**Chapter 23 • WATER RESOURCES**
**2016 Annual Report**[1]

## I. FEDERAL DEVELOPMENTS

### *A. Alaska*

#### 1. Judicial

In *Sturgeon v. Frost*,[2] the United States Supreme Court reversed and remanded the Ninth Circuit's decision to uphold the district court's rejection of challenges to National Park Service (NPS) regulations prohibiting the use of hovercraft on the Nation River within the boundaries of NPS administered lands. In its decision, the Court rejected the Ninth Circuit's interpretation of section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. section 3103(c). On remand, the Court directed the lower court to consider: 1) whether the river qualifies as "public land" for purposes of ANILCA, 2) whether the Park Service has authority under 54 U.S.C. section 100751 to regulate Mr. Sturgeon's activities, even if the river is not "public land", and 3) whether the Park Service has authority under ANILCA over both "public" and "non-public" lands

[1]This chapter summarizes significant state and federal developments in water resources in late 2015 and 2016. Editor: Mitra M. Pemberton, White & Jankowski, LLP, Denver, Colorado. Co-editors: Rachel S. Anderson, Fabian VanCott, Salt Lake City, Utah; Emily Bergeron, PhD.; Elizabeth P. Ewens, Ellison, Schneider & Harris L.L.P., Sacramento, California; Chris Bromley, McHugh Bromley, PLLC, Boise, Idaho; and Elizabeth Newlin Taylor, Taylor & McCaleb, PA, Corrales, New Mexico. The editors were ably assisted by the correspondents listed below who authored the states' reports. The correspondents are: for Alaska, George Lyle and Nicholas Ostrovsky, Guess & Rudd P.C., Anchorage, Alaska; for Arizona, Michele L. Van Quathem, Law Offices of Michele Van Quathem, PLLC, Phoenix, Arizona; for California, Elizabeth P. Ewens, Robert E. Donlan, Peter Kiel, Christopher Sanders, Craig A. Carnes, Shane Conway McCoin, and Shawnda M. Grady, Ellison, Schneider & Harris L.L.P., Sacramento, California; for Colorado, Dulcinea Hanuscak, Brownstein Hyatt Farber Schreck LLP, Denver, Colorado; for Idaho, Garrick L. Baxter and Emmi Blades, Deputy Attorneys General, Idaho Department of Water Resources, Boise, Idaho; for Kansas, David M. Traster, Foulston Siefkin LLP, Wichita, Kansas; for Montana, Holly J. Franz, Franz & Driscoll, PLLP, Helena, Montana; for Nebraska, LeRoy W. Sievers, Legal Counsel, Nebraska Department of Natural Resources, Lincoln, Nebraska; for Nevada, Therese A. Ure, shareholder, and Lindsay Thane, J.D. paralegal, Schroeder Law Offices, P.C., Reno, Nevada; for New Mexico, Elizabeth Newlin Taylor, Taylor & McCaleb, PA, Corrales, New Mexico; for North Dakota, Jennifer L. Verleger, Assistant Attorney General, Bismarck, North Dakota; for Oklahoma, Jonathan Allen, Assistant General Counsel, Oklahoma Water Resources Board, Oklahoma City, Oklahoma; for Oregon, Laura A. Schroeder, Lindsay Thane, and Sarah R. Liljefelt, Schroeder Law Offices, P.C., Portland, Oregon; for South Dakota, Ann Mines, Assistant Attorney General, Sioux Falls, South Dakota; for Texas, Drew Miller, Kemp Smith LLP, Austin, Texas; for Utah, Rachel S. Anderson, Fabian VanCott, Salt Lake City, Utah; for Washington, Tadas Kisielius, Van Ness, Feldman LLP, Seattle, Washington; for Wyoming, Jenifer E. Scoggin and Sami L. Falzone, Holland & Hart LLP, Cheyenne, Wyoming; for the Eastern States, Emily Bergeron, PhD; and for the Great Lakes States, Nicholas J. Schroeck, Director, Transnational Environmental Law Clinic, Assistant (Clinical) Professor, Wayne State University Law School, Detroit, Michigan.
[2]136 S. Ct. 1061 (2016).

within the boundaries of conservation system units in Alaska. The Ninth Circuit heard argument on remand on October 23, 2016.

*B. California*

In *Pacific Coast Federation of Fishermen's Ass'n v. United States Department of the Interior*,[3] the United States Ninth Circuit Court of Appeal held that the United States Bureau of Reclamation (Reclamation) abused its discretion under the National Environmental Policy Act in preparing the environmental assessment (EA) in relation to its approval of eight interim two-year water delivery contracts by not fully and meaningfully considering the alternative of reduced maximum delivery quantities. The court remanded the case back to the district court with instructions for Reclamation to consider a reduced maximum delivery quantity alternative in any future EA.

*C. Colorado*

The United States Forest Service amended its internal directives[4] for ski areas in its Special Uses Handbook[5] which address the sufficiency of water for operation of ski areas on National Forest System lands. The final directive includes a definition of the phrase "sufficient quantity of water to operate the ski area" and clarifies when and how the holder of a ski area permit must show sufficiency of water to operate the permitted ski area and new ski area water facilities. The final directive also addresses the availability and maintenance of federally-owned and permittee-owned ski area water rights during the permit term and on permit revocation or termination.

*D. Kansas*

On August 24, 2016, the Republican River Compact Administration approved two long-term agreements among Kansas, Colorado, and Nebraska.[6] Under the agreements, Colorado will receive full credit for its augmentation deliveries on the North Fork Republican River, and will retire an additional 25,000 groundwater-irrigated acres in the South Fork Republican River basin in order to improve flows into Kansas. Nebraska will receive full credit for its compliance activities so long as the "compliance water" is delivered to Harlan County Reservoir in Nebraska for use in Kansas.[7]

*E. Nevada*

The Ninth Circuit Court of Appeals determined in *United States v. Estate of Hage*[8] that ownership of a water right does not allow a rancher to graze his cattle on federal lands near the source of his water right without a federal grazing permit. Here, the defendant grazed cattle on federal public land without a grazing permit, claiming he had an easement by necessity to access the water on public lands within a half mile of the water source where he possessed water rights. The Ninth Circuit found that water rights do not also allow an appurtenant right to graze.

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[3]No. 14-15514, 2016 U.S. App. LEXIS 5717 (9th Cir. Mar. 28, 2016).
[4]Ski Area Water Clause, 80 Fed. Reg. 81,508 (Dec. 30, 2015).
[5]U.S. FOREST SERVICE, FOREST SERVICE HANDBOOK, 2709.11-SPECIAL USES HANDBOOK, CH. 50 (2016).
[6]*Republican River Compact*, KAN. DEP'T OF AGRIC. (last visited Mar. 3, 2017).
[7]*Id.*
[8]810 F.3d 712 (9th Cir. 2016).

### F. New Mexico

A federal district court found that Spain extinguished aboriginal water rights for three Pueblos in northern New Mexico, which represents a significant change in New Mexico law. In the Jemez River Adjudication,[9] a magistrate judge found that "the Pueblos [of Santa Ana, Zia, and Jemez] possessed aboriginal water rights prior to the Spanish occupation of New Mexico, but conclude[d] that the Spanish crown exercised complete dominion and control over New Mexico in a manner adverse to the Pueblos and thus extinguished the Pueblos' aboriginal water rights."[10] The United States and the Pueblos argued that because the Spanish crown took no affirmative act to extinguish the aboriginal title to water rights, the Mexican government properly recognized the rights, as did the United States in the Treaty of Guadalupe Hidalgo in 1848. The court rejected that argument. The proposed decision is subject to objections.

In *New Mexico v. Aamodt*,[11] the federal district court approved a settlement of tribal water rights for the Pueblos of Tesuque, Pojoaque, Nambe, and San Ildefonso. The court rejected about 800 objections that raised complaints about the procedure for the approval of the settlement, concerns about the implementation of the settlement, and disagreements about the application of state and federal laws. The settlement quantifies the Pueblos' water rights and authorizes construction of a regional water system to distribute water to the Pueblos and the Santa Fe County Water Utility.

### G. Oregon

In *Bohmker v. Oregon*,[12] the United States District Court for the District of Oregon considered Senate Bill (SB) 838 (2016), which places a moratorium until 2021 on using motorized equipment to extract precious metals from the beds or banks of the waters of the state. The court found SB 838 is a legitimate way to protect water quality and fish habitat and is not in direct conflict with or preempted by various federal land use and environmental laws regulating mining and the waters of a state. Particularly, SB 838 is not preempted by federal law as it does not violate the Mining Act's guarantee that federal lands will be free and open to mineral discovery. Instead, SB 838 only limits the form of mining used in certain areas, and does not prohibit mining altogether. The court found that SB 838 constitutes a reasonable environmental law to protect Oregon's natural resources, including fish, wildlife, riparian areas, and water quality.

In *Juliana v. United States*,[13] the plaintiffs sued the United States for violating their constitutional due process rights by failing to take action to curb the continuing increase in carbon pollution, ocean acidification, and ocean warming. The magistrate judge found the plaintiffs had standing to assert their novel claim, and noted the Due Process Clause imposes an affirmative obligation on the government to ensure due process interests are not infringed upon by government action. The court also found a public trust obligation, for example, through the United States Environmental Protection Agency's duty to protect the public from pollution and the federal government's authority to protect territorial waters off the West Coast and their resources for public enjoyment. The United States District Court for the District of Oregon affirmed Judge Coffin's Findings and Recommendations on November 10, 2016. In her opinion[14] she stated the fundamental

[9] Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, at 1, United States v. Abouselman, No. 6:69-cv-07896 (D.N.M. Oct. 4, 2016).
[10] *Id.* at 1.
[11] 171 F. Supp. 3d 1171 (D.N.M. 2016).
[12] 172 F. Supp. 3d 1155 (D. Or. 2016).
[13] No. 6:15-cv-1517-TC, 2016 U.S. Dist. LEXIS 52940 (D. Or. Apr. 8, 2016).
[14] No. 6:15-cv-01517-TC, 2016 U.S. Dist. LEXIS 156014 (D. Or. Nov. 10, 2016).

right at issue is the right to a climate system capable of sustaining human life and free from governmental action affirmatively and substantially damaging the climate system because the federal government has a public trust responsibility to protect resources, such as the territorial seas and the navigable waters.

In *Oregon Wild v. United States Forest Service*,[15] the plaintiffs asserted the Forest Service's 2011 consultation failed to consider the benefits of critical habitat on the threatened Klamath River bull trout and the impact of grazing permits on public land when compared with cumulative effects and climate change. The court determined the Forest Service satisfied the consultation requirement of the Endangered Species Act because it considered the effect of grazing on recovery and conservation of the Klamath River bull trout. The court also found the Forest Service did not ignore its duties under section 313 of the Clean Water Act by permitting grazing near streams with bull trout because the Forest Service implemented measures to achieve compliance with Oregon Department of Environmental Quality water temperature standards.

The court also determined the Wild and Scenic Rivers Act (WSRA) requirement to "protect and enhance" the Upper Sycan River's outstandingly remarkable values is not inconsistent with other public uses. The Court deferred to the Forest Service's judgment and found that grazing is still compatible with WSRA obligations and may be permitted on the banks of the Sycan River.

### *H. Wyoming*

In *Montana v. Wyoming*,[16] concerning the dispute over the 1950 Yellowstone River Compact (Compact), the United States Supreme Court upheld the findings of the Special Master. See the 2016 Water Resources chapter in the Year In Review for a summary of the findings of the Special Master. The Court remanded the case to the Special Master to determine damages and other appropriate relief.

Montana and Wyoming submitted a joint memorandum[17] articulating the issues that must be resolved in the remedies phase of the proceedings, including: (1) the amount of damages to which Montana is entitled based on Wyoming's liability for 2004 and 2006; (2) how costs should be allocated for the proceeding; and (3) whether the Court should issue affirmative relief, and if so, what such relief should be.

On April 27, 2016, Wyoming moved for summary judgment,[18] seeking judgment against itself to pay Montana $20,340, plus prejudgment interest, and dismissal of the case with prejudice. Wyoming claims Montana's damages are limited to the cost of readily available replacement water, injunctive relief is not appropriate because there is no cognizable danger of Wyoming violating the Compact again, the specific controversy Montana brought to the Court has been resolved and Montana is not entitled to further declaratory relief, and costs should not be awarded to either party because each state prevailed on some issues in the proceedings. On May 27, 2016, Montana moved for summary judgment to declare that the Compact protects Montana's water right in the Tongue River Reservoir, to fill 72,500 acre-feet, less carryover storage, each year.[19] The parties are awaiting a decision from the Special Master on both motions.

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[15]No. 1:15-cv-00895-CL, 2016 U.S. Dist. LEXIS 79006 (D. Or. Mar. 3, 2016).

[16]136 S. Ct. 1034 (2016).

[17]Joint Memorandum Regarding Issues, Procedure, and Proposed Schedule for Remedies Phase, Montana v. Wyoming, No. 137 (U.S. Apr. 25, 2016).

[18]Wyoming's Motion for Summary Judgment as to Remedies, Montana v. Wyoming, No. 137 (U.S. Apr. 27, 2016).

[19]Montana's Motion and Brief for Summary Judgment on Tongue River Reservoir, Montana v. Wyoming, No. 137 (U.S. May 27, 2016).