Chapter 24 • WATER RESOURCES
2018 Annual Report[1]

I. FEDERAL DEVELOPMENTS

A. Alaska

Sturgeon v. Frost, et al.[2] arose from a challenge to the U.S. Court of Appeals for Ninth Circuit's 2017 upholding of the federal district court's rejection of challenges by John Sturgeon to National Park Service (NPS) regulations regarding the use of hovercraft on the Nation River within the boundaries of NPS administered lands. The Ninth Circuit's 2017 holding was based on its finding that the Alaska National Interest Lands Conservation Act (ANILCA) did not limit the NPS from applying the hovercraft ban on the Nation River because, under circuit precedent, the United States held an implied reservation of water

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[1]This chapter summarizes significant federal judicial developments and significant judicial, legislative, and administrative state developments in water resources in 2018. Editors: Sarah A. Klahn, Michelle Chester, and Diane Thompson, Somach Simmons & Dunn, Denver, Colorado and Sacramento, California. Co-editors: Rachel S. Anderson, Fabian VanCott, Salt Lake City, Utah; Emily Bergeron, J.D., PhD, Department of Historic Preservation, University of Kentucky; Elizabeth P. Ewens, Ellison, Schneider Harris & Donlan L.L.P., Sacramento, California; Chris Bromley, McHugh Bromley, PLLC, Boise, Idaho; and Elizabeth Newlin Taylor, Taylor & McCaleb, PA, Corrales, New Mexico. The editors were ably assisted by the correspondents listed below who authored the states' reports. The correspondents are: for Alaska, George R. Lyle and Adam Harki, Guess & Rudd P.C., Anchorage, Alaska; for Arizona, Michele L. Van Quathem, Law Offices of Michele Van Quathem, PLLC, Phoenix, Arizona; for California, Elizabeth P. Ewens, Craig A. Carnes, Jr., Shawnda M. Grady, and Janelle S.H. Krattiger, Ellison, Schneider Harris & Donlan L.L.P., Sacramento, California; for Colorado, Dulcinea Z. Hanuschak, Brownstein Hyatt Farber Schreck LLP, Denver, Colorado; for Idaho, Garrick L. Baxter and Emmi Blades, Deputy Attorneys General, Idaho Department of Water Resources, Boise, Idaho; for Kansas, Chris Bromley, McHugh Bromley, PLLC, Boise, Idaho; Holly J. Franz, Franz & Driscoll, PLLP, Helena, Montana; for Nebraska, LeRoy W. Sievers, Legal Counsel, Nebraska Department of Natural Resources, Lincoln, Nebraska; for Nevada, Karen A. Peterson, Esq., Justin Townsend, Esq., and Jennifer McMenomy, Esq., Allison MacKenzie, Ltd., Carson City, Nevada; for New Mexico, Elizabeth Newlin Taylor, Taylor & McCaleb, PA, Corrales, New Mexico; for North Dakota, Jennifer L. Verleger, Assistant Attorney General, Bismarck, North Dakota; for Oklahoma, Jonathan Allen, Assistant General Counsel, Oklahoma Water Resources Board, Oklahoma City, Oklahoma; for Oregon, Laura A. Schroeder, Lindsay Thane, and Jakob Wiley, Schroeder Law Offices, P.C., Portland, Oregon; for South Dakota, Ann Mines-Bailey, Assistant Attorney General, Sioux Falls, South Dakota; for Texas, Andrew S. "Drew" Miller, Kemp Smith LLP, Austin, Texas; for Utah, Rachel S. Anderson, Fabian VanCott, Salt Lake City, Utah; for Washington, Tadas A. Kisielius, Van Ness, Feldman LLP, Seattle, Washington; for Wyoming, Jenifer E. Scoggin and Sami L. Falzone, Holland & Hart LLP, Cheyenne, Wyoming; for the Eastern States, Elizabeth Newlin Taylor, Taylor & McCaleb, P.A., Corrales, New Mexico, with reporting assistance from Emily Bergeron, J.D., PhD., Department of Historic Preservation, University of Kentucky.

[2]872 F.3d 927 (9th Cir. 2017). *See also* Supreme Court Docket, *No.17-949* (last visited Feb. 14, 2019).

rights, which rendered the river "public lands" under ANILCA. Sturgeon appealed to the Supreme Court, which granted certiorari on June 18, 2018.[3] By October 11, 2018 the appeal was fully briefed, and oral argument was heard on November 5, 2018. Amicus curiae briefs were filed in support of Sturgeon by numerous states, including Alaska, Arizona, Arkansas, Idaho, Indiana, Nebraska, Nevada, South Carolina, Wisconsin, and Wyoming. The appeal is currently ripe for decision.

B. Arizona

In *Navajo Nation v. Department of Interior*,[4] the Ninth Circuit Court of Appeals reviewed the trial court's dismissal of all claims asserted by the Navajo Nation to challenge Interior's 2001 Colorado River Interim Surplus Guidelines[5] and the 2008 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead[6] (together, the Guidelines). The Navajo Nation's dismissed claims included: (1) that the adoption of the Guidelines violated the National Environmental Policy Act (NEPA) because Interior failed to adequately consider and protect the Nation's water rights and interests; and (2) that Interior breached its trust obligations to the Nation for failure to protect the Nation's water rights and interests. The court upheld the dismissal of the Nation's NEPA claim for lack of standing because the Nation failed to demonstrate it was reasonably probable that the Guidelines threatened the Nation's priority to water.[7] The court reversed the dismissal of the breach of trust claim, however, because it found the trial court had erred in its conclusion that sovereign immunity prevented the claim. The Ninth Circuit found instead the statutory waiver of sovereign immunity in section 702[8] of the Administrative Procedure Act (APA) applied to allow the Nation's non-APA claim.[9]

C. Nevada

On May 22, 2018, the Ninth Circuit Court of Appeals entered orders on nine appeals taken from orders entered by the U.S. District Court for the District of Nevada in *United States v. Walker River Irrigation District*.[10] As to the first appeal, regarding federal and tribal requests to establish additional senior federal reserved water rights under the Walker River Decree, the Ninth Circuit reversed the decision of the United States District Court in and for the District of Nevada to dismiss, based upon *res judicata*. The Ninth Circuit noted that the parties were not afforded an opportunity to brief the issue of *res judicata* prior to the District Court's dismissal and, on remand, ordered such briefing.

As to *Mineral County v. Walker River Irrigation District*,[11] the Ninth Circuit entered an order certifying a legal question to the Nevada Supreme Court, and later entered an amended order[12] certifying the following two questions to the Nevada Supreme Court: (a) "Does the public trust doctrine apply to rights already adjudicated and settled under the

[3]138 S. Ct. 2648 (2018).
[4]876 F.3d 1144 (9th Cir. 2017) (*Navajo Nation*).
[5]66 Fed. Reg. 7772, 7772-82 (Jan. 25, 2001).
[6]73 Fed. Reg. 19,873, 19,873-92 (Apr. 11, 2008).
[7]*Navajo Nation*, 876 F.3d at 1160.
[8]Administrative Procedures Act, 5 U.S.C. § 702 (2018).
[9]*Navajo Nation*, 876 F.3d at 1150.
[10]890 F.3d 1161 (9th Cir. 2018).
[11]890 F.3d 1174 (9th Cir. 2018).
[12]900 F.3d 1027 (9th Cir. 2018).

doctrine of prior appropriation and, if so, to what extent?" and (b) "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?" In the underlying district court proceedings, Mineral County sought an amendment to the Walker River Decree to allow for minimum flows of water to reach Walker Lake under the public trust doctrine. The Nevada Supreme Court, in *Mineral County, et. al. v. Lyon County, et. al.*,[13] accepted the certified questions and ordered briefing to be concluded in early 2019.

Regarding the remaining six related appeals, the Ninth Circuit, in *United States v. United States Board of Water Commissioners*,[14] concluded that (a) state law applies to the question of whether the Nevada State Engineer and the California State Water Resources Control Board properly consider the impacts to junior users of changes to the manner and place of use of senior water rights under the Walker River Decree; (b) the United States District Court was required to afford the same level of deference to the state agencies as the state courts would; (c) substantial evidence supported the Nevada and California agencies' findings that junior users were not harmed by transfer of the consumptive use portion of senior rights from agricultural to instream use; and (d) Walker Lake is located within the Walker River Basin such that delivery of water from the river to the lake does not violate the Decree's prohibition on delivery of water outside the river basin.

D. Texas

On March 5, 2018, the United States Supreme Court issued its decision in *State of Texas v. State of New Mexico*.[15] In this original jurisdiction action, Texas alleges that New Mexico is in violation of the Rio Grande Compact by allowing the diversion of groundwater and surface water from the Rio Grande River downstream from the Elephant Butte Reservoir and upstream of the Texas/New Mexico state line. The United States Supreme Court held that the United States, which intervened, may present its claims alleging similar violations of the Rio Grande Compact in this original action as well.

E. Washington

On June 11, 2018, the United States Supreme Court resolved the seventeen-year-long "Culverts Case," *Washington v. United States*, involving the United States and Washington's twenty-one treaty tribes, by means of a 4-4 deadlock.[16] The deadlock affirms the earlier decision of the Ninth Circuit Court of Appeals in *United States v. Washington*,[17] granting summary judgment to the Tribes and upholding an injunction requiring the State to remove or repair State-owned culverts blocking salmon passage to spawning habitat. Because the decision is the result of a tie in the Supreme Court, the Supreme Court's decision has no precedential value, though Washington is bound to the decision of the Ninth Circuit that it violated the treaties and must obey the injunction.

[13]No. 75917 (Nev. filed Sept. 7, 2018).
[14]893 F.3d 578 (9th Cir. 2018).
[15]138 S. Ct. 954 (2018).
[16]138 S. Ct. 1832 (2018).
[17]853 F.3d 946 (9th Cir. 2017).

F. Wyoming

In *Montana v. Wyoming*,[18] which concerns the interpretation of the 1950 Yellowstone River Compact, the Final Report of the Special Master[19] was filed with the United State Supreme Court in January 2018. In February 2018, the court accepted and entered the proposed judgment and decree[20] provided by the Special Master in the Final Report. The judgment and decree reflects the Special Master's suggested award of monetary damages to the State of Montana for the State of Wyoming's violations of the Yellowstone River Compact that reduced the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1,300 acre feet in 2004 and 56 acre feet in 2006.[21] Additionally, the Special Master recommended that the Court: (i) grant Montana particularized declaratory relief, including that Montana hold an appropriative right, protected by the Yellowstone River Compact, to store up to the original capacity of the Tongue River Reservoir each water year; (ii) deny Montana any injunctive relief; and (iii) award costs to Montana through the First Interim Report.[22]

G. Eastern States

In *Florida v. Georgia*,[23] the United States Supreme Court ruled that the Special Master was "too strict" in determining that no remedy would increase flow into the Apalachicola River, giving Florida a victory in its decades-long fight with Georgia. In a 5-4 decision, the Court remanded the case to be reheard. The Special Master had found that Florida had not proven that limiting the amount of water Georgia consumed would provide relief to Florida, but the Court found that Florida had made a "sufficient showing" that capping consumption by Georgia would provide a direct benefit to Florida.

II. STATE DEVELOPMENTS

A. Alaska

1. Administrative

On August 28, 2018, the Commissioner of the State of Alaska Department of Natural Resources (DNR) issued an administrative decision[24] denying three applications filed by Chuitna Citizens Coalition, Inc. (CCC) in 2009 for instream flow reservations of water on different reaches of Middle Creek/Stream 2003 (the Creek). While the applications were pending, CCC sued the DNR, asking the state court to order DNR to promptly decide its applications. Accordingly, the Commissioner was ordered to issue a

[18] 131 S. Ct. 1765 (2011). North Dakota is also named as a defendant because it is a signatory to the Yellowstone River Compact, but Montana seeks no relief against North Dakota in the current litigation.
[19] Final Report of the Special Master, Montana v. Wyoming, No. 137 (U.S. Jan. 10, 2018).
[20] Montana v. Wyoming, 138 S. Ct. 758 (2018).
[21] *Id.*
[22] Final Report of the Special Master, Montana v. Wyoming, No. 137 at 126.
[23] 138 S. Ct. 2502 (2018).
[24] DNR Decision in Response to Court Order on the remaining application by Chuitna Citizens Coalition, Inc, for a Reservation of Water, Under AS 46.15, the Alaska Water Use Act (Alaska Dep't of Nat. Res. 2018).

decision by August 28, 2018. The Commissioner's decision that the DNR had insufficient information to determine either CCC's "need" for the proposed instream flow reservations or the public's interest in CCC obtaining them. The Commissioner explained that, given the DNR's overloaded docket and limited resources, coupled with the fact that no competing applications regarding the use of the Creek's waters were pending, the full adjudication of the CCC applications was a low DNR priority. The DNR noted that CCC's claimed interests in the water rights were protected so long as no competing applications were pending; however, because the court ordered a decision by August 28, 2018, the Commissioner held that the Applications must be denied because he was without sufficient information to grant them. In September 2018, the Commissioner's decision was appealed to the Superior Court for the State of Alaska,[25] which, on October 16, 2018, granted a joint motion to stay the appellate proceedings.

B. Arizona

1. Judicial

In *Silver v. Pueblo Del Sol Water Co.*,[26] the Arizona Supreme Court held[27] that an Arizona statute requiring a subdivider to demonstrate an adequate water supply for a proposed subdivision did not require the Arizona Department of Water Resources (ADWR) to consider potentially competing but unquantified federal reserved rights for a conservation area established by Congress in 1988.[28] Among other things, Arizona Revised Statutes section 45-108, subdivision I[29] requires a subdivider to demonstrate water is continuously, legally and physically available for at least 100 years. Despite acknowledging that the federal reserved rights might, when quantified, be used to limit the subdivision's groundwater supply, the court upheld ADWR's interpretation, citing the plain language of the statute and the Legislature's intention to adopt ADWR's definition of legal availability.[30] The court recognized that the statute "does not eliminate all water supply risk for consumers, nor was it designed to do so."[31]

2. Legislative

In S.B. 1182,[32] the Arizona Legislature added a provision to Arizona Revised Statute section 48-2914.01[33] allowing an irrigation and water conservation district that includes more than 10,000 acres of land and has five board members to (1) provide for the election of an additional qualified elector from each division, and (2) reduce the board membership from two at-large directors to one.

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[25]Chuitna Citizens Coal. v. State of Alaska, Dep't of Natural Res., No. 3AN-18-09457CI (Alaska Super. Ct. filed Sept. 27, 2018).
[26]423 P.3d 348 (Ariz. 2018) (hereinafter *Silver*).
[27]*Id.* Four of the seven judges on the Court joined the majority opinion, and the remaining three judges concurred in part and dissented in part.
[28]*Id.* at 364.
[29]ARIZ. REV. STAT. § 45-108 (2011).
[30]*Silver*, 423 P.3d at 355.
[31]*Id.* at 359.
[32]S.B. 1182, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).
[33]ARIZ. REV. STAT. ANN. § 48-2914.01 (2018).

3. Administrative

ADWR formally initiated a rulemaking[34] to modify the calculation method and future use of assured water supply extinguishment credits in the Pinal Active Management Area. Extinguishment credits are granted in exchange for the permanent extinguishment of grandfathered groundwater withdrawal rights and may be used to satisfy replenishment obligations in assured water supply requirements.

C. California

1. Judicial

In *Northern California Water Assn. v. State Water Resources Control Board*,[35] the Third Appellate District of the California Court of Appeal upheld certain fees assessed by the State Water Resources Control Board (SWRCB) on water permit and license holders. The court found that the fees were proportionate to the benefits derived from them when measured collectively and considering all rate payors.

In *Santa Barbara Channelkeeper v. City of San Buenaventura*,[36] Division Two of the First Appellate District of the California Court of Appeal held that the trial court abused its discretion in striking the Defendant City of Buenaventura's (City) Cross-Complaint. Channelkeeper sued the City, alleging that the City's diversions are unreasonable under Article X, section 2 of the California Constitution because of the effect they have on steelhead trout, a listed endangered species, during summer months when river levels are low. The City cross-complained against other water users that divert water from the Ventura River watershed, alleging that their water use is unreasonable. Granting Channelkeeper's motion to strike the Cross-Complaint, the trial court found that the reasonable use and public trust doctrines do not require examination of competing uses of water to grant the relief sought by the plaintiff. Reversing, the Court of Appeal reasoned that the transaction at issue includes any and all diversion or pumping of water that leads to allegedly insufficient flow in the Ventura River during the summer months because the "transaction" Channelkeeper complains of is generalized to include all entities potentially responsible for it.

In *Environmental Law Foundation v. State Water Resources Control Board*,[37] the Third Appellate District of the California Court of Appeal affirmed the trial court's judgment. First, the appellate court held: (1) the County of Siskiyou and the SWRCB have common law fiduciary duties under the public trust doctrine to consider potential adverse impacts of groundwater extraction on the Scott River, a public trust resource, when issuing well permits; and (2) the Sustainable Groundwater Management Act of 2014 (Cal. Water Code § 10720 *et seq*.) (SGMA) does not remove that duty. As to the first holding, the court found that the dispositive issue is whether the challenged activity harms a navigable waterway. Because the extraction of groundwater may harm the Scott River, a navigable waterway, SWRCB and the County have a duty to consider such effects when issuing well permits. As to the second holding, the court reasoned that, because there was no legislative intent to in the text or scope of SGMA to eviscerate the public trust in navigable waterways

[34]24 Ariz. Admin. Reg. 2459, 2459-2467 (Aug. 17, 2018).
[35]230 Cal. Rptr. 3d 142 (Ct. App. 2018).
[36]228 Cal. Rptr. 3d 584 (Ct. App. 2018).
[37]237 Cal. Rptr. 3d 383 (Ct. App. 2018).

nor to interfere with existing law, SGMA does not abolish the common law public trust doctrine.

In *California Water Impact Network v. County of San Luis Obispo*,[38] the Second Appellate District of the California Court of Appeal held that the California Environmental Quality Act (CEQA) does not apply to the ministerial act of issuing a well permit. Since the County of San Luis Obispo (County) ordinance provides that well permits "shall be issued" if they comply with state and county standards, the court found that the County lacks any discretion to impose water usage conditions on permits issued, and thus the act is ministerial rather than discretionary.

In *Restore Hetch Hetchy v. City and County of San Francisco*,[39] the Fifth Appellate District of the California Court of Appeal affirmed the trial court's judgment sustaining Appellee Respondent City and County of San Francisco's (San Francisco) demurrer. The trial court concluded that Petitioner and Appellant Restore Hetch Hetchy's claim that the Hetch Hetchy Reservoir and O'Shaughnessy Dam constitute unreasonable methods of diverting water under Article X, section 2 of the California Constitution was preempted by the Raker Act, federal legislation granting certain rights-of-way to San Francisco. Affirming, the Court of Appeal held that section 11 of the Raker Act, the savings clause, does not preclude a finding of conflict between Restore Hetch Hetchy's claims and the express determination by Congress to divert water on a permanent basis at the site of O'Shaughnessy Dam. Such a finding relies on "obstacle preemption," which, the court explains, applies in cases where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[40] Thus, the court held that Restore Hetch Hetchy's claims failed under federal preemption principles.

In *City of San Buenaventura v. United Water Conservation District*,[41] the California Supreme Court affirmed in part and reversed and remanded in part the decision of the court of appeal regarding a groundwater charge imposed on well operators by the United Conservation District (District) to fund certain groundwater conservation measures. The City of San Buenaventura (City) argued that the charges violate Proposition 218 (Cal. Const. art. XIII D, sec. 6) or, alternatively, the charges violate Proposition 26 (Cal. Const. art. XIII C). In concluding that the fees are not property-related fees subject to Proposition 218, the California Supreme Court reasoned that because the District's conservation and replenishment services, by their nature, are not directed at any particular parcel or set of parcels, the fees could not be property-related. The Court further explained that the fees were not charged on landowners in their capacity as landowners, but in their capacity as extractors of groundwater, and thus the fees are not property-related nor subject to Proposition 218. The Supreme Court remanded the case to the Court of Appeal to consider whether the District's fees bore a reasonable relationship to the burdens on or benefits derived from the District's conservation activities, as required by Proposition 26.

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[38] 236 Cal. Rptr. 3d 53 (Ct. App. 2018).
[39] 236 Cal. Rptr. 3d 417 (Ct. App. 2018).
[40] *Id*. at 426, *citing Tohono O'odham Nation v. City of Glendale* (9th Cir. 2015) 804 F. 3d 1292, 1297.
[41] 406 P.3d 733 (Cal. 2017).

2. Legislative

On May 31, 2018, California Governor Jerry Brown signed Assembly Bill 1668[42] and Senate Bill 606,[43] companion bills aimed at furthering the ongoing efforts to "make water conservation a California way of life." The bills require the creation of water use objectives and long-term water use efficiency standards for residential, commercial, industrial and institutional water use. The bills also revise the drought planning and preparedness requirements for urban retail water suppliers and agricultural water suppliers.

On February 26, 2018, Governor Brown signed Assembly Bill 1270.[44] Prompted by the spillway failure at the Oroville Dam, the bill requires the Department of Water Resources (DWR) to inspect dams, reservoirs, and related structures (with hazard classifications of significant, high, or extremely high) at least once per fiscal year. The bill deems information relating to DWR's dam inspections to be public records subject to the California Public Records Act except where the information discloses a dam's vulnerability or poses a security threat.

On August 27, 2018, Governor Brown signed Assembly Bill 2975.[45] The bill expands protections of the state wild and scenic rivers system under certain conditions to include any California river or segment thereof that the federal government decides to remove from the national wild and scenic rivers system. The expanded protections provided will remain effective, at the longest, until December 31, 2025.

On September 28, 2018, Governor Brown signed Assembly Bill 2501.[46] The bill authorizes the SWRCB to order the extension of service to an area or the consolidation of a public or state small water system serving a disadvantaged community that is not receiving an adequate supply of safe drinking water. The bill also authorizes the SWRCB to order a receiving water system to consolidate or extend service to a public water system operated by a local educational agency under specified circumstances.

On September 22, 2018, Governor Brown signed Assembly Bill 747.[47] The bill, effective July 1, 2019, creates an independent organizational unit within the SWRCB known as the Administrative Hearings Office that will provide qualified and impartial hearing officers for adjudicative proceedings involving certain water right matters.

On November 6, 2018, California voters rejected Proposition 3, which would have authorized $8.877 billion in state general obligation bonds for infrastructure projects relating to safe drinking water and water quality, watershed and fisheries improvements, groundwater sustainability and storage, and surface water storage and dam repairs.

3. Administrative

In early 2018, the SWRCB undertook a rulemaking process[48] to develop and adopt permanent regulations to prohibit water use practices that it deemed wasteful pursuant to the reasonable use doctrine under Article X, section 2 of the California Constitution. While many stakeholders agreed with the prohibitions in general, there was significant opposition

[42]A.B. 1668, 2017-18 Reg. Sess. (Cal. 2018)
[43]S.B. 606, 2017-18 Reg. Sess. (Cal. 2018)
[44]A.B. 1270, 2017-18 Reg. Sess. (Cal. 2018)
[45]A.B. 2975, 2017-18 Reg. Sess. (Cal. 2018)
[46]A.B. 2501, 2017-18 Reg. Sess. (Cal. 2018)
[47]A.B. 747, 2017-18 Reg. Sess. (Cal. 2018)
[48]*Regulation on Waste and Unreasonable Water Uses*, CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, (Feb. 8, 2018).

to the SWRCB's use of the reasonable use doctrine to support the regulations. At its meeting on February 20, 2018, the SWRCB considered a draft version of the regulations but has not taken any action thereon. Given the enactment of Assembly Bill 1668[49] and Senate Bill 606[50] addressing conservation and water use efficiency, it is unclear whether the SWRCB will take further action on the proposed regulations.

Throughout 2018, the SWRCB conducted hearings[51] for Part 2 of the California WaterFix Project (WaterFix), the water rights change petition filed by DWR and United States Bureau of Reclamation (USBOR). Part 2 of the proceedings was focused on the project's potential impacts on fish, wildlife, and recreational uses of water. In February 2018, DWR announced[52] that it was considering implementing the project in stages, first developing two intakes and one tunnel, rather immediately proceeding with three intakes and two tunnels as originally planned. In June 2018, DWR and USBOR distributed the Administrative Draft Supplement Environmental Impact Report/Environmental Impact Statement addressing the potential impacts associated with the proposed phasing of the project.[53] The Phase 2 presentation of testimony and cross-examination concluded on October 1, 2018.

The SWRCB is continuing its multi-phase process to develop and implement an update to its Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan).[54] The first phase of the update is focused on the Lower San Joaquin River flows and Southern Delta Salinity and the second phase is focused on the Sacramento River and its tributaries, Delta eastside tributaries, Delta outflows and interior Delta flows. On July 6, 2018, the SWRCB released a Proposed Final Substitute Environmental Document (SED) in support of amendments relating to new and revised water quality objectives for the Lower San Joaquin River and its main tributaries, the Stanislaus, Tuolumne, and Merced Rivers.[55] The SWRCB circulated changes to the proposed amendments to the Bay-Delta Plan on August 20, identified as Change Sheet #1 and Change Sheet #2, and October 25, identified as Change Sheet #3.[56] The SWRCB continued final action on the proposed amendments and SED to its November 7 meeting, but following a request by California's Governor and Governor Elect, the SWRCB further continued the final action to December 12, 2018, to provide parties additional time to enter

[49] *See* A.B. 1668, *supra* note 42.
[50] *See* S.B. 606, *supra* note 43.
[51] *Board Videos*, CALIFORNIA STATE WATER RESOURCES CONTROL BOARD (last updated Feb. 13, 2019).
[52] *Memorandum from Karla A. Nemeth*, Dep't of Water Resources Director, to Public Water Agencies Participating in WaterFix (Feb. 7, 2018).
[53] *ICF,* CALIFORNIA WATERFIX DRAFT SUPPLEMENTAL EIR/EIS (2018).
[54] *San Francisco Bay/Sacramento – San Joaquin Delta Estuary (Bay-Delta) Watershed Efforts*, CALIFORNIA STATE WATER RESOURCES CONTROL BOARD (last updated Dec. 20, 2018).
[55] *Bay-Delta Plan Update: Amendments and Substitute Environmental Document (SED) for Lower San Joaquin River and Southern Delta*, CALIFORNIA WATER BOARDS STATE WATER RESOURCES CONTROL BOARD (last updated Jan. 7, 2019).
[56] *Change Sheet #1*, CALIFORNIA WATER BOARDS STATE WATER RESOURCES CONTROL BOARD (Aug. 20, 2018); *Change Sheet #2*, CALIFORNIA WATER BOARDS STATE WATER RESOURCES CONTROL BOARD (Aug. 20, 2018); *Change Sheet #3*, CALIFORNIA WATER BOARDS STATE WATER RESOURCES CONTROL BOARD (Oct. 25, 2018).

voluntary agreements.[57] In July 2018, the SWRCB also published a Framework for the Sacramento/Delta Update to the Bay Delta Plan.[58]

On May 19, 2018, DWR published a Draft 2018 SGMA Basin Prioritization Process and Results and related data. The report is an update to its 2014 prioritization of California's groundwater basins, as required by SGMA following the 2016 update to the Bulletin 118 basin boundaries.[59] The public comment period closed on August 20, and DWR is expected to release the Final Prioritization in November 2018. To facilitate submission and communication of information to the public pursuant to SGMA, DWR has also developed a web-based SGMA Portal.

On July 24, 2018, the California Water Commission (CWC) approved conditional funding amounts for eight proposed water storage projects and requests from three of the applicants to receive a portion of the funding early to help complete permits and environmental documents.[60] The project proponents applied for the funding through the Water Storage Investment Program (WSIP) administered by the CWC, which provides access to the $2.7 billion fund established by Proposition 1, passed by California voters in 2014. The eight projects were selected based on their anticipated public benefits, including flood control, ecosystem improvement, water quality improvement, emergency response, and recreation. If completed as planned, the eight projects will increase California's water storage capacity by 4.3 million acre-feet.

D. Colorado

1. Judicial

In *Front Range Resources, LLC v. Colo. Ground Water Comm'n*,[61] the Colorado Supreme Court evaluated whether the anti-speculation doctrine applies to replacement plans. Front Range applied to the Groundwater Commission for a replacement plan to allow it to withdraw designated groundwater from an over-appropriated designated groundwater aquifer by replacing the withdrawn groundwater with other sources of water. The Commission dismissed the application and on appeal the District Court likewise rejected the plan. The Supreme Court affirmed the District Court's finding that the anti-speculation doctrine applies to replacement plans involving new appropriations or changes of designated groundwater rights. Front Range's replacement plan constituted a new appropriation and its request for increased use of Front Range's existing wells and the proposed construction of new wells fell within the Groundwater Commission's regulatory definition of a "change of water right." The Supreme Court found that Front Range failed to demonstrate that it had a specific plan and intent to put the replacement plan water to beneficial use and that Front Range's option contract with the City of Aurora to purchase replacement plan water after the replacement plan's approval was speculative because it did not obligate Aurora to purchase any of the water. However, the Supreme Court did not

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[57]Letter from Edmond G. Brown Jr., Governor of the State of California to Felicia Marcus, Chairwoman of the State Water Resources Control Board (Nov. 6, 2018).

[58]*Framework for the Sacramento/Delta Update to the Bay-Delta Plan*, CALIFORNIA WATER BOARDS STATE WATER RESOURCES CONTROL BOARD (July 2018).

[59]Cal. Water Code § 10722.4(c) (West 2016).

[60]*Commission Approves Investing $2.7 Billion in Eight Water Storage Projects*, CALIFORNIA WATER COMMISSION (July 24, 2018).

[61]415 P.3d 807 (Colo. 2018).

hold that option contracts could never satisfy the anti-speculation doctrine under any circumstances.

In *Coors Brewing Co. v. City of Golden*,[62] the Colorado Supreme Court affirmed the Water Court's determination that Coors may not use an augmentation plan amendment to obtain the right to reuse and successively use return flows from water that it diverts out-of-priority pursuant to previously-decreed augmentation plans, but instead must adjudicate a new water right. Additionally, the Supreme Court affirmed the Water Court's decision that water Coors does not consume through its initial use of the water must be returned to the stream, rejecting Coors's argument that the water it diverts and fully replaces under its decreed augmentation plan is functionally equivalent to foreign or developed water, types of water which have an inherent right to reuse or successive use. Finally, the Supreme Court found that the terms of Coors's previously-decreed augmentation plans allow only a single use of water and require Coors to permanently replace return flows to the stream. The Supreme Court was not persuaded by Coors's assertion that it should be allowed to use return flows that are in excess of the amount required to replace depletions from Coors's actual out-of-priority diversions.

In *Jim Hutton Educational Foundation v Rein*,[63] the Colorado Supreme Court evaluated the jurisdictional reach of the water courts with respect to the Foundation's as-applied constitutional challenge to Senate Bill 10-52[64] (S.B. 52), which states that once a designated basin is finalized, the boundaries cannot be altered to exclude any well for which a permit to use designated groundwater had been issued. The Foundation claimed that permitted groundwater wells in the Northern High Plains designated groundwater basin were not actually pumping designated groundwater and were injuring the Foundation's surface water rights, and sought to ultimately get the basin's boundaries redrawn to exclude any improperly permitted wells. The Foundation claimed that S.B. 52 was unconstitutional as applied in the basin because it prevents surface water users from petitioning the Commission to change the basin boundaries. The Colorado Supreme Court determined that the Water Court did not have jurisdiction to evaluate the Foundation's constitutional challenge until the Groundwater Commission first makes a factual determination that the water at issue is not designated groundwater, and thus affirmed the Water Court's decision to dismiss that claim for lack of subject matter jurisdiction. The Supreme Court reasoned that in the context of a jurisdictional conflict between the Commission and Water Court, the Commission must make the initial determination of whether the controversy involves designated groundwater.

2. Legislative

House Bill 18-1199[65] added C.R.S. § 37-90-107.6 to recognize aquifer storage and recovery plans as distinct from replacement plans and authorize the Groundwater Commission to promulgate rules regarding aquifer storage and recovery plans.

Senate Bill 18-041[66] amended C.R.S. § 37-90-107 and C.R.S. § 37-90-137, to provide that well permits associated with exposure of groundwater in sand and gravel

[62]420 P.3d 977 (Colo. 2018).
[63]418 P.3d 1156 (Colo. 2018).
[64]Ch. 63, sec. 1, §37-90-106, 2010 Colo. Sess. Laws 223.
[65]H.B. 18-1199, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018) (adding COLO. REV. STAT. § 37-90-107.6).
[66]S.B. 18-041, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018) (amending COLO. REV. STAT. §§ 37-90-107 and 37-90-137).

mining operations may authorize uses of water incidental to those mining operations, including processing and washing mined materials, dust suppression, mined land reclamation, liner or slurry wall construction, production of concrete and other aggregate-based construction materials, dewatering, and mitigation of impacts from mining and dewatering. The replacement plan or substitute water supply plan for these wells may also include such uses.

House Bill 18-1073[67] amended C.R.S. § 37-45-131 to provide that water conservancy districts may enter into additional types of contracts, including contracts for the use of capacity in the district's water works for municipal and industrial use and added C.R.S. § 37-45.1-106(4) to provide that a water conservancy district or its water activity enterprise may contract with any other person, including another district or water activity enterprise.

Senate Bill 19-019[68] eliminated the time limits for which the Colorado Water Resources and Power Development Authority may make loans under the Authority's water pollution control and drinking water revolving loan programs, so long as the those time limits are in compliance with the federal Clean Water Act and Safe Drinking Water Act.

C.R.S. § 37-92-102(8)[69] was added to allow owners of water storage rights that allow water to be stored in new reservoir capacity to comply with fish and wildlife mitigation measures identified in a fish and wildlife mitigation plan approved under C.R.S. § 37-60-122.2 by contracting with the Colorado Water Conservation Board to make releases from the new capacity to reasonably avoid, minimize, or mitigate impacts of the new capacity on fish and wildlife within a qualifying stream reach. The statutory addition further provides for a water court process to allow the owner of the water right to obtain protection from other water right owners, including protection from exchanges that would reduce the amount of the mitigation release through the qualifying stream reach and to maintain dominion and control over the released water through that stream reach.

E. Idaho

1. Judicial

In *Eden v. State*,[70] the Idaho Supreme Court rejected an attack on the finality of the Snake River Basin Adjudication's (SRBA) *Final Unified Decree*. The court affirmed the SRBA district court's decision denying Gary and Glenna Edens' (Edens) motion to file a late claim for a disallowed water right after issuance of the *Final Unified Decree*. The Idaho Supreme Court determined that Edens received service of SRBA proceedings as required by Idaho Code section 42-1408, which adequately notified Edens of the statutory requirements for filing claims.[71] The court held that Edens' failure to file a claim in accordance with that notice was due to mistake, inadvertence, or neglect on their part and no unique and compelling circumstances warranted setting aside the decree.[72]

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[67]H.B. 18-1073, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018) (amending COLO. REV. STAT. §37-45-131 and adding Colo. Rev. Stat. § 37-45.1-106(4)).
[68]S.B. 18-019, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018) (amending COLO. REV. STAT. §§ 37-95-103, 37-95-107.6, and 37-95-107.8)
[69]S.B. 18-170, 71st Gen. Assemb., 2nd Reg. Sess. (Colo 2018) (adding COLO. REV. STAT. 37-92-102(8)).
[70]429 P.3d 129 (Idaho 2018).
[71]*Id.*
[72]*Id.*

In *Barnes v. Jackson*,[73] the Idaho Supreme Court affirmed the district court's order dismissing Chad and Jane Barnes' (Barnes) complaint against Kirk Jackson (Jackson) seeking forfeiture of Jackson's water right. Jackson obtained his water right in 2012 when he purchased a portion of Craig Bloxham's (Bloxham) property. The water right appurtenant to Bloxham's property (Parent Right) "was split in proportion to the division of land."[74] In 2014, Barnes purchased the remaining portion of Bloxham's property and filed their complaint against Jackson. Barnes supported the complaint with an affidavit from Bloxham stating that from 2004-2012 Bloxham did not irrigate the portion of land Jackson purchased.[75] Barnes argued that, because Bloxham did not irrigate the portion of the property purchased by Jackson, the water right was partially forfeited. In affirming the district court's dismissal of Barnes' complaint, the Idaho Supreme Court determined that, "*even if* partial forfeiture occurred, that partial forfeiture was excused by the 'no control' exception" to forfeiture.[76] The court explained that "[t]he availability of water qualifies as a circumstance over which an appropriator has no control."[77] The court determined that Barnes "failed to identify any instance where Bloxham failed to use all of the water that was available to him under the Parent Right."[78] Accordingly, the five-year statutory period for forfeiture restarted in 2012, when Jackson obtained his water right.[79] In sum, the court held that, "[b]ecause Barnes has failed to present facts that would support a finding that Bloxham did not use all of the water that was available to the Parent Right and filed the Complaint before the five-year period of nonuse had run, the district court did not err when it ruled that Jackson's [water right] was not forfeited."[80]

In *United States v. Black Canyon Irrigation Dist.*[81] and *Black Canyon Irrigation Dist. v. State of Idaho*,[82] the Idaho Supreme Court addressed appeals from a single water right case decided by the SRBA district court. At issue in the SRBA case was the ability to refill federal reservoirs after flood control releases. The United States filed late claims in the SRBA asserting "supplemental beneficial use storage water rights" to store water "in priority after flood-control releases."[83] The SRBA special master recommended the late claims be disallowed on two grounds: (1) the late claims failed because they were not asserted in a previous general stream adjudication involving the same water source; (2) the late claims, "were duplicative of the rights already decreed and unnecessary."[84] The SRBA presiding judge agreed with the special master that the late claims were precluded because of the prior adjudication, but concluded the special master erred in determining that the late claims were duplicative of the underlying water rights. In *United States v. Black Canyon Irrigation Dist*., the Court affirmed the SRBA district court's judgment that claim preclusion barred the United States' late claims. In *Black Canyon Irrigation Dist. v. State of Idaho*, the Court affirmed the SRBA district court's ruling that the special master erred in determining that the late claims were duplicative. The Court agreed with the presiding judge that the special master's decision

[73] 408 P.3d 1266 (Idaho 2018).
[74] *Id.* at 1268.
[75] *Id.*
[76] *Id.* at 1271.
[77] *Id.* at 1270.
[78] *Id.* at 1271.
[79] *Barnes*, 408 P.3d. at 1271.
[80] *Id.*
[81] 408 P.3d 52 (Idaho 2017).
[82] 408 P.3d 899 (Idaho 2018).
[83] *Id*. at 901.
[84] *Id*.

was in effect, "telling [the Director of IDWR] how to count water when determining whether the decreed quantities are satisfied."[85] The court held that this, "improperly encroaches on the [Director of IDWR]'s discretionary duty of administering water."[86]

2. Legislative

Senate Bill 1111, enacted in 2017, codified the findings of the Idaho Supreme Court in *Joyce Livestock Co. v. United States,*[87] wherein the court held that agencies of the federal government cannot hold stock water rights unless they put the water to beneficial use by watering livestock owned by the agency."[88] The 2018 Idaho Legislature went a step further with House Bill 718.[89] Prior to the court's decision in *Joyce Livestock*, thousands of stock water rights were decreed in the name of federal agencies that did not own the livestock being watered on federal land. House Bill 718 directs the Director of the Idaho Department of Water Resources (IDWR) to compile a list of stock water rights decreed to federal agencies based on beneficial use and then, upon approval by the governor, issue an order to the federal agencies requiring them to show cause why the stock water rights should not be lost or forfeited for failure to put the water to beneficial use.[90]

F. Kansas

1. Administrative

In April, the Chief Engineer of the Department of Agriculture in the Division of Water Resources issued an Order designating much of the Northwest Kansas Groundwater Management District (GMD) No. 4 as a Local Enhanced Management Area (LEMA). The LEMA statute permits GMDs to propose corrective controls to address declining groundwater levels in defined areas within a GMD.[91] The Chief Engineer approved proposed reductions in the quantities that can be withdrawn for irrigation, without regard to priority, during calendar years 2018-2022 in all townships under the GMD with an average annual decline during 2004-2015 that exceeded 0.5 percent. A Petition for Judicial Review of the Order has been filed in the district court.

G. Montana

1. Judicial

In *Teton Coop Canal Co. v. Teton Coop Reservoir Co.*,[92] the Montana Supreme Court held the Water Court properly assigned a 1936 priority date to the Teton Canal's Eureka Reservoir and did not exceed the scope of remand by decreeing volumes for Teton Canal's direct flow and storage water rights. The Montana Supreme Court further held

[85] *Id*. at 912.
[86] *Id*.
[87] 156 P.3d 502 (Idaho 2007).
[88] S.B. 1111, 64th Leg., 1st Reg. Sess. (Idaho 2017).
[89] H.B. 718, 64th Leg., 2nd Reg. Sess. (Idaho 2018).
[90] *Id.*
[91] KAN. STAT. ANN. § 82a-1041 (2018).
[92] 412 P.3d 1 (Mont. 2018).

Teton Canal could temporarily store its 1890 direct flow water right in the Eureka Reservoir for later use during the same irrigation season.

In *Teton Coop Reservoir Co. v. Farmers Cooperative Canal Co.*,[93] the Montana Supreme Court held that there was no statutory requirement that a filed notice of appropriation include a specific land description of the intended place of use or that it identify a specific reservoir at the time of filing the notice. The Court also held the equitable doctrine of laches bars Teton Reservoir from asserting its 1902 priority date against Teton Canal's junior reservoirs.

In *United States v. Korman*,[94] the Montana Supreme Court ruled that stock water rights for surface water reservoirs were not exempt from the statewide adjudication filing requirements, and the Kormans forfeited their alleged stock rights by failing to timely file statements of claim. The Court also upheld the wildlife purpose claimed by the United States for two stock water reservoirs ruling the additional purpose did not expand the original appropriations.

2. Administrative

The Montana Department of Natural Resources and Conservation (Department) amended its rules[95] regarding water right permitting to address, among other issues, combined groundwater appropriations, deficiency letters, sage grouse, aquifer tests, and physical surface water availability. The Department also adopted an administrative rule[96] creating the Burlington Northern Santa Fe Somers Site Controlled Groundwater Area.

H. Nebraska

1. Judicial

In *Cappel v. State of Nebraska*,[97] plaintiffs, surface water right holders, sought compensation for the alleged taking of their right to use surface water when the State closed their appropriations due to a call to meet obligations to Kansas under the Republican River Compact. The Nebraska Supreme Court denied relief, holding that the right to appropriate surface water is not an ownership of property and thus regulating it by prohibiting its use to comply with a compact did not amount to a taking.

The Nebraska Supreme Court determined in *Upper Republican Natural Resources District v. Dundy County Board of Equalization*,[98] that leasing back real estate owned by the Nebraska Resources Department (NRD) that it had purchased from the prior owner was for a public purpose and thus tax exempt. The NRD claimed that it was required to own the overlying land (rather than just the use of groundwater underneath the land) in order to pump the water, despite the fact it had sold other lands and retained the right to pump ground water from it as a part of the sale. The county asserted that the lease back of the use of land surface for grazing cattle was not for a predominately public purpose and should be subject to taxation. The court, however, disagreed.

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[93]414 P.3d 1249 (Mont. 2018).
[94]427 P.3d 72 (Mont. 2018).
[95]Mont. Admin. Reg. 36-22-196 (2018).
[96]Mont. Admin. Reg. 36-22-199 (2018).
[97]905 N.W.2d 38 (Neb. 2017).
[98]912 N.W.2d 796 (Neb. 2018).

2. Legislative

LB 758[99] authorizes[100] voluntary payments to local governmental jurisdictions in lieu of property taxes by natural resources districts or entities form by them for purposes of a specific type of stream augmentation projects.

I. Nevada

1. Judicial

In *King v. St. Clair*,[101] the Nevada Supreme Court found that nonuse of a water right alone does not establish an intent to abandon. The property owner found an abandoned well on his property and applied to the State Engineer for a permit to temporarily change the point of diversion to another location on his property. The property owner submitted proof with his application to the State Engineer that there was a pre-statutory vested water right held by a prior owner. The State Engineer denied the application on the basis the prior owner had not utilized the water right in decades. The Nevada Supreme Court held that nonuse alone does not establish clear and convincing evidence that a property owner intended to abandon his water rights.

In *Eureka County v. Seventh Judicial District Court in and for County of Eureka*,[102] the Nevada Supreme Court held that junior water rights holders in Diamond Valley must be given notice and an opportunity to be heard at a show cause hearing that could potentially lead to curtailment proceedings. Water rights are property rights protected by due process and because the district court could order the State Engineer to begin curtailment proceedings at the show cause hearing, notice to all water rights holders in the Diamond Valley Hydrographic Basin was required.

2. Administrative

In 2018, the State Engineer issued the following orders regarding water resources. Order 1292 requires water users of the Diamond Valley Hydrographic Basin to install and maintain measuring devices. Order 1197A[103] curtails new appropriations of groundwater within the Amargosa Valley Hydrographic Basin, Nye County, Nevada. Order 1295[104] curtails new appropriations of groundwater within the Elko Segment and Marys Creek Area Hydrographic Basins and Order 1298[105] curtails new appropriations in Hualapai Flat Hydrographic Basin. Order 1297[106] implements rules limiting movement of junior groundwater water rights in the Silver State Hydrographic Basin. Order 1293A[107] amends a prior order prohibiting the drilling of new domestic wells in the Pahrump Artesian Basin,

[99]L.B. 758, 105th Leg., 2d Reg. Sess. (Neb. 2018).
[100]NEB. REV. STAT. § 46-1701 (2018).
[101]414 P.3d 314 (Nev. 2018).
[102]417 P.3d 1121 (Nev. 2018).
[103]Nev. State Eng'r Order 1197A (2018).
[104]Nev. State Eng'r Order 1295 (2018).
[105]Nev. State Eng'r Order 1298 (2018).
[106]Nev. State Eng'r Order 1297 (2018).
[107]Nev. State Eng'r Order 1293A (2018).

in Nye County, Nevada. Order 1293A was overturned by a district court; the Nevada State Engineer's office has appealed the decision.[108]

In response to a remand order from the district court in and for White Pine County, the State Engineer issued Ruling 6446 denying underground water right applications of the Southern Nevada Water Authority in Cave Valley, Delamar Valley, Dry Lake Valley, and Spring Valley Hydrographic Basins in Lincoln and White Pine Counties.

On August 30, 2018, the State Engineer issued his preliminary order of determination in the adjudication of the waters of Diamond Valley Hydrographic Basin and objections to the preliminary order were filed with the State Engineer by November 7, 2018. Hearings on the preliminary order of determination are scheduled for early 2019. On October 30, 2018, the State Engineer held a public hearing under the provisions of NRS 534.037 to receive testimony on a proposed groundwater management plan to remove the critical management area designation for the Diamond Valley Hydrographic Basin.

J. New Mexico

1. Judicial

In *State ex rel. State Engineer v. San Juan Agricultural Water Users Ass'n*,[109] the New Mexico Court of Appeals affirmed an agreement between the Navajo Nation and state government settling Navajo water rights claims in the San Juan River Basin. Leading up to this litigation, in 2009, Congress enacted federal legislation[110] to approve and implement a Settlement Agreement reached between the State and the Navajo Nation regarding the Nation's claim for the majority of water from the San Juan Basin. The San Juan County District Court was asked to approve water rights previously allocated in the settlement, which would benefit, among other projects, the Navajo-Gallup Water Supply Project. Despite objections from non-settling parties, the District Court approved the Settlement Agreement, finding it fair, adequate, reasonable, and consistent with the public interest and all applicable laws. On appeal, the Court of Appeals upheld the District Court's ruling. The court noted that water is a commodity that can move in interstate commerce; because the San Juan River crosses several state boundaries, it is subject to the control of the federal, not state, government. The State and several other parties have appealed this portion of the ruling to the New Mexico Supreme Court.

Further, tribes have a proprietary interest in waters recognized by federal reservation treaties, and state law does not apply to Native Americans or their property. Tribes are not required to prove immediate beneficial use to quantify their water rights as required by state law. Further, the District Court was correct in applying the fair, adequate, and reasonable standard to the Settlement and was in compliance with statutory and constitutional requirements. The Navajo Nation agreed to forgo larger water claims in exchange for federal support for construction of a water pipeline in Navajo country.

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[108]Robin Hebrock, *Pahrump Water Order Case in the Hands of Nevada Supreme Court*, PAHRUMP VALLEY TIMES (Jan. 4, 2019).

[109]425 P.3d 723 (N.M. Ct. App. 2018).

[110]Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009).

2. Legislative

The New Mexico Drought Preparedness Act of 2018[111] directs the Bureau of Reclamation to carry out a water acquisition program in New Mexico's major surface water basins. The Bureau is charged with leasing or buying water rights consistent with the Rio Grande Compact and applicable state water rights law. Further, it will take actions to enhance stream flow to benefit fish and wildlife, water quality, and river ecosystem restoration and to enhance conservation of working land, water, and watersheds.

In response to nearly 1,500 protests filed with the State Engineer's administrative hearing unit regarding a permit for a new appropriation of groundwater in the Rio Grande Basin sought by a group of New York-based investors operating as Augustin Plains Ranch, LLC (Augustin), the New Mexico Legislature asked the State Engineer to delay issuing a permit until it could examine potential impairment to senior water users.[112] The company sought a permit to appropriate 54,000 acre-feet of water per year in the Plains of San Augustin to market water to municipalities and the state.

3. Administrative

The New Mexico State Engineer denied as speculative the application of Augustin Plains Ranch, LLC (Augustin) to appropriate 54,000 acre feet per year of groundwater in the Rio Grande Underground Water Basin.[113] Using Colorado law to explain the, "anti-speculation doctrine," the State Engineer found that Augustin's application was speculative because it failed to identify any contracts for use of the water or a specific plan for the purchase and delivery of the water to specific users, which Augustin said would include municipalities and commercial users in seven counties along the Rio Grande. Without that specificity, the State Engineer found that the application was speculative and its approval would, "encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whaterver unappropriated water remains."[114]

New Mexico's Interstate Stream Commission (ISC) is required to review the State Water Plan (SWP) every five years and amend or update it as needed.[115] The SWP is a strategic management tool for the Legislature, water managers, and the regional planning districts, which is intended for policy direction in managing the state's waters. In June 2018, the ISC released a draft State Water Plan update for public comment. The state's *Final Plan*[116] was released December 6, 2018.

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[111]S. 1012, 115th Cong. (2018).

[112]S. Mem. 30, 53d Leg., 2d Reg. Sess. (N.M. 2018).

[113]Report and Recommendation Granting Motions for Summary Judgment, *In the Matter of the Corrected Application Filed by Augustin Plains Ranch, LLC, for Permit to Appropriate Groundwater in the Rio Grande Underground Water Basin in the State of New Mexico*, N.M. State Engineer, Hearing No. 17-005, OSE File No. RG-89943 POD 1-POD 37 (Aug. 1, 2018).

[114]*Id.*, ¶ 80 (quoting *Colorado Riv. Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (Colo. 1979)).

[115]N.M. STAT. ANN. § 72-14-3.1 (2003).

[116]*2018 New Mexico State Water Plan*, N.M. INTERSTATE STREAM COMM'N (Dec. 6, 2018).

K. North Dakota

1. Judicial

In 2005, the Province of Manitoba sued the Secretary of the Department of the Interior and officials of the Bureau of Reclamation (Bureau), challenging their compliance with the National Environmental Policy Act (NEPA) in approving a project to transfer water between river basins for the Northwest Area Water Supply (NAWS). North Dakota intervened as a defendant. In *Government of Manitoba v. Norton*,[117] the United States District Court for the District of Columbia remanded to the Bureau and subsequently entered an order partially granting Manitoba's motion for permanent injunction but allowing certain project-related activities to proceed. Following the Bureau's NEPA analysis, Missouri filed a separate challenge, alleging that the Bureau's Environmental Impact Statement (EIS) did not properly account for cumulative effects of water withdrawal from the Missouri River. Following consolidation of Missouri's and Manitoba's cases, the district court, in *Government of Manitoba v. Salazar*,[118] again remanded to the Bureau. In *Government of Manitoba v. Zinke*,[119]after completion of further NEPA review, the district court granted the Bureau and North Dakota's motions for summary judgment, holding that the supplemental EIS work was adequate. The district court also held that Missouri lacked standing as parens partriae to bring an action against the federal government challenging the NEPA work.[120] Both Manitoba and Missouri appealed, but a settlement was reached with Manitoba. Missouri's appeal continues, with oral arguments on the standing issue scheduled at the D.C. Circuit for November 8, 2018.

L. Oklahoma

1. Legislative

Signed into law on May 3, 2018, Senate Bill 1294[121] modifies Oklahoma Groundwater Law[122] by allowing the Oklahoma Water Resources Board (OWRB) to delay or gradually implement the annual withdrawal limits set by the agency when a Maximum Annual Yield (MAY) and Equal Proportionate Share (EPS) are set for a specific groundwater basin in the state. Senate Bill 1294 made additional changes to Oklahoma Groundwater unrelated to the delayed or gradual implementation of annual withdrawal limits. Language was added to 82 O.S. Section 1020.4 which explicitly authorizes the OWRB to cooperate with tribal agencies in conducting hydrological surveys. Revisions to 82 O.S. Section 1020.17 that authorize the OWRB to enact well spacing rules over a groundwater basin prior to setting a MAY and EPS, where previously the agency could not set well spacing rules for unstudied basins.[123] Language was added to 82 O.S. Section 1020.18 provides explicit, but not exhaustive, criteria for applicants seeking exceptions to the OWRB well spacing rules.[124] Finally, language was added to 82 O.S. Section

[117]398 F. Supp. 2d 41 (D.D.C. 2005).
[118]691 F. Supp. 2d 37 (D.D.C. 2010).
[119]273 F. Supp. 3d 145 (D.D.C. 2017).
[120]*Id.* at 167-68.
[121]SB 1294 is codified in 82 O.S. §§ 1020.4, 1020.6, 1020.17, and 1020.18 (OSCN 2018).
[122]82 O.S. § 1020.1 *et seq.* (OSCN 2018).
[123]*See* 82 O.S. §1020.17 (OSCN 2017, superseded November 1, 2018).
[124]82 O.S. § 1020.18 (OSCN 2018).

1020.6(D), which states that subsequent or updated hydrologic surveys on already-studied groundwater basins will not affect previously-issued regular permits for groundwater use.[125]

Signed into law on May 1, 2018, House Bill 3405 modifies Oklahoma Groundwater Law[126] by expanding the statutory definition of "groundwater" to include water with greater concentrations of total dissolved solids. Under the previous version of 82 O.S. Section 1020.1, "groundwater" referred only to fresh water with less than 5,000 parts per million total dissolved solids, and defined all other water as "salt water."[127] The new law adds a new definition for "marginal water," which includes water which has 5,000 or greater and less than 10,000 parts per million total dissolved solids.[128] The revised statute now includes both fresh water and marginal water under the ground within its definition of "groundwater."

This change to Oklahoma Groundwater Law was recommended by Oklahoma's Comprehensive Water Plan,[129] and is intended to promote the beneficial use of waters which were previously outside of the regulatory jurisdiction of the Oklahoma Water Resources Board. Though not regulated prior to the passage of House Bill 3405, there is legal support found in Oklahoma's statutory provision in 60 O.S. Section 60 indicating that marginal waters are the property of the owner of the overlying surface estate.[130] House Bill 3405 does not directly speak to the ownership rights of marginal water in Oklahoma.

Under the provisions of 69 O.S. Section 1707, the Oklahoma Turnpike Authority (OTA) is authorized to acquired property, by purchase or condemnation, to the surface estate of real property for the purpose of constructing or maintaining turnpike projects. Prior to the enactment of House Bill 3089 on April 18, 2018, that surface estate include rights to groundwater.[131] The revised statute allows the condemnee or acquiree to make a written request to sever and retain groundwater rights to the land.[132] While the new statutory language permits severance of groundwater rights, the statute prohibits any reservation of a right of access to the property or the construction, maintenance, or operation of any water well on property owned by the OTA without express written approval of the OTA.[133]

2. Administrative

Following the enactment of legislation in 2016 authorizing the storage of stream water in underground aquifers for later recovery, the OWRB enacted new rules in 2018 for implementing the agency's authorized regulation of Aquifer Storage and Recovery (ASR) activities. The new rules, found in Chapter 32 of Title 785 of the Oklahoma Administrative Code (OAC), require all ASR activities to be conducted pursuant to a site-specific ASR

[125] 82 O.S. § 1020.6(D) (OSCN 2018).
[126] 82 O.S. § 1020.1 *et seq.* (OSCN 2018).
[127] *See* 82 O.S. § 1020.1 (OSCN 2017, superseded November 1, 2018).
[128] *Id.*
[129] *See* 2012 Oklahoma Comprehensive Water Plan Executive Report, at p. 97.
[130] *See id.* (The owner of the land owns water flowing under its surface but not forming a definite stream).
[131] *See* 60 O.S. § 60 (The owner of the land owns water flowing under its surface but not forming a definite stream).
[132] 69 O.S. § 1707 (OSCN 2018).
[133] *Id.*

plan approved by the agency.[134] The new rules prescribe procedures for submitting an application for approval of an ASR project, public notice requirements, administrative hearings for contested projects, and criteria for approval of such projects by the OWRB.[135] Following the issuance of an ASR permit, the new rules further require annual reporting by the permit holder, and provide authority for the OWRB to suspend or cancel ASR permits for non-compliance with the terms of the permit or the site-specific ASR plan approved by the agency.[136]

M. Oregon

1. Judicial

In *Klamath Tribes v. U.S. Bureau of Reclamation*,[137] the Klamath Tribes moved for a preliminary injunction to require the Bureau of Reclamation to maintain water levels in Upper Klamath Lake during the 2018 irrigation season, as suggested in a joint federal agency Biological Opinion.[138] The U.S. District Court for the Northern District of California denied the injunction, but granted Defendants' motion to transfer venue, thereby transferring this case to the U.S. District Court of Oregon. The California District Court stated the transferee judge will determine the appropriate course of action to protect the endangered sucker fish and protect water deliveries to Klamath Irrigation District farmers and ranchers.

2. Administrative

The Governor issued Executive Orders No. 18-02, 18-04, 18-06, 18-07, 18-09, 18-10, 18-12, 18-19, 18-20, 18-25, 18-26 designating drought emergencies in Klamath County,[139] Grant County,[140] Harney County,[141] Lake County,[142] Baker County,[143] Douglas County,[144] Wheeler County,[145] Lincoln County,[146] Morrow County,[147] Gilliam County,[148] Malheur County,[149] respectively, until December 31, 2018.

The Oregon Water Resources Department issued an administrative order amending Oregon Administrative Rule (OAR) 690-517-0000, which changes the classification of water uses in the South Coast Basin Program for the Smith River watershed to restrict new

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[134]OKLA. ADMIN. CODE § 785:32-3-2 (2018).
[135]OKLA. ADMIN. CODE §§§ 785:32-3-5, 785:32-3-6, 785:32-3-7 (2018).
[136]OKLA. ADMIN. CODE §§ 785:32-5-2, 785:32-5-3 (2018).
[137]No. 18-cv-03078-WHO, 2018 U.S. Dist. LEXIS 124741 (N. Dist. Cal. July 25, 2018).
[138]*Id.* at *5.
[139]Office of the Gov., State of Or., Exec. Order No. 18-02 (Feb. 13, 2018).
[140]Office of the Gov., State of Or., Exec. Order No. 18-04 (Apr. 10, 2018).
[141]Office of the Gov., State of Or., Exec. Order No. 18-06 (May 24, 2018).
[142]Office of the Gov., State of Or., Exec. Order No. 18-07 (May 29, 2018).
[143]Office of the Gov., State of Or., Exec. Order No. 18-09 (June 14, 2018).
[144]Office of the Gov., State of Or., Exec. Order No. 18-10 (June 14, 2018).
[145]Office of the Gov., State of Or., Exec. Order No. 18-12 (July 18, 2018).
[146]Office of the Gov., State of Or., Exec. Order No. 18-19 (Aug. 14, 2018).
[147]Office of the Gov., State of Or., Exec. Order No. 18-20 (Aug. 14, 2018).
[148]Office of the Gov., State of Or., Exec. Order No. 18-25 (Sept. 24, 2018).
[149]Office of the Gov., State of Or., Exec. Order No. 18-26 (Oct. 17, 2018).

uses.[150] OAR 690-205-0005 was amended to increase the bond for water well constructors and for landowner water well construction.[151] Temporary rules were issued in OAR chapter 690, division 22 that were effective from April 17, 2018 to October 13, 2018. The temporary rules implemented a drought preference of water right uses for human consumption in Klamath County and for stock watering uses in the Williamson River Basin over other water uses, regardless of the priority date of the water use rights.[152]

N. South Dakota

1. Legislative

During the 2018 legislative session, the South Dakota Legislature enacted HB 1081,[153] which repealed the sunset provision contained in the nonmeandered water legislation which had been passed during the 2017 special session. The 2017 legislation,[154] which generally provided that all nonmeandered waters overlying private property are open for recreation unless the landowner otherwise designates the area as closed, was due to be automatically repealed on June 30, 2018.[155] HB 1081 became effective on June 29, 2018.

The South Dakota Legislature also enacted HB 1140,[156] which prohibits the vacation of a section-line highway which provides access to public waters which are forty acres or greater in size. The legislation, however, specifically provides that this section does not prohibit the closure of a road if it is unsafe for travel.

O. Texas

1. Judicial

On June 18, 2018, the United States District Court for the Western District of Texas issued its decision in *League of United Latin American Citizens* (LULAC) *v. Edwards Aquifer Authority*.[157] The League of United Latin American Citizens (LULAC), three minority plaintiffs, and intervenor San Antonio Water System, sued the Edwards Aquifer Authority (EAA), under the one person/one vote doctrine of the Equal Protection Clause of the U.S. Constitution. Plaintiffs argued that the members of the Board of Directors of the EAA are required by the Equal Protection Clause to be elected from districts that are equally apportioned by population, rather than by the regionally-balanced districts established by the Texas Legislature. The court held that the EAA is a special purpose district with a limited purpose and scope to fulfill the EAA Act and not a general purpose governmental body and, therefore, the EAA is not subject to one person/one vote. Further, the court found that the EAA directors' districts have a rational basis as they are balanced to reflect the different water interests in the region that are disproportionately impacted by the EAA. The case is currently on appeal to the Fifth Circuit.

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[150]OR. ADMIN. R. 690-517-0000 (2018).
[151]OR. ADMIN. R. 690-205-0005 (2018).
[152]OR. ADMIN. R. 690-022-0020 (2018).
[153]H.B. 1081, 2018 Leg., 93rd Sess. (S.D. 2018).
[154]H.B. 1001, 2017 Leg., 92nd Sess. (S.D. 2017).
[155]*Id.*
[156]H.B. 1140, 2018 Leg., 93rd Sess. (S.D. 2018).
[157]313 F. Supp. 3d. 735 (W.D. Tex. 2018).

2. Legislative

At the close of the legislative session in 2017, Texas' Speaker of the House issued *Interim Charges for the House Committee on Natural Resources*,[158] asking that the Committee investigate several issues for possible legislative action in 2019. These charges include requests to:

- Examine the status of water markets in Texas and the potential benefits of and challenges to expanded markets for water;
- Analyze the need to update Water Availability Models for river basins;
- Study the hazards presented by abandoned and deteriorated groundwater wells, and make recommendations to address the contamination and other concerns these wells may represent; and
- Examine opportunities to enhance water development opportunities involving neighboring states and Mexico (including evaluating lessons from previous attempts to import new water supplies, as well as the impacts of noncompliance with the 1944 treaty with Mexico on the Rio Grande Valley region).

3. Administrative

On September 26, 2018, Texas' Attorney General (AG) issued an opinion[159] in which the AG considered the authority of a groundwater conservation district (GCD) to amend a historic or existing use permit as to the purpose of use or place of use. The Texas Supreme Court, in its 2008 *Guitar Holding* case, held that while a GCD could preserve historic and existing use, that preservation was tied both to the amount and purpose of the prior use, and once groundwater used for irrigation was transferred out of the district, it no longer qualified for a historic or existing use permit and the transfer must be treated as a new use subject to requirements applicable to all new uses. This opinion concerns the ability of a GCD to amend a historic or existing use permit where the new place of use is within the district. The Attorney General noted that under the *Guitar Holding* case, a change in the purpose of the proposed use of water to be produced under a historic or existing use permit is a new use, even if the new use would occur within a GCD. The AG stated that whether a district must treat an application for an amended permit as an application for a new use will depend on the particular facts and is a matter for a GCD to determine, subject to judicial review. The AG then stated that a GCD has broad regulatory powers to accept an owner's surrender of a portion of the right to produce under a historic or existing use permit, while maintaining protection on the remainder. Further, the AG opined that a GCD must apply its new use requirements uniformly to all requests for new uses, whether the request appears in an application to amend a historic or existing use or in an application for a new use permit.

[158]Joe Straus, *House Speaker's Interim Committee Charges*, 85th Leg. Sess. (Tex. 2017).
[159]Tex. Att'y Gen. Op. No. KP-0216 (2018).

P. Utah

1. Judicial

In *Utah Stream Access Coalition v. Orange Street Development*,[160] the Utah Supreme Court concerns the ongoing tug-and-pull regarding recreational access to streambeds in Utah. In 2008, the Utah Supreme Court, in *Conaster v. Johnson*,[161] held that a public easement right exists to touch the beds of all Utah waterways for recreational or other lawful purposes. In direct response to this decision, the Utah State Legislature in 2010 adopted the Public Waters Access Act,[162] scaling back the rights described in Conaster. That act restricted recreational streambed and water access to public water that is navigable water or on public property. Otherwise, as for public water running through private property, a person can have recreational access to the streambed with permission of the private property owner. A person can float on the public water, through private property, so long as he does not touch the streambed except as incidentally required for safe passage and continued movement, to portage around obstructions, and to fish while floating.

Following these prior decisions, the Utah Stream Access Coalition (USAC) sued Orange Street Development and other property owners along a one-mile stretch of the Weber River, requesting a declaration that the one-mile stretch was "navigable water" to which the public has a statutory right of recreational use of the water and streambed. The District Court ruled in USAC's favor, holding the stretch of river to be navigable, and the Supreme Court affirmed that decision. The Court held that the Public Waters Access Act invokes a "legal term of art embedded in federal law," and the river in question qualifies as navigable under the so called "navigability for title" standard used in federal cases.[163] This test requires the Court to determine whether the waterway met navigability standards as of the time of statehood. The Court concluded that this stretch of the Weber River met the standard because, as of the time of Utah's statehood, the waterway was "useful [for] commerce" and "used and susceptible of being used, in its natural and ordinary condition, as highway of commerce,"[164] citing the Weber River's historic use for log drives.

The Court did reverse the District Court decision to quiet title to the streambed in the name of the State of Utah. The parties specifically agreed that title to the streambed was not an issue in the case, and thus the District Court erred in making such a determination. This potentially leaves open future questions regarding title to streambeds of public waterways abutting private property.

In *Utah State Engineer v. Johnson*,[165] the Utah Court of Appeals clarified a matter relating to the administration of the State's general adjudication of water rights.[166] Here, the court confirmed that diligence claims (claims for water rights dating back before March 12, 1903, when the State Legislature instated a mandatory water appropriation application process) cannot be made—they are in fact untimely—in a water area that has already been the subject of a "proposed determination" in the State's general adjudication process. The appellant, Evan Johnson, was the successor in interest to a diligence claim that was first claimed in 1981 and later included in a 1985 proposed determination. Johnson attempted

[160] 416 P.3d 553 (Utah 2017).
[161] 194 P.3d 897 (Utah 2008).
[162] UTAH CODE ANN. §§ 73-29-101, *et seq*.
[163] *USAC*, *supra* note 160, at ¶ 3.
[164] *Id.* at ¶ 28.
[165] 427 P.3d 558 (Utah Ct. App. 2018).
[166] *Id.* at ¶ 18.

to file an additional diligence claim in 1999 to essentially expand the size of the original claim. His attempt was rejected by the State Engineer, the District Court, and finally here at the Court of Appeals. The Court concluded that the diligence claim should have been included with the original claim, before the proposed determination was issued. Not only that, but the claimant also had the opportunity to object to the proposed determination for 90 days after its publication, and this action was not taken by Johnson or his predecessors. Thus, Johnson and his predecessors did not avail themselves of their due process rights several decades ago, and a refusal to consider new claims at this late date is not a violation of Johnson's due process.

In *Haik v. Jones*,[167] the Utah Supreme Court took up a case by Plaintiff/Appellant Mark Haik, who has spent the past two decades engaging in several lawsuits to attempt to force Salt Lake City to serve water to his property in Little Cottonwood Canyon. This time, Haik protested a change application filed by Salt Lake City to modify one of its water rights to expand the place of use to add an addition 25 acres to serve an additional 10 homes. The change application did not impact Haik's property or water rights. After the State Engineer approved the change application, Haik sued, but his case was dismissed by the District Court for Haik's lack of standing as an aggrieved party. The Supreme Court ultimately affirmed the decision. Haik exhibited no palpable injury or particularized harm, and thus did not meet traditional standing requirements. He also didn't qualify for public interest standing according to the Court.

In *EnerVest, Ltd. v. Utah State Engineer*,[168] the Utah Supreme Court discussed the issue of standing to appeal a district court's decision in regards to an objection made to a proposed determination. This case was a long time coming, in that the general adjudication of the area at issue—Minnie Maud Creek—was initiated all the way back in 1956, with a proposed determination being published in 1964. At that time, four objections were filed to challenge the Minnie Maud Reservoir and Irrigation Company's (MMRIC) water rights. Nothing more happened until 2012, when EnerVest, Ltd. filed a petition to expedite a hearing on the objections that had been pending since the 1960s. At issue was whether MMRIC did, in fact, own the water rights at issue. Several parties participated in the resulting hearing, in which the district court ruled that MMRIC was correctly listed as owner of the water rights in the proposed determination. The decision was appealed, but certain other parties eventually dismissed their appeal, leaving EnerVest as the sole appealing party. The problem for EnerVest was that it had not, itself, filed an objection to the proposed determination to begin with. Ultimately, the Court determined that EnerVest lacked standing to pursue the appeal on its own, noting that "a non-objecting party's interest can piggyback on another party's objection, but only as far as the objecting party is willing to travel. Once the objecting party chooses to end its objection's journey, the non-objecting party cannot take over."[169] The case was dismissed for lack of jurisdiction.

2. Legislative

H.B. 74[170] exempts pickup trucks owned by a canal company that are being used exclusively for canal and irrigation purposes from emission inspection requirements. To receive the exemption, the canal company must provide a signed statement to the

[167]427 P.3d 1155 (Utah 2018).
[168]2018 UT 55.
[169]*Id.* at ¶ 45.
[170]H.B. 74, 62nd Leg., Gen. Sess. (Utah 2018).

legislative body of the county stating that the pickup truck qualifies for the emissions inspection exemption under this new section of law.

H.B. 303[171] modifies portions of the Safe Drinking Water Act of Title 19, Chapter 4 of the Utah Code by requiring a community water system serving a population of 500 or more to collect and annually report accurate water use data to the Division of Water Rights. The Bill requires the Director of the Division of Drinking Water to establish system specific water source sizing requirements, depending on the size of the system. The Board of Drinking Water is empowered to make rules setting fines and penalties for failure to comply with such reporting requirement. Wholesale water suppliers serving a population of more than 10,000 and serving a population that is 75% or more of the total population served, are exempt from these requirements.

H.B. 381[172] creates the Agricultural Water Optimization Task Force for the purpose of identifying critical issues facing the state's long-term water supply, identify current obstacles to, and constraints upon, quantification of agricultural water use on a basin level, and identify means, methods, systems, or technologies with the potential to maintain or increase agricultural production while reducing the agricultural industry's water diversion and consumption. The task force is to consist of a person representing the Department of Agriculture and Food, a person representing the Board or Division of Water Resources, a person representing the Division of Water Rights, a person representing the Division of Water Quality, a person representing the interests of the agricultural industry, a person representing environmental interests, a person representing water conservancy districts, and one nonvoting member from the higher education community with a background in research.

S.B. 34[173] removes the December 31, 2018 sunset date for the Legislative Water Development Commission and authorizes the Commission to meet up to six times per year without approval from the Legislative Management Committee.

S.B. 35[174] extends the repeal date of the instream flow water right for trout habitat from December 31, 2018 to December 31, 2019.

S.B. 45[175] requires the State Engineer, when conducting a field examination of a diligence claim, to include an evaluation of the asserted beneficial use as it existed at the time of the claimed priority date, specifically identifying any portion of the claim not placed to beneficial use in accordance with law. As per existing portions of the statute, this law only applies to diligence claims submitted on or after May 14, 2013.

S.B. 61[176] makes a few changes to the part of the Water Code dealing with general adjudications of water rights. A minor technical modification is made to the wording of the general adjudication summons. The Bill states that an untimely Water Users Claim filed in the general adjudication shall be returned to the claimant with no further action. Finally, it authorizes the State Engineer to file addenda to a proposed determination.

S.B. 96[177] provides a process for a property owner and the owner of water conveyance facility to approve and move forward with a plan to modify a water conveyance facility, and states that the Property Rights Ombudsman can provide mediation and arbitration services in this regard when requested.

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[171]H.B. 303, 62nd Leg., Gen. Sess. (Utah 2018).
[172]H.B. 303, 62nd Leg., Gen. Sess. (Utah 2018).
[173]S.B. 34, 62nd Leg., Gen. Sess. (Utah 2018).
[174]S.B. 35, 62nd Leg., Gen. Sess. (Utah 2018).
[175]S.B. 45, 62nd Leg., Gen. Sess. (Utah 2018).
[176]S.B. 61, 62nd Leg., Gen. Sess. (Utah 2018).
[177]S.B. 96, 62nd Leg., Gen. Sess. (Utah 2018).

Q. Washington

1. Judicial

On September 5, 2018, in *Hamilton, et al., v. Washington State Pollution Control Hearings Board, et al.,* Division II of the Washington State Court of Appeals rejected an appeal by a party claiming an ownership interest in a water right because the appeal was late and failed to challenge the proper agency action.[178] The case addresses a nephew's efforts to unwind his aunt's sale of an irrigation groundwater right to a city. The city obtained approval from the Department after an eight-year process to change the place and purpose of use for the city's use of the right for municipal purposes. The nephew had not participated in the transaction with the city or the Department's process, nor did he appeal the Department's decision approving the changes sought by the City. Three years after the Department issued its decision approving the City's application the nephew wrote to the Department to assert his interest in the underlying water right. The Department responded with a letter in which it indicated that its decision was final and could no longer be appealed.

The nephew appealed the Department's letter to the Pollution Control Hearings Board (PCHB), which granted summary judgment in favor of the Department. On appeal, the Court affirmed the PCHB's conclusion that the Department's letter was not an appealable order. Additionally, the court rejected the nephew's alternative argument that he was entitled to seek judicial relief under a catch-all appeal provision in the Administrative Procedures Act (APA) for appeals of an "other agency action" that is neither an agency order nor an agency rule.[179] The court relied on language in the APA that limits the catch-all avenue to appeals to those "whose rights are violated by an agency's *failure to perform a duty* that *is required by law to be performed*. . . ."[180] The Court acknowledged that the Water Code includes a provision that the Department "shall" return an application when it finds an application to be defective.[181] However, the Court held that the provision applies only while the application is pending and is inapplicable after the Department has rendered its decision. Accordingly, the Court concluded that the Department was under no legal duty to correct the errors the nephew alleged and appeal was therefore not available under the APA's "catch-all" for "other agency action."

2. Legislative

On January 19, 2018, the Governor signed Engrossed Senate Substitute Senate Bill 6091,[182] also known as the "*Hirst* Fix." ESSB 6091 seeks to redress some of the implications of a landmark state Supreme Court decision, *Whatcom County v. Hirst*,[183] in which the Court concluded that the Growth Management Act (GMA), the state's primary land use planning statute, requires counties to play an expansive role in the regulation of water availability. ESSB 6091 eases restrictions on new domestic wells in rural areas and

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[178] 426 P.3d 281 (Wash. 2018).
[179] WASH. REV. CODE § 34.05.570(4) (2018).
[180] *Id.*
[181] WASH. REV. CODE § 90.03.270 (2018).
[182] 2018 Wash. Sess. Laws, Ch. 1 (ESSB 6091).
[183] Whatcom County v. Hirst, 381 P.3d 1 (Wash. 2016).

simultaneously initiating a significant new mitigation planning effort in most watersheds in the state to offset impacts of those new wells.

ESSB 6091 also establishes a process to fund and explore potential expansion of mitigation opportunities for all water rights appropriations (not just permit-exempt domestic uses that were the focus of *Hirst*) in response to another controversial case, *Foster v. Yelm*.[184] In *Foster*, the Court concluded that out-of-kind mitigation strategies cannot be used to mitigate impairment of instream flows. In response, ESSB 6091 establishes a process to develop and recommend legislative changes to facilitate a mitigation sequencing strategy for new water rights—one that could allow some applicants to provide out-of-kind mitigation, but only after analyzing whether impacts can be avoided or minimized.

R. Wyoming

1. Legislative

The 2018, by passage of HB 66, the Wyoming State Legislature statutorily authorized the Lake DeSmet Reservoir Project (Project).[185] The legislation grants the Water Development Commission (WDC) authority to purchase and manage the Project, which includes water storage capacity in Lake DeSmet, land containing Healy Reservoir, the Clear Creek diversion structure, and pumping and pipeline facilities relating to the Project.[186] This legislation also allocates $4.5 million to fund the Project and creates a Lake DeSmet Reservoir account for all revenues received by the State relating to the Project.[187]

In SF 53, the 2018 Wyoming Legislature revised Wyoming Statutes Annotated sections 99-3-1903 and 99-3-1904 to remove the requirement that the maximum cost of a small water project be limited to $135,000; however, small projects will still have a maximum contribution from the WDC of $35,000.[188] Additionally, by passage of SF 54, the Legislature created Wyoming Statutes Annotated section 41-2-121(e), which requires each water project sponsor to demonstrate that the sponsor has the authority to adequately assess fees or collect funds to cover project operation and maintenance expenses.[189]

In HB 77, Wyoming Statutes Annotated section 41-3-1004 was revised to require that the Wyoming Game and Fish Commission pay the cost of any consultant and related costs that the WDC deems necessary to complete an instream flow feasibility study.[190]

2. Administrative

In order to address ongoing historic drought conditions and prevent Colorado River reservoirs (particularly Lake Powell and Lake Mead) from further declining to critical conditions, the seven Colorado River Basin States, including Wyoming, the United States Department of the Interior and water entitlement holders in the Lower Basin have been negotiating Draft Contingency Plan (DCP) agreements, which include an Upper Basin

[184] 362 P.3d 959 (Wash. 2015).
[185] 2018 Wyo. Sess. Laws 115.
[186] *Id.*
[187] *Id.*
[188] 2018 Wyo. Sess. Laws 16.
[189] 2018 Wyo. Sess. Laws 17.
[190] 2018 Wyo. Sess. Laws 34.

DCP and Lower Basin DCP.[191] The Upper Colorado Basin DCP is designed to: (i) protect critical elevations at Lake Powell and assure compliance with the 1922 Colorado River Compact, and (ii) authorize water conserved in the Upper Basin to be stored, which may help establish a foundation for a Demand Management Program to be developed in the future.[192] The Lower Basin DCP is designed to: (i) require Arizona, California, and Nevada to provide additional water for Lake Mead storage at predetermined elevations, and (ii) create flexibility to incentivize additional voluntary conservation of water for storage in Lake Mead.[193]

The Wyoming State Engineer rescinded a policy and practice regarding applications for stock and domestic wells.[194] In the early 1980s, the State Engineer's Office (SEO) adopted a policy in which stock use of groundwater was for no more than four points of use within one mile of the well or spring and domestic use was for no more than three single family dwellings from one well.[195] Appropriations not satisfying the policy interpretation were permitted as "miscellaneous" use with adjudication requirements (and costs) specified under Wyoming Statutes Annotated section 41-3-935, including a Beneficial Use (BU) Map prepared by a licensed surveyor or engineer.[196] Due to complaints related to the cost of adjudication, including the BU Map, the State Engineer rescinded this policy in 2018 such that no BU Map or adjudication will be required for any single stock well proposing to use 25 gallons per mile (gpm) or less, regardless of the number of tanks or miles of conveyance.[197] Similarly, domestic use filings may now be used where flow from a single well produces no more than 25 gpm at all times, regardless of the number of dwellings supplied.[198] Permits for all stock and domestic use where the proposed use would have been classified as "miscellaneous" under the SEO's previous policy now include a permit condition in which appropriators must provide Global Positioning System (GPS) locations of their wells and points of use.[199]

Also, the Wyoming State Board of Control (Board) adopted a policy extending the cutoff date for new petitions filed with the Board from 30 days prior to the start of the Board's meeting to 45 days prior.[200]

In late 2017, the SEO and Board promulgated rules to amend Chapter 1, "Fees," of the SEO's General Agency, Board or Commission Rules.[201] The rules were amended to reflect statutory changes shifting responsibility for payment of water right adjudication advertisement fees from the county where the water right is located to the appropriators who hold the water rights.[202]

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[191]Memorandum from Patrick Tyrrell, State Eng'r to Wyo. State Eng'rs Office, Colo. River Drought Contingency Planning Final Review Draft Agreements (Oct. 9, 2018).
[192]*Id.*
[193]*Id.*
[194]Memorandum from Patrick S. Tyrrell, State Eng'r to State Eng'rs Office Pers., Policy Regarding Groundwater Applications for Domestic and Stock Watering Uses (Feb. 6, 2018).
[195]*Id.*
[196]*Id.*
[197]*Id.*
[198]*Id.*
[199]*Id.*
[200]State of Wyoming, Board of Control, Memorandum (May 25, 2018).
[201]Gen. Agency, Bd. or Comm'n Rules, Wyo. Admin. Rules, Ch. 1 (Oct. 18, 2017).
[202]*Id.*

S. Eastern States

1. Judicial

The Superior Court of Massachusetts considered the state's Department of Environmental Protection's (DEP) role under the Massachusetts Water Management Act (WMA) regarding the renewal of water withdrawal permits and grandfathered water rights under the Permit Extension Act (PEA),[203] finding that the DEP was not required to allow three towns to file renewals of their water rights.[204] The case turned on the broad language of the PEA. The three plaintiff towns, which have historically drawn water for residents, did not want to concede to the DEP's delay of renewal registration statement to claim their grandfathered rights to withdraw water for fear that the deferral would mean that the environmental agency has some power over their rights. The issue was whether the required filing of a renewal registration statement to reconfirm grandfathered rights to withdraw water under the WMA, and DEP's determination that the renewal registration statement complies with the PEA's regulatory requirements, constitutes an "approval." The court concluded that the DEP's actions were correct. The court further contended that, although the DEP's receiving renewal registration statements does constitute decision-making because it must determine if the renewal statement meets the regulatory requirements, the agency's construction of its role under the WMA is entitled to deference.

[203]Permit Extension Act, St. 2010, c. 240, § 173, *amended by* St. 2012, c. 238, §§ 74-75.
[204]*Town of Wellesley Dep't of Pub. Works v. Mass. Dep't of Envtl. Prot.*, 2018 Mass. Super. LEXIS 68, 2018 WL 3013891 (Mass Super. Ct. 2018).