

GOVERNMENT

Denial of Domestic Well Permits Debated in NM

The process for obtaining a domestic well permit in New Mexico may become longer and more complicated, reported the *Albuquerque Journal* in July. The state's practice of approving all domestic well applications, typical throughout the West, was ruled a violation of the state doctrine of prior appropriation by a New Mexico district court.

An existing state statute appears to give the New Mexico Office of the State Engineer no opportunity to deny a domestic well permit. A southern New Mexico farmer filed suit against the state in 2006, claiming that domestic wells in his area were drying the Upper Mimbres River and impairing his senior water rights. Although the district court judge found no evidence of impairment, he ruled the domestic well statute unconstitutional, saying it does not allow due process for senior water rights holders, according to the *Journal*. He noted in his decision that irrigators cannot "sit idly and wait for actual impairment. When the water is gone, it will be too late."

The judge concluded that the state engineer must treat applications for domestic wells the same as any other water right—a process requiring public notice, review by staff for potential impairment to existing rights, and the opportunity to protest. If a permit is not approved, water rights can be purchased in the open market, where they sell for as much as \$15,000 per acre-foot, reported the *New Mexico Independent*.

State Engineer John D'Antonio previously warned the legislature that such a ruling might happen if the statute was not amended, reported the *Journal*. He has filed a friendly appeal in the case to "ensure that every legal basis in support of the presumption [of constitutionality of the statute] is fully deliberated," according to an agency press release. The decision will not be enforced during the appeal.

D'Antonio told the *Journal* that his office processes 7,000 to 8,000 domestic well applications each year, and the extra work of reviewing them "could bog down" his agency and delay the permitting process.

Until 2006, domestic wells were permitted to withdraw three acre-feet per year; that number has been reduced to one acre-foot. The vast majority of domestic wells in the state are not metered.

Visit www.ose.state.nm.us, www.abqjournal.com, and www.newmexicoindependent.com.

CA Drought Prompts Actions

In response to California Gov. Arnold Schwarzenegger's statewide drought proclamation on June 4 and state of emergency proclamation on June 12 for nine counties affected by severe water shortages, the California Department of Water Resources (DWR) announced in July that it was entering into water transfer agreements to aid Central Valley farms.

Some 50,000 acre-feet of water was to be pumped into the State Water Project (SWP) from groundwater wells in the Westlands Water District, then transferred to other parts of the district lacking groundwater access. DWR also planned to lend 37,500 acre-feet of water to Central Valley Project (CVP) contractors from the San Luis Reservoir.

Metropolitan Water District of Southern California made available 25,000 acre-feet of water to benefit both CVP and SWP contractors by delaying their own delivery until later in the year, after the growing season, reported the *Fresno Bee*.

In addition, DWR began expediting \$12 million in grants to water agencies and nonprofit organizations for water conservation activities. The agency also awarded \$6.4 million in grants to 31 public agencies from the Local Groundwater Assistance Program. These funds supported activities such as development of groundwater management plans and programs, installation of

groundwater monitoring wells, hydrogeologic studies of groundwater basins, and development of groundwater models and data storage systems.

Visit www.dwr.water.ca.gov and www.fresnobee.com.

Colorado Closer to Harvesting Rain

Colorado Gov. Bill Ritter signed a bill in May allowing the first use of rainwater harvesting in the state. The bill charges the Colorado Water Conservation Board and the state engineer with selecting up to ten new residential developments to conduct cistern pilot projects and authorizes the collection of 5,000 gallons of rainwater per single-family home in those projects. The water must be used for fire protection, watering of animals on farms and ranches, or irrigating gardens and lawns up to one acre.

Colorado currently does not allow rainwater harvesting because state water law requires all rainwater be allowed to flow downstream to water rights holders, reported the *Denver Post* in April.

The Water Resources Review Committee must study issues related to the exemption created by the bill, which lasts for three years. The study will address whether the practice prevents a significant amount of water from reaching rivers, or whether most of the rainwater would have infiltrated into the ground anyway, added the *Post*. Only new developments can participate so that the study can address groundwater infiltration before and after development.

Visit www.colorado.gov, www.leg.state.co.us, and www.denverpost.com.

EPA Proposes Carbon Dioxide Storage Rules

In July, the U.S. Environmental Protection Agency proposed a rule for the underground injection of carbon dioxide for long-term storage, also known as

geologic sequestration. The regulation was proposed under the Safe Drinking Water Act to make sure that injection-related activities do not have deleterious effects on underground sources of drinking water.

Geologic sequestration of carbon dioxide can reduce carbon emissions to the atmosphere and may help mitigate climate change. Because carbon dioxide has a unique combination of properties including relative buoyancy, corrosivity in the presence of water, high likelihood of the presence of impurities, and mobility in the subsurface, and because of the large injection volumes anticipated, EPA needed to create a new injection-well classification and modify technical criteria under its existing Underground Injection Control program.

The rule establishes criteria for “geologic site characterization; area of review and corrective action; well construction and operation; mechanical integrity testing and monitoring; well plugging; post-injection site care; and site closure for the purposes of protecting drinking water,” according to an EPA fact sheet. It would apply to owners and operators of wells that will be used to inject carbon dioxide into the subsurface for the purpose of long-term storage.

EPA is coordinating with the Department of Energy on carbon sequestration research and development.

Visit www.epa.gov/safewater/uic/wells_sequestration.html.

Rapanos Decision Is Affecting CWA Enforcement

A U.S. Supreme Court decision related to the Clean Water Act and a subsequent guidance document by federal agencies have adversely impacted enforcement of clean water programs, reported two House Committee chairmen in July.

Chairman James L. Oberstar of the Committee on Transportation and Infrastructure and Chairman Henry A.

Waxman of the Committee on Oversight and Government Reform obtained an internal U.S. EPA memo from Granta Y. Nakayama, EPA’s assistant administrator for enforcement and compliance assurance, to Benjamin Grumbles, the agency’s assistant administrator for water.

In the memo, Nakayama cited approximately 500 enforcement cases that were negatively affected in a nine-month period as a result of the three separate opinions in the 2006 *Rapanos v. United States* case and the 2007 guidance produced by EPA and the Army Corps of Engineers to address that decision. *Rapanos* dealt with the definition of navigable waters, which are protected under the Clean Water Act, yet did not clearly define them.

The chairmen sent a letter to EPA Administrator Stephen L. Johnson to request more information about the agency’s enforcement protocols. They

also pointed out that in three hearings held by the Committee on Transportation and Infrastructure related to the *Rapanos* decision, the Bush Administration failed to reveal the extent to which the uncertainty created by the decision was undermining the protection of clean water.

Copies of relevant communications were to be submitted to the committees by July 21. Both committees have oversight jurisdiction over EPA and enforcement of the Clean Water Act, and both planned further oversight on this issue.

Visit oversight.house.gov/documents/20080707150814.pdf.

Colorado River Pilferers May Be Cut Off

Well owners near the Colorado River in Arizona, California, and Nevada who pump river water without proper

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entitlement may soon be cut off. The Bureau of Reclamation has proposed such a rule in order to properly account for the use of lower Colorado River water and to ensure existing and future use of the water consistent with federal law.

Reclamation says the rule will help ensure the long-term sustainability of the lower Colorado River, which over the past eight years has been affected by severe drought conditions. It will also protect the water rights of lower Colorado River water entitlement holders.

The 1928 Boulder Canyon Project Act requires all Colorado River water users in the lower basin to have an entitlement to that water, but current data indicate that 9,000 to 15,000 acre-feet of Colorado River water is used in the lower basin each year without entitlement. Most of this use is from wells located in the river's floodplain that are hydraulically connected to the river. The *Arizona Republic* reported that more than half the wells affected are in Arizona.

The proposed rule will adopt a methodology to determine which wells are pumping Colorado River water, establish criteria for water users to demonstrate that their wells do not pump

water that would be replaced by river water, establish an appeals process, provide for public review and comment, and importantly, provide options for unlawful users to legitimize their use.

Well owners may be able to acquire water still available under the states' apportionments. The *Republic* cited as much as 10,000 acre-feet of unallocated water in Arizona, but virtually nothing available in California and Nevada. Other options include transferring or leasing from an existing assignment, becoming a customer of an existing entitlement holder, and acquiring a different source of water.

Visit www.usbr.gov/lc/region/programs/unlawfuluse.html and www.azcentral.com

Transfers Excluded from NPDES

In June, the U.S. EPA published a final rule clarifying that water transfers are not regulated under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program.

The basis for EPA's rule is a legal interpretation of the CWA indicating that Congress intended for states to have primary oversight of water transfers in cooperation with federal authorities, rather

than subjecting transfers to the NPDES program. In addition, pollutants are not added to water during the transfer process, as any pollutants present are already in the water.

The rule excludes from the definition of water transfer those that are subjected to "intervening industrial, municipal, or commercial use" and does not apply to "pollutants introduced by the water transfer activity itself to the water being transferred."

Visit www.epa.gov/npdes/agriculture.

Western Mining Claims Hot, But Not in Grand Canyon?

Mining claims have exploded throughout the West in the last five years, due to high prices for copper, gold, and uranium. Total claims within five miles of western cities and towns increased 46 percent—from 35,350 to 51,000—between 2003 and 2008, according to an analysis of Bureau of Land Management records by the Environmental Working Group. The Las Vegas and Phoenix metropolitan areas are each closely surrounded by over 5,000 claims.

The U.S. EPA has named metal mining the country's top toxic polluter for nine straight years and reported that mining has contaminated 40 percent of the headwaters of western watersheds. Uranium is a double threat to water quality because it is both a toxic heavy metal and radioactive.

Last spring, the U.S. Forest Service approved applications to start exploratory drilling for uranium on the Kaibab National Forest near the South Rim of the Grand Canyon. But after environmental groups sued, the Forest Service agreed in September to withdraw the application approval and to require a full Environmental Impact Statement (instead of using a categorical exclusion) before allowing any renewed attempts to drill.

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Meanwhile in June, the U.S. House Natural Resources Committee adopted a resolution requiring that the Secretary of the Interior immediately withdraw more than one million acres of federal land adjacent to Grand Canyon Park from future mining claims for up to three years.

The *Arizona Daily Star* reported in June that Committee Chair Raul Grijalva expected the Secretary to either not enforce the ban or to challenge it in court. "This will be good for three to six months," Grijalva told the *Star*. "Even if it's challenged and we lose, I think the focus on the Grand Canyon is good."

Visit www.ewg.org, www.azstarnet.com, and resourcescommittee.house.gov.

NV, UT Oppose Each Other's Proposed Water Transfer

What do Utah and Nevada have in common when it comes to water resources these days? Both have plans to build 100-plus-mile pipelines to transport water to fast-growing areas of the states and both oppose each other's plans because of environmental and growth issues.

In June, the *Salt Lake Tribune* reported on Southern Nevada Water Authority (SNWA) General Manager Patricia Mulroy's opposition to the selection

of the Federal Energy Regulatory Commission (FERC) as the federal lead in managing environmental studies of Utah's proposed pipeline from Lake Powell to three fast-growing southern counties. Mulroy questioned FERC's narrow expertise and lack of identification of "significant cumulative impacts" related to interbasin water transfers such as "induced growth and... impacts on lands and water resources in and surrounding the areas to be served."

In July the *Tribune* reported that Utah officials object to SNWA's proposal to pipe water from Snake Valley on the Utah-Nevada border to Las Vegas, fearing it would lower the water table, causing dust storms and degraded air quality. Local ranchers worry that their ability to grow is being exchanged for future growth in Las Vegas, said the *Tribune*, meanwhile Mulroy said it would be "unreasonable" to develop the Lake Powell pipeline partly because it is planned for people not yet living in southern Utah.

Mulroy wrote a reaction piece to the *Las Vegas Sun's* series on her agency's proposed project, saying that the opposition's dire environmental predictions for rural areas from which Las Vegas plans to import water ignore both science and environmental safeguards in state and federal law. She added that

the pipeline is not just for future growth: if Lake Mead were to go dry as some predict, even the current population could not survive on the ten percent of its water supply that now comes from sources other than Lake Mead.

SNWA's Snake Valley proposal is part of a larger importation plan. Last July, Nevada State Engineer Tracy Taylor granted SNWA 18,755 acre-feet per year (about half the water they applied for) from Cave, Dry Lake, and Delamar valleys. Rulings for Spring Valley have already been issued, and hearings on the Snake Valley application are scheduled to begin in fall 2009.

Visit www.sltrib.com, www.lasvegassun.com, and www.water.utah.gov.

EPA Won't Regulate 11 Contaminants

The U.S. EPA will not regulate 11 contaminants on the second drinking water contaminant candidate list (CCL 2) because they do not occur nationally in public water systems or they occur at levels below a public health concern.

EPA is, however, updating health advisories for seven of the 11 contaminants in order to include current health information for situations

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where the contaminants may be present. These include boron, 2,4-dinitrotoluene, and 2,6-dinitrotoluene (used in manufacturing); dacthal mono- and di-acid degradates (herbicides); 1,3-dichloropropene (soil fumigant); and 1,1,2,2-tetrachloroethane (volatile organic).

EPA is not updating or creating health advisories for 1-dichloro-2,2-bis (p-chlorophenyl) ethylene (degradate of the pesticide DDT), s-ethyl propyl thiocarbamate and Terbacil (herbicides), and Fonofos (insecticide) because national monitoring data showed almost no occurrence at levels of public health concern as determined by peer-reviewed data.

Under the Safe Drinking Water Act, EPA is required to develop a CCL every five years and to make a regulatory determination for at least five contaminants on each list. CCL 1 was published in 1998 and CCL 2, made up of 51 contaminants from CCL 1, was published in 2005. In February 2008, EPA published CCL 3, with 104 contaminants.

In May 2007, EPA requested public comment on their preliminary decision not to regulate these 11 contaminants from CCL 2. The agency's final regulatory determination is based on

extensive review of health effects, occurrence data, and public comments.

Visit www.epa.gov/safewater/ccl/ and yosemite.epa.gov/opa/advpress.nsf.

Tribe, Water Districts Resolve Conflict

Decades of litigation between the Soboba Band of Luiseño Indians and various water districts in Southern California ended with President Bush's signing of a settlement act in July. The tribe filed a lawsuit in 2000 against Metropolitan Water District (MWD), claiming that a tunnel constructed by MWD in 1932 to transport water from the Colorado River to Southern California was illegally draining water from the Soboba reservation. The act approves a settlement agreement dated June 7, 2006 (see *Southwest Hydrology*, Sept/Oct 2006) involving the Soboba Band, MWD, and other area water districts.

The bill, introduced by Congresswoman Mary Bono Mack in December 2007, was broadly supported by Congress, local leaders, and residents, including the Soboba Band, the City of Hemet, the City of San Jacinto, MWD, the Lake Hemet Water District, and the Eastern Municipal Water District.

The act also creates new sources of water for San Jacinto Valley residents and assists both the tribe and local residents with critical water infrastructure needs.

Visit bono.house.gov/news.

EPA Approves Hopi Standards

In July, the U.S. EPA approved water quality standards for the Hopi tribe in northeastern Arizona. Now 33 tribes across the United States have water quality standards effective under the Clean Water Act.

EPA's approval action culminates a two-step process that began with its April 2008 finding that the tribe was eligible to be treated in the same manner as a state for administering a water quality standards program. The second step—approval of the water quality standards—ensures that all surface waters within the boundaries of the Hopi Indian Reservation are covered by standards under Section 303(c) of the Clean Water Act, including designated uses and water quality criteria. The standards can now form the basis for federally enforceable regulatory requirements. EPA provides technical assistance to tribes to develop and implement water quality standards, and to manage other water quality programs.

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