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WESTERN WATER NEWS

IDAHO GOVERNOR ISSUES EXECUTIVE ORDER NO. 2024-06—PROTECTING IDAHO WATER SOVEREIGNTY ACT

On June 26, 2024, Idaho Governor Brad Little issued an Executive Order in the midst of a tumultuous start to the 2024 irrigation season, particularly on the Eastern Snake Plain Aquifer (ESPA). On May 30, 2024, the Director of the Idaho Department of Water Resources (IDWR) issued the state's largest-ever curtailment order, directing the curtailment of groundwater rights on the ESPA junior to March 31, 1954, due to modeled injury to senior, hydrologically interconnected surface water rights sourced from the Snake River. The Executive Order (No. 2024-06) (Executive Order) implores the affected water users to cooperatively negotiate an updated, long-term mitigation plan while also marshaling resources from IDWR and other Idaho agencies and legislative committees to participate in ESPA sustainability and conservation planning.

Conjunctive Management of the ESPA

In 1994, and at the direction of the Idaho Supreme Court in the case *Musser v. Higgenson*, 125 Idaho 392 (1994), IDWR drafted and began implementing its Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) (CM Rules). The CM Rules attempt to bridge the gap between the somewhat different legal regimes under which surface water rights and groundwater rights were administered up to that point out of recognition that groundwater and surface water sources are often hydrologically interconnected. For better or worse, this interconnection exists between Idaho's two largest water sources, the Snake River and the ESPA. Perhaps the two most well-known (and litigated) interconnections are the Thousand Springs reach of the Snake River in and near Hagerman, Idaho, and the Blackfoot to Neeley reach of the Snake River upstream of American Falls Reservoir. In the Thousand Springs reach, hundreds (if not the namesake "thousands") of springs discharge from the basaltic Snake River Canyon walls and flow into the river below. In the Neeley area, the ESPA expresses itself largely as baseflows though the river bottom contributing to river flow.

In 2005, surface water user irrigation entities (the Surface Water Coalition, or SWC) filed a delivery call with IDWR seeking agency intervention to curtail (shut down) junior groundwater wells on the ESPA to remedy asserted injury to senior Snake River flows upon which the SWC relied. This litigation was the first domino in a series of legal actions involving the aforementioned reaches of the Snake River largely ongoing ever since.

While the above-discussed summary is extremely short-shrift and generalized, the ultimate result in 2024 was IDWR's issuance of the largest curtailment order in Idaho history—the May 30, 2024 *Final Order Curtailing Ground Water Rights Junior to March 31, 1954* (Curtailment Order).

Magnitude of the Curtailment Order and the 2024 Irrigation Season Bridge Stipulation

The Curtailment order, reaching back to a 1954 priority date, issued based on IDWR model-predicted injury of 74,100 acre-feet of water owing to SWC member Twin Falls Canal Company. This 2024-predicted injury issued by order in April 2024. The Curtailment Order threatened ongoing irrigation on more than 500,000 acres of groundwater-irrigated lands. In very approximate numbers, the Eastern Snake River Plain is irrigated almost equally between sources—1 million acres of groundwater-irrigated acres, and 1 million acres of surface water-irrigated acres. The potential impacts of the Curtailment Order were significant (if not dire).

The April 2024-predicted/modeled injury (the irrigation season "demand shortfall") and the Curtailment Order precipitated a flurry of filings with IDWR by groundwater users and the SWC alike. Numerous groundwater districts sought shelter from the Curtailment Order under existing IDWR-approved mitigation plans, and through proposals involving newly proposed mitigation plans. For a variety of reasons

too numerous to do justice here, the SWC and the groundwater users (largely operating under the organizational umbrella of the Idaho Ground Water Appropriators, Inc.—IGWA) arrived at a stipulated resolution shielding IGWA member districts from curtailment during the 2024 irrigation season. IDWR approved that stipulation on June 20, 2024, in its *Order Approving 2024 Stipulation as Compliance With Approved Mitigation Plan* and effectively confirmed safe harbor from curtailment in its near-simultaneous issuance of the agency's *Second Order Amending Curtailment List* of the same date.

The Executive Order

Focusing on the foregoing conflicts even more concisely than this article, the Executive Order notes the convergence of two parallel ESPA-related paths: (1) the hopeful completion of a larger, more global, EPSA groundwater management plan on or before September 1, 2024; and (2) the likewise hopeful completion of a new, long-term mitigation plan between the SWC and the IGWA member groundwater districts by October 1, 2024. Failure to accomplish the latter will reignite several administrative and judicial legal proceedings that the parties agreed to stay for negotiations purposes.

Conclusion and Implications

The Executive Order lauds the "Idaho Way" of getting things done via user-to-user negotiation and compromise. The ongoing irrigation of approximately 2 million acres of fertile ground overlaying the much of the ESPA depends on it. The Executive Order is available online at: https://adminrules.idaho.gov/rules/current/EXOs/2024-06_ExOr_24-7.pdf
(Andrew J. Waldera)

ONEWATER NEVADA, AN INNOVATIVE WATER TREATMENT FACILITY RECEIVES $30 MILLION IN FEDERAL FUNDING

Through the Bipartisan Infrastructure Law, the OneWater Nevada partnership has received $30 million to support the development of a water treatment facility. The facility will process treated effluent with the objective of providing local communities in northwestern Nevada purified and safe recycled drinking water.

Background

Nevada is the driest state in the nation with the average precipitation being just over 10 inches. In addition to being an arid state with limited precipitation, it also has limited surface water sources and groundwater supplies. In addition to having some of the most limited water available to serve its population of any other state, Nevada continues to be one of the fastest growing states both in population and economic growth. With increasing population and economic growth comes increasing demands on the state's natural resources, especially water.

Meeting these increasing demands on Nevada's water supplies requires innovation as to how to maximize the use of the state's limited water resources, particularly where the state faces increasing aridification and other climatic changes. To this end, though a collaborative partnership between the University of Nevada Reno, Washoe County, Truckee Meadows Water Authority, Western Regional Water Commission and Northern Nevada Water Planning Commission, Truckee Meadows Water Reclamation Facility, City of Reno, and City of Sparks, Nevada is engaging in an evaluation of utilizing an advanced purification system to provide clean and safe recycled water to Nevada's communities.

OneWater Nevada

OneWater Nevada is a program dedicated to identifying approaches to sustainable water use and reuse to extend Nevada's limited water resources to improve water resiliency and sustainability for years to come. OneWater Nevada is focused on identifying conservation mechanisms to allow for the current available water supplies to extend to more uses and users, evaluating long-term management of water resources with respect to quantity and quality of those water supplies, identifying and developing technology, best practices to sustain the quality of life of Nevadans, and helping to support and preserve the integrity of the environment surrounding the water sources and watersheds.

Nevada's Advanced Purified Water Facility

On June 13, 2024, the City of Reno and Truckee Meadows Water Authority announced the receipt of a $30 million grant to support the OneWater Nevada A+ Advanced Purified Water Facility (APWF), which will be Nevada's first advanced purified water treatment facility for water reuse situated in Nevada. The grant funding comes through the United States Bureau of Reclamation's WaterSMART grant program as part of President Biden's Bipartisan Infrastructure Law.

The funding will help support the construct of the APWF facility, which will be located north of Reno, Nevada. The APWF facility will take treated effluent from the Reno-Stead Water Reclamation Facility and treat the water utilizing an advanced treatment process that will include ozone oxidation and biological filtration processes to produce A+ reclaimed water. The advanced treated water will then be injected into the groundwater aquifer upgradient from recovery wells situated downgradient. The water will then be extracted and used to supply the municipal water supply.

The project, which has nearly reached its 60 percent design phase, will include the construction of the advanced water purification center, six miles of pipe and two injection wells. In coordination with the injection of A+ treated effluent, effluent will be used at a nearby farm to substitute for the current reliance on groundwater. This will allow for a reduced demand on groundwater, which in turn will allow the injected treated effluent to be stored and improve the storage capacity of the aquifer. Construction is expected to begin in 2025 and is expected to last approximately two years.

Long-Term Benefits

The OneWater Nevada project is aimed to evaluate the ability to utilize aquifer storage and recovery of highly treated effluent to build and sustain regional water supplies. Benefits of such a program may provide drought resilient, reliable and local water supplies. Local benefits would include the reduction to localized discharge of treated effluent, which can create localized hazards such as flooding and water quality challenges based upon the location of the discharged effluent. Additionally, if demonstrated to be successful, OneWater Nevada will provide expanded opportunities to increase the sustainability and resiliency of regional water supplies, particularly in areas with limited water resources while potentially reducing demands on freshwater supplies.

Conclusion and Implications

Through exploring innovative solutions to drought and constraints on limited water supplies, OneNevada Water is forging ahead in developing a recycled water treatment process to supply municipal customers. This approach may serve to temper public perceptions associated with recycled water and direct reuse while simultaneously providing an opportunity to build resiliency by replacing existing users reliance on groundwater and providing an opportunity to build water storage in underground aquifers. Such an approach may not be feasible in all locations, but will likely serve as a model of other Nevada communities, as well as those with similar conditions and opportunities.

(Micheline Nadeau Fairbank)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA BILL COULD TRANSFORM PRIME AGRICULTURAL LAND INTO SOLAR FARMS

California's agricultural landscape, particularly in the Central Valley, could significantly change from agricultural farms to solar farms, under Assembly Bill 2528. Assembly Bill 2528, introduced by Assemblyman Joaquin Arambula, D-Fresno, proposes a bill that would ease the process for farmers without adequate water resources to exit their Williamson Act contracts without incurring stiff penalties, potentially paving the way for the conversion of these lands into solar farms.

The Williamson Act and AB 2528

The Williamson Act, formally known as the California Land Conservation Act of 1965, was enacted to promote the conservation of agricultural and open-space lands. It provides property tax relief to landowners in exchange for a commitment to restrict the land's use to agriculture or open space for a minimum of ten years. This act has helped to preserve many acres of California's prime agricultural land, ensuring that vast tracts of prime farmland remain undeveloped and dedicated to agricultural use.

Assembly Bill 2528 introduces a notable exception to the stringent conditions of the Williamson Act. Under current law, a landowner seeking to cancel a Williamson Act contract must pay a cancellation fee equivalent to 12.5 percent of the land's assessed value. This fee serves as a significant deterrent against the premature termination of these contracts, thereby safeguarding agricultural and open-space lands from conversion to other uses. However, AB 2528 proposes that landowners who lack sufficient water resources should have this cancellation fee reduced to 6.25 percent, allowing them to exit their contracts with a less impactful financial penalty.

Water Supply Conditions Prompting Consideration of Alternative Revenue Sources

According to propontents fo the Bill, this legislative proposal stems from ongoing water scarcity challenges faced by farmers in California. The Central Valley, often referred to as the nation's breadbasket, has been severely impacted by prolonged droughts, the implementation of the Sustainable Groundwater Management Act, fluctuating crop prices, and increased costs to obtain water. For many farmers, the lack of reliable or affordable water sources has rendered traditional agricultural activities economically unviable. AB 2528 aims to provide farmers with an alternative pathway, allowing them to pivot from water-intensive agriculture to other uses, notably solar energy production.

Will the Bill Undermine Agriculture?

While the intention behind AB 2528 is to offer relief to water-strapped farmers, it has sparked some opposition from agricultural proponents including the California Farm Bureau. One concern is the potential for widespread conversion of fertile agricultural land into solar farms. The Central Valley's prime agricultural lands are among the most productive in the world, supporting a diverse range of crops and contributing significantly to the state's economy. One argument against the bill is that allowing these lands to be repurposed for solar energy could undermine food security and erode the agricultural foundation of the region.

Moreover, there is apprehension about the long-term implications of this potential policy shift. The Williamson Act has been a cornerstone of California's land conservation efforts for over five decades. Eroding its protections could set a precedent that jeopardizes other conservation initiatives. Environmental groups also worry that large-scale solar developments could disrupt local ecosystems, displacing wildlife and altering natural habitats.

Additional Consisderations for Agricultural Interests

Proponents of AB 2528 emphasize the potential benefits of integrating renewable energy production with agricultural land use. The argument is that solar farms could provide a sustainable and economically viable alternative for farmers facing water shortages,

who may otherwise lose the economic viability of their property altogether. Additionally, the transition to renewable energy is asserted to align with California's ambitious climate goals, reducing the state's reliance on fossil fuels and decreasing greenhouse gas emissions.

The legal landscape surrounding AB 2528 is complex, involving considerations of land use policy, water rights, and environmental law. If enacted, this bill would require special energy projects to provide a community benefits package that could include local employment, water services, and electricity discounts. Policymakers would need to establish clear guidelines to ensure that the conversion of agricultural land to solar farms is conducted in a manner that minimizes adverse impacts on the environment and rural communities.

Conclusion and Implications

Assembly Bill 2528 represents a significant legislative initiative with far-reaching implications for California's agricultural sector and renewable energy landscape. While it offers a potential lifeline for farmers grappling with water scarcity and affordabily issues, it also poses challenges to the preservation of prime agricultural land. As this bill progresses through the legislative process, it will require thorough scrutiny and balanced consideration to achieve a harmonious integration of agricultural sustainability and renewable energy development.
(Darien Key, Derek Hoffman)

REGULATORY DEVELOPMENTS

EPA ADOPTS FINAL RULE TO PROTECT TRIBAL RESERVED WATER RIGHTS

In June 2024, revisions to the federal Clean Water Act (CWA) adopted by the U.S. Environmental Protection Agency (EPA) regarding Tribal reserved rights became effective. In particular, EPA made revisions to CWA water quality standards regulations by adding requirements for states establishing water quality standards in waters where Tribes hold and assert rights to CWA-protected aquatic and aquatic-dependent resources reserved through treaties, statutes, or Executive orders. The Rule became effective June 3, 2024, prior to the Supreme Court overturning the long-standing Chevron doctrine, and thus there is uncertainty as to whether the Rule will survive a legal challenge.

Background

Tribes may hold rights to natural and cultural resources that are reserved through treaties, statutes, or executive orders.

The CWA establishes the basic structure for regulating pollutant discharges into waters of the United States. In the CWA, Congress established the national objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to achieve "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" (CWA sections 101(a) and 101(a)(2)). CWA section 303(c) directs states to adopt water quality standards (WQS) for waters of the United States. The core components of WQS are designated uses, water quality criteria, and antidegradation requirements. Designated uses establish the environmental objectives for a water body, such as public drinking water supply, propagation of fish, shellfish and wildlife, or recreation. Water quality criteria define the minimum conditions necessary to achieve those environmental objectives. Antidegradation requirements maintain and protect water quality that has already been achieved.

WQS serve as the basis for several CWA programs, including the following: water body assessments, identification of impaired waters, and development of Total Maximum Daily Loads (TMDLs); certifications of federal licenses and permits; water quality-based effluent limits in National Pollutant Discharge Elimination System (NPDES) permits issued by approved state programs or by the EPA; and permits for dredged or fill material. The CWA provides that:

> . . .[water quality] standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

CWA section 303(c)(2)(A) and the EPA's implementing regulation at 40 CFR part 131 require, among other things, that a state's WQS specify appropriate designated uses of the waters, and water quality criteria to protect those uses.

The Final Rule

The EPA's newly finalized Rule (Rule) establishes a framework for how Tribal reserved rights, as defined in the Rule, must be considered in establishing WQS. The Rule amends the federal water quality standard regulation at 40 CFR part 131 to: (1) define Tribal reserved rights for purposes of that regulation; (2) establish and clarify the responsibilities of states with regard to Tribal reserved rights in the water quality standard context; and (3) establish and clarify the EPA's related responsibilities and oversight role.

In particular, the Rule defines Tribal reserved rights, for purposes of 40 CFR part 131, as:

> . . .any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right

holders, either expressly or implicitly, through Federal treaties, statutes, or executive orders.

The Rule further defines "Tribal reserved rights" for use in WQS actions. Notably, in defining Tribal reserved rights" for purposes of federal WQS, the EPA is not establishing or interpreting rights that may exist, or the scope of such rights, under a federal treaty or other sources of federal law. Rather, the definition provides that rights reserved by treaty, statute, or executive order to aquatic and/or aquatic-dependent resources that also fall within the ambit of resources protected under the CWA are within the scope of potentially applicable rights for purposes of the Rule. Accordingly, whether a Tribal reserved right, as defined in the Rule, will result in new or revised water quality standards is a case-by-case inquiry to be undertaken in accordance with the provisions of the Rule.

According to the EPA, the Rule requires that if a Tribe asserts a Tribal reserved right in writing to a state and the EPA for consideration in establishment of WQS, the state must, to the extent supported by available data and information: (1) take into consideration the use and value of its waters for protecting the Tribal reserved right in adopting or revising designated uses; (2) take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant WQS; and (3) establish water quality criteria to protect the Tribal reserved right where the state has adopted designated uses that either expressly incorporate protection of the Tribal reserved right or encompass the right. According to EPA, this latter requirement includes developing criteria to protect right holders using at least the same risk level (*e.g.*, cancer risk level, hazard quotient, or illness rate) as the state would otherwise use to develop criteria to protect the state's general population (*i.e.*, non-right holders), paired with exposure inputs (*e.g.*, fish consumption rate) representative of right holders exercising their reserved right. The EPA will be subject to the same requirements when promulgating federal WQS.

According to EPA, the Rule commits the EPA to: (1) provide assistance to both states and right holders in evaluating Tribal reserved rights, upon request, to the extent practicable; and (2) initiate the Tribal consultation process with any right holders that have asserted their rights for consideration in establishment of WQS. The Rule amends the list of minimum requirements for state submissions of new or revised WQS to the EPA for review pursuant to CWA section 303(c) to include, where applicable, submission of information provided by right holders about relevant Tribal reserved rights and of documentation indicating how the state considered that information.

The Rule also revises the list of factors that the EPA considers in determining whether state-adopted new or revised WQS are consistent with CWA section 303(c) and 40 CFR part 131 to include, where applicable, whether WQS are consistent with the requirements for states established by the Rule. Finally, the Rule modifies the procedures for state review and revision of WQS to require that the triennial review process include any new information available about Tribal reserved rights.

Conclusion and Implications

The Rule has been challenged by 12 states in a recent lawsuit. It remains to be seen whether the Rule will survive the legal challenge, particularly in light of the recent Supreme Court decision overturning the long-standing Chevron doctrine. It also remains to be seen to what extent the Rule may affect federal and state water rights, if at all. The Rule available at https://www.govinfo.gov/content/pkg/FR-2024-05-02/pdf/2024-09427.pdf
(Miles Krieger)

U.S. ENVIRONMENTAL PROTECTION AGENCY RELEASES ITS 2024-2027 CLIMATE ADAPTATION PLAN

On June 20, 2024, the U.S. Environmental Protection Agency released its 2024-2027 Climate Adaptation Plan, which describes agency actions to address the impacts of climate change and help build a more climate-resilient nation. The plan expands the agency's efforts to ensure its programs, facilities, workforce and operations are increasingly resilient to climate change impacts. EPA plays a central role in the Biden-Harris Administration's efforts to tackle the climate crisis and build a climate-resilient nation.

The plan builds on work initiated in the 2014 and 2021 EPA Climate Adaptation Plans to incorporate climate adaptation into the agency's programs, policies, rules, enforcement activities and operations. EPA has already made significant strides partnering with other federal agencies, states, Tribes, territories and local governments to promote climate resilience across the nation, placing a particular focus on advancing environmental justice. Nevertheless, more needs to be done given the magnitude of this global challenge.

"We're already seeing the devastating impacts of climate change in our daily lives, such as more frequent and intense weather events," said Vicki Arroyo, EPA Associate Administrator for Policy. "The publication of EPA's 2024-2027 Climate Adaptation Plan supports our continuing efforts to prepare for these impacts, build resilience, and support climate-smart solutions and investments that work for communities across the country."

"We are strengthening EPA's ability to adapt, and building a more climate-informed workforce," said Kimberly Patrick, EPA Principal Deputy Assistant Administrator for Mission Support.

Background

President Biden directed federal agencies to meet the challenge of the climate crisis in a way that protects federal investments, grows good jobs and industries and makes the nation more economically competitive. That includes making federal agencies and programs more resilient to the climate crisis.

The Climate Adaptation Plan

The plan lays out EPA's roadmap for the next four years to reinforce our facilities, critical infrastructure, supply chains and procurement processes to withstand potential risks posed by climate change—above all, to safeguard our workforce so that they can continue to carry out our mission of protecting human health and the environment.

Highlights from EPA's 2024-2027 Climate Adaptation Plan are included below:

- Fostering a Climate-Ready Workforce—EPA is building a climate-literate workforce through ongoing education and training and to ensure staff are equipped with an understanding of projected climate impacts, the vulnerability of EPA programs to these impacts, and adaptation approaches. One example is the agency-wide Climate Conversations webinar series helping to build a community of practice and encourage peer-to-peer sharing of experiences.

- Building Facility Resilience—EPA is continuing to conduct facility resiliency assessments to identify vulnerabilities to the impacts of climate change and make recommendations to increase facility resilience.

- Developing Climate-Resilient Supply Chains—EPA has included an assessment of climate hazard risk as part of its overall Agency Supply Chain Risk Management plan. The agency plans to conduct supply chain risk assessments under the Program Management Improvement Accountability Act and Federal Information Technology Acquisition Reform Act in fiscal year 2024.

- Integrating Climate Resilience into External Funding Opportunities—EPA is modernizing its financial assistance programs to encourage investments by communities and Tribes that are more resilient in an era of climate change. To support this effort, EPA launched an internal Climate-Resilient Investments Clearinghouse website to help managers of financial assistance programs incorporate climate adaptation and

resilience considerations in the investment decisions EPA makes each day.

• Applying Climate Data and Tools to Decision Making—EPA is equipping communities and the recipients of financial resources with the tools, data, information and technical support they need to assess their climate risks and develop the climate-resilience solutions most appropriate for them.

• Integrating Climate Adaptation into Rulemaking Processes—EPA is integrating climate adaptation into its rulemaking processes where appropriate and in keeping with our statutory authorities to ensure they are effective even as the climate changes. For example, on March 14, 2024, EPA finalized a rule requiring a broad array of facilities that manage hazardous materials to develop response plans to prepare for the largest foreseeable discharges in adverse weather conditions, including more extreme weather conditions expected as the climate changes. EPA is also committed to applying climate change and environmental justice policy principles through National Environmental Policy Act reviews.

In March 2024, EPA launched a new Office of Climate Adaptation and Sustainability that will support efforts to build resilience to climate change and promote sustainability in support of the agency's mission and its partnerships.

"As communities face extreme heat, natural disasters and severe weather from the impacts of climate change, President Biden is delivering record resources to build climate resilience across the country," said Brenda Mallory, Chair of the White House Council on Environmental Quality. "Through his Investing in America agenda and an all-of-government approach to tackling the climate crisis, the Biden-Harris Administration is delivering more than $50 billion to help communities increase their resilience and bolster protections for those who need it most. By updating our own adaptation strategies, the federal government is leading by example to build a more resilient future for all."

Conclusion and Implications

Federal agencies have been making steady progress on efforts to build adaptive capacity and resilience across federal operations. Today's publication of EPA's 2024-2027 Climate Adaptation Plan is part of a coordinated release of more than twenty federal agencies' climate adaptation plans. These plans highlight efforts across the federal government to ensure federal facilities, employees, resources and operations are increasingly resilient to climate change impacts. Find EPA's 2024-2027 Climate Adaptation Plan on our climate adaptation website.
(Robert Schuster)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ADOPTS STATE WATER PROJECT LONG-TERM DROUGHT PLAN

The California Department of Water Resources (DWR) recently adopted a State Water Project Long-Term Drought Plan (Drought Plan). The Drought Plan provides a strategy for the State Water Project (SWP) to prepare for and address future droughts.

Background

California has a unique and diverse landscape and includes coastal shores, deserts, foothills, and mountain ranges. Similarly, California has a unique and diverse climate which is more variable than any other state in the United States. According to DWR, the annual precipitation across California can vary from a less than 11 inches to almost 43 inches. California experiences extended dry conditions, which often result in significant droughts. California droughts can also vary by location and scale, periods of time and duration, climate and landscape conditions, and impacts to communities and economies. This danger drives the need for DWR and California to prepare for more impactful droughts and water shortages in its future. DWR developed the Drought Plan to help ensure that California's massive State Water Project can deliver adequate water supplies.

State Water Project

The State Water Project is a critical backbone California water supply and water conveyance system that provides water to other water agencies through a complex system of canals, pipelines, reservoirs, and hydroelectric power facilities. The SWP delivers water from snowmelt and runoff from the northern Sierra mountains to 29 public agencies, which serve 27 million Californians and provide irrigation for approximately 750,000 acres of farmland. The SWP acts as a wholesale water provider, providing drinking water to up to two thirds of California residents.

The SWP, as a wholesale water supplier, makes no guarantee of annual water deliveries. Instead, the SWP stores and delivers available water to the maximum extent possible within regulatory, contractual, and operational constraints. During droughts, there is a risk that there is not enough water available to meet all needs within the state.

Long-Term Drought Plan

The SWP developed the Drought Plan based on its role as a wholesale water provider. The scope of the SWP's drought planning activities is driven by the role the SWP plays within California's water management system during times of drought. The Drought Plan consolidates information and actions taken during past droughts along with descriptions of the actions taken by the SWP to plan for and prepare for future droughts. This Drought Plan describes historical California climate and droughts, analysis of future climate and drought vulnerability, SWP water supply planning objectives, SWP water supply allocation planning and operations, SWP drought planning actions, lessons learned from previous droughts, and SWP actions to improve long-term drought resilience and enhance the physical capabilities and flexibility of the system. DWR will review the Drought Plan once every five years, at a minimum, and will update the plan following significant drought events.

Objectives of the Long-Term Drought Plan

The objectives of the Drought Plan include: (1) delivering water to meet minimum human health and safety needs; (2) preserve upstream storage for future drought protection; (3) meet regulatory requirements; (4) deliver water based on water rights priority; and (5) maximize diversion to storage and delivery of water supply. A summary follows:

- Deliver water supply to meet minimum human health and safety (HHS) needs. HHS demand for water is based on minimum unmet water demands to meet domestic supply, fire protection, and sanitation needs during the year. The current HHS demand for water is limited to 55 gallons per capita per day.

- Preserve upstream storage for future dry year and drought protection. To prepare for future dry conditions the SWP plans for targeted carryover storage, which is water that could have been delivered but was held in storage instead.

- Meet regulatory requirements. The State Water Board issued Water Rights Decision 1641 (D-1641) to DWR and U.S. Bureau of Reclamation (Reclamation) in 1999. D-1641 includes water right permit terms and conditions to implement water quality objectives to protect municipal and industrial and agricultural beneficial uses in the Delta as well as water quality and flow objectives to protect fish and wildlife beneficial uses. The objectives vary by month and by water year classification. In addition to D-1641 objectives, the SWP also provides for minimum instream flows to the Feather River as well as additional flows through export reductions in the south Delta for state and federal Endangered Species Act (ESA) protections as required by the biological opinions issued by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) and the incidental take permit issued by the California Department of Fish and Wildlife (CDFW).

- Deliver water based on water rights priority. In addition to providing water to meet minimum HHS and Delta water quality and flow objectives, other deliveries are made pursuant to contracts with entities downstream of Lake Oroville that assert senior water rights. Pursuant to these agreements, DWR supplies up to approximately 955 taf of water each year during the contracted irrigation season. Outside of the irrigation season, these districts historically have taken

delivery of water for beneficial uses, such as rice stubble decomposition and waterfowl habitat.

•Maximize diversion to storage and delivery of water supply. The SWP maximizes diversion during the winter and spring to upstream storage to be released later for re-diversion at the SWP south Delta export facility.

Conclusion and Implications

The Drought Plan establishes a framework and objectives to prepare for future droughts. The Drought Plan is designed to help the SWP deliver water supply to meet minimum HHS needs and preserve upstream storage for future dry year and drought protection. The Drought Plan is available on the DWR website at: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Files/Long-Term-Drought-Action-Plan_Final.pdf
(C. Suarez, Derek Hoffman)

WASHINGTON POLLUTION CONTROL HEARING BOARD RULES IN FAVOR THE STATED DEPARTMENT OF ECOLOGY IN WATER RIGHTS CHANGE APPLICATION

Round Lake Farms, LLC v Washington Dept of Ecology, PCHB No. 22-078 (May 1, 2024).

The Pollution Control Hearing Board, the administrative appeals board that oversees the state agency's water resources actions, ruled in favor of the Washington State Department of Ecology's defense of denial of Round Lake Farms' request to add a new groundwater well.

Factual and procedural background

Round Lake Farms (Round Lake) holds a Certificate of Water Right (S3-24700C) for the surface waters of Round Lake, a tributary to Crab Creek, with a priority of 1975.

Round Lake filed for a water right change with the Grant County Conservancy Board (Conservancy Board) to add a groundwater point of withdrawal. They argued this was necessary due to upstream impoundments impairing their water rights, causing surface water to infiltrate groundwater before reaching Round Lake and increasing overall groundwater use in the basin. They claimed their surface water right is hydrologically connected to the groundwater they seek to draw from. They noted that the additional withdrawal comes from public surface water that became groundwater in the Quincy unconsolidated zone, distinct from the Quincy Basin groundwaters affected by the Federal Water Project.

The Conservancy Board denied Round Lake's application for a change and prepared a Record of Decision and Report of Examination (ROE) for the application, which Ecology reviewed and modified.

Ecology conducted an independent field investigation and made the following findings:

1) Round Lake is filled from overflow from Brooks Lake during high spring surges,
2) Round Lake is composed of basalt and lacks a hydrogeological connection to the adjacent groundwater as the basalt severs any connection,
3) Further changes were made to the ROE to be consistent with Ecology's findings.

Ecology concluded that the proposed change would enlarge Round Lake's water right because they would access groundwater when it was not available through surface water.

Based on Ecology's expert findings, Ecology upheld the Conservancy Boards' decision to deny Round Lake's water right transfer. Round Lake timely appealed Ecology's decision to the Pollution Control Hearing Board (PCHB).

Contention of Surface Water Code and Groundwater Code

Washington has a surface water code, found at RCW 90.03, and a groundwater code, found at RCW

90.44. Round Lake contends that RCW 90.03.380 is the sole governing statute when seeking to change a surface water right's point of diversion from the surface to a groundwater well.

Ecology asserts groundwater changes and transfers are governed by RCW 90.44.100 (2) and, therefore, requires the four criteria for water permit applications governed by RCW 90.03.290 to apply to groundwater right applications. The PCHB affirmed that the groundwater and surface water codes apply to changes in surface water rights seeking to add a groundwater point of withdrawal.

Ecology's Denial of Round Lake's Application Due to Water Unavailability.

Ecology may approve a water right change request only if legally available water exists at the proposed location (see RCW 90.03.290, .380; RCW 90.44.100). Ecology exercises regulatory authority over "all public and artificially stored groundwater of the Quincy Subarea." WAC 173-134A-050. Consequently, Ecology determines the legal and physical availability of water. However, Ecology's decision is subject to PCHB and Superior Court review if appealed.

The legal issues under review are whether Ecology erred in denying Round Lake's change application, whether the rejection was correct, whether the conclusion that water was not physically or legally available was proper, and whether the denial was accurate due to the Quincy Basin Subarea being closed to additional groundwater withdrawals.

In its assessment of water availability, Ecology determined that Round Lake draws water from high flows in Crab Creek, which historically occurred during higher springtime flows. It is unlikely that the proposed well would collect water that would otherwise flow down Crab Creek into Round Lake.

In its assessment of legally available water, Ecology disagreed with Round Lake consultants that the interrupted surface waters from Round Lake were increasing groundwater flows. Rather, Ecology determined that the Quincy Basin cannot accommodate additional groundwater withdrawals because it has been fully appropriated. The proposed well in the Quincy Sub-Area would effectively equate to a new water right using Bureau of Reclamation water for a state-issued certificate.

Round Lake references its water certificate and entitlement to withdraw water from Crab Creek that would otherwise flow into Round Lake. Their right to withdraw from a new location relies on the hydrological connection between the Quincy Sub-Area and Upper Crab Creek. Ecology disputes the connection between Crab Creek and the Quincy Basin because Round Lake lacks a hydrogeological connection, as noted in their findings.

Pollution Control Hearing Board Decision

The PCHB found the following: 1) Round Lake's surface water right draws only from Round Lake water; 2) Round Lake does not fill year-round, and water availability is seasonally limited; 3) Adding groundwater well in the Quincy Basin Subarea would draw from a new water source, regardless of whether there is a hydrologic connection.

The PCHB determined that the Quincy Groundwater Subarea Management Policy, Chapter 173-134A WAC, applies to Round Lake's change in application.

The PCHB found the following facts about Round Lake: 1) intention to add new groundwater well in the Quincy Groundwater Subarea, 2) although regulations do not state Quincy Groundwater Subarea is closed and there are small amounts of public water available, 3) WAC 173-134A-020 provides a sufficient basis for Ecology's decision to deny the change application as it clearly states, "all waters in the Quincy Basin groundwater system have been allocated to permits or certificates under state law."

The PCHB found Ecology did not err in denying Round Lake's surface water right application to add a well because groundwater in the Quincy Basin Subarea is not legally or physically available and granted summary judgment to Ecology on all counts.

This is a final decision, and the parties did not appeal.

(Ricardo Franco)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

June 27, 2024—The U.S. Environmental Protection Agency announced that Carlisle Construction Materials, LLC paid a $24,780 penalty for Clean Water Act violations that occurred at its former facility in McMinnville, Oregon.

In December 2021, an EPA inspector found several violations of the company's NPDES permit including: (1) failure to document an undisclosed stormwater discharge source in their Stormwater Pollution Control Plan; (2) failure to monitor, sample, and visually inspect undisclosed stormwater discharge source; (3) failure to reduce exposure of crumb rubber pile against stormwater.

Due to excessive levels of dissolved oxygen, phosphorus, iron, and for high temperatures, the South Yamhill River is considered an impaired waterbody by EPA and the Oregon Department of Environmental Quality. The river is not meeting its Clean Water Act beneficial uses for fish and other aquatic life.

The Clean Water Act prohibits discharging pollutants from industrial sources into a water of the United States without a NPDES permit. Stormwater can pick up pollutants like chemicals, oils, and sediment from industrial facilities which are then carried into waterways and harm fish and other aquatic life. The permit requires industrial sites to monitor, measure, and reduce stormwater pollution leaving their facilities.

June 26, 2024—The U.S. Department of Justice, the U.S. Environmental Protection Agency, and the Washington Department of Ecology announced today that they have reached an agreement in principle with King County and the City of Seattle that commits the local governments to significant expansion of the work they agreed to perform in 2013 to reduce discharges of untreated combined sewage and stormwater into Lake Washington, Lake Union, the Duwamish River, and Puget Sound.

In 2013, Ecology and EPA found that the city and county's interconnected combined sewer system regularly violated the state and federal clean water laws by sending hundreds of millions of gallons of untreated or undertreated wastewater into local waterways each year, and allowing sewage to back up into homes in some low-lying communities such as the Duwamish Valley. At that time, both the city and county signed consent decrees with Ecology and the United States committing to major infrastructure investments to reduce the wastewater entering local waterways and people's homes.

Citing increasing rainfall intensity and other impacts of climate change, supply-chain disruptions, and the increased costs of construction in the Seattle area, in 2019 the city and county requested modifications to the 2013 consent decrees to allow for more time to control combined sewer overflows. The new agreements extend the completion date for some of the projects from 2030 to 2037 and commit the city and county to significant increases in wastewater storage and treatment capacity.

The additional time also enables closer coordination between the city and county, projects to reduce stormwater volumes, and additional planning and design work to ensure that new wet-weather control facilities are more resilient to a changing climate. Generally, this means that these facilities will be capable of handling larger volumes of combined sewage that will result from changing rainfall patterns in the Seattle area.

EPA provided loans under the Water Infrastructure Finance and Innovation Act to the City of Seattle for $192.2 million and King County for $96.8 million for this project.

June 24, 2024—The Environmental Protection Agency, along with the Department of Justice and the United States Attorney for the Southern District of New York, announced a settlement with the Westchester Joint Water Works (WJWW), the town/village of Harrison, the village of Mamaroneck, and the town of Mamaroneck (collectively, the defendants) for violation of the federal Safe Drinking Water Act (SDWA) in 2019 due to the presence of contaminants that are known to threaten public health in the public water system in excess of the level set by EPA. Thereafter, WJWW violated an EPA administrative order requiring the construction of a water filtration plant by specified deadlines.

According to the complaint filed along with the consent decree, the defendants failed to ensure that the drinking water they supply to approximately 120,000 Westchester County residents complies with federal limits on potentially cancer-causing disinfection byproducts resulting from water treatment. Specifically, the defendants own and/or operate a public water system.

In 2019, WJWW violated the SDWA and its Stage 2 Disinfectants and Disinfection Byproducts Rule because it supplied water exceeding legal limits for certain chemicals resulting from the disinfection process, specifically, five regulated haloacetic acids known as HAA5. Epidemiological studies have supported a potential association between disinfection byproduct exposure and bladder cancer and suggested an association with colon and rectal cancers. Additionally, exposure to chlorinated drinking water or disinfection byproducts may cause adverse developmental or reproductive health effects.

Although WJWW has taken certain short-term measures to mitigate risk to its consumers, defendants have failed to implement necessary corrective actions, including WJWW's failure to construct and operate a filtration plant required by an EPA administrative order and the Surface Water Treatment Rule of the SDWA.

The consent decree establishes various interim deadlines for the drinking water filtration plant construction project and requires WJWW to continue to implement measures to ensure the safety of its water supply until the filtration plant is operational. The consent decree also requires WJWW to pay a $600,000 civil penalty to the United States. In addition, WJWW agreed to spend at least $900,000 on a supplemental environmental project to modify an extended detention basin in the Rye Lake portion of the Kensico Reservoir and manage invasive species in the area. This supplemental environmental project is expected to improve source water quality in the reservoir by decreasing natural organic material and turbidity. Compliance with the SDWA is not only a public health necessity but also a matter of environmental justice. At least one of the municipalities relying on defendants' drinking water is overburdened and underserved, facing disproportionate environmental impacts and other burdens.

The State of New York is contemporaneously joining the lawsuit to assert its own claims under state law and a previously entered state court judgment requiring the construction and operation of a filtration plant. The consent decree resolves claims by New York to enforce a previous state judgment against WJWW for violating separate regulations requiring the implementation of filtration. In addition to the construction of the filtration facility, the defendants will pay New York a $650,000 civil penalty and spend at least $6.8 million on two state water quality benefit projects.

The consent decree is subject to public comment and approval by the court. Notice of the proposed consent decree will be published in the Federal Register, and the public will have the opportunity to submit comments on the consent decree for a period of at least 30 days before the parties seek the court's approval.

June 18, 2024—The U.S. Environmental Protection Agency (EPA) has announced a settlement with Tristar Terminals Guam, Inc., over Clean Water Act violations for unauthorized discharge of oily wastewater into the Big Guatali River. This river flows into Apra Harbor.

Under the settlement, Tristar Terminals must improve oil water separation processes, perform effluent monitoring, and update their Pollution Prevention Plan to improve operations and maintenance at the petroleum storage facility in Hågat.

In 2023, an EPA and a Guam EPA inspector performed an on-site inspection of the Tristar facility and found that an unauthorized discharge of oily wastewater had reached the Big Guatali River.

EPA observed that the facility had not properly operated and maintained treatment units, including the

Oil Water Separator, which led to inadequate treatment and excess oily wastewater leaving the facility.

Under the Order, Tristar has agreed to:

- Upgrade and/or replace the Oil Water Separator treatment unit to meet industry design standards;
- Clean all treatment units of oily waste materials;
- Increase the height of a treatment unit berm to prevent future discharges directly into the Big Guatali River;
- Perform effluent monitoring of new Oil Water Separator to ensure compliance; and
- Update Pollution Prevention Plan to improve operations and maintenance of all treatment units.

Tristar Terminals Guam, Inc. owns and operates the over 200-acre facility where it receives, stores, and distributes fuels in over 20 fuel storage tanks. The facility receives, stores, and distributes gasoline, A1 jet fuel, liquefied petroleum gas, Number 5 residual fuel oil, and ultra-low sulfur fuel oil.

EPA's proposed settlement with Tristar Terminals Guam, Inc. addresses the violations found at the facility.

(Robert Schuster)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT LET'S STAND NINTH CIRCUIT'S DECISION REGARDING DREDGE MINING AND THE NEED FOR A PERMIT UNDER THE CLEAN WATER ACT

Idaho Conservation League v. Poe, Rev. Denied, (U.S. 2024).

On July 2, 2024, the U.S. Supreme Court in *Idaho Conservation League v. Poe* declined to review the decision of the Ninth Circuit Court of Appeals leaving stand the Ninth Circuit's decision that the grant of summary judgement in favor of the Conservation League by the U.S. District Court in Idaho was appropriate. In so doing the U.S. Supreme Court upheld the longstanding requirement that suction dredge miners must obtain a Clean Water Act permit before engaging in the activity. The Supreme Court rejected a petition to review prior federal court rulings that found gold miner Shannon Poe, of California, violated the Clean Water Act when he dumped suction dredge mining waste into Idaho's South Fork of the Clearwater River without a required pollution permit.

At the Ninth Circuit

In *Idaho Conservation League v. Poe*, ___F.4th___, Case No. 22-35978 (9th 2023) the Ninth Circuit Court of Appeal affirmed the decision of the District Court for Idaho in its summary judgment in favor of the Idaho Conservation League in its action under the federal Clean Water Act against Poe who engaged in instream suction dredge mining, a method of placer mining, in Idaho's South Fork Clearwater River without a National Pollutant Discharge Elimination System (NPDES) permit.

The Ninth Circuit held that to establish a violation of the federal Clean Water Act's NPDES requirements, (Section 402 permitting) a plaintiff must prove that the defendant (1) discharged, i.e. added (2) a pollutant (3) to navigable waters (4) from (5) a point source. As to the first element the court held that Poe's suction dredge mining "added" a pollutant to the South Fork.

The court followed *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), which upheld the U.S. Environmental Protection Agency (EPA) regulations interpreting the Clean Water Act as prohibiting discharges from placer mining sluice boxes unless done in compliance with a Section 402 permit. In two subsequent cases: *S. Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) and *L.A. County Flood Control District v. Natural Resources Defense Council, Inc.*, 568 U.S. 78 (2013), The U.S. Supreme Court held that the transfer of polluted water from one location to another within the same waterbody did not constitute an "addition" of pollutants.

The Ninth Circuit pointed out that in the instant case, Poe excavated from the riverbed materials that were not already suspended in the water. The Ninth Circuit concluded that the *Rybachek* decision was not "clearly irreconcilable" with the *L.A. County* or with the *Miccosukee Tribe* decisions, and therefore was "still good law."

The Ninth Circuit further held that the process material discharged from Poe's suction dredge mining was a pollutant, not dredged or fill material, and therefore required an NPDES permit under Section 402 of the Clean Water Act, rather than a permit from the U.S. Army Corps of Engineers under Section 404 of the act.

The court went on to find that because the meaning of the Clean Water Act and its implementing regulations was ambiguous, the court deferred to the "official joint conclusion of the EPA and the Corps."

The Ninth Circuit further explained:

> . . .even if the material starts as dredged material, that fact does not settle the issue of whether material that was dredged remains "dredged material" after it has been processed. Poe processed the materials dredged from the riverbed when he ran them through the sluice on his dredge, extracted heavy metals and other materials, and discharged the remaining was and sediments into the South Fork. In any event, the meaning of the CWA. . . remains sufficiently ambiguous

> that deference to the agencies' official. . .conclusion is appropriate.

In the end, the Ninth Circuit affirmed the summary judgment of the U.S. District Court:

> The concern here "is not with the navigability of the water body, a concern that fall within the Corps' expertise"; rather the concern is with the health of the water body, a concern that lies at the heart of EPAs expertise. The Corps and the EPA reasonably could conclude that EPA was better suited than the Corps to make [these] types of water quality decisions.

The Ninth Circuit affirmed the grant of summary judgment by the District Court in favor of the Idaho Conservation League.

Conclusion and Implications

The U.S. Supreme Court apparently saw no reason to intervene in this case leaving the decision of the Ninth Circuit in its affirmation of the District Court's decision finding that Poe needed and failed to obtain a permit from EPA for his dredge mining operation. The 2023 Ninth Circuit's opinion [and it's detailing of the facts] is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/11/20/22-35978.pdf
(Robert Schuster)

CALIFORNIA SUPERIOR COURT UPHOLDS ENVIRONMENTAL IMPACT REPORT FOR SITES RESERVOIR PROJECT

Friends of the River v. Sites Project Authority, Case No. CV-2023-2625 (Yolo County Super Ct. 2024).

On May 31, 2024, the Yolo County Superior Court found that the final Environmental Impact Report (EIR) for the Sites Reservoir Project (the Project) complied with the California Environmental Quality Act (CEQA) and its guidelines. Six non-profit organizations (the Organizations) challenged the EIR on a number of grounds, including that the Sites Project Authority (Authority) relied on an inaccurate environmental baseline, failed to consider a reasonable range of alternatives, inadequately described the environmental setting of the Project area, and provided an inaccurate project description. The court rejected all of the Organizations' arguments and denied the petition for writ of mandate.

Background

Planned for several decades, the Project includes the construction of a large, off-stream water storage reservoir in rural Glenn and Colusa Counties. At 1.5 million acre-feet, the Sites Reservoir would be the first major water storage project of its scale in California since 1978. Water will be diverted from the Sacramento River and pumped into the Reservoir between September 1 and June 15 and held in storage for release from May to November. Released water may be used within the Sacramento Valley, the Delta or exported for use south of the Delta. Operations of Sites Reservoir will be coordinated with the Central Valley Project (CVP) and State Water Project (SWP).

The Project has proceeded through various stages of CEQA since 2001, with draft EIRs released in 2017 and 2021. In November 2023, the Authority released the final EIR for the Project. Shortly thereafter, the Board of Directors for the Authority certified the EIR and the Organizations filed their legal challenges. Under the recently enacted CEQA streamlining bill, S.B. 149, Governor Newsom certified the Project for expedited CEQA review, requiring the court to rule on the challenges within 270 days.

CEQA requires lead agencies to inform the decision maker and the public of any significant environmental impacts of a proposed project through an EIR. (Pub. Resources Code, § 21001; Cal. Code Regs., tit. 14, § 15003. (Guidelines).) To analyze a project's impacts, an EIR must define baseline environmental conditions in the project's area. (Guidelines, § 15125.) An EIR must also include reasonable alternatives to a project that reduce a project's environmental impact. (*Id.* at 15126.6.)

The CEQA challenges include the EIR's reliance on 2019 Biological Opinions (BiOps) for the CVP and SWP to establish the Project's environmental

baseline. In 2022, a federal court remanded the 2019 BiOps, "without invalidating or vacating them," so that federal agencies could revise them in accordance with the Biden Administration's environmental policies. (*Ruling*, at p. 18.) In the meantime, the court issued an interim plan to coordinate CVP and SWP operations until 2024. The Project EIR did not rely on the interim plan, nor did it rely on the State Water Resources Control Board's 2018 updated Water Quality Control Plan for the Bay-Delta (Bay-Delta Plan). The Organizations challenged the EIR's omission of the interim plan, the Bay-Delta Plan, future updates to the Bay-Delta Plan, and future biological opinions for CVP and SWP operations.

The Court's Decision

The Organizations argued that the EIR's reliance on the 2019 BiOps and exclusion of the 2018 Bay-Delta Plan formed an inaccurate environmental baseline assessment of the Project's effects. Since the 2019 BiOps were withdrawn and replaced by an interim plan, the Organizations argued that the Project's environmental baseline assessment was outdated. Employing substantial evidence review, the court held that the Authority properly acted within its discretion in relying on the 2019 BiOps because the 2019 BiOps were not actually vacated, the interim plan expired before 2024, and the Authority properly accounted for the laws and regulations at the time the EIR was prepared. Because the 2018 Bay-Delta plan was limited to water quality objectives for the lower San Joaquin River outside the Project area, the court held the Authority appropriately used its discretion to omit it from the baseline. (*Ruling*, at p. 31.) Turning to future updates to the Bay-Delta Plan and biological opinions, the court found the Authority acted within its discretion to exclude future uncertain changes under substantial evidence review. (*Id.*)

Range of Alternatives

Next, the court addressed whether the EIR failed to include a reasonable range of alternatives. The Organizations argued that the three alternatives included in the EIR were "only minor variations of the Project" and that the Authority failed to consider operational alternatives. (*Id.* at p. 32.) After reviewing the entire record, the court found that the Authority considered a wider range of project variations and operational alternatives before arriving at the three alternatives in its EIR. The court held that these alternatives sufficiently informed decision-makers and the public about the Project's options, based on the Project's identified objectives. (*Id.* at p. 44.)

Reliability of Data

The court also considered the EIR's description of the Project's environmental setting of the Project area. The court employed substantial evidence review because the Organizations challenged the reliability of data and findings in the EIR. Specifically, the Organizations argued that, instead of modeling certain Project areas, the Authority should have physically surveyed those areas, including privately held parcels. The Organizations also challenged the Authority's use of pre-construction surveys, arguing that pre-construction surveys might be invalid by the time construction begins. The court found no substantial evidence that the Authority's description of the environmental setting amounted to a prejudicial abuse of discretion. (*Id.* at pp. 56-57.)

Project Description

Finally, the Organizations alleged the EIR's description of the Project was inaccurate. The Organizations argued that major Project components have yet to be designed and the EIR failed to sufficiently disclose the location of construction of infrastructure including new roads, recreation areas, and canal system upgrades. (*Id.* at p. 59.) To the contrary, the court found the "voluminous Project description" in the EIR provided "tremendous detail" on Project components, and that requiring more detail would exceed CEQA's general description standards. (*Id.* at p. 63).

Conclusion and Implications

The court ultimately concluded that the EIR did not mislead the public or governmental decision makers about the Project. The Authority acted within its discretion to consider an adequate range of alternatives and sufficiently described the Project and its environmental setting in compliance with CEQA. Accordingly, the court denied all of the Organizations' challenges.

The court's approval represents a significant step forward for the Sites Reservoir Project. As the first streamlined project under S.B. 149, the Ruling

also demonstrates how quickly a project can move through normally lengthy CEQA proceedings. The Organizations filed an appeal of the trial court's Ruling on June 17, 2024. Separately, a hearing is also underway on the Project's pending water right application before the State Water Resources Control Board. A copy of the Ruling is available online at: https://sitesproject.org/wp-content/uploads/2024/06/CV2023-2626-ORDER4-1.pdf
(Dustin R. Messner, Austin Cho)

COLORADO SUPREME COURT CONFIRMS LAW OF INJURY, CLARIFIES RULING STANDARDS IN CERTAIN WATER COURT CASES

City of Golden v. United States, 2024 CO 43

The Colorado Supreme Court recently ruled on a long-standing dispute between the United States and the City of Golden. This ruling, issued on June 17, 2024, confirms Colorado water law standards regarding a showing of no injury in Water Court cases. This complex case involving decades-old decrees and a recent administrative protocol is an informative outline in the interplay between federal, municipal, and private water rights, particularly in the case of transmountain diversion projects.

Background

This dispute revolves around Green Mountain Reservoir, an on-channel reservoir owned by the United States located on the Blue River south of Kremmling, Colorado. Congress, through Senate Document 80 (SD-80) directed Green Mountain Reservoir to be built in 1937 as part of the Colorado-Big Thompson Project (CBT). The CBT is a transbasin diversion project intended to supply northeast Colorado with supplemental irrigation water from the Colorado River system. As part of CBT, Green Mountain Reservoir was built to provide replacement water to western slope users affected by CBT, and also to allow construction of a federal hydropower generating station.

In 1942, almost immediately after completion of Green Mountain Reservoir, various parties engaged in litigation concerning the interaction between the federal rights in Green Mountain Reservoir and Denver and Colorado Springs (Cities) rights in the Blue River upstream of the reservoir.

The Blue River Decree

This litigation resulted in the 1955 "Blue River Decree" dictating operations between these parties. In sum, although the Cities' water rights are junior to Green Mountain, the Blue River Decree allowed the Cities to divert out-of-priority prior to the filling of Green Mountain, provided it was "reasonably probable" that Green Mountain would fill. If the Cities' diversions would not adversely affect Green Mountain's fill or Green Mountain's SD-80 functions, they could divert their transbasin Blue River rights out-of-priority. The United States and the Cities also executed power interference agreements under which the Cities would pay financial compensation in the event their diversions impacted Green Mountain's power generation capabilities. Finally, the Blue River Decree memorialized SD-80's directive that Green Mountain's purposes be accomplished "in a fair and efficient manner, equitable to all parties having interests therein."

The Green Mountain Reservoir Administrative Protocol

The Blue River Decree generally worked for many decades until, in 2003, a dispute arose between the Blue River Decree parties and the Colorado State Engineer's Office (SEO) regarding administration of the various water rights during Green Mountain's fill period. SEO began an interim policy that controlled operations for ten years until the parties agreed on the Green Mountain Reservoir Administrative Protocol (Protocol) in 2013. SEO then adopted the Protocol as an interim policy and has administered the Protocol since 2014. Among other things, the Protocol elaborates on the Blue River Decree and specifies how to account for the Cities' out-of-priority diversions and how those rights operate when there is a calling water right below Green Mountain.

Importantly, between the Blue River Decree and the Protocol, the City of Golden acquired a large

water right in the upper Blue River drainage from the Vidler Ditch Company (Vidler Rights). Vidler previously had a power interference agreement with the United States allowing for out-of-priority diversions vis-à-vis Green Mountain in exchange for financial compensation. Vidler attempted to assign this agreement to Golden, but the United States refused to consent to the assignment or otherwise enter a new agreement with Golden because the federal government was concerned this agreement could be viewed as a general subordination of all United States' power rights to all other upstream water rights senior of the Vilder Rights.

Section IV of the Protocol required the parties to seek a judicial determination that the Protocol is consistent with the Blue River Decree, leading to the present litigation. In 2013 the Blue River Decree parties filed an application for determination of water rights under C.R.S. § 37-92-302(1), and later filed an amended application in 2020. Golden filed a statement of opposition arguing that the Protocol would injure its Vidler Rights. The Water Court set the case for trial, triggering a flurry of discovery and expert reports from all sides. The United States' and Cities' reports focused on the gist of the application—that the Protocol is consistent with the Blue River Decree. Golden conversely focused on how the Protocol would injure its Vidler Rights and that the United States' refusal to execute a power interference agreement constitutes selective subordination of the Green Mountain rights.

The Motion for Summary Judgment

The United States then filed a motion for summary judgement, arguing that there was no genuine issue of material fact because Golden did not dispute that the Protocol was inconsistent with the Blue River Decree, and instead raised injury concerns, an inquiry the United States asserted was not properly before the court. The Water Court agreed with the United States, granting the motion and holding that the application did not warrant an injury analysis because it involved only interpretation and application of established water rights." *In re Application of United States for Determination of Water Rts.*, 13CW3077 (Dist. Ct., Water Div. 5, May 26, 2022) (quoting *Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226 (Colo. 2011)). The Water Court agreed that injury to water rights is an important part of Colorado law, but that "does not make [injury] an issue in every case." *Id.* at 19. The Water Court then found that the Protocol was consistent with the Blue River Decree and, importantly, that SD-80's "fair" and "equitable" requirements do not apply to Golden because those terms only affect beneficiaries to the Blue River Decree, those being parties with interests in CBT and western slope users benefitting from Green Mountain's replacement water.

Golden then appealed the Water Court's grant of the motion for summary judgment to the Colorado Supreme Court. In Colorado, appeals from the Water Court skip the Court of Appeals and go directly to the Colorado Supreme Court, resulting in the decision at issue today.

The Colorado Supreme Court's Decision

The Colorado Supreme Court upheld that Water Court's ruling by principally finding that Golden's injury claims were not relevant in this case. The Colorado Supreme Court made several other findings, discussed below, but all were corollary to the general ruling on the scope of injury inquiries:

> Although injury to other adjudicated water rights is a central principle in Colorado's prior appropriation system, that does not mean that injury is relevant to every water rights proceeding. When a Water Court application asks only that the Water Court construe the scope of an existing decree, any reduction in the water supply available to junior appropriators resulting from the administration of water rights consistent with that decree is a consequence of the prior appropriation doctrine and does not establish an independently cognizable injury to junior appropriators. *United States v. Golden*, 2024 CO 43, at 9.

The Court concluded that Golden's Vidler Rights are junior to the Blue River Decree rights, that the Protocol is consistent with the Blue River Decree, and therefore the Water Court properly granted the United States' motion for summary judgment.

Injury Was Not a Proper Inquiry In This Case

The Court first upheld the Water Court's ruling that injury, while important, is not a proper inquiry in

all Water Court cases. The Court acknowledged the reality that regardless of protective conditions, the reality is that there will be times when a stream does not have enough water to satisfy all users. *Kobobel v. State*, 249 P.3d 1127, 1135 (Colo. 2011) ("The risk of curtailment is inherent to Colorado water right holders because water…is an over-appropriated, relatively scarce resource."). But the mere fact that a junior water right may be called out is not injury, provided that the senior water right is being exercised consistent with its decree. *United States v. Golden*, at 31. In the same vein, the Court outlined many cases where injury is a critical factor, such as new water rights or changes to existing water rights. "But where a water user's request goes no further than the interpretation of the terms of an existing decree, there is no potential for this type of injury." *Id.* at 33 (*e.g.*, *Southern Ute Indian Tribe*, ruling that injury is not at issue when determining whether an existing decree included a winter stockwatering component).

The Protocol Is Consistent with The Blue River Decree

The Colorado Supreme Court upheld the Water Court's finding that the Protocol is consistent with the Blue River Decree, for the same reasons. Importantly for this appeal, Golden did not contest the Water Court's findings on this issue. Instead, Golden asserted two alternate reasons why the Protocol is inconsistent: first, that the actual questions should be not whether the Protocol is consistent, but rather what is required under the Blue River Decree, and second, that the Protocol violates the "fair" and "equitable" requirements of SD-80. The Supreme Court generally dismissed Golden's arguments on the basis that these were simply the same injury inquiry in disguise. It is true that Golden might have less water when the Protocol is operating, but that is not injury, merely a function of owning junior water rights within the prior appropriation system.

However, the Court did take the time to address the SD-80 argument, holding that SD-80 does not afford protection to *every* upstream user on the Blue River, but instead only the *beneficiaries* under SD-80 (parties having "interests therein"). Those parties are either 1) part of CBT, or 2) western slope users benefitting from Green Mountain replacement water. Golden is neither, and therefore Golden's interests are not required to be included when determining whether the Protocol conforms to the Blue River Decree and SD-80.

The Protocol Is Consistent with the Prior Appropriation System

Golden also raised concerns that the Protocol is not consistent with Colorado's prior appropriation system. According to Golden, the Protocol is no more than a serious of selective subordination agreements under which a senior water right owner (the United States) consents to stand in priority behind junior users (the Cities). Golden correctly asserted that such agreements are generally disfavored by Colorado courts. However, the Supreme Court categorized this claim as "dubious at best," primarily because the Protocol itself specifically states that it is *not* a subordination agreement. Instead, the Protocol defines itself as a policy designed to allow as much water as possible to be available *without* impairment of Green Mountain's fill right. *Id.* at 42. If snowpack and stream conditions are such that Green Mountain will not fill, the Cities are not allowed to divert out-of-priority in a manner that would impair Green Mountain's rights. The Court acknowledged that the Protocol is complex, but its permission of out-of-priority diversions is limited to the extent those diversions do not harm the United States, thus maximizing beneficial use of all parties' water rights, and therefore the Protocol complies with Colorado's law of prior appropriation. *Id.* at 43-44

Conclusion and Implications

The Colorado Supreme Court did not make any "new" law through this decision, yet the holding is still an important development in Colorado water law. The Court confirmed the importance of injury analyses but reaffirmed that such an inquiry is not always required, specifically when a water rights holder merely requests confirmation of an existing decree. The Court also confirmed the Protocol is consistent with the Blue River Decree. This is important because Green Mountain, CBT, and the other involved water rights serve millions of Coloradans and are critical for the state's water supply. The case also highlights the complex interplay between federal, municipal, and private water rights, particularly in the case of transmountain diversions.
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