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WESTERN WATER NEWS

U.S. ENVIRONMENTAL PROTECTION AGENCY ANNOUNCES $10M GRANT TO SUPPORT WASTEWATER CONVERSION IN NEVADA

In late October, the U.S. Environmental Protection Agency (EPA) announced $10 million in funding to support the septic-to-sewer program established by the Southern Nevada Water Authority (SNWA). The funding will help southern Nevada improve its water recycling program and maximize the available supply of Colorado River water to Clark County customers.

Background

Faced with over 20 years of drought conditions and lower-than-midcentury flows on the Colorado River, SNWA has implemented a number of programs to curb consumption and recycle water. Among these programs are rebates for turf-removal, schedules for lawn-watering, nationally-leading infrastructure for water recycling, and reuse requirements for large-scale landscape irrigation. One of its newest programs, focusing on converting septic systems to sewer service, now includes full funding for select customers thanks to a grant from the EPA.

Return-Flow Credits

Under the Colorado River Compact, Nevada's consumptive use allocation is just 300,000 acre feet annually (afa). Continuously declining water levels on Lake Mead triggers cuts to Nevada's share under the Drought Contingency Plan, progressively reducing the state's allocation to as little as 270,000 afa should the lake level drop below 1,025 feet. SNWA leans heavily on recycling and return-flow credits—the principle under which water returned to the Colorado River has not been consumptively used and therefore remains available for consumption—to supply the needs of the Las Vegas area, allowing it to draw more than its nominal allocation from the river.

AB 220 and Return-Flow Deficits

Pressures on water resources in the Las Vegas Valley led the Nevada legislature to pass Assembly Bill 220 (AB 220) in 2023. Under the law, existing domestic well owners in Clark County, many of whom were previously operating on temporary water rights, are required to establish connection to municipal water supplies if there is a public utility servicing the area and a domestic main is within 1250 feet of their property. The new requirements posed a problem for southern Nevada water utilities, however, in that in certain areas customers of the municipal supply are largely still utilizing septic systems and in other areas new connections are too far from the municipal sewer system and must rely on septic systems. This means that while demand on the Colorado River supply would increase, wastewater from the new customers would in many cases not be available for return-flow offset and for those existing systems, the Colorado River Supply is still lost.

Currently, there are about 14,000 homes in Clark County which still rely on septic systems, roughly half of which are connected to the municipal water supply. And while the use of septic systems returns water to the aquifer and ultimately benefits the hydrographic system as a whole, the 2,000 afa discharged to the water table by these septic-reliant customers fails to yield an allocation benefit to SNWA in the form of return-flow credits.

Partially Funded Septic-to-Sewer Conversion

In July of last year, SNWA commissioned a voluntary, partially funded septic-to-sewer conversion program authorized by AB 220. Eligible customers can receive a reimbursement in the amount of 85 percent of their conversion expenses (including costs for permitting, design, construction, and septic abandonment) up to a maximum of $40,000. To date, 67 sewer conversions have been completed, nine are underway, and another 26 are in the planning and approval stage. Funding for the program came in the form of grants totaling $1.7 million from the Bureau of Reclamation, $3 million from EPA, and $5 million from the Nevada Department of Conservation and Natural Resources.

Fully Funded Septic-to-Sewer Conversion

SNWA proposed to launch a fully funded conversion program in early 2025, using state or federal grants to fund construction at no cost to select customers. Priority would be based on available funds, timing, proximity to sewer lines (especially properties within 50 feet of existing infrastructure), and groundwater quality. SNWA already identified one of its first targets for priority, an 82-unit mobile home park in northwest Las Vegas.

On October 23, SNWA announced EPA's commitment of $10 million in a grant supporting the fully funded conversion program that will connect homeowners to sewer and gradually resolve the return-flow credit deficit. Ultimately, this solution serves the best of both worlds, reducing stress on the water table from wells while ensuring that any newly-supplied municipal water is also available for recycling and return-flow credit. Together, these approaches keep southern Nevada's consumptive use relatively steady.

Conclusion and Implications

The EPA's $10 million grant for the fully funded septic-to-sewer conversion program will help SNWA tackle the challenge of fully consumptive municipal water customers, a stress on Nevada's limited Colorado River allocation. The fully funded program allows SNWA to acquire return flows from customers who would otherwise be unable to afford, or insufficiently incentivized to participate in, the conversion program. The program has the added benefit of reducing stress on the groundwater supply in the Las Vegas Valley. As the Colorado River basin continues to face lower flows than the total available allocation, drought contingency measures (including any new restrictions effective in 2026), the possibility of further aridification, and a growing population, Southern Nevada benefits from every drop it can reuse or recycle. (Evan Klouse, Micheline Nadeau Fairbank)

CALIFORNIA'S IMPERIAL IRRIGATION DISTRICT AND U.S. BUREAU OF RECLAMATION EXECUTE SIGNIFICANT CONSERVATION AGREEMENT FOR COLORADO RIVER WATER

The Imperial Irrigation District (IID) signed a significant conservation agreement with the U.S. Bureau of Reclamation (USBR) to conserve up to 700,000 acre-feet of water for the Colorado River and increase Lake Mead's elevation by ten to twelve feet.

Background

The Colorado River presents a long and storied history, with historical events occurring on a regular basis due to its geographical significance stretching across many of the western states, coupled with supply shortages and competing interests.

This agreement unlocks $250 million in federal funds for Salton Sea restoration, focusing on expanding the State of California's Species Conservation Habitat. IID's General Manager highlighted the sacrifices and sustainable farming practices adopted by the Imperial Valley farming community as a model for future water conservation efforts. The agreement involved multiple stakeholders, including the Bard Water District, the Metropolitan Water District of Southern California, and Arizona's Gila River Indian Community, emphasizing the importance of cooperation for the Colorado River system's stability.

The Agreement

The agreement has several significant impacts on local communities: (1) water conservation by conserving up to 700,000 acre-feet of water, the agreement helps ensure a more sustainable water supply for the region, which is crucial for both agricultural and residential needs; (2) economic benefits with the $250 million federal investment for Salton Sea restoration can create jobs and stimulate the local economy through various conservation and infrastructure projects; (3) environmental improvements with restoration efforts at the Salton Sea can improve air quality and habitat conditions, benefiting both wildlife and human health; and (4) community outreach efforts by involving multiple stakeholders, which highlights the importance of community collaboration in addressing water scarcity and environmental challenges, fostering a sense of shared responsibility and cooperation.

Overall, this agreement aims to balance environmental sustainability with economic and social benefits for the local communities.

Local farmers can adapt to water conservation measures through several effective strategies: (1) drip irrigation methods for delivering water directly to the plant roots, significantly reducing water loss due to evaporation, potentially saving up to 80 percent more water compared to some other methods but crop types are a critical factor to ensuring successful growing and harvesting cycles; (2) capturing and storing water by farmers building ponds to capture and store rainfall to use throughout the year, in turn benefitting local wildlife habitats with a reliable supply; (3) irrigation scheduling by carefully monitoring weather forecasts, soil moisture, and plant needs for increasing irrigation efficiency to avoid over- or under-watering; (4) utilizing drought-tolerant crops that are naturally drought-tolerant or have been bred for low water needs can help farmers maintain productivity with less water, such as certain varieties of olives, beans and tomatoes; (5) dry farming, which is a technique that relies on soil moisture rather than irrigation, using special tilling practices to retain water in the soil (dry farming is reported to potentially result in lower yields or quantities but with enhanced flavors for certain crops, such as tomatoes and wine grapes; and (6) rotational grazing by moving livestock between fields to improving pasture regrowth and the fields' water absorption, making the fields more drought resistant.

Collectively, these practices not only help conserve water but also contribute to sustainable farming and environmental health.

Challenges Ahead

Challenges do exist, however. Initially is the investment to implement new irrigation systems, such as drip irrigation, or building water storage facilities can require significant upfront costs. Then a transition period to shift to drought-tolerant crops or new farming techniques may involve a learning curve and temporary reduction in yields. On a more long-term basis are the maintenance costs for advanced irrigation systems and water management practices may require ongoing maintenance and monitoring, adding to operational expenses.

Subject to varying perspectives, benefits are wide ranging and far reaching, including: (1) long-term savings with efficient water use can reduce water bills and lower the costs associated with water scarcity, such as crop losses during droughts; (2) increased resilience through sustainable practices can make farms more resilient to climate change and water shortages, ensuring more stable production and income over time; (3) market opportunities due to growing consumer demand for sustainably produced goods, which can open up new markets and potentially allow farmers to charge premium prices for their products; and (4) government incentives for eligible farmers for subsidies, grants, or tax breaks to implement water conservation measures, helping to offset initial costs.

Conclusion and Implications

While there are upfront costs and adjustments required, the long-term economic benefits and increased resilience can make these changes worthwhile for various categories of water users and ultimately for helping to better ensure long-term sustainability and availability of water supplies.
(Wes Miliband)

REGULATORY DEVELOPMENTS

NEW EPA RULE REQUIRES WATER SYSTEMS TO REPLACE LEAD WATER SERVICE LINES WITHIN TEN YEARS

On October 8, 2024, the United States Environmental Protection Agency (EPA) finalized its Lead and Copper Rule Improvements (LCRI), which will require community water systems and non-transient non-community water systems across the country to replace an estimated 9.2 million lead service lines (LSL) that connect water mains to homes over the next ten years. The EPA estimates that the LCRI will help protect millions of Americans from the harmful effects of lead exposure in drinking water such as lower infant birthweights, reduced IQ points, and premature deaths from heart disease.

Background

The LCRI is the latest federal action to address lead contamination in drinking water. Following the enactment of the Safe Drinking Water Act (SDWA) in 1974, Congress passed amendments in 1986, which prohibited the use of lead pipe, flux, and solder in new public water systems and buildings. Two years later, the Lead Contamination Control Act of 1988 required states to create remedial action programs for removing lead from school drinking water. EPA's 1991 Lead and Copper Rule (1991 Rule) established action thresholds for lead and copper in drinking water at customer taps that, if met, require water systems to control corrosion and inform the public about steps they can take to protect their health. In 2011, the Reduction of Lead in Drinking Water Act banned the use or sale of water pipes that do not meet the SDWA's "lead-free" definition. The 2016 Water Infrastructure Improvements for the Nation Act established grant programs to support drinking water infrastructure improvements in small, underserved, and disadvantaged communities. EPA's 2021 Lead and Copper Rule Revisions (2021 Rule) adopted more stringent public notification requirements and required water systems to take inventory of all service lines under their control by October 16, 2024.

Lead and Copper Improvements Final Rule

The LCRI issued on October 8, 2024, is scheduled to be published in the *Federal Register* on October 30, 2024, and to take effect on December 29, 2024. It adds to prior lead reduction actions imposed by the 2021 and the 1991 Rules. Specifically, the LCRI is focused on five areas: (1) replacing LSLs and certain galvanized service line pipes (GRR) within ten years; (2) locating legacy lead pipes; (3) improving tap sampling practices; (4) lowering the lead action level to 10 parts per billion; and (5) strengthening protections to reduce exposure and improving public outreach.

The EPA states that LSLs and GRR service lines are the most significant sources of lead in drinking water. Meeting the ten-year removal deadline will be a sizable undertaking—LSLs were commonly used in water distribution systems and plumbing systems before their ban in 1986. Subject to a limited deadline extension for water systems with high proportions of LSLs, water systems must replace all LSLs and GRR service lines under their control within ten years, regardless of the lead levels occurring in sampled drinking water. If a property owner's consent is required to access the service line, water systems must make reasonable efforts to engage property owners about a full replacement.

Beyond the directive to remove LSLs and GRR service pipes, water systems must make specific process improvements and comply with heightened public outreach requirements. Building on the 2021 Rule's requirement that water systems create and update an inventory of all service lines under their control, the LCRI requires systems to annually update and include relevant information in their inventories, such as associated street addresses and service line connector materials. Those inventories will be made publicly available so customers can take action to reduce lead exposure. The LCRI also strengthens prior protocols by incorporating the latest tap sampling practices that are being deployed at local and state levels. Before conducting tap sampling, water systems must provide public education materials to their customers on the lead exposure risks.

States are tasked with setting optimal water quality parameters to optimize or re-optimize corrosion

control treatments for medium water systems serving between 10,000 and 50,000 customers. Although medium water systems must meet the state's parameters to demonstrate that they maintain optimal corrosion control, they may defer implementing the new measures if they can replace all LSLs and GRR service lines within a shorter span of five years. The LCRI subjects small community water systems and non-transient non-community water systems to less rigorous standards than their larger counterparts, while lowering the eligibility threshold from 10,000 customers to 3,300. Eligible small community systems and non-community non-transient systems that take advantage of compliance flexibility are still subject to lower action levels and improved public education and sampling requirements.

Funding Available to Implement the LCRI

In conjunction with the LCRI, the EPA announced that $2.6 billion in newly available drinking water infrastructure funding through the Bipartisan Infrastructure Law will flow through the Drinking Water State Revolving Fund to support LSL replacement and water system safety projects. The announcement adds to the $26.7 billion already authorized under the Bipartisan Infrastructure Law that may be used for lead pipe replacement. Of that $26.7 billion, $15 billion is expressly set aside for lead service line inventories and replacement, while the remaining $11.7 billion can support both lead pipe removal and drinking water projects.

Conclusion and Implications

The EPA has stated that there is no safe level of lead in drinking water and the set of actions incumbent on water systems in the LCRI is evidence of that policy. Once the rule becomes effective on December 29, 2024, water systems will have ten years to remove all LSLs and GRR service lines under their control. Going forward, it will be important to monitor how water systems implement these requirements and whether there is continued political and financial support for the LCRI given the long-term nature of the program. The final LCRI and supporting documents are available at: https://www.epa.gov/dwreginfo/lead-and-copper-rule.

(Chris Marelich, Austin Cho)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

Oct. 31, 2024—The U.S. Environmental Protection Agency (EPA) has announced the issuance of a draft permit for stormwater discharges to the Mystic, Charles, and Neponset River watersheds. The draft permit, issued under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program, addresses stormwater runoff from properties in the watersheds that are contributing to water quality impairment.

The Clean Water Act gives EPA the authority to issue permits for certain stormwater discharges that contribute to water quality problems. This important regulatory step is expected to dramatically improve water quality throughout the watersheds. Secondary benefits include reduced localized flooding through stormwater controls and increased recreational opportunities through healthier river systems in historically disadvantaged neighborhoods.

The permit will help limit pollutants such as bacteria, nutrients, and sediments, which have been identified as major contributors to water quality issues in the Mystic, Charles, and Neponset Rivers.

Municipal governments in Charles, Mystic and Neponset River watershed cities and towns are already subject to EPA permits that require them to take steps to reduce pollution in stormwater, and they have made significant investments to do so. However, much of this pollution comes directly from stormwater originating from certain commercial, industrial, and institutional sources – such as office parks, industrial parks, shopping centers, private colleges and universities, and hospitals – which are not currently required to be covered by an existing permit.

This draft permit creates greater accountability and places responsibility for cleaning up pollution squarely on those responsible – reducing the burden faced by cities and towns throughout these watersheds.

Large impervious areas such as parking lots and roofs are one of the last major unregulated sources of water pollution, and a chief culprit in dramatic algal blooms – including toxic cyanobacteria – as well as high bacteria levels that have plagued the Charles, Mystic, and Neponset in recent years. Extensive impervious cover also aggravates the severity of flooding because those areas diminish the amount of land that can naturally soak in and filter rainwater.

For decades, EPA's efforts to address water quality impairment in the Charles, Mystic, and Neponset Rivers has featured coordinated efforts among EPA, state and local governments, private organizations, and environmental advocates. Cities and towns in the watersheds have invested hundreds of millions of dollars in stormwater and sewer improvements. As a result, much progress has been achieved making the rivers safer for recreation, such as boating and, in some cases, swimming. By moving forward with this permit, EPA is now addressing one of the last remaining unregulated sources of pollution harming the rivers.

EPA encourages public input on the draft permit. A public comment period will be open for 90 days during which interested parties can review the draft and submit feedback in written form. In addition, public meetings will be held to discuss the permit and answer questions from the community.

The public comment period for draft permit will remain open from October 31, 2024 to January 29, 2025.

Oct. 30, 2024—The U.S. Environmental Protection Agency announced today that Candace Stuart-Stephens and Jerrod Stuart have paid a $75,000 Clean Water Act penalty for the unauthorized destruction of the native streambank adjacent to their property on the Priest River in Priest River, Idaho.

EPA brought the case against Stuart-Stephens and

Stuart after the agency discovered that on or around June 4, 2022, as they prepared to install two bridges and one dock, the couple excavated and side-cast natural riverbank habitat of the Priest River and replaced it with rip rap rock, decorative rock, and steel pilings without obtaining a Clean Water Act permit from the U.S. Army Corps of Engineers.

This type of habitat destruction has serious implications for impacts to cold water aquatic life, including spawning of trout and char. This section of the Priest River is listed by the Idaho Department of the Environmental Quality as impaired by high temperatures and sediment deposits – due, in part, to severe erosion along its banks – and is deemed critical habitat for bull trout under the Endangered Species Act. The Priest River also hosts westslope cutthroat trout, which is considered a Species of Special Concern by the State of Idaho, and a sensitive species by the U.S. Forest Service.

Under terms of the settlement, Stuart-Stephens and Stuart also agreed to remove some of the materials they have placed in the river, apply for a permit from the U.S. Army Corps of Engineers, and pay additional funds to a nearby wetlands mitigation bank as compensation for the loss of riverine habitat.

The Priest River is connected to the Pend Oreille River downstream of the Albeni Falls Dam, where the Pend Oreille River is a traditional navigable water.

Oct. 29, 2024— The U.S. Environmental Protection Agency is issuing its plan to reduce the amount of polychlorinated biphenyls, or PCBs, in the Spokane River basin.

PCBs enter surface water through industrial and municipal wastewater, stormwater, groundwater, and atmospheric deposition, and readily accumulate in aquatic organisms. Even small amounts in the environment can pose health problems for people who consume fish.

EPA committed to finalizing the plan in a legal agreement between the agency and the Sierra Club and Center for Environmental Policy and Law.

The agency's plan establishes a Total Maximum Daily Load for PCBs—often referred to as a pollution budget—to protect human health and aquatic life along the approximately 100 miles of the Spokane and Little Spokane rivers of Washington from the Idaho border to the confluence with the Columbia River.

Specifically, the new plan reduces the allowable concentration of PCBs discharged into the watershed from the current standard for the State of Washington of seven picograms per liter to 1.3, the standard established by the Spokane Tribe of Indians in 2013.

PCBs concentrations in the Spokane River range from about 30 picograms per liter near Post Falls, Idaho to well over 150 through Spokane Valley and into Long Lake (also known as Lake Spokane) in Washington.

Next, the Washington Department of Ecology will use this budget to develop an implementation plan to achieve the goals of the TMDL. In practical terms, the new TMDL for the Spokane River Basin will mean a concerted effort in Washington and western Idaho to reduce PCBs through measures such as stormwater controls and stricter limits for PCBs in state-issued permits for wastewater treatment plants and industrial facilities.

EPA recognizes that the TMDL limits are low, not currently measurable by an EPA-approved method, and in the near term will be very challenging to meet. However, EPA supports Ecology's gradual tightening of PCBs limits in discharge permits as technologies mature.

Idaho's water quality standards require their Clean Water Act programs to meet downstream water quality standards, including those in another state.

Dischargers in the Spokane River watershed have made significant strides in reducing PCBs through wastewater treatment plant upgrades, stormwater retrofits, and regional efforts by the Spokane River Toxics Task Force and Spokane Toxics Advisory Committee. Continuation of these efforts will be particularly important in the heavily industrialized Spokane Valley.

EPA recently provided close to $7 million in grant funds to the Washington Department of Ecology as part of the Columbia River Basin Restoration Program for toxics reduction in the Spokane River basin, which includes funds to develop a regional plan specific to the Spokane River and for on-the-ground implementation activities after the plan is developed.

Prior to being banned in 1979, PCBs were widely used by multiple industries in dyes, paints, plastics, caulking, fluorescent lights ballasts, electrical transformers, and many other industrial and consumer applications. PCBs are found throughout watersheds around the world.

Oct 17, 2024— The Environmental Protection Agency has issued an administrative order to the Puerto Rico Department of Transportation and Public Works (DTPW) requiring them to resolve Clean Water Act violations associated with the municipality's separate storm sewer systems (MS4) and stormwater management program. DTPW owns and operates several storm sewer systems in Puerto Rico, including those located in PR-123 Road and PR-585 Road at Playa Ward in the Municipality of Ponce.

EPA has received complaints from the local community about flooding events at PR-123 Road and PR-585 in Ponce Playa. EPA has been inspecting the system since 2022. EPA found that DTPW had not implemented a storm water management plan that would detect illegal discharges into their storm sewer systems at Ponce Playa. Illegal dumping and connections can result in serious pollutants like car oil and sewage getting into storm sewer systems. The most recent EPA investigation was conducted in August 2024. EPA was joined by officials from DTPW, Municipality of Ponce, Puerto Rico Aqueduct and Sewer Authority (PRASA), and Ponce Playa community leaders. The inspection revealed that DTPW's storm sewer systems lack required operation and maintenance, and unpermitted pollutants are being discharged into the system, to the detriment of the community.

The EPA order includes a detailed schedule for the performance of compliance measures that will result in the elimination of illicit discharges into the Caribbean Sea.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

Oct. 24, 2024—The U.S. Environmental Protection Agency announced that U.S. Army Garrison Fort Wainwright will pay $233,300 for violating federal hazardous waste management requirements.

During a routine inspection of the garrison in August 2021 EPA inspectors found several violations of the Resources Conservation and Recovery Act including failure to make a hazardous waste determination, storage of hazardous waste without a permit, failure to properly manage pharmaceutical waste, failure to properly manage used oil, and failure to properly manage universal waste such as aerosol cans and lamps.

At the time of the inspection, EPA determined the facility was operating as an unpermitted hazardous waste treatment, storage, and disposal facility. Several hazardous wastes were stored improperly and containers were left open or were stored on-site longer than allowed.

In response to the inspection findings, USAG Fort Wainwright agreed to pay the monetary penalty in addition to taking the necessary steps to come into compliance and resolve the violations.

Oct. 23, 2024—The U.S. Environmental Protection Agency announced agreements with four companies to settle violations of the Resource Conservation and Recovery Act's regulations related to coal ash surface impoundments and landfills. The settlements, finalized in recent weeks, address facilities located in Alabama, Pennsylvania, Colorado and Puerto Rico, and require companies to take certain actions including addressing groundwater monitoring issues, conducting effective and protective groundwater cleanup, addressing emergency planning, and paying a fine.

The settlement advances EPA's National Enforcement and Compliance Initiative, Protecting Communities from Coal Ash Contamination. This Initiative is delivering protections for communities affected by widespread noncompliance with the federal coal ash regulations. Coal ash, which is produced from the burning of coal for energy, is a large industrial waste stream (by volume) and contains certain contaminants known to cause cancer and other serious health effects. Prior to 2015, the management and disposal of coal ash was not regulated at the national level; instead, it was regulated to varying degrees, if at all, by some states. Historically, coal ash was typically disposed in unlined landfills and unlined surface impoundments many of which are in contact with groundwater.

Without proper containment and management, contaminants from coal ash can pollute waterways, groundwater, drinking water and the air. The additional enforcement resources under EPA's National Enforcement and Compliance Initiative will help protect water sources, including drinking water, as well as the often-overburdened communities who live near these units.

The following is an overview of the four settlement agreements:

•Puerto Rico (Region 2): AES Puerto Rico, L.P., which operates an electrical generating plant in Guayama, Puerto Rico, agreed to address groundwater monitoring issues and ensure proper reporting of its coal ash landfill and pay a civil penalty of $71,845;

•Pennsylvania (Region 3): Keystone-Conemaugh Projects, LLC (KEY-CON), which operates the Conemaugh Generating Station,certified and committed to ensure compliance with coal ash regulations at its four coal ash surface impoundments and pay a civil penalty of $185,927;

•Alabama (Region 4): The Alabama Power Company (Alabama Power), which operates the James M. Barry Electric Generating Plant ("Plant Barry"), agreed to evaluate and expand its groundwater monitoring program associated with its coal ash surface impoundment, review and upgrade its Emergency Action Plan, and pay a civil penalty of $278,000;

•Colorado (Region 8): The Public Service Company of Colorado (PSCo), which operates the Cherokee Station electrical generating plant, agreed to address groundwater monitoring deficiencies, conduct effective and protective groundwater cleanup, and pay a penalty of $134,500. Specific actions required under the settlement include developing and implementing a remedy for ash ponds, including the lithium releases.

In April 2015, EPA established national rules for coal ash management and disposal to address: (1) Risks from disposal of coal ash, including leaking of contaminants into groundwater; (2) Blowing of contaminants into the air as dust and (3) Catastrophic failure of coal ash surface impoundments. (Robert Schuster)

LAWSUITS FILED OR PENDING

WASHINGTON STATE'S NEXT WATER RIGHT ADJUDICATION PENDING

Washington State's water rights adjudication history is entering its next chapter with the initiation of an adjudication of waters in a portion of northwest Washington. Washington's last adjudication, *Ecology v. Acquavella*, began in 1977 and concluded in 2019. Under Washington law, the Washington State Department of Ecology (Ecology) is authorized to initiate a case in a Superior Court to determine the rights to waters of the state, after the department determines the public interest will be served. RCW 90.03.110. In 2019, the Washington State Legislature directed Ecology "to assess and explore opportunities to resolve water rights uncertainties and disputes through adjudications" in select watersheds. In 2020, Ecology submitted a report to the Legislature that identified watersheds that it believes should be adjudicated to address conflicts and uncertainties over water rights. Specifically, Ecology identified two basins as "urgent priority basins": Nooksack Water Resource Inventory Area (WRIA) No.1 in northwest Washington and the Upper Columbia River WRIA in central Washington.

Background

Over the past couple of years, Ecology has been meeting with individuals, groups, and local governments to discuss filing an adjudication in the Nooksack watershed and surrounding waterways generally referred to as WRIA 1. WRIA 1 includes the part of Washington State bordering Canada, the Salish Sea, and the Cascade Mountains. This area includes the Nooksack River and its tributaries, including groundwaters flowing towards the Nooksack River. It also includes streams and groundwaters flowing towards the Fraser River in Canada to the North and the Salish Sea to the West. Under RCW 90.03.110, Ecology can initiate the adjudication by filing a "statement of facts, together with a plan or map of the locality under investigation . . . in the Superior Court of the county in which said water is situated . . . ." On May 1, 2024, Ecology filed a Statement of Facts and Map as its petition for an adjudication of WRIA 1 in Whatcom County Superior Court. Ecology stated that after its extensive assessment of the need for an adjudication of water rights and the request of the Lummi Nation and Nooksack Tribe, Ecology determined that the public interest will be served by a determination of surface and groundwaters, including permit-exempt groundwater use, in WRIA 1.

At the Superior Court

Ecology's initial pleadings included a draft Order of the court directing the issuance of the summons and a hearing on June 26, 2024. Ecology's initial pleadings did not include a proposed claim form. Under RCW 90.03.120(1):

> Upon the filing of the statement and map as provided in RCW 90.03.110 the judge of such Superior Court shall make an order directing summons to be issued . . . .

Furthermore, the Legislature stated that "that for an adjudication filed in water resource inventory area 1 after June 1, 2023, the return day for the latest time to file claims pursuant to such a summons shall be not less than one year after the making of such an order . . ." unless by modified by special rules of procedure established by the court. Attorneys for numerous potential claimants filed notices of appearance, motions, an *amicus* brief and other pleadings in response to Ecology's initial pleadings. On June 26, 2024, the court held a hearing and directed Ecology to file its Summons and Claim Form by August 30, 2024, and to set a date for a subsequent hearing to consider issuing the summons with the claim form. Additionally, the court issued an Order on Pre-Commencement Motion Practice, stating that " . . . a civil action is commenced upon the service of summons and complaint." In addition, the court stated that it " . . . has not yet granted an order authorizing the summons." Therefore, any interested party must first seek leave of court and provide timely notice to Ecology before filing a motion. The court also issued an order establish-

ing a Steering Committee for the case and requested interested parties to submit letters of interest to the court.

Conclusion and Implications

Ecology submitted its draft claim form by August 30, 2024, and the court held a subsequent hearing on September 26, 2024. In the hearing, the court requested changes to Ecology's claim form, including changes to confirm the claim form to general rules and address service requirements. Ecology proposed a May 2026 deadline for defendants to file their claims. Ecology agreed to file a revised claim form prior to the next hearing. The court also issued an Order Naming Steering Committee members and directing the Steering Committee to meet prior to the next court hearing, now set for December 3, 2024.

The next chapter of Washington's water rights adjudication history will likely include service of the summons and claim form on an estimated 30,000 claimants in 2025.
(Jessica Kuchan)

JUDICIAL DEVELOPMENTS

FEDERAL DISTRICT COURT REJECTS WINEMAKERS' WELL PERMIT CHALLENGE AS UNRIPE

Double Vee Properties, LLC, et al. v. County of Napa, ___F.Supp.4th___, Case No 23-cv-04546-AGT (N.D. Cal. Sept. 11, 2024).

In September, a U.S. District Court granted the County of Napa's motion to dismiss a complaint brought by wine makers who applied for a well permit to construct a new groundwater well and, before the well permit was processed, sued the county on constitutional and state water law claims. The court dismissed the complaint as unripe or unactionable with leave to amend.

Background

According to the complaint, plaintiffs Double Vee Properties, LLC, Caldera Ranch, LLC, Hundred Acre LLC, and the Hundred Acre Wine Group, Inc. grow highly quality grapes on their properties for the production of wine. Plaintiffs' properties are within 1,500 feet of the Napa River, which overlies the Napa Groundwater Basin (Basin). The County of Napa is the groundwater sustainability agency for the Basin formed pursuant to the Sustainable Groundwater Management Act (SGMA). According to the complaint, the groundwater sustainability plan (GSP) for the Basin sets the sustainable yield of the Basin—the amount that can be pumped without causing adverse results—at 15,000 acre-feet which can be pumped annually.

The complaint alleges that the County's Department of Planning, Building & Environmental Services (PBES), which is responsible for managing a groundwater well permitting scheme pursuant to a County ordinance, recommended certain well permitting criteria that are contrary to the County's own permitting requirements. In particular, PBES recommended that proposed groundwater use under a new groundwater well permit not exceed 0.3 acre-feet per acre of land, that the proposed well be located at least 1,500 feet from a stream, and that a proposed well be located at least 500 feet from other existing water supply wells. Plaintiffs allege that the recommendations are not based on science and exceed the County's well permitting authority.

In 2022, certain of the plaintiffs filed permit applications with the County to construct new wells on their properties to support their grape-growing operations. However, the complaint alleges that PBES informed those plaintiffs that a water budget and water availability analysis would be required. Other of the plaintiffs who had not yet submitted permit applications declined to do so because they expected the County would deny the applications unless the usage restrictions were complied with. Plaintiffs collectively sued the County, arguing that the groundwater usage restrictions constituted a takings under the Fifth Amendments of the United States Constitution, violated the Equal Protection Clause and the First Amendment, and sought declaratory relief. The takings claim was predicated on the 0.3 acre-foot per acre limitation on groundwater pumping. The First Amendment claim was predicated on the County's cross-complaint against Plaintiff Hundred One Acre Wine Group's complaint in a different action filed a year earlier in federal court challenging the County's conservation regulations. Plaintiffs' declaratory relief claim was based on California water law, namely, that the 0.3 acre-foot per acre limitation was not supported by findings that the water to be used was not reasonable and beneficial as compared to another appropriative and overlying users in the Basin, and that the rule was discriminatory against "dormant" overlying users, i.e. overlying rights holders who have not yet exercised their overlying rights to groundwater.

The District Court's Decision

The District Court denied all of plaintiffs' claims with leave to amend.

Takings Claim

With respect to the takings claim, the court noted that in order to prevail on a takings challenge, plain-

tiffs would need to prove that, but-for the challenged regulation, the alleged injury would not have occurred. On these facts, the court reasoned that plaintiffs would need to make the showing that their proposed wells, which would be within 1,500 feet of the Napa River, would not likely contribute to significant and unreasonable stream depletion. If they could not make that showing, the County could prohibit their groundwater pumping altogether irrespective of the 0.3 acre-foot per acre rule. At the time of the complaint, plaintiffs had not endeavored to make that showing. The court therefore ruled that, until the plaintiffs finalized their permit applications and the County made a final decision on those applications, the parties and the Court would not know whether the 0.3 acre-foot per acre limitation on groundwater pumping would actually harm plaintiffs. Accordingly, the court dismissed that cause of action as unripe.

Ripeness

The court further ruled that the ripeness requirement applicable to the takings cause of action also applied to the due process and equal protection claims, and therefore those claims were unripe. The court likewise rejected the First Amendment claim on the grounds that the cross-complaint filed by the County was a request for redress, which as a matter of federal law cannot form the basis of a retaliation claim that might violate an opposing parties' First Amendment rights.

State Water Law

Finally, the court rejected plaintiffs' claims for declaratory relief under state water law because plaintiffs had failed to state a viable federal claim. Accordingly, the court declined to exercise supplemental jurisdiction over the state law claims until plaintiffs stated a viable federal claim.

Conclusion and Implications

The District Court's ruling follows federal precedent that an action must be ripe for adjudication for the federal court to exercise jurisdiction. Federal courts look for the existence of an injury, among other things, before exercising jurisdiction. If plaintiffs can show that the 0.3 acre-foot per acre limitation restricts their water rights, independent of sustainability requirements for streamflows influenced by groundwater, they may bring an amended complaint. If they can establish a viable federal claim in that regard, they may also reassert their state law claims and ask that the federal court assert supplemental jurisdiction over those claims. Whether plaintiffs exhaust the administrative requirements for a well permit application and make the requisite showings remains to be seen. The court's order is available online at: Federal District Court Ruling available at https://www.courthousenews.com/wp-content/uploads/2024/09/double-vee-properties-v-county-of-napa-mtd-ruling.pdf
(Miles Krieger)

U.S. DISTRICT COURT IN CALIFORNIA ENJOINS GROUNDWATER ORDINANCE DUE TO POTENTIAL DISCRIMINATION

Ger Chong Ze Chang, et al, v. County of Siskiyou,
___F.Supp.4th___, Case No. 2:22-cv-01378-KJM-AC (E.D. Cal. Oct. 25, 2024).

In October, a U.S District Court granted in part a preliminary injunction against the County of Siskiyou (County) for employing county zoning ordinances in a racially discriminatory way against Asian American customers. The County's ordinance was designed to combat contamination to water supplies resulting from illegal marijuana growing operations.

Background

Siskiyou County is a large, mostly rural and undeveloped county on California's northern border. It has banned commercial cannabis cultivation for many years and has contended with the effects of illegal cannabis grow operations within its territory. Pesticides found in remote illegal marijuana grow sites contain suspected carcinogens that can pollute groundwater, are highly toxic to fish and aquatic invertebrates, and that have been reported to cause nausea, vomiting, eye and throat irritation, shortness of breath, redness of the face, severe eye irritation, skin rash, blistering, and itching. Authorities have found flammable, corrosive, and combustible liq-

uids at illicit grow sites, which can increase the risk of wildfires; pits filled with trash, debris, hazardous waste, and pools or containers of unknown liquids, illegal burn pits, human waste and sewage dumped from trailers directly into the ground; and illegally diverted water.

Most commercial cannabis growers in Siskiyou County use water trucks filled with pumped groundwater to supply their crops. In 2020, the County passed an ordinance banning the use of groundwater for illegal cannabis cultivation. The county also began investigating and enforcing its zoning ordinances against suspected water suppliers—landowners who were pumping water from the ground and selling the pumped water to illicit cannabis cultivation operations. Despite the County's new ordinance and zoning enforcement efforts, water trucks still appeared to be transporting groundwater to illicit cannabis operations within the County. The County thus passed two more ordinances requiring landowners to obtain a permit in all instances in which groundwater is extracted and transported off the parcel from which it was extracted and imposing permit requirements on water truck drivers.

As part of the County's enforcement efforts, the County began investigating water extraction and hauling activities occurring on the properties of Asian American residents. According to a prior lawsuit and as alleged in the instant case, the County's ordinances had effectively shut off the supply of water certain Asian American residents relied on to meet their basic needs, from drinking and cooking to raising animals and growing gardens. Other Asian American residents, who are plaintiffs in the instant case, allowed water hauling trucks on their properties to provide water to elderly family and other clan members who relied on that water supply, but the County ordinances made doing so unaffordable due to escalating fines. Moreover, plaintiffs alleged that they were unable to change their zoning designations to allow for water hauling, forcing those clan members who relied on the water to drill wells that they could not afford. Other of the plaintiffs alleged that they needed groundwater delivered by truck for drinking, cooking, bathing, washing clothes, caring for pets, growing food, raising livestock, and fighting fires.

The District Court's Decision

Plaintiffs alleged that the County's recent enforcement efforts were arbitrary, extreme, nonsensical and discriminatory in violation of their Due Process rights under the federal Constitution. To obtain a preliminary injunction, plaintiffs must establish four things by a clear showing: they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and an injunction is in the public interest. *City & County of San Francisco v. U.S. Citizenship & 19 Immigr. Servs.*, 944 F.3d 773, 788–89 (9th Cir. 2019). Alternatively, serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. District courts within the Ninth Circuit must consider whether plaintiffs are likely to succeed on the merits of any constitutional claims they assert.

The District Court ruled that plaintiffs were likely to succeed on their Due Process claim. According to the court, the Fourteenth Amendment Due Process Clause prohibits state government bodies from depriving any person of life, liberty, or property, without due process of law. U.S. Const. 7 amend. XIV, § 1. As the court explained, this language demands fair procedures by its own terms, but it also bars some government actions outright, regardless of the fairness of the procedures used to implement them, and prevents government power from being used for purposes of oppression.

While the substantive protection does not generally impose an affirmative duty on governments to protect their citizens' lives, liberty, and property from all harms, several federal courts of appeals have held government actors violate the Fourteenth Amendment if, through deliberate indifference, they take affirmative actions exposing a person to a danger that person would not otherwise have faced. This is commonly known as the state-created-danger doctrine, which is applied using a two-part test: (1) plaintiffs must allege and ultimately prove affirmative conduct on the part of the state that exposed them to an actual, particularized danger they would not otherwise have faced, and (2) plaintiffs must allege and ultimately prove the defendants acted with deliberate indifference to the danger. The court found that plaintiffs were likely to pass the test because (1) the county took affirmative action by enforcing its zoning

ordinances against well owners who have sold or donated pumped well water to people on other properties and those people were in a worse position as a result of the County's actions and (2) the danger was obvious and foreseeable to the County, and perhaps even the result they specifically intended. Accordingly, the court fashioned a preliminary injunction to prevent the County from enforcing its ordinances as to residents' properties that lacked a residential well or municipal water source, subject to certain future water supply conditions that, if shown by the County, would lift the injunction.

Conclusion and Implications

It remains to be seen whether plaintiffs will ultimately prevail on their Constitutional claims. However, the District Court ruling suggests that strict water extraction requirements that prevent minimal health and safety needs from being met might be subject to Constitutional constraints, although such constraints may be narrowly fashioned to protect only those affected while maintaining important enforcement tools held by public agencies. The court's ruling is available here: https://www.courthousenews.com/wp-content/uploads/2024/10/siskiyou-water-injunction.pdf
(Miles Krieger)

U.S. DISTRICT COURT IN IDAHO DISMISSES WETLANDS COMPLAINT DUE TO LACK OF SURFACE CONNECTION SPECIFICS

United States v. Ace Black Ranches, LLP, ___F.Supp.4th___,
Case No. 1:24-cv-00113-DCN (D. Id. Aug. 29, 2024).

In late August 2024, the United States District Court of Idaho dismissed a complaint by the United States against a ranching company related to alleged discharges of pollutants into the Bruneau River, a water of the United States, and adjacent wetlands. The court's ruling turned on the absence of allegations that the alleged wetlands had a continuous surface connection with the Bruneau River and thus did not present sufficient facts such that the United States could satisfy the adjacency test recently formulated by the United States Supreme Court.

Background

Defendant Ace Black Ranches operates a roughly 800-acre ranch in the Bruneau Valley (Ranch) in Owyhee County, Idaho. The Ranch has historically been privately used for agriculture and cattle grazing. The Bruneau River (River) and its wetlands pass through the Ranch, providing habitat for native wildlife.

In 2021, the United States Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corp) began investigating potential violations of the Clean Water Act (Act) on the Ranch. After concluding its inspection of the Ranch, the Government filed suit against Ace Black Ranches in 2024, alleging that Ace Black Ranches discharged pollutants into waters of the United States in violation of Sections 309(b) and (d) of the Act.

In its complaint, the United States alleges that Ace Black Ranches constructed multiple road crossings in the River and wetlands, impeding the flow of water and polluting the River. The United States also alleged that, in mining sand and gravel from the River, Ace Black Ranches disturbed the riverbed resulting in further pollution to the river, and that while constructing a center pivot irrigation system, Ace Black Ranches cleared and leveled nearly all of the Ranch's wetlands. The EPA and the Corps allegedly observed sand and gravel mining, as well as evidence of mechanical scraping, pushing, or pulling of earth in and next to the River and adjacent wetlands. The complaint alleges that these mining operations began in 2017 and continued through at least 2021.

Ace Black Ranches moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief can be granted because the United States did not plausibly allege each required element to claim a violation under the Act. Specifically, Ace Black Ranches argued that the complaint failed to plausibly allege that the wetlands where pollutants were allegedly discharged had a continuous surface

connection with the River, thus failing to satisfy the standard set forth in the Supreme Court's recent decision in *Sackett v. EPA*, 598 U.S. 651 (2023).

The Clean Water Act

Congress enacted the Clean Water Act in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). The Act in part regulates the discharge of dredged or fill material into navigable waters. In the context of the Act, the term "navigable waters" is defined as "waters of the United States." 33 U.S.C. § 1362(7). The Act prohibits the discharge of any pollutant by any person into waters of the United States without a permit. 33 U.S.C. § 1311(a).

To successfully claim a violation of the Act, a plaintiff must plausibly allege that: (1) a person; (2) discharged pollutants; (3) from point sources; (4) to waters of the United States; (5) without a permit. To determine if adjacent wetlands qualify as waters of the United States, courts apply the adjacency test, which requires that the wetland be adjacent to and "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]." *Sackett*, *supra*, 598 U.S. at 676. Accordingly, a party seeking to allege a violation of the Act in a wetland must plausibly show that the wetland was: (1) adjacent to waters of the United States; and (2) that the wetland "shares a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins." *Rapanos v. United States*, 547 U.S. 715, 742 (2006).

The District Court's Decision

According to the court, Ace Black Ranches did not dispute that the River is a traditional, navigable water, and is, therefore, considered waters of the United States for purposes of the Act. Instead, Ace Black Ranches argued that the United States did not sufficiently allege that Ace Black Ranches discharged pollutants into wetlands that were indistinguishable from, and had a continuous connection with, the River in satisfaction of the adjacency test under *Sackett*.

After reviewing the complaint, the court ruled that the United States did not specify that the wetlands at issue had a continuous surface connection with the River to be considered indistinguishable from the River as required to satisfy the adjacency test. The court posed numerous questions that were unanswered by the complaint. As a threshold matter, the court determined that a reader would be required to infer that adjacent wetlands were at issue such that they fell under the purview of the Act. The court also queried which wetlands were at issue, whether they currently maintained a surface connection with the River, whether they maintained at any point a surface connection with the River, and whether those wetlands were indistinguishable from the River. Those questions, according to the court, also applied to the Ranch's alleged mining operations.

The court rejected the United States' claim that such answers could be resolved during discovery, because doing so would be putting the cart before the proverbial pleading horse. However, the court observed that the pleading deficiencies in the complaint could be cured. Ace Black Ranches did not object to the United States amending the complaint. Accordingly, the court granted Ace Black Ranches' motion to dismiss but allowed the United States leave to amend.

Conclusion and Implications

The recent *Sackett* decision appears to impose an obligation on the United States to allege sufficient facts to demonstrate a surface connection between wetlands and a water of the United States in order to withstand a motion to dismiss at the pleading stage. Thus, more specificity in pleadings seeking relief for discharges into wetlands is likely in the future. It remains to be seen whether the United States will amend its complaint, and whether it will be able to meet the requirements of the adjacency test under *Sackett*. The court's order is available online at: https://casetext.com/case/united-states-v-ace-black-ranches-llp
(Miles Krieger)

U.S. DISTRICT COURT IN IDAHO UPHOLDS BASIC STATE STOCKWATER RIGHTS, BUT DECLARES SOME IDAHO WATER RIGHTS PROCEDURES UNCONSTITUTIONAL AS TO THE UNITED STATES

U.S. v Idaho ___F.Supp.4th___, Case No. (D. Id. Aug. 26, 2024).

The U.S. District Court in Idaho has issued a split decision on whether Idaho state law treats the federal government's water rights in a constitutional manner. The case decision deals with a suit by the United States to enjoin enforcement of a handful of Idaho laws that establish rights for water for livestock in the Snake River Basin and deal with maintenance and forfeiture of the water rights. The main allegations of the United States were that the Idaho laws variously violated the sovereign immunity of the U.S., and breached the Supremacy, Contracts, Takings, and Property clauses of the Constitution.

The case is symptomatic of a long history of conflicts and arguments over policy between and among a number of Western states and the federal government regarding states' roles and private party use and access to federal lands. Idaho is certainly no exception, inasmuch as about 60 percent of the State's territory is federally owned and managed, whether as national forest, national parks, wildlife refuge, timberlands or grazing lands.

This article provides some background for the litigation, describes the parties' arguments and opinion of the court, and evaluates the court's decision. At this writing, the case is not final at the District Court level, because motions have been filed to clarify the actual judgment that was issued. Whether there will be any appeal is unclear.

Background

To understand the background of the controversy in Idaho it is useful to examine the meaning of the reserved rights of the United States in this controversy. The acreage under Bureau of Land Management (BLM) range or grazing control in Idaho is reportedly 11.5 million acres.

A great deal of land in the Snake River Basin of Idaho is owned and managed by the federal government as grazing land pursuant to law. The Snake River, originating at Yellowstone Park in Wyoming, cuts a large "smile-shaped" course across southern Idaho, running from east to west, and exiting eventually to become a major tributary of the Columbia River in Washington. A majority of the Idaho population lives in the Snake River Basin.

Historically, the Taylor Grazing Act, first passed in 1934, was designed to maximize rangeland productivity in a cooperative effort between states, livestock owners, and BLM. The original stated Purpose of the legislation was:

> To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.

A few amendments since have augmented the utility of the lands to private livestock owners, while BLM has emphasized environmental issues in management of the lands, stemming from the National Environmental Policy Act (NEPA), the Endangered Species Act, and other legislation.

Idaho's Water Rights System

Importantly, Idaho has a water rights legal system based on prescription, like other western states where water is a limited and yet vital resource. In practice, this has meant that "first in use, first in right" was the historic formula for establishing one's rights of withdrawal, as opposed to the reasonable use based riparian doctrines of most eastern states. Also importantly, Congress has been accepting of and has generally legislated with respectful deference to state law on the issue of who has the right to use or consume natural waters. This is so even where, as with the Snake River, its historic navigability has made it a federal waterway under the Constitution.

The Snake River Basin Adjudication and the McCarran Act

Given the intense competition for water resources among various interests, western states have now

generally established regulatory systems to keep track and administer water usage rights. Idaho set up such a system and decreed that all claimants of water rights enter into the Snake River Basin Adjudication process. The SRBA involved tens of thousands of water rights claims and it lasted for years, culminating in a 2014 court Final Unified Decree.

While the SRBA was still ongoing, some major ranchers whose land holdings did not border a tributary of the Snake, but whose cattle had watered there under claims of right, pressed actions in state court to sort out the law governing the overlapping claims of the BLM and themselves. In *Joyce Livestock Co. v U.S. (In re SRBA Case No. 39576*), 156 P. 3d 502 (ID, 2007). The Idaho Supreme Court there ruled that in Idaho rights to water livestock on federal land are appurtenant to the cattle owner's base properties, which were ranches not on federal land. The court also ruled that the mere ownership of the BLM was not sufficient in itself to establish a water use right for livestock.

The United States participated fully in the SRBA, pursuant to 1952 consent of Congress in the so-called McCarran Amendment (43 U.S.C. 666), which allows the U.S. to be joined as a party in a state water rights adjudication and also waives the right to plead the rights adjudicated are not applicable or enforceable as to it.

Setting the Stage for the District Court's Review

The Claims of the United States

In the case at hand, after receiving a Notice from the State to show cause why certain of its numerous adjudicated water rights were not subject to forfeit for lack of use, the United States brought suit for declaratory and injunctive relief against Idaho and its relevant agencies. It contended there were a number of Constitutional violations and injury to the U.S. from Idaho statutes enacted between 2017-2022 that limit federal agencies' ability to acquire and retain water rights in Idaho. The statutes were passed after the Snake River Basin Adjudication (SRBA) was complete, at least as to the United States' stockwater rights.

Appropriateness of Court Taking Full Jurisdiction

The responses of the State and intervening defendants were to seek dismissal of the federal Complaint. On grounds ranging from *res judicata* to *Burford* abstention, the State urged the federal court not to hear the case. The State argued that the rights of the federal government were fully decided in the SRBA and that the United States was seeking to relitigate them. The District Court focused on the fact that each of the statutes challenged had been passed after the 2014 Final Decree in the SRBA. That meant to the court that there was a new subject matter that mainly dealt with new procedures with alleged unconstitutional impact on the Plaintiff federal government. The Court also belittled the Burford abstention argument on the grounds that it was competent to make a judgment, and it had jurisdiction; it thus seems to your author to have given less than full heed to the intent of Congress in the McCarran Act and other policy to respect state water law and its establishment. See *infra*.

The Supremacy Clause Allegations and Results

The United States alleged that several Idaho Code sections discriminate against it and thus are in violation of the Supremacy Clause of the Constitution, and the companion doctrine of "intergovernmental immunity," Const. Art.VI, Cl. 2. In the Idaho district court's expressed view, the Supremacy clause is violated if a state law treats the federal government worse than everyone else. The doctrine of intergovernmental immunity "makes clear that the states may not single out the United States—for special disfavor."

A key Idaho statute challenged by the Complaint of the U.S. was Id. Code § 42-222(2). That provision states a longstanding tenet of Idaho law, that water use rights that go unused for five straight years are subject to forfeiture and reversion to the State. The burden of proof of such non-use is on the State or other person challenging a particular claim of rights.

Curiously, despite making the challenge in its amended Complaint and also in its Motion for Injunction, the U.S. did not pursue it at the argument stage, declined to pursue it when queried, and offered no evidence on its allegations. This led the district court to dismiss the §42-222(2) challenge. §42-222(2) provided for show cause process if non-use of

rights was alleged to have occurred for more than five years.

In respect to §42-224, an Idaho statute closely related to §42-222 which gave publicly owned entities an extra step to take respecting their rights, the Court found that there was not discrimination of an unconstitutional nature against the U.S., because it was being subjected to administrative steps other governmental owners (e.g. State, local governments) had to follow to preserve their own water rights.

Other Idaho Laws Held in Violation of Supremacy Clause

Idaho Code §§ 42-113(2)(b), 42-502, and 42-504 were each examined by the Court in turn, and each determined to violate the Supremacy Clause of the U.S. Constitution by discriminating against the federal government.

Section 42-502 stipulated that before the federal government could acquire water rights for livestock it must "own livestock" and put the water to that beneficial use. The Court found this was plain discrimination against the federal government since it mentioned only federal governmental claims. In your author's view the Court takes too simplistic a view of the context, and it gives little respect to the history of federal holdings, which I believe did not originally involve livestock ownership or grazing, but involved grazing land preservation for the benefit of the private economy.

As to ID Code §42-113(2)(b) which stated that declared water rights for livestock based off of federal property belong to the based property. This was a plain declaration of State law. Similarly, the Court rules §42-504, which ties a livestock water right on grazing land of the federal government to its prescribed livestock use, and to the specified federal property. This again was a statement of state law, and it was affirmed in the SRBA adjudications, including the *Joyce* case. In so ruling, the district court seems oblivious to the historic reality that a fairly consistent thread of deference to state water law by Congress is well-documented in both statutory provisions and Supreme Court rulings, underscoring the importance of state authority in water rights management See e.g. , *California v. United States, 438 U.S. 645, Texas v. New Mexico*, 144 S. Ct. 1756, *California v. FERC*, 495 U.S. 490, *Federal Power Act*, § 821. (State laws and water rights unaffected.)

Further, it is surprising to see a court readily issue a ruling for a party (whether the government or private) without an actual controversy having been joined. In other words, to my knowledge, for example, there was no actual application made for government water rights without owning livestock. The controversy was theoretical, not real, and unripe for adjudication.

Other Challenges Rejected

The federal government actually claimed in its pleadings that Idaho law could not be applied to it, because it enjoyed sovereign immunity, the express waiver of same in the McCarran amendment notwithstanding. Thankfully, the district court made short work of this argument, reminding the federal government that sovereign immunity is a defense to an adverse claim, not a cause of action.

Although the government made arguments that the statutes since the SRBA Final Decree deprive it of property and contract rights, the Court found basically that nothing had occurred that disturbed the property rights found or recognized by the government's express consent and settlement of the SRBS litigation.

The District Court's Decision

The court found that §§ 42-113(2)(b), 42-502, and 42-504 single out the federal government for disfavored treatment by imposing extra requirements like livestock ownership and restrictions on changing water rights, violating the Supremacy Clause's intergovernmental immunity doctrine.

However, § 42-224's forfeiture provisions treat the federal government the same as others, so it does not discriminate. The statutes also do not violate other constitutional provisions because they can be applied prospectively without impairing existing rights.

As earlier indicated, motions are on file from the State to clarify the judgment order. However, the court's ruling can be summarized as follows:

- Complaint dismissed as to Sections 42-222(2) and 42-224.

- Summary judgment was granted to U.S. on Supremacy Clause claim for §§ 42-113(2)(b), 42-502, and 42-504.

• Summary judgment was denied to U.S. on all other claims.

• Permanent injunction was issued prohibiting enforcement by the State and Intervenors of §§ 42-113(2)(b), 42-502, and 42-504 against the federal government.

Conclusion and Implications

From afar, it seems traditional federal government policy of respect for state water rights law reflected in Supreme Court and Congressional history is not clear or evident in the posture of DOJ and BLM in this litigation. The government takes what seems like a competitor's position, rather than that of a partner or trustee for the preservation of rangeland.
(Harvey M. Sheldon)

CALIFORNIA COURT OF APPEAL UPHOLDS USE OF CEQA CATEGORICAL EXEMPTION FOR CONVERSION OF OIL WELL TO INJECTION WELL

Sunflower Alliance v. California Department of Conservation, ___Cal.App.5th___, Case No. A167698 (1st Dist. Sept. 6, 2024).

In *Sunflower Alliance v. California Department of Conservation*, the First District Court of Appeal found that substantial evidence supported the California Department of Conservation's Division of Geologic Energy Management's (CalGEM's) determination that converting a former oil well into an injection well constituted a negligible expansion of use and therefore fit within CEQA's Class 1 categorical exemption. The Court of Appeal held that a project is not automatically disqualified from the categorical exemption by any new use but instead depends on whether the change in use, and the environmental risks of the change, are negligible.

Factual and Procedural Background

In 2020, Reabold California LLC filed an application with the Department of Conservation's Division of Geologic Energy Management (CalGEM) to convert a former oil well in Contra Costa County into a Class II injection well. The well was drilled in 1963 and operated for over 20 years before it was plugged. Reabold operates two nearby oil wells that produce about 300 barrels of water per day. Currently, the produced water is transported to a disposal site 32 miles away, which requires ten truck trips per week. Reabold intends to use the proposed injection well to eliminate those trips.

The application proposed minor changes to the existing injection site, including removal of the well plug, installation of injection equipment inside the well, and use of the existing well pad and access road. The application was reviewed by CalGEM, the State Water Resources Control Board, and the Regional Water Quality Control Board. Reabold submitted a technical report from an engineer, a geologist, and a hydrologist, which concluded that the injected water would be confined to the aquifer by a barrier of about 1,000 vertical feet of shale. The agencies ultimately approved the application.

Regarding the California Environmental Quality Act (CEQA), CalGEM found that the project fit within the Class 1 categorical exemption (CEQA Guidelines, § 15301) as a "minor alteration" of an existing facility involving "negligible or no expansion" of a well's former use. CalGEM had previously promulgated a regulation determining that minor well conversions and injections may fall within the Class 1 exemption, based on a case-by-case and fact-intensive inquiry. In this case, CalGEM noted that the injection equipment would be installed within the existing well boring and would require no significant surface equipment or new drilling. In addition, the project would eliminate the need for routine trucking of produced water from Reabold's active wells.

At the Trial Court

Sunflower Alliance filed a petition for writ of mandate challenging CalGEM's use of the categorical exemption. The trial court held that, despite the fact that the physical modifications to the well would be minor and fit within the exemption, the exemption did not apply because injection, rather than

extraction, is a "significantly different use." The court entered judgment in favor of Sunflower Alliance and issued a peremptory writ of mandate directing CalGEM to set aside its approval of the project. CalGEM complied with the writ, and Reabold appealed.

The Court of Appeal's Decision

The First District Court of Appeal reversed, holding that well conversion projects are not inherently outside of the Class 1 exemption's scope. In reviewing CalGEM's decision to apply the exemption, the court considered whether the agency abused its discretion in determining that the exemption applied to this project, and whether substantial evidence in the record supported the decision.

First, the court considered whether well conversion projects, as a group, are beyond the exemption's scope. Sunflower Alliance argued that any new use of a modified well is an impermissible expansion. On the other hand, Reabold argued that the applicability of the exemption instead depends on the degree of change; here, since the change essentially just reverses the process, the degree of change is insignificant.

The court did not fully agree with either approach. To determine the applicable rule, the court looked to CEQA's plain language to conclude that the exemption does not inherently bar any new use. Instead, the court interpreted the exemption to allow changes or expansions in use that are inconsequential, and to exclude changes in use that threaten environmental harm. In other words, a "change in use is unimportant, as far as CEQA goes, if the risk of environmental harm from the new use is negligible." The court supported this interpretation of the Guidelines by considering the fundamental purpose of categorical exemptions, which is to exclude from CEQA review certain classes of projects that have been determined to not have significant environmental impacts.

Based on this interpretation, the court found that the project fit within the Class 1 categorical exemption because it only included "minor alterations" to "existing equipment." The court reiterated that conversion to an injection well requires minor alterations to the existing well, and no significant changes to existing roads, the well pad, or surrounding vegetation. Further, the court found that the change in the well's use was negligible, since the well formerly pumped oil and water from an exempt aquifer, and it would simply inject water into the same aquifer. Part of CalGem's regulatory determination in approving the site as a Class II well is ensuring that the injected water cannot escape the aquifer and harm people, property, or the environment. Based on this determination, the court concluded that the environmental risks of the conversion are negligible.

The Court of Appeal then rejected Sunflower Alliance's argument that substantial evidence did not support CalGEM's decision to apply the categorical exemption to the project. The court pointed out that Sunflower Alliance did not dispute any particular findings or argue that the agency made a mistake, but instead "briefly raised concerns that there 'may' be significant adverse impacts although it is 'unclear.'" The court first rejected Sunflower Alliance's concern about the injected water's impact on the aquifer's water quality, finding no evidence in the record of negative effects on the already poor-quality water in the aquifer. The court then found that Sunflower Alliance had no basis to question the agencies' technical conclusions in determining that the injected fluids would not escape from the aquifer. Therefore, the court concluded that substantial evidence supported CalGEM's determination that the project fit within the Class 1 exemption.

Lastly, the court rejected Sunflower Alliance's argument that CalGEM improperly imposed mitigation measures to eliminate the project's alleged environmental impacts. CalGEM adopted several conditions in approving the well, which Sunflower Alliance asserted were mitigation measures used to mitigate the project into the categorical exemption. The court stated that the conditions and regulations that Sunflower Alliance pointed to were imposed in response to CalGEM's standard that it usually required for permit issuance. Compliance with these standards is a legally mandated element of the project, not a CEQA measure to lessen the project's environmental impact in order to fit within a categorical exemption.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies its approach to analyzing whether and how a proposed project qualifies for CEQA's Class 1 categorical exemption. The court emphasized relying on the plain language of Guidelines section 15301 and adhering to the exemption's underlying purpose in interpreting its requirements. Ultimately, the court found that the relevant inquiry is whether a

proposed change and the environmental impacts of that change are negligible, and it rejected the contention that the Class 1 categorical exemption inherently does not apply to any new proposed use. The First District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/documents/A167698.PDF.
(Hannah Rider, Bridget McDonald)

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