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CONTENTS

CALIFORNIA WATER NEWS

Upper and Lower Colorado River Basin States Submit Competing Proposals for Post-2026 Operational Guidelines 145

Klamath Dam Removal: Heavy Metals and Kill-Offs Create Short-Term Environmental Consequences 147

The California Water Commission: A Primer on Its Functions and How It Shapes the California Water Landscape 149

California Governor Gavin Newsom's Office Releases Comprehensive Salmon Strategy for California 150

LEGISLATIVE DEVELOPMENTS

Federal Bill Seeks to Reduce Uncertainty in Clean Water Act Permitting 153

REGULATORY DEVELOPMENTS

U.S. Bureau of Reclamation Releases Final Supplemental Environmental Impact Statement for the Colorado River 155

California Department of Fish and Wildlife Issues Instream Flow Recommendations for Mill, Deer and Antelope Creeks Ahead of Amendments to Water Quality Control Plan 157

California Department of Water Resources Updates Initial State Water Project Allocation Forecast Based on Increased Snowfall and Rain 158

State Water Resources Control Board Will Hold Pre-Hearing Conference and Public Hearing on Sites Reservoir Water Rights Application and Petitions 160

Continued on next page

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LAWSUITS FILED OR PENDING

United States Supreme Court Holds Oral Arguments in Long-Standing *Texas v. New Mexico* Interstate Compact Litigation 162

RECENT FEDERAL DECISIONS

District Court:
Florida Loses Clean Water Act Section 404 Dredge and Fill Permit Authority 165
Center for Biological Diversity v. Regan, et al., ___F. Supp.4th___, Case No. 26823; (D. D.C., Feb 15, 2024).

RECENT CALIFORNIA DECISIONS

Sixth District Court Upholds Decision to Dismiss CEQA Action For Failure to Timely File a Request for Hearing Pursuant to Public Resources Code Section 21167.4. 167
Steinbruner v. Soquel Creek Water District et al., *Unpub.*, Case No. H050093 (6th Dist. Feb. 5, 2024).

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CALIFORNIA WATER NEWS

UPPER AND LOWER COLORADO RIVER BASIN STATES SUBMIT COMPETING PROPOSALS FOR POST-2026 OPERATIONAL GUIDELINES

In 2026, a host of agreements that provide guidelines on managing the Colorado River are set to expire. To prepare for this, the Upper and Lower Colorado River Basin states submitted separate proposals for the Bureau of Reclamation to consider. Both basins agree that the Colorado River is the most vital resource for supporting the forty million—and growing—Americans reliant on the river. Despite the two basins having the same goal of conserving this resource, the proposals are at odds with each other in one detail. Particularly, each basin argues that the other should bear the burden of reducing diversions during times of shortage.

Background

The Colorado River Compact was enacted in 1922 to divide the river's flows between the "Upper Basin" (Colorado, Utah, Wyoming, New Mexico) and the "Lower Basin" (Nevada, Arizona, California). The agreement was based on approximately 30 years of streamflow records suggesting an average annual flow of 17.5 million acre-feet (maf) past Lee's Ferry, the historical divider between the Upper and Lower Basins. With these assumptions in mind, the Upper Basin agreed to deliver the Lower Basin an average of 7.5 maf per year (measured as 75 maf every ten years) at Lee's Ferry. However, recent studies suggest that those years were some of the wettest years in observational history, and the average flow hovers closer to 13 maf per year. This means the river is already overallocated, and recent trends of drought and climate change only exacerbate the river's decreasing volume.

The Lower Basin benefits from both Lake Mead and Lake Powell, which act as water banks that store water during wetter periods so that during drier periods, water can be released into the river for the Lower Basin's use. Because of Powell and Mead, there is a more consistent water supply for the Lower Basin during times of low river flows and drought. On the other hand, the Upper Basin relies on that year's snowmelt to provide flows, which can be less steady or predictable. But this operation also means that both lakes have dropped significantly over the last decade as more water is released to the Lower Basin than inflows from the Upper Basin. Lake Powell, in particular, has flirted with the elevations that trigger short sharing rules and potentially impact the ability of Glen Canyon Dam to produce hydropower.

Since 2000, the western United States has experienced some of the driest decades in observational history. Lake Powell dropped to only one-third of its capacity in 2005, and by 2010, Lake Mead was approaching the "drought trigger" level, which is the predetermined level that triggers the Bureau of Reclamation to enforce water rationing in Arizona and Nevada. These low levels caused tensions between states and the basins, resulting in the Bureau establishing the 2007 Interim Guidelines. This protocol was in place from 2008 until December 31, 2015, and regulated how water in Lake Powell and Lake Mead was allocated depending on reservoir levels. The 2007 Interim Guidelines were intended as longer-term plans with the opportunity to reevaluate in 2026. However, increased drought and dropping reservoir levels resulted in the 2019 Drought Contingency Plans. These plans were enacted to similarly regulate water allocation to protect the river and reservoir levels, specifically in an attempt to reduce the risk of reaching "critical levels" in Lake Powell while still ensuring compliance with the original Colorado River Compact. Even with both shortage-sharing programs in place, the megadrought continues throughout the west, further stretching each reservoir and threatening Colorado River Compact stability. With both protocols set to expire, the Bureau of Reclamation requested proposals from the basin states to regulate water distribution under the Compact.

2024 Proposals

The U.S. Bureau of Reclamation requested the proposals by March 11, 2024 so that the Bureau has time to prepare an Environmental Impact Statement

(EIS) under the National Environmental Policy Act (NEPA) and make a decision before 2026. The Bureau plans to release a draft EIS by the end of 2024 which will assess the proposals and other alternatives for operational plans on the river.

The Bureau originally directed the states to work together to submit a unified proposal. However, conflict and disagreement between the Upper and Lower Basins quickly became apparent and each basin agreed to work cooperatively amongst itself to submit two separate proposals to the Bureau.

Upper Basin Proposal

The Upper Basin's proposal calls for operations of Lake Powell to be aligned with actual hydrologic conditions, as opposed to models and predictions. Per the Upper Basin, the releases from Lake Powell should depend on the actual capacity of the reservoir. Simply, the lower the level, the less that the Lower Basin should be releasing. The proposal also calls for the Lower Basin to reduce diversions from Lake Mead to preserve its storage. The Upper Basin's focus is on the Lower Basin and imposing mandatory conservation efforts, with only incentives for voluntary reductions in the Upper Basin. Releases based on snowpack and inflows would relieve the Upper Basin from the Colorado River Compact burden of delivering the same 7.5 maf per year, regardless of how much water is actually in the river. This proposal relies on the fact that the Upper Basin believes it is well below its Compact allotments. Thus, the Lower Basin should bear the majority of cutbacks during drought conditions.

Lower Basin Proposal

The Lower Basin's post-2026 operational guidelines apply a self-described "holistic" approach to managing river operations. The Lower Basin first acknowledges that at least 1.3 maf are lost each year to evaporation and seepage, also referred to as the "structural deficit." Climate change and continuing aridification are expected to worsen these losses. To offset the structural deficit, the plan proposes a voluntary cut of 1.5 maf per year for the Lower Basin. The Lower Basin proposal also focuses on managing diversions in accordance with levels in the reservoirs. Based on the reservoir volumes, the plan delineates conservation efforts for both basins.

Bearing the Burden of Diversion Reductions

The main difference between the Upper and Lower Basin proposals is the issue of who bears the burden of reducing diversion in times of shortage. The Upper Basin contends that it has conserved as much water as practicable and that it should be primarily up to the Lower Basin to make meaningful reductions. Under the original Compact, the Lower Basin is entitled to receive an average of 7.5 maf per year. Meaning, in times when the river's flow is less than 15 maf (or more, when accounting for Mexico's allotment under the Compact), which is becoming more common because of climate change and the megadrought, the Upper Basin receives less than half of the river's flow. Because the Upper Basin must ensure that the Lower Basin gets its 7.5 maf, the Upper Basin argues that it cannot continue to make reductions and the Lower Basin needs to do more to conserve the river's flows. Further, the Upper Basin states do not have comparable reservoirs like Lake Mead or Lake Powell to stabilize supply in times of shortage. Instead, these states rely on that year's snowmelt for water supply. But the Lower Basin argues that it has more people living in its Basin and everyone reliant on the river—which is 40 million people between both basins—needs to make sacrifices.

Conclusion and Implications

If the states do not agree on a unified plan the federal government, through Reclamation, could step in and devise its own protocol to divide the Colorado River. The probability of either basin viewing the Bureau's plan as unfavorable runs the risk of potential litigation, which, if it resembles the *Arizona v. California* cases—one of the longest-running series of water rights disputes beginning in 1952 and continuing to 2000—means it could be a long time before there is an agreement. A long-term legal dispute is not in the interest of either Basin as the effects of climate change and the megadrought will continue without regard to whether a final agreement has been reached. Thus, a management plan must be enacted, at least temporarily, while the Basins and the Bureau work towards a long-term solution.

Without any plan in place, if the Upper Basin could not deliver 7.5 maf to the Lower Basin, then the Lower Basin could potentially put forth a "compact call." A compact call would require the Upper

Basin to curtail its water use to ensure that the Lower Basin is receiving its allocated amount under the Compact. A compact call has never occurred before. But if there is no management plan in place, and states and the federal government are intertwined in a long-term legal dispute, then this could be a last-ditch effort for the Lower Basin to ensure it is getting its allocated amounts under the Compact. A compact call would in itself no doubt result in messy and protracted litigation. If the conflicting opinions on who should bear the burden in times of shortage in the 2024 proposals are any indication of the contention between the Basins, litigation would not be in the best interest of maintaining good relations between each state, despite the strong, shared interest of protecting this resource.

Balancing the competing interests and justifications for each Basin will indeed prove difficult. But without an agreement, all seven basin states continue to gamble with their most valuable resource, a risk that neither Basin seems willing to accept.
(Lauren Hoover, John Sittler)

KLAMATH DAM REMOVAL: HEAVY METALS AND KILL-OFFS CREATE SHORT-TERM ENVIRONMENTAL CONSEQUENCES

In recent weeks the Klamath Dam removal project has come under scrutiny due to unexpected fish kills along with the increased detection of heavy metals associated with the water drawdowns required for dam removal. These unforeseen consequences have emerged, prompting concerns over water quality and public health as the dam removal continues.

Background

The Klamath dam removal issue has long pitted environmentalists and tribal advocates against local residents and agricultural interests. Environmentalists and tribal advocates have argued that removing the dams would help to protect fish populations in the river while those opposed argued such drastic measures were not necessary or justified by the costs and jeopardize their livelihoods.

In 2016, many of the interested parties entered into the Klamath Hydroelectric Settlement Agreement (KHSA) setting the stage for removal of the dams. The signatories to the KHSA, include several NGOs, Tribes, and the States of California and Oregon. Under the KHSA, the states and PacifiCorp take on the liability for and cost of the dams' deconstruction and create the Klamath River Renewal Corporation, the entity tasked with removing the dams.

The decision to remove the four dams: JC Boyle, Copco 1, Copco 2, and Iron Gate was approved on November 17th, 2022, by the Federal Energy Regulatory Commission after it approved the surrender and removal of the four dams. The Klamath River Renewal Corporation plans to finish removal of the dams in 2024.

The Klamath will be the largest dam removal in the U.S. and will open up over 400 stream miles of habitat and is argued to reduce summer water temperatures and fish diseases, thus boosting the health of the salmon and steelhead runs. Post-dam removal, toxic algae blooms that currently exist along the river and reservoirs are anticipated to be reduced.

Copco No. 2 was fully removed in October 2023, marking the first of four dam removals along the Klamath River. The other three dams' removal are slated for May to November 2024 preceded by a "draw down" of waters behind the dams so the dams can be safely demolished.

Public Health Warnings Regarding Water Quality as Drawdown Begins

As drawdown began the County of Siskiyou Department of Environmental Health on March 1, 2024 noted that:

> [t]he heavy metal analytes [..] have exceeded the primary and secondary EPA standards, and those which have exceeded the California Beneficial Use Standards may cause deleterious health effects if consumed.

The report said, "Therefore, it is not safe to consume the Klamath River surface water. In addition, at this time, it is advisable to stay out of the Klamath

River."

While this increase is a cause for concern KRRC environmental reviews noted it was expected that 5 million to 7 million cubic yards of sediment occur from the project.

The County of Siskiyou County Environmental Health Department noted it would further assess water quality and identify any harmful substances but that in the meantime precautionary measures are deemed necessary to safeguard public health.

Unexpected Salmon Fish Kills

Additionally, the California Department of Fish and Wildlife (CDFW) announced on March 2, 2024, that fall-run chinook salmon fry released for the first time from its Fall Creek Fish Hatchery in Siskiyou County are presumed to have succumbed to gas bubble disease in the Klamath River.

On Monday, February 26, CDFW released approximately 830,000 fall-run chinook salmon fry into Fall Creek, a tributary above Iron Gate Dam. The fish were hatched at CDFW's new, $35 million, state-of-the-art Fall Creek Fish Hatchery, which represents California's long-term commitment to supporting and restoring both chinook and coho salmon runs on an undammed Klamath River.

According to CDFW, the salmon fry experienced a large mortality based on monitoring data downstream. It appears the cause of mortality is gas bubble disease that likely occurred as the fry migrated through the Iron Gate Dam tunnel, old infrastructure that is targeted for removal along with the Iron Gate Dam itself later this year. Gas bubble disease results from environmental or physical trauma often associated with severe pressure change.

Looking Ahead to Future Removals

Both the fish kills and subsequent water warnings at roughly the same time have sparked apprehension within the local community with residents expressing concerns about the potential long-term impacts on both environmental and human health. While the fish kills and heavy metals are causes for concern, KRRC notes that certain short-term impacts were expected.

Additionally, as the process contains it is presumed KRRC will adapt to short-term consequences that could occur in future work. The CEO of KRRC notes that:

> . . .[p]eople are suggesting that this is an environmental disaster without acknowledging that we've had an environmental disaster for the past 100 years. . . [and]. . .[t]hese are anticipated conditions. The observations can be difficult. But we're not going to undo the legacy of this environmental disaster in a couple of weeks.

Conclusion and Implications

The recent fish kills and increased heavy metals at the Klamath Dam Removal sites have underscored the complexity of dam removal and the arrival of the short-term consequences. Many parties acknowledge that dam removal is a relatively new process in environmental restoration and as such may experience problems along the way such as the ones noted here.

That being said, while the dam removal project aims to promote long-term ecological restoration, current significant short-term consequences have caused concern about how "short-term" these consequences actually are.

(Darien Key, Derek Hoffman)

THE CALIFORNIA WATER COMMISSION: A PRIMER ON ITS FUNCTIONS AND HOW IT SHAPES THE CALIFORNIA WATER LANDSCAPE

It's no secret that California's system of water governance is labyrinthine. Water is governed (at least in part) by the Department of Fish and Wildlife, Department of Water Resources, Department of Conservation, Regional Water Quality Control Boards, California Environmental Protection Agency, the State Water Resources Control Board and more. But where does the California Water Commission (Commission) fit into the matrix of regulation? This article provides a summary of the Commission, which is part of the Department of Water Resources (DWR), and its recent discussions about critical water infrastructure projects.

Background

Established in 1950s, the Commission consists of nine members who are appointed by the Governor, but confirmed by the California Senate, to serve four-year terms. (Wat. Code §§ 151 & 154.) Seven Commission members are required to have "knowledge of, interest in, and experience with problems relating to the control, storage, and beneficial use of water." (Wat. Code § 152.) Two members should be members of the public "having an interest in and knowledge of the environment." Finally, the California Legislature expressed an intent that members be selected to represent all parts of the state.

Commission Duties

The Commission's duties and responsibilities are numerous and important. In no particular order, the Commission is tasked with the following:

•Conferring with, advising, and making recommendations to the Director of the DWR on matters and subjects under the Director's jurisdiction. (Wat. Code § 161.)

•Approving all proposed DWR rules and regulations, other than those governing internal

•DWR administration and management, which also includes regulations for the Sustainable Groundwater Management Act (SGMA)and the creation of Groundwater Sustainability Plans (GSPs) by local agencies.

•Conducting an annual review of construction and operation of the State Water Project and reporting its findings to DWR and to the Legislature, together with any recommendations. (Wat. Code § 165.)

•Adopting Resolutions of Necessity before DWR may commence an action in eminent domain. (Code Civ. Proc. § 1245.210.)

•Presenting the views of California counties, cities, state agencies, public districts, or local agencies to appropriation committees of the Congress of the United States regarding flood control or reclamation projects being planned or constructed in California by the United States Army Corps of Engineers (Corps) or the Bureau of Reclamation under the United States Department of the Interior. (Wat. Code § 12602.)

•Holding hearings and investigating strategies for managing long-term drought and supporting in-basin, locally-led groundwater trading programs per directions stemming from the Governor's 2020 Water Resilience Portfolio, which calls for actions to meet California's water needs.

•Distributing $2.7 billion in funds under Proposition 1: The Water Quality, Supply, and Infrastructure Improvement Act (2014) ("Proposition 1"), which is discussed further below.

Recent Developments

In recent meetings, the Commission has discussed its role under Proposition 1, a critical water infrastructure program. Approved by California voters in 2014, Proposition 1 provides $2.7 billion for:

. . .public benefits associated with water storage projects that improve the operation of the state

water system, are cost effective, and provide a net improvement in ecosystem and water quality conditions. (Wat. Code § 79750.)

Under Proposition 1, the Commission is responsible for administering the funds authorized by the law. The Commission first prepared regulations to create a competitive public process that ranks potential projects based on certain public benefits they would provide (as opposed to private benefits). The funding will not cover the total cost of any project. The Commission then accepted applications for projects and selected eight projects for funding. Although one project withdrew from the program, the remaining projects are anticipated to increase the state's water storage capacity by 2.77 million acre-feet (appx. 9 billion gallons). Presently, six projects have been awarded early funding in the amount of $123,400,374 to assist the project with permitting, environmental studies, and other preconstruction requirements. The final award of funding will be authorized once a project has complied with all Proposition 1 requirements and is ready for construction.

During its January 2024 meeting, the Commission grappled with its duties and/or responsibilities in the event a project is determined to be making insufficient progress. In short, the Commission was informed that it will have wide latitude to make an "insufficient progress" determination due to the vague wording of the law and the fact that each project will face unique circumstances and challenges. In other words, the Commission will evaluate progress on a case-by-case basis. Such a determination is significant, however, because the Commission has awarded the projects only 5 percent of the funds available for each project. Failure to make progress can result in the withdrawal of Proposition 1 funding, which, in turn, might kill the project.

During its February 2024 meeting, the Commission returned to this issue, but specifically contemplated how it may be able to use any funds that are withdrawn from a project due to "insufficient progress." In brief, the Commission was provided with three options: (a) provide "inflationary adjustments" to the projects already approved; (b) solicit projects that were deemed feasible but were not selected for funding; or (c) seek completely new projects.

Conclusion and Implications

The California Water Commission is a relatively little-known body with significant power and responsibility. Any person interested in keeping updated on California water policy and projects should take care to monitor the Commission and its actions. To learn more about the Commission, *see:* https://cwc.ca.gov (Wes Miliband, Jeff Frey)

CALIFORNIA GOVERNOR GAVIN NEWSOM'S OFFICE RELEASES COMPREHENSIVE SALMON STRATEGY FOR CALIFORNIA

On January 30, 2024 the office of California Governor Gavin Newsom released the "California Salmon Strategy for a Hotter, Drier Future: Restoring Aquatic Ecosystems in the Age of Climate Change." The plan purports to be a broad strategy related to the recovery and maintenance of California salmon populations, with six categories of actions contained in the plan. The strategy emphasizes coordination and collaboration between agencies, interest groups, and tribes, and identifies a lead California agency and other primary partners to implement each category of action. Actions of priority in the plan include increasing flows in salmon-bearing rivers, restoring and expanding salmon habitat, and removing obsolete dams that impact salmon rivers.

Background

As a precursor to the "California Salmon Strategy for a Hotter, Drier Future: Restoring Aquatic Ecosystems in the Age of Climate Change" (the Strategy), the State of California released "A Holistic Approach for Healthy Rivers and Landscapes in the Sacramento River Basin" in July of 2023 (Holistic Approach). Both the Holistic Approach and Strategy describe diminished salmon populations in California, suggesting that over past five years, "abysmally poor salmon returns have twice caused the closure of commercial and sport salmon fisheries and severely limited tribal harvest in California." The Strategy aims to assist in salmon recovery.

According to the Strategy, salmon persist across much of California, annually swimming through California's rivers into the Pacific Ocean and then returning several years later to reproduce. The Strategy describes salmon as central to religions, creation stories, the health and subsistence of Indigenous Peoples, and a multi-million-dollar fishing industry, in addition to nourishing soils and forests through their migrations that bring ocean nutrients to headwater streams and rivers. As described in the Strategy, four major species of salmon still exist in California—chinook, coho, pink, and chum. Chinook and coho are the predominate species in the state. The chinook have different "run types," which means the time of year those returning fish swim back up rivers from the Pacific Ocean. For example, spring-run and winter-run chinook are different. Climate change effects are everywhere including on Chinook run types, and some populations are now migrating earlier than usual and others later. Steelhead also exist in California, including along the coastline as far south as Los Angeles and Orange counties. Steelhead behave like salmon. Unlike salmon, steelhead can migrate back and forth between the ocean and freshwater rivers to spawn multiple times.

The Strategy

The Strategy identifies six categories of potential action: (1) Remove Barriers and Modernize Infrastructure for Salmon Migration (2) Restore and Expand Habitat for Salmon Spawning and Rearing (3) Protect Water Flows and Water Quality in Key Rivers at the Right Times to Support Salmon (4) Modernize Salmon Hatcheries (5) Transform Technology and Management Systems for Climate Adaptability and (6) Strengthen Partnerships.

Removing Barriers and Modernizing Infrastructure

This action focuses on the removal of dams on specifically identified rivers. First, the plan expresses firm commitment to remove two obsolete dams on the Eel River, which according to the Strategy "now block salmon access to over 90 percent of their historical spawning and rearing habitat higher in mountain streams." The Strategy states a desire to decommission the Scott Dam on the Eel River and "replace the Cape Horn Dam with a fish-friendly water diversion for Russian River communities." Removal of these barriers could potentially have a great impact on salmon by making the Eel the longest free flowing river in California. The Strategy affirmatively states that it plans to complete negotiations with PG&E and secure submission to the Federal Energy Regulatory Commission (FERC) for a license surrender and decommissioning plan by the end of 2024 for the two dams.

The Strategy also highlights dam removal projects that are already underway and that have broad support, such as the Matilija Dam in Ventura County and Rindge Dam on Malibu Creek in Los Angeles County. The commitments from this first action appear to be the strongest in the Strategy, as they include tangible physical goals that are already underway.

Habitat and Water Flows

This action focuses on restoring and expanding habitat, and is mostly a discussion of activities the state is already involved in. The sections did identify priority action arears to restore salmon and steelhead habitat, which included Lagunitas Creek, Russian River tributaries, the Mendocino Coast, and the Eel River. However, the Strategy reflects that flow and habitat related actions "depend[d] on available resources."

Identified actions include the following: (1) ensuring green infrastructure is integrated across and within the Administration's infrastructure priorities as a nature-based solution by the end of 2023; (2) completing beaver translocation efforts at one sentinel location to evaluate feasibility for watershed restoration, and identify a second project for spring of 2024; (3) begin Tisdale Weir fish passage construction and complete construction by fall 2025; (4) complete at least two additional beaver translocation, watershed restoration projects by the end of 2024; (5) identify 20,000 acres that are suitable and feasible for targeted setback levees projects within the mainstem Sacramento River and major tributaries to restore functional riparian ecosystems; (6) complete data studies related to coastal Chinook and Coho "strongholds" in certain watersheds and rivers; (7) raise awareness for salmon restoration projects, with a target of 20 restoration projects by 2025 and 20 more projects by 2026; and (8) construct additional habi-

tat, including seasonal inundation and reconnecting floodplain habitat in the Central Valley.

Flow-related actions may pertain to establishing or developing minimum instream flows in specific rivers like the Scott and Shasta rivers, and other northern creeks and streams like Mill, Deer, and Antelope creeks. Other actions include collaborating with stakeholder groups on flow solutions, including potential voluntary agreements related to salmonid species, and study and develop data and metrics to inform state agency recommendations and actions related to water quality, transfers, and other flow management activities.

Modernizing Hatcheries, Transforming Technology, and Strengthening Partnerships

The Strategy states that modern hatcheries will be necessary for species restoration. Currently, the California Department of Fish and Wildlife (CDFW) is taking the lead on these actions. First, CDFW started a comprehensive assessment for the long-term future of hatcheries. Second, "CDFW conducted experimental parental-based tagging (PBT) studies on releases of newly-hatched salmon on the American River." This is a somewhat new fish-tagging technology that is used to help fish managers determine details about hatchery fish. As to commitments to future plans, the state "has also committed $44.5 million towards construction of a Salmon Conservation and Research Facility on the San Joaquin River."

Along with a discussion of efforts the state has already engaged in to improve technology for fish management and overview of those technologies, the Strategy also makes calls to action. This includes a directive to the Pacific Fishery Management Council to:

> . . .modernize its analytical tools, processes, and harvest approaches. . .[as well as a call for statutes to]. . .be re-examined and updated where necessary to give state fisheries managers the flexibility and tools to respond to the climate disruption of multiple fisheries.

Lastly, the Strategy calls for the state to continue developing relationships and partnerships with tribes and other interest groups, as many of the recent fishery policies developed in California, including this Strategy and the Klamath dam removal projects, have been a collaborative effort.

Conclusion and Implications

There are no apparent immediate actions under this plan that will have imminent impacts. However, the Strategy appears to be focused on a broad range of potential actions, and may have implications for water supply infrastructure and land use/habitat moving forward. For more information, *see:* https://www.gov.ca.gov/wp-content/uploads/2024/01/Salmon-Strategy-for-a-Hotter-Drier-Future.pdf
(Miles Krieger, Steve Anderson)

LEGISLATIVE DEVELOPMENTS

FEDERAL BILL SEEKS TO REDUCE UNCERTAINTY IN CLEAN WATER ACT PERMITTING

On March 21, the United States House of Representatives passed House Resolution 7023 modifying requirements under the federal Clean Water Act, including requirements concerning water quality criteria, the National Pollutant Discharge Elimination System (NPDES) program, the permit program for discharging dredged or fill material into waters of the United States, and the meaning of waters of the United States. It also limits the issuance of permits under the act.

Factual and Procedural Background

Congress enacted the federal Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA protects "navigable waters" which the statue itself defines as the "waters of the United States," (WOTUS). The Supreme Court of the United States, in *Rapanos v. United States*, decided that a "significant nexus" test applied to determine whether a water was a WOTUS, which allowed for a broad interpretation of the meaning of WOTUS. However, in the 2023 decision *Sackett v. EPA*, the Supreme Court instead held that the CWA "extends only to those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that they are indistinguishable from those waters." This substantially narrowed wetlands that can be defined as WOTUS.

The new *Sackett* rule, commonly called the "adjacency test" requires two things. First, the party asserting jurisdiction over the wetlands, in this case the Corps, has to establish that adjacent body of water to wetlands is itself a WOTUS. Second, the party asserting jurisdiction over the wetlands has to show that the wetland has a continuous surface connection with the established WOTUS, making it potentially difficult to determine where the water ends and the wetland begins.

The CWA "categorically prohibits any discharge of a pollutant from a point source without a permit." *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). "[D]ischarge of a pollutant" is defined as the "addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12). The CWA defines "pollutant" broadly to include "dredged spoil," "solid waste," "rock," "sand," and "industrial . . . waste discharged into water." 5 U.S.C. § 1362(6). The CWA does not define what constitutes the "addition" of a pollutant.

Before discharging any pollutant, a person must obtain a permit from either the U.S. Environmental Protection Agency (EPA) or the Army Corps of Engineers (Corps). The NPDES permitting program (also referred to as Section 402 permitting) authorizes the EPA to issue permits "for the discharge of any pollutant, or combination of pollutants," on the condition that the discharge will otherwise comply with the CWA. 33 U.S.C. § 1342(a)(1). Section 404 of the CWA authorizes the Corps to issue permits "for the discharge of dredged or fill material . . . ." 33 U.S.C. § 1344(a) (referred to as Section 404 permits). When a discharge requires a Section 404 permit, it does not require a Section 402 permit. The CWA does not define "discharge of dredged material" or "dredged material." See 33 U.S.C. §§ 1342, 1362. To establish a violation of the CWA's NPDES requirements, "a plaintiff must prove that defendant[] (1) discharged, *i.e.*, added (2) a pollutant (3) to navigable waters (4) from (5) a point source."

House Resolution 7023

HR 7023, called the "Creating Confidence in Clean Water Permitting Act," (Act), was passed in the House by a vote of 213-205. The Act would generally modify the CWA in a number of ways.

First, the Act would direct EPA to develop any new or revised water quality criteria for states through a rule. This also includes directing the EPA and the Corps to begin a process to issue guidance on the implementation of the 2023 final rule titled Revised Definition of "Waters of the United States"; Conforming and stipulates the guidance must comply

with the decision of the Supreme Court in *Sackett*.

Second, the Act would allow EPA to issue general permits under the program. Further, the Act would modify the NPDES program to include statutory authority for provisions that shield NPDES permit holders from liability under certain circumstances. Specifically, under the Act, compliance with the conditions of a NPDES permit would be considered compliance with respect to a discharge of any pollutant for which an effluent limitation is included in the permit; and any pollutant for which an effluent limitation is not included in the permit that is (1) specifically identified as controlled or monitored through indicator parameters in the: permit, the fact sheet for the permit, or the administrative record relating to the permit; (2) specifically identified during the permit application process as present in discharges to which the permit will apply; or (3) whether or not specifically identified in the permit or during the permit application process present in any waste streams or processes of the point source to which the permit applies, which waste streams or processes are specifically identified during the permit application process, or otherwise within the scope of any operations of the point source to which the permit applies, which scope of operations is specifically identified during the permit application process.

Third, to reduce permitting uncertainty, the Act would limit the EPA's veto authority to restrict, prohibit, deny, or withdraw the specification by the Corps of a site for the discharge of dredged or fill material into waters of the United States to the time period beginning on the date on which an applicant submits all information to complete the application and the issuance of the permit.

Fourth, the Act modifies requirements for general permits to discharge dredge or fill material that are issued on a nationwide, regional, or state basis for particular categories of activities, including by extending the maximum term for a general permit from a period of five years to ten years. It also exempts the Corps from certain consultation and environmental review requirements when reissuing nationwide general permits, including consultations under the federal Endangered Species Act and the National Environmental Policy Act. Judicial challenges to individual or general permits must be filed within 60 days of the issuance of the permit, and a challenging party must have exhausted administrative remedies by participating in the public comment period and administrative proceedings in sufficient detail to put the Secretary of State on notice of the issues to be litigated.

Finally, the Act prohibits permits from being issued under Title IV of the Clean Water Act for any discharges from a point source that is owned or operated by certain foreign counties of concern and any subsidiaries of entities that are subject to the jurisdiction of such countries.

Conclusion and Implications

It remains to be seen whether the Senate will pass the Act, if at all, either as-is or with amendments. However, the provisions of the Act reflect an effort to increase certainty in the permitting process affecting waters of the United States in light of the *Sackett* decision, as well as to streamline agency decision-making and entities who may receive permits. For more information, *see:* HR 7023 available at https://www.congress.gov/bill/118th-congress/house-bill/7023/text?s=1&r=1

(Miles Krieger)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE COLORADO RIVER

In early March 2024, the U.S. Bureau of Reclamation (Reclamation) released the Final Supplemental Environmental Impact Statement for Near-Term Colorado River Operations (SEIS). The SEIS details Reclamation's updated operational guidelines for Glen Canyon Dam and Hoover Dam, which form the reservoirs at Lake Powell and Lake Mead, respectively, and in doing so responds to historically low runoff levels threatening water supplies in the Colorado River Basin. The SEIS reflects Reclamation's proposal to revise the standing 2007 Interim Guidelines, and if implemented, its alternative guidelines are projected to result in a minimum savings of three million acre-feet of system water by 2027. Reclamation also entered into three conservation implementation agreements, committing California water entities to conserve nearly 400,000 acre-feet of Lake Mead water in that same period.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau of Reclamation. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million-acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, Reclamation, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

Citing the need to address "historic drought, historically low reservoirs, and low-runoff conditions in the Basin," Reclamation partnered with multiple state and federal agencies in order to supplement the existing Interim Guidelines, which were previously intended to remain in effect until 2027. SEIS, p. 1-10. The Interim Guidelines, are published in their current form in 73 *Federal Register* 19881 (April 11, 2008). When the Interim Guidelines were promulgated, "the potential for … persistent low level-conditions was recognized as a low possibility," and they "did not include provisions that would prevent system collapse" under such conditions. *Id.* at p. 1-12. In recent years, Reclamation has taken multiple "unprecedented" emergency actions, including: authorizing increased releases from the Colorado River

Storage Project to deliver additional water to Lake Powell; a "500 Plus Plan" aimed at reducing water consumption in the Lower Basin (including Arizona and parts of California and Nevada); increased releases from neighboring reservoirs to increase Lake Powell's storage levels; multiple drought contingency plans; and conservation and efficiency programs for both the Upper and Lower Colorado River systems. *Id.* at p. 1-6. Despite these efforts, 2021 was one of the lowest inflow years on record, and "the combined storage of Lake Powell and Lake Mead declined from about 50 percent to 25 percent of total live capacity" between 2020 and 2022. *Id.* at p. 1-7.

Determining that it lacked "the operating tools to sufficiently protect system operations," Reclamation thereafter issued a notice on November 17, 2022, declaring its intent to revise the Interim Guidelines to address these conditions with the intent of stabilizing reservoir storage levels and staving off system collapse. *Id.* at pp. 1-8, 1-12–13.

The lead agencies (under the National Environmental Policy Act) responsible for preparing the SEIS were Reclamation, Upper Colorado Basin Interior Region 7 (comprising all or parts of Arizona, Colorado, Idaho, Nevada, New Mexico, Texas, Utah, and Wyoming), and Lower Colorado Basin Interior Region 8 (comprising all or parts of Arizona, California, and Nevada (Lower Division States)). *Id.* at pp. 1-11, 1-12. These agencies worked in cooperation with the Bureau of Indian Affairs, National Park Service, Western Area Power Administration, US Fish and Wildlife Service, and the US Section of the International Boundary and Water Commission.

Accounting for "Extreme Low Runoff"

According to Reclamation, continuing operations at Lakes Powell and Mead without accounting for the "extreme low-runoff scenarios" that threaten the American Southwest risks depleting the reservoirs' water levels to a point "limiting operation of Glen Canyon Dam or Hoover Dam, or both," impacting their ability to provide water supplies in the Basin." *Id.* at p. 2-7. To guard against this outcome, SEIS proposes to amend the Interim Guidelines, expanding and/or modifying the following sections: (i) Section 2, "Determination of Lake Mead Operation During the Interim Period"; (ii) Section 6, "Coordinated Operation of Lake Powell and Lake Mead During the Interim Period"; and (iii) Section 7, "Implementation of Guidelines." *Id.* at p. 1-9.

Inflows Stored Above the Dam

The SEIS proposes to adjust how "inflows stored above the dam" are "managed in light of the specific physical and operational characteristics of the dam and reservoir." These characteristics include each dam's "storage capacity, types and elevations of structures to release water, or the need to preserve space for additional inflow as snow melts." The time of year and even day-to-day variances in factors such as temperature and ecological conditions will necessitate adjustments in how and when releases are performed. Each facility's infrastructure, river maximum and minimum flow rates, and safety considerations for downstream infrastructure and water users must also be taken into account. In short: "Reservoir operators must routinely—and continuously—adjust releases for these characteristics; there is no option for reservoir operations to simply stop while new rules are developed." Operators must be ready and able to respond to, and exploit, ever-changing conditions in order to optimize precisely how much water they release—and when.

Glen Canyon Dam and Lake Mead

The SEIS modeling changes to the Dams' operation based on savings estimates of 3 million acre-feet through conservation efforts through 2026, including savings of 1.5 million acre-feet before 2025. *Id.* at 2-7. Under its Proposed Action, Glen Canyon Dam would continue to operate as under the current Interim Guidelines unless Lake Powell's water levels are projected to fall below 3,500 in the next 12 months, in which case "a mid-year adjustment could be made to reduce the annual volume to no less than 6.0 [million acre-feet]." Further, if Lake Mead's content is projected to fall below 1,025 feet, the Lower Division States "would have 45 calendar days to provide Reclamation with an implementation plan to project Lake Mead from falling to a surface elevation of 1,000 feet, and Reclamation "may take additional action" to prevent this outcome if it does not approve of such plan. *Id.* at 2-8. In essence: "the annual Lake Powell release would be based on the volume of water in storage or the corresponding elevations of Lake Powell and Lake Mead," as divided into certain operational tiers. *Id.*

at 2-10. Overall, higher water levels would be maintained in Lake Mead. *Id.* at 3-221. The Secretary of the Interior would retain "the authority to protect the Colorado River system if hydrologic conditions require additional action." *Id.* at 2-13.

Conclusion and Implications

The SEIS's Proposed Action purports to increase the resiliency of the Colorado River system by more closely coordinating releases from Lake Powell and the operation of Glen Canyon Dam in order to respond to rapidly changing hydrological conditions and stave off low water elevation in both Lake Powell and Lake Mead. While under the 2007 Interim Guidelines Reclamation was limited in how it could respond to the sustained low-runoff conditions that have impacted the Basin in recent years, the SEIS would expand the operational tools available to it in order to take faster action in response to declining reservoir levels. For more information, *see:* Final SEIS for Near-term Colorado River Operations, U.S. Bureau of Reclamation, Mar. 2024: https://www.usbr.gov/ColoradoRiverBasin/documents/NearTermColoradoRiverOperations/20240300-Near-termColorado-RiverOperations-FinalSEIS-508.pdf
(Miles Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE ISSUES INSTREAM FLOW RECOMMENDATIONS FOR MILL, DEER AND ANTELOPE CREEKS AHEAD OF AMENDMENTS TO WATER QUALITY CONTROL PLAN

On February 21, the State Water Resources Control Board (SWRCB) received a letter from the California Department of Fish and Wildlife (CDFW) recommending instream flow requirements for Mill, Deer, and Antelope creeks to be implemented in the long-term flow setting process. Citing to a decline in anadromous salmonid populations, voluntary efforts involving water rights holders drawing from the creeks not producing CDFW's desired results, and recent instream flow studies, CDFW's instream flow recommendations implicate developing amendments to the Water Quality Control Plan applicable to the Sacramento River system.

Factual Background

Mill, Deer, and Antelope creeks are tributaries to the Sacramento River located in Tehama County, California. Mill and Deer Creeks are home to viable, independent populations of Central Valley spring-run chinook salmon (spring-run), a species recognized as threatened at the state and at the federal level. Mill, Deer, and Antelope creeks also serve as aquatic habitats for the threatened Central Valley steelhead and Pacific lamprey. Spring-run populations have been in decline since 2015. CDFW cites water diversions from the tributaries as a significant obstacle to migration by the resident anadromous salmonids.

Amid emergency drought conditions in 2014, SWRCB adopted minimum instream flow requirements to protect species of fish residing in the creeks and accommodate drought conditions. In Mill and Antelope creeks, voluntary agreements were entered between CDFW, the National Marine Fisheries Services (NMFS), and water users drawing from their respective creeks, while Deer Creek received curtailment orders from SWRCB. Affected water users believe that physical channel modifications can protect aquatic resources and provide fish passage without reducing the amount of water they are allowed to divert from the creeks.

CDFW Recommendations

CDFW's instream flow recommendations follow a series of efforts working with water rights holders diverting from Mill, Deer, and Antelope creeks, and incorporates results of instream flow studies conducted in the creeks in recent years. CDFW completed and published instream flow studies for Mill and Deer creeks in 2017, which CDFW utilizes to support the monthly flow recommendations included in CDFW's letter. In 2020, CDFW completed an instream flow investigation for Antelope Creek, which was also included when setting the flow recommendations in the letter to SWRCB. Using the information from

these instream flow studies when setting long-term flow requirements, optimal fish passage and ecological function are sought to be protected in Mill, Deer, and Antelope creeks.

While voluntary agreements have been entered in Mill and Antelope creeks, CDFW believes that these agreements have not succeeded in securing the long-term flows required to protect aquatic species and ecological function in the affected tributaries. Since the imposition of emergency drought regulations and throughout the voluntary agreement process, threatened fish populations have continued to decline within the creeks. CDFW's recommendations contemplate higher minimum flows (depending on water year and type) in the creeks to protect spawning fish by ensuring spawning ground availability and reducing the detrimental effect of low water levels. In light of its past efforts, and consistent with its responsibility as the state's trustee agency for fish and wildlife, CDFW recommends that the SWRCB should include the instream flow recommendations provided during long-term flow setting processes as a tool to balance all beneficial uses of water in the creeks. Unclear is the extent to which these recommendations impact existing water rights, part of which have already contributed to flows for fisheries, thus highlighting the elusive balance between human consumptive water needs and those of fisheries (and riparian habitats).

Conclusion and Implications

California's Department of Fish and Wildlife's instream flow recommendations may have broader implications that reach beyond the Sacramento River. Because the Sacramento River is the largest River in California, treatment of its tributaries by regulators may be instructive throughout the state. Further, while the setting of instream flow requirements can protect aquatic species and ecological functions, human needs (*i.e.*, municipal and agricultural uses) may also be impacted by the imposition of these requirements. However, human and fishery interests can co-exist if long-term flow setting processes are backed by reliable science and seek to balance releases and diversions with temperature controls, while considering the habitat necessary to support spawning fish populations.

The instream flow recommendations also implicate the Water Quality Control Plan Update, being developed by State Water Resources Control Board, for the San Francisco Bay and Sacramento-San Joaquin Delta Estuary. Previous versions of the plan consider the protection of viable anadromous salmonid populations in the area, and list substantial diversion as a major factor in ecosystem decline. Stakeholder engagement is critical to better ensuring a viable solution and without years of contentious administrative or legal proceedings.

(Wes Miliband with Kevin Harris)

CALIFORNIA DEPARTMENT OF WATER RESOURCES UPDATES INITIAL STATE WATER PROJECT ALLOCATION FORECAST BASED ON INCREASED SNOWFALL AND RAIN

On February 21, 2024, the California Department of Water Resources (DWR) announced that it was updating its State Water Project (SWP) allocations based on changes in rainfall. The updated allocation is *15 percent of contracted supplies, which is a 5 percent increase from the initial allocation in December 2023. *[Note: as this article went to "print" in March the new updated allocation rose to 30 percent].

Background

DWR provides its initial annual SWP allocation by December 1 each year based on available water storage and projected water supply demands. On December 1, 2023, DWR set its initial allocation at 10 percent of contracted supplies.

The State Water Project

The SWP is a complex system of canals, pipelines, reservoirs, and hydroelectric power facilities. The SWP delivers water to 29 public agencies, which serve 27 million Californians and provide irrigation for approximately 750,000 acres of farmland. It delivers snowmelt and runoff from the northern Sierra mountains into Lake Oroville and down through the Sacramento-San Joaquin River Delta into the Los Angeles Basin. In normal years, the SWP will pro-

vide drinking water to up to two-thirds of California residents.

Significance of Increase in Water Allocation

DWR's increase in allocation will mean well over an additional 200,000 acre-feet of water across the 29 public water agencies. This current allocation is 10 percent higher than 2022's initial allocation. This shows that there is a relatively steady increase in water allocations for SWP.

Reason for Increase

DWR weighs several factors when determining its initial water allocation for each year. Some of the factors include current levels of reservoir storage, and the projected water demands. The assessment that led to this current increase did not include the results of any of the storms that hit California earlier this month. The February allocation forecast update takes into account snow survey measurements and data up until February 1 and spring runoff forecasts outlined in the first Bulletin 120 of the season. This information shows how winter storms have affected the current water supply in the state.

During December and January, California has experienced a series of winter storms. These storms have been warmer and have brought historic rainfall to southern California. However, northern California, which is home to the SWP headquarters, has not benefitted as much from these winter storms as Southern California. In fact, precipitation for Northern California was below average for the region.

Despite the decrease in precipitation, DWR has been able to take advantage of the winter storms by increasing storage at both Lake Oroville and San Luis Reservoir. Lake Oroville has increased 460,000 acre-feet and San Luis Reservoir has increased 85,000 acre-feet since January of 2024. Additionally, as of February of 2024, the statewide snowpack is 86 percent of average for this date, and 69 percent of its April 1 average, which is considered the peak snowpack for the season. Further, SWP's reservoirs remain above average for this time of year, as the state continues to benefit from last winter's historic snowpack and efforts to capture and store as much water as possible.

Potential for Additional Allocations

It is possible that the allocation will improve further in response to a continued wet March. Allocations are typically updated each month after snowpack, rainfall and runoff are examined. A final allocation occurs in May or June. The State Water Project will continue to review conditions and may revise the forecasted allocations prior to final allocations. Additionally, water supplies will likely increase further as the snowpack begins to melt. The increases in water supply will likely mean that DWR will be positioned to increase allocations further. The recent storms have brought more rain than snow. Because of this, DWR will continue to carefully monitor weather conditions and work to increase the State's storage capabilities to capture more water. DWR has been working with local agencies and has also been supporting efforts statewide to capture stormwater and use it to recharge critical groundwater basins.

Conclusion and Implications

DWR's updated allocation is 30 percent, which is 20 percent higher than its initial allocation issued in December 2023. It is possible that DWR will change this allocation in the coming months as DWR continues to monitor snowpack and potential rainfall. (Christina Suarez, Derek Hoffman)

STATE WATER RESOURCES CONTROL BOARD WILL HOLD PRE-HEARING CONFERENCE AND PUBLIC HEARING ON SITES RESERVOIR WATER RIGHTS APPLICATION AND PETITIONS

On March 2, 2024, the State Water Resources Control Board (State Water Board or Board) Administrative Hearings Office (AHO) announced it will hold a pre-hearing conference and public hearing to discuss Sites Project Authority's (Authority) pending water right petitions.

On May 11, 2022, the State Water Board Division of Water Rights (Division) received Authority's petitions for partial assignment of state-filed Application 25517 and accompanying water right Application 25517X01. The Authority also petitioned for release from priority of state-filed Applications 25513, 25514, 25517, 22235, 23780, and 23781.

The Authority seeks approval of their petitions to move forward with construction and operation of the Sites Reservoir Project. The State Water Board's purpose in setting the conference and hearing is to receive evidence for the Board to consider in determining whether to approve the applications, and if so, specific terms and conditions to include in those approvals.

In its announcement of the Authority's water right application, the Division invited the public to submit protests. The Authority filed written answers to those protests, then the Authority and protestants underwent a 180-day period of good faith efforts to resolve those protests. This period ended on February 28, 2024. Now, both the Authority and protestants must file a written status report for each protest by March 29, 2024.

On November 13, 2023, the State Water Board assigned all the petitions to the AHO to conduct an adjudicative hearing and recommend a decision or order on the water rights, for consideration by the Board. In their latest announcement, the AHO explained that an evidentiary hearing is required to resolve disputed issues of material fact. Regarding the state-filed applications for release and assignment, the Board is required to hold a public hearing before acting on such petitions.

Water Right Application 25517X01

In water right Application 25517X01, the Authority seeks to divert up to 1,500,000 acre-feet per year (afy) to storage in the Sites Reservoir under a partial assignment of state-filed Application 25517. Proposed diversions will come from the Sacramento River and its tributaries, Funks Creek and Stone Corral Creek. The Authority proposes to use the stored water for several purposes, including irrigation, municipal, domestic, industrial, water quality, fish and wildlife preservation and enhancement, and recreational uses. If approved, the water right covered by Application 25517X01 would have a priority date of 1977.

The Authority also petitioned for release from priority in Applications 25513, 25514, 22235, 23780, and 23781. Additionally, the Authority petitioned for release from any unassigned portion of Application 25517, in favor of Application 25517X01.

Issues to be Addressed at the Upcoming Hearing

In its March 2024 announcement, the AHO explained the various findings the State Water Board must make in deciding whether to approve the Authority's various petitions. First, to approve the Authority's petitions, the project must not be in conflict with:

> . . .any general or coordinated plans for the development, utilization, or conservation of water resources, including the California Water Plan.

Second, any approvals must also be consistent with water quality control plans, both state and regional. The area covered by the Sites Reservoir Project implicates two such plans: (1) the Central Valley Regional Water Quality Control Board's Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Central Valley plan); and (2) the Bay-Delta Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta watershed (Bay-Delta Plan). The Bay-Delta Plan is currently in the process of being updated, and the Board has not made any final decisions on how they will proceed. Key documents related to the Bay-Delta Plan updates will be identified as Exhibit AHO-279 and offered into the evidentiary record during the hearing.

Third, to approve a water right application, the Board must determine whether there is adequate available unappropriated water to supply to the Authority. As part of this analysis, the State Water Board must determine whether the appropriation would deprive protected areas, directly or indirectly, of water supply adequate to support instream beneficial uses, such as those in water quality control plans. The Board may condition its approval on avoiding unreasonable impacts to fish and wildlife and other instream beneficial uses. The State Water Board must also consider the effect of approval on public trust resources and protect those resources where doing so is feasible and in the public interest. Accordingly, the State Water Board must determine that the diverted water will be put to reasonable and beneficial use and will not result in wasteful or unreasonable diversion or use of water.

Fourth, the Authority, must prove that it has obtained, or has the ability to obtain, necessary rights of access to the property and infrastructure required to carry out the appropriation.

Finally, the Authority is the lead agency for preparation of environmental review documents required by the California Environmental Quality Act (CEQA). The Authority released its Final Environmental Impact Report (EIR) on November 2, 2023, certified by their Board of Directors on November 17, 2023. As the 30-day challenge period for the certification has passed, the State Water Board concluded that the Final EIR's adequacy will not be at issue for the hearing. As a responsible agency under CEQA, however, the State Water Board must consider the Final EIR in approving the Authority's petitions. Specifically, for each significant environmental effect identified in the Final EIR within the Board's area of responsibility, the Board must find: (1) changes have been required in the project that mitigate or avoid the significant effect; (2) such changes are within the responsibility and jurisdiction of another public agency; or (3) the relevant mitigation measures or project alternatives identified in the Final EIR are infeasible.

During the hearing, the AHO will receive evidence on these and several other issues in developing a proposed order for the State Water Board to consider in deciding whether to grant the Authority's petitions.

Conclusion and Implications

The Administrative Hearings Office's pre-hearing conference is currently scheduled for April 10, 2024, and the public hearing itself is scheduled to begin as early as June 17 and continue through October 10, 2024. Under Water Code § 1114(c), interested parties can expect the AHO to transmit a proposed order to the State Water Board within 90 days after the matter is submitted.
(Arley Titzler, Sam Bivins)

LAWSUITS FILED OR PENDING

UNITED STATES SUPREME COURT HOLDS ORAL ARGUMENTS IN LONG-STANDING *TEXAS V. NEW MEXICO* INTERSTATE COMPACT LITIGATION

On March 20, 2024, the United States Supreme Court heard arguments regarding the decades old interstate compact litigation involving, *inter alia*, how New Mexico manages water deliveries in the Rio Grande. These management decisions, both groundwater and surface water deliveries and related storage, affect not only irrigation districts in New Mexico, but also in Texas and Mexico. [*Texas v. New Mexico and Colorado*, Case No. 141 orig. (U.S. Sup. Ct. Mar. 20, 2024).]

Background

As neighboring states and partners to several interstate compacts (the Pecos River Compact, the Rio Grande Compact, and the Canadian River Compact) New Mexico and Texas share a long water history. As the downstream state, Texas's focus remains on ensuring New Mexico meets its various compact delivery requirements.

On January 27, 2014, the United States Supreme Court granted the State of Texas' motion for leave to file a bill of complaint against New Mexico over alleged violations of the 1938 Rio Grande Compact, 53 Stat. 785 (1939). In effect, the Court ruled that Texas can proceed with its lawsuit against New Mexico. In ruling that the case should proceed, the Supreme Court evaluated "the nature of the interest of the complaining State" as well as the "seriousness and dignity of the claim" and "the availability of an alternative forum in which the issues tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted).

Texas seeks declaratory relief ordering New Mexico to cease alleged illegal diversions as well as damages incurred as a result of Compact violations. Texas has long argued that excessive groundwater pumping between Elephant Butte Reservoir and the New Mexico–Texas border is depriving Texas of water to which it is legally entitled.

Overview of 1938 Rio Grande Compact

As with most compacts, the 1938 Rio Grande Compact was developed out of a shared desire to remove all causes of present and future controversy with respect to the use of the waters of the Rio Grande. The Compact effects an equitable apportionment of the waters of the Rio Grande among Colorado, New Mexico and Texas by establishing delivery amounts due at specific gauges. The last gauge for delivery in the Rio Grande Compact is Elephant Butte Reservoir, which feeds Caballo Reservoir right below it. Because of siltation and other practical problems, the gauge was moved to the outflow at Caballo Reservoir. The Compact allocates water among the three states, and in the case of the downstream state, Texas, guarantees water by use of a set of indexing stations whereby when "x" quantity of water passes a station, then "y" must reach the lower point. The Compact, however, is silent about what happens below Elephant Butte Reservoir.

In dividing the waters of the Rio Grande between Colorado, New Mexico and Texas, the Compact maximizes the beneficial use of the water among all states without impairment of any beneficial uses under the conditions that prevailed in 1929. While Colorado and New Mexico can increase their storage, Texas is assured that 790,000 acre-feet will be released to the lands below Elephant Butte Reservoir. However, based on Reservoir levels, during drought conditions Colorado and New Mexico may be required to release water from storage and may be precluded from increasing the amount of water in storage. The application of these Compact requirements during a drought depends, *inter alia*, on the accrued debit/credit status of each state. Unlike some compacts, the Rio Grande Compact acknowledges the variability of the hydrograph and allows accruals of credits and debits.

Historically, the Compact has resulted in 57 percent of the water supply below Elephant Butte Reservoir being delivered to New Mexico and 43

percent delivered to Texas. Texas contends that water provided to it under the Compact is then taken away by groundwater pumping below New Mexico's Elephant Butte Reservoir. According to Texas, these hydraulically connected wells take water before it arrives at the New Mexico–Texas state line, in effect resulting in re-diversions of Texas's water after it has been released to Texas.

Texas v. New Mexico

The dispute has its origins from the time that the Supreme Court held in *Sporhase v. Nebraska*, 458 U.S. 941 (1982) that one state could not preclude another state from appropriating water within the boundaries of the state seeking the appropriation. Shortly thereafter, the City of El Paso, by and through its Public Service Board, applied to appropriate 296,000 acre-feet annually from the Lower Rio Grande and Hueco Underground Water Basins. The Lower Rio Grande Underground Water Basin includes the Hueco-Mesilla Bolson Aquifer, as defined by the New Mexico State Engineer. The Hueco-Mesilla Bolson contains a great deal of unappropriated groundwater. Ironically, the Hueco-Mesilla Bolson Aquifer within Texas was quickly being depleted by El Paso. As translated, "Hueco Bolson" in Spanish means an "empty purse." In the U.S. District Court case that arose from El Paso's Application, Judge Bratton ruled that, "the purpose of the embargo is to promote New Mexico's economic advantage." *City of El Paso, By and Through its Public Service Bd. v. Reynolds*, 563 F.Supp. 379, 389 (1983). Judge Bratton overruled the New Mexico State Engineer's denial of the Application.

A year later in 1984, Judge Bratton reversed his prior decision holding that:

> (1) limitation of water exports to those which are 'not contrary to public conservation of water within the state and are not otherwise detrimental to the public welfare of the citizens of New Mexico' did not render the statute facially unconstitutional. *City of El Paso By and Through Public Service Bd. v. Reynolds*, 597 F.Supp. 694 (1984).

Judge Bratton had no idea that the controversy that he addressed 40 years ago would still be continuing, albeit with the United States considering itself the real party in interest to ensure that it could deliver water under the Rio Grande Project to its contractors.

Ironically, the purpose of El Paso was to extract 296,000 acre-feet to support its municipal growth, irrespective of the stream flow effects on the Rio Grande. The exact opposite is taking place now 40 years later, when the State of Texas and the States of New Mexico and the State of Colorado have entered into a "Consent Decree" that the above three States argue will prevent any negative effects on the United States, either as to the United States' obligation to deliver 60,000 acre feet of water annually under the Convention of 1906 to Mexico, or its obligation to provide water in proportional amounts of 57 percent to the water users within the Elephant Butte Irrigation District and 43 percent to the irrigators in Texas.

The United States' Position

The United States' argument before the Supreme Court, as stated in its Exception to the Special Master's Report (*see* Exception by the United States to Third Interim Report of the Special Master, *Texas v. New Mexico and Colorado*, No. 141 orig. (S.Ct. Oct. 6, 2023)) (Exception to Special Master's Report), can be divided into essentially three points. Their first point is weakened by the fact that the United States is not a party to the Rio Grande Compact. Not being a party, the first Special Master in this case allowed the United States to intervene, but solely for the purpose of protecting their "distinctively federal interests." *See* Exception to Special Master's Report at 11-12. The second Special Master reviewed the matter differently and concluded that the only real parties in interest are the compacting state's themselves, and it is not for the Supreme Court in a case involving an interstate state compact among states to undo an agreement that has been reached as between the states themselves. *See also Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614 (2013) (Supreme Court rules 9 to 0 against United States and Tarrant Regional Water District in Texas, holding that the intent of the compact drafters is the most important thing to consider because a compact is a contract among the States).

The United States' second point is that the consent decree should be rejected because it imposes obligations on the United States without the United States' consent. This is not a strong position for the United States because it forces the Supreme Court to

decide what is and is not an obligation of the United States under the Compact. Since the United States is not a party to the Compact, the Court would be speculating as to the intention of the only drafters of the Compact—the State Texas, the State of New Mexico and the State of Colorado.

The third point of the United States is that the proposed Consent Decree should be rejected because it makes it difficult for the United States to provide its annual obligation of 60,000 acre-feet to Mexico. This argument fails because the Compact builds in a process by which the amount delivered to Mexico can be reduced in the event of shortages within the states of the United States and Mexico.

However, at page 46 of its Exception Brief, the United States argues that the Consent Decree cannot be defended because: "the baseline on which the Compact was predicated was the baseline that existed when the Compact was signed□not decades later after groundwater pumping in New Mexico had greatly increased and drawn water away from the Project." "The Project" means the United States's obligation to deliver water to the two irrigation districts in New Mexico and Texas. Even the United States cannot push aside the events that caused the groundwater pumping in New Mexico and ignore that history of groundwater pumping from the dates of the numerous permits authorized by New Mexico's late State Engineer Steve Reynolds, each of which drew water from the Rio Grande. This proposed Consent Decree is the State of Texas, New Mexico and Colorado's attempt to start where the parties are now, not where they should have been had the United States raised its concerns earlier.

Oral Argument

In their questioning and commentary during the Oral Argument, the Supreme Court justices seemingly grappled with the role of the federal government given the fact the Rio Grande Compact is an agreement between states. Justice Gorsuch questioned:

> . . .[y]ou're asking us to say the two states cannot resolve their disagreement in this court consistent with a compact so long as the United States objects. . . . That's the upshot of what we're being asked to enforce.

The arguments highlighted the role of the United States to merely administer the Rio Grande Project versus more involved participation by the government when in interstate compacts wherein federal interests are involved. Justice Kagan stated:

> . . .[t]here are compacts that really do involve only the states and don't have distinctively federal interests attached to them, and this compact is not that. . . . [The Rio Grande Compact is] is inextricably intertwined with the Rio Grande Project and the downstream contracts, which, of course, are federal in nature.

Conclusion and Implications

Last week's Supreme Court arguments capture how prolonged drought conditions have played a significant role in all Western states' interstate water issues. Despite seasons of bountiful snowpack and boosting spring run-offs into New Mexico's rivers and watersheds, ongoing drought seasons continue to implicate New Mexico's water storage and delivery obligations under its various intestate compact obligations. In years past, water managers correctly forecasting the emerging trend that downstream states would increasingly seek to invoke United States Supreme Court jurisdiction to address issues created in the event drought results in under deliveries and municipal demand increases in the face of decreased supplies and storage. Ironically, these are some of the same tensions that prompted the states to develop and negotiate the Compact.
(Christina J. Bruff)

RECENT FEDERAL DECISIONS

FLORIDA LOSES CLEAN WATER ACT SECTION 404 DREDGE AND FILL PERMIT AUTHORITY

Center for Biological Diversity v. Regan, et al., ___F.Supp.4th___, Case No. 26823; (D. D.C., Feb 15, 2024).

The State of Florida's application to the federal government to become only the third U.S. state authorized to administer wetlands permitting under the federal Clean Water Act, Section 404, was approved in late 2020. The approval was recently disallowed by a U.S. District Court judge in Washington D.C. in *Center for Biological Diversity v. Regan* on Feb 15, 2024.

The questions presented by the pending motions in this case are whether the U.S. Environmental Protection Agency (EPA) "cut corners" to finalize its decision to transfer certain federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, permitting authority from the U.S. Army Corps of Engineers (Corps) to the State of Florida in late 2020, and, if so, whether the plaintiffs—seven environmental organizations—suffered any cognizable and redressable injuries as a result.

Background

At the core of this case is Section 404 of the Clean Water Act, which governs the issuance of permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." Although Corps is responsible for the issuance of such permits, a state may submit an application to the EPA seeking authority to:

> . . .administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters . . . within its jurisdiction, 33 U.S.C. § 1344(g)(1).

A state's application to assume permitting authority under Section 404 must include, among other things, a "complete program description" and a "statement" from the state's attorney general.

On August 18, 2020, the State of Florida submitted an application to administer the Section 404 permitting program within its borders. The EPA deemed the application complete on August 20, 2020, triggering the statutory 120-day period for the agency to review the application. On September 16, 2020, the EPA issued a public "[n]otice and request for comments" on Florida's Section 404 program application and announced that the EPA would hold two "virtual hearings" in October 2020. For those hearings, the EPA "recommend[ed] that commenters also submit the text of their oral comments . . . as written comments to the rulemaking docket." Following those hearings, the EPA explained, "verbatim transcripts w[ould] be included in the rulemaking docket." *If* at the end of this process, the EPA approved this program, EPA would also codify the approval in 40 C.F.R. 233 subpart H.

The EPA received over 3, 000 comments, including from the plaintiffs in this case. Earthjustice, counsel to plaintiffs in this case, wrote to the EPA on October 23, 2020, arguing that Florida's application was incomplete and that the EPA had erred when it concluded otherwise. Florida's application, according to that letter, was unsatisfactory in at least three ways.

First, Florida had, as alleged, "not demonstrated how it "w[ould] ensure no jeopardy to listed species" under the federal Endangered Species Act" and, instead, had ". . .indicated it w[ould] rely on an anticipated programmatic Biological Opinion and an anticipated, associated incidental take statement."

Second, as alleged, the state had "failed to identify the waters that would be assumed under its proposed program, " in contravention of applicable EPA regulations.

Third, Florida had not:

> . . .provide[d] [the] EPA and the public with complete information regarding how it would implement, operate and enforce a Section 404 program, particularly given the substantial impact the COVID-19 pandemic has had on State coffers.

Earthjustice submitted that because, in its view, Florida had "failed to provide [the] EPA with a com-

plete program submission in [these] three, critical respects, " the proper course was to:

> . . .suspend the public comment period and review of Florida's application until the State cure[d] these deficiencies and submit[ted] a complete program proposal to the agency.

On November 2, 2020, Earthjustice submitted further, detailed comments on behalf of several of the Plaintiffs in this case. EPA's Andrew Wheeler, announced approval of Florida's program, and the agency published a notice of approval in the Federal Register on December 22, 2020.

The District Court's Rulings

The court has under review a multi-statute challenge to the approval. In addition to the Clean Water Act, the petitioners assert that the approval violates the Endangered Species Act, the Administrative Procedure Act, and the Rivers and Harbors Act. The grounds for the February decision are based on the Endangered Species Act, and the court's determination that inadequate adherence occurred to the hurdles the government must successfully pass when issuing a Section 404 program permission to a state.

The District Court concluded that the ESA requires a detailed permit by permit review of both whether endangered species are threatened by a given proposed operation and also, whether the chances of incidental taking are minimized. Florida had proposed and the Government agreed to a statewide ESA review that would serve in lieu of permit specific review. In Florida's program, the state, recognizing that wetlands abound throughout the State and that there are numerous endangered species there, suggested a sort of "work around" to the administrative challenge of performing individual ESA reviews in the numerous cases that would otherwise require that review.

Florida's proposal of the program was justified on the grounds that the procedures required by the ESA, and in particular the incidental taking process, would tie up larger projects for major development for years at a time, per project. Instead, Florida proposed that the case-by-case requirements of addressing takings issues by Section 7 of the ESA could be managed better if viewed as discretionary procedure rather than mandatory requirements. Florida proposed that instead the impact of developments in Florida could be managed by doing a biological assessment for the entire state at the outset of the program, and that individual species and project specific incidental takings questions could be managed through the mandatory consultation of the applicant with the federal and state authorities for each permit.

The District Court was not persuaded that the process approved for Florida met the strict requirements of the ESA, especially for Incidental Take analysis:

> In short, the court was persuaded that the FWS' programmatic BiOp and Incidental Take Statment fail to satisfy the requirements of the ESA, and the Court is unpersuaded that the non-statutory technical assistance process is a lawful substitute for the procedures and remedies that Congress enacted in the ESA and that the Services established in the implementing regulations.

Conclusion and Implications

A great deal of the controversy here pretty clearly occurred due to lack of trust by the plaintiff organizations in the good faith of EPA in the closing days of the Trump administration. The EPA took that position when it made its decision to approve the program that the approval constituted an "adjudication." not a Rule. It pronounced the program approval was immediately effective, and it declined to codify the program rules in the Code of Federal Regulations. It based the validity of this view in part on the fact that it had sought public comment on its authority to so treat 404 applications in a parallel notice and comment process initiated and completed during the pendency of Florida's 404 Program application with the Agency.

The tactic of deeming the federal action of approval an adjudication, while it avoided the "freeze" on effectiveness of new rules instituted by President Biden on January 20, 2021, drew immediate legal challenge from the plaintiffs. A decision by another judge in the D.C. District Court entertained an injunction action and soon ruled that the approval was legally a rule that was governed as such by the APA.

At this writing, a month past the decision, Florida has suspended its program and is in a process of deciding what its next steps will be. The court's opinion is available online at: https://casetext.com/case/ctr-for-biological-diversity-v-regan-1
(Harvey M. Sheldon)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT UPHOLDS DECISION TO DISMISS CEQA ACTION FOR FAILURE TO TIMELY FILE A REQUEST FOR HEARING PURSUANT TO PUBLIC RESOURCES CODE SECTION 21167.4

Steinbruner v. Soquel Creek Water District et al., *Unpub.*, Case No. H050093 (6th Dist. Feb. 5, 2024).

In an *unpublished* decision filed on February 5, 2024, the Sixth District Court of Appeal upheld the trial court's judgment to dismiss the plaintiff's writ of mandate under the California Environmental Quality Act (CEQA) for untimely filing of a request for a hearing pursuant to Public Resources Code section 21167.4. The plaintiff sought relief based on excusable neglect under Code of Civil Procedure section 473, subdivision (b), but the trial court concluded that the plaintiff's excuses were unpersuasive and granted defendant's motion to dismiss. The appellate court, while acknowledging another trial court could have reasonably reached a different conclusion, found that the plaintiff did not demonstrate the trial court's decision was so at odds with the relevant facts or law as to constitute an abuse of discretion.

Factual and Procedural Background

The Pro Per plaintiff petitioned for a writ of mandate under CEQA to challenge an addendum of a previously certified Environmental Impact Report (EIR). However, the plaintiff filed a request for a hearing 96 calendar days after the petition was filed when Public Resources Code section 21167.4, subdivision (a) required the request to be filed within 90 days.

Defendants moved to dismiss the petition based on the plaintiff's untimely request. The plaintiff filed opposition to the motion to dismiss, requesting relief under Code of Civil Procedure section 473, subdivision (b) due to excusable neglect. Some of the hardship plaintiff described in its first declaration were as follows: being the primary caregiver of her old mother-in-law, the suicide of a close friend, responding to defendant serving plaintiff's husband with an order of examination relating to a different case, quarantining due to COVID-19, *etc*.

The trial court issued a tentative ruling granting the motion to dismiss. In her second declaration filed the day of the hearing on the motion to dismiss, plaintiff added that she had forgotten to note the deadline to file the request for hearing in her paper calendar due to hardships laid above, attaching a copy of her calendar as an exhibit. Still, the trial court was not persuaded and granted the motion to dismiss.

The Court of Appeal's Decision

The Sixth District Court upheld the trial court's judgment.

The court first noted that the sole issue on appeal was whether the trial court abused its discretion in denying plaintiff's request for discretionary relief under the Code of Civil Procedure section 473, subdivision (b) from dismissal after the untimely request for a hearing. Although a trial court order denying relief under Code of Civil Procedure section 473 is "scrutinized more carefully than an order permitting trial on the merits," the court stated they were limited to reviewing the decision for abuse of discretion, that the plaintiff had to demonstrate that the trial court's decision was so at odds with the relevant facts or law as to constitute an abuse of discretion on this record.

Plaintiff relied on a case called *Comunidad en Accion v. Los Angeles City Council*, 219 Cal.App.4th 1116 (2013), another case involving a late filing for request of hearing and relief under Code of Civil Procedure section 473. The Court of Appeal noted the *Comunidad* court balanced between two public policies —the strong preference for a trial on the merits and the policy favoring expeditious review of CEQA challenges. There, the petitioner's counsel stated in its declaration that he forgot to put the request for hearing deadline in his personal calendar system due to taking care of a family illness. Additionally, the court noticed that one of the *Comunidad* court's reasons the respondents would not suffer prejudice from

the short delay was that "they themselves had sought extensions to prepare the administrative record."

The court found that, among the various hardships laid out as excuses in plaintiff's opposition to the motion to dismiss and first supporting declaration, forgetting to note the deadline in plaintiff's personal calendar was not one of them. Pointing out it was only on the day of hearing the motion to dismiss that plaintiff filed a second declaration describing the calendar issue, the court found that the trial court could reasonably conclude that plaintiff would have raised the calendar issue in her initial opposition papers had that been the primary reason she failed to file the request for hearing timely.

Lastly, plaintiff took issue with the trial court's reliance on an unpublished opinion in related litigation. The court acknowledged that the trial court's consideration of the unpublished opinion was improper, but this did not amount to an abuse of discretion.

Conclusion and Implications

The *Steinbruner* decision, while *unpublished*, highlights the crucial importance of meeting filing deadlines. Although the Code of Civil Procedure section 473 was intended to protect petitioners from genuine mistakes or excuses, the seemingly arbitrary distinction made in this case between failure to mark the deadline on one's calendar and the actual hardships highlights the unpredictable and "discretionary" nature of this relief. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/H050093.PDF
(David Song)

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