Volume 29, Number 3
January 2025

WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

WESTERN WATER NEWS

Upper and Lower Basin States Still at Impasse over Colorado River Management 49

Arizona Governor Concludes Negotiations Over Tribal Water Rights Resulting in Settlements with Tribes 51

California Delta Watermaster Extends Deadline for Alternative Delta Water Right Reporting 52

REGULATORY DEVELOPMENTS

U.S. Fish and Wildlife Service Issues Biological Opinion for Long Term California Water System Operations 54

U.S. Army Corps of Engineers and Bureau of Reclamation, in Conjunction with the Bonneville Power Administration, Reopen the 2020 Columbia River System Operations Final EIS 55

EPA announces $319 Million Water Infrastructure Finance and Innovation Act Loan for Improvements to a Critical Drinking Water System in Oregon 57

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties, and Sanctions 59

LAWSUITS FILED OR PENDING

Indian Wells Valley Groundwater Authority Petitions California Supreme Court for Review of Trial Phasing Order in Comprehensive Groundwater Adjudication 63

Continued on next page

EDITORIAL BOARD

Christina J. Bruff, Esq.
Law & Resource Planning Assoc.
Albuquerque, NM

Jonathan Clyde, Esq.
Clyde, Snow, Sessions & Swenson
Salt Lake City, UT

Micheline Nadeau Fairbank, Esq.
Fennemore Craig
Reno, NV

Miles Krieger, Esq.
Best, Best & Krieger,
Tucson, AZ

Jessica Kuchan, Esq.
Confluence Law
Seattle, WA

John Sittler, Esq.
Patrick | Miller | Noto
Aspen, CO

Andrew J. Waldera, Esq.
Sawtooth Law Offices
Boise, ID

ADVISORY BOARD

Robert Johnson, Exec. Dir.
National Water Resources Assn.
Arlington, VA

John E. Echohawk, Exec. Dir.
Native American Rights Fund
Boulder, CO

Prof. Robert Jerome Glennon
Univ. of Arizona School of Law
Tucson, AZ

Anthony G. Willardson, Exec. Dir.
Western States Water Council
Midvale, UT

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

JUDICIAL DEVELOPMENTS

Utah State District Court Makes Proposed Determination of Water Rights for the Provo River Division. 65
In The Matter of The General Determination of The Rights to The Use of All of The Water, Both Surface and Underground, Within The Drainage Area of The Utah Lake and Jordan River In Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties In Utah. Provo River Division, Provo City North Subdivision (55-7) (Salt Lake County Civil No. 365729847)

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 © 2025 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) $1025.00. 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, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

Western Water Law and Policy Reporter is a trademark of Argent Communications Group.

WWL

WESTERN WATER NEWS

UPPER AND LOWER BASIN STATES STILL AT IMPASSE OVER COLORADO RIVER MANAGEMENT

The Colorado River Upper and Lower Basins are still sparring over the best way to allocate shortages in the Colorado River as the 2026 deadline to reach an agreement continues to creep closer. The Bureau of Reclamation recently released four proposed options to manage the Colorado River, although none of the options is particularly appealing to either basin, leading to increased friction between the states. Nevertheless, representatives from all states are hopeful that an agreement will be reached before the 2007 interim guidelines expire.

Background

The Upper Basin states (Colorado, Utah, Wyoming, New Mexico) and the Lower Basin states (Nevada, Arizona, California) enacted the Colorado River Compact in 1922 to allocate the river's flows between the states. However, the agreement was based on an extremely wet hydrologic period suggesting annual river flows up 17.5 million acre-feet (maf) past Lee Ferry, the historic dividing line between the basins. Using those assumptions, the Compact requires the Upper Basin to deliver at least 7.5 maf per year (measured as 75 maf every ten years) to the Lower Basin. But recent hydrology, particularly accounting for the aridification and severe drought throughout the west, suggests that actual annual streamflows are closer to 12 maf per year. This means that the current Compact is essentially unworkable for the future, and the basin states must therefore cooperate to reach a new agreement and operating guidelines for the Colorado River.

2007 Interim Guidelines

The Bureau of Reclamation enacted the 2007 Interim Guidelines as a stopgap measure to allow the basin states to further negotiate on the best way to allocate shortages throughout the Colorado River. The Bureau further implemented the 2019 Drought Contingency Plans to reduce the risk of Lakes Powell and Mead reaching "critical levels" that could impact power production and reservoir releases. For example, if Lake Powell falls below 3,490 feet of elevation then Glen Canyon Dam can no longer provide hydroelectric power, and an elevation of 3,370 feet is "dead pool" meaning the reservoir cannot release water downstream at all. The current elevation in Lake Powell is 3,572 feet. The Bureau has suggested a target elevation in Lake Powell of 3,525 to ensure a 35-foot buffer above the minimum power pool level. But that level is less than 50 feet above the current elevation, meaning that shortage is looming.

2024 Proposals

The Upper and Lower Basin each submitted proposals to the Bureau of Reclamation earlier this year. *See, Upper and Lower Colorado River Basin States Submit Competing Proposals for Post-2026 Operational Guidelines*, 28 W. Water L. & P'lcy Rptr. 129, 129-131 (Apr. 2024). As to be expected, each competing proposal essentially suggested that the other basin should be responsible for absorbing the lion's share of water use reductions.

Recent Developments

Representatives from all basin states, as well as many other water managers, attended the Colorado River Water Users Association annual conference in Las Vegas in early December. However, in a telling sign of the current situation, all seven basin state negotiators failed to meet together for the first time in recent memory. Tanya Trujillo, the water policy advisor and deputy state engineer for New Mexico said that:

> . . .the tensions are extremely high this year. Of the 20 years I've been coming to this conference, this is the one with the least-good relations among the states.

Elaborating on the proposal already submitted to the Bureau of Reclamation, the Upper Basin believes it should be exempt from mandatory water-use cuts because its use is already restricted by the amount

of available precipitation. Unlike the Lower Basin, which benefits from upstream reservoir releases in dry years, the Upper Basin must rely on snowpack and rainfall for its water supply, and therefore already reduces its water use in dry years. For example, Colorado imposes river calls and restricts usage every year because of a lack of available water supply.

Representatives from the Upper Basin published an editorial in the *Salt Lake Tribune* in early December 2024, stating that the Upper Basin is committed to a "fair, common sense, data-driven approach that balances the needs of all stakeholders." The editorial noted that a disconnect between various proposals fails to acknowledge the aridification and severe drought throughout the entire Colorado River Basin, and that fundamentally the river is not the same as it was. The Upper Basin therefore wants to plan for and manage "the river we have, not the river we want." The editorial offered support for the Upper Division States Alternative by noting that over the last 20 years the Upper Basin has used an average of 4.3 maf per year, well below the 7.5 maf apportionment contemplated in the 1922 Compact.

On the other hand, the Lower Basin States says it has already made notable cuts to its water usage, but the entire system cannot operate without help (*i.e.*, further reductions) from the Upper Basin in extremely dry years. For example, Arizona has recently reduced its use from 2.8 maf per year to 1.9 maf. The Lower Basin plan contemplates implementing 1.5 maf of cuts whenever the storage in all Colorado reservoirs falls below 58 percent. Further cuts, up to 3.9 maf would be imposed if storage falls below 38 percent, but these cuts would be distributed between all seven basin states.

Bureau of Reclamation Proposals

With the current guidelines set to expire at the end of 2026, the Bureau must implement a new operations plan before then. Under federal law, any new operational regime must include environmental analysis and review of public comments. Therefore, the Bureau has a goal to make a final decision no later than August 2026. The Bureau was originally scheduled to release its National Environmental Policy Act (NEPA) environmental report by the end of 2024 but has since postponed that release to sometime in 2025. The four Bureau proposals are:

- Similar to 2007 interim guidelines—This plan would require the Lower Basin to absorb up to 3.5 maf in water use restrictions. Releases from Lake Powell would be based on levels in Lake Powell, although smaller federally managed reservoirs (such as Blue Mesa Reservoir near Gunnison, Colorado) could be forced to release water if water levels in Lake Powell are too low.

- Combination of federal agency and tribal input—Both basins would be expected to conserve water under this approach. Releases from Lake Powell would depend on levels in both Powell and Mead, the average ten-year hydrology, and water use in the lower basin. Water use restrictions would further be influenced by water levels in all seven federally managed reservoirs throughout the Colorado River basin.

- Derived from conservation organization proposals—Releases from Powell would be determined by total Upper Basin storage and recent hydrology. Both basins would implement voluntary reductions, although the Lower Basin could be forced to implement up to 4 maf of cuts.

- Combination of Upper and Lower Basin proposals, with tribal input—Releases from Powell would be determined mostly by levels in Powell, although occasionally Lake Mead levels would influence those decisions. Water use reductions would be based on levels in all seven federally-managed reservoirs, and both basins would be required to conserve water at various levels.

There is a fifth option, required by federal law, to do nothing, but all stakeholders agree that it is essentially a non-option and will not be seriously considered.

Conclusion and Implications

Overall, the federal government is seeking up to 4 maf in water savings. With the basins at an impasse, both the Bureau as well as state representatives have floated the idea of a high-level mediator appointed by the White House, which was necessary to finally agree to the 1922 Compact. The incoming Trump administration has not indicated either way whether it supports that idea. All parties want to avoid litigation

which would be expensive, time-consuming (likely a decade or more) and uncertain. However, the Central Arizona Project board members recently passed a resolution calling on the Bureau to analyze options for implementing a "Compact call" should the basins not agree and the Upper Basin States fail to deliver the required amount of water passed Lee Ferry.

Lakes Powell and Mead are currently at a combined 36 percent storage level, although the Bureau believes the reservoirs can maintain active levels for at least another three years. Both the Upper and Lower Basin States have expressed skepticism with the four current Bureau proposals. However, perhaps that first agreement may be the spur the basins need to cooperate on a workable agreement to manage the Colorado River in 2026 and beyond.
(John Sittler)

ARIZONA GOVERNOR CONCLUDES NEGOTIATIONS OVER TRIBAL WATER RIGHTS RESULTING IN SETTLEMENTS WITH TRIBES

On Nov. 19, Governor Katie Hobbs announced the "official" conclusion of "decades of negotiations and court battles over tribal water rights" when with her signing two settlements involving four Arizona Native American tribes.

The Water Rights Settlement Agreements

The Arizona Governor signed the Northeastern Arizona Indian Water Rights Settlement Agreement, which settled long-standing claims with the Navajo Nation, Hopi Tribe and the San Juan Southern Paiute Tribe. In addition, Governor Hobbs also signed the agreement with the Yavapai Apache Nation, which secures safe and sustainable water supplies for the Nation, while also preserving and protecting the Verde River. It includes building a 60-mile water pipeline from C.C. Cragin Reservoir on the Mogollon Rim to deliver water to the Yavapai-Apache Nation, providing water certainty to the Nation and neighboring non-tribal communities. (*See:* https://yavapai-apache.org/waterrightssettlement/)

Both agreements with the federally recognized tribes are now before Congress for ratification.

The Northeastern Arizona Indian Water Rights Settlement Act settles some of the largest outstanding tribal water-rights claims in Arizona. It includes Colorado River allocations, in-state surface water rights, and rights to pump groundwater. Settlement of the three Tribes' water rights claims will provide certainty to the Tribes and non-tribal water users regarding the three Tribes' water rights, while also ensuring reliable, secure and safe water supplies for the three Tribes.

The legislation includes $5 billion in federal funding to construct water delivery infrastructure in northeastern Arizona across the three Tribes' reservations. Such water delivery infrastructure will include water lines to bring settlement water to communities and homes throughout the three Reservations, including communities and homes currently without running water.

The Yavapai-Apache Nation settlement, meanwhile, would provide funding for construction of a water infrastructure project that would deliver water from the C.C. Cragin Reservoir on the Mogollon Rim to the Yavapai-Apache Nation Reservation for treatment to drinking water standards, along with related infrastructure necessary to deliver that water to customers. This new, renewable supply of water to the Verde Valley would help preserve the flow of the Verde River and reduce dependence on groundwater wells in the area.

The signing of the Northeastern Arizona and Yavapai-Apache tribal settlements marks a critical milestone along the path to ensure reliable and sustainable water supplies to the Navajo Nation, Hopi Tribe, the San Juan Southern Paiute Tribe, and Yavapai Apache Nation.

The tribal leaders made their observations regarding settlement.

"I also want to thank the team at the Arizona Department of Water Resources for all of their work," President Nygren added. "With their help, I'm confident we can build a consensus with the seven Basin States to get this through Congress."

Timothy L. Nuvangyaoma, Chairman of the Hopi Tribe, also acknowledged the governor's achievement as well as the work of ADWR toward making it happen.

Conclusion and Implications

The Northeastern Arizona Indian Water Rights Settlement Agreement can be viewed in detail, online at: https://nnwrc.navajo-nsn.gov/Public-Education/Arizona-Settlement. The Navajo Nation Nation's take on the settlement is available online at: https://nnwrc.navajo-nsn.gov/Public-Education/Arizona-Settlement. The Northeastern Arizona agreement settles outstanding tribal water rights claims to the Colorado River, the Little Colorado River, and groundwater sources in Northeastern Arizona. Water infrastructure funded through this settlement will help alleviate the lack of safe, reliable water supplies for members of all three Tribes, and help ensure the access to clean running water that all Arizonans deserve.
(Robert Schuster)

CALIFORNIA DELTA WATERMASTER EXTENDS DEADLINE FOR ALTERNATIVE DELTA WATER RIGHT REPORTING

On November 25, 2024, the Delta Watermaster announced that the deadline for water right reporting for the 2024 water year using the Delta Alternative Compliance Plan (Delta ACP) has been extended from February 1, 2025, to April 1, 2025. The Delta ACP enables water diverters to measure and report water use within the Sacramento-San Joaquin River Delta (Delta) using satellite imaging and evapotranspiration data. The regulatory deadline was extended to account for delays in updating the Delta ACP online platform.

The Delta Watermaster

The position of Delta Watermaster was created as part of the Delta Reform Act of 2009. (Wat. Code, § 85230.) While the Watermaster is appointed to a four-year term by the State Water Resources Control Board (State Water Board), the position is an independent officer of the state who reports to both the State Water Board and the Delta Stewardship Council (Council).

The Delta Watermaster oversees the day-to-day management of water rights in the Delta and possesses monitoring, reporting, and enforcement authority over Delta diverters. The Delta Watermaster is also responsible for assisting the State Water Board and Council with executing their legislative and administrative purposes to enhance the ecology and improve the reliability of the water supply in the Delta.

Senate Bill 88

In response to a series of critical drought years, the Legislature passed Senate Bill (SB) 88 in 2015, requiring all California water right holders who divert more than ten acre-feet of water per year to measure and report their diversions to the State Water Board. (Wat. Code, §§ 1840-1841.5.) The State Water Board adopted regulations implementing the SB 88 diversion requirements in 2016 and is currently considering adjustments to certain requirements and key terms. (Cal. Code Regs., tit. 23, §§ 931-938.) The required frequency of monitoring ranges from monthly to hourly, based on the amount of water a right holder directly diverts or stores in a year. Failure to comply with the measurement and reporting requirements or implement an acceptable alternative compliance plan can result in civil liability of up to $500 per day, pursuant to Water Code section 1846.

The Delta Alternative Compliance Plan

During the initial implementation of SB 88, it became evident that strict compliance with the measurement and reporting rules was not feasible for many Delta water users, due to unique hydrologic conditions and other limitations. The Delta's subsided, channelized islands, and the wide use of siphon pumps that are affected by fluctuating tides and debris, can cause traditional methods of metering at points of diversion to be less reliable and face more technical challenges. Those challenges prompted a group of diverters and experts to form the Delta Measurement Experimentation Consortium (Consortium) in 2016, and the development of the Delta ACP as an alternative plan under SB 88.

The Delta ACP, which went into effect in March of 2023, is a reporting system that tracks the overall consumptive use of water from all points of diversion in the Delta. A program called OpenET quanti-

fies evapotranspiration data via satellite imaging to approximate consumptive use in a given area. The evapotranspiration data is the amount of water that evaporates from crop plants, as well as land and water surfaces. Using Landsat satellites and surface weather information, OpenET estimates the quantity of water used by crops, rather than the quantity diverted by growers. In addition to avoiding the expense and challenge of individual meters, the Consortium also found the OpenET method of measuring water use more accurately accounts for the unused diverted water that returns to its source via porous Delta lands.

To participate in the Delta ACP, growers must input the place of use boundaries of their fields in the Delta ACP website, DeltaACP.com, which then applies the water use information from OpenET to the diverter's land. OpenET uses the digitized place of use for each diverter to compare acreage and monthly evapotranspiration in acre-feet. The Delta ACP website provides diverters with a preview of their evapotranspiration data obtained from OpenET, allowing participants to review the data for errors. After confirming their place of use boundaries and ET data, participants complete the remainder of their supplemental statements of diversion pursuant to SB 88. The consumptive use is then reported in the participant's annual supplemental statement of diversion and use form that is electronically provided to the State Water Board.

About half of Delta water users have participated in the Delta ACP reporting since its adoption and the Delta Watermaster has championed the program as a contributor to the ninety-eight percent reporting compliance rate for Delta diverters in 2023.

Purpose for the Extension

For the 2024 water year, which covers the period of water diverted and used between October 1, 2023 and September 30, 2024, the Delta Watermaster has granted a two-month extension from the regulatory reporting deadline of February 1, 2025 to account for delays resulting from the need for software upgrades and integration of new OpenET data. With the extension, participants in the Delta ACP will have additional time to submit their reports to the Delta ACP website interface, which resumed operation on December 1, 2024.

Conclusion and Implications

The reporting deadline extension will provide participants additional time to familiarize themselves with the updated Delta ACP website. While the need for a deadline extension indicates the Delta ACP is still being refined, the high reporting compliance rate and the innovative method for tracking water use in the Delta demonstrate the utility of the tool.

The deadline extension announcement and documents associated with the Delta ACP are available at the State Water Board's website at: https://www.waterboards.ca.gov/water_issues/programs/delta_watermaster/#:~:text=The%20extension%20for%20filing%20for,be%20incorporated%20into%20the%20system.
(Sarah Nagle, Austin Cho)

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE ISSUES BIOLOGICAL OPINION FOR LONG TERM CALIFORNIA WATER SYSTEM OPERATIONS

Surface water in California is conveyed primarily by two large conveyance systems commonly known as the State Water Project (SWP) and the Central Valley Project (CVP), which are owned and operated by the State of California Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR), respectively. The CVP and SWP are a network of dams, reservoirs, canals, and other facilities that provide water, power, and flood control for California. What one system does may, and often does, impact the other, thus making coordinated operations critical for timely and reliable delivery of water supplies throughout the state. These operations are referred as Long-Term Operations and become subjected to myriad of federal and state regulatory and environmental compliance requirements.

Background

Among those requirements for the federal government is developing and adopting a Biological Opinion, which the United States Fish and Wildlife Service (USFWS) has issued for the CVP's Long-Term Operations. USFWS is the primary federal agency whose main responsibility is to manage fish and wildlife resources.

By way of brief background, the Biological Opinions include Reasonable and Prudent Alternative (RPA) actions to prevent the projects from jeopardizing these species. For example, the 2008 Biological Opinion recommended actions to prevent the Delta smelt from becoming endangered. The Biological Opinions are intended to ensure consistency between the federal and state agencies that operate the CVP and SWP. However, a lawsuit filed by California and others in 2019 challenged the Biological Opinions, claiming the opinions did not provide enough protection for protected species.

In September 2021, the USBR requested to reinitiate Endangered Species Act consultation on the Long-Term Operations of the CVP and SWP. The new Biological Opinion includes goals to support species viability, protect life history diversity, support operational flexibility, provide regulatory certainty, support science and monitoring, and create a single, adaptable, coordinated operation for the CVP and SWP.

During late November 2024, the USFWS issued its Biological Opinion for the Long-Term Operations. This opinion assesses the potential impacts of the LTO on sixteen federally-listed and proposed species, as well as designated critical habitats.

Long-Term Operations Plan

The Long-Term Operations plan aims to provide more predictable actions for endangered fish species and a more reliable response to multi-year droughts. Key points include: (1) improved regulatory certainty for water users and a more stable water supply for communities, farms, and fish; (2) a new framework for Shasta Reservoir operations to benefit winter-run Chinook salmon; (3) revised operational criteria for Delta exports; (4) early implementation of components of the Healthy Rivers and Landscapes Program to provide more Delta outflow and habitat restoration in the Sacramento-San Joaquin Bay-Delta; and (5) collaboration with partners from various federal and state agencies.

The plan purports to be designed to build resilience to drought, support endangered species, and improve habitat conditions throughout the Delta. Also included in the plan is early implementation of components of the Healthy Rivers and Landscapes Program to provide more Delta outflow and habitat restoration. The Healthy Rivers and Landscapes Program involves numerous interests coming together to provide water for fisheries and riparian habitats in the Delta as part of the California State Water Resources Control Board's Water Quality Control Plan Update.

Ultimately, the proposed action's key findings include: (1) may affect, but is not likely to adversely affect, four species; (2) it is not likely to jeopardize the continued existence of twelve species; (3) the proposed action may affect, but is not likely to adversely affect, designated habitat for one species; and (4) it is

not likely to destroy or adversely modify designated critical habitat for three species

Conclusion and Implications

Biological Opinions impact the balancing of water resource management with the protection of endangered species and their habitats, especially given California's challenges with droughts. The Biological Opinion may impose restrictions on water deliveries to protect species such as salmon and delta smelt, affecting agricultural, urban, and environmental water users some of whom hold very senior water rights in the state. Long-term, this could lead to more stringent water management practices and investment in infrastructure or alternative water sources to mitigate impacts on water supply reliability. Additionally, these opinions may spur legal challenges or policy adjustments as stakeholders seek to balance ecological protection with their water needs.
(Wes Miliband)

U.S. ARMY CORPS OF ENGINEERS AND BUREAU OF RECLAMATION, IN CONJUNCTION WITH THE BONNEVILLE POWER ADMINISTRATION, REOPEN THE 2020 COLUMBIA RIVER SYSTEM OPERATIONS FINAL EIS

The United States Army Corps of Engineers (Corps) and the Bureau of Reclamation (BOR) as the lead agencies, together with the Bonneville Power Administration as a cooperating agency, issued a scoping notice in the Federal Register on December 18, 2024 (89 FR 102869) reopening the 2020 Columbia River System Operations (CRSO) Final National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) in part in response to the Biden administration's December 2023 federal commitments Memorandum of Understanding (the now-called Resilient Columbia Basin Agreement) and United States-Canada ongoing negotiations seeking to modernize the countries' Columbia River Treaty. Regional United States Senators, including Risch (Idaho), Crapo (Idaho), Lummis (Wyoming), Daines (Montana), and Barrasso (Wyoming) are taking a dim view of the outgoing Biden administration's efforts attempting to breach the Lower Snake River Dams (LSRD) portion of the CSRO (Lower Granite, Little Goose, Lower Monumental, and Ice Harbor dams).

Idaho (and Regional) Opposition to the Resilient Columbia Basin Agreement

In December 2023, the executive branch of the United States signed a Memorandum of Understanding (effectively, the Agreement) with the states of Oregon and Washington, various regional native American tribes, and environmental non-governmental entity (NGO) plaintiffs initiating what could become up to a ten-year stay in the decades-long CSRO litigation over the perpetuation and recovery of Endangered Species Act (ESA)-listed salmonid species in the Pacific Northwest. Hailed as the product of meaningful regional stakeholder negotiations, the Agreement largely takes aim at the continuing existence of the LSRD.

However, stakeholders reliant on the LSRD assert that they were effectively deprived of meaningful opportunity to participate in the negotiations, if allowed to participate at all. Members of Congress were equally concerned because the Agreement issued absent Congressional input or oversight despite containing various federal obligations, including the proposed expenditure of over $1 billion in funding for fish and habitat restoration in the Columbia River Basin and the funding and completion of several studies exploring the replacement of LSRD-related benefits (e.g., hydropower generation, transportation, and water supply) so that the LSRD may be breached in the future. The Biden administration, through the Agreement, seemingly wrote a check and consented to a plan of action that the administration, in and of itself, cannot do. The Agreement has been roundly panned by the Idaho executive branch and Idaho Congressional members since its inception.

Idaho Administration's Concerns of a Lack of Meaningful Stakeholder Participation

For example, in December 2023, Idaho Governor Little and Lieutenant Governor Bedke, among others in the Pacific Northwest, found that the settlement negotiation process lacked meaningful stakeholder participation and was ignorant of the practical im-

pacts/costs to Idaho should the dams be breached in the future. While acknowledging the importance of anadromous fish recovery, Governor Little and Lieutenant Governor Bedke questioned the settlement agreement's motives and ability to deliver. Citing an estimated 8,000 MW projected power production shortfall in the region over the next decade, breaching the LSRD would only put the region farther behind the power production curve and worsen the electricity importation costs that the region (including Idahoans) already shoulders during peak demand periods. And, breaching the LSRD would compound the problem via the removal of a reliable source of "green" energy (produced absent use of fossil fuels). Breaching the SRD would also impose significant commodity transportation cost increases on the region, and Idaho in particular. Barging from the Port of Lewiston would effectively end, and need be replaced by far more costly overland routes (rail and highway), the existing infrastructure of which cannot accommodate the additional traffic in its existing condition.

Defending Against Manipulative Negotiations Act

In January 2024, Idaho Congressman Russ Fulcher joined Representatives Dan Newhouse (Washington State), Cathy McMorris Rogers (Washington State), Lori Chavez-DeRemer (Oregon), and Cliff Benz (Oregon) in introducing the Defending Against Manipulative Negotiations Act (DAMN Act) on January 24, 2024 in response to the Agreement. The Act was introduced in an attempt to prohibit the use of federal funds to: (a) study LSRD benefits replacement alternatives, or take any action ultimately leading to the modification or removal of the LSRD; and (b) support or implement the Initiative as detailed in the Agreement.

Use of Green Energy

Whether and how hydropower generation, barging/transportation, and water supply (including agricultural water supply) benefits of the LSRDs can meaningfully be replaced is an interesting, and for some, ironic question. The Biden administration and the state legislatures of Oregon and Washington have been particularly aggressive at mandating the development and use of "green" energy (that which is not fossil fuel or nuclear-based). This alone, it seems, is a major hurdle to overcome in the Pacific Northwest Region where approximately 80 percent of the electricity generated comes from hydro sources (at least in terms of Bonneville Power Administration supply). Approximately 10 percent is sourced from wind, and less than 1 percent comes from solar.

Transportation and Water Supply Issues

Transportation and water supply questions are no less concerning or ambitious. Barging on the Columbia and Lower Snake Rivers between Portland, Oregon and Lewiston, Idaho is undisputedly the most cost effective method of commodities shipping/transportation in the region—significantly cheaper than rail and overland truck. Existing highway and rail corridors are narrow and congested—replacement of barging will likely require the whole cloth construction of entirely new highway and rail systems nearly as ambitious (and certainly more costly) than the initial construction of what currently exists. And what of the many thousands of acres of irrigated agriculture that are reliant on the water elevations and pools provided by the LSRD—at what cost are those pumping plants retrofitted?

The Risch-Crapo, *et al.* Letter (December 19, 2024)

And now, Idaho Senators Risch and Crapo are likewise requesting that the Biden administration stand down at this eleventh hour, particularly after being shown the door in the November 2024 election. In their letter, joined by Senators Lummis, Daines, and Barrasso, the senators expressly "oppose[d]" efforts to reopen the 2020 CRSO Final EIS for a variety reasons.

Like those before them, the senators pointed to unbalanced stakeholder participation in Agreement negotiations, regional electrical power generation instability threats, and regional barging/transportation corridor concerns. At the sunset of the Biden administration, the senators compared the robust underpinnings of the 2020 CRSO Final EIS (costing approximately $55 Million to conduct, and including over 450,000 public comments) to the current reopening effort based largely on the "backroom" Agreement built upon "predetermined political outcomes."

Conclusion and Implications

Whether and to what extent the incoming Trump administration affects ongoing implementation of the Agreement remains to be seen. But it is likely that the Trump administration will roll back implementation to the dissatisfaction of the environmental NGO and tribal plaintiffs. The plaintiffs will likely exit the stay and reignite the pending litigation at their first opportunity in Year five (the current stay of the litigation carries a potential term of ten years, but with a five year review and offramp opportunity should the plaintiffs disagree with the direction that matters in the region are heading).

The federal executive branch is one thing. But only an act of Congress can breach the LSRD, because only Congress can repeal the Congressional authorization that built the dams in the first place. The 2024 election results seem to further signal that Congress will not be inclined to follow the Biden administration's lead on LSRD breaching. (Andrew J. Waldera)

EPA ANNOUNCES $319 MILLION WATER INFRASTRUCTURE FINANCE AND INNOVATION ACT LOAN FOR IMPROVEMENTS TO A CRITICAL DRINKING WATER SYSTEM IN OREGON

On December 16, 2024, the U.S. Environmental Protection Agency (EPA) announced a $319 million Water Infrastructure Finance and Innovation Act (WIFIA) loan to the City of Portland, serving Oregon's Multnomah, Clackamas, and Washington counties. The loan supports construction of the new Bull Run Treatment Projects to meet federal and state safe drinking water standards, and it will help protect the public health of nearly 1 million residents.

This is the city's second WIFIA loan, bringing their total WIFIA loans to over $1 billion for the Bull Run Treatment Program. The WIFIA program's loan deferment capabilities and advantageous terms will help the city save an estimated $140 million over the life of the loan.

Background

Established by the Water Infrastructure Finance and Innovation Act of 2014, the WIFIA Program (https://www.epa.gov/wifia) is a federal loan program administered by the EPA. The WIFIA program aims to accelerate investment in the nation's water infrastructure by providing long-term, low-cost supplemental credit assistance for regionally and nationally significant projects. The WIFIA program has an active pipeline of pending applications for projects that will result in billions of dollars in water infrastructure investment and thousands of jobs.

EPA's WIFIA loans are an important piece of the Biden-Harris administration's initiative of Investing in America's Infrastructure. President Biden's Bipartisan Infrastructure Law, signed in November of 2021, provides $50 billion to invest in water infrastructure. Today, Bipartisan Infrastructure Law-funded projects are breaking ground nationwide while tackling legacy pollution, upgrading drinking water and wastewater infrastructure, and making communities more resilient to the effects of climate change.

Since its creation, EPA's Water Infrastructure Finance and Innovation Act program has announced nearly $21 billion in financing to support $45 billion in water infrastructure projects that are strengthening drinking water, wastewater, and stormwater infrastructure while creating over 150,000 jobs.

Two WIFIA Loans Announced in December 2024

Wendi Wilkes, EPA Director of Infrastructure Implementation for EPA Water stated that:

> These two WIFIA loans mark the largest EPA contribution ever to a drinking water project, and an impressive step forward for the City of Portland as they ensure safe drinking water for their residents.

With this funding, Portland will construct a new filtration facility and related pipelines from their Bull Run supply to filter out a pathogen called *Cryptosporidium*, before it goes to customers. In addition to removing *Cryptosporidium* from the Bull Run water source, filtration will provide consistent, high-quality drinking water to meet today's water quality standards, help address future risks and regulations and improve system resilience.

The projects will help create 6,100 jobs, and over $400 million will go to firms certified by the Certification Office for Business Inclusion and Diversity (COBID). This highlights the City of Portland's ongoing initiative to advance equity, diversity, and inclusion. The City of Portland's Water Bureau invests in a job apprenticeship program that recruits individuals from diverse backgrounds and life experiences to learn trade skills and earn rewarding jobs throughout the bureau.

New Filtration Facility and Pipelines

The construction contracts for the new filtration facility and pipelines will include Community Benefits Agreements that set workforce equity goals for people of color and women in the trades. The contracts also maximize opportunities for Disadvantaged, Minority-Owned, Women-Owned, Emerging Small Businesses, and Service-Disabled Veterans Business Enterprise contractors and subcontractors.

"Securing another major WIFIA loan for the Bull Run Treatment Program is a huge step forward in our work to ensure clean, safe, and reliable water for Oregonians," Senator Jeff Merkley said. With this new federal backing, not only will Portland-area folks be getting safer drinking water, but we will be creating thousands of construction jobs and saving working families money in the process. "This is exactly the win-win-win WIFIA was created to achieve for our communities."

> This filtration facility is a long-term investment that will pay dividends in protecting our livability, our economy, and our health now and for generations to come. And with the support of the EPA and this low-interest financing, we're able to reduce the costs of this valuable project for our community members. (Bureau Director Edward Campbell).

Conclusion and Implications

EPA's WIFIA loans are an important piece of the Biden-Harris administration's initiative of Investing in America's Infrastructure. President Biden's Bipartisan Infrastructure Law, signed in November of 2021, provides $50 billion to invest in water infrastructure. Today, Bipartisan Infrastructure Law-funded projects are breaking ground nationwide while tackling legacy pollution, upgrading drinking water and wastewater infrastructure, and making communities more resilient to the effects of climate change.

EPA is currently in its eighth selection round for WIFIA financing. In this round, EPA is offering $6.5 billion through WIFIA, and $1 billion through SWIFIA, which is a loan program exclusively for state infrastructure financing authority borrowers. EPA is currently accepting letters of interest for WIFIA and SWIFIA loans.

In addition to WIFIA loans, there are many federal funding resources available for communities and utilities to improve vital water and wastewater resources. President Biden's Bipartisan Infrastructure Law is a once-in-a-generation investment in our nation's infrastructure and competitiveness.
(Robert Schuster)

PENALITIES & 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

Dec. 31, 2024—December 30, 2024, the U.S. Environmental Protection Agency (EPA) issued four Underground Injection Control (UIC) Class VI well permits to Carbon TerraVault JV Storage Company Sub 1, LLC (CTV), a subsidiary of California Resources Corporation (CRC). Class VI UIC wells are used to inject carbon dioxide into deep rock formations for permanent underground storage. This technology, called carbon capture and underground storage or geologic sequestration, can be used to reduce carbon dioxide emissions to the atmosphere and mitigate climate change. The four Class VI UIC permits are for the first permitted Class VI injection wells in California and represent the first such permits issued by EPA's Pacific Southwest Region.

EPA has determined that the activities authorized under the Class VI UIC permits are protective of underground sources of drinking water and public health as required by the Safe Drinking Water Act (SDWA). EPA completed a thorough technical review of all information submitted by CTV in its permit application, as well as the operational standards, the monitoring requirements, and the existing geologic setting. In order to ensure the surrounding community could provide input, EPA held public comment periods and reviewed thousands of public comments submitted on the draft permits. EPA also met with local officials in Kern County, emergency responders, community members, and property owners to explain the Class VI well program, listen to concerns, and answer questions.

The permits authorize CTV to construct four deep injection wells in the Elk Hills Oil Field, approximately 20 miles west of Bakersfield, California. The wells will be constructed to depths of more than a mile below surface level, into the Monterey Formation. CTV plans to inject about 1.5 million metric tons of carbon dioxide per year for 26 years, totaling almost 38 million metric tons of carbon dioxide removed and stored. The permits identify CRC's pre-combustion gas treatment within the Elk Hills Oil Field as the initial carbon dioxide source and prescribe a process for CTV to add additional sources of carbon dioxide with EPA's approval.

EPA's permits require extensive monitoring for well integrity, ground water quality and to track carbon dioxide movement. In addition, CTV must conduct surface-level air and leak detection monitoring to ensure that the injected carbon dioxide is staying underground. CTV will provide the surface air and leak detection monitoring data along with other monitoring data on a publicly accessible website. CTV is also required to plan for emergencies and maintain an Emergency and Remedial Response Plan, which includes an Emergency Communication Plan to inform the public of any unanticipated event that requires an emergency response.

Before EPA will authorize the start of carbon dioxide injection, CTV is required to properly plug 200 wells where carbon dioxide is expected to migrate during the project. EPA will review and approve the final plugging records to ensure that the wells do not allow carbon dioxide to migrate upward into underground sources of drinking water.

Based on EPA's review of CTV's application, including maps, well logs, cores, and the results of seismic surveys, EPA determined that the regional and local geologic features of the site will allow the Monterey Formation to safely receive and store the total volume of carbon dioxide authorized for injection. In addition, the confining zone -- the geologic formation that overlies the injection formation -- provides a suitable trap for the carbon dioxide to remain in place without migration. EPA also reviewed historic seismicity data in the area, including an assessment of faults and fractures, as well as the probability of

induced seismicity due to injection activities. Based on this review, EPA determined that the injection operations are unlikely to cause seismic activity or containment issues.

EPA will also require CTV to maintain financial responsibility throughout the life of the project to plug the injection wells, perform all required post-injection site care, properly decommission the site at the end of project operations, and conduct any needed emergency and remedial response measures. CTV has secured approximately $30,000,000 for these activities. EPA has reviewed and approved this amount and will continue to review the cost of the activities and require CTV to update the amount on an annual basis if there are changes.

While the Class VI UIC permits issued by EPA authorize the injection of carbon dioxide pursuant to the federal Safe Drinking Water Act (SDWA), the permits do not relieve CTV of complying with applicable federal, state or local laws or regulations.

Dec. 19, 2024—The U.S. Environmental Protection Agency has fined The Cliff Corp. and Grupo Caribe, LLC a total of $50,000 for violations of the Clean Water Act relating to their ongoing construction project for an 86-villa development in the Borinquen Ward of Aguadilla, Puerto Rico. The companies failed to comply with a water permit, called the National Pollutant Discharge Elimination System (NPDES) Construction General Permit, for stormwater discharges. This permit requires that steps be taken to reduce pollution going into local waterways.

The EPA found that The Cliff Corp. and Grupo Caribe, LLC started construction on a site at the Cliff Villas Hotel and Country Club in Aguadilla, Puerto Rico, without obtaining the necessary permits or taking steps to control erosion from their construction site. That allowed stormwater to carry sediment and pollutants from the site and run into local water bodies, potentially impacting water quality.

In response to these violations, the EPA is requiring the companies to take actions, including: (1) Submit a Notice of Intent permit application; (2) Implement erosion and sediment controls; and (3) Conduct regular site inspections to ensure compliance with the Clean Water Act.

The EPA's inspection of the project site revealed that the developers began work and discharged pollutants into waters of the United States without the required stormwater permit authorization. EPA also found inadequate erosion and sediment controls. EPA required the companies to develop a plan to control stormwater runoff and provide compliance reports to the agency describing the status and progress of the actions taken to comply.

Dec. 18, 2024—Federal Judge Thomas O. Rice today granted a request by the U.S. Department of Justice, on behalf of the U.S. Environmental Protection Agency, to require three Lower Yakima Valley dairies to provide well testing and bottled water or water treatment systems to well users near Granger, Washington.

EPA believes the health of people in the area could be at risk from nitrate-polluted drinking water and alleges that three large dairies in that area have contributed nitrate to the area's groundwater and contaminated drinking water wells**.**

The EPA is urging nearby residents to visit EPA's Lower Yakima Valley Groundwater webpage to learn whether their well is in the area affected by the ruling and to accept upcoming offers for well testing. To comply with the court's order, the dairies must submit a plan for testing residential wells within 30 days and complete the testing within 60 days of EPA's approval of a plan. People can also call the EPA hotline at 509-204-1941 or 888-508-6344 for more information.

Nitrate is an acute contaminant. A single exposure can pose health risks, including a condition in infants known as methemoglobinemia, or "blue baby syndrome," that can result in death. Nitrate exposure can also cause other health effects. People who are pregnant or have other health concerns are also at high risk.

On June 26, 2024 DOJ filed a lawsuit on behalf of EPA in federal court alleging the three dairies have failed to adequately control nitrate contamination from their operations and are potentially endangering the health of people located downgradient of the dairies. DOJ asked the court to order the dairies to immediately test downgradient wells and provide alternative water to impacted residents.

In this ruling the court ordered the dairies to test drinking water wells in an area up to 3.5 miles downgradient of the dairies and to provide and maintain reverse-osmosis water treatment systems or bottled water to homes where this testing finds nitrate levels above 10 milligrams per liter. The court also ordered

the dairies to immediately conduct groundwater monitoring and test a lined lagoon for leaks.

Today's ruling does not conclude the legal action against the dairies. EPA and DOJ also seek to address the risk to downgradient residents from the dairies' ongoing contamination of area groundwater with nitrate and to resolve the dairies' failure to comply with outstanding requirements of their 2013 agreement with EPA.

Even with the work that the court is ordering the dairies to perform, more work is necessary to address nitrate contamination in underground sources of drinking water throughout the Lower Yakima Valley, on which thousands of people rely.

For residences located outside of the area impacted by today's ruling, free well testing and alternative water is available from the Lower Yakima Valley Groundwater Management Area Safe Drinking Water Initiative.

Dec. 11, 2024—The U.S. Environmental Protection Agency announced a final rule to streamline, modernize, and clarify the procedures for states, territories and authorized Tribes to administer programs that protect local waterbodies. This is the first comprehensive update to the *Clean Water Act Section 404(g) Tribal and State Assumption Program* regulations in 35 years.

"The Clean Water Act envisions collaborative implementation between EPA and state and Tribal co-regulators to protect our nation's waters that support public health, thriving ecosystems, business development, recreation, agriculture, and more," **said EPA Principal Deputy Administrator for Water Bruno Pigott**. "This final rule will make it easier for states and Tribes to administer a vitally important permitting program while complying with Clean Water Act requirements that have strengthened our water resources for 50 years."

The 2024 Rule for the Clean Water Act Section 404(g) Tribal and State Assumption Program clarifies the procedures and requirements for states, territories and authorized Tribes to assume and administer the Clean Water Act Section 404 permitting program in some waters of the United States. Since the program was enacted in 1977, many Tribes and states have expressed interest in administering the program. Tribes, states and other stakeholders have identified several barriers to assumption and requested that EPA clarify the program's requirements and procedures.

The 2024 Rule responds to this feedback and establishes new procedures to address these barriers. It also harmonizes the requirements for program assumption with existing requirements for program operation and creates new opportunities for Tribal engagement and public input. Further, the 2024 Rule clarifies EPA's oversight role, which will increase transparency and help facilitate conversations between EPA and the assuming state or Tribe. Because the 2024 Rule replaces outdated and unclear procedures with more transparent requirements and more streamlined procedures, the 2024 Rule will facilitate assumption of Clean Water Act Section 404 while ensuring that approved state and Tribal programs are meeting their requirements.

For more information, including a pre-publication version of the *Federal Register* notice and fact sheets, visit the CWA 404g website.

Dec. 11, 2024—The U.S. Environmental Protection Agency, along with the Department of Justice and the State of Illinois, announced the filing of a complaint against the City of East St. Louis, Illinois.

The complaint seeks penalties and infrastructure improvements to remedy East St. Louis' failure to operate its sewer system in compliance with the Clean Water Act. This failure has led to hundreds of unlawful discharges of untreated sewage to various locations in the community, including the Mississippi River and Whispering Willow Lake in Frank Holten State Park.

East St. Louis operates a combined sewer system that carries sanitary sewage and stormwater through the same pipes. During periods of heavy rain, combined sewage is discharged directly from East St. Louis' outfalls to the Mississippi River or Whispering Willow Lake without any treatment, which the United States alleges is in violation of the Clean Water Act. Since 2020, East St. Louis has discharged untreated sewage to the Mississippi River on over 140 separate days. The city has also discharged untreated sewage into Whispering Willow Lake, though the precise number of discharges is unknown because East St. Louis has failed to install required monitoring devices.

Areas of the Mississippi River that are downstream of East St. Louis are designated for recreation such as swimming and kayaking; Whispering Willow Lake

is frequently used for fishing and boating. East St. Louis' failure to monitor outfalls interferes with EPA's ability to evaluate the danger that discharges to these water bodies pose to human health. Untreated sewage contains pathogens such as E. coli, which can cause severe illness if ingested. The frequent discharges of untreated sewage from East St. Louis' outfalls could pose significant health risks to residents who recreate in the receiving waters.

East St. Louis also operates a separate sewer system that carries sanitary sewage only. Both the combined and separate sewer systems that the city operates are in a state of disrepair. The city's failure to properly operate and maintain these systems has led to additional discharges of combined or sanitary sewage into streets and buildings and has put members of the public at risk for unknowingly coming into contact with untreated sewage.

The complaint was filed in the U.S. District Court for the Southern District of Illinois. The United States and Illinois will request an order for the City of East St. Louis to cease further violations of the Clean Water Act and complete all actions necessary to ensure future compliance. These requested compliance measures will likely include sewer improvement and other infrastructure projects.

The Justice Department and EPA are asking East St. Louis community members to consider submitting optional Community Statements regarding sewer overflow events by April 30, 2025. The agencies seek information on the extent and impact of the sewer overflow problems and input on long-term solutions. Community members can provide input at dojenrd.gov1.qualtrics.com/jfe/form/SV_3aSMl4v9WteSESy.

The United States has brought enforcement actions to require municipalities across the country to update their sewer systems and address similar Clean Water Act violations. Nationally, EPA has been working with states, municipalities, and trade organizations to develop tools to help communities work towards compliance with Clean Water Act requirements. On Dec. 10, the Justice Department, EPA and the State of Illinois announced a settlement with the nearby City of Cahokia Heights, Illinois, resolving that city's Clean Water Act violations. Details of that settlement can be found at www.justice.gov/opa/pr/justice-department-and-epa-announce-settlement-cahokia-heights-illinois-improper-operation.
(Robert Schuster)

LAWSUITS FILED OR PENDING

INDIAN WELLS VALLEY GROUNDWATER AUTHORITY PETITIONS CALIFORNIA SUPREME COURT FOR REVIEW OF TRIAL PHASING ORDER IN COMPREHENSIVE GROUNDWATER ADJUDICATION

On November 25, 2024, the Indian Wells Valley Groundwater Authority (Authority) filed a petition for review with the California Supreme Court (Petition), challenging an August 5, 2024, trial phasing order in the comprehensive groundwater adjudication of the Indian Wells Valley Groundwater Basin. (*Indian Wells Valley Groundwater Authority v. Superior Court of Orange County*, California Supreme Court, Nov. 25, 2024, Case No. S288048.) In the wake of a summary denial of the Authority's petition for writ of mandate on November 14, 2024 (Fourth District Court of Appeal, Case No. G064757), the Petition seeks clarification from the Supreme Court on the interplay between the Sustainable Groundwater Management Act (SGMA) and the so-called Streamlined Adjudication Statutes, which govern the legal process for groundwater adjudications under SGMA.

SGMA and the Streamlined Adjudication Statutes

The California Legislature reshaped groundwater management in 2014 with the enactment of the SGMA, which assigns responsibility to local groundwater sustainability agencies (GSA) to develop and implement Groundwater Sustainability Plans (GSP) for the sustainable management of the majority of the state's groundwater basins by 2040. (Wat. Code, §§ 10720-10738.) Each GSP must detail how the Groundwater Sustainability Agency (GSA) will manage the groundwater resources in the basin to achieve "sustainable yield," which SGMA defines as the "maximum quantity of water that can be withdrawn annually from a groundwater supply without causing an undesirable result." (*Id.* at § 10721(w).)

The following year, the Legislature passed Assembly Bill 1390 and Senate Bill 226 (Streamlined Adjudication Statutes) to amend the California Water Code and Code of Civil Procedure to streamline the legal process for comprehensive groundwater adjudications in superior court, and ensure consistency with SGMA objectives. (*See generally*, Code Civ. Proc. §§ 830 *et seq*.)

Indian Wells Valley Groundwater Basin

The Indian Wells Valley Groundwater Basin (Basin) lies in the northwestern corner of the Mojave Desert in southeastern California and is the sole supply of potable water for the Indian Wells Valley. (Petition at 21.) The vast majority of the Basin, nearly 80 percent of its acreage, is owned by the United States Navy for the Naval Air Weapons Station China Lake, or managed by the U.S. Bureau of Land Management. The remainder is used for domestic, industrial, or agricultural purposes. The Basin was designated as "high-priority" under SGMA by the Department of Water Resources (DWR) because of its history of overdraft and declining groundwater levels.

In July 2016, the City of Ridgecrest, Inyo County, Kern County, San Bernardino County, and the Indian Wells Valley Water District formed the Authority for the purpose of serving as the GSA for the Basin. (Petition at 20.) The Authority developed and adopted its GSP (Plan) in January 2020, which DWR approved in 2022. The Plan determined the Basin's sustainable yield to be 7,650 acre-feet per year. The Authority began implementing the Plan by identifying a water import project and adopting a replenishment fee to pay for the imported water and other actions identified in the Plan as necessary to achieve sustainability. The replenishment fee was subject to litigation in *Mojave Pistachios, LLC v. Superior Court* (2024) 99 Cal.App.5th 605.

The adjudication arose from a quiet title action in 2021 over the groundwater rights of four of the biggest producers of groundwater in the Basin—Mojave Pistachios, LLC, Indian Wells Valley Water District (District), Searles Valley Minerals, Inc. (SVM), and Meadowbrook Dairy Real Estate, LLC—after the District filed a cross-complaint for comprehensive ad-

judication pursuant to the Streamlined Adjudication Statutes. (Petition at 24.) Among the issues in dispute, some pumpers argued that the Basin's safe yield should be 14,300 acre-feet per year, nearly double the 7,650 acre-feet identified in the Plan. (*Id.* at 17.)

The Petition for Review

In May of 2024, SVM moved to set trial phases to determine the safe yield of the Basin (Phase 2) and establish a physical solution (Phase 3). (Petition at 24.) The Authority opposed the trial phasing order on the grounds that a comprehensive groundwater adjudication cannot be used to collaterally attack an adopted GSP. (*Id.* at 30–31.) However, the trial court granted SVM's motion and certified the issue for immediate review, holding that its determination of a safe yield was a key component of the physical solution. (*Id.* at 36.) The Authority filed a petition for writ of mandate in the Court of Appeal for the Fourth District, arguing the trial court should be required to accept the safe/sustainable yield the Authority already established in the Plan. (*Id.* at 24–25.) The appeals court summarily denied the Authority's writ petition in a two-page order.

In its Petition, the Authority relies on the Streamlined Adjudication Statutes to argue Phase 2 is inappropriate and the court should defer to the findings in the Plan. (Petition at 25–26.) For instance, courts have authority to stay proceedings to allow adoption of a GSP that addresses issues in the adjudication. (Code Civ. Proc., § 848(a)(1); see also *id.* at § 849(b) ["Before adopting a physical solution, the court shall consider any existing [GSP] or program."].) The Authority argues a Phase 2 determination of a safe yield for the Basin would essentially be a reevaluation of the sustainable yield determination in the Plan and a challenge of the Plan itself, because the two are so inextricable. (Petition at 34–37.) The Petition states the provisions of the Streamlined Adjudication Statutes:

> . . .make clear that the Legislature intended for adjudications to be managed to take advantage of, and not interfere with, the technical information developed as part of a Plan. (*Id.* at 28–29.)

According to the Petition, Phase 2 could invalidate and supplant the Plan, which should only be done through a reverse validation action. (Petition at 26–28, citing Wat. Code, § 10726.6.) The Authority argues SGMA's incorporation of the validation statutes (Code Civ. Proc., §§ 860 *et seq.*) reflects a legislative intent that courts defer to the expertise of the GSA and its technical information and findings on a basin. (Petition at 28.) Further, SGMA states that any judgment entered by the court must "not substantially impair the ability of a [GSA] … to achieve sustainable groundwater management." (*Ibid.*, citing Wat. Code, § 10737.8.) In sum, the Petition argues that the trial court's phasing order authorizes an improper collateral attack on the Plan's technical findings, creates redundancy and confusion, and contravenes the legislative intent in the Streamlined Adjudication Statutes and SGMA to implement sustainable groundwater management.

Conclusion and Implications

The Authority's Petition asks the California Supreme Court to clarify the role of a trial court in a comprehensive groundwater adjudication when the basin is concurrently managed under a GSP. While SGMA and the Streamlined Adjudication Statutes

JUDICIAL DEVELOPMENTS

UTAH STATE DISTRICT COURT MAKES PROPOSED DETERMINATION OF WATER RIGHTS FOR THE PROVO RIVER DIVISION

In The Matter of The General Determination of The Rights to The Use of All of The Water, Both Surface and Underground, Within The Drainage Area of The Utah Lake And Jordan River In Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties In Utah. Provo River Division, Provo City North Subdivision (55-7) (Salt Lake County Civil No. 365729847)

On December 19, 2024, the Utah State Engineer and Utah Attorney General made a Proposed Determination of water rights for the Provo River Division, Provo City North Subdivision. The Proposed Determination was scheduled to go to public comment on 9 January.

Background

On September 1, 1944, the Third District Judicial District Court in and for Salt Lake County ordered the State Engineer to make a determination and adjudication of all rights to the use of water of Utah Lake and Jordan River and their tributaries in Utah and Salt Lake counties. On June 21, 1972, the court issued an order clarifying that the adjudication area includes all right to the use of water, both surface and underground, within the drainage area of Utah Lake and Jordan River and their tributaries in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete and Juab counties. The State Engineer followed the dictates of Title 73, Chapter 4 of the Utah Code completed hydrologic surveys and evaluated claims from water users within the area. Prior to the adjudication the court entered a decree in *Provo Reservoir Company v. Provo City* (Provo River Decree). This judicial decree was "instrumental in distributing water from the Provo River. . ."

The Proposed Decree

The Proposed Decree provides a comprehensive and detailed list of water rights throughout the jurisdiction area. *See:* https://waterrights.utah.gov/docImport/0666/06667799.pdf including a Priority Schedule, Description of Water Rights, Description of Exchanges, Description of Share Statements, Renumbered Rights, and Forfeited Rights listed in great detail that is beyond the scope of this article.

Conclusion and Implications

A public meeting was scheduled for January 9, 2025, to provide water users within the Provo City North Area to comment and raise concerns. Representatives from the Division of Water Rights were scheduled to be in attendance to field questions and provide explanations regarding the Proposed Determination. For more information on the public meeting with links, *see:* https://waterrights.utah.gov/meetinfo/2025/m20250109/20250109_agenda_pcnorth.pdf. For information on water rights in Utah, *see:* http://waterrights.utah.gov and https://waterrights.utah.gov/meetinfo/2025/m20250109/default.asp (Robert Schuster)

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

CHANGE SERVICE REQUESTED

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