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Water Rights, Water Quality & Water Solutions in the West

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APPORTIONING INTERSTATE GROUNDWATER

***MISSISSIPPI V. TENNESSEE*, *CITY OF MEMPHIS*, *MEMPHIS LGW*, NO. 143 ORIG.**

by Don Blankenau, Blankenau Wilmoth Jarecke LLP (Lincoln, NE)

Introduction

Enterprising professionals are creative, and always searching for innovative solutions to vexing problems. A new computer program to aid in administering water rights, or a new application for remote sensory data, or a novel application of a tested legal theory, can revolutionize the way states, cities, and other water users access and consume water. So it was with the State of Mississippi when it tried to solve the problem: How does a state monetize water molecules that originated under its borders, but are being drawn across state lines to wells located in a neighboring state? Mississippi officials first pondered this question back the early 2000s, when they noted that groundwater from a multi-state aquifer was being drawn across state lines into Tennessee, by wells that supplied the municipal and industrial needs of the City of Memphis. While that water migration was not causing any water shortage or limiting access to groundwater in Mississippi, Mississippi considered the groundwater to be property of the state, and any action that deprived them of that property, required compensation. Thus began a long and rather serpentine legal road to the United States Supreme Court.

The Water Source, The Middle Claiborne Aquifer, and the City of Memphis

The significance of this case radiates from the water source itself — an interstate aquifer called the Middle Claiborne (also often referred to as the Memphis Sand or Sparta aquifer). The Middle Claiborne is part of the Mississippi Embayment Regional Aquifer System (Aquifer System) located in the Gulf Coast Plain. The Aquifer System consists of a layered group of aquifers separated by confining beds at various depths.

Some have likened the Aquifer System to a multi-layered cake with the Middle Claiborne being one of those layers. Significantly, unlike some of the other layers within that System, the Middle Claiborne is unique in size and quality. The Middle Claiborne underlies portions of eight states in the American Southeast: Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee. Much of the water within the Middle Claiborne is old, with water moving slowly between some of these states. The water in the Middle Claiborne is also of high quality, and users in all of those states draw from it using a wide variety of wells.

Founded in 1819, the City of Memphis (Memphis) lies along the banks of the Mississippi River at the western edge of Tennessee. For over 100 years, Memphis has tapped the Middle Claiborne for water to serve its residents with water for their homes and businesses. Memphis, through the Memphis Light, Gas & Water Division, (MLGW), pumps approximately 120 million gallons a day from the Middle Claiborne. MLGW's wellfield consists of over 160 wells and is located south of Memphis not far from Tennessee's border with Mississippi. Notably, MLGW's wells are vertical and are wholly within the State of Tennessee.

Interstate Groundwater

Cone of Depression

No Compact

Mississippi Lawsuit

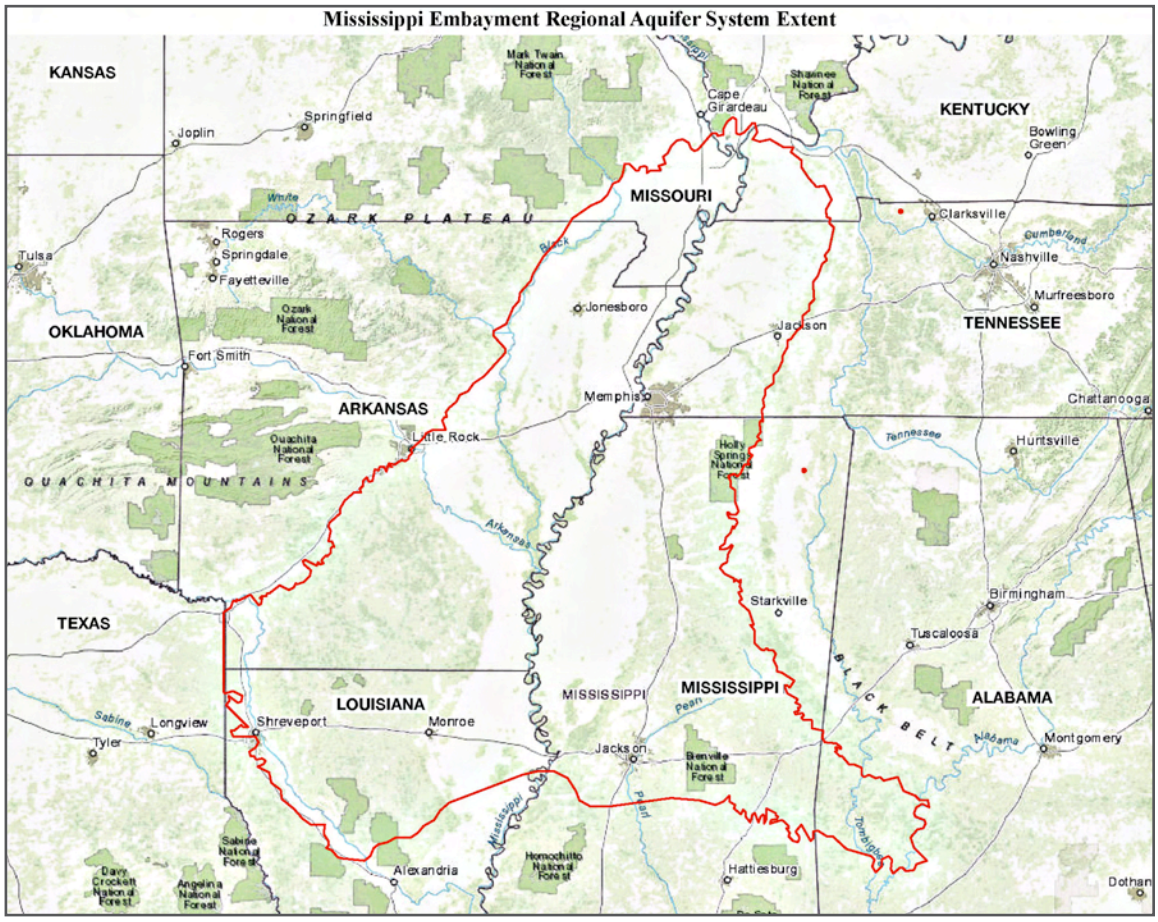
Jurisdiction Issues

Like all wells, MLGW's individual wells create cones of depression within the Middle Claiborne as a consequence of water withdrawal. The combined impact of MLGW's operating wellfield is broad and complex, comprising a regional cone of depression that extends beyond the borders of Tennessee and into DeSoto County, Mississippi. Although this regional cone of depression causes water in the Middle Claiborne to move from Mississippi into Tennessee at a rate that is greater than in pre-development periods, it has not lowered the depth to water in Northwest Mississippi more than a few inches. For that reason, the water use by Memphis/MLGW did not prevent or even limit access to groundwater in Mississippi. It is, however, the movement of groundwater within the Middle Claiborne and across state lines that caught the attention of the State of Mississippi's Attorney General.

The District Court Litigation

No compact or decree apportions either surface or ground waters between Tennessee and Mississippi. Although both states could have engaged in negotiations to resolve any water management concerns, no concerns were ever raised, and no such negotiations occurred. In that vacuum of concern, the City of Memphis and MLGW were surprised to learn in 2005 that they had been sued by Mississippi in the federal district court of the Northern District of Mississippi. The suit alleged that the Memphis/MLGW wellfield took "billions of gallons of Mississippi's portion of the Aquifer ground water" and converted that state property to its own municipal uses. Mississippi asked for injunctive relief and compensation approaching $1,000,000,000.

This suit did not, however, name the State of Tennessee as a defendant — for practical and strategic reasons. By limiting its claims to Memphis and MLGW, Mississippi's claims were on their face within the jurisdictional scope of the federal district court. Had Mississippi named Tennessee as a party, jurisdiction in the Mississippi court would have been facially flawed because, Article III, § 2 of Constitution and 28 U.S.C. § 1251, would cast the case into the exclusive jurisdiction of the United States Supreme Court. Moreover, the relief sought was primarily aimed at compensation for taking water rather than seeking state regulation to abate any water shortage. State v. state litigation typically carries with it greater costs and longer resolution times than federal district court litigation. With Memphis/MLGW being the primary water user of the Middle Claiborne, and with a documented cross-boundary groundwater impact, Memphis was the logical and logistically desirable defendant.



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Interstate Groundwater

Exclusive Ownership

Conversion

"Equitable Apportionment"

District Court Dismissal

Fifth Circuit Affirms

Appeal: Alternative Claims Denied

New Action

Equitable Apportionment Rejected

Mississippi, however, faced a significant legal hurdle to its claims: If the water at issue is an interstate resource and there is no compact or decree apportioning that resource, on what legal theory can exclusive ownership rest? In other words, if there has been no determination by Congress or the Supreme Court establishing ownership rights to an interstate resource, can a state reasonably assert its ownership and obtain compensation? Mississippi landed on the standard tort claim of "conversion" — which in simple terms, requires compensation for taking and using the property of another. While a well-recognized legal theory, conversion had never before been used in an interstate water conflict.

Memphis/MLGW were quick to pounce on this issue and sought to dismiss the suit, arguing that only after each state's respective rights to the groundwater has been established could a state bring suit to obtain compensation for the loss of its established allocation. "Equitable apportionment" is the only legal vehicle for judicially determining the respective rights to interstate water. Under the equitable apportionment doctrine, the Supreme Court allocates the rights to disputed interstate waters between states. To that end, Memphis/MLGW claimed Tennessee was an indispensable party that could not be joined to the district court litigation, requiring the dismissal of the action.

The district court, however, was initially unmoved by the Memphis/MLGW position and the case proceeded to discovery and on to trial. The case poised for trial in 2008 but just before trial was to open, the district court reversed course and issued an order, *sua sponte* (on its own accord), dismissing the suit. The district court reasoned that a judicial resolution to competing claims to a shared water resource did indeed require an equitable apportionment. Because rights to the use of water are generally within the traditional realm of state powers, states are the proper and essential parties to such suites. Accordingly, the district court held that it lacked jurisdiction to resolve the dispute and dismissed the matter. *See Hood ex rel. Miss. v. Memphis*, 533 F. Supp. 2d 646, 651 (ND Miss. 2008).

Mississippi appealed the district court's decision to the Fifth Circuit Court of Appeals (Fifth Circuit). In affirming the district court, the Fifth Circuit held that interstate aquifers are comparable to interstate rivers and are thus subject to equitable apportionment. Curiously, the Fifth Circuit noted that aquifers flow — "if slowly" — in making its comparison to rivers. The Fifth Circuit also rejected Mississippi's assertion that water below the ground should be treated differently than rivers, noting that the difference in location resulted in "no analytical significance." *Hood ex rel. Miss v. Memphis*, 570 F. 3d 625, 630 (2009).

Undaunted by this setback, Mississippi then petitioned the US Supreme Court (Court) for a writ of certiorari. In a curious move, Mississippi simultaneously filed a motion for leave to file a bill of complaint against Tennessee, and Memphis/MLGW under the Court's original jurisdiction. The proposed complaint renewed the claim for $1 billion in compensation for the taking of property but also sought, in the alternative, an equitable apportionment of the Middle Claiborne with damages for past diversions. Effectively, Mississippi offered the Court two alternatives to take up its claims: as an appeal or as an original action. The Court chose neither. On the same day, the Court issued an order that declined to grant certiorari, 559 U.S. 904 (2010), and another that denied, without prejudice, the motion for leave to file the bill of complaint, 559 U.S. 901 (2010). In its one-sentence denial of the motion for leave, the Court, cited *Virginia v. Maryland*, 540 U.S. 56, 74, n. 9 (2003) and *Colorado v. New Mexico*, 459 U.S. 176, 187, n. 13 (1982). In short, the cited footnotes in those cases suggest that a plaintiff state is subject to federal common law (equitable apportionment) and bears the burden to show a real or substantial injury before the Court will exercise jurisdiction and grant relief.

The Original Action

Following those decisions, the case appeared to have concluded. No substantive discussions or formal negotiations between the states seeking to apportion the water occurred. Surprisingly (at least to those in Tennessee), in 2014 Mississippi again sought leave from the Court to file a bill of complaint against Tennessee and Memphis/MLGW. This proposed complaint took a slightly different tack, alleging that MLGW had "forcibly siphoned into Tennessee hundreds of billions of gallons of high quality groundwater owned by Mississippi." Complaint ¶ 23. Curiously Mississippi claimed that "mechanical pumping" caused groundwater to cross its borders that "would never under normal, natural circumstances been drawn into Tennessee." *Id*., ¶ 24. Mississippi went on to explain that the cone of depression created by the MLGW wells, required Mississippi to drill its wells deeper to access the aquifer and use more electricity to get that water to the surface. *Id*., ¶ 54(b). Of critical importance, Mississippi expressly disclaimed equitable apportionment as the legal tool to resolve the matter. *Id*., ¶ 49.

In rejecting equitable apportionment, Mississippi's claim for damages rested on its claims of absolute ownership of the groundwater as a matter of its rights as a state upon entry to the Union. As relief, Mississippi sought $615,000,000 in property loss and injunctive relief against unspecified water use in Tennessee beyond MLGW's wells. (It is not clear why the damage claim was for less than the previous

Interstate Groundwater Monetization of Groundwater

claim). While tactically, the State of Tennessee was an essential party to the litigation, the State was actually a nominal party in that the relief sought was secondary to the monetization of groundwater. Notably, the management of the water of the Middle Claiborne to avert any shortages or interference wasn't at issue.

Memphis/MLGW and Tennessee both opposed the Motion for Leave by noting that because the Middle Claiborne underlies multiple states, equitable apportionment was the sole legal theory available to Mississippi. Given that Mississippi had expressly rejected an equitable apportionment as relief, Memphis/MLGW and Tennessee asked the Court to decline to exercise its jurisdiction. The United States, at the invitation of the Court, filed a brief as amicus curiae, making a nearly identical argument urging the Court to decline jurisdiction.

Special Master Appointed

The Court, however, concluded that Mississippi's claims did rise to the seriousness and dignity of the Court's exclusive and original jurisdiction and granted the Motion for Leave. In a later order, the Court appointed Judge Eugene E. Siler, Jr., of the Sixth Circuit Court of Appeals, to serve as the Special Master. As a special master, Judge Siler was to conduct the trial proceeding and make reports, with recommendations to the Court.

Following discovery and motion practice, Special Master Siler held a five-day evidentiary hearing in May of 2019. At the hearing, Mississippi presented the testimony of two hydrologists, and the Defendants (Memphis/MLGW and Tennessee) called three of their own. The focal point of all the experts' testimony concerned the interstate nature of the Middle Claiborne and how the water moved through it. Following closing arguments, the matter sat in the hands of the Special Master for nearly a year and a half, until November 2020 when he issued a report to the Court. In his report, the Special Master recommended that the Court dismiss Mississippi's complaint based on four factual findings:

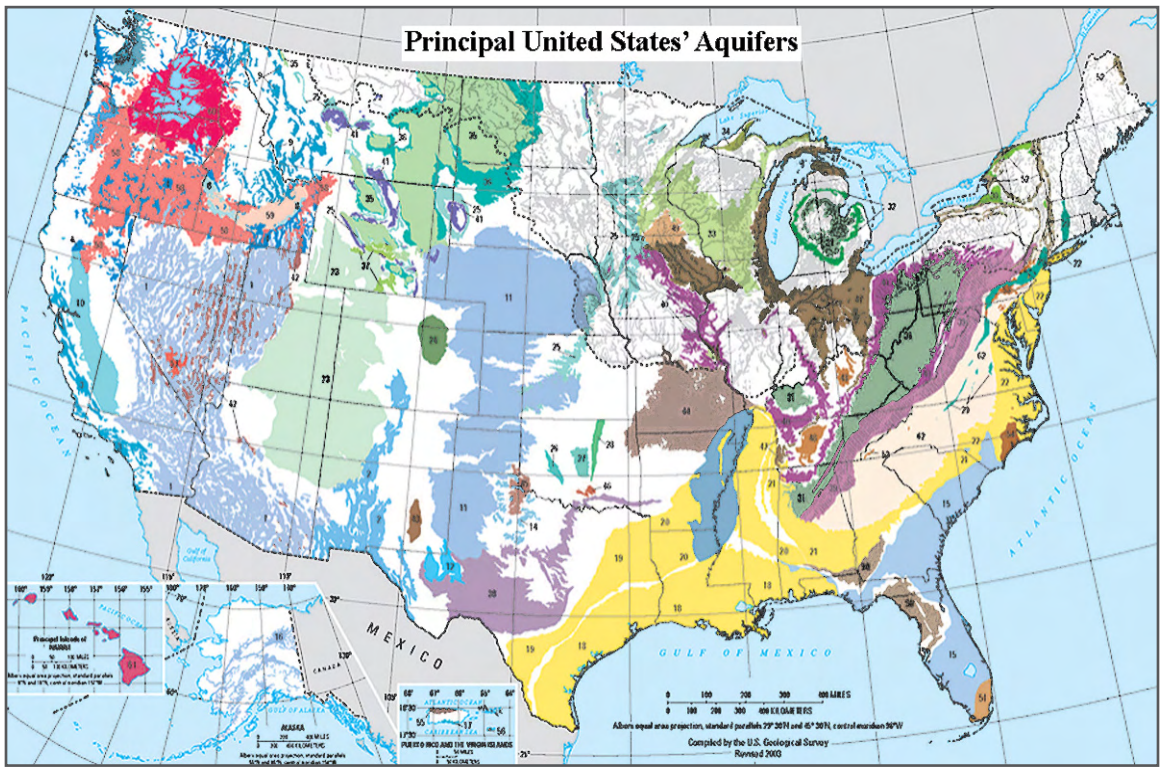
Factual Findings

- "First, the Middle Claiborne Aquifer and the groundwater inside it is a single hydrogeological unit underneath several states."
- "Second, Tennessee's water pumping affected the groundwater underneath [the] Mississippi, showing that the Aquifer in an interconnected resource."
- "Third, natural flow patterns indicate that the water inside the Aquifer would ultimately — even if slowly — flow across Mississippi's border."
- "Fourth, the water inside the Aquifer interacts with, and discharges into, interstate surface waters."

Report of Special Master at 11.

Appropriate Remedy = Equitable Apportionment

The upshot of the findings was that equitable apportionment is the appropriate remedy for interstate disputes involving natural resources. Interestingly, the Special Master also recommended that the Court grant Mississippi leave to file an amended complaint seeking an equitable apportionment. Mississippi and the Defendants all filed exceptions with the Supreme Court to the Special Master's report.



Interstate Groundwater

Ownership

Gatekeeping Analysis

Quick Decision

Transboundary Resource

Interstate Effects

Groundwater Ownership

Control

Equitable Apportionment

Physical Entry

Mississippi excepted to the recommendation that the suit be dismissed, arguing that equitable apportionment did not apply. In so doing, Mississippi argued that the Court's past apportionment cases relied on interstate resources that moved quickly across state borders — rivers, streams, and fish. Since groundwater did not move quickly, Mississippi argued equitable apportionment was not a useful tool to resolve disputes concerning groundwater. Mississippi also leaned heavily on its position that states, as a matter of their inherent authority, are the absolute owners of the groundwater that underlies their borders.

The Defendants took exception to the Special Master's recommendation that leave to amend for Mississipppi be granted. The Defendants argued that the Court's gatekeeping analysis, which is a preliminary evaluation to determine whether the complaint's allegations rise to the seriousness and dignity of the Court's jurisdiction, would be circumvented with a perfunctory amendment. The Defendants further noted that an equitable apportionment action is vastly different than a claim for conversion and could implicate multiple other states and parties, none of whom would have an opportunity to object to jurisdiction.

The exceptions of all parties were fully briefed and amicus support for the Defendants came from the States of Colorado, Nebraska, South Dakota, North Dakota, Idaho, and Oregon. The Defendants also received amicus support from a number of legal scholars as well as the United States.

Leading off the Supreme Court's October term, the case was argued on October 4, 2021. Following the argument, the Court wasted no time in issuing its decision just seven weeks later, on November 22, 2021. Chief Justice Roberts delivered the unanimous opinion, which first examined Mississippi's exception:

> First, we have applied equitable apportionment only when transboundary resources were at issue. See *Virginia v. Maryland*, 540 U.S. 56, 74, n. 9 (2003); *Colorado v. New Mexico*, 459 U.S., at 183. The Middle Claiborne Aquifer's ""multistate character" seems beyond dispute. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982). Mississippi concedes that the "geologic formation in which the groundwater is stored straddles two states." Complaint ¶41. Indeed, a core premise of Mississippi's suit is that Tennessee is pumping water that was once in Mississippi. The evidence shows that wells in Memphis and wells in northwest Mississippi are "pumping from the same aquifer."

Slip Opinion at 8 (some internal citations omitted).

The Chief Justice went on to note that groundwater pumping in Tennessee did have an impact within the borders of Mississippi and stated: "Such interstate effects are a hallmark of our equitable apportionment cases...For these reasons, we hold that the waters of the Middle Claiborne Aquifer are subject to the judicial remedy of equitable apportionment." *Slip Opinion* at 9.

The Chief Justice however, did not stop there. He then turned his attention to Mississippi's claim that it owned the groundwater:

> Mississippi contends that it has sovereign ownership of all groundwater beneath its surface, so equitable apportionment ought not apply. We see things differently. It is certainly true that "each State has full jurisdiction over lands within its borders, including the beds of streams and other waters." *Kansas v. Colorado*, 206 U.S. at 93. But such jurisdiction does not confer unfettered "ownership or control" of flowing interstate waters themselves. *Wyoming v. Colorado*, 259 U.S., at 464. Thus, we have "consistently denied" the proposition that a State may exercise exclusive ownership or control of interstate "waters flowing within her boundaries." *Hinderlider v. La Plata River & Cherry Creek Ditch Co*., 304 U.S. 92, 102 (1938). Although our past cases have generally concerned streams and rivers, we see no basis for a different result in the context of the Middle Claiborne Aquifer. When a water resource is shared between several States, each one "has an interest which should be respected by the other." *Wyoming v. Colorado*, 259 U.S. at 466. Mississippi's ownership approach would allow an upstream State to completely cut off flow to a downstream one, a result contrary to our equitable apportionment jurisprudence.

Slip Opinion at 9-10.

As authority to support its position, Mississippi had argued that the Court's prior ruling in *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614 (2013), supported its proposition that the state owned the groundwater. Justice Roberts responded:

> We disagree. *Tarrant* concerned the interpretation of an interstate compact...To the extent *Tarrant* stands for the broader proposition that one State may not physically enter another to take water in the absence of an express agreement, that principle is not implicated here. The parties have stipulated that all of Tennessee's wells are drilled straight down and do not cross the Mississippi-Tennessee border.

Slip Opinion at 10.

Interstate Groundwater

Leave to Amend

Finally, having disposed of Mississippi's exception, the Chief Justice turned to the Defendants' exception — i.e., whether Mississippi should be granted leave to amend its complaint to seek an equitable apportionment. Making short work of the exception, the Court deftly side-stepped the issue and noted: "As Mississippi has neither sought leave to amend nor tendered a proposed complaint seeking equitable apportionment, we have no occasion to determine how these and other pertinent principles might apply." *Slip Opinion* at 12. In other words, the Court simply concluded there was no issue to resolve since Mississippi was not proposing to amend. And with that, the case was dismissed.

Concluding Thoughts

Takeaways

For water managers and lawyers, there are at least three important takeaways from this case:

1) The doctrine of equitable apportionment can apply to interstate groundwater aquifers
2) State claims to absolute ownership of water are, at best, limited
3) The Court is moved by resource management concerns over isolated claims for compensation

Hydrologic Connection

With respect to equitable apportionment, while the Court made it clear that the doctrine can apply, that doesn't mean that it will be applied in all circumstances. In this case, the groundwater between the two combatant states has a clear hydrologic connection across the shared border — a connection that isn't always clear with interstate aquifers. Here, the actions in Tennessee did have measurable impacts to the water in Mississippi. That direct connection appears to have been the central fact that allowed the Court to recognize equitable apportionment as the appropriate remedy. The Court, however, noted that all of the other elements of an equitable apportionment would need to be present before relief could be granted — most notably *harm of a serious magnitude* that is traceable to the depletions caused by the offending state. From the evidence adduced at the May 2019 hearing, that element of harm may have been a difficult bar for Mississippi to clear. That bar is also likely to discourage other states from seeking an apportionment even though most states share interstate groundwater. Given the number of interstate aquifers in the United States, had the Court not so ruled, it is likely that a number of other cases would follow.

Harm Requirement

Ownership Claims

With regard to claims of ownership, the Court did acknowledge that States do hold substantial rights and powers to manage the water within their borders. But the Court also made it clear that ownership claims to interstate or shared waters are not favored. This conclusion is not necessarily new but many, if not most States, claim ownership over their water resources. When viewed from an interstate vantage point, states would be wise to consider the potential for cross-border claims in designing their management strategies.

Resource Management & Cooperation

In that same vein, the Court's decision seems a wise one for resource management. Mississippi placed its primary focus on claims for compensation rather than resource management. While a reasonable case can be made for monetizing water as a resource management tool, that case wasn't seriously argued by Mississippi. In the absence of a well-articulated basis for such a management strategy, monetization of the resource — without a compact or decree quantifying each states' entitlement — would seem to invite opportunism rather than stewardship. Moreover, doing so without quantification of each state's entitlement first, could cause significant disruption to established water uses and investment-backed development. From an economic, and resource sustainability perspective, it seems the Court correctly concluded that a quantification of each states' entitlement must come before any monetary claims for overuse can proceed.

For Additional Information:

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Slip Opinion available at: www.supremecourt.gov/opinions/21pdf/143orig_1qm1.pdf

Don Blankenau served as "consulting legal counsel" to Memphis/MLGW during the course of the litigation. Don is a founding member of the firm Blankenau Wilmoth Jarecke LLP in Lincoln, Nebraska. He has represented clients in a wide-range of water disputes including interstate cases involving the Platte River, Republican River, Missouri River and Apalachicola-Chattahoochee-Flint Rivers. He has also been involved in a variety of water disputes involving groundwater conflicts, served as administrative law judge in over 100 hearings concerning water use, and presently assists various individuals with conflicts concerning competing users. Prior to entering private practice, Mr. Blankenau served as legal counsel, assistant director, and interim director of the Nebraska Department of Water Resources. Before attending law school, Mr. Blankenau received a B.S. degree in Natural Resources Management. He received his J.D. from the University of Nebraska-Lincoln. In addition to all Nebraska state courts, he is admitted to the United States Supreme Court and multiple federal district and circuit courts.

ESA Changes

ENDANGERED SPECIES ACT CHANGES

WHAT'S ON THE HORIZON FOR 2022?

by Morgan Gerard and Charles Sensiba, Troutman Pepper (Washington, DC)
Andrea Wortzel Troutman Pepper (Richmond, VA)

Introduction

Biden Administration Changes

Significant changes to federal Endangered Species Act (ESA) regulations have been announced by the Biden Administration. These changes are expected to be proposed in 2022, and will likely take effect in 2023. In order to understand the significance of these changes, a review of the ESA regulatory actions taken during the Trump Administration is necessary.

Economic Impacts

The Endangered Species Act was enacted in 1973, 16 U.S.C. §§1531 *et. seq*. Prior to the issuance of the Trump Administration's regulatory revisions, the implementing regulations had not been comprehensively updated by the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) (collectively, the "Services") since 1986. In the 33 years that those regulations were in effect, there were growing concerns that the ESA consultation process had become lengthy and cumbersome. There were also concerns that the ESA requirements did not consider or balance the benefits of a project or the economic impacts associated with the requirements. The Trump Administration attempted to address that with its regulatory revisions.

2019 ESA Rules (Currently in Effect)

The regulatory revisions promulgated by the Trump administration addressed ESA Section 4 (relating to species listings and designation of critical habitat) and Section 7 (relating to consultation).

Section 4

The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. Under the ESA, species may be listed as either endangered or threatened.

Species Listings

"Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. Section 4 of the ESA requires species to be listed by the Services as endangered or threatened solely on the basis of their biological status and threats to their existence. In other words, the economic impacts of the listing are not considered. At the time a species is listed (or within 12 months), its critical habitat must be designated. In contrast to the species listing decision, the economic consequences of a critical habitat designation are considered as part of the listing process. Once listed and designated, both the species and its critical habitat are then protected.

Critical Habitat

Critical Habitat and Unoccupied Habitat

Unoccupied Habitat

When the Services propose a species for listing under the ESA, they are required to consider whether there are geographic areas that contain essential features or areas that are essential to conserving the species that should be protected as critical habitat. Critical habitat may be occupied or unoccupied. The question of when unoccupied habitat could be designated as critical habitat has been increasingly controversial. In 2016, the Obama Administration finalized a rule that allowed the Services to designate unoccupied habitat as critical habitat, without first determining whether the designation of occupied habitat alone would be inadequate to ensure conservation of the species.

Critical Habitat Designation

During this same time period, a challenge to the critical habitat designation for the dusky gopher frog was winding its way through the courts. In this case, over 1,500 acres of privately owned land that was unoccupied by the dusky gopher frog was included in the critical habitat designation. The condition of the property was such that it was inhospitable to the dusky gopher frog and action would need to be taken to improve the land to make it habitable by the frog. The case ultimately made its way up to the United States Supreme Court. *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018). The Court remanded the issue of the critical habitat designation of unoccupied habitat to the Fifth Circuit Court of Appeals, noting that while critical habitat was defined, habitat was not. *Id.* A determination as to whether the unoccupied land was habitat must be made before the question of whether it is critical habitat could be examined. *Id.* The case ultimately settled out of court.

Essential to Conservation

The Trump Administration's regulatory revisions were a direct response to the Obama-era regulation and the *Weyerhaeuser* decision. 84 Fed. Reg. 45,020 (Aug. 27, 2019). These regulations restored a previous method of evaluating critical habitat — a step-wise approach that would only designate unoccupied habitat as critical habitat if such a designation was essential to conservation of the species.

ESA Changes

"Reasonable Certainty"

"Threatened" Listing

"Foreseeable Future" Definition

Economics Controversy

"Take"

Blanket 4(d) Rule

Consultation Process

Biological Opinion

Incidental Take

Consultation Criticism

For an unoccupied habitat to be considered essential, there must also be a "reasonable certainty" that the area: (1) will contribute to the conservation of the species; and (2) contains one or more of the physical or biological features essential to the conservation of the species. The Services elaborate that this standard should preclude designations of unoccupied habitat based upon "mere potential or speculation." The Trump administration also established a definition of "habitat." Finally, the Trump administration codified the process for excluding certain areas from designation as critical habitat for economic, national security, or other reasons.

Foreseeable Future and Threatened Listings

For a species to be listed as "threatened," the Services must find that a species is likely to become endangered within the "foreseeable future." 16 U.S.C. § 3(20). The term "foreseeable future" is not defined in the ESA, and was not defined in the ESA regulations. Instead, the term was interpreted by the Courts. For example, the Ninth Circuit interpreted this term to include species' "likely" extinction approximately 100 years from the time of listing. *See*, *e.g.*, *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016).

The Trump regulation creates a definition of "foreseeable future" — specifying that it "extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." *See* 50 C.F.R. § 424.11(d). The Services further explain in the preamble that the term only extends to actual, not potential, threats and a species' response to those threats must be "more likely than not" to occur. Regarding climate change, the Services explicitly provide that foreseeable future determinations will be based on the best available science and that they will "consider the ranges of probabilities and uncertainties associated with the available [climate change] data, and... will not arbitrarily dismiss reliable aspects of various climate change predictions or projections (e.g., directionality) even if other aspects (e.g., rate of change) have greater levels of uncertainty." 84 Fed. Reg. 44753 (Aug. 27, 2019).

Economic Considerations in Listing

The ESA requires that listing decisions be made on five non-economic factors. 16 U.S.C. § 1533(a)(1). The Trump regulation provides that, while the Services will not base listing decisions on economic factors, the Services will compile economic information to better inform the public of the impact of a listing decision. This element of the Listings Rule is highly controversial given the prohibition in the statute on economic listing decision-making.

Protections for Threatened Species

The ESA protects species listed as endangered from "take." Take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Species determined by the Services to be "threatened" are not automatically protected from take. Instead, under the ESA, the Services must specifically extend the take prohibition to the threatened species by regulation. In 1975, the FWS issued a "Blanket 4(d) Rule," which automatically applied the take prohibition to all threatened species. The Trump regulations remove the "Blanket 4(d) Rule," instead requiring the scope of protections for threatened species to be developed on a case-by-case basis. In other words, the FWS would need to develop tailored rules under ESA Section 4(d) to outline what protections apply to a given threatened species.

Section 7

Section 7 of the ESA establishes the consultation process. Under Section 7, federal agencies must consult with the Services to ensure that effects of actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species. Thus, the consultation process is triggered any time a project requires a permit from a federal agency. Consultation involves the assessment of a given project's impacts on protected species and their habitat. Depending on the scope of the project and its impacts, consultation can be formal or informal. At the conclusion of formal consultation, the Services issue a "biological opinion" as to whether the project will jeopardize a protected species or adversely modify its critical habitat. A biological opinion can also include an Incidental Take Statement, authorizing a certain amount of incidental take (take that is not purposeful, but results from otherwise lawful activities such as project construction). If the Services conclude that jeopardy would occur, they can outline "reasonable and prudent alternatives" that modify the permit and avoid jeopardy. If the applicant does not follow those reasonable and prudent alternatives, the project cannot take place.

Over the years, the consultation process has received criticism for being unduly lengthy and cumbersome. There were uncertainties about the roles of the applicant, the "action agency," and the Services. Additionally, some felt that the consultation process was a vehicle for requiring compensatory mitigation and other measures that are not specifically provided for in the ESA.

ESA Changes

Streamlining Effort

Adverse Affect

Adverse Modification

"All Consequences"

Environmental Baseline Determination

Trump Rule "Baseline"

Pending Lawsuits

Review Order

The Trump Administration's regulatory revisions attempted to streamline the consultation process and provide additional clarity. The regulations codified the ability to use alternative consultation methods and adopt portions of other Federal agencies' documents to support the consultation process (rather than creating new review documents for each federal agency). 84 Fed. Reg. 44,976 (Aug. 27, 2019). Additionally, the changes support the ability to use programmatic consultations to reduce the number of project-by-project consultations and established set timelines for informal consultation. Some of the most significant changes are described below.

Consultation Process

Formal consultation with the Services is required when a federal agency, through a biological assessment or review, determines that an action is *likely to adversely affect* a listed species. On the other hand, an informal consultation is required with the Services by an agency when an action *may* affect a listed species. The Trump regulations revised the circumstances that trigger Section 7 formal consultations and clarified what information is needed to initiate formal consultation, including a detailed description of the action and any required biological assessment.

Definition of Destruction or Adverse Modification

Federal agencies are required to avoid "destruction" or "adverse modification" of designated critical habitat. The Interagency Cooperation Rule revised the definition of "destruction or adverse modification," and clarified that adverse modification is an alteration that appreciably diminishes the value of a critical habitat "as a whole." In adding this modifier, the Services clarified that "the final destruction or adverse modification determination is made at the scale of the entire critical habitat designation." Impacts to only portions of a critical habitat can still be considered adverse modification, but only if the impacted area is "particularly important in its ability to support the conservation of a species (e.g., a primary breeding site)."

Effects of an Action

During Section 7 consultation, the Services must not only consider the immediate effects of a proposed action on a species and critical habitat, but also certain related activities. The prior regulations differentiated between direct and indirect effects. The final rule replaces the "all effects" language with a new phrase: "all consequences." The Services state their intention as simplifying and streamlining the review process, rather than making a substantive change. Consequences caused by the action must meet a "two-part test": (1) the effect would not occur *but for* the proposed action; and (2) the effect is *reasonably certain* to occur.

Environmental Baseline

The effects of a proposed action are measured against the "environmental baseline." There has been a lot of debate about how the environmental baseline is determined for large existing infrastructure projects when the federal permits relating to such projects come up for renewal or reissuance. This issue is significant because calibrating the environmental baseline serves as the benchmark for the Services' review of the effects of the proposed action. A recent court decision held that the environmental baseline for evaluating the impacts of a 100-year old dam was the historical condition of a waterway before the dam's construction. *American Rivers v. FERC*, 895 F.3d 32 (D.C. Cir. 2018)

The Trump regulation addresses this issue by including a stand-alone definition of "environmental baseline." The definition clarifies that the environmental baseline is not to be considered when evaluating the effects of the action. The rule also makes it clear that the consequences of ongoing agency activities and existing facilities that are not within the Services' discretion to modify should be considered part of the baseline. Further, the final rule states that it is for a federal permitting agency with discretion over issuing a particular federal permit (particularly for ongoing operations or for constructed facilities that are seeking modifications or permit renewals) to appropriately scope the Section 7 consultation.

Challenges and Updates to the 2019 ESA Rules

Lawsuits filed by certain states and environmental groups are pending in the U.S. District Court for the Northern District of California. The complaints request the rules be vacated and allege violations of the ESA, National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA). *See, e.g.*, *Center for Biological Diversity v. Haaland*, No. 4:19-cv-05206 (N.D. Cal. Aug. 21, 2019); *California v. Haaland*, No. 4:19-cv-06013 (N.D. Cal. Sept. 25, 2019); and *Animal Legal Def. Fund v. Haaland*, No. 4:19-cv-06812 (N.D. Cal. Oct. 21, 2019).

In the meantime, when the Biden Administration took office, an Executive Order was issued requiring review of all regulations issued during the Trump Administration. The ESA regulatory revisions are among those under review. While the current Administration determines its path forward, the court actions are ongoing and proceeding to briefing and hearings on the merits.

ESA Changes

Biden Approach

The arguments raised by the states and environmental groups may provide some foreshadowing into how the Biden Administration will approach updating the 2019 ESA Rules. Predictably, the petitioners took issue with the more controversial aspects of the new rules, including: the elimination of the Blanket 4(d) Rule; inclusion of economic information in listing decisions; and the changes to key terminology in Section 7 consultations. States and environmental groups also claim that the Services did not meet the high administrative burden required of an agency when reversing a prior regulation.

ESA and the National Environmental Policy Act

NEPA Requirements

The National Environmental Policy Act (NEPA) requires projects with a federal nexus (i.e., those that receive federal permits or federal funding) to conduct a review of the project's environmental impacts, including species-related impacts. 42 U.S.C. § 4321 *et seq*. While NEPA requires a "hard look" at the environmental impacts of an action, it does not mandate any particular outcome. The Council on Environmental Quality (CEQ), housed within the White House, is responsible for issuing regulations to guide Federal agencies through the NEPA process. The federal agency issuing a license, permit, or approval conducts the NEPA process.

NEPA Complaints

As with the ESA regulations, CEQ's NEPA regulations had not been updated since the 1970s. The NEPA process had become lengthy and cumbersome, and there were complaints that the reviews were duplicative, requiring multiple different assessments to satisfy different regulatory programs. Additional confusion was caused by the fact that the NEPA and ESA regulations include many of the same terms, but they had been interpreted or applied differently. For example, NEPA and the ESA have some similar concepts and terminology, such as evaluating the impacts from a proposed project, comparing those effects to a baseline, and attempting to measure impacts into the foreseeable future.

Trump Revisions

The Trump Administration finalized revisions to the NEPA regulations in July 2020. The changes made to the NEPA recommendations are similar in many respects to the changes made to the ESA regulations. For example, the regulatory changes modify how agencies review the environmental impacts of the proposed actions. The definition of "effects" — which traditionally has included a review and discussion of "direct, indirect, and cumulative effects" — was significantly revised. These three categories were deleted and replaced by a statement that the effects must be "changes to the human environment" that are "reasonably foreseeable" (an ordinary person's standard) and have a reasonably close causal relationship to the proposed action or alternatives. The agencies are not required to consider effects that they have no authority to prevent, including resulting from projects outside the action agency's jurisdiction.

"Effects" Revisions

Climate Change

The NEPA regulatory revisions also sought to place some boundaries on the uncertainties to a project proposal that may be posed by climate change. For example, the revised NEPA regulations limit the analysis of greenhouse gas impacts to reasonably foreseeable effects with a reasonably close causal relationship to the proposed action or alternatives.

The regulations also include time frames and page limits for the NEPA review process.

Expected Changes from the Biden Administration

Current Review

Shortly after taking office, on January 25, 2021, President Biden issued Executive Order 13990 requiring federal agencies to review regulations issued by the Trump Administration. Accordingly, the Services re-evaluated the Trump Administration's revisions to the ESA regulations. As a result of that review, in July 2021, the Services announced that they "will initiate rulemaking in the coming months to revise, rescind, or reinstate five [ESA] regulations finalized by the prior administration."

Rulemaking

Two such proposals have already been issued. On October 27, 2021, the Services announced that they were rescinding the definition of habitat, as well as the regulations relating to critical habitat exclusions. 86 Fed. Reg. 59,353 (Oct. 27, 2021); 86 Fed. Reg. 59,346 (Oct. 27, 2021).

Future Rulemaking

A series of additional future rulemakings were also announced. The Biden Administration stated that it will propose to: (1) remove the provision regarding submission of economic information regarding the impact of listing a species; (2) reinstate the "Blanket 4(d) Rule;" and (3) revise the regulations relating to the Section 7 consultation process. This will include revisions to the definitions of "effects of the action."

The Biden Administration includes these regulatory updates in its Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions. Initial proposals are expected in the first half of 2022.

Conclusion

While the Biden Administration has announced its intention to revisit the ESA and NEPA regulations, it has also prioritized addressing climate change, and the development of renewable energy and other infrastructure necessary to do so. Thus, it is possible that the regulatory revisions will retain some of the streamlining procedures (i.e., the page and time limits for NEPA review documents; the informal

ESA Changes

Consistency

and alternative consultation options under ESA Section 7) developed in the Trump-era regulations. Additionally, the Biden Administration has the opportunity to bring more consistency to the federal review process, ensuring that the definitions and reviews required under these statutes do not conflict. For example, consistently defining terms like "foreseeable future" and "reasonably foreseeable," and clarifying how climate change should be addressed as part of these reviews would be beneficial changes. If the Biden Administration were to take a more balanced approach to its regulatory revisions that provides greater certainty and consistency, they are less likely to be reopened yet again when a new administration takes office.

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Tribal Compact

Compact & Funds Authorized

Negotiations History

Tribal Rights & Non-Tribal Rights

Montana's Compacts

Reserved Water Rights

The views expressed in this article are the authors' own and are not intended to represent or reflect the positions of the Office of the Solicitor or the Department of the Interior.

TRIBAL WATER RIGHTS COMPACT

CONFEDERATED SALISH AND KOOTENAI TRIBES' WATER RIGHTS COMPACT RATIFICATION

by Duane Mecham & Jennifer Frozena, US Department of the Interior (Portland, OR)

INTRODUCTION

The Montana Water Rights Protection Act (MWRPA or Act) became law on December 27, 2020. *Consolidated Appropriations Act of 2021*, Division DD, Pub. L. No. 116-260, 134 Stat. 1182. This Act authorizes, ratifies, and confirms the Confederated Salish and Kootenai Tribes' (CSKT or Tribes) water rights compact (Compact) and authorizes $1.9 billion of Federal funds for the implementation of the Compact and for other authorized uses. The Compact became effective on September 17, 2021, when Secretary of the Interior Deb Haaland executed it.

Traditionally when Indian water right agreements are executed, the parties hold a signing ceremony to commemorate the occasion. With COVID-related travel restrictions, Secretary Haaland was not able to join the leaders of the other signatories: CSKT and the State of Montana. Despite this lack of ceremony, the parties have significant cause to celebrate. The Secretary's signature was the culmination of over two decades of active discussions, negotiations, and reviews to resolve the Tribes' reserved water right claims filed in the Montana general stream adjudication.

In the August 2013 edition of *The Water Report* (*TWR* #114), Jay Weiner and Mark Stermitz authored an in-depth report on the negotiations through the 2013 Montana legislative session, a critical juncture in the history of the negotiations. Essentially picking up the discussion from that point, this article starts with background to provide context for the legal basis for the CSKT water right claims and the sources of longstanding water resource conflicts on the Flathead Indian Reservation (Reservation) going back more than a century. This is followed by a review of what has been accomplished through the final approval and execution of the Compact from two key perspectives: 1) how the Compact's terms establish secure water rights for CSKT; and 2) benefits and protections for non-Tribal water users on the Reservation, and how approval of the Compact will avoid protracted and divisive litigation of the Tribes' claims. The article then describes the extensive undertakings of the State, Tribal, and Federal parties beginning in 2013 to achieve final approvals by Montana in 2015, CSKT in 2020, and the United States in 2021. A final section summarizes the three governments' current efforts to secure a judicial decree of the CSKT water rights and move forward on Compact implementation.

BACKGROUND

The legal basis for quantifying the Tribes' water rights, Montana's unique approach to negotiate compacts to achieve "equitable division and apportionment of state waters" and the unique history of the Flathead Reservation are summarized in Weiner's and Stermitz's excellent 2013 article. However, to frame the discussion that follows and the pivots that were made after a fully negotiated Compact failed to be ratified by the 2013 Montana state legislature, it is important to provide the following legal and historical background.

Winters Doctrine

The *Winters* reserved water rights doctrine provides the primary legal basis for asserting, and negotiating a settlement of, a tribe's federal reserved water rights. Under *Winters v. United States*, 207 U.S. 564 (1908), when the United States establishes an Indian reservation, it implicitly reserves an amount of unappropriated water sufficient to accomplish the purposes of the reservation. *See also Cappaert v. United States,* 426 U.S. 128, 138 (1976); *Arizona v. California,* 373 U.S. 546 (1963) (*Arizona I*). Water rights under the *Winters* Doctrine are defined primarily by federal common law. *See, e.g., Colville Confederated Tribes v. Walton (Walton III),* 752 F.2d 397, 400 (9th Cir. 1985). Contrary to water rights based in state law, *Winters* rights are determined by what is needed to accomplish the reservation's purposes and address both present and future needs. *Winters* rights do not entail an initial water appropriation or even current "beneficial use" of water, as is usual under the Prior Appriation Doctrine commonly relied upon throughout the American West. *Arizona I,* 373 U.S. at 598, 600-01, 605 (1963); *Colville Confederated Tribes v. Walton (Walton II),* 647 F.2d 42, 47 (9th Cir. 1981). Tribal purposes that significantly pre-date the establishment of the reservation have a priority date of "time immemorial," and uses developed under a treaty (i.e., farming, industry) have a priority date of the date of the treaty. *See United States v. Winans*, 198 U.S. 371 (1905); *Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754 (Mont. 1985); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

Tribal Compact

Stevens Treaties

On- & Off-Reservation Right

Tribal Lands Allotment

"Surplus" Lands

Irrigation Project

"Surplus" Lands

Tribal Instream Flows & Irrigation

Irrigation Project Control

Disagreements & Withdrawal

The Hellgate Treaty, Flathead Allotment Act, and Development of Irrigation on the Reservation

The aboriginal CSKT homeland spans present-day western Montana, northern Idaho, and north into Canada. In 1855, the Governor for the Washington Territory, Isaac Stevens, concluded a treaty between the US and the Bitterroot Salish, Pend d'Oreille, and Kootenai Tribes. By the terms of this "Hellgate Treaty" the Tribes ceded to the United States more than 90% of their aboriginal territory and reserved to themselves the Flathead Indian Reservation (Reservation) in northwestern Montana. The Hellgate Treaty is one of a series of similar Indian treaties entered into between the US and certain tribes in the Pacific Northwest. A common attribute of these "Stevens treaties" is the express reservation of tribal aboriginal hunting, fishing, and gathering rights on and off reservations. In the Hellgate Treaty, the Tribes reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Reservation. They also expressly reserved the right to fish at usual and accustomed fishing sites off the reservation "in common" with non-Indian settlers. In addition, the Treaty recognized the Tribes' right to an agrarian lifestyle based on extensive, economically viable agricultural lands within the Reservation.

From 1855 to 1904, the Tribes enjoyed the exclusive use of the Reservation. Over the objections of the Tribes, however, the Flathead Allotment Act of 1904 (Act of April 21, 1904, 33 Stat. 302) directed the allotment of Tribal land to individual Indians and authorized the disposal of additional "surplus" lands for non-Indian homestead entry. The 1904 Act also authorized irrigation facilities on the Reservation, and a 1908 amendment (Act of May 29, 1908, 35 Stat. 444, 450) authorized the construction of a greatly expanded irrigation system to serve both Indian and non-Indian irrigable lands on the Reservation. This irrigation system became known as the Flathead Indian Irrigation Project (FIIP). Over the next few decades, FIIP was constructed to irrigate approximately 130,000 acres of Reservation land. By the 1930s, most of the lands allotted to individual Tribal members within the Project were no longer in Indian ownership. Currently, nearly 90% of the lands irrigated by FIIP are owned by non-Indians. The federal Bureau of Indian Affairs (BIA) owns and operates FIIP. Much of the irrigation water supply for FIIP is diverted directly from several streams that also support the Tribes' treaty-reserved fisheries.

FIIP Management, Irrigation Districts, and the Flathead Joint Board of Control

In authorizing the construction and expansion of FIIP, Congress required the owners of the "surplus" lands served by FIIP to repay the funds appropriated for construction. Separately, Congress also required that all landowners served by FIIP pay annual operation and maintenance assessments for irrigation water delivery. From the beginning, landowners served by FIIP were unable to meet these repayment obligations. In 1926, Congress took an initial step to address this problem by making further appropriation of construction funds for FIIP contingent on the non-Indian irrigators organizing into irrigation districts that would execute repayment contracts with the US. The Mission, Jocko Valley, and Flathead Irrigation Districts were formed under state law soon thereafter.

In 1981, the Flathead Joint Board of Control (FJBC or Board) was formed under state law by a vote of these three irrigation districts served by FIIP, to jointly represent their interests. For decades, FJBC and the Tribes clashed over water use on the Reservation, with the Tribes seeking to secure instream flows for fish and FJBC looking to secure sufficient water to serve FIIP irrigators. These disputes are detailed below in the discussion of risks if claims are not settled and in the 2013 Weiner/Stermitz article. Disputes have ebbed and flowed over the years, but because conflicts and FJBC opposition were particularly prevalent during the recent reviews and approvals of the Compact detailed below, it is important to understand the recent roles and activities of the FJBC.

In the late-2000s, the Tribes and the FJBC actually came together to form a Cooperative Management Entity (CME) and entered into an agreement with the US to transfer operation and management of FIIP from BIA to the CME. The CME assumed operation of FIIP in 2010 and managed it from 2010 through early 2013. During this time, FJBC played a key role in the water rights negotiations, working closely with the Tribes to negotiate terms related to FIIP water use and ultimately agreeing to a "Flathead Water Use Agreement" that attempted to balance the Tribes' instream flow rights and the irrigators' need for irrigation water.

In elections in early 2013, several of the FJBC board members supportive of the CME and Compact were voted off the Board. Soon after, disagreements regarding the CME's operation and management of FIIP arose among the three irrigation districts. In December 2013, two of the three districts comprising the FJBC, the Mission and Jocko Valley districts, voted to withdraw from the FJBC and the FJBC was effectively dissolved. These circumstances led BIA, in March 2014, to reassume operation and management of FIIP — a result that further exacerbated relations among BIA, CSKT, and some of the districts.

Tribal Compact

In May 2014, district commissioners discussed reformation of the FJBC and approved a "reformation contract." FJBC resumed its role as a joint board but was soon sued by certain irrigators for failing to follow state law requirements for reformation. The state court ultimately found that the FJBC's reformation violated state law and hence the FJBC was not a valid governmental entity. The court found that the FJBC was dissolved, and the Board remains dissolved to this day.

2015 COMPACT: WHAT WAS ACCOMPLISHED

Terms of the Compact

2013 Compact

As detailed extensively below, the parties worked together to revise the 2013 Compact. Subsequently, the Montana Reserved Water Rights Compact Commission (RWRCC) presented a revised agreement to the Montana legislature in January 2015. Approved by the Montana legislature in 2015, the "2015 Compact" in many ways parallels the version Montana had declined to approve in 2013.

The 2013 package included three primary documents:

1) the Compact, which formally quantifies the Tribes' water rights, both on and off the Reservation
2) the Unitary Administration and Management Ordinance (UMO), a body of laws enacted by the state and the Tribes to provide for joint administration of surface water and groundwater within the exterior boundaries of the Reservation
3) the FIIP Water Use Agreement (FWUA), a separate agreement entered into by the Tribes, the United States, and the FJBC that attempted to balance the Tribes' instream flow rights and irrigators' need for irrigation water

Available Water Division

The FWUA divided available water into:

1) minimum enforceable flows — baseline instream flow levels that are to be satisfied first in priority
2) farm turnout allowances — quantities of water that each FIIP irrigator could be assured of receiving
3) target instream flows — increased instream flows that would come available after FIIP improvements, which the Tribes would be entitled to protect

Reopened Negotiations

As referenced throughout this article, discord within the three districts comprising the FJBC ultimately led to its dissolution and to the BIA reassuming operations and management of FIIP. After the 2013 Compact failed, Governor Bullock cited these events as a basis for reopening negotiations, noting that dissolution and reassumption "leaves the Compact without the protections for FIIP irrigators that were previously negotiated as the 'Water Use Agreement.'" The Tribes, too, authorized the reopening of negotiations "for the single purpose of revising the Water Use Agreement and incorporating it into the Compact." Accordingly, when parties returned to the negotiating table in 2014, their focus was to incorporate provisions balancing instream flow rights and irrigation water rights into the body of the Compact itself. The result was an agreement that retained many of the previously negotiated components but incorporated key water balance provisions into the Compact and its appendices. The discussion below describes how the FJBC and others strongly objected to these revised Compact terms, asserting that they were not protective of FIIP irrigation supplies and illegally transferred ownership of the rights away from irrigators.

2015 Compact Format

The 2015 Compact, like the 2013 version, follows the format of other Tribal water rights settlements in Montana. Article I sets out: several explanatory recitals on the background of the Tribes and the creation of the Reservation; Tribal water right claims; and the resolution of those claims. Key recitals state the parties' intent "to secure to all residents of the Reservation the quiet enjoyment of the use of waters of the Reservation for beneficial use" and "to protect Tribal Instream Flows, Existing Uses, and Historic Farm Deliveries to Flathead Indian Irrigation Project irrigators." Article II contains the definitions of the terms in the Compact that the parties deemed were necessary for clarity and implementation of the Compact.

Tribal Rights Quantified

Article III formally quantifies the Tribes' water rights, both on and off the Flathead Reservation. The Compact defines these water rights, collectively, as the "Tribal Water Right." On-reservation, the Tribal Water Right includes instream flows; water supplied to the Flathead Indian Irrigation Project (FIIP); minimum pool elevations in FIIP reservoirs; water for wetlands, high mountain lakes, and Flathead Lake; water to operate two tribally owned hydroelectric projects; water to meet allottees' rights; and water for religious and cultural uses. Additionally, Article III recognizes the Tribes' right to 229,000 acre-feet of direct flow from Flathead Lake or the Flathead River, for any beneficial use on or off the Reservation.

Direct Flow & Storage

To help meet that right, the Tribes are entitled to 90,000 acre-feet of storage water from the Bureau of Reclamation's Hungry Horse Reservoir. The priority date for the instream flows, wetlands, and high mountain lakes rights is time immemorial; the rest have a priority date of July 16, 1855 (the date of the Treaty). (The MWRPA subsequently established the priority date for the storage water in Hungry Horse to be the priority date of Reclamation's state-based water right. The effect of this change is discussed below.)

Tribal Compact

Instream Rights

Key Parameters of Rights

Balancing Commitments (Protections)

Implementation Process

Monetary Contributions

Administration Ordinance

Adjudication Deadline (Claims)

Article III recognizes two categories of CSKT instream flow rights off the Reservation. Some of the rights are held as Indian reserved water rights with a priority date of time immemorial. In addition, Article III provides that CSKT will jointly hold with Montana Department of Fish, Wildlife and Parks a number of instream flow rights established under state law. As part of the settlement, the Tribes relinquished the remainder of their instream flow claims in western Montana and east of the continental divide. As further compromise, discussed below, the Tribes through the Act agreed to relinquish additional off-Reservation claims.

Additionally, Article III addresses key parameters of the water rights for the Tribes that the Compact recognized, such as period of use, points and means of diversions. The Tribes commit to protect all non-irrigation water use and groundwater use less than or equal to 100 gallons per minute. Article III also extends call protections afforded to non-Tribal water rights — i.e., the Tribes commit to protect FIIP irrigators by agreeing they won't make a "call" against the quantity of water established in the annual FIIP quota or an equivalent farm delivery amount within an applicable "River Diversion Area" (RDA). [Editors' note: under the Prior Appropriation Doctrine, a "call" can be made by senior water right holders to curtail water delivery to junior water rights to the extent necessary to fully satisfy the senoir rights.]

Most of the water balancing commitments that were previously in the "Water Use Agreement" were integrated into Article IV of the Compact, which addresses Compact implementation. Article IV recognizes that the Tribal Water Right will be held in trust by the US for the benefit of the Tribes, their members, and allottees, and cannot be lost through non-use. It also establishes protections for Tribal on-Reservation instream flows, minimum reservoir pool levels, and irrigation water supplies for FIIP. To the latter, Article IV commits to meeting RDAs for each RDA area, and an appendix defines the amount of water that will be delivered to each RDA in wet, normal, and dry natural flow years. Important for maintaining protections for FIIP irrigation deliveries, Article IV provides that RDAs will be evaluated to ensure they are adequate to meet "Historic Farm Deliveries" and contains provisions for shared shortages in dry years, between FIIP and instream flows. Article IV also provides that FIIP irrigators are entitled to a "Delivery Entitlement Statement" which runs with the land and is valid so long as the land remains assessed and the irrigator is in compliance with all applicable BIA rules and guidelines.

Article IV commits to adaptive management, water management, and establishes a Compact Implementation Technical Team to (among other things) plan and implement improvements to FIIP that increase instream flows. Article IV also:

- Establishes the process for registering existing tribal uses of water
- Sets out procedures for making changes in use and establishing new uses of the Tribal Water Right
- Contains procedures and conditions for leasing portions of the Tribal Water Right
- Continues to provide FIIP a low-cost block of power from Selis Ksanka Qlispe Dam and net power revenues from BIA's power distribution system, Mission Valley Power
- Establishes a five-member Water Management Board to serve as the regulatory body responsible for administering all water rights on the Reservation under the UMO. Two members are selected by the Tribe, two members by Montana's governor, and the fifth member is selected by the other four. One change from the 2013 compact is a provision allowing local county governments to nominate individuals for the Governor's consideration for appointment to the Board. (As detailed below under the discussion of Compact reviews and approvals, the establishment of joint Tribal-State water right administration under the UMO and Water Management Board often referenced for substantial opposition to the Compact.)

Article V sets out general and specific disclaimers and reservations of rights and addresses the requirement for Congressional ratification of the Compact. Article VI addresses monetary contributions to the settlement, and Article VII establishes the process by which the Compact would be ratified, become effective, and be incorporated into a final water rights decree in the Montana Water Court.

Appendix 4 contains the Unitary Administration and Management Ordinance, or UMO, which prescribes the processes to register existing uses of water, change water rights, and provide for new water development. The UMO is essentially the same as the version appended to the 2013 Compact.

Avoidance of the Litigation Scenario - General Stream Adjudication

As the above Compact terms were negotiated and preliminarily agreed upon by Tribal, state, and Federal negotiators, parties were cognizant of the June 2015 statutory deadline in the Montana general stream adjudication requiring the US and Tribes to file their unsettled water rights claims. As detailed below, this deadline was not extended. Consequently, in June 2015 the US as trustee for the Tribes and their members filed in the Montana Water Court over 7,300 claims for aboriginal and reserved water rights. The scope of the claims was substantial, covering the entire 1.3-million-acre Reservation and large parts

Tribal Compact

Claims

Tribes' Water Rights (Reserved)

Legal Foundation

Tribes' Priority

Potential Liability

Settlements

Delays & Impasses

of Montana off-Reservation. On-Reservation, the claims included nearly every type of fish and wildlife habitat as well as environmental, domestic, industrial, agricultural, commercial, and energy-related uses — historical, present, and future. Off-Reservation, the US claimed instream flows in streams and rivers in western and central Montana where Tribal members fished at the time of the Treaty.

Absent a negotiated compact, the US would have pursued these reserved and aboriginal water rights claims and sought a decree confirming them. The United States' positions in the Montana Water Court would be supported by significant legal precedent from both federal and state court decisions confirming the nature and extent of the Tribes' water rights. Early Ninth Circuit cases established that the Hellgate Treaty reserved all waters on the Reservation to the Tribes unless Congress dictated otherwise. *See United States v. Alexander*, 131 F.2d 359, 360 (9th Cir. 1942), *United States v. McIntire*, 101 F.2d 650, 653 (9th Cir. 1939). The Ninth Circuit's 1987 decision in *Joint Board of Control v. United States* established that the Hellgate Treaty preserved the Tribes' right to fish, and implied a right to water for the fishery. The court clarified that "neither the BIA nor the Tribes are subject to a duty of fair and equal distribution of reserved fishery waters. Only after fishery waters are protected does the BIA…have a duty to distribute fairly and equitably the *remaining* waters among irrigators of equal priority." *Joint Board of Control v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (emphasis in original). The Montana Supreme Court has also weighed in on the Tribes' entitlement to water. In *State of Montana ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764 (1985), the court found that aboriginal uses have a time immemorial priority date and new uses contemplated in the Treaty have a date of reservation priority.

These cases established a strong legal foundation to conclude that the Tribes are entitled to instream flow rights sufficient to support fishery resources and the Tribes' treaty-reserved fishing rights, and that reserved instream flow rights have a priority date of time immemorial. As such, they are senior to the irrigation water rights for FIIP.

If, in the absence of settlement, the US had to pursue its water rights claims in court, it likely would have secured substantial instream flows for the Tribes' fisheries. Under that scenario, FIIP would be required to leave a significant amount of water in stream and reduce or even eliminate diversions for irrigation. Further, Federal reviews examining the Compact (as reported in 2020 testimony to Congress discussed below) determined that FIIP would have likely been rendered nonviable under the litigation scenario. With no or greatly reduced water supplies, non-Tribal farmers on the Reservation would have been left with few options, such as converting from irrigated agriculture to lower-valued dryland agriculture, resulting in a reduction of net returns to farming of hundreds amounting to millions of dollars.

Moreover, if FIIP were rendered nonviable, the United States would have been faced with walking away from an extensive irrigation network that could fall into disrepair and cause damages to life and property if not decommissioned. Decommissioning FIIP's infrastructure would have required the removal and restoration of 1,300 miles of canals and laterals, 10,000 structures (including 17 dams and storage reservoirs), and three major pumping facilities and could have cost the United States in excess of a billion dollars. Faced with this possibility, the United States determined that settlement would be the better course. An expanded discussion of these potential impacts can be found in the June 24, 2020 testimony that Dr. Timothy Petty, then-Assistant Secretary of the Interior for Water and Science, provided to the Senate Indian Affairs Committee.

The non-indian benefits of the Compact are not limited to on-Reservation farming. The Tribes and the US also filed substantial claims off-Reservation, and — if successfully litigated — these claims could have resulted in reduced water deliveries to irrigators in those areas, significantly diminishing off-Reservation irrigator net income.

2013-2021 – CSKT COMPACT REVIEWS AND APPROVALS

Indian water settlements, regardless of the size or number of claims, take years or even decades to be negotiated and approved by the necessary parties. This is not surprising when one takes into account the time needed to: build common technical understandings; identify and evaluate options for tribal water supplies; align myriad interests and stakeholders; and obtain approvals by principals (usually at the legislative level) to become effective. Extended delays and impasses in these negotiations also are common. The Nez Perce Tribal water right negotiations in Idaho, for example, had a hiatus of nearly four years before renewed negotiations achieved an agreement. *See*, Klee, Ann R. and Mecham, Duane, *The Nez Perce Indian Water Right Settlement – Federal Perspective*, 42 Idaho Law Rev. 595 (2006).

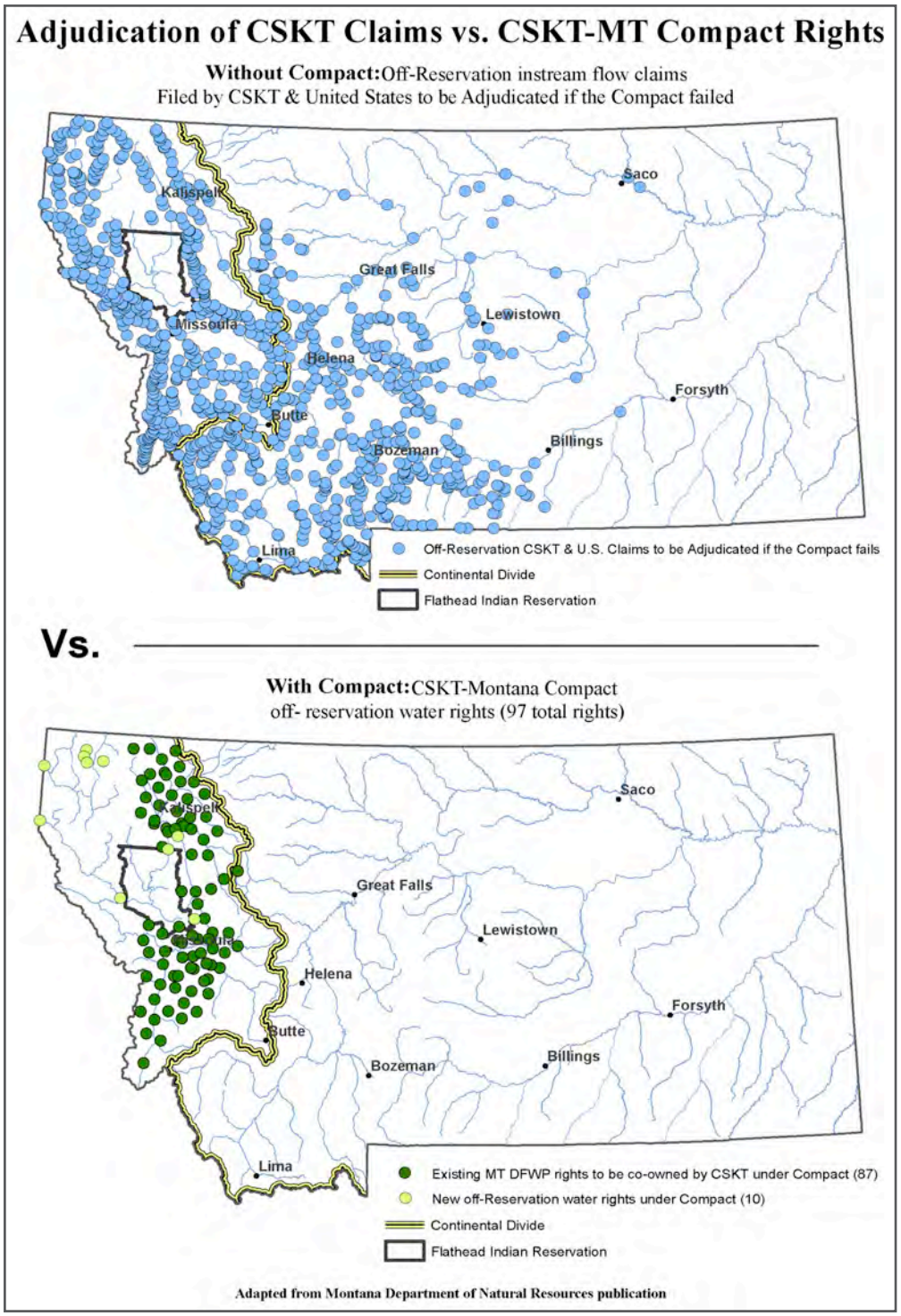
With roots stretching back to at least the 1980s, negotiations addressing CSKT water right claims were no exception. As described in *TWR's* 2013 Wiener/Stermitz article, efforts reached a critical juncture when the fully negotiated 2013 CSKT Compact did not gain traction in the 2013 Montana legislative session. The authors noted at that time their "hope that a path forward can be found to allow a successful negotiated settlement to be achieved. Whether and how that outcome can be brought about, however, is presently very unclear."

Tribal Compact

Litigation Option

Gamut of Concerns

Ultimately, CSKT, Montana and the US did secure a final settlement — otherwise this would be a very different article. Reviewing what was necessary to move from an uncertain future in 2013 to a realized final Compact in 2021 is instructive on several levels. Overall, the concerted efforts described below underscore what was at stake in Flathead country. All three governments understood, as detailed above, that litigating the CSKT reserved water rights would be a protracted and massive undertaking involving scores of parties and, based on case law, winners and losers including irrigated agriculture on the Reservation. In addition, while hopefully other tribal water negotiations don't encounter similar obstacles, this review helps to illustrate the degree to which parties supporting a settlement need to be prepared to directly address the full gamut of concerns and objections raised by other interests in the basin, whether those concerns be technical, legal, or political. Related, efforts described below show how a tribe can, over time, work effectively with state leaders and local supporters to better understand the need for an agreement and support its terms.



Tribal Compact
Existing Rights Protection

2013-2015 – The Pathway to Compact Approval by Montana

Challenges

In the compact brought forward in 2013, the negotiating parties sought to comprehensively resolve the expansive array of CSKT water right claims. They also sought to adhere to the original negotiating principle brought forward by CSKT in 2007 — i.e., that any agreement reached would protect all valid existing water uses on the Reservation, both Tribal and non-Tribal.

Working toward these ends meant resolving several complex and novel issues that were not present in the other Indian water right compacts approved in Montana. As noted above, achieving an acceptable agreement entailed: reconciling the directly competing claims for flows and agriculture; resolving for the first time in the State extensive off-reservation flow claims; and agreeing on how to administer complex and commingled Tribal and non-Tribal water rights on the Reservation. Further, time was not a friend to the parties' negotiators — grappling with these issues and agreeing on solutions required negotiating throughout 2012, with a deadline to introduce state legislation in early 2013.

2013-015 Efforts

Presented with complex issues, novel but politically controversial solutions, and little time to sort through the strongly held arguments for and against the 2013 Compact, it is not surprising the 2013 legislature took no action to approve or even consider the Compact. By mid-2013, however, it had become apparent that a lack of action in 2013 did not equate to a rejection of the negotiation pathway. In fact, as detailed below, steps taken over the next two years by the parties, the legislature, and others led to a much different result in 2015, when a revised Compact was recommended to and approved by the 2015 legislature. These actions included continued support by the Governor's office and significant technical and legal evaluations undertaken by the state legislature. In addition, the Compact parties participated in several forums developed during this time to vet concerns and arguments of parties opposing a negotiated solution.

Import of June 2015 Claims Filing Deadline

Claims Filing Deadline

Informing all of the actions discussed below was the looming June 30, 2015 deadline in the Montana general stream adjudication to file all federal and tribal water right claims that had not been fully settled. Certainly, an orderly schedule for parties to file and defend their asserted water right claims is a central function of an adjudication. But many states, recognizing that time and resources often are not available to litigate and negotiate claims at the same time, provide for stays of claim filings or other deadlines to enable negotiations. In fact, a hallmark of the Montana adjudication was the Montana legislature's approval of suspensions of the filing deadline which proved instrumental in the State's success in reaching negotiated agreements for all tribal and federal reserved claims.

Extension Veto

In 2009, shortly after CSKT compact negotiations became active, the legislature extended the filing deadline to June 30, 2015. By 2013, however, different dynamics were emerging. On the one hand, the 2013 legislature authorized another suspension, which would have pushed the claims deadline back to June 2017, primarily to provide more time for CSKT Compact negotiations. Then-Governor Steve Bullock, not agreeing with this approach, vetoed the extension. In his veto statement, he explained that the 2013 Compact was "a reasonable settlement" and it was not likely CSKT would agree to a wholesale reopening of negotiations (Letter from Governor Bullock to Linda McCulloch, Secretary of State, 5/3/13). CSKT had provided similar messages during the 2013 session. Regardless of motivation, with the Governor's veto of an extension, the looming June 2015 claims filing deadline increased the pressure to either reach a negotiated solution or set a course for protracted and contentious litigation.

Actions Taken by Key Players

New Negotiations

Proponents and opponents of the CSKT compact were active on several fronts in the 2013-2015 era. This activity led to a new round of negotiations in mid-2014 and a revised CSKT Compact by January 2015.

• *Governor and RWRCC*

Governor Bullock and the RWRCC continued to strongly support a negotiated agreement. They made senior staff available to anyone interested in learning more about the Compact and the need to reach a settlement. State officials also were proactive in addressing concerns raised about Compact terms. For instance, In a January 21, 2015 letter to the Flathead County Commissioners the Governor directly addressed the County's concerns at length and noted: "The negotiations have resulted in a fair compromise which protects the interests of the parties and stakeholders. I would not support an agreement that did otherwise." The Governor's role in reinitiating negotiations in 2014 is discussed below.

• *Montana Legislature*

Bi-Partisan Committee

Anticipating that a CSKT compact could be reintroduced in the 2015 session, the 2013 legislature took important steps to increase their understanding of the CSKT water right claims and proposed settlement terms. The Water Policy Interim Committee (WPIC), a standing bi-partisan legislative committee comprised of House and Senate members, undertook an extensive review of the issues surrounding the Compact. Holding several sessions throughout 2013 and 2014, the WPIC developed a strong record of

Tribal Compact

objective information for the 2015 legislature concerning the CSKT water rights and the propriety of the proposed settlement terms. The WPIC also provided several opportunities for public comment and input, allowing a full airing of views from those supporting and opposing a negotiated solution. CSKT, groups in opposition, and others also provided extensive technical and policy input to WPIC.

Technical Support

A primary focus of the WPIC was to evaluate whether there was sufficient technical support to conclude that existing irrigation water uses on the Reservation would be protected under the Compact, as claimed by Compact proponents. In the negotiations, CSKT compiled a substantial technical record to support this conclusion, based on studies, modeling, and 30 years of flow measurements on the Reservation; this record in turn was independently reviewed and accepted by the Compact Commission and the Federal negotiation team. Intent on having its own independent review, the WPIC established a working group comprised of technical and water resource experts from several state agencies. In a September 23, 2014 report, the technical working group submitting the report stated that the modeling completed by CSKT to "build a quantitative foundation for the CSKT water rights settlement is reasonable."

Legal Issues

The legislature also requested that its Legal Services Office review fundamental legal issues arising from the proposed joint Tribal-State administration of water rights on the Reservation under the UMO. Based on hearings and testimony in 2013, it was clear that future water rights administration on the Reservation was one of the most contentious issues. While (as noted in the 2013 Wiener/Stermitz article), there were strong rationales for implementing joint administration on the Reservation where Tribal and non-Tribal water uses and jurisdictions intersect, opponents to the 2013 Compact argued that any joint Tribal-State administration was illegal under the Montana Constitution and provided too much authority to the Tribes.

Future Administration

In a memorandum to the WPIC dated August 22, 2014, Montana's Legal Services Office extensively reviewed these concerns, finding:

State - Tribal Board

> A court is unlikely to conclude that the State of Montana, through passage of the proposed Unitary Administration and Management Ordinance ("UMO"), is unlawfully delegating water administration responsibilities to the CSKT. The UMO establishes a joint state-Tribal board to administer and manage water rights on the Flathead Indian Reservation. The Montana Constitution requires the Legislature to "provide for the administration, control, and regulation of water rights" in Montana, but does not expressly limit the state's authority to develop other mechanisms for water right administration. The Legislature retains all the lawmaking powers of a sovereign entity and is limited only by the U.S. and Montana constitutions. Nothing in law appears to prohibit the formation of a dual state-Tribal board to administer or manage water rights on an Indian reservation; the decision to establish a unitary management system is a policy question for the Legislature.

Subsequently, in a January 15, 2015 legal memorandum, the Chief Legal Counsel for Governor Bullock also concluded that the UMO did not violate the Montana Constitution.

• *Federal Negotiators*

Federal Position

Federal officials also weighed in on the prospect of renewing negotiations. In a February 14, 2013 letter to CSKT and the Compact Commission, the chair of the federal negotiation team highlighted that "[f]rom the federal perspective, a failure or significant extension of the negotiations would leave unresolved several critical water resource needs and conflicts on the Reservation that, with or without settlement, will have to be addressed in the near future." Based on discussions with Federal policy makers, the chair explained:

> Specifically, failure or delay of the negotiations should not be equated with a long-term extension of the status quo for irrigation water deliveries on the Reservation. Should negotiations lapse, I anticipate that the federal government will need to address in tandem at least two critical issues in the near-term with the Tribes and others: 1) the adequacy of the current interim instream flows, and 2) the need to implement efficiencies and other measures within the federal Flathead Indian Irrigation Project (FIIP) to conserve water and improve operations.

• *Confederated Salish & Kootenai Tribes*

Tribal Compromise

In a number of public meetings held in 2012 and 2013, CSKT leaders emphasized that the 2013 Compact represented a substantial compromise on their part, and explained they were not interested in additional negotiations based on, from their perspective, requiring even more compromise. Nonetheless, CSKT representatives remained engaged with other parties and local and state interests. A Tribal attorney told the WPIC that the Tribes were hopeful a new round of negotiations could proceed, and the CSKT Tribal Council worked with the Governor's Office and the RWRCC to provide public information on the need for a Compact.

Tribal Compact

Opponents' Concerns

Governor's & CSKT Leadership

Protection Principles

Water Use Agreement

• *Opponents to the Compact*

By 2012, with Compact terms firming up, pockets of opposition to a negotiated agreement emerged within the non-Indian community on and near the Reservation. This opposition manifested itself in a number of ways. Within the FJBC, whose representatives in 2012 helped negotiate the proposed FWUA, many non-Indian landowners served by FIIP were either concerned or believed that the agreement did not adequately protect their asserted entitlement to FIIP irrigation water. By 2013, a majority of the FJBC was opposed to the Compact. Some residents living on the Reservation argued that the 2013 Proposed Compact and the Unitary Management Ordinance gave the Tribes too much control over water resources. Some local governments, including the boards of two counties which overlap with the Reservation, raised similar concerns and highlighted their opposition to any Compact terms that confirmed instream flow rights off the Reservation. Opponents made their points in public meetings, were active in front of the 2013 legislature, and increasingly mobilized to oppose any compact submitted to the 2015 legislature.

The concerns and objections raised by opponents to the Compact played a central role in all the governmental reviews and approvals of the Compact described below. The discussion that follows details the objectors' primary themes and how those themes were addressed at the State and Federal levels.

Recommencement of Negotiations

In spite of the extensive review activity in 2013, it was not clear going into 2014 that negotiations would recommence to address issues and concerns arising from the 2013 Compact. Nonetheless, engagement among the Compact parties continued, especially between the Governor's Office and CSKT leadership. In a March 31, 2014 letter to then-CSKT Chairman Ronald Trahan, Governor Bullock addressed the topic:

> I enjoyed our February 26 discussion and appreciate your commitment to the proposed water compact between the State of Montana and the Confederated Salish & Kootenai Tribes. I am likewise convinced that negotiated settlement represents the best resolution for the people of Montana. The June 30, 2015 deadline for the Tribes to file their claims in the statewide general stream adjudication means that the 2015 legislative session represents the final opportunity for the legislature to approve the Compact prior to the filing of claims.

The Governor then highlighted recent developments related to FIIP and the FJBC that, in his view, warranted recommencing negotiations. As described above and in the 2013 Weiner/Stermitz article, a primary component of the 2013 Compact was the FWUA, developed by representatives of the CSKT, FJBC, and the US. This agreement in essence "divided the waters" of the Reservation to provide both continued irrigation water supplies based on historic demand and increased instream flows through improvements and conservation measures. A series of events beginning in 2013, however, undermined the FJBC's previous support for the FWUA. This resulted in a number of conflicts between CSKT and the FJBC about the management of FIIP and ultimately led to the dissolution of the FJBC in early 2014. The Governor cited to these events as a basis for renegotiations:

> The recent dissolution of the Flathead Joint Board of Control and reassumption of the Flathead Indian Irrigation Project by the Bureau of Indian Affairs leaves the Compact without the protections for FIIP irrigators that were previously negotiated as the "Water Use Agreement." I would like to extend to the Tribes a formal invitation to reopen negotiations with the State for the purpose of resolving this issue so that legislation may be presented to the 2015 legislature.

The Governor also reiterated the State's position "that negotiations concerning FIIP water use should be based upon the same premise that motivated the initial negotiations — namely, that irrigation deliveries will be protected and that water saved through upgrades and repairs to the FIIP will be allocated to Tribal instream flows."

Responding on April 17, 2014, Chairman Trahan, noting that the Tribal Council had considered the recent developments associated with the FJBC, stated that the Council "is prepared to engage in a narrow reopening of negotiations. The Council authorized reopening negotiations for the single purpose of revising the Water Use Agreement and incorporating it into the Compact." He also explained that "[s]ince the Bureau of Indian Affairs had reassumed operation and management of the Flathead Indian Irrigation Project, they will be a necessary party to the negotiations… ." The Chairman's response also reflected the Tribal Council's overall view that wholesale reopening of negotiations was not warranted because the 2013 Compact already represented a significant compromise of the CSKT claims.

Federal representatives also anticipated renewed negotiations. In a December 20, 2013 letter, the chair of the Federal negotiation team provided "comments and perspectives on key issues and concerns that have been raised about the proposed compact." In particular, the federal negotiating team set out federal perspectives on key issues that renewed negotiations were likely to address:

Tribal Compact

- The Confederated Salish and Kootenai Tribes have cognizable claims to water rights for off-reservation instream flows, and it is appropriate to seek to resolve those claims in this compact negotiation.
- With respect to federal policies and directives addressing tribal water administration, the proposed Unitary Management Ordinance would be an appropriate approach for resolving how Tribal and non-Tribal water rights would be administered on the Flathead Reservation.

Federal Perspectives

2015 Legislative Session: Consideration and Approval of the 2015 Compact

2015 Compact

With these express endorsements, State, Tribal and Federal representatives reentered negotiations. The result was the 2015 CSKT Compact that the Montana Reserved Water Rights Compact Commission unanimously recommended to the legislature on January 12, 2015 (detailed above). A bill to approve the Compact was introduced and heard in the State Senate. The Montana Legislature ratified the Compact on April 16, 2015. The Governor signed the legislation on April 24, 2015. The legislature appropriated $3 million for early implementation of the Compact.

Intense Scrutiny

This quick synopsis does not, of course, capture the intense scrutiny that the Compact received in the session or how narrow the voting margins were, especially in the House. A complete review of the session is beyond the scope of this paper, but it is important to highlight that, unlike 2013, the 2015 legislature was both prepared to consider the Compact and to receive the views and positions of stakeholders and the public. Each chamber held extensive hearings, including an unprecedented day-long hearing held by the House on a Saturday. Entities such as the FJBC weighed in with strong objections, but the legislature also heard from a large contingent of FIIP landowners and off-Reservation agricultural industry groups in support of the Compact. In summary, it is apparent that the 2013 Compact raised significant issues, which had to be better understood and addressed by Montana decision makers. It is also clear that the actions taken by State and Tribal proponents provided the best possible foundation for the legislature's consideration of the Compact in 2015 in the face of intense scrutiny by opponents and proponents alike. Seen in this light, the State's ratification of the 2015 Compact was a monumental achievement.

2015-2016: Challenges & Federal Review

Federal Approval

With State approval of the Compact achieved in 2015, proponents turned their attention to procuring necessary Federal approvals. As most tribal water settlements need Congressional approval, proceeding with the requisite reviews at the Federal level can be daunting, and approval often is uncertain at best. This was certainly true of the CSKT Compact; having run the gauntlet to obtain State approval, the reviews undertaken at the Federal level beginning in 2016 would essentially put the Compact through a second refiner's fire. But even as the Federal reviews were beginning in earnest, the Compact had to face a final Montana test in a state court challenge ultimately resolved by the Montana Supreme Court. This court challenge and the Congressional approval process are now examined.

State Court Challenge

State Court Challenge to Montana Legislature's Approval of the 2015 Compact

Soon after the Governor signed the law approving the Compact, the FJBC mounted a serious challenge in state court to the State's ratification. The case was brought forward on arguments based on arcane provisions of Montana law. It raised an existential threat to the Compact's legislative approval if the courts ruled in favor of the FJBC.

Sovereign Immunity

The FJBC's assertions were founded on Article II, Section 18 of the Montana Constitution which directs that the State and its political subdivisions "shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature." Claiming that two provisions in the Compact granted new sources of sovereign immunity from suit, the FJBC argued that because the Compact included these two provisions, the Montana Constitution required a 2/3 majority vote in the legislature, a level of support that was not achieved in 2015 in either chamber. The state trial court agreed in part with the FJBC, finding that one of the Compact's provisions (section 1-2-111 of the Unitary Management Ordinance) was a new grant of sovereign immunity from suit. Interestingly, the court also found that a "severance clause" in the Unitary Management Ordinance, section 1-1-113(1), applied in this instance thereby allowing the court to void the immunity provision without voiding the entire statute approving the Compact. Given the court did not invalidate the State's approval, the FJBC appealed.

Montana Supreme Court Ruling

The trial court's finding that the Compact included an unconstitutional clause did not survive review in the Montana Supreme Court. *Flathead Joint Board of Control v. State*, 389 Mont. 270, 405 P.3d 88 (2017). The Court concluded that the disputed provision did not create a new source of sovereign immunity and instead recognized "immunities from suit as to individual public employees", something that State law already allowed. *Id*. at 276. Thus, it was not until November 8, 2017, the date of the Montana Supreme Court's decision, that the parties knew that the State's approval was final.

Tribal Compact

Settlement Principles

Federal Bill

Blackfeet Tribe Settlement

Support Withheld

Tribe's Sensible Solution

Key Milestones (Documents)

Consideration and Review of the CSKT Compact by Congress and the Executive Branch

Congressional approval of tribal water right settlements tend to follow the same general pathway. Ultimately, Congress must act to ratify a settlement and direct the Executive to execute and implement it. Congress also looks to the current administration for its views when considering legislation to approve a settlement. This is important because over the course of several administrations, the Federal government has sought to ensure that key settlement principles are adhered to, such as ensuring that tribal water right settlements comprehensively resolve the tribe's water right claims and provide adequate and legally protected water resources and other benefits for current and future Tribal needs. *See*, "*Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*" 55 Fed. Reg. 9223 (March 12, 1990). Understanding the importance of engaging on all fronts, CSKT recognized that they needed to work with both the Administration and Congress to obtain Federal ratification of the CSKT Compact. The discussion below summarizes the key developments on both fronts that led to final approval by Congress in December 2020.

• *2016 Tester Bill and Review by the Obama Administration*

CSKT representatives began drafting Federal legislation in 2015. Based on the Tribes' draft, Senator Tester of Montana introduced S. 3013 in the 114th Congress on May 26, 2016. The Senate Indian Affairs Committee held a hearing on June 29, 2016. At the hearing, Senator Tester acknowledged that more work needed to be done at the Federal level, stating that "introducing this bill is a first step in getting the Tribes and the Federal government to sit down and hammer out a final agreement." At the same hearing, Senator Daines of Montana, who had not co-sponsored the bill, noted his preference that Congress first take up the pending legislation to approve the Blackfeet Tribe's settlement before taking up the CSKT Compact.

Alletta Belin, at the time a senior counselor in the Interior Department, provided testimony on behalf of the Obama Administration. Ms. Belin commended Montana and CSKT for taking a strong leadership role in seeing the negotiations to completion at the State level:

> The Tribes and the State brought these leadership qualities to this tribal water negotiation, and the Department recognizes the substantial effort that they have made in negotiating a resolution of the Tribes' water right claims; the issues surrounding these claims have been among the most contentious to be addressed to date in a tribal water settlement.

Ms. Belin then explained that the Department could not support S. 3013 at that time:

> While the Department has a record of strong support for Indian water rights settlements and the Compact is similar to many other water rights settlements that Congress has approved, the Department is unable to support S. 3013 as introduced. Additional time is needed for the Department to complete its review of the legislation… .

After the hearing held by the Senate Indian Affairs Committee, the Senate took no further action on S. 3013.

2017 – 2020: CSKT Compact Before Congress

FURTHER REVIEW — CONGRESSIONAL ACTION

Beginning in 2017, CSKT engaged actively with both the Montana delegation and the Administration to achieve the requisite Federal approvals. The Tribes' representatives understood that in this round, consideration and approval of the Compact by Congress would need the full support of the delegation. Further, given that a vast majority of tribal water settlement acts originate in the Senate, they also recognized the importance of working closely with the State's senators. But they also knew that they were not the only ones seeking to influence the delegation, given that opposition to the 2015 Compact remained strong and active during this time period. Therefore, the Tribes had to mount a case to show that the Compact was a sensible solution that avoided disastrous litigation and was not — as asserted by opponents — an improper and illegal agreement.

This high-level engagement culminated in the release of three documents in 2019 and 2020, which represent key milestones in the path to Congressional approval:

- November 18, 2019, letter from then-Secretary of the Interior David Bernhardt to Daines;
- S. 3019, legislation (introduced December 11, 2019) to approve the CSKT Compact, co-sponsored by Senator Daines and Tester;
- June 24, 2020, testimony supporting S. 3019 by Dr. Timothy Petty, Assistant Secretary, Water and Science, Department of the Interior, before the Senate Indian Affairs Committee on June 24, 2020.

When evaluated together, these documents evidence the significant degree of consideration the Compact received at the highest levels of the Federal government. Secretary Bernhardt's letter (see below) demonstrated the Department's support for important terms of the Compact at a critical time. S. 3019 set out terms to ratify the Compact, but also reflected a level of compromise on key concerns that had been raised by Senator Daines. The Department's testimony provided clear rationales for the Administration's support for significant Federal contributions to ensure full implementation of the Compact.

Tribal Compact

Unprecedented Opposition

Trustee for Tribes

Interior's Response

Compact Concerns

Off-Reservation Instream Flows

On-Reservation Instream Flows

Irrigation Claims

Irrigation Supply Protection

Secretary Bernhardt's Letter

In the fall of 2019, although new federal legislation to approve the Compact had not yet been introduced, engagement among the parties remained active. A primary indication of this engagement was Secretary Bernhardt's letter responding to a request from Senator Daines for the Department's views on concerns that had been expressed about key terms of the CSKT Compact.

Under the circumstances, it was both significant and not surprising that the senator would make this request. Given the vocal nature of the opposition to the Compact, it seemed reasonable to seek input from the Department and the Secretary concerning the appropriateness of Compact terms. The Department of the Interior is trustee for tribal resources, including tribal water rights. Working closely with the US Department of Justice and others, Interior has the lead for Federal involvement in tribal water right negotiations and in the review of proposed settlements, which gives the Department significant expertise in these matters. Further, negotiations and reviews of agreements are overseen at the highest levels of the Department through the Secretary's Indian Water Rights Office and senior level secretarial counselors, including then-Senior Advisor to the Secretary Alan Mikkelsen. The Secretary also noted in the letter his own experience in tribal water settlements "over the past two and a half decades." Finally, the exchange of letters, coming at this time in the process, served as an early barometer reading for the Montana delegation that the Administration would support legislation to approve the Compact once it was introduced.

Secretary Bernhardt prefaced his response to Senator Daines by explaining:

> I am informed that during the course of negotiating and reviewing the CSKT Compact, concerns and objections were raised about whether proposed Compact terms appropriately resolved the Tribes' claims and about the perceived impacts that the Compact could have on non-Indian water right holders. These concerns are important… .

Noting that Senator Daines had asked for the Department's "views," Secretary Bernhardt explained: "I would like to provide our perspective at this time on how I understand that [concerns about the Compact] have been addressed." He then framed the discussion:

[T]he primary concerns about the Compact raised to date tend to fall into three main themes:

- Objections to the inclusion of reserved rights for off-Reservation instream flows.
- Objections to how the Compact resolves the water rights for FIIP in conjunction with the CSKT reserved rights for on-Reservation instream flows.
- Assertions that the Compact's approach to administering and enforcing water rights on the Reservation is unconstitutional, primarily under Montana law.

These themes raised by objectors had remained consistent throughout the negotiation and review of the Compact. Further, as detailed above, each had been addressed in detail by State governmental and legislative bodies. It is also worthy of note, however, that many of these objections were rooted in the claims that the United States had made on behalf of CSKT. Thus, as Secretary Bernhardt acknowledged, it was "important" to have Federal views and responses to these objections.

CSKT Compact Terms for Off-Reservation Instream Flows

Turning first to assertions that there was no legal basis for CSKT off-reservation flow claims, the Secretary noted that concerns were "understandable" given this was "the first time that claims based on a treaty reserving off-Reservation fishing rights have been addressed in Montana." The letter then details how "[t]he Department determined that the case law, the history of the Tribes, and the Hellgate Treaty supported off-Reservation flow claims for CSKT in the Montana adjudication." In turn, the Department concluded it was appropriate to resolve these claims as part of the Compact.

On-Reservation Instream Flows and FIIP

The Secretary's letter extensively addressed what were arguably the most pervasive objections cited against the CSKT Compact: failure to protect FIIP water deliveries and improper quantification of CSKTs' instream flow rights on the Reservation.

> I understand that a central concern is that the Compact may deprive water users served by FIIP of their entitlements to Project water. In fact, it appears that one of the most contentious issues during the negotiations was how to address the FIIP irrigation water right claims. Further, because the FIIP water rights and the Tribes' on-Reservation reserved flow rights often compete for the same water supply, addressing in tandem these two rights was critical for reaching a successful settlement.

Noting the primary concern that the "Compact would permanently reduce the FIIP Water supply," Secretary Bernhardt set out his conclusion that "the Compact protects the net FIIP water supplies needed to irrigate crops." Tribal, State, and Federal negotiators "employed technical studies to determine that historical net irrigation supplies could be maintained and protected while project improvements were made to save water for instream flows." The letter also sets out several of the FIIP water supply safeguards set out in the Compact (described above).

Tribal Compact

Legal Title

Instream Levels Quantification

Risk to Irrigators

Management Balance (UMO)

Senators' Support

Instream Water Rights

Tribal Relinquishment

S. 3019: Concerns Addressed

A closely related concern were assertions that "the Compact takes legal title to the FIIP water rights away from landowners served by FIIP and places it with CSKT." The Secretary explained that legal precedent supports having the US hold water rights for BIA irrigation projects in trust for tribes, even projects that serve both tribal and non-tribal landowners. Nonetheless, "…the Department also recognizes that all landowners served by a BIA irrigation project, whether Indian or non-Indian, are entitled to continue to receive project irrigation water to the extent the water is physically and legally available…The CSKT Compact includes protections for FIIP water users' entitlements to Project water."

Perhaps most important, the Secretary discussed the "obvious risks" if the quantification of instream flow levels on the Reservation could not be settled. First highlighting that the courts had "recognized CSKT's entitlement to on-Reservation instream flows throughout the Reservation with a time-immemorial priority date that is senior to FIIP," the letter then sets out a stark assessment of the risks to FIIP water supplies:

> Under this legal precedent, water would not be shared between FIIP and the instream flows; rather, instream flows would be met first to the full extent of their legal entitlement…Currently, Federal claims seek instream flow rights for the majority of water even in wetter years; if the courts were to confirm this claim, water for FIIP diversion would be available in the wetter years and only to the extent not needed to meet the instream flow right. Even if the Water Court were to quantify the right at a lower median range, the Department's assessments show a likelihood that insufficient water will remain for viable FIIP irrigation diversions… .

The UMO and Joint Administration of On-Reservation Water Rights

Turning to objections that the Unitary Administration and Management Ordinance (UMO) is unconstitutional under Montana law, the Secretary recognized that this was primarily a state law issue, but also noted the several state reviews that had confirmed the UMO was proper under State law. He also shared Federal perspectives:

> The Department did an extensive review of the UMO and concluded that, while the administration of on-Reservation rights through a single management board is novel, the terms of the Compact establish a workable and appropriate administration regime, provided that the Board and UMO are authorized by the State legislature, the Tribes and Congress.

S. 3019: "Montana Water Rights Protection Act"

Soon after receiving Secretary Bernhardt's letter, Senators Daines and Tester introduced S. 3019. Generally speaking, S. 3019 included the legislative terms necessary for Federal ratification and execution of the 2015 Compact. This included providing for the waiver of water right and damages claims in exchange for the Compact's benefits (Section 10(a)) and the protection of Tribal water rights from state law forfeiture provisions (Section 5(c)). The bill also had terms which reflect that compromises were reached prior to its introduction.

The Compact lists several instream flow water rights currently held by the Montana Department of Fish, Wildlife and Parks throughout western Montana. Under Article III of the Compact, CSKT co-holds these water rights for fishery benefits. Some of the water rights listed in the appendices are located in the Flathead River basin upstream of Flathead Lake. Section 10(a)(4) of S. 3019 addressed these Flathead basin flow rights by providing that, "as consideration for recognition of the Tribal Water Right and other benefits described in the Compact and this Act, the Tribes shall relinquish any right, title, or claim to the water rights located within the Flathead basin and described in [appendices 28 and 29]."

This language, which was included in the final version of S. 3019 passed by Congress, decreases the number of water rights CSKT would have received under the Compact. As highlighted above, Compact terms providing for CSKT flow rights off-Reservation were a major source of concern in certain areas of the State. The January 8, 2015 Flathead County letter discussed above, for example, was founded on those concerns. Given that CSKT strongly supported S. 3019 as introduced, even with this relinquishment of rights, it seems apparent that this change to the Compact was both acceptable to CSKT and served to directly address these key concerns.

In addition to addressing concerns about Tribal water rights, S. 3019 addressed opponents' concerns in other ways. Section 13(l) authorized Federal funding for Sanders and Lake Counties, both of which overlap the Reservation. Section 13(l)(1) authorizes continued payments by the Department to the counties "to reduce the financial impact" due to the transfer of the National Bison Range from the US Fish & Wildlife Service to CSKT. Section 13(l)(2) directs that each county will receive $5,000,000 to fund improvements on county roads, bridges, and culverts as part of the overall rehabilitation of FIIP. Section 7(i)(2) provides express Congressional endorsement of the arrangement in Article IV.D.2 of the Compact by which landowners served by FIIP can obtain a certificate of entitlement to have water delivered by FIIP.

Tribal Compact

Interior Support

Department of the Interior Testimony before the Senate Indian Affairs Committee

The Senate Indian Affairs Committee held a hearing on June 24, 2020 to consider S. 3019 and the CSKT Compact. The Department's Assistant Secretary for Water and Science Dr. Timothy Petty provided testimony on behalf of the Administration. Dr. Petty stated that the Department "supports the goals of S. 3019." As noted above, Dr. Petty described both the benefits provided under the Compact and the risks of not settling. Having the Department express this level of support for S. 3019 was instrumental in achieving approval by both the Senate and the House in December 2020.

Implementation

Going Forward – Execution and Implementation of the CSKT Compact

With enactment of the MWRPA in December 2020, the parties have been proceeding on three fronts: 1) final execution of the CSKT Compact; 2) preparations to file motions with the Montana Water Court to have the Court review and decree CSKTs' water rights set out in the Compact; and 3) initial implementation of Compact terms.

Final Approval and Execution

Article II.28 defines the "Effective Date" of the Compact to mean "the date on which the Compact is finally approved by the Tribes, by the State, and by the United States… ." The State's final approval dates back to April 24, 2015 when Governor Bullock signed the bill passed by the legislature. The CSKT Tribal Council ratified the Compact by resolution on December 29, 2020.

Funds Approval

The Montana Water Rights Protection Act (MWRPA) directed how the Compact would be finally approved by the Federal government. Section 4(a)(1) "authorized, ratified, and confirmed" the Compact "[as] modified by" the MWRPA. Section 4(b) directed that, "[t]o the extent that the Compact does not conflict with" the MWRPA, the Secretary of the Interior "shall execute the Compact… ." To comply with Section 4(b), the Department undertook extensive review to determine whether any provision of the MWRPA conflicted with the CSKT Compact, in a manner requiring the Compact to be amended before it could be executed by the Secretary. As noted in the Execution Statement attached to the version of the Compact signed by the Secretary, although the MWRPA changed terms of the Compact (i.e., the priority date of the Tribes' right to water stored in Hungry Horse Reservoir and relinquishment of the off-Reservation flow rights in the Flathead basin as discussed above), these changes did not conflict with, or require any amendment of, the Compact. Based on this review, Secretary of the Interior Deb Haaland signed the CSKT Compact on September 17, 2021. Because the Federal government was the last Compact party to execute the Compact, this date is also the effective date of the Compact.

Effective Date

Water Rights Decree Process before the Montana Water Court

With final approvals accomplished, the Compact parties will file motions with the Montana Water Court seeking a decree of CSKTs' water rights as set out in the Compact. Under Article VII.B.1 of the Compact, this motion must be filed within 180 days of the effective date, which is on or near March 18, 2022. Under Water Court procedures and precedents followed for other tribal water settlements in Montana, the Court likely will establish a special proceeding and direct the parties to provide notice to all water right claimants in all basins where CSKT water rights would be established.

Montana Decree

The notice also will provide opportunity for water right claimants to file objections based on assertions that the CSKT water rights will harm or otherwise conflict with objectors' water rights. Given the high degree of opposition during the negotiation and approval phases, protests are likely, and those that cannot be resolved through settlement talks will be heard by the Water Court. While any prediction of the ultimate outcome of the Court's review of objections would be speculative at this time, it is important to note that all of the tribal water rights compacts previously presented have been decreed by the Water Court. The completion of the Water Court's consideration of the proposed CSKT water rights decree will be a worthy juncture for a future article on the progress of completing the CSKT Compact.

Protests Likely

Implementation of the CSKT Compact

Having achieved their respective final approvals, the parties have appointed implementation teams and begun to work together to implement the myriad terms of the Compact. Two early implementation activities are worthy of note. First, in finalizing their approvals of the Compact, all parties have also approved the UMO, which means that under Article IV.I.1 of the Compact, the UMO and the Flathead Reservation Water Management Board have become effective. As explained on the Montana Department of Natural Resource and Conservation's website:

> On the Effective Date, the [UMO] took effect, and the Water Management Board ("Board") was established. This Board is a regulatory body comprised of members appointed by both the State of Montana and the Tribes and is the authority for all water right permitting and changes within the Flathead Indian Reservation in perpetuity. Please note that it will take some months for the State of Montana and Tribes to make their selections for the Board.

Management & Operations

Tribal Compact

Mandatory Funding

Tribes' Entitlement

Both the State and Tribes will make two appointments to the Board, respectively, and a fifth member will be selected by the other four members.

http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact.

As previously noted, Congress provided a substantial level of funding for the CSKT settlement in the MWRPA. Section 8(a) established the Selis-Qlispe Ksanka Settlement Trust Fund for the management of these funds and Section 8(h) sets out the uses for which funds can be used. Notably, Section 9(a)(2) authorized annual mandatory funding to the Trust Fund of $90,000,000 per year through 2029 without the need for separate Congressional appropriations. This means that funding is already available for key implementation tasks set out in Section 8 of the Act. The MWRPA also provided funding for the UMO and Board.

CONCLUSION

Commencing with the Supreme Court's seminal decision in the *Winters* case, federal and state courts considering Indian reserved water right issues have established a solid legal foundation supporting Indian tribes' entitlements to senior and substantial water rights for their reservations. Nonetheless, for any particular tribe, determining the specific purposes and quantities of water to which the tribe is entitled to must be done on a case-by-case basis, whether through litigation or negotiated settlement. The Federal government, states, and tribes have long supported resolving claims through negotiation; prior to the Consolidated Appropriations Act of 2021 (which included both the MWRPA and the Navajo-Utah Water Rights Settlement), the Department reported that 36 Indian water rights settlements had been approved or enacted (https://doi.gov/siwro). With final governmental approvals and an executed agreement, the CSKT Compact can now be added to that list.

For Additional Information:

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Interior's Indian Water Rights Office website: https://doi.gov/siwro

Duane Mecham is an attorney with the Department of the Interior's Solicitor's Office based in Portland, Oregon. He received his BA and JD degrees from Brigham Young University. Prior to locating to Portland in 1996, he was an attorney with the Solicitor's Office in Washington, DC. Duane advises and represents several Interior agencies in matters relating to tribal and federal water rights, hydropower and irrigation project operations, compliance with the Endangered Species Act, and salmon recovery in the Columbia and other river basins. He has extensive experience representing the Department in multi-party water resource disputes, including negotiations addressing the water right claims of the Nez Perce Tribe in Idaho, the Salish and Kootenai Tribes in Montana, and the Umatilla Tribes in Oregon. He currently is assigned to the US State Department's team representing the United States in negotiations with Canada seeking to modernize the terms of the Columbia River Treaty.

Jennifer Frozena is an attorney with the Department of the Interior's Solicitor's Office, in the Division of Water Resources' Branch of Indian Water. She received her BS from Marquette University, and her JD from the University of Oregon. After a clerkship with the Wisconsin Court of Appeals, she entered the Solicitor's Office's Honors Program and spent three years in Washington, DC representing the US Fish and Wildlife Service and National Park Service on hydropower relicensing issues. In 2003 she relocated to Oregon and worked as a policy analyst for the Columbia River Inter-Tribal Fish Commission, assisting the Columbia River treaty tribes on hydropower licensing proceedings. In 2006, she returned to the Department of the Interior and now represents the Department in matters related to hydropower relicensing, Indian irrigation, and federal reserved water rights. She worked extensively on the negotiations to settle the water rights claims of the Confederated Salish and Kootenai Tribes.

WATER BRIEFS

500+ PLAN WEST

LAKE MEAD CONSERVATION

Water agencies across Arizona, California and Nevada, together with the US Department of the Interior, announced on December 15th a historic effort to invest up to $200 million in projects over the next two years to keep the Colorado River's largest reservoir, Lake Mead, from dropping to critically low levels. The Memorandum of Understanding (MOU), known as the 500+ Plan, aims to add 500,000 acre-feet of additional water to Lake Mead in both 2022 and 2023 by facilitating actions to conserve water across the Lower Colorado River Basin. The additional water — enough water to serve about 1.5 million households a year — would add about 16 feet total to the reservoir's level, which continues to reach record low levels. In addition to the Bureau of Reclamation (Reclamation), the 500+ Plan includes the Arizona Department of Water Resources (ADWR), Central Arizona Project (CAP), The Metropolitan Water District of Southern California (Metropolitan), and the Southern Nevada Water Authority (SNWA).

In 2019, Arizona, Nevada, and California signed the Lower Basin Drought Contingency Plan (DCP) and agreed to contribute water to Lake Mead as it reached certain levels, to keep it from dropping even further and reaching critically low levels. The DCP also included a provision that if modeling indicates a possibility of the reservoir reaching an elevation of 1,030 feet, action would be required. As noted in the MOU, the "additional measures" to be taken would be designed "to avoid and protect against the potential for Lake Mead to decline below 1,020 feet… ." MOU at 3 (citing the DCP Operations rule set known as the LBOps).

Under the MOU, signed December 15th during the Colorado River Water Users Association's annual conference, ADWR committed up to $40 million to the initiative over two years, with CAP, Metropolitan and SNWA each contributing up to $20 million. The federal government plans to match those commitments, for a total funding pool of $200 million. The MOU also noted, "… recognizing both the recent history of low runoff conditions and the variability of flows in the Colorado River Basin and without predetermining what additional measures may be appropriate or necessary through 2026, generally, these technical workgroups concluded that 500,000 or more acre-feet per year of additional reductions in water use or augmentation of system water may be required to meet this goal… ." MOU at 4.

Some of the specific conservation actions and programs that will be implemented through the 500+ Plan have already begun, while others are still being identified. The MOU includes conservation efforts in both urban and agricultural communities, such as funding crop fallowing on farms to save water (including the recent approval of a short-term agricultural land fallowing program in California), or urban conservation to reduce diversions from Lake Mead.

As of January 3rd, Reclamation's Lower Colorado Water Supply Report showed Lake Mead was 34% full, with its elevation (feet above mean sea level) at 1066.40; Lake Powell was 28% full, and its elevation was 3,537.04. "We had hoped the contributions made under the DCP would be enough to stabilize Lake Mead while we seek longer-term solutions to the challenges on the Colorado River. But they aren't, which is why we are moving forward with the 500+ Plan," said Metropolitan General Manager Adel Hagekhalil.

The 500+ Plan marks the latest collaborative effort by the Lower Basin states in partnership with Reclamation to bring sustainability to the Colorado River, which has been in a historic drought since 2000. The plan also highlights the Bipartisan Infrastructure Bill's historic $8.3 billion investment in water infrastructure and will help minimize the impacts of drought, and develop a long-term plan to facilitate conservation and economic growth. The Infrastructure Bill's investments will fund water efficiency and recycling programs, rural water projects, WaterSMART grants and dam safety to ensure that irrigators, Tribes and adjoining communities receive adequate assistance and support.

For info: MOU available upon request from *The Water Report*; Rebecca Kimitch, Metropolitan, 202/ 821-5253 or rkimitch@mwdh2o.com; Patti Aaron, Reclamation, 702/ 293-8189 or paaron@usbr.gov; Bronson Mack, SNWA, 702/ 249-5518 or bronson.mack@lvvwd.com

CADIZ DESERT PROJECT CA

PIPELINE RIGHT-OF-WAY

The US Bureau of Land Management (BLM) on December 3rd moved to scrap a Trump administration decision challenged by conservation groups in March of 2020, who alleged that the decision illegally granted a pipeline right-of-way to Cadiz Inc. (Cadiz) without the required environmental review. The BLM motion, filed in US District Court in Los Angeles, seeks to vacate BLM's approval in the final days of the Trump administration for Cadiz to repurpose a mothballed oil-and-gas pipeline crossing the Mojave Trails National Monument and other protected federal land in southeastern California as a water pipeline. The right-of-way would facilitate Cadiz's groundwater-mining plan to tap ancient aquifers under the Mojave Desert to feed new developments in and around Los Angeles.

Defendant BLM set out its request in the Motion for Voluntary Remand at page 2: "Specifically, Defendants request that the Court grant a remand of BLM's decision to issue a right-of-way to Cadiz Real Estate, LLC…allowing it to operate a pipeline to transport water between Cadiz and Barstow, California. In making that decision, BLM did not adequately analyze the potential environmental impacts of granting the right-of-way under the National Environmental Policy Act…and did not sufficiently evaluate potential impacts to historic properties under the National Historic Preservation Act… ." Cadiz opposed the motion.

Cadiz's project would pump water from a fragile aquifer under the Mojave Trails National Monument and near the Mojave National Preserve. According to the Center for Biological Diversity (CBD), hydrologists from

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the US Geological Survey have found the pipeline's water use unsustainable. They also found that Cadiz's privately funded study vastly overstates the aquifer's recharge rate. Opponents to the project maintain that it threatens to dry up life-sustaining desert springs in the monument and the preserve, hurting vegetation and key habitat for iconic desert wildlife, including desert tortoises, bighorn sheep, Mojave fringe-toed lizards and kit foxes.

In 2019 the groups won a lawsuit challenging an earlier Interior Department approval of an existing railroad right-of-way for the pipeline. The judge ruled that the Trump administration had broken the law when it reversed two Obama administration decisions and had wrongly concluded the 43-mile pipeline did not require BLM permits or approvals.

BLM's primary assertions were set out in the Introduction of the Memorandum in Support of the motion (page 8): "Due to the lack of analysis, the agency does not know the source of the water that will be transported through the pipeline and therefore could not have analyzed the potential impacts on the environment or historic properties of drawing down the water at its source. Cadiz did not provide specific information about its plans, and the agency, nevertheless, proceeded to grant a right-of-way without knowing either the specifics of Cadiz's plans or evaluating the potential impacts of Cadiz's operations."

For info: Motion at: www.biologicaldiversity.org/campaigns/Cadiz/pdfs/Cadiz_BLM_Motion_for_remand-120321.pdf; Ileene Anderson, CBD, 323/ 490-0223 or ianderson@biologicaldiversity.org; Zoe Woodcraft, Earthjustice, 818/ 606-7509 or zwoodcraft@earthjustice.org

WATER RIGHTS DATA CA

NEW DATA SYSTEM

On December 21, the California State Water Resources Control Board (SWRCB) is launching a new project called *Updating Water Rights Data for California* (UPWARD California) to improve the way the state collects and manages its water rights data and information. California's water rights data includes information on water use, demand, and when and how water is diverted from streams and rivers. This type of information is critical for data-driven water management decisions, particularly when hydrology affects supply, such as drought. The state's current water rights data system is outdated and lacks features that would make water rights reporting simpler and public access to information easier. UPWARD California will create a 21st century, modern platform that is crucial for California's long-term water resilience in the face of ongoing climate change.

For info: SWRCB website at: waterboards.ca.gov/upward

PUGET SOUND WA

BIENNIAL REPORT

The recently released *State of the Sound* biennial report is intended to help partners of the Puget Sound Partnership (PSP) and decision makers better understand: (1) how well the recovery effort is going; (2) ecosystem health and progress toward Puget Sound recovery goals; and (3) the role each partner can play in achieving Puget Sound recovery. Required by Washington law, the *State of the Sound* Report includes information on the status of the Puget Sound recovery effort, including detailed information on funding, Near Term Actions, ongoing programs, legislative and policy developments, and a summary of citizen concerns.

The Director of PSP noted some of the primary challenges faced in Puget Sound that require the call to action. "Very few of our indicators met their 2020 targets. The Southern Resident orca population hovers at 74 animals, and Chinook salmon populations show no signs of recovery. Marine water quality continues to decline." The current situation led PSP to make the following recommendations (Report at 7):

- Work with the Governor's Office to make Puget Sound and salmon recovery the cornerstone of Governor Inslee's third term;
- Establish a new funding source — such as a Puget Sound Recovery Fund — and significantly increase funding for habitat restoration, road retrofits to manage stormwater, and wastewater treatment systems to protect shellfish beds;
- Bring the State Growth Management Act and Shoreline Management Act into the 21st century with a Net Ecological Gain standard, and other updates that will reverse historic habitat loss;
- Broaden and deepen the coalition demanding a healthy Puget Sound, including annually convening Puget Sound Day on the Sound, to highlight Puget Sound recovery needs and generate political momentum for necessary decisions and investments; and
- Implement systems of accountability, performance measurement, and adaptive management to ensure our investments in Puget Sound recovery

For info: *2021 State of the Sound* at: https://stateofthesound.wa.gov/

TOXICS ORDER TO EPA WA

SALMON & ORCAS

On December 29, a federal district court ordered the US Environmental Protection Agency (EPA) to take the first step towards protecting endangered salmon, steelhead, and Southern Resident killer whales from toxics in Washington State waters. Writing that "EPA's Waiting-for-Godot approach... cannot be justified with the framework or purpose of the [Clean Water Act]," federal district court Judge Marcia J. Pechman gave EPA 180 days to issue a formal determination on whether it needs to take action. *Northwest Environmental Advocates v. EPA*, Case No. C20-1362 (12/29/21), Order on Cross-Motions for Summary Judgment, (*Order* at 14).

The judge pointed to Washington's long-standing failure to protect aquatic species as well as EPA failures. "Despite acknowledging Washington's feeble efforts to timely comply with the CWA [Clean Water Act], EPA has not taken its backstop role seriously and has unreasonably abandoned its role for years." *Id*. at 20. Judge Pechman concluded that "[T[his case presents exceptional circumstances justifying

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the imposition of a timeline on EPA's further review." *Id*. NWEA had requested that the Court set a 180-day timeline for EPA to make its necessity determination. Judge Pechman earlier pointed out that EPA failed to "pay heed to the unique species in Washington, such as Puget Sound's Southern Resident Orcas who are some of the most contaminated marine mammals in the world due to bioaccumulation through the food stock, particularly through Chinook salmon." *Id*. at 18.

The lawsuit, filed in federal district court in 2020 by Northwest Environmental Advocates (NWEA), challenged EPA's 2017 denial of a formal petition that the organization submitted to EPA in 2013. The NWEA petition asked EPA to update Washington's nearly three decades-old water quality standards to protect aquatic life — such as Chinook salmon — from toxics.

In justifying its denial of the NWEA petition, EPA relied on its assumption that the Washington State Department of Ecology would eventually take care of the problem. But Judge Pechman said EPA's reliance was not justified because "Washington had abdicated its duties under the CWA, having failed to update the majority of its aquatic life WQS [Water Quality Standards] since 1992, as EPA concedes." *Id*. at 12. "So while EPA wanted to 'work in partnership to efficiently and effectively allocate resources to address pollution and accelerate state adoption of new and revised criteria,' nothing in the record showed that Washington was a willing partner." *Id*. The lawsuit identified many toxics as not having been updated as required by law including the following: aluminum, ammonia, arsenic, copper, cyanide, mercury, nickel, PCBs, selenium, pentachlorophenol, and tributylin.

For info: Nina Bell, NWEA, 503/ 295-0490 or nbell@advocates-nwea.org; Bryan Telegin, Bricklin & Newman, LLP, 206/ 264-8600 x3, telegin@bnd-law.com; *Order* at: www.northwestenvironmentaladvocates.org/2021/12/30/protections-for-washington-waters/

INFRASTRUCTURE LOAN CA

EPA LOAN PROGRAM

On December 21, EPA announced an $81 million Water Infrastructure Finance and Innovation Act (WIFIA) loan to the Sacramento County Water Agency in northern California. The financed project will modernize water infrastructure to support a more reliable and climate-resilient water supply.

Sacramento County Water Agency's Arden Service Area Distribution System Pipe Realignment and Meter Installation Project will reduce water loss and the frequency of waterline breaks by modernizing the aging water distribution infrastructure. Additionally, the project helps Sacramento County comply with current fire protection standards and water metering requirements by installing 30 miles of new distribution pipeline, 260 fire hydrants, and 3,000 new water meters. Improved leak detection and water conservation methods will reduce water use by an estimated 17 percent annually, increasing the community's resiliency to the effects of climate change.

EPA's $81 million WIFIA loan will finance nearly half of the $165 million project costs. Sacramento County Water Agency will save approximately $22 million through its WIFIA financing. Project construction and operation are expected to create an estimated 530 jobs and construction is expected to be completed in 2025.

For info: WIFIA website: www.epa.gov/wifia

TEXAS WATER PLAN TX

WITHSTANDING DROUGHT

The *2022 State Water Plan* marks a quarter century of Texas' widely recognized regional water planning process and the fifth state water plan based on the work of hundreds of water planning stakeholders. The state's water planning process is founded on extensive data and science and guided by a robust state framework that requires all 16 regional water planning groups to openly and genuinely address all their water supply needs. This plan sets forth thousands of specific, actionable strategies and projects — costs and sponsors included — that clearly demonstrate how Texas will be able to withstand future droughts. TCEQ works diligently to continually improve data collection, water science, and other tools in support of better planning, which ultimately result in water projects with tangible benefits for the state. The *2022 State Water Plan* was adopted by the Texas Water Development Board on July 7, 2021.

For info: www.twdb.texas.gov/waterplanning/swp/2022/index.asp

PCB CLEANUP PLAN WA

EPA SETTLEMENT

On December 1 in the Federal Register, EPA published its settlement with Sierra Club, Center for Environmental Law and Policy (CELP), and plaintiff-intervenor, the Spokane Tribe of Indians, committing the agency to prepare a cleanup plan for cancer-causing PCBs that severely pollute the Spokane River. The settlement caps 10 years of litigation filed by Sierra Club, CELP, and intervenor Spokane Tribe of Indians. The lawsuit sought to enforce the federal Clean Water Act mandate for an EPA cleanup plan, necessary because of decades of inaction by the State of Washington.

PCBs are a dangerous chemical that harms aquatic and human life, causing cancer and other diseases. Tiny amounts of the toxin concentrate as it moves up the food chain. The Washington Department of Health's public health advisory, issued many years ago and still in effect, warns against consumption of PCB-contaminated fish in the Spokane River.

Under the settlement, EPA will complete a Total Maximum Daily Load (TMDL) by September 2024. A TMDL is a science-based pollution cleanup plan. This one is designed to ensure that the Spokane River meets protective water quality standards issued by Washington state and the Spokane Tribe.

PCB manufacture is banned in the U.S. Most PCBs entering the Spokane River pre-date the ban, with one major exception: Inland Empire Paper Co. (IEP) recycles paper printed with imported inks that contain PCBs.

The TMDL will require significant reductions in PCB pollution discharged

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to the Spokane River by the five industrial and municipal treatment plants located in Washington. In addition to IEP, Kaiser Aluminum and the Liberty Lake, Spokane County, and City of Spokane wastewater treatment plants each discharge PCBs to the river. All five discharge pipes are permitted by the Washington State Department of Ecology, but these permits contain no limits on PCBs flowing into the Spokane River. The TMDL will change that. The PCB cleanup plan is especially significant because of heavy use of the Spokane River by the public for recreation and fish consumption.

The settlement had a 30-day public comment period ending January 3, 2022. The settlement will be presented to the federal court for approval.

For info: Spokane River Team at: John Osborn, john@waterplanet.ws; Kathy Dixon, kathleengdixon@gmail.com; John Allison, jdallison@eahjlaw.com; Tom Soeldner, waltsoe@allmail.net; Rachael Osborn, rdpaschal@earthlink.net; Maggie Franquemont, mfranquemont@celp.org

PFAS RULE US

NATIONWIDE MONITORING

On December 20, EPA finalized the Fifth Unregulated Contaminant Monitoring Rule (UCMR 5) to establish nationwide monitoring for 29 per- and polyfluoroalkyl substances (PFAS) and lithium in drinking water.

EPA uses the Unregulated Contaminant Monitoring Rule to monitor for priority unregulated contaminants in drinking water every five years. UCMR 5 will collect new data on 29 PFAS that is needed to improve EPA's understanding of the frequency and magnitude at which these chemicals are found in the nation's drinking water systems. Additionally, expanded monitoring in UCMR 5 will improve EPA's ability to conduct state and regional assessments of contamination. This enables analyses of potential Environmental Justice impacts on disadvantaged communities. This data will also serve as a potential source of information for systems with infrastructure funding needs for emerging contaminant remediation.

The federal Safe Drinking Water Act, as amended by the Water Infrastructure Act of 2018, requires all drinking water systems serving between 3,300 and 10,000 people to participate in UCMR and specifies that a representative sample of systems serving fewer than 3,300 people participate, subject to the availability of appropriations and laboratory capacity. If the necessary funds are appropriated, the UCMR 5 will significantly expand the number of small drinking water systems participating in the program, which should provide more Americans with a better understanding of potential drinking water. contaminants. The rule requires participating drinking water systems to collect samples from 2023-2025 and report results through 2026.

EPA will host two identical virtual meetings (via webinar) on March 16 and 17, 2022, to provide public water systems (PWSs), states, laboratories, and other stakeholders with a comprehensive overview of the UCMR 5 program. *See* www.epa.gov/dwucmr/unregulated-contaminant-monitoring-rule-ucmr-meetings-and-materials.

For info: EPA UCMR 5 website: www.epa.gov/dwucmr/fifth-unregulated-contaminant-monitoring-rule

WELL LEVELS AZ

"BASIN SWEEP"

Beginning the week of January 1st, 2022, and continuing for multiple months, Arizona Department of Water Resources (ADWR) field services staff will be making an extensive effort to measure water levels in wells in Arizona's Western Planning Area (WPA): Butler Valley, Harquahala, McMullen Valley, Ranegras Plain, and Tiger Wash Basins. ADWR's objective is to measure water levels at hundreds of wells in these groundwater basins. This survey of wells — or basin "sweep," as it is known — was last conducted in winter 2016 for the WPA. The Harquahala Irrigation Non-Expansion Area (INA) will also be included in the basin sweep as it is contained within the Harquahala Basin.

The data collected will be analyzed and used to obtain a comprehensive overview of the groundwater conditions and used to support scientific and water management planning efforts. Data collected will be used for several purposes, including:

- Analysis of water-level trends
- Groundwater modeling
- Water-level change maps
- Hydrologic reports
- Water resource planning and management.

F**or info:** Shauna Evans, ADWR, 602/771-8079 or smevans@azwater.gov

WATERSHED FUNDING US

NRCS PROGRAMS

The US Department of Agriculture (USDA) is encouraging local sponsors to submit project requests for funding through the Infrastructure Investment and Jobs Act. USDA's Natural Resources Conservation Service (NRCS) offers several programs to help communities improve land and water resources within watersheds as well as relieve imminent hazards to life and property created by a natural disaster.

Programs include the Watershed and Flood Prevention Operations Program (WFPO), Watershed Rehabilitation Program (REHAB) and Emergency Watershed Protection Program (EWP).

Funding is available for new projects as well as those already submitted to NRCS. NRCS will give additional consideration to projects in historically underserved communities that directly benefit limited resource areas or socially disadvantaged communities.

Eligible project sponsors include: state government entities; local municipalities; conservation districts; and federally-recognized tribal organizations. Sponsors are encouraged to reach out to their state's NRCS Watershed Program Manager with watershed concerns as soon as possible to ensure their project request is in the funding queue for consideration. Links to state contacts can be found at: www.nrcs.usda.gov/wps/portal/nrcs/detail/or/newsroom/releases/?cid=NRCSEPRD1864629

For info: Gary Diridoni, USDA/Watershed Resources, 503/ 414-3092 or gary.diridoni@usda.gov

CALENDAR

January 17 WEB
Public Health and Water Quality Webinar Series: How Does Water Become Contaminated?, 11am-12pm CST. Presented by the University of Nebraska Lincoln Extension. For info: http://go.unl.edu/Health&Water

January 18 WEB
California Water Environment Association (CWEA) Advanced Water Treatment Technologies - Virtual Event, RE: Advanced Water Treatment Operator Certification & Latest Technologies Updates. For info: www.cwea.org (Events)

January 19 WEB
Technology and Climate Resiliency Webinar, 1:00pm-2:15pm Eastern Time. Presented by GreenTech & the Environmental Law Institute. For info: Environmental Law Institute, www.eli.org

January 19-20 OR
Pacific Northwest Drought and Human Health Workshop, Portland. Portland State University. Identifying Needs, Collaborative Opportunities, Integrating the Health Sector Into Existing Drought Activities. For info: www.drought.gov/events/pacific-northwest-drought-and-public-health-meeting

January 19-21 CA
California Association of Sanitation Agencies (CASA) Winter Conference, Palm Springs. Hilton Palm Springs. Speakers, Panel Presentations & Networking. For info: https://casaevents.memberclicks.net/winter-conference

January 20 OR
Superfund Conference: Environmental Contamination & Cleanup, Portland. World Forestry Center - Miller Hall. In-Person Gathering Limited to 100 Participants; Remote Option Available. For info: Environmental Law Education Center, Holly Duncan, www.elecenter.com

January 20 WEB
Regulatory Compliance for Water and Wastewater Systems - Virtual Event, For info: www.euci.com/events/

January 20-21 WEB
Cybersecurity Fundamentals for Water & Wastewater Utilities - Virtual Event, For info: www.euci.com/events/

January 20-21 WA
29th Annual Endangered Species Act Conference, Seattle. Washington Athletic Club; Available In Person, Live Webcast or On Demand. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

JanuarWy 20-21 TX
Texas Wetlands-LIVE! Conference, Houston. JW Marriott by the Galleria. For info: CLE International, 800/ 873-7130 or www.cle.com

January 21 WEB
Snowtography: Snowpack & Soil Moisture Monitoring Handbook - Webinar, 11:00am-12:30am Mountain Standard Time. Presented by Western Water Assessment, with The Nature Conservancy & USDA-Agricultural Research Service. For info: https://wwa.colorado.edu/outreach/events/snowtography-snowpack-soil-moisture-monitoring-handbook

January 24 WEB
Public Health and Water Quality Webinar Series: Impacts of Atrazine, 11am-12pm CST. Presented by the University of Nebraska Lincoln Extension. For info: http://go.unl.edu/Health&Water

January 25-27 ID
Idaho Ground Water Association (IGWA) Annual Convention & Tradeshow, Boise. Riverside Hotel. Water Well Contractor's Event. For info: https://igwa.info

January 25-28 TX
Texas Ground Water Association Annual Convention and Trade Show, Frisco. Embassy Suites & Convention Center. RE: Texas Water Well Drillers and the Texas Water Well Industry. For info: www.tgwa.org/event-4422646

January 26 CO
Colorado Water Congress – 2022 Annual Convention, Aurora. Hyatt Regency Aurora-Denver. RE: Legislation, Management, Protection, and Preservation of Colorado's Water. For info: https://watercenter.colostate.edu/event/colorado-water-congress-annual-convention-2/

January 27-28 CO
MBTA & BGEPA-LIVE! Conference, Denver. Embassy Suites. For info: CLE International, 800/ 873-7130 or www.cle.com

January 30-Feb. 2 MN
2022 Minnesota Water Well Association Convention & Trade Show, Minneapolis. Minneapolis Marriott Northwest. For info: https://mwwa.org/

January 31 WEB
Public Health and Water Quality Webinar Series: Impacts of Nitrate, 11am-12pm CST. Presented by the University of Nebraska Lincoln Extension. For info: http://go.unl.edu/Health&Water

January 31-Feb. 3 NV
Nevada Water Resources Association Annual Convention and Trade Show, Las Vegas. Tuscany Suites & Casino. Water Rights in Nevada. For info: http://www.nvwra.org/2022-annual-conference-week

January 31-Feb. 3 AZ
National Association of Clean Water Agencies (NACWA) Winter Conference, Scottsdale. Scottsdale Plaza. RE: Challenging Issues That Lie Ahead. For info: www.nacwa.org/conferences-events

February 1-2 WEB
Leadership Development for Water Sector Utilities - Virtual Event, Key Characteristics of an Effective Utility Leader. For info: www.euci.com/events/

February 1 WEB
Hydropower 101 - Virtual Event, Basic Overview of Hydropower Operations. For info: www.euci.com/events/

February 7 WEB
Public Health and Water Quality Webinar Series: Responses to Water Quality Issues, 11am-12pm CST. Presented by the University of Nebraska Lincoln Extension. For info: http://go.unl.edu/Health&Water

February 10-11 AZ
Water Security on the Path to Resiliency: 10th Annual Tribal Water Law Conference, Scottsdale. We-Ko-Pa Casino Resort. For info: CLE International, 800/ 873-7130 or www.cle.com

February 21-24 IN
Water & Wastewater Equipment, Treatment & Transport (WWETT) Conference & Expo, Indianapolis. Indiana Convention Center. World's Largest Annual Trade Show for Wastewater & Environmental Service Professionals. For info: www.wwettshow.com/en/show-info.html

February 24-25 NV
Family Farm Alliance Annual Conference, Reno. Silver Legacy Resort. Focusing on Those on the Ground, Working Hard to Manage Western Water. For info: www.familyfarmalliance.org/events/

March 1-3 AZ
Growing Water Smart Workshop, Phoenix. TBA / Virtual Backup. Presented by Arizona Growing Water Smart Communities. For info: http://resilientwest.org/growing-water-smart/arizona/

March 5-9 TX
37th Annual WateReuse Symposium, San Antonio. Marriott San Antonio Rivercenter. For info: https://watereuse.org/news-events/conferences/

March 7-8 WEB
Asset Management for Water Utilities - Virtual Event, Intro Course. For info: www.euci.com

March 7-9 DC
Association of Municipal Water Agencies (AMWA) 2022 Water Policy Conference, Washington. Hyatt Regency Capitol Hill. RE: Biden Administration Priorities; Legislative Plans from Congressional Members; and Implementation Timetables. For info: www.amwa.net/conference/2022-water-policy-conference

March 9 WEB
Establishing an Asset Management System (AMS) for Water and Wastewater Utilities with ISO 55000 - Virtual Event, For info: www.euci.com

March 14-16 TBD
P3C's Public-Private Partnership Conference & Expo - 10th Annual Conference, TBA. For info: https://thep3conference.com/

March 16-17 WEB
PFAS Monitoring: EPA's Fifth Unregulated Contaminant Monitoring Rule (UCMR 5) Information Meeting, EPA Hosting Two Identical Meetings (Via Webinar) Providing Comprehensive Overview of the UCMR 5 PFAS Monitoring Program. See Brief, This TWR. For info: EPA UCMR 5 website: www.epa.gov/dwucmr/fifth-unregulated-contaminant-monitoring-rule

March 18-19 OR
Pacific Northwest Ground Water Exposition, Portland. Red Lion Hotel. Pacific Northwest Ground Water Association Event. For info: https://pnwgwa.org

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CALENDAR

(continued from previous page)

March 21-23 TX
Geospatial Water Technology Conference, Austin. DoubleTree by Hilton. For info: www.awra.org

March 23-24 WEB
Emergency Management for Public Water Systems Workshop - Virtual Event, For info: www.euci.com/events/

April 5-7 VA
2022 Western States Water Council Spring (198th) Meetings & Washington Roundtable, Crystal City. DoubleTree Hotel in Washington, DC. For info: https://westernstateswater.org/events/

April 5-7 DC
Interstate Council on Water Policy 2022 Washington DC Roundtable, Washington. TBA; In-Person Meeting. Co-Sponsoring with Western States Water Council & the National Water Supply Alliance. For info: Sue Lowry, ICWP, 307/ 630-5804 or www.icwp.org