

Introduction 2026 Edition

Thank you for subscribing to the 2026 Edition of *Law of Water Rights and Resources*. Highlights of this edition include:

- The Bureau of Reclamation’s continuation of the National Environmental Policy Act process for post-2026 operations of the Colorado River Basin’s primary reservoirs, Lake Mead and Lake Powell, a multi-year NEPA process that will identify a range of alternatives and determine operations for Lake Powell and Lake Mead and other water management actions for potentially decades into the future, including issuance of an Alternatives Report on January 17, 2025, documenting the alternatives Reclamation publicly released on November 20, 2024, and anticipated carrying forward for analysis in the draft EIS, followed by release of the Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead—Draft EIS for public download on January 9, 2026. During the 45-day public review and comment period on the Draft EIS, Reclamation hosted two public meetings and received over 18,000 submissions.
- A Ninth Circuit decision construing the Clean Water Act’s NPDES permit exemption for “discharges composed entirely of return flows from irrigated agriculture” as applying “when return flows do not contain additional point source discharges from activities unrelated to crop production,” issued on September 5, 2025, in *Pacific Coast Federation of Fishermen’s Associations v. Nickels*, Case No. 23-15599, interpreting the scope of the irrigated return flow exemption under the Clean Water Act and concluding that drainage flows from the Grassland Bypass Project conveyed through the drainage system, and discharged into the San Luis Drain, qualify for the exemption. Nonpoint sources like groundwater seepage, road runoff, or windblown dust do not jeopardize the exemption.
- A Ninth Circuit decision holding that in cases where a preliminary injunction is sought to benefit one Endangered Species Act-listed species, yet the injunction might adversely impact other listed species, federal district courts must consider the balance of the equities and public interest factors in relation to the other listed species, *San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. Dec. 3, 2025), holding that “when mandatory injunctive relief under the ESA may benefit one protected species at the expense of other protected species, a court must consider competing equities and the public interest as to those other species,” and, because the district court did not do so, vacating the preliminary injunction and remanding for further proceedings. In cases under the ESA, the Ninth Circuit generally does not consider the third and fourth factors of the four-factor preliminary injunction test, reasoning that Congress in the ESA already has struck the balance of equities in favor of protected species. Here, however, the presence of the California red-legged frog and the tidewater goby—in addition to the steelhead trout, which

the plaintiffs sought to protect—“test[ed] the logic” of the Ninth Circuit’s existing approach.

- A Ninth Circuit decision upholding, on remand from the U.S. Supreme Court’s decision in *PPL Montana*, the U.S. District Court for the District of Montana’s application of the *Daniel Ball* test governing navigability for title with respect to seventeen delineated segments of the Missouri, Madison, and Clark Fork rivers. In a unanimous opinion authored by Justice Anthony Kennedy, the Supreme Court had ruled that Montana state courts misapplied federal law in finding the Upper Missouri, Madison and Clark Fork Rivers in Montana to be navigable for title purposes. The legal test of determining whether or not a river was navigable focuses on whether the river was navigable-in-fact at the time of statehood, a test first described in *The Daniel Ball*.
- A Ninth Circuit decision reversing and remanding the U.S. District Court for the District of Arizona’s grant of summary judgment to the Gila River Indian Community (GRIC) in a suit brought by GRIC against groundwater pumpers who allegedly are violating GRIC’s water rights along the Gila River mainstem under the Globe Equity Decree.
- A Federal Circuit decision affirming the Court of Federal Claims’ dismissal on ripeness grounds of a California water conservation district’s appropriative rights-based takings claim because the claim asserted a regulatory (vs. physical) taking and the district had not applied for an incidental take permit under the Endangered Species Act.
- A Federal Circuit decision holding the Winnemucca Indian Colony located in northern Nevada did not assert a cognizable breach of trust claim against the United States for damages, stemming from the federal government’s non-intervention in an upstream third party’s actions interfering with water availability and water rights on the tribe’s land.
- A Federal Court of Claims decision denying in part and granting in part, on remand, dismissal of breach of trust claims brought by the Ute Indian Tribe of the Uintah and Ouray Reservation for damages based upon the United States’ management of tribal water rights and irrigation infrastructure.
- Two California Court of Appeal cases addressing the state’s Sustainable Groundwater Management Act as it applies within the Tulare subbasin following the State Water Resources Control Board’s designation of that basin as probationary.
- A Colorado Supreme Court decision holding that state’s anti-speculation doctrine does not apply to applications to obtain or amend augmentation plans filed by landowners in the Denver Basin seeking to pump not-nontributary groundwater.
- A Colorado Supreme Court decision addressing non-injury analysis in the context of augmentation plans accompanying applications for conditional water rights, including clarifying the “reasonably accurate” standard and the temporal relationship between non-injury analysis and water courts’ exercise of retained jurisdiction.
- A New Mexico Supreme Court decision clarifying the test for abandonment in that state under the prior appropriation doctrine, and, concomitantly, harmonizing existing precedents on abandonment as well as differentiating abandonment and forfeiture.
- An Oregon Supreme Court decision construing the public interest standard in ORS 537.170(8) as allowing for consideration of a proposed appropriation’s impacts on the beneficial purposes of instream flow rights, as well as requiring consideration of all factors enumerated in that provision when reaching final determinations under the standard.
- A Utah Supreme Court decision holding the Upper Colorado River Basin Compact does not preempt Utah’s Export Statute and the state engineer correctly determined that statute’s requirements had not been met by an applicant seeking to divert via a 300-mile pipeline up to 55,000 acre-feet annually from the Green River in Utah to Colorado’s Front Range.