No. 06-729

In The Supreme Court of the United States

CITY OF NEW YORK, *et al.*,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

Brief *Amici Curiae* Of National Water Resources Association, Western Urban Water Coalition, Western Coalition Of Arid States, Association Of California Water Agencies, [California] State Water Contractors, Idaho Water Users Association, Arizona Department Of Water Resources, Central Arizona Water Conservation District, City And County Of Denver Acting By And Through Its Board Of Water Commissioners, Albuquerque Bernalillo County [New Mexico] Water Utility Authority, Metropolitan Water District Of Salt Lake & Sandy [Utah], Central Utah Water Conservancy District, Fremont Madison [Idaho] Irrigation District, Pioneer Irrigation District, El Dorado Irrigation District, Northern Colorado Water Conservancy District, City Of Aurora, Yuba County Water Agency, Yolo County Flood Control & Water Conservation District, And Browns Valley Irrigation District, In Support Of Petitioners

PETER D. NICHOLS*
PEGGY E. MONTAÑO
ROBERT V. TROUT
TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C.
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

Counsel for National Water Resources Association, Northern Colorado Water Conservancy District

**Counsel of Record for all Amici*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

DOUGLAS K. MILLER,
General Counsel
SUZANNE TICKNOR,
Deputy General Counsel
CENTRAL ARIZONA WATER
CONSERVATION DISTRICT
P.O. Box 43020
Phoenix, Arizona 85080

GREGORY K. WILKINSON, ESQ.
BEST BEST & KRIEGER LLP
3750 University Avenue,
Suite 400
Riverside, California 92502
Counsel for State Water Contractors

NORMAN M. SEMANKO, ESQ.,
Attorney at Law
1010 W. Jefferson St.,
Suite 101
Boise, Idaho 83702
Counsel for Idaho Water Users Association

PATRICIA L. WELLS,
General Counsel
CITY AND COUNTY OF
DENVER, BOARD OF
WATER COMMISSIONERS
1600 West 12th Avenue
Denver, Colorado 80204

CHRISTINE MCKENNEY,
Assistant City Attorney
CITY OF AURORA
15151 E. Alameda Parkway,
First Floor
Aurora, Colorado 80012

GUY R. MARTIN, ESQ.
PERKINS COIE LLP
607 14th Street NW
Washington, DC 2005
Counsel for Western Urban Water Coalition

WHITNIE HENDERSON, ESQ.
ASSOCIATION OF CALIFORNIA
WATER AGENCIES
910 K Street, Suite 100
Sacramento, California
95814

SHAWN E. DRANEY, ESQ.
SNOW, CHRISTENSEN
& MARTINEAU
10 Exchange Place
Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Counsel for Metropolitan Water District of Salt Lake & Sandy

MARIA O'BRIEN, ESQ.
MODRALL SPERLING
500 Fourth Street NW
P.O. Box 2168
Albuquerque, New Mexico
87103
Counsel for Albuquerque Bernalillo County Water Utility Authority

THOMAS D. CUMPSTON, ESQ.,
General Counsel
EL DORADO IRRIGATION
DISTRICT
2890 Mosquito Road
Placerville, California 95667

W. PATRICK SCHIFFER, ESQ.,
Chief Counsel
GREGG A. HOUTZ, ESQ.,
Deputy General Counsel
ARIZONA DEPARTMENT
OF WATER RESOURCES
3550 North Central Avenue
Phoenix, Arizona 85012

LAWRENCE S. BAZEL, ESQ.
BRISCOE, IVESTER & BAZEL, LLP
155 Sansome Street,
7th Floor
San Francisco, California
94104
*Counsel for Western
Coalition of Arid States*

JERRY R. RIGBY, ESQ.
RIGBY, THATCHER, ANDRUS,
RIGBY & MOELLER,
CHARTERED
25 N. 2nd E.
P.O. Box 250
Rexburg, Idaho 82440
*Counsel for Fremont Madison
Irrigation District*

STEVEN E. CLYDE, ESQ.
CLYDE SNOW SESSIONS
& SWENSON, PC
One Utah Center
Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
*Counsel for Central Utah
Water Conservancy District*

SCOTT L. CAMPBELL, ESQ.
MOFFATT THOMAS BARRETT
ROCK & FIELDS
CHARTERED
101 South Capitol Boulevard,
10th Floor
P.O. Box 829
Boise, Idaho 83701
*Counsel for Pioneer
Irrigation District*

RYAN S. BEZERRA, ESQ.
BARTKIEWICZ, KRONICK
& SHANAHAN
A Professional Corporation
1011 Twenty-Second Street
Sacramento, California
95816
*Counsel for Yuba County
Water Agency, Yolo
County Flood Control &
Water Conservation
District, and Browns
Valley Irrigation District*

QUESTION PRESENTED

Amici and other Western water users rely upon thousands of water transfers to deliver trillions of gallons of water daily pursuant to State water allocations to meet essential domestic, municipal, industrial, agricultural and other demands. The question *Amici* will address is: whether extending the National Pollutant Discharge Elimination System to water transfers would violate Congress' specific instruction in the Clean Water Act, 33 U.S.C. §§ 1251(g), not to supersede or abrogate individual water allocations of the States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici Curiae – Western water users associations and western water users – submit this brief in support of New York City's Petition for a Writ of Certiorari seeking reversal of the lower court's decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*").[1]

West of the 100th Meridian,[2] the nation is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Further, since most precipitation in the west falls as snow, it is necessary to capture water where and when the snow melts, invariably far from the major urban and agricultural centers that need the water. Hence, it is compulsory to transfer water through complex systems of manmade and natural conveyances and reservoirs. Water transfers allow the west to sustain its cities, farms, and ranches. Without this elaborate system of water transfers, many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, and the Snake River Valley of Idaho. Similarly, many of the nation's great cities could not exist, including Albuquerque, Cheyenne, Denver, Los Angeles, Phoenix, Reno, Salt Lake City, and San Francisco.

Under individual water rights determined pursuant to State water law, *Amici* and countless other public and private entities in the western United States divert water

---

[1] Pursuant to Rule 37.6 of this Court, *Amici* represent that counsel for *Amici* authored this brief in its entirety and that no person or entity other than *Amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a) consent of all parties has been given and the letters have been filed with the Clerk of this Court.

[2] The 100th Meridian forms the eastern boundary of the Texas panhandle, and splits the states of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

from natural streams and lakes.[3] Many then transfer water through manmade tunnels, canals, and pipelines into other natural streams and lakes to meet the domestic, agricultural, commercial, and industrial water needs of residents in another watershed. These water transfers range from a few hundred thousand gallons per year needed to irrigate a high-mountain pasture in northern Idaho to 2.4 trillion gallons per year delivered by California's Central Valley Project for municipal, irrigation, and other uses. Water transfers may be as commonplace as the diversion of water from a river into a nearby (but hydrologically separate) stream for delivery to a nearby town or field, or as massive as the transfer of Sacramento River water by the Federal Central Valley Project and State Water Project to serve citizens throughout northern, central, and southern California. Extending the National Pollutant Discharge Elimination System ("NPDES") program of the Clean Water Act ("CWA" or "Act") could severely disrupt *Amici's* necessary water transfers to meet essential domestic, agricultural, commercial, and industrial water demands throughout the West, which would supersede or abrogate such transfers.

The National Water Resources Association ("NWRA") is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the western United States. Its members range from the Metropolitan Water District of Southern California, which serves most of California's south coast, an area of

[3] The States allocate the waters within their boundaries for "beneficial" or "reasonable" use under one of two prevailing legal doctrines. Eastern States, like New York, use variations of the riparian doctrine, whereas the arid Western States generally follow the prior appropriation doctrine. Under that doctrine, the States grant specific water users the right to use particular quantities of public water resources for specific purposes.

3,328,000 acres, to the farmer who owns the McCormick Rowe Ditch in St. Anthony, Idaho, which is used to irrigate 240 acres of farmland.[4] NWRA members directly engage in, or rely on, water from innumerable water transfers.[5] If these water transfers were effectively halted or became prohibitively expensive to operate due to NPDES program requirements, NWRA members would be unable to meet essential domestic, agricultural and industrial water demands.

The Western Urban Water Coalition ("WUWC") is an association of the largest municipal water utilities in the western United States. The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. WUWC members[6] own and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including water transfer facilities. The continued,

[4] Other NWRA members include the Arizona Cattlemen's Association (AZ), the Central Arizona Water Conservation District (AZ), Coachella Valley Water District (CA), Glen-Colusa Irrigation District (CA), Imperial Irrigation District (CA), East Bay Municipal Utility District (CA), San Diego County Water Authority (CA), Colorado River Water Conservation District (CO), City of Fort Collins (CO), Montana Water Users Association (MT), Garrison Diversion Conservation District (ND), Middle Rio Grande Conservancy District (NM), Las Vegas Valley Water District (NV), Owyhee Irrigation District (OR), Central Oregon Irrigation District (OR), OWRC (OR), Brazos River Authority (TX), Provo River Water Users Association (UT), and Methow Valley Irrigation District (WA).

[5] NWRA has maintained a close working relationship with the U.S. Bureau of Reclamation ("Reclamation"), as many of its members are the operators or beneficiaries of Reclamation water projects, including projects with significant water transfer components, for example Colorado's Frying-Pan Arkansas Project, California's Friant-Kern Canal (part of Central Valley Project), and New Mexico's San Juan-Chama Project.

[6] WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Utah and Washington, including those residing within the cities of Phoenix, Denver, San Diego, Los Angeles, San Francisco, Oakland, Las Vegas, Salt Lake City, Tucson and Seattle.

unimpeded operation of these facilities is essential to the continued ability of WUWC members to serve the water needs of the major population centers of the west.

The Western Coalition of Arid States ("WESTCAS") is the voice of water quality in the arid west and an advocate for laws, regulations and policies that ensure sustainable supplies of water for the arid west and protect public health and the environment. WESTCAS was formed over 12 years ago in order to appropriately address water quality issues in an area of the country where precipitation is oftentimes less than ten inches per year and, as a consequence, unique arid ecosystems are the norm. Many WESTCAS members[7] depend upon water transfers both to meet municipal water supply requirements and to sustain, by virtue of water transport or wastewater discharge, riparian ecosystems that have developed in ephemeral or intermittent stream systems.

The Association of California Water Agencies ("ACWA") is a voluntary, statewide non-profit association of 440 public water agencies. Together, these agencies are responsible for more than 90 percent of the water delivered in the state. In addition to public agency members, ACWA also includes 28 affiliate members, consisting of mutual water companies and other non-public, non-profit water related agencies, and 302 associate members including firms and corporations in the law and engineering fields with an interest in California water issues. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner. Although the

[7] WESTCAS members include numerous water and wastewater agencies, such as the City of Phoenix (AZ), Tucson Water (AZ), the Salt River Project (AZ), Eastern Municipal Water District (CA), Los Angeles County Sanitation District (CA), the Sweetwater Authority (CA), Denver Metro Wastewater District (CO), Clark County Water Reclamation District (NV), the cities of Albuquerque and Santa Fe (NM), and El Paso Water Utilities (TX).

largest conveyance facilities in California are often the focus of attention, there are literally thousands of small conveyance systems in the state whose operators have used natural channels to convey developed waters for over a century.

The [California] State Water Contractors ("SWC") represents 27 of the 29 public water agencies operating within California who contract with the California Department of Water Resources for water supplies from the State Water Project ("SWP").[8] The SWP diverts water from the Sacramento-San Joaquin Delta through the California Aqueduct for distribution to the San Joaquin Valley and delivery over the Tehachapi Mountains into southern California. The Project supplies water for drinking, commercial, industrial and agricultural purposes to public water agencies, encompassing a population of over 22 million Californians – about two-thirds of the State's population – and over 750,000 acres of farm land throughout the San Francisco Bay area, the Central Valley, and Southern California. The SWP constitutes a significant portion of the supplies available to SWC members. As a result, the SWC is very concerned with matters affecting the SWP, the Sacramento-San Joaquin Delta, and tributaries to the Delta.

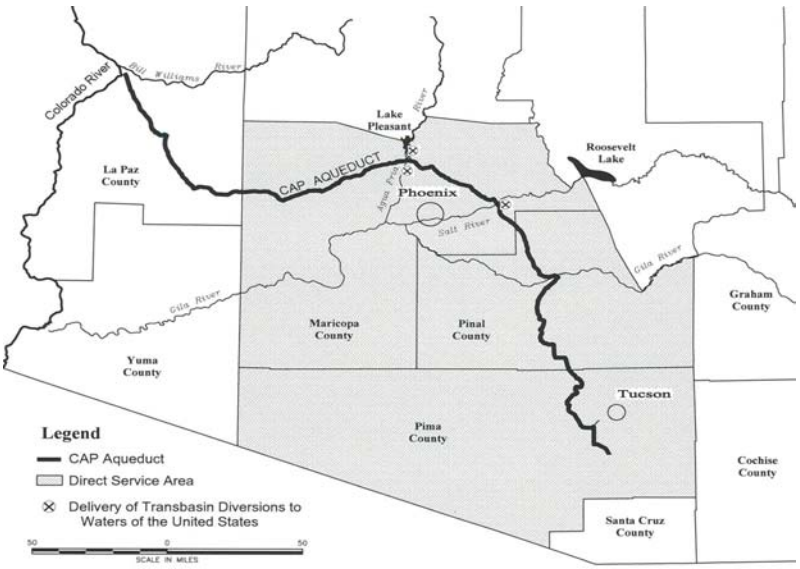
---

[8] The agencies that comprise the State Contractors are the following: Alameda County Flood Control and Water Conservation District, Zone 7, Alameda County Water District, Antelope Valley-East Kern Water Agency, Casitas Municipal Water District, Castaic Lake Water Agency, Central Coast Water Authority, City of Yuba City, Coachella Valley Water District, Count of Kings, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Dudley Ridge Water District, Empire-West Side Irrigation District, Kern County Water Agency, Littlerock Creek Irrigation District, Metropolitan Water District of Southern California, Mojave Water Agency, Napa County Flood Control and Water Conservation District, Oak Flat Water District, Palmdale Water District, San Bernardino Valley Municipal Water District, San Gabriel Valley Municipal Water District, San Gorgonio Pass Water Agency, San Luis Obispo County Flood Control and Water Conservation District, Santa Clara Valley Water District, Solano County Water Agency, and Tulare Lake Basin Water Storage District.

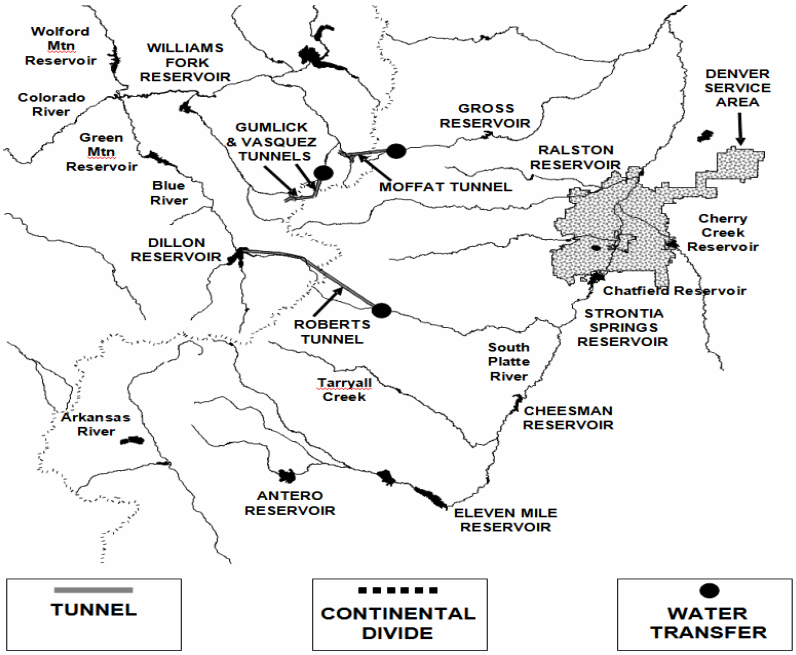
The Metropolitan Water District of Southern California ("Metro"),[9] a public entity made up of 26 member public agencies, imports water from the Colorado River through the Colorado River Aqueduct and from northern California through the California Aqueduct, as shown in the map below. Metro serves water to approximately 18 million people in a 5,200 square mile service area that includes Los Angeles, Orange, San Diego, Riverside, and Ventura counties. In fiscal year 2005-06 Metro delivered approximately 1.9 million acre feet of water, the equivalent of over 619 billion gallons.

[9] Metro is a member of the National Water Resources Association, Association of California Water Agencies, the State Water Contractors, and the Western Urban Water Coalition.

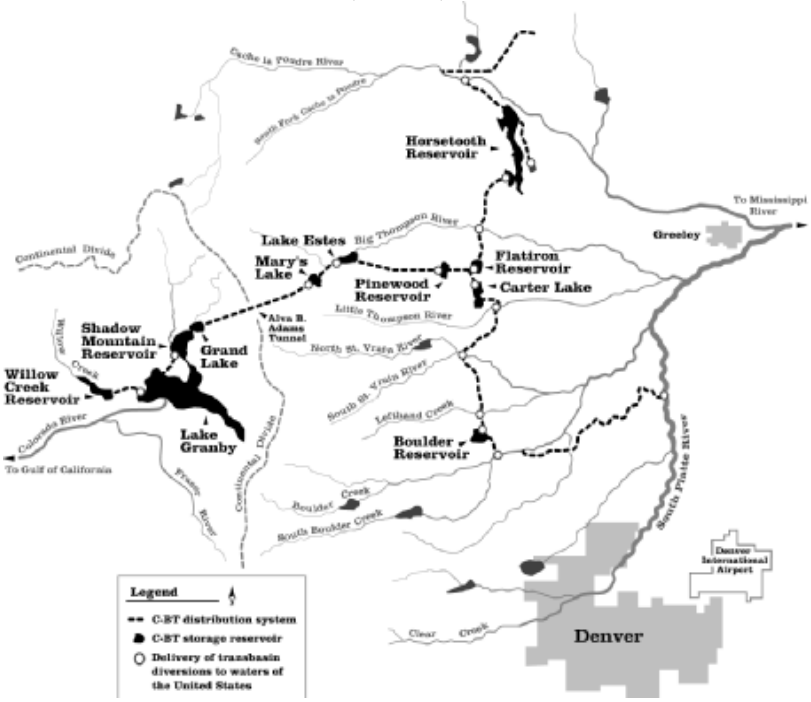
The Central Arizona Project ("CAP"), operated by the Central Arizona Water Conservation District, is a 336-mile long water transfer system of pumping plants, concrete-lined canals, inverted siphons, tunnels and pipelines that annually moves about 489 billion gallons of Colorado River water from Lake Havasu on the Colorado River to central and southern Arizona. The CAP water supply represents Arizona's largest renewable water supply; it serves municipal and industrial customers, non-Indian agricultural users and Indian communities. The service area of the CAP encompasses 80 percent of Arizona's water users, including the Phoenix and Tucson metropolitan areas. There are at least three operational points on the CAP system that release Colorado River water into other waters of the United States, as depicted below.



The City and County of Denver acting by and through its Board of Water Commissioners ("Denver Water") provides an average of 65 billion gallons per year of potable, raw and recycled water to approximately 1.2 million people in the Denver metro area. Denver Water diverts its supplies from 42 streams and numerous smaller tributaries and transfers it via two pump stations, 77 miles of canals, tunnels, siphons, and four trans-mountain tunnels. Water is stored in 13 reservoirs, with a combined storage capability of over 221 billion gallons.



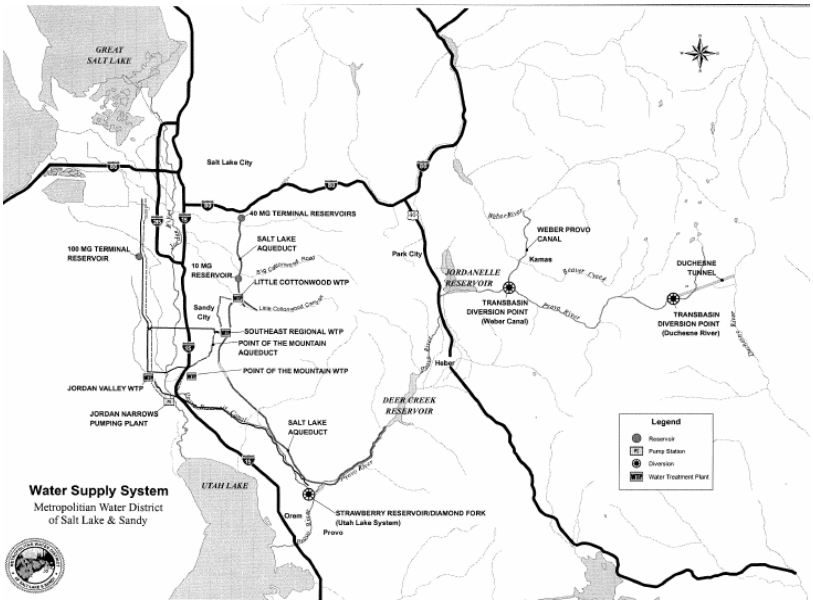
The U.S. Bureau of Reclamation's Colorado-Big Thompson ("C-BT") Project, operated by the Northern Colorado Water Conservancy District, conveys an average of 74 billion gallons per year through the Rocky Mountains and the Continental Divide to irrigate over 693,000 acres and supply approximately 750,000 people in 31 cities and towns and 16 water districts.[10] The C-BT Project diverts water from four source lakes, reservoirs, and streams, and conveys that water by gravity and three pump stations through two tunnels and nine canals into seventeen different streams, rivers, lakes and reservoirs.[11]



[10] The Municipal Subdistrict of the Northern Colorado Water Conservancy District operates the Windy Gap transbasin diversion project that is designed to provide approximately 16 billion gallons of water per year on average for municipal/industrial use.

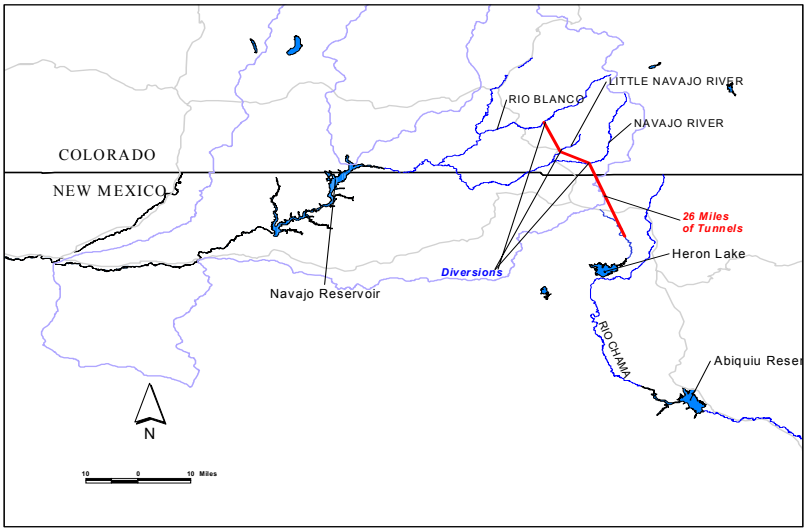
[11] Although the C-BT Project is the largest transbasin diversion in Colorado, it is not unusually complex in comparison to other western systems.

Metropolitan Water District of Salt Lake & Sandy, Utah ("District") provides supplemental water that makes up a portion of the supply for an estimated 400,000 people in the Salt Lake Valley. The District is the largest subscriber of water from the Provo River Project, a U.S. Bureau of Reclamation project completed between the 1930s and 1950s, and the second largest subscriber of water from the Bonneville Unit of the Central Utah Project, a U.S. Bureau of Reclamation project. The Provo River Project includes the Duchesne Tunnel, a 388 million gallons per day ("MGD") capacity tunnel that transfers water from the Duchesne River to the Provo River, and the Weber-Provo Canal, a 646 MGD capacity canal that transfers water from the Weber River to the Provo River. The Bonneville Unit of the Central Utah Project is serving the needs of a growing population in large part through a trans-basin diversion of water from tributaries of the Duchesne River. Approximately half of Metro's water supply depends upon trans-basin diversions.



Congress authorized construction of the San Juan-Chama Project in 1956. The Project imports water from the Colorado River Basin into the Rio Grande Basin, and consists of three diversions in Southern Colorado that divert water from tributaries of the San Juan River, itself a tributary of the Colorado River, through a series of tunnels beneath the Continental Divide to the Rio Chama Basin in New Mexico. The Project imports about 35 billion gallons of water annually.

The Albuquerque Bernalillo County Water Utility Authority ("Authority") is the largest San Juan-Chama Contractor and receives approximately 16 billion gallons per year. This water is the key to the Albuquerque area's water future by using surface water to replenish ground water depletion. Currently, the Authority is constructing the $375 million Drinking Water Project to transition use from the depleted aquifer to surface supplies. San Juan-Chama water will constitute 90 percent of Albuquerque's supply when the project comes on-line in 2008.



SUMMARY OF ARGUMENT

In *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108-09 (2004), this Court recognized that the imposition of NPDES permit requirements on water transfers from one waterbody to another is a nationally important issue of particular concern to the West:

> If we read the Clean Water Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western states, whose water supply networks often rely on engineered transfers among various natural water bodies. See Brief for Colorado et al. as *Amici Curiae*. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g).

Under the holding of the Second Circuit in *Catskill II*, at each point where a ditch, canal, tunnel, or pipeline introduces water to a stream or reservoir for subsequent use, an NPDES permit would be required, 451 F.3d at 84-85, automatically subjecting the transfer to the effluent limitations of the Act. This extension of the NPDES Program would supersede, abrogate, or impair the States' ability to meet the unique and varied needs of their residents and to meet their legal obligations to other States under interstate water compacts and apportionments, contrary to the established federal-state framework of deference to State water allocations. *See* Brief for Colorado et al. as *Amici Curiae* at II.A. In addition, many

water rights owners – including *Amici* – would face an impossible choice: constructing prohibitively expensive facilities to meet NPDES requirements ordinarily applicable to wastewater dischargers or forfeiting part or all of their water rights. Either way, essential water will not be available for existing beneficial uses, contrary to Congress' specific directive in the Act.

ARGUMENT

The issue before the court is nationally important. The Second Circuit's decision to extend NPDES permitting requirements to water transfers could have broad impacts nationwide on residents and water users who rely on water transfers every day, particularly the more than 60 million residents of the arid West. Furthermore, the decision contributes to the uncertainty following this Court's ruling in *Miccosukee, supra*, as the Brief for Colorado et al. points out at I.A. That uncertainty inhibits *Amici's* ability to meet the essential water needs of the West.

In § 1251(g), Congress stated that the Act shall not be "construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251(g) (2006). The States of Colorado et al. argue that Congress expressed its clear intent to preserve the established federal-state framework to defer to State water allocation law and specific State water allocations while recognizing the States' authority to address any related water quality issues pursuant to State law. *See* Brief for Colorado et al. at II.A. *Amici* agree, and explain below why extending NPDES permitting requirements to water transfers – as the Second Circuit has held – would produce a contrary result.

REQUIRING NPDES PERMITS FOR WATER TRANSFERS WOULD SUPERSEDE OR ABROGATE STATE WATER ALLOCATIONS BECAUSE PERMIT CONDITIONS WOULD EFFECTIVELY PROHIBIT THE FULL EXERCISE OF MANY STATE WATER RIGHTS.

In *Miccosukee*, the Supreme Court postulated that general permits might ameliorate the impact of extending the NPDES program to water transfers. 541 U.S. at 108-09. Unfortunately, however, general permits would provide no relief to water rights owners, such as *Amici*. All NPDES permits – general as well as individual permits – must include limitations to comply with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A). In addition, "[n]o permit may be issued . . . [w]hen the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA." 40 C.F.R. § 122.4(d) (2006). Moreover, all NPDES permits, no matter how simplified the administrative process, are subject to antidegradation and best management practices requirements of the Act. If required to operate under NPDES permits, many water rights owners would have no alternative but to curtail their transfers because treatment facilities required to meet effluent discharge limits of the Act would be impractical and cost prohibitive, if not impossible, to construct treatment facilities.

A. WATER QUALITY STANDARDS

The Second Circuit concluded that water transfers constitute discharges from a point source. *Catskill II*, 451 F.3d at 84-85. If a discharge merely has the "potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i); *see*

also Committee to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993) ("The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit."). Thus, an NPDES permit must contain conditions that limit the amount of constituents delivered to the receiving waters, regardless of whether standards are, in fact, exceeded or whether the transfer is a significant potential cause of an exceedance.

Water quality almost inevitably varies between basins. Movement of water from one basin to another could therefore be subject to permit requirements even though the transferor has no ability to control naturally occurring or ubiquitous parameters. The only sure way an operator of a water transfer could control the introduction of different constituents into receiving waters would be to transfer no water at all.

For example, Colorado has adopted water quality standards for thirty-six different naturally-occurring parameters, including suspended solids and temperature, 5 COLO. CODE REGS. § 1002-31.16 (2005), which are influenced by snowmelt, rain runoff, and reservoir storage. Water quality standards also apply to numerous metals commonly present downstream from Colorado's mineralized mountains. *Id.* Eighty percent of the precipitation in the western states falls as snow. Runoff from snowmelt and storm events naturally contains elevated levels of total suspended solids, i.e. particles of soil and sediment, and turbidity, i.e. muddy water, from erosion caused by rapid runoff and accompanying high stream flows. The dramatic topography of the west – which extends from 280 feet below sea level to over 14,494 feet above sea level – is, of course, the result of such natural erosive processes.

Water conveyances typically are open canals and ditches and therefore receive regulated constituents directly from natural erosion. The source water itself, such as the headwaters of the Colorado River, may be naturally high in total dissolved solids such as salts as a result of its passage through saline geological formations and inflows from brackish hot springs. Although suspended solids and turbidity conveyed into a stream or open ditch may eventually settle out downstream, their temporary presence could contribute to loadings in the receiving waters, triggering regulatory consequences.

B. THE IMPACT ON WATER TRANSFERS

To avoid the potential to cause an excursion above the water quality standards of the receiving waterbody during spring runoff or following a thunderstorm, a single operator of a water transfer might have to expend hundreds of millions of dollars to construct one or more treatment facilities or implement best management practices ("BMPs")[12] to reduce the presence of even naturally occurring constituents. Each facility would be required to treat peak flows – which might occur just one or two days a year during spring snowmelt – in order to match the water quality of receiving waters. Further, expensive treatment plants would operate for only a few weeks or months because water is usually available only during snowmelt (50 percent of mountain stream flow occurs in just three months: May, June and July).

[12] Best management practices are methods and practices, including structural and nonstructural controls and operation and maintenance procedures, applied before, during, or after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters. *See*, *e.g.*, 40 C.F.R. § 130.2(m).

As one example, the C-BT Project transfers water from the Colorado River and delivers it through a tunnel under the Continental Divide for municipal, agricultural, and other uses in northeastern Colorado. The C-BT Project diverts water from four source lakes, reservoirs, and streams, and conveys that water by gravity and three pump stations through two tunnels and nine canals into and then out of at least thirteen different natural streams and rivers that are integral parts of the water transfer. Transfers average 203 MGD and peak at 358 MGD.[13] Even assuming that the necessary infrastructure could be put in place to handle spring peaking flows,[14] the potential capital cost to treat C-BT Project water *once* could exceed $315 million, *double* the initial cost of the entire C-BT Project.[15] Without the ability to treat peaking flows, the C-BT Project would face an uncertain future. Furthermore, the C-BT Project might have to treat essentially the same water 17 times in 17 different treatment plants, that is, at every point water is discharged to a lake, reservoir, or stream for later delivery. Such treatment would be prohibitively expensive, if even possible.

Many water transfers, such as the C-BT Project, traverse federal land, including national parks and national forests adjacent to wilderness areas. Given the

---

[13] For comparison, Metro, the nation's largest water agency, delivers 1,696 MGD.

[14] Treatment plants generally cannot handle large fluctuations in throughput; they require gradual changes. Therefore, most treatment plants have a forebay, i.e., a surge reservoir, to buffer variable flows.

[15] The Engineering Department of Denver Water, which transfers an average of 106 MGD – 39 billion gallons per year – to meet the needs of the Denver Metro area, estimates that the capital costs of treating water transfers for total suspended solids, metals, and phosphorus could be as much as $0.90 per gallon per day of capacity, depending on plant location and complexity of necessary treatment.

location of many transfers within or near pristine areas and the need for large sites for treatment facilities,[16] the NPDES approach may not be economically or technically feasible, politically acceptable, or environmentally desirable.

For the insurmountable practical reasons discussed above, requiring treatment of water transfers under the NPDES program would preclude many such transfers in part and even altogether. That result would effectively supersede or abrogate State-allocated water rights, contrary to Congress' directive in the Act.

C. ANTIDEGRADATION REQUIREMENTS

Where the quality of waters "exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water," antidegradation provisions apply so as to maintain and protect existing quality. 40 C.F.R. § 131.12(a)(2). Although transferred water is often suitable for beneficial use without treatment, water transfers would nonetheless be subject to this "no degradation" requirement if an NPDES permit were necessary.[17] Antidegradation requirements may apply where only one water quality constituent is better than the corresponding stream standard. The only practical way for many diverters to meet antidegradation requirements for high quality waters – typical in headwaters areas – might be to curtail transfers and forgo the use of a

[16] Possible site requirements to treat C-BT Project water, as described above, could exceed 240 acres per plant. The removal of constituents by the treatment plant produces a "sludge," which also requires appropriate disposal.

[17] A state may allow degradation only if it finds, following an analysis of alternatives, that "allowing lower water quality is necessary to accommodate important economic or social development in the areas where the waters are located." 40 C.F.R. § 131.12(a)(2).

portion of their State-allocated right to use a specific quantity of water.

D. BEST MANAGEMENT PRACTICES

NPDES permits may include numeric effluent limitations on the concentration of constituents as necessary to comply with water quality standards, 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. § 122.4(d), and may require BMPs, 33 U.S.C. § 1314(e). However, adherence to BMPs – generally simpler and less costly than the usual technological controls – does not automatically assure compliance with requirements of the CWA addressing water quality standards. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 589 (9th Cir. 1985), *rev'd on other grounds and remanded by Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). It is also difficult to envision how many water providers could utilize BMPs in an economical manner to control source water quality without significantly curtailing their water transfers. Moreover, many of the BMPs would implicate land use controls over which the transferor would have little, if any, authority.

Thus, the NPDES program requirements would force many water transferors like *Amici* to forgo the full exercise of their State water allocations, as explained above.

CONCLUSION

There are few if any issues more critical to Western municipalities, water districts, canal and ditch companies, and individual farmers and ranchers than their continued ability to utilize scarce water resources when and where they are needed. Water supply in the West necessarily involves the collection, storage and transfer of water

through pipelines, tunnels, canals and natural waterbodies. Such water management activities have always been, and must remain, a State prerogative.

The Second Circuit's conclusion that the mere movement of natural waters from one stream or river to another constitutes a regulated addition of pollutants is clearly at odds with the specific Congressional directive not to supersede or abrogate state water allocations. *Amici* therefore urge this Court to (i) grant New York City's Petition for Certiorari and (ii) reverse the decision of the Second Circuit.

Respectfully submitted,

PETER D. NICHOLS*
PEGGY E. MONTAÑO
ROBERT V. TROUT
TROUT, RALEY, MONTAÑO,
WITWER & FREEMAN, P.C.
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

Counsel for National Water Resources Association, Northern Colorado Water Conservancy District

**Counsel of Record for all Amici*