



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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LITIGATION/ENVIRONMENT

West Virginia v. EPA/Clean Air Act

On June 30, the U.S. Supreme Court decided *West Virginia v. the Environmental Protection Agency* (EPA). The question presented to the Court was whether under 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, the Congress constitutionally authorized to issue significant rules reshaping the Nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy – with no limits on what the agency can require so long as it considers cost, non-air impacts, and energy requirements. Petitioners included the States of West Virginia, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming; and Mississippi Governor Tate Reeves.

The Supreme Court concluded that the Congress did not clearly delegate to EPA power to tackle the major questions inherent in restructuring full industries and displacing state authority. The Court found that Section 111 of the Clean Air Act does not vest EPA with “industry-transforming, state-displacing power.” The District of Columbia Circuit Court faulted EPA for not assuming a broader mandate under Section 111(d). It urged EPA to not just reorder the power sector, but also undertake whatever other sweeping changes it decided would help reduce carbon emissions. “Yet neither Section 111 nor anything else in the CAA provides a clear statement from Congress that it intended EPA to take this power on. Without a clear statement, two independent canons of construction – the major-questions doctrine and the federalism canon – confirm that the text does not grant EPA these powers. Congress must delegate with unmissable clarity if it intends to give an agency economy-transforming abilities to decide major questions or alter the power balance between the States and the federal government. Here, it did no such thing.”

The “major-questions doctrine,” said the Court, responds to “the danger posed by the growing power of the administrative state.” *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). It rests on “two overlapping and reinforcing presumptions” – that Congress “intends to make major policy decisions itself,” and that Congress should make those choices under a

“separation of powers-based” default against delegating “major lawmaking authority.” *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017). Major questions implicate crosscutting matters extending beyond one agency’s core expertise. See: 20-1530 *West Virginia v. EPA* (06/30/2022) (supremecourt.gov)

LITIGATION/WATER RIGHTS

Nevada/Groundwater

On June 16, the Nevada Supreme Court reversed a district court decision regarding a community-based solution to long-term groundwater shortages in Diamond Valley (*Diamond Natural Resources Protection & Conservation Assn., et al. v. Diamond Valley Ranch, et al.*, No. 81224). The State Engineer designated the Diamond Valley hydrologic basin as a Critical Management Area (CMA) that was over-appropriated and over-pumped. The majority of water rights holders in the basin petitioned the State Engineer to approve a Groundwater Management Plan (GMP) that established a process for removal of the CMA designation. The Court said: “Although the GMP deviated somewhat from the guiding principle underlying Nevada’s water law statutes – the doctrine of prior appropriation, which dictates that priority is assigned based on first in time, first in right to put the water to beneficial use – the State Engineer approved the Diamond Valley GMP. The crux of this case...concerns whether [the relevant statutes] allow the State Engineer to approve a GMP that deviates from the doctrine of prior appropriation. We hold that the Legislature unambiguously gave the State Engineer discretion” to approve the Diamond Valley GMP. The Court then reinstated the State Engineer’s decision.

In its recitation of facts, the Court noted that (1) the Diamond Valley aquifer has a perennial yield of 30,000 acre-feet; (2) roughly 76,000 acre-feet of groundwater is withdrawn annually; (3) water rights permit up to 126,000 acre-feet of water to be withdrawn from the aquifer every year; (4) post-1960 water rights would be subject to curtailment if the State Engineer limited pumping to the perennial yield; and (5) pre-1960 water rights would have seniority and would not be subject to curtailment. The Diamond Valley GMP created a 35-year plan to reduce pumping at five-year intervals, requiring all water rights holders to reduce their withdrawals, not just junior users.

Senior water rights holders in the basin filed petitions for review of the GMP decision. “The district court concluded that the GMP violated (1) the doctrine of prior appropriation by forcing senior appropriators to reduce their water use; (2) the beneficial use statute, NRS 533.035, by allowing unused groundwater to be banked or transferred; and (3) two permitting statutes, NRS 533.325 and NRS 533.345, by allowing appropriators to change the point or manner of diversion without filing an application with the State Engineer.”

The State Engineer and several water rights holders appealed to the Nevada Supreme Court, arguing that the State Engineer had discretion to approve the GMP as long as the factors enumerated in NRS 534.037(2) were considered and the GMP would remove the CMA designation. The seven factors to consider are: (a) the hydrology of the basin; (b) the physical characteristics of the basin; (c) the geographic spacing and location of groundwater withdrawals; (d) the water quality; (e) the wells located in the basin, including domestic wells; (f) whether a GMP already exists; and (g) any other factor deemed relevant by the State Engineer.

At oral argument, the Nevada Supreme Court inquired about the evidence the senior water rights holders presented to the State Engineer during the GMP approval process, and it was determined there was no evidence presented and that the burden of proof was on the senior water rights holders to show that the approval of the GMP was arbitrary or capricious.

In addressing the dissenting justices, the majority pointed out that the Diamond Valley GMP “ratably reduces water usage such that senior appropriators are still allowed more water than junior appropriators, and in that regard, still honors priority rights and therefore does not abrogate them.”

The Court added in a footnote that the holding was limited to non-vested (post-1913) rights, and that it does not preclude any vested (pre-1913) water rights holders (including surface water rights) from asserting future constitutional claims if the GMP actually affects their water rights, “because statutory law may not impair vested water rights. NRS 533.085(1).”

MEETINGS

Western States Water Council - Workshop Series

On June 21, the WSWC hosted the first of the summer workshop series exploring regional approaches to WOTUS implementation that take into consideration variations in hydrologic conditions across the Nation. There were 32 attendees from 16 States. Participants explored five existing regional classification schemes presented by four federal agencies: (1) Watershed Boundaries and National Hydrography Dataset (Kim

Jones, USGS); (2) Ecoregions (Brian Topping, EPA), (3) Stream Flow Assessment Duration Method Regions (Brian Topping, EPA); (4) Regionalization of Wetland Delineation Guidance (Kyle Gordon, USACE); and (5) Major Land Resource Areas (Drew Kinney, NRCS). Participants offered insights that will be reflected in a technical whitepaper to be drafted over the coming weeks.

A post-workshop survey indicated that most participants believe the number of regions should be limited to 10 – 25 across the country and that the Stream Flow Duration Assessment Method best balances the various regional factors of concern to States, although there was support for further exploring several of the other classification schemes.

A second workshop will be held on July 11, and will focus on existing tools that could be used to implement WOTUS determinations in a regional context. A full-day workshop is scheduled at the WSWC summer meeting on August 2, in Polson, Montana where participants will reflect on the technical outputs of the two pre-meeting workshops and discuss policy elements of a regional WOTUS approach. For further information on the workshops, see: <https://westernstateswater.org/upcoming-meetings/>.

Western States Water Council - Summer Meetings

The WSWC Summer (199th) Meetings will be held in Polson, Montana on August 2-5, at the KwaTaqNuk Resort-Casino. Please note the cut-off date for our hotel room block is July 13. There is no registration fee to attend, but we are asking all individuals, regardless of in person or virtual attendance to please register in advance. For further information on the meetings, including registration see: <https://westernstateswater.org/events/2022-summer-meetings/>.

Schedule of Meetings

Tuesday, August 2

8:30 am WOTUS Workshop

Wednesday, August 3

8:30 am WestDAAT Workshop

11:00 am Field Trip

Thursday, August 4

8:00 am Host State Presentation

8:45 am Water Resources Committee Meeting

12:00 pm Executive Committee (over lunch)

1:30 pm Water Quality Committee Meeting

3:45 pm Legal Committee Meeting

6:00 pm Social Hour

Friday, August 5

8:00 am Full Council Meeting (199th)

The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.