



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY

CWA §401 Certification Authority/Federalism

On August 18, the Environmental Protection Agency (EPA) Office of Water held a federalism consultation call with States regarding EPA's request for public comment on Implementation Challenges Associated With Clean Water Act §401. In May, EPA issued a memorandum clarifying and reinforcing the agency's perspective that §401 certifications must be tied to water quality and should not be used as a tool for States to achieve policy goals untethered to water (WSW #2662, #2671). A public docket for input closed on August 6, and the federalism consultation is scheduled to end on September 7.

Oregon, Rhode Island, and the Association of Clean Water Administrators (ACWA) said frequent rule changes have been a significant challenge. They said the uncertainty creates expensive confusion, delays, and extra workload for both the agency and project proponents. The regulatory whiplash prevents States from planning effectively or making costly updates to administrative procedures. ACWA also pointed out that States rarely issue outright denials with prejudice; instead, they tend to request more information from applicants when applications are incomplete. Oregon expressed appreciation for the 2023 rule, particularly that it allows certifying authorities to waive pre-filing meeting requests, which is critical for emergency project reviews.

Wyoming DEQ supported revisiting the rule, explaining that the 2020 rule's focus on discharge was appropriately narrow, while the 2023 rule allowing States to consider project activities was overly broad and applied inappropriately. Wyoming emphasized that the tool should function as a "scalpel, not a hammer." Colorado said the 2023 rule has been beneficial for their State. Colorado deals with many water transfers, upstream diversions, and large water supply projects, which often involve more than just the discharge elements typically reviewed under Section 401.

Some requested longer comment periods for rulemaking efforts, noting that States have their own internal review procedures for responding to agency actions which often require more than 30 days. Others

highlighted that the timeliness of actions by federal agencies is an expensive delay for State processes, regardless of which rule is in effect.

WATER RESOURCES

North Dakota/Flood Control

On August 7, after three years of construction, the Red River was permanently rerouted 2,000 feet to the west to flow through the Red River Control Structure in Fargo, North Dakota. The diversion through the engineered channel will enable completion of the dam embankment across the existing river channel, which serves as the border between North Dakota and Minnesota. The Red River Structure is the largest of three gated structures being constructed by the Corps as part of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project. The 30-mile diversion is scheduled for completion in 2027 and will protect the metro area's more than 260,000 residents against a 100-year flood event.

Governor Kelly Armstrong (R-ND) said: "This is truly historic, not only for Fargo-Moorhead but the entire state of North Dakota. Not since the opening of Garrison Dam in 1953 has a river of this size been intentionally rerouted through a manmade structure in North Dakota. What is happening here today is beyond impressive, moving our state's largest metro area one giant step closer to a more secure and prosperous future." Armstrong thanked North Dakota lawmakers for the \$850M investment of state funding in the \$3.2B project. He also applauded the high level of collaboration on the project, with more than 50 organizations involved, including 30 state, local and federal agencies. The diversion is the first public-private partnership (P3) flood management project in North America, and the first P3 civil works project with the Corps.

WATER RIGHTS

California/Non-Tribal Reserved Groundwater Rights

On July 28, the Orange County, California Superior Court issued a proposed Statement of Decision in Phase 1 of the groundwater adjudication in *Mojave Pistachios, LLC v. Indian Wells Valley Water District*

(#30-2021-01187275). The court quantified the U.S. Navy's federal reserved water right for Naval Air Weapons Station – China Lake at 2,008 acre-feet per year (AFY), with a priority date of 1947. China Lake is the Navy's largest land holding in the world, is located in the Mojave Desert, and the only source of potable water available for the military base is groundwater.

The original complaint was filed by Mojave Pistachios, LLC. The cross-complaint by the Indian Wells Valley Water District (IWWVD) sought “a judgment to comprehensively determine and adjudicate all groundwater rights in the Basin and to provide a physical solution for the perpetual and continuous management of the Basin.” IWWVD's website noted that water use in the basin has exceeded groundwater supply for years, resulting in an “overdraft” condition. IWWVD is a member of the Indian Wells Valley Groundwater Authority, formed pursuant to the Sustainable Groundwater Management Act (SGMA). The Authority developed and adopted a groundwater sustainability plan (GSP), and several lawsuits were filed alleging that the GSP actions to regulate water use and impose fees were unlawful and excessive, leading in part to the present adjudication.

IWWVD's website said: “The Basin underlies approximately 382,000 acres or approximately 600 square miles of land. Approximately 301,000 acres of land overlying the Basin are federal property managed by Naval Air Weapons Station China Lake, the Bureau of Land Management, and the Forest Service. The non-federal lands overlying the Basin consist of the City of Ridgecrest and unincorporated land in the Counties of Kern, Inyo, and San Bernardino. Water rights of the federal government are beyond the jurisdiction of the State to regulate. Under applicable law [McCarran Amendment, 43 U.S.C. §666], the federal government may only participate in a water rights lawsuit if such a case is considered to be what is called a ‘comprehensive adjudication’ involving all stakeholders/pumpers.”

In 2024, the adjudication was separated into several phases. Phase 1 addressed the federal government's reserved water rights claims to groundwater. Phase 2 will adjudicate the safe yield and groundwater in storage. Phase 3 will determine the water rights claims of all other parties. Phase 4 will determine a physical solution.

The court declined to set the reserved water right priority date on the basis of a 1943 order from the Secretary of the Navy to establish the base. Although there were several steps taken toward purchasing land and withdrawing it from public use beginning in 1943, the court held that the formal Public Land Order 431 published in the Federal Register in 1947 was the date of the reservation from the public domain, and therefore established the priority date of the reserved water right.

The court distinguished non-tribal reserved rights from cases involving Indian reservations, where courts look at treaties, executive orders, and statutes, and give a liberal interpretation favorable to the tribes.

The court was careful to distinguish between reserved water rights that serve the primary purpose of the reservation, and water for secondary purposes that the Navy can obtain through the state like any other water right user. “All of the key historical documents point to the development and testing of weapons as the primary purpose of China Lake.” The court rejected 20 AFY for off-base management of burros and horses as part of an agreement with BLM, as well as 200 AFY for endangered Tui Chub in the lake, as those are secondary purposes. The court also excluded treated wastewater obtained by agreement from the nearby town. While the court agreed that water for on-base housing could be encompassed by the reserved water right, off-base housing that is located off the reservation land was excluded.

Notably, when determining the quantity of water needed to fulfill the primary purposes, the court looked at the full history of China Lake's water use since the date of the reservation, the reasonably anticipated future uses, long-term versus temporary uses, and its water conservation efforts since 1989. “[T]he time frame in which the reserved water right is adjudicated is critical. Thus, if quantification of China Lake's reserved right was determined in the 1940s during World War II, then that right likely would have taken into account the ongoing war effort, the need for new weapons, the ever-increasing size of the base and the lack of a viable off-base housing alternative.... Any determination at that time could not have contemplated base closings and consolidations that happened many decades later, nor could it account for the many water-conservation methods that have developed over the years. Likewise, if the reserved water right had been adjudicated in 1969 at the height of the Vietnam War, then the water use (nearly 8,000 AFY) the base's total population (nearly 20,000) and the available on-base housing (3,800+ residences/dorm spaces) undoubtably would have dictated a different result from today. However, because this proceeding is occurring 50+ years after Vietnam and 80+ years after World War II, the previous historical use is of little value given the many significant changes that have occurred since those wars ended. In short, in determining China Lake's reserved water right, the Court starts with current water usage as a baseline, taking into account fluctuations that have occurred in the relevant past. And while the Court agrees that potential future expansion of China Lake's mission should be taken into account in calculating that water right, that expansion must meet the ‘reasonably probably to occur’ criterion.”

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.