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WESTERN WATER NEWS

REVIVING THE DESERT: CALIFORNIA ADVANCES RESTORATION OF THE NEW RIVER AND CONTINUES PROGRESS FOR THE SALTON SEA MANAGEMENT PROGRAM WITH EAST POND EXPANSION FILLING

California officials recently celebrated a major environmental and public health milestone in the Imperial Valley: the completion of the New River Improvement Project in Calexico and the progress of the broader Salton Sea Management Program (SSMP). These two initiatives, while distinct, are closely tied together by geography and environmental impact, both addressing long-standing ecological and public health challenges in Southern California's desert region.

Background

The New River, which flows from Mexicali, Mexico, into Calexico, California, has long been a conduit for pollution, carrying untreated waste, industrial discharges, and solid waste into the United States. The contamination posed severe public health risks and significantly degraded the ecosystem along the river's path and ultimately at the Salton Sea—California's largest inland lake.

Recognizing the urgent need for remediation, the City of Calexico, in partnership with several California state agencies, including the Department of Water Resources (DWR), the State Water Resources Control Board, and California State Parks, implemented the New River Improvement Project. The $46.5 million project installs several new infrastructure components: a trash screen to remove solid waste, a diversion structure to reroute polluted flows, and a pump-back system that introduces treated water into the river channel. These interventions prevent contaminated water from passing through a 1.5-mile stretch of the river in Calexico before it empties into the Salton Sea.

In parallel, the state has been ramping up other efforts at the Salton Sea, whose receding waters and rising salinity have created an environmental and public health crisis. Once a recreation hub, the Salton Sea has suffered from reduced inflows, mostly due to agricultural water conservation and reallocation. As the lake shrinks, exposed lakebed—called playa—emits airborne dust, worsening air quality in an already pollution-burdened region. This has led to higher rates of asthma and other respiratory issues among local residents.

To address this, Governor Gavin Newsom's administration launched a ten-year Salton Sea Management Program (SSMP) focused on building 30,000 acres of habitat and dust suppression projects. A centerpiece of the plan is the Species Conservation Habitat Project, which recently reached a milestone with the filling of the East Pond Expansion. Originally planned as a 4,100-acre project, state and federal investments totaling nearly $445 million have expanded the project's footprint to over 9,000 acres.

Strategic Shift Toward Environmental Restoration

Both the New River Improvement Project and the SSMP reflect a strategic shift toward environmental restoration and public health protection in the Salton Sea region. The projects address interrelated issues: pollution control, habitat loss, air quality, and climate resilience.

From a public health perspective, the New River Improvement Project marks a tangible reduction in exposure to toxic pollutants for the residents of Calexico. Historically, the New River has ranked among the most polluted waterways in the United States, with raw sewage, industrial discharges, and pesticides contributing to its degraded state. By installing infrastructure that intercepts and treats water before it flows through populated areas, the project is believed to significantly mitigate risks to human health and local wildlife.

Stakeholders see this as a collaborative success. DWR Director Karla Nemeth emphasized the state's broader goal of providing clean, safe, and affordable water, while Calexico Mayor Diana Nuricumbo credited longstanding partnerships for enabling the

city to improve its river and wetlands. These sentiments suggest that state-local coordination was key to overcoming decades of inertia surrounding the New River's condition.

At the Salton Sea, the Species Conservation Habitat Project and the broader SSMP aim to reverse ecological decline and prevent public health deterioration due to dust emissions from exposed playa. Air quality in the Imperial and Coachella Valleys is among the poorest in the state, and the retreat of the Salton Sea has further exacerbated the problem. Restoration efforts seek to stabilize the situation by reflooding areas to trap dust and create wetlands that can support biodiversity—especially bird species traveling the Pacific Flyway.

The habitat created by the East Pond Expansion includes berms, engineered water delivery systems, and nesting islands intended to support fish and bird populations. Project leaders have highlighted the initiative's dual goals of ecosystem restoration and improved public health, framing it as a model of integrated environmental planning.

Despite recent progress, some aspects of the restoration effort may prompt further consideration. For example, the long-term feasibility of maintaining improvements, particularly in light of ongoing water scarcity, could potentially present challenges. Similarly, the pace of implementation may be an area of focus for future planning, especially as projects expand beyond the current ten-year framework.

Additionally, the state's ambition to transform the Salton Sea region into a hub for lithium extraction and battery production introduces new economic and environmental considerations. While this move aligns with California's transition to a zero-emission economy, it is unclear how industrial development might interact with ongoing restoration and environmental justice efforts.

Conclusion and Implications

The recent developments in Calexico and around the Salton Sea underscore California's evolving approach to complex environmental issues and emphasizes collaboration, infrastructure investment, and integrated planning. The completion of the New River Improvement Project represents a significant public health safeguard for one of the state's most environmentally burdened communities. Simultaneously, restoration work at the Salton Sea offers hope that the region's ecological decline can be slowed or even reversed.

As with any large-scale project, these efforts raise longer-term questions. For one, the sustainability of restored river flows and refilled wetland habitats hinges on future water availability in an era of increasing scarcity. The state's consideration of water importation as part of the Salton Sea's future underscores the scale of the challenge.

There are also broader environmental justice implications. Residents of the Imperial Valley, many of whom are low-income and Latino, have borne disproportionate health and economic burdens linked to environmental degradation. The current restoration initiatives may begin to address historical neglect, but ongoing community engagement and equitable governance will be crucial to ensure these projects deliver lasting benefits.

Finally, the intersection of restoration and resource extraction, such as the proposed lithium development, presents both opportunity and risk. If managed well, it could bring jobs and investment to a region in need; if poorly planned, it could further strain an already fragile environment.

In sum, while significant progress has been made, the projects at Calexico and the Salton Sea are still part of a larger, unfinished story—one that will require continued attention, transparent policymaking, and a long-term vision to secure a healthier, more sustainable future for the region. The press release of the New River Improvement is available at: https://water.ca.gov/News/News-Releases/2025/May-25/State-and-Local-Agencies-Complete-New-River-Project-in-Calexico

The press release of the East Pond Expansion Filling is available at: https://www.gov.ca.gov/2025/05/22/california-reaches-major-restoration-milestone-at-the-salton-sea/?utm_medium=email&utm_source=govdelivery

(Miles Krieger, Steve Anderson)

IRRIGATION SEASON ON THE EASTERN SNAKE PLAIN AQUIFER BEGINS FAR MORE SMOOTHLY IN 2025 THAN WAS THE CASE IN 2024

What a difference a year can make. While the 2024 irrigation season on the Eastern Snake Plain Aquifer (ESPA) was a bumpy one for junior groundwater users in particular, 2025 has gone far more according to plan notwithstanding the Idaho Department of Water Resources (IDWR) having issued a *Final Order Curtailing Ground Water Rights Junior to August 28, 1955* (May 16, 2025) (2025 Curtailment Order).

Background

Similar to 2024 when IDWR modeling predicted a 74,100 acre-foot irrigation water demand shortfall owed to senior surface water irrigation entities attributed to junior priority groundwater pumping-related depletions of ground and spring water baseflows in the Snake River, April 2025 modelling predicted a 63,000 acre-foot irrigation water demand shortfall.

The 2025-Modeled Shortfall and 2025 Curtailment Order

This 2025-modeled shortfall led to Department issuance of the 2025 Curtailment Order, ordering curtailment of ESPA-sourced groundwater rights junior to August 28, 1955. While the 2024 curtailment order further spurred simmering tensions and conflict, the 2025 Curtailment Order did not.

New Settlement Agreement and Stipulated Mitigation Plan

This is because on November 15, 2024, surface and groundwater users on the ESPA entered into a new settlement agreement and stipulated mitigation plan effectively ending a recent wave of litigation beginning in 2021 and coming to a head during the 2024 irrigation season over a prior agreement and mitigation plan (2016 Plan). The 2024 curtailment order issued in response to various groundwater district/groundwater user refusal to confirm their intent to comply with the parameters of the 2016 Plan ahead of the 2024 irrigation season. The 2024 curtailment order result (at least on paper) was stark. The order could have curtailed approximately 700,000 acres of groundwater-irrigated farmland already planted heading into the 2024 irrigation season. In contrast, the 74,100 AF generated by the curtailment represented an irrigation supply to approximately 21,200 acres at a seasonal supply of 3.5 AF per acre (the general flood irrigation duty of water in most of southern Idaho is 4.5 AF per acre). In June 2024, IDWR officials went out into the field and began "red-tagging" wells—physically affixing red curtailment tags to wells required to be idled in response to the curtailment order.

After a bridge agreement was reached to salvage the 2024 irrigation season, water users aided by Idaho officials from the Department, the Idaho Water Resources Board, and the Lieutenant Governor facilitated farmer to farmer negotiations in an effort to hammer out a new agreement and plan—one superseding the 2016 Plan that grew increasingly difficult to implement and perform in light of Department aquifer modeling updates pointing out foundational flaws in the parties' hydrologic understandings back in 2015 when the 2016 Plan was negotiated. Several assumptions underpinning the 2016 Plan were incorrect as Department data collection and modeling refinements increasingly demonstrated over time. Under prior IDWR modeling (ESPAM v.2.1), curtailment dates would typically reach water rights with priority dates of the late 1970s to mid-1980s. Under current modeling (ESPAM v.2.2), curtailment dates consistently reach back to the mid (or so)-1950s.

Like the 2016 Plan, the new (2024) stipulated mitigation plan contains pumping reduction conservation requirements, coupled storage water procurement and delivery obligations to mitigate for groundwater pumping depletions to surface water supplies. New concepts include individual groundwater district allocations and enforcement—meaning that each participating groundwater district operates independently and cannot be curtailed due to non-compliance of other districts under the plan. Also new are groundwater use allocations based on four-year blocks, and compliance measured on averaging to provide better crop rotation planning and flexibility. Also new, are increased storage water procurement and delivery obligations (75,000 AF in 2025 and 2026, and up to 82,500 AF in 2027 depending on how river reach

gains rebound (or not) from 2023 levels), and the creation of a reach gain mitigation fund designed to create a war chest of funds to deploy, if necessary, to create and implement more targeted water conservation and managed aquifer recharge projects to boost river reach gains over the longer term. The new plan also calls for more and better water measurement, data collection and reporting, and annual technical review of data collected and trends developing in terms of water use and conservation activities. Ultimately, the new plan is easily renewable for successive 4 years terms, but it also provides off ramps for the parties to explore other options should 2024 assumptions prove flawed in hindsight.

Conclusion and Implications

While the durability of the 2024 settlement agreement and related mitigation plan remains to be seen, it has at least bought some peace in the interim. During this window of peace, IDWR in in the process of expanding the ESPA Area of Common Ground Water Supply (the regulatory boundary within which the ESPA groundwater use curtailment orders apply) to the American Falls, Big Lost River, Little Lost River, Portneuf River, and Raft River Tributary Basins. The administrative boundary expansion proceedings are in the public hearing and comment phase. Understandably, water users in those tributary basins are not excited by the prospect of being caught in the net of ESPA water right administration. However, mounting hydrologic evidence suggests that stabilization of the ESPA requires broader, more comprehensive water right administrative reach than historically performed.
(Andrew J. Waldera)

LEGISLATIVE DEVELOPMENTS

ASSEMBLY BILL 104: NEVADA ADOPTS WATER RIGHTS RETIREMENT PROGRAM

At the end of May 2025, the Nevada Legislature voted to approve a new statewide voluntary water rights retirement program. This program follows up on a pilot initiative introduced in 2023.

Background

Throughout Nevada, over-allocated basins, overpumping of groundwater, and declining water tables continue to pose a serious threat to the future of the state's water resources. In the state's previous legislative session (2023), a bill to create a formal water rights buyback program—SB 176—was approved by the Senate's Committee on Natural Resources but never returned from the Committee on Finance. Instead, the Nevada Department of Conservation and Natural Resources (DCNR) kick-started its own pilot program with the objective of curtailing drawdown and aquifer impacts through financial incentives to water rights holders.

Pilot Program

In 2023, DCNR received $100 million of Nevada's federal allocation under the American Rescue Plan Act. DCNR appropriated $25 million of these funds to launch and operate the Nevada Water Conservation and Infrastructure Initiative (NWCII), a program through which it successfully retired water rights in the amount of 25,000 acre-feet annually. The NWCII program received requests for buyouts to the tune of $65 million, demonstrating its potential as a serious solution to some of Nevada's groundwater woes. Given the success of NWCII, legislators once again looked to establish a structured water rights retirement program.

Assembly Bill 104

Two bills aimed at implementing a more permanent voluntary water rights purchase system were introduced in the (current) 83rd Session of the Nevada Legislature. One of these bills, Assembly Bill (AB) 104, unanimously passed the Assembly on April 22, and then also unanimously passed the Senate on May 22. The Assembly concurred in the slight amendments adopted by the Senate on May 26, and enrolled on May 29 delivering the bill to the Governor.

The text of AB 104, as modified, creates the Voluntary Water Rights Retirement Program. Under this program, the State Engineer may use funds from an Account for Retiring Water Rights (also created under AB 104) to purchase decreed or certificated water rights from willing and interested owners. However, in order to prevent state funds from primarily benefitting the owners of unused "paper" water rights, the State Engineer may only purchase water rights if: (1) they are located in an over-appropriated basin in which the issuance of new water rights has already been suspended, or (2) the retirement of the water rights will (a) "Protect the natural resources of [the] State," (b) "Address declining levels of groundwater," or (c) "Address conflicts with existing rights or with protectable interests in domestic wells."

While the bill does establish the structure for the water rights buyback system and a dedicated account in the State's General Fund, it does not provide funding for the program. Noticeably, too, the program expires at the end of the 2035 fiscal year.

Senate Bill 36

A similar bill introduced in the Nevada Senate, Senate Bill (SB) 36, also would have created a Nevada Voluntary Water Rights Retirement Program, funded through an Account for Retiring Water Rights. The bill contained identical restrictions on the State Engineer's purchase of rights to those found in AB 104: they must be from over-appropriated basins or meet the necessary findings of public benefit from protecting state resources, alleviating groundwater drawdown, or resolving conflicts. SB 36 was approved as amended by the Senate's Committee on Natural Resources on April 15 and proceeded to the Committee on Finance, but no further action was taken on the bill.

Conclusion and Implications

AB 104 successfully passed in the 2025 Legislative Session, garnering unanimous support in both chambers of the Legislature as the Session draws nearer to the conclusion of its 120-day schedule. Despite the bill's success (and even if it is signed into law), the Account for Retiring Water Rights implemented under AB 104 still requires funding to be effective. Nevadans, particularly those dependent on groundwater for agricultural or domestic purposes, will continue to monitor the enactment and implementation of AB 104, particularly with respect to its funding. (Evan Klouse, Micheline Nadeau Fairbank)

REGULATORY DEVELOPMENTS

FEDERAL FISHERIES AGENCIES PROPOSE RULE RESCINDING THE REGULATORY DEFINITION OF 'HARM' UNDER THE ENDANGERED SPECIES ACT

On April 17, 2025, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively: the Services) published notice of a proposed rule in the Federal Register that would rescind the current definition of "harm" to species under the Services' federal Endangered Species Act (ESA) regulations.

Background

Enacted in 1973, the ESA is a federal statute designed to conserve species of wildlife, fish, and plants that are considered endangered or threatened. (16 USCA § 1531.) Among the ESA's key provisions is a list of prohibited acts, which makes it unlawful to engage in certain conduct involving endangered species of fish, wildlife, or plants. (16 USCA §§ 1538, 1533.) For example, the ESA prohibits the sale or offer for sale of listed species in interstate or foreign commerce, as well as their import into or export from the United States. (16 USCA § 1538.) The statute also prohibits the "take" of endangered fish or wildlife, either within the United States, the territorial waters of the United States, or the high seas. (16 USCA § 1538.) The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." (16 USCA § 1532.)

Both USFWS and NMFS have issued regulations defining harm as it is used within the ESA definition of "take" to include harmful modifications to habitat. USFWS defines harm as "an act which actually kills or injures wildlife" in a manner that "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." (50 CFR § 17.3.) NMFS uses a similar definition that encompasses "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." (50 CFR § 222.102.) Thus, under both regulatory definitions, take is interpreted broadly to include indirect and unintentional harm to species that may be caused by changes to habitat.

Proposed Rulemaking

In the recent Federal Register notice, the Services propose to rescind the definitions of harm contained in their respective regulations. (90 Fed. Reg. 16102 (Apr. 17, 2025).) The Services explain that the current interpretation of harm—originating in regulations upheld by the Supreme Court in *Babbit v. Sweet Home Chapter of Communities for a Great Oregon* (*Sweet Home*) 515 U.S. 687 (1995), "do not match the single, best meaning" of the ESA. (*Id.* at 16103.) In *Sweet Home*, the Supreme Court upheld the USFWS regulation defining harm based on the deference afforded to agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (*Chevron*) 467 U.S. 837 (1984), and the Secretary of the Interior's discretion in construing the intent of Congress when defining the term harm under the ESA. (515 U.S. at 708.) But last year in *Loper Bright Enterprises v. Raimondo*, (*Loper Bright*) 603 U.S. 369 (2024), the Court overruled the longstanding precedent of *Chevron* deference, holding that agency regulations must conform to the governing statute's "single, best meaning." (See 90 Fed. Reg. at 16103 [quoting *Loper Bright*, 603 U.S. at 400, 406].) In lieu of granting *Chevron* deference, the Supreme Court analyzed whether "the *statute* authorize[d] the agency action." (*Id.*)

Relying on the Dissent in *Sweet Home*

The Services cite the dissent in *Sweet Home* to support their position that the current definition of harm does not match the single, best meaning of the ESA. That dissent argued that even under *Chevron*, a definition of harm that included indirect effects was untenable. (*Id.* [citing *Sweet Home*, 515 U.S. at 715].)

The Services' notice emphasizes that "take" should be limited to actions that "reduce those animals, by killing or capturing, to human control." (*Id.* at 16103 [quoting *Sweet Home*, 515 U.S. at 717].) Under the interpretive cannon *noscitur a sociis*—the principle that a word is known by the company it keeps—the term "harm," like the nine other verbs in the definition of "take," is better understood to connote an "affirmative act []… directed immediately and intentionally against a particular animal," not merely indirect or accidental injury to a population of animals. (*Id.* [quoting *Sweet Home*, 515 U.S. at 719-20].)

Existing Definitions of Harm are Erroneous

Following *Loper Bright*, the Services conclude that the existing definitions of harm violate established interpretive canon, disregard centuries of legal history, and conflict with the structure of the ESA. (*Id.* at 16103.) They also state that a replacement definition is unnecessary, given the statute's comprehensive definition of the term "take." Further elaboration on a single component—*i.e.*, "harm"—is, in the Services' view, therefore superfluous. (*Id.*) The Services distinguish the holding in *Sweet Home* by characterizing the prior definition of harm as a permissible interpretation, but not the only possible one. Thus, the proposed rescission is consistent with *Sweet Home*, particularly in light of *Loper Bright's* abrogation of Chevron deference. (*Id.*)

Conclusion and Implications

With the removal of deference to agency interpretations in *Loper Bright*, the Services propose to rescind their regulatory definitions of "harm" to ensure that their respective definitions conform to the single, best reading of the ESA. The Services accepted public comments on the proposed rule until May 19, 2025. The Federal Register notice remains available at the following link: https://www.govinfo.gov/content/pkg/FR-2025-04-17/pdf/2025-06746.pdf
(Taylor Strain, Austin C. Cho)

CALIFORNIA DEPARTMENT OF WATER RESOURCES COMPLETES ITS INITIAL EVALUATION OF REMAINING GROUNDWATER SUSTAINABILITY PLANS IN CALIFORNIA

On April 29, 2025, the California Department of Water Resources (DWR) issued its final batch of initial determinations for Groundwater Sustainability Plans (GSP) in eight low- and very low-priority basins. This release marks a historic milestone in implementing the Sustainable Groundwater Management Act (SGMA), as DWR has now completed its initial review of all GSPs submitted by Groundwater Sustainability Agencies (GSA) across California. Of the eight remaining GSPs reviewed, DWR approved those for the Arroyo Santa Rosa Valley, Atascadero Area, Bear Valley, and Bedford-Coldwater basins. It issued incomplete determinations for the Castac Lake Valley, Owens Valley, Riverside-Arlington, and San Gabriel Valley basins.

Background

Enacted in 2014, SGMA established California's first comprehensive framework for managing groundwater. The statute emphasizes local control but permits state intervention if the local management within a particular basin proves inadequate. SGMA requires that all groundwater basins be managed sustainably within 20 years to prevent defined undesirable results, including: (1) chronic lowering of groundwater levels; (2) significant and unreasonable reduction in groundwater storage; (3) significant and unreasonable seawater intrusion; (4) significant and unreasonable degradation of water quality; (5) significant and unreasonable land subsidence; and (6) depletion of interconnected surface waters. (Wat. Code, § 10721(x)(1)-(6).)

DWR was tasked with classifying the state's 515 groundwater basins as very low-, low-, medium-, or high-priority, based on factors such as projected population growth, the number of public supply wells, and the extent of irrigated acreage. (Wat. Code, § 10933(b).) For all medium- and high-priority basins, SGMA required GSAs to submit GSPs to DWR for review and approval. (Wat. Code, §10720.7.) Any GSP found to be deficient was labeled incomplete and the responsible GSAs were given an opportu-

nity to supplement with necessary information and resubmit. If DWR found a resubmitted GSP was still inadequate, the provisions for state intervention would kick in and the State Water Resources Control Board (Board) could hold a hearing to determine whether that basin should be put on "probationary" status. (Wat. Code, §10720.7.) That process is occurring for a handful of high-priority basins in the state. Once a basin is put on probationary status, the Board is authorized to implement an interim plan and impose reporting and fee requirements on groundwater extractors in the basin.

By contrast, SGMA does not necessarily require GSAs in low- and very low-priority basins to submit GSPs to DWR for review. (Wat. Code, §10720.7(b).) Still, it encourages and authorizes the GSAs in those basins to adopt and implement GSPs voluntarily. (Wat. Code, §10720.7(b).) Importantly, SGMA explicitly exempts these basins from state intervention by the Board should the GSAs decide not to submit a GSP.

Department of Water Resources Determinations

In its evaluation of a GSP, DWR must determine whether it substantially complies with SGMA and the associated GSP regulations. This includes assessing whether the GSP's proposed management actions will achieve basin sustainability within the statutory 20-year timeframe. For instance, DWR approved the Bear Valley Basin GSP, finding that groundwater levels within the basin are relatively stable, with only short-term fluctuations attributable to climatic variation and pumping during dry periods. (DWR, Bear Valley Basin—2022 Groundwater Sustainability Plan, at p. 15.) DWR also found that the groundwater quality conditions in the basin are sufficiently described and that overall subsidence in the basin had not exceeded three inches. (*Id.* at p. 16.) In its approval, DWR concluded that the GSP contained no major inconsistencies or deficiencies and expressed "no significant concerns." (*Id.* at p. 17.)

DWR offers corrective measures in its approval determinations for the GSAs to consider for their future periodic GSP updates. It advises that the GSAs should take care to explain how thresholds for groundwater levels and storage are established and recommended improving monitoring well networks to gather data from all the principal aquifers in those respective basins.

By contrast, DWR issued "incomplete" determinations for four of the eight low and very-low priority GSPs. The reasons for an incomplete determination of these basins tend to center on informational deficiencies. For example, the Castac Valley Lake Basin GSP was deemed incomplete because it failed to establish sustainable management criteria for groundwater levels and water quality in line with SGMA and the GSP Regulations. (DWR, Castac Valley Lake Basin – 2020 Groundwater Sustainability Plan, at pp. 6-7.) Acknowledging that SGMA does not impose a specific submission deadline for low- and very low-priority basin GSAs to address the identified deficiencies, DWR requests the GSAs that received incomplete determinations to submit revised GSPs within 180 days.

Conclusion and Implications

DWR's latest issuance of determinations represents a significant milestone in California's effort to implement SGMA. All GSPs that were submitted to DWR have now received an initial determination. GSAs with approved GSPs may proceed with implementation, while those with incomplete or inadequate determinations face additional work before they will be found to be in compliance.

The status of all GSPs and DWR's determinations are available at the SGMA GSP Portal: https://sgma.water.ca.gov/portal/gsp/status

(Jake R. Voorhees, Austin C. Cho)

WASHINGTON STATE PURSUES A "DROUGHT INSURANCE PROGRAM" FOR INTERRUPTIBLE WATER RIGHTS ON THE COLUMBIA RIVER

The Washington State Department of Ecology (Ecology), Office of Columbia River (OCR) was formed in 2006 to "aggressively pursue the development of water supplies to benefit both in-stream and out-of-stream uses." RCW 90.90.005. Among other authorities, OCR was directed to focus its efforts on developing water supplies within the Columbia River basin to address:

> (a) Alternatives to groundwater for agricultural users in the Odessa subarea aquifer; (b) Sources of water supply for pending water right applications; (c) A new uninterruptible supply of water for the holders of interruptible water rights on the Columbia river mainstem that are subject to instream flows or other mitigation conditions to protect streamflows; and (d) New municipal, domestic, industrial, and irrigation water needs within the Columbia river basin. RCW 90.90.020.

Development of the Drought Insurance Program

OCR, in its efforts to address interruptible water supply in times of drought, is developing a Drought Insurance Program for certain water users.

The Drought Insurance Program seeks to address a class of water users that are subject to minimum instream flows and system wide allocations of water during a drought. Minimum instream flows for the Columbia River were set by administrative rule in 1980. See Chapter 173-563 WAC. The regulations set flow targets between Grand Coulee Dam (located at river mile 596.6 on the Columbia River) and Bonneville Dam (located at river mile 146 on the Columbia River). Drought conditions are evaluated as of March 1st each year. When the March 1 forecast of April through September runoff at the Dalles Dam (located at river mile 191.5 on the Columbia River) is expected to be 60 million acre-feet or less, Ecology is required to curtail out-of-stream diversion when the predicted gaged flows fall below the minimum average weekly flows established by regulation. WAC 173-563-056.

The proposed Drought Insurance Program is designed to address those water rights that are considered interruptible in the Columbia River system. OCR has identified approximately 380 Columbia River water rights holders who could be curtailed in the event of a drought declaration on the Columbia River. The total curtailed demand from those rights is estimated to be approximately 650,0000 acre-feet if gaged flows are not met during any part of the season.

The last drought declaration on the Columbia River was in 2001 and is generally expected to occur at least once every 20 years. During 2001, there were 11 weeks of active curtailment, resulting in the need to mitigate 350,000 acre-feet of deliveries.

Timing for Compliance

One of the hardships of the annual drought declaration is in the timing for compliance. The irrigation season in this region typically starts April 1st. Getting notice on March 1 that water will not be available this season makes finding alternative supplies or making alternative arrangements difficult. OCR intends for the Drought Insurance Program to be able to quickly address water need for participating users.

The first step of which is to understand the scope of the need. On the demand side, this initiative begins with a survey of water users, currently underway, to ensure OCR can establish contact with the 380 potentially interruptible water rights. From initial contact, OCR plans to review the status of the water rights and their current use to confirm that the water rights have addressed any administrative issues that might slow down emergency permits, such as making sure ownership of water rights permits is correctly assigned, that divisions of water rights have been completed in the case of subdivisions, that proofs have been properly filed and certificated, and that current uses are consistent with the authorizations in place. Much of this effort is being implemented by Western Water Market as a third-party contractor and Aspect Consulting to avoid concerns about governmental intervention.

On the supply side, OCR is developing supplies for those who are subject to interruption, with the intention that these supplies will be ready for lease when the time comes. OCR anticipates that the neces-

sary supplies will be sourced from a combination of contracted releases from Lake Roosevelt (33,000 AF secured), as well as existing and pending water rights acquisitions and leases, including leasing unused water from other public and participating private mitigation water banks.

Conclusion and Implications

The intent is that water users participating in the Drought Insurance Program, and complying with its requirements, will be able to quickly seek emergency mitigation in a declared drought. Water users who have not secured an uninterruptible water supply in advance of curtailment will be required to call Ecology each week to confirm they can pump and, if not, to cease pumping for that week.

For more information about the program, see https://westernwatermarket.com/columbia-drought-solutions.
(Jamie Morin)

PENALTIES & SANCTIONS

RECENT PENALTIES, SANCTIONS AND EPA NEWS

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.

May 27, 2025—The U.S. Environmental Protection Agency (EPA) announced a settlement with South Pacific Petroleum Corporation Inc. over claims of violations of the Clean Water Act at the company's facility located in Piti, Guam. Under the terms of the settlement, the company will take actions to improve operations and maintenance at the petroleum storage facility.

"Under the Clean Water Act, oily wastewater cannot go in island waterways. Guam's waters must be protected," said EPA Pacific Southwest Regional Administrator Josh F.W. Cook. "This Order will stop contamination from reaching Guam's coastal waters used for recreation and fishing. As the U.S. expands our national defense in the Pacific, Guam environmental issues will be at the top of the list."

The South Pacific Petroleum Cabras Island Terminal is a bulk petroleum storage and wholesale distribution facility that receives, stores, and distributes gasoline, diesel, and jet fuel. The facility is authorized to discharge treated oily wastewater and stormwater under a National Pollutant Discharge Elimination System permit.

In February 2025, an EPA inspector performed an on-site inspection and found that the facility had not properly operated and maintained treatment units, which led to inadequate treatment and excess oily wastewater leaving the facility and flowing into Apra Harbor.

Under the Order, South Pacific Petroleum has agreed to:

- Complete maintenance to remove oily waste and materials within the oil water separators and the oily waste storage area, and ensure materials are properly disposed.
- Complete maintenance to ensure oil water separator treatment systems are functioning properly.
- Clean the trench drains surrounding the loading rack area and ensure materials are properly disposed.
- Clean all spills within the loading rack area.
- Minimize any potential spillage for all liquid storage tanks within the loading rack area.
- Update the facility's Pollution Prevention Plan to address the noncompliance, including a cleaning schedule to remove oily waste and debris from the oil water separators at least once per year.
- Develop a Capital Improvement Project plan to upgrade, repair, and/or replace all corroded, damaged, and leaking equipment within the loading rack area, including pipes, pumps, fuel lines, switches, valves, and other components which have the potential to cause spills.

South Pacific Petroleum Corporation will be able to continue daily operations at the facility as it carries out the Order.

The National Pollution Discharge Elimination System permit program, created in 1972 by the Clean Water Act, helps address water pollution by regulating sources that discharge pollutants to waters of the United States.

May 22, 2025—The U.S. Environmental Protection Agency (EPA) has announced an expedited cost recovery agreement with Concrete Strategies to recover over $30,000 for cleanup work performed by EPA Region 7's Superfund program relating to a spill in 2023.

"EPA Region 7's Emergency Response program dispatched an on-scene coordinator quickly after learning about the release from a report to our spill line," said EPA Region 7 Superfund Director Bob Jurgens.

"The actions taken by our responder, KDHE, and the responsible party led to a quick cleanup and reduced costs for all parties involved."

EPA Region 7 responded to a report of white liquid with a strong chemical odor impacting a stormwater drain and downstream retention ponds near I-435 in Lenexa, Kansas. An EPA Region 7 on-scene coordinator and officials from the Kansas Department of Health and Environment (KDHE) responded to the scene and oversaw the cleanup performed by parties hired by Concrete Strategies.

The chemical composition of the white liquid was determined to include hazardous substances, as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. Cleanup actions included recovering light nonaqueous phase liquids; pumping and filtration; surface skimming; particulate sock filtration to remove solids from the liquids; and carbon filtration. On May 2, 2023, KDHE approved the discontinuation of cleanup operations and EPA Region 7's operations were completed.

May 19, 2025—U.S. Environmental Protection Agency (EPA) Administrator Lee Zeldin announced the City of Flint, Michigan, has completed all requirements of EPA's Safe Drinking Water Act (SDWA) emergency order and it will now be lifted. Since EPA issued the emergency order in January 2016, the City of Flint and the State of Michigan have worked cooperatively with EPA to address and complete all requirements. Water sampling shows that Flint's water system is now in compliance with lead standards, a major milestone accomplished through years of cooperative federalism dating back to 2016, culminating in the termination of this emergency order.

EPA's involvement has been instrumental in protecting the people of Flint. EPA has awarded more than $100 million in grants to EGLE to fund drinking water infrastructure upgrades in Flint through the Water Infrastructure Improvements for the Nation Act of 2016. EPA also provided direct technical assistance to the system operators to support continued compliance and capacity building in Flint.

In 2024, Flint agreed to an administrative consent order with EGLE to ensure continued compliance with EPA's Lead and Copper Rule and the Safe Drinking Water Act. EPA has worked closely with the city and state as they complied with the emergency order, which required the city to take numerous actions to protect residents. Those actions included:

- The city and EGLE undertook a corrosion control and comprehensive pipe loop study to determine optimal corrosion control treatment, which was then implemented. Optimal corrosion control treatment ensures lead levels are minimized and comply with the federal lead action level.

- Flint constructed a backup pipeline connecting treated water from the Genesee County Drain Commission to the Flint public water system to serve as a secondary back-up source of water. Having a reliable backup source of water is critical to maintaining services during an emergency and during routine maintenance and repairs.

- Flint increased permanent staffing levels since 2016, developed new and updated existing standard operating procedures, and has 13 state-certified, licensed drinking water operators. Adequate staffing is ensuring safe, efficient and effective operations of the Flint public water system.

Flint studied and developed a plan to optimize corrosion control treatment in its drinking water system as part of their efforts to address EPA's 2016 emergency order. As a result of implementing that plan, Flint's water system has continually tested below action levels for lead since July 2016. Additionally, the city has replaced over 97 percent of legacy lead pipes carrying water to homes, known as lead service lines.

The end of the order returns the City of Flint to its regular, ongoing obligation to comply with the requirements of the SDWA and its regulations, which are primarily overseen by the Michigan Department of Environment, Great Lakes and Energy (EGLE). EGLE will maintain compliance, including overseeing implementation of the water system plan to ensure ongoing technical, managerial, and financial capacity necessary to operate and maintain the city's water system.

May 16, 2025—The U.S. Environmental Protection Agency issued three new permits and modifications to three existing permits to Michigan Potash Operating LLC to inject fluid underground in Osceola and Mecosta counties in Michigan.

These permits will allow the company to inject non-hazardous salt water from a proposed potash mining and processing facility for disposal into Class I wells. EPA solicited public input about the permits and responded in writing to all significant comments.

The permitting process was accelerated to be consistent with President Trump's Executive Order, "Immediate Measures To Increase American Mineral Production." Under EPA's Underground Injection Control (UIC) program, the Safe Drinking Water Act requires EPA to regulate the injection of fluids into wells to protect the quality of underground sources of drinking water. EPA's UIC program plays a key role in our nation's economic future by protecting underground water supplies and ensuring that materials from industrial and energy projects are safely stored underground. Federal regulations require operators of Class I wells to inject waste into deep, confined rock formations below the deepest underground source of drinking water. All Class I wells must be cased and cemented to prevent the movement of fluids into or between underground sources of drinking water. Permits require active monitoring to confirm safe operation of the wells.

Apr. 29, 2025—A court sentenced Tribar Technologies, Inc. (Tribar), to pay a $200,000 fine, complete a five-year term of probation and enact an environmental compliance plan. Tribar also will pay $20,000 in restitution to the City of Ann Arbor, Michigan.

The company pleaded guilty to negligently violating a pretreatment standard under the Clean Water Act (33 U.S.C. §§ 1317(d) and 1319(c)(1)(A)).

Tribar manufactures automobile parts and presently operates five active plants in southeast Michigan. Plant 5 is a chrome plating facility located in Wixom, Michigan. It uses an electroplating process to apply chrome finishing to plastic automotive parts. Plant 5 generates wastewater that contains chromium compounds, including hexavalent chromium, a known carcinogen.

On July 23, 2022, Plant 5 accumulated approximately 15,000 gallons of untreated wastewater containing high concentrations of hexavalent chromium. This wastewater had higher levels of pollutants than the wastewater typically generated from Plant 5 operations. During the week beginning July 25, 2022, Plant 5 employees attempted to treat this wastewater in a holding tank to reduce the amount of hexavalent chromium before putting it into the Plant 5 wastewater treatment system. By the end of the week, the wastewater still contained high concentrations of hexavalent chromium.

On July 29, 2022, an employee discharged approximately 10,000 gallons of insufficiently treated wastewater from the holding tank into the Plant 5 wastewater treatment system. This discharge activated wastewater treatment system alarms, indicating that the wastewater required further treatment before it could be discharged to the Wixom sanitary sewer system. The employee disabled approximately 460 alarms and discharged the wastewater to the Wixom sanitary sewer system, and ultimately to the Wixom publicly owned treatment works, without completing the treatment necessary to remove chromium from the wastewater, as required by Tribar's Industrial Pretreatment Program Permit.

The U.S. Environmental Protection Agency Criminal Investigation Division, the Michigan Department of Environment, Great Lakes and Energy, and the Federal Bureau of Investigation conducted the investigation.

Apr. 16, 2025—Aghorn Operating Inc., an oilfield company, Trent Day, an executive of Aghorn, and Kodiak Roustabout Inc., entered guilty pleas and were sentenced yesterday in relation to criminal worker safety and federal clean air and safe drinking water violations. According to court documents, Aghorn owns and operates oil wells in and near Odessa, Texas. Odessa is in the Permian basin where oil reserves are "sour," meaning they have high hydrogen sulfide content. Hydrogen sulfide gas can be deadly at high concentrations.

The case leading to these pleas is the result of an investigation of the Oct. 26, 2019, death of Aghorn employee Jacob Dean and his wife Natalee Dean. Both were overcome by hydrogen sulfide at an Aghorn facility in Odessa.

Day agreed to plead guilty to a Clean Air Act (CAA) negligent endangerment charge and serve five months in prison. Aghorn pleaded guilty to CAA negligent endangerment and an Occupational Safety and Health Act willful violation count for the death of Jacob Dean. Kodiak pleaded guilty to a felony violation of the Safe Drinking Water Act for falsifying oil well integrity tests. Aghorn will pay a $1 million

criminal fine and Kodiak will pay a $400,000 criminal fine. These pleas were made under agreements the defendants entered into with the United States. Under the agreements, other pending charges will be dismissed. Yesterday, the court accepted the defendants' guilty pleas and sentenced them in accordance with their plea agreements.

"Energy production is vital, but it must be done competently and lawfully," said Acting Assistant Administrator Jeffrey Hall of the Environmental Protection Agency (EPA)'s Office of Enforcement and Compliance Assurance. "Operators who gravely endanger and kill others and those who lie to the government will be held accountable for their criminal conduct. EPA's criminal investigation of these tragic deaths led to today's plea deal."

According to a factual statement accepted by Day and Aghorn, Jacob Dean responded to a call to check a pump at an Aghorn facility. There, he encountered deadly hydrogen sulfide gas, was overcome, and died. His wife, Natalee Dean, knew where Jacob had gone and started calling him when he did not return in a timely manner. When those calls went unanswered, Natalee drove to the facility. When Natalee arrived at the facility, she was also overcome while looking for Jacob and died.

Trent Day admitted that he should have controlled hydrogen sulfide emissions as part of his duties and that because he did not, he placed others in imminent danger of death. Aghorn admitted the same criminal negligence and to a separate charge that it willfully violated the Occupational Safety and Health Act regulations requiring companies to implement respiratory protection programs to address hazards like those at the facility. In addition to paying a $1 million fine, the company will maintain a set of improvements it made after the tragedy during its period of probation.

The investigation also uncovered false statements by Kodiak about injection well testing related to Aghorn's oil operations. The mechanical integrity of an injection well must be evaluated by conducting pressure tests. These tests are part of programs under the Safe Drinking Water Act to prevent leaks from those wells. Such leaks could, under some circumstances, contaminate groundwater. In its plea agreement, Kodiak admitted that it sent forms and charts to the Texas Railroad Commission, claiming they were tests for specific wells when Kodiak knew they were not actual records of tests of those wells. Kodiak, in addition to its $400,000 fine, will guarantee that at least 33 tests conducted for Aghorn wells during its year of probation are witnessed or conducted by a third party.

The EPA's Criminal Investigation Division investigated the case. The Justice Department and EPA would like to thank the Texas Commission on Environmental Quality, the Texas Railroad Commission, Ector County Environmental, and the Odessa Fire Department for their support of the investigation. (Robert Schuster)

JUDICIAL DEVELOPMENTS

CALIFORNIA COURT OF APPEAL REVERSES PRELIMINARY INJUNCTION INVOLVING FISH FLOWS

Bring Back the Kern v. City of Bakersfield, ___Cal.App.5th___, Case No. F087487 (5th Dist. Apr. 2, 2025).

In *Bring Back the Kern v. City of Bakersfield* the Fifth District Court of Appeal reversed the Kern County Superior Court's orders granting a preliminary injunction and implementing a stipulation regarding water flows in the Kern River.

The case was remanded for further proceedings consistent with the appellate court's opinion, requiring the trial court to conduct a reasonableness analysis and address procedural and substantive deficiencies in any future orders. Costs were awarded to the appellants. The plaintiffs have petitioned to the California Supreme Court for review.

Background

The plaintiffs sought to enforce California Fish and Game section 5937 to ensure sufficient flows in the Kern River to protect fish populations, invoking the public trust doctrine. However, the appellate court ruled that the trial court erred by failing to consider whether this use of water was reasonable under Article X, Section 2 of the California Constitution. While the public trust doctrine supports preserving fish and wildlife, the court clarified that this must be balanced against other beneficial uses, such as domestic water supply and irrigation.

The Court of Appeal's Decision

In reversing the Superior Court, The Court of Appeal's ruling emphasized the following key points.

Failure to Consider Reasonableness

The trial court erred by not evaluating whether the use of water to keep fish in good condition, as required by Fish and Game Code section 5937, was reasonable under Article X, Section 2 of the California Constitution. The appellate court held that all uses of water, including public trust uses, must conform to the constitutional standard of reasonableness.

Definiteness of Injunction

The injunction was overly vague because it did not specify the flow rate required to keep fish in good condition. The appellate court advised that any future injunction should set clear, objective standards for compliance.

Due Process Violation

The implementation order, which prioritized Bakersfield's municipal water needs over the water agencies' rights, violated the due process rights of the water agencies. The order was based on a stipulation that excluded the water agencies, despite directly affecting their water delivery rights.

Reasonable Use of Water

The court defines reasonable use of water as a case-specific determination that depends on the totality of the circumstances, including competing demands and the availability of water. It emphasized that no single use of water, including domestic use or public trust uses like preserving fish, has absolute priority. Instead, reasonableness requires a comparison of uses, balancing environmental concerns, beneficial uses, and the needs of various stakeholders.

The court noted that what constitutes reasonable use can change over time due to evolving conditions, such as water scarcity or increased demand. It also clarified that the reasonable use requirement applies to all uses of water in California, regardless of whether they are governed by statutes like Fish and Game Code section 5937.

The Public Trust Doctrine

The public trust doctrine played a significant role in this case as it intersects with California's water rights regime. The doctrine, rooted in Roman and English common law, establishes that the state holds

navigable waterways and the lands beneath them in trust for the benefit of the public. It requires the state to protect public trust uses, such as recreation, wildlife preservation, and environmental conservation, whenever feasible. The court emphasized that the state has an affirmative duty to consider public trust uses in the planning and allocation of water resources. However, this duty must be reconciled with the constitutional requirement under Article X, Section 2 that all uses of water, including public trust uses, must be reasonable.

Conclusion and Implications

The court clarified that public trust uses must be balanced against other beneficial uses, such as domestic water supply and irrigation. This balancing act reflects the broader implications of the doctrine: it protects environmental values while requiring courts and policymakers to consider the needs of all stakeholders. Stated differently, courts must ensure that public trust uses are protected "whenever feasible," but this does not mean they always take precedence over other uses. In fact, the ruling makes clear that court must weight environmental concerns against human and economic needs. An issue for further clarification that might come from this case as it navigates the legal process is to what extent vested water rights must yield to the public trust doctrine. The court's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/F087487.PDF
(Wes Miliband)

COLORADO SUPREME COURT REAFFIRMS NO-INJURY STANDARDS WHEN EVALUATING PLANS FOR AUGMENTATION

Concerning the Application for Water Rights of the Town of Firestone, 2025 CO 33 (Colo. May 27, 2025).

The Colorado Supreme Court recently reaffirmed the standards for which an applicant must prove "no-injury" to vested water rights when applying for approval of a plan for augmentation. This decision, while consistent with prior law, underscores the evidentiary burden that applicants must meet to obtain conditional groundwater rights in over-appropriated basins. The Court also clarified the scope of its retained jurisdiction regarding plans for augmentation.

Overview of Plans for Augmentation Including Conditional Groundwater Rights

A brief overview of pertinent Colorado water law is helpful to understand the facts and claims at issue in this case. Colorado operates under a relatively pure version of the prior appropriation system, under which water rights are administered according to priority dates. In order to prevent curtailment of junior water rights during times of a downstream call, a water right owner may apply to the water court for approval of a plan for augmentation. A plan for augmentation is a court-approved water supply plan that replaces water back into the stream system to offset depletions from a new junior water use.

Colorado water law also recognizes both conditional and absolute water rights. An absolute water right is one that is fully developed, meaning the owner has put the water to beneficial use. In contrast, a conditional water right is one that has not yet been developed. A decreed conditional water right preserves the owner's priority within the prior appropriation system while allowing for future development of the intended water project. *Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros.*, 307 P.3d 1056, 1064 (Colo. 2013). Conditional water rights often require a plan for augmentation to protect senior water rights against injury. The "no-injury" doctrine requires applicants to demonstrated that their proposed diversions will not cause injury (*i.e.*, a diminution of available water) to vested senior water rights. *Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001).

Surface water rights may not require a plan for augmentation because they can be immediately curtailed during a call to prevent injury to downstream senior water rights. However, depletions from groundwater rights are "lagged" meaning that the depletions may take months, or longer, to affect the nearest surface stream system. Thus, conditional groundwater rights in over-appropriated basins, which include Division 1 at issue in this case, must be accompanied by an approved plan for augmentation. *City of Aurora ex rel.*

Util. Enter. v. Colo. State Eng'r, 105 P.3d 595 (Colo. 2005) (holding that "a conditional right to pump water that would injure senior appropriators may only be decreed in conjunction with an augmentation plan."). Analysis of lagged groundwater depletions requires precise engineering calculations to determine the amount and timing of those out-of-priority depletions and how those depletions will affect downstream senior water rights. A standard engineering methodology for calculating lagged depletions relies on a computational model that uses Unit Response Functions (URFs) to quantify the timing and amount of depletions that a nearby surface stream will experience as a result of new well pumping. "If an applicant for a new conditional groundwater right fails to meet their burden of showing non-injury, including by submitting inaccurate or insufficient lagged depletion calculations in their augmentation plan, then a water court is obligated to dismiss the application." *Firestone* at ¶ 13 (citing *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 684 (Colo. 2008)).

Background and Procedural History

The Town of Firestone filed an application with the Division 1 Water Court in 2019 seeking, among other things, several new conditional surface and groundwater rights, as well as approval of a plan for augmentation. The Town applied for these water rights as part of its planning measures that predict population doubling by 2050 and the need for additional municipal water supplies. Numerous parties opposed the application, although Firestone was able to reach stipulations with all but the St. Vrain Sanitation District. St. Vrain specifically raised concerns about Firestone's claims for three conditional well fields.

At trial before the water court, Firestone provided quarter-quarter section legal descriptions for each of the three well fields, but did not specify exact well locations or the number of proposed wells within each well field. Thus, the URFs were based on estimated locations and number of wells, and Firestone proposed to later refine the URFs and lagged depletion models after construction of the wells.

After Firestone concluded its case-in-chief, St. Vrain filed a motion to dismiss arguing that the proposed well fields lacked the specificity necessary for an accurate URF analysis, and that Firestone's proposal to refine the URF modeling at a later date improperly shifted the burden of proving no-injury to a later proceeding. The water court agreed and partially granted the motion, dismissing the portions of the application related to the three well fields and the corresponding portions of the plan for augmentation. The water court's ruling found that Firestone's URF calculations, based on "estimated, potential" well locations were insufficient to prove a showing of no-injury. The court specifically relied on Firestone's own expert who testified that inaccurate URF calculations could lead to underestimated lagged depletions, which could ultimately injury senior water rights. Regarding Firestone's proposal to refine the URF modeling after well construction, the water court held that, because it was unable to find for Firestone on the issue of non-injury, it would be inappropriate to retain jurisdiction over the application. Firestone then appealed directly to the Colorado Supreme Court.

The Colorado Supreme Court's Decision

Required Location Specificity in No-Injury Analysis

The Colorado Supreme Court began its opinion by noting that it historically:

> . . .has looked to both context and case-specific facts when approaching the question [of] whether an applicant must identify an exact location for a diversion structure to obtain a conditional water right. *Firestone* at ¶ 41.

These decisions, which did include several cases in which quarter-quarter sections were sufficient for a water court to make a finding of non-injury, were distinguishable from Firestone's application. Specifically, those cases involved either absolute water rights or surface water rights and thus the depletions, in both timing and location, were more readily discernable.

In this case, the water court found, and the Colorado Supreme Court refused to overturn, that the case-specific facts regarding the proposed wells were not sufficient to allow the court to accurately determine whether the proposed plan for augmentation would be sufficient to prevent injury. The Colorado Supreme Court noted that by doing this the water

court did not create a bright line rule that an applicant must construct a well before obtaining the conditional groundwater right and accompanying plan for augmentation. Instead, water courts are obligated to evaluate each application on a case-by-case basis to determine whether the evidence presented by an applicant is sufficient to permit the water court to make a "reasonably accurate" determination of non-injury. *City of Aurora,* 105 P.3d at 616-17.

Firestone argued that the water court's decision finding that the proposed locations were not sufficient to allow an accurate URF analysis adopted a new "precisely accurate" standard rather than the "reasonably accurate" standard under *City of Aurora*. The Colorado Supreme Court upheld the water court's findings primarily based on the above-described case-by-case analysis standard. It is possible that an applicant could prove no-injury without exact location information, but in this case the water court found that Firestone did not meet that burden. The Supreme Court agreed and declined to overturn the water court's finding that Firestone's plan for augmentation, as plead, did not sufficiently demonstrate that it would replace out-of-priority depletions in the proper place, timing, and amount.

Retained Jurisdiction

The Colorado Supreme Court then turned to Firestone's argument that it should be granted the conditional water rights and then allowed to refine the URF calculations under the water court's retained jurisdiction. In essence, Firestone asked the water court to grant the conditional water rights and then later refine and update the URF calculations to align with the actual construction. The water court refused to allow this provision and held that it would be an impermissible use of the water court's powers of retained jurisdiction.

The Colorado Supreme Court agreed with the water court's ruling, relying on *Buffalo Park* which held that the:

> . . .[i]ntroduction of reliable evidence of the quantity, time, and location of depletions and the legal availability of replacement water is the responsibility of the applicant and cannot be postponed to occur under retained jurisdiction. 195 P.3d at 685 (citing *City of Aurora*, 105 P.3d at 616-17).

The Supreme Court reaffirmed that an applicant must meet the burden of showing no-injury "*at the time it applies for a conditional groundwater right*." Firestone at ¶ 52 (emphasis in original). Instead, the Court ruled, again citing *City of Aurora* "the purpose of retained jurisdiction is to *reconsider* injury once an augmentation plan is operating, not to prove depletions or prove injury for the first time." *Id.* (quoting *City of Aurora*, 105 P.3d at 616). Because Firestone failed to prove injury at the time of the application, the Supreme Court upheld the water court's decision dismissing the three well fields and declining to allow a future no-injury analysis under the water court's retained jurisdiction.

Conclusion and Implications

The *Firestone* decision reaffirmed the strict no-injury standards that an applicant must prove when obtaining approval of a plan for augmentation. This analysis must be done on a case-by-case basis and may require an applicant to further specify the location of proposed conditional water rights. The locations may not need to be "precisely accurate" but must be "reasonably accurate" such that a water court may properly analyze the URF calculations or other engineering demonstrating the location, timing, and amount of proposed depletions. The Colorado Supreme Court further reaffirmed its holdings in *Buffalo Park* and *City of Aurora* that the water court's powers of retained jurisdiction are only to be used for evaluating a plan for augmentation that has already been approved and is operational. Retained jurisdiction may not be used to kick the proverbial can down the road and avoid an applicant's burden of proving no-injury at the time it applies for conditional water rights.

Although this decision does not necessarily create new law, it reinforces that the burden to prove non-injury in water rights adjudications remains firmly with the applicant, and that the water court can and should demand clarity, precision, and credible modeling before approving conditional water rights and a plan for augmentation. This opinion offers valuable guidance to municipalities and other water rights holders that are planning future water projects and do not yet have exact information about the proposed project. The *Firestone* decision does not necessarily place a greater burden on future applicants but rather confirms that applicants for new conditional water

rights and plans for augmentation must be fully prepared to conclusively prove that the new project will not cause injury to senior water rights. The Court's opinion is available here: https://www.coloradojudicial.gov/system/files/opinions-2025-05/24SA109.pdf (John Sittler)

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