

MEMORANDUM

June 14, 2006

TO: NWRA Members

FROM: Peter Nichols, Esq.  
Trout, Raley, Montano, Witwer & Freeman, P.C.  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
303-861-1963  
Direct: 303-339-5825  
Assistant: Glenice Martinez, 303-339-5832  
Fax: 303-832-4465

SUBJECT: Catskill Mountains Decision

The Second Circuit Court of Appeals issued its decision in Catskill Mountains Chapter of Trout Unltd. v. New York City on June 13, 2006 (No. 03-7203) (Catskill II) [attached]. Disappointingly but not unexpectedly, the three-judge panel upheld its earlier decision that NYC's water transfer is subject to NPDES permitting under the Clean Water Act.

As you know, New York City stores runoff in a reservoir and transfers it through a tunnel to a creek, which ultimately supplies drinking water to the City. In Catskill I, the Second Circuit held that the unpermitted water transfer violated the Clean Water Act, and remanded the case for a determination of penalties. The trial court calculated potential penalties of \$63+ million, but reduced the fine to \$5+ million because of mitigating factors, including a lack of environmental harm. NYC appealed. In Catskill II, the Court rejected NYC's request to reconsider its holding in Catskill I. In so concluding, the court reviewed intervening developments in the law, including the Supreme Court's decision in Miccosukee and EPA's 2005 Agency Interpretation addressing the applicability of the Clean Water Act to water transfers.

The Court concluded that Miccosukee recognized a legally significant distinction between inter- and intra-basin transfers, a part of the court's rationale in Catskill I. In addition, the court rejected EPA's "holistic" theory of the Clean Water Act, citing PUD No. 1 v. Washington Dept. of Ecology for the holding that while states have the power to regulate water quantity, federal regulation of water quality is not inconsistent - a broad reading of that case, particularly in light of the Supreme Court's recently-released decision in S.D. Warren v. Maine (No. 04-1527, May 15, 2006). The court

concluded that its plain reading of the language of the statute better adhered to the balance Congress intended to strike than EPA's "holistic" interpretation. The court also noted that its decision is consistent with decisions reached by other courts of appeals in Fidelity Exploration, Miccosukee, and Dubois.

The court discussed the western state's amicus brief, but cited the Supreme Court's dicta regarding their similar brief in Miccosukee, i.e., that although requiring permits for water transfers could raise costs prohibitively and violate the Act's preservation of state authority over water allocations, such permits might be necessary to protect water quality.

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