Volume 34, Number 11
August/September 2024

CALIFORNIA WATER™
LAW & POLICY Reporter

CONTENTS

FEATURE ARTICLE

U.S. Supreme Court Decides *Texas v. New Mexico*: Giving the United States a Seat at the Interstate-Compact Table by Lauren Hoover, Esq., Patrick, Miller & Noto, Basalt, Colorado 229

CALIFORNIA WATER NEWS

Biden Administration Implements Ecosystem and Habitat Restoration in the Upper Colorado River Basin 232

Imperial Irrigation District Agrees to Increase Water Storage in Lake Mead Through 2026 233

Argent Communications Group Hosts 38th California Water Law & Policy MCLE Conference—In Person 235

REGULATORY DEVELOPMENTS

U.S. Fish and Wildlife Service Proposes to List Long Valley Speckled Dace as an Endangered Species 236

Environmental Impact Statement for Long-Term Operations of the Central Valley Project Set to be Released 237

San Francisco Bay-Delta Population of Longfin Smelt Listed as Endangered under the Federal Endangered Species Act 239

State Water Board Announces February 2025 Hearing to Determine Whether to Place Kern County Groundwater Subbasin on Probationary Status 240

State Water Board Adopts Water Conservation Regulations for Urban Retail Water Suppliers 241

Continued on next page

EDITORIAL BOARD

Robert M. Schuster, Esq.
Executive Editor
Argent Communications Group

Steve Anderson, Esq.
Best Best & Krieger, LLP

Austin Cho, Esq.
Downey Brand LLP

Derek Hoffman, Esq.
Fennemore Craig

Wesley Miliband, Esq.
Miliband Water Law

ADVISORY BOARD

David R.E. Aladjem, Esq.
Downey Brand, LLP

Mary Jane Forster Foley
MJF Consulting Inc.

Prof. Brian Gray
U.C. Hasting College of Law

Robert B. Maddow, Esq.
Bold, Polisner, Maddow,
Nelson & Judson

Antonio Rossmann, Esq.
Rossmann & Moore

Michele A. Staples, Esq.
Jackson Tidus

Amy M. Steinfeld, Esq.
Brownstein Hyatt Farber Schreck



Sites Reservoir Water Right Hearing Is Underway 243

California Public Utilities Commission Tags the Department of Water Resources to Procure up to 10.6 Gigawatts of Clean Energy 244

RECENT CALIFORNIA DECISIONS

District Court of Appeal:
Third District Court Affirms Denial of CEQA Challenge Against Prospective Purchaser Agreement as It Was Not a Project 246
Liam Meyer v. Department of Water Resources, Unpub., Case No. C097929 (3rd Dist. Jul. 30, 2024).

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

Copyright © 2024 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to $250,000 and up to three years imprisonment, and statutory damages in civil court are up to $150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

Subscription Rate: 1 year (11 issues) $955.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135; Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

California Water Law & Policy Reporter is a trademark of Argent Communications Group.

FEATURE ARTICLE

U.S. SUPREME COURT DECIDES *TEXAS V. NEW MEXICO*: GIVING THE UNITED STATES A SEAT AT THE INTERSTATE-COMPACT TABLE

By Lauren Hoover

Near the end of the 2023–24 term, the United States Supreme Court decided the case *Texas v. New Mexico*, as another of many interstate water disputes arising out of the Court's original jurisdiction. At issue was a proposed consent decree between New Mexico, Texas, and Colorado—a decree that the United States opposed. Contrary to the recommendation of the Special Master in the case, the Court denied approval of the proposed decree based upon its finding that the decree improperly disposed of the federal government's claims without its consent. [*Texas v. New Mexico and Colorado*, ___U.S.___, Case No. 141 Orig. (June 21, 2024).]

Background

Rio Grande Project and Downstream Contracts

The center of the dispute is the Rio Grande River, which begins in Colorado, flows through New Mexico into Texas, then continues along the Texas-Mexico border before emptying into the Gulf of Mexico. The origins of the dispute date back over a century ago. After increased usage of the river in the United States due to westward development, Mexico had voiced its concerns about Rio Grande water supply; and, in 1906, the two countries entered into a treaty where the United States promised to deliver 60,000 acre-feet of Rio Grande water annually to Mexico. In 1912, the United States began constructing the Elephant Butte Reservoir in New Mexico, about one hundred miles north of the Texas-New Mexico border as a way to capture and store water for subsequent deliveries. The federal government then entered into the "Downstream Contracts," which were a series of agreements between the United States and two irrigation districts: Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement No. 1 in Texas. The contracts provide that, after ensuring that Mexico gets its portion of Rio Grande water, the United States will deliver apportionments to these political subdivisions.

Rio Grande Compact

While these Downstream Contracts resolved federal issues, they did not resolve interstate issues. As a response, Colorado, New Mexico, and Texas agreed to the Rio Grande Compact in 1938, which required Colorado to deliver a certain amount of water to New Mexico and required New Mexico to deliver a certain amount of water to Elephant Butte Reservoir. States are granted the authority to enter into compacts with the consent of Congress under article 1, section 10, clause 3 of the United States Constitution. Interstate compacts are contractual in nature, but once Congress gives its stamp of approval, compacts become the law of the land like any federal statute.

The area then experienced prolonged drought conditions in the 1940s and 50s. As a result, entities in southern New Mexico began pumping groundwater downstream of Elephant Butte Reservoir to remediate the drier conditions and support local agriculture. But the downstream pumping affected the water supply of the Rio Grande by disturbing and intercepting return flows to the river. To understand how the groundwater pumping affected the Rio Grande's flows, the Bureau of Reclamation developed the "D2 Curve," which used data from 1951-1978—i.e., the "D2 Period" during which New Mexico increased its ground-

The opinions expressed in attributed articles in *California Water Law & Policy Reporter* belong solely to the contributors, do not necessarily represent the opinions of Argent Communications Group or the editors of *California Water Law & Policy Reporter*, and are not intended as legal advice.

water pumping—to predict the availability of water to the irrigation districts based upon the amount released from Elephant Butte Reservoir.

Present Disputes

Even with the D2 Curve in place to predict flows, increased groundwater pumping remained a contentious issue for the states. In 2013, Texas filed an original action in the United States Supreme Court against New Mexico, alleging that New Mexico was violating the Compact by permitting pumping rates that exceeded those of 1938—the year in which the Compact was signed. The United States sought to intervene in the suit and therefore filed its own complaint in 2014. While the Special Master in the case said that the United States should not be able to intervene, the Supreme Court held in *Texas v. New Mexico*, 583 U.S. 407 (2018)—a precursor to this dispute—in sum that because the federal government had an interest in the successful operation of the Elephant Butte Reservoir to fulfill its obligations under Downstream Compacts, the government could intervene.

The Proposed Consent Decree

The litigation continued, and soon after, Texas, New Mexico, and Colorado entered into a proposed consent decree to resolve the dispute once and for all. The proposed decree had multiple aspects, the core of it being to establish the Effective El Paso Index, a new method allocating water based on conditions during the D2 Period. But the United States opposed the decree. As a third-party intervenor, the United States cannot simply block the entry of a decree merely for the reason that it chooses to withhold consent. However, a court cannot approve a consent decree where nonconsenting third-party intervenor's claims would be disposed of.

The Supreme Court's Decision

The Supreme Court summarized the matter before it as follows:

> In 2013, Texas filed suit in this Court against the Compact's other two signatory States, alleging that excessive groundwater pumping in New Mexico was depleting supplies of Rio Grande water found for Texas. The United States sought to intervene, alleging essentially the same-claims as Texas. In 2018 this Court allowed the United States to intervene, holding that the United States "has an interest in seeing that water is deposited in the [Elephant Butte] Reservoir consistent with the Compact's terms," as that "is what allows the United States to meet its duties under the Downstream Contracts, whare are themselves essential to fulfillment of the Compact's expressly stated purpose." [Citation]. . .Texas and New Mexico now seek approval of a proposed consent decree that would resolve this case and codify a methodology for allocating each State's share of the Rio Grande's waters. The Special Master recommended that this Court approve the consent decree, but the United States objected and filed an exception to the Special Master's report.

The Court had to determine whether the United States had valid compact claims in the first place. And, if so, the Court had to decide whether approving the consent decree would dispose of the United States' claims.

The Court first found that the United States did have valid compact claims because the compact is inextricably intertwined with the Rio Grande Project, because the Downstream Contracts are carried out by the federal government, and because the federal government has obligations under the 1906 Treaty to deliver water to Mexico. The Court then found that approving the consent decree would dispose of the United States' valid compact claims, as the language of the consent decree clearly states that the United States will not have any remaining compact claims if entered. Accordingly, the Court refused to approve the proposed decree. While the dissent argued that the United States should litigate its claims in an alternate forum, the majority responded by questioning the purpose of approving a consent decree if it will simply be subject to challenge and litigation down the line.

Conclusion and Implications

The Court's decision in a nutshell was that "because the proposed consent decree would dispose of the United States' Compact claims without its consent, the State's motion to enter the consent decree is denied."

The case thus presents the future potential for the federal government to intervene in what are typically thought of as solely interstate matters. For example, the Colorado River's long-term operational rules expire in 2026, and Colorado River Compact States are in the process of renegotiating rules along with the United States. Interestingly, the Court cited the United States' obligations under the 1906 Treaty to delivery Rio Grande water to Mexico as part of why the federal government has an interest in the dispute, thus posing the potential of the federal government being able to assert an interest in all interstate Colorado River disputes by means of The Mexican Water Treaty of 1944 which requires the United States to deliver 1.5 million acre-feet of Colorado River water to Mexico annually. Ultimately, this case imposes additional considerations for resolving interstate disputes in the future, perhaps giving the federal government a more prevalent seat at the negotiations table. The Supreme Court's opinion is available online at: https://www.supremecourt.gov/opinions/23pdf/141orig_d18f.pdf

---

Lauren Hoover is an associate at the Patrick, Miller & Noto, PC, resident in the firm's Basalt, Colorado office. Lauren's practice focuses on water rights, including water court litigation, water rights ownership and transfers, and ditch easement disputes.

CALIFORNIA WATER NEWS

BIDEN ADMINISTRATION IMPLEMENTS ECOSYSTEM AND HABITAT RESTORATION IN THE UPPER COLORADO RIVER BASIN

The Biden administration, under its Investing in America agenda, has opened a funding opportunity for ecosystem and habitat restoration projects in the Upper Colorado River Basin to address the impacts of drought.

Background

On October 28, 2022, the Department of the Interior announced an investment from the Inflation Reduction Act to enhance long-term system efficiency across the Colorado River Basin. This investment includes at least $500,000 earmarked for the Upper Basin States to promote water conservation, environmental benefits, and ecosystem and habitat restoration. Addressing the historic 23-year drought in the Colorado River Basin is critical, as the Basin provides water to over 40 million people, supports hydropower resources in seven U.S. states, serves as a crucial resource for 30 Tribal Nations and two states in Mexico, and sustains 5.5 million acres of agriculture across the West. The U.S. Bureau of Reclamation initially invested nearly $50 million to relaunch a System Conservation Pilot Program in the Upper Colorado River Basin, which the Bureau of Reclamation estimates will conserve an estimated 104,000 acre-feet of water by the end of September.

July 2024 Announcement and New Opportunity

On July 22, 2024, President Biden announced that additional funding would be allocated through the Inflation Reduction Act to the Bureau of Reclamation for what is known as "Phase 2 of the Upper Colorado River Basin System Conservation and Efficiency Program." This funding will address drought-related impacts in the Upper Colorado River Basin, specifically targeting Colorado, New Mexico, and Utah. The funds aim to enhance community and landscape resiliency, restore habitats, and support species recovery. Public or Tribal entities, or those partnered with such entities, are eligible to apply for project funding. Applications must be submitted by October 14, 2024.

Phase 2 of the Upper Colorado River Basin System Conservation and Efficiency Program

Phase 2, known as "Bucket 2," will utilize $450 million from the Inflation Reduction Act, organized into two components.

Bucket 2 Environmental Drought Mitigation

The "Bucket 2 Environmental Drought Mitigation" (B2E) component of Phase 2 provides funding to public entities and tribes for projects that offer general environmental benefits or ecosystem and habitat restoration specifically addressing drought-related issues. Eligible projects must benefit the environment, ecosystems, or habitats within the Upper Colorado River Basin or its tributaries. The Bureau of Reclamation seeks cost-effective, long-term environmental, ecosystem, or habitat benefits.

The Request for Applications, titled "Upper Basin Environmental Drought Mitigation (B2E)," opened on July 22, 2024, and will remain open until October 14, 2024. Projects must have a minimum size of $300,000 and should be completed within five years of the grant agreement execution. The Bureau of Reclamation will give additional consideration to projects that collaborate across multiple stakeholders.

The Bureau of Reclamation encourages state agency participation through encouraging applicants to consult State agency representatives to ensure compliance with state water rights and related laws before submitting proposals. The Bureau of Reclamation provided examples of eligible projects under the B2E program, such as creating connectivity of waterways, habitats, and ecosystems; restoring streams with increased erosion due to drought; and improving water quality affected by drought.

Bucket 2 Water Conservation

The "Bucket 2 Water Conservation" (B2W) component will focus on identifying and funding projects that achieve verifiable, multi-year reductions in water use or demand. The B2W component is still under development, with a funding opportunity expected to be announced later this year.

Conclusion and Implications

As the western United States continues to battle drought and increasing demand on water supplies, this additional funding cycle from the Biden administration represents a crucial step toward building resiliency in the Colorado River Basin. With proper planning and appropriate funding, projects under the B2E program will enhance the Upper Colorado River Basin's ability to adapt to ongoing drought conditions. Ensuring resiliency and mitigating drought-related impacts are essential for the continued success of all beneficial uses that rely on the Colorado River. (Kole Kelley, Micheline Nadeau Fairbank)

IMPERIAL IRRIGATION DISTRICT AGREES TO INCREASE WATER STORAGE IN LAKE MEAD THROUGH 2026

In August 2024, the Imperial Irrigation District approved a two-year agreement with the United States Bureau of Reclamation (Reclamation) to conserve 700,000 acre-feet of water in the lower basin of the Colorado River in exchange for funding related to agricultural conservation programs and Salton Sea restoration.

Background

IID is an irrigation district, a limited-purpose public agency, formed under the laws of the State of California. IID holds rights to divert water from the Colorado River and deliver it to its water users, including farmers, tenants, landowners, cities, unincorporated areas, and special districts within a portion of Imperial County. IID was formed by a vote of the people pursuant to the California Irrigation District Law (formerly the California Irrigation District Act) in 1911. Shortly thereafter, IID acquired 13 mutual water companies in the Imperial Valley which had developed and operated water distribution canals.

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by 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.

Law of the River

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.

Drier Conditions, Less Water Available

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. 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 (2007 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.

In 2014, to support maintaining the elevation of Lake Mead, Reclamation and certain other lower and upper basin state participants funded a pilot system conservation program to reduce diversions from the

Colorado River system through the voluntary, compensated, and temporary use reductions. Also that year, lower basin parties agreed to generate protection volumes through conservation measures to support Lake Mead elevations.

In 2019, the parties entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and Reclamation must consult and determine what additional measures will be taken by Reclamation and the lower basin states if lake levels are forecast to be at or below 1,030 feet during the succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. Reclamation makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, Reclamation releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

In May 2024, as a supplement to the 2007 Interim Guidelines, Reclamation took administrative action to begin implementing a lower basin plan (Lower Basin Plan) approved by the lower Basin states to conserve up to 3 million acre-feet to address critical elevations in Lake Mead and Lake Powell. Conservation volumes, of which California is assigned 1.6 million acre-feet, exceed those set forth under the 2007 Interim Guidelines.

System Conservation Implementation Agreement

In furtherance of the Lower Basin Plan, IID and Reclamation entered into the System Conservation Implementation Agreement (SCIA) in which, among other things, IID agreed to leave up to 700,000 acre-feet of water in Lake Mead through 2026—approximately 300,000 per year. IID previously entered into a similar agreement in 2023, where it agreed to conserve up to 100,000 acre-feet of water in Lake Mead. The SCIA is supplemental to that, resulting in a total near-term commitment to conserve nearly 800,000 acre-feet of water, or nearly half of California's 1.6 million acre-foot-share of conservation amounts under the Lower Basin Plan.

The SCIA allocates funds to IID to enable it to expand an existing On-Farm Efficiency Conservation Program (OFECP) and a new deficit irrigation program (DIP). The maximum acreage potentially participating in the OFECP is 65,000 acres per year resulting in up to a maximum of 50,000 acre-feet per year of efficiency-based conserved water.

IID may implement the DIP for agricultural water users on fields that are owned or leased for agricultural use and cultivating alfalfa, bermuda grass, or klein grass, or seeds for one of these three crops within the IID service area. Participating fields are allowed to choose between a 45-day to 60-day time period within the months of June, July, August, and September during which time the field will not be irrigated. The maximum acreage potentially participating in the DIP is 180,000 acres per year resulting in up to a maximum of 226,000 acre-feet of conserved water per year. Participating fields will be paid for the water conservation volume attributable to the fallowed 45-day to 60-day time period on a per acre-foot basis. In exchange for these commitments, up to $250 million earmarked for Salton Sea restoration work will be activated.

Thereafter, between 2024 and 2026, SCIA will finance the development of significant volumes of conserved water. The resulting conservation will be equivalent to approximately one-quarter of IID's annual entitlement to Colorado River water.

Conclusion and Implications

Imperial Irrigation District's agreement with the federal government to conserve hundreds of thousands of additional gallons of water in Lake Mead is intended to support the Colorado River system that is, and for decades has been, struggling with drought conditions. It remains to be seen whether future climatic conditions will improve water levels in Lake Mead after 2026, or if additional future conservation agreements will be necessary to protect supplies. For more information, *see:* IID Press Release available at: https://www.iid.com/Home/Components/News/News/1207/

(Miles Krieger, Steve Anderson)

ARGENT COMMUNICATIONS GROUP HOSTS 38TH CALIFORNIA WATER LAW & POLICY MCLE CONFERENCE—IN PERSON

There is still time to register for the California Water Law & Policy Conference—in-person this year in San Deigo, September 30-October 1, 2024. Our Conference Co-Chairs, Meredith Nikkel, Esq. of Downey Brand and Miles Krieger, Esq. of Best Best & Krieger, have assembled for you a comprehensive and practice-oriented two-day Conference.

This Conference—our 38th—is designed to hone in on the issues that will most impact your water-related practice and the governance of water in the state. As an attendee, you'll gain practical knowledge on key developments in water supply, rights, management, regulation, and legislation.

Conference Highlights

This year we focus on multiple statewide concerns: Managing flood control and water storage; water project operations and species protection; the status of the Delta Water Conveyance project proposal; issues with dwindling Colorado River supplies; and the administration of groundwater under the Sustainable Groundwater Management Act. We also cover other timely issues of growing concern that water practitioners find themselves having to address day in and day out: Climate change modelling to help you plan for water supply and flood challenges ahead; Waters of the United States and the "reach" of the federal Clean Water Act; Tribal water rights; pending water-related federal legislation; and a CEQA update for water law practitioners.

We don't skimp on perspectives here with presentations that thoroughly address these key areas of water rights and water supply. Our faculty "dig deeper" with updates you need to remain savvy in your practice. Our expert faculty of 25 speakers consists of representatives of federal and state regulatory agencies, local agencies, consultants, the academic community, and top water attorneys from throughout the state.

We are honored this year to have a Keynote Presentation by Karla Nemeth, Director of the California Department of Water Resources.

You'll also have plenty of invaluable networking opportunities with the faculty and your colleagues, including a hosted Conference Reception immediately following the presentations on Day 1.

Conference Registration

Conference tuition of $995 includes participation in all sessions, continental breakfasts, refreshment breaks, hosted Conference Reception, as well as all program materials prepared by the Faculty. Discounts apply for individuals from government agencies, public interest groups, or academia, or when you register two or more attendees from the same firm or organization.

Find the full program information and registration rdetails on the Conference Brochure, or go directly to the Registration Page.

We look forward to seeing you in-person in San Diego, September 30-October 1!

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE PROPOSES TO LIST LONG VALLEY SPECKLED DACE AS AN ENDANGERED SPECIES

On August 8, 2024, the United States Fish and Wildlife Service (USFWS) issued a Proposed Rule to list the Long Valley speckled dace as an endangered species under the federal Endangered Species Act (ESA). The Proposed Rule does not, however, designate any critical habitat for the Long Valley speckled dace.

Long Valley Speckled Dace

The Long Valley speckled dace, *Rhinichthys Nevadensis Caldera*, is a small freshwater fish, native to isolated springs and ponds in the Long Valley volcanic caldera region of Mono County, California. Proposed Rule, 89 Fed. Reg. 64855–56. Typically smaller than eight centimeters long, the Long Valley speckled dace is a subspecies of the desert speckled dace, *Rhinichthys Nevadensis*. It is distinguished by a small downfacing mouth, a thick caudal peduncle, small scales, and a pointed snout. True to its name, the Long Valley speckled dace has distinctive dark spots on the sides and upper parts of its body and a dark lateral band running from tail to snout.

The Proposed Rule states that the Long Valley speckled dace likely originated during the late Pleistocene pluvial period when the dace colonized the upper Owens Valley from the Mono Lake Basin, as water spilled into the Adobe Valley. Proposed Rule, 89 Fed. Reg. 64856. The Adobe Valley drained into the Owens River and from there, the fish likely swam upstream to Long Valley. *Id.* Over time, the Long Valley speckled dace population was separated from the Owens Valley as the Owens River's hydrology changed roughly 100,000 years ago. *Id.*

The Long Valley speckled dace previously occupied habitat in the Owens Basin, ranging from cold-water streams to hot spring pools with temperatures up to 85°F. Proposed Rule, 89 Fed. Reg. 64855. Currently, the Long Valley speckled dace is limited to one wild population in Whitmore Marsh and one translocated population at three sites in the O'Harrel Canyon Creek. *Id.* The California Department of Fish and Wildlife maintains a refugium population in an artificial pond at the White Mountain Research Center.

Endangered Species Act

The ESA requires that the USFWS and National Marine Fisheries Service (agencies) "identify and list species that are 'endangered' or 'threatened.'" *Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017). The ESA defines "endangered species" as "any species [except certain insects] which is in danger of extinction throughout all or a significant portion of its range," and further defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20). Section 4 of the ESA and the implementing regulations set forth the procedures for determining whether a species is endangered or threatened (i.e., listing), issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. *Id.* at § 1533; 50 CFR part 424. Under Section 4, the agencies consider five factors in determining whether to list a species. *Id.* at § 1533(a)(1)(A)–(E). If, based on the best scientific and commercial data available, an agency concludes that a species should be listed, the agency will publish a proposed rule in the Federal Register describing why the species should be listed, whether and what critical habitat shall be designated, and the final regulation to implement the determination. *Id.* at (b)(1), (b)(5). Interested parties can submit comments on the proposed rule and request a hearing within 45 days of the proposed rule's issuance. *Id.* at (b)(5)(E).

Alternatively, interested parties can petition the agencies to list a species. 16 U.S.C. § 1533(b)(3)(A). Within 90 days of receiving the petition, an agency shall, "to the maximum extent practicable," publish a notice in the Federal Register determining whether the petition contains substantial supporting evidence that listing the species is appropriate. *Id.* If the agency determines that the petition meets this standard, it then has twelve months to conduct a review of the status of the species. *Id.* at (b)(3)(B). At the conclusion of this review, the agency then must publish a

finding in the Federal Register that: (1) listing is not warranted, (2) listing is warranted with a proposed rule, or (3) listing is warranted but other issues prevent issuing a proposed rule.

Proposed Rule to List the Long Valley Speckled Dace as an Endangered Species

The Long Valley speckled dace's listing process was initiated by a petition from the Center for Biological Diversity (CBD). 89 Fed. Reg. 64854. USFWS published a notice that CBD's petition contained substantial scientific and commercial data indicating that the Long Valley speckled dace should be listed as an endangered species. USFWS organized a team of biologists to conduct a species status assessment, which was subsequently peer-reviewed by four independent outfits.

The Proposed Rule finds that the Long Valley speckled dace is endangered due to threats from disease, non-native species predation, recreation, water diversions, and climate change, the effects of which are exacerbated by limited habitat and small population size. 89 Fed. Reg. 64858–61. Reduced numbers of fish at each site impair the subspecies' ability to withstand existential threats, such that one single catastrophic event could result in extinction. *Id.* 64861–62. As a result, the Proposed Rule finds that "the Long Valley speckled dace does not have sufficient resiliency, representation, and redundancy to sustain viability," and is at risk of extinction throughout its entire range. The Proposed Rule concludes that the Long Valley speckled dace meets the ESA's definition of an endangered species and warrants protection. However, the Proposed Rule does not designate any critical habitat for the Long Valley speckled dace, due to a lack of sufficient data to perform the analyses required under the ESA.

Conclusion and Implications

USFWS intends to adopt a Final Rule listing the Long Valley speckled dace as an endangered species but seeks additional information on the fish's biology and range, and appropriate conservation and regulatory measures. Interested parties may submit comments and additional information by October 7, 2024. Requests for USFWS to hold a hearing on the Proposed Rule should be submitted by September 23, 2024. The Proposed Rule is available at: https://www.federalregister.gov/documents/2024/08/08/2024-17249/endangered-and-threatened-wildlife-and-plants-endangered-species-status-for-the-long-valley-speckled
(Nico Chapman, Austin Cho)

ENVIRONMENTAL IMPACT STATEMENT FOR LONG-TERM OPERATIONS OF THE CENTRAL VALLEY PROJECT SET TO BE RELEASED

Much has been written over the years, and will be in the years to come, regarding the federal government's Central Valley Project (CVP) and the California state government's State Water Project (SWP). Of breaking news now is the United State Bureau of Reclamation (USBR) is poised to release to the public by September 9 a Draft Environmental Impact Statement (DEIS) regarding coordinated long-term operations of the CVP and SWP. An undertaking of this magnitude is among the biggest at least in the western United States given the size and capacities of these projects and geographical area covered in terms of space, topography, and varying regional climates. All the while, the numerous beneficial uses of water are at stake for water users ranging from municipal, irrigation, and environmental and fishery needs.

Background

Long-term operations (LTO), and coordination between the SWP and CVP, are needed to meet myriad of water supply, flood control, fish and wildlife, power generation, and other important purposes. Other such purposes are water quality, as quite often the quantity of water is only as good as the quality of that water. Recreational purposes are also highly valued for various rivers and reservoirs throughout both the SWP and CVP in the western states.

The CVP is approximately 400 miles long with a complex network of dams, reservoirs, canals and power plants, while the SWP is a multi-purpose water storage and delivery system extending approximately 700 miles along California with a similar network of facilities.

The DEIS process started a decade or so ago. In August 2016, the USBR and DWR began to develop a new operations plan and, working with other federal fisheries and wildlife agencies, USBR and DWR requested reinitiation of consultation under the Endangered Species Act. As federal administrations have changed a couple times since then, so too did some requirements or mandates relating the DEIS process. Specifically in October 2019, biological opinions were issued and have been challenged, for allegedly lacking safeguards for protected species and habitat in the Delta, though other water users and environmental groups can cite to other benefits of these biological opinions for fish, wildlife, and habitat, in the Delta and/or elsewhere. New Biological Opinions are expected later this year once USBR selects an alternative. The DEIS itself is a response to review of the 2019 biological opinions.

The Environmental Impact Statement

The DEIS is part of the environmental compliance process involving various federal, state, and local governmental agencies, as well as tribal governments, private interests, and environmental groups. The DEIS is mandated by the National Environmental Policy Act of 1969 (NEPA) to analyze potential modifications to the LTO of the CVP and SWP. The DEIS creates a "Proposed Action" for continued operations so as to meet legal requirements under federal and state laws, and contractual obligations.

The DEIS includes five alternatives that provide a range of options for the LTO, including a no-action alternative. These alternatives establish different objectives for storage, release, and diversion of water that would lead to different downstream flow, water supply, and power generation impacts, further varying on the water-year type and season of year. One such alternative involves "risk-informed operations," which seeks to identify and implement actions incorporating new science for real-time conditions.

The DEIS is available for a 45-day public comment period with September 9, 2024, set by USBR as the closing period. Six public meetings were scheduled to provide an overview of the DEIS and to elicit public comments.

Comments include concerns from irrigation (agricultural) and municipal interests with water rights and/or contractual rights to water that the DEIS's alternatives provides less water in critically dry years as water is diverted for instream uses and to protect cold water resources as some reservoirs, namely Shasta Reservoir of the CVP system in the far northern reaches of California. Conversely, environmental interest groups push hard for better and more strict protections.

Conclusions and Implications

As the name of the DEIS suggests, the DEIS has long-term implications by how operations are actually done as singular systems and jointly since the SWP and CVP are intertwined to move massive amounts of water throughout the state of California ranging from needs of human survival in households, growth of crops that fuel people (and the economy), as well as the natural environment for this and future generations. Each of those components is important and challenging enough to balance now much less forecasting each of those and collectively toward the future's horizon. Accordingly, the DEIS bears much significance to California's water supplies and operations.

(Wes Miliband)

SAN FRANCISCO BAY-DELTA POPULATION OF LONGFIN SMELT LISTED AS ENDANGERED UNDER THE FEDERAL ENDANGERED SPECIES ACT

On July 30, 2024, the U.S. Fish and Wildlife Service (USFWS) published its final rule adding the San Francisco Bay-Delta distinct population segment (DPS) of longfin smelt (*Spirinchus thaleichthys*) (hereafter, Bay-Delta longfin smelt) to the List of Endangered and Threatened Wildlife under the federal Endangered Species Act (ESA).

Background

The longfin smelt is a small fish that lives in a variety of habitats along the Pacific coast of the United States (*e.g.*, nearshore waters, estuaries, and lower portions of freshwater streams). Although longfin smelt are found in waters throughout the west coast, from California to Alaska, the specific DPS identified for ESA listing occupies California's San Francisco Estuary and Sacramento/San Joaquin Delta (Bay-Delta) as well as areas of the Pacific Ocean out to the Farallon Islands. The Bay-Delta longfin smelt's status under the ESA has long been controversial, with environmental groups advocating for protection of the fish since the 1990s. Most recently, San Francisco Baykeeper, along with other environmental organizations, filed suit against UFSWS in 2024 seeking to compel the agency to meet required deadlines for listing the Bay-Delta longfin smelt.

The Decision to List

Citing negative impacts from habitat alteration due to reduced freshwater flows and impacts associated with climate-change conditions, which include changes to hydrology associated with reduced freshwater flows, increasing water temperatures, predation, and reduced food sources, among other things, USFWS determined the Bay-Delta longfin smelt meet the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) under the ESA. Specifically, the ongoing reductions and alterations in freshwater flows into the Bay-Delta estuary greatly impact the physical and ecological processes that are critical to the Bay-Delta longfin smelt spawning and larval rearing habitat. Abundance and density of the species throughout the area have "substantially declined" such that USFWS determined, using the best scientific and commercial information available, that the DPS is in danger of extinction throughout all of its range.

Accordingly, and in conjunction with the primary purpose of the ESA—to restore listed species to a point where they are "secure, self-sustaining, and functioning components" of their ecosystems—recovery plans for the for the Bay-Delta longfin smelt will be made available on USFWS's website (https://www.fws.gov/program/endangered-species) as they are completed. Funding for recovery actions is also available from a variety of federal, state, academic and nongovernmental sources. Information on USFWS grant programs can be found at: https://www.fws.gov/service/financial-assistance.

Critical Habitat

USFWS is currently in the process of developing a proposed critical habitat designation for the Bay-Delta longfin smelt and plans to publish a proposed critical habitat rule in the near future. With the listing of the Bay-Delta longfin smelt, the ESA's many protections will extend to the species. It will be illegal for anyone to "take" the fish—*e.g.*, harm, harass, or kill—even if such take is incidental to an otherwise legal activity. Examples of activities that are considered likely to result in ESA violations are: (1) handling or collecting individual fish; (2) destruction or alteration of the Bay-Delta longfin smelt's habitat; (3) unauthorized diversion of surface flows in the Bay-Delta; (4) introduction of harmful pollutants to the Bay-Delta; and/or (5) introduction of nonnative species that compete with or prey on the fish.

Conclusion and Implications

Anyone wishing to proceed with a legal activity that may take the fish will be required to obtain an incidental take permit under the federal ESA. The effective date for the final rule is August 29, 2024. For more information, see: https://www.fws.gov/press-release/2024-07/us-fish-and-wildlife-service-lists-bay-delta-longfin-smelt-endangered The federal register listing is available here: https://www.federalregister.gov/documents/2024/07/30/2024-16380/endangered-and-threatened-wildlife-and-plants-endangered-species-status-for-the-san-francisco
(Dustin Peterson, Megan Somogyi)

STATE WATER BOARD ANNOUNCES FEBRUARY 2025 HEARING TO DETERMINE WHETHER TO PLACE KERN COUNTY GROUNDWATER SUBBASIN ON PROBATIONARY STATUS

On July 25, the State Water Resources Control Board gave notice that it will conduct a probationary hearing on February 20, 2025, in order to determine whether to designate the Kern County Subbasin as "probationary" under the Sustainable Groundwater Management Act. (*See: Water Board to Hold Probationary Hearing for Kern County Subbasin Under Sustainable Groundwater Management Act*, California Water Boards, https://www.waterboards.ca.gov/press_room/press_releases/2024/pr20240725-kern-county-subbasin.pdf (last accessed Aug. 23, 2024).)

Background

The Sustainable Groundwater Management Act (SGMA) requires local groundwater sustainability agencies to submit and maintain compliance with groundwater sustainability plans. All groundwater supplies subject to SGMA's sustainability plan requirement must be sustainably managed by 2024. To ensure agencies meet this obligation, SGMA authorizes the State Water Resources Control Board (State Water Board), after a noticed hearing, to designate any medium- or high-priority basin as "probationary." A probationary designation requires the groundwater sustainability agencies overseeing the basin in question to remedy any identified deficiency within 180 days, or else the Board may develop and impose an interim plan for the basin's management. In order to designate a basin as having a "probationary" status, the State Water Board must make certain findings; as of January 1, 2025, the board must find:

- A medium- or high-priority basin is subject to a groundwater sustainability plan that is inadequate or is not being implemented in a manner that will likely achieve the stated sustainability goal; and

- The basin is in a condition where groundwater extractions result in significant depletions of interconnected surface waters.

To make these findings, the Department of Water Resources (Department) and the State Water Board may rely on the Department's periodic assessments, though the Board may request additional assessments. Once the State Water Board makes its determination, it must post it to its website and provide 30 days' time for public comment. Any designation as a probationary basin requires the State Water Board to identify the specific deficiencies underlying its conclusion and the potential actions to address those deficiencies.

The Kern County Subbasin (Basin) is one such high-priority groundwater basin. In 2022, the Department referred the Basin for state intervention, deeming its basin plan "inadequate."

Engaging in Fact-Finding

By issuing its July notice of hearing, the State Water Board signaled its intent to engage in fact-finding to determine whether the Basin: (1) is subject to an inadequate groundwater sustainability plan and/or the plan is not being implemented in a way that is likely to achieve its sustainability goal; and (2) is in such a condition where continued groundwater extractions will result in depletions of interconnected surface waters. The State Water Board has already issued a July 2024 Draft Staff Report setting forth its preliminary conclusions as to the deficiencies in the Basin's groundwater sustainability plan. The July 25 notice highlights two key perceived deficiencies justifying the hearing: (1) the current groundwater sustainability plans submitted by the agencies in 2022 "do not rely on the same data and methodologies or monitoring objectives, effectively preventing functional co-management of the basin"; and (2) "[t]he plans … use low projected groundwater level thresholds that could result in groundwater levels declining below historic lows without triggering any management actions."

In the event the Basin is placed on probation, "most groundwater pumpers could be required to report their groundwater usage and pay state fees" no later than three months after the designation. Basin's groundwater sustainability agencies would then be required to prepare sustainability plans that meet the State Water Board's standards within one year.

Conclusion and Implications

The July 25 notice of public hearing triggered a 60-day public comment period, which will end on September 24, 2024. The State Water Board will conduct workshops on August 26 and August 29, detailing how the Basin's probationary hearing process will take place.

If the State Water Board concludes at its February 2025 hearing that the local groundwater sustainability agencies' plans for the Basin are deficient, or improperly implemented, such that interconnected surface waters could be impacted, it will likely put the Basin on "probationary" status. This will trigger statutory deadlines to submit revised, compliant plans, and if the local agencies fail to do so, the state will likely get involved in preparing such plans on their behalf. Local groundwater pumpers could be subject to fees as soon as 90 days after the designation and may be subject to increased oversight in the form of state reporting obligations. The Notice of Hearing is available at: https://www.waterboards.ca.gov/press_room/press_releases/2024/pr20240725-kern-county-subbasin.pdf (Miles Krieger, Steve Anderson)

STATE WATER BOARD ADOPTS WATER CONSERVATION REGULATIONS FOR URBAN RETAIL WATER SUPPLIERS

On July 3, 2024, the California State Water Resources Control Board (State Water Board) adopted water use efficiency regulations for urban retail water suppliers under the statewide *Making Conservation a California Way of Life* framework. Starting January 1, 2025, the approximately 400 suppliers that supply water to 95 percent of Californians will be subject to annual urban water use objectives and conservation goals that the State Water Board estimates will achieve a savings of 500,000 acre-feet of water per year by 2040.

Background

A 2016 executive order by former Governor Brown (E.O. B-37-16) and ensuing 2017 report by the Department of Water Resources (DWR) and State Water Board introduced the *Making Conservation a California Way of Life* regulatory framework (2017 Framework). The 2017 Framework identified legislative and regulatory actions needed to enhance water conservation in the state, centered around four primary goals: (1) use water more wisely; (2) eliminate water waste; (3) strengthen local drought resilience; and (4) improve agricultural water use efficiency and drought planning.

The California Legislature passed Assembly Bill 1668 (Friedman) and Senate Bill 606 (Hertzberg) in 2018, which directed DWR and the State Water Board to conduct water conservation studies and empowered the State Water Board to develop and implement long-term standards for the efficient use of commercial, industrial, and institutional water, consistent with the 2017 Framework. In 2022, the Legislature established residential indoor water use standards with Senate Bill 1157 (Hertzberg). The State Water Board issued a notice of proposed rulemaking for urban retail water suppliers on August 18, 2023, seeking public comment on its proposed objectives. An urban retail water supplier is:

> . . .a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes. (Wat. Code, § 10608.12(af).)

While the regulations targeted urban retail water suppliers and not the residents and businesses they serve, some public commenters raised concerns over the indirect cost implications for suppliers and customers, particularly inland water suppliers and low-income communities. In January 2024, the Legislative Analyst's Office reviewed the first draft of the regulations and issued a report finding that "some of the proposed requirements are overly complicated and that some may be unrealistic for suppliers to achieve." (Legislative Analyst's Office, "Assessing Early Implementation of Urban Water Use Efficiency Requirements," at p. 33 (Jan. 4, 2024).) The report recommended that the Legislature intervene to relax the more stringent conservation goals and compliance deadlines.

From March to July of 2024, the State Water Board issued five additional notices of revised regulations and public comment periods before approving a final version of the regulations on July 3, 2024.

The Adopted Regulations

Under the adopted regulations, every urban retail water supplier will be required to calculate its urban water use objective, a supplier-specific water budget that is the sum of water use efficiency budgets for component water uses, such as residential indoor water use, residential outdoor water use, real water loss, and commercial, industrial, and institutional (CII) landscapes with dedicated irrigation meters by January 1, 2025. (Cal. Code Regs., tit. 23, § 966 [to be codified on Jan. 1, 2025].) The efficiency standards that comprise an urban water use objective will vary for each urban retail water supplier, as different local service characteristics such as population, climate, and landscape area will factor into the total water use objective. Importantly, to comply with the regulations, urban retail water suppliers will be required to meet their overall water use objectives, not necessarily each individual water use budget. Starting January 1, 2027, urban retail water suppliers will be required to annually demonstrate compliance with their urban water use objectives. (*Id.* at subd. (g).)

Thresholds for CII Performance Measures

Section 973 of the regulations sets thresholds for CII performance measures, incorporating revisions to allow suppliers more latitude to demonstrate increased efficiency and reduced water use among CII customers. After identifying all CII water users associated with large landscapes over 0.5 acres by June 30, 2027, urban retail water suppliers will be required to install dedicated irrigation meters or employ in-lieu technologies such as advanced metering infrastructure for at least 95 percent of those water users by June 30, 2040. (*Ibid.*)

Implementation Regulations

In its adopting resolution, the State Water Board directs staff to implement the regulations in a manner that protects water resources while considering affordability and equity concerns. The final regulations provide for alternative compliance pathways and variances to make compliance more achievable for the urban retail water suppliers facing the biggest overhauls.

Conclusion and Implications

The regulations mark a significant milestone in the push toward *Making Conservation a California Way of Life*. January 1, 2025, will be the first time urban water retailers must comply with individualized water budgets rather than general statewide water reduction mandates. Implementation of the regulations will affect each urban water retailer differently, as some will have to invest in significant infrastructure changes to achieve the prescribed standards. In contrast, other suppliers that have already modernized their water use data and conservation standards may not have to make many adjustments. The final regulations and information about the *Making Conservation a California Way of Life* framework are available at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/water_efficiency_legislation.html#reg-docs.

(Austin C. Cho, Jake R. Voorhees)

SITES RESERVOIR WATER RIGHT HEARING IS UNDERWAY

The Sites Project Authority, a Joint Powers Authority (Authority), is undergoing a public hearing at the State Water Resources Control Board (State Water Board) to acquire a water right for the proposed new reservoir known as Sites Reservoir. The Authority is composed of local government entities and irrigation districts. This water right, if approved, seeks to construct and operate this new reservoir as a water project to divert, store, and release water. The project would involve diversion and storage from the Sacramento River and two of its tributaries. This water is intended for use in northern and southern California for multiple uses including municipal, agricultural, and fish and wildlife protection. The Sites Reservoir would be located near the town of Maxwell, about 70 miles north of Sacramento and approximately 15 miles west of the Sacramento River.

The State Water Board received on May 11, 2022 a petition from Sites Project Authority for a combination of assignments and applications collectively for the construction and operation of Sites Reservoir. Within the petition is Water Right Application 25517X01 in which the Authority seeks to divert up to 1,500,000 acre-feet per year (afy) between September 1 to June 14 of each year. In addition to the beneficial uses identified above are additional purposes for the water, including power, aquaculture, frost protection, stockwatering, and recreation.

Geographically, the places of use for the Sites Reservoir water is over 32,600,000 acres from Glenn and Colusa counties in the north through the Central Valley and parts of the Central Coast down to San Diego and Imperial counties.

Proceedings at the State Water Board

On June 2, 2023, the State Water Board issued a public notice regarding the Authority's water right application. Following the State Water Board's procedures in these matters was a protest period, which ended on August 31, 2023. Various protests were received, thus pursuant to procedures the parties are required to attempt good-faith efforts to resolve the protests. With protests being unresolved as of the deadline set for February 28, 2024, the matter was assigned from the State Water Board to the Administrative Hearings Office (AHO) so that an evidentiary hearing could proceed to resolve disputed issues. The hearing is legally necessary to address factual disputes and for taking action to release from priority or assign a state-filed application.

The AHO set various deadlines leading up to the hearing and for the hearing itself. July and August were for case-in-chief, with up to nine days set in September and October for rebuttal evidence and hearing days. Closing briefs are due November 12, 2024. Following the hearing, the AHO makes recommendations for the State Water Board to consider adopting, in whole or in part.

Issues at Hand

The specific applications before the AHO for this hearing are a partial assignment of State-Filed Application 25517 (with a face value of 3,164,000 afy and a priority date of September 30, 1977) and the accompanying Applications 25517X01. The Authority has proposed to subordinate its right to divert under any such permit to some but not all of the existing, permitted rights that otherwise would be junior to the permit. The State Water Board, following conclusion of the hearing before the AHO, may approve the Authority's petitions for release from priority of and petition for assignment of state-filed applications only if the releases and the assignment are for a purpose not in conflict with any general or coordinated plans for development, utilization, or conservation of water resources, including the California Water Plan.

Also relevant to the Authority's petitions are water quality control plans for imposing reasonable protections of beneficial uses of water, including municipals, industrial, agricultural and fish and wildlife uses. Other significant legal and regulatory issues exist such as Area of Origin protections and compliance with the California Environmental Quality Act.

Specific hearing issues as enumerated by the AHO include: (1) whether the State Water Board should approve partial assignment of state-filed Application 22517; (2) should the State Water Board approve the release from priority of various state-filed Applications in favor of Application 25517X01; (3) would a release from priority of the state-filed applications deprive counties in which the water originates of water necessary for the counties' development; and

(4) is there a feasible alternative or are there feasible mitigation measures within the State Water Board's authority that would substantially lessen or avoid any significant effect of the project? Numerous "sub-issues" relate to these four larger issues.

Conclusion and Implications

The Sites Reservoir project is significant for various reasons traversing municipal, agricultural, and environmental interests. These reasons include: water storage; flood management; environmental benefits and costs; agricultural support; and drought resilience. Thus, the outcome of this hearing and ultimately the State Water Board's actions will have lasting impacts on California's water future for decades to come. (Wes Miliband)

CALIFORNIA PUBLIC UTILITIES COMMISSION TAGS THE DEPARTMENT OF WATER RESOURCES TO PROCURE UP TO 10.6 GIGAWATTS OF CLEAN ENERGY

On August 22, 2024, the California Public Utilities Commission (Commission) approved a decision making an initial need-determination under Assembly Bill (AB) 1373 to procure up to 10.6 gigawatts of capacity from eligible, emerging technology resources with delivery dates between June 1, 2031, and June 1, 2037. The decision states that the Commission will request the Department of Water Resources (DWR) to act as a centralized procurement entity on behalf of all load-serving entities (LSEs) within California and hold a series of competitive solicitations for 12+ hour and multi-day long-duration energy storage (LDES) and geothermal resources beginning in 2026, and for offshore wind resources starting in 2027. The Commission will make a formal request that DWR conduct centralized procurement within six months.

Background

AB 1373, passed and signed into law in 2023, directs the Commission to review all integrated resource plans (IRP) submitted by LSEs and determine if there is a need to procure eligible energy resources through a centralized mechanism. The Commission's IRP proceeding requires each LSE operating in California to submit a biennial plan that identifies the entity's strategy for electric generation contracts to meet its greenhouse gas reduction, reliability, and cost containment objectives. The Commission then aggregates all IRPs into a Preferred System Plan (PSP) portfolio to track the state's progress toward its emission reduction goals and identify a portfolio of resources needed to maintain a reliable electricity supply while cost-effectively integrating renewable energy.

To ensure that California can meet its long-term emission reduction targets, AB 1373 authorizes the Commission to request that DWR conduct centralized procurement of long lead time (LLT) resources, or generation that must be procured well in advance because of long delivery times, on behalf of all of LSEs under the Commission's IRP purview. AB 1373 does not obligate DWR to accept the responsibility of centralized procurement, nor does it require that DWR procure the maximum amount of resources identified in the Commission's initial need determination. However, if DWR does perform any centralized procurement of emerging technology resources, the Commission must then allocate the cost and benefits of any procurement amongst LSEs.

Commission Decision on Central Procurement

The decision's initial need determination of up to 10.6 GW of capacity is divided among three emerging technologies: (1) up to 7.6 GW of offshore wind resources; (2) up to 1 GW of geothermal; and (3) up to 1 GW of multi-day LDES and 1 GW of 12+ hour LDES. Each resource has tremendous energy potential but is not widely contracted for by LSEs and requires significant capital investment to reach commercialization.

The Commission's initial need determination of up to 7.6 GW of offshore wind resources represents the physical cap of the Morro Bay and Humboldt lease areas from a transmission perspective and signals the Commission's strong interest in prioritizing upfront investment in the buildout of offshore wind resources.

A need determination of up to 1 GW of geothermal was selected because geothermal generation produces little to no air emissions and allows operators to access a broader variety of thermal sources in diverse locations. The decision notes that lithium batteries with 8-hour dispatch capabilities and pumped storage hydropower widely procured by LSEs may not meet California's long-term energy needs as California increases the amount of intermittent resources on the electric grid. To address these concerns, the Commission identifies a need to procure up to 1 GW of 12+ hour LDES and up to 1 GW of multi-day LDES.

DWR as the Centralized Procurement Agency

The Commission intends to request that DWR act as the centralized procurement entity on behalf of all LSEs. As part of this request, the Commission will ask DWR to include LSE representatives in solicitation activities, seek input from community groups and Tribal Nations, and retain an expert to advise DWR staff on procurement decisions. The Commission envisions that DWR will begin preparation activities in 2024–2025 and conduct solicitation activities for LDES, geothermal, and offshore wind between early 2026 and late 2030. Although the Commission acknowledges that its proposed timeline may change, the resources referenced in the decision are targeted for delivery between June 1, 2035, and June 1, 2037.

If DWR does conduct centralized procurement, LSEs may not opt out and will share in the costs and benefits of DWR's procurement investments. While AB 1373 does not require publicly owned utilities (POU) to share in the costs of any centralized procurement, the Commission states that POUs may voluntarily opt-in to help drive the market transformation of emerging technologies that could help California reach its climate goals.

Conclusion and Implications

While the Department of Water Resources is technically able to decline the Commission's request to conduct central procurement of the identified resources, stakeholders expect that DWR will agree to assume central procurement responsibilities. Following the Commission's official request, DWR will begin the process of working with stakeholders and the Commission to design the solicitation framework and target dates. The Commission will continue to revisit the level of central procurement need in future IRP cycles, with the potential to increase the target amounts as the emerging technologies launch and the state's generation portfolio changes.
(Christopher Marelich, Megan Somogyi)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT AFFIRMS DENIAL OF CEQA CHALLENGE AGAINST PROSPECTIVE PURCHASER AGREEMENT AS IT WAS NOT A PROJECT

Liam Meyer v. Department of Water Resources, *Unpub.*, Case No. C097929 (3rd Dist. Jul. 30, 2024).

In an *unpublished* opinion filed on July 30, 2024, the Third District Court of Appeal affirmed the trial court's judgment to sustain the Department of Water Resources' (DWR) demurrer without leave to amend and denied appellant Meyer's motion for summary judgment against the Central Valley Flood Protection Board (Board) and DWR's enforcement action and judgment regarding Meyer's failure to take proper steps to cure erosion issues.

Factual and Procedural Background

The Notice of Violation

In mid-February 2017, the failure of the Oroville Dam spillway resulted in the sudden release of a large volume of water into the Sacramento River (hereafter the 2017 high water event). As a result, the riverbank located at the subject property in Sacramento (Property) experienced massive damage. In May 2017, MBK Engineers sent a letter on behalf of the previous owner to the Board requesting emergency authorization to conduct repairs at the Property because a significant portion of the Property fell into the adjacent Sacramento River and was exposed to continued erosion. In January 2018, Reclamation District 1000 informed the Property did not qualify for assistance, and in March 2018, the Board issued the previous owner a notice of violation (NOV) regarding several violations existing on the Property.

On May 28, 2019, appellant began discussions to purchase the Property and was provided a copy of the NOV subsequently, being informed that if he purchased the property, he would have to comply with the corrective actions in the NOV. Appellant purchased the Property in September 2019.

In October, appellant submitted to the Board a stabilization plan to address the NOV, but the Board informed appellant the stabilization plan did not comply with the corrective actions stated in the NOV, as it did not include the required design documents prepared by a California licensed civil engineer, nor a project schedule, and failed to address other violations noted in the NOV. The Board issued appellant a ceaseand desist order, which was upheld following a hearing in November 2019.

Enforcement Order and Complaint

On February 28, 2020, the Board issued an enforcement order against appellant for not remedying the violations as directed in the NOV and assessed civil penalties. The Board stayed the findings in the order to allow additional time to comply with the cease and desist order. If Meyer did not comply with the required corrective actions, the enforcement order would become effective on May 28, 2020. In August 2020, the Board obtained a civil judgment against appellant in an amount totaling $106,000.

Appellant filed a complaint in November 2020, and subsequently, appellant amended the complaint and filed a second amended complaint in pro per, alleging various causes of action against both the Board and DWR. The causes of action included: (1) request to stay enforcement of the Board's judgment under Code of Civil Procedure section 1094.5, subdivision (g); (2) request to remand the matter to an appropriate forum under section 1094.5; (3) request for a writ of mandate under section 1085 ordering DWR and the Board to cease their unlawful interpretation of the Water Code and continued enforcement action against appellant; (4) request for a writ of prohibition under sections 1102 and 1103 ordering DWR and the Board to cease their unlawful action by assessing penalties in excess of the statutory limit; (5) request for an alternative writ under sections 1087 and 1104 and order to show cause why the matter should not be stayed; (6) request for injunctive relief to restrain

DWR and the Board from enforcing related actions against appellant;6 (7) claiming all actions by DWR and the Board exceed statutory authority in the Water Code; (8) inverse condemnation; and (9) a denial of due process by failing to provide a fair hearing and that he is required to comply with "infeasible" demands.

DWR demurred to the second amended complaint arguing, inter alia, that appellant's attempt to obtain writ relief was time-barred and that DWR was not the appropriate party to sue because the Board was the agency involved in the actions that appellant challenged in the lawsuit (*i.e.*, actions regarding violations, enforcement, and judgment). Appellant moved for summary judgment. The trial court first noted that injunctive relief was a remedy and not a cause of action and sustained the demurrer on the sixth cause of action. The trial court further sustained DWR's demurrer to the rest of the causes of action of the complaint without leave to amend and denied appellant's motion for summary judgment.

Appellant filed a notice of appeal.

The Court of Appeal's Decision

The Third District Court of Appeal granted the Board's motion to dismiss the appeal against them, pursuant to *Angell v. Superior Court*, 73 Cal.App.4th 691, 698 (1999).

Because orders denying a motion for summary judgment are not appealable under Code of Civil Procedure section 904.1, the court limited its discussion to whether the trial court properly granted DWR's demurrer.

Statutory Overview

The court first visited relevant statutes to this case. Under the California Water Code, the Board has the authority to issue NOVs for encroachments into rivers and boundaries. (Wat. Code, §§ 8532, 8701.) When a party fails to respond to a NOV, the Board has the authority to issue a cease and desist order. (Wat. Code, § 8701.2.) When a person has failed to correct a violation as outlined in a cease and desist order, the Board must hold an enforcement hearing to consider the issuance of an enforcement order. (Wat. Code, § 8701.4.) If the Board issues an enforcement order against a person, that person may seek judicial review pursuant to Water Code section 8579, which provides that such review shall be by writ of mandate in accordance with Code of Civil Procedure section 1094.5, within 30 days after the decision or action becomes final. (Wat. Code, §§ 8701.4, subd. (e), 8579.)

In addition, upon an enforcement hearing and issuance of an enforcement order pursuant to Water Code section 8701.4, the Board may impose administrative penalties. (Wat. Code, § 8704.1, subd. (a).) Then, after the time for judicial review pursuant to Water Code section 8579 has passed, the board may apply to the clerk of the appropriate court in the county in which the administrative penalties were imposed for a judgment to collect the penalties assessed. (Wat. Code, § 8704.1, subd. (e).) The statutory provisions regarding the Board's remedies also provide that the:

> . . .remedies provided by this article are not exclusive of, but shall be concurrent with and in addition to, any other remedy, penalty, or sanction that may exist by law, civil or criminal... The action or proceeding may be commenced and maintained by the board in the name of the state. (Wat. Code, § 8704.4.)

Timeliness

The court then focused on whether appellant timely filed its writ relief sought under section 1094.5 and found that not to be the case. Pursuant to the statutory scheme described above, the relevant date for calculating the timeliness of writ relief under section 1094.5 was February 28, 2020, the date the enforcement order was adopted by the Board, thus making the Board's decision final. Appellant then had until March 29, 2020, 30 days after finalizing the enforcement order, to seek judicial review of that order. However, appellant did not initiate the instant suit until November 2020, over seven months beyond the statutory deadline.

The court noted that even if it construed the final date of the enforcement order to be May 28, 2020, the effective date of the enforcement order if appellant failed to comply, appellant still did not initiate judicial review within 30 days as required by Water Code section 8579. As a result, appellant's challenges to the validity of the enforcement order through section 1094.5 were time-barred.

The court rejected appellant's argument that the time limits in Water Code section 8579 did not apply

but rather set by *Knick v. Township of Scott*, 588 U.S. 180 (2019).

DWR Not the Responsible Agent

The court tackled the appellant's first five causes of action relating to writs, where each statute stated within required that the entity against whom the writ relief was sought was the one responsible for an administrative duty impacting the petitioner. The court decided that appellant's writ of mandate, whether it be under section 1094.5, section 1085, or section 1087, against DWR for the allegedly improper enforcement process was misplaced because DWR was not the responsible agency. Citing *Paterno v. State of California*, 113 Cal.App.4th 998 (2003), appellant argued that because the state, and DWR in particular, had a ministerial duty to maintain the Oroville Dam and the flood control system, the failure of the dam leading to the 2017 high water event placed the blame for the soil erosion squarely at their feet and any attempt to hold him responsible for those damages was subject to judicial intervention. However, the court found that *Paterno*, at best, could be helpful to appellant's inverse condemnation case but did not provide for the ability to pursue writ relief challenging subsequent enforcement actions initiated by a different agency.

The court found that it was undisputed that the agency involved in the NOV, cease and desist and enforcement orders, and the judgment against appellant was the Board. Because the Water Code assigned the enforcement responsibilities to the Board in the name of the state, the statutory obligation to conduct enforcement procedures belonged to the Board. Appellant could not factually establish that DWR made an administrative decision impacting appellant or otherwise had a legal obligation or ministerial duty to him subject to judicial review through the writ process.

For similar reasons, the court also concluded that the demurrer was properly sustained as to Meyer's seventh and ninth causes of action, where the causes of action alleged wrongdoing on both the Board and DWR. Since the Board was already dismissed and appellant could not state any basis for holding DWR responsible for the Board's actions, the court found these causes of action properly demurred and could not be cured of these defects in these causes of action by amendment with any reasonable possibility.

Inverse Condemnation

In the eighth cause of action, appellant alleged that DWR, responsible for maintaining the Oroville Dam and nearby levees, was liable for the damage caused by the 2017 high water event, resulting in "specifically preventing the best use of the land" and constituting a compensable taking under the theory of inverse condemnation. He also alleged that the subsequent judgment lien entered against him constitutes a compensable taking. DWR contended that appellant had no interest in the Property when it was damaged and, thus, had no right to recover in inverse condemnation. DWR also contended that even if he could recover under that theory, he filed the lawsuit after the expiration of the statute of limitations. The court agreed with DWR.

First, the court noted that to state an inverse condemnation cause of action, the property owner must show there was an invasion or appropriation (a 'taking' or 'damaging') of some valuable property right that the property owner possesses by a public entity and the invasion or appropriation directly and specially affected the property owner to his injury. However, appellant did not allege that he had an interest in the Property at the time it was damaged back in 2017. For this reason, the court noted that appellant could not show he could cure this defect by amendment. As a result, even *if* DWR could be held liable for the damage sustained from the 2017 high water event as appellant alleged pursuant to *Paterno*, appellant failed to state a cause of action regarding his entitlement to compensation.

To the extent appellant claimed that the enforcement action and judgment against him constituted a different form of inverse condemnation, the court decided that he failed to support this claim with a coherent, reasoned argument and thus forfeited it.

Lastly, appellant claimed that a previous lawsuit he filed the day before the enforcement order was issued effectively rendered the enforcement order void or tolled the statute of limitations for the inverse condemnation claim because that deprived the administrative court of jurisdiction to enter the enforcement order. The court found this claim unsupported by any legal authority and, thus, forfeited.

Conclusion and Implications

In sum, the court concluded that appellant did not state a cause of action for inverse condemnation or identify any reasonable possibility this defect could be cured by amendment, affirming the trial court's order sustaining DWR's demurrer.

Aside from the lesson that one should always be careful when buying properties to not get involved in unnecessary, additional costs, this case highlights the fundamentals, that one cannot be too late filing its claim and cannot simply raise issues against an agency that had seemingly no direct involvement in one's alleged damages. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C097929.PDF
(David Song)

CALIFORNIA WATER™
LAW & POLICY Reporter

California Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108