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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES

Colorado River Post-2026 Operations

On November 20, the Department of Interior (DOI) released five proposed alternatives to be analyzed as part of the Post-2026 Operations for the Colorado River: (1) No Action; (2) Federal Authorities; (3) Federal Authorities Hybrid; (4) Cooperative Conservation; and (5) Basin Hybrid. In a press release, DOI highlighted the Basin Hybrid Alternative saying: "[It] is designed to reflect components from the proposals and concepts submitted by the Upper Division States, Lower Division States, and Tribal Nations to present elements that could provide a basis for coordinated operations and may facilitate greater agreement across the Basin."

The Federal Authorities Alternative relies solely on Lake Powell's elevation for determining releases which would range from 9.5 to 5.0 million acre-feet (MAF). Shortages in the Lower Basin (up to 3.5 MAF) would be triggered by combined storage in Lakes Powell and Mead, and be distributed consistent with the priority system. This alternative does not include new storage mechanisms, instead protecting existing infrastructure.

The Federal Authorities Hybrid Alternative would determine Lake Powell releases based on both Powell and Mead elevations, 10-year running-average hydrology, and Lower Basin deliveries. It proposes to develop new delivery and storage mechanisms involving both federal and non-federal storage pools. This alternative would also trigger shortages based on combined storage in Lake Powell and Lake Mead, but would distribute them pro-rata. This alternative emphasizes Basin-wide shared contributions including: (1) Upper Basin conservation to be stored in Lake Powell; (2) Lower Basin shortages starting at 1.5 MAF, which exceeds average annual evaporative and system losses at and below Lake Mead.

The Cooperative Conservation Alternative prioritizes water conservation and system storage stability. Lake Powell releases would range from 11.0 MAF to 5.0 MAF, and be determined based on total Upper Basin system storage and recent hydrology. Releases would switch to "run-of-river" releases when Lake Powell's elevation reaches 3,510 feet or lower. It would incorporate Basin-wide shared contributions including voluntary contributions from both basins and 4.0 MAF of shortages in the Lower Basin triggered by combined seven-reservoir (Flaming Gorge Reservoir, Blue Mesa Reservoir, Navajo Reservoir, Lake Powell, Lake Mead, Lake Mojave, and Lake Havasu) storage and recent hydrology.

Under the Basin Hybrid Alternative, Lake Powell releases would range from 12.0 to 5.0 MAF and would be determined by Lake Powell elevation, but consider Lake Mead in certain scenarios. It would trigger Lower Basin shortages (up to 2.1 MAF) based on seven-reservoir storage but analyzes both priority and pro-rata distribution methods. This alternative would include new delivery and storage mechanisms for Lake Powell and Lake Mead, including incentivized conservation and managing/offsetting reductions, to provide Tribal and non-Tribal entities expanded opportunities to conserve, store, and take subsequent delivery of water in and from Lake Mead and/or Lake Powell reservoirs. https://www.doi.gov/news

Infrastructure/Drought Mitigation

On December 2, the Bureau of Reclamation announced an investment of $50M for drought mitigation in the Great Salt Lake Basin. The State of Utah is investing over $50M to match. The investment will allow the Office of the Great Salt Lake Commissioner and Utah Department of Natural Resources to enhance and expand their ongoing agricultural optimization efforts. It also allows the State to implement the program to lease water and then deliver conserved water to the Great Salt Lake reducing water losses throughout the basin. Reclamation Commissioner Camille Touton said: "We recognize the local commitment to conservation of the Great Salt Lake and make this investment in an effort to slow the long-term decline of the water level. The impacts of drought to the area are evident and we must work with the state and local community to conserve this important water body to stop negative impacts to the local environment and wildlife habitat, the agriculture ecosystem services, recreation, and industry."

CONGRESS

House Natural Resources

On November 20, the House Committee on Natural Resources Subcommittee on Water, Wildlife, and Fisheries held a legislative hearing focused on western water infrastructure. Ranking Member Jared Huffman (D-CA) expressed support for the Finish the Arkansas Valley Conduit Act (H.R. 9514), the Lower Colorado River Multi-Species Conservation Program Amendment Act (H.R. 9515), and H.R. 9969 which aims to address the impacts of hydropower production on ecosystems at Glen Canyon Dam.

Representative Harriet Hageman (R-WY) presented H.R. 9969, which would direct Reclamation to analyze the costs of a 2024 Record of Decision made to address invasive species in the Lower Colorado River. The decision requires higher flows to combat invasive smallmouth bass, leading to increased costs for hydropower customers. She emphasized the need for the federal agencies to address these impacts through a collaborative process. Representative Lauren Boebert (R-CO) discussed H.R. 9514, which would eliminate interest payments for non-federal costs of the Arkansas Valley Conduit pipelines. Boebert said that without H.R. 9514, the cost of drinking water for these communities could triple to meet water quality standards. Representative Ken Calvert (R-CA) discussed the benefits of the Lower Colorado River Multi-Species Conservation Program and emphasized the need to find efficiencies in its funding to ensure the program's long-term sustainability. He said the interest earned through H.R. 9515 would help offset the effects of inflation without requiring additional funding.

LITIGATION

Audubon Society v. Federal Aviation Administration

On November 12, the D.C Circuit Court of Appeals issued a ruling in Marin Audubon Society v. Federal Aviation Administration (No. 23-1067), concluding that the White House Council on Environmental Quality (CEQ) does not have the authority to issue binding regulations under the National Environmental Policy Act (NEPA). In the underlying case, petitioners challenged the Federal Aviation Administration and the National Park Service (the Agencies) on their compliance with NEPA in their development of an Air Tour Management Plan (ATMP) for four national parks near San Francisco. Petitioners argued that the Agencies had improperly relied on a categorical exclusion under NEPA to approve the ATMP. The court found the Agencies' NEPA analysis had used an improper baseline for flight traffic and vacated the plan. However, both parties argued the case based on CEQ's regulations. The court said those arguments could not be addressed and declared the CEQ's NEPA regulations were outside CEQ's authority. Chief Judge Srinivasan, in her dissenting opinion, argued that the court should have limited its decision to the legal questions presented by the parties, not to initiate its own inquiries.

The court held that the constitutional implications of the CEQ's regulatory authority justified its decision to rule on the issue, even without a direct challenge from the parties. It asserted that it possessed the "independent power to identify and apply the proper construction of governing law," particularly when a law might be unenforceable or non-binding (citing *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446, 1993). The court wrote: "There are good reasons, indeed there are compelling reasons, for us to determine the validity of the CEQ regulations once and for all. Over many years, our court has expressed serious concerns about whether CEQ's regulations had any 'binding effect' because it was 'far from clear' that CEQ had any 'regulatory authority under [NEPA]'.... It is time for our court's long-standing misgivings to be put to the test: 'where there is so much smoke, there must be a fair amount of fire, and we would do well to analyze the causes.'"

The court characterized the question as a separation of powers issue, pointing out that CEQ traces its authority to an Executive Order of the President and not legislation: "No statutory language states or suggests that Congress empowered CEQ to issue rules binding on other agencies—that is, to act as a regulatory agency rather than as an advisory agency. NEPA contains nothing close to the sort of clear language Congress typically uses to confer rulemaking authority."

The court disagreed that the CEQ's regulations could be justified under the "Take Care Clause" of the Constitution (Art. III, Sec. 3). The court argued that if all federal agencies were bound to follow and courts were to enforce CEQ regulations, then those regulations extend beyond the President's power to oversee his administration. The court reasoned that upholding the CEQ regulations as an exercise of Presidential oversight would imply that the President could circumvent the limitations of agencies, which derive their powers solely from congressional statutes. The court also examined specific legal provisions cited by President Carter in Executive Order 11991 (42 FR 26967), which purportedly authorized CEQ to issue regulations. Reviewing Section 309 of the Clean Air Act, the court determined that it only supports CEQ's role as advisory and not regulatory. It also considered the Environmental Quality Improvement Act of 1970, which established an Office of Environmental Quality headed by CEQ's chairman, and found that the authority granted was to assist other federal agencies, not broad rulemaking authority.