Volume 18, Number 8
October 2023

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

FEATURE ARTICLE

WATER NEWS

REGULATORY DEVELOPMENTS

PENALTIES AND SANCTIONS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT FEDERAL DECISIONS

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/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster.
Eastern Water Law & Policy Reporter is a trademark of Argent Communications Group.

EWL

FEATURE ARTICLE

THE SUPREME COURT REJECTS THE NAVAJO NATION'S BREACH OF TRUST CLAIM FOR WATER

By Miles Krieger

On June 22, 2023, in a 5-4 decision, the United States Supreme Court rejected a breach of trust claim by the Navajo Nation (Nation) that the United States failed to (1) assess the water needs of the Nation and (2) act so as to secure water to satisfy those needs as required by an 1868 treaty. The Court held that the Nation had not identified a specific, trust-creating duty in the treaty, which created the Nation's later-expanded reservation as a homeland for the Navajo people. The Court's holding is significant for several reasons.

First, the Court's decision clarifies that federally recognized tribes may only bring breach of trust claims against the United States if they can identify a specific, trust-creating statute, treaty, or regulation, and the United States has expressly accepted that duty. Second, the Court's decision confirms that the United States Congress has plenary authority over federally recognized tribes and may structure its trust relationship with tribes in its capacity as sovereign. Of note, the Court's decision raises the broader question of whether the judiciary must take a subservient role to legislative determinations regarding tribal water needs. Finally, as a practical matter, the Court's decision may present an opportunity for the Nation to pursue adjudication—including quantification—of *Winters* rights to the Colorado River under the *Arizona v. California* decree.

[*Arizona, et al., v. Navajo Nation, et al.*, ___US___, Case No 21-1484 (June 22, 2023).]

Historical Background

With over 300,000 enrolled members, the Nation is one of the largest tribes in the United States. Today, the reservation spans more than 17 million acres across Arizona, New Mexico, and Utah. The reservation lies almost entirely within the Colorado River Basin and, as currently configured, abuts or encompasses the Colorado River, the Little Colorado River, and the San Juan River.

The reservation was established pursuant to two treaties in 1849 and 1868. In short, the 1849 treaty purported to end hostilities between the Navajo people and the United States, and the United States promised to create territory specifically for the Navajo people. Despite the treaty, hostilities persisted, and the United States forcibly removed the Navajo from their ancestral homelands to Bosque Redondo, resulting in several years of significant suffering and hardship among the Navajo. In 1868, the Navajo and United States agreed to a second treaty, formally ending hostilities and creating the Nation's original reservation as a permanent homeland for the Navajo people. Under the 1868 treaty, the United States agreed, among other things, to build schools, provide teachers, and supply seeds and agricultural implements for up to three years, in addition to providing funding for the purchase of sheep, goats, cattle, and corn.

Legal and Procedural Background

Under the *Winters* doctrine, when the federal government creates a federal reservation—whether for a tribe, the military, or for wildlife purposes—it impliedly reserves sufficient water appurtenant to the reservation to satisfy the purpose of the reservation, provided the water is surplus to existing uses. *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978). Breach of trust claims, on the other hand, require a tribe to establish that an applicable treaty, statute, or regulation, creates a specific trust duty, and

that the United States has expressly accepted that duty. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-174 (2011).

In 2003, the Nation sued the United States Department of the Interior (Interior), the Secretary of the Interior (the Secretary), the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively: Federal Parties), bringing claims under the National Environmental Policy Act and a breach of trust claim for failure to consider the Nation's as-yet-undetermined water rights in managing the Colorado River. Several parties, including Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities, intervened to protect their interests in the Colorado's waters.

The U.S. District Court dismissed both claims on standing grounds and sovereign immunity. The Ninth Circuit reversed as to the breach of trust claim, holding that it was not barred by sovereign immunity. *Navajo Nation v. Dep't of Interior* (*Navajo I*), 876 F.3d 1144, 1174 (9th Cir. 2017). After re-considering the breach of trust claim, the District Court again dismissed the Nation's complaint without leave to amend. The District Court reasoned that any attempt to amend the complaint was futile because the Supreme Court reserved jurisdiction over allocation of rights to the Colorado River in *Arizona v. California* (*Arizona I*), 373 U.S. 546 (1963), thus depriving the District Court of jurisdiction. The District Court also ruled that the Nation did not identify a specific treaty, statute, or regulation that imposed an enforceable trust duty on the federal government that could be vindicated in federal court. The Nation appealed.

At the Court of Appeals

The Ninth Circuit Court of Appeals held that the U.S. District Court erred in dismissing the complaint because, in contrast to the District Court's determination:

> . . .the amendment was not futile. Although the Supreme Court retained original jurisdiction over water rights claims to the Colorado River in *Arizona I*, the Nation's complaint does not seek a judicial quantification of rights to the River, so we need not decide whether the Supreme Court's retained jurisdiction is exclusive. […]

The Ninth Circuit also reversed the District Court's ruling on the Nation's breach of trust claim. According to the Ninth Circuit, the Nation's unquantified *Winters* rights to the Colorado River provided a basis on which the Nation could predicate a breach of trust theory, "especially when considered along with the [Federal Parties'] pervasive control over the Colorado River." The Ninth Circuit thus remanded the case back to the District Court to allow the Nation to amend its complaint to assert a breach of trust claim. The Federal Parties and intervenors filed a petition for writ of *certiorari* with the United States Supreme Court, which the Supreme Court granted.

The Supreme Court's Decision

Each side made a number of arguments before the Court. According to the Federal Parties, United States Supreme Court precedent holds that a breach of trust claim only arises if there is a "specific, applicable, trust-creating statute or regulation." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*). Accordingly, the "general trust relationship" between the federal government and tribes is not a specific, applicable, trust-creating statute or regulation. (*Jicarilla*, 564 U.S. at 173.) Instances where the Court determined that a specific trust-creating duty existed include where the federal government assumed "full responsibility to manage Indian resources and land for the benefit of the Indians" (*United States v. Mitchell*, 463 U.S. 206, 224 (1983) (timber resources managed for the benefit of individual tribal members)), or where the applicable statutes expressly designated the federal government as trustee of a specific trust corpus (*White Mountain Apache Tribe*, 537 U.S. 465, 474-476 (2003) (federal government exercised plenary control of Fort Apache Military Reservation held in trust for tribe, including daily supervision and occupation)).

The Nation, on the other hand, argued that the United States promised it sufficient water for the reservation to serve as a permanent homeland when it entered into the 1849 and 1868 treaties. In other words, the treaties' promise of a permanent home land also included the promise of sufficient water. Under principles of treaty interpretation, an Indian treaty must be read to give effect to the parties' intentions and the agreement's purpose, which means in

favor of, and not against, tribal rights. *See*: *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979). In addition, the Nation argued that an enforceable duty exists when a tribe can identify a specific rights-creating or duty-imposing source of law that bears the hallmarks of a conventional fiduciary relationship. *United States v. Mitchell*, 463 U.S. 206, 225 (1983). According to the Nation, the treaties provided the substantive source of law bearing the hallmarks of a conventional fiduciary relationship.

No Duty to Take Affirmative Steps to Secure Water for the Navajo Nation

The Court rejected the Nation's argument that the 1868 treaty imposed a duty on the United States to take affirmative steps to secure water for the Nation. First, the Court reasoned that the 1868 treat "set apart" the Nation's reservation for the "use and occupation" of the Nation, but did not contain any rights-creating or duty-imposing language that imposed a duty on the United States to take affirmative steps to secure water for the Nation. In support of this view, the Court observed that the 1868 treaty imposed a number of specific duties on the United States; for example, to construct schools, provide teachers, and supply seeds and agricultural implements for up to three years. Despite the implication that seeds and agricultural implements are only usable if water is also provided, the Court noted that the Nation's reservation already contains a number of water sources that the Navajo people have used and continue to rely on. In other words, the fact that the United States agreed to provide seeds and farm implements did not also mean that the United States agreed to secure necessary water, let alone to do so indefinitely into the future.

The Court also rejected the Nation's argument that the United States' control over the Colorado River, including its role as federal watermaster, supported a determination that the United States owed the Nation a trust duty to secure water. According to the Court, in agreeing with the Federal Parties, "control alone" does not give rise to a breach of trust claim. Supreme Court precedent holds that a breach of trust claim only arises if there is a "specific, applicable, trust-creating statute or regulation." *Jicarilla*, *supra*, 564 U.S. at 177; *Navajo I*, *supra*, 537 U.S. at 506. As a sovereign, the United States does not occupy the same position a private trustee, which means that Congress:

> . . .may style its relations with the Indians… without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is limited or bare compared to a trust relationship between private parties at common law. *Jicarilla*, *supra*, at 174.

Thus, the "general trust relationship" between the federal government and tribes is not a specific, applicable, trust-creating statute or regulation. *Id.* at 173.

In a concurring opinion, Justice Thomas questioned whether a cognizable trust relationship exists between the federal government and tribes at all, but the majority did not adopt Justice Thomas' reasoning.

Broad Limitations on the Role of the Court in Addressing Tribal Water Rights

Finally, the Court identified seemingly broad limitations on its role in federal Indian law, including tribal water rights. Notably, the Court stated that "it is not the Judiciary's role to update the law" in reference to the likelihood that the 1868 treaty did not provide for all the Nation's water needs 155 years later. Instead, the Court explicitly identified Congress' authority to "address the modern water needs of Americans, including the Navajos, in the West." For its part, the Court must stay in its:

> . . .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.

In other words, according to the Court, the 1868 treaty should be interpreted as a historical document, and only if it clearly provides for ongoing or contemporary obligations will the Court find a sufficiently articulated (and accepted) duty to compel action by the federal government.

Finally, the Nation may have an opening to assert *Winters* rights to the Colorado River. The Court recognized that the Nation "may be able to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their

claimed interests." In dissent, Justice Gorsuch emphasized that:

> . . .it is hard to see how this Court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim.

Conclusion and Implications

It is not clear, however, what the scope of the Nation's *Winters* rights to Colorado River may be, given that the original reservation did not abut the Colorado River, *i.e.* was not appurtenant to it, and was only later expanded to abut the river. As of the date of publication, the Nation is considering its options.

The Supreme Court's decision leaves intact Congress' authority to structure the United States' trust relationship with tribes, binding the federal government only to those obligations it expressly accepts. The Court's decision correspondingly limits the existence of enforceable trust duties to those specifically set forth in the specific text at hand, whether it be a treaty, statute, or regulation. Not only will the Court only enforce specifically set forth trust duties, it will not judicially create any such duties, for instance based on principles of treaty interpretation. It is not clear, then, what role the judiciary will play moving forward in formulating remedies for disputes involving tribal water needs, particularly if such needs are, in the words of the Court, the responsibility of the legislative and executive branches. Nonetheless, it is possible the Nation pursues a quantification of *Winters* rights in the Colorado River at a future date. The Court's opinion is available at: The Suprme Court's opinion is available at: https://www.supremecourt.gov/opinions/22pdf/21-1484_aplc.pdf.

Miles B. H. Krieger is an associate in Best Best & Krieger LLP's Environmental Law & Natural Resources practice group, resident in the firm's Riverside, California office.

Miles' practice focuses on state and federal environmental litigation and regulatory issues, with an emphasis on California water rights matters. Miles represents both public and private sector clients. His litigation experience includes: water rights disputes including tribal water rights, and disputes under the Sustainable Groundwater Management Act, Solid Waste Management Act, and in inverse condemnation and taxation matters involving tribal lands.

Miles also has experience providing public and private clients with strategic legal and regulatory advice related to: petitions to the State and Regional Water Quality Control Boards, water rights transfers, and practice under CERCLA, Williamson Act, Porter-Cologne and federal Clean Water Act. Miles serves on the Editorial Board of the *Western Water Law & Policy Reporter*.

EASTERN WATER NEWS

DROUGHT: WATER AVAILABILITY AND ALLOCATION CHALLENGES IN THE OGALLALA AQUIFER REGION OF THE GREAT PLAINS

Drought and water allocation issues in the United States have become synonymous with the Desert Southwest. Record-breaking dry spells, groundwater depletion, and allocation challenges, however, are in no way foreign to other regions of the country. The Great Plains region, which includes portions of eastern Colorado and eastern New Mexico, has increasingly become a focal point for water challenges in America. The Ogallala Aquifer, in particular, is under increasing stress from extended periods of drought and as populations grow and spread out across the Basin. This aquifer helps grow food in one of the world's most important food-producing regions, a region which spans across several States. Drought and allocation challenges make this problem only more complex. Ultimately, despite some regional improvements in infrastructure, what lies ahead remains challenging for water access and allocation in eastern New Mexico, as the Great Plains and the Ogallala Aquifer move on toward an uncertain future.

The Aquifer

The Ogallala Aquifer is the largest freshwater aquifer in all North America. The aquifer lies beneath several states—including South Dakota, Wyoming, Nebraska, Kansas, Colorado, Oklahoma, New Mexico, and Texas. is no surprise that an aquifer of this size is responsible for supporting one of the most agriculturally productive regions of the world. The Great Plains region of the United States, which is currently facing a historic drought, spans across the Ogallala Aquifer. As in other parts of the country, ongoing drought in addition to a quickly depleting aquifer call for appropriate solutions before it's too late.

Eastern New Mexico is in the Southern High Plains Section of the Great Plains. The Ogallala Aquifer lies directly beneath this section of New Mexico. Portales, New Mexico, home to approximately 12,000 residents and Eastern New Mexico University, temporarily restricted certain water usage to make up for hot, dry weather this summer and its impact on the City's water supply over the summer. Portales and its neighboring communities have relied on the Ogallala Aquifer for generations. However, decades of heavy usage is forcing Portales to begin changing course. This section of Eastern New Mexico provides a third of the agricultural products of the state, and most of the crops grown here feed livestock in both New Mexico and Texas.

Local officials are encouraging residents to cut back. Officials are working on a pipeline project that's been over a half-century in the making and will likely finish in the next few years, thanks to funding from the federal Infrastructure Investment and Jobs Act, which was enacted in 2021. The plan is to have a new pipeline system that will take water from Ute Reservoir, about 80 miles from Portales, and make the area less reliant on wells that strain the Ogallala Aquifer. Using less water directly from the aquifer will help conserve aquifer water levels. However, concerns remain about the completion of the project, as well as the demand that the change of water policy will cause to Ute Reservoir due to the ongoing drought.

Impacts to Agriculture

Similar concerns plague many sections of the Ogallala Aquifer. The Aquifer's $35 billion yearly crop production has come at a cost—farmers are pulling water out of the Ogallala faster than rain and snow can recharge it. Between 1900 and 2008, 89 trillion gallons were drained from the Aquifer—equivalent to two-thirds of Lake Erie. In Kansas, for example, dry wells now account for about 30 percent of the Aquifer. It is projected that within 50 years the entire aquifer will have been 70 percent depleted. While both continuing drought and high farmer withdrawal are factors—there may be additional factors regarding the rapid depletion of the Aquifer. For example, farmers may be draining the Ogallala Aquifer because state and federal policies are encouraging them to do so. Federal subsidies are putting farmers on a "treadmill," working harder to produce more crops while draining the resource that supports their livelihood.

Government payments are creating an unsustainable cycle of overproduction that intensifies water use—as subsidies encourage farmers to expand and buy expensive equipment to irrigate larger areas. Paradoxically, for quite some time, federal, state, and local conservation efforts have mainly targeted individual farmers, providing ways for individuals to voluntarily reduce water use or adopt water-efficient technologies. And, despite these efforts, the status of the Aquifer's decline has not improved.

Farmers in other states that depend on the Aquifer are just as concerned about the future. Following years of dry land and lack of rainfall, farmers in the High Plains are depending more and more on the Ogallala Aquifer. The consequences of such a high dependance are becoming clearer. A report from the High Plains Underground Water Conservation District shows water levels in the Ogallala Aquifer have dropped consistently in the region over the last five years. More than 1,300 wells were measured earlier this year, including ones from the smaller Edwards-Trinity Aquifer, all of which show varying degrees of decline. The biggest decrease in water levels was recorded in Parmer County, which sits on the New Mexico border in between Lubbock and Amarillo, where there was a noted decline of 1.30 feet in the Aquifer water levels. The ongoing situation has caused concern for the future of agriculture in Texas and the rest of the Great Plains. Climate change has pushed average temperatures higher in Texas, making heat waves and droughts worse and more persistent. With the limited amount of water that must be allocated throughout the Great Plains region between Texas, Colorado, New Mexico, Kansas, Nebraska, Oklahoma, Wyoming and South Dakota, the Ogallala running dry could have incredibly devastating consequences nationwide. The Aquifer is the direct source of water for 30 percent of the nation's irrigation systems, boosting up the farms and ranches that supply a quarter of the nation's agricultural production. Additionally, approximately 82 percent of Americans who live within the aquifer's boundaries obtain their drinking water from the Aquifer.

Conclusion and Implications

As the challenges mount regarding the Ogallala Aquifer, the eight states under which the Aquifer lies must begin to work together to find compromises and solutions to preserving the largest freshwater aquifer on this continent. Places like Eastern New Mexico have begun planning on diversifying their sources of water—even while this diversification of water sources comes with concerns. In other parts of the Great Plains, farmers note that lack of rainwater leads them nowhere else but right back to groundwater reliance for their crops and overall livelihoods. Complicating federal and states policies that create a large incentive to rely on the Aquifer as a source of water will not alleviate the problem, but instead make matters worse. In order to significantly change the situation in the Ogallala Aquifer region—the several states it provides water for, and the federal government, will have to dissect current laws and policies in order to construct new and more appropriate policies to protect the agricultural industry in this region and the drinking water for millions of Americans. (Christina J. Bruff)

NEWS FROM THE WEST

In this month's News from the West we first report on legislation in the California Assembly seeking to greatly reduce or eliminate the use of drinking water on public turf. Despite the state's currently plentiful reservoirs, the state is looking forward to a new normal of drought. Next, we report on a state court lawsuit filed by environmental and health groups against various State of Utah agencies seeking "compliance" with their trust obligations under the public trust doctrine to increase inflow to the quickly diminishing Great Salt Lake. Finally, we turn to the Eastern Snake Plain Aquifer in Idaho and report on efforts by Ground Water Management Area Management Plan Advisory Committee to establish groundwater management rules.

California State Assembly Approves AB 1572 to Ban Use of Potable Water on Non-Functional Turf Beginning in 2027

Under a bill passed by the California Assembly on 12 September 2023, California businesses and institutions will have to stop watering their lawns with

potable water. AB 1572, proposed by assemblymember Laura Friedman earlier this year, is now in the hands of Governor Newsom. If the bill is ultimately signed into law, the prohibition would be rolled out in phases beginning in 2027 with government owned properties. Although the Governor's office has yet to weigh in on this bill, Governor Newsom's Executive Order N-7-22 directed the State Water Resources Control Board to consider adopting measures similar to those proposed by AB 1572, namely the prohibition on the use of potable water for non-functional turf.

Rolling out the Prohibition

While the general idea behind the bill is to reduce—or eliminate entirely—the use of non-native landscapes that require excessive watering, AB 1572 goes beyond that and makes several other findings and mandates. First and foremost, and unsurprisingly, the bill specifically includes legislative findings and declarations that the use of potable water to irrigate nonfunctional turf is wasteful and incompatible with the state's policies relating to climate change, water conservation, and reduced reliance on the Sacramento-San Joaquin Delta. In keeping with these findings, the bill would further direct state agencies to encourage and support the elimination of nonfunction turf irrigation using potable water.

As for the ban itself, the bill would specifically prohibit the use of potable water for the irrigation of nonfunctional turf located on commercial, industrial, and institutional properties, with exceptions carved out for cemeteries and properties of homeowners' associations, common interest developments, and community service organizations.

California's ban comes hot off the coattails of measures taken by neighboring states and cities therein, including Las Vegas, Tucson, Castle Rock, Aurora, and the State of Nevada. Many of these new water restrictions only apply to new developments, however. Nevada's AB356, signed into law in 2021, shares much of the primary goals and directives found in California's AB 1572. Just like with AB 1572, Nevada's ban won't take effect until 2027. California's ban under AB 1572, however, is more limited in its scope than its neighbor's. Nevada's nonfunctional turf ban is set to be implemented on any property that is not zoned exclusively for a single-family residence. So, while multi-family residences will be subject to the prohibition on using potable water for irrigation of nonfunctional turf in Nevada, California's bill explicitly limits its reach to the enumerated categories described above, meaning residential properties in California will not be subject to AB 1572.

Even without factoring in residential properties, however, grass covers an estimated 218,000 acres in the Metropolitan Water District's service area with up to 51,000 acres fitting into the category of nonfunctional turf. As a sponsor of the bill, the Metropolitan Water District has expressed great support for the prohibition, estimating that by replacing non-residential decorative grass across all of southern California with native or non-irrigated landscapes would save as much as 300,000 acre-feet of water per year. On the larger, statewide scale, the Pacific Institute has made estimates of its own relating to the replacement of grass with low water demanding plants and landscapes, concluding that total water use across California could be reduced by 1 million to 1.5 million acre-feet per year if such measures were taken throughout the entire state.

The implementation of the ban won't take effect until 2027, starting first with government properties, and continue to be rolled out in phases with other institutional, commercial and industrial properties being subjected to the turf ban in 2028. AB 1572 does provide for some limited carve outs, however, as the State Water Resources Control Board can give three-year extensions if necessary and certain disadvantaged communities won't be required to comply until 2031 or when they receive state funding, whichever comes later.

Conclusion and Implications

With the issuance of Executive Order N-7-22, Californians have already been faced with many of the measures provided for in AB 1572. N-7-22 is currently set to expire in June of 2024, however, meaning there could be as much as two and a half years of a grace period between the expiration of the ban put in place by the executive order and the time when AB 1572 will take effect. In any case, the bill comes as a somewhat piecemealed approached to conservation in California. It is unclear just how much water has been saved thanks to the ban currently in place, but it can be said that at least *some* water savings are being had with estimates by the Metropolitan Water District and Pacific Institute showing significant

conservation figures attributable to the replacement of nonfunctional turf with native and low water demanding landscapes. It's typically acknowledged that there is no one single solution that's going to cure all of California's water supply issues, but by taking a broader approach the state can continue to create water savings where the impacts may be felt the least. For the summary and full text of AB 1572, *see:* https://trackbill.com/bill/california-assembly-bill-1572-potable-water-nonfunctional-turf/2374456/ (Wesley A. Miliband, Kristopher T. Strouse)

Environmental and Health Groups File Suit Against Utah State Agencies Seeking to Enforce Public Trust Doctrine Obligations as to the Great Salt Lake

A number of environmental and public health non-profits (Plaintiffs) have filed a complaint seeking a declaratory judgment requiring various agencies of the State of Utah to invoke and enforce their public trust obligations with regard to the Great Salt Lake. Specifically, the Plaintiffs seek the establishment of a minimum lake elevation of 4,198 feet above sea-level and demand that the state agencies take any and all necessary steps to ensure that this minimum lake elevation is maintained. [*Utah Physicians For A Healthy Environment, et al, v. Utah Department Of Natural Resources, et al.*, Utah 3rd District Court, *filed* Sept 6, 2023).]

Background

The Great Salt Lake (GSL or Lake) is the largest saline lake in North America. It is a home to approximately 10 million migratory birds, which stop over at the GSL during their annual migrations. The GSL supports a variety of critical industries, including brine shrimp fishing, tourism, recreation, mineral extraction, and skiing, all of which depend on the Lake's waters and the conditions they create. These industries collectively contribute around 2 billion dollars each year to Utah's economy and provide thousands of jobs.

Recently, the GSL has come into the spotlight and media focus because drought conditions, climate change, and appropriative policy have all combined to cause a drastic decline in lake levels. Declining lake levels have already exposed, and will continue to expose, lakebed sediments containing arsenic, mercury, nickel, lead, and other pollutants toxic to humans. In many areas these sediments have become airborne and are potentially inhaled by millions of Utahns along the Wasatch Front. Additionally, the health of the lake is critical to provide habitat for shorebirds, waterfowl, brine flies and brine shrimp. Declining lake levels have the potential to the finely balanced ecosystem upon which these species depend.

It is undisputed that the elevation of the lake has been declining in recent years. Some media outlets and scientific reporting predict that unless substantial steps are taken to increase inflows, the lake could face systemic collapse in as little as five years. The recent snowfall in 2022-2023 has somewhat delayed this outcome, but unless changes are made, the lake is likely to continue to decline.

The Complaint

Plaintiffs' complaint seeks a declaration from the court that state agencies comply with their public trust obligations and take steps to increase inflow to the lake. The complaint leaves the means and methods for accomplishing this largely to the defendant agencies but does suggest a review of all existing water diversions, which, if necessary, should be modified and monitored to ensure compliance with the public trust obligations.

The Public Trust Doctrine

The public trust doctrine finds its roots in the common law which ensured that the public had a right to use navigable waters of the United States for navigation, commerce, and fishing. *See, e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997); *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). As a navigable body of water at the time of Utah's acceptance into the union, the waters of the GSL fall under the public trust doctrine and are held in trust by the State for the benefit of the public. *See: Utah v. United States*, 403 U.S. 9, 10–12 (1971); *Hardy Salt Co.*, 486 P.2d at 392–93; *see also Morton Int'l, Inc. v. S. Pac. Transp. Co.*, 495 P.2d 31, 32–34 (Utah 1972). The bed of the Great Salt Lake also falls within the public trust doctrine's ambit, as do the "lands surrounding the Great Salt Lake." *Hardy Salt Co.*, 486 P.2d at 392–93; *see also Colman v. Utah State Land Bd.*, 795 P.2d 622, 635–36 (Utah 1990).

The public trust doctrine requires that the myriad natural resources of the state are to be held in in trust for the public. The doctrine is "founded upon the

necessity" of "preserving" these resources for public use and enjoyment. *Illinois Cent.* 146 U.S. at 436. This doctrine has been applied to coastal waters and also inland rivers and lakes. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012); *Illinois Cent.*, 146 U.S. at 435–37. Utah courts have recognized this doctrine and have held that "the state holds navigable waters and the lands underlying navigable waters in trust for the public." *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 601, 610 (Utah 2019); *Colman*, 795 P.2d at 635.

The public trust doctrine includes typical recreation activities, but likewise protects the "ecological integrity" of trust resources. *Nat'l Parks & Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 919 (Utah 1993).

Accordingly, under this doctrine the state has an obligation to maintain the "ecological integrity" of trust resources in order to protect the public's ability to use these resources for navigation, commerce, fishing, leisure, and other trust purposes. *Id.* The public trust doctrine also covers public lands, including the bed and shores of the GSL up to the highwater mark. The state's obligation to protect these lands dates from Utah's entrance into the union, when the state took title to all lands underlying navigable waters. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195–96 (1987).

The Utah Constitution further reinforces this public trust obligation, stating that all sovereign lands "are declared to be the public lands of the state; and shall be held in trust for the people." Utah Const. art. XX, § 1. These public lands include the bed of the Great Salt Lake. *Hardy Salt Co.*, 486 P.2d at 392–93. These obligations have been delegated by the legislature to the defendant agencies. Utah Code §§ 65A-1-1(6), 65A-1-4(1)(b), which acts under the supervision of DNR, *id.* § 65A-1-4(1)(a). These state agencies have confirmed their obligations and role as trustee of the GSL by adopting the 2013 Comprehensive Management Plan for the Lake, which was mandated by the Utah Legislature. That Plan requires the management of the GSL and its resources under multiple-use, sustained yield principles by implementing legislative policies and accommodating public and private uses to the extent that those policies and uses do not substantially impair Public Trust resources and or the lake's sustainability."

Utah courts have recognized that "common-law trust principles" are applicable when interpreting the public trust doctrine. *VR Acquisitions, LLC*, 439 P.3d at 610. Such principles include the fiduciary duties that "[a]ll trustees owe" to the beneficiaries of a trust. *Nat'l Parks &*

Conservation Ass'n, 869 P.2d at 918. Consequently, the state as trustee is required by law to manage public trust resources consistent with the terms of the trust, the interests of its beneficiaries, and the principles of loyalty, impartiality, and prudent administration. Restatement (Third) of Trusts §§ 76–79 (Am. L. Inst. 2007) (updated 2023); *see also* Utah Code §§ 75-7-801 to -804.

Conclusion and Implications

As of the time of this writing, this complaint has not been served upon the defendant agencies. Consequently, no responsive arguments or counterfactuals have yet been offered by the defendants. What is clear is that should the court determine that the defendant agencies have violated their public trust obligations, it will require substantial action on behalf of the agencies to achieve the minimum lake level requested in the complaint. Such actions may involve the curtailment of many vested junior water rights and interests. Given the way that Utah was developed, many of the largest municipalities and water suppliers hold the most junior water rights on the system. Consequently, it will be necessary to balance the public welfare with the strict application of the prior appropriation doctrine. For more information, *see*:: https://www.sltrib.com/news/environment/2023/09/06/groups-sue-utah-try-save-great/ (Jonathan Clyde)

Eastern Snake Plain Aquifer Ground Water Management Area Ground Water Plan Development Effort Underway in Earnest

On September 13, 2023, the Eastern Snake Plain Aquifer (ESPA) Ground Water Management Area Management Plan Advisory Committee (Committee) met for the first time since its creation/appointment in August. The Committee was formed at the request of Idaho Governor Little, and consists of water users from the following constituent groups, among other at-large appointees: the Idaho Ground Water Appropriators, Inc.; the Surface Water Coalition; Idaho

Power Company; the Coalition of Cities; the Big Lost River Ground Water District; and the Hagerman area spring water users.

The Problem

The Eastern Snake Plain Aquifer is the largest (estimated Lake Erie-sized), and likely most litigated aquifer in the state of Idaho. Measuring roughly 60 miles wide and 170 miles long between St. Anthony in the east and west of Bliss in the West, the ESPA has, according to some, been overdeveloped and over-drafted, for decades. Others changes, including drought cycles and the conversion from flood irrigation to more efficient sprinkler irrigation lessening seepage has also played a role in the aquifer's decline. The aquifer supplies irrigation water to somewhere between 1.5 and 2 million acres of agricultural lands, and serves as the drinking water source for dozens of towns and cities, including Twin Falls, Idaho Falls, Pocatello, Rexburg, Blackfoot, Burley and several others.

Based on spring flow discharge data (the ESPA discharges through surface springs throughout the Snake River Canyon, particularly in the "Thousand Springs" reach of the river), the Idaho Department of Water Resources estimates that ESPA water levels peaked in the early 1950s and they have been declining ever since with a handful of periodic rebounds merely slowing what is otherwise an overall declining trend from 1952 to today. For example, in 1952, the Department calculated a Thousand Springs reach discharge of approximately 6,700 cfs of water (equating to an estimated aquifer volume of slightly over 18 million acre-feet). In 2023, the Department calculated spring discharge of approximately 4,600 cfs (equating to an estimated aquifer volume of just over 4 million acre-feet).

After nearly 20 years of litigation between senior surface water users and more generally junior groundwater users resulted in a 2015 settlement centered around groundwater pumping reductions and state-sponsored managed aquifer recharge of as much as 250,000 acre-feet per year when available, spring discharges and aquifer volumes rebounded between 2016 and 2020 (spring discharges increased to above 5,000 cfs and estimated aquifer volumes increased to around 7 million acre-feet accordingly). But that rebound was short-lived and exacerbated by drought. Spring discharges and aquifer volumes have been steadily declining since—dropping approximately 300,000 acre-feet below 2015 settlement agreement era lows—triggering additional litigation, state intercession and mediation attempts, and a larger groundwater management plan development effort that has arguably been lacking since the ESPA groundwater management area was designated and its boundary was first drawn in 2016.

The Primary Constituent Groups

The Idaho Ground Water Appropriators, Inc. is the representative entity of the groundwater users on the ESPA. Its members are comprised of several groundwater districts, including Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Carey, Jefferson-Clark, Madison, Magic Valley, and North Snake. IGWA members also include several municipalities, including American Falls, Blackfoot, Chubbuck, Heyburn, Jerome, and Rupert. IGWA members irrigate in excess of one million acres on the Eastern Snake Plain.

The Surface Water Coalition consists of senior surface water users—water diverted from the Snake River that is fed by baseflow and spring fed discharges from the ESPA—including Twin Falls Canal Company, North Side Canal Company, Milner Irrigation District, Burley Irrigation District, A&B Irrigation District, American Falls Reservoir District #2, and Minidoka Irrigation District. The Surface Water Coalition members likewise provide irrigation water to several hundreds of thousands of acres in the Eastern Snake Plain.

As noted above, in 2015 IGWA and the SWC reached a settlement ending decades of litigation at the time. With the settlement terms reducing groundwater pumping and providing the SWC with additional storage water supplies rented from storage water owners elsewhere in the basin, the SWC was, hopefully, to be kept whole in terms of its senior surface water rights, and the ESPA was to, hopefully, stabilize if not increase in volume due to state recharge efforts. In large part the state of Idaho, IGWA, and the SWC were hopeful that their collective efforts would be enough to solve the problem without the need for a broader groundwater management plan.

The Goal?—Conclusion and Implications

After ESPA levels began declining again after 2020, and litigation alleging breach of the 2015

settlement agreement ignited, the state, IGWA, and the SWC agreed that a broader effort was needed regardless of whether the 2015 settlement agreement was breached. Those efforts are underway with the next Committee meeting scheduled to take place in October.

The fundamental question for the group is what is the goal? What spring flow discharge and aquifer volume is considered stable and sustainable. Spring flow discharge and aquifer volumes during the 1950s is not only infeasible, but unrealistic given canal lining and sprinkler conversions over time. Water efficiency and conservation practices have a nasty habit of decreasing incidental seepage benefitting the ESPA. Population growth and groundwater development on the ESPA are not going to reverse either.

Once the goal is determined, crafting a groundwater management plan will likely prove even more difficult than reaching the 2015 settlement agreement due to the additional parties at the table. Chances are that more tributary basins than historically administered as part of the ESPA will be included in a new administrative boundary—the area hydraulic interconnection for larger groundwater management purposes needs be more comprehensive to have a chance of succeeding.
(Andrew J. Waldera)

REGULATORY DEVELOPMENTS

'WATERS OF THE UNITED STATES' REDEFINED—EPA AND THE CORPS ISSUE CONFORMING WOTUS RULE IN WAKE OF THE *SACKETT* DECISION NARROWING THE 'REACH' OF THE CLEAN WATER ACT

On September 8, 2023, the U.S. Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively referred to as the Agencies) published a new rule (hereinafter referred to as the Conforming Rule) amending their January 18, 2023 Revised Definition of Waters of the United States (WOTUS) rule (Revised Definition) to conform with the U.S. Supreme Court's holding in *Sackett v. EPA*. (88 Fed. Reg. 61964 [Sept. 8, 2023].) The Conforming Rule is a limited series of amendments that nip and tuck the Revised Definition to fit within the bounds of the Supreme Court's recent narrowing the "reach" of the Clean Water Act (CWA). The Conforming Rule is *effective immediately* and the Agencies are not providing opportunity for public notice or comment. Importantly, the Conforming Rule does not wholly replace the Revised Definition, but merely amends aspects of the Revised Definition that were considered nonconforming in the wake of *Sackett* (*e.g.*, eliminating the significant nexus standard and defining "adjacent" to mean "a continuous surface connection") while maintaining the other provisions.

As a result of ongoing litigation surrounding the Revised Definition, the Agencies will implement the Revised Definition, as amended by the Conforming Rule, in 23 states (including California), the District of Columbia, and the U.S. Territories. In the other 27 states the Agencies are interpreting "WOTUS" consistent with the pre-2015 regulatory regime, as it conforms with the decision in *Sackett*.

Relevant Background

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

The Agencies have separate regulations defining WOTUS, but their interpretations have been similar and remained largely unchanged from 1977 to 2015 (referred to in the Revised Definition as the 1986 regulations). Since 2015, the Agencies have revised the WOTUS definitions via three significant rule changes under differing political administrations (2015 Clean Water Rule, 80 Fed. Reg. 37054 [June 29, 2015]; 2020 Navigable Waters Protection Rule, 85 Fed Reg 22250 [April 21, 2020]; and the 2023 Revised Definition, 88 Fed. Reg. 3004 [Jan. 18, 2023].)

The Agencies' 2023 Revised Definition, relied heavily on the pre-2015 regulatory framework and associated case law, while simultaneously reinvigorating the "significant nexus" standard delineated by Justice Kennedy in the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) and the "relatively permanent" standard concurrently articulated by a plurality of the Justices in *Rapanos*.

The *Sackett* Decision

On May 25, 2023, the Supreme Court released its highly anticipated ruling in *Sackett v. United States Environmental Protection Agency*. While the Revised Definition was not directly before the Court in *Sackett*, the Court considered the "relatively permanent" and "significant nexus" jurisdictional standards set forth in that rule; the Court subsequently struck

down the significant nexus standard as inconsistent with the CWA. Moreover, the Court concluded that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses:

> . . .only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.' *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739).

The Court also agreed that wetlands are considered WOTUS when the wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between "waters" and wetlands.'" *Id.* at 1344 (citing *Rapanos*, 547 U.S. at 742, 755).

In response to the Court's decision, on August 29, 2023, the Agencies issued a pre-publication final rule to amend the Revised Definition to conform with the ruling in *Sackett*. The final rule was published in the Federal Register on September 8, 2023. The rule is effective immediately.

Jurisdictional Waters of the United States under the Conforming Rule

The Conforming Rule amended the Revised Definition's provisions on interstate waters, tributaries, adjacent wetlands, and additional waters. Ultimately, the Conforming Rule eliminated any use of or reference to the significant nexus standard and redefined adjacent to mean having a continuous surface connection. The Revised Definition, in conjunction with the amendments from the Conforming Rule, define WOTUS to include:

- Traditional navigable waters (interstate commerce; the territorial seas; and interstate waters) (referred to in the Conforming Rule as "(a)(1) waters");
- Impoundments of WOTUS;
- Jurisdictional tributaries—tributaries to traditional navigable waters, the territorial seas, interstate waters, or impoundments when the tributaries are relatively permanent, standing, or continuously flowing bodies of water;
- Adjacent wetlands; and
- Intrastate lakes and ponds that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to WOTUS.

Conclusion and Implications

Notably lacking from the Conforming Rule are definitions clarifying (1) what constitutes relatively permanent, standing, or continuously flowing body of water or (2) what makes up a tributary. The Revised Definition relies heavily on the pre-2015 regulations for interpretation of those terms, but the lack of formal clarification in the Conforming Rule has left some in the regulated community disappointed with the amendments. Additionally, the Agencies indicated that waters that are no longer jurisdictional under the Conforming Rule's definition of WOTUS may still be subject to CWA jurisdiction. Specifically, the Agencies mentioned that a discharge from a point source to a non-jurisdictional tributary may still need a 402 permit if that non-jurisdictional tributary connects to a jurisdictional water. The Conforming rule maintains a large portion of the 2023 Revised Definition, carving out non-conforming portions while attempting to salvage the remainder, leading to conflicting views on how the remaining provisions will be defined and, ultimately, how CWA jurisdiction will be implemented.

(Jaycee Dean and Megan Somogyi)

U.S. EPA ENTERS INTO SETTLEMENT AGREEMENT TO FURTHER ASSESS PESTICIDE RISKS TO THREATENED AND ENDANGERED SPECIES

The Center for Biological Diversity (CBD) reached a settlement agreement with the U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (FWS). This settlement strengthens consultation and information-sharing between EPA and FWS, as well as pushes EPA to propose new monitoring requirements on pesticide users, in order to better assess harms to threatened and endangered wildlife from the direct application of pesticides to waters. The settlement resolves a petition for review that CBD filed in the U.S. Court of Appeals for the Ninth Circuit, challenging EPA's issuance of a federal Clean Water Act permit without fully assessing the risks posed to freshwater endangered species by pesticides applied directly to water and EPA and FWS's alleged failures to comply with the ESA. [*Center for Biological Diversity v. U.S. Environmental Protection Agency*, Case No. 21-71306 (9th. Cir., Oct. 4, 2021).]

Factual and Procedural Background

The Clean Water Act (CWA) authorizes the EPA to protect water quality by creating various permitting regimes to regulate, *inter alia*, discharges from industrial activity into U.S. waters. Section 402 of the CWA regulates the discharge of pesticide applications through the National Pollutant Discharge Elimination System (NPDES). EPA and states issue Pesticide General Permits (PGP) under the NPDES program to regulate pesticide operators. In many cases, the state environmental protection department is the NPDES permitting authority. However, for areas and activities where the states are not authorized, the EPA issues the PGP to control pesticide discharges that leave a residue in U.S. waters.

The first PGP was issued in 2011, in response to the United States Sixth Circuit Court of Appeals vacating EPA's 2006 Final Rule on Aquatic Pesticides. The term of each PGP lasts for five years, with the second PGP issued in 2016 and the most recently in 2021. As part of the PGP process, FWS conducts a Biological Opinion on the effects of the 2021 PGP on threatened and endangered species, pursuant to Section 7 of the federal Endangered Species Act (ESA). The 2021 PGP did not substantially update either the conditions or the requirements of the 2016 PGP. On September 16, 2021, EPA issued the 2021 PGP.

October 4, 2021, CBD filed a petition for judicial review of the 2021 PGP. The petition alleged EPA and FWS violated the CWA and ESA for issuing the 2021 PGP. The petition claimed the FWS violated the ESA by failing to complete the Section 7 biological evaluation until after the 2021 PGP was issued. Further, the petition alleged EPA violated the ESA by failing to ensure that the agency would not irreversibly commit resources with respect to the agency action, which would foreclose reasonable and prudent alternative measures, by not completing the Section 7 consultation prior to issuing the 2021 PGP. The parties then entered into the Ninth Circuit Mediation Program to negotiate a settlement.

The Settlement

The substantive terms of the settlement are divided into three key areas: (1) 2026 PGP consultation and issuance; (2) interim actions by EPA and FWS; and (3) proposed changes to the 2026 PGP monitoring provisions. Nothing in the settlement affects the 2021 PGP.

In addressing 2026 PGP consultation and issuance, the FWS agreed to draft its Biological Opinion analyzing the effects of the PGP on threatened and endangered species and their critical habitats no later than August 30, 2024, with the final opinion issued by October 31, 2024. The EPA agreed to issue the final 2026 PGP by December 17, 2024, nearly two years before it would go into effect.

With respect to interim actions, the EPA agreed to update its NPDES e-reporting tool for the PGP, used for submitting notices of intent (NOIs) and annual reports for pesticide discharges, to ensure FWS can also review and respond to appropriate NOIs submitted under the 2021 PGP. Both EPA and FWS agreed to review any NOIs that overlap with National Marine Fisheries Service (NMFS) Listed Resources of Concerns within 30 days before authorizing the pesticide discharges. EPA further agreed to give summaries of the annual PGP reports to FWS and NMFS, and

FWS will include relevant information, such as the types of permits, the number of pest management areas, the number, location, size of treatment areas, and the amount and name of pesticides used, as it prepares its future Biological Opinion. As part of their PGP eligibility worksheet tool, EPA also agreed to direct operators of pesticide discharges to FWS's online tool that includes ESA-listed species and habitats that should be addressed with protective measures and to contact FWS for technical assistance if required. The settlement also obligates EPA and FWS to commit to several notification and information sharing measures, such as providing a link to FWS online tools on the PGP webpages and listing on the PGP webpage all biological opinions for pesticide registration decisions under the Federal Insecticide, Fungicide, and Rodenticide Act.

Finally, the settlement covers several proposed changes to the 2026 PGP monitoring regime. Those hired to apply pesticides must conduct visual monitoring and document the findings or give reason as to why no visual monitoring was conducted. In instances where the EPA determines more monitoring is needed to ensure compliance, EPA will notify the operator of additional monitoring requirements and give the reason. EPA also agreed to propose for public comment amendments to the Pesticide Discharge Management Plan for the 2026 PGP. These amendments mostly affect the visual monitoring procedures, establishing minimum requirements for the businesses and industries under PGP's purview (decision-makers) to set up a process for determining the location of any monitoring, the monitoring schedule, the person responsible for conducting the visual monitoring, and procedures for documenting visual monitoring. Other proposed amendments would also require decision-makers who submit annual reports to also include copies of monitoring records.

Conclusion and Implications

This settlement obligates the Environmental Protection Agency and the Fish and Wildlife Service to make several immediate and long-term changes to the PGP, largely aimed at improving monitoring, compliance, and information sharing. These changes alter the process by which EPA and FWS complete their respective obligations in issuing the PGP, pushing each agency to fulfill those obligations in a timely manner. More on the settlement can be found at: https://perma.cc/2DVD-N8SM
(Michael Ervin, Rebecca Andrews)

EPA AGREES TO INVESTIGATE FIRST-EVER TITLE VI CLAIM STEMMING FROM THE STATE WATER BOARD'S ACTIONS ON THE SAN FRANCISCO BAY-DELTA PLAN

On August 8, 2023, the Evironmental Protection Agency's Office of External Civil Rights Compliance (OECRC) (EPA) issued a letter to the California State Water Resources Control Board (State Water Board) stating that OECRC intends to investigate a complaint lodged against the State Water Board by a coalition of tribes and environmental organizations alleging violations of federally-based rights under the Civil Rights Act and Clean Water Act arising from the State Water Board's planning efforts related to the Bay-Delta Water Quality Control Plan.

Background

Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, and Save California Salmon (Petitioners) filed the complaint in December 2022. Petitioners allege that the State Water Board's failure to review water quality standards in the Bay-Delta violated Title VI of the Civil Rights Act of 1964 (Title VI) by disproportionately harming tribes and other communities of color. *See* Title VI Complaint, 2-4, 40-44.

Under the Clean Water Act, states review water quality standards every three years and hold public hearings for proposed changes. Petitioners further allege that the State Water Board intentionally excluded Petitioners and communities of color from the rulemaking process in favor of closed-door negotiations. *See* Title VI Complaint, 44-45.

Title VI

Title VI prohibits federal funding recipients from discriminating against anyone based on race, color, or national origin, and may apply to inaction and facially neutral policies that result in disparate impacts. EPA implements Title VI through regulations set forth in 40 C.F.R. Part 7 (Implementing Regulations). The Implementing Regulations allow any person of a protected class to file a complaint with the EPA if a recipient of EPA assistance subjects them to discrimination based on that protected class. Petitioners filed their complaint under these regulations, and it is the first that EPA has agreed to investigate.

Relief Sought

Petitioners seek several forms of relief to bring the State Water Board into Title VI compliance. First, Petitioners request that EPA withhold federal permits for the Delta Conveyance Project and withhold approval of water quality standards "crafted through exclusionary policymaking processes." *See* Title VI Complaint, 55. If the State Water Board refuses to comply, Petitioners ask EPA to terminate or withhold State Water Board funding. *Id.* Further, Petitioners seek EPA to exercise their oversight authority to promulgate water quality standards that would, among other things, designate certain tribal activities as beneficial uses for the Bay-Delta. *Id.*

EPA's Investigation

The OECRC's investigation will focus on two issues: (1) whether the State Water Board's delayed rulemaking and public participation subjects tribes and other communities of color in the Bay-Delta to discrimination based on race color and national origin and (2) whether the State Water Board has instituted nondiscrimination safeguards required under EPA's Implementing Regulations.

According to Petitioners' complaint, the State Water Board's failures to maintain federal Clean Water Act-compliant water quality standards have disproportionately harmed tribes by impairing tribes' access to fish, riparian resources, and waterways essential to their sustenance, ceremony, religion, and identity. Second, the same alleged failures have caused outsized harms to Bay-Delta communities of color, who are particularly vulnerable to harmful algal blooms, the loss of fisheries, and other forms of ecological damage. Third, Petitioners allege that by substituting negotiation of voluntary agreements for an open public process, the State Water Board has excluded tribes and communities of color from decision-making on water quality standards.

To establish a prima facie case of disparate impact, the EPA must: (1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish disparity; and (4) establish causation. Starting on August 8, OECRC has 180 days to complete its investigation and issue preliminary findings. According to its Case Resolution Manual, OECRC will issue Requests for Information soon after accepting a complaint. At its request, the State Water Board will be required to provide OECRC with its:

> . . .books, records, accounts and other sources of information, including its facilities, as may be pertinent to ascertain compliance with EPA's nondiscrimination regulation. EPA Office of External C.R. Compliance, Case Resolution Manual, 19 (Jan. 2021).

A refusal to assist OECRC may lead to a preliminary finding of noncompliance.

The Implementing Regulations prescribe informal resolution whenever possible. If both parties agree to engage in alternative dispute resolution (ADR) or OECRC's informal resolution agreement process, OECRC will suspend its investigation into the State Water Board. Assuming they agree to an informal resolution agreement process, OECRC's role switches from fact-finder to drafter, seeking input from Petitioners on resolution issues and preparing terms to share with the State Water Board. ADR provides a similar yet more formal process, with a mediator conducting the negotiations. If 180 days pass without resolution, OECRC will resume its investigation.

Recommendations for compliance will accompany OECRC's preliminary findings. Once those findings are issued, the State Water Board will have 50 days to accept those recommendations or:

> . . .[s]ubmit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended. 40 C.F.R. § 7.115(d)(2).

Failure to take action will result in a formal determination of noncompliance. At that point, EPA may terminate financial assistance or "use any other means authorized by law" to obtain compliance, including referring the matter to U.S. Department of Justice. § 7.130.

Conclusion and Implications

It is unclear how the State Water Board will respond to the investigation. The novelty of the complaint only raises further uncertainty about how the process will unfold. However, the deadlines are relatively short, and some activity within the next year is likely. For more information, *see:* Letter from Anhthu Hoang, Acting Dir., EPA Office of External C.R. Compliance, to Eileen Sobeck, Exec. Dir., Cal. State Water Res. Control Bd. (Aug. 8, 2023), available at https://www.restorethedelta.org/wp-content/uploads/2023.08.08-REC_Acceptance_01RNO-23-R9.pdf
(Miles Krieger, Steve Anderson)

U.S. BUREAU OF RECLAMATION RECEIVES SCOPING COMMENTS ON POST-2026 COLORADO RIVER OPERATIONS

On August 15, 2023, the U.S. Bureau of Reclamation (Reclamation) concluded a 60-day public comment period seeking input on long-term operational strategies for the Colorado River when current rules expire in 2026. Reclamation received comment letters from federal, state, and local agencies, Tribes, organizations, individuals, as well as the seven Colorado River basin states that share its water under an interstate compact. The scoping comments will help Reclamation identify the proper scope, issues, and a suitable range of alternatives for its environmental analysis of post-2026 Colorado River operations under the National Environmental Policy Act (NEPA).

Background

The 1,450-mile Colorado River is an essential resource for water supply, hydroelectric power, fish and wildlife habitat, recreation, and other beneficial uses in the southwestern U.S. and Mexico. Pursuant to a 1922 compact, the seven states within the Colorado River drainage basin (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) share consumptive rights to the River. Based on expected average annual flows of 16.4 million acre-feet (MAF), the compact provides for an equal division of 15 MAF between the upper basin states (Colorado, New Mexico, Utah, and Wyoming) and lower basin states (Arizona, California, and Nevada), leaving each basin to split its 7.5 MAF by separate compacts. An additional 1.5 MAF of water is reserved for Mexico pursuant to a 1944 treaty. To date, quantification of the reserved water rights of the 30 federally recognized Tribes within the Colorado River basin remains incomplete.

The 1922 compact and Reclamation's storage of Colorado River water at Lake Powell and Lake Mead enabled a great expansion of agricultural irrigation and population growth in the Southwest. According to Reclamation, agricultural irrigation represents roughly 70 percent of consumptive Colorado River water use, while the municipal demands of 35 to 40 million people make up the remaining 30 percent.

An unprecedented eight-year drought beginning in 2000 caused significant water shortages and a first-time need for adaptive measures to safeguard the dwindling flows of the Colorado River. In 2007, Reclamation adopted interim guidelines for the coordinated operation of Lake Powell and Lake Mead during drought and low reservoir conditions. The 2007 interim guidelines defined shortage levels and triggers for limited reservoir releases when less than 7.5 MAF is available to the lower-basin states. Following additional shortages during the 2014-2015 drought, the basins each adopted drought contingency plans in 2019, with additional actions and conservation measures beyond those contemplated in the 2007 interim guidelines. Even with the contingency plans in place, elevations in Lake Powell and Lake Mead reached near-record lows during the 2020-2022 drought, prompting further voluntary cuts and calls for more robust plans.

The Scoping Process

The scoping process is an early planning stage for an Environmental Impact Statement (EIS) under NEPA, during which a federal agency engages with state and local governments, Tribes, and the interested public, and solicits comments regarding issues the EIS should consider. The more than 21,000 comment letters submitted on post-2026 Colorado River operations covers a wide range of positions on the appropriate range of issues and alternatives that Reclamation should consider.

In a 2020 report, Reclamation found that changed hydrologic conditions and increased severity of droughts in the Colorado River basin meant the 2007 interim guidelines were insufficient to reduce the risk of critically low reservoir levels. Average flows in the Colorado River over the past 20 years were 12.5 MAF on average, well below the 16.4 MAF average contemplated in 1922. Many of the submitted comment letters urge that the post-2026 operations include a management system that will provide reliability and water supply certainty, with flexible mechanisms to quickly respond to changed hydrologic conditions and protect storage levels against severe and prolonged droughts.

Upper Basin States

The upper basin states of Colorado, New Mexico, Utah, and Wyoming submitted a joint letter asking Reclamation to keep its scope narrowly limited to operations of Lake Powell and Lake Mead, and to keep the rules interim to allow further opportunities to adapt and revise based on results. They stated that the post-2026 operations should address the recurring imbalance between supply and demand by reducing the lower-basin's allotment to account for 1.5 MAF of annual evaporation and conveyance losses. The upper basin states suggest that other issues, such as Tribal water rights and species protection, are better addressed in separate programs and frameworks.

Lower Basin States

The lower basin states of Arizona, California, and Nevada submitted their own joint comment letter, which agreed the scope should not go beyond the water releases, deliveries, and conservation associated with the two reservoirs. Citing the Law of the River, the lower basin states assert that Reclamation may not disturb the body of agreements, laws, and court opinions governing existing priority rights on the Colorado River. The lower basin states seek predictable and easily understood criteria for releases from Lake Powell and Lake Mead, and clearer accounting of upper basin water use to address the supply and demand imbalance.

Agricultural Irrigations

Commenters that supply water for agricultural irrigation sought to preserve the priority system, consider alternatives to curtailment, and expand on the existing Law of the River rather than dismantle it. The three largest urban water users submitted a joint letter, requesting stronger measures to limit agricultural water deliveries to no more than what is reasonably required for beneficial use.

Tribes

The Colorado River Indian Tribes, Hopi Tribe, Navajo Nation, and other Tribal organizations commented that the scope of the EIS should address the operations of the entire Colorado River system, coordinated endangered species issues, and environmental concerns, while protecting the reserved Tribal rights that remain unquantified. Several of the letters state Reclamation must fully account for the 1.2 MAF of water lost each year due to structural deficits like seepage and evaporation losses, and that those system losses may not be assessed against senior Tribal rights to mainstream water.

Conclusion and Implications

The scoping comments submitted by the upper and lower basin states and other stakeholders highlight a wide range of concerns and issues the Bureau of Reclamation will need to consider as it develops post-2026 operational strategies to address climate change and recurring drought. With the comment period now closed, Reclamation is working on a public scoping report for the fall of 2023.

After issuing its scoping report, Reclamation will work on EIS alternatives with partners and stakeholders through spring of 2024. By the end of 2024, Reclamation expects to release a draft EIS for public review. Before the expiration of the current interim guidelines in 2026, Reclamation will publish a final EIS and a record of decision.
(Austin C. Cho, Sam Bivins)

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

Sept. 29, 2023— The U.S. Department of Justice (DOJ), the U.S. Environmental Protection Agency (EPA), the Tennessee Attorney General's Office, and the Tennessee Department of Environment and Conservation (TDEC) announced today a federal Clean Water Act settlement with the Hamilton County Water and Wastewater Treatment Authority (WWTA). A consent decree was lodged in the U.S. District Court for the Eastern District of Tennessee in Chattanooga and resolves the claims identified in a joint federal and state complaint filed with the consent decree. The settlement will resolve WWTA's liability for Clean Water Act violations, including unauthorized overflow of untreated raw sewage at locations in the WWTA wastewater collection and transmission system and bypasses of treatment at WWTA's Signal Mountain wastewater treatment plant. Under the consent decree, WWTA will undertake a thorough assessment of, and implement extensive improvements to, its sanitary sewer system and the wastewater treatment plant. In addition, WWTA will pay a civil penalty of $598,490 to be equally divided between the United States and the State of Tennessee.

WWTA owns and operates a sanitary sewer system serving over 30,000 sewer customers. The system includes one sewage treatment plant, the Signal Mountain wastewater treatment plant, and a wastewater collection system that is composed of over 5,000 miles of sewer collection lines, 60 pump stations, and associated equipment.

Inadequacies in WWTA's separate sewer systems' infrastructure and management programs have resulted in unlawful discharges of millions of gallons of untreated and partially treated sewage into streams in the Hamilton County area. The sewage discharges have affected the Tennessee River and many streams that drain to the Tennessee River.

The major features of the consent decree relating to the sanitary sewer system will require WWTA to evaluate the capacity, design, and condition of the components of its sanitary sewer system and develop and implement remedial measures to eliminate sanitary sewer overflows (SSOs). The total estimated cost of remedial and compliance measures required under the Consent Decree is $300 million.

Sept. 29, 2023—The Justice Department, working with the U.S. Environmental Protection Agency (EPA) and the State of West Virginia, reached a proposed consent decree yesterday with Waco Oil and Gas Co. Inc. to resolve alleged violations of the federal Clean Water Act and West Virginia state law for unauthorized discharges of dredged or fill material into waters of the United States in Braxton County, West Virginia.

Under a proposed consent decree filed in U.S. District Court for the Northern District of West Virginia, Waco Oil and Gas agreed to pay a $825,000 penalty, restore the vast majority of the impacted waters and provide compensatory mitigation for waters that cannot be restored. Additionally, the company will place a deed restriction on its property to protect the restored waters in perpetuity.

A filed complaint alleged that beginning in approximately 2017, Waco Oil and Gas discharged dredged or fill material into tributaries of Bear Run and adjacent wetlands as well as tributaries of Cunningham Fork without the required federal or state permits.

The consent decree is available for public viewing at www.justice.gov/enrd/consent-decrees. The United States will publish a notice of the consent decree's lodging with the U.S. District Court for the Northern District of West Virginia in the Federal Register and

will accept public comment for 30 days after the notice is published. The Federal Register notice will also include instructions for submitting public comment.

Sept. 28, 2023— The U.S. Department of Justice, on behalf of the U.S. Environmental Protection Agency (EPA)finalized a consent decree with Transocean Offshore Deepwater Drilling, Inc (Transocean) for alleged violations of the National Pollutant Discharge Elimination System (NPDES) Gulf of Mexico - Outer Continental Shelf General Permit (general permit) and Sections 301 and 309 of the federal Clean Water Act (CWA). The complaint alleges that Transocean did not obtain coverage under the relevant general permit before discharging, discharged pollutants in excess of effluent limits, and submitted inaccurate discharge monitoring reports, among other violations. Transocean will pay a civil penalty of $507,000.

As part of the settlement, Transocean must comply with the CWA and its implementing regulations, as well as the general permit. To achieve compliance, Transocean must continue development and implementation procedures to track its vessels and mobile facilities engaged in oil and gas exploration and production activities in the Gulf, submit timely and accurate reports, and perform all required inspections and monitoring. In addition, Transocean is required to establish procedures for cooling water intakes that ensure fish and other aquatic species do not become trapped in filter screens.

Pursuant to the settlement, Transocean must hire a third-party auditor to review compliance plans and must demonstrate to EPA that it has completed all Third-Party Audit Corrective Actions. Transocean also must submit annual reports to EPA to demonstrate compliance with requirements set forth in the consent decree. The settlement was filed in the U.S. District Court for the Southern District of Texas on September 6, 2023 and is subject to a 30-day public comment period before final court approval of the consent decree.

Sept. 28, 2023— the U.S. Environmental Protection Agency (EPA) announced two settlements with the Navajo Tribal Utility Authority (NTUA) to address non-compliance with its Clean Water Act wastewater programs. NTUA operates the Shiprock and Window Rock wastewater treatment plants, which discharge treated wastewater within the boundaries of the Navajo Nation.

The two treatment plants collect and treat sewage from five communities in the Navajo Nation, serving over 13,000 people. The Shiprock plant serves the community of Shiprock, and discharges treated water into the San Juan River, while the Window Rock plant serves the communities of Fort Defiance, St. Michaels, Tse Bonito, and Window Rock and discharges treated wastewater into Black Creek.

Following an August 2021 inspection of the Shiprock plant, EPA determined that NTUA's wastewater treatment did not comply with federal Clean Water Act regulations. The plant discharged wastewater that exceeded the permitted limit for *E. coli* concentrations. These exceedances were caused by inadequate operation and maintenance of the ultraviolet disinfection system.

After completing a November 2021 inspection, EPA similarly determined inadequate operation and maintenance of the ultraviolet disinfection system at the Window Rock plant caused multiple exceedances of the limit for *E. coli* concentrations between April 30, 2020, and June 30, 2022.

Wastewater with high concentrations of *E. coli* discharged into waters such as the San Juan River and Black Creek poses risks to public health.

Sept. 18, 2023— Chief engineer Denys Korotkiy of the vessel *Donald* was sentenced on Sept. 15 to serve twelve months and a day in prison after being convicted of conspiracy to obstruct justice, obstruction of justice and failure to maintain an accurate oil record book. U.S. District Court Judge Todd W. Robinson for the Southern District of California sentenced Korotkiy.

Trial evidence showed that oily bilge water—typically containing oil contamination from cleaning and operating a vessel's machinery—was illegally dumped from the *Donald*, without being legally recorded, directly into the ocean through the vessel's sewage tank and not properly processed through required pollution prevention equipment. Korotkiy made false and fictitious entries in the oil record book claiming oily bilge had been transferred from the engine room bilge wells to the bilge holding tank. He also conspired with others to obstruct the U.S. Coast Guard from inspecting and investigating the mishandling of oily bilge water on the *Donald*.

Vessel operating company Interunity Management (Deutschland) GMBH previously pleaded guilty for maintaining false and incomplete records relating to the discharge of oily bilge water and was ordered to pay a total of $1.25 million, including more than $312,000 to benefit marine and coastal natural resources in or near the Tijuana River National Estuarine Research Reserve.

Senior Trial Attorney Stephen Da Ponte of the Environment and Natural Resources Division's Environmental Crimes Section and Assistant U.S. Attorney Melanie K. Pierson for the Southern District of California are prosecuting the case.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

Sept. 29, 2023— the U.S. Environmental Protection Agency (EPA) announced a settlement with Integrated DNA Technologies Inc. for claims of violations of the Resource Conservation and Recovery Act tied to emissions at the company's San Diego, California facility. The company has agreed to pay a $15,890 civil penalty and has certified it is now in compliance with the requirements of federal law. Additionally, as part of the settlement, the company agreed to perform a supplemental environmental project valued at $61,388 to purchase equipment for the City of San Diego Fire-Rescue Department's use in safely responding to emergencies involving airborne contaminants.

"Failure to prevent emissions tied to hazardous waste and leaky equipment can pose a serious health risk to nearby communities. It's imperative that companies meet their obligations to properly manage hazardous waste," said EPA Pacific Southwest Regional Administrator Martha Guzman.

Integrated DNA Technologies Inc. develops and manufactures custom synthetic DNA that supports the life sciences industry and is a large quantity generator of hazardous waste. During a 2022 inspection, EPA determined that the company violated federal law by failing to comply with hazardous waste regulations related to air emissions standards for equipment leaks and tanks.

Hazardous waste that is improperly managed poses a serious threat to human health and the environment. The Resource Conservation and Recovery Act, passed in 1976, was established to set up a framework for the proper management of hazardous waste. The act requires effective monitoring and control of air emissions from hazardous waste storage tanks, pipes, valves, and other equipment.
(Robert Schuster)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT FINDS U.S. SURFACE TRANSPORTATION BOARD FAILED TO TAKE A 'HARD LOOK' AT UTAH OIL RAIL PROJECT'S ENVIRONMENTAL IMPACTS UNDER NEPA

Eagle County, Colorado v. U.S. Surface Transportation Board et al.,
___F.4th___, Case No. 22-1019 (D.C. Cir. 2023);
Center for Biological Diversity et al. v. U.S. Surface Transportation Board et al.,
___F.4th___, Case No. 22-1020 (D.C. Cir. 2023).

In an opinion filed on August 18, 2023, in consolidated petitions in *Eagle County, Colorado v. U.S. Surface Transportation Board et al.* and *Center for Biological Diversity et al. v. U.S. Surface Transportation Board et al.*, the D.C. Circuit Court of Appeals vacated the U.S. Surface Transportation Board's (STB) approval of the construction and operation of a new rail line transporting crude oil in the Uinta Basin in Utah (Railway or Project). The Court of Appeals found that STB's Environmental Impact Statement (EIS) for the Project, prepared pursuant to the National Environmental Policy Act (NEPA), failed to fully evaluate several environmental issues, including increase in greenhouse gas (GHG) emissions, wildfire risks, and potential train derailments. The court also found that STB violated its own enabling act, the Interstate Commerce Commission Termination Act of 1995 (ICCT Act), when it "failed to weigh the [Railway's] uncertain financial viability and the full potential for environmental harm against the transportation benefits it identified," and granted the Project an exemption from STB's formal application requirements to authorize the Project. The court vacated STB's exemption order, EIS, and the Biological Opinion (BiOp) issued by the U.S. Fish and Wildlife Service (FWS), and remanded the matter to STB for further analysis.

Background

Under the ICCT Act, (Pub. L. No. 104–88, 109 Stat. 80), STB has jurisdiction over rail carriers. To get STB approval for the construction or operation of a railroad line, a party may either: (1) seek a certificate from STB by "submit[ting] an application that provides information about itself and its proposed use of the line, including operational, financial, environmental, and energy data"; or (2) seek an exemption from the full application requirements upon an STB finding that:

> . . .compliance with those provisions 'is not necessary to carry out the transportation policy'. . . , and that either the 'transaction or service is of limited scope' or the 'application in whole or in part of the provisions is not needed to protect shippers from the abuse of market power.' (*See*: *Snohomish Cnty. v. STB* 293 (D.C. Cir. 2020) 954 F.3d 290, 293–94, quoting 49 U.S.C. §§ § 10101, 10502(a)(1)–(2), 10901(c), 10902(c).)

Additionally, as STB is a federal agency, it is required "to examine the environmental effects of" its proposed actions "and to inform the public of the environmental concerns that were considered in the agency's decisionmaking" pursuant to NEPA. (*See: Citizens Against Rails-to-Trails v. STB* (D.C. Cir. 2001) 267 F.3d 1144, 1150.) Further, STB was also required to consult regarding the Project with the U.S. Fish and Wildlife Service under the federal Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, for protection and conservation of endangered and threatened species; (*see:* 16 U.S.C. §§ 1531(b), 1536(a)–(d)); and comply with the National Historic Preservation Act (NHPA) to "take into account the [Project's] effect . . . on any historic property." (54 U.S.C. § 306108.)

Pursuant to this statutory background, in May 2020, a coalition of seven Utah counties (Coalition) petitioned STB for the construction and operation of the 88-mile rail line for freight transportation of waxy crude oil produced in Uinta Basin to a Union Pacific Railroad connection and for ultimate trans-

portation to refineries in Texas and Louisiana. The Coalition's petition made two requests: (1) an exemption from STB's formal application requirements, and (2) authorization of the Project in a two-part process whereby STB would "conditionally approve" the exemption based on its transportation merits, pending the Project's environmental review under NEPA and related statutes.

Despite opposition from several groups questioning the Project's financial viability, purported benefits, and "impact to public health, safety, and the environment," STB conditionally granted the exemption in January 2021, and then issued the final EIS in August 2021. The FWS also issued the BiOP for the Project in September 2021, which it based on the STB-defined action area for considering the environmental impact of the Project on protected species and their designated critical habitat. STB, in a 4-1 decision, then issued the final exemption order in December 2021. STB's final exemption order found that the Project could have "major impacts" on water resources, air quality, special status species like the greater sage-grouse, land use and recreation, local economies, cultural resources, and the Ute Indian tribe, as well as "minor impacts" on vehicle safety and delay, and rail operations. But the STB majority found the Project's transportation merits outweighed its environmental effects. The lone dissenter, STB Chairman Marty Oberman, argued that there was no demonstrated transportation need for crude oil transportation from the Uinta Basin and that the negative downstream environmental effects outweighed any public interest need for the Project.

Petitioners, consisting of environmental groups and Eagle County, Colorado, filed lawsuits seeking a review of the STB's preliminary and final exemption orders, the EIS, and the BiOp, asserting violations of NEPA, ESA, NHPA, and the ICCT Act. Petitioners argued that the Project's EIS failed to analyze the full impact of GHG emissions from oil extraction encouraged by the new rail line or the potential air pollution from processing of waxy crude oil transported to Gulf Coast refineries, and that STB did not adequately asses the risks related to wildfires, derailments, and harm to endangered species.

The D.C. Circuit's Decision

The D.C. Circuit broadly agreed with the majority of the petitioners' arguments and found that STB failed to take a "hard look" at the environmental impacts of the Project under NEPA. The court also found violations of the ESA and the ICCT Act, but not for NHPA provisions.

Greenhouse Gas Analysis

First, regarding the EIS's adequacy of GHG emission analysis under NEPA, the court rejected STB's argument that analysis of the upstream and downstream GHG emissions from increased oil drilling, refining, and combustion are unforeseeable. The court found that the STB's own environmental analysis developed scenarios projecting the expected increases in rail traffic, the number of new wells needed to satisfy expected production in the region, and narrowed the list of processors to a limited number of refineries in Texas and Louisiana, but then characterized the effects of downstream use as not foreseeable. The court criticized this STB approach for not providing a reason as to why the it could not do further analysis and quantify the GHG emissions and effects of the oil production and wells that STB itself had stated as a "reasonably foreseeable development scenario."

Downstream Impacts Regarding Derailments and Wildfire Risks

Second, the court also held that the EIS underestimated the Project's downstream effects regarding train derailment and wildfire risks. The court found that STB's assertion that adding 9.5 new downline trains a day would not create new sources of wildfire ignition as "utterly unreasoned" because more trains necessarily involve more potential ignition opportunities. And because STB downplayed derailment risks, it also underestimated the wildfire risks posed by these derailments. The court also faulted STB for assuming that loaded freight trains were as likely to derail as unloaded trains and ignoring the evidence of the increased risk of trains loaded with oil navigating difficult mountainous terrain.

Downline Resources Adverse Impacts

Lastly, the court also held that the EIS failed to evaluate adverse effects on downline resources under NEPA, including water resources, biological resources, land use and recreation, and noise and vibrations. The court found no evidence in the record that STB explicitly considered those topics, and the record did

not mention the Colorado River, even though it flows for hundreds of miles next to rail lines downline of the Project. The court chided STB that merely "stating that a factor was considered … is not a substitute for considering it," and STB also failed to take the requisite "hard look" at these downline effects.

Endangered Species Act Analysis

Regarding STB's compliance with ESA, the court held that STB "arbitrarily narrowed the scope of ESA and [USWS] adopted that flawed determination without interrogation." The court found that FWS-issued BiOp was inadequate because the STB-defined project area impermissibly reduced the geographic reach of the analysis and ignored the threat potential of oil spills or other rail-related accidents on endangered freshwater fish in the Colorado River.

The ICCT Act Analysis

With respect to the ICCT Act, the court held that STB's order exempting the Project from the full application requirements was arbitrary and capricious because STB failed to weigh certain downline environmental effects, including climate effects of the combustion of fuel from increased oil drilling, even when presented with information showing questionable demand for Uinta Basin crude oil or the Project's transportation benefits. The court reasoned that:

> . . .the ICCT Act necessitated a more fulsome explanation for [STB's] conclusion that the Railway's transportation benefits outweighed the project's environmental impacts.

The court found that STB's approach here was inconsistent with its own precedent and violated an obligation to weigh rail policies, including environmental impacts, before granting an exemption.

Conclusion and Implications

The D.C. Circuit's decision underlines the importance of federal agencies taking a "hard look" and undertaking a full lifecycle analysis of a project's environmental impacts under NEPA, particularly with regards to GHG emissions. Further, federal agencies would be well-served in considering the public criticism around assumptions and analysis of environmental effects of a project based on facts in the record, rather than just making its own bare conclusions. The court's opinion in the consolidated cases is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/5396DAC54F312EAD85258A0F00514C72/$file/22-1019-2013122.pdf.
(Hina Gupta, Megan Somogyi)

FOURTH CIRCUIT APPLIES THE MAJOR QUESTIONS DOCTRINE TO LIMIT THE SCOPE OF THE CLEAN WATER ACT

North Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291 (4th Cir. Aug. 7, 2023).

The United States Court of Appeals for the Fourth Circuit relied on the "major questions doctrine" to determine that trawl nets brushing the ocean floor and the return of bycatch to Pamlico Sound did not require permits or violate the federal Clean Water Act.

Factual and Procedural Background

The North Carolina Coastal Fisheries Reform Group (Group) is a nonprofit organization dedicated to protecting North Carolina's coastal and marine public trust resources and to promoting sustainable fishing practices. The Group consists of both fishing captains, and employees or residents of North Carolina, who aim to repair the current state of fisheries following the enactment of the Fisheries Reform Act.

Defendants are commercial shrimpers in Pamlico Sound, a coastal estuary in North Carolina. Shrimpers harvest shrimp by dragging trawl nets along the ocean's floor. The nets trap shrimp and stir up sediment, which later resettles on the ocean floor. The nets also inadvertently snare other fish and marine organisms, many of which the trawlers cannot legally keep, and are known as "bycatch." Trawlers throw the bycatch overboard, returning it to the ocean.

The Group sued defendants under the Clean Water Act's citizen-suit provision, alleging defendants are violating the Act and must obtain Clean Water Act permits, in addition to the fishing permits already required. Specifically, the Group claimed the defendants needed a permit under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES), which permits "the discharge of any pollutant" and a permit under Section 404 of the act, which regulates the discharge of "dredged or fill material into the navigable waters."

The U.S. District Court dismissed the suit for failure to state a claim, holding that the Act does not regulate bycatch and that disturbing sediment with trawl nets does not violate the Clean Water Act. Defendants appealed.

The Fourth Circuit's Decision

The court first considered whether defendants violated the Clean Water Act by putting bycatch back into Pamlico Sound without an NPDES permit. The Group claimed the bycatch was a pollutant, citing to the Act's definition of "pollutant," which includes biological materials. The court rejected the Group's argument, relying on the major questions doctrine. Under the major questions doctrine, a federal agency must have clear congressional authorization before adopting an expansive construction of a statute or exercise powers in a new way under an old statute.

Here, the court found that the question raised by the Group was a major question because there is already a distinct regulatory scheme in place where the National Marine Fisheries Service (NMFS) regulates bycatch, not the EPA, and adopting the Group's reasoning would moot the established scheme to regulate bycatch. Under this doctrine, the court determined the Group must identify "clear congressional authorization" to regulate bycatch under the Clean Water Act. The court then rejected the Group's argument regarding bycatch, determining that an expansive, vaguely worded definition of "pollutant" is not akin to a clear congressional authorization in light of the established scheme for regulating bycatch and trawling.

Second, the court considered and rejected the Group's arguments that the disruption of sediment by the trawling nets required a Section 404 or an NPDES permit. The court determined the disrupted sediment did not qualify as "dredged spoil" to trigger Section 404 because it was not actually dredged. The court also determined the rock and sand disrupted by the nets were not "discharged" or "added" to the waters and did not trigger an NPDES permit requirement.

The court affirmed the trial court's full dismissal of the claims by the Group.

Conclusion and Implications

This case is one of the first federal appellate decisions to expressly invoke the major questions doctrine to limit the scope of the Clean Water Act. This decision may signal a willingness for courts to consider any statutory reading with significant political and economic consequences to be a major question, requiring clear congressional authority for the proposed statutory construction. The Fourth Circuit's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca4/21-2184/21-2184-2023-08-07.html.

(Rebecca Andrews, Elleasse Taylor)

Eastern 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