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WESTERN WATER NEWS

NEVADA AS A BELLWETHER: WHAT AGGRESSIVE GROUNDWATER ADMINISTRATION SIGNALS FOR THE INTERIOR WEST

Groundwater over-appropriation across the Interior West has shifted from a long-term management concern to an immediate administrative challenge. Declining aquifer conditions, prolonged drought, and sustained demand have narrowed the distance between planning and enforcement. While recent policy attention has focused on large-scale statutory frameworks, most notably California's Sustainable Groundwater Management Act (SGMA), Nevada is emerging as one of the more active groundwater administrators in the region.

Although sometimes viewed as a smaller water state, Nevada has long relied on centralized administrative control rather than basin-level planning entities. As enforcement activity increases, Nevada offers a useful case study of how active groundwater administration functions in practice and what similar approaches may signal for other Interior West states confronting groundwater depletion.

Centralized Authority and Basin Designation

Nevada groundwater law centers on the authority of the State Engineer, who administers both surface water and groundwater rights. Unlike states that emphasize basin-specific governance bodies, Nevada vests primary decision-making authority in a single statewide office. The State Engineer is responsible for basin designation, determining perennial yield, and regulating groundwater use to prevent impairment of senior rights and protect the public interest.

Designation orders provide a primary mechanism for heightened administration. Once a basin is designated, new appropriations and existing uses may be subject to increased restrictions and regulatory scrutiny, depending on the scope of the order. Nevada law also recognizes the hydrologic connection between surface water and groundwater, allowing for integrated administration where appropriate. Priority enforcement remains a foundational feature of the system.

This centralized structure enables relatively prompt administrative action but also concentrates regulatory responsibility and political pressure within a single institution.

From Planning to Enforcement

Recent experience in Nevada reflects a shift from arms-length groundwater management toward more active administration in certain basins. In over-appropriated areas, the State Engineer increasingly relies on meter orders, monitoring requirements, and reporting obligations. These tools are becoming routine components of basin management and reflect a broader effort to develop the data and metrics necessary to inform future administrative decisions.

This shift is particularly significant as groundwater levels decline, and scrutiny increases over systems in which groundwater pumping captures or conflicts with senior surface water rights. In response, Nevada has begun developing methodologies to identify groundwater uses contributing to surface water depletion and to evaluate the scope and limitations of curtailment orders.

Administrative decisions are typically supported by hydrographic studies, groundwater modeling, and basin-specific data. Because each hydrologic system is unique, enforcement strategies vary. Some are implemented incrementally, while others applied more broadly. Although the State Engineer retains discretion over timing and scope, the overall trend has been toward greater operational control.

Flexibility and Administrative Pressure

Despite its emphasis on priority enforcement, Nevada groundwater law allows limited flexibility. Transfers, change applications, and mitigation plans offer mechanisms for water users to adjust to reduced pumping. In some basins, negotiated arrangements have helped reduce withdrawals while mitigating impacts, though these are largely private solutions outside the State Engineer's direct authority.

Increased enforcement has generated protests, administrative appeals, and litigation. Agricultural,

mining, and development interests have challenged both the substance and process of regulatory actions, citing economic impacts and alleged regulatory overreach. Courts have largely upheld State Engineer decisions supported by substantial evidence and consistent with statutory mandates.

Conclusion and Implications

Nevada's experience highlights both the promise and strain of enforcement-based groundwater administration. Aggressive regulation can proceed under existing legal frameworks, but it requires centralized authority, technical capacity, sound science, and sustained political will. States lacking similar institutional structures or resources may face greater challenges implementing comparable approaches.

At the same time, Nevada demonstrates that prolonged reliance on planning without enforcement carries significant risk. Delay can compound legal, economic, and ecological consequences once administrative action becomes unavoidable. As groundwater conditions continue to deteriorate across the Interior West, pressure to move from planning toward active control is likely to intensify.

Nevada's approach offers insight into the practical realities of modern groundwater governance. While not without controversy or constraint, its shift toward active administration reflects a broader regional reckoning with groundwater scarcity. In that sense, Nevada serves less as an outlier than as an early indicator of the policy and legal challenges likely to shape the next phase of groundwater governance throughout the Interior West.
(Micheline Nadeau Fairbank)

SETTLEMENT REACHED IN INDIAN WELLS VALLEY GROUNDWATER AUTHORITY GROUNDWATER SUSTAINABILITY PLAN LAWSUITS—GROUNDWATER RIGHTS ADJUDICATION CONTINUES

In November 2025, a settlement was reached between Indian Wells Valley Groundwater Authority (IWVGA) and Searles Valley Minerals Inc., (Searles) resolving certain litigation over a Groundwater Sustainability Plan, adopted by IWVGA in 2020. The settlement, which includes an agreement that both parties drop multiple lawsuits against one another, reflects a positive step of creating a cooperative framework between the parties toward advancing responsible groundwater management in the Indian Wells Valley Basin.

Background

The Indian Wells Valley Groundwater Basin is located in the northwestern part of the Mojave Desert and does not have any water importation infrastructure, or significant water features, thus water producers in the region must rely exclusively on groundwater extraction to meet their demands. Because of these specific features, and historic reliance on groundwater extraction in the region, the Department of Water Resources (DWR) estimates the region's groundwater supply has steadily declined since 1945. Over the past decades, several efforts have been undertaken to reach solutions toward sustainable groundwater management including implementation of a Groundwater Sustainability Plan, in accordance with the Sustainable Groundwater Management Act (SGMA), which ultimately became subject of several legal actions, including litigation between IWVGA and Searles.

SGMA

In 2014, the California Legislature implemented SGMA which, among other things, established minimum standards for sustainable groundwater management and granted local groundwater authorities the power to sustainably protect and manage groundwater through several mechanisms including creating Groundwater Sustainability Plans (required for certain basins designated as high or medium priority by SGMA), as well as the authority to carry out several powers related to those plans, including the ability to impose fees on groundwater extraction to fund the costs of groundwater sustainability initiatives. SGMA also directs DWR to identify groundwater basins in critical overdraft, where average annual amounts of groundwater extraction exceeds the long-term average of annual supply of water to the basin. Designa-

tion of basins in this state can be critical, as overdraft can create several negative effects, such as seawater intrusion, land subsidence, groundwater depletion and/or chronic lowering of groundwater levels, according to DWR.

Critically Overdrafted Basin Status and the GSP

In 2016, after collecting data in consultation with the State Climatologist, DWR released a list of critically over drafted basins. This list, which was more recently updated in 2020, includes the Indian Wells Valley Groundwater Basin. Under SGMA, when a basin is designated as being in a state of critical overdraft, the local groundwater sustainability agency is required to implement a Groundwater Sustainability Plan. These plans create a roadmap for how the basin will avoid future, adverse effects of groundwater overdraft, and create balanced levels of groundwater to reach sustainability, through measured goals, monitoring, and other mechanisms.

In 2020, IWVGA, in accordance with SGMA, adopted a Groundwater Sustainability Plan which reported total sustainable yield (the maximum amount of water that can be withdrawn annually without potentially negative results) of the Basin as 7,650 acre-feet per year. In context, pumping reported by stakeholders more recently, in 2024, estimated 20,840 acre-feet per year, more than double the sustainable yield estimate given two years prior. Based on the estimated sustainable yield, as well as other details, the 2020 GSP stated the Basin could not achieve groundwater sustainability through extraction reductions alone and therefore required more comprehensive solutions, including overdraft mitigation projects to ensure long-term groundwater sustainability. Under the GSP, such projects would be financed through fee assessments on the individuals and entities that would benefit from the mitigation projects. Efforts to implement the plan created controversy, and resulted in several lawsuits, including the recently settled litigation between IWVGA and Searles.

Litigation and Settlement

On September 20, 2020, Searles filed litigation in Orange County Superior Court challenging the validity of the IWVGA's Groundwater Sustainability Plan, and various actions related to the Authority's implementation of that plan. Subsequently, on January 5, 2022, IWVGA also filed litigation in Orange County Superior Court seeking to enjoin Searles from operating groundwater wells without payment of requisite fees, delinquent groundwater extraction charges and civil penalties. An initial phase of trial for both actions was set to take place in 2025.

Before trial could proceed, the parties reached a settlement as to certain of their claims. On November 20, 2025, IWVGA issued a public press release stating IWVGA and Searles Valley Minerals, Inc. entered a "comprehensive Settlement and Mutual Release Agreement that fully resolves legal challenges concerning the Groundwater Sustainability Plan." The press release stated the settlement stipulated both parties permanently drop certain lawsuits files against each other in an effort to promote a cooperative relationship, allowing both parties to work toward effective planning, management, and implementation of projects to enhance long-term groundwater sustainability in the basin.

Additionally, the settlement allows Searles access to reclaimed water, which would allow for Searles to replace pumping of approximately 2,000 acre-feet per year of groundwater with reclaimed water. The release further states that Searles has agreed to prioritize, where possible, use of this reclaimed water before exporting additional groundwater from the region for its industrial use, and IWVGA agrees to relinquish its option on approximately 2,000 acre-feet per year of reclaimed water from the City of Ridgecrest, making that water available for use by Searles.

Comprehensive Groundwater Rights Adjudication Remains Active

Relatedly, in 2021 several parties, including Searles, initiated a comprehensive groundwater rights adjudication, pursuant to the Streamlined Adjudication Act, in an effort to determine water rights within the Basin, so as to more effectively move toward a solution addressing ongoing, critical overdraft. A groundwater rights adjudication action provides an opportunity for a court to adjudicate the rights of each party involved, and may also declare priority, amount, purpose of use, extraction location, and other specifics related to such right. Importantly, the settlement reached between Searles and IWVGA does not affect the ongoing adjudication action.

Searles and IWVGA both remain involved parties in the comprehensive adjudication. Thus, the comprehensive groundwater rights adjudication remains, and Searles has stated that the company intends to actively participate in the action.

Conclusion and Implications

The lawsuits challenging the 2020 Groundwater Sustainability Plan, and associated adjudication actions, have raised several, broader questions within the state, particularly relating to long-term groundwater sustainability in basins where overdraft has been designated, and the interconnected roles of, both, SGMA and the groundwater rights adjudication process. Last year, concerns over these issues resulted in introduction of legislation in the California Legislation. Assemblymember Diane Papan introduced Assembly Bill 1413, requiring certain updates to the Groundwater Sustainability Plan process and, while the bill did not advance during the 2024-2025 legislative session, it generated legislative discussion around these issues which indicates potential for similar, future legislative efforts.

Nonetheless, the limited settlement reached between Searles and IWVGA brings a resolution to Searles' challenged to the GSP in this action. (Miles Krieger)

Editor's Note: the author's firm represents Searles Valley Mineral, Inc. in the matters discussed in this article

REGULATORY DEVELOPMENTS

U.S. ENVIRONMENTAL PROTECTION AGENCY PROPOSES NEW RULE TO REGULATE PERCHLORATE IN RESPONSE TO THE *NRDC V. REGAN* DECISION

The U.S. Environmental Protection Agency (EPA) has proposed a National Primary Drinking Water Regulation (NPDWR) and a health-based Maximum Contaminant Level Goal (MCLG) for perchlorate under the Safe Drinking Water Act (SDWA) section 1412 in response to the D.C. Circuit's 2023 decision in *NRDC v. Regan*. (*See:* https://www.nrdc.org/sites/default/files/2023-11/dc-circuit-perchlorate-opinion-20230509.pdf)

That decision states that the EPA must begin regulating a contaminant after finalizing a determination to do so, even if the Agency later concludes, based on updated science, that the statutory criteria for regulation may no longer be met.

Background

Perchlorate

Perchlorate is an inorganic chemical compound typically used in rocket propellants, munitions, fireworks, and potentially fertilizers. It is also a byproduct of improper handling of hypochlorite solutions used for drinking water treatment. Exposure to the compound can interfere with how the thyroid absorbs iodine, a chemical element essential for producing thyroid hormones. When iodine uptake is reduced, the thyroid produces fewer hormones, which can lead to decreased thyroid function. In pregnant women, disruptions in thyroid hormone levels may negatively affect fetal brain development and result in long-term neurological consequences.

Safe Drinking Water Act Section 1412

SDWA section 1412(b)(1)(A) requires the EPA to regulate a contaminant if the Administrator finalizes a determination that: (1) it may cause adverse health effects, (2) it is known or likely to occur in public water systems (PWSs) at levels and frequencies of concern, and (3) regulating it would meaningfully reduce health risks for people served by PWSs. Further, SDWA section 1412(b)(4) entails that each MCLG be set at a level that maximizes health protection. An MCLG is the maximum level of a contaminant in drinking water at which no known or anticipated adverse health effects would occur, with an adequate margin of safety. Under section 1412(b)(3)(C)(i)(V), the EPA must also consider a contaminant's effects on populations that are more vulnerable than the general public. Upon making a determination to regulate a chemical compound under the SDWA, section 1412(e) requires the Agency to consult with its Science Advisory Board (SAB) before proposing an MCLG.

EPA's 2020 Decision Not to Regulate Perchlorate

The EPA has long reported that perchlorate appears in only a small percentage of U.S. drinking water systems. Based on this limited prevalence, the Agency issued a preliminary determination not to regulate perchlorate in 2008. In 2009, the EPA requested public comment on its preliminary determination, noting the lack of data and uncertainty about the exposure levels at which perchlorate causes adverse health effects. In light of this uncertainty, the EPA considered alternative safety benchmarks that accounted not only for pregnant women, but also for infants and children. These alternative benchmarks suggested that lower levels of perchlorate could pose health concerns. In 2011, the EPA relied upon these low thresholds, despite them not being based on a fully peer-reviewed modeling framework, in making the determination to regulate perchlorate.

The EPA sought guidance from the SAB on the modeling approach and health effects information available to set a proper MCLG for perchlorate. The SAB raised issues with the Agency's approach, recommending that the EPA revise how it determines levels of perchlorate that may pose a public health risk. The EPA previously based its safety threshold on

an early biological effect—reduced iodine uptake in the thyroid—that does not itself cause harm but can lead to later health problems. Instead, this approach only focused on an early warning sign without fully accounting for whether it would lead to actual health impacts.

In response, the EPA developed a science-based model to more accurately estimate how perchlorate exposure and iodine intake affect thyroid hormone levels in women before and during early pregnancy, and to assess potential neurodevelopmental risks to offspring. Based on its new modeling approach, the EPA proposed an NPDWR and MCLG for perchlorate in 2019.

However, in the rule's preamble, the agency also requested comment on whether to withdraw its prior determination to regulate, based on its updated analysis. The EPA concluded that perchlorate did not occur in public water systems at levels or frequencies of public health concern and that a national regulation would not meaningfully reduce health risks as required under the SDWA. Accordingly, in 2020, the EPA revised its prior determination, concluding that nationwide regulation of perchlorate was not warranted under the best available peer-reviewed science.

The *NRDC v. Regan* Decision

The withdrawal of this determination was challenged, culminating in the D.C. Circuit's decision in *NRDC v. Regan*, ___F.4th___, Case No. 20-1335 (D.C. Cir. May 9, 2-23). The Circuit Court of Appeals held that once the EPA issues a final determination to regulate a contaminant under the SDWA, it must proceed with proposing and finalizing an NPDWR and MCLG, even if subsequent scientific evidence suggests that national regulation is unwarranted. As a result of the court's vacatur, the EPA was required to publish a proposed NPDWR and MCLG by January 2, 2026 and finalize a rule by May 21, 2027.

EPA's Proposed Rule

The EPA is proposing a MCLG of 20 micrograms per liter (µg/L) based on the best available science and its current peer-reviewed systematic review methods. This proposed MCLG is intended to protect the population most vulnerable to perchlorate exposure—iodine-deficient women in their first trimester of pregnancy.

The EPA is also proposing a Maximum Contaminant Level (MCL) for perchlorate of 20, 40, or 80 µg/L. An MCL represents the maximum allowable concentration of a contaminant in water delivered by a PWS. Under the SDWA, the EPA must set the MCL as close to the MCLG as feasible, unless the Administrator determines that the costs outweigh the benefits, in which case the MCL is set at the level where benefits most justify costs.

The proposal also includes monitoring and reporting requirements for PWSs to meet the perchlorate MCL along with provisions designed to reduce regulatory burden given the Agency's finding that most systems do not have perchlorate at levels of public health concern. These provisions include a reduction in monitoring frequency for systems based on initial sampling results. PWSs with perchlorate levels that exceed the proposed MCL would be required take corrective actions, such as installing treatment systems or switching to uncontaminated water sources. Treatment options include ion exchange, reverse osmosis, and biological technologies. Affected PWSs would also be required to conduct public notification of MCL exceedance.

Nonetheless, as perchlorate rarely occurs at levels of health concern, the vast majority of the water systems subject to the rule (about 66,000) would still incur substantial administrative and monitoring costs with limited or no corresponding public health benefit.

Conclusion and Implications

The EPA's proposal of a NPDWR and MCLG for perchlorate—despite its conclusion that, based on the best available data and science, the benefits of the regulation do not outweigh its costs and burdens on PWSs—underscores the importance of the D.C. Circuit's decision in *NRDC v. Regan*. Once the EPA determines that a contaminant should be regulated under the SDWA, it is legally bound to follow through with that decision. The Agency's prior choice to rely on a non-final reference dose recommended by the National Research Council contributed to years of revised analyses and litigation. Moving forward, the Agency must base its determination on finalized, peer-reviewed models that accurately reflect a contaminant's health effects.
(Adam Nir)

U.S. ENVIRONMENTAL PROTECTION AGENCY PROPOSING A NEW RULE COVERING AND CLARIFYING THE SCOPE OF SECTION 401

On January 13, 2026, the U.S. Environmental Protection Agency (EPA) annouced a proposed rule that would return federal Clean Water Act (CWA) Section 401 to its "proper statutory purpose," of protecting water quality while eliminating, what EPA deems "regulatory overreach that has imposed unnecessary burden on critical infrastructure projects." This proposed rule would fulfill EPA's statutory role to ensure the water quality certification process operates within the clear boundaries established by Congress, maximizing permitting efficiency and eliminating unwarranted delays that have stifled economic growth. The changes directly support the essential role that state co-regulators and authorized tribes play in protecting water resources while advancing the Trump Administration's commitment to cooperative federalism.

Background

Section 401 of the federal Clean Water Act provides states and authorized Tribes with an important tool to help protect the water quality of federally regulated waters within their borders, in collaboration with federal agencies.

Under Section 401 a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a Section 401 water quality certification is issued, or certification is waived. States and authorized Tribes where the discharge would originate are generally responsible for issuing water quality certifications. In cases where a state or Tribe does not have authority, EPA is responsible for issuing certification. 33 USC 1341.

Some of the major federal licenses and permits subject to Section 401 include:

- Clean Water Act Section 402 and 404 permits issued by EPA or the Corps,
- Bridge Act of 1946 permits issued by the U.S. Coast Guard,
- Federal Energy Regulatory Commission (FERC) licenses for hydropower facilities and natural gas pipelines, and
- Rivers and Harbors Act Section 9 and 10 permits.

The Clean Water Act provides that certifying authorities (states, authorized Tribes, and EPA) must act on a Section 401 certification request "within a reasonable period of time (which shall not to exceed one year) after receipt" of such a request. A certifying authority may waive certification expressly, or by failing or refusing to act within the established reasonable period of time. In making decisions to grant, grant with conditions, or deny certification requests, certifying authorities consider whether the federally licensed or permitted activity will comply with applicable water quality requirements, which include water quality standards, effluent limitations, new source performance standards, toxic pollutants restrictions and other appropriate water quality requirements of state or Tribal law.

Once the federal licensing or permitting agency receives both the application for the license or permit and a certification, it must immediately notify EPA under the neighboring jurisdiction process set forth in CWA Section 401(a)(2). A federal agency may not issue a license or permit for an activity that may result in a discharge into waters of the United States prior to the completion of the CWA Section 401(a)(2) process.

Why the New Proposal?

First and foremost, EPA states that the purpose of this proposal is to:

> . . .correct a fundamentally flawed 2023 Biden EPA rule that allowed delay tactics and protracted certification timelines inconsistent with the Clean Water Act.

EPA goes on to state that the 2023 rule's expansion of Section 401's scope enabled certain states to abuse this provision, creating substantial regulatory burdens that unnecessarily delayed or blocked vital energy, infrastructure, and development projects critical to America's economic and national security. The Trump EPA's proposal would eliminate these

regulatory hurdles, restoring the law to its intended function while removing impediments to responsible development.

In summary, the proposed rule would update Section 401 as follows:

> The Agency is proposing to revise:
>
> . . .the following provisions in 40 CFR part 121: the contents of a request for certification at 40 CFR 121.5; the scope of certification at 40 CFR 121.3; the contents of a certification decision at 40 CFR 121.7; the modification process at 40 CFR 121.10; and the section 401(a)(2) process at subpart B. The Agency is also proposing to add regulatory text at 40 CFR 121.6 regarding withdrawal and resubmittal of requests for certification and proposing to remove regulatory text at 40 CFR 121.11 regarding treatment in a similar manner as a State for Tribes. The Agency is also proposing several clarifying and conforming revisions throughout part 121.

The 2025 Trump Administration Memo

In response to implementation challenges to the 2023 Clean Water Act Section 401 Certification rule, the EPA took swift action in the spring of 2025, issuing a memo that clarified the specific roles of states and authorized tribes under Clean Water Act Section 401. The agency also sought public input this summer to inform the updates being proposed in this action.

EPA's proposed rulemaking goal would be to:

> . . .ensure predictability in Clean Water Act Section 401 implementation by standardizing approaches for certification requests and decisions, eliminating back-and-forth delay tactics on certification submissions, adhering to statutory timelines for certification decisions, and defining a clear process for both applicants and certifying authorities.

EPA went on to state that another goal of the proposed rule is to:

> . . .ensure that states and tribes are no longer able to use Section 401 to shut down projects for reasons that fall outside of the Clean Water Act's statutory requirements and appropriate and applicable water quality-related regulations.

Following the proposed rule's publication in the Federal Register, EPA will open a 30-day public comment period. The agency will quickly review comments received as it works to develop a final rule in the spring of 2026.

EPA Chimes in on the Proposal

Administrator Lee Zeldin provided the following statement about the proposed rule:

> Today's proposal restores the Clean Water Act to its intended purpose, protecting America's water quality and ending the weaponization of the law that has been obstructing infrastructure and energy projects vital to our nation's economy . . . By returning Section 401 to its clear statutory boundaries, we're strengthening the role of state and tribal partners while ensuring environmental protections are implemented lawfully, efficiently, and consistent with congressional intent.

Conclusion and Implications

EPA will be accepting comments on the proposed rule through February 17, 2026. This proposed rule would revise several procedural and substantive aspects of the current regulations to increase transparency, efficiency, and predictability for certifying authorities and the regulated community, better align the regulations with the text and legislative history of the Clean Water Act, and to ensure states and authorized tribes understand and adhere to their section 401 role. To learn more about the detail of the proposed rule, *see*: https://www.epa.gov/system/files/documents/2026-01/cwa-401-proposed-rule-preamble.pdf

(Robert Schuster)

U.S. BUREAU OF RECLAMATION RELEASES DRAFT EIS ALTERNATIVES REPORT FOR COLORADO RIVER MANAGEMENT

The U.S. Bureau of Reclamation (Bureau) recently released a draft Environmental Impact Statement (EIS) and alternatives report outlining five potential alternatives to manage the Colorado River after 2026. The current guidelines expire at the end of this year, and thus the Bureau has a stated goal of implementing a new plan before the October 1 start of water year 2027. The Bureau's deadlines to the states have so far been unable to force an agreement among the seven basin states, although, with most alternatives disfavored by the states, compromise is still possible.

Background

The Colorado River provides water for domestic, agricultural, and other uses across the seven basin states, comprised of the Upper Basin (Colorado, Utah, Wyoming, New Mexico) and the Lower Basin (California, Nevada, Arizona). Historically, this water has been shared under the 1922 Colorado River Compact that requires the Upper Basin to deliver at least 7.5 million acre-feet (maf) per year (measured as 75 maf every ten years) to the Lower Basin as measured at Lee Ferry. However, climate change and aridification have severely reduced flows in the Colorado River, leaving the Compact essentially unworkable for the future.

The Bureau first enacted the 2007 Interim Guidelines to address shortages and water sharing while allowing the basin states time to negotiate new sharing measures. The decade following the Interim Guidelines saw little progress and continued draining of Lake Mead and Lake Powell, leading the Bureau to implement a Drought Contingency Plan in 2019. This plan was intended to prevent Lake Mead and Lake Powell from reaching "critical levels" under which those reservoirs could no longer generate power or, even worse, release water if levels fell below "dead pool." The 2019 plan, along with several good winters, was effective at preventing those critical levels, although the two reservoirs continue to drop.

The seven basin states submitted preferred plans to the Bureau in early 2024. *See, Upper and Lower Colorado River Basin States Submit Competing Proposals for Post-2026 Operational Guidelines*, 28 *W. Water L. & P'lcy Rptr.* 129, 129-131 (Apr. 2024). Each state qualified its plan as the best option for all river users while simultaneously criticizing the plans from the opposing basin. The states continued to negotiate without success throughout the rest of 2024 and 2025.

In November 2024 the Basin released four proposed plans (technically five counting the federally required "no action" alternative) in the event the basin states were unable to agree. *See, Upper and Lower Basin States Still at Impasse over Colorado River Management*, 29 *W. Water L. & P'lcy Rptr.* 49, 49-51 (Jan. 2025). These plans, ranging from essentially a continuation of the 2007 Interim Guidelines to massive environment and conservation focused cuts, were similarly unpalatable to the basin states at least as far as achieving any basin-wide agreement.

The Bureau set a deadline of November 11, 2025 for the basin states to agree on a new proposal, but that deadline passed without any agreement. Representatives from several states expressed a continued desire to negotiate, while Arizona Governor Katie Hobbs requested Secretary of the Interior Dough Burgum intervene. The Bureau responded by extending the deadline to February 14, although an agreement has still not been reached as of press time.

Draft EIS and Proposed Alternatives

On January 9, 2026, the Bureau released the "Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead" Draft Environmental Impact Statement ("Draft EIS"). An environmental impact statement analyzes the potential impacts, including environmental, economic, and social, of a proposed federal action. The public, including special interest groups, may then comment on the proposals to better guide the agency's decision. The Bureau will gather and review the comments before revising the report into a final EIS.

The Alternatives Report expands upon the proposals first identified in November 2024. *Id.* Those alternatives are discussed below.

No Action

This option is federally required although all basin states and the Bureau agree this is not a true alternative. No action would almost certainly result in Lake

Powell and Lake Mead falling below minimum power pool, creating stress on the Western Interconnect power grid, and eventually into dead pool, a catastrophic scenario that would essentially cut off water supply to the Lower Basin. This scenario would likely result in a "Compact call" leading to lengthy and expensive litigation before the Supreme Court. The Alternatives Report acknowledges these negative consequences and notes that:

> . . .[the no action alternative]'s inclusion is designed to clearly describe to the public what the limitations and potential environmental impacts of [no action] would be.

Basic Coordination

This option requires the least agreement among the basin states and is essentially a "fail safe" to protect federal infrastructure. The Secretary of the Interior has "vested authority and responsibility…to respond to exigent and emergency conditions" and would use that authority to manage operations on a year-to-year basis depending on climate and river conditions. This is the vaguest of the four action alternatives allowing the Bureau to react as necessary, although this is seemingly not a true long-term solution and creates uncertainty for all river users and could include cuts to either or both the Upper and Lower Basins.

Enhanced Coordination

The Enhanced Coordination alternative is based on several existing proposals from Tribes, federal agencies (including Fish & Wildlife Service and the National Park Service, and other stakeholders. This option builds off the Basic Coordination goal of protecting critical infrastructure while also seeking to benefit "key resources," defined as environmental, hydropower, and recreation. The Bureau would achieve this goal by operating Lake Mead and Lake Powell as a unified system, distributing storage between each reservoir as necessary. This sharing would be effectuated through a pro rata shortage reduction, up to 3 maf per year, across the three Lower Basin states.

Maximum Operational Flexibility

This alternative does exactly what it says—offers the Bureau the maximum flexibility to address unknown and constantly changing hydrologic conditions. Based on a proposal from several conservation organizations, this option would use a "dual indicator" based on total system storage and recent hydrology combined with a newly introduced "Conservation Reserve." Total reductions up to 4 maf per year could be implemented based on the dual indicator value as of October 1 each year. The Conservation Reserve is an interesting concept to store up to 8 maf (3 maf allocated to the Upper Basin and 5 maf to the Lower Basin) across Lake Mead and Lake Powell. This water would be "banked" as a result of conservation measures in either basin and excluded from the dual indicator calculation. After assessing a 10 percent transit loss, this Conservation Reserve could then be used to support the entire system in dry years.

Supply Driven

A supply driven alternative proposal incorporates some ideas from both the Upper and Lower Basin proposals. Unlike Maximum Operational Flexibility which considers total system storage, the Supply Driven option solely considers historic annual flow of the Colorado River system. Lake Powell releases would be determined each year based on a set percentage of the preceding three-year average of natural flow at Lee Ferry with Lower Basin deliveries (*i.e.*, Lake Mead releases) based on Lake Mead elevation. The Bureau would limit total shortage volumes to 2.1 maf per year.

Conclusion and Implications

A new water sharing regime for the Colorado River is desperately needed, particularly in the face of ever-increasing drought and aridification. Both Lake Powell and Lake Mead are currently less than 1/3 full and the Upper Basin, particularly Colorado, is in the midst of its worst winter on record with current snowpack in the 0 percentile.

Discussions remain ongoing, but the Bureau seems to be leaning towards the Maximum Operational Flexibility or Supply Driven alternatives. These options attempt to incorporate parts of each basin's proposal in addition to considerations from conservation groups and other federal agencies. However, it is still possible that the Upper and Lower Basins reach some agreement to avoid forfeiting their current decision-making power. The public comment period on the

Draft EIS opened January 16 and runs through March 2, 2026. For more information on the Draft EIS, *see:* https://www.usbr.gov/ColoradoRiverBasin/post2026/draft-eis/index.html
(John Sittler)

U.S. FISH AND WILDLIFE SERVICE AND NATIONAL MARING FISHERIES SERVICE PROPOSE NEW ENDANGERED SPECIES ACT RULEMAKING

In November 2025, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively: Services) announced proposed revisions to the federal Endangered Species Act (ESA). The proposed rulemaking emphasizing causal proximity, economic transparency, and species-specific tailoring. By rescinding the 2024 Biden-era "blanket rules" and "compensatory mitigation" requirements, the Services aim to reduce the regulatory burden on infrastructure and energy sectors. However, critics argue these changes introduce administrative inefficiencies and may increase extinction risks by narrowing the scope of federal oversight.

Background

Since 2019, the ESA has been subject to regulatory oscillation, where successive administrations have fundamentally redefined core implementing regulations at 50 C.F.R. Parts 17, 402, and 424. In 2019, the first Trump administration introduced major reforms to Section 4 (listing/critical habitat) and Section 7 (consultation). In 2024, the Biden administration rescinded many of the 2019 changes, re-instating "blanket" protections for threatened species and expanding the "environmental baseline."

Before the recent proposed rulemaking, Section 4 of the ESA regarding species listing and delisting (50 C.F.R. § 424) prevented agencies from taking into consideration possible economic impacts from the listing process. Furthermore, there was broad consideration of impacts in the "foreseeable future". Traditionally under Section 4(d), a blanket rule automatically granted threatened species the same protections as endangered species.

Section 7 of the ESA outlines the procedures for interagency cooperation to ensure that federal actions do not jeopardize the continued existence of endangered or threatened species or results in the destruction or adverse modification of a critical habitat. This imposes an independent duty on all federal agencies to consult with the Services before engaging in any discretionary action that may affect a listed species or critical habitat. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003). Local agencies are required to consult with federal agencies when there is a federal nexus such as a federal permit or federal funding.

The current administration seeks to reverse the 2024 changes, citing the need for "regulatory certainty" and alignment with the *Loper Bright* standard from the Supreme Court decision *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which requires agencies to adhere to the "single, best meaning" of the law rather than a "reasonable" interpretation.

The Proposed Rule

The proposed rule removes the phrase "without reference to possible economic or other impacts" from the listing process. While the ESA still requires listing decisions to be based solely on biological data, this change allows for the concurrent presentation of economic data to provide transparency to the public. The proposal further plans to reinstate a standard where the "foreseeable future" extends only as far as the Services can "reasonably determine that both the future threats and the species' responses to those threats are likely The proposals further aim to simplify the listing/delisting process to three clear paths: (1) extinction, (2) the entity no longer meets the definition of a "species," or (3) the species no longer meets the definition of threatened or endangered.

Under Section 4(d), FWS has the authority to issue regulations "necessary and advisable" for the conservation of threatened species. Historically, FWS used a "blanket rule" that automatically granted threatened species the same "take" protections as endangered species. The FWS will now issue species-specific rules for every newly listed threatened species. This aligns FWS practice with that of NMFS. While this allows for more "tailored" conservation, conser-

vationists argue it creates a massive administrative backlog and leaves species vulnerable during the gap between listing and rule finalization.

Interagency Consultation

Perhaps the most impactful change in the proposed rulemaking is interagency consultation (50 C.F.R. § 402). First, the proposal redefines how federal agencies assess the "effects of the action." The proposed rule clarifies that the environmental baseline refers to the condition of the species without the consequences of the proposed action. Critically, it excludes the impacts of existing infrastructure (*e.g.*, a dam that is already built) from the effects of a new permit for that same infrastructure. To be considered an "effect," a consequence must be "reasonably certain to occur" and meet a "but-for" causation test. The new rule re-inserts factors like temporal and geographic remoteness and causal complexity to limit the scope of federal liability. Moreover, the new rule removes the 2024 provision allowing the Services to require "compensatory mitigation" (offsets) as part of Reasonable and Prudent Measures (RPMs), arguing that the statute only authorizes measures to "minimize" take, not "offset" it.

Surviving *De Novo* Judicial Review

The 2025 proposals appear to rely on a constructionist interpretation of the ESA. By overturning *Chevron*, the Supreme Court signaled that courts should no longer defer to agency "interpretations" of ambiguous statutes. The 2025 rules are designed to survive "de novo" judicial review by arguing that terms like "minimize" (Section 7) and "foreseeable future" (Section 4) have a fixed legal meaning that does not include broader concepts like "mitigation" or "speculative climate modeling.

Conclusion and Implications

The November 2025 ESA proposals represent an effort to date to tether agency action to a narrow, causal, and economically transparent framework. While this provides the "regulatory certainty" long sought by industry, critics may find that it places a heavy burden on the Services to prove that species-specific management can prevent extinction with fewer broad-based federal protections. Final rules are expected in mid-2026. However, given the significant shift in policy, they will almost certainly be met with challenges and opposition. The proposed rulemakings can be found here: https://www.federalregister.gov/documents/2025/11/21/2025-20549/endangered-and-threatened-wildlife-and-plants-listing-endangered-and-threatened-species and https://www.federalregister.gov/documents/2025/11/21/2025-20551/endangered-and-threatened-wildlife-and-plants-interagency-cooperation-regulations
(Miles Krieger)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Feb. 3, 2026—The U.S. Environmental Protection Agency (EPA) began a soil cleanup at the East Troy Contaminated Aquifer Superfund site in Troy, Ohio. The cleanup will address one of two areas EPA identified as the source of volatile organic compound contamination at the site. Work is expected to be complete by summer.

The project focuses on an area in the northwest corner of the former Hobart Cabinet property. Work is scheduled to take place Monday through Friday from 7 a.m. to 4:30 p.m. Some work may take place on Saturdays depending on weather conditions. Residents can expect increased truck traffic in the area during working hours.

Crews will excavate contaminated soil and transport it for proper disposal. Excavated areas will be backfilled with clean soil and disturbed areas restored. During these activities, EPA will suppress dust to ensure particulate contaminants do not migrate from the site. Before trucks leave the site, crews will clean and cover their loads with tarps to prevent tracking contaminants offsite.

The site encompasses a 20-square block area located along the western bank of the Great Miami River. Numerous businesses and industries operated in the area during the 20th century, several of which have been identified as potential sources of trichloroethene and tetrachloroethylene contamination at the site. EPA's Superfund program is responsible for cleaning up some of the nation's most contaminated land and responding to environmental emergencies, oil spills and natural disasters. To protect public health and the environment, the Superfund program focuses on making a visible and lasting difference in communities, ensuring that people can live and work in healthy, vibrant places.

Jan. 27, 2026—The U.S. Environmental Protection Agency (EPA) and the West Virginia Department of Agriculture (WVDA) today reaffirmed their partnership through a renewed Memorandum of Understanding (MOU) to protect agricultural and environmental health and promote agribusiness for the next five years.

Van-Blarcom Lackey and Leonhardt hold the signed MOU in the Commissioner's office in the WV Capitol Building. (Jan. 27, 2026)

EPA Mid-Atlantic Regional Administrator Amy Van Blarcom-Lackey and West Virginia Agriculture Commissioner Kent Leonhardt signed the MOU at the West Virginia Capitol Building in Charleston.

In the agreement, EPA and WVDA commit to, "share the goal of [achieving] well-managed and productive farms that produce food for our communities and a clean environment for everyone to enjoy."

EPA and WVDA will produce an annual report to highlight collective achievements made under the MOU and to outline plans for the coming year.

Under the renewed agreement, EPA and WVDA plan to:

- Increase state-federal collaboration by participating in organized meetings, sharing updates, and communicating about program and regulatory activities.

- Encourage open and transparent discussions between EPA and the agriculture community by hosting roundtables and farm tours and participating in events.

- Recognize, measure, and promote environmental stewardship by documenting and sharing best practices, case studies, and funding opportunities with farmers.

- Enhance regulatory compliance and improve water quality by participating in joint training and program assessments and refining communications on compliance and enforcement activities.

The West Virginia Department of Agriculture protects plant, animal and human health through a variety of scientific, regulatory and consumer protection programs. The Commissioner of Agriculture is one of six statewide elected officials who sits on the Board of Public Works.

Jan. 22, 2026—The U.S. Environmental Protection Agency (EPA), Atlantic Richfield Company, BP Products North America Inc. and the East Chicago Waterway Management District announced a project agreement to clean up contaminated sediments at two sites in the Grand Calumet River Area of Concern in Northwest Indiana. The agreement commits more than $200 million to remove more than 240,000 cubic yards of contaminated canal and river bottom sediment across a combined area of 100 acres. This agreement builds on the progress made to clean up the AOC with more than 2 million cubic yards of contaminated sediment already remediated and six of the 12 sediment projects completed to delist the AOC.

The Grand Calumet River and Indiana Harbor and Ship Canal are located in one of the most heavily industrialized areas in the United States. The river and harbor were designated as an Area of Concern under the Great Lakes Water Quality Agreement in the 1980s. An AOC is an area where significant environmental degradation has occurred.

EPA and partners—funded by the Great Lakes Restoration Initiative and non-federal contributions through project agreements under the Great Lakes Legacy Act—have remediated more than 2 million cubic yards of contaminated sediment and restored more than 1,000 acres of important habitat within the Grand Calumet River AOC, including the restoration of globally rare dune and swale habitat. To date, six of the 12 sediment remediation projects and two of the five habitat restoration projects necessary to delist the AOC have been completed.

Jan. 15, 2026—The U.S. Environmental Protection Agency (EPA) is proposing a plan to clean up contaminated sediment, soil and industrial waste in Pierson's Creek, a 1.5-mile waterway that runs through an industrial area in Newark, New Jersey. The proposed plan targets remediation in areas with high levels of mercury, polychlorinated biphenyls (PCBs), lead and other hazardous substances linked to historic industrial operations. This marks the first major phase of cleanup at the superfund site.

EPA's proposed plan includes the following actions:

- Remove contaminated creek sediment;
- Install a protective cap;
- Remove heavily contaminated bank soil;
- Clean enclosed sections of the creek;
- Restore wetlands and monitor over the long term.

EPA would excavate and dispose of the top two feet of contaminated sediment along the full length of the creek. In a smaller, highly contaminated area near the upper section of the creek, EPA would remove all impacted sediment.

This involves placing an engineered cap over remaining sediment to prevent exposure and stop contaminants from spreading.

This would be achieved by fully removing soil along portions of the creek banks that contain oily chemical waste (known as non-aqueous phase liquid or NAPL) from past industrial activity.

EPA would flush out and dispose of contaminated sediment from sections of the creek that flow underground through enclosed pipes and concrete channels.

EPA would restore disturbed wetlands by replating native species as needed and conduct long-term monitoring to ensure the cleanup remains protective.

Pierson's Creek flows beneath Newark Liberty International Airport and the New Jersey Turnpike before emptying into Newark Bay. Contamination in the creek and along its banks comes largely from historical chemical manufacturing activities at nearby properties, including a former facility at One Avenue L. Due to its complexity, EPA is conducting the Pierson's Creek site cleanup in phases. The current proposed plan focuses on contamination in the creek and along its banks. A separate area at the former chemical manufacturing facility at One Avenue L is still under investigation. EPA expects to propose a cleanup approach for that area in 2027.

Jan. 7, 2026—The U.S. Environmental Protection Agency (EPA) is awarding a total $297,375 to the Pueblo of Tesuque and $318,634 to the Pueblo of Taos to address environmental priorities within each of the Pueblo's territories. These funds are being provided through EPA's Indian Environmental General Assistance Program (GAP) and Clean Water Act (CWA) grants.

The Pueblo of Tesuque is located in the hills of the Sangre de Cristo Mountains near Santa Fe, New Mexico. The funding will be used to ensure the protection and improvement of the water quality in the Tribe's rivers, lakes, streams, groundwater, and other waterbodies. The Pueblo will conduct surface water quality monitoring in accordance with Tesuque's Water Quality Standards (WQS), continue community outreach, ensure underground storage tank compliance and monitor surface water quality within the Pueblo's borders.

The Pueblo of Taos is in the north central part of the state of New Mexico and includes all the headwaters of the Rio Pueblo and the Rio Lucero. The Pueblo will use these funds to conduct community outreach to inform Tribal members of updates to the environmental program, create an emissions inventory for winter and summer time periods to aid understanding of what emissions could be impacting the Pueblo, review the process for air monitoring, decrease non-point pollution, review and maintain surface water quality monitoring operations, coordinate monitoring efforts with on-the-ground land management activities and grow the Tribal Water Quality Program in accordance with Tribal needs.

The Indian Environmental GAP is a resource for Tribal grantees to plan, develop, and establish internal capacity with the expected outcome to assume environmental regulatory functions and programs currently administered by EPA.

The CWA grant programs offer organizations and Tribes the opportunity of receiving funding to develop water quality projects and ensuring critical water infrastructure is maintained.
(Robert Schuster)

LAWSUITS FILED OR PENDING

WATER RIGHTS OR REGULATORY MANDATES? THE U.S. SUPREME COURT CONFRONTS THE TAKINGS CLAUSE IN CALIFORNIA

Two recent matters before the United States Supreme Court involving the use of California water illustrate the continued uncertainty surrounding takings claims in the water rights context. In one case, *City of Fresno, California, et al., v. United States* (U.S. Supreme Court Case No. 25-266) (*City of Fresno*), the Supreme Court denied *certiorari*, leaving in place a Federal Circuit decision rejecting a Fifth Amendment takings claim arising from federal reclamation project operations. In the other, *United Water Conservation District v. United States* (U.S. Supreme Court Case No. 25-523) (*United Water*), a petition for *certiorari* remains pending before the Court, and raises questions regarding whether a federal diversion of another's right to use water should be treated as a physical taking or regulatory taking.

Although both cases involve federal water management decisions, they pertain to different types of water rights. Together, they offer a useful look at how courts are currently deciding takings claims involving water rights and offer insight into how water disputes may be decided in the future.

Background

Physical vs. Regulatory Takings

Takings claims involving water often sit at the intersection of state water law establishing property rights, federal regulatory authority, and environmental or reclamation mandates and policies. The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without providing just compensation, a protection that applies to both direct appropriations and certain regulatory burdens. *U.S. Constitution, amendment V.* Courts have long distinguished between physical takings, such as permanent physical occupations, and regulatory takings, which arise when government action restricts property use without physically invading it. *See: Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426–435 (1982) (establishing that permanent, government-authorized physical occupations are per se takings); *see also: Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321–323 (2002) (explaining that regulatory land-use restrictions are not subject to the per se rule used for physical takings and instead require case-specific analysis).

Physical takings are categorically compensable under established Supreme Court doctrine. In contrast, regulatory takings are evaluated under a balancing framework developed in cases like *Penn Central*, which considers factors such as the economic impact of the regulation, the extent to which it interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central Transportation Co. v. New York City*, 38 U.S. 104 (1978).

How a particular water action is characterized can therefore be determinative for the outcome of a takings claim related to water related property rights. A government decision that reallocates or limits water use may be treated very differently from one that physically diverts water for governmental or third-party uses. The two cases discussed here fall on different sides of that divide.

The Federal Circuit's Decision and Supreme Court's Denial of *Certiorari* in City of Fresno: The Question of Ownership

The *City of Fresno* case arose out of water allocation decisions made by the Bureau of Reclamation during California's severe 2014-2015 drought. Cities, irrigation districts, water districts, and individual landowners alleged that, despite the availability of water stored within the Central Valley Project (CVP), the federal government delivered little or no irrigation water to certain Friant Division users while continuing to supply water to other "exchange contractors." According to the petitioners, those actions resulted in significant economic losses and amounted to compensable taking of water related property rights.

The United States Court of Federal Claims dismissed the takings claim, and the United States Court of Appeals for the Federal Circuit affirmed in a decision issued on December 17, 2024. While the Federal Circuit concluded that the petitioners had adequately alleged injury and standing, it held that, under California law, the petitioners did not possess a cognizable property interest in the water delivered by the U.S. Bureau of Reclamation. Instead, the Court of Appeals determined that the federal government held the appropriative water rights put to use by the CVP, and because no protected property interest existed, the takings claim failed as a matter of law. The petitioners argued that this holding was inconsistent with Section 8 the Reclamation Act, and earlier case law, which establishes that the "right to the use of water acquired [under the Act] shall be appurtenant to [*i.e.*, attached to] the land irrigated" on the basis of beneficial use, rather than to the United States itself. (43 U.S.C., § 372).

On December 15, 2025, the Supreme Court denied the petition for writ of *certiorari*, leaving the Federal Circuit's decision in place and ending any further appellate review in the case.

The Petition for *Cert* in *United Water Conservation*: Physical or Regulatory?

The *United Water* case presents a different set of facts. United Water Conservation District (United) holds an undisputed property right under California law to divert and use water from the Santa Clara River. The takings claim arose when the federal government commandeered tens of thousands of acre feet of water to increase bypass flows for steelhead trout.

United claims that the federal government's order to surrender water, which United possessed an undisputed state-law property interest in, constitutes a physical taking because it is a direct appropriation of United's water rights and requires the payment of just compensation. The lower court disagreed, concluding that because the government did not completely cut off the district's water rights or require the return of water already diverted, the action should be treated as a regulatory-taking rather than a physical-taking. Applying regulatory takings principles, the court of appeals ultimately found that no compensable taking had occurred.

A petition for writ of *certiorari* has been filed seeking Supreme Court review of that decision, and several *amici* have weighed in in support of review. As of the date of this article, the petition remains under consideration.

Conclusion and Implications

The Supreme Court's denial of certiorari in *City of Fresno* leaves in place the Federal Circuit's conclusion that certain users of federal reclamation project water do not hold compensable property interests for purposes of the Fifth Amendment. The pending petition in *United Water*, by contrast, raises a narrower question regarding how federal water diversions should be characterized under takings law when an underlying state law property right is undisputed.

Together, these cases reflect the courts' continuing efforts to define the constitutional boundary between the federal government's regulation of water resources and compensable takings. Entities involved in water management and environmental compliance may wish to monitor the developments of *United Water*, and whether the Supreme Court grants review. The Federal Circuit's opinion in *United Water* is available online at: https://www.cafc.uscourts.gov/opinions-orders/23-1602.OPINION.4-2-2025_2492406.pdf. The petition for cert before the Supreme Court in *United Water* is available online at: https://www.supremecourt.gov/DocketPDF/25/25-523/380720/20251027141903868_UWCD%20-%20Petition%20for%20Writ%20of%20Certiorari.pdf
(David Boyer)

WATER FOR ENERGY PROJECTS IN WASHINGTON— STATE SUPREME COURT TO REVIEW RENEWABLE ENERGY PROJECT NEAR COLUMBIA RIVER

Recently, Tri-Cities C.A.R.E.S, Benton County, and the Yakama Nation challenged the approval of a renewable energy project near the Columbia River for failure to consider natural resource impacts and other issues. This project, the Horse Heaven Wind Farm, plans to integrate wind turbines, solar panels, and battery storage systems across approximately 72,000 acres south of Kennewick. The project would be the largest energy project in Washington State, consisting of wind turbines 671 feet tall and spanning an area 25 miles long. The Washington State Supreme Court will review the matter, slated for oral argument during the Court's 2026 calendar. [*Tri Cities C.A.R.E.S. v. Energy Facility Site Evaluation Council et al.* Case No. 1048777-7]

Energy Facilities Site Locations Act

Under Washington's Energy Facilities Site Locations Act, the Energy Facility Site Evaluation Council (EFSEC) reviews, certifies, and monitors major energy facilities projects. Chapter 80.50 RCW. EFSEC creates a singular process to consider large scale projects at a state level rather than through the typical land use approval process. Washington's Energy Facilities Site Locations Act states that actions of EFSEC and approval of energy facilities shall:

> . . .balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public. RCW 80.50.010.

EFSEC includes representatives from the Washington State's Department of Ecology, Fish and Wildlife, Commerce, Utilities and Transportation Commission and Natural Resources.

Legal Opposition to the Final EIS

In October 2023, EFSEC issued a Final Environmental Impact Statement (FEIS) for the construction and operation of the project. The FEIS did not specifically address the water source for the project. In 2024, EFSEC recommended approval of the project and Governor Inslee signed the site certificate agreement. The site certificate agreement states that the project proponent shall identify the source of potable water for the project and provide certificate of water availability for other uses.

Tri-Cities C.A.R.E.S., Benton County, and the Yakama Nation opposed the approval due to concerns about environmental damage, farmland impact, threats to endangered ferruginous hawks, and the effect on cultural and natural resources, including water. The opponents also raised a variety of additional legal issues including procedural infirmities, authority of EFSEC to use delegated authority, compliance with the state's Administrative Procedure Act, Open Public Meetings Act and State Environmental Policy Act (SEPA). Tri-Cities C.A.R.E.S., Benton County and the Yakama Nation first sought review before the Thurston County Superior Court and then petitioned for review by the Washington State Supreme Court.

The Yakama Nation asserts that EFSEC and Governor Inslee did not consider water needs and water resource impacts prior to approval of the project. Under WAC 463-60-165(3), an applicant to EFSEC shall demonstrate the source of water and its authorization under state law.

Addendum to the FEIS

On May 5, 2025, approximately 18 months after the FEIS was issued and after approval, EFSEC issued an Addendum to the FEIS to specify the project will rely on leasing a water right from the Department of Natural Resources. The applicant explained that it would rely on the water right to supply approximately 203 acre-feet per year for mixing concrete, treating roads, dust suppression, equipment cleaning and water store for fire protection. The Yakama Nation asserts the water source and its potential impacts should have been identified and considered prior to approval.

Conclusion and Implications

In Washington State, it is typical that the water source for a project is considered as part of the application process. For land use projects that are evaluated at a local government level, Washington state law requires a local government to demonstrate that water is legally and physically available prior to approval

of a building permit or subdivision. RCW 19.27.097; RCW 58.17.110; *Whatcom County v. Hirst*, 186 Wn.2d 648, 686-688 (2016). The Washington State Supreme Court will now consider whether EFSEC properly considered the water source for the project.

This case will be briefed before the Washington State Supreme Court in the early part of 2026. The Washington Supreme Court will likely hear oral argument in the spring 2026 term.
(Jessica Kuchan)

JUDICIAL DEVELOPMENTS

WHEN ONE SPECIES' LIFELINE ENDANGERS ANOTHER: NINTH CIRCUIT CLARIFIES INJUNCTION STANDARDS UNDER THE ENDANGERED SPECIES ACT

San Luis Obispo Coastkeeper, et al. v. County of San Luis Obispo, ___F.4th___, Case No. 24-7807 (9th Cir. Dec. 3, 2025).

On December 3, 2025, the U.S. Court of Appeals for the Ninth Circuit issued an opinion in *San Luis Obispo Coastkeeper, et al. v. County of San Luis Obispo* addressing the limits of injunctive relief under the federal Endangered Species Act when court-ordered measures designed to protect one listed species may pose risks to others. The case arose from long-running disputes over the operation of the Lopez Dam and Reservoir in San Luis Obispo County, California, and the downstream effects of those operations on protected aquatic species.

Environmental organizations alleged that the County's management of the dam unlawfully harmed threatened South-Central California Coast steelhead trout by altering the natural flow regime of Arroyo Grande Creek. The U.S. District Court agreed and issued a mandatory preliminary injunction requiring the County to take affirmative steps to modify dam operations and pursue regulatory compliance. On appeal, the Ninth Circuit vacated that injunction, concluding that the District Court had not applied the correct legal framework when multiple protected species were potentially affected.

Background

Arroyo Grande Creek supports several species listed under the Endangered Species Act, each with distinct habitat requirements. The steelhead trout is an anadromous fish that depends on seasonal high flows to trigger migration, maintain spawning habitat, and allow juveniles to reach the ocean. Federal agencies have designated the creek as critical habitat, recognizing its importance to regional steelhead recovery.

The creek and its associated lagoon are also home to the endangered tidewater goby and the threatened California red-legged frog. These species occupy different ecological niches and life stages that can be sensitive to rapid changes in flow. The County argued that flow releases intended to benefit steelhead could scour goby habitat or dislodge frog egg masses, potentially resulting in prohibited takes of those species.

This ecological overlap framed the central legal issue in the case: how courts should approach injunctive relief under the ESA when protecting one listed species may risk harm to another equally protected species.

At the U.S. District Court

The plaintiff organizations sought a mandatory preliminary injunction compelling the County to alter dam operations, implement specific flow release schedules, clear debris from culverts, study fish passage alternatives, and expedite preparation of a habitat conservation plan and incidental take permit application. They emphasized the urgency of the steelhead's winter migration season and argued that immediate relief was necessary to prevent irreparable harm.

The District Court granted much of the requested relief, finding a likelihood of success on the ESA claims and concluding that irreparable harm to steelhead was imminent. While the court summarized expert testimony regarding potential impacts on the tidewater goby and red-legged frog, it did not explicitly weigh those impacts in its equitable analysis. Instead, it directed the County to consult with federal wildlife agencies during implementation of the injunction.

The Ninth Circuit's Decision

On appeal, the Ninth Circuit focused on the nature of mandatory preliminary injunctions under the ESA. Traditionally, courts applying the Supreme Court's decision in *Tennessee Valley Authority v. Hill*

have held that Congress displaced judicial balancing of equities and the public interest in ESA cases, prioritizing species protection regardless of cost. Under that framework, courts typically consider only likelihood of success and irreparable harm.

The panel held that this approach does not apply cleanly where injunctive relief for one listed species may jeopardize another. In such circumstances, the rationale of *TVA v. Hill*, which addressed a conflict between economic development and species preservation, does not resolve the competing interests at stake. Rigid application of that rule, the court explained, risks favoring one species while ignoring concrete risks to others that Congress also sought to protect.

Accordingly, the Ninth Circuit clarified that when a court considers a mandatory preliminary injunction under the ESA that may affect other listed species, it must weigh the competing equities and the public interest as they relate to those species. This holding does not reopen consideration of economic or developmental interests, but it does require courts to confront interspecies tradeoffs directly.

Application to the Lopez Dam Injunction

Applying this framework, the Ninth Circuit concluded that the District Court's analysis was incomplete. Although the lower court acknowledged evidence concerning the tidewater goby and red-legged frog, it did not resolve conflicting expert opinions or explain how potential harms to those species factored into the decision to grant mandatory relief. Reliance on future consultation with federal agencies was not an adequate substitute for judicial weighing of the equities at the preliminary injunction stage.

The panel also emphasized the heightened scrutiny applicable to mandatory preliminary injunctions, which compel affirmative action and alter the status quo before the merits are resolved. In complex ecological settings involving multiple protected species, that standard is particularly demanding. The court therefore vacated the injunction and remanded the case for further proceedings, instructing the District Court to weigh the evidence regarding all affected species and determine whether some or all of the requested relief is warranted.

State Law Claims and Broader Context

The plaintiffs also brought claims under California Fish and Game Code section 5937, which requires dam owners to release sufficient water to maintain downstream fish in good condition. The Ninth Circuit agreed that, unlike the ESA, section 5937 does not displace the traditional four-factor test for preliminary injunctions. However, because the District Court's equitable analysis under state law mirrored its incomplete ESA analysis, the panel vacated the injunction on the state law claim as well.

Conclusion and Implications

The Ninth Circuit's decision provides important guidance for courts and litigants confronting ESA disputes in ecosystems that support multiple protected species. While reaffirming the statute's commitment to species protection, the court recognized that ecological reality often involves tradeoffs that require careful, explicit judicial analysis.

For courts, it emphasizes the obligation to weigh those competing risks when considering mandatory preliminary injunctions, rather than deferring difficult questions to future agency processes.

For public agencies operating dams and other infrastructure, the opinion highlights the importance of comprehensive planning tools such as habitat conservation plans and incidental take permits.
The Ninth Circuit's opinion is available online here: https://cdn.ca9.uscourts.gov/datastore/opinions/2025/12/03/24-7807.pdf
(Darien Key, Derek Hoffman)

ON REMAND, FEDERAL CLAIMS COURT DETERMINES UTE TRIBES MAY PROCEED ON CLAIMS AGAINST FEDERAL GOVERNMENT FOR BREACH OF TRUST

Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States, ___F.Supp.4th___, Case No. 18-359 (Fed. Cl., Dec. 31, 2025).

In *Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States*, the Court of Federal Claims granted in part and denied in part the Government's motion to dismiss, holding that several of the Tribe's Tucker Act breach of trust claims survived. These claims were based on the U.S. Government's alleged failure to maintain and repair the Uintah Indian Irrigation Project (UIIP) and to implement existing water quality control measures. The court also allowed the Tribe to proceed on claims challenging the Secretary's transfer of Tribal water rights under the 1941 Act.

Factual and Procedural Background

Congress authorized the UIIP in 1906, granting title to the project's water rights and infrastructure to the Secretary of the Interior to be held in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe). In 1941, Congress authorized the Secretary to make several transfers of UIIP water rights. In 1967, the Tribe's water and water rights were transferred again under the Midview Exchange Agreement from the Bureau of Reclamation to the Bureau of Indian Affairs. The U.S. Government (Government) agreed to operate and maintain the Midview facilities as part of the UIIP and to grant the Tribe's exclusive management authority over recreational and wildlife uses at the Midview Reservoir. Over time, the Government designated significant portions of Tribal land within the UIIP service area as non-assessable due to inadequate water supply and entered into carriage agreements delivering non-Tribal water through UIIP infrastructure without Tribal involvement.

The Tribe grew unsatisfied with the Government's management of the UIIP and in 2006, filed an action regarding the Government's alleged breaches of trust regarding Tribal water and water rights. The parties ultimately reached a settlement agreement disposing of the case in 2012, in which the Tribe agreed to a broad waiver of its claims. However, the Tribe retained the right to bring suit regarding its water rights, including claims for damages for loss of water resources allegedly caused by the Government's failure to protect those rights. In March 2018, the Tribe's filed suit again, alleging breaches of trust and breach of contract.

At the Federal Circuit and the Remand Order

The Court of Federal Claims initially dismissed the complaint in its entirety. On appeal, the Federal Circuit reversed in part and remanded regarding the Tribe's claims arising under the 1906 Act relating to water infrastructure responsibilities and part of the Tribe's claim relating to the Midview Exchange Agreement, while affirming dismissal of the remaining claims. On remand, the Court of Federal Claims was directed to consider three issues: (1) whether the Midview Exchange Agreement involved water rights; (2) whether the complaint adequately pleaded a breach of contract claim relating to water rights; and (3) whether the exception in the 2012 settlement agreement applied.

Tucker Act

The Tucker Act grants the Court of Federal Claims jurisdiction over claims against the United States. The Indian Tucker Act extends that jurisdiction to claims brought by Indian tribes. To invoke jurisdiction under the Indian Tucker Act, a tribe must identify an independent source of law that gives rise to a money-mandating claim. This determination is conducted under the two-step framework articulated in *United States v. Navajo Nation* (*Navajo II*). First, the tribe must identify statutes or regulations imposing obligations on the United States that appear to create a conventional fiduciary relationship. A tribe must plausibly allege the Government failed to perform those duties. Second, if the tribe establishes that such a relationship exists, it will proceed to step two, where it must show that the substantive law can fairly be interpreted as mandating compensation for damages resulting from a breach of the Government's duties.

The Court of Federal Claim's Decision

The Tribe pursued three claims on remand: (1) breach of trust based on deficient operation, maintenance, oversight, and administration of the UIIP; (2) breach of trust based on repudiation of trust responsibilities, including unlawful transfer of water rights; and (3) breach of contract arising from the Midview Exchange Agreement.

Breach of Trust Claims Based on UIIP Maintenance and Water Quality

The Tribe alleged that the Government breached fiduciary duties by failing to complete the UIIP, including by not providing storage infrastructure. The court held this claim was barred by the mandate rule because the Federal Circuit had already determined that the 1906 Act imposed no duty to construct additional infrastructure. The Tribe also alleged that the Government breached its trust duties by failing to adequately maintain and repair existing UIIP infrastructure, allowing the system to fall into serious disrepair. The court held that this claim survived in part, but only as to breaches occurring after March 7, 2012, the beginning of the six-year statute of limitations period applicable to Tucker Act claims. Because the alleged maintenance failures could be characterized as a series of discrete breaches, the court applied the continuing claims doctrine and allowed claims accruing within the limitations period to proceed. The court further held the 2012 settlement agreement barred recovery for maintenance-related harms occurring before March 8, 2012.

The court dismissed the Tribe's claim regarding the designation of UIIP lands as non-assessable, finding no specific trust duty governing such determinations and characterizing the alleged harm as derivative of maintenance failures. By contrast, the court allowed claims based on the Government's failure to implement water quality controls, concluding that alleged violations of duties under the 1906 Act implicated water rights and fell within the settlement agreement's exception. Water quality claims accruing within the limitations period were permitted to proceed.

Breach of Trust Claim Based on Unlawful Water Rights Transfers under the 1941 Act

The Tribe's second breach of trust claim alleged that the Government unlawfully transferred Tribal water rights under the 1941 Act by conveying federally decreed rights to non-Indian lands without Tribal consent or compensation, affecting roughly 10,000 acres. The Government moved to dismiss this claim for failure to state a claim and as time barred. The court denied the motion to dismiss, holding that the Tribe adequately stated a claim and was not required to plead with heightened specificity. It also declined to dismiss on statute of limitations grounds, finding the Tribe plausibly alleged it did not discover the transfers until September 2012.

However, the court dismissed the portion of the claim based on carriage agreements that allegedly increased UIIP wear and tear without benefiting the Tribe, concluding this theory merely repackaged the maintenance claim and did not establish an independent breach of trust. Any claims for damages arising from conduct before March 8, 2012, were also barred by the settlement agreement.

Claims Relating to the Midview Exchange Agreement

The court dismissed all remaining claims arising from the Midview Exchange Agreement. Claims based on the Government's entry into the agreement or its terms accrued in 1967, when the Tribe signed the agreement and possessed actual knowledge of the transfers. Accordingly, those claims were time-barred. The Tribe's claim that the Government repudiated its trust duties by refusing to administer the Midview Reservoir as part of the UIIP was also barred by the 2012 settlement agreement, which waived claims relating to assets held in trust or that should have been transferred into trust.

Finally, the court dismissed the Tribe's breach of contract claim, holding that although the agreement involved water rights, the complaint failed to plausibly allege a breach concerning those rights and instead relied on a foreclosed theory that the Government failed to transfer the Midview Property into trust. The claim was dismissed under Rule 12(b)(6).

Limitation on Recoverable Damages

The court held that the Tribe's surviving claims—relating to UIIP maintenance and repair, water quality control, and unlawful water rights transfers under the 1941 Act—could proceed only to the extent the

Tribe itself suffered damages. The court rejected the Tribe's attempt to assert *parens patriae* standing to recover for agricultural losses suffered by individual landowners, concluding that the Tribe may recover only for injuries directly sustained by the Tribe as a distinct legal entity.

Conclusion and Implications

The Court of Federal Claims' decision in *Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States* allows several of the Tribe's breach of trust claims to proceed, including claims based on the Government's alleged failure to maintain and repair existing tribal water infrastructure, to implement established water-quality control measures, and to lawfully administer tribal water rights under the 1941 Act. Despite this, much of the Tribe's claims were narrowed or barred via the mandate rule, settlement agreement, statute of limitations, and pleading requirements. If it were to succeed on the merits, the Tribe could again receive damages for the Government's breaches of trust and feasibly deter mismanagement of tribal water and water rights in the future. (Adam Nir)

CALIFORNIA COURT OF APPEAL REJECTS BOND VALIDATION FOR DELTA PROGRAM—FINDS DWR LACKED AUTHORITY TO ISSUE BONDS

Department of Water Resources v. Metropolitan Water District of Southern California, ___Cal.App.5th___, Case No. C100552 (3rd Dist. Dec. 31, 2025, *certified for partial publication* Jan. 28, 2026).

In *Department of Water Resources v. Metropolitan Water District of Southern California*, the Third District Court of Appeal affirmed a judgment denying validation of revenue bonds proposed by the California Department of Water Resources (DWR) for the "Delta Program." The court concluded that DWR lacked statutory authority to issue the bonds because the Delta Program was too vaguely defined to qualify as a permissible modification of the Feather River Project under Water Code section 11260.

Background

DWR sought judicial validation of revenue bonds to fund the planning, acquisition, and construction of the Delta Program, which it defined as facilities to convey water through the Sacramento–San Joaquin Delta. Various environmental organizations, public agencies, taxpayer groups, and water contractors opposed validation, asserting statutory and environmental law challenges. The trial court denied validation, and the Court of Appeal affirmed.

Statutory Authority for the Feather River Project

DWR's request for bond validation relied on Water Code section 11260, which authorizes the department to construct and operate the Feather River Project as the initial feature of the State Water Project. Rather than describing the project's physical components, section 11260 identifies the Feather River Project by reference to three planning reports prepared in the 1950s. The statute also authorizes DWR to implement "further modifications" to the project.

The dispute centered on whether the Delta Program fell within this modification authority or instead constituted a separate project requiring independent legislative authorization. Because the statute does not define the outer bounds of permissible modifications, the court was required to evaluate whether the Delta Program could reasonably be understood as part of the Feather River Project framework.

The Court of Appeal's Decision

In the bond resolutions submitted for validation, DWR defined the Delta Program broadly as "facilities for the conveyance of water in, about and through the Sacramento–San Joaquin Delta." The resolutions did not identify specific facilities, configurations, or operational parameters, nor did they describe how the Delta Program related to the Feather River Project as originally authorized. The Court of Appeal concluded that this definition lacked sufficient specificity to support validation.

The court emphasized that validation proceedings require an affirmative showing of statutory authority. Where a proposed project is described only in general terms, courts may be unable to determine whether the project falls within the scope of existing legislative authorization. Here, the absence of defined facilities, operational parameters, or a clear relationship to the Feather River Project prevented such a determination.

The decision underscores that bond validation is not a purely ministerial exercise. Agencies seeking validation may be required to demonstrate, with meaningful detail, how proposed projects align with statutory authority. Generalized descriptions may be insufficient, particularly where statutes rely on historical planning documents rather than contemporary project definitions.

As a practical matter, agencies may need to provide more detailed project descriptions earlier in the financing process or delay validation until project parameters are more clearly developed.

The court's analysis highlights the challenges of relying on decades-old statutory authorizations to support modern infrastructure initiatives. While section 11260 permits modifications to the Feather River Project, the court declined to infer expansive authority from a statute grounded in mid-twentieth-century planning materials. This suggests a judicial reluctance to extend historic authorizations to projects that may differ substantially in scope or function from those originally contemplated, absent clear legislative direction.

Although the decision did not reject Delta conveyance as a policy objective, it indicates that future Delta conveyance efforts may require clearer statutory grounding. Agencies pursuing similar projects may need to more explicitly tie proposed facilities to existing authorizations or seek new legislative approval to avoid challenges at the validation stage.

Relationship between Statutory Authority and Environmental Review

Respondents also challenged the bonds on environmental and public trust grounds, including alleged violations of the California Environmental Quality Act (CEQA) and the Sacramento–San Joaquin Delta Reform Act. The Court of Appeal affirmed the trial court's rejection of those claims, though the portion of the opinion addressing them was not certified for publication.

Importantly, the court resolved the validation issue independently of environmental compliance, reinforcing that statutory authority and environmental review serve distinct legal functions.

Conclusion and Implications

The decision illustrates that compliance with environmental review requirements does not substitute for clear statutory authority. Even where environmental challenges are unsuccessful, agencies must independently establish that proposed financing mechanisms are authorized by law. This distinction may shape litigation strategy and project sequencing in future infrastructure disputes.

Department of Water Resources v. Metropolitan Water District underscores the limits of relying on historic statutory authorizations to support modern water infrastructure financing. While section 11260 allows for modifications to the Feather River Project, the decision makes clear that agencies must define proposed projects with sufficient specificity to demonstrate that they fall within legislative authority. The case also illustrates the judiciary's role in scrutinizing bond validation requests where the scope of agency authority is uncertain. Going forward, the decision may encourage greater legislative clarity or more detailed project definitions when agencies seek to finance large-scale Delta conveyance efforts through revenue bonds. The court's *partially* published opinion is available online at: https://www4.courts.ca.gov/opinions/documents/C100552M.PDF

(Christina Suarez, Derek Hoffman)

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