Volume 30, Number 10
August/September 2026

WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

WESTERN WATER NEWS

Four Years of Drought: Washington State's Governor Seeks Collaboration on the State's Water Future 243

REGULATORY DEVELOPMENTS

U.S. Bureau of Reclamation Issues Colorado River Operating Guidelines 245

California State Water Resources Control Board Moves Toward California's First SGMA Interim Plan as Courts Define the Limits of Probationary Authority 247

California State Water Resources Control Board to Consider $50,000 to $250,000 Fee for "Good Actor" Fee Exclusion Requests in Probationary Basins 249

Idaho Water Resource Board Receives Technical Updates Concerning the Health of the Eastern Snake Plan Aquifer 250

New Mexico Weighs New State and NPDES Surface-Water Permitting Frameworks 252

EPA NEWS AND SANCTIONS

Recent EPA News, Investigations and Sanctions 254

LAWSUITS FILED OR PENDING

Nevada Files Suit in the U.S. District Court Challenging the Bureau of Reclamation's August 2026 Record of Decision for Colorado River Guidelines 259

Continued on next page

EDITORIAL BOARD

Micheline Nadeau Fairbank, Esq.
Fennemore
Reno, NV

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

Jamie Morin, Esq.
Confluence Law
Seattle, WA

Miles Schuster, M.A.
Argent Communications Group
Fairfield, CA

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

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

ADVISORY BOARD

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

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

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

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

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT FEDERAL DECISIONS

Circuit Court of Appeals:
Ninth Circuit Affirms Endangered Species Act Applies to U.S. Bureau of Reclamation's Operation of the Klamath Project 261
Yurok Tribe v. U.S. Bureau of Reclamation, 179 F.4th 663 (9th Cir. 2026).

District Court:
U.S. District Court for Arizona Invalidates Incidental Take Statements for Coronado National Forest Grazing Program 263
Center for Biological Diversity v. Moore, ___F. Supp.4th___, Case No. CV-23-00354-TUC-AMM (D. Ariz. Aug. 18, 2026).

U.S. District Court Denies Preliminary Injunction over Shasta Dam Operations, Upholding U.S. Bureau of Reclamation's Water Plan 265
San Francisco Baykeeper v. U.S. Bureau of Reclamation, ___F.Supp.4th___, Case No. 2:26-cv-00671-JLT-EPG (E.D. Cal. Aug. 3, 2026).

RECENT STATE DECISIONS

California Court of Appeal Limits Scope of Regulatory Fees under SGMA to Owners and Operators of Groundwater Wells 267
Garst v. Tehama County Flood Control and Water Conservation District, 121 Cal.App.5th 507 (3rd Dist. 2026).

Publisher's Note:

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

WWW.ARGENTCO.COM

Copyright © 2026 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to $250,000 and up to three years imprisonment, and statutory damages in civil court are up to $150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

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

Subscription Rate: 1 year (11 issues) $1025.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 201, Galena, IL 61036-0201; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

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

WWL

WESTERN WATER NEWS

FOUR YEARS OF DROUGHT: WASHINGTON STATE'S GOVERNOR SEEKS COLLABORATION ON THE STATE'S WATER FUTURE

Washington State is in its fourth consecutive year under a statewide drought declaration. Against this backdrop, Governor Bob Ferguson launched a statewide initiative to foster a broad conversation about how Washington can prepare for a more uncertain water future. The initiative, known as Washington's Water Future, reflects a growing recognition that the State's traditional approach to managing water supplies must adapt to changing climate conditions, population growth, and competing demands for a finite resource.

Background

Washington is a state of geographic and climatic diversity. Its landscapes include wet coastal rainforests, temperate marine climates, snow-covered Cascade Mountains and the arid and semi-arid regions east of the mountains. These differences create complex water challenges. Some communities face seasonal shortages and declining surface and groundwater supplies, while others must manage increasingly severe winter flooding. Washington also includes a diverse economic landscape. Agriculture, growing communities, industry, fisheries, and ecosystems all depend on reliable water supplies, often from the same rivers and aquifers.

Climate change is intensifying these challenges. Historically, Washington has relied heavily on mountain snowpack as a natural reservoir, with winter snow accumulating at higher elevations and melting gradually in spring and summer. Warmer winters and shifting precipitation patterns are leading to more water short years. More winter precipitation is falling as rain rather than snow, contributing to higher winter flows and flooding, while a reduced and earlier-melting snowpack can leave less water available during the dry summer months, when demand is greatest. These changes affect not only eastern Washington's agricultural communities but also the traditionally water-rich regions west of the Cascades.

The Governor's Initiative

Governor Ferguson's initiative emphasizes the need for the state, tribal and local governments, water users, and communities to work together to identify solutions. The initiative aims to secure water supplies that can support Washington's economy and growing communities, sustain agriculture, protect healthy fish runs, and preserve Tribal resources. Washington's Water Future is structured as a statewide effort to identify shared challenges, learn from regional experience, and explore practical approaches that can work across diverse local conditions.

Under the Governor's initiative, the Washington State Department of Ecology has been directed to lead conversations with Tribal governments, local governments, agricultural interests, businesses and industries, water utilities, environmental organizations, community groups, and other stakeholders. Over the summer, Ecology hosted multiple regional roundtable discussions and virtual sessions across sectors and interests. The regional discussions have focused on barriers to building a resilient water future, including physical, legal, financial, and social or political obstacles. Participants have also been asked to identify solutions and opportunities to improve water reliability and watershed health.

The conversations have reflected both regional and issue-specific concerns. In some discussions, participants have explored whether permitting and regulatory processes can be made more flexible and adaptive for projects that provide multiple water benefits, such as storage, restoration, or mitigation. Other conversations have focused on municipal and drinking-water supplies, conservation, agricultural water needs, and the challenges of financing and constructing new infrastructure.

Ecology is compiling themes and findings from the roundtables and other outreach and plans to publish a statewide summary later this year. Ecology's greatest challenge may be translating a broad statewide conversation into concrete actions that are adequately

funded, legally viable, and responsive to Washington's diverse regional needs. The results are expected to inform discussions with the Governor and other state agencies about potential policy, planning, and on-the-ground actions, including ideas that could be considered before the 2027 legislative session.

Conclusion and Implications

Ultimately, Washington's Water Future represents an effort to move beyond responding to individual droughts, floods, or water shortages and toward more strategic, long-term planning for changing water conditions. The initiative comes at a time when Washington is experiencing the consequences of increasingly variable precipitation, declining snowpack reliability, population growth, and growing pressure on rivers and aquifers. The Governor's leadership emphasizes the need for all stakeholders to participate in discussions to identify collaborative approaches to managing our shared resource.
(Jessica Kuchan)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION ISSUES COLORADO RIVER OPERATING GUIDELINES

The U.S. Bureau of Reclamation issued the 2027-2028 Colorado River Operating Guidelines on August 21, 2026. These guidelines, the result of years of studies, competing plans, and failed negotiations, outline how the seven Colorado River Basin states will share in what seem to be unavoidable shortages. Predictably, the Guidelines were met with mixed reactions, including an almost immediate challenge from Nevada.

Background

The Colorado River is shared among the seven basin states, comprised of the Upper Basin (Colorado, Utah, Wyoming, New Mexico) and the Lower Basin (California, Nevada, Arizona). The 1922 Colorado River Compact divides the river's water between the two basins, requiring that the Upper Basin shall not deplete the river's flows at Lee Ferry below an average of 7.5 million acre-feet (maf) per year. However, climate change and aridification have severely reduced the river's flows, leaving the current Compact essentially unworkable and resulting in historically low levels in Lake Powell and Lake Mead.

The Bureau of Reclamation first attempted to address the issues within the Colorado River Basin through the 2007 Interim Guidelines. The stated goal with the interim guidelines was to provide a temporary framework while allowing the basin states time to negotiate new sharing measures. Negotiations stalled and dropping reservoir levels forced the Bureau to implement a Drought Contingency Plan in 2019 aimed at keeping both Lake Powell and Lake Mead from reaching critical levels. Both reservoirs have a "minimum power pool" below which they can no longer generate hydroelectric power, and "dead pool" below which they cannot release water at all. The 2019 Drought Contingency Plan, aided by several good winters, kept the reservoirs above these critical levels.

Each of the seven states submitted competing alternatives in early 2024. See, Upper and Lower Colorado River Basin States Submit Competing Proposals for Post-2026 Operational Guidelines, 28 *W. Water L. & P'lcy Rptr*. 129, 129-131 (Apr. 2024). As expected, each state roundly criticized the other proposals and negotiations continued to stall. The Bureau finally set November 11, 2025, as the deadline for the states to reach an agreement. They did not. The Bureau then extended the deadline to February 14, again without success. By that time most of the Colorado River Basin was in extreme drought, in the middle of its worst winter on record, and something had to be done to protect Lake Powell and Lake Mead.

While the states were attempting to negotiate, the Bureau released four proposed plans in November 2024. When it became clear that the states were not going to agree on a proposal, the Bureau, in January 2026, released a draft Environmental Impact Statement (EIS) analyzing the potential impacts of future guidelines and expanding on the alternatives first identified in November 2024. U.S. Bureau of Reclamation Releases Draft EIS Alternatives Report for Colorado River Management, 30 *W. Water L. & P'lcy Rptr*. 85, 85-87 (Feb. 2026). These alternatives ranged from the federally required "no action" alternative, which all parties agreed was not a true option, to plans grounded in "basic coordination" or "supply driven" approaches. Id.

Final Environmental Impact Statement and Preferred Alternative

The Bureau issued the final Environmental Impact Statement and identified its preferred alternative on July 31, 2026. In completing this three-year process, the Bureau worked closely with other federal agencies including the U.S. Fish and Wildlife Service. The Bureau's preferred alternative is a ten-year adaptive "decision framework" meaning that it establishes principles and goals and outlines a process for developing operational guidelines every two years. This allows for protection of Lake Powell and Lake Mead in the interim, while also giving the seven basin states additional time to reach a larger cooperative agreement. The decision framework requires that each set

of operational guidelines remain responsive to year-to-year hydrology and triggers additional actions if Lake Powell falls below 3,500 feet or Lake Mead falls below 1,000 feet.

2027-2028 Operating Guidelines

On August 21, 2026, Secretary of the Interior Doug Burgum signed the first operating guidelines, imposing a framework for the next two water years. For Lake Powell, the Guidelines create three elevation ranges (upper, mid, and lower) each with corresponding releases between 6.0 and 8.23 maf per year. These elevations and releases are calculated to keep Lake Powell above 3,510 feet to support operational reliability. That 3,510 level is only 20 feet above minimum power pool at 3,490 feet. If projections show that Lake Powell will reach 3,500 feet, releases may be throttled down to 5 maf. However, if Lake Powell is predicted to end the year above 3,565 feet, total releases may be as much as 8.23 maf. Releases below 7 maf will trigger additional releases from Upper Basin Reservoirs, such as Flaming Gorge and Blue Mesa. However, those additional releases are subject to year-to-year hydrology and must be agreed to by the Bureau and the Upper Basin in consultation with the Lower Basin. The Bureau's August 2026 study projects Lake Powell will be in the lower elevation range for water year 2027 with an expected release of 6-7 maf.

The Operating Guidelines immediately imposed a cut of 1.25 maf in Lake Mead releases for each of 2027 and 2028. The Bureau will consult and may take further action if Lake Mead is predicted to fall below 1,010 feet (minimum power pool is 950 feet, although power generation capacity is reduced below 1,035 feet). The Bureau adopted several flexibility tools from the various Lower Basin proposals, including at least 700,000 acre-feet of system conservation water stored in Lake Mead through 2028; expanded Intentionally Created Surplus accounts, capped at deliveries of 800,000 acre-feet; and a federally managed pool of up to 450,000 acre-feet to meet tribal obligations and provide limited shortage offsets.

Lower Basin States React

The Operating Guidelines impose more stringent cuts on the Lower Basin, and the states have reacted in kind. If the Lower Basin implements its proposed sharing agreement, Arizona would cut 760,000 acre-feet; California 440,000; and Nevada 50,000 while the Upper Basin, which uses comparatively much less water, faces no mandatory reductions. The Upper Basin could however be forced to operate its reservoirs to release additional water to protect Lake Powell. The states generally agree that the decision framework's flexibility and prioritization of consensus agreements will be helpful in the long run. Tom Buschatzke, director of the Arizona Department of Water Resources, summed up the general consensus in a press release noting that the Operating Guidelines create a "level of stability" but that "the framework for years three to ten continues to be of concern." The Upper Basin on the other hand is generally happy with the Operating Guidelines as proposed, with the caveat that the Bureau could completely change course in three years.

Nevada Challenges on NEPA Grounds

Unsurprisingly the Bureau's decisions were almost immediately challenged in court. On August 24, 2026, the State of Nevada, together with the Colorado River Commission of Nevada, and the Southern Nevada Water Authority, sued the Bureau and Secretary Burgum. The complaint alleges that the decision framework, Final EIS, and 2027-2028 Operating Guidelines violate the Administrative Procedure Act, National Environmental Policy Act (NEPA), and the Law of the River. Nevada therefore asks the court to vacate all three and enjoin the Bureau from implementation. Ironically, this would result in the "no action" alternative as the Colorado Basin would operate without any guidelines or shortage sharing mechanisms in the 2027 water year. Nevada claims that, under the Operating Guidelines and decision framework, it could be forced to endure cuts of up to 213,556 acre-feet during a worst-case 3.6 maf basin-wide shortage. That would equate to an approximately 71 percent cut in Nevada's entitlement that currently supplies 90 percent of the water to the Las Vegas Valley, among other areas.

Nevada's claims are based on procedural grounds, arguing that the Bureau skipped NEPA's required procedural steps by declining to interpret and apply the Law of the River and failing to adequately analyze the socioeconomic effects of severe cuts to municipal water supplies. (See: related coverage of Nevada's lawsuit at page 259 in this issue of the Western Water Law & Policy Reporter)

Conclusion and Implications

The decision framework, Final EIS, and 2027-2028 Operating Guidelines are the first concrete governing steps the Bureau has taken since 2019 to address the deepening shortages in the Colorado River Basin. Any decision was almost certain to be challenged, and it remains likely that any final decisions and policies will end up before the courts. As much as the basin states have yet to find common ground, there does seem to be at least a tacit agreement that any compromise agreement is better than leaving these technical water questions to the courts. How the courts will weigh Nevada's claims against the substantial deference now enjoyed by federal agencies will likely shape the next chapter of Colorado River operations. In the meantime, there is one thing that all basin states agree on: let's hope it snows. (John Sittler)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD MOVES TOWARD CALIFORNIA'S FIRST SGMA INTERIM PLAN AS COURTS DEFINE THE LIMITS OF PROBATIONARY AUTHORITY

Three developments over the summer of 2026 have clarified the state's expanding role under the Sustainable Groundwater Management Act (SGMA) and the courts' treatment of challenges to local and state groundwater-management decisions. Together, the developments mark a transition from plan review and probationary oversight toward direct state intervention, fee enforcement, and more defined limits on judicial reexamination of technical groundwater determinations.

In July 2026, State Water Resources Control Board (Water Board or Board) staff told Tule Subbasin water managers to expect a pumping moratorium along a corridor of the Friant-Kern Canal as early as April 2027—the opening phase of what would be the first interim plan adopted under SGMA. In August, a Kings County Superior Court judge cleared the way for the Board to begin invoicing most Tulare Lake Subbasin pumpers for probationary extraction fees, while enjoining enforcement as to two Groundwater Sustainability Agencies (GSAs) whose "good actor" exclusion requests the Water Board had denied. And on July 30, the Third District Court of Appeal held that the primary jurisdiction doctrine bars a reverse validation action that would have a trial court redo the Department of Water Resources' (DWR) technical evaluation of a Groundwater Sustainability Plan (GSP).

Background

SGMA (Water Code § 10720 et seq.) requires local agencies in high- and medium-priority basins to form GSAs and to adopt GSPs that avoid six enumerated undesirable results, including chronic lowering of groundwater levels, land subsidence, and depletion of interconnected surface water. Critically overdrafted basins must achieve sustainability by 2040.

Where DWR determines a GSP is inadequate, primary regulatory oversight shifts to the State Water Board. Under Water Code § 10735.2, the Water Board may designate a basin probationary, which triggers extraction reporting and filing fees. Section 10735.2(e) permits the Board to exclude from probationary status a portion of a basin managed by a GSA that is operating consistently with SGMA—the so-called "good actor" provision. If the deficiencies that produced the designation are not corrected within the period specified by the Water Board (one year for the Tule Subbasin), § 10735.8 authorizes the Board, after notice and hearing, to adopt an interim plan. It is at that stage that the state itself may impose extraction restrictions.

DWR has referred seven San Joaquin Valley subbasins to the Board since 2023: Tulare Lake, Tule, Kaweah, Kern County, Delta-Mendota, Chowchilla, and Pleasant Valley. Two were designated probationary in 2024, Tulare Lake in April and Tule in September. The Kern County Subbasin was returned to DWR oversight in September 2025 after the Board

found its revised plans substantially, though not entirely, corrected earlier deficiencies.

The Tule Subbasin and the First Interim Plan

On July 16, 2026, Board staff met with Tule Subbasin water managers to lay out the interim plan process. The presentation left little ambiguity about direction. Phase I would target subsidence damage to the Friant-Kern Canal, with growers farming within roughly two miles of the canal in southern Tulare County directed to prepare for a pumping moratorium. Staff put the cost of canal damage above $797 million.

The schedule presented was substantially accelerated from what managers had previously been told. A public draft of the Phase I plan would issue in January 2027, notices to pumpers in February, and a final version in March, with Board consideration expected at an April 2027 meeting. Phase II would extend pumping reductions across the subbasin to protect critical infrastructure and domestic wells. The draft would also raise the extraction fee from $20 to $35 per acre-foot.

Practitioners should note the conditional character of the timeline. Staff indicated the process could be overtaken if subbasin GSAs produce an acceptable groundwater management plan first. Local agencies are attempting exactly that. The subbasin's original six GSAs have since divided into twelve; eleven of the twelve have signed on to a unified plan effort, all twelve have joined a subsidence study defining where and why sinking is occurring, and managers report more than 50 technical and policy meetings since April. A rewritten GSP is targeted for June 2027. Negotiations with Friant Water Authority over canal protection continue and may themselves produce a reduced pumping zone on either side of the canal.

Tulare Lake Subbasin: Kings County Farm Bureau Litigation

The Tulare Lake Subbasin has followed a different path through the courts. The Kings County Farm Bureau (Farm Bureau) sued the Board in 2024 following the April 2024 probationary designation, obtained a preliminary injunction halting probationary measures, saw that injunction reversed by the Fifth District Court of Appeal in October 2025, and had review denied by the California Supreme Court in early 2026.

On remand, the Farm Bureau sought a second preliminary injunction. In a ruling issued in mid-August 2026, Kings County Superior Court Judge Shane Burns granted it in part and denied it in part. The court found the Farm Bureau likely to succeed on its claim that the Board erred in 2024 by failing to consider excluding Tri-County Water Authority and Southwest Kings GSA under the good actor provision, and barred enforcement of probationary measures, including fees within those two agencies pending final resolution. The Board had denied those requests on the ground that no comprehensive plan existed for the subbasin as a whole.

As to the remainder of the subbasin, the court denied relief, resting on California's "pay first, litigate later" rule requiring payment of contested fees and taxes while their legality is adjudicated. The practical consequence is that the Board may now invoice most Tulare Lake pumpers at $20 per acre-foot, excepting those extracting 20 acre-feet or less per year, whom the Board excluded from probationary reporting and fees by resolution in April 2026. A hearing on the merits is set for October 6, 2026.

AquAlliance v. Vina Groundwater Sustainability Agency

In *AquAlliance v. Vina Groundwater Sustainability Agency*, ___Cal.App.5th___, Case No. C102382 (July 30, 2026), the Third District addressed the scope of judicial review of GSPs. https://www4.courts.ca.gov/opinions/documents/C102382.PDF.

AquAlliance, the California Water Impact Network, and the California Sportfishing Protection Alliance filed a reverse validation action in Butte County Superior Court in February 2022 challenging the GSP adopted in December 2021 by the Vina GSA and Rock Creek Reclamation District. DWR approved the plan in July 2023, accompanied by a staff report and six corrective actions. The trial court then dismissed, and plaintiffs appealed; the agencies cross-appealed the earlier ruling permitting non-agency parties to bring the action.

On standing, the court sided with plaintiffs, finding nothing in the validation statutes limiting reverse validation actions to public agencies. On the merits, it affirmed dismissal under the primary jurisdiction doctrine, reasoning that the plaintiffs' action and DWR's statutory evaluation posed the identical question: whether the plan would achieve the basin's

sustainability goal. The court held the Legislature committed that scientific and technical judgment to the Department. The court also invoked statewide uniformity, observing that independent county-by-county technical reviews would produce inconsistent application of a single statute.

The court stated it was not foreclosing later judicial review of DWR's own work; the defect was that the action sought "to supplant the Department's evaluation." Nor did the court decide how challenges to plan components unrelated to the core sustainability determination, or actions joining other legal theories, should be treated. Acting Presiding Justice Robie authored the opinion, joined by Justices Krause and Mesiwala.

Conclusion and Implications

Taken together, these developments narrow the paths available to those seeking to contest pumping restrictions.

AquAlliance substantially forecloses one route. Plaintiffs retain standing to bring reverse validation actions, but a challenge framed as a technical attack on whether a DWR-approved plan will achieve sustainability now faces dismissal under primary jurisdiction.

The Kings County ruling directs that the good actor provision remains viable, and the court's finding of likely success on that claim has implications extending beyond the two agencies enjoined. But the pay-first rule means the Board's revenue mechanism will proceed regardless.

The Tule Subbasin process appears to be where the statute's ultimate authority may be tested. An interim plan is the only mechanism by which the state directly restricts extraction under SGMA, and a moratorium in a corridor planted in permanent crops will present takings, water rights, and Proposition 218 questions that no prior SGMA proceeding has squarely raised. The Board has both adopted an accelerated schedule and stated that local action can still displace state action.
(David Boyer)

STATE WATER RESOURCES CONTROL BOARD TO CONSIDER $50,000 TO $250,000 FEE FOR "GOOD ACTOR" FEE EXCLUSION REQUESTS

In September 2026, the State Water Resources Control Board (State Water Board) will consider adopting a new fee under the Sustainable Groundwater Management Act (SGMA). The fee would apply to Groundwater Sustainability Agencies (GSAs) in probationary groundwater basins that ask the State Water Board to consider whether their updated plan adequately manages their portion of the basin and, therefore, whether their landowners should be exempted from probationary fees.

Background: Probation and Exclusion Requests

Under SGMA, when the State Water Board designates a groundwater basin as "probationary," all groundwater pumpers in the basin become subject to registration and reporting requirements as well as a volumetric fee on groundwater pumping—intended to fund the cost of the State Water Board's administration of the probationary basin. In addition, the State Water Board can prepare an interim plan to manage the basin until GSAs establish adequate plans.

However, the State Water Board has the authority to exempt pumpers from these requirements and fees if their extractions "are subject to a local plan or program that adequately manages groundwater within the portion of the basin to which that plan or program applies." (Wat. Code, § 10735.2, subd. (c)(1).) Some colloquially refer to this as the "good actor" or "good guy" exemption or exclusion. Many GSAs in the two probationary basins have indicated that they believe modifications made to their plans since the probationary hearing justify their receiving this exemption and have requested that the State Water Board reconsider granting those exemptions.

Proposed Fee Structure

The State Water Board staff has proposed that the board impose an application fee for seeking a "good actor" exemption. Several GSAs in the probationary basins have made multiple applications in the past, and State Water Board staff says reviewing those requests is very time-consuming. Therefore, they have proposed a fee that would range from $50,000 to $250,000 for each application, depending on the "groundwater usage tier" of the GSA. The proposal has been discussed at workshops and stakeholder meetings, and it is currently expected to go before the State Water Board for potential adoption on September 15, 2026.

GSA managers in the probationary basins argue that the fee creates the wrong incentives by continuing to penalize landowners in GSAs that are doing the necessary work to manage their portion of the basin. They have also raised questions about the other SGMA fees imposed by the State Water Board and how those funds are being used.

Conclusion and Implications

Joaquin Esquivel, the chairman of the State Water Board, has previously commented at a public meeting that the pursuit of the "good actor" exemption is often a "distraction" from the goal of improving GSPs and getting out of probation. However, as the State Water Board staff prepare interim plans for the probationary basins, many GSAs are likely to want their exemption request considered if they believe that they have made the necessary changes to their plan—even if the other GSAs in the basin have not. If the State Water Board adopts this fee, it will certainly affect the cost-benefit analysis of an application. But it might not actually deter GSAs from applying.

Editors Note: The author represents clients in both of the current probationary basins, including a GSA in the Tulare Lake Subbasin and a water district in the Tule Subbasin.
(Brett Stroud)

IDAHO WATER RESOURCE BOARD RECEIVES TECHNICAL UPDATES CONCERNING THE HEALTH OF THE EASTERN SNAKE PLAN AQUIFER

On August 26, 2026, the Idaho Water Resource Board (Board) listened to presentations from Idaho Department of Water Resources (Department) technical staff regarding Eastern Snake Plan Aquifer (ESPA) water storage changes over time, interconnected Snake River reach gains and spring changes over time, and technical modeling of what, if any, improvements have occurred in response to the Board's managed aquifer recharge programs coupled with ESPA ground water district and municipal water pumping reduction/conservation efforts. The data sets are interesting in that they include one of the wettest/snowiest winters on record (2017) and one of the driest (2026).

Aquifer Storage Changes

Department modeling (ESPAM 2.2) interpolates water elevation data across a network of wells located on the ESPA, with measurements taken in the Spring. Mass measurements previously took place sporadically (for example in the Spring of 1980, 2001, 2002, 2008, 2013, 2018, and 2023), but measurements are now taken annually. The Spring timeframe is used to create a consistent timeframe snapshot of aquifer contents prior to the start of each irrigation season to avoid to the extent possible localized irrigation season pumping impacts. While the aquifer is, conceptually, thought of as a bathtub holding a volume of water, it is by no means regular or symmetrical. Consequently, irrigation season pumping in some areas has far greater impacts than in others. Basically, the pre-irrigation season spring measurements seek to measure and model aquifer contents in as "undisturbed" an aquifer condition as possible. Department modeling also relies heavily on data retrieved from transducer-data loggers, which produce data that are more robust because they factor in a variety of variables that do not skew as much with localized pumping regimes, localized managed aquifer recharge efforts, or particularly wet winters.

Aquifer Storage Modeling

The Department's presentation focused largely on aquifer storage modeling between 2015 and 2026. It did so because prior well data collection was far less regular in terms of timing and regularity. Since 2016, the Department has coordinated measurement of a dedicated well network each Spring on an annual basis to yield and model more consistent data.

Between 2015 and July 2026, Department modeling estimates that the aquifer lost 100,000 AF over that time period. This result included gains exceeding 1.5 MAF attributable to the "snowmageddon" winter of 2017, and losses of 1MAF (drought winter of 2022) and 600kAF (drought winter of 2026). It is hard to say what this timeframe-based loss of 100,000 AF between 2015 and 2026 tells one. Estimated aquifer contents have changed considerably between 1912 and today (as have the data and tools to model capacity to provide such estimates). The estimated aquifer contents "arc" begins with total aquifer contents of approximately 3.2 MAF in 1916, peak contents of approximately 18MAF in the mid-1950s, and recent contents of approximately 3.2 MAF in 2025. The arc illustrates the tremendous charging of the aquifer with the advent of widespread flood irrigation practices in the earlier 1900s, and the drawdown of the same over time with the proliferation of groundwater development between he 1950s and 1970s, coupled with flood irrigation practices largely being replaced by sprinkler irrigation across large portions of the aquifer (both by surface water irrigators and groundwater irrigators) reducing incidental recharge.

Whether aquifer "declines" are more a product of the aquifer reaching historical equilibrium or a product of mining beyond annual sustainable yield depends on who one consults. The "arc" also begs the question of what any "recovered" volume of water contents is historically; is it pre-advent of flood irrigation (the beginning, most natural background condition), or something more than that? It is fair to say that all-involved (surface water users and groundwater users) believe that the "recovered" volume is something more than arguably natural background. At a minimum, all-involved, including the State of Idaho at least seek to live within the means of the best-calculated annual sustainable yield that science can provide and likely then some because the science is not perfect by any stretch.

All of this is further complicated by also determining and perpetuating a "sweet spot" of Snake River reach gains (discharge from the aquifer to the river in key stretches) that serve as water supplies for senior surface water uses. Like aquifer storage contents, what is the "recovered" volume of river reach gains?

Reach Gain/Spring Outflow Analysis

There are various locations along the Snake River corridor where the ESPA discharges to the river. Perhaps, the two most notable and important locations are the Blackfoot to Neely reach and the Thousand Springs section in Hagerman, Idaho. The Blackfoot to Neely reach bolsters river flows into American Falls Reservoir, while the Thousand Springs segment bolsters river flows important to meeting the Swan Falls minimum streamflow requirements at the Murphy gage.

Prior to more modern Department aquifer contents modeling, aquifer storage contents were estimated by spring flow discharge to the Snake River in the Thousand Springs reach. Though the spring flow discharge data does not reach back quite as far as 1912, the cumulative reach gain and spring flow data largely tracks the above-discussed "arc." Aquifer discharge peaked between approximately 1975 and 1985, lagging a bit behind the aquifer volume peak timeframe of approximately 1950 to 1970, presumably as a result of groundwater travel time to the springs reaches. At its peak, aquifer discharge to the river ranged between 3,000 and 3,200 cfs. As aquifer volumes have declined and rebounded over time, so have the reach gains.

As with the aquifer volume contents arc, what is the "recovered" spring flow target because that target is going to be tied to aquifer storage volume? Whatever the volume considered "recovered," that benchmark in terms of spring flows and reach gains will lag based on groundwater travel times. Modeling "recovery" is certainly a difficult technical question. But what "recovery" and annual sustainable yield are also meets at the very busy intersection of law and policy.

Some Good News

Board and ground water district conservation efforts (pumping reductions and managed aquifer recharge) are bearing fruit. According to Department modeling, Board managed aquifer recharge (diverting

excess surface water available in wet years into canals and recharge beds for seepage purposes) has increased aquifer storage contents by 1.5 MAF between 2014 and 2026. Storage gains attributable to ground water district efforts amount to 1.3 MAF, for total aquifer storage gains of 2.8 MAF between 2014 and 2026. This, in turn, has increased river reach gains in the Blackfoot to Neely reach by approximately 54,000 AF per year, and increased gains to the river downstream of Milner Dam by 143 cfs annually.

Conclusion and Implications

No doubt that challenging times and challenging water right administration decisions lie ahead. But progress is being made through the cooperation of senior surface water users, junior ground water users, and the Board. While the quantity and pace of progress may not be to the liking of some, progress is being made. However, tools available to achieve more (and maybe faster progress) are increasingly contentious as the arguably easier "low-hanging fruit" solutions are already being implemented.

Though the struggle continues, water users and state officials are working hard together in an effort to perpetuate the meaningful yield and function of the ESPA. That is a good thing.
(Andrew J. Waldera)

NEW MEXICO WEIGHS NEW STATE AND NPDES SURFACE-WATER PERMITTING FRAMEWORKS

New Mexico is considering two new permitting frameworks to address surface-water permitting regulations. As part of the New Mexico Environment Department's Surface Water Quality Bureau (SWQB) Surface Water Quality State Permitting Program (SPP), the state's Water Quality Control Commission (WQCC or Commission) held a June 8–18 rulemaking hearing on proposed amendments to 20.6.2 NMAC and proposed new rule 20.6.5 NMAC. The 20.6.2 amendments would create a state permitting system for pollutant discharges and dredge-and-fill activities affecting "surface waters of the state," including those that may no longer fall under federal Clean Water Act (CWA) jurisdiction. 20.6.5 would establish a New Mexico Pollutant Discharge Elimination System (NPDES) for point source discharges of pollutants into federally protected "waters of the United States." As roughly 97 percent of New Mexico's non-Tribal stream miles are non-perennial, the state is particularly vulnerable to narrowing federal CWA jurisdiction.

Background

The narrowing of federal CWA jurisdiction stems largely from *Sackett v. EPA* (2023), which restricted federal coverage to relatively permanent waters and wetlands with a continuous surface connection to those waters. Prior to *Sackett*, Justice Kennedy's concurrence in *Rapanos v. United States* (2006) articulated the widely used significant-nexus approach—that an adjacent wetland could be regulated when it significantly affected waters covered under the CWA, even without a continuous surface connection. The significant-nexus approach allowed regulators to look beyond a visible surface connection and consider whether a wetland or water had a meaningful chemical, physical, or biological effect on a traditionally navigable water. *Sackett* rejected that broader functional approach, instead adopting the relatively permanent waters and continuous surface connection standards for determining federal jurisdiction.

Sackett v. EPA therefore had an outsized effect in New Mexico, leaving a substantial share of the state's waters outside federal CWA protections. That regulatory gap prompted New Mexico to enact SB 21 (2025), authorizing the state to develop its own surface-water permitting program and pursue administration of the federal NPDES program. SB 21 laid the statutory groundwork for the two permitting frameworks now under consideration by the WQCC, to be implemented through 20.6.2 and 20.6.5 NMAC.

Proposed Rules and Stakeholder Concerns

These permitting frameworks work in tandem, but each serves a different function. On the state-law side, 20.6.2 NMAC covers discharges to "surface

waters of the state," including waters beyond current federal CWA reach. 20.6.5, on the other hand, establishes the NPDES component, creating the NMPDES framework New Mexico would use if EPA later authorizes the state to administer the federal NPDES program. As EPA currently administers NPDES permitting in New Mexico, the proposed structure does more than fill a post-Sackett gap; it is also part of a broader shift toward state administration of surface-water permitting.

The proposed rules have prompted debate over how broadly the new permitting requirements should apply and how certain longstanding activities should be treated. Acequia associations, which manage traditional community irrigation ditches, and agricultural users, in particular, have focused on how the permitting framework and its exemptions would affect traditional practices. More broadly, debate has centered on the reach of the proposed rules, available exemptions, mitigation requirements, and compliance obligations. Under the proposed dredge-and-fill provisions, applicants could be required to avoid and minimize impacts to aquatic resources and mitigate certain unavoidable impacts.

Section 20.6.2.2303 NMAC provides a number of noteworthy exemptions. Construction or maintenance of acequias and irrigation ditches is exempt from the dredge-and-fill permitting rules. Ordinary activities such as seeding, plowing, cultivating, harvesting, minor drainage, and some conservation practices are exempt; return flows composed entirely from irrigated agriculture and agricultural stormwater runoff are also excluded from applicable permitting requirements. These dredge-and-fill exemptions are not absolute, however, and do not apply where a discharge contains a toxic pollutant or where a new discharge brings previously unused surface water into farm production.

There are also anti-duplication exemptions. If a discharge is already subject to "effective and enforceable state or federal surface-water requirements," the proposed 20.6.2 rules generally would not require a second, duplicative state permit for that same discharge. That exemption does not apply where a hazard to public health or the environment may result or where an applicable water-quality standard will not be achieved. The final scope of these exemptions will shape how much additional permitting 20.6.2 creates for agricultural, acequia, and already-regulated activities.

Rulemaking Status and Implementation

NMED released draft rules for public review in August 2025, petitioning WQCC to adopt them. At the time of publication, the proposed amendments and new rule remain under deliberation, and the Commission has not issued a final decision. Because these deliberations are ongoing, the final requirements, implementation schedule, and permit-transition process may still change prior to adoption. 20.6.2 NMAC could move toward implementation under state law following adoption, while the NMPDES program under 20.6.5 NMAC will still require EPA approval before New Mexico can administer the federal NPDES program.

For regulated entities and their counsel, the key issues to watch include the final scope of exemptions and permit triggers, treatment of existing permits and applications, implementation dates, and the timing of EPA authorization for NMPDES.

Conclusion and Implications

With the proposed rules, New Mexico is responding directly to the contraction of federal CWA jurisdiction following *Sackett*, rather than simply tweaking an existing state permitting scheme. The final rules will have to balance broader state permitting coverage with exemptions for acequias, agriculture, and already-regulated discharges while avoiding unnecessary overlap with federal permitting. For regulated parties, much will depend on the final permit triggers, exemptions, and implementation procedures. New Mexico's approach could also provide a useful reference point for other Western states seeking to address gaps in federal CWA coverage.

The proposed rules can be viewed at: 20.6.2, https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2026/03/2026-03-13-Am.-Pet.-Att-2-20.6.2-NMAC.pdf; 20.6.5, https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2026/03/2026-03-13-Am.-Pet.-Att-3-20.6.5-NMAC.pdf.
(Miles Schuster)

EPA NEWS & SANCTIONS

RECENT EPA NEWS, INVESTIGATIONS 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.

August 26, 2026—The U.S. Environmental Protection Agency's (EPA) Gulf of America Division (GAD) announced 24 projects selected from the Innovative Solutions for Improving Water Quality and Strengthening Local Economies in the Gulf of America Watershed Notice of Funding Opportunity (NOFO). The NOFO encompassed EPA Regions 4 through 8 and the awards ranged from $500,000 to $ 1,000,000 with a three-to-five-year project period.

The full list of award recipients and project summaries can be found here.

"With a vast basin, the Mississippi River empties into the Gulf of America from Louisiana carrying water, sediment and pollution accumulated from nearly every Midwestern and Eastern state. That's why a holistic approach to water quality is so important to restoring and maintaining the health of the Gulf," said EPA Region 6 Administrator Scott Mason.

This funding opportunity sought applications that improve water quality through nutrient reduction demonstration projects that are enhanced by innovative technology. All applicants identified how their nutrient reduction project and use of innovative technology could lead to cost savings and economic benefits in the future.

This announcement also reflects EPA's strong commitment to cooperative federalism. By partnering with state, local, tribal, academic, agricultural, and community stakeholders, EPA is supporting place-based solutions that leverage the expertise of those closest to the water and the land. This shared approach recognizes that the most durable progress on water quality is achieved when federal resources, state leadership, and local knowledge work together to advance common goals for the benefit of entire watersheds.

The Gulf of America Division (GAD) is one of the U.S. Environmental Protection Agency's (EPA) Great Water Body programs, founded to facilitate collaborative actions that protect, maintain, and restore the health and productivity of the Gulf of America in ways consistent with the economic well-being of the region. The division maintains and expands partnerships with state and federal agencies, federally recognized tribes, local governments and authorities, academia, regional businesses and industry, agricultural and environmental organizations, and individual citizens and communities.

August 21, 2026—The U.S. Environmental Protection Agency (EPA) released guidance to help drinking water systems that are working to keep their communities safe from lead. This guidance advances the agency's commitment to clear and plain language communication while sharing information, definitions, and useful examples to help water systems comply with lead pipe replacement requirements of the Lead and Copper Rule. Reducing exposure to lead—a powerful neurotoxin that is especially dangerous to children—advances the Trump EPA's commitment to Making America Healthy Again.

EPA is releasing two documents, Access Tips and Service Line Inventory Tips, to provide practical information to help water systems and states implement the Lead and Copper Rule Improvements (LCRI). In April 2026, EPA sought the public's input on these two Tips documents and EPA considered the comments received in the development of these final resources.

EPA is taking on lead in drinking water holistically, including prioritizing collaboration, practical implementation, and communication. The agency recently published a revamped lead website, found at epa.gov/lead, including a new StoryMap about Lead and Children's Health. The streamlined website allows parents and caregivers, contractors, health care professionals, and other users to quickly find critical information on how to prevent exposures from lead. This is one of many actions

being undertaken by EPA under the government-wide Federal Lead Action Plan, which was launched in President Trump's first term as a blueprint for reducing lead exposure through collaboration among federal agencies.

Releasing this new resource is yet another example of the Trump EPA working to ensure that all Americans can rely on clean and safe drinking water. They complement the agency's robust technical assistance effort, Real Water TA. Real Water TA focuses on hands on assistance for communities and water systems working to address water infrastructure challenges or funding needs. EPA also supports state and local efforts to upgrade and maintain water infrastructure with funding opportunities. This year, EPA announced nearly $3 billion in funding for lead pipe identification and removal.

There is no safe level of lead. Lead pipes, when present, are the primary source of lead in drinking water. EPA is committed to using every tool available to protect all Americans from lead in drinking water. The 2024 Lead and Copper Rule Improvements (LCRI) builds on the strong foundation of the first Trump Administration's 2021 Lead and Copper Rule Revisions to achieve this goal. First promulgated in 1991, the Lead and Copper Rule (LCR) regulates lead and copper in public drinking water systems.

August 13, 2026—The U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) announced a settlement agreement with Old Dutch Mustard Co., Inc., a mustard and vinegar manufacturing company, resolving violations of the Clean Water Act at its facility in Greenville, New Hampshire. Under the agreement, the company will pay a civil penalty of $50,000 and implement a comprehensive environmental compliance program.

Between 2019 and 2026, the facility violated its stormwater discharge permit that resulted in acidic pollutant discharges into a tributary of the Souhegan River. The company has been subject to past enforcement actions by EPA, the New Hampshire Department of Environmental Services (NHDES), and the New Hampshire Attorney General's Office, resulting in the company being required to monitor the tributary as it passes through the facility. According to the complaint, on at least 1,728 days between November 2019 and December 2026, the company's monitoring results showed high levels of acidity, indicating unauthorized wastewater discharges from the facility. Also, the company failed to provide its compliance information to EPA in a timely manner, as required by the Clean Water Act.

To come into compliance, the company agreed to:

- Improve its monitoring efforts
- Thoroughly investigate any future discharges of pollutants to determine their cause and implement corrective measures to stop future discharges of pollutants
- Hire an independent consultant to identify current sources of environmental contamination.

Old Dutch Mustard has been the subject of repeated enforcement efforts over the last two decades, including most recently for separate criminal violations of the Clean Water Act, to which the company and its president pled guilty in February 2025. In April 2026, the company president was sentenced to 18 months in federal prison and ordered to pay a $250,000 fine, while the company was placed on probation for five years and ordered to pay a $1.5 million fine and to establish environmental compliance and ethics programs.

The proposed consent decree was filed with the U.S. District Court for the District of New Hampshire and is subject to a 30-day comment period. The complaint and the proposed consent decree are available on the DOJ's Proposed Consent Decree webpage.

August 12, 2026—An indictment was unsealed today charging César P. Borges-Arroyo, Neftalí Borges-Gómez, Erison Delgado-Santos, Héctor Fulgencio-Cabrera, and Ganaderos Borges Inc. (GBI), with four violations of the Clean Water Act as well as conspiring to violate the Clean Water Act. The charges relate to the discharge of pollutants from GBI into the waters of the United States.

GBI is a corporation in Naguabo, Puerto Rico, that operates a slaughterhouse and meat processing plant. The operations encompass receiving and holding live animals for slaughter, butchering animals (bleeding), initial processing of animals, and operations that produce consumer-ready meat products. According to the indictment, the defendants conspired for the benefit of GBI, to knowingly discharge a pollutant—specifically wastewater from the meat processing waste

retention lagoon—into waters of the United States without having obtained a Clean Water Act permit.

"The defendants' willfully disregarded the complete prohibition on discharges under the Clean Water Act and knowingly sent a disgusting sludge of animal blood and waste, and cleaning products into the Caribbean Sea, only miles from nature preserves, beaches, and a military base. Illegal discharges such as these cause serious harm, jeopardizing the safety and health of the water, wildlife, and human health," said Assistant Administrator Jeffrey A. Hall for EPA's Office of Enforcement and Compliance Assurance.

Starting in August 2018 and continuing through at least September 2025, GBI president Borges-Arroyo and GBI operator Borges-Gómez directed employees including, but not limited to, Delgado-Santos and Fulgencio-Cabrera to discharge liquid waste from GBI's waste retention lagoon towards an adjacent creek. They did this by using a submersible pump placed in the waste retention lagoon and connected to a hose, attempting to avoid millions of dollars in annual waste removal costs.

GBI generated waste from various on-site processes, including animal intake, slaughtering, hide removal, butchering, and cleaning. The waste included animal blood, hair, tissue, and feces, as well as grease, wastewater, disinfectant, and other liquids used inside the GBI slaughterhouse and processing areas. The mixed waste flowed from the facility to a discharge pipe that emptied into a waste retention lagoon located on the southwest corner of the GBI property. The western edge of the waste retention lagoon is adjacent to a creek which travels approximately half-a-mile to the Caribbean Sea at Tropical Beach in Naguabo, Puerto Rico.

GBI held a non-discharge wastewater treatment permit that required liquid waste to be hauled from the facility to a disposal facility. At no time was any waste permitted to be discharged on-site or to any other body of water. The permit expired on July 31, 2019, and they continued to violate the Clean Water Act until at least September 2025.

To conceal the illegal waste discharge, the defendants hid the submersible pump and hose when it was not being used and provided false and misleading statements and documents to authorities to hide the illegal activities.

The defendants are scheduled to appear before Magistrate Judge Héctor Ramos Vega of the U.S. District Court for the District of Puerto Rico for their respective initial appearances. If convicted, they face a maximum penalty of five years in prison and $250,000 in fines for each charge. GBI faces a maximum penalty of $500,000 in fines per charge.

EPA's Criminal Investigation Division investigated the case with assistance from the FBI. EPA and FBI participate in the Puerto Rico and U.S. Virgin Islands Environmental Crimes Task Force.

All defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

August 3, 2026—U.S. Environmental Protection Agency (EPA) announced the next step in its review of public health risks linked to fluoride in drinking water: the release of the Protocol for Developing the Fluoride Human Health Toxicity Assessment. This marks a significant milestone in the agency's expedited assessment of fluoride under the Safe Drinking Water Act (SDWA), a priority set by EPA Administrator Lee Zeldin as part of the Trump administration's commitment to Make America Healthy Again, while following gold standard science.Earlier this year, EPA released its Preliminary Assessment Plan and Literature Survey for public comment. The agency's new Protocol for Developing the Fluoride Human Health Toxicity Assessment reflects public input received on that plan. The Protocol is an essential part of developing the human health assessment; it is a road map that transparently describes how EPA will conduct the assessment while applying gold standard science.

EPA's assessment of fluoride under the SDWA will consider neurodevelopmental effects in children (e.g., negative effects on brain function, including lower IQ). EPA's assessment will also consider the negative health effects of dental fluorosis (e.g., discoloration and pitting of tooth enamel) in children. The agency will develop a human health toxicity assessment examining how much exposure to fluoride causes these negative health effects. This is called dose-response analysis, which EPA uses to determine the fluoride levels that a person can be exposed to without experiencing harmful health effects. The Protocol explains the scientific plan for conducting this analysis.

The agency will use this Protocol to develop the draft fluoride human health toxicity assessment, which once completed will be available for public comment. EPA will use systematic review practices that

are consistent with gold standard science and SDWA requirements, draw on expertise from the U.S. Department of Health and Human Services (HHS), and will not prejudge any outcomes of the assessment. When final, the assessment will inform potential revisions to federal drinking water regulations. It will also help states and local leaders make informed decisions about fluoridating drinking water.

EPA's role under the SDWA is to limit the amount of contaminants in drinking water provided by public water systems to protect public health. EPA previously set the maximum contaminant level (MCL) for fluoride at 4.0 milligrams per liter, a standard designed to prevent known or anticipated adverse health effects that was set in 1986 and most recently reviewed in 2024. Under normal SDWA timelines, the next comprehensive analysis of new scientific information, which includes evaluation of the potential health risks of fluoride in drinking water would not be due until 2030, but EPA has accelerated this work to deliver updated health information to the public sooner while maintaining rigorous review and quality controls.

Decisions on whether to add fluoride to drinking water are guided by public health recommendations from HHS and the Centers for Disease Control and Prevention (CDC) and are ultimately made at the state or local level. U.S. Public Health Service has issued Recommendations for Fluoride Concentration in Drinking Water for the Prevention of Dental Caries, otherwise known as tooth decay. CDC's Community Water Fluoridation Program recommends amounts of fluoride in drinking water to best prevent cavities. Their recommended optimal level of fluoride is 0.7 milligrams per liter. These recommendations are just that, are advisory and do not apply to EPA's authority under the SDWA.

The federal regulatory standards set by EPA apply regardless of whether fluoride is naturally occurring in a system's source water or is intentionally added by the water system. EPA's responsibility is to ensure that overall fluoride levels remain within health-protective limits, but the agency does not make policy recommendations to state or local systems to add fluoride to drinking water.

July 24, 2026—The U.S. Environmental Protection Agency (EPA) is proposing an interim cleanup plan to address mercury-contaminated sediment and soil along the banks of Wappinger Creek in Dutchess County, New York.

The Wappinger Creek Superfund site includes the lower two miles of the creek, from the base of Wappingers Falls to where the creek meets the Hudson River. EPA's proposed plan focuses on the upper portion of the site to remove contaminated material that could move downstream. The proposal calls for removing sediment from the creek and soil along the banks that contain high levels of mercury. After the contaminated material is removed, EPA would backfill the excavated areas and restore the affected parts of the creek and stream bank.

This proposed cleanup is an interim action designed to get cleanup action moving faster. It is not the final cleanup decision for the entire site. EPA would monitor conditions after the work is completed to confirm the interim cleanup is working as intended and to help guide a future final cleanup plan for the site.

The proposed plan and supporting documents will be available on the Wappinger Creek Superfund site profile page.

July 21, 2026—The U.S. Environmental Protection Agency (EPA) finalized its cleanup plan for removing arsenic- and lead-contaminated soil from floodplain properties along the Tarkiln Branch in Vineland, New Jersey. The finalized cleanup plan calls for excavating contaminated soil transport off-site for disposal and restoring affected residential and commercial properties. EPA's plan will protect human health and address contamination resulting from the former Kil-Tone Company pesticide manufacturing facility, while the agency continues its broader investigation of sediment, surface water, and groundwater at the site.

EPA has identified approximately 55 floodplain properties where arsenic and lead in soil are present at levels requiring remediation. Cleanup activities on private properties will proceed only after obtaining owner permission and will be conducted in coordination with property owners. EPA's finalized plan calls for excavating the full extent of contaminated soil, followed by off-site disposal. All impacted properties will be restored after cleanup. While EPA expects to clean up all the contaminated material from the floodplain properties, the remedy also provides for additional measures such as deed notices and long-term

maintenance to make sure the remediation is protective if there are any properties where full cleanup is not possible.

The former Kil-Tone Company operated its pesticide manufacturing facility at 527 East Chestnut Avenue in Vineland from the late 1910s to the early 1930s, releasing arsenic and lead that contaminated the facility, nearby properties, and downstream areas along the TarkilnBranch. The site was added to the National Priorities List in 2016. EPA has already completed cleanup at 85 residential properties, with additional work ongoing at the former facility and surrounding non-residential properties. Now that the cleanup plan has been issued, EPA can begin remediation of floodplain properties immediately while other investigations continue.

The finalized cleanup plan and supporting documents will be available on the Kil-Tone Superfund site profile page.

Since the 1970s, EPA has worked alongside partners at the federal, state, Tribal, and local levels to protect children's health and make progress in reducing lead exposures and lead-related health risks. Despite improvements over the last 50 years, ongoing exposures to lead where our families live, work, and play present a health risk, especially to children.

To combat this issue, in 2025 the EPA reestablished a committee of senior leaders across the agency's program offices and ten regions to drive success in reducing children's exposure to lead. This renewed agency-wide focus is centered around strengthening cooperative federalism, streamlining actionable risk communications, and unleashing private sector innovation to protect human health and the environment.
(Robert Schuster)

LAWSUITS FILED OR PENDING

NEVADA FILES SUIT IN THE U.S. DISTRICT COURT CHALLENGING THE BUREAU OF RECLAMATION'S AUGUST 2026 RECORD OF DECISION FOR COLORADO RIVER GUIDELINES

On August 24, 2026, a coordinated complaint was filed in the U.S. District Court for Nevada on behalf of the State of Nevada, Colorado River Commission of Nevada and the Southern Nevada Water Authority against the U.S. Department of the Interior seeking declaratory and injunctive in conjunction with the Bureau of Reclamation's Record of Decision on the of August 21, 2026, and Final Environmental Impact Statement for operation of Lake Mead and Lake Powell. [*State of Nevada, et al. v. Secretary of the Department of the Interior, et al.*, Case No. 2:26-cv-02665, filed Aug. 24, 2026 (D. Nev.).]

Background

The Colorado River is managed and operated under various compacts, treaties, federal laws, court decisions and regulatory guidelines collectively known as the Law of the River.

The Colorado River Compact (Compact) was negotiated between the seven Basin States in 1922, and which divides the river into Upper Basin States of Colorado, Utah, Wyoming and New Mexico; the Lower Basin States include Nevada, California and Arizona, allocating 7.5 million acre-feet (maf) annually.

The Boulder Canyon Project Act of 1928 ratified the Colorado River Compact. The Compact "presumptively approved a Lower Basin compact that would apportion the Lower Basin's 7.5 maf among Arizona (2.8 maf), California (4.4 maf) and Nevada (.3 maf). . ." and gave the Secretary of the Interior "the sole authority to enter into contracts" with Lower Basin users "which contracts the Secretary thereafter issued in the same proportions."

The complaint goes on to reference the Mexican Water Treaty of 1944 (1.5 maf allocation) and the Upper Colorado River Basin Compact of 1948 which apportioned the flows among the Upper Basin States of Colorado (51.75 percent), New Mexico (11.25 percent), Utah (23 percent) and Wyoming (14 percent). It also apportioned 50,000 maf annually to Arizona because a portion of the state lies geographically both in the Upper and Lower Basins.

In 1956 Congress passed the Colorado River Storage Project Act (CRSPA) which authorized a water development plan for the Upper Basin that included construction of the Glen Canyon Dam and other Upper Basin facilities.

In 1963 the U.S. Supreme Court decided *Arizona v. California*, 376 U.S. 340 in which the Court ruled that the Lower Basin States have a right to "appropriate and use tributary flows before they reach the Colorado River and also confirmed the Lower Basin States' mainstream apportionments of 2.8 maf for Arizona, 4.4 maf for California and .3maf for Nevada.

The Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs

In 1970 Interior released its Criterial for Coordinated Long-Range Operation of Colorado River Reservoirs which provide for coordinated operations of Law Powell and Lake Mead. The document provided that the "objective shall be to maintain a minimum release of water from Lake Powell of 8.23 maf."

In 2006 the U.S. Supreme Court issued a consolidated decree addressing insufficient mainstream water available for release as follows:

> If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,00 acre-feet in the [Lower Basin States], then the Secretary . . .after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts. . . may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project. . .and with other applicable

federal statutes, but in no event shall be more the 4,400,000 acre-feet be apportioned for use in California. . . .

In 2007 the Bureau finalized the Colorado River Interim Guidelines. These Guidelines went into effect through 2026.

On August 21, 2026, the Bureau of Reclamation, Department of the Interior (Federal Defendants) issued its Record of Decision (ROD) on the previously released July 31, 2026, Final Environmental Impact Statement (EIS) for the Post 2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead (Final EIS). Lake Powell and Lake Mead supplies "essential water" for "approximately 40 million people and nearly 5.5 million acres of agricultural lands."

The EIS

The complaint alleges that the Final EIS is "intended to address the following operational elements:"

- Circumstances under which the Secretary would allocate annual water available for use from Lake Mead to the Lower Basin States "at, below or above 7.5 million acre-feet pursuant to Arizona v. California, 376 U.S. 340;

- Coordinated operations of the lakes under low reservoir conditions;

- Storage and delivery of conserved water in the lakes to "increase the flexibility to meet water needs of both reservoirs, including the storage and delivery of non-system water and water conserved through extraordinary measures. . . "

The complaint further alleges that Nevada's Colorado River water allocation is "critical to the stability and viability of southern Nevada" and the Las Vegas Valley. It further alleges that Nevada's allocation of 300,000 acre-feet is a "relatively meager 3.3 percent" of all water apportioned to the Lower Basin States and Mexico.

Nevada also alleges that despite submitting comments to the Draft EIS which included an alternative to the proposed action for inclusion in the analysis under the National Environmental Policy Act (NEPA) that "fully complies the Law of the River and better satisfies the purpose and need of the proposed action than the preferred alternative in the Final EIS" and that the Federal Defendants "failed to consider and carry forward" this alternative.

Conclusion and Implications

In a nutshell, the lawsuit alleges violations of the Administrative Procedure Act and NEPA with the 2026 Draft EIS and August 2027 Final EIS. The lawsuit finds fault with several aspects of the EIS analysis including technical, water quantifications, socioeconomic effects, environmental effects (including the quality of the "human environment"), methodologies inconsistent with the Decree and CRBPA, etc. And perhaps most to the point, Nevada alleges that Federal Defendants failed to consider and give proper weight to "a reasonable range of alternatives."

The lawsuit seeks to vacate the ROD on the Decision Framework for Colorado River Guidelines: Coordinated Operations of Lake Powell and Law Mead" for the years 2027-2036; vacate the Coordinated Operations of Lake Powell and Law Mead and vacate the 2026 Final EIS; and enjoin the Federal Defendants implementation of the ROD and the Operating Guidelines util such time as Federal Defendants comply with the APA, Law of the River and NEPA. The lawsuit is available online at: https://www.documentcloud.org/documents/28574592-httpsstoragecourtlistenercomrecapgovuscourtsnvd184047govuscourtsnvd18404710-2/?embed=1&q=acre-feet&mode=document#document/p4.
(Robert Schuster)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT AFFIRMS ENDANGERED SPECIES ACT APPLIES TO U.S. BUREAU OF RECLAMATION'S OPERATION OF THE KLAMATH PROJECT

Yurok Tribe v. U.S. Bureau of Reclamation,
179 F.4th 663 (9th Cir. 2026).

In *Yurok Tribe v. U.S. Bureau of Reclamation*, decided by the U.S. Court of Appeals for the Ninth Circuit, the court reviewed whether the U.S. Bureau of Reclamation (Reclamation) has authority to operate the Klamath Project in compliance with the federal Endangered Species Act. They further reviewed whether the U.S. District's Court's preemption determination was a "judicial taking" and whether the Colorado River abstention doctrine applied to this matter.

Background

The Klamath Project is a large water management project in northern California and southern Oregon which supplies water for irrigation as well as several national wildlife refuges. It is managed and operated by Reclamation. Recently, in response to new endangered species listings and consecutive critically dry years in the Klamath Basin, Reclamation completed Endangered Species Act (ESA) consultation with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) (together: Federal Appellees). This resulted in requirements that Reclamation maintain water levels in Upper Klamath Lake and provide minimum stream flows in the Klamath River.

Procedural History

This appeal arises out of a complex procedural history. This case commenced in 2019 when the Yurok Tribe and other plaintiffs challenged Reclamation's 2019 ESA consultation. The Klamath Irrigation District and Klamath Water Users Association (together Appellants) intervened.

During this litigation, Klamath Irrigation District also filed a suit in Oregon state court compelling the Oregon Water Resources Department (OWRD) to enjoin Reclamation's release of water from Upper Klamath Lake for non-irrigation purposes. In response to the lawsuit, OWRD issued an order directing Reclamation to cease water distribution for ESA compliance purposes. NMFS and FWS filed a crossclaim in this action seeking declaratory relief that Reclamation has authority to operate the Klamath Project in compliance with the ESA. The District Court granted the agencies' summary judgment determining that the ESA applied to Reclamation's operation of the Klamath Project and that the OWRD order was preempted and unenforceable. OWRD subsequently withdrew the order.

The Klamath Irrigation District and the Klamath Water Users Association appealed. During this appeal, following the change of Presidential Administrations, the Federal Appellees withdrew their earlier legal position and moved to dismiss for lack of jurisdiction because of mootness and moved to vacate the district court's judgment. The Appellants also moved to dismiss the case and vacate the District Court's judgment. The Ninth Circuit denied the motions concluding that the declaratory relief on whether the ESA applied to the Klamath Project would give the parties meaningful relief and presented a live controversy for the court's decision.

The Ninth Circuit's Decision

The ESA applies to Reclamation's Operation of the Klamath Project

The Ninth Circuit held that case law requires the determination that Reclamation's operation of the Klamath Project is subject to compliance with the ESA. The court pointed to *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, a 1999 case in which the Ninth Circuit ruled on this very issue.

Despite contentions from Appellants that the *Patterson* opinion is mere dicta and has been superseded, the court held that Patterson's holding, that the Bureau of Reclamation has authority over the Klamath Project and must comply with the ESA in its operation, is good law. This was because the reasoning in Patterson was integral to the decision and may not be considered mere dicta.

Further, the Ninth Circuit held that more recent cases, including the Supreme Court case, *Nat. Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644 (2007), and the Ninth Circuit decision in *Nat. Res. Def. Council v. Haaland*, 102 F.4th 1045 (2024), do not affect the Patteson holding. Appellants argued that Reclamation did not have "discretion" to act for the benefit of protected species, and thus, under these more recent cases, the ESA implementing regulations do not apply. The court disagreed with this interpretation of *Home Builders* and *Haaland*. Home Builders held that Section 7(a)(2) of the ESA applies only to discretionary agency actions and does not apply to actions that an agency is required to undertake by a conflicting federal statute. The court stated that the baseline assumption in *Home Builders* was that Section 7(a)(2) applies to an "agency action," to which the conflicting statute rule is a narrow exception. Here, there was no conflicting statutory mandate and thus *Home Builders* did not apply to this case, nor did it affect Patterson's holding.

Under *Haaland*, the court held that the terms of the executed water supply contracts at issue in that case did not give the Bureau of Reclamation sufficient discretion to require reinitiation of consultation when implementing the renewed settlement contracts. However, nothing in *Haaland* ever asserted that the Bureau of Reclamation did not have to comply with the ESA in its operation of the Central Valley Project. Additionally, here the Bureau has ongoing obligations under its water supply contracts and maintains discretion to implement ESA actions. The court thus held that Haaland did not affect the Patterson holding either.

The District Court's Ruling Was Not a Judicial Taking

Appellants further contended that the District Court's ruling that the OWRD order was preempted was a judicial taking of Klamath Irrigation District's property interests in its water rights. The court notes that four Supreme Court justices have recognized that a state court may cause a "judicial taking" if, as a matter of adjudicating state-law property rights, it "declares that what was once an established right of private property no longer exists." (*Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion).) The Ninth Circuit questioned whether "judicial takings" claims are available since such a claim has not been recognized by a majority of Justices. But, even if it were to be a valid claim, the Ninth Circuit determined that the ESA question in this action did not adjudicate property rights; no water rights were adjudicated in this action. Thus, there was no possible "judicial taking."

The Doctrine of Prior Exclusive Jurisdiction and Colorado River Abstention Did Not Apply

Lastly, the Appellant contended that the federal courts did not have jurisdiction over this crossclaim action under the doctrines of prior exclusive jurisdiction and Colorado River abstention. The Ninth Circuit found these claims to be without merit.

The Klamath Irrigation District emphasized that if "a state or federal court has taken possession of property, or by its procedure has obtained jurisdiction over the same, then the property under that court's jurisdiction is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign." (*Sexton v. NDEX West, LLC*, 713 F.3d 533, 536 (2013) (internal quotation marks and citations omitted).) The Ninth Circuit held that the doctrine of prior exclusive jurisdiction, however, does not apply here because the question of this action does not involve the adjudication or administration of any provisionally determined water rights. The state court reviewing the Klamath Basin Adjudication did not determine the Bureau's ESA obligations, nor does the state court have jurisdiction over the federal question whether ESA applies. The Ninth Circuit thus held that the prior exclusive jurisdiction doctrine did not apply.

Similarly, the Colorado River abstention argument was also rejected. Under the doctrine of Colorado River abstention, a federal court may decline to adjudicate federal water rights claims as against other claimants, where relative rights in a common source are being comprehensively adjudicated in a state-

court McCarran Amendment proceeding. (*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809–21. (1976)) The current matter does not involve establishment or adjudication of federal water rights claims, and the ESA issue here was not adjudicated in the Klamath Basin Adjudication. The Ninth Circuit held there was no reason for the District Court to have abstained in this matter.

The Dissent

Circuit Judge Ryan Nelson dissented to the majority's analysis of whether the ESA applies to the Klamath Project in this action. The dissent found that *Patterson* is irreconcilable with *Home Builders* and Haaland. Judge Nelson asserted that mere control of the Klamath Project is insufficient to establish the applicability of ESA section 7 obligations following *Home Builders* and *Haaland*. Instead, new precedent requires the court to ask whether there is sufficient discretion to act on behalf of endangered or threatened species despite Congressionally mandated action. Judge Nelson stated, here, the Congressionally mandated action is the congressionally authorized and approved water contracts. Accordingly, the majority failed to properly grapple with the implications of *Home Builders* and *Haaland* and alternatively the dissent found that Reclamation's contracts here impose non-discretionary duties. Judge Nelson would, therefore, remand for proper analysis under Haaland including review of the terms of the contracts. Under the proper legal analysis, the dissent found that no statutory provisions or contracts provide the agency with discretion sufficient to trigger the ESA.

Conclusion and Implications

In the end, the Ninth Circuit held:

> Following Ninth Circuit precedent in Patterson and its progeny, we affirm the district court's holding that the ESA applies to the Bureau of Reclamation's operation of the Klamath Project. We therefore affirm the district court's ruling in phase one. We also hold that the district court's ruling did not constitute a 'judicial taking' and that the district court had jurisdiction to decide the crossclaim.

The Ninth Circuit held that the lower courts had not adjudicate any water rights, so no judicial taking had taken place, and the lower courts had jurisdiction to decide the Endangered Species Act's ESA's applicability to the Klamath Irrigation Project.

The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2026/06/17/23-15521.pdf.
(Sara Helms, Bridget McDonald)

U.S. DISTRICT COURT FOR ARIZONA INVALIDATES INCIDENTAL TAKE STATEMENTS FOR CORONADO NATIONAL FOREST GRAZING PROGRAM

Center for Biological Diversity v. Moore,
___F.Supp.4th___, Case No. CV-23-00354-TUC-AMM (D. Ariz. Aug. 18, 2026).

The U.S. District Court for Arizona has upheld the U.S. Fish and Wildlife Service's (Service) no-jeopardy findings for a large livestock grazing program in the Coronado National Forest but invalidated incidental take statements for two threatened aquatic species. The decision emphasizes that when the Service uses habitat conditions as a surrogate for measuring incidental take, the surrogate must provide an objective and sufficiently definite threshold for determining when authorized take has been exceeded.

Background

In *Center for Biological Diversity v. Moore*, the Center for Biological Diversity and Maricopa Audubon Society challenged a 2021 Biological Opinion issued by the U.S. Fish and Wildlife Service (FWS) concerning ongoing livestock grazing in the Coronado National Forest. The grazing program covers 177 allotments and approximately 1.46 million acres, or roughly 90 percent of the National Forest.

The 2021 Biological Opinion

The U.S. Forest Service determined in 2019 that the grazing program was likely to adversely affect eight listed species, prompting formal consultation under Section 7 of the federal Endangered Species Act (ESA). Following that consultation, FWS issued a Biological Opinion in September 2021 finding that the grazing program was not likely to jeopardize the continued existence of the threatened Sonora chub, Chiricahua leopard frog, or western yellow-billed cuckoo, or adversely modify their designated critical habitat.

FWS nevertheless determined that the program was reasonably certain to result in incidental take of the Sonora chub and Chiricahua leopard frog and therefore issued incidental take statements for both species. No Incidental Take Statement was issued for the cuckoo because FWS did not anticipate that the grazing program would result in take of that species.

The District Court's Decision

The plaintiffs challenged the Biological Opinion's no-jeopardy determinations on several grounds, including that FWS inadequately considered species recovery and failed to sufficiently account for climate-change impacts.

The court rejected those claims. Applying the Administrative Procedure Act's arbitrary-and-capricious standard, the court concluded that FWS had adequately considered the grazing program's effects on the recovery of the three species and their critical habitat. The court emphasized the deference afforded to an agency's evaluation of scientific information within its technical expertise.

The court similarly rejected the plaintiffs' climate-change arguments. Although FWS had recognized climate change as a significant threat, particularly to the Sonora chub, the court found that the plaintiffs had not identified specific scientific information demonstrating that climate impacts were reasonably certain to combine with the grazing program's effects in a manner that undermined FWS's no-jeopardy findings.

Incidental Take Statements Found Deficient

The plaintiffs prevailed, however, on their challenges to the incidental take statements for the Sonora chub and Chiricahua leopard frog.

An Incidental Take Statement must identify the amount or extent of anticipated take and establish a mechanism for determining when that level has been exceeded. Although numerical limits are preferred, ESA regulations allow FWS to use a habitat or ecological surrogate when measuring individual animals is impracticable. When a surrogate is used, the agency must explain the causal relationship between the surrogate and take and establish a clear standard for determining when anticipated take has been exceeded.

For the Sonora chub, FWS relied on "measurable effects to habitat" rather than a numerical take limit. The court concluded that the connection between the habitat surrogate and take was too vague to function as an effective limit. Some of the applicable standards focused on maintenance of livestock-exclusion fencing and forage-utilization levels—measures developed to manage the grazing program rather than directly assess the condition of the chub or its habitat.

The court observed that compliance with those measures theoretically could continue even while chub were harmed through trampling, degradation of riparian habitat, introduction of nonnative species, or changes in water temperature. Because the standards did not establish a sufficiently clear threshold that would trigger renewed consultation, the court held that the chub Incidental Take Statement was arbitrary and capricious.

Frog Take Standard Also Lacked Objective Trigger

The court reached a similar conclusion regarding the Chiricahua leopard frog, although the frog's Incidental Take Statement was more directly tied to habitat conditions.

The statement used characteristics of frog habitat, including water quality and vegetation, but required that adverse effects be "directly attributable to livestock grazing or livestock management" before they would count toward the take threshold. The court found that the statement did not identify which agency would make that causation determination, what metrics would be used, or what degree of causation would be sufficient.

Without those standards, the court concluded that the Incidental Take Statement did not provide the objectivity necessary to determine when authorized take had been exceeded and consultation must be reinitiated.

Remedy Remains Undecided

The court granted the plaintiffs' summary judgment motion only with respect to the two incidental take statements and otherwise upheld the challenged agency actions. Although the plaintiffs requested that the entire 2021 Biological Opinion be vacated and remanded for additional consultation, the court did not immediately impose that remedy.

Instead, the court directed the parties to submit supplemental briefing concerning the appropriate remedy, with briefing extending into September 2026.

Conclusion and Implications

The decision reinforces an important distinction in ESA consultation between the substantive no-jeopardy determination and the incidental take authorization accompanying it. FWS may use habitat, hydrologic, vegetation, or other ecological conditions as surrogates when direct measurement of individual animals is impracticable, but the surrogate must do more than generally describe environmental conditions. It must be sufficiently connected to effects on the listed species and provide an objective threshold capable of determining when authorized take has been exceeded and reinitiation of consultation is required. The forthcoming remedy decision may further clarify the practical consequences when an Incidental Take Statement is invalidated while the underlying no-jeopardy Biological Opinion remains intact. The court's order is available online at: https://earthjustice.org/wp-content/uploads/2026/08/center-for-biological-diversity-v.-moore.pdf.
(Micheline Fairbank)

U.S. DISTRICT COURT DENIES PRELIMINARY INJUNCTION OVER SHASTA DAM OPERATIONS, UPHOLDING U.S. BUREAU OF RECLAMATION'S WATER PLAN

San Francisco Baykeeper v. U.S. Bureau of Reclamation,
___F.Supp.4th___, Case No. 2:26-cv-00671-JLT-EPG (E.D. Cal. Aug. 3, 2026).

The U.S. District Court for the Eastern District of California denied three environmental organizations' request for a preliminary injunction requiring the U.S. Bureau of Reclamation (Reclamation) to modify its 2026 operations of Shasta Dam and Reservoir. The court classified the requested relief as a mandatory injunction and concluded that the plaintiffs failed to satisfy the heightened standard applicable to such relief.

Background

On March 2, 2026, San Francisco Baykeeper, the Center for Biological Diversity, and Friends of the River filed suit against Reclamation, the National Marine Fisheries Service, and several federal officials. The broader lawsuit alleges that the federal defendants violated the federal Endangered Species Act and Administrative Procedure Act in connection with Reclamation's operation of the Central Valley Project. Among other allegations, the plaintiffs contend that Reclamation failed to comply with protective measures and incidental-take limits established by the National Marine Fisheries Service's (NMFS's) 2024 Biological Opinion (BiOp) for winter-run chinook salmon, Central Valley steelhead, and North American green sturgeon.

The preliminary-injunction motion addressed a narrower issue: Reclamation's operation of Shasta Dam and Reservoir during the summer and early fall of 2026. Keswick Dam prevents winter-run chinook salmon from reaching their historic upstream spawning habitat. Consequently, the survival of eggs deposited downstream depends substantially on Reclamation's release of sufficiently cold water from Shasta Reservoir. The 2024 BiOp established a "Shasta Framework" for managing water temperature and reservoir storage while accounting for fish protection, water-delivery obligations, flood control, and other authorized project purposes.

In the framework, Reclamation designated 2026 as a "Bin 2A" year based on projected end-of-April and end-of-September reservoir storage. The plaintiffs

argued that the high end-of-April storage level required Reclamation to treat 2026 as a more protective Bin 1 year and preserve at least 2.4 million acre-feet of water through September unless achieving that target was impossible. Reclamation responded that the framework uses both April storage and projected September storage to make the initial classification and that the forecasts therefore supported its Bin 2A designation.

The plaintiffs sued Reclamation under sections 7 and 9 of the Endangered Species Act and the Administrative Procedure Act, alleging that Reclamation was operating outside the 2024 biological opinion's Shasta Framework. The plaintiffs then sought emergency relief requiring Reclamation to reduce releases from Shasta Reservoir, prepare a new operating plan, and operate consistently with the plaintiffs' interpretation of the Bin 1 requirements. The court denied the plaintiffs' request for a temporary restraining order on July 9, 2026, and subsequently denied their motion for a preliminary injunction.

The District Court's Ruling

Although the order is not a final ruling on the merits, it indicates that the court views Reclamation's interpretation of the Shasta Framework as better supported by the governing documents. The court expressly stated that the plaintiffs did not appear likely to succeed on the claim advanced in the motion and failed to make the stronger showing required for a mandatory injunction.

In its ruling, the District Court first rejected the plaintiffs' argument that the requested injunction would merely preserve the status quo. The proposed relief would have required Reclamation to conduct new modeling, prepare and implement a new temperature-management plan, and materially change its reservoir operations. Because the requested order would compel affirmative action, the court treated it as a mandatory injunction. The plaintiffs therefore had to demonstrate that the law and facts clearly favored their position, not merely that they were likely to prevail.

Second, the court found Reclamation's interpretation of the 2024 BiOp more persuasive. Although language in Table 25 of the BiOp supported the plaintiffs' position, the court concluded that the underlying Proposed Action, decision tree, and operational modeling supported using both projected April and September storage to determine the applicable Bin. The court suggested that Table 25 may have inaccurately summarized the end-of-April storage ranges described in the Proposed Action. The court used the interpretive framework from Kisor v. Wilkie as guidance but did not ultimately rely on agency deference. The Court directly addressed the interpretations of the BiOp, and underlying data to support and, in doing so, made clear that the decision was not based on any level of agency-deference but, instead, based on a finding that Reclamation's position was more factually supported and, therefore, did not assess questions of deference.

Conclusion and Implications

The ruling leaves Reclamation's 2026 Shasta operations unchanged by the requested federal injunction. It does not, however, finally approve those operations or resolve the plaintiffs' broader allegations concerning incidental take, reinitiation of ESA consultation, or the validity and application of the 2024 BiOp.

Legally, the decision underscores the high threshold plaintiffs face when seeking mandatory injunction against federal agency operations, particularly when relying on narrow claims regarding BiOp framework, and addresses the importance of a fact-based assessment, while declining to address to questions of agency deference. The court's order is available here: https://www.courthousenews.com/wp-content/uploads/2026/08/baykeeper-injuction-denied-ruling.pdf. (Stephanie Cook, Miles Krieger)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL LIMITS SCOPE OF REGULATORY FEES UNDER SGMA TO OWNERS AND OPERATORS OF GROUNDWATER WELLS

Garst v. Tehama County Flood Control and Water Conservation District, 121 Cal.App.5th 507 (3rd Dist. 2026).

In *Garst v. Tehama County Flood Control and Water Conservation District*, the Third District Court of Appeal reviewed a 29-cent-per-acre fee imposed on all land in Tehama County to fund the costs of groundwater management planning under the Sustainable Groundwater Management Act (SGMA). The Court of Appeal held that the authority of a Groundwater Sustainability Agency (GSA) to impose such regulatory fees was limited to owners and operators of groundwater wells, both on statutory and on constitutional grounds.

Background

The California Legislature enacted SGMA in 2014 with the goal of sustainably managing California's groundwater resources by 2040. The statute provides for local public agencies to become or to form GSAs to manage all or part of a groundwater basin. GSAs are required to prepare a Groundwater Sustainability Plan (GSP), a planning document that compiles and analyzes data regarding the groundwater resources it is managing, sets objectives and thresholds for avoiding what SGMA calls "undesirable results," and sets out a plan for projects and management actions to make the basin sustainable by 2040.

To fund these activities, SGMA provides GSAs with several statutory tools for imposing fees, and it also allows them to use their existing authorities as public agencies to collect funds for SGMA purposes. One of statutory authorities granted by SGMA is Water Code Section 10730, which allows a GSA to impose:

> …fees, including, but not limited to, permit fees and fees on groundwater extraction or other regulated activity, to fund the costs of a groundwater sustainability program, including, but not limited to, preparation, adoption, and amendment of a groundwater sustainability plan, and investigations, inspections, compliance assistance, enforcement, and program administration, including a prudent reserve.

The other primary funding authority for GSAs, Water Code Section 10730.2, allows GSAs to impose "fees on the extraction of groundwater" provided they do so under the procedures set forth in Article 13D, Section 6 of the California Constitution (Prop 218). Fees under Water Code Section 10730, by contrast, have often been imposed without following those procedures, with the GSA arguing they are non-tax fees under Article 13C, Section 1 (Prop 26).

The Tehama County Flood Control and Water Conservation District (District) serves as a GSA in 11 different groundwater subbasins, which collectively underlie the County of Tehama. In order to fund its activities as a GSA, the District required all groundwater wells to be registered with the District and imposed an annual charge of $0.29 on each acre of land in the County, collected on the ad valorem tax roll with ordinary property taxes, to fund that registration program.

David Garst, a landowner, brought this action contesting the registration charge's validity, arguing it violated SGMA and Prop 26. He prevailed in the trial court, and the District appealed. The Court of Appeal upheld the judgment invalidating the registration charge on both statutory and constitutional grounds.

The Court of Appeal's Decision

Statutory Interpretation of Water Code Section 10730

The court held that Section 10730 must be read in the context of the surrounding sections. Most impor-

tantly, Section 10730.6 provides that groundwater fees imposed under SGMA are "due and payable to the groundwater sustainability agency by each owner or operator on a day established by the groundwater sustainability agency." Reading this text in conjunction with Section 10730, the court concluded that groundwater fees under SGMA may only be imposed on "owners" or "operators" of groundwater wells.

However, the court acknowledged that the District had other statutory authority to impose fees. Therefore, assuming for the sake of argument that the District was authorized to impose the fee under one of those authorities, it proceeded to consider the constitutionality of the fee.

Constitutional Interpretation of Proposition 26

Proposition 26 provides that all exactions of money by local government agencies are "taxes" subject to the 2/3 vote requirements of Prop 13 unless they fall into one of seven exceptions. The District asserted that its per-acre charge qualified for the "regulatory fee" exception under Prop 26, which permits

> …[a] charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

The court reviewed the pre-Prop 26 case law that was implicitly incorporated into Prop 26 by the voters and concluded that the premise of a regulatory fee is to shift the cost of a regulatory program from the general public to those engaged in the regulated activity. Therefore, a per-acre fee, which imposes the costs on landowners whether or not they engage in the regulated activity of groundwater pumping could not be characterized as a regulatory fee.

Conclusion and Implications

The *Garst* decision is relevant to future SGMA fee litigation in several ways. Beyond the core holdings discussed in this article, it also discussed issues regarding the statute of limitations and the prerequisites for refund claims. But it is most significant in those GSAs that have adopted per-acre charges to fund SGMA compliance. Some GSAs may have made that choice because they lacked the data to impose a charge only on well owners, and some may have done so for other policy reasons. For instance, all lands within a basin theoretically have a right to some portion of the groundwater supply, even if they are not presently operating a well. *Garst* seems to foreclose many of those approaches, at least within the regulatory-fee framework. It remains to be seen, in future cases, whether other theories could authorize per-acre charges under Prop 26. The court's opinion is available online here: https://www4.courts.ca.gov/opinions/documents/C103356.PDF.
(Brett Stroud)

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

CHANGE SERVICE REQUESTED

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