



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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GROUNDWATER & SURFACE WATER

ARE WE LURCHING TOWARD A NEW REALITY IN FEDERAL LEGAL CONSIDERATIONS?

by Kathy Robb, Robb Water Partners LLC (New York, NY)

Introduction

Three recent United States Supreme Court cases — the decisions in *County of Maui v. Hawai'i Wildlife Fund* and *Mississippi v. Tennessee*, and the ongoing litigation before the Supreme Court in *Texas v. New Mexico and Colorado* — reflect the slow but inexorable changes to the traditional legal framework surrounding federal consideration of surface water and groundwater interaction.

In the 19th and early 20th centuries — when states and courts first established laws and rules governing groundwater and surface water — relatively little was understood about the movement and location of groundwater, and its connection to surface water. Surface water, in plain sight, was more readily understood. Groundwater hydrology and hydraulics were largely unknown compared to surface water. As a result, the law traditionally has treated surface water and groundwater separately.

Technological developments in pumps after World War II increased the knowledge about sources — as well as litigation over groundwater and its connection to surface water. Presently, it has long been known that surface water and groundwater are hydraulically connected and inextricably linked. An increasing focus on conjunctive management of water reflects this understanding. However, the legal framework set up so long ago through common law and court decisions has largely remained the same.

Congress generally has deferred to the states to manage groundwater supply, with the federal government more directly managing water quality. (State regulation of groundwater, which in some states is extensive, is outside the scope of this article). Consideration of the connections between water quality and quantity — and groundwater and surface water — has heightened as policies for increasing water supplies in the face of drought and the overall need for more water are examined. Often, the focus is on the potential to use surface water to recharge aquifers, and the ability to recover stored groundwater.

These considerations are reflected in three cases recently before the US Supreme Court (Court or Supreme Court), where the Court variously applied to water disputes the 50 year old Clean Water Act, traditional common-law principles, and an 84-year old compact.

The Supreme Court in *Maui*

INDIRECT DISCHARGES THROUGH GROUNDWATER ARE REGULATED UNDER THE CWA

In *County of Maui v. Hawai'i Wildlife Fund*, 590 U.S. ___, 140 S.Ct. 2778 (2020), the Supreme Court for the first time held that a National Pollution Discharge Elimination System (NPDES) permit is required under the Clean Water Act (CWA) for discharges from a “point source” (for example, a well, ditch, or other conveyance) *through groundwater* into navigable water or its tributaries if the discharge is the “functional equivalent” of a direct discharge.

Groundwater

Rivers on Fire

CWA Goals

The Water Report

(ISSN 1946-116X)
is published monthly by
Envirotech Publications, Inc.
260 North Polk Street,
Eugene, OR 97402

Editors: David Light
David Moon

Phone
541/ 517-5608
Fax
541/ 683-8279

email
TheWaterReport@yahoo.com
website:
www.TheWaterReport.com

Subscription Rates:
\$299 per year
Multiple & Electronic
Subscription Rates Available

Postmaster: Please send
address corrections to
The Water Report
260 North Polk Street
Eugene, OR 97402

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The bundle commonly referred to as the Clean Water Act (CWA or Act) is made up of a statute first passed in 1972 and last amended in 1987, with antecedents as far back as the Rivers and Harbors Act of 1899. It is well to remember that in the beginning, US rivers were literally on fire. The Cuyahoga River had fires every decade between 1868 and 1972. Iconic photos from those fires, published on the cover of Life magazine in 1969 (see Figure 1), galvanized political support for passage of the Act three years later. Congress overrode a presidential veto to the initially-named “Federal Water Pollution Control Act Amendments of 1972” by 52 to 12 in the Senate and 247 to 23 in the House, with members of both parties casting votes on each side, in a bipartisan atmosphere we now can only marvel at.

Figure 1



Cuyahoga River, Cleveland, June 1952

Congress set audacious goals in 1972: “To restore and maintain the chemical, physical, and biological integrity of the nation’s waters,” to make waters fishable and swimmable by 1983, and to eliminate the discharge of pollutants by 1985. Unsurprisingly, these target dates were not met. But by 1998, the United States had doubled the waters clean enough for fishing and swimming; more than doubled the number of people served by modern sewage treatment plants; and drastically reduced wetlands losses. In 1972, less than a third of the nation’s waters met the CWA’s goals; by 2016, it was estimated, over 65% did.

Tensions inherent in the CWA from the beginning remain 50 years later. Three jurisdictional aspects of the Act are still the subject of litigation and debate (all three tensions came to a head in the *Maui* case):

- 1) What are “navigable waters” (which defines the jurisdictional waters under the Act)?
- 2) What does the “cooperative federalism” that is a hallmark of the Act mean for jurisdiction between the federal government and the states?
- 3) What is the regulatory scope of the Act for groundwater?

Between 1985 and 2006, the Court considered jurisdiction in three cases: *United States v. Riverside Bayview*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). All three cases addressed issues of surface water and 404 permits for wetlands.

Before 2015, the definition of “waters of the United States” (WOTUS) included a lot of jurisdictional determinations on 404 permits (see sidebar) on a case-by-case basis by the US Army Corps of Engineers (Corps) based on individual sites and specific facts. The determinations sometimes were viewed as inconsistent from district to district, and even within districts. The Corps uses a graphic of its jurisdiction under the pre-2015 law (see Figure 2) which reflects its administration of the 404 permitting process for wetlands. 404 permitting decisions have largely driven the 20-year controversy that is still raging about the definition of WOTUS. However, the issues in *Maui* involve CWA section 402, under which the National Pollution Discharge Elimination System (NPDES) permit process is conducted. The NPDES program is largely administered by the states through delegation from EPA.

CWA Section 404 Permits

RE: MATERIALS DISCHARGED TO WOTUS

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include: fill for development; water resource projects (such as dams and levees); infrastructure development (such as highways and airports); and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities).

See: www.epa.gov/cwa-404/permit-program-under-cwa-section-404

Figure 2

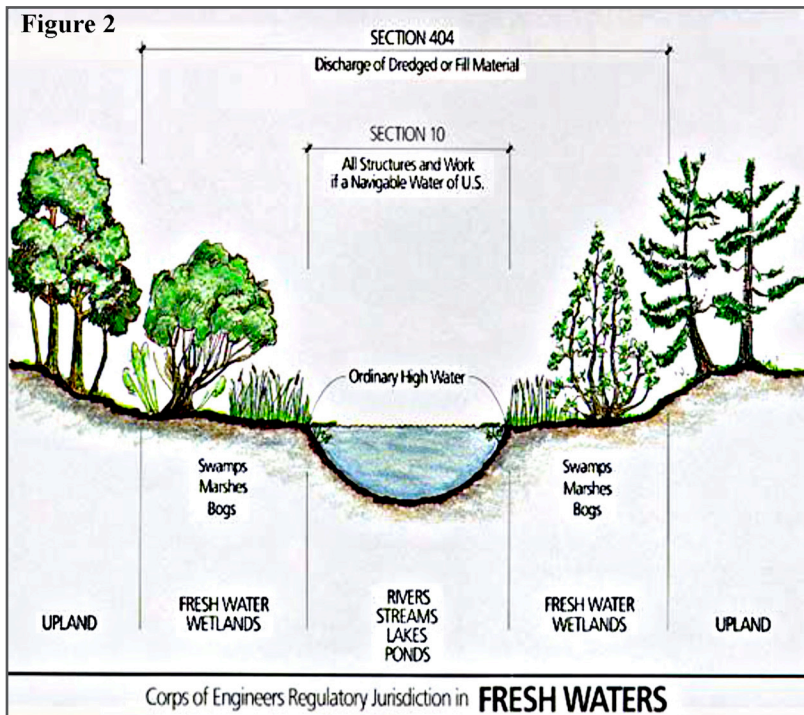
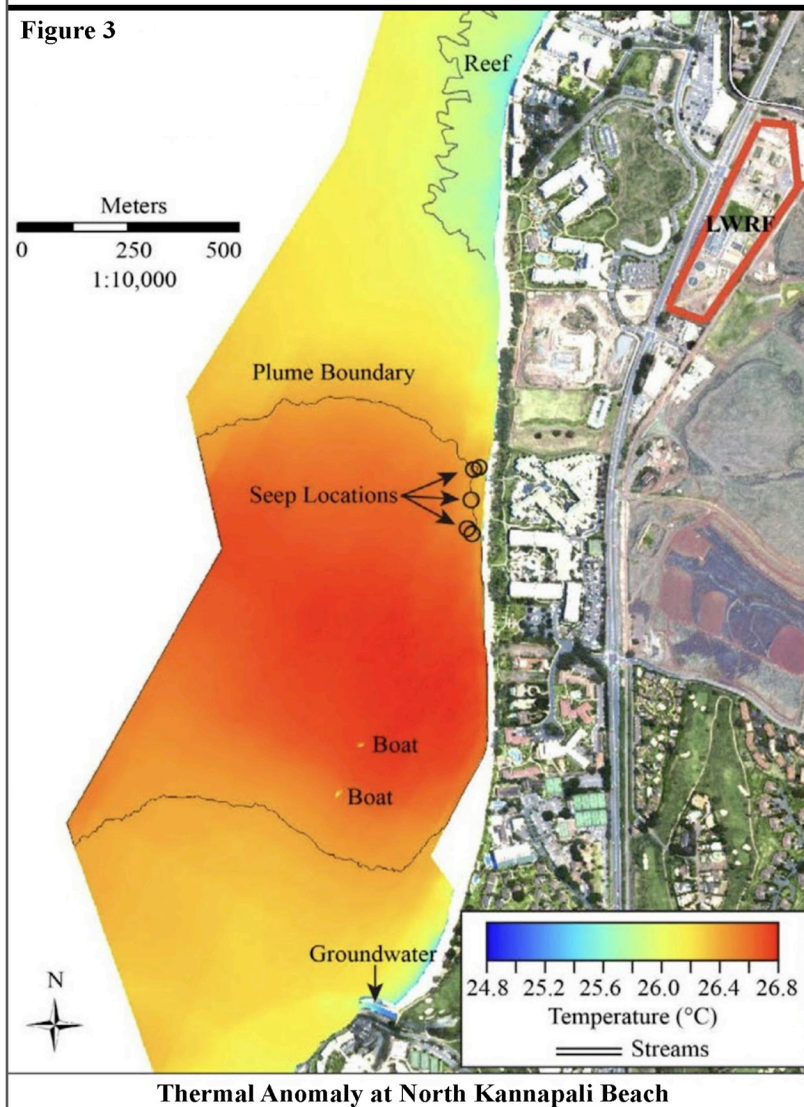


Figure 3



At the Lahaina Wastewater Reclamation Facility, the County of Maui injects 3 to 5 million gallons of recycled, treated wastewater daily into four injection wells located a half-mile inland from the Pacific Ocean. The injection wells are long pipes that carry effluent about 200 feet underground into a shallow groundwater aquifer. The wastewater made its way through the groundwater to the Pacific Ocean. A tracer dye study showed that 84 days after the dye was injected into two of the county's four wells, the dye emerged from the seafloor through points known as "submarine springs." (see Figure 3).

The idea that indirect discharges of pollutants to navigable waters through groundwater are regulated under the CWA — sometimes known as the "groundwater conduit" theory — is not new. But groundwater has not generally been regulated under the CWA. The Act prohibits a discharge of a pollutant to "navigable waters" defined under the Act as "the waters of the United States (WOTUS), including the territorial seas" from a point source without an NPDES permit. A "discharge" is defined as "any addition of any pollutant into navigable waters from any point source."

Plaintiffs argued that the County's effluent injections were discharges from a point source (the wells) carried through the groundwater to navigable water (the Pacific Ocean), causing damage to coral reefs and violating the CWA. The County argued that the discharge from a point source must be made *directly* to navigable waters to come under the CWA. The Supreme Court held that the indirect discharge through groundwater to the Pacific was subject to regulation under the CWA and required a permit if it was the "functional equivalent" of a discharge.

The Supreme Court described seven factors that "may prove relevant (depending upon the circumstances of a particular case)" in determining whether a discharge satisfies the "functional equivalent" test:

- (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

Id., 140 S. Ct. at 1476-77.

The Court noted that "the structure of the statute indicates that, as to groundwater pollution and non-point source pollution, Congress intended to leave substantial responsibility and autonomy to the states." *Id.*, 140 S. Ct. at 1471. The Court also examined the legislative history of the CWA and concluded that "[t]he upshot

Groundwater

Chevron Deference

When a legislative delegation to an administrative agency on a particular issue or question is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency, instead “deferring” to the agency’s interpretation. See: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.” *Id.*, 140 S. Ct. at 1472. Thus, the “functional equivalent” test defined by the Court does not regulate groundwater categorically under the CWA, and it does express the Justices’ concerns stated in oral argument and the opinion that the purpose of the statute is to protect the waters.

EPA had filed an amicus brief in *Maui* before the Ninth Circuit, supporting the view that the *Maui* discharges required a permit if the discharges reached jurisdictional surface waters through groundwater with a direct hydrological connection to that surface water. On April 12, 2019, EPA issued an Interpretive Statement reversing that position, based on its position that releases of pollutants to groundwater are categorically excluded from CWA jurisdiction because Congress explicitly left regulation of discharges to groundwater to the states and to EPA under other statutory authorities. In its amicus brief in *Maui*, EPA argued that, while the CWA permitting regime excludes groundwater, several other federal statutes address protection of groundwater, and many states regulate groundwater. There was no suggestion by the government that EPA’s Interpretive Statement was entitled to deference by the Court under the *Chevron* doctrine. The April 23rd Court opinion in *Maui* notes the position in the interpretive statement, saying EPA “has changed its mind”. *Id.*, 140 S. Ct. at 1473. [The Interpretive Statement was published in the Federal Register on April 23rd (see www.federalregister.gov/documents/2019/04/23/2019-08063/interpretive-statement-on-application-of-the-clean-water-act-national-pollutant-discharge)].

In 2015, while the *Maui* case was ongoing, EPA also finalized a new definition of WOTUS. The rule, called the Clean Water Rule, was challenged in litigation of epic proportions. What the fighting was about is summed up graphically in two maps of WOTUS jurisdiction provided by Kansas in its comments on the rule. The first (see Figure 4) showed the then-current jurisdictional waters under the CWA, and the second (see Figure 5) the additional jurisdiction under the 2015 rule, which added ephemeral streams as tributaries, moving from an estimated 32,000 mile of streams all the way to 134,000 miles of streams. [RE: 2015 Clean Water Rule controversy see: Glick, *TWR* #175 and Sensiba & Gerard, *TWR* #179].

The 2015 Clean Water Rule was eventually replaced by the 2019 rule, the Navigable Waters Protection Rule, which excluded “groundwater, including groundwater drained through subsurface drainage systems”

from the jurisdictional waters definition along with 11 other explicit exclusions. That rule, also the subject of litigation, has been withdrawn. EPA is developing a new WOTUS definition. [See: Megdal, et al., *TWR* #196 and Roose, *TWR* #200].

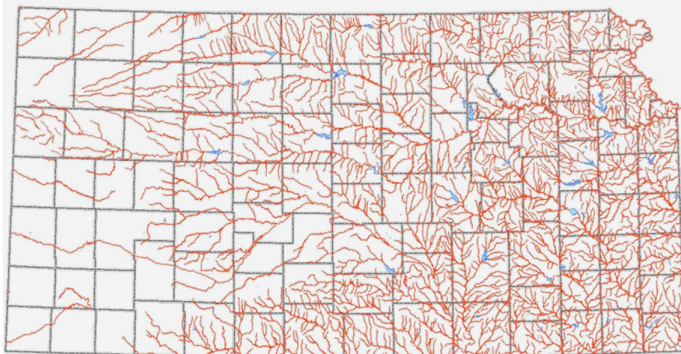
It is clear from subsequent developing case law that the “functional equivalent” determination requires a fact-specific inquiry and expert testimony to determine whether a particular indirect discharge requires an NPDES permit, all of which can be technically challenging. On remand from the Court’s decision, the district court applied the seven factors, plus consideration of the volume of pollutants discharged, and required a permit, for which the County of Maui has applied. [For further examination of *Maui* see: Robb *TWR* #189 and Robb *TWR* #196.]

In January, 2021, EPA issued Interpretive Guidance on the *Maui* decision, reiterating the “functional equivalent” factors and adding one more: “system design and performance”. 86 Fed Reg. 6321 (Jan. 21, 2021). In September of 2021, EPA withdrew guidance that had been issued in January, 2020 interpreting the Supreme Court factors. In withdrawing the guidance, EPA’s short press release explaining the withdrawal stated:

The addition of that factor skewed the “functional equivalent” analysis in a way that could reduce the number of discharges requiring an NPDES permit. The agency is rescinding this guidance upon determining that this additional factor is inconsistent with the Clean Water Act and the Supreme Court decision in *County of Maui v. Hawai’i Wildlife Fund*.

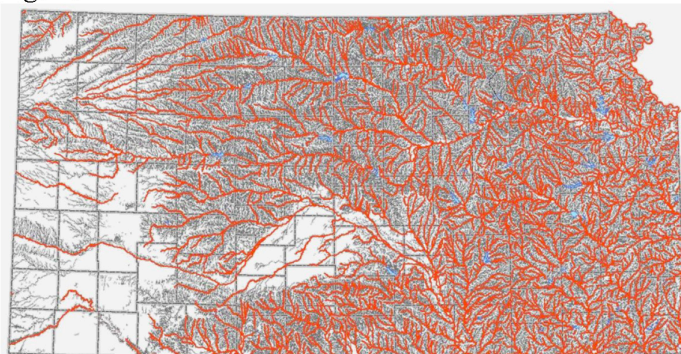
In the meantime, decisions are continuing to be made on a case-by-case basis. In addition to the decision on remand in *Maui*, in *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F. 4th 1002 (7th Cir. 2021), the Seventh Circuit stayed an

Figure 4



Pre-2015 Designated WOTUS in Kansas

Figure 5



Additional WOTUS in Kansas

If **ephemeral streams** are included as tributaries, Kansas Department of Health and Environment estimates an increase from 32,000 miles of streams to 134,000 miles of streams.

Groundwater
Groundwater Apportionment
Mississippi Lawsuit
Original Jurisdiction
Initial Claim

appeal on a coal ash discharge case that had been dismissed in the district court, to consider the appeal after the *Maui* case was decided. The Seventh Circuit ultimately concluded that the plaintiffs lacked standing and did not reach application of the “functional equivalent” factors.

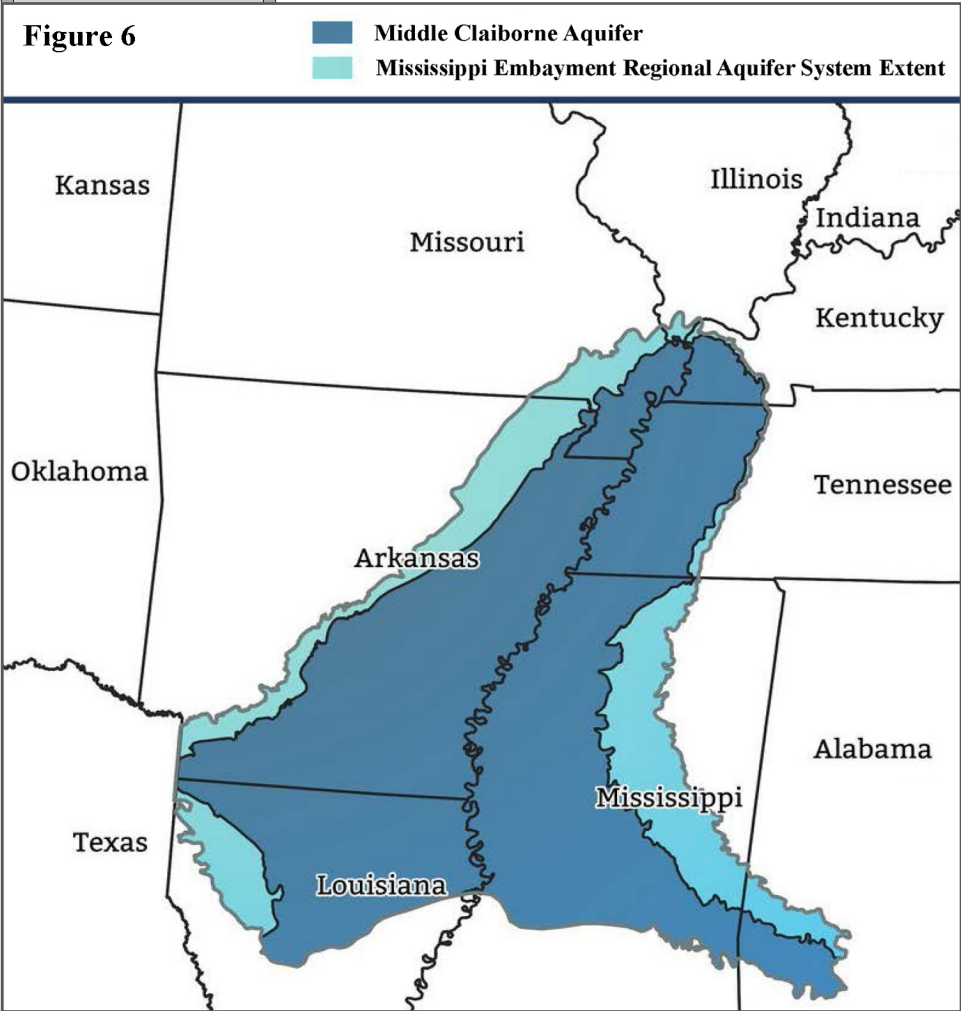
Mississippi v. Tennessee

EQUITABLE APPORTIONMENT APPLIES TO INTERSTATE AQUIFERS

Shared underground waters have been the subject of recent attention by the Court. In November, 2021 — just seven weeks after hearing argument — the Supreme Court issued its unanimous opinion in *Mississippi v. Tennessee*, holding that water in an underground aquifer that flows across state lines is subject to equitable apportionment between the states, in similar fashion to interstate streams and rivers.

Mississippi had sued Tennessee in federal district court under common law theories, arguing that the City of Memphis was taking Mississippi-owned groundwater by pumping in Memphis from the shared Middle Claiborne aquifer. The Court denied leave to Mississippi to amend the Complaint and dismissed it. If Mississippi wants to pursue its claim, its sole remedy is to request leave of the Court to file a new complaint seeking equitable apportionment. (For a full discussion of the decision and the case background see “Apportioning Interstate Groundwater, *Mississippi v. Tennessee, City of Memphis, MLGW*” by Don Blankenau, *The Water Report* #215, January 15, 2022).

The Supreme Court has original jurisdiction over equitable apportionment for interstate waters. In 2005, Mississippi originally had filed a claim in federal district court against Memphis and Memphis Light, Gas, and Power (MLGW) but not the State of Tennessee, rather than bring an equitable apportionment claim in the Supreme Court. Mississippi argued that it owned outright the groundwater being pumped in Memphis and sought an injunction and compensation for the water. That claim was ultimately dismissed on procedural grounds. Interestingly, in dismissing the claim, the Fifth Circuit noted “no analytical difference” between rivers on the surface and water under the ground, rejecting Mississippi’s assertion that water below the ground should be treated differently than the rivers. *Hood ex rel. Miss. v. Memphis*, 570 F. 3d 625, 630 (2009).



In the current case, Mississippi filed a motion for leave to file a complaint in the Supreme Court in 2014, naming Tennessee as a party in addition to Memphis and MLGW. Mississippi relied on its claim of absolute ownership of groundwater as a matter of right as a state when it first entered into the Union in 1817, even after the water has left Mississippi borders, and sought \$615,000 in damages and injunctive relief, specifically disclaiming reliance on the Doctrine of Equitable Apportionment.

The Middle Claiborne Aquifer underlies eight states (see Figure 6). The City of Memphis has pumped the Middle Claiborne for over 130 years to provide residents and businesses with water, and currently pumps an estimated 120 million gallons a day from the aquifer, all from wells located in Tennessee. The cone of depression created by this pumping moves groundwater from Mississippi to Tennessee at a slightly greater rate than in pre-development days, but the depth to water in Northwest Mississippi has not lowered more than a few inches, and the water use does not prevent or limit access to groundwater in Mississippi. Some aquifer water naturally flows from Mississippi to Tennessee. There are no interstate compacts or decree apportionments between Mississippi and Tennessee of surface water or of groundwater.

Groundwater	<p>Equitable apportionment is expensive and time-consuming. It is fact-intensive, requires multiple parties, and is driven by hydrological models and expert testimony given over a period of years before an appointed Special Master — all funded by the involved parties. The Court previously has applied the Doctrine of Equitable Apportionment to interstate rivers and streams, interstate river basins — all surface waters — and even to cases where groundwater pumping is affecting the flow of interstate surface water or for the benefit of anadromous fish migrating through several states. However, the Court has not until now addressed whether equitable apportionment applies to interstate aquifers. The burden to establish apportionment is heavy: the state seeking apportionment must establish by clear and convincing evidence that the use objected to is causing real or substantial injury or damage to the State’s substantial interests, and must persuade the Court that the nature and magnitude of the claimed injuries are sufficient to justify the impacts from the reductions the injured State seeks.</p>
Interstate Aquifers	<p>During oral argument, the justices expressed concern about applying the Doctrine of Equitable Apportionment doctrine to groundwater, fearing many original jurisdiction cases about interstate aquifers would result. Interstate water disputes are heard directly by the Supreme Court under its “original jurisdiction.” (Previously in this oral argument, Chief Justice Roberts asked, if wild burros crossed from Mississippi to Tennessee, could Tennessee say “they’re on our territory, they’re under our physical control, we can exercise dominion over them, period.” Tr. at 19. Justice Breyer posed the same kind of question: “Suppose somebody came by in an airplane [in San Francisco] and took some of the beautiful fog and flew it to [other states]...I mean, do you understand how I am totally at sea? It’s the water that runs around. And whose water is it? I don’t know.” Tr. at 23. The justices had used these examples — wild burros, wild horses, fog — in oral argument in the <i>Maui</i> case as well).</p>
Burden of Proof	<p>Justice Gorsuch: Mr. Frederick [representing Tennessee], our Doctrine of Equitable Apportionment arises in the area of moving water, of rivers, and you’re asking to extend it to groundwater, and you’ve made a very strong argument for why that might be sound.</p>
Court’s Concerns	<p>I -- I’m wondering what the limiting principle is, however, and what we’re buying here. Is every aquifer in -- in the country that might have some interstate effect now going to be part of this Court’s original jurisdiction? Is -- is Justice Breyer’s fog now part of the Court’s original jurisdiction? Is the Chief Justice’s herd of wild burros, who may or may not be a nuisance, part of this Court’s original jurisdiction now?</p>
Expansion of Original Jurisdiction	<p>Mr. Frederick: Well, what the Court has held is that the Equitable Apportionment Doctrine applies to natural resources, principally water and, in the one case of the fish, to the public trust doctrine. ...</p> <p>Justice Gorsuch: But so far, it has been about moving water and the fish. You’re right. I forgot about the fish. Okay. But that’s part of the moving water, the salmon in the river. And this is an extension. And I’m -- I’m -- just analytically, what are the outer bounds of it? You can sell me on how it’s not a big deal. Fine, I got it. But what are the outer bounds of this principle? Where does it end?</p> <p>...</p> <p>[So] the burros -- I’m not aware of any in Mississippi, but there might be some, wild -- all that’s part of the Court’s original jurisdiction?</p> <p><i>Mississippi v. Tennessee</i>, Tr. pp.45-47, available at: www.supremecourt.gov/oral_arguments/argument_transcripts/2021/143-orig_c1ne.pdf</p>
Shared Resources	<p>But concerns about states having an equal right to reasonable use of shared water resources through a fair allocation clearly won the day. In the unanimous opinion authored by Chief Justice Roberts, the Court rejected Mississippi’s ownership argument and held that the Doctrine of Equitable Apportionment applied to the Middle Claiborne aquifer based on three criteria: (1) “The Middle Claiborne’s ‘multistate character’ seems beyond dispute”, establishing it as a transboundary water; (2) it “contains water that flows naturally between the States”, noting that while, as Mississippi argued, the flow is “extremely slow”, the transboundary flow of one or two inches a day was still over 35 million gallons a day and 10 billion gallons a year, and therefore “does not place the aquifer beyond equitable apportionment”; and (3) pumping in Tennessee has affected Mississippi groundwater storage and “[s]uch interstate effects are the hallmark of equitable apportionment cases” before the Court. 595 U.S. ____ (2021), <i>Slip Op.</i> at 8-9.</p>
Aquifer Criteria	<p>The Chief Justice concluded that “we hold that the waters of the Middle Claiborne Aquifer are subject to the judicial remedy of equitable apportionment.” <i>Id.</i> at 9. The Court now has held for the first time that equitable apportionment applies to interstate aquifers. When and how it applies remains to be seen. The Court clearly stated that the showing for an equitable apportionment must be made, which includes establishing real and substantial injury of a serious magnitude to substantial state interests, and persuading the Court that the nature and magnitude of the claimed injuries justify the impacts from the reductions that the state seeks. Such harm is difficult to establish.</p>
Remedy Applies	
Injury Showing	

Groundwater
Ownership Claim Rejected
Compact Negotiations
Pumping Impacts
Texas Allegations
Compact Delivery Requirement

The Court also distinguished this case from *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614 (2013), where there was a interstate compact in dispute. The Chief Justice rejected Mississippi’s contention, relying on *Tarrant*, that the state owned the aquifer water: “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.” 595 U.S. ____ (2021), *Slip Op.* at 10.

We are likely to see more of these kinds of claims given the pressures on water resources. There are 68 regionally extensive aquifers identified in the US, with many stretching across state boundaries.

The holding may encourage states to reach agreement on transboundary groundwater resources through compact, obviating the need for an equitable apportionment. And it bodes well for conjunctive management — with the focus on equitable apportionment for both transboundary surface water and transboundary groundwater, perhaps innovative trade-offs could be negotiated between parties dealing with both.

Texas v. New Mexico and Colorado

GROUNDWATER PUMPING IS DIVERTING REQUIRED WATER DELIVERIES FROM THE RIO GRANDE
THE CRUX OF THE CLAIM BY TEXAS

In 2013, attorneys representing Texas filed a lawsuit in the Supreme Court against New Mexico and Colorado, alleging that New Mexico violated the Rio Grande Compact (Compact) and took more than its fair share of water in the river. Unlike *Mississippi v. Tennessee*, the case involves an interstate compact and the complaint was filed in the Supreme Court under its original jurisdiction. But like the *Mississippi* case, the relationship between groundwater and surface water is critical to the claims. [See: Bond, *TWR*#130; Stein, *TWR* #151; and Deitchman & Johnson, *TWR* #182.]

Texas alleges that New Mexico farmers are pumping groundwater from wells hydrologically connected to the Rio Grande south of Elephant Butte, and that the State of New Mexico is complicit in the activity. Colorado is a named defendant only because it is a signatory to the Compact. In the complaint, Texas states that the pumping reduces the apportionment of water it is entitled to by tens of thousands of acre-feet each year. Texas asks the Supreme Court to order New Mexico to pay about \$1 billion dollars for water owed over decades for water it did not receive. If New Mexico loses, that could curtail groundwater pumping in the state and jeopardize certain New Mexican water rights.

The Rio Grande originates in Colorado, flows south into New Mexico, and flows into Texas near El Paso. The 82-year old Rio Grande Compact, entered into by the states and ratified by Congress in 1939, apportions the water of the Rio Grande Basin among the states of Colorado, New Mexico, and Texas. Among other things, the Compact provides that Colorado must deliver a specific quantity of water to the New Mexico state line, and that New Mexico must then deliver a specific quantity of water to Elephant

Butte Reservoir, a federal Bureau of Reclamation project built as part of the Rio Grande Project that distributes water to New Mexico and Texas. The water stored at Elephant Butte is used for irrigation districts in New Mexico and Texas, the allocation for Texas, and to provide Mexico its share of Rio Grande water. Elephant Butte, though located in New Mexico over 100 miles from the Texas state line, was the chosen delivery point to support Downstream Contracts simultaneously entered into with the Compact, promising Texas a certain amount of water from the reservoir annually. Elephant Butte was (and still is) the only project reservoir storage in the area (see Figure 7).



Figure 7

Elephant Butte Reservoir

Groundwater**Irrigation
Agreement**

This isn't the first fight New Mexico and Texas had over Rio Grande water. As a result of a deal reached between two irrigation districts and the federal government during drought in the early 2000s, Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 agreed to share water throughout the drought. In 2008, they entered into an operating agreement with the Bureau of Reclamation. The states, however, were not parties to the agreement. The 2008 operating agreement was the subject of a 2011 federal district court lawsuit that New Mexico brought against Texas, alleging that the agreement gave too much water to Texas and shorted New Mexico.

Two years later, Texas filed this lawsuit in the Supreme Court, which agreed to take it up in 2014, and granted New Mexico the opportunity to file a motion to dismiss the case.

US Intervention

In 2014, the United States moved to intervene in the lawsuit. The US sided with Texas, claiming that New Mexico's groundwater activity depleted water, both threatening the United States' ability to fulfill the treaty obligation to Mexico and harming the agency's ability to deliver water to the irrigation districts. The then Special Master finalized his first report in 2016, recommending that the court reject New Mexico's motion for dismissal, allow the federal government to join the lawsuit, and reject irrigation districts joining as members to the suit.

In March 2018, the Supreme Court issued a unanimous opinion limited to the United States motion to join the lawsuit, granting the request. The Court's opinion, written by Justice Gorsuch — which began "Will Rogers reportedly called the Rio Grande 'the only river I ever saw that needed irrigation'" — was limited to the question of intervention by the Bureau of Reclamation. All other exceptions to the special master's report were summarily overruled.

**Water
Allocation
Issues**

After the decision, New Mexico filed counterclaims in 2018 against Texas and the Bureau of Reclamation, alleging that the federal government failed to allocate water fairly and alleged accounting issues about Texas and Mexico water allocations. New Mexico alleged Texas' groundwater pumping allowed Texas to take surface water greater than its share and thereby violated the Compact. New Mexico also said Texas' alleged activity requires greater releases from the Rio Grande to offset their groundwater use, causing indirect harm and requesting damages. *See:* <https://ecf.ca8.uscourts.gov/files/smDocuments/State%20of%20New%20Mexico's%20Counterclaims.pdf>.

Trial was split into two portions, one virtual in October, 2021, and one in-person intended to begin March 14, 2022. Testimony was taken at the end of 2021. The spring trial has been postponed to the fall of 2022 to accommodate confidential settlement talks among the parties. On March 28, 2022, the status conference scheduled that day was also postponed, to May 3, 2022.

Conclusion

The three decisions illustrate the interest by plaintiffs to pursue issues of groundwater and surface water interaction, and the Supreme Court has shown it will consider them, applying existing law not reflective of current science to new claims. To be sure, we will see more of these kinds of claims given the struggle to meet existing and future water demands. The resolutions reached may spur innovation that moves the needle on the complex water quality and supply issues we face.

**Water
Interaction:
Law v. Science?****FOR ADDITIONAL INFORMATION:**

KATHY ROBB, Robb Water Partners LLC, 917/ 428-3742 or krobb@Robbwaterpartners.com

Kathy Robb is the founder of Robb Water Partners, LLC, a consultancy focusing on water law and policy, and a founding director of BlueCommons, Inc., a community Blue Bank. A nationally-recognized lawyer in water law and policy, she worked for over 35 years in private practice on water-driven litigation, and transactions and sustainability, representing water districts, investors, developers, lenders, energy companies, industrial and paper companies, and chemical companies across the U.S. in state, federal and the U.S. Supreme courts. Her work as a partner in a large law firm, where she co-headed the environmental practice, included contaminated river and groundwater sites, regulatory policy issues, and endangered species. From January, 2020 to May, 2021, she served as the CEO of Blue Access LLC, a sustainable finance company focused on water. She has co-founded four environmental-related non-profit organizations, and is currently the chair of the Environmental Law Institute's Leadership Council in Washington, DC, after serving on its board; chair of the National Water Law Forum; and Vice-Chair of the Waterfront Alliance in New York City. She was elected to the American College of Environmental Lawyers in 2016, and named as a "Sustainable 100" by New York's *City and State* in 2017.

MUNICIPAL WATER LAW IN MONTANA

by Peter G. Scott, Scott Law (Bozeman, MT)

Municipal Water Rights

Statutory Authority

Urban/Rural Divide

Prior Appropriation

Water Supply

Municipal Purposes

Nonuse Issue

Nonabandonment Presumption

DNRC Interpretation

Guidance

Municipal Rights

Introduction

Unlike many western states, Montana has not yet adopted comprehensive statutory authority governing municipal uses of water. For the most part, municipal water use in Montana remains subject to more general legal authorities common to all appropriation rights. This state of affairs is starting to change in light of recent state Supreme Court decisions that apply certain provisions of the Montana Water Use Act (MWUA) consistent with the growing communities doctrine. While judicial recognition of that doctrine has been helpful in providing municipal users with some direction, it does not meet the growing need for comprehensive legislative policies governing the acquisition and use of water for municipal purposes (discussed below).

The need for comprehensive municipal water law is being driven by rapid and unrelenting population growth in many areas of the state. Like the flag in a tug-of-war, tensions in affected areas often hover over municipal boundaries as the traditional divide between urban and rural interests. The seemingly simple yet endlessly divisive question underlying these tensions is which side of that line should development occur. Legislation adopting policies designed to incentivize higher density development will help preserve resources including, water and land.

In many affected areas water availability plays a significant role in tensions between urban and rural development. This article first looks at past and present authorities and then some of the recent legal developments associated with municipal water use. It then discusses some of the policy decisions facing Montana.

Background

Montana's status as a prior appropriation state was established early by statute and a Montana Supreme Court (Supreme Court) holding that the suggestion of riparian rights can have no force against one who "actually diverted and appropriated water for beneficial uses under the statutes of the territory recognizing the right of appropriation." *Haggin v. Saile*, 23 Mont. 375 (1899); *see also Thorp v. Woolman*, 1 Mont. 168 (1870). The right of cities and towns to procure water rights by purchase, appropriation, location, condemnation or otherwise "[f]or the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes," was also codified early in state history. Laws 1897, p. 203; *see City of Helena v. Rogan*, 26 Mont. 452 (1902).

Based on limited authority, it is fair to assert that the right to use water for municipal purposes has historically been governed by principles common to all appropriation rights. For example, in 1992 the Supreme Court affirmed a lower court ruling that the City of Deer Lodge failed to overcome a presumption of abandonment created by evidence of extended nonuse. *Matter of Clark Fork River Drainage Area*, 254 Mont. 11 (1992). The Court cited the common law rule "when the appropriator, or his successor in interest, abandons or ceases to use the water for such purpose, the right ceases." *Id.*, *citing Power v. Switzer*, 21 Mont. 523, 529 (1898).

In 1999, Senate Bill 235 was introduced to amend the MWUA by including a presumption of nonabandonment for municipal water rights. 1999 Mont. Laws 689-90; Montana Code Annotated (MCA) § 85-2-227(4). The presumption of nonabandonment requires a showing that the appropriator "has used part of the water right or municipal water supply" and satisfies one or more conditions to demonstrate planned future use of water under the subject right(s).

Initially, nothing much changed, with municipal rights continuing to be treated the same as other rights under the MWUA. In 2008, the Supreme Court made reference to the abandonment statute in the context of defining who can hold municipal rights and commented that otherwise questions about municipal use were left to the interpretation of Montana's Department of Natural Resources and Conservation (DNRC). *Lohmeier v. State, Dep't of Nat. Res. & Conservation*, 346 Mont. 23 (2008).

In 2014, DNRC published a *Guidance for Municipal Purposes & Water Rights (Guidance)*, which explained that municipal water rights established prior to enactment of the MWUA are limited to "the maximum diverted flow rate, diverted volume, and consumed volume perfected through beneficial use." The *Guidance* lists various "sub-beneficial uses" which fall under the umbrella of municipal use, including domestic, non-agricultural irrigation, firefighting, industrial, etc., each subject to fixed measure of flow and volume. In a section entitled "Issues Unique to Municipalities" DNRC recognized that municipal water users do not maintain ownership of the Place of Use (POU). Instead, DNRC said a properly adopted growth policy under MCA 76-1-601 may be considered for the purpose of satisfying the requirement to show a possessory interest in the POU.

Municipal Water Rights

Reservations (Future Use)

Ten-Year Review

Water Reservations

Provision was made in the MWUA for government entities to reserve water for existing or future beneficial uses or to maintain minimum flow levels or quality of water. § 85-2-316(1), MCA. The majority of reservations are associated with three final orders issued by DNRC. The Yellowstone Final order was issued December 15, 1978. The Upper Missouri Final Order was issued July 1, 1992. The Lower Missouri Final Order was issued December 30, 1994. Reserved uses associated with these final orders include instream fisheries flow, municipal use, irrigation, and storage.

In 2015, the legislature enacted Senate Bill 330 requiring a ten-year review of reservations to assess on-going need for subject reservations. DNRC adopted implementing administrative rules. *See generally*, Administrative Rules of Montana (ARM) Chap. 36.16. On February 26, 2018, DNRC issued its first “Ten Year Review” which included the following tabulation of active municipal reservations.

Municipal Reservations: Summary of Use					
Yellowstone Reservations					
Reservation #	Municipality	Volume Granted	Volume In Use	Volume Remaining	% in Use
847600	Big Timber	365 AF/YR	0	365 AF/YR	0
964600	Billings	53,550 AF/YR	0	53,550 AF/YR	0
995300	Broadus	605 AF/YR	45 AF/YR	560 AF/YR	7.4
993700	Columbus	883 AF/YR	334 AF/YR	549 AF/YR	37.8
993800	Glendive	3281 AF/YR	0	3281 AF/YR	0
993900	Laurel	7,151 AF/YR	244 AF/YR	6,907 AF/YR	3.4
994000	Livingston	4,510 AF/YR	0	4,510 AF/YR	0
995400	Miles City	2,889 AF/YR	0	2,889 AF/YR	0
Lower Missouri Reservations					
Reservation #	Municipality	Volume Granted	Volume In Use	Volume Remaining	% in Use
8449200	Circle	78 AF/YR	0	78 AF/YR	0
7764600	Culbertson	365 AF/YR	365 AF/YR	0	100
8448500	Ekalaka	20 AF/YR	0	20 AF/YR	0
7774900	Fort Peck	100 AF/YR	0	100 AF/YR	0
8448600	Havre	475 AF/YR	0	475 AF/YR	0
8448300	Malta	137 AF/YR	0	137 AF/YR	0
8449100	Plentywood	235 AF/YR	0	235 AF/YR	0
8448800	Poplar	448 AF/YR	0	448 AF/YR	0
7764700	Scobey	168 AF/YR	0	168 AF/YR	0
8448400	Wibaux	75 AF/YR	0	75 AF/YR	0
8448200	Wolf Point	504 AF/YR	0	504 AF/YR	0
Upper Missouri Reservations					
Reservation #	Municipality	Volume Granted	Volume In Use	Volume Remaining	% in Use
7011900	Belgrade	645 AF/YR	565 AF/YR	80 AF/YR	88
7011800	Bozeman	609 AF/YR	0	609 AF/YR	0
7258300	Chester	340 AF/YR	0	340 AF/YR	0
7257800	Cut Bank	400 AF/YR	0	400 AF/YR	0
7189500	East Helena	258 AF/YR	0	258 AF/YR	0
7215400	Fairfield	325 AF/YR	0	325 AF/YR	0
7188900	Fort Benton	124 AF/YR	0	124 AF/YR	0
7189000	Great Falls	6,489 AF/YR	6,418 AF/YR	71 AF/YR	99
7258100	Helena	7,071 AF/YR	19.73 AF/YR	7,051.27 AF/YR	0.3
7258400	Lewistown	1,247 AF/YR	0	1,247 AF/YR	0
7189100	Shelby	161 AF/YR	0	161 AF/YR	0
7011700	Three Forks	81 AF/YR	0	81 AF/YR	0
7011500	West Yellowstone	1922 AF/YR	0	1,922	0
7199800	Winifred	161 AF/YR	0	161 AF/YR	0

See DNRC Summary Report, SB330 Water Reservation Ten Year Review (June 2016)

http://dnrc.mt.gov/divisions/water/water-rights/docs/water-reservations/dnrc-summary-report2_recommendations_webversion.pdf

Municipal Water Rights Anticipated Use?	<p>In the <i>Ten Year Review</i>, DNRC noted generally that almost all of the anticipated use for the municipal reservations has not been achieved. Until recently, most reservation holders have been able to meet their municipal needs with existing rights or the acquisition of provisional permits and groundwater rights.</p> <p>DNRC also notes differences in how the tabulated reservations are conditioned under each of the three final orders. For example, there are differences in the respective perfection deadlines. DNRC recommended all municipal reservations be subject to a condition found only in the Yellowstone Final Order, which stated:</p> <p style="padding-left: 40px;">The reservation is intended to run concurrently with and overlap, rather than run consecutively with, any other right to the use of water claimed by the reservant but not perfected to the effective date of the adoption of the reservation.</p> <p><i>Id.</i> at 5.</p>
New Rights Deduction	<p>Based on that language DNRC recommended that any appropriations of water granted after the date of reservation be deducted from reserved flow and volume granted to each municipality. DNRC also recommended reevaluation of the reservations granted under each final order upon entry of a Final Decree for each affected basin in the ongoing statewide adjudication. Other recommendations are made applicable to each final order and specific reservations.</p>
Future Demand	<p>While it is true that only one municipal reservation has been fully utilized and only a few have been partially used, it is apparent from participation and responses that cities and towns holding reservations believe they are needed to meet future demand.</p>
Beneficial Use	<p style="text-align: center;">Judicial Recognition of the Growing Communities Doctrine</p> <p>In 2016, the Supreme Court considered whether actual beneficial use is required to perfect water rights appropriated for the purpose of sale. The <i>Curry</i> case dealt with water rights held by a canal company for use in an irrigation project developed pursuant to the Carey Land Act (CLA), 43 U.S.C.A. § 641. Though not directly related to municipal water rights, the decision is instructive on several related points, including beneficial use, appurtenance, and place of use (POU).</p>
Sale of Water	<p>In <i>Curry</i> the Supreme Court first established that the sale of water is recognized as a beneficial use in the State constitution. It then quoted an earlier decision for the following proposition:</p> <p style="padding-left: 40px;">[A] corporation [that] does not own, control, or possess any land is organized for the purpose of selling or renting water to settlers to irrigate arid lands; that it proceeds under the statute to make its appropriation and fully complies with all the statutory requirements, completes its distributing system, and is ready and offers to supply water to settlers upon demand. Now, if the corporation can ever make an appropriation, it has done so, for it has performed every act which it can perform. It cannot use the water itself, for it has no land or other means of use. Any further acts must be performed by its customers who are to be the users.</p>
Municipal Appropriation	<p><i>Curry v. Pondera Cty. Canal & Reservoir Co.</i>, 383 Mont. 93, 105 (2016) quoting <i>Bailey v. Tintinger</i>, 45 Mont. 154, 175-76 (1912).</p>
Perfection	<p>Based on this reasoning, the Supreme Court held water rights developed pursuant to the CLA by a public service corporation are defined by the sale of shares within a reasonable time following project development. <i>Curry</i>, 383 Mont. at 106. Questions not answered in <i>Curry</i> include whether municipal appropriators are considered public service corporations for the purpose of appropriating municipal water rights. Also, whether such rights can be perfected before actual beneficial use by intended customers, and, if so, under what circumstances?</p>
Appurtenance & Ownership	<p>Regarding appurtenance and place of use, the Supreme Court explained that movement of water within the project boundaries is specifically contemplated, and also that water right ownership and land ownership remain distinct. Thus, in the context of a CLA project, the Court held the concept of appurtenance does not define the water right's overall place of use. <i>Curry</i>, 383 Mont. at 109. The Court also held that a service area is the proper method of satisfying the POU requirement for CLA projects. <i>Id.</i> at 111. Again, <i>Curry</i> does not establish similar principles for municipal uses.</p>
Speculation Exception	<p>In dissent, Justice McKinnon explained the holding in <i>Bailey</i> is better understood as an expansion of the growing communities doctrine, which is widely understood as a limited exception to the common law rule against water speculation. Under that common law rule, appropriation rights are defined and measured by actual beneficial use. As explained by Justice McKinnon, the growing communities doctrine allows municipal users to hold unperfected water rights to satisfy reasonably foreseeable future demand. “The growing communities doctrine is an infrequently invoked exception to the common law requirement of actual beneficial use for perfection of a water right, which permits appropriators — typically only municipalities — to perfect a water right based on anticipated future or contemplated beneficial use.”</p>
Growing Communities Doctrine	<p><i>Curry</i>, 383 Montana at 122.</p>

Municipal Water Rights	<p>Justice McKinnon’s dissenting opinion in <i>Curry</i> appears to be the first time that the growing communities (or cities) doctrine was expressly recognized in Montana law. Subsequent case law confirmed applicability of the doctrine in the context of municipal use. In <i>City of Helena</i>, the Court announced that “Section 85-2-227(4), MCA, comports with the purpose of the growing communities doctrine by creating a presumption of nonabandonment when a city is planning for its future water needs and requires flexibility in such planning efforts.” <i>City of Helena v. Cmty. of Rimini</i>, 388 Mont. 1, 14, 397 P.3d 1, 11 (2017).</p>
Nonabandonment Presumption	<p>Significantly, the Court applied the growing communities doctrine to actions taken by the City of Helena many years before MCA § 85-2-227(4) was codified in connection with historic rights, holding that a diversionary structure built in 1921 and a pipeline expansion in 1948 evidenced planned future use of water in support of presumed nonabandonment.</p>
Foreseeable Needs	<p>Soon after <i>City of Helena</i>, the Supreme Court reviewed a water court ruling that tested the extent to which cities may rely on the doctrine to hold rights for future use. The case involved an ordered reduction in the volume of a municipal right held by the City of Fort Peck. <i>United States Dep’t of Army Corps of Engineers (USACOE)</i>, 396 Mont. 433, 435, 445 P.3d 828, 830 (2019). The water court explained, and the Supreme Court agreed, “the growing cities doctrine embodied in § 85-2-227(4), MCA was intended to allow towns like Fort Peck to protect existing uses plus a reasonable amount of water for foreseeable needs.” <i>USACOE</i>, 396 Mont. at 441. Objectors to Fort Peck’s claim asserted that it far exceeded the volume of water reasonably needed for that purpose. The courts agreed. In calculating the reasonably foreseeable amount of water to meet future needs, the courts applied evidence of Fort Peck’s projected growth over a 40-year period and multiplied it by average per capita consumption rates. Consequently, Fort Peck’s annual municipal right was reduced from 1,500 to 171 acre-feet for existing and reasonable future uses.</p>
40-Year Projection	
Growing Communities & Legislation	<p style="text-align: center;">Future Issues for Consideration</p> <p>Recognition of the growing communities doctrine has been helpful for Montana cities in planning for growth. However, many issues specific to municipal water use remain to be addressed. Given the pace of population growth — prompting an immediate need to address planning for future demand — it is not practical to leave development of municipal water law solely to the courts.</p>
Purpose of Use	<p>The following are examples of issues that merit legislative attention. Undoubtedly, the reader can think of others. For a more comprehensive regional discussion of municipal water law issues see <i>Water Law Handbook</i>, Given Pursley LLP (March 1, 2022).</p> <p>Purpose of Use</p> <p>The appropriation of water for municipal purposes is a beneficial use. The sale and rental of water is constitutionally recognized as a beneficial use. <i>Mont. Const. art. IX, § 3</i>. The issue of a shareholder’s right to sell or lease project water has been an issue in a number of settings and is not easily resolved under current law. For example, the City of Conrad is a shareholder of the canal company whose rights were at issue in <i>Curry</i>. Presumably, Conrad sells that water for municipal use of its own customers. <i>Curry</i>, 383 Mont. at 99.</p>
State Storage Projects	<p>The DNRC owns and operates a number of storage projects that provide water to shareholders for various purposes. In 2016, the State Water Projects Bureau Chief authored a letter to the President of the Tongue River Water Users Association, asserting that shareholders are contractually prohibited from marketing their water to other users. But the letter goes on to say that shareholders <i>may sell</i> their shares to another party within the service area pursuant to those same underlying agreements — presuming the party purchasing the shares uses them in a manner consistent with the purpose of the project, which in the case of the Tongue River Project is irrigation. The letter specifically addresses land values, population growth, and municipal needs as being among the reasons users are willing to pay more for water that is being used for purposes other than irrigation. It is unclear how that reasoning applies to other state-owned projects that include municipal uses.</p>
“Sub-Beneficial” Uses	<p>In the <i>Guidance</i> document referenced above, DNRC refers to municipal purpose as an umbrella right for other “sub-beneficial” uses, which according to DNRC must each be established and quantified on its own merits. So, what happens when a City rezones an area to allow commercial development in a formerly residential area? DNRC’s <i>Guidance</i> suggests that the City must change its water rights to account for a new “sub-beneficial use.” Many public and private projects sell shares, and that begs the question whether “sale” is also an umbrella purpose. Under what conditions may shareholders change or sell their shares to others in the service area who wish to use water for a different “sub-beneficial use?” This question is of particular importance in areas of the state where irrigation service areas are being annexed by growing cities.</p>
“Sale” Purpose	

<div data-bbox="115 180 345 268">Municipal Water Rights</div> <div data-bbox="115 300 345 369">Broadly Defined Uses</div> <div data-bbox="139 474 321 579">Change Requirement & Flexibility</div> <div data-bbox="139 684 321 753">Service Area Limitation</div> <div data-bbox="139 932 321 1001">Automatic Amendment</div> <div data-bbox="139 1106 321 1140">Volume Limit</div> <div data-bbox="107 1276 354 1310">Planning Horizon</div> <div data-bbox="115 1415 345 1449">Conserved Water</div> <div data-bbox="139 1593 321 1663">Consumption Extent</div> <div data-bbox="115 1768 345 1801">Expansion Issue</div>	<p>States with comprehensive municipal water laws generally define municipal use broadly to include any water use incidental to the functioning of a city. However, many cities and towns also own water rights issued for other purposes, such as irrigation. Thus, questions arise about future use by the municipality and exactly what the city can do with these other water rights. What purpose of use can a city use the water right for? Can the City sell water under an irrigation right to a new private golf course within its service area? Or can a city simply use the water right for its needs and, if so, with what limitations (volume, season of use, etc.)?</p> <p>It appears under present Montana law that DNRC would likely require a change of use application to change the right to a municipal use. In contrast, Washington State's municipal water law provides if any portion of a right owned by a "municipal water supplier" is used for "municipal water supply purposes" then "any other beneficial use of water under the right generally associated with the use of water within a municipality is also for municipal water supply purposes." RCW 90.03.015(4). The key for incentivizing urban development is the adoption of flexible policies recognizing differences in municipal rights with sideboards to protect other existing uses.</p> <p>Place of Use (Expanding Service Area)</p> <p>The holding in <i>Curry</i> recognized the right of a public service corporation, that sells water, to move that water within its defined service area. Unsurprisingly, municipalities in Montana have latched on to that concept. Place of use is a water right element that must be specifically identified. Thus, under present law every time a city annexes property to accommodate growth it is technically required to file one or more applications to change the place of use. For obvious reasons many cities have elected not to do so. Consider that many larger cities hold a portfolio of rights, often from multiple sources, which are co-mingled and delivered to different pressure zones within an expanding service area. Thus, every annexation would trigger multiple change applications. With applications taking years to accomplish, requiring changes every time property is annexed is impractical, if not impossible.</p> <p>Most states with municipal water laws, automatically amend the place of use to reflect municipal growth by pegging development to planning. Idaho's law for example, establishes the place of use to a flexible service area based in expanding city limits. IC § 42-202B(9). Idaho, like Montana, allows cities to provide extraterritorial water service. In such cases, the place of use also includes distribution within the city's larger planning area that is physically connected to the city's system.</p> <p>Volume Limits (Growing Into Municipal Rights)</p> <p>Under the growing communities doctrine, municipal rights are often quantified by flow rate — without a volume limit — to allow a city to grow into the right. Such rights may only be used at first to meet peak demand but may develop to serve full time base load as the city grows.</p> <p>Related subjects include expansion of system capacity and increased consumption of water rights over time. Hypothetically, if a city determines that a 10-inch water main will meet its needs over a determined planning horizon, the question becomes whether the capacity of that water main controls the measure of the city's right(s); or, may the city later install additional capacity as needed to fully utilize its rights when demand dictates. <i>City of Helena</i> answers the question in part, by allowing capital improvements made over the course of years to establish plans for using additional water under the city's existing municipal right.</p> <p>Most of Montana's cities employ conservation measures. Those cities universally use the conserved water to serve new demand. The longstanding rule in Montana is that "public interest requires that water be conserved and not allowed to waste to place the arid lands of this state to productive use." <i>See e.g., Farmers Union Oil Co. v. Anderson</i>, 129 Mont. 580, 583, 291 P.2d 604, 606 (1955). The rule is generally understood to require that appropriators do not use water in excess so that others may use water too. However, the extent to which an appropriator may use conserved water is not clear, certainly in the context of municipal water use. Theoretically, municipal conservation of water could be used to increase the consumptive use of water to exhaustion, meaning no water returns to the source. Though desirable for cities, this appears to be inconsistent with present law.</p> <p>California adopted the Urban Water Management Plan Act, which establishes a goal of water conservation and efficient use. <i>Sonoma Cnty. Water Coal. v. Sonoma Cnty. Water Agency</i>, 116 Cal. Rptr. 3d 616, 622 (Cal. Ct. App. 2010). The California act appears to be forward looking and does not necessarily address the question of conservation that makes water under existing water rights available to serve new customers. Idaho adopted a Water Conservation Act in 2003, which allows an appropriator to use "additional" water in her control as long as the original purpose is not expanded. But expansion is the question and the law does not specifically address municipal uses. Data show that effective conservation substantially reduces per capita water use, which in turn reduces the amount of additional water needed to meet reasonably foreseeable future needs. It makes sense to adopt policies that incentivize conservation of municipal water as one way of meeting new demand.</p>
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Municipal Water Rights

Change/Transfer (Irrigation Rights)

Permit Exempt Wells

Development Barriers

Rural Development

Hydrological Connections

Acquisition of Water Rights

In some areas of Montana, it is still possible to appropriate water. Typically, that is not the case in areas with rapid population growth, where options include purchasing and changing existing water rights to municipal use or for mitigating a new use, most often a groundwater permit.

Changing appropriation rights can be difficult anywhere. In Montana it can be excruciating. So much so that the challenges sometimes appear to be by design. Most existing water rights are for irrigation. Unquestionably there is significant statewide tension between urban and rural interests. Fair or not, there is a widely held perception that the rural-dominated legislature is not interested in making it easier for cities to acquire irrigation rights to meet future demand. The key going forward is to recognize, as other states have, that incentivizing urban development reduces pressures on rural resources.

Municipalities are obligated to “procure appropriate water rights” and other property necessary to supply water for its citizens. § 7-13-4405, MCA. Public water systems are heavily regulated and very expensive to build, maintain, and operate. Anything that increases the cost — such as unavailability of water and interminable change proceedings — raises the cost of new homes and the tax burden on all city residents. In contrast, rural development continues to rely on permit exempt wells, which can be constructed at relatively low cost and does not impose an ongoing tax burden to repay bonds and the like. (Permit exempt wells provide the opportunity for a new groundwater appropriation that is exempt from the permit process normally required by the state Department of Natural Resources and Conservation to obtain a new water right).

A problem with these policies is the extent to which they create a barrier to urban development and incentivize rural development, with the resulting pressure that imposes on agriculture in fast growing areas of the state. In Washington, similar tensions arose over rural development reliant on permit exempt wells. See *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016). In the *Hirst* case, Whatcom County persisted in issuing plats and building permits in rural areas of the County knowing that enforceable senior surface rights were being adversely affected. Much has been written about the holding in *Hirst*. See Dickison & Haensly, *TWR* #155; Pitre, *TWR* #169. For present purposes it is enough to recognize the profound effect the case had on rural development statewide.

Montana has experienced tension over the use of permit exempt wells. It is foreseeable that similar facts could give rise to disputes in Montana, which like Washington, prohibits new groundwater withdrawals that adversely affect hydrologically connected surface sources. See e.g., *Montana Trout Unlimited v. Montana Dep’t of Nat. Res. & Conservation*, 331 Mont. 483, 133 P.3d 224 (2006). The legislature should take a hard look at water related policies that incentivize rural development.



Conclusion

Montana is experiencing unprecedented population growth. The time has come to revise water law and policies adopted nearly 50 years ago at a time when development pressure was relatively low. Other states that have experienced the kind of growth now occurring in Montana adopted comprehensive municipal water laws to incentivize urban development and conserve resources, including water and open space.

FOR ADDITIONAL INFORMATION:

PETER SCOTT, Scott Law, 406/ 585-3295 or peter@scott-law.com

Peter G. Scott is a water resource, environmental, and land use attorney. He has served as regulatory and litigation counsel for government, private, and corporate entities throughout the Columbia Basin states. After serving in the US Navy, Peter received his Bachelor of Science in Geology *cum laude* from the University of Massachusetts. He spent five years working as a hydrogeologist in Idaho and Montana. He received his JD *with honors* from Lewis and Clark College in Portland, Oregon. Peter clerked for Chief Justice Paul DeMuniz at the Oregon Supreme Court then entered private practice in Washington with the firm of Preston Gates and Ellis. He and his family later moved to Helena, Montana where he became a partner at Gough, Shanahan Johnson and Waterman. In 2015, Peter founded Scott Law in Bozeman, Montana.

WOTUS	 WOTUS UNDER THE CLEAN WATER ACT  SUPREME COURT REVISITS SCOPE OF “WATERS OF THE UNITED STATES”
Wetlands	Editors’ Introduction: On January 24, 2022, the US Supreme Court agreed to review <i>Sackett v. US Environmental Protection Agency</i> (<i>Sackett</i>). The case represents a long-running dispute regarding whether certain wetlands are “waters of the United States” (WOTUS) subject to protection under the federal Clean Water Act (CWA). The following article is a slightly abridged version of a Congressional Research Service “Legal Sidebar” on this subject (author: Kate R. Bowers, Legislative Attorney), which was released on March 11, 2022. It has been lightly edited to better fit our format.
Jurisdiction Dispute	<p style="text-align: center;">Introduction</p> <p>In <i>Sackett</i>, the US Court of Appeals for the Ninth Circuit (Ninth Circuit) upheld the US Environmental Protection Agency’s (EPA’s) assertion of jurisdiction over certain wetlands because the wetlands are WOTUS under a standard described in a prior Supreme Court decision. The precise definition of WOTUS is important because it determines which waters are subject to federal government regulations and protections. The US Army Corps of Engineers (Corps) and EPA — the two agencies tasked with implementing the CWA — use the definition of WOTUS to determine which water bodies are subject to a variety of requirements under the statute, including coverage in CWA permitting programs.</p>
CWA Permitting	<p>The Corps and EPA are also currently undertaking an administrative process to redefine WOTUS through two rulemakings. Depending on its timing and scope, the <i>Sackett</i> ruling could affect how the agencies shape those regulations. This Sidebar: discusses the history of Supreme Court litigation addressing the definition of WOTUS; examines potential implications of the Supreme Court’s ruling in <i>Sackett</i>; and reviews legislative and executive branch efforts to define WOTUS.</p>
Rulemakings	<p style="text-align: center;">Prior Supreme Court Rulings Regarding WOTUS</p> <p>The CWA prohibits discharging certain pollutants into navigable waters, defined as “the waters of the United States, including the territorial seas” without a permit. The statute does not define WOTUS. For decades, Congress, the courts, stakeholders, and the Corps and EPA have debated how to define the term, and how to interpret the scope of waters that are federally regulated.</p>
WOTUS Undefined	<p>The Supreme Court has considered the scope of WOTUS in three cases. In 1985, the Court in <i>United States v. Riverside Bayview Homes, Inc.</i> upheld the Corps’ interpretation that CWA jurisdiction extended to certain wetlands that were adjacent to other jurisdictional waters. In 2001, the Court in <i>Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers</i> (<i>SWANCC</i>) rejected the Corps’ interpretation and held that the use of isolated ponds by migratory birds could not form the basis of CWA jurisdiction over those ponds.</p>
Case Law	<p>In 2006, the Supreme Court decided <i>Rapanos v. United States</i>, a pair of consolidated cases that concerned the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters. The Sixth Circuit had approved of the Corps’ assertion of jurisdiction under the then-current regulatory definition of WOTUS, which included wetlands that were “adjacent” to a body of water that fed into a traditional navigable water. Some had hoped that <i>Rapanos</i> would provide clarity on jurisdictional questions that lingered after <i>SWANCC</i>. Instead, the Court rejected the Corps’ assertion of jurisdiction, but issued a fractured 4-1-4 decision with two different standards and no majority opinion providing a rationale indicating how to determine whether a particular waterbody is a water of the United States.</p>
Rapanos Decision	<p>Writing for a four-Justice plurality, Justice Scalia articulated a bright-line rule holding that WOTUS includes only “relatively permanent, standing or continuously flowing bodies of water,” such as streams, rivers, or lakes; and wetlands that have a “continuous surface connection” to other waters subject to the CWA. In a concurring opinion joined by no other Justice, Justice Kennedy wrote that the Corps should determine on a case-by-case basis whether wetlands have a “significant nexus” to traditionally navigable waters. Justice Kennedy further wrote that a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water. Justice Stevens, joined by three Justices, dissented and would have upheld the Corps and EPA’s assertion of jurisdiction.</p>
Scalia Plurality	<p>Following <i>Rapanos</i>, lower courts have considered which Justice’s opinion should apply. Under a framework referred to as the Marks analysis, when a majority of the Court agrees only on the outcome of a case and not on the basis for that outcome, courts are instructed to apply the holding that “may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” The</p>
“Significant Nexus” Test	
“Narrowest Grounds”	

<div data-bbox="152 180 303 218">WOTUS</div> <div data-bbox="152 260 310 323">Controlling Standard</div> <div data-bbox="164 470 295 533">Wetlands Complex</div> <div data-bbox="164 642 295 705">Litigation History</div> <div data-bbox="115 995 344 1125">Significant Nexus to Navigable Water</div> <div data-bbox="152 1272 310 1335">Sackett's Allegations</div> <div data-bbox="131 1556 328 1583">EPA Response</div> <div data-bbox="131 1692 328 1719">CWA Purpose</div>	<p>Supreme Court has not defined or identified how lower courts should determine the “narrowest grounds” on which a judgment rests, however. Every court of appeals to consider the two standards has held either that Justice Kennedy’s significant nexus standard is controlling, or that jurisdiction may be established under either standard. Some courts have declined to identify which opinion is controlling, either because the parties stipulated that the significant nexus standard applied or because both tests had been met. The Ninth Circuit held in 2007 that Justice Kennedy’s concurrence “is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases,” and therefore provided the controlling standard for cases within its circuit.</p> <p style="text-align: center;"><i>Sackett</i> Litigation History</p> <p>The petitioners, Chantell and Michael Sackett, own a parcel of land in Idaho, near Priest Lake and across the road from a wetlands complex that drains into an unnamed tributary of a creek that in turn feeds into the lake. As detailed in the Ninth Circuit opinion, the Sacketts’ efforts to build on the parcel have been the focus of a long-running dispute with the Corps and EPA. In 2007, after they began backfilling the property with sand and gravel, EPA issued a compliance order directing them to restore the site. In 2008, the Corps issued a jurisdictional determination (JD) concluding that the property contained wetlands subject to regulation under the CWA, after which EPA issued an amended compliance order that extended the compliance deadlines. The Sacketts sued EPA, arguing that the compliance order was arbitrary and capricious because its underlying jurisdictional basis was flawed. (In an earlier decision, the Supreme Court held in 2012 that the compliance order constituted a “final agency action” for purposes of the Administrative Procedure Act and that the Sacketts could challenge the compliance order before EPA brought an enforcement action against them.) The district court granted summary judgment in favor of EPA, ruling that the Sacketts’ property contained jurisdictional wetlands. In March 2020, while the Sacketts’ appeal was pending, EPA withdrew the amended compliance order, but not the JD.</p> <p>The Ninth Circuit affirmed the district court’s grant of summary judgment in EPA’s favor. The court held that, contrary to EPA’s assertion, its withdrawal of the amended compliance order did not moot the dispute because EPA had not disclaimed its authority to regulate the Sacketts’ property. On the merits, the court held that it was bound by its precedent to apply as the controlling opinion Justice Kennedy’s concurrence in <i>Rapanos</i>. Applying Justice Kennedy’s significant nexus test, and looking to the regulations that were in effect when EPA issued the amended compliance order, the court held that the record “plainly supports” EPA’s conclusion that the wetlands on the Sacketts’ property were adjacent to a jurisdictional tributary. The court also upheld EPA’s conclusion that those wetlands, together with the similarly situated wetlands complex across the road, had a significant nexus to Priest Lake, a traditional navigable water. The court thus concluded that EPA reasonably determined that the Sacketts’ property was subject to federal jurisdiction under the CWA and the relevant regulations.</p> <p style="text-align: center;">Supreme Court Review in <i>Sackett v. EPA</i></p> <p>Describing the post-<i>Rapanos</i> landscape as “[f]ifteen years of fruitless confusion, conflict, and litigation,” the Sacketts urged the Supreme Court in their petition to revisit <i>Rapanos</i> and adopt Justice Scalia’s plurality test. The Sacketts’ petition for certiorari did not ask the Court to review the Ninth Circuit’s application of the significant nexus standard to the jurisdictional question in their case, but instead focused on whether that standard should be the controlling rule. The petition asserted that review was appropriate in light of conflicts among the lower courts in applying <i>Rapanos</i>, the Corps and EPA’s failure to implement a workable and legally sound interpretation of that case, and the costs to regulated entities associated with resolving jurisdictional issues. Several groups, including a coalition of 21 states, filed amicus briefs in support of the Sacketts’ petition.</p> <p>EPA argued in its response that review was unnecessary to resolve a purported conflict among the circuits because every circuit court to decide the issue has held at a minimum that the significant nexus standard could be used to establish jurisdiction. According to EPA, the interpretation of adjacency arising out of that standard is consistent with the language and purpose of the CWA. EPA further argued that the Ninth Circuit correctly applied that standard in holding that the Sacketts’ property contained jurisdictional wetlands. EPA also argued that review was premature because the rulemaking process to revise the regulatory definition of WOTUS is still underway; according to the agency, allowing it to complete that process would place the Court in a better position to evaluate the scope of the agencies’ authority under the CWA. Finally, EPA argued that this case did not present an opportunity for the Court to provide “substantial guidance” regarding the scope of WOTUS because of the narrowness of the facts underlying the jurisdictional question, the low likelihood of future enforcement action based on the Sacketts’ earlier conduct, and the fact that any enforcement action based on a future violation of the CWA would be governed by the revised definition of WOTUS that results from the agencies’ rulemaking process.</p> <p>The implications of the Supreme Court’s decision in <i>Sackett</i> depend on the scope of the Court’s ruling. In <i>Rapanos</i>, Chief Justice Roberts issued a short concurring opinion in which he cautioned that, in light</p>
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<div data-bbox="154 178 305 216">WOTUS</div> <div data-bbox="167 258 293 325">Majority Opinion?</div> <div data-bbox="154 361 310 394">Proper Test</div> <div data-bbox="142 432 319 499">Court's Composition</div> <div data-bbox="123 640 339 674">Court's Options</div> <div data-bbox="151 919 310 987">WOTUS Definition?</div> <div data-bbox="154 1234 306 1339">Regulation v. Litigation</div> <div data-bbox="138 1549 321 1617">CWA Amendment?</div> <div data-bbox="142 1795 321 1829">Amicus Brief</div>	<p>of the lack of a controlling majority opinion, “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis.” The Supreme Court could use this case as an opportunity to provide a majority opinion for a definition of WOTUS. While the Sacketts’ petition stated the question presented as whether “<i>Rapanos</i> [should] be revisited to adopt the plurality’s test for wetlands jurisdiction under the Clean Water Act,” the Court’s grant of certiorari specified that review would be limited to “whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act.” While the significance of the Court’s decision to reword the question presented is uncertain, it does not foreclose the de novo consideration of jurisdictional standards that were not articulated in <i>Rapanos</i>.</p> <p>More narrowly, the Court could consider whether one or both of the <i>Rapanos</i> tests provides a meaningful legal standard that can be applied. Changes in the Court’s composition could be relevant to the application or potential reconsideration of <i>Rapanos</i>. While Justice Scalia died in 2016 and Justice Kennedy retired in 2018, the three Justices who joined Justice Scalia’s opinion (Thomas, Alito, and Chief Justice Roberts) remain on the Court. The five Justices who joined the Court since <i>Rapanos</i> was decided (or six, if a nominee to replace Justice Breyer is confirmed before the Court hears <i>Sackett</i>) could provide a majority for a single standard to govern jurisdictional analyses under the CWA.</p> <p>It is also not clear whether the Court will articulate principles that could apply to the definition of WOTUS more broadly, or focus on the narrower question of when wetlands — or “adjacent” wetlands, as on the Sacketts’ property — constitute WOTUS. The latter approach would more closely parallel the question on which the Court granted certiorari, and the Court’s decisions in <i>SWANCC</i> and <i>Rapanos</i>, which considered jurisdiction with respect to specific categories of waters, and would leave unresolved jurisdictional questions as to other categories. Apart from considering questions of CWA jurisdiction, the Court could provide guidance about how lower courts should undertake a Marks analysis when it is not clear which opinion in a fractured ruling provides the narrowest grounds for the majority’s holding.</p> <p>Finally, the Court’s ruling could affect the regulatory effort currently underway to develop a definition of WOTUS. The Obama and Trump Administrations both issued comprehensive regulations to define the term — the Clean Water Rule in 2015, and the Navigable Waters Protection Rule in 2020 — but those regulations are no longer in effect. In June 2021, the Corps and EPA announced that they intended to revise the definition of WOTUS, first by a rule to “[r]estore] the protections in place prior to [the agencies’ 2015 Clean Water Rule],” and then by developing a new regulatory definition. In August 2021, a district court remanded and vacated the 2020 Navigable Waters Protection Rule, leading the agencies to announce that they were interpreting WOTUS “consistent with the pre-2015 regulatory regime until further notice.”</p> <p>December 7, 2021, the Corps and EPA issued a proposed rule that would codify the pre-2015 regulatory framework, consisting of regulations from the 1980s with amendments to reflect the agencies’ interpretation of intervening case law. Prior to the grant of certiorari in <i>Sackett</i>, EPA stated that it intended to propose a new definition of WOTUS later in 2022. The agencies have not indicated whether they plan to alter their rulemaking timeline in light of the pending Supreme Court proceedings. But in another case this Term in which the Court has agreed to review questions in an area of active regulation, EPA officials indicated that they intended to continue moving forward with the regulatory process. If the Court opines on relevant statutory language in <i>Sackett</i> before the Corps and EPA finalize a new definition of WOTUS, the agencies may need to consider the Court’s interpretation in their regulations.</p> <p>The Sacketts’ opening brief was due by April 11, and the deadline for EPA’s brief is June 10. Oral argument has not yet been scheduled, but is expected to take place in the next term, which begins in October 2022.</p> <div data-bbox="792 1507 1117 1537"> <p>Considerations for Congress</p> </div> <p>Congress could consider proposing legislation to amend the CWA to provide a definition of WOTUS or to provide more specific instruction to the Corps and EPA, regulated parties, and the courts as to the interpretation of the statute. Some Members have already introduced a number of bills in the 117th Congress that would codify various definitional text.</p> <p>Congress could also conduct oversight over the Corps and EPA’s rulemaking process to redefine WOTUS. Some Members in the House and Senate have called on the agencies to halt that process while <i>Sackett</i> is pending before the Supreme Court. Others have argued that the agencies should continue to move forward with their regulatory efforts.</p> <p>Members of Congress could consider participating in the litigation by submitting an amici curiae brief expressing their views on these legal issues. Some Members of Congress filed amici curiae briefs in <i>Rapanos</i>, and more recently in the litigation challenging the Clean Water Rule and the Navigable Waters Protection Rule.</p> <div data-bbox="378 1932 1258 1990"> <p>FOR ADDITIONAL INFORMATION: CRS Legal Sidebar at: https://crsreports.congress.gov/product/pdf/LSB/LSB10707</p> </div>
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**WQ RULE REINSTATED US
STAY DURING APPEAL**

On April 6th, the US Supreme Court (Court) in a 5-4 vote reinstated a Trump-era rule that deals with a state's authority to review infrastructure projects for compliance with water-quality standards. *Louisiana, et al. v. American Rivers, et al.*, Case No. 21A539, 596 U. S. ____ (2022). The Court agreed to halt a lower court judge's order, which threw out the rule. By granting the Application for Stay, the rule was reinstated and will remain in effect while the Biden Administration rewrites the rule and the Ninth Circuit appeal continues.

"The district court's October 21, 2021 order, insofar as it vacates the current certification rule, 40 C.F.R. Part 121, is stayed pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such a writ is timely sought." *Id.* at 1. In the order granting the stay, the Court majority did not explain the reasoning behind their decision. Chief Justice John Roberts joined the Court's three liberal justices in dissenting.

The federal law at issue is Section 401 of the Clean Water Act (CWA). Until the Trump-era rule, federal agencies could not issue a license or permit to conduct any activity that could result in any discharge into navigable waters — unless certification was obtained (from the affected state or tribe) that the discharge would comply with the CWA and state law, or certification was waived. This "401 Certification" provided states and tribes with important authority concerning water quality in the permitting process. For additional information on Section 401, see Wortzel & Sensiba, *TWR* #204.

Justice Elena Kagan wrote a blistering dissent, concluding that the Court should deny the request for stay pending appeal by a group of States and industry organizations, who claimed they would otherwise suffer irreparable harm. Kagan first laid out the standard to "stay" a decision. "This Court may stay a decision under review in a court of appeals 'only in extraordinary circumstances' and 'upon the weightiest considerations.'" (citations omitted) *Id.* at 1. Justice Kagan then stated that the "applicants here have not met

our standard because they have failed to substantiate their assertions of irreparable harm. The Court therefore has no warrant to grant emergency relief." *Id.* at 1-2.

After setting forth additional case law in support of her reasoning, Justice Kagan pointed out that an applicant for a stay "must offer concrete proof that irreparable harm is 'likely' to occur." (citation omitted) *Id.* at 2. The dissent further noted that "the request for a stay rests on simple assertions — on conjectures, unsupported by any present-day evidence, about what States will now feel free to do." *Id.* at 3.

Kagan sums up the dissent, alluding to the recent criticism of the use of the "shadow docket" by the Court. "By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations — except made without full briefing and argument." *Id.* at 3.

For info: Stay Order at: www.supremecourt.gov/opinions/21pdf/21a539_6jgm.pdf

**CLIMATE WORLD
IPCC GLOBAL WARMING REPORT**

Human-induced climate change is causing dangerous and widespread disruption in nature and affecting the lives of billions of people around the world, despite efforts to reduce the risks. People and ecosystems least able to cope are being hardest hit, said scientists in the latest Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report, released February 28. "This report is a dire warning about the consequences of inaction," said Hoesung Lee, Chair of the IPCC. "It shows that climate change is a grave and mounting threat to our wellbeing and a healthy planet. Our actions today will shape how people adapt and nature responds to increasing climate risks."

The world faces unavoidable multiple climate hazards over the next two decades with global warming of 1.5°C (2.7°F). Even temporarily exceeding this warming level will result in additional severe impacts, some

of which will be irreversible. Risks for society will increase, including to infrastructure and low-lying coastal settlements. *Climate Change 2022: Impacts, Adaptation and Vulnerability*, the Working Group II contribution to the IPCC Sixth Assessment Report, assesses the impacts of climate change, looking at ecosystems, biodiversity, and human communities at global and regional levels. It also reviews vulnerabilities and the capacities and limits of the natural world and human societies to adapt to climate change.

Increased heatwaves, droughts, and floods are already exceeding plants' and animals' tolerance thresholds, driving mass mortalities in species such as trees and corals. These weather extremes are occurring simultaneously, causing cascading impacts that are increasingly difficult to manage. They have exposed millions of people to acute food and water insecurity, especially in Africa, Asia, Central and South America, on small islands, and in the Arctic.

To avoid mounting loss of life, biodiversity and infrastructure, ambitious, accelerated action is required to adapt to climate change, at the same time as making rapid, deep cuts in greenhouse gas emissions. So far, progress on adaptation is uneven and there are increasing gaps between action taken and what is needed to deal with the increasing risks, the new report finds. These gaps are largest among lower-income populations.

There are options to adapt to a changing climate. This report provides new insights into nature's potential not only to reduce climate risks but also to improve people's lives. Scientists point out that climate change interacts with global trends such as unsustainable use of natural resources, growing urbanization, social inequalities, losses and damages from extreme events and a pandemic, jeopardizing future development. "Our assessment clearly shows that tackling all these different challenges involves everyone — governments, the private sector, civil society — working together to prioritize risk reduction, as well as equity and justice, in decision-making and investment," said IPCC Working Group II Co-Chair Debra Roberts.

This report provides a detailed assessment of climate change impacts, risks and adaptation in cities, where

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more than half the world's population lives. People's health, lives and livelihoods, as well as property and critical infrastructure, including energy and transportation systems, are being increasingly adversely affected by hazards from heatwaves, storms, drought and flooding as well as slow-onset changes, including sea level rise.

The Report highlights the narrowing window for action. Climate change is a global challenge that requires local solutions and that's why the Working Group II contribution to the IPCC's Sixth Assessment Report (AR6) provides extensive regional information to enable Climate Resilient Development. Climate Resilient Development is already challenging at current warming levels. It will become more limited if global warming exceeds 1.5°C (2.7°F). In some regions it will be impossible if global warming exceeds 2°C (3.6°F). This key finding underlines the urgency for climate action, focusing on equity and justice. Adequate funding, technology transfer, political commitment, and partnership lead to more effective climate change adaptation and emissions reductions. "The scientific evidence is unequivocal: climate change is a threat to human wellbeing and the health of the planet. Any further delay in concerted global action will miss a brief and rapidly closing window to secure a liveable future," said Hans-Otto Pörtner.

For info: Full Report at: www.ipcc.ch/report/ar6/wg2/

STORMWATER USE US "PURE POTENTIAL" REPORT

The Water Environment Federation, US Environmental Protection Agency, National Municipal Stormwater Alliance, and other partners have been working to identify and dismantle barriers hampering stormwater capture and use (SCU) adoption. The team has released a report, which aims to establish a "unified community of practice" around SCU similar to other alternative water sources like desalination and wastewater reclamation. The full report, *Pure Potential: The Case for Stormwater Capture and Use*, is available at the EPA website listed below.

"Ensuring global water security demands that we do more to take advantage of stormwater as a vital

resource instead of regarding it as a nuisance to manage," said Claudio Ternieden, WEF Senior Director of Government Affairs, who helped coordinate the report. "As many communities across the U.S. are already demonstrating, thoughtfully planned stormwater capture and use programs have the potential to augment drinking water, mitigate flooding, and enhance environmental equity. Pure Potential proposes a framework to help guide regulators, academics, and stormwater professionals as they work to maximize these benefits."

The report, which synthesizes conclusions from a series of meetings in 2021 that included EPA, WEF, NMSA, the WaterReuse Association (Alexandria, VA), and the Re-Inventing the Nation's Urban Water Infrastructure (ReNUWIt) research consortium, outlines six key focus areas to spur SCU adoption:

- enhance SCU coordination and leadership
- build trust and understanding through partnerships
- clarify regulations, policy, and guidance;
- expand funding mechanisms
- advance science and treatment standards
- accelerate the use of new technologies and SCU strategies

For info: Report at: www.epa.gov/system/files/documents/2022-03/wrap-pure-potential-report.pdf

IRRIGATION VIOLATION WA WATER RIGHTS LACKING - PENALTY ISSUED

The Washington Department of Ecology on April 4th issued a \$267,000 penalty to Acme Properties LLC, Junior Farms LLC and Skagit Farmland LLC (collectively, Skagit Valley Farm) for irrigating 348 acres of vegetable crops in the lower Skagit and Samish watersheds without water rights during the 2021 irrigation season. See Notice of Penalty, Docket #21998. "The violations occurred during a drought and on the heels of a historic heat wave in a watershed where low streamflows threaten endangered salmon species," said Ria Berns, northwest regional manager for Ecology's Water Resources Program.

Skagit Valley Farm operates on more than 3,100 acres in Skagit County and other parts of the state. Because of the size of Skagit Valley Farm's

operations, noncompliance presents a significant environmental harm. "We're talking about irrigating a significant number of acres in a basin where stream flows are lowest when fish need water the most. Unpermitted irrigation in the Skagit Watershed harms farmers and water users who've worked to be in compliance with the law. It also threatens habitat for endangered salmonid species that need minimum streamflows to survive." Berns said.

Based on the most recently available agricultural statistics, Ecology estimated that the 348 acres of crops irrigated in 2021 without water rights have an annual value of over \$1.7 million.

Skagit Valley Farm (SVF) "irrigated 348 acres on 8 sites without approved and adequate water rights..." according to the Notice of Penalty (p. 1). "The unlawful irrigation identified occurred at a time when the area was under an emergency drought declaration." *Id* at 2. "Ecology notified SVF of violations of the state water code on July 14, 2021, through a detailed technical assistance letter" and "continued to observe irrigation on multiple sites after SVF received the letter and well into August 2021...SVF chose to irrigate crops for financial gain after receiving notice that these activities were unlawful." *Id* at 2.

"Our agricultural industry is vital to our state's economy and we are committed to working with Skagit Valley Farm to identify viable water solutions going forward," Berns said. The Notice of Penalty noted that "nearly half of their acreage in Skagit County (1,400 of this 3,100 acres) lack any kind of irrigation water right. Irrigated crops have been documented on much of this acreage in recent years. Despite Ecology's attempts to gain compliance and initiate dialogue...these companies were slow to respond, took only limited steps to address the breadth of water right issues on their lands, and continued to irrigate unlawfully through the remainder of the 2021 irrigation season." *Id*.

Skagit Valley Farm has 30 days to appeal the penalty to the Pollution Control Hearings Board. The Notice of Penalty is available upon request from TWR.

For info: <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights>

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ENFORCEMENT INFO **US**
“ECHO NOTIFY”

On March 22, EPA announced the release of a new web tool, called “ECHO Notify,” that empowers members of the public to stay informed about important environmental enforcement and compliance activities in their communities. Through ECHO Notify, users can signup to receive weekly emails when new information is available within the selected geographic area, such as when a violation or enforcement action has taken place at a nearby facility.

“EPA is committed to empowering communities with the information they need to understand and make informed decisions about their health and the environment,” said EPA Administrator Michael S. Regan. “We’ve also seen that increased transparency leads to stronger deterrence of environmental violations. As more people play an active role in protecting their neighborhoods from pollution, EPA has developed ECHO Notify so that finding updates on environmental enforcement and compliance activities is as easy as checking your email.”

ECHO Notify provides information on all EPA enforcement and compliance activities as well as activities of state and local governments under the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and the Safe Drinking Water Act.

For info: EPA’s website: <https://echo.epa.gov/tools/echo-notify>

CONSERVATION **WEST**
STATE OF THE ROCKIES SURVEY

Colorado College State of the Rockies Project’s annual Conservation in the West Poll (2022) results, released in January 2022, showed a spike in concern over issues such as drought, inadequate water supplies, wildfires, the loss of wildlife habitats and natural spaces, and climate change among Mountain West voters. Those concerns align with continued strong support for pro-conservation policies.

The poll surveyed voters in eight Mountain West states (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) and found 69% of voters are concerned about the future of nature — meaning land, water, air, and wildlife. That level

of concern was a notable jump from 61% in last year’s poll. Against that backdrop, 86% of Western voters now say issues involving clean water, clean air, wildlife, and public lands impact their decision about whether to support an elected official, up from 80% in 2020 and 75% in 2016.

Climate change is seen as a threat with voters expressing concern over impacts. Most voters in the Mountain West (62%), believe climate change is happening and requires action. Among them, 44% agree climate change is established as a serious problem and immediate action is necessary. Another 18% say there is enough evidence of climate change that some action should be taken. 52% of voters view climate change as a very serious or extremely serious problem, up from 46% in 2020 and 27% in 2011.

The level of concern around water issues among Westerners spiked in this year’s poll. Water issues viewed as very serious or extremely serious problems by voters include drought (73%, up from 52% in 2016); low levels of water in rivers (73%, up from 55% in 2020), inadequate water supplies (71%, up from 45% in 2020), and pollution in rivers, lakes, and streams (56%, up from 42% in 2011).

Those concerns translate into strong support for water conservation efforts aimed at addressing water shortage situations in the future by voters in Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming. 81% prefer using water supplies more wisely by encouraging more water conservation, reducing use, and increasing water recycling. By contrast, 14% would rather divert more water from rivers in less populated areas of the state to communities where more people live.

Asked about remote locations, 87% of voters across the survey support increasing federal funding to extend running water and sanitation services to rural areas and tribal communities that currently lack access.

For info: Full Poll results at: State of the Rockies’ website: www.coloradocollege.edu/other/stateoftherockies/; Katrina (Kat) Miller-Stevens, State of the Rockies Project, kmillerstevens@coloradocollege.edu

RURAL PIPELINE **NM**
MUNICIPAL WATER PROJECT

Governor Michelle Lujan Grisham, the Eastern New Mexico Water Utility Authority (ENMWUA), and the US Bureau of Reclamation (Reclamation) on March 31st announced that the ENMWUA has received funding from the federal Infrastructure Investment and Jobs Act FY2022 appropriations in the amount of \$160,000,000 for use in the construction of the Eastern New Mexico Rural Water System (ENMRWS) pipeline. The pipeline will provide a reliable water source for 70,000 New Mexicans, as well as Cannon Air Force Base. ENMWUA will receive an additional \$17,400,000.00 from Reclamation 2022 appropriations. New Mexico’s Governor and eastern New Mexico legislators secured an additional \$30,000,000.00 during the 2022 state legislative session to add to federal funds for the ENMRWS and complete the state’s cost-share requirements for the project. The total amount of 2022 funding appropriations announced are \$207,400,000.00. The ENMWUA will match that amount with \$20,740,000.00 for a total of \$228,140,000.00.

The federal funding is a portion of \$420 million from the Bipartisan Infrastructure Law, which will be distributed for rural water projects across six states including Iowa, Minnesota, Montana, New Mexico, North Dakota and South Dakota. The eastern New Mexico project is receiving the greatest portion of funding.

The project will provide a supply of treated surface water to parts of Eastern New Mexico including Clovis, Elida, Portales, Texico, Cannon Air Force Base, and unincorporated areas in Roosevelt and Curry counties that currently rely on the steadily declining Ogallala groundwater aquifer for their supply. The Ogallala Aquifer is the sole source of municipal and agricultural water for much of eastern New Mexico; it is estimated that under current withdrawals from the aquifer, it will be depleted in less than 15 years.

Ute Dam and Reservoir, which is owned and operated by the New Mexico Interstate Stream Commission (NMISC), will be the source of up to 16,415 acre-feet per year of water for the ENMRWS pipeline. The water provided for the project is a portion of the water granted to New Mexico within

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the Canadian River Compact with Texas and Oklahoma. As owner of the water, the NMISC has worked with the ENMWUA and Reclamation to develop this project to relieve the critical municipal water shortage situation in eastern New Mexico.

The purpose of the project is to provide potable water to four city member agencies and Cannon Air Force Base for municipal, commercial, and industrial use from a renewable surface water supply at Ute Reservoir. The ENMRWS includes approximately 120 miles of transmission pipeline and laterals, two raw water pump stations, one smaller finished water pump station, and a water treatment plant. The ENMWUA plans to ramp up efforts with all remaining components of the ENMRWS beginning immediately.

For info: ENMWUA at: <http://www.enmwua.com/>

WATER TREATMENT US TECHNOLOGY DEVELOPMENT

The US Bureau of Reclamation (Reclamation) is providing \$5.6 million in financial assistance to 15 projects to improve the technology used to treat unusable waters like seawater, brackish groundwater, and municipal wastewater. The projects are funded through Reclamation's Desalination and Water Purification Research Program, which plays a critical role in taking an idea from the lab through to a real-world demonstration that can both attract industry commercialization and provide the water treatment community practical benefits.

"There are technologies that show the potential to provide Western communities a new source of water," said Acting Commissioner David Palumbo. "Reclamation is supporting the study and development of these new technologies to make more water available for use."

The 15 projects that were selected include 11 projects to test submitted ideas in a laboratory and four projects to test concepts in a real-world environment. The Desalination and Water Purification Research program support President Biden's Executive Order on Tackling the Climate Crisis at Home and Abroad. The program seeks to invest in developing advanced water treatment technologies to expand access

to otherwise unusable water resources. More information and complete descriptions of the research projects are available on Reclamation's website.

For info: www.usbr.gov/research/dwpr

RESTORATION AWARD WA FORESTRY & STREAM

The Nisqually Tribe won the 2021 George F. Ames Performance and Innovation in the State Revolving Fund Creating Environmental Success (PISCES) Award from the EPA for their work in the Mashel River watershed. The awards are given out to projects that demonstrate leadership in innovative financing, partnership, and problem-solving while improving water quality and public health protection. The award is one of just 27 projects given out nationwide to state or local governments, public utilities, and private entities.

The Mashel River is the main tributary to the Nisqually River near Mt. Rainier. It's also federally-designated critical habitat for threatened Chinook salmon and steelhead trout. The river is the direct source of water for the town of Eatonville and an indirect source for many rural residents. The upper Mashel sub-basin remains in intensive commercial forestry while still in a state of recovery from massive clear-cut logging in the early and mid-1900s. It's been damaged by erosion, sediment filling spawning areas, reduced water retention, and lack of woody debris that provides habitat for fish. The river suffers from high temperatures and very low flows in the summer months.

The Nisqually Tribe's project is a partnership with Nisqually Community Forest and the Nisqually Land Trust to purchase properties for permanent forestry management and stream restoration. The goal is to protect forested land under immediate threat of clear-cut logging and purchase recently logged properties. Part of the restoration process will be using technology like streamflow gauges to monitor the forest and track changes in real time, using data to help make decisions on sustainable forest management.

The Tribe purchased its first 1,240 acres of land along the North Fork of Busy Wild Creek, which enabled the Nisqually Land Trust to purchase an

adjoining 960 acres. The combined acquisitions permanently protect over three miles of Busy Wild Creek. In addition, they adjoin and will be managed to complement the 1,960-acre Nisqually Community Forest, which permanently protects the three-mile-long South Fork of Busy Wild Creek. Together, these projects now protect the entirety of the Busy Wild Creek headwaters and, by extension, those of the Mashel. The Nisqually Tribe used funds from the Clean Water State Revolving Fund (SRF), which provides low interest loans for water infrastructure projects. Using the loan to purchase land that will be uniquely managed in this way is an innovative approach. The Nisqually Tribe is currently looking for additional land to purchase with the remaining SRF award and other investments.

EPA's PISCES program celebrates excellence and innovation by the organizations who have received funding through the Clean Water State Revolving Fund. The Funds are EPA-state partnerships that provide communities with a permanent, independent source of low-cost financing for a wide range of water quality and drinking water infrastructure projects. The Department of Ecology administers the Clean Water State Revolving Fund for Washington State.

For info: PISCES Program at: www.epa.gov/cwsrf/piscs

PERCHLORATE PLAN US DRINKING WATER

On April 1, the EPA announced that it completed review of a July 2020 determination to not regulate perchlorate in drinking water. Considering the best available science and the proactive steps that EPA, states, and public water systems have taken to reduce perchlorate levels, the agency has determined that perchlorate does not meet the criteria for regulation as a drinking water contaminant under the SDWA. Therefore, the agency is withdrawing the 2011 regulatory determination and is making a final determination to not issue a national regulation for perchlorate at this time. Additionally, EPA announced multiple integrated actions to ensure that public health is protected from perchlorate in drinking water.

WATER BRIEFS

The agency is committed to partnering with state co-regulators, Tribes, and communities to address perchlorate. Through the Bipartisan Infrastructure Law, EPA is providing \$11.7 billion through the Drinking Water State Revolving Funds supplemental, and \$4 billion in dedicated funding to address emerging contaminants. This funding is part of the single-largest investment in US water infrastructure and can be used to address perchlorate and other drinking water needs.

Investing in infrastructure will complement additional actions the agency announced. EPA will support research to better understand perchlorate as it relates to firework displays. EPA also plans to establish a web-based toolkit to provide updated technical information to assist drinking water systems and communities that may have concerns about perchlorate contamination of their source water. EPA anticipates that this toolkit would be available online in 2022.

Additionally, cleaning up existing contamination and protecting drinking water sources from future contamination is central to EPA's approach for addressing perchlorate in drinking water. EPA is working with states to address perchlorate contamination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund program. These cleanups have already reduced perchlorate levels at some sites. The agency will also consider proposed revisions to Resource Conservation and Recovery Act (RCRA) standards for the open burning and open detonation of waste explosives and bulk propellants to reduce impacts of perchlorate to human health and the environment.

While EPA is not pursuing a drinking water regulation at this time, the agency will continue to consider new information on the health effects and occurrence of perchlorate. EPA's decision does not impact any state standards for perchlorate. The agency will continue to consider if perchlorate should be added to future Contaminant Candidate Lists for possible regulation under the Safe Drinking Water Act.

For info: EPA website: www.epa.gov/sdwa/perchlorate-drinking-water

NUTRIENT REDUCTIONS US

WATER QUALITY STRATEGY

EPA has released a new policy memorandum on *Accelerating Nutrient Pollution Reductions in the Nation's Waters* (April 2022 Memorandum).

In the memo, EPA commits to deepening existing partnerships and fostering new collaboratives with the US Department of Agriculture (USDA), states, Tribes, territories, agriculture, industry, and the broader water sector. The agency will support innovation and pursue science-based and data-driven strategies to reduce excess nutrients in our nation's waters. Critically, EPA will also provide technical assistance and other support to help states, Tribes, and territories scale effective nutrient loss reduction strategies. The Bipartisan Infrastructure Law also provides dedicated resources to accelerate efforts, such as the work happening through the Gulf Hypoxia Taskforce on state nutrient reduction strategies. EPA will also continue to evolve and implement the Clean Water Act regulatory framework to holistically address nutrient pollution.

Additionally, under this policy memo, EPA will prioritize nutrient pollution reduction, treatment, and mitigation activities that help protect public health and the environment in our most vulnerable communities. Disadvantaged communities across the country disproportionately bear the brunt of environmental impacts from nutrient pollution and lack the resources to address these issues on their own.

For info: EPA's Nutrient Policy Website at: www.epa.gov/nutrient-policy-data

ASBESTOS BAN US

WATER TREATMENT USE

On April 5, EPA Administrator Michael Regan signed a proposed rule to protect people from asbestos exposure by releasing a proposed rule to prohibit ongoing uses of the only known form of asbestos currently imported into the US. This proposed rule is the first-ever risk management rule issued under the new process for evaluating and addressing the safety of existing chemicals under the Toxic Substances Control Act (TSCA) that was enacted in 2016.

The proposed rule would ban chrysotile asbestos, the only known form of asbestos currently imported into the US, which is found in products like asbestos diaphragms, sheet gaskets, brake blocks, aftermarket automotive brakes/linings, other vehicle friction products, and other gaskets also imported into the US.

This proposal would rectify a 1991 court decision that largely overturned EPA's 1989 ban on asbestos that significantly weakened EPA's authority under TSCA to address risks to human health from asbestos or from any other existing chemical. With the 2016 amendments to TSCA, the law gained clear requirements and a mandate to comprehensively prioritize and evaluate chemicals and put in place protections against any unreasonable risks.

Raw chrysotile asbestos currently imported into the US is used exclusively by the chlor-alkali industry. Chlor-alkali chemicals are used in sectors important to the national economy and in operations that can help protect human health such as drinking water treatment, which uses chlorine manufactured through the chlor-alkali process. While chlorine is a commonly used disinfectant in water treatment, there are only ten chlor-alkali plants in the US that still use asbestos diaphragms to produce chlorine and sodium hydroxide. One plant is expected to close this year. The nine remaining chlor-alkali plants using asbestos diaphragms range in age from 40 to 123 years old and none have increased use of asbestos diaphragms in approximately 17 years. The use of asbestos diaphragms has been declining and these remaining plants only account for about one-third of the chlor-alkali production in the country. Alternatives to asbestos-containing diaphragms for chlor-alkali plants exist, and the use of alternatives, specifically membrane cells, accounts for almost half of the country's chlor-alkali production.

EPA will accept public comments on the proposed rule for chrysotile asbestos for 60 days following publication in the Federal Register via docket EPA-HQ-OPPT-2021-0057 at <https://www.regulations.gov/>.

For info: EPA Asbestos Website at: www.epa.gov/asbestos/epa-actions-protect-public-exposure-asbestos

April 18-21 UT Western Snow Conference: Drought, Fire, and Precipitation Extremes, Salt Lake City. University of Utah. For info: westernsnowconference.org	April 25-27 AL American Water Resources Association 2022 Spring Specialty Conference - "Water Risk Under a Rapidly Changing World: Evaluation and Adaptation", Tuscaloosa. Bryant Conference Center at the University of Alabama. Co-Hosted by the AWRA Future Risk Committee & the Alabama Water Institute. For info: www.awra.org	May 3-5 CA ACWA 2022 Spring Conference & Exhibition, Sacramento. SAFE Credit Union Convention Center. RE: Water Management, Innovation, Public Communication, Affordable Drinking Water, Energy, Finance, Federal Forum & More; Presented by the Association of California Water Agencies. For info: www.acwa.com/events/2022-spring-conference-exhibition/	May 5-6 NM Litigating an Energy, Natural Resources, or Environmental Case Institute, Santa Fe. Eldorado Hotel. Presented by The Foundation for Natural Resources and Energy Law (formerly Rocky Mountain Mineral Law Foundation). For info: https://fnrel.org/programs/lit22/overview
April 20-22 CA Central Valley Tour 2022, Sacramento. Water Education Foundation Tour. For info: www.acwa.com/events/central-valley-tour-2022/	April 25-28 LA Gulf of Mexico Conference (GoMCon), Baton Rouge. Raising Canes River Center. Conference Combines: the Annual Gulf of Mexico Alliance All Hands Meeting; the Annual Gulf of Mexico Oil Spill & Ecosystems Science Conference; and the Triannual State of the Gulf Summit; Integrating Science & Management for Decision-Making. For info: www.gulfbase.org/event/gulf-mexico-conference-gomcon-2022	May 4-6 OR 2022 Professional Engineers of Oregon Annual Conference, Glendon Beach. Salishan Coastal Lodge. For info: https://oregonengineers.org/events/	May 6 WEB Ecosystem Restoration Conference, Interactive Online Broadcast. For info: Law Seminars Int'l: 206/ 467-4490; register@lawseminars.com or www.lawseminars.com
April 20 WEB Smart Energy Storage for Water Districts - Live Webinar, Presented by Association of California Water Agencies. For info: www.acwa.com/events/2022april20webinar/	April 26-27 DC National Association of Clean Water Agencies (NACWA) 2022 National Water Policy Fly-In, Washington. Hilton National Mall. For info: www.nacwa.org/conferences-events	May 5 OR Energy & Climate Change Conference, Portland. Millar Hall, World Forestry Center. In-person and Remote Participation Available; 1-6pm Pacific Time; Reception to Follow. For info: Environmental Law Education Center, www.elecenter.com	May 9-12 TX AWRA 2022 Geospatial Water Technology Conference, Austin. Austin Marriott South. Presented by the American Water Resources Association. For info: www.awra.org/Members/Events_and_Education/Events/2022_GIS_Conference/2022_GIS_Conference.aspx
April 20-21 WEB Overview of TSCA New Chemicals Collaborative Research Program - Virtual Public Meeting, Presented by EPA, Office of Chemical Safety & Pollution Prevention. For info: www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/new-chemicals-collaborative	April 28-29 CO 2nd Young Natural Resources and Energy Lawyers Institute, Denver. Sheraton Downtown Denver Hotel. Presented by The Foundation for Natural Resources and Energy Law (formerly Rocky Mountain Mineral Law Foundation). For info: https://fnrel.org/programs/yp22/overview	May 5-6 NM Public Land Law, Regulation, and Management Institute, Santa Fe. Eldorado Hotel. Presented by The Foundation for Natural Resources and Energy Law (formerly Rocky Mountain Mineral Law Foundation). For info: https://fnrel.org/programs/pl22/overview	May 10-11 TX Environmental Trade Fair & Conference, Austin. Austin Convention Center. Presented by the Texas Commission on Environmental Quality. For info: www.tceq.texas.gov
April 22 CA Berkeley Law's Annual Environmental Awards Banquet & Ecology Law Quarterly's 50th Anniversary Celebration, Oakland. Scott's Seafood in Jack London Square. Honoring Environmental Leadership Award Winner Dr. Robert Bullard. For info: Center for Law, Energy, & the Environment, 510/ 642-7235, clee@law.berkeley.edu or www.law.berkeley.edu/research/clee/events/annual-energy-environmental-awards-banquet/			May 12 WEB Immerse 2022: Virtual Benefit for The Freshwater Trust, 7:00pm Pacific Time. For info: thefreshwatertrust.org
			May 16 IL SEER Superfund Master Class, Chicago. TBA. Sponsored by the ABA Section on Environment, Energy, and Resources (SEER). For info: ambar.org/SEERevents



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CALENDAR

(continued from previous page)

May 17-18 **NC**

US Water Treatment Conference / Integrating Renewables & US Water Treatment, Charlotte. For info: www.lmnpower.com

May 17-20 **TN**

National Association of Clean Water Agencies (NACWA) 2022 National Pretreatment Workshop & Training, Nashville. Nashville Marriott. Sponsored by the ABA Section on Environment, Energy, and Resources (SEER). For info: www.nacwa.org/conferences-events

May 18 **WEB**

Water & the Northern Colorado Real Estate Market Webinar, 1pm-2pm Mountain Time. Presented by WestWater Research. For info: www.waterexchange.com

May 18-20 **CA**

Bay-Delta Water Tour, Sacramento. Water Education Foundation Tour. For info: www.acwa.com/events/bay-delta-water-tour/

May 19 **CA**

2022 Kern County Water Summit, Bakersfield. Mechanics Bank Theatre. Presented by the Water Assoc. of Kern County: 7am-3pm Pacific Time; Registration Deadline May 6. For info: www.wakc.com

May 19 **MT**

Easements in Montana Conference, Helena. Helena Colonial. For info: The Seminar Group: 206/ 463-4400, info@theseminargroup.net or theseminargroup.net

May 19-20 **NM & WEB**

Next Generation Water Summit 2022: "Growth in a Time of Drought", Santa Fe. Virtual Event: Some Speakers Presenting in Santa Fe Central Location. For info: <https://ngws.vfairs.com/>

May 19-20 **WEB**

Water Law in Washington Annual Conference: Critical Developments in Water Right & Resource Management, Live Online via Interactive Broadcast. For info: Law Seminars Int'l: 206/ 467-4490; register@lawseminars.com or www.lawseminars.com

May 19-20 **NM**

Law of the Colorado River 23rd Annual Conference, Santa Fe. La Fonda on the Plaza. For info: CLE International: 800/ 873-7130 or www.cle.com

May 23-24 **CA**

Smart Water Utilities USA 2022: Reducing Water Leakage Across the Network Summit, Huntington Beach. For info: www.usa.smart-water-utilities.com/?join=VR

May 24-26 **WEB**

H2OSECCON - Virtual Event, 4.5 Hours/Day. RE: Recommendations & Resources Utilities Need to Protect Customers, Assets & the Environmental; Presented by Association of California Water Agencies. For info: www.acwa.com/events/h2oseccon/