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WESTERN WATER NEWS

UPPER DIVISION STATES ON THE COLORADO RIVER REFINE MARCH 2024 ALTERNATIVE FOR POST-2026 RIVER OPERATIONS TO INCLUDE CONSERVATION MEASURES

In late January 2025, the Upper Division States on the Colorado River—Colorado, Utah, New Mexico, and Wyoming—submitted refinements to their March 2024 proposal for guidelines to govern water allocations and cuts once the current guidelines expire in 2026. The refinements come after negotiations to develop a consensus alternative for Colorado River management with the three Lower Division States—California, Arizona, and Nevada—stalled over fundamental disagreements. With additional conservation measures to be provided by the Upper Division States, the refined alternative proposal could be a step toward resuming those discussions.

Background

In 2007, the U.S. Bureau of Reclamation (Reclamation) adopted interim guidelines for water supply shortages on the Colorado River in response to persistent drought conditions and the fact that prior rules only addressed operating criteria for normal and surplus water supply conditions. Water levels across the Colorado River Basin experienced decline beginning the early 2000s that has yet to fully recover. In total, Colorado River flows have decreased by about twenty percent since the twentieth century. With the interim guidelines set to expire in 2026, Reclamation gave the Upper and Lower Division States a deadline of March 2024 to submit a consensus-backed alternative for updated guidelines to manage the river's water supplies going forward.

However, in March 2024 the Divisions were unable to reach a consensus and instead submitted two separate alternative proposals. The competing proposals differed significantly in how future Colorado River flows and responsibilities would be allocated. The Upper Division States' proposal called for mandatory cuts to the Lower Division States' supply should Lake Mead fall below a specified level, while reductions to the Upper Division States' supplies would be wholly voluntary. The Upper Division States' proposal was based on a long-held position that they should not be subject to further supply reductions since their water users already deal with shortages in dry years. The Upper Division States have historically not used their entire allocation, while higher demands have caused the Lower Division States to frequently divert more than their assigned share.

The Upper Division States have previously considered conservation and reduction measures, including a demand management program under review by the Colorado Water Conservation Board, and the federally funded System Conservation Pilot Program employed across the four Upper Division States. Both of these programs are structured around paying Upper Division States water rights holders to leave their allocated water in the River for downstream use. The System Conservation Pilot Program, however, has been scrutinized for its high cost, limited water savings, and potential negative implications for local economies.

The Refinements

The Upper Division States in late January submitted refinements to their proposed 2024 alternative guidelines (Refined UDS Alternative). The Refined UDS Alternative involves the creation of two water "savings accounts" in Lake Powell: a Lake Powell Conservation Account to store up to 200,000 acre-feet of water per year generated by Upper Division conservation efforts, and a Lake Powell Protection Account to release water from upstream reservoirs when water elevation at Lake Powell drops below 3,535 feet. The Lake Powell Protection Account would store water released from reservoirs located upriver when water levels in Lake Powell dip below the specified threshold, which could potentially be recovered or credited when water levels improve. This storage would be limited to 500,000 acre-feet of water per year and would be subject to the project-specific criteria at each upriver reservoir, including

adherence to existing Records of Decision, Biological Opinions, authorized purposes for each reservoir, and legal obligations, including existing and future water and hydropower contracts and states' water right administration requirements.

The proposed savings accounts would work in concert with other "parallel activities," such as a proposed Upper Basin Tribal Forbearance Program, which would compensate Tribes for their quantified but unused water to help ensure long-term reductions in demand. Additional parallel activities and conservation measures are intended to be developed under separate agreements.

Conclusion and Implications

After the seven basin states failed to reach a consensus by March 2024, the Refined UDS Alternative indicates the Upper Division States are willing to incorporate additional conservation measures for periods of severe drought. While the extent of the impact of the Refined UDS Alternative remains uncertain, stakeholders have recently resumed talks to come to an agreement on a workable set of guidelines for the Colorado River for 2026 and beyond. See: http://www.ucrcommission.com/wp-content/uploads/2024/03/UDS-Alternative-Submittal-Press-Release.pdf
(Sarah Nagle, Austin Cho)

PACIFIC GAS & ELECTRIC SEEKS TO SURRENDER HYDROELECTRIC PROJECT IN CALIFORNIA

Built over 100 years ago, the Potter Valley Project includes dams, reservoirs, and a powerhouse that have historically generated power and diverted water from the Eel River to the Russian River watershed in northern California. This water diversion supported agriculture and communities in several counties, much like many other hydroelectric projects around the state. While salmon and steelhead are able to use a fish ladder to get around the Cape Horn Dam at Potter Valley, the anadromous fish are unable to get past the Scott Dam. As it continued to age, the Potter Valley Project became uneconomic for Pacific Gas & Electric (PG&E). In 2019, PG&E decided to not relicense the project. PG&E plans to remove Cape Horn and Scott Dams and is collaborating with various entities to create a new water diversion facility for ongoing community needs.

The Potter Valley Project

The Potter Valley Project (Project) is located in northern California, in the Upper Eel River and Russian River watersheds, in Lake and Mendocino counties. The main storage reservoir for the Project, Lake Pillsbury, is formed behind Scott Dam, which is located on the Eel River. Water captured and stored in Lake Pillsbury is released into the Eel River and then captured again in Van Arsdale Reservoir, an approximately 65-acre reservoir formed behind Cape Horn Dam. Water captured in Van Arsdale Reservoir is diverted and conveyed to the Potter Valley Powerhouse, which is located just north of a predominately agricultural area known as the Potter Valley. After generating power, water is discharged via canal into the East Branch Russian River, or into irrigation canals, used by the Potter Valley Irrigation District (PVID) to provide irrigation water to farmers in the Potter Valley. The water discharged to the East Branch Russian River is captured in Lake Mendocino, which is administered by the U.S. Army Corps of Engineers for flood protection, but also stores water used by the Sonoma County Water Agency (SWCA).

FERC's Surrender Process

In 2019, PG&E determined that it would be contrary to the best interests of its electric ratepayers to continue relicensing the Project and filed a Notice of Withdrawal of the Notice of Intent (NOI) and Pre-Application Document (PAD) for the Project, both previously filed on April 6, 2017. In response to PG&E's Notice of Withdrawal, on March 1, 2019, the Federal Energy Regulatory Commission (FERC) issued a Notice Soliciting Applications from any party interested in filing a license application for a new license for the Project, stating that applicants must first file a NOI and PAD. FERC's solicitation did not result in a viable new applicant, and on May 11, 2022, FERC directed PG&E to provide a plan and schedule for submitting a Surrender Application by

July 11, 2022. PG&E's approved plan and schedule stated that PG&E would file a Surrender Application with FERC within 30 months after FERC approval of the proposed plan and schedule. The FERC approved PG&E's proposed plan and schedule on July 29, 2022; the deadline for filing of the Draft Surrender Application was January 31, 2025.

Ecosystem Changes and Water Diversion Impacts

The removal of the dams will alter the flow of the Eel River, potentially restoring more natural river dynamics. However, this could also lead to changes in sediment transport and water temperature, which might impact aquatic life.

The project has historically diverted water from the Eel River to the Russian River watershed, supporting agriculture and communities. Decommissioning will reduce or eliminate these diversions, which could affect water availability for downstream users. More specifically, the project has historically diverted water from the Eel River to the Russian River watershed, supporting agriculture and communities in Mendocino, Sonoma, and northern Marin counties. Decommissioning will reduce or eliminate these diversions, potentially affecting water availability for irrigation and municipal use.

Plans for a new water diversion facility aim to balance environmental restoration with community water needs. However, the construction and operation of this facility could have its own environmental footprint. Plans for a new seasonal diversion facility, the New Eel Russian Facility (NERF), aim to provide some water during wetter months. However, this will leave communities without diverted water during dry summer months, increasing reliance on groundwater storage and conservation measures.

Conclusion and Implications

Dam removal, while perhaps restoring natural flows, imposes significant alterations to existing conditions and reliance of habitat and humans. Local governments, water agencies, and stakeholders are working together to find solutions, such as groundwater storage and new infrastructure, to mitigate the impacts on water supply availability and quality for fisheries. This project may serve as an example for similar projects.
(Wes Miliband)

IDAHO WATER USERS, WATER MANAGERS, AND POLICYMAKERS HAVE A FULL PLATE

Like most western states, Idaho history with water challenges (quantity in particular) is long and litigious. It is also, fortunately, long on partnerships and cooperation. Oftentimes, water users, water managers, and policymakers find themselves addressing immediate—time is now-type issues. But water supply management decisions rarely confine themselves to the short term. No matter how focused on the moment issues of the day may be, water management decisions typically linger for generations to come. Southern Idaho, in particular, is at the intersection of several water policy/management issues that will impact water supplies and use for years to come.

Anderson Ranch Dam Raise—Boise River Basin

In the Boise River Basin, the Idaho Water Resource Board and the United States Bureau of Reclamation have long explored potential sites for additional water storage projects. With the days of building new dams and reservoirs whole cloth largely over with the advent of federal environmental regulations, state and federal officials focused on dam raising opportunities in the basin.

Ultimately, Anderson Ranch Dam on the South Fork of the Boise River was chosen as the best opportunity for dam raising purposes. But at what cost and for what benefit? Overall, the project is expected to raise Anderson Ranch dam approximately 6 feet in height, netting an additional 29,000 acre-feet of water storage space. With the design phase approximately 60 percent complete, project completion costs are an estimated (round numbers) $120M. Current anticipated water pricing is approximately $4,500 per acre-foot. Many expect that number to increase as the design phase nears completion.

In addition to the daunting construction costs relative to the quantity of additional storage space

achieved, the reliability of the water supply needed to fill that space is arguably less than robust. Though the Boise River Basin typically yields approximately 1.7 MAF of annual runoff on average with only 1 MAF of existing storage space in the basin (Anderson Ranch, Lucky Peak, and Arrowrock Reservoirs), the South Fork of the Boise River is the smallest "spigot" with the largest existing "bucket" in the system (existing Anderson Ranch Reservoir active storage equals approximately 413 KAF). Arrowrock and Lucky Peak Reservoirs downstream benefit from the larger North and Middle Fork drainages, and Lucky Peak also captures the Mores Creek drainage. Thus, current modeling projects that the additional 29,000 acre-feet of space created by the Anderson Ranch dam raise will only fill in roughly 50 percent of years.

That the Anderson Ranch Dam raise project was chosen as the best available option despite the foregoing cost-benefit considerations speaks to the seeming dearth of opportunities left for capturing Boise River Basin flood flows in this day and age.

Managed Aquifer Recharge—Eastern Snake River Plain Aquifer

More top of mind locally and nationally after the, by far, largest water right curtailment order issued in Idaho history near the beginning of the 2024 irrigation season, senior surface water users and junior groundwater users are supporting Idaho Water Resource Board efforts to increase annual average managed aquifer recharge rates from 250,000 acre-feet on average up to 350,000 acre-feet on average on the Eastern Snake Plain Aquifer. The increase in average annual recharge taking place in the Upper Snake River Basin above Milner Dam (Water District 01) is an important component to the parties' November 2024 stipulated mitigation plan subsequently approved by the Director of IDWR.

The additional recharge water is largely comprised of flows that would otherwise spill over Milner Dam (from Water District 01 to Water District 02). Potentially at odds with the increased managed aquifer recharge regime are Idaho Water Resource Board efforts to spill water past Milner Dam for the benefit of wintertime hydropower generation by Idaho Power Company despite Idaho's "Two Rivers" doctrine whereby water rights sourced from the Snake River upstream of Milner Dam and downstream of Milner Dam are treated as two separate sources. In other words, Idaho law contains a Milner Dam "zero flow" provision, the application of which precludes water users downstream of Milner Dam from calling for water from upstream of Milner Dam. Consequently, bypass flows used by Idaho Power Company for hydropower generation below Milner Dam is additional water that, legally speaking, Idaho Power cannot compel delivery of from within Water District 02.

Understandably, junior groundwater users in Water District 01 want the Idaho Water Resource Board to maximize managed aquifer recharge opportunities upstream of Milner Dam as a means by which to ease curtailment pressures on the aquifer. Thus, striking a balance between increased upstream aquifer recharge and spiling flows past Milner Dam for other purposes is an interesting policy question. As a legal matter, the Two Rivers doctrine governs. As a practical matter intertwined with a legal matter, any water left to flow past Milner Dam that could otherwise be used for managed aquifer recharge activities upstream of the dam threatens potential gains in ESPA stabilization which, in turn, threatens: (a) greater groundwater pumping curtailment potential; and (b) ESPA-linked spring flows discharging into the Snake River below Milner Dam in the Thousand Springs reach of the river—spring flows that contribute to Snake River minimum stream flows under the landmark Swan Falls Agreement and the "trust" water rights created thereunder (negotiated between the state of Idaho and Idaho Power Company). To say that it is all interconnected is an understatement.

Nez Perce Agreement Flow Augmentation

Idaho water users, the United States Bureau of Reclamation, and the state of Idaho are also acutely aware of the approaching expiration of the landmark 2004 Nez Perce Agreement in 2034, unless the agreement is renewed. One of the major components of the agreement is the willing seller/willing buyer flow augmentation regime supported by the state's storage water rental pools.

In terms of flow augmentation, the agreement provides that Idaho will contribute (through Bureau of Reclamation rental) 427,000 acre-feet of storage water annually during targeted periods of the year to, in theory, support salmonid smolt migration. The agreement further contains provisions pushing the flow augmentation potential up to 487,000 acre-feet under certain circumstances.

The efficacy of flow augmentation remains debatable. What is not subject to debate, however, is the fact that Idaho's flow augmentation commitments were critical to the Bureau of Reclamation securing 30-year terms on the ESA Biological Opinions underpinning Upper Snake River storage facility operations upstream of Idaho Power Company's Hells Canyon Complex. Idaho's flow augmentation commitments "bought" multiple decades'-worth of storage reservoir operation certainly and has largely kept the ESA-listed salmonid species litigation long-pending in the Columbia Basin downstream of Idaho confined to the Lower Snake and Columbia River basins downstream of Idaho.

Whether renewal of the Nez Perce Agreement, if renewal occurs, will require more or less flow augmentation water commitments remains to be seen. The proliferation of managed aquifer recharge activities in the Snake River basin upstream of Milner Dam since the 2004 implementation of the agreement (via Congressional enactment of the Snake River Water Rights Act of 2004), and projected increases in those programs as noted above will likely also have some bearing on future agreement commitments.

Conclusion and Implications

Idaho water users, water managers, and water policymakers know full-well that "A River Runs Through It" is much more than a well-known Norman Maclean novella and 1992 big screen movie starring Brad Pitt and Tom Skerritt, among others. (Andrew J. Waldera)

STATE OF UTAH AND NAVAJO NATION FINALIZE 'LANDMARK' WATER RIGHTS AGREEMENT

The state of Utah and the Navajo Nation are celebrating the finalization of a landmark water rights agreement.

Background

On January 31, 2025, the state confirmed and quantified water rights, totaling 81,500 acre-feet per year, now belong to the Navajo Nation in Utah. The settlement stems from the Utah Seventh Judicial District Court's January 31 determination and adjudication of all Navajo Nation rights to the use of surface and underground water in the state.

A formal ceremony was held on February 19, 2025, in the Utah State Capitol.

The Settlement

The decree signifies the completion of a decades-long effort between the State of Utah and the Navajo Nation. It clarifies water rights and grants the Tribe its fully quantified and adjudicated federal reserved water rights. This accomplishment is expected to markedly improve the lives of those who live in Utah Navajo territories.

Water rights negotiations began in 2003 and the Navajo Utah Water Rights Settlement (NUWRS) Agreement was reached between the Navajo Nation and the State of Utah in 2015. NUWRS was approved by Congress in 2020 and the Act was finalized by the Navajo Nation, State of Utah and the Department of the Interior on May 27, 2022. The Utah Seventh Judicial District Interlocutory Decree determines and establishes the Nation's right to use 81,500 acre-feet of water per year (AFY) on its lands within in the State of Utah. (https://nndoj.navajo-nsn.gov/Portals/0/Press%20Releases/2025/2025.02.07%20FINAL%20Press%20Release%20RE%20Water%20Rights%20in%20Utah.pdf)

Utah Lieutenant Governor's Support of the Settlement

"The Navajo people's history in the San Juan River area stretches back more than 400 years, and they still call that area '*home*,'" Lt. Gov Deidre Henderson said, adding, "This latest accomplishment grants water rights autonomy and ownership to the Tribe, and it allows them to pursue the additional funding they need to build a stronger community."

The Tribe's Support

"Water is the foundation of our culture, tradition and identity as Navajo People," said Crystalyne Curley, Speaker of the 25th Navajo Nation Council. "Our connection to the land and water is inseparable. For our Navajo-Utah residents, securing our water

rights is essential in protecting our way of life. This agreement is not just a legal victory; it is a reaffirmation of our sovereignty and our right to care for the resources that sustain us. We thank the state of Utah and its Division of Water Rights for recognizing our sovereignty and quantifying water rights that will help to empower our people."

Conclusion and Implications

The Decree also gives administrative authority to the Tribe and protects reserved water rights in perpetuity.

"Three years ago, we signed the Utah-Navajo Nation Water right Settlement Agreement. It was a meaningful step in the right direction, but a lot of technical and administrative work still needed to be done," said Utah State Engineer and Division of Water Rights Director Teresa Wilhelmsen. "I'm grateful to our adjudication team that carefully and fairly completed this adjudication. Every action taken moves toward a better future for Navajo-Utah residents. And it's been a privilege and an honor to complete this historic effort with them." (https://naturalresources.utah.gov/dnr-newsfeed/navajo-nation-and-state-of-utah-reach-another-water-rights-milestone/)
(Robert Schuster)

LEGISLATIVE DEVELOPMENTS

IDAHO WATER USERS SUPPORT WATER RIGHT FORFEITURE CLARIFICATION BILL

Idaho water users, including the Idaho Water Users Association, support Senate Bill 1084 clarifying water right forfeiture tolling provisions for water rights leased into the state water supply bank system. The proposed statutory amendment of Idaho Code Section 42-1764 will better mirror the forfeiture tolling provisions of SRBA Basin-Wide Issue No. 5 (*i.e.*, water user experiences and expectations within the context of Idaho general stream adjudications).

Background

Like many western prior appropriation doctrine states, Idaho water rights are subject to potential forfeiture in whole or in part. Also like many western prior appropriation doctrine states, Idaho common law disfavors the forfeiture and abandonment of water rights. Thus, while Idaho Code Section 42-222 provides that forfeiture, in whole or in part, occurs upon 5 continuous years of non-use, that statutory forfeiture provision is counter-balanced by several statutory defenses and exemptions to forfeiture found in Idaho Code Section 42-223, including codification of the formerly judicial resumption of use doctrine.

One of the more commonly used forfeiture shelters under Idaho law is the state's water supply bank. Where one has no present need for the use of their water right, they can lease the right into the water supply bank program and the right can then be rented from the bank by others in need of water. Though the rental rate-based income is relatively nominal, the chief benefit for water right lessors is shelter from forfeiture as provided under Idaho Code Section 42-223(5). However, a question of interpretation arose over the scope of the forfeiture protection.

Some water users understood acceptance of a water right into the water supply bank as a full "reset" of the five-year forfeiture clock. For example, and no matter the circumstances, some water users believed that water rights exiting back of the bank exited the bank at Year Zero for statutory forfeiture timing purposes. This understanding is similar to the tolling provisions outcome of SRBA Basin-Wide Issue No. 5 in which the Idaho Adjudication Court held that:

> . . .the running of the statutory forfeiture provision of Idaho Code Section 42-222 tolls upon the filing of a [water right] claim in the [adjudication] until a partial decree is entered . . . After the partial decree is entered the statutory period begins to run anew.

Others understood the forfeiture shelter of the water supply bank to be partial—that water rights leased into and accepted by the bank received a "pause" on the forfeiture clock. For example, if one had not used their irrigation water right for two consecutive irrigation season, it entered the bank at Year Two on the forfeiture time spectrum and later exited the bank in Year Two—meaning that the water right owner had only three years remaining before a third party forfeiture claim could be initiated against the water right. This understanding is consistent with Idaho Code Section 42-1764 suggesting that only a forfeiture pause occurs. However, Section 42-1764 also provided a step further that if a water right was leased into the bank and rented by another from the bank, the rental would wipe any prior non-use clean and the water right would exit the bank at Year Zero again on the forfeiture time spectrum.

Senate Bill 1084

Senate Bill 1084 seeks to end the debate consistent with the overarching legal mandate that water right forfeitures and abandonments are disfavored under the law. Thus, Senate Bill 1084 (if enacted) provides that water rights leased to (and accepted into) the water supply bank later exit the bank at Year Zero regardless of whether there was any continuous time period of non-use preceding entry into the water supply bank; and regardless of whether the water right was rented from (and put to use by the renter) from the water supply bank. For more information on

Senate Bill 1084, *see:* https://legiscan.com/ID/drafts/S1084/2025 and here: https://legislature.idaho.gov/sessioninfo/2023/legislation/S1084/

Conclusion and Implications

The proposed amendment of Idaho Code Section 42-1764 does not immunize one from statutory forfeiture that may have already occurred however. "Acceptance" of a water right into the water supply bank by the Idaho Department of Water Resources on the front end still applies. In other words, water rights already suffering from statutory forfeiture cannot be accepted into the bank. The water right owner must continue certifying that any water right that they propose to lease into the water supply bank is in good standing and has not been forfeited, and the Department routinely performs some investigation verifying that certification.
(Andrew J. Waldera)

REGULATORY DEVELOPMENTS

ADDITIONAL FUNDING FROM THE US BUREAU OF RECLAMATION ANNOUNCED FOR SOUTHERN NEVADA WATER AUTHORITY CONSERVATION INITIATIVES

Last month, the US Bureau of Reclamation announced an additional $60 million in funding for the turf removal rebate program administered by the Southern Nevada Water Authority (SNWA).

Background

Water conservation programs in Southern Nevada are managed by SNWA, the local agency responsible for providing water treatment and distribution services in the greater Las Vegas and Laughlin areas. The Bureau's latest funding package to SNWA will help the agency continue to reduce Nevada's consumptive draw on the lower Colorado River.

The Cash-for-Grass Program

In 1999, SNWA implemented its Water Smart Landscapes program, a "cash-for-grass" turf removal rebate. Since its inception, the program has replaced over 200 million square feet turf in Clark County, conserving some 4 million acre-feet of water. Currently, qualifying single-family residential property owners can receive a payment of $3 per square foot for grass removal, up to 10,000 square feet (decreased to $1.50 per square foot for grass removed over the 10,000 square foot limit). Rebate amounts for commercial, multi-family residential, and homeowners' association properties are separated by functional vs. non-functional turf. For functional turf, the program pays the same amounts as for single-family residential properties, though non-functional turf removals yield a lesser reimbursement of $2 per square foot up to 10,000 square feet, and $1 per square foot thereafter. SNWA claims the rebate program yields an average water use reduction for commercial property landscape conversions of over 50 gallons per square foot, per year.

Assembly Bill 356

The Nevada Legislature passed Assembly Bill (AB) 356 in 2021. This law prohibits commercial, multi-family, homeowners' association, and government properties from using SNWA water to irrigate non-functional turf after 2026. Further, the bill formed the Nonfunctional Turf Removal Advisory Committee, which defined nonfunctional turf as "an irrigated grass area not providing functional use" and provided examples of such areas including "streetscape turf," "frontage, courtyard, interior and building-adjacent turf," and "certain HOA-managed landscape areas." Irrigated grass for recreational use that is more than ten feet from the street, sloped less than 25 percent and not fronting on the street are generally permissible. Qualifying recreational uses include athletic facilities, golf courses, playgrounds, cemeteries, small leisure areas of multi-family properties, and pet relief areas.

The Funding Package

The most recent Bureau grant of $60 million was part of a larger $285 million funding package for water conservation projects in the Lower Colorado River Basin. Funding for the grants, issued to SNWA, the Metropolitan Water District of Southern California (MWD), and the Coachella Valley Water District (CVWD), was provided by the Inflation Reduction Act. With these new funds, SNWA expects to retire over 23 million square feet of turf and conserve nearly 190,000 acre-feet annually—two thirds of Nevada's Colorado River allocation. The grant to MWD includes a similar investment in Southern California's non-functional turf rebate program, with which MWD hopes to replace 30 million square feet of grass. MWD also received funding for its surplus water storage project on the California Aqueduct in southern Kern County, and $8 million for a leak identification and repair project. CVWD's share will largely go toward a water recycling facility for major agricultural water users.

Other Conservation Programs

In addition to the turf removal rebate, SNWA has initiated a few other water conservation measures

in recent years. One such measure is SNWA's 2021 resolution prohibiting new grass installations other than at schools, parks, and cemeteries. Another noteworthy move was the agency's 2022 rule limiting the size of new residential swimming pools in an effort to prevent evaporative losses.

Conclusion and Implications

Southern Nevada, a region heavily impacted in the past 25 years by the Colorado River drought, is today considered a leader in water conservation initiatives. The additional $60 million in funding announced by the Bureau in early January will support SNWA's existing turf removal incentives, which have the potential to significantly reduce future demands on Colorado River water resources. With just two years remaining until the effective date of SNWA's non-functional turf prohibition takes effect, property owners in Clark County have a significant opportunity to receive compensation, through Bureau of Reclamation-provided funding, in exchange water-smart landscape conversions.
(Evan Klouse, Micheline Nadeau Fairbank)

UNITED STATES ARMY CORPS OF ENGINEERS MAKES UNPLANNED RELEASES FROM TWO TULARE LAKE BASIN DAMS

Over the weekend of January 31, 2025, at the direction of the Trump administration, the United States Army Corps of Engineers (the Corps) released 6,300 acre-feet (AF)—roughly two billion gallons of water—from Lake Kaweah and Success Lake in the Tulare Lake Basin for unclear purposes and with little advance notice to downstream local agencies in charge of flood management.

Background

Terminus Dam and Success Dam are federal facilities built and operated by the United States Army Corps of Engineers on rivers in the Tulare Lake Basin. The Terminus Dam impounds flow from the Kaweah River at Lake Kaweah, which has a maximum storage capacity of 185,000 AF. Success Dam enables the storage of up to 82,000 AF of Tule River water at Success Lake. The Kaweah and Tule Rivers ultimately terminate at Tulare Lake, a typically dry lakebed with no natural outlet to a larger body of water. Under extremely wet conditions, water managers are able to divert floodwaters from Tulare Lake to the California Aqueduct through the Kern River Intertie. Under these limited circumstances, water from the Tulare Lake Basin can be moved over the Tehachapi Mountains for use by State Water Project (SWP) contractors in Southern California.

The Corps manages the Terminus and Success Dams for flood control purposes during the non-irrigation season. (Corps, Sacramento District, Water Control Data System (accessed Feb. 25, 2025) https://www.spk-wc.usace.army.mil/glossary.html.) Generally, the Corps seeks to maintain storage levels in the reservoirs near or below the "top of conservation pool level," a value that corresponds to a certain amount of authorized flood space that the Corps must keep available to store inflow from sudden storms and high inflow. (*Id.*)

January Releases

Prior to January 31, 2025, Lake Kaweah and Success Lake held 39,890 AF and 17,265 AF of stored water, respectively. Storage levels in the two lakes were above top of conservation pool levels—Lake Kaweah's storage encroached by over 26,000 AF, while Success Lake encroached by approximately 4,000 AF. During the five days before January 31, the Corps had been maintaining respective releases of 5 cubic feet per second (cfs) and 52 cfs on average from Terminus and Success Dams to manage flood capacity levels in the corresponding reservoirs. *[The data in this section are reported by the California Department of Water Resources, California Data Exchange Center. (cdec.water.ca.gov.) Data for Success Dam releases can be found here: https://cdec.water.ca.gov/dynamicapp/QueryF?s=SCC&d=30-Jan-2025+20:11&span=12hours; and data for Terminus Dam releases can be found here: https://cdec.water.ca.gov/dynamicapp/QueryF?s=TRM&d=31-Jan-2025+08:11&span=12hours. Similarly, data for Top of Conservation Conditions for Lake Kaweah can be found here: https://cdec.water.ca.gov/re-

sapp/ResDetailTop?resid=TRM; and data for Top of Conservation Conditions for Success Lake can be found here: https://cdec.water.ca.gov/resapp/ResDetailTop?resid=SCC]

On January 30, 2025, at 6:00 p.m., the Corps began to dramatically increase releases from the two dams. By 10:00 a.m. on Friday, January 31, Terminus Dam releases had increased from 5 cfs to 1,545 cfs. Success Dam operation followed a similar curve—releases increased from 56 cfs at 10:00 a.m. January 30, to 986 cfs the following day. Releases from the two dams remained high throughout the weekend, as Lake Kaweah releases averaged 903 cfs on Saturday, February 1, and 502 cfs on Sunday, February 2, and Success Lake releases averaged 562 cfs on Saturday and 272 cfs on Sunday. By Monday, February 3, the Corps drew down its releases from Lake Kaweah and Success Lake down to 13 cfs and 49 cfs, respectively.

According to Corps spokesperson Gene Pawlik, the sudden weekend releases were "consistent with the direction" in the Trump administration's Executive Order regarding Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas, dated January 24, 2025. Mr. Pawlik further stated the releases were to "ensure California has water available to respond to the wildfires" that were ravaging parts of Los Angeles at the time. It is unclear, however, how federal officials planned for the approximately 6,300 AF of water to reach Southern California, as the Tule and Kaweah Rivers themselves do not directly connect to any conveyance infrastructure that crosses the Tehachapi mountains. While some of the released water ultimately reached Tulare Lake, there is no indication any of that water was subsequently conveyed through the Kern River Intertie for rediversion into the California Aqueduct.

Conclusion and Implications

The US Army Corps of Engineers' sudden water releases were met with controversy. Some decried the releases for the Corps' lack of coordination with downstream water managers and local officials with flood control responsibilities. Others applauded the releases as an indication that the Corps can and will act quickly to deliver stored water to meet irrigation or other demands. The releases are particularly notable given the critical role the agency serves with California's vast water supply and flood protection networks.
(N. Chapman, Austin Cho)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD PROPOSED REGULATIONS TO ADDRESS GROUNDWATER CONTAMINATION CAUSED BY DAIRY WASTE

California's proposed regulatory changes to dairy waste management aim to address nitrate contamination in groundwater by introducing stricter controls on land application practices, while balancing the economic challenges faced by the dairy industry and ensuring safe drinking water for affected communities.

Background

The California State Water Resources Control Board (SWRCB) has proposed new regulations to address nitrate contamination in groundwater caused by dairy waste, particularly in the Central Valley. These draft regulations aim to reduce nitrates in drinking water by imposing stricter water quality standards on dairies that apply dairy waste to land. While existing regulations focus only on milk-cow dairies in the Central Valley, the proposed framework would expand these requirements statewide, affecting all California dairies that utilize manure, wastewater, and fertilizer in agricultural operations.

After reviewing the older regulations, known as the Dairy General Waste Discharge Requirements (WDRs) the SWRCB's rationale for the new regulations in the draft order states that new data has shown that the practice of land application of manure, process wastewater, and fertilizers on dairy croplands has been the major contributor to nitrogen contamination. Initial regulations assumed that the primary source of nitrogen loading to groundwater was from seepage of dairy waste stored in earthen retention ponds. This shift has led the SWRCB to recognize that dairy waste should no longer be treated simply as a fertilizer source with incidental ground-

water impacts. Instead, the SWRCB finds that waste should be viewed primarily as a waste product that requires careful management to prevent environmental harm. Therefore, the new proposed regulatory framework focuses on controlling nitrogen discharges from dairies through more stringent land application practices.

The draft order highlights the serious public health consequences of nitrate contamination in groundwater. The SWRCB's draft order notes that rural communities in the Central Valley have been dealing with unsafe drinking water for years, leading to various health issues, including conditions like methemoglobinemia, commonly known as blue baby syndrome, which affects infants. Nitrate contamination has also had severe economic and social consequences for these communities. In light of these impacts, the Board is prioritizing the need to regulate dairy waste management practices in a way that ensures both the health of local populations and the long-term sustainability of water resources in the region.

The revised regulations will be subject to further review and discussion, with workshops planned for mid-2025 and the possibility of final adoption by the end of 2025 or early 2026. These changes are intended to mark a new phase in regulating the dairy industry's waste management practices, with a focus on protecting groundwater quality and ensuring that all Californians have access to safe drinking water.

The Proposed Regulations

The proposed regulations aim to curb the significant nitrate contamination caused by dairies, a concern that has been raised since before 2007, when the state first adopted its dairy waste discharge requirements. The new regulatory framework is seen as a response to address concerns from environmental groups over the years. The newer data relied on by the SWRCB is the primary objective support for the stringent shift.

The new draft regulations would require dairies to meet a nitrogen discharge limit of 10 milligrams per liter to comply with the nitrate drinking water standard. This includes new provisions for land application of manure, waste retention ponds, and the provision of alternative drinking water to affected residents.

Such a shift is not without resistance. Several stakeholders, including dairy farmers and agricultural groups, have expressed concerns about the practicality and economic impact of these proposed regulations. Farmers argue that the regulations mischaracterize the role of manure as a beneficial fertilizer, stating that the rules would create excessive economic burdens, particularly with the requirement to retrofit waste retention ponds. Additionally, some critics believe that the new regulatory framework duplicates efforts already undertaken by local agencies like the Central Valley Regional Water Quality Control Board, which has worked extensively on addressing water quality issues in the region.

SWRCB's response to these concerns are two-fold. To mitigate the economic and practical impacts of the new regulation, the SWRCB stresses continued collaboration between the dairy industry, governmental agencies, and technological innovators to develop solutions for more efficient waste management. The SWRCB also points out that looking at dairy waste as a valuable resource, rather than a by-product of the dairy industry, can benefit the agricultural industry when used properly.

Conclusion and Implications

In conclusion, the proposed revisions to the Dairy General WDRs represent a significant shift in how California will regulate the dairy industry's impact on groundwater quality. The new framework focuses on reducing nitrate contamination by imposing stricter limits on the application of dairy waste to land and aims to protect public health, address environmental concerns, and support the long-term sustainability of the dairy industry in California. It is unclear how far reaching the economic and practical impacts of the regulation will be for the dairy industry but the details of SWRCB's proposal and how it will attempt to mitigate such impacts have yet to be finalized. The California State Water Resources Control Board's draft order available at: https://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/r5-2013-0122/a2283bdrftordr.pdf
(Miles Krieger, Steve Anderson)

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

Feb 25, 2025—Liza Hash pleaded guilty to discharging oil into United States and contiguous zone waters, violating the Clean Water Act (CWA) (33 U.S.C. §§ 1319(c)(2), 1321(b)(3)). Sentencing is scheduled for May 21, 2025.

Hash was the owner and operator of the *S/V Juliet*, a sailing vessel used for multi-day scuba diving trips between Miami and the Bahamas. Over the course of approximately six years, Hash's vessel carried up to 12 passengers per trip, along with the crew, between the U.S. and the Bahamas.

On June 16, 2023, U.S. Coast Guard investigators boarded the *Juliet* following its return from the Bahamas. After noticing an active oil sheen originating from the vessel, they conducted a safety examination.

During the inspection, they noted oily water in the bilge, and a pump connected to the vessel's grey water tank, to facilitate illegal overboard discharges. Hash had used the vessel's grey water tank (which is intended to hold liquid waste from the boat's washer, dryer, sinks, and showers) to store oil-contaminated bilge water and discharge overboard.

Investigators estimate that Hash discharged approximately 26,000 gallons of oily water during the five-year period.

The United States Coast Guard conducted the investigation.

Feb. 21, 2025—James Howard Spencer, the Mayor of Glen Lyn, Virginia, pleaded guilty to a felony violation of the Clean Water Act (CWA) (33 U.S.C. § 1319(c)(2)(A)). Spencer admitted to directing employees of the Town of Glen Lyn to illegally discharge raw sewage and other pollutants into the East River, a tributary of the New River, on three occasions- in the summer of 2019, December 2020, and June 2021.

The discharges occurred at a pump station located behind the Glen Lyn Post Office, which was not an authorized discharge point of the National Pollutant Discharge Elimination System (NPDES) permit for the Glen Creek Wastewater Treatment Plant. The East River, a perennial stream and a tributary of the New River, is a protected waterway under the CWA.

Spencer knowingly violated multiple conditions of the NPDES permit, including discharges from unauthorized locations and failing to report the discharges to the Virginia Department of Environmental Quality.

The Environmental Protection Agency's Criminal Investigation Division and the Virginia State Police conducted the investigation.

Feb. 19, 2025—This spring, U.S. Environmental Protection Agency will begin to install a barrier wall to reduce the risk of soil and groundwater contamination flowing into the Pine River at the Velsicol Chemical Superfund site in St. Louis, Michigan—a critical component of EPA's cleanup of the former plant site. EPA expects to complete installation this year.

During this time, residents will notice increased truck traffic bringing equipment and material to cleanup areas along North Street and North Watson Street. EPA will take steps to reduce construction noise and will work during normal business hours.

EPA is hosting an availability session about the Velsicol Chemical Superfund site on Tuesday, March 18, from 4 - 7 p.m. at City Hall, 300 N. Mill Street, St. Louis. The site team will provide more information on the barrier wall construction as well as next steps in the Superfund process.

EPA is coordinating closely with the Michigan Department of Environment, Great Lakes and Energy on the cleanup.

Feb 18, 2025—the U.S. Environmental Protection Agency (EPA) Administrator Lee Zeldin announced a $147 million Water Infrastructure Finance and Innovation Act (WIFIA) loan to Florida Keys Aqueduct Authority. The announcement follows EPA's "Powering the Great American Comeback" initiative that affirms the agency's commitment to protecting human health and the environment while remaining good stewards of tax dollars and advancing policies to energize the economy. This loan will help the Authority ensure reliability and longevity of drinking water infrastructure, serving 150,000 people while creating local jobs.

"Part of our Powering the Great American Comeback initiative is putting taxpayer dollars to good use, and this nearly $150 million WIFIA loan will provide clean and safe drinking water to 150,000 Americans. I will always work with local, public, and private partners to help EPA achieve its goal of carrying out our core mission of bringing clean air, land, and water to all Americans," said Administrator Zeldin.

The Florida Keys Aqueduct Authority expects to complete several projects in Miami-Dade and Monroe Counties to improve the system's ability to withstand hurricanes and other extreme weather events, address emerging contaminants, and expand capacity to meet customer needs. The Authority will undertake nine project components consisting of critical upgrades to the transmission mains, storage tanks, and a water treatment facility with this WIFIA loan. These enhancements will protect against damage caused by saltwater intrusion and improve drinking water quality through proactive regulatory compliance. The Authority will also reduce risk of service disruptions and enhance system reliability.

EPA's WIFIA loan allows deferment of principal payments for several years, which will save the Florida Keys Aqueduct Authority an estimated $29.5 million over the life of the loan. This is EPA's second WIFIA loan to the Florida Keys Aqueduct Authority. Combined, approximately $200 million in WIFIA financing is helping accelerate critical drinking water system projects.

Since issuing its first loan in 2018, EPA's WIFIA program has announced over $21 billion in financing to support $47 billion in water infrastructure projects that are strengthening drinking water, wastewater, and stormwater infrastructure while creating over 160,000 jobs. Through its flexible financing features and competitive interest rates, WIFIA helps communities save money.

Feb. 18, 2025—U.S. Environmental Protection Agency (EPA) Administrator Lee Zeldin signed a final rule approving the State of West Virginia's request to regulate the injection of carbon dioxide (CO_2) into deep rock formations. Administrator Zeldin was joined by U.S. Department of the Interior Secretary Doug Burgum, Senator Shelley Moore Capito (R-WV), and Congressman Riley Moore (R-WV-02) for the signing ceremony. By granting the State primacy for Class VI Wells under the Safe Drinking Water Act, EPA recognizes that West Virginia is best positioned to protect underground sources of drinking water while bolstering energy independence and dominance. This marks the fourth time a state has received primacy for Class VI wells since 2018 and the third approval under President Trump's leadership.

"To Power the Great American Comeback, we need to produce more energy right here in the United States, and that requires cooperative federalism and permitting reform. As one of my first acts as EPA Administrator, I am proud to sign this rule to allow West Virginia the independence it needs to permit and regulate itself, while also working to safeguard our environment and drinking water. Under President Trump's leadership, we will continue to advance conservation and foster economic growth for families across the country," said Administrator Zeldin.

Administrator Zeldin also announced that he is directing the Office of Water to fast-track the agency's review and approval of state primacy under this section of the Safe Drinking Water Act.

Jan. 17, 2025—The U.S. Environmental Protection Agency has updated its 2017 cleanup plan for the Peninsula Boulevard Groundwater Plume Superfund Site in Hewlett, New York, to address more extensive contamination in the area. The updated plan reflects the results of recent sampling, which show that groundwater contamination at the site is more extensive than originally expected.

The Peninsula Boulevard Groundwater Plume site is contaminated with volatile organic compounds (VOCs) such as tetrachloroethylene (PCE) and trichloroethylene (TCE) from historic dry-cleaning operations. This contamination affects groundwater in the Village of Hewlett and the Town of Hempstead,

however the New York American Water Company treats the drinking water and provides clean, safe drinking water to the residences in the area.

In 2011, the EPA finalized a plan to address groundwater contamination. However, further investigations revealed that source material beneath several properties needed to be addressed first. A 2017 cleanup plan targeted addressing this source material, but more recent sampling has uncovered contamination that is more extensive than originally identified.

To address the broader scope of contamination, the EPA's updated plan includes:

- In-Place Thermal Treatment: Heating contaminated soil and groundwater at the Cedarwood Cleaners property and nearby parcels, including sections of West Broadway and Hewlett Parkway, to break down harmful chemicals.

- Groundwater Recirculation System: Pumping out groundwater, removing contaminants through treatment, and returning clean water to the aquifer.

Cedarwood Cleaners, identified as a primary contamination source, will be demolished to allow for effective cleanup of contamination under it. During the public information session held on January 16, EPA informed the community about the modified cleanup plans, and outlined additional sampling and investigations scheduled for this winter. While the design process is expected to take two to three years to complete, EPA is committed to working closely with local businesses and property owners to minimize disruptions and will continue to provide regular updates.

Jan. 17, 2025—Cattle feedlot operators Wickstrum Farms Inc. and Wickstrum Cattle LLC of Pottawatomie County, Kansas, will pay a combined $70,000 in civil penalties to resolve alleged violations of the federal Clean Water Act.

According to the U.S. Environmental Protection Agency (EPA), the companies failed to comply with multiple Clean Water Act permit requirements, resulting in discharges of pollution into local streams.

In the settlement documents, EPA alleges that the companies' facilities contained approximately 9,862 head of cattle combined. During a 2023 inspection, EPA observed uncontrolled discharges from the feedlots entering into tributaries to Pleasant Run Creek. The operators have since constructed additional runoff controls and have addressed the causes of the discharges.

Pollution associated with manure, feed, and other animal waste runoff may include nutrients (particularly nitrogen and phosphorus), organic matter, solids, pathogens, and odorous/volatile compounds.

Under the Clean Water Act, animal feeding operations that contain threshold numbers of livestock are required to obtain permits and follow the requirements outlined in those permits to reduce pollution runoff. Failure to obtain a permit or to follow the requirements of a permit may violate federal law. (Robert Schuster)

LAWSUITS FILED OR PENDING

A CHALLENGE TO THE SCOPE OF THE POLLUTION CONTROL HEARINGS BOARD IN GRANTING WATER RIGHTS CURRENTLY BEFORE THE WASHINGTON STATE SUPERIOR COURT

Wagner et al v. Department of Ecology, PCHB No. 22-054 (Jan. 8, 2025).

A case that raises important issues about the issuance of New Water Rights, Surface Water Source Limitations not adopted by rule under the Administrative Procedures Act and the role of the administrative hearings board in overriding agency decisions. *Wagner et al v. Department of Ecology*, PCHB No. 22-054 (Jan. 8, 2025).

Background

The water users Peter Wagner and Tonye-Marie Castaneda, individually and as trustees of the Peter Wagner and Tonye-Marie Castaneda Revocable Family Trust (referred to herein as "Wagner") own property in Stevens County in Northeast Washington. Fivemile Creek, a tributary to the Columbia River, runs through the property. In 2004, the Wagners purchased the property with a surface water right to Fivemile Creek. In 2020, Ecology determined that the original water right, Certificate No. 9931, was relinquished due to a lapse in use prior to Wagner purchasing the property. Wagner timely appealed Ecology's relinquishment order. *Wagner et al. v. Dept. of Ecology,* PCHB No. 20-056. According to court filings, Wagner and Ecology agreed to stay the appeal of the relinquishment order to provide time for Ecology to process a new application to withdraw the same amount of water from the same source. *Wagner et al v. Dept. of Ecology,* Petition for Judicial Review and Complaint, Stevens County Superior Court Cause No. 25-2-00059-33, pg. 4 lines 8-11 (Feb. 7, 2025).

Application for a New Water Right Permit before the Department of Ecology

On July 6, 2020, Wagner applied for a new water right permit to use water from Fivemile Creek. Wagner also submitted technical information to Ecology to support the issuance of the permit. Under Washington law, Ecology must make four determinations prior to the issuance of a water right permit: (1) what water, if any, is available for appropriation; (2) what beneficial uses the water is to be applied; (3) whether the appropriation will impair existing rights; and (4) whether the appropriation will detrimentally affect the public welfare. RCW 90.03.290. Ecology denied the Wagner Application, finding that water is not physically and legally available, that the appropriation will impair existing rights and that the application will be detrimental to the public interest. Ecology's decision was based, in part, on its determination that there was no water available due to a Surface Water Source Limitation (SWSL) for Fivemile Creek established in 1962.

Ecology defines a Surface Water Source Limitation (SWSL) as:

> . . .an administrative request by the Director of the Washington State Department of Fish and Wildlife (WDFW) under the authority of RCW 77.57.020 to condition or deny a water right application. Finding Rural Domestic Water Solutions While Protecting Instream Resources, Publication No. 15-11-007 (2016).

RCW 77.57.020 states that Ecology:

> . . .may refuse to issue a permit if, in the opinion or the director of ecology, issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream.

A SWSL request from WDFW is distinctly different from Ecology's authority to establish instream flow requirements or closures under RCW 90.22.010 and RCW 90.54.050. Unlike instream flows set by regulation, which have equal standing with water rights in the priority scheme based on the date of

adoption, SWSLs are not set by regulation but rather are administrative determinations.

Before the Pollution Control Hearings Board

Wagner timely appealed and the PCHB conducted a four-day hearing to consider evidence of whether Ecology erred in denying the application. The PCHB, in its final order held that Wagner had demonstrated water was available from Fivemile Creek (although it may be less than the requested 1.0 cfs). The PCHB held that Ecology improperly considered another water right that was relinquished in its impairment analysis. Additionally, the PCHB held that: ". . . Ecology erred in relying upon the SWSL as the largest or sole factor in denying the Application and failing to determine what amount of water is available for appropriation in Fivemile Creek." *Wagner et al v. Dept. of Ecology*, Findings of Fact, Conclusions of Law, and Order, PCHB No. 22-054, pg. 14, lines 15-19 (Jan. 8, 2025). The Board remanded the Application to Ecology for a new decision.

The Pending Appeal Before the Superior Court

On February 7, 2025, Wagner filed an appeal to the Stevens County Superior Court asserting that the findings of facts before the PCHB "support approval of the Application." Wagner asserts that the PCHB acted arbitrarily and capriciously by not directing Ecology to issue the Permit. Additionally, Wagner has asked the court to declare that the SWSL is invalid because Ecology applied it as a rule of general applicability and it was not adopted in accordance with the Administrative Procedure Act, Chapter 34.05 RCW.

On appeal, Wagner raises several interesting issues of statewide interest. First, does the PCHB have the authority to override the Agency on matters of factual determination and substitute its decision for that of the Agency such that it can order the issuance of a permit? If the PCHB has such authority, must it do so? Second, what is the proper process for determination and application of SWSLs?

Conclusion and Implications

The underlying statutory authority for RCW 77.57.050 was adopted in 1949 as a means to allow the Fish and Game (now Department of Fish and Wildlife) authorities to comment on water rights applications individually. The state has since adopted a more robust administrative rule process for Ecology to follow to address regulatory instream flows under Chapters 90.22 and 90.54 RCW. Many watersheds in Washington State have SWSL requests that are decades old. Some SWSL decisions were embedded into later issued rules adopted by Ecology, but many were not. The Wagner case raises questions about whether SWSLs can be used as a general applicable basis for denial of water rights authorizations as administrative recommendations or whether more robust vetting of these objections are required.
(Jessica Kuchan)

JUDICIAL DEVELOPMENTS

REAFFIRMING TAXPAYER PROTECTIONS: CALIFORNIA COURT OF APPEAL FINDS WATER DISTRICT'S RATE STRUCTURE RAN AFOUL OF THE STATE CONSTITUTION

Howard Jarvis Taxpayers Association v. Coachella Valley Water District, ___Cal.App.5th___, Case No. E080870 (4th Dist. Jan. 31, 2025).

In January of this year, the California Court of Appeal for the Fourth District affirmed the trial court's decision in *Howard Jarvis Taxpayers Association v. Coachella Valley Water District* holding that the Coachella Valley Water District's (Water District) rate structure was an improper tax under Article XIII C of the California Constitution. The Court of Appeal upheld a refund of at least $17 million to affected customers.

Background

The case is centered around canal water from the Coachella Canal (Canal) that is being provided to consumers through the Coachella Valley Water District. The Canal branches off from the All-American Canal in Imperial County and carries water (Canal Water) for about 120 miles to the Coachella Valley in Riverside County. The Canal's water is mainly used for agriculture, golf courses, and groundwater replenishment. In the past seven years, approximately 75 percent of Canal Water has been used for agriculture and 18 percent for groundwater replenishment. Domestic customers indirectly pay for Canal Water through the Water District's interfund transfers.

Propositions 218 and 26

The main issue in the Howard that the court addressed was whether a charge imposed by the local agency a tax. To understand how the court answers this question, we must first understand the mechanics of Propositions 218 and 26. Propositions 218 and 26 expand on the definitions of and procedures for enacting taxes under the Constitution. Proposition 26 added a new definition of "tax" to the California Constitution. Under Proposition 26, all levies, charges, or exactions of any kind imposed by a local government are taxes unless they meet one of seven exceptions. Under Proposition 218, if a levy, charge, or exaction imposed by a local government does not fall under any of the exceptions, it is a tax and requires voter approval by a majority (or two-thirds majority for a special tax.) Proposition 218 defines Combined, Propositions 218 and 26 restrict local governments from levying taxes without voter approval.

Procedural Posture

The *Howard* case officially began in 2019, when plaintiff Randall Roberts (Roberts), who was later substituted by plaintiff Howard Jarvis (Jarvis), filed a combined petition and putative class action complaint against the Water District for the rates for Canal Water. Robert's claims were regarding the Water District's two-tiered rate system for Canal Water. The Water District classified customers as Class 1 or Class 2.

Class 1 customers were those Canal Water for commercial agricultural activities. Class 2 customers were non-agricultural users. Roberts defined the putative class as domestic water customers of Water District who have paid and/or are paying Class 2 Canal Water rates. Roberts alleged that the Water District was charging Class 1 customers $34.32 per acre-foot, while charging Class 2 customers $102.12 per acre-foot of Canal Water. Roberts (and later Jarvis) was suing on behalf of domestic water customers of the Water District who were paying Class 2 Canal Water rates.

According to Roberts, Class 2 customers were subsidizing the water rates of Class 1 customers by paying a much higher rate for the same product. The Water District imposed the Class 2 rate without prior voter approval. Thus, according to Roberts, the Water District violated the California Constitution, including Propositions 218 and 26. In November 2021, the

trial court held that the Water District Canal Water rates violated Proposition 218.7 and the California Constitution. In March 2023, the trial court entered judgment awarding the Class 2 customers approximately $17.5 million for invalid charges by the Water District. The Water District appealed the decision.

The Court of Appeal's Decision

The Water District contended that the trial court erred in both its liability and remedies rulings. The Water District argued that it qualified under one of the exceptions for tax under Proposition 26. If the Class 2 rate qualified under one of the seven exceptions, then the Water District did not need voter approval to impose the Class 2 rate. Thus, the Water District argued that the rate was not invalid under the California Constitution. Specifically, the Water District argued that the Class 2 rate qualified under two potentially applicable exceptions: (1) Article XIII C, section 1, subdivision (e)(7) (Property Fee Exception), which excludes "[p]roperty-related fees imposed in accordance with the provisions of Article XIII D,"; and (2) subdivision (e)(2) of the same section (Charges for Specific Government Services or Products Not Exceeding Reasonable Costs Exception) , which excludes:

> . . .charge[s] imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

The Court of Appeal held that neither exception applied to the Class 2 rates.

For the Property Fee Exception to apply, the Water District attempted to show that the Class 2 rate does not exceed the proportional cost of providing Class 2 customers with Canal Water. This argument would rest on whether Class 2 customers paid for the Canal and irrigation distribution system. However, the court held that this argument was invalid because Class 2 customers did contribute significantly to the Canal and irrigation distribution system. Thus, the Class 2 customers were not paying a proportional rate, and the Class 2 rate did not fall under the Property Fee Exception.

For the Charges for Specific Government Services or Products Not Exceeding Reasonable Costs Exception to apply, the court found that the Water District must prove, government must also prove that:

> . . .the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

The court held that this exception did not apply for the same reasons that the Property Fee Exception did not apply.

Thus, the Court of Appeal affirmed the trial court's decision and upheld the judgment awarding approximately $17 million to affected Class 2 customers.

Conclusion and Implications

If a local government, such as a city or local agency, wishes to impose a charge or rate for a service, the government must ensure that they are applying the rate fairly and in compliance with the processes outlined by the California Constitution. If the local government wishes to impose a charge without needed to obtain voter approval, then the government must ensure that the charge falls squarely within one of the exceptions in Proposition 26. Charges that do not fall into one of the exceptions and that are not approved by voters are invalid. Charges that are imposed disproportionately between different classes of users disproportionately and without valid reason likely do not fall under one of the Proposition 218 exceptions, as shown in the case.

The results of the Howard case reinforce the tax protections afforded to customers and citizens by the California Constitution. Local governments such as the Water District must take great care to ensure that they comply with the requirements of the California Constitution when imposing charges. The court's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/E080870.PDF
(Christina Suarez, Darien Key, Derek Hoffman)

Western Water Law & Policy Reporter
Argent Communications Group
P.O. Box 201
Galena, IL 61036-0201

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