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WESTERN WATER LAW & POLICY REPORTER™

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WWL

WESTERN WATER NEWS

NEVADA'S STOPGAP STRATEGY IN COLORADO RIVER NEGOTIATIONS

Nevada has advanced a short-term "stopgap" proposal in ongoing Colorado River negotiations, reflecting a pragmatic effort to maintain stability as states struggle to agree on a long-term framework. The proposal highlights important legal and policy questions about federal authority, compact flexibility, and the increasing role of adaptive management.

Background

The current Colorado River operating guidelines expire at the end of 2026, and basin states have yet to reach consensus on a replacement framework. At the same time, declining reservoir levels and reduced flows have intensified pressure to adopt new shortage-sharing measures.

The Stopgap Proposal

Nevada's proposal would extend or modestly adjust existing shortage-sharing rules for a limited period, rather than forcing agreement on a comprehensive long-term regime. The approach is designed to preserve continuity in reservoir operations, particularly at Lake Mead, while allowing additional time for negotiation.

This type of interim arrangement is not unprecedented. Prior agreements, including the 2007 Interim Guidelines and the 2019 Drought Contingency Plan, were adopted as time-limited measures in response to evolving hydrologic conditions. Nevada's proposal builds on this model by emphasizing incremental adjustment rather than structural overhaul.

Legal Foundations and Constraints

From a legal perspective, a stopgap agreement appears feasible under existing frameworks, but its durability depends on how it is structured and implemented. The Secretary of the Interior retains significant authority to manage Lower Basin reservoirs, including the ability to adopt operational guidelines through administrative action. This authority has historically supported interim agreements where basin states reach sufficient consensus.

However, that authority is bounded by the Colorado River Compact and related statutes governing apportionment. Any interim measure must avoid directly altering established allocation priorities or reallocating water in a manner inconsistent with those governing documents. If a stopgap arrangement were perceived as exceeding those limits, it could invite legal challenge.

Broad state agreement would reduce that risk. Conversely, a lack of consensus could place greater reliance on federal action, increasing the likelihood of litigation or political conflict. As a result, legal durability is closely tied to the proposal's acceptance across the basin.

Nevada's Strategic Position

Nevada's advocacy for a stopgap approach reflects both its constraints and its strengths. With an annual allocation of 300,000 acre-feet, Nevada holds the smallest share of Colorado River water in the Lower Basin. This limits its ability to influence outcomes through scale alone.

At the same time, Nevada has developed a reputation for efficient water use, particularly through conservation and return-flow practices. These measures have allowed the state to maximize the utility of its allocation while maintaining compliance with existing rules. By promoting an interim solution, Nevada positions itself as a stabilizing force in negotiations, emphasizing continuity over confrontation.

This strategy may also serve to protect Nevada from unfavorable outcomes that could arise in a rushed or contentious long-term agreement. By supporting a phased approach, the state preserves flexibility while maintaining its standing as a cooperative participant.

Implications for Basin Governance

The stopgap proposal reflects a broader shift in how Colorado River governance is evolving. Historically, the Law of the River has relied on relatively fixed allocations based on assumptions of stable

hydrology. Those assumptions are increasingly challenged by declining flows and greater variability.

An interim approach aligns with a more adaptive model of management. Rather than attempting to resolve long-term allocation questions in a single agreement, it allows for periodic reassessment and adjustment as conditions change. This approach may better accommodate uncertainty, particularly in the context of climate variability.

At the same time, reliance on short-term agreements introduces new considerations. Temporary measures may create uncertainty for water users who depend on long-range planning. They may also delay more comprehensive reforms needed to address structural imbalances between supply and demand.

Risks and Tradeoffs

While a stopgap approach offers near-term stability, it is not without tradeoffs and ongoing risk. Extending existing frameworks may preserve familiar rules, but those rules were developed under conditions that no longer fully reflect current realities. Continued reliance on interim measures could postpone difficult decisions about allocation reductions and system-wide adjustments.

There is also the risk that repeated short-term agreements could erode predictability in the system. Water users, particularly in agriculture and municipal planning, often require long-term certainty to make investment decisions. A series of temporary arrangements may complicate that planning environment.

On the other hand, the alternative of forcing a comprehensive agreement under current conditions carries its own risks. A hastily negotiated framework could lock in provisions that prove unworkable or inequitable as hydrologic conditions continue to change.

Conclusion and Implications

Nevada's stopgap proposal illustrates a pragmatic response to the current impasse in Colorado River negotiations. It relies on existing legal authorities and builds on prior interim agreements, offering a path forward that emphasizes stability and flexibility. At the same time, it reflects a broader transition toward adaptive management in basin governance.

Whether the proposal ultimately facilitates a durable long-term solution or serves primarily as a temporary measure will depend on how other basin states and federal authorities respond. In either case, Nevada's approach underscores the growing tension between the need for legal certainty and the realities of an increasingly uncertain water supply. (Micheline Nadeau Fairbank)

CALIFORNIA'S VANISHING SNOWPACK AND THE LEGAL STAKES FOR WATER MANAGEMENT

On April 1, 2026, the California Department of Water Resources (DWR) announced that its critical spring snow survey at Phillips Station found no measurable snow. The agency attributed the result to an exceptionally hot and dry March, combined with warm storms and high elevation rain that rapidly melted what remained of the Sierra Nevada snowpack. DWR reported that the statewide snowpack had fallen to 18 percent of average for that date and indicated that the April 1 snowpack was likely the second lowest on record. The agency also stated that statewide snowpack likely peaked on or near February 24, well ahead of the historical norm.

Snowpack is one of the most important indicators in the state's annual water management cycle. It informs runoff forecasts, reservoir operations, State Water Project allocation updates, groundwater planning, and drought response.

The April 1 Survey and What It Signals

The April 1 survey has long served as a critical benchmark because it typically coincides with or approximates the seasonal peak snowpack. In 2026, however, DWR reported that the seasonal peak arrived more than a month earlier. The agency emphasized that the problem was not only limited precipitation, but also the growing disconnect between precipitation and snow accumulation. In many regions, precipitation totals were closer to normal than snowpack figures would suggest, but a significant portion of that water fell as rain instead of snow.

California's snowpack functions as a form of natural storage. Snow that accumulates in winter and melts gradually in spring helps regulate runoff and supports downstream reservoir refill. When storms arrive warmer and snow melts earlier, the timing of available water changes. That complicates the job of state and local water managers, who must operate infrastructure and administer water supplies under legal and practical constraints that were developed around more traditional runoff patterns. DWR's description of a rapid shift from winter conditions to heat driven melt underscores a broader challenge for a system that still relies heavily on assumptions built around historical seasonality.

Operational Consequences for Reservoirs and Forecasting

DWR made clear that April snowpack data feeds directly into the state's water supply forecasts, including Bulletin 120 runoff forecasting. Those forecasts are central to reservoir management because operators must balance two obligations that can pull in opposite directions. On one side is flood control, which requires maintaining space in reservoirs during wet periods. On the other is water supply storage, which depends on retaining enough water to meet municipal, agricultural, and environmental needs through the dry season.

When snowmelt occurs weeks early, operators lose part of the predictability that snowpack normally provides. Earlier runoff can arrive before anticipated storage windows, and warmer storms can produce hydrologic responses that differ materially from historic norms. DWR has acknowledged that these conditions make runoff forecasting more complex. That complexity matters because regulatory and operational decisions often depend on those forecasts. The state cannot manage reservoirs, coordinate project operations, or communicate delivery expectations in a disciplined way if the underlying hydrology is becoming less stable and less seasonally legible.

Impacts to the State Water Project and on Water Supply Planning

The State Water Project supplies water to 29 public water agencies serving roughly 27 million Californians and 750,000 acres of farmland. DWR uses snowpack, precipitation, runoff, and storage conditions to determine and revise annual allocation forecasts. Because Bulletin 120 forecasts are one of the inputs used in calculating allocation updates, the collapse of the April snowpack has direct implications for project contractors and the communities they serve.

Agencies that depend on imported supplies may need to revisit conservation planning, local storage strategies, water transfer assumptions, and reliance on supplemental groundwater pumping. In some regions, the operational effect of an early disappearing snowpack may be felt not through formal rationing, but through increased uncertainty about runoff timing, reservoir carryover, and the reliability of later season supplies.

Groundwater, Drought Response, and Regulatory Pressure

A weak or rapidly disappearing snowpack also places indirect pressure on groundwater systems. When surface supplies become less reliable or less predictable, many users turn to groundwater to bridge the gap. In California, that response now occurs within the framework of the Sustainable Groundwater Management Act, which requires local agencies to bring basins into long term balance and avoid undesirable results.

In basins already under stress, reduced confidence in surface water availability can intensify pumping pressure and strain local management efforts. The same is true for drought planning more generally. DWR's release reinforces that California's current water management challenges are increasingly driven by hydrologic timing and temperature, not just by absolute precipitation deficits.

In practical terms, agencies may need to rely more heavily on dynamic forecasting, interagency coordination, and near-real-time operational adjustments. Those needs are likely to shape both regulatory expectations and future infrastructure investment priorities.

Conclusion and Implications

The April 1, 2026, DWR survey is best understood as more than an alarming snow measurement. It is a concrete example of how climate driven changes in precipitation form and runoff timing are creating new legal and operational stress across California's water

system. The disappearance of measurable snow at the state's signature April survey highlights a central problem for water managers: a year can produce meaningful precipitation and still generate acute water management difficulty if that precipitation falls as rain and melts out early.

For lawyers, agencies, and water users, the lesson is straightforward. Snowpack data remains one of the most important factual inputs in California water administration, but its meaning is evolving. The state's regulatory structure, project operations, groundwater planning, and infrastructure priorities are all being tested by a hydrologic regime that is becoming warmer, less stable, and harder to manage through historic assumptions. The 2026 survey should therefore be read not as an isolated anomaly, but as another signal that California water governance must continue shifting from planning around average conditions to planning around volatility.

Editor's Note: As of May 5, 2026, as this article was finalized, DWR reports the following "percentage of normal" for this date for California's Regions for snowpack: North 8%; Central 25%; South 33% and Statewide, 22 %. https://cdec.water.ca.gov/snowapp/sweq.action (Darien Key, Derek Hoffman)

LOW SNOWPACK, HIGH RISK: THE STATE OF COLORADO AND THE UPPER BASIN AFTER A RECORD DRY WINTER

In recent weeks, Colorado has begun to feel the effects of the of the driest winter on record. Snowpack sits at a mere 18 percent of historical average, further hampered by an unusually warm spring. March brought record high temperatures, accelerating snowmelt, and initiating runoff months before it usually begins. In response, water suppliers and users across the state are announcing plans to lower consumption and mitigate evaporation loss.

Antero Reservoir

Denver Water, the largest municipal water provider in Colorado, declared a stage 1 drought on March 25, planning to cut use by up to 20 percent by next year. As part of the plan to address the ongoing drought, Denver Water also announced that it would be draining Antero Reservoir. Located in Park County, the 2,500-acre impoundment along the South Platte River is an additional storage facility is Denver Water's system but is more widely known for its exceptional angling and recreational opportunities. Antero's depth and geography subject it to extensive evaporation losses, and Denver Water combats this issue by relocating water to deeper, cooler impoundments like Cheeseman Reservoir.

Denver Water has previously drained Antero on multiple occasions. In 2002, the reservoir began a five-year closure due to prolonged drought. In 2015, the reservoir was drained to make essential repairs to the dam. Colorado Parks and Wildlife recently initiated a fish salvage by removing all bag limits for species in the reservoir in an effort to remove as many fish as possible before the water is gone. Efforts are also underway to relocate fish populations to neighboring reservoirs to prevent total loss, with trophy trout being relocated to Spinney and Elevenmile Reservoirs. Anglers and other recreators are disappointed with the closure of Antero reservoir but are coming to terms with the realities of drought in the western United States.

The Historic Users Pool

On the Western Slope, the Colorado River Water Conservation District (River District) approved multiple drought mitigation actions to reduce impacts to users within its jurisdiction. The River District decided to freeze all new water marketing contracts until it can decide the best uses with limited water. In addition to the impacts to the River District, the Historic Users Pool (HUP), a 66,000 acre-foot pool in Green Mountain Reservoir reserved for Western Slope appropriators with rights that predate the Colorado Big Thompson Project, will be severely diminished by drought this year. HUP water is primarily utilized by irrigators on the Western Slope who would otherwise be curtailed by the annual Cameo Call near Grand Junction. It is unclear how UP protections will be affected if Green Mountain Reservoir's fill is severely limited. After senior appropriators along Colorado's biggest rivers take their share, juniors across the state will be left little water to fulfil their needs.

Upper Basin of the Colorado River in Crisis

Perhaps the most-dire threat from the driest winter on record will be felt further downstream of the River District and the Grand Valley. Lake Powell is the second largest reservoir in the United States and an essential piece of water infrastructure of millions of Americans. Currently, it sits at the lowest levels it has ever been, holding just 23 percent of its total capacity. Glen Canyon Dam, which impounds Lake Powell, has multiple releases that feed water from the lake into the Colorado River below. However, if lake levels fall below a critical elevation marker, the dam loses its ability to generate hydropower, and the risk of dead pool, the point at which water can no longer pass through the dam, becomes immediate concern.

If water can no longer pass through Glen Canyon Dam, lower basin states would be unlikely to receive their allocated share of water laid out by the Colorado River Compact. The delivery obligation, 75-million acre-feet over any consecutive ten-year period, as measured at Lee Ferry, would become extremely difficult to reach leading to states to fight before the United States Supreme Court. Obligations to Mexico made in the 1944 U.S.-Mexico Water Treaty also become high problematic hampering already fragile relations. Finally, Lake Mead, and Hoover Dam also run the risk of dropping to critical levels, further adding to the long list of disastrous possibilities.

A temporary fix by way of upstream reservoirs is likely to prevent these issues from occurring this year. Flaming Gorge Reservoir, a massive impoundment on the Green River located in Wyoming and Utah, is slated to be drained to make up for expected losses in Lake Powell. Flaming Gorge is a very large and deep reservoir with thousands of acre-feet of water it can send downstream before issues arise. In addition to Flaming Gorge, Navajo Reservoir in New Mexico and Blue Mesa Reservoir in Colorado will also contribute stored water to Lake Powell. These temporary fixes are beneficial for this year, and potentially next year as well; however, without replenishment from snowmelt, the issues of continual overuse and need downstream create a large basin wide shortage. This leads to problems that are currently at issue on Lake Powell to start arising across the Upper Basin, leaving both it and the Lower Basin in a water crisis.

Conclusion and Implications

The 2025-2026 winter drought and record low snowpacks are creating issues felt across the west, indicating both current and future issues. From localized issues at prized fisheries to a national water crisis, water users across the west are grappling with this reality. Some believe that the lack of moisture was an outlier, an abnormally dry year. However, many others believe that it is slowly becoming the new normal, and that the states of the west must adapt to an even drier landscape.
(Colton Goldfarb, John Sittler)

SCANT SNOWPACK ACROSS MUCH OF IDAHO LEADS TO DROUGHT DECLARATIONS ACROSS THE STATE

As in much of the intermountain west, the winter of 2025/26 was warmer and drier. In the Boise River Basin it was certainly warmer, but not terribly drier; rather snowpack suffered primarily due to temperature because the precipitation that did fall fell primarily as rain especially in the lower elevations. Water users (particularly recent transplants from elsewhere) are likely soon to learn that full reservoirs do not necessarily a full irrigation season make.

Reservoirs Were Consistently Ahead of Schedule, Snowpack Not So Much

As early as February 2026, storage contents of the Boise River Reservoirs (Arrowrock, Anderson Ranch, and Lucky Peak) were 80 percent *ahead* of schedule due to early winter rains. Eventually the Army Corps of Engineers (owner and operator of Lucky Peak Dam) conducted flood control operations in April. While the flood control operations were not much, the Corps actually had to*evacuate* some reservoir space to accommodate forecasted snowmelt in the system. As of writing this, the Boise River Reservoirs' (totaling ~1 Maf of storage) aggregate content is approximately 95 percent.

While the physical storage contents of the reservoirs were consistently ahead of schedule throughout the winter, late season snowpack at Mores Creek Summit (~6,200 feet) was the lowest measured in

the nearly 90-year history of the measurement site. Several locations in the vicinity of the SNOTEL site were bare ground in early April.

Day of Allocation

When Boise Valley irrigation district and ditch companies warned water users of likely reduced water allotments and a shorter 2026 irrigation season, the most common response was "why" when the reservoir system was essentially full? The answer is the "day of allocation."

The day of allocation is the inflection point on the Boise River when irrigation diversion demand exceeds the natural flow of the river. When this occurs, and generally speaking, natural flow river rights begin to be cut in order of priority under the prior appropriation doctrine. This is "generally speaking" because there are river-wide decrees (the Stewart and Bryan Decrees) that share percentage-based stepdown cuts across all rights before true priority-based administration/curtailmemnt occurs.

While the Boise River Reservoirs may be full, the reservoirs alone cannot sustain a full irrigation season from mid-April through early/mid-October. The reservoirs were constructed to *supplement* irrigation water supplied by natural flow earlier in the season. Therefore, the length of the irrigation season is largely determined by the availability of natural flow which, in turn, is derived chiefly from snowpack—the fourth Boise River Reservoir.

In typical, full irrigation season years, the day of allocation occurs in approximately the third week of June. In high snowpack years the day of allocation can push to mid-later July. However, a day of allocation in mid to late May dips into reservoir supplies much earlier and eventually more intensively than usual leading to a shortened irrigation season. Currently, several Boise Valley irrigation entities are predicting an irrigation season that will likely stretch into early-mid September instead of the more "normal" early-mid October. But what is "normal" going forward?

A New Normal?

Changing circumstances in terms of climate and irrigation demand profile are conspiring to create a new "normal" likely leading to consistently shorter irrigation seasons in the future. Climate change is predicted to bring more precipitation, but warmer temperatures, thus more rain. The rain may fill the reservoirs, but less snowpack will result in less sustained natural flow and earlier and more intense reservoir drafting.

The other change is the proliferation of urban development and residential sprinkler systems replacing more traditional agricultural flood irrigation practices. Residential turf grass is the cruelest "crop" of all. It is both water intensive and never harvested. For better or worse, residential irrigators water their yards intensively from the first day of the irrigation season to the last day of the irrigation season. There is no differential crop-based rotation and no periodic harvest that "frees up" water in the system. And sprinkler-based irrigation lessens (if not eliminates) return flow runoff and eliminates shallow groundwater recharge and irrigation drain return flows back to the system.

This changing irrigation demand profile is proving difficult to manage at the irrigation water delivery entity level. While many residential HOAs set watering schedules in many subdivisions, resident compliance is oftentimes spotty at best. The irrigation delivery systems (laterals and pump stations) are hit hardest in the early morning and early evenings before residents leave for work and then later in the day when they return home.

Conclusion and Implications

Whether the existing reservoir system will be able to keep up with these changing circumstances (climate change and irrigation demand profile changes) remains to be seen. It is likely fair to suggest that stricter watering schedule enforcement and the development of alternative sources of water (*e.g.*, recycled municipal wastewater) will need be developed to help smooth out the peaks and valleys. Even potential recycled wastewater development comes with its own challenges from a water system mass balance perspective. WWTP effluent recycled for irrigation reuse and discharged to canals instead of drains and rivers has the potential to alter the flow regimes of those former receiving water bodies. Additional groundwater development is another potential option, but certainly not limitless or necessarily advisable if it interferes with potable water supply and hydrologically interconnected surface water bodies and the prior use of those surface water bodies under more senior water rights.

Ultimately, full reservoirs are certainly a good thing. But the snowpack "reservoir" is an integral component of successful irrigation seasons across Idaho. Without it, *supplemental* storage water alone will likely prove insufficient.
(Andrew J. Waldera)

REGULATORY DEVELOPMENTS

ENDANGERED SPECIES ACT "GOD SQUAD" EXEMPTS GULF OIL AND GAS EXPLORATION— FIRST "NATIONAL SECURITY" EXEMPTION IN GOD SQUAD'S HISTORY

On March 31, 2026, the "God Squad," a group high-ranking government officials including the administrators of the United States Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA), the secretaries of the Army and the Department of the Interior, and the chairman of the Council of Economic Advisers, voted unanimously to exempt all oil and gas drilling activities in the Gulf from the federal Endangered Species Act (ESA).

Background

The federal Congress passed the Endangered Species Act in 1973 which generally allows the secretaires of interior and commerce to list species as endangered or threatened, requires federal agencies to consult with the National Marine Fisheries Service (NMFS) or the Fish and Wildlife Service (FWS) before acting in a manner that may threaten such species, and forbids the "taking" of listed endangered species. After a series of high-profile energy projects were stunted by the ESA in the years following its passage, senators from Iowa and Tennessee introduced a bill in 1978 to create a committee of high-ranking government officials that could exempt certain projects from the ESA. That group became known as the "God Squad" on account of their powers of extirpation. Within a few months of that bill receiving President Carter's signature, the God Squad issued its first project-specific ESA exemption to the Grayrocks Dam in Wyoming. Since then, the God Squad has only convened once to exempt a timber harvesting program in Oregon in 1992. Notably, the God Squad has never invoked "national security" to expedite their process.

Procedurally, if NMFS or FWS concludes ESA consultation with a lead federal agency by issuing a biological opinion concluding a particular project would violate the ESA, the agency, applicant, or associated governor may seek an exemption. Within 20 days of receipt of the exemption application, the relevant Secretary must determine whether the applicant and agency: (1) acted in good faith during consultation, (2) fairly considered project modifications and reasonable project alternatives that would avoid violating the ESA, (3) completed the requisite biological assessment, and (4) avoided making irreversible commitments of resources during the process.

If the relevant secretary determines the exemption applicant and associated agencies pass this threshold test, that secretary must hold a hearing on the exemption application and prepare a report within 140 days detailing: (1) the availability of reasonable and prudent alternatives, (2) a summary of the evidence pertinent to determining whether project approval is in the public interest and whether the project is of national or regional significance, (3) a list of reasonable mitigation and enhancement measures which should be considered by the God Squad, and (4) a finding regarding whether the lead agency and exemption applicant refrained from making any irreversible commitment of resources.

Within 30 days of the completion of the Secretary's report, the God Squad must issue the exemption if at least five of the Committee's seven members determine, based on the Secretary's hearing and subsequent report, that: (1) there are no reasonable and prudent alternatives to the project, (2) the project is in the public's interest and its benefits "clearly outweigh" the benefits of alternatives which may conserve the species or its critical habitat, (3) the project is of regional or national significance, and (4) neither the lead federal agency nor the exemption applicant have made any irreversible commitment of resources. The God Squad also has a duty to implement "reasonable mitigation and enhancement measures … as are necessary and appropriate to minimize the adverse effects of the [project] upon the endangered species, threatened species, or critical habitat." The God Squad must also specify mitigation and enhancement measures tied to the ESA exemption.

Biological Opinion and National Security Concerns

Here, the Bureaus of Ocean Energy Management (BOEM) and Safety and Environmental Enforcement (BSEE) are the federal agencies responsible for the Outer Continental Shelf Oil and Gas Program, which governs oil and gas leases in the Gulf. On May 15, 2025, as part of the ESA consultation process for the portion of that program within the Gulf, NMFS issued a Biological Opinion (BiOp) which analyzed impacts to several species of whales, fish, turtles, corals, conch, and more. The BiOp concluded that after all avoidance and minimization measures were applied, the only ESA violation caused by the project would be potential vessel strikes to Rice's whales.

Secretary Hegseth asked Secretary of Interior Burgum to convene a meeting of the God Squad to exempt the Gulf portion of the Outer Continental Shelf Oil and Gas Program from the ESA despite NMFS's BiOp due to national security concerns. According to Hegseth and Burgum, the invocation of national security concerns means that none of the procedural and substantive requirements associated with a God Squad exemption discussed above apply, including the requirement to make certain findings and to impose avoidance and mitigation measures as a condition of the exemption.

Notably, Hegseth's "national security" rationale is that domestic energy supply disruption is a national security concern and active ESA litigation against oil and gas exploration in the Gulf could result in a pause on some of that work. Notably, the same administration has recently initiated a war which halted approximately 20 percent of the world's oil supply and 25 percent of the world's natural gas supply. Equally notable is Hegseth's rationale that if we don't exempt Gulf oil and gas exploration from the ESA, "Russia and Iran will generate more revenue from their own oil exports," which would in turn "blunt U.S. sanctions efforts and bolster these countries' economies and geopolitical standing." The day before Hegseth made these arguments, Secretary Bessent paused sanctions on Russian oil through April 11. Secretary Bessent continued that pause on April 17, effective through May 16.

Conclusion and Implications

The President, through the Secretary of "War," has unilaterally exempted all oil and gas exploration in the Gulf of "America" from the Endangered Species Act on the ground that disruption in domestic supply resulting from hypothetically successful ESA litigation could increase fossil fuel prices. The same administration started a war that throttled 20 percent of the world's oil supply and 25 percent of the world's natural gas supply, then responded by revoking sanctions on Russian oil. This use of "emergency" authority to consolidate power in the office of the executive is consistent with the broader mandates of the Unitary Executive Theory. Several environmental organizations have pledged to sue the federal government to stop this overreach.

The God Squad's Committee Order can be found here: https://www.doi.gov/sites/default/files/documents/2026-03/endangered-species-committee-order.pdf

Secretary Hegseth's Letter of March 13 to Secretary Burgum, including the supporting rationale for his national security findings, can be found here: https://www.doi.gov/sites/default/files/documents/2026-03/act-exemption-osd070136-26-res-final.pdf

NMFS's Biological Opinion date May 20, 2025, can be found here: https://repository.library.noaa.gov/view/noaa/71211

(Blaine R. Dyas)

ENVIRONMENTAL PROTECTION AGENCY NEWS: RECENT FUNDING, GUIDANCES, COMPLAINTS, AND RECOGNITIONS

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.

Apr. 29, 2026—The U.S. Environmental Protection Agency (EPA) announced the availability of approximately $80 million through the Sewer Overflow and Stormwater Reuse Municipal Grant program to help communities address stormwater and sewer infrastructure needs. The grants are intended to strengthen systems that capture and manage stormwater and help prevent contaminants, including untreated sewage, from entering nearby waterways. EPA will provide funding from fiscal years 2025 and 2026 to states, which will award the funds to communities across the country.

Western state allotments under the program include the following amounts, listed as fiscal year 2025 allotment followed by fiscal year 2026 allotment:

- Arizona—$415,000 and $414,000;
- California—$3,834,000 and $3,834,000;
- Colorado—$781,000 and $780,000;
- Idaho—$203,000 and $203,000;
- Montana—$203,000 and $203,000;
- Nevada—$203,000 and $204,000;
- Oregon—$572,000 and $572,000;
- Utah—$332,000 and $332,000;
- Washington—$945,000 and $945,000;
- Wyoming—$203,000 and $203,000.

Stormwater can collect pollutants including trash, chemicals, oils, and dirt or sediment and convey them to nearby waterways. When mixed with domestic and industrial wastewater in combined sewers, stormwater can also contribute to combined sewer overflows during heavy storm events. The Sewer Overflow and Stormwater Reuse Municipal Grant program will prioritize projects for small and/or financially distressed communities.

Apr. 23, 2026—The U.S. Environmental Protection Agency (EPA) provided updated interim guidance for the destruction and disposal of per- and polyfluoroalkyl substances (PFAS). EPA said the updated guidance addresses available information on PFAS destruction and disposal and is intended for states, utilities, waste handlers, and local communities managing PFAS waste.

PFAS are widely used, long-lasting chemicals that break down very slowly over time. Because of their persistence in the environment, EPA said PFAS waste should be managed using destruction or disposal methods that reduce the potential for environmental releases. The updated guidance recommends technologies with the lowest potential for releasing PFAS to the environment based on site-specific conditions, including:

- Using Class I underground injection wells for long-term waste storage;

- Disposing of PFAS in Resource Conservation and Recovery Act (RCRA)-regulated hazardous waste landfills; and

- Using hazardous waste combustors that operate under specific conditions to destroy PFAS and minimize harmful byproducts and air emissions.

EPA said it is continuing to review destruction and disposal techniques and to evaluate new technologies and methods for PFAS destruction. The updated guidance also includes a new technology evaluation framework to assess the safety and effectiveness of emerging tools. EPA will accept comments on the interim guidance for 60 days following publication in the Federal Register, and comments may be submitted to the public docket at Regulations.gov, Docket ID EPA-HQ-OLEM-2020-0527.

Apr. 22, 2026—The U.S. Environmental Protection Agency (EPA) is seeking public input on an interim cleanup plan to address groundwater con

tamination at the Baird & McGuire Superfund Site at 775 South Street in Holbrook, Massachusetts. EPA is accepting public comments on the proposed plan from May 6, 2026, through June 12, 2026.

EPA will host an informational meeting on May 5, 2026, and a public hearing on June 9, 2026, both at the Holbrook Middle-High School Auditorium. Comments must be submitted by June 12, 2026, and may be submitted orally during the public hearing or through Regulations.gov, Docket ID EPA-R01-SFUND-2026-0430.

Baird & McGuire Company, Inc. operated a chemical mixing and batching operation at the site for approximately 71 years. Manufactured products included herbicides, pesticides, disinfectants, soaps, floor waxes and solvents. Operations from the facility resulted in contaminant releases to soil and groundwater. Site-related contamination includes various volatile and semivolatile organic compounds (VOCs and SVOCs), pesticides and arsenic.

Apr. 20, 2026—The U.S. Environmental Protection Agency (EPA) and the Department of Justice's Environment and Natural Resources Division (ENRD) filed a complaint against the District of Columbia Water and Sewer Authority (DC Water) for alleged Clean Water Act (CWA) violations related to the collapse of the Potomac Interceptor.

The complaint alleges that DC Water discharged raw sewage into the Potomac River without authorization, ignored warning signs of imminent failure, and violated its CWA permit by failing to properly maintain the Potomac Interceptor and its broader sanitary sewer system. The complaint further alleges that after the collapse occurred, DC Water failed to adequately mitigate the damage. The lawsuit seeks civil penalties and injunctive relief to require DC Water to mitigate the alleged harm and prevent future collapses.

DC Water owns and operates the Potomac Interceptor, a 54-mile regional sewage pipeline that carries approximately 60 million gallons of wastewater daily from portions of Virginia, Maryland and the District of Columbia to the Blue Plains Advanced Wastewater Treatment Plant in Washington, D.C. Maintaining the Interceptor and related infrastructure in good working order is a condition of DC Water's CWA permit.

EPA said a federal emergency declaration was approved on Feb. 20, 2026, and that the federal response, with EPA as lead agency, addressed contamination at the site by mid-March. The complaint also alleges that although DC Water diverted sewage around the break using the Chesapeake & Ohio Canal, the diversion polluted a national park and did not adequately mitigate the collapse because raw sewage continued to wash into the Potomac River.

Apr. 9, 2026—The U.S. Environmental Protection Agency (EPA) recognized 48 water infrastructure projects nationwide for excellence and innovation, including a desalination project in Antioch, California, a water recycling facility in Escondido, California, and a reclamation facility for the Yavapai Apache Nation in Camp Verde, Arizona. The projects were financed in part through State Revolving Fund (SRF) programs and address drinking water reliability, water recycling, wastewater treatment, and water reuse needs.

EPA's AQUARIUS program recognized the City of Antioch with an Excellence in Infrastructure Designed for the Future award. To reduce dependence on purchased water and maintain a reliable drinking water supply during drought, the City of Antioch financed a brackish desalination plant with a $60 million Drinking Water State Revolving Fund construction loan and a state grant.

EPA's George F. Ames PISCES program recognized the City of Escondido for an Exceptional Project. The City of Escondido financed a membrane filtration reverse osmosis facility with a $45 million Clean Water State Revolving Fund loan to deliver recycled water for agricultural and landscape irrigation.

EPA also awarded the Yavapai Apache Nation an Exceptional Projects Honorable Mention. To reduce demand on limited surface and groundwater supplies, the Yavapai Apache Nation financed an upgrade at the Middle Verde Water Reclamation Facility with $16 million in Clean Water State Revolving Fund assistance, augmented by Tribal and federal support. The project produces Class A+ reclaimed effluent to replace a failing lagoon and protect culturally and environmentally significant water resources.

Apr. 9, 2026—The U.S. Environmental Protection Agency (EPA) recognized the Lummi Tribal Sewer and Water District with a PISCES award for Excellence in Environmental and Public Health Protection for the upgrade of the Gooseberry Point

Wastewater Treatment Plant. The project was financed in part through State Revolving Fund programs and is intended to improve wastewater treatment, reduce pollution, and protect public health.

The Lummi Tribal Sewer and Water District received a $15 million Clean Water State Revolving Fund loan to upgrade the Gooseberry Point Wastewater Treatment Plant. For years, the aging plant was not adequately treating wastewater, and aging infrastructure caused frequent permit exceedances. The project upgraded the plant to a reliable activated sludge process and added an effluent pump station to overcome hydraulic constraints.

EPA said the improvements ensured higher quality, permit-compliant discharges through the outfall, including during high tides and storms. The upgrades will reduce pollution and public health risks and restore protection for commercial and Tribal shellfish beds, which the Lummi Nation depends on for sustenance, cultural practices, and economic activity. The project also improves habitat for marine species such as the Southern Resident Orca pod, marbled murrelets, and Puget Sound rockfish.

The Clean Water State Revolving Fund and Drinking Water State Revolving Fund programs are EPA-state partnerships that provide communities with low-cost financing for a wide range of water quality and drinking water infrastructure projects. (Miles Schuster)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD DENIES ALL "GOOD ACTOR" FEE EXCLUSION REQUESTS IN TULE SUBBASIN, PREPARING INTERIM PLAN

On April 21, 2026, the State Water Resources Control Board (State Water Board) denied requests from eight different Groundwater Sustainability Agencies (GSAs) in the Tule Subbasin (Bulletin 118 Basin No. 5-022.13), each of which requested that its landowners be exempted from reporting extractions and paying fees to the State Water Board, arguing that their local management was sufficient. The initial reporting and fees were due May 1, 2026.

Background: Tule Subbasin Probation, Reporting, and Fees

The Tule Subbasin was designated as probationary by the State Water Board on September 17, 2024. One effect of a basin being designated as probationary is that groundwater pumpers in the basin must report all extractions to the State Water Board under Water Code section 5202 and pay fees set by the State Water Board under section 1529.5. After the Tule Subbasin, as well as the neighboring Tulare Lake Subbasin, were designated as probationary in 2024, the State Water Board worked to create a new system to manage such reporting and fee collection, known as GEARS (Groundwater Extraction Annual Reporting System). That system is now live, and initial reports and fee payments were due on May 1, 2026.

Exclusion Requests

In advance of that initial reporting and payment date, the State Water Board considered these requests for exclusion from those requirements. Under Water Code section 10735.2, subdivision (c)(1), the board can exclude from the requirements any class or category of extractions "are subject to a local plan or program that adequately manages groundwater within the portion of the basin to which that plan or program applies" or they "are likely to have a minimal impact on basin withdrawals."

Several such exclusions are already in place within the Tule Subbasin. In the original resolution designating the Tule Subbasin as probationary, it excluded Delano-Earlimart Irrigation District GSA and Kern-Tulare Water District GSA, finding that their Groundwater Sustainability Plans (GSPs) adequately managed their portions of the basin. The State Water Board also decided, on April 7, 2026, to exclude nearly all pumpers of less than 20-acre feet per year, finding that they would have a minimal impact on basin withdrawals.

At the April 21 hearing, the State Water Board considered requests for similar exclusions by Lower Tule River Irrigation District GSA (Lower Tule), Pixley Irrigation District GSA (Pixley), Tri-County Water Authority GSA (Tri-County), Tea Pot Dome

Water District GSA (Tea Pot Dome), Terra Bella Irrigation District GSA (Terra Bella), Porterville Irrigation District GSA (Porterville), Saucelito Irrigation District GSA (Saucelito), and Vandalia Water District GSA (Vandalia).

Hearing and Decision

Prior to the hearing, the State Water Board staff released a staff report recommending that all of the requests be denied. (SWRCB, Review of Requests for Exclusion from Probationary Reporting and Fees, Tule Subbasin (March 2026), https://www.waterboards.ca.gov/sgma/docs/tule/202603-exclusion-staff-review.pdf.) At the hearing, the staff presented that recommendation to the board, and a panel of managers and experts from the GSAs presented counter-arguments. Many of the disagreements were quite technical, involving the method of accounting for water budgets in the revised GSPs. Others were questions of fairness. Several GSAs objected to the staff report's reliance on the Department of Water Resources (DWR) report on Best Management Practices for Land Subsidence (DWR, Best Management Practices of the Sustainable Management of Groundwater: Land Subsidence (January 2026), which was finalized after their latest GSPs were adopted and were only released in draft form in August of 2025, immediately before the plans were adopted. They argued that they should not be held to standards they could not have been aware of. Some GSAs, including Vandalia and Teapot Dome, argued that their conditions were similar to those of the two districts already granted exclusion in the probationary resolution and that they should not be treated differently.

After some back-and-forth between GSA and board staff, the board took public comments. Most of the comments offered were from family farms in the affected GSAs, who described the rapid implementation of the GSPs and its impact on their ability to continue farming. They urged the board not to add yet another fee to worsen that situation. The board's chairman, Joaquin Esquivel, commented that the purpose of the fees was not to be punitive but to fund the State Water Board's work in regulating probationary basins. He also noted the fees are required by statute.

The State Water Board members applauded the GSAs for the work they have done to improve their GSPs, but ultimately, they accepted the staff recommendation to deny all of the requests.

Conclusion and Implications

During the hearing, Chairman Esquivel made a comment that the pursuit of these statutory exclusions has often been a "distraction" from the work of remedying the deficiencies in GSPs so that a basin can get beyond probation. That comment, and the board's action on these requests, may be an indication of the board's general attitude toward exclusion requests.

The staff also indicated, during their presentation, that they were in the process of preparing an interim plan for the basin. Water Code section 10735.8 authorizes the State Water Board to prepare and adopt such a plan for a probationary basin that has been in probation for at least one year, a provision that has yet to be implemented in any basin. The staff indicated that such a plan might be prepared for the Tule Subbasin by late 2027.
(Brett Stroud)

Editor's Note: The author represents clients in both of the current probationary basins, including a GSA in the Tulare Lake Subbasin and a water district in the Tule Subbasin.

LAWSUITS FILED OR PENDING

THE *FODE* SAGA CONTINUES: TECHNICAL ASSISTANCE AND THE EXPANDING EDGE OF WATER CODE PENALTIES IN WASHINGTON STATE

The litigation orbiting *Fode v. Department of Ecology* has become a durable reference point for how Washington's Water Code is actually enforced—not just interpreted. We first reported on *Fode v. Ecology* in the June 2022 edition of *Western Water L. & P'lcy Rptr*. [The court's 2022 opinion is available here: https://www.casemine.com/judgement/us/628e2280714d583e4133008e]

What began as a fact-specific dispute over unauthorized irrigation in the particularly complicated subbasin of the state has evolved into a broader test of statutory sequencing, agency discretion, and the procedural limits of enforcement. The latest chapter, now waiting for a possible audience before the Washington Supreme Court review, squarely presents two issues with regional implications: (1) what constitutes "technical assistance" under RCW 90.03.605, and (2) when agency practice crosses into unpromulgated rulemaking under the Administrative Procedure Act (APA). The petition for review to the Washington Supreme Court is available here: https://www.courts.wa.gov/content/petitions/1050411%20Answer%20to%20Petition%20for%20Review.pdf

[*Fode v. Washington State, Department of Ecology*, Case No. 1050411, *filed* Mar. 12, 2026, Supreme Court, State of Washington]

From Irrigation Violation to Statewide Test Case

The underlying facts are straightforward and familiar to practitioners in over-appropriated basins. Ron Fode irrigated multiple parcels without valid water rights, despite warnings from the Washington State Department of Ecology. Ecology issued cease-and-desist orders and ultimately assessed substantial penalties—initially totaling $618,000, later reduced by the Pollution Control Hearings Board (PCHB) to $260,000.

The enforcement authority for those penalties is outlined in RCW 90.03.600, which authorizes civil fines of up to $5,000 per day per violation. But the more consequential statutory provision—and the one now driving appellate scrutiny—is RCW 90.03.605. Enacted in 2002, it imposes a mandatory sequence: Ecology must first attempt voluntary compliance through "information and technical assistance" before escalating to enforcement.

That sequencing requirement reflects a legislative compromise between regulatory enforcement and practical water management. As the Washington Water Utilities Council noted in its Amicus in Support of Appellant's Petition for Review, the statute was designed to prioritize education and assistance before penalties, particularly given the complexity of water rights administration.

The Core Dispute: What Is "Technical Assistance"?

The Court of Appeals' 2025 decision (Case No. 40449-8-III Unpublished Opinion filed December 18, 2025) affirmed Ecology's penalties and adopted a narrow view of the agency's obligations. [The Court of Appeals' 2025 opinion is available online at: https://www.courts.wa.gov/opinions/pdf/404498_unp.pdf]

In its formulation:

> In this instance, the only technical assistance Ecology could provide to Mr. Fode was information that he did not have adequate water rights and that he could not withdraw and use public groundwater until he obtained legal authorization.

That interpretation effectively collapses "technical assistance" into notice of violation—a position now under sustained attack in the pending petition for review. Both the petitioner and *amici* argue that the statute requires something qualitatively different: affirmative, solution-oriented guidance that helps the water user achieve lawful compliance.

The *amicus* brief filed by the National Federation of Independent Business Small Business Legal Center frames the issue starkly. It contends that the statute obligates Ecology to provide "specialized, practical help…identifying one or more means" to accomplish the user's objective within the law, not merely to warn of illegality.

In the *Fode* context, that distinction matters. The record reflects that a potential compliance pathway—seasonal transfer of existing water rights—was proposed but not processed. Ecology's refusal to entertain that option, according to the petition, transforms the statutory "assistance" requirement into a nullity.

The "Office Deadline" Problem

Layered onto the technical assistance dispute is a classic administrative law issue: whether agency practice has hardened into an unpromulgated rule.

Ecology declined to process Fode's proposed seasonal transfer because it was submitted after an internal February 15 "office deadline." That deadline is not codified in statute or rule. Yet, in practice, it functioned as a categorical bar to considering the transfer—and therefore to providing the very compliance pathway the statute arguably requires.

The Court of Appeals rejected the argument that this deadline constitutes a "rule" under the APA, reasoning that applicants have no entitlement to approval of seasonal transfers. The petition for review, however, reframes the inquiry. The relevant question is not whether approval is guaranteed, but whether applicants have a statutory right to have their applications "accepted and considered". On that point, the petition relies heavily on *Hillis v. Department of Ecology*, in which the Washington Supreme Court held that agency-imposed processing priorities required formal rulemaking because they altered statutory rights to the investigation of applications.

If the Supreme Court accepts that framing, the implications are significant. Many water-rights administration practices—deadlines, prioritization protocols, internal review thresholds—could be vulnerable if they materially affect access to statutory benefits and are not APA-compliant.

Penalties: Still Expansive, Still Discretionary

While the Supreme Court petition focuses on process, the underlying penalty framework remains intact and expansive. The Court of Appeals reaffirmed that Ecology may assess penalties on a per-parcel basis, treating each illegally irrigated parcel as a separate violation.

This interpretation mirrors environmental enforcement cases in which discrete acts (e.g., tree removal, discharges) are penalized individually. The practical effect is multiplicative exposure: large-scale agricultural operations can face six-figure liability quickly, even without demonstrated harm to other users. At the same time, the PCHB's reduction of penalties—limiting them to days with observed irrigation—signals an evidentiary limitation. Ecology cannot simply assume continuous violation throughout an irrigation season; it must prove daily use, either directly or by competent inference.

Conclusion and Implications

If review is granted, the Supreme Court will be asked to reconcile legislative intent favoring voluntary compliance with an enforcement regime that, in practice, often proceeds directly to penalties. For practitioners, the takeaway is immediate: technical assistance is no longer a throwaway argument. It is emerging as a central litigation lever—one that may redefine how water rights enforcement is initiated, defended, and reviewed in Washington.
(Jamie Morin, Jessica Kuchan)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT LARGELY SIDES WITH NMFS AND THE CENTER FOR BIOLOGICAL DIVERSITY IN THE AGENCY'S ASSESSMENT OF CRITICAL HABITAT UNDER THE ESA FOR THREATENED SEAL SPECIES

State of Alaska v. National Marine Fisheries Service; Center for Biological Diversity v. State of Alaska, ___F.4th___, Case Nos. 24-7276, 24-7377 (9th Cir. Mar. 25, 2026).

This appeal to the Ninth Circuit marks, what the court referred to as a "culmination of the National Marine Service's (NMFS) decade-long efforts to conserve two species of Arctic seal." The agency's efforts began in 2012 with its listing a subpopulation of the Pacific bearded seal and the Arctic subspecies of the ringed seal as threatened under the federal Endangered Species Act (ESA). This listing triggered NMFS's statutory obligation to designate "critical habitat" for those seal species, completed in 2022. Alaska opposed those efforts and filed suit in the U.S. District Court, which mostly agreed that the habitat designations were unlawful which resulted in vacating the rules and remanding the matter back to NMFS. The Center for Biological Diversity intervened and appealed. In the end the Ninth Circuit found that it had jurisdiction over CBD's appeal and entered judgment in favor of CBD and NMFS.

Background

The Endangered Species Act, in its role to "conserve endangered species and threatened species and their habitats placed the responsibility to accomplish this role jointly with the Secretaries of Commerce and of the Interior through NMFS and Fish and Wildlife Service (FWS) (jointly referred to as the Services. The seal species at issue fall within NMFS's jurisdiction. The Services "core responsibility is to determine whether species within their respective jurisdictions are endangered or threatened." Once listed as endangered or threatened NMFS must concurrently designate critical habitat.

Before designating critical habitat NMFS must consider the "economic. . .national security and. . .other relevant impacts of the proposed designation" The agency "may exclude any area from critical habitat if the agency concludes that the benefits of such exclusion outweigh the benefits. . ."

In 2012 NMFS listed two species of Arctic seal as threatened: the ringed seal and the bearded seal. Litigation over the threatened-species listings concluded in 2017 after the Ninth Circuit upheld the listings. By 2019 NMFS had not yet designated critical habitat for either seal. That prompted the CBD to file another lawsuit "which spurred NMFS to issue critical habitat designations in two final rules in 2022. . ."

As part of designation of critical habitat NMFS prepared Regulatory Impact Reviews assessing the economic, national security and other relevant impacts as well as their benefits. NMFS exercised its discretion to exclude from critical habitat designation a portion of the Beaufort Sea with the U.S. Navy conducts training exercises:

> But NMFS declined to exclude other areas—including a twenty-mile buffer zone proposed by Alaska—because its analysis did not indicate that "significant economic impacts" would result from those areas' inclusion.

Alaska challenged the rules under the ESA and Administrative Procedure Act (APA) and the CBD intervened as a defendant.

At the District Court

The U.S. District Court granted summary judgment to Alaska agreeing with its contention that the critical habitat designations violated the ESA's termas as well as the statute's "reasoned decision-making requirement." The District Court found that the ESA required NMFS to find that the entire designated area of occupied critical habitat "itself is essential to the conservation of the species," not just that the are contains "essential features." The District court "faulted NMFS for failing to explain "why the en-

tirety of each designated area is necessary to the seals' survival" and "why a similar area" would not suffice.

Ultimately, the District Court found NMFS actions as arbitrary and capricious for failure to account for foreign nation conservation efforts and the existence of foreign habitat. It concluded that NMFS abused its discretion in declining to consider exclusion of the coastal buffer zones for oil and gas activities.

NMFS and the CBD appealed to the Ninth Circuit and Alaska filed a cross-appeal with respect to the prudency issue. During briefing before the Ninth Circuit NMFS moved to voluntarily dismiss its appeal and concurrently to dismiss the CBD's appeal arguing the Ninth Circuit lacked jurisdiction over "non-agency litigant's appeal of a District Court remand order."

The Ninth Circuit's Decision

Jurisdiction and Considerations of Finality

The Ninth Circuit granted NMFS's motion to voluntarily dismiss but denied its motion to dismiss the CBD's appeal without prejudice and the Ninth Circuit permitted the parties to move forward and brief on the issue of the Ninth Circuit's jurisdiction.

The Ninth Circuit concluded that the remand order by the U.S. District Court is "final" providing the Court of Appeals with jurisdiction over the CBD's appeal. The Court of Appeals' found that the District Court's order "contains several distinct legal rulings, the application of which would be entirely unnecessary if the court was incorrect." Further, the Ninth Circuit found that ". . .It is highly unlikely that the Center would be able to obtain a favorable outcome in the remand proceedings ordered by the district court."

The Ninth Circuit referenced that in the past the court has held that finality considerations favor exercising jurisdiction over appeals by agencies form remand orders. For example, the court found that allowing appeals of such orders permits resolution of discrete "questions of law" that will guide the proceedings on remand and that application of the incorrect standard would "result in a totally wasted proceeding below" and that the lack of an "immediate appeal may foreclose review because an agency cannot challenge its own post-remand rule." The court also pointed out that an agency cannot obtain a "favorable outcome on remand—as the party on the losing end of the district court's decision, the agency will be forced to adhere to a legal standard with which it disagrees."

The court went on to discuss that finality considerations may "shake out differently where the party seeking review is not an agency litigant."

The Ninth Circuit's concluded that in determining whether it had jurisdiction over the CBD's appeal:

> . . .we focused on the third finality consideration and found it dispositive. We observed that future judicial review was not foreclosed because the organization could bring suit to challenge any unlawful post-remand rule. . .critically however, we also emphasized that the organization could obtain "all the relief if it seeks" in the remand proceedings. NMFS could revise its regulations and list the species as threatened again, thereby reaching the same result as before.

Finally, the court held that in past rulings and under similar circumstances it has emphasized that "meaningless remands are "anathema to judicial economy and support[s] appellate jurisdiction."

The Merits of the Designations—Occupied Critical Habitat

The CBD contended that NMFS's designations were consistent with the ESA's definition of occupied critical habitat. On the CBD's view, to designate occupied critical habitat, the agency is only required to find that the occupied areas "include 'physical or biological features' that are 'essential to the conservation of the species.'" The CBD maintained that the ESA does not separately require the agency to find that the entire designated area is itself "essential" to the species, nor does the statute require an explanation of why a smaller area would not suffice. The Ninth Circuit agreed. The court found that the statute defines "critical habitat" to include the "specific areas," occupied by a species, "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations." That language, the court found, is straightforward: "all that [the ESA] requires" is for NMFS to identify "physical or biological features" that meet those two criteria. Once NMFS identifies such features within a threat-

ened species' occupied range, the agency generally must designate the areas containing those features "as critical habitat."

The court rejected Alaska's interpretation to the contrary, finding that the "critical habitat" definition refutes Alaska's argument that the word "essential" requires a separate determination about a "specific area[']s" conservation value. The adjective "essential" modifies "physical or biological features" that the "specific areas" *contain*; it does not modify the "specific areas" themselves. The court found it would "stretch the modifier too far" by applying

"essential" to the latter, "disconnected phrase." Accordingly, the court found that NMFS complied with the ESA by identifying essential physical and biological features and designating a "single specific area" that contains all of those features. 87 Fed. Reg. at 19189; *id.* at 19241.

Alaska also urged the court to consider that the designations—which cover nearly 160 million acres—were simply too vast to constitute a "specific area" within the meaning of the ESA. The court found Alaska "misreads the statute" as [despite the vast acreage involved in the designations] the term "specific area" does not provide any inherent limitation on the size of a designation.

Foreign Nation Conservation Efforts and Habitat

The court was faced with the issue of whether NMFS was required to account for foreign nation conservation efforts or the existence of foreign habitat in making its designations. The court found it did not for purposes of critical habitat designations and that by virtue of the fact that the ESA *does* expressly require such an analysis for decisions to *list* a species, such language's absence in critical habitat decision-making was conspicuous by its omission.

Exclusions from Final Designations

The issue of whether NMFS acted appropriately when it decided to consider excluding certain coastal areas which Alaska sought express exclusion, the court sided with NMFS finding it acted well within its discretion. The court found that CBD's argument that the ESA requires the agency to "consider" relevant impacts, "the ultimate decision whether to exclude areas from critical habitat is discretionary." The court found that because exclusion decisions are discretionary its review was "narrow." In the end, in court found that NMFS review of all relevant factors with "reasonable explanation for declining to consider [certain geographic areas] meant NMFS "cleared that low hurdle."

Prudency

On cross-appeal Alaska argued that the designations erred because they failed to comply with the ESA's prudency requirement. The court found that in response to public comments it adequately explained why the "not prudent" exception was inapplicable. The court found that NMFS emphasized in its analyses that habitat destruction from climate change, oil and gas activity marine shipping, etc., is one of the primary threats to the seals' survival and that designation would not "increase the degree of threat. . . . under any circumstances." The court declined to read into this "rare exception" factors that "Congress clearly did not intend to require the agency to consider." The court supported NMFS again, here on this point

Conclusion and Implications

After a multi-issue analysis and extensive discussion of the various issues on appeal the Ninth Circuit held as follows:

> Because the district court's remand order resolved discrete legal issues; the court's conclusions, if erroneous, could result in a "wasted proceeding"; and the Center may not obtain a favorable result on remand, the order constitutes a final, appealable judgment as to the Center. On the merits, we reverse the district court's rulings that the designations are unlawful and affirm the district court's ruling as to the ESA's "prudent" requirement. We reinstate the critical habitat designation for each seal species and we remand with instructions to enter judgment in favor of the Center and NMFS.

The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2026/03/25/24-7276.pdf
(Robert Schuster)

JUDICIAL CONFIRMATION AND FEDERAL WATER DELIVERY: DISTRICT COURT GRANTS SUMMARY JUDGMENT MOTIONS IN FAVOR OF DEFENDANTS AND WESTLANDS WATER DISTRICT

North Coast Rivers Alliance v. U.S. Department of the Interior,
___F.Supp.4th___, Case No. 1:16-cv-00307 (E.D. Cal. Mar. 26, 2026).

On March 26, 2026, the United States District Court for the Eastern District of California issued a ruling between a coalition of environmental organizations and the federal government regarding water distribution in California's Central Valley. U.S. District Judge Jennifer L. Thurston granted summary judgment in favor of the U.S. Department of the Interior and various local water agencies, effectively dismissing the remaining claim in a case that has spanned several years.

Background

The litigation originated from a challenge by the North Coast Rivers Alliance and other environmental groups (plaintiffs) against the U.S. Bureau of Reclamation's (Reclamation) management of the Central Valley Project (CVP). The CVP is one of the largest water infrastructure systems in the United States, supplying water to more than 20 million agricultural and domestic consumers through central and southern California.

The specific legal controversy focused on the conversion of "water service contracts" into "repayment" contracts under the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016. Under the WIIN Act, water contractors were permitted to request the conversion of their existing contracts to allow for the accelerated repayment of their share of CVP construction costs. Westlands Water District, (Westlands) defendant-intervenor in this case, was among more than 70 contractors that sought such a conversion.

The plaintiffs' primary contention was that Reclamation violated 43 U.S.C. § 423e. The statute stipulates that water shall not be delivered from a "new project or new division of a project" until the relevant water contracts have been confirmed by a decree of a court of competent jurisdiction.

The plaintiffs argued that because Westlands had unsuccessfully attempted to secure a validation judgment in the Fresno County Superior Court, Reclamation was legally barred from delivering water under the converted contracts. The environmental coalition maintained that the CVP qualified as a "new" project because it did not exist when the 1926 law was enacted.

The District Court's Decision

The court's analysis focused narrowly on the language and timing of the statutory triggers found in 43 U.S.C. § 423e. The court's decision rested on several key legal determinations.

First, the court rejected the plaintiffs' argument that the CVP remains a "new" project indefinitely for the purposes of the 1926 Act. The court noted that the statutory language is specifically tied to the completion of a project. The court found that the specific language triggering the statute's restrictions "upon the completion of any new project" refers to a specific, singular point in time: after the construction is finished but before the first delivery of water. The court concluded that the CVP was completed for the purposes of the law decades ago, and nothing in the evidentiary record suggested the project should still be categorized as new.

Second, the court rejected plaintiffs' argument that prior failed validation attempts by Westlands in state court triggered section 423e. The plaintiffs argued that these attempts were "tacit recognition" that federal law required validation. The court found that while Westlands' own contracts included terms requiring validation, these were contractual obligations, not federally mandated under section 423e. The court emphasized that a failure to meet a contractual condition for validation does not automatically invoke a federal statutory bar to water delivery.

The court also addressed the plaintiffs' changing legal strategy. The plaintiffs had previously invoked 43 U.S.C. § 511, which concerns the validity and enforceability of contracts, but later abandoned these section 511 claims during the briefing process. The court observed that section 511 provides that con-

tracts Reclamation enters into shall not be "binding" until validated, whereas section 423e—the only remaining claim—imposes a specific bar on the delivery of water. The court found that arguments made by the plaintiffs could only be premised upon section 511 and did not advance any viable theory of liability under section 423e.

In sum, the court did not find section 423e to preclude the delivery of water under Westlands' WIIN Act Repayment Contracts because of the lack of validation. The court granted Reclamation and defendant-intervenors motions for summary judgment.

Conclusion and Implications

The granting of the summary judgment in favor of the U.S. Bureau of Reclamation represents a substantial victory for California water agencies and federal authorities. The decision provides administrative certainty to Reclamation and more than 250 water contractors. By ruling that a judicial validation is not a federal statutory prerequisite for water delivery in established projects, the court has removed a potential obstacle to the Central Valley Project under the WIIN Act. Moreover, the court's narrow interpretation of "new project" limits the ability of litigants to use nearly century-old statutes to challenge current operations of long-completed infrastructure. The ruling also clarifies that while a water district may be contractually required to seek validation under state law, a failure to achieve that validation does not necessarily empower federal courts to halt water deliveries under federal law, provided that the project is not "new." The District Court's order/ruling is available at: https://www.courthousenews.com/wp-content/uploads/2026/03/reclamation-water-contracts-ruling.pdf (Miles Krieger)

RECENT STATE DECISIONS

CALIFORNIA SUPREME COURT DENIES REVIEW IN DELTA PROGRAM BOND VALIDATION CASE, CLEARS WAY FOR DELTA CONVEYANCE PROGRAM BOND VALIDATION CASE

Department of Water Resources v. Metropolitan Water District of Southern California, 117 Cal.App.5th 751 (3rd Dist. 2025), as modified on denial of reh'g (Jan. 28, 2026), review denied (Apr. 15, 2026)

On April 15, 2026, the California Supreme Court denied review of the Court of Appeal's decision that upheld the denial of validation to its Delta Program Bond resolution.

Background

The Delta Conveyance Project

The Delta Conveyance Project (DCP) is the latest in a series of proposed projects to increase water exports from the Sacramento-San Joaquin Delta into the State Water Project (SWP). In the 1960s, the state proposed to build the Peripheral Canal for that purpose, and ultimately the legislature passed a bill to construct that facility in 1980. However, a statewide referendum on the 1982 ballot repealed that legislation, effectively scuttling the Peripheral Canal project.

Later efforts included the Bay Delta Conservation Plan (BDCP) and eventually Governor Jerry Brown's proposed "California WaterFix," which would have constructed two large underground tunnels to move water underneath the Delta from the north, bypassing the environmentally sensitive estuary entirely. When Governor Newsom took office, he put an end to that project and substituted in its place what is now known as the DCP, a single-tunnel alternative.

DWR is currently involved in a variety of court and regulatory proceedings to implement the DCP, including proceedings before the Delta Stewardship Council, a petition to add points of diversion before the Administrative Hearings Office of the State Water Resources Control Board, eminent domain proceedings to do geotechnical work, and others.

The Delta Program Bond Validation Case

A validation proceeding under Code of Civil Procedure section 860 is a case filed by a government agency to confirm the validity of a contract, bond resolution, or some other matter that the law allows to be validated in this way. Any party that disputes the validity of the matter can answer the complaint and make its case, and the final judgment of the court is binding on everyone, thus giving the agency certainty about its authority to proceed. Validation is particularly important in bond issuance, because bond purchasers need to be assured that the bonds are legally valid.

Prior to the completion of its Environmental Impact Report for the DCP, DWR initiated proceedings to validate its authority to issue bonds. However, the bond resolution it sought to validate was not expressly tied to the DCP. Instead, it approved bonds for a broadly defined "Delta Program," with the specific facilities to be determined later.

The Trial and Court of Appeal's Decisions

The trial court and Court of Appeal both held that this broadly defined program could not be validated, because they could not determine from its vague description whether it was authorized as part of the SWP. DWR's argument was that the Delta Program was authorized as a "modification" of the Feather River Project, a component of the SWP defined in Water Code section 11260. The trial court and the Court of Appeal concluded that the definition of the Delta Program was too broad and uncertain to determine whether it would be a mere modification of that existing project. According to the Court of Appeal, DWR's authority to "modify" a unit of the SWP "is not so broad as to permit DWR to add entirely new and different 'units'" and that "at minimum, any 'further modifications' must be consistent with the Feather River Project's features and tethered to its purposes, objectives, and effects." (117 Cal.App.5th at p. 780.)

Next Chapter: The Delta Conveyance Program Bond Validation Case

After the trial court ruled against the Delta Program Bond validation, while the appeal was pending, DWR filed a separate action to validate a more specific "Delta Conveyance Program," which includes the specific facilities constituting the DCP. (*DWR v. All Persons Interested*, Sacramento County Case No. 25CV000704.) That action was apparently initiated as a "backup" option in the event DWR did not prevail on appeal. On January 27, 2026, after the Court of Appeal denied rehearing, the trial court stayed this second validation case pending the Supreme Court's potential review. Now that review has been denied, that case will resume.

Conclusion and Implications

The Delta Conveyance Project is an extremely consequential project in California's current water landscape (for good or ill, depending on your perspective). This litigation over the validation of bonds implicates the broader question of whether the project is authorized under existing statutes and existing contracts. It is only one front in a multi-front battle over the potential future of the DCP, but it is one that proponents and opponents of the project both should be watching. The Third District Court of Appeal's opinions are available online at: https://www4.courts.ca.gov/opinions/documents/C100552M.PDF (Brett Stroud)

Editor's Note: The author represents clients that receive water from the State Water Project and participated in the trial and appeal in this case.

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