

2024 Litigation Look Ahead Series: SCOTUS' Pass on Cases Sets Up Continued Fight Over Tribal Water Rights, State Mineral Development Cases in Coming Year



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B&D is pleased to present the final installment of our *2024 Litigation Look Ahead* series. (Read [part five](#) covering the Comprehensive Environmental Response, Compensation, and Liability Act here.) In this edition, [our litigation team](#) examines two cases involving tribal water rights and state permitting authority over

mining and mineral development that the U.S. Supreme Court declined to review. In light of the Court's declinations, tribal water rights disputes could continue to increase, and states' permitting authority and mineral development rights remain in question.

Klamath Irrigation District v. U.S. Bureau of Reclamation, No. 22-1116 (Tribal Water Rights)

Case Summary

In 2019, two irrigation districts in Oregon and other water users sought to enjoin a Bureau of Reclamation plan to use stored water in the Upper Klamath Lake to augment instream flows in the Klamath River to benefit endangered species and tribes in southern Oregon and northern California and to limit the amount of water available to the irrigation districts. The districts argued that the federal government only had the right to store water in the Upper Klamath Lake, not use it. Both the Hoopa Valley Tribe and Klamath Tribe intervened as of right in the lawsuit and moved to dismiss the case on the ground that they were required parties under Rule 19 of the Federal Rules of Civil Procedure in that they had interests in the water that the U.S. Environmental Protection Agency's (EPA) decision would impair. Due to tribal sovereign immunity, they could not join as defendants. In May 2021, a magistrate judge agreed with the Tribes and recommended the case's dismissal. In September 2021, the U.S. District Court for the District of Oregon adopted the recommendation and dismissed the challenge. The districts appealed, arguing that the Tribes were not required parties because the Bureau of Reclamation adequately represented their interests. In September 2022, the U.S. Court of Appeals for the Ninth Circuit [upheld](#) the dismissal. The appellate court found that the Bureau of Reclamation's and Tribes' interests were not fully aligned: The Bureau's overriding interest was in complying with environmental laws, while the Tribes had a competing, sovereign interest in ensuring their citizens' continued access to natural resources. Importantly, the Ninth Circuit held that the "Tribes' water rights are "at a minimum coextensive with [the Bureau's] obligations to provide water for instream purposes under the [Endangered Species Act]," and that the disposition of the districts' case could "impair[]" "the Tribes' long-established reserved water rights."

The districts [petitioned](#) the U.S. Supreme Court for certiorari. They argued that, under the McCarran Amendment, the United States' waiver of sovereign immunity to adjudicate water rights extends to reserved water rights the government holds on behalf of tribes, and that, absent this, state-adjudicated water rights would be rendered meaningless against the federal government if any tribe objected. Both the Bureau of Reclamation and the Tribes argued that the McCarran Amendment does not apply to this case because it only applies to challenges involving an adjudication or the administration of water rights. On October 30, 2023, the Supreme Court declined to grant certiorari, finding that the case involved the District's and the Tribes' competing claims to a finite natural resource and there was no way to shape relief to avoid prejudice to the Tribes, which could not be joined in the action absent a waiver of their sovereign immunity.

Implications

Although the Supreme Court declined to hear the case, litigation involving tribal water rights and water rights more generally will likely continue to increase. As water becomes more scarce and disputes over the resource increase, courts will continue to ensure that the rights of all interested parties, including tribes, are recognized and, to the extent possible, protected. Following the Ninth Circuit's decision, parties seeking to challenge agency actions that implicate tribal water rights must involve the tribes in discussion and negotiation and ensure that all parties with established water rights can be joined in any litigation so that an adjudicating court can grant appropriate relief.

Alaska v. U.S. & Michael Regan, No. 22-0157 (Mining and Mineral Rights)

Case Summary

In February 2023, EPA blocked a proposed copper and gold mine, the Pebble Mine, and similar extraction projects within approximately 300 square miles in Southwest Alaska. 88 Fed. Reg. 7441 (Feb. 3, 2023). In July 2023, the State of Alaska [asked](#) the U.S. Supreme Court to reverse EPA's decision and allow Pebble Mine and similar projects to proceed. EPA issued its decision under CWA Section 404(c), allowing the agency to bar certain waters of the United States from being used as disposal sites for the discharge of dredged or fill material for the construction and routine operation of the proposed mine. Alaska's complaint argues that EPA's veto overrides state authority, which violates Alaska's Statehood Act and effectively creates a new federal preserve.

The United States [argued](#) that this case does not fall within the narrow class of disputes warranting the Court's original jurisdiction and that Alaska's claims do not rise to the "seriousness and dignity" the Court has required to exercise its jurisdiction. The United States contended that there is nothing distinctly sovereign in Alaska's claims and that the State has other, fully adequate, federal forums available to challenge the agency's final agency action, including federal district court under the Administrative Procedure Act or the U.S. Court of Appeals under a special statutory review procedure, and the Court of Federal Claims to seek monetary compensation for an alleged taking.

On January 8, 2024, the Supreme Court [declined](#) to hear the case, but this challenge is far from over. On March 14, 2024, Alaska filed a [complaint](#) against the United States in the U.S. Court of Federal Claims. The State argues that the federal government violated a 1976 land swap agreement under which the United States received 700,000 acres of land to create Lake Clark National Park and Preserve in exchange for giving the State federal lands, including the Bristol Bay watershed where the Pebble mine would be

located. Alaska argues that there is no other economically productive activity that can occur on these lands, and therefore, the EPA's final determination has deprived the State of all of the lands' value. The State seeks compensation under the Fifth Amendment's taking clause.

In addition, the developers of the proposed mine filed a [separate lawsuit](#) in the U.S. Court of Federal Claims alleging similar Fifth Amendment violations. On March 15, 2024, the developers also [filed a complaint](#) against the EPA in U.S. District Court for the District of Alaska. The developers claim EPA's action in vetoing the proposed mine was arbitrary and capricious in violation of the APA because it failed to consider the decision's economic impacts and overestimated the protected waters that would be impacted by mining activity.

Implications

First, EPA's decision could have a lasting impact on Alaska's economy. The State's complaint estimates that Pebble Mine alone would provide more than \$100 million in annual revenue through state taxes, licensing fees, and royalty payments. Second, the decision threatens further mineral development in Southwest Alaska. As the global economy puts ever-greater emphasis on sources of renewable energy and emerging technologies, rare metal mines such as those proposed at the Pebble Mine site are becoming increasingly important as sources of supply and for their contributions to economic vitality. Finally, if the ongoing challenges of this decision fail, EPA could use its authority under the CWA to undermine states' permitting authority for such mines and deprive states of the benefit of their mineral rights.

In Conclusion

The Supreme Court's denial of certiorari in *Klamath Irrigation District* leaves the Ninth Circuit's decision in place. That decision emphasizes that the tribes have a sovereign interest in ensuring their citizens' continued rights to access to water from the Klamath River, but that they cannot be joined in the action absent a waiver of their sovereign immunity. Accordingly, parties challenging agency actions involving access to water must ensure that all parties with established rights to the water, including tribes, are involved in any discussions or negotiations and that they can be properly joined in any litigation so that the court can fashion meaningful relief.

In *Alaska*, the Supreme Court's decision not to exercise its original jurisdiction leaves the EPA's decision blocking the Pebble Mine in place for now. The agency's decision is subject to further challenge, but if it is ultimately upheld, it could effectively undercut states' permitting authority and their mineral development rights.

Litigation Series: In Case You Missed It...

In our 2024 Litigation Look Ahead series, we highlighted cases – environmental and otherwise – that could have notable impacts on the regulated community or lead to changed regulatory approaches. In case you missed it, read:

- ◆ [Part one of the series covering the future of *Chevron* deference](#)
- ◆ [Part two covering the major questions doctrine](#)
- ◆ [Part three covering administrative enforcement issues](#)
- ◆ [Part four covering Fifth Amendment "regulatory" takings](#)
- ◆ [Part five covering the Comprehensive Environmental Response, Compensation, and Liability Act \(CERCLA\)](#)

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