

Irrigation Issues Facing Treasure Valley Irrigators

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Challenges Facing the Water User Community

- Federal: Waters of the United States (WOTUS) Rulemaking and TMDLs
- State: Basin-Wide Issue 17 / Refill
- Local: Encroachments

Notice title says Water User, not just irrigation.

WOTUS Rulemaking

“Waters of the United States”

Definition of this term is determinative of CWA jurisdiction

Clean Water Act

- § 402: NPDES Programs (MS₄, CGP, PGP, etc.)
- § 404: Dredge and fill
- § 303: TMDLs (impairment of beneficial uses; CWAL, Recreation)

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EPA and U.S. ACE published Proposed Rule in the Federal Register (79 FR 22187) seeking to “clarify” the definition of “waters of the United States.”

What was once a statutory definition approximately one paragraph in length is now multiple pages long, and includes over 1,000 pages of justifying documents and reports.

WOTUS Rule “Clarity”

- Maybe, maybe not; but definitely expansive
 - “60 percent of the streams and millions of acres of wetlands across the country aren’t protected from pollution and destruction”
 - Proposed rule breeds clarity by casting a massive net capturing intermittent and ephemeral streams

The “clarity” comes from extending jurisdiction to all “tributaries” of navigable waters no matter how high up—watershed approach.

The question is no longer “What waters are WOTUS?”; rather, it is now, “What waters are not WOTUS?”

- Regulated community left asking where does “significant nexus” and “adjacency” end?
- Need to prove that historically non-jurisdictional waters remain non-jurisdictional
- Virtually all waters deemed jurisdictional until proved otherwise

Significant Expansion in the Arid West

- Arizona – 94% of streams are intermittent
- Nevada – 89%
- New Mexico – 88%
- National average – 60%

The Ditch to Nowhere

“Excavated wholly in uplands, drain[ing] only uplands, and hav[ing] less than perennial flow”

- This is not just a rural/agricultural versus urban issue—Thousands of miles of ditches, canals and drains
- Seemingly bright-line exception is not based in reality

Implications

- Pesticide and herbicide applications
- Erosion control
- Stormwater runoff
- Dredging and filling activities
 - irrigation exceptions open to challenge, at least arguably
- Local water and land use planning/control

Basin-Wide Issue 17 / Refill

Do flood control releases/operations count against water storage accounts?

- Idaho says yes: one fill state and paper fill is the one time fill
- “Refill by the grace of God (and relative lack of juniors in Basin 63)”

- 1911 Arrowrock (irrigation)
- 1940 Anderson Ranch (irrigation)
- 1963 Lucky Peak (flood control, recreation, stream flow and irrigation)

1953 Agreement

- Use of reservoir system for coordinated flood control

1986 Water Control Manual

- Established rule curves and runoff forecasts balancing flood control and physical storage

- State says irrigators need a new water right for refill
- Irrigators say they don't need a new right because you can't "refill" what has not filled once in the first place

- State wants to protect junior “expectation” or “entitlement” that has developed since 1963
- Irrigators may be agreeable to do so, but that “expectation” is a mistake, and we need to protect against future erosion of unallocated storage
- Cost-benefit analysis

TMDLs

- CWA § 303(d) listed as “impaired” for a narrative beneficial use under Idaho WQS
- Pollutants typically sediment, bacteria and Phosphorus
- Impaired uses typically CWAL and primary/secondary contact recreation

- CWAL = default under current WQS
 - Problematic assumption for man-made/man-altered waters with a working use

Effects

- Municipal discharges
- Industrial discharges
- MS₄ stormwater discharges
- Agriculture exempt?

Agriculture Exempt?

- Technically “yes,” but:
 - Writing TMDLs for drains (*e.g.*, 5/10/15-Mile, Mason Creek, Willow Creek, Sand Hollow Creek)
 - Mounting pressure from regulated community . . . agriculture is in the cross-hairs because you can not get blood from a turnip

Opportunity knocks?

- Pollution credit generation/trading?
- Direct discharge and re-use
- Pump-back projects
- Voluntary or not, agriculture **must** be part of the solution because the currently regulated community cannot get there alone

Encroachments

- Idaho Code § 42-1102
- Idaho Code § 42-1201 through 42-1204
- Idaho Code § 42-1209

What exactly is “unreasonable and material interference?”

Competing Uses

- Pathways
- Stormwater discharge
- Fee simple landowner use
- Irrigation delivery and drainage

Pioneer v. City of Caldwell (2012)

- Idaho Code § 42-1209
 - Must get written permission because of plain language and unique statutory duties
 - Cannot say “no” for sake of saying “no”; arbitrary and capricious standard and reasoned decision-making
 - Initial decision/discretion rests with ditch owner and deference on judicial review

BUT ...

- UMI is not “no interference”;
only that which is not “unreasonable” or “material”
- Need to strike a constructive and cooperative balance
where possible but does not mean the answer always is,
or can be, “yes”

Questions?

For more information or questions,
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