

Moffatt Thomas

WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER (Dec. 2009 – Feb. 2010)

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U.S. FISH AND WILDLIFE SERVICE PROPOSES RULE TO RE-DESIGNATE BULL TROUT CRITICAL HABITAT

Several thousands of acres and miles of lakes, rivers, streams, and reservoirs throughout Idaho, Oregon, Washington, and Montana have recently been proposed for designation as critical habitat under the Endangered Species Act as a means of fostering the “recovery” of bull trout. Idaho and Montana will house the majority of the proposed habitat.

The re-designation of bull trout critical habitat comes after prior proposals in 2002 and 2004, and the publication of a final designation in 2005. The 2005 designation drew a lawsuit filed against the U.S. Fish and Wildlife Service by two environmental conservation organizations—Alliance for the Wild Rockies and the Friends of the Wild Swan. Both groups found the 2005 critical habitat designation lacking in that the final designation significantly scaled back the amount of habitat proposed in 2002 and 2004 by roughly eighty percent. The 2005 designation excluded all waters impounded behind dams (reservoirs), and excluded unoccupied habitat (habitat that could theoretically support bull trout, but habitat in which no confirmed bull trout occupied). The U.S. Fish and Wildlife Service sought the voluntary remand of its 2005 designation after an internal Department of the Interior investigation determined that the 2005 designation was improperly interfered with by a high ranking department political appointee.

Currently, large portions of the Clearwater, Weiser, Payette, Salmon, and Boise River drainages are proposed to be designated as critical habitat. This includes Lost Valley Reservoir, Sage Hen Reservoir, Little Payette Lake, Cascade Reservoir, Deadwood Reservoir, Arrowrock Reservoir, Anderson Ranch Reservoir, Warm Lake, and all sources of water flowing into them. While bull trout are already protected under the Endangered Species Act, listed as a “threatened” species, the designation of critical habitat will bring an additional layer of federal oversight intended to protect the fish. Generally speaking, protection under the Act means that the fish themselves, or their continued

existence, cannot be “harmed” or “jeopardized.” However, “harm” would be measured in actual negative impacts to the physical being of the fish. Critical habitat takes the traditional “harm” analysis one step further by broadening impermissible “harm” to include not only adverse impacts to the fish, but also the destruction or adverse modification of bull trout critical habitat. Stated differently, after the designation of critical habitat, impermissible “harm” is no longer restricted to injury to a fish, but now includes injury to the habitat regardless of whether a fish is directly, physically harmed.

While the U.S. Fish and Wildlife Service is downplaying the significance of the proposed critical habitat designation, others are concerned over what the designation could mean to water rights, water delivery from Federal facilities, water storage, and grazing on Federal lands located in designated watersheds. A public meeting is scheduled in Boise from 4 to 6 p.m. on February 25, 2010. That public meeting will be followed by a public hearing from 7 to 9 p.m. Public comments regarding the proposed critical habitat designation can be submitted on or before March 15, 2010.

IDAHO ISSUES NATION’S FIRST AIR PERMIT WITH CO₂ LIMITATIONS

The regulation of carbon dioxide and other greenhouse gases (“GHG”) is currently a topic of much discussion and controversy. At the legislative level, the U.S. Congress continues to work on legislation that would regulate GHG emissions through a cap-and-trade system. At the administrative level, the U.S. Environmental Protection Agency (“EPA”) is promulgating regulations to regulate GHG as part of its Clean Air Act permitting program. However, other than EPA’s newly promulgated GHG inventory and reporting program, at the current time, carbon dioxide and other GHG are largely unregulated as air pollutants.

Despite this current state of affairs, the Idaho Department of Environmental Quality (“DEQ”) recently issued a new air permit to Southeast Idaho Energy LLC (“SIE”) that contains enforceable carbon dioxide

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limitations. DEQ originally issued a permit to SIE for its proposed coal-fired fertilizer plant in Power County in February 2009. That permit did not contain any carbon dioxide limitations. However, that permit was then challenged by the Sierra Club and the Idaho Conservation League, on the basis that carbon dioxide limitations were required to protect regional air quality. That administrative proceeding was then stayed while the three parties negotiated regarding potential carbon dioxide limitations for the proposed facility. Eventually, the parties came to an agreement, and SIE then applied to DEQ for a revision to its permit to incorporate the agreed-upon limitations.

Even though DEQ currently does not regulate carbon dioxide as an air pollutant, it agreed to incorporate the carbon dioxide limitations into the permit, which it issued on November 30, 2009, and which became final on January 4, 2010, after the expiration of the 35-day administrative appeal period. However, DEQ has also stated that it included the carbon dioxide limitations only because the parties agreed to them. According to DEQ, until federal regulations regulating carbon dioxide and other GHG have been finalized, it does not plan to include GHG limits in future air permits.

IDAHO DEPARTMENT OF WATER RESOURCES DECISION HOLDS THAT ONLY PREEXISTING “MUNICIPAL PROVIDERS” MAY APPROPRIATE EXCESS WATER UNDER A “PLANNING HORIZON”

On December 21, 2009, the Idaho Department of Water Resources (“IDWR”) granted M3 Eagle, LLC (“M3”) (the developer of a master-planned community in the foothills north of Eagle) only a fraction of the water it sought for supplying the yet to be developed community. While M3 sought 23.18 cfs of water for municipal supply purposes, IDWR ultimately approved a permit for an instantaneous diversion rate of 4.0 cfs and a total annual volume of 1,089 acre-feet.

The M3 property contains approximately 6,000 acres of raw land, none of which is currently served by any municipal services, and none of which is currently contiguous to any portion of the city of Eagle. Historically, the property was used for dry land stock grazing. The nearest municipal water service infrastructure is several miles away. Consequently, M3 would be building the proposed community’s municipal services infrastructure from the ground up. At build out, M3 estimated that the community would house upwards of 21,000 residents.

M3 proposed to meet the community’s water needs through pumping groundwater lying beneath the

property from what is characterized as the Pierce Gulch Sand Aquifer. According to M3 consultants and IDWR personnel, the Pierce Gulch Sand Aquifer is a massive aquifer stretching from the foothills underlying the M3 property down to the Boise River Valley, and running more or less west down along the river valley floor. A portion of the M3 property overlays the northeastern edge of the aquifer.

While testimony of M3 consultants and IDWR personnel differed over the quantity of water available from the aquifer, as well as over aquifer recharge rates and sources, IDWR predominantly scaled back the quantity of water ultimately granted via permit because M3 was not a preexisting “municipal provider” as defined in Idaho Code Section 42-202B. In short, M3 applied for 23.18 cfs of water for municipal purposes in order to ensure that it would have enough water to serve the proposed community at completion. M3 did so reasoning that as a future “municipal provider,” it would be able to appropriate more water than was immediately necessary under the reasonable “planning horizon” provisions of the law—provisions that permit municipal providers to appropriate additional water for reasonably forecasted future supply needs.

Though IDWR did not quarrel with allowing M3 to appropriate water for “municipal” purposes, the Interim Director did disagree with M3’s ability to appropriate water under a reasonable “planning horizon.” In short, IDWR held that only preexisting municipal providers could avail themselves of the planning horizon provisions of the law, and that M3 was not a preexisting municipal provider. While M3 intended to become a municipal provider in the future, it was not one at the time of its application and, consequently, it could not secure water for anticipated future needs beyond that which could be established within the five-year proof of beneficial use period prescribed to a typical water right. In sum, IDWR was not willing to allow a prospective municipal provider obtain a future needs-based water right without first having at least some of the underlying development and service infrastructure in place.

EPA SEEKS TO STRENGTHEN STORMWATER RULES

The Clean Water Act prohibits discharges of pollutants into the waters of the United States without a National Pollutant Discharge Elimination System (“NPDES”) permit. Importantly, stormwater is among the regulated discharges, and persons and entities engaged in construction activity disturbing one or more acres are required to obtain a NPDES stormwater permit.

On December 1, 2009, EPA issued a final stormwater rule covering all newly permitted construction projects disturbing one acre or more, effective February 1, 2010. The rule requires owners and operators of construction sites to implement best management practices related to erosion and sedimentation controls, soil stabilization, and pollution prevention. The rule also prohibits discharges from concrete and other washout activities, as well as discharges of fuels, oils, soaps, and solvents used in vehicle and equipment operation and maintenance. It also imposes monitoring requirements and enforceable numeric limits on discharges for projects disturbing 10 or more acres, which requirements will be phased in over four years. The final rule represents the first national performance standards for stormwater discharge due to construction activity and is expected to impact more than 80,000 construction and development firms and result in nearly \$1 billion in additional annual compliance costs.

In response to stakeholder comments regarding post-construction activities, EPA has also initiated rulemaking in order to strengthen rules governing post-construction stormwater discharges. On December 28, 2009, EPA announced several listening sessions to review EPA's current approach to stormwater discharges from newly developed and redeveloped sites and address the recommendations for a stronger stormwater program made by the National Research Council. The meetings, held in late January, elicited concern from some real estate development stakeholders, who noted that the costs associated with stronger post-construction stormwater rules might further impede new development, which has already experienced a significant decline in the last year.

POCATELLO-BASED WIND TURBINE MANUFACTURER SECURES SIGNIFICANT CAPITAL INVESTMENT

Pocatello-based Nordic Windpower recently received \$38 million in working capital to go with a \$16 million loan from the U.S. Department of Energy to solidify its operations for at least the next three years. Rather than designing and manufacturing the typical three-blade turbines that Idahoans most often see dotting the landscape, Nordic Windpower specializes in the design and manufacture of smaller "community" footprint turbines. Nordic's smaller, community landscape friendly turbines are designed to generate an average of 300 kilowatts—enough to power approximately 300 homes per turbine.

Nordic Windpower received the \$38 million investment from two Palo Alto, California-based venture capital firms—Coast Ventures and New Enterprise Associates—that target investments in alternative energy and other "green" products. Nordic shipped its first complete turbine to Uruguay in South America in December 2009. Nordic is also working on an order to manufacture and ship two turbines to an Indiana School District.

Though Nordic's turbines are "smaller" than the typical three rotor turbine, "smaller" is a relative term. The Nordic turbines still contain roughly 500 different parts and weigh approximately 50 tons. Nordic's turbine design incorporates various features which permit the use of the turbines even in extremely gusty wind conditions—a condition that can lead to the intentional idling of other turbine designs as a means of protecting their structural and mechanical integrity.

UPDATE ON IDAHO WATER LEADERSHIP VACANCIES

On Thursday, January 14, 2010, Eric Wildman took the oath of office to officially become the fifth presiding judge of Idaho's Snake River Basin Adjudication ("SRBA") district court in Twin Falls. He will also preside over the water right adjudications that are now underway in north Idaho. Governor Otter announced the appointment of Judge Wildman to this position in December 2009. Previously, Judge Wildman was a staff attorney with the SRBA court. The vacancy for the presiding judge position opened up when former presiding judge John Melanson was appointed by Governor Otter to the Idaho Court of Appeals in August 2009.

By contrast, Governor Otter still has not named a permanent director of IDWR, to replace former director David Tuthill, Jr., who retired from that position in June 2009. Gary Spackman remains the interim director of IDWR.

If you would like additional information regarding the topics covered, or if there are additional topics that you would like us to cover in upcoming newsletters, please contact Lela Peña at (208) 345-2000 or llw@moffatt.com, and she will connect you with the appropriate contact. In addition, please contact Ms. Peña if you would prefer to receive the newsletter electronically, or if you would like to be removed from our mailing list altogether.