This article serves as an update on Ecology's efforts.

Policy 1010, Administration of the Statewide Trust Water Rights Program

In June 2022, Ecology published the Water Resources Program Policy and Interpretive Statement on Administration of the Statewide Trust Water Rights Program, POL-1010, after it was made available for two rounds of public comment. In the same month, Ecology published the revised Water Resources Program Guidance on Administering the Trust Water Rights Program, Publication 22-11-012, after the first iteration was made public for commenting.

Policy statements are used to guide and ensure consistency in the administration of laws and regulations. Ecology states that the specific purpose of POL-1010 is to provide transparency and consistency in the administration of the TWRP when considering water banks and water right donations. (The Washington Department of Ecology's Water Resources Program Policy and Interpretive Statement on Administration of the Statewide Trust Water Rights Program,

POL-1010, can be found at https://appswr.ecology.wa.gov/docs/WaterRights/wrwebpdf/pol1010.pdf).

Guidance documents are used to advise agency staff on how to carry out a procedure or action. Ecology's Program Guidance supplements POL-1010 by establishing the requirements and procedures for creating trust water rights under the TWRP. These can be seen in detail in Appendix A: Summary Matrix of Trust Water Right Processing, which contains the mechanisms, application forms, public notice information, timelines, and explanations for each step in the process applied to Water Banks, Short-Term Leases, Donations, and Water Conservation Projects.

Ecology's Update to the Legislature

In compliance with the Legislature's request, Ecology subsequently produced the Water Right Transfers, Water Banking, and Trust Legislative Report, Publication 22-11-023, on December 1, 2022. Agency reports are used by the Legislature as a status update to ensure that budget allocations are used for their intended purpose as well as to hear policy recommendations from the agency as to how the framework of the desired agency action can be improved. In compliance with the Legislature's request, Ecology outlined the success and challenges faced since implementing the Pilot Program as well as actions taken to ensure transparency to the public in the form of improving the Ecology website and posting notices any time a trust water right is applied for or created. Furthermore, Ecology made three recommendations for the Legislature to improve "the state's framework for water banking, water trust, and water right transfers."

First, Ecology recommended that the Legislature should continue to allocate funding to the Pilot Program within the Governor's FY 2023-25 Capital Budget proposal. Second, Ecology recommended that the Legislature explore the possibility of creating a statutory requirement that all water right sales, transfers, or ownership changes must be reported to the state for public viewing. Lastly, Ecology recommended that the Legislature explore implementing a requirement wherein the public interest be evaluated when determining whether to grant or deny surface water right change applications. Ecology's recommendations stem from engagement with Tribes and stakeholders to address issues identified by these groups regarding the TWRP, such as concern about private speculation, out-of-basin water transfers, and water right investment. Whether the Legislature chooses to pursue these recommendations are entirely within its discretion.

Funding for Rural Headwater Counties Using the Statewide Trust Water Rights Program

Alongside the Policy statement and Guidance document, the 2021 (FY21-22) operating budget (ESSB 5092) instructed Ecology to report to the Washington State Legislature (Legislature) regarding work conducted pursuant to the Water Banking Grants Pilot Program. The Water Banking Pilot Program allocated up to $14 million in funding to buy water rights and pay for related costs for the development of water banks in rural headwater counties. The funding is available only to public entities and partners to preserve water rights in their basins for local use and provide benefits for streamflow.

Conclusion and Implications

As of the close of the 2023 biennium, four applications requesting funding under the Program had been received. The three applications submitted consisted of Chelan County in December 2021, the Okanogan Conservation District in July 2022, Yakima County in September 2022, and a second Okanogan Conservation District grant in May 2023. The Legislative Report stated that the Chelan County application has been approved but is still being negotiated, and both the Okanogan and Yakima applications are currently under evaluation and technical review by Ecology. The 2023 Legislature reallocated the unappropriated Rural Headwater funds for the 2023-2025 biennium and intends to reopen the grant process for additional banks in rural counties. (*See:* https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Water-banks).

(Nick Tovar, Jessica Kuchan)

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 ground-

water, 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 n 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 situation. . . 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 "reason-

able 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)

COLORADO SUPREME COURT DECLINES OPPORTUNITY TO CLARIFY STATE OWNERSHIP OF NAVIGABLE RIVERBEDS, DECIDES CASE ON STANDING

State v. Hill, 2023 CO 31 (2023).

The Colorado Supreme Court, on June 5, 2023, concluded Roger Hill lacked standing to pursue a declaratory judgment "that the State of Colorado owns a segment of riverbed that was navigable for title at statehood" because he did not have a legally protected interest independent of the State of Colorado's (State) alleged ownership of the riverbed. The Supreme Court determined that an individual does not have standing to pursue a declaratory judgment of State ownership when his or her asserted legally protected interest rests entirely on an antecedent question of State ownership Through this ruling, the Supreme Court declined the opportunity to opine on the merits of the underlying assertion that the State owns title to navigable riverbeds and to clarify whether, and to what extent, the public trust doctrine should apply to the beds of navigable rivers in Colorado.

Background and Procedural History

A comprehensive background of the complex procedural history of this case previously appeared in the April 2022 edition of *Western Water Law and Policy Reporter*. *See*, Colorado Court of Appeals Allows 'Freedom to Wade' Case to Advance to Trial on the Merits, 26 *W. Water L. & P'lcy Rptr.* 165, 165-167 (Apr. 2022). To briefly recap, Roger Hill is a fly fisherman whose favorite fishing hole is located along the Arkansas River. Mark Everett Warsewa and Linda Joseph (collectively: Warsewa) own the land abutting the river and have a home overlooking the fishing hole. Hill's repeated attempts to fish there caused a long-standing dispute between the parties and eventually led to Warsewa chasing Hill off the property with threats and violence.

Hill filed a complaint against Warsewa in the Fremont County District Court asserting two claims—the first to quiet title to confirm the State owns the navigable riverbeds in trust for the public, and the second for a declaratory judgment that Warsewa has no right to exclude Hill from the riverbed at the subject location. The case was removed to federal court, where the State intervened, and eventually remanded back to the District Court. In both the federal and

state court proceedings, the State argued that it alone may decide whether and when to pursue its property rights, and thus Hill did not have standing to bring his claims. On remand, the District Court agreed with the State and dismissed both of Hill's claims for lack of standing.

The Court of Appeals' Decision

On appeal, Hill argued that the portion of the river that traverses Warsewa's property was navigable at statehood, title to the riverbed transferred to the State by law at statehood under the Equal Footing Doctrine, and therefore the disputed riverbed is now public land owned by the State. If the riverbed belongs to the State, Hill claimed, then he was not trespassing by wading in the river.

The Court of Appeals upheld the District Court's dismissal of the quiet title claim but reversed the dismissal of the declaratory judgment claim. The Court of Appeals agreed that Hill had no claim to title, and therefore could not request a declaration of the State's property rights without a personal interest. However, the Court of Appeals determined Hill's right to wade and fish in the river at the location in question was a personal interest that gave him standing to bring a declaratory judgment claim, arguing that Warsewa, as a private landowner, could not exclude the public from land they did not own.

The Colorado Supreme Court's Decision

The Supreme Court granted the State's petition for *certiorari* but limited its review to one issue: whether Hill had a legally protected interest that afforded him standing to pursue his claim for a declaratory judgment "that a river segment was navigable for title at statehood and belongs to the State."

Right to Fish on Public Land Rested Entirely on an Antecedent Question of the State's Ownership

The Supreme Court found Hill's claimed right to wade and fish on public land turned on his underlying assertion that the State owned the disputed riverbed. The Supreme Court reasoned it was not possible to adjudicate whether Warsewa had an ownership interest in the riverbed without also considering whether the land is owned by the State in trust for the public. For that reason, Hill must prove the State's alleged ownership of the riverbed as a necessary prerequisite to demonstrate a legally protected interest to meet the threshold standing issue.

The Supreme Court found it was not possible for the court to conclude that Hill had a legally protected interest without also assuming Hill would win on the merits of whether the State owned the disputed property. The Supreme Court held that Hill's trespass claim only existed contingent on the quiet title claim of the State's ownership, which the Court of Appeals already determined he could not pursue. For those reasons, Hill's right to wade and fish on the disputed riverbed could not rest on the underlying antecedent question of the State's ownership or afford Hill standing to pursue a declaratory judgment claim.

Declaration of the State's Property Interest Cannot Be a Necessary Precursor to Any Individual Legally Protected Interest

The Supreme Court agreed with the Court of Appeals that allowing Hill to pursue his declaratory judgment claim would simply be a quiet title in the name of State under a different name. Thus, Hill could not, under the guise of declaratory judgment, seek any declaration regarding State ownership of the riverbed and consequently he did not have standing to pursue such declaration as a necessary precursor to his individual legally protected interest.

Conclusion and Implications

The Supreme Court ruled Hill did not have standing to pursue a declaratory judgment because he did not demonstrate an individual legally protected interest independent of the State's ownership of the riverbed. By dismissing Hill's claim for lack of standing, the Supreme Court declined the opportunity to opine or rule on the merits of the underlying assertion that the State owns the disputed riverbed and to address or resolve the issue of whether, and to what extent, the public trust doctrine should apply in Colorado. Arguably, this decision is in fact that Court's ruling on that issue—if Mr. Hill did not have standing to assert the State's ownership likely no other private party could either and thus the current riverbed ownership and access questions are conclusively answered. Although this decision did not provide the clarity many hoped for, the Supreme Court's decision to punt on this issue is perhaps informative—the

Court does not wish to upset the current understanding of ownership and river access in the state. Thus, after many years of litigation in multiple courts, the final outcome remains the same: from a legal standpoint, there are no navigable for title rivers in Colorado and therefore the bed and banks of all rivers and streams are owned by the underlying property owner. The Court's opinion is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2022/22SC119.pdf.
(Lisa Claxton, John Sittler)

Western Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108