The Water Report
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STATE AUTHORITY & HYDROPOWER

SUPREME COURT AFFIRMS STATE AUTHORITY

S. D. WARREN v. MAINE

by Richard M. Glick, Davis Wright Tremaine, LLP (Portland)

On May 15, 2005, a unanimous US Supreme Court held in *S. D. Warren v. Maine Board of Environmental Protection,* 547 US ___ (2006), that non-polluting hydroelectric projects are subject to Clean Water Act (CWA) § 401. The issue was whether water passing through dams that themselves add no pollutants, constitutes a "discharge" so that state certification is required under section 401.

CWA § 401(a)(1), 33 USC § 1341(a)(1), provides that any applicant for a federal permit to conduct any activity that "may result in any discharge into the navigable waters" must obtain certification from the state in which the discharge originates that the discharge will not violate water quality standards. Through this provision, the states are infused with federal authority. The extent of this authority, and the inherent conflict between state and federal power, has many times been tested in the context of hydroelectric power project licensing under the Federal Power Act (FPA). In *First Iowa Hydro-Electric Cooperative v. Federal Power Com'n.*, 328 US 152 (1946), the Supreme Court held that the Federal Power Act confers upon the Federal Energy Regulatory Commission ("FERC"—formerly the Federal Power Commission) paramount authority over hydroelectric licensing, with narrow exceptions, such as regulation of state water rights. States are pre-empted from imposing duplicative regulatory burdens on FERC applicants and licensees, which are already subject to a comprehensive environmental regulatory scheme under the FPA. (See Moon, TWR #12 for a general discussion of water quality certification under § 401 of the CWA.)

However, citing CWA § 401, the Court significantly expanded the range of water quality related matters subject to state regulation. In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 US 700 (1994), the Court allowed imposition by the state of flow requirements that the Department of Ecology deemed integral to water quality. The question of what constitutes a "discharge" for purposes of § 401 jurisdiction was not addressed, as the fact of a discharge was not at issue in that case.

Courts have held that dams are not point sources that require National Pollution Discharge Elimination System (NPDES) permits under CWA § 402, 33 USC § 1342, solely because they "discharge" pollutants by passing upstream polluted water through or over the dam. *National Wildlife Federation v. Gorsuch*, 693 F2d 156 (DC Cir. 1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F2d 580 (6th Cir. 1988). The courts noted that dams may alter the condition of a waterway, but absent the addition of a pollutant by dam operations, were not subject to regulation:

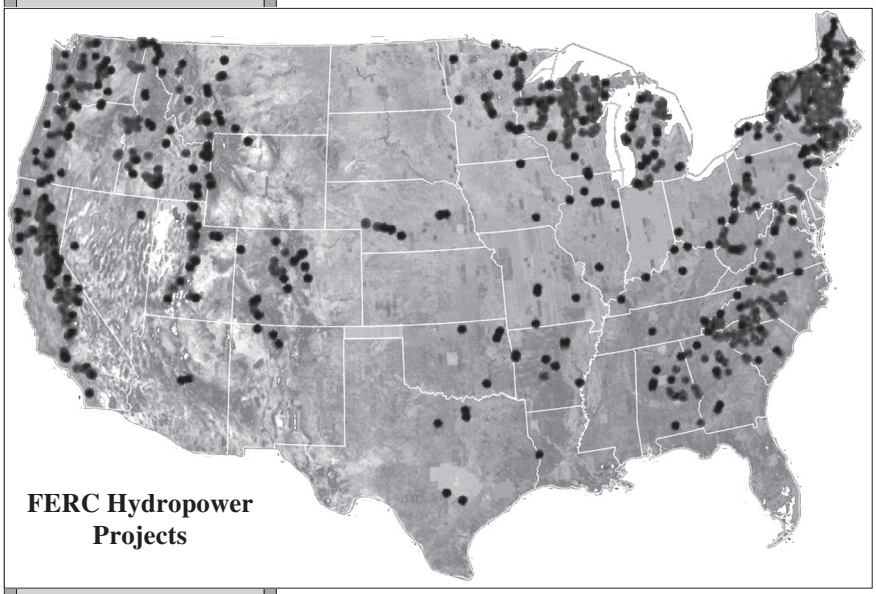
> . . . generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the "nonpoint source" category of pollution.
> *Consumers Power* at 588.

Hydropower Ruling

Case Background

Also in the CWA § 402 context, the Supreme Court had the opportunity to clarify whether water transfers through man-made obstructions result in a "discharge of pollutants" in *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 US 95 (2004) [see Glick, TWR #2], but stopped short of a definitive ruling. The Court did note, however, that polluted waters flowing from a canal into a wetlands would constitute a discharge of pollutants only if the two water bodies were meaningfully distinct. The Court quoted approvingly from a lower court ruling that "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110, citation omitted. The Court remanded the case for further evidence on the question of the distinctness of the water bodies.

The *S. D. Warren* case follows on this history. The petitioner there sought a ruling that the mere passage of already polluted water that enters the petitioner's dam and is passed unchanged back to the stream below the dam, is not a "discharge" that triggers CWA § 401 jurisdiction. Warren owns and operates five hydroelectric dams on the Presumpscot River in Maine, constructed in the early 1900s. The dams operate as run-of-river impoundments and have no meaningful storage capacity. It is undisputed that the dams do not add pollutants, though they do alter river flows, which of course affects aquatic habitat.



FERC Hydropower Projects

While reserving the question of the state's jurisdiction because the dams do not result in a discharge, Warren applied for § 401 certification. Certification was granted, but the Department of Environmental Protection imposed "extensive restrictions on the operation of the facilities, resulting in a projected loss of energy equivalent to roughly one-seventh of the dams' electric generation (10,000 barrels of oil per year)." Warren Petition for Writ of Certiorari at 9. These restrictions related to flows, fish passage, mitigation for loss of dissolved oxygen and recreational facilities. Warren appealed to the state's highest court and lost. *S. D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27.

Warren's central argument focused on the meaning of "discharge" as used in § 401. The term "discharge" is not defined in the CWA, but the Act provides that when the term is used without qualification, it "includes a discharge of a pollutant, and a discharge of pollutants." 33 USC § 1362(16). The terms "discharge of a pollutant" and "discharge of pollutants" are defined to mean "any addition of any pollutant to navigable waters from any point source." 33 USC § 1362(12). Since the Warren projects did not "add" any pollutants, Warren argued that, as a matter of law, there is no discharge to trigger § 401.

The Maine Supreme Judicial Court acknowledged that operation of the Warren dams does not add pollutants to the river, and agreed that an addition of pollutants is necessary for there to be a discharge for § 401 purposes. This notwithstanding, the court advanced a novel theory for finding that a "discharge" had occurred. The court reasoned that water passing through a dam is subject to private control and thus temporarily loses its status as waters of the United States. Therefore, when the impounded water is returned to the stream through the tail race, this results in an "addition" of waters that are not waters of the United States.

The Court affirmed the Maine high court, but summarily rejected its reasoning in a footnote:

> We disagree that an addition is fundamental to any discharge, nor can we agree that one can denationalize national waters by exerting private control over them.
> Slip Op. at 7, fn. 5.

Instead, the Court took a more common sense approach to the distinction between "discharge" under § 401 and "discharge of pollutants" under § 402. Justice Souter, writing for the Court, concluded that "'discharge' presumably is broader, else superfluous" and turned to a Webster's dictionary definition, of "flowing or issuing out." *Id.*, at 4. Water clearly flows out of the Warren dams, and thus constitutes a discharge.

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Hydropower Ruling

Triggers Distinguished

Permitee Concerns

States' Purview

The Court did not consider applicable its recent holding in *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 US 95 (2004). As noted above, that case interpreted CWA § 402, not § 401, and concerned whether transferring polluted water unchanged from one water body to another constituted an "addition" of pollutants. The Court concluded that such a transfer, if it occurred, is not an "addition," and therefore that a NPDES permit from the state is not required.

The *Warren* Court distinguished the trigger for § 402 from the trigger for § 401, holding that the latter does not require an addition.: "In sum, the understanding that something must be added in order to implicate §402 does not explain what suffices for a discharge under §401." Slip Op. at 9. Thus, the *Warren* case is not likely to have significant implications for the scope of state NPDES permit authority, and provides no guidance for the *Miccosukee* remand.

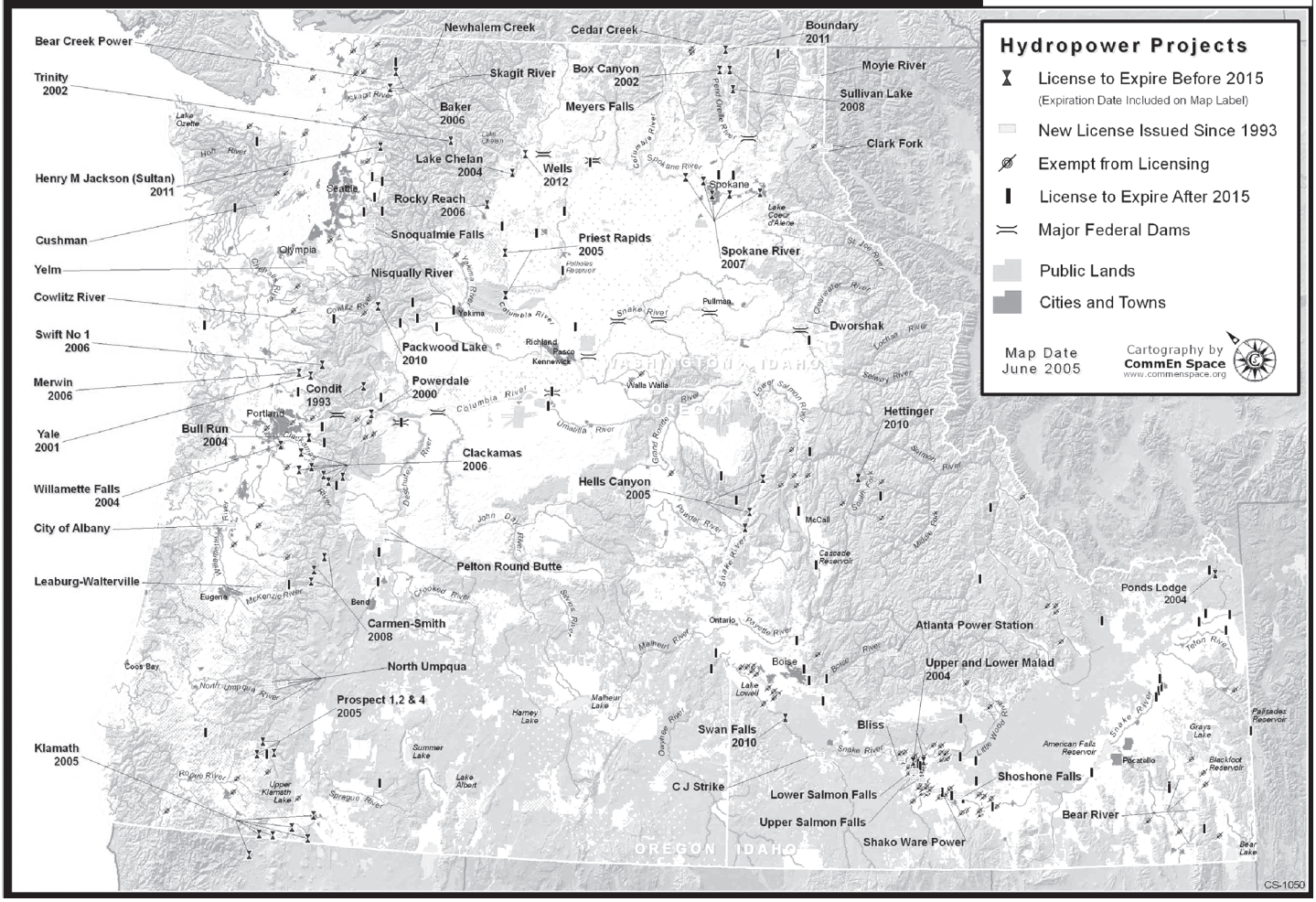
Of particular concern for owners of hydropower facilities or applicants for other federal permits (such as CWA § 404 fill permits), the Court gave a ringing endorsement of state § 401 authority. The Court noted that the restorative goals of the CWA go beyond preventing the "addition" of pollutants, and deal more broadly with "pollution," which the Act defines as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 USC § 1362(19). The Court then drew from the record as to the changes wrought by the Warren projects, including destruction of aquatic habitat, blockage of migratory fish passage, reduced dissolved oxygen, and reduced recreational opportunities, and concluded:

> Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns.
> Slip Op. at 14.

FERC HYDROPOWER PROJECTS

Washington, Oregon, & Idaho

TWR thanks the **Hydropower Reform Coalition** [website below] for allowing us to use their maps to accompany this article.



FERC HYDROPOWER PROJECTS
California

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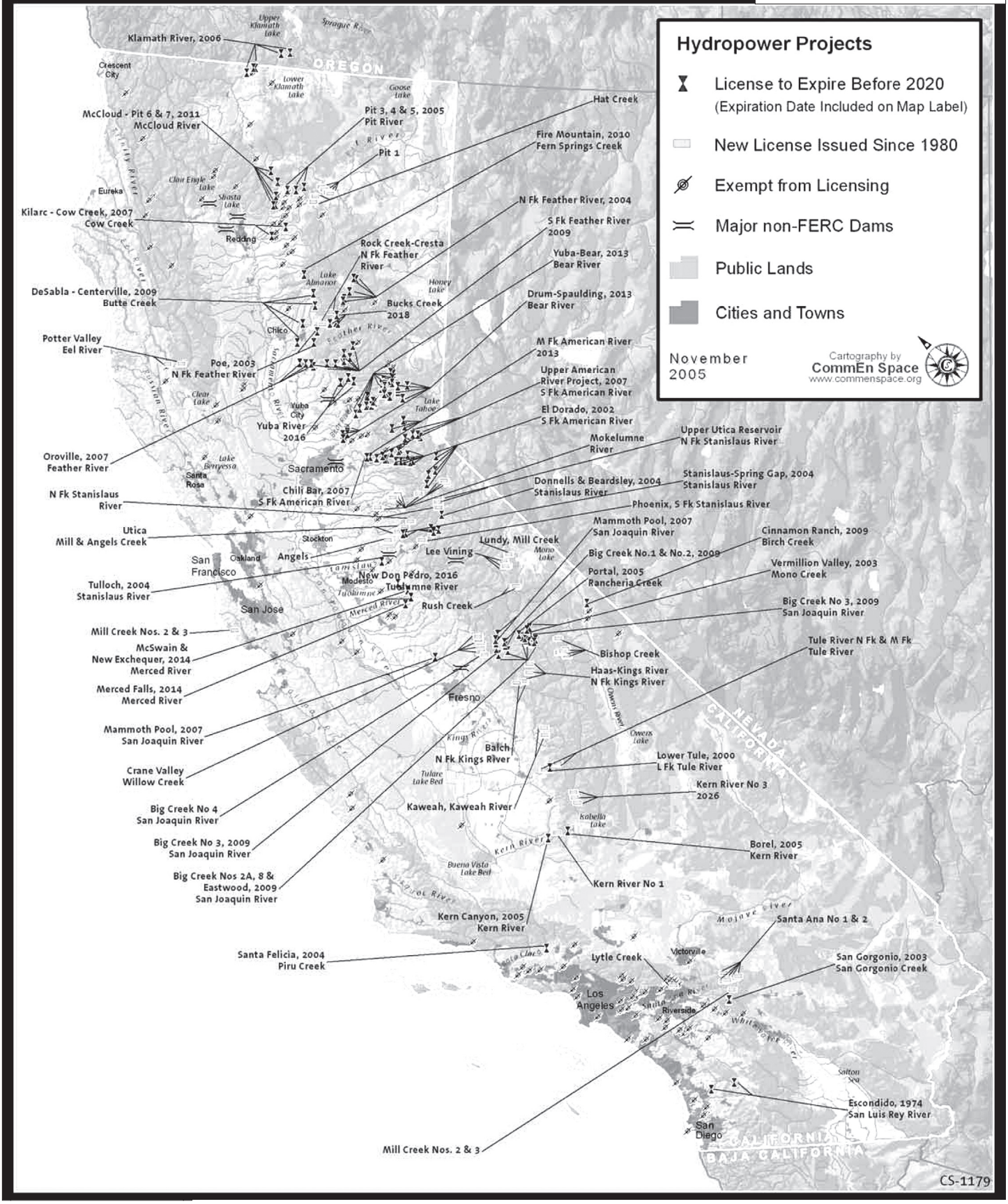

Hydropower Ruling

§ 401 Authority

States Emboldened?

FPA v. CWA

This rather sweeping dicta confirms many states' long-held view that authority under § 401 extends far beyond protection of water quality standards. The Court continued: "State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution," and citing Senator Muskie's floor speech in favor of enacting § 401, concluded:

> These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U.S.C. §1341(d), by imposing conditions on federal licenses for activities that may result in a discharge [citation omitted]. Reading §401 to give "discharge" its common and ordinary meaning preserves the state authority apparently intended." Slip Op. at 15.

Thus, the states may feel emboldened to exercise authority beyond mere water quality parameters to cover recreation, fish passage and the panoply of changes to river conditions brought about by dams. If pressed too far, such an assertion of authority could bring the Clean Water Act in confrontation with the Federal Power Act. FPA § 10(a) places water power development and protection of instream values on an equal footing:

> That the project adopted . . . shall be such as in the judgment of the [FERC] will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes . . .
> 16 USC § 803(a)(1).

Conclusion

It is clear that Congress intended hydroelectric projects to be protective of the natural environment, but it is also clear that Congress intended there to *be* hydroelectric projects. If the effect of state implementation of CWA § 401 is to duplicate the comprehensive regulatory scheme established by the FPA, or to render uneconomic a project undergoing relicensing, the conflict that the Supreme Court tried to lay to rest in *First Iowa, supra,* will rise again. 16 USC § 803(a)(1). (Editor's Note: The greatest amount of authorized generating capacity - approximately 7,420 megawatts - will come up for relicensing in 2007. Between 2005 and 2015, the top five states for number of licenses expiring are California, New York, Oregon, Washington and North Carolina.)

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Editors' Note: The Hydropower Reform Coalition website contains links to the Supreme Court's opinion, in addition to the briefs of the parties and a transcript of the oral argument. [See http://hydroreform.org/SDWarren.asp] We would like to express our gratitude for the Coalition's help in obtaining the graphics we ran with this story.
Your author for this story is not associated with the coalition.

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