



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES

Department of the Interior/Colorado River/Mexico

On June 15, the U.S. Department of the Interior announced initiation of the formal process to develop future operating guidelines to protect the stability of the Colorado River, and replace the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead, which are set to expire at the end of 2026. A robust and transparent public process will inform the new set of operating guidelines, taking into account the current and projected hydrology and the likelihood of warming temperatures and continued low-runoff conditions.

“The Biden-Harris administration has held strong to its commitment to work with states, Tribes and communities throughout the West to find consensus solutions in the face of climate change and sustained drought,” said Deputy Secretary Tommy Beaudreau. “As we look toward the next several years across the Basin, the new set of operating guidelines for Lake Powell and Lake Mead will be developed collaboratively based on the best-available science.” They are also committed to continued collaboration with Mexico, facilitated by the International Boundary and Water Commission, consistent with the 1944 Water Treaty.

“Developing new operating guidelines for Lake Powell and Lake Mead is a monumentally important task and must begin now to allow for a thorough, inclusive and science-based decision-making process to be completed before the current agreements expire in 2026,” said Commissioner Camille Calimlim Touton. “The Bureau of Reclamation is committed to ensuring we have the tools and strategies in place to help guide the next era of the Colorado River Basin, especially in the face of continued drought conditions.”

Separately, Reclamation is preparing a Supplemental Environmental Impact Statement (EIS) to revise the December 2007 Record of Decision that will set interim operating guidelines through the end of 2026. The Notice of Intent (NOI) to prepare the EIS asked the public to help inform future operational strategies that can be sufficiently robust and adaptive to withstand a broad range of hydrological conditions. The NOI also asks the public to consider how and whether the purpose

and elements of the 2007 Interim Guidelines should be retained, modified, or eliminated. The deadline for public comment on the NOI is August 15, 2023.

President Biden’s Investing in America agenda includes “...providing pivotal resources to enhance the resilience of the West to drought and climate change, including to protect the short- and long-term sustainability of the Colorado River System. Through the Bipartisan Infrastructure Law, Reclamation is investing \$8.3 billion over five years for water infrastructure projects, including water purification and reuse, water storage and conveyance, desalination and dam safety. The Inflation Reduction Act is investing an additional \$4.6 billion to address the historic drought.”

The investments include: (1) \$281M for 21 water recycling projects to increase annual water capacity by 127,000 acre-feet (af) annually; (2) up to \$233M in water conservation funding for the Gila River Indian Community, including \$83M for a water pipeline project, and an additional \$50M through the Lower Colorado River Basin System Conservation and Efficiency Program, with similar investments in 2024 and 2025; (3) over \$73M for infrastructure repairs on water delivery systems, with \$19.3M in Fiscal Year 2022 and another \$54M in the future; (4) \$71M for 32 drought resiliency projects to expand groundwater storage, rainwater harvesting, aquifer recharge and water treatment; (5) \$20M in new small surface and groundwater storage investments; (6) eight new System Conservation Implementation Agreements in Arizona with entities in the Tucson and Phoenix metro areas to conserve up to 140,000 af of water in Lake Mead in 2023, and up to 393,000 af through 2025.

CONGRESS/WATER QUALITY

WOTUS/EPA/Army Corps

In a June 21, letter to Michael Regan, Administrator, U.S. Environmental Protection Agency (EPA) and Michael Connor, Assistant Secretary of the Army for Civil Works, House and Senate Republican committee and subcommittee leaders requested a “detailed update on the planned next steps” in response to the Supreme Court’s recent *Sackett v. EPA* decision. Signed by Senators Shelley Moore Capito (R-WV) and Cynthia Lummis (R-WY), together with Representatives Sam

Graves (R-MO) and David Rouzer (R-NC), the letter noted: “The Court’s ruling reinforces property owners’ rights, protects the separation of powers by limiting your Agencies’ authority to what Congress has delegated in statute, and ensures adherence to the congressional intent in writing the Clean Water Act (CWA). Additionally, the Court upholds the cooperative federalism framework of the CWA, as well as the states’ authority and responsibility to regulate non-Federal waters within their borders.”

The letter added: “In implementing the Court’s decision, the Agencies must adhere to the majority opinion and not slow-walk compliance with the decision. The Agencies wasted valuable time and resources by prioritizing the promulgation of a rule over the first two years of the Biden Administration; that is now clearly unlawful. Notably, this Administration ignored our repeated admonitions that the Agencies should wait until the Supreme Court acted to proceed, and our warnings that the rule being drafted would not be “durable.” Now the EPA and the Corps must work to bring application of WOTUS [Waters of the United States] quickly and effectively in line with Sackett II.”

They declared, “...we are concerned that the Administration is now delaying implementation of the ruling. For instance, in response to the Supreme Court’s decision, some Corps districts have stated that they will temporarily halt the review and issuance of approved jurisdictional determinations. Such a freeze in processing jurisdictional determinations unnecessarily delays the permitting process for projects...is indicative that these recent delays are needless at best, or intentional efforts to halt economic development at worst.” They suggested, “...the ‘continuous surface connection test’ upheld by a majority of the Court in *Sackett II* is clear and can be implemented immediately.”

LITIGATION/WATER RIGHTS **Navajo Nation**

On June 22, the U.S. Supreme Court held (5-4): “The 1868 treaty establishing the Navajo Reservation reserved necessary water to accomplish the purpose of the reservation but did not require the United States to take affirmative steps to secure water for the Tribe. The Tribe asserts a breach-of-trust claim based on its view that the 1868 treaty imposed a duty on the United States to take affirmative steps to secure water for the Navajos. To maintain such a claim here, the Tribe must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States. The Federal Government owes judicially enforceable duties to a tribe “only to the extent it expressly accepts those responsibilities.” Whether the Government has expressly accepted such obligations ‘must train on specific rights-creating or duty-imposing’ language in a treaty, statute, or regulation.”

“Here, while the 1868 treaty ‘set apart’ a reservation for the ‘use and occupation of the Navajo tribe,’ it contains no language imposing a duty on the United States to take affirmative steps to secure water for the Tribe. Notably, the 1868 treaty did impose a number of specific duties on the United States, but the treaty said nothing about any affirmative duty for the United States to secure water. As this Court has stated, ‘Indian treaties cannot be rewritten or expanded beyond their clear terms.’”

The Court added, “To be sure, this Court’s precedents have stated that the United States maintains a general trust relationship with Indian tribes, including the Navajos. But unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, this Court will not ‘apply common-law trust principles’ to infer duties not found in the text of a treaty, statute, or regulation. Here, nothing in the 1868 treaty establishes a conventional trust relationship with respect to water. And it is unsurprising that a treaty enacted in 1868 did not provide for all of the Navajos’ current water needs 155 years later. Under the Constitution, Congress and the President have the responsibility to update federal law as they see fit in light of the competing contemporary needs for water.”

The Court said, “Other arguments offered by the Navajo Tribe to support its claims under the 1868 treaty are unpersuasive.” The Tribe asserted that purported federal control over the reserved water rights supports the view that the U.S. owes trust duties to the Navajos. The Court held that a breach-of-trust claim “cannot be premised on control alone.” Moreover, the Court found the “text of the treaty and records of treaty negotiations do not support the claim that in 1868 the Navajos would have understood the treaty to mean that the United States must take affirmative steps to secure water for the Tribe.”

In a footnote, the Court recognized: “The intervenor States separately argue that the Navajo Tribe’s claimed remedies with respect to the Lower Colorado River would interfere with this Court’s decree in *Arizona v. California*, 547 U. S. 150 (2006). The question of whether certain remedies would violate the substance of this Court’s 2006 decree is a merits question, not a question of subject-matter jurisdiction. Because we conclude that the treaty imposes no duty on the United States to take affirmative steps to secure water in the first place, we need not reach the question of whether particular remedies would conflict with this Court’s 2006 decree.”

Justice Brett Kavanaugh delivered the opinion joined by Justices John Roberts, Clarence Thomas, Samuel Alito and Amy Coney Barrett. Justice Thomas filed a concurring opinion. Justices Neil Gorsuch, Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson dissented.

The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.