



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / www.westernstateswater.org

Chairwoman - Jeanine Jones; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

ADMINISTRATION/WATER QUALITY

Sackett v. EPA/Clean Water Act

On March 13, the Environmental Protection Agency (EPA) issued an Amended Administrative Compliance Order (ACO) to Chantell and Michael Sackett in regards to their Idaho property. The property was thought to contain wetlands abutting a "water of the United States," thus requiring the Sackett's to obtain a permit under Section 404 of the Clean Water Act (CWA) in order to develop it. The property has been the subject of litigation for 12 years, including a unanimous Supreme Court decision in favor of the couple that established Administrative Procedure Act judicial review for ACOs under the CWA (*Sackett v. EPA*, 132 S. Ct. 1367 (2012)). An outstanding case remains for declaratory and injunctive relief, *Chantell and Michael Sackett v. US EPA*, 2:08-cv-00185 (9th Cir.). See WSW #1975.

The amended ACO states, "On May 15, 2008, EPA issued an ACO in connection with the alleged unauthorized placement of fill material into wetlands at the Site in April and May of 2007. You challenged the EPA's issuance of the ACO and several years ago the EPA decided to no longer enforce the ACO against you. Given the passage of time and the fact that the EPA's enforcement case is not active, the EPA is withdrawing the ACO. Under these circumstances, the EPA does not intend to issue a similar order to you in the future for this Site." The Sacketts will ask the 9th Circuit Court for clarification on whether their property is subject to EPA jurisdiction, as the amended ACO does not address this issue. <https://pacificlegal.org/case/sackett-v-environmental-protection-agency/>

LITIGATION/WATER RIGHTS

Klamath River Basin/Oregon/Prior Appropriations/

On March 11, the Marion County Circuit Court in Oregon granted the plaintiffs' motion for summary judgement in *Brooks v. Byler et al.* (19-cv-27798), ruling that the Oregon Water Resources Department (OWRD) exceeded its authority when it shut off junior groundwater users to protect senior rights of surface water users, violating the due process rights of the irrigators. A 2018 OWRD rule established a process for shutting off junior irrigators pumping from wells within 500 feet of surface waters at the request of senior water users to prevent

substantial interference with water rights. Racquel Rancier, OWRD's policy manager, said: "This ruling suggests to the department that a critical groundwater designation is necessary in order to manage groundwater for senior surface water rights within the Klamath Basin." This would require both a determination of how much water irrigators can sustainably withdraw from the aquifer each year, and a contested case hearing before regulating junior groundwater rights for interference with senior surface rights. See WSW #2066, #1967; also *Capital Press* 3/17/20.

OWRD's 2019 Budget Note Report states: "The Klamath Basin represents one of the most complex water management challenges in Oregon, with multiple listed species requiring lake levels or river flows, four Tribes between Oregon and California, a 200,000-acre federal irrigation project, and significant amounts of groundwater discharging into springs and rivers that support streamflow. Like many arid areas in the Western United States, the needs for water in the Klamath Basin often exceed the available resources to meet them on a year-to-year basis, resulting in extensive water use regulation." Numerous lawsuits have challenged OWRD's regulatory actions, and in 2019 OWRD launched an effort to engage with the Klamath Basin water users to develop a plan for managing groundwater to address water needs and issues between groundwater and surface water users, as well as and to improve understanding of the basin hydrology.

Klamath River Basin/ESA/Indian Water Rights

On March 13, Klamath River Basin farmers from Oregon and California filed a petition for certiorari with the U.S. Supreme Court (19-1134). The petition appeals two decisions of the Federal Circuit Court of Appeals, *Baley v. U.S.* (18-1323) and *John Anderson Farms, Inc. v. U.S.* (18-1325). Both cases dealt with a 2001 decision by Reclamation to shut off irrigation water supplies to protect endangered fish. The question presented to the Supreme Court is: "Whether, against the legal backdrop of Congress's and this Court's recognition of the primacy of state law to determine, quantify, and administer water rights, a federal court may deem federal agency regulatory action under the Endangered Species Act (ESA) to constitute the adjudication and administration of water rights for tribal purposes."

The petitioners argue that the Federal Circuit's decision upends several principles of western water rights administration. First, senior water rights, including federal reserved water rights, do not passively curtail junior water rights. With a valid call on the system, the state water right administrator curtails the most junior rights on the system until the senior right making the call is satisfied. Absent a call and administrative curtailment under state law, junior users may continue diverting water, to "ensure that water is not wasted." Under the McCarran Amendment, petitioners emphasize, this also applies to federal reserved water rights.

Second, although Reclamation "...has an obligation to comply with the ESA, nothing in that or any other statute authorizes [Reclamation] to determine the existence, location, or quantity of asserted tribal water rights, or to curtail a specific junior right to satisfy a senior right. To the contrary, section 8 of the Reclamation Act precludes [Reclamation] from determining water rights." The Federal Circuit, "...acting outside of any adjudicatory process..." assumed the existence of tribal water rights and referenced the trust obligations of the U.S. While it is undisputed that the U.S. holds tribal fishing rights and associated water rights in trust, that "...is not the same as saying the United States has the authority to unilaterally determine where and in what quantities such water rights may exist, or to implement any such rights by selectively regulating parties that may be junior."

Third, tribal water rights to instream flow are not the same as rights to storage water captured during high run-off. "That results in a new source of water, physically and legally distinct from the natural flow of the stream." The petitioners note that the California tribes did not assert claims to store and use water in the Upper Klamath Lake, and that the exclusive purpose for the stored water is for irrigation, not to enhance tribal fisheries with instream flow.

The petitioners conclude: "This Court has long acknowledged the potentially disruptive effects of federal reserved water rights claims on state water rights.... Congress and this Court have addressed this problem by giving deference to state law and state systems for adjudication and administration, effectively fitting the federal rights into the state system, a policy of continuing importance in all western states.... Re-allocation of water resources under the ESA or other regulatory statutes imposes new disruption to the lives of water-reliant enterprise and communities and to the system of cooperative federalism that solidified over the last century. The underlying principle of [the] petitioners' action is that if society chooses to re-allocate their property to another purpose, the Fifth Amendment requires just compensation. The courts below sidestepped adjudication of the takings issue by retroactively concluding that agency staffs had determined and administered water rights wholly outside

any adjudicatory process and out of conformity with the mechanisms of the west's water rights system. [This] decision upsets the security, flexibility, and finality provided by western state general stream adjudications, and threatens to wreak havoc in the future." See WSW #2225 and #2664; also https://sct.narf.org/documents/baley_v_us/cert_petition.pdf.

WATER RESOURCES **Colorado River/Snow**

On March 29, the U.S. Geological Survey (USGS) announced the results of a collaborative study published in the journal *Science*, titled "*Colorado River Flow Dwindles as Warming-Driven Loss of Reflective Snow Energizes Evaporation*." Previous studies have had wide-ranging estimates of streamflow reduction per degree increase in temperature (1-8%), complicating the task of planning and management of water resources in snow-dominated river basins. The USGS Water Resources Mission Area and National Oceanic and Atmospheric Administration's (NOAA) Geophysical Fluid Dynamics Laboratory used a new model and satellite-based observations of surface albedo and surface radiation. Identifying these mechanisms to explain the sensitivity of water flow to warming temperatures enables more confident projections. The USGS research "indicates that streamflow in the Upper Colorado River Basin is decreasing by about 5% per degree Fahrenheit as a consequence of atmospheric warming, causing a 20% reduction over the past century." <https://pubs.er.usgs.gov/publication/70209076>

MEETINGS **WSWC Spring Meetings/Washington Roundtable**

Given the unique circumstances and restrictions with COVID-19, our recent WSWC meetings were canceled. However, the Executive Committee met via conference call on March 6, to review and revise seven sunseting positions that: (1) support sub-seasonal to seasonal weather research, forecasting, and innovation; (2) support the Bureau of Reclamation's maintenance, repair and rehabilitation needs; (3) support Reclamation's dam safety program; (4) support the careful evaluation of the transfer of federal water and power assets; (5) encourage the Administration and Congress to work together with States to strengthen the National Levee Safety Program; (6) encourage continued federal appropriations for state and tribal capitalization grants and loans to help States address their water infrastructure needs; and (7) support financial and technical assistance for small, rural and tribal communities to meet federal water quality and drinking water mandates. Pursuant to WSWC's Rules of Organization, with sufficient notice and a quorum on the call, the positions were adopted.

The WESTERN STATES WATER COUNCIL is an organization 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.