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FEATURE ARTICLE

OKLAHOMA V. CASTRO-HUERTA: U.S SUPREME COURT'S RECENT EXPANSIVE INTERPRETATION OF STATES' RIGHTS TO APPLY THEIR LAWS ON INDIAN RESERVATIONS

By Roderick E. Walston

The U.S. Supreme Court's interpretation of the principles of federal Indian law, and of the states' rights to apply their laws on Indian reservations, has steadily evolved, from the Court's early view that state laws have no place on Indian reservations to its more recent view that whether state laws apply requires an accommodation of federal, state and tribal interests.

In its recent decision in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), the Supreme Court took a particularly significant step in the evolution of federal Indian law, by significantly expanding the states' rights to apply their laws on Indian reservations. The Court held that Indian reservations are part of a state and not separate from a state, and that under the Constitution the states may apply their laws on all Indian reservations within their borders unless the state laws are preempted by federal law. And in determining whether the state laws are preempted, the Court held that the ordinary standard of preemption that applies in other contexts—that state laws are presumptively not preempted—also applies in determining whether state laws are valid as applied on Indian reservations. The default standard, the Court stated, is that state laws *apply* on Indian reservations unless specifically preempted by Congress, and not that state laws are *preempted* unless specifically authorized by Congress.

In sum, *Castro-Huerta* significantly expanded the states' authority to apply their laws on Indian reservations, by grounding their authority on the Constitution and by holding that state laws apply unless Congress clearly speaks otherwise.

The state laws that potentially apply on Indian reservations may take many different forms—such as state tax laws that apply to Indians and non-Indians on reservations; state laws that regulate property on reservations, such as state zoning, building and outdoor advertising laws; and state laws that regulate Indian activities in water, such as fishing and hunting. Although the specific rules that apply to one category of state laws may not necessarily apply to another category, some general overarching principles apply to all of these categories of state law, and this Article will focus on these general overarching principles.

The U.S. Supreme Court's Evolving Principles of Federal Indian Law

Worcester v. Georgia: State Laws Are Categorically Precluded as Applied on Indian Reservations

Under the Commerce Clause of the Constitution, Congress has power to regulate commerce among the states and with Indian tribes. U.S. Const., art. I, § 8, cl. 3. Under its commerce powers, Congress has "plenary" power to regulate Indian reservations and affairs. *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–471 (1979). Congress has historically exercised its plenary power by entering into treaties with Indian tribes and by enacting statutes. But Congress' plenary power does not, itself, necessarily preclude the application of state laws on Indian reservations, to the extent the state laws do not conflict with Congress' treaties and statutes. The states' rights to apply their laws on Indian reservations, and to Indian conduct and activities, has undergone a checkered history, and has evolved from the nation's early history to the present.

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In *Worcester v. Georgia*, 31 U.S. 515 (1832), the U.S. Supreme Court, in a decision written by Chief Justice John Marshall, held that state laws are categorically precluded as applied on Indian reservations in the absence of Congress' or the Indian tribe's consent. Although a Georgia statute prevented white missionaries from living on the Cherokee Nation's reservation unless they obtained a permit from and swore an oath of loyalty to Georgia, the Supreme Court held that Indian reservations are separate federal enclaves in which state laws have "no force," and thus Georgia's citizens have "no right to enter" the reservation without Congress' or the Indian tribe's consent. *Worcester*, 31 U.S. at 561. President Andrew Jackson refused to enforce the *Worcester* decision, and is reputed to have said, "John Marshall has made his decision: now let him enforce it!"

The Court's Modern View: State Laws Apply on Indian Reservations Unless Preempted by Federal Law or Interfere with Tribal Self-Government, But Tradition of Tribal Sovereignty May Weigh in Favor of Preemption

As the United States expanded westward in the nineteenth century in pursuit of its Manifest Destiny, Congress adopted the policy of assimilating Indians into the rest of society rather than isolating them on their reservations. *Organized Village of Kake v. Egan* (*Kake Village*), 369 U.S. 60, 72 (1962). In 1871, Congress abolished its power to make treaties with Indian tribes. 25 U.S.C. § 71. In 1887, Congress enacted the General Allotment Act, 25 U.S.C. § 331, which allowed individual Indians to acquire allotments of reservation land for their agricultural and other purposes. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). But Congress abruptly halted the assimilation policy in 1934 by enacting the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, which preserved Indian reservations in their present form, authorized the Secretary of the Interior to acquire new trust lands, and ended the policy of Indian allotments, although preserving existing allotments.

Concomitantly, the Supreme Court departed from the principle established in *Worcester v. Georgia*, stating that *Worcester* has "yielded to closer analysis." *Kake Village*, 369 U.S. at 72. Under the Court's modern view, an Indian reservation is "part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Id.* Therefore, the Court has held, state laws may apply on Indian reservations "unless such application would interfere with tribal self-government or impair a right granted or reserved by federal law." *Id.* at 75; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Williams v. Lee*, 358 U.S. 217, 220 (1959). Thus, the Court's modern view is that state laws may apply on an Indian reservation but are subject to a twin barrier: the state laws are inapplicable if they are preempted by federal law or interfere with tribal self-government.

The Supreme Court has increasingly relied on federal preemption rather than tribal self-government as a bar to the application of state laws on Indian reservations. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 136, 172 (1973); *Rice*, 463 U.S. at 718. And, in determining whether state laws are preempted, the Court has held that the traditional preemption standard that applies in other contexts does not apply in determining whether state laws are preempted as applied on Indian reservations. *McClanahan*, 411 U.S. at 172; *Rice*, 463 U.S. at 718. Rather, the tradition of tribal sovereignty serves as a relevant "backdrop" in determining whether state laws are preempted, and this "backdrop" weighs in favor of preemption of state laws. *Id.* The Supreme Court has in some cases adopted a rule of statutory interpretation that ambiguities in federal law must be construed favorably to the Indians, and this rule supports preemption of state laws as applied on Indian reservations. *McClanahan*, 411 U.S. at 172; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

Even so, the Supreme Court's jurisprudence has been uneven in determining under what circumstances state laws may apply on Indian reservations, and the weight accorded to tribal sovereignty in making this determination. The Court has held in some cases that state laws are preempted unless they are specifically authorized by Congress, and in others that whether the state laws are preempted depends on the balance of state, federal and tribal interests. And in making this determination, the Court has accorded greater weight to tribal sovereignty in some cases than in others.

In *McClanahan*, for example, the Supreme Court held that, in light of the tradition of tribal sovereignty, state laws "generally are not applicable to

tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan*, 411 U.S. at 170-171. The Court, in holding that a state income tax was preempted as applied to income received by Indians from on-reservation sources, cited its decision in *United States v. Kagama*, 118 U.S. 375 (1886), which had held that Indian tribes are a "separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *McClanahan*, 411 U.S. at 173, *citing Kagama*, 118 U.S. at 381-382. Thus, under *McClanahan*, state laws are generally preempted as applied on Indian reservations unless they are specifically authorized by Congress.

But in other cases the Supreme Court has balanced state, federal and tribal interests in determining whether state laws are preempted as applied on Indian reservations, and has held that tribal sovereignty, although accorded weight in determining the tribal interest, must yield in the face of more compelling state interests. In *Rice v. Rehner*, the Court held that the tradition of tribal sovereignty requires an "accommodation" between the interests of an Indian tribe and the federal government, on the one hand, and the state, on the other, and that the "balance of state, federal and tribal interests" may accord "less weight" to the tradition of tribal sovereignty. *Rice*, 463 U.S. at 719-720; *see also Washington v. Confederate Tribes of the Colville Indian Reservation* ("*Confederated Colville Tribes*"), 447 U.S. 134, 156 (1980); *Nevada v. Hicks*, 533 U.S. 353, 362 (2001).

In *Rice* itself, the Court balanced state, federal and tribal interests in holding that California could require a federally-licensed trader who operated a general store on an Indian reservation to obtain a state liquor license in order to sell liquor for off-premise consumption. *Rice*, 463 U.S. at 718. In *Confederated Colville Tribes*, the Court also balanced these interests in holding that Washington could impose its cigarette and sales taxes to on-reservation purchases by nontribal members. *Confederated Colville Tribes*, 447 U.S. at 156-157. There, the Court stated that the tribal interest was strongest when tax revenues are derived from value generated on the reservation by the tribal members, but weakest when, as in the instant case, the tribe seeks to market an exemption from state laws that apply elsewhere in the state. *Id.*; *see also Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976).

Similarly, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1980), the Supreme Court balanced state, federal and tribal interests in considering whether California's anti-gambling laws applied on an Indian reservation, although the Court concluded that the balance of interests weighed in favor of preemption of the California laws. *Cabazon*, 480 U.S. at 214-222. The Court rejected *McClanahan*'s broad view that state laws are preempted unless authorized by Congress, and stated that the Court's cases "have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of congressional consent"; rather:

> . . .[u]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances may assert jurisdiction over the on-reservation activities of tribal members. *Id.* at 214-215, *citing, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983). (*Cabazon* led to Congress' enactment of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, which regulates gaming on Indian reservations. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014).)

The Supreme Court has made clear that state laws generally apply to conduct and activities of Indians outside the borders of their reservations. In *Ward v. Race Horse*, 163 U.S. 504 (1896), the Court held that—even when Indian fishing and hunting rights have been reserved in treaties—state laws regulating fishing and hunting generally apply to Indians outside of their reservations. *See also Kake Village*, 369 U.S. at 75 (holding that state laws generally apply to off-reservation Indian conduct, such as state criminal laws and state laws regulating fishing and hunting); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973) (holding that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.")

In sum, under the Supreme Court's modern view, state laws may apply on Indian reservations unless they are preempted by federal law, and, while the

tradition of tribal sovereignty may weigh in favor of preemption of state laws, the tradition of tribal sovereignty is accorded less weight if the balance of state, federal and tribal interests support the state laws. The weight accorded to tribal sovereignty appears to have varied depending not simply on the facts of the case but also, in some instances, on the justice who wrote the Court's majority opinion. Justice Thurgood Marshall, for example, who wrote the majority opinion striking down state regulation in *McClanahan*, appeared to rely more on tribal sovereignty as a bar to state regulation than Justice O'Connor and then-Justice (later Chief Justice) Rehnquist, who wrote the majority opinions upholding state regulation in *Rice v. Rehner* and *Confederated Colville Tribes*, respectively.

State Laws as Applied to Non-Indians on Indian Reservations: The *Bracker* Balancing Test

In the instance of state laws as applied to *non-Indians* on an Indian reservation, the Supreme Court has in its recent history consistently that whether state laws apply to the non-Indians depends on the balance of state, federal and tribal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *Cotton Petroleum Corps. v. New Mexico*, 490 U.S. 163, 175 (1989). This balancing test—generally referred to as the *Bracker* balancing test—may apply, for example, in determining whether state laws apply to non-Indians who lease property on Indian reservations for commercial or residential purposes, or to non-Indians who enter into tribal contracts to perform services on an Indian reservation, such as harvesting timber or building a tribal structure.

In *Cotton Petroleum Corps. v. New Mexico*, 490 U.S. 163, 175 (1989), the Supreme Court, applying *Bracker*, held that the balance of state, federal and tribal interests supported the state's right to apply its severance tax to a non-Indian lessee who produced oil and gas on an Indian reservation pursuant to a tribal contract. The Court held that—even though the state tax imposed an economic burden on the tribe—the state provided important services to the tribe and the lessee, and therefore the balance weighed in favor of the state tax. 490 U.S. at 185. As the Court stated, "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186. "Under current doctrine," the Court stated, "a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." *Id.* at 175.

In other cases, however, the Supreme Court has held that the balance of interests under *Bracker* weighed in favor of the tribal and federal interests and against the state interest, and therefore the state laws were preempted as applied to the non-Indians. In *Bracker* itself, the Court held that the balance of interests supported preemption of a state tax as applied to a non-Indian logging company that had contracted with an Indian tribe to harvest and sell timber on the reservation. The Court stated that the economic burden of the tax fell on the Indians and the non-Indian logging company, *Bracker*, 448 U.S. at 151, and that the state had performed no regulatory functions or services that might justify the tax, *id.* at 148–149.

Similarly, in *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (2005), the Supreme Court, applying *Bracker*, held that a state gross receipts tax was preempted as applied to a non-Indian construction company that built tribal educational facilities on the tribe's reservation pursuant to a tribal contract. The Court held that the federal government comprehensively regulated construction and financing of Indian educational institutions, that the state tax imposed a significant burden on Indian educational opportunities, and that the state had no specific regulatory interest sufficient to justify the tax. *Ramah*, 458 U.S. at 843-846, 839-842. "Having declined to take any responsibility for the education of these Indian children," the Court stated, "the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has left the State with no duties or responsibilities." *Id.* at 843.

In a separate but related line of cases, the Supreme Court has held that state laws generally apply to non-Indians who own *fee* lands on an Indian reservation, and that the Indian tribe itself has no jurisdiction over the non-Indian owned fee lands. *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Plains Commerce Bank v. Long Gamily Land & Cattle Co.*, 554 U.S. 316, 327-330 (2008); *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). (Typically, a non-

Indian may acquire fee lands on an Indian reservation by purchasing an allotment of fee lands acquired by an individual Indian under the General Allotment Act of 1887.) Indeed, an Indian tribe does not have the same jurisdiction over non-tribal members on the tribe's reservation that is has over its members; as *Montana* stated, the "inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." *Montana,* 450 U.S. at 565.

Public Law 280: Application of Certain State Laws on Indian Reservations

In 1953, Congress enacted Public Law 280, which authorizes certain states, including two continental western states, California and Oregon, to apply their criminal and civil laws on Indian reservations within their borders. Public Law 280 provides in its criminal prong that the states have jurisdiction over "offenses committed by or against Indians" in "Indian country," 18 U.S.C. § 1162, and in its civil prong that the states have jurisdiction over "civil causes of action" involving Indians within "Indian country," and that state "civil" laws that are of "general application" shall have "the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360.

The Supreme Court has held that Public Law 280 does not authorize the states to apply their *civil regulatory* laws on Indian reservations, such as their zoning, building and other regulatory laws. *Bryan v. Itasca County*, 426 U.S. 373, 385, 388-390 (1976); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207-208 (1987). Rather, the Court has held, Public Law 280 establishes a distinction between civil regulatory laws and criminal prohibitory laws, and authorizes only the application of the latter and not the former on Indian reservations. *Cabazon*, 480 U.S. at 207-208. The Ninth Circuit has further limited the effect of Public Law 280, holding that the statute authorizes only the application of state laws—and not local laws of counties and cities—on Indian reservations. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1390 (9th Cir. 1987); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 661 (9th Cir. 1975).

Thus, while the criminal prohibitory laws of California, Oregon and other identified states apply on Indian reservations under Public Law 280, the civil regulatory laws of the states do not.

Oklahoma v. Castro-Huerta: Supreme Court Expansion of States' Rights to Apply Their Laws On Indian Reservations

In *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), the Supreme Court recently expansively interpreted the states' authority to apply their laws on Indian reservations. The Court, in a 5-4 decision written by Justice Kavanaugh, applied the *Bracker* balancing test in holding that Oklahoma has concurrent jurisdiction with the federal government to apply its criminal laws against non-Indians who commit crimes against Indians on an Indian reservation in Oklahoma. 597 U.S. at 650-651. The decision is significant less for its conclusion that Oklahoma had concurrent jurisdiction than for its analysis of the principles of federal Indian law that underlay the conclusion. The decision substantially expanded the states' authority to apply their laws on Indian reservations than under prior decisions, and thus represents a significant development in the evolution of federal Indian law.

First, the Court in *Castro-Huerta* held that the states' rights to apply their laws on Indian reservations is based on the Constitution itself, thus indicating that the states' authority has a constitutional source and is not based simply on Congress' consent. The Court stated that "Indian country is part of the state, not separate from the state," and "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." 597 U.S. at 636. In support of this conclusion, the Court cited the Tenth Amendment of the Constitution, which provides that powers not delegated to Congress are retained by the states. *Id.* The Court also cited its decision in *Pollard v. Hagan*, 44 U.S. 212, 228 (1845), which held that a state is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Id.* The Court stated that Chief Justice John Marshall's view in *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)—that Indian reservations are separate enclaves in which state laws do not apply—has been abandoned in the Court's recent decisions, such as *Kake Village*, 369 U.S. at 72, and *Nevada v. Hicks*, 533 U.S. at 353, 361, which, among others, held that state laws may be applied on Indian reservations under some circumstances because the reservations are part of the state. 597 U.S. at 636-637. The Court concluded that "the Court's precedents establish that Indian country is part of a

State's territory and thus, unless preempted, States have jurisdiction over crimes committed in Indian country." *Id.* at 637.

Second, in determining whether the state laws are preempted, the Court, citing its precedents, held that whether state laws are preempted as applied on Indian reservations depends on the "ordinary principles of federal preemption." 597 U.S. at 638. The Court thus indicated that the traditional preemption standard that applies in other contexts also applies in determining whether state laws are preempted as applied on Indian reservations. Under the traditional preemption standard, state laws are not preempted unless Congress indicates otherwise by its "clear and manifest purpose." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). By adopting the traditional preemption standard, the Court in *Castro-Huerta* appeared to depart from the view that the tradition of tribal sovereignty serves as a "backdrop" that weighs in favor of preemption, *e.g.*, *McClanahan*, 411 U.S. at 174, and that ambiguities in federal law must be construed favorably to Indians. *Id. Castro-Huerta* indicates that greater deference may be accorded to state laws unless they have been clearly and unambiguously preempted by Congress.

Third, the Court rejected the dissenting opinion's argument that state laws are preempted as applied on Indian reservations unless Congress specifically *authorizes* their application, and stated, just the opposite, that state laws are authorized on Indian reservations unless Congress specifically *preempts* their application. 597 U.S. at 6503. As the Court stated, "States do not need a permission slip from Congress to exercise their sovereign authority." *Id.* The Court thus resolved the disagreement among its earlier decisions in which the Court stated in some cases that state laws do not apply on Indian reservations unless they are authorized by Congress, *e.g.*, *McClanahan*, 411 U.S. at 170-171, and in other cases that state laws may apply on Indian reservations if the balance of state, federal and tribal interests supports their application, *e.g.*, *Rice v. Rehner*, 463 U.S. at 719-720; *Nevada v. Hicks*, 533 U.S. at 362. The Court held the latter paradigm applies and not the former.

The Dissent

The dissenting opinion in *Castro-Huerta*, 597 U.S. at 656-696, written by Justice Gorsuch, disagreed with all of the above aspects of the majority decision. The dissenting opinion argued that state laws do not apply on Indian reservations unless Congress has expressly authorized their application; that ambiguities in federal law involving Indians must be construed favorably to the Indians; that Indian tribes are not "private organizations within state boundaries" but are "sovereigns"; and that only the federal government or an Indian tribe can punish crimes by or against Indians on Indian reservations. 597 U.S. at 656-686. Although the Supreme Court has routinely stated that its view in *Worcester* that state laws have no place on Indian reservations has "yielded to closer analysis," *e.g.*, *Kake Village*, 369 U.S. at 72, the dissenting opinion argued that *Worcester* is "one of this Court's finer hours." 597 U.S. at 656.

In sum, the Supreme Court's majority and dissenting opinions in *Castro-Huerta* reflect the contrasting views in the Court's long evolution of the principles of federal Indian law. The majority opinion held that the states' rights to apply their laws on Indian reservations is based on the Constitution itself; that the states may apply their laws unless they are preempted under ordinary standards of preemption; and that the default standard is that state laws apply unless specifically preempted, and not that state laws are preempted unless congressionally-authorized. The dissenting opinion argued the polar opposite, that under *Worcester* state laws do not apply on Indian reservations unless they are authorized by Congress, and that Congress presumptively does not authorize state laws on Indian reservations unless it clearly expresses its intent. *Castro-Huerta* was narrowly decided, with five justices supporting the former view and four justices supporting the latter. Whether the Court embraces or departs from the principles established in *Castro-Huerta* will likely depend on the Court's future perspectives, and perhaps its future composition.

Conclusion and Implications

The U.S. Supreme Court's jurisprudence concerning federal Indian law has evolved from the nation's early history—from the Court's early view in *Worcester* that state laws are categorically precluded as applied on Indian reservations, to its more recent view that state laws may apply on Indian reservations but are generally preempted by tribal sovereignty, and to its even more recent view that whether state laws apply on Indian reservations requires an "accom-

modation" and balancing of state, federal and tribal interests. The Court's decision in *Castro-Huerta* represents another significant step in this evolutionary process, by sourcing the states' rights to apply their laws on the Constitution and by holding that state laws apply unless preempted under ordinary preemption standards. Whether the Court follows or departs from the principles established in *Castro-Huerta* will likely form the next chapter in the continuing evolution of federal Indian law.

The views and opinions expressed in this article are those of the author and not necessarily those of his law firm or of his clients.

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CALIFORNIA WATER NEWS

KERN GROUNDWATER STORAGE PROJECT RECEIVES ADDITIONAL FUNDING FROM THE U.S. BUREAU OF RECLAMATION

In early 2024, the U.S. Bureau of Reclamation (Reclamation) approved a $3.9 million grant for the Kern Fan Groundwater Storage Project (Project). The grant follows a similar $4.7 million grant approved by Reclamation for the project in 2023. The project was previously awarded $89 million of Proposition 1 water storage bond money, and construction on Phase 1 of the project is expected to be completed in 2026. The $171 million groundwater banking project is intended to benefit multiple agencies in the Kern County area and contemplates environmental uses in other groundwater basins.

Background

The Kern Fan Groundwater Storage Project, located in California's San Joaquin Valley, is a groundwater banking project that is estimated to reach a full recharge capacity of 100,000 acre-feet of groundwater. The Project is led in collaboration by the Rosedale-Rio Bravo Water District (RRBWD) and Irvine Ranch Water District (IRWD), and construction on Phase 1 of the Project is expected to finish in 2026. The Project also promises to hold 25 perecent of the stored water in an "ecosystem account" for the Department of Water Resources to use in the Sacramento-San Joaquin Delta for environmental reasons should the need arise.

In 2018, the Project received approval from the California Water Commission for $89 million of Proposition 1 water storage bond money, becoming the only San Joaquin Valley project to win approval of such funds. The "ecosystem account" is one of the main reasons the Project was approved for Proposition 1 funding. Groundwater in the area has also been found to contain 1,2,3-Trichloropropane (TCP), a carcinogenic fumigant applied from the 1950s through the 1980s, but it is believed that the TCP levels can be reduced before the Project is connected to the California Aqueduct.

Bureau of Reclamation Grants

Recently, the Bureau of Reclamation approved a $3.9 million grant for the project, which follows a similar grant of $4.7 million from Reclamation in 2023. While the Proposition 1 money approved for the project does not need to be matched by RRBWD and IRWD, the grants from Reclamation require a 75 percent match and the Project requires additional permits before the Proposition 1 funds can be released by the state. In addition to the required permits, the Project was also the subject of opposition in the courts.

Lawsuits

Placement of a canal intended to connect the Project to the California Aqueduct was the subject of two now-settled lawsuits. The City of Bakersfield sued due to concerns that the project would divert Kern River water outside of the county, while the Kern County Water Agency sued based on its concern that the Project's connection to the Aqueduct would impact other districts' ability to use the Aqueduct. Both lawsuits were settled when Project officials agreed not to divert Kern River water and to conduct a full environmental study before deciding where to place the canal. While the location of the canal has not been determined yet, the project is thought to be saving water now due to construction beginning on land that was heavily irrigated in the past.

Conclusion and Implications

The additional funds from the U.S. Bureau of Reclamation indicate federal support for California's groundwater banking programs, which seek to help agencies share the burden of building infrastructure intended to provide long-term sustainability the region's basins. The grants from Reclamation may be a viable option for managers of similar projects seeking to address feasibility concerns in the future and may supplement state funding through programs like Proposition 1.

Reclamation's grant also implicates other projects that were awarded Proposition 1 funds. Proposition 1 authorized $7.545 in general obligation bonds for

water projects, including surface and groundwater storage. The funding authorized by Proposition 1 is administered by the State Water Resources Control Board, and the inclusion of the ecosystem account in the project was one of the reasons the project received the water storage bond money. The additional funding the project has received indicates support for projects that contemplate environmental uses by other agencies.
(Wes Miliband, Kevin Harris)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL WOULD ADD TRIBAL WATER USES AS 'WATERS OF THE STATE' THAT MAY BE PROTECTED AS 'BENEFICIAL USES'

On February 14, 2024, State Assembly Member James C. Ramos introduced Assembly Bill (AB) 2614. The bill would update the definition of "beneficial use," which currently describes "certain waters of the state that may be protected against quality degradation," including "domestic, municipal, agricultural, and industrial supplies," in order to add tribal water uses. (AB 2614, Leg. Counsel's Digest, § (1).)

Background

The Porter-Cologne Water Quality Control Act (Water Code, § 13000, *et seq.*) (Act) is California's clean water statute, and provides for the creation of regional water quality control boards to serve as agencies with primary responsibility for coordinating and controlling water quality. Under the Act, it is the policy of the state to protect "beneficial uses of the waters of the state."

The Act presently defines "beneficial uses" as follows:

> Beneficial usesof the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

Only beneficial uses count as "waters of the state that may be protected against quality degradation" under the Act.

At present, the definition of "beneficial use" does not expressly contemplate tribal uses. AB 2614 aims to include tribal uses as beneficial uses under the Act. As of April 23, 2024, the bill has been referred to the Assembly's Appropriations Committee and is pending there.

Assembly Bill 2614

AB 2614 would add tribal water uses to the definition of "beneficial uses" under the Act. In its present form, the bill amends Water Code sections 13000, 13050, 13144, 13181, and 13241, while adding sections 13142.1, 13170.4, and 13243.5.

Among AB 2614's proposed changes, the bill would add certain findings that "California tribal communities have special ties to the bodies of water that have sustained their people, who have suffered from genocide, disease, displacement, and discrimination dating back to European colonization, and therefore tribal water uses must be protected through the statewide program for the control of the quality of all the waters of the state," and further that "allowing for tribal water uses should be a primary factor in determining the highest water quality that is reasonable in all regulatory decisions."

The proposed definition of "tribal water uses" is as follows:

> Tribal water uses means any tribal practice that involves contact with a body of water or use of animals, plants, or fungi that reside in, or are adjacent to, a body of water. A California tribal community that elects not to publicly disclose its tribal water uses may confidentially disclose them to the state board or a regional board pursuant to the consultation provisions of Section 65352.4 of the Government Code. This definition of tribal water uses shall be used exclusively and shall replace all definitions previously adopted by a state agency, including, but not limited to, definitions of "tribal traditional cultural uses" and "tribal subsistence uses."

The bill emphasizes the value of tribal ecological knowledge and would direct state agencies to make resources available for tribal co-management of

aquatic resources within both traditional and current tribal lands.

Further, the bill would require any project or regulatory program subject to approval by the state or any regional control board to, within an environmental review and any findings presented, "describe, with both quantitative and qualitative information, how the project or regulatory program will impact tribal water uses." The State Water Resources Control Board would be required, on or before December 1, 2025, and every two years thereafter, to publish a report on the implementation of these requirements on its website.

AB 2614 would also require the State Water Resources Control Board to, no later than January 1, 2026:

> . . .incorporate water quality standards to achieve reasonable protection of tribal water uses into the water quality control plan for the San Francisco Bay and Sacramento-San Joaquin Delta watershed.

Current law requires the California Environmental Protection Act and Natural Resources Agency to have entered into a memorandum of understanding (MOA) to establish the California Water Quality Monitoring Council, to be administered by the state board. AB 2614 would require, by no later than December 1, 2025, that California EPA and the Natural Resources Agency amend such MOA "to incorporate participation from California tribal communities in the actions of the monitoring council." This may include council membership for tribal representatives, the creation of a separate tribal water quality council, or consultation with tribal communities.

The bill would also add two new statutory considerations required in any water quality control plan: consultations with California tribal communities; and environmental justice considerations.

Finally, the bill exempts the adoption of tribal water uses within a water quality control plan from the requirements of the California Environmental Quality Act, and requires, by January 1, 2028, that each regional board must adopt water quality standards to achieve reasonable protection of tribal water uses as part of their water quality control plans.

Conclusion and Implications

Assembly Bill 2614, if enacted into law, would specifically recognize tribal water uses as "beneficial uses" under the Act. By requiring state and regional water quality boards to take-into-account issues of environmental justice, consider the impacts of projects on tribal water use, and promoting consultation and collaboration with tribal members, the bill would expand the number of protected interests that state agencies must take into account in their water quality planning functions. For more information, *see:* California Assembly Bill 2614, LegiScan, Mar. 21 2024, https://legiscan.com/CA/text/AB2614/2023
(Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES WATER PLAN UPDATE LOOKING TO THE FUTURE OF WATER RESOURCE MANAGEMENT

On April 3, 2024, the California Department of Water Resources released the 2023 Update to the California Water Plan. The statewide plan provides local communities, water districts, tribes, cities, counties and the public guidance with respect to the statewide objectives for the use and development of California's water resources.

Background

The California Water Plan is updated every five years and the 2023 Update focuses on promoting climate resilience by providing a vision for the entire state, establishes clear goals, and provides planning frameworks and toolkits to support the Plan's objectives. The updated Water Plan also includes resource management strategies, regional planning and performance tracking tools, and looks to a future where changes to the climate are invariably impacting resource management.

Development of the 2023 State Water Plan Update

In preparing the 2023 Update, the Department of Water Resources engaged with California's tribal communities, other state agencies, industry representatives, non-governmental organizations, water suppliers and local government. Committees and teams were established as well as numerous public meetings and workshops were conducted gathering the concerns, priorities and ideas, which were integrated into the final plan.

Key Elements of the 2023 Update

The primary objective of the 2023 Update is to continue to build California's water supplies to be climate resilient and equitable into the future. The 2023 Update integrates the Water Plan with existing water policies, laws and regulations that have been implemented in recent years. This includes financial investments, prioritizing vulnerable and disadvantaged communities, accounting for ecosystem needs and the importance of water resource management in California's economy. Integrating three primary themes, the 2023 Update addresses climate urgency, strengthening watershed resilience, and steps to achieve equity with the overarching goal of assuring California has climate resilient water systems that equitably benefit all Californians.

The 2023 Update identifies seven objectives that provide a roadmap toward resilience in meeting the challenges facing California. These include: (1) Supporting water resilience planning and implementation; (2) Improved resiliency of "backbone" state, federal, and regional water infrastructure; (3) Improved resiliency of natural "backbone" infrastructure; (4) Advancing equitable outcomes in water resource management; (5) Support and learn from tribal water resource management practices; (6) Support and increase flexibility of regulatory systems; and, (7) Provide guidance and support continued resources for implementation of actions toward water resilience.

Climate Urgency

Focusing on water resource planning while expanding on existing knowledge and experiences. The 2023 Update examines the challenges facing California's water systems and builds on the lessons learned—both positive and negative—to improve water supply management, improve water quality and food security while seeking to protect communities from the adverse impacts of the changing climate, including drought, flooding, sea level rise, and excessive heat. In achieving these objectives, the 2023 Update addresses strategies to continue to enhance and protect infrastructure within watersheds and regions.

Resilient Watersheds

As watersheds, including surface and groundwater systems, are on the frontline of impacts from climate

change, the 2023 Update focuses on encouraging climate vulnerability analyses and adaptation plans for California's watersheds. These evaluations and plans will then support the development of solutions and programs that will allow for communities to implement solutions to face climate and resource uncertainties.

Equity

Building on California's legislative recognition that every human has the right to safe, clean, affordable, and accessible water, the 2023 update focuses on implementing strategies to achieve water equity for all Californian's regardless of social, economic, and health disadvantages. This includes addressing inequities in access to domestic water supplies as well as inequities in water quality. The 2023 Update also addresses challenges to disadvantaged communities in responding to the impacts of climate change, including drought and floods.

Conclusion and Implications

The 2023 Update to the California Water Plan continues California's efforts to be proactive in addressing the challenges in managing the state's water resources. By building on lessons that have been learned over prior years and developing strategies to meet the goals and needs of the State, the 2023 Update continues to reflect California's priorities of understanding the challenges facing the state though developing proactive strategies to meet those challenges while improving equity and economic opportunities for all Californians.
(Micheline Nadeau Fairbank, Derek Hoffman)

STATE WATER BOARD EXTENDS DEADLINE TO PROTEST CHANGE PETITION FOR DWR'S DELTA TUNNEL PROJECT

On February 29, 2024, the State Water Resources Control Board (State Water Board) issued notice of a water rights change petition (Change Petition) for the Department of Water Resources' (DWR) proposed Delta Conveyance Project (DCP) and an April 29, 2024 deadline to file protests. The DCP is the single-tunnel successor to DWR's prior conveyance project, known as the WaterFix twin tunnels. On April 17, in response to requests by the public, the State Water Board extended the protest period by two weeks to establish a new deadline of May 13, 2024.

Background

The DCP encompasses the construction and operation of two large intake structures on the Sacramento River in the North Delta, a 45-mile underground tunnel, and related facilities to be incorporated into DWR's State Water Project (SWP) system and bolster water deliveries to contractors south of the Delta. According to DWR, the DCP is needed to address water reliability concerns and uncertainties due to climate change, and the risks of seismic activity to existing Delta levee infrastructure. DWR anticipates without the DCP, those factors could lead to lower water quality in the Delta, increased risk of interruptions to SWP operations, less water stored as snowpack in the mountains, reduced operational flexibility due to saltwater intrusion, and larger peak inflows that will not be captured due to more precipitation falling as rain instead of snow.

The purpose of the DCP is to develop diversion and conveyance facilities that will be more resilient in the face of climate change and provide operational flexibility to better manage water supplies for the 27 million Californians and 750,000 acres of farmland that rely on SWP deliveries. DWR approved and certified the final Environmental Impact Report (EIR) for the DCP in December of 2023, which multiple parties have since challenged in court under the California Environmental Quality Act (CEQA) for failure to consider the full impacts of the project. Earlier this year, a Sacramento County Superior Court judge ruled that DWR acted outside of its delegated authority under the Central Valley Project Act when it issued bonds finance the project in 2020. Notwithstanding the pending court cases, DWR estimates all necessary permitting processes and certifications for the DCP will be completed by the end of 2026.

Grounds for Extension

The DCP is a significant water infrastructure project that will require changes to DWR's water right

permits to authorize the addition of new points of diversion in the North Delta. Before it may approve a water right change petition, the State Water Board must determine that the requested changes will not injure other legal users of water, adversely affect the environment, or otherwise be contrary to law. Section 1703.1 of the California Water Code provides that any interested person may file a written protest against approval of a change petition by a provided deadline.

Following notice of the Change Petition, the State Water Board received written requests from the public seeking to extend the April 29, 2024 protest deadline in light of the DCP's voluminous administrative record, overlapping administrative hearings and permitting processes, and pending legal challenges to DWR's approval of the DCP. One letter, jointly submitted by several tribal coalitions, fisheries groups, and environmental and public interest organizations, identified several grounds for delaying the protest deadline, including that the EIR and other documents identified to support the Change Petition are too voluminous to meaningfully review within the provided protest window. Further, with a multitude of ongoing regulatory matters and pending litigation that relate to the DCP, and other concurrent State Water Board proceedings such as the Water Quality Control Plan Update for the Bay-Delta, the groups argued there should be no urgency to process the Change Petition on such an accelerated schedule.

In its opposition to extend the protest deadline, DWR responded that the original protest period was reasonable because the Change Petition only relies on certain sections of the EIR, a draft version of which has been available for review since July of 2022. While other administrative matters and permitting efforts are taking place at the same time, DWR suggests the concurrent processes are intended to provide for efficiencies.

The State Water Board declined requests to vacate the Change Petition altogether or suspend the protest deadline for other matters to conclude, citing the potential importance of resolving DCP issues for managing California's water supply. But recognizing that some entities are balancing resources to participate in another major water right hearing with coinciding due dates, the State Water Board determined a two-week extension to May 13, 2024 would be warranted to avoid the undue burden associated with that inadvertent overlap.

To address concerns over the size of the administrative record for the DCP, the extension notice clarifies that parties do not need to support their protests with "an extensive amount of comprehensive information," so long as the protests meet the basic legal requirements of identifying the bases for potential claims, as prescribed in the Change Petition notice and relevant sections of the Water Code.

Conclusion and Implications

While it does not go as far as some requested, the State Water Board's extension of the protest deadline for the DCP Change Petition may provide some relief to parties whose resources have been stretched thin by multiple ongoing water proceedings. The extension notice also encourages potential protestants to identify issues they could settle with the Department of Water Resources informally, though it acknowledges a number of protests will not be resolvable without a water right hearing.

The Change Petition for the DCP and related documents are available on the State Water Board's website at: https://waterboards.ca.gov/bay_delta/delta_conveyance.html.

(Arley Titzler, Austin C. Cho)

CALIFORNIA STATE BOARD HOSTS WORKSHOP ON REVISED DRAFT PROPOSED REGULATION FOR 'MAKING CONSERVATION A CALIFORNIA WAY OF LIFE'

On March 20, the California State Water Resources Control Board (SWRCB) hosted a workshop to discuss its proposed regulatory framework for "Making Conservation a California Way of Life" (Proposed Regulation). The Proposed Regulation would set shifting annual urban water use objectives for urban retail water suppliers based on a formula taking-into-account multiple efficiency budgets, including residential indoor water use, residential outdoor water use, real water loss, and commercial, industrial, and institutional landscapes with dedicated irrigation meters. Under the Proposed Regulation, urban suppliers would be held to an aggregate efficiency target taking each of these uses into account.

Background

"Making Conservation a California Way of Life" is a new regulatory framework proposed by State Water Board that establishes individualized efficiency goals for urban retail water suppliers. These goals are based on the unique characteristics of an urban retail supplier's service area and gives them flexibility to implement solutions based on the needs of their locality. The efficiency goals, if successful, could reduce urban water use by more than 400,000 acre-feet by 2030.

In 2018, the Legislature enacted twin statutes (AB 1668 and SB 606) which directed the SWRCB to promulgate new efficiency standards and performance measures for commercial, industrial, and institutional water use. The 2018 legislation required the Department of Water Resources (DWR), in coordination with the SWRCB, to perform studies related to indoor residential water use and potential benefits and impacts associated with a changing standard. DWR made a number of recommendations to the SWRCB in 2022. In response, SWRCB developed the Proposed Regulation to establish individualized efficiency goals for individual urban retail water suppliers based on individual factors unique to each supplier (such as service area, *etc.*).

In 2022, via SB 1157, the California Legislature set the residential indoor standard for water use and water loss, and SWRCB adopted its water loss standard in 2023. The rulemaking process began in earnest in August 2023 with an initial public comment period and hearing, followed by a second public comment period in March 2024. As part of this public comment process, SWRCB held its March 20 public workshop, during which stakeholders such as the Association of California Water Agencies (ACWA) made comment. As of the date of this publication, ACWA anticipates that SWRCB will formally adopt the Proposed Regulation in Summer 2024.

The Proposed Regulation

The Proposed Regulation aims to take-into-account highly variable rainfall (such as that received during storms and flooding as opposed to extended periods of drought), by emphasizing water conservation in times of relative surplus. Because urban retail water suppliers are responsible for providing water supplies to 95 percent of California residents, the Proposed Regulation envisions significant water savings via the imposition of aggressive water-saving targets for urban uses. (SWRCB Fact Sheet, *Making Conservation a California Way of Life*, p. 1.)

Specifically, the Proposed Regulation seeks to promote efficient water use by imposing an annual "urban water use objective" on urban retail water suppliers (rather than end users). In this way, larger systemic inefficiencies can theoretically be corrected without having to rely on buy-in and conscientious participation by individuals. Retail suppliers are required to, no later than January 1, 2025, and each year thereafter, calculate its water use objective according to certain regulatory formulas. (Proposed Regulation, § 966.) Retail suppliers must begin annually demonstrating *compliance* with that objective beginning on January 1, 2027. Calculations are based on use conditions in the previous state fiscal year for a particular retail supplier.

To calculate the total objective, suppliers must calculate budgets for each of the following: (1) efficient indoor residential water use; (2) efficient outdoor residential water use; (3) efficient water use on commercial, industrial, and institutional landscapes with dedicated irrigation meters (CII_{DIM}); (4) efficient real water losses; (5) approved variances and temporary

provisions; and (6) any bonus incentive for potable water reuse. The Proposed Regulation provides specific equations for each. The total urban water use objective is equal to the sum of all efficiency budgets, plus variances and bonus incentives (if any). Suppliers would not be required to demonstrate that each individual budget is met, only that the overall objective is met (with the exclusion of budgeted water loss, which is separately regulated).

The Proposed Regulation also requires urban water retail suppliers to submit to SWRCB all annual reports on water use objectives and actual use, which reports are already required to be made to the Department of Water Resources pursuant to Water Code section 10609.24. (Proposed Regulation, § 975.)

The State Water Resources Control Board anticipates that this new regulatory framework will "result in suppliers making investments and programmatic changes that encourage individuals, businesses, and local governments to adapt how they use water." For example, SWRCB hopes that the Proposed Regulation will incentivize retail suppliers "to reevaluate rate structures and invest in partnerships that reduce urban heat." In this way, the Proposed Regulation seeks to indirectly exert control over end users, by holding their retail *suppliers* to account.

Conclusion and Implications

The State Water Resources Control Board's Proposed Regulation, if ultimately adopted, will impose new efficiency targets and reporting requirements on urban retail water suppliers. In doing so, SWRCB aims to promote end users' water use efficiency indirectly, by requiring their suppliers to meet efficiency targets and adjust their business models accordingly. For more information, *see State Water Board Holds Workshop on Revised Draft Regulation for Water Use Efficiency*, ACWA, Mar. 20 2024, https://www.acwa.com/news/state-water-board-holds-workshop-on-revised-water-use-efficiency-regulation/
(Miles Krieger, Steve Anderson)

TULARE LAKE SUBBASIN: SGMA'S FIRST BASIN PLACED IN PROBATION

The State Water Resources Control Board (SWRCB) oversees the management of water resources in California. As part of this responsibility, the SWRCB under the Sustainable Groundwater Management Act (SGMA) recently has conducted its first probationary hearing in order to address water management issues for groundwater basins that are allegedly not meeting SGMA requirements. SGMA aims to achieve sustainable groundwater management in California by having Groundwater Sustainability Agencies (GSAs) implement a Groundwater Sustainability Plan (GSP) the GSA created.

One of SGMA's most touted features is that it empowers local GSAs to manage groundwater resources as they best see fit provided their GSP works to address SGMA's six identified undesirable results. This feature has served as the bedrock of SGMA implementation, but always with the understanding that should a GSA fail to meet its SGMA obligations, the state may be required to intervene and manage the basin itself.

State Water Board Votes to Put Tulare Lake Subbasin Into Probationary Status

On April 16, 2024 the SWRCB met for its first probationary hearing under SGMA concerning the Tulare Lake Subbasin. The Tulare Lake Subbasin, situated in the southern Central Valley, faces issues of groundwater overdraft, declining water levels, and deteriorating water quality.

The probationary hearing scrutinized the efforts of five GSAs in the subbasin and their attempts to address these issues and how the GSAs' single GSP failed to comply with SGMA mandates. Stakeholders from various sectors, including agriculture, environmental advocacy, and the GSAs themselves, participated in a hearing that lasted over nine hours, providing testimony regarding the potential impacts related to probation and the efforts of all these groups to comply with SGMA.

Ultimately, the SWRCB Board in a 5-0 decision adopted the SWRCB staff recommendation to designate the subbasin as a probationary basin and found

that none of the GSAs in the Basin qualified for exemption from the probation determination.

Consequences of Being on Probation: Reporting, Metering, and Fees

With Tulare Lake subbasin being the first basin put on probation, it is worth looking at what SGMA probation means in practice.

The first is the imposition of two new fees on groundwater users in the subbasin:

- A $20 per acre-foot groundwater pumping fee.
- An annual fee of $300 per well.

  This fee excludes deminis pumpers which are pumpers who annually pump less than 2 acre-feet a year.

Additionally, groundwater users (except deminis pumpers) must begin annually reporting their extractions as of February 24, 2025 with the reports covering extractions from July 16, 2024 onward. In the same vein, these groundwater users must also install well metering to support their reports.

If GSP deficiencies are not addressed within a year, the SWRCB could move into the second phase of the state intervention process, called an interim plan. Only during this second phase, after another public hearing, could the SWRCB Board impose pumping restrictions on basins or issue fines for exceeding water allotments.

The Path to Exit Probation: One Year to Fix GSP Deficiencies

Now that Tulare Lake Subbasin is on probation, the next question is what can the GSAs do to exit probationary status?

During this probationary period, GSAs have time to resolve deficiencies identified in their GSPs related to groundwater overdraft, declining water levels, and deteriorating water quality. The GSAs in the meantime retain their authority, responsibilities, and must continue to implement their GSP regardless of whether the basin is on probation. This first phase of probation allows the GSAs at least one year to remedy the identified issues in the GSP.

Only after one year could SWRCB proceed to put a basin on an interim plan after an additional public hearing. An interim plan means SWRCB devises its own GSP-equivalent on how to comply with SGMA in the Tulare Lake subbasin. While the approved SWRCB resolution authorizing probation is short on specifics of how to exit probation, the SWRCB Board directed SWRCB staff to continue to provide technical feedback so that the GSAs can resolve the deficiencies in the Tulare Lake subbasin GSP.

As such the current path available to the GSAs is to remedy their GSP as to groundwater overdraft, declining water levels, and deteriorating water quality within one year or SWRCB will do it for the GSAs.

Conclusion and Implications

While this probationary determination abruptly emphasizes the next stage of SGMA implementation, there is still time for the Tulare Lake subbasin GSAs to amend their GSP and ultimately stop SWRCB from implementing an interim plan for the subbasin. While the additional requirements from the SWRCB will undoubtedly have effects on the local groundwater users, and likely make any such remedies for the GSAs more difficult, the GSAs likely have little option if the GSAs want to retain local control of groundwater supplies and management.
(Darien Key, Derek Hoffman)

RECENT FEDERAL DECISIONS

DISTRICT COURT HOLDS FLORIDA LOSES CLEAN WATER ACT SECTION 404 DREDGE AND FILL PERMIT AUTHORITY

Center for Biological Diversity v. Regan, et al., ___F.Supp.4th___, Case No. 26823; (D. D.C., Feb 15, 2024).

The State of Florida's application to the federal government to become only the third U.S. state authorized to administer wetlands permitting under the federal Clean Water Act, Section 404, was approved in late 2020. The approval was recently disallowed by a U.S. District Court judge in Washington D.C. in *Center for Biological Diversity v. Regan* on Feb 15, 2024.

The questions presented by the pending motions in this case are whether the U.S. Environmental Protection Agency (EPA) "cut corners" to finalize its decision to transfer certain federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, permitting authority from the U.S. Army Corps of Engineers (Corps) to the State of Florida in late 2020, and, if so, whether the plaintiffs—seven environmental organizations—suffered any cognizable and redressable injuries as a result.

Background

At the core of this case is Section 404 of the Clean Water Act, which governs the issuance of permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." Although Corps is responsible for the issuance of such permits, a state may submit an application to the EPA seeking authority to:

> . . .administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters . . . within its jurisdiction, 33 U.S.C. § 1344(g)(1).

A state's application to assume permitting authority under Section 404 must include, among other things, a "complete program description" and a "statement" from the state's attorney general.

On August 18, 2020, the State of Florida submitted an application to administer the Section 404 permitting program within its borders. The EPA deemed the application complete on August 20, 2020, triggering the statutory 120-day period for the agency to review the application. On September 16, 2020, the EPA issued a public "[n]otice and request for comments" on Florida's Section 404 program application and announced that the EPA would hold two "virtual hearings" in October 2020. For those hearings, the EPA "recommend[ed] that commenters also submit the text of their oral comments . . . as written comments to the rulemaking docket." Following those hearings, the EPA explained, "verbatim transcripts w[ould] be included in the rulemaking docket." *If* at the end of this process, the EPA approved this program, EPA would also codify the approval in 40 C.F.R. 233 subpart H.

The EPA received over 3, 000 comments, including from the plaintiffs in this case. Earthjustice, counsel to plaintiffs in this case, wrote to the EPA on October 23, 2020, arguing that Florida's application was incomplete and that the EPA had erred when it concluded otherwise. Florida's application, according to that letter, was unsatisfactory in at least three ways.

First, Florida had, as alleged, "not demonstrated how it w[ould] ensure no jeopardy to listed species" under the federal Endangered Species Act and, instead, had:

> . . .indicated it w[ould] rely on an anticipated programmatic Biological Opinion and an anticipated, associated incidental take statement.

Second, as alleged, the state had "failed to identify the waters that would be assumed under its proposed program, " in contravention of applicable EPA regulations.

Third, Florida had not:

> . . .provide[d] [the] EPA and the public with complete information regarding how it would implement, operate and enforce a Section 404 program, particularly given the substantial impact the COVID-19 pandemic has had on State coffers.

Earthjustice submitted that because, in its view, Florida had "failed to provide [the] EPA with a complete program submission in [these] three, critical respects, " the proper course was to:

> . . .suspend the public comment period and review of Florida's application until the State cure[d] these deficiencies and submit[ted] a complete program proposal to the agency.

On November 2, 2020, Earthjustice submitted further, detailed comments on behalf of several of the Plaintiffs in this case. EPA's Andrew Wheeler, announced approval of Florida's program, and the agency published a notice of approval in the Federal Register on December 22, 2020.

The District Court's Rulings

The court has under review a multi-statute challenge to the approval. In addition to the Clean Water Act, the petitioners assert that the approval violates the Endangered Species Act, the Administrative Procedures Act, and the Rivers and Harbors Act. The grounds for the February decision are based on the Endangered Species Act, and the court's determination that inadequate adherence occurred to the hurdles the government must successfully pass when issuing a Section 404 program permission to a state.

The District Court concluded that the ESA requires a detailed permit by permit review of both whether endangered species are threatened by a given proposed operation and also, whether the chances of incidental taking are minimized. Florida had proposed and the Government agreed to a statewide ESA review that would serve in lieu of permit specific review. In Florida's program, the state, recognizing that wetlands abound throughout the State and that there are numerous endangered species there, suggested a sort of "work around" to the administrative challenge of performing individual ESA reviews in the numerous cases that would otherwise require that review.

Florida's proposal of the program was justified on the grounds that the procedures required by the ESA, and in particular the incidental taking process, would tie up larger projects for major development for years at a time, per project. Instead, Florida proposed that the case-by-case requirements of addressing takings issues by Section 7 of the ESA could be managed better if viewed as discretionary procedure rather than mandatory requirements. Florida proposed that instead the impact of developments in Florida could be managed by doing a biological assessment for the entire state at the outset of the program, and that individual species and project specific incidental takings questions could be managed through the mandatory consultation of the applicant with the federal and state authorities for each permit.

The District Court was not persuaded that the process approved for Florida met the strict requirements of the ESA, especially for Incidental Take analysis:

> In short, the court was persuaded that the FWS' programmatic BiOp and Incidental Take Statment fail to satisfy the requirements of the ESA, and the Court is unpersuaded that the non-statutory technical assistance process is a lawful substitute for the procedures and remedies that Congress enacted in the ESA and that the Services established in the implementing regulations.

Conclusion and Implications

A great deal of the controversy here pretty clearly occurred due to lack of trust by the plaintiff organizations in the good faith of EPA in the closing days of the Trump administration. The EPA took that position when it made its decision to approve the program that the approval constituted an "adjudication." not a Rule. It pronounced the program approval was immediately effective, and it declined to codify the program rules in the Code of Federal Regulations. It based the validity of this view in part on the fact that it had sought public comment on its authority to so treat 404 applications in a parallel notice and comment process initiated and completed during the pendency of Florida's 404 Program application with the Agency.

The tactic of deeming the federal action of approval an adjudication, while it avoided the "freeze" on effectiveness of new rules instituted by President Biden on January 20, 2021, drew immediate legal challenge from the plaintiffs. A decision by another judge in the D.C. District Court entertained an injunction action and soon ruled that the approval was legally a rule that was governed as such by the APA.

At this writing, a month past the decision, Florida has suspended its program and is in a process of deciding what its next steps will be. The court's opinion is available online at: https://casetext.com/case/ctr-for-biological-diversity-v-regan-1
(Harvey M. Sheldon)

DISTRICT COURT ISSUES CONSENT DECREE BETWEEN LOS ANGELES WATERKEEPER AND STEEL COMPANY OVER ALLEGED FEDERAL CLEAN WATER ACT VIOLATIONS

Los Angeles Waterkeeper v. Tell Steel, Inc., ___F.Supp.4th___,
Case No. CV 23-8720-GW-PVCx (C.D. Cal. Mar. 27, 2024).

The United States District Court for the Central District of California recently issued a consent decree (Consent Decree) between Los Angeles Waterkeeper (LA Waterkeeper) and Tell Steel, a Steel company located in Long Beach, California. The Consent Decree came as a result of negotiations over a lawsuit brought by LA Waterkeeper against Tell Steel for alleged violations of the federal Clean Water Act (CWA) and a general permit regulating pollutant discharges. Included in the Consent Decree are a number of requirements to implement Best Management Practices (BMPs) and policies to reduce the amount of toxic metals flowing in Waters of the United States (WOTUS) from storm water drainage and runoff from the Tell Steel center.

Factual and Procedural Background

LA Waterkeeper issued a notice of intent to file for suit on August 15, 2023 for violations of the CWA and a general permit for Tell Steel's facility under the National Pollutant Discharge Elimination System (NPDES Permit). The NPDES program regulates storm water discharges associated with industrial activity, including at Tell Steel's facility in Long Beach. On October 6, 2023, LA Waterkeeper filed a complaint against Tell Steel in the United States District Court for the Central District of California. LA Waterkeeper and Tell Steel agreed to enter into a Consent Decree to resolve the lawsuit.

The Consent Decree

The basic objectives of the Consent Decree are compliance with all the terms of the Consent Decree, the NPDES Permit, and of the CWA. The "Commitments of the Settling Parties" section of the Consent Decree contains six sections: (a) Storm Water Pollution Control Best Management Practices, (b) Monitoring and Reporting (c) Reducing/Preventing Pollutants in Facility Discharges (d) Visual Observations (e) Compliance with Monitoring and Reporting (f) Environmental Mitigation, Litigation Fees and Costs, Stipulated Penalties, and Interest.

The Consent Decree term is the date between the effective date and the termination date, which can be a variety of dates as laid out in the Consent Decree. At the earliest, the Consent Decree will terminate on June 30, 2027, but may be later if Tell Steel delays their compliance with the Consent Decree.

Storm Water Pollution Control Best Management Practices

The first section, Storm Water Pollution Control Best Management Practices, lays out the best management practices that Tell Steel must implement. It broadly states that "any unauthorized non-storm water discharged, as defined in the General Permit," and "any industrial activity occurring in areas designated as non-industrial or no-exposure" in the Storm Water Pollution Prevention (SWPPP) are both violations of the Consent Decree. Additionally, this section lays out the overarching requirement that Tell Steel implement the BMPs identified in its SWPP and as laid out in this section. The Consent Decree requires a number of actions from Tell Steel, including installing an electronic rain gauge sensor, installing concrete berms and barriers to prevent discharge from any point other than Designated Points, and installing new wattles/filter socks. Tell Steel is also required to implement BMP policies. More specifically, Tell Steel must implement a three-prong sweeping program and a pre-rain protocol, including a requirement to cover all industrial materials before a rain event.

Monitoring and Reporting

The second section, Monitoring and Reporting, requires Tell Steel to "develop and implement an expanded MIP that includes storm water sample collection and analysis" for qualified storm events and lays out the designated locations from which those samples must be taken. The definition of a qualified

storm event is set forth in the NPDES Permit. In particular, a qualifying storm event is one that produces a discharge for at least one drainage area and is preceded by 48 hours with no discharge from any drainage area.

Prevention of Discharges

The third section focuses on the prevention of pollutant discharges and contains a table that specifically lays out the numeric levels of pollutants Tell Steel must not exceed. If Tell Steel fails to meet these standards at any time between the effective date of the Consent Decree and the end of the remainder of the terms of the Consent Decree, then Tell Steel must submit an Action Plan to LA Waterkeeper of how it will achieve compliance with the standards.

Visual Observations

The Visual Observations section sets a requirement for visual observations during qualified storm events as well as monthly non-storm observations. Tell Steel must keep records of these observations. Additionally, the Consent Decree requires Tell Steel to implement a training program within 45 days of when the Consent Decree becomes effective and lays out what the training program must include. Lastly, this section calls for the revision of the SWPPP, including the training program, updated site maps, and assessments of potential storm water discharge, among other requirements.

Compliance Monitoring and Reporting

The fifth section, Compliance Monitoring and Reporting, is aimed at allowing LA Waterkeeper to oversee and monitor Tell Steel's implementation of all these proceeding requirements. It allows LA Waterkeeper to conduct one annual site inspection and requires Tell Steel to send photos and confirmations of writing of their compliance with the Consent Decree. This reporting requirement is accompanied by a promise by Tell Steel to pay $5,000 a year to LA Waterkeeper to cover the costs of their oversight, which is to be paid every year during the term.

Monetary Obligations

The last section provides for the monetary obligations of Tell Steel under the Consent Decree. This includes a $35,000 to the Rose Foundation to "fund environmental project activities that will reduce or mitigate the impacts of storm water pollution from industrial activities occurring in the Los Angeles River." Tell Steel must also pay $95,000 to LA Waterkeeper to partially reimburse them for their investigation, fees, and costs for investing, filing, and negotiating the lawsuit.

Conclusion and Implications

Following the issuance of the Consent Decree, LA Waterkeeper will submit the Consent Decree to the EPA and the U.S. Department of Justice for review. The agencies can either object to the Consent Decree or let 45 days pass after receipt of the Consent Decree, and so long as the agencies do not object the Consent Decree will be operative until at least June of 2027. This Consent Decree does not require Tell Steel to pay any penalties other than to LA Waterkeeper and their chosen Rose Foundation but does require Tell Steel to implement a number of practices and policies and allows LA Waterkeeper some limited oversight to ensure those requirements are met. Accordingly, consent decrees can impose substantial obligations, but parties may prefer them over litigating a case to conclusion with an uncertain outcome.
(Miles Krieger)

RECENT CALIFORNIA DECISIONS

SACRAMENTO COUNTY SUPERIOR COURT RULES IN FAVOR OF THE STATE WATER BOARD'S SUBSTITUTE ENVIRONMENTAL DOCUMENT FOR PHASE I OF THE BAY-DELTA PLAN

On March 15, 2024, a Sacramento Superior Court judge upheld the State Water Resources Control Board's (State Water Board) Substitute Environmental Document (SED) for the Phase I update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). The SED adopts more stringent flow objectives for native and migratory fish in the lower San Joaquin River and its three major tributaries, the Merced, Stanislaus, and Tuolumne rivers, while partially relaxing salinity standards for South Delta crops. In a comprehensive 160-page ruling, the court considered all 116 claims filed by various petitioners and found the State Water Board did not violate the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), the California Environmental Quality Act (CEQA), the public trust doctrine, or article X, section 2 of the California Constitution. (Super. Ct. Sacramento County, 2024, No. JCCP5013 (Ruling).)

Background

The Porter-Cologne Act authorizes the State Water Board and its regional boards to adopt, implement, and update plans that protect water quality in California's rivers and waterways for fish, agriculture, and other beneficial uses of water. Under CEQA, a lead agency must analyze the environmental impacts of a proposed project and inform the public in an Environmental Impact Report (EIR). Here, a program-level SED was prepared in place of an EIR, but like an EIR, an SED must identify and analyze the potential impacts, alternatives, and feasible mitigation measures of a proposed plan or program. In addition to the statutory frameworks that govern the adoption of a new Bay-Delta Plan, the State Water Board is subject to the common law public trust doctrine and article X, section 2 of the California Constitution. The public trust doctrine vests a duty in the State, as sovereign, to act as trustee for the benefit of the people by taking the public trust into account when managing and allocating public resources, and to protect public trust uses whenever feasible. Article X, section 2 of the California Constitution establishes a rule that all water use in the state must be reasonable and beneficial.

At the confluence of the Sacramento and San Joaquin rivers, the Delta is the largest estuary on the West Coast and a significant source of the state's water supply. The State Water Board adopted the first Bay-Delta Plan in 1978, shortly after the enactment of the Porter-Cologne Act. The Bay-Delta Plan was updated in 1991, 1995, and 2006, though flow standards have remained largely unchanged since 1995. For the current Bay-Delta Plan update, the State Water Board has divided the process into two phases: Phase I to address flow and salinity objectives for the San Joaquin River watershed, and Phase II to address flow and cold-water management standards in the Sacramento River and the Delta.

The Supplemental Environmental Document

The SED revises the San Joaquin portion of the Bay-Delta Plan by adding a numeric objective to maintain 40 percent unimpaired flow—with an allowed adaptive range of 30 to 50 percent—to support and maintain the viability of fish populations in the San Joaquin River watershed. Unimpaired flow is the amount of natural flow in a river, unaffected by upstream diversions, storage, or other manipulation. Requiring 40 precent unimpaired flow will likely prohibit water right holders from diverting the full amount allowed under their water rights in certain conditions. To justify its new flow requirements, the SED relies on a 2012 technical report that found:

> . . .increased unimpaired flows are needed in February through June when juvenile fall-run Chinook are in the critical freshwater-rearing phase of their life cycle and migrating from the [San Joaquin River] basin through the Delta and out to the ocean. (*Ruling,* at p. 16.)

The SED also lowers the summer salinity threshold for agriculture that was originally developed in the 1978 Bay-Delta Plan to avoid salt stress and damage to crops on roughly 100,000 acres of irrigated farmland in the southern Delta. Under the 2006 Bay-Delta Plan, the salinity objective was 0.7 deciSiemens per meter (dS/m) from April through August, and 1.0 dS/m from September through March. Citing a 2010 report on salt tolerance that found South Delta crops could handle a salinity range of 0.9 to 1.1 dS/m, the SED revises the salinity standard to 1.0 dS/m, year-round.

The Superior Court's Decision

In establishing a water quality control plan, the State Water Board must ensure the reasonable protection of beneficial uses. (Wat. Code, § 13241.) One of the factors that must be considered under the Porter-Cologne Act is "[p]ast, present, and probable future beneficial uses of water." (*Id.* at subd. (a).) Numerous parties challenged the SED, arguing that the State Water Board did not consider the impacts to other beneficial uses, such as municipal, industrial, and agricultural uses, when it set the unimpaired flow objective.

CEQA Claims

However, the court found the administrative record demonstrates the State Water Board did consider the water supply impacts and did not abuse its discretion, despite foreseeable impacts to competing beneficial uses. *The court reasoned that since* other flow alternatives would result in more harm to native fish populations, the mere fact that reasonable minds could disagree over the State Water Board's ultimate decision does not indicate the decision was arbitrary or capricious. The court deferred to the State Water Board's conclusions regarding water supply impacts, finding substantial evidence to support the use of the hydrologic modeling and analysis employed to consider the topic.

The other primary CEQA claim was that the State Water Board did not adequately analyze the impact of the complete Bay-Delta Plan because it "improperly segmented" the project by not considering the Phase II update to the Bay-Delta Plan. The court rejected the argument that the SED needed to consider the impacts of Phase II because:

> . . .the [Lower San Joaquin River] flow and southern Delta salinity objectives operate independently of any future amendments in the Sacramento River or Delta watersheds and can be implemented separately.

The court held that the interconnected ecosystems of the Delta do not require the State Water Board to formulate revisions to the Bay-Delta Plan in a single environmental review process:

> . . .because the phases pertain to separate rivers and watersheds in hydrologically distinct geographic areas with native fish that have different viability needs.

Public Trust Doctrine and Article X Claims

In considering challenges under the common law public trust doctrine, the court held that the State Water Board satisfied its affirmative duty to take the public trust into account by satisfying its responsibilities under the Porter-Cologne Act. Similarly, the court held that the State Water Board did not act in an arbitrary or capricious manner that would amount to a violation of its authority to balance competing beneficial uses of water under article X, section 2 of the California Constitution.

Salinity Standards

Lastly, the court rejected claims that the revised salinity standards for crops in the South Delta relied on faulty analysis or were otherwise arbitrary or capricious. Finding no significant discrepancy between the State Water Board's 2010 report and petitioners' conflicting expert analysis, the court deferred to the administrative findings under the substantial evidence standard. Moreover, the court agreed with the State Water Board's conclusion that the additional unimpaired flows would provide an added benefit of higher water quality. For any remaining claims that were not specifically addressed in the Ruling, the court considered them, but did not find them persuasive.

Conclusion and Implications

The court's ruling represents a significant victory for the State Water Board, which may be emboldened as it moves forward with the implementation of Phase

I and considers the draft SED for the Phase II update to flow objectives in the Sacramento River and Delta watershed.

A copy of the Ruling is available at: https://qhj126.p3cdn2.secureserver.net/wp-content/uploads/2024/03/2024-03-15-State-Water-Board-cases-decision.pdf
(Jake R. Voorhees, Austin C. Cho)

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