

LEGISLATIVE AND CASELAW UPDATE – 2024

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LEGISLATION

HB 280, 5th Substitute – Water Related Changes (Rep. Snider & Sen. Sandall)

This bill repeals and reenacts Section 73-10-15, regarding State water plan. It requires the Division of Water Resources to publish a State water plan beginning December 31, 2026. That plan must be consistent with the State water policy established in Section 73-1-21, reference the State unified water infrastructure plan created by the Water Development Coordinating Council under Section 73-10g-602, foster communities and business, facilitate local agriculture, address outdoor recreation, and provide for a healthy environment. The plan is to be updated every 10 years. Subsection (3) identifies several entities that are required to cooperate with DWRe in the formulation of the plan.

It also enacts Section 73-10-39, which requires DWRe to study and make recommendations regarding the following by October 31, 2024: (i) which funds or accounts used to finance water infrastructure projects should be tied to the planning and prioritization process in Chapter 10g, Part 6; (ii) whether any funds or accounts should be consolidated; and (iii) whether changes to the membership of the Water Development Coordinating Council are needed to fulfill the purposes of Chapter 10g, Part 6. That section further requires DWRe to study and make recommendations regarding whether to impose a new fee to fund water infrastructure projects identified in the water infrastructure plan adopted under Section 73-10g-602 by October 31, 2025. The findings and recommendations are to be reported to the Natural Resources, Agriculture, and Environment Interim Committee by the November 2024 and 2025 interim meetings, respectively.

This bill also modifies the composition of the existing Water Development Coordination Council, adding an individual appointed by the Governor who is familiar with water infrastructure projects and is employed by a water conservancy district subject to the asset management criteria of Section 17B-2a-1010. It adds engaging in planning and prioritization of water infrastructure projects and expending money from the Water Infrastructure Fund to the purposes of the Council. The Water Infrastructure fund is created in Section 73-10g-107. It consists of appropriations for the Legislature, money from the federal government, grants or donations, money made available to the state for water infrastructure projects from any source, money received from repayment of loans made from the Fund, and interest and earnings on the Fund. It can be used (a) by the Council to pay for the costs of administering Part 6, including staff of the Council; (b) by DWRe to fund and pay for the studies required under Section 73-10-39; and (c) to issue loans or grants prioritized in accordance with Section 73-10g-603.

The bill adds the State Engineer and the Director of the Division of Natural Resources to the Watershed Council within DNR as nonvoting members.

Finally, the bill enacts Title 73, Chapter 10g, Part 6, “Planning and Prioritization.” This part requires the Water Development Coordinating Council to adopt a unified water infrastructure plan by March 1, 2026, which is to be updated at least every 4 years. The plan must describe water infrastructure projects needed to maintain the reliable supply of safe and clean water within the state that is organized in 10-year phases up to at least a 20-year plan; must be consistent with the policies, goals, and recommendations of the state water plan; and must be based primarily on agency plans submitted by the “relevant agencies” (DWRe, Division of Drinking Water, Division of Water Quality, Housing and Community Development Division, and Department of Agriculture and Food). It is to be provided to the Watershed Council prior to adoption. Beginning September 1, 2024, “relevant agencies” are required to annually prepare a report and submit it to the Water Development Coordinating Council regarding the funds or accounts the agency administers. And, beginning June 30, 2025, “relevant agencies” are required to annually adopt a water infrastructure agency plan that describes and ranks needed water infrastructure projects within their jurisdiction, which includes ranking justifications. The Water Development Coordinating Council is then required beginning in fiscal year 2027 to develop a written prioritization process for ranking and prioritizing water infrastructure projects that are or will be funded by Water Infrastructure Fund money, which is to be utilized to determine priorities and funding levels of water infrastructure projects for each fiscal year. Section 73-10g-605 makes it a condition of receiving Water Infrastructure Fund money by a loan or grant that the recipient conduct a reserve study (containing identified information) showing how it will repay the loan and collect money for repair and replacement of the project; update the study every 5 years or until the loan is repaid; and comply with the relevant capital asset management requirements. The “relevant agency” can provide Water Infrastructure Fund money to a recipient to assist in complying with or technical assistance with the planning, reserve analysis, and capital asset management requirements.

SB 18, 1st Substitute – Water Modifications (Sen. Sandall & Rep. Snider)

This bill defines “saved water” in Section 73-3-3(1)(i).

It adds saved water to the list of exclusions from the effect of forfeiture. Specifically, it adds, “subject to Subsection (2)(h), that portion of a water right that is quantified as saved water in a final order from the state engineer approving a change application, but not to exceed the amount subsequently verified by the state engineer in a certificate issued under Section 73-3-17.” Subsection (2)(h) provides that saved water does not have this protection and any period of nonuse begins to run on the day on which (i) the underlying water right is declared by a court decree to have been lost due to forfeiture or (ii) title of a right to saved water segregated under Section 73-3-27 is conveyed independent of the underlying water right.

It adds to the State Engineer’s rulemaking authority to ability to make rules regarding the administration of saved water, including quantification, reporting, verification, segregation, and subsequent placement to beneficial use.

The bill also authorizes a person entitled to the use of water to file a change application on a perfected water right to request that the State Engineer quantify saved water or allow beneficial use of saved water separate from the underlying water right, and identifies additional requirements for such change applications. It authorizes the State Engineer to impose conditions for approval of a change application to ensure that the recognition and use of saved water is quantified, reported, and verified; does not lead to enlargement of the underlying water rights; is limited to the net decrease in depletion and net reduction in diversion of the underlying water right; is limited to the volume of water that will be sustained over time from the net decrease in depletion or net reduction in diversion of the underlying water right; does not violate an existing agreement; and when based

solely on net reduction in diversion, the subsequent use is limited to nonconsumptive beneficial uses and does not increase the depletion of the underlying water right or cause quantity impairment when beneficially used separate from the underlying water right.

SB 211, 1st Substitute – Generational Water Infrastructure Amendments (Sen. Adams & Rep. Schultz)

This bill enacts Section 11-13-228, providing the 4 largest water conservancy districts by budget are required to enter into an agreement with one another and the Division of Water Resources to form the Water District Water Development Council. The Council shall consist of the GMs or their designee for each of the 4 largest water conservancy districts and the Director of DWRe, who cannot receive compensation. The Council is required to appoint a director and set the director's salary and to establish and maintain office space and staff for the Council and the State Water Agent. It is required to plan for generational water infrastructure and advance the responsible development of water within the jurisdiction of the water conservancy districts to address water users' generational need for adequate and reliable water supplies, including through several identified actions. The Council is not able to levy, assess, or collect property taxes or issue bonds. It does not control money used to fund water infrastructure.

This bill also deletes provisions of Section 73-10-3 regarding the Board of Water Resources' designation of a representative. It enacts Title 73, Chapter 10g, Part 6, "Utah Water Agent." The Utah Water Agent is to be appointed by the Governor for a 6-year term, with a salary set by the Governor. The Water Agent is to explore and negotiate with officials of other states, tribes, and other governmental entities regarding possible water importation projects, including identified actions.

SB 270, 1st Substitute – Utah Lake & Great Salt Lake Amendments (Sen. Adams & Rep. Schultz)

This bill enacts Section 65A-10-5, "Utah Lake study." It requires the Division of Fire, Forestry, and State Lands to conduct a study to determine how to enhance identified benefits of Utah Lake. FFSL must begin by reviewing available information, literature, and data concerning improving Utah Lake, and assess the scientific, technical, measurement, and other informational needs for determining methods to enhance Utah Lake. It is then to study those needs. In doing so, it must (i) respect the need to preserve water rights and interests related to and projects for water collection, storage, or delivery; and (ii) consult with the State Engineer to identify conditions associated with Utah Lake that may affect the State's ability to deliver water from Utah Lake to the Great Salt Lake under an approved instream flow change application. The study must be completed by November 1, 2025, with findings and a proposed implementation plan reported to the Natural Resources, Agriculture, and Environment Interim Committee by the November 2025 interim meeting. Subsection (7) provides, "This section may not be interpreted to override, supersede, or modify any water right within the state or the role and authority of the state engineer."

HB 11, 2nd Substitute – Water Efficient Landscaping Requirements (Rep. Owens & Sen. Winterton)

This bill enacts three sections regarding the use of overhead spray irrigation: Sections 11-39-108, 53G-7-224, and 72-7-111. Section 11-39-108 precludes a "local entity" with property within the Great Salt Lake basin that is undertaking new construction or reconstruction on or after May 1, 2024, from installing, maintaining, or using overhead spray irrigation in a landscaped area unless it is an active recreation area (but not including a park strip, an area less than 8 feet wide, a planting bed, or an area that is larger than reasonably required for the anticipated use the area is intended to accommodate). Section 53G-7-224 imposes the same restrictions on "LEAs"—school districts,

charter schools, and the Utah Schools for the Deaf and Blind. Section 72-7-111 precludes highway authorities from installing, maintaining, or allowing the installation or maintenance of landscaping that uses overhead spray irrigation in identified areas of a highway construction project (between back of curb and either side of the highway or between the shoulders, including medians and roundabouts) within the Great Salt Lake basin commenced on or after May 1, 2024.

HB 42 – Water Rights Publication Amendments (Rep. Briscoe & Sen. McKell)

This bill adds subsection (1)(d) to Section 73-3-6, providing, “The state engineer may confirm publication of a notice of application under this Subsection (1) through electronic means.”

HB 61 – Water Measuring & Accounting Measures (Rep. Albrecht & Sen. McKell)

This bill adds telemetry to Subsection (1)(b)(ix) of Section 73-1-21, providing, “Utah will promote . . . standards for accurate water use measurement, telemetry, tracking, enforcement, and reporting.” It also adds telemetry to Subsection (5)(b) of Section 73-2-1, providing, “The state engineer may make rules . . . consistent with the purposes and provisions of this title, governing: . . . (b) water measurement, telemetry, and reporting.” It removes from Subsection (5) the ability of the State Engineer to make rules regarding “preferences of water rights under Section 73-3-21.5,” and adds the ability to make rules regarding “water distribution accounting.”

HB 62, 1st Substitute – Utah Water Ways Amendments (Rep. Ownes & Sen. Sandall)

This bill provides that the existing “Utah Water Ways” partnership shall coordinate with the State Board of Education to create standards-aligned resources and professional development opportunities to be used in select K through 12 grades of the public education system, including an overview of the water cycle, an overview of Utah’s water systems, an overview of how water is used in Utah, information on the geological and climate changes for the last 30,000 years that created and changed the Great Salt Lake, strategies for individuals to protect water quality, strategies for individuals to optimize use of water, and hands-on methods to help students learn this information. The standards-aligned resources cannot include information on human-created climate change.

HB 275, 2nd Substitute – Water Amendments (Rep. Snider & Sen. Sandall)

This bill modifies the limitation on homeowners associations to require lawn or turf, making it a blanket prohibition on requiring property owners to install or keep lawn or turf.

It allows the Division of Water Rights to require that water use data from certain cities of the first class and water conservancy districts that provide service within a county of the first or second class be submitted electronically in a particular format.

Finally, it modifies Section 73-10-34.5(8), allowing the Board of Water Resources to issue grants to secondary water systems who seek to meter at strategic points under Subsection 73-10-34(13) rather than only under Subsection 73-10-34(13)(a)(iii).

HB 295 – Produced Water Amendments (Rep. Lund & Sen. Vickers)

This bill enacts Title 40, Part 12, “Produced Water Act.” Under the Act, the Board of Oil, Gas & Mining is required to regulate “produced water.” The nonconsumptive use of produced water in an oil and gas activity is not an appropriation of water for beneficial use, or a waste of water. A

water right is not established by the nonconsumptive use of produced water. And, the State Engineer cannot require an operator to obtain a water right for the nonconsumptive use of produced water in an oil and gas activity. The Act further makes produced water from an oil and gas producing well the responsibility of the operator of the well. The operator has a possessory interest in produced water, which includes the right to take possession of the produced water, nonconsumptive use the produced water in an oil and gas activity, and obtain proceeds from that use. The operator can sell or convey the produced water to another operator, a person who provides recycling or treatment services for produced water, or a person who provides disposal services for produced water. Once transferred, the transferee has a possessory interest in the produced water and is liable for the disposal of the produced water.

Section 40-12-102 makes clear (1) the Act does not authorize the use of produced water as part of a consumptive beneficial use without a water right; (2) a person can engage in the nonconsumptive use of produced water only as provided in the Act; and (3) the Act does not modify the statutory enforcement and other duties of the State Engineer, except as provided in Section 40-12-201(2).

HB 433, 2nd Substitute – Brine Amendments (Rep. Bolinder & Sen. Owens)

This bill enacts Section 40-8-24, “Brine mining.” Under that section, the Board of Oil, Gas & Mining may, by rule, designate areas within the State as a multiple mineral development area for purposes of brine mining operations. The Board has the authority to adjudicate and certain multiple mineral conflicts among brine mining operations. The Division of Oil, Gas & Mining is required to study brine mining operations to evaluate current and potential regulation of brine mining operations. It is required to present the results of the study, including any recommendations for legislation, to the Natural Resources, Agriculture, and Environment Interim Committee by the October 2024 interim committee meeting.

HB 453, 4th Substitute – Great Salt Lake Revisions (Rep. Snider, Sen. Sandall & Cosponsors)

This bill creates a comprehensive regulatory scheme for mining companies that mine using evaporation ponds near Great Salt Lake. Among other things, it requires the Division of Fire, Forestry, and State Lands to ensure that a mineral lease or royalty agreement involving the extraction of Great Salt Lake elements and minerals from brines in the Great Salt Lake include a provision that provide for reduction of the volume of water that the operator may divert from the Great Salt Lake by the volume of water the operator does not use during the longer of the primary term of the mineral lease or seven years if the operator fails to use the volume of water for beneficial use, unless it is a result of a reduction of water use under Section 73-33-201 or excused under Section 73-1-4. If the volume of water that can be diverted is reduced under that provision, the Division is required to pursue a judicial forfeiture action. If successful, the Division is required to petition the State Engineer to order a reversal of the application approval in accordance with the terms of the reduction or forfeiture of the water right.

The bill also enacts Title 73, Chapter 33, “Great Salt Lake Distribution Management.” For purposes of that chapter, “Great Salt Lake water right” is defined as “water right that allows for the diversion of surface water or groundwater from a point below the Great Salt Lake meander line and that contemplates the recovery of salts or another mineral or element, as defined in Section 65A-17-101, from the water resource by precipitation or otherwise.”

Under that new chapter, the State Engineer is required to regulate the measurement, appropriation, apportionment, and distribution of water within the Great Salt Lake meander line by adopting a distribution management plan by October 1, 2025, after following a prescribed public process. The

plan must establish requirements for the measurement, quantification, and reporting of diversions, depletions, and return flows associated with Great Salt Lake water rights; and procedures for apportionment and distribution of Great Salt Lake water rights. The plan is to be based on the principles of prior appropriation and multiple use sustained yield, as those principles relate to reasonable preservation or enhancement of the Great Salt Lake's natural aquatic environment. The State Engineer must also establish a priority schedule that apportions Great Salt Lake water rights based on relative priority. Water users can be allowed to participate in voluntary arrangements that compensate or otherwise mitigate for the use of Great Salt Lake water rights. A person aggrieved by a distribution management plan under this chapter may file a de novo judicial review action within 60 days in a manner similar to judicial reviews of change applications.

Under Chapter 33, a person diverting a Great Salt Lake water right is required to physically measure the water or brine diverted from the Great Salt Lake as part of the mineral or element extraction and the salinity of any discharge of water or brine from the person's operations into the Great Salt Lake. By June 1, 2025, the Division of Water Quality, in consultation with FFSL, is required to make rules setting the limit for the salinity of water or brine that a person can discharge into the Great Salt Lake as part of the mineral or element extraction process.

HB 519, 4th Substitute – Department of Natural Resources Modifications (Rep. Snider & Sen. Sandall)

Among other things, this bill removes Subsection 73-5-15(10)(e)(v), which required that a district court in which judicial review actions challenging a groundwater management plan have been filed to consolidate all such actions. It also removes Subsection 73-10-27(3), which required that the Board of Water Resources establish a benefit-to-cost ratio for projects, that the Board weight the benefit-to-cost ration based on the relative cost of the project when considering whether a project should be built, and that the accumulative benefit-to-cost ratio of projects cannot be less than one to one.

SB 17 – Safe Drinking Water Act Sunset Extension (Sen. Sandall & Rep. Brooks)

This bill extends the sunset date of the Safe Drinking Water Act from July 1, 2024, to July 1, 2029.

SB 39 – Water Shareholder Amendments (Sen. Sandall & Rep. Snider)

This bill changes the time for water companies to respond to proposed temporary change applications, extending that time from 60 days to 120 days.

SB 77 – Water Rights Restricted Account Amendments (Sen. Sandall & Rep. Snider)

This bill authorizes the Division of Water Rights to use funds in the Water Rights Restricted Account for the following additional costs incurred by the Division that benefit water rights adjudications: (i) installing, operating, and maintaining measurement infrastructure; and (ii) sharing the costs of installed United States Geological Survey stream gauges. It also authorizes the Division to use up to 5% of the money deposited into the account under Section 59-12-103(5)(e) in the fiscal year preceding the fiscal year of appropriation, costs incurred to acquire, manage, and analyze surface and groundwater data, not limited to areas of adjudication.

Repealing Legislation

HB 57 – Snake Valley Aquifer Council (Rep. Brooks & Sen. Sandall)

This bill repeals the Snake Valley Aquifer Council chapter of the Utah Code, Title 63C, Chapter 12, and related provisions.

HB 206 – Columbia Interstate Compact Amendments (Rep. Peterson & Sen. Sandall)

This bill repeals the State’s ratification of the Columbia Interstate Compact.

SB 242 – Utah Lake Modifications (Sen. McKell & Rep. Brammer)

This bill repeals the Utah Lake Restoration Act, Title 65A, Chapter 15; the Utah Lake Diking Project chapter of the Utah Code, Title 73, Chapter 12; and related provisions.

UTAH CASES

Second Big Springs Irrigation Co. v. Granite Peak Properties LC, 2023 UT App 22

The Utah Court of Appeals addressed the question of, “Is this a tort case or is this case more appropriately addressed in a general adjudication pursuant to the adjudication provisions of Utah’s Water and Irrigation Code?” ¶ 2. Second Big Springs Irrigation Co. and Granite Peak Properties LC both own water rights in the Snake Valley Hydrographic Basin. Second Big Springs, whose rights are senior, brought an interference claim against Granite Peak, claiming its groundwater pumping was interfering with Second Big Springs’s senior rights. Granite Peak moved to dismiss, arguing that the claim required an adjudication of rights under the general adjudication statute and the district court lacked jurisdiction to adjudicate Nevada water rights. The district court denied the motion. Granite Peak later filed a third-party complaint naming 25 additional parties with junior water rights to Second Big Springs, arguing that fault should be allocated among those junior right holders. In response to motions to dismiss by the third-party defendants, the district court agreed to treat the action as a general adjudication because the joinder of parties had “transformed the case.” The court then directed the parties to seek consolidation of the case with the ongoing Tooele County general adjudication. When the parties did not do so, the court dismissed the case on Granite Peak’s motion. On appeal, the Court of Appeals provided a background explanation of general adjudications and interference claims. It then examined each of the forms of relief sought by the parties—monetary damages, injunctive relief, and declaratory relief—to determine the nature of the action. Monetary damages are not available in a general adjudication; the injunctive relief sought was not for an adjudication of rights, but rather enforcement of already-existing rights; and none of the requested declarations implicate an adjudication of rights, but rather sound in tortious interference. The Court accordingly held that the action was a tort case and not a statutory general adjudication. Even if it could be construed as a general adjudication, the Court held the ongoing Tooele County general adjudication did not deprive the district court of jurisdiction. That case is not “substantially the same” as the present case, at least because the requested relief would not be available in the general adjudication.

Utah Stream Access Coalition v. VR Acquisitions, LLC, 2023 UT 9

In this appeal, the Utah Supreme Court evaluated “whether there was a 19th-century basis for an easement providing the public with the right to touch privately owned streambeds underlying state waters.” It held the plaintiff had failed to establish such a basis.

In *Conaster v. Johnson*, 2008 UT 48, the Court had held that the public easement over public water includes the right to touch privately owned beds of state waters so long as the use does not cause injury to the landowner. The Utah Legislature subsequently enacted the Public Waters Access Act, limiting public recreational access to water flowing over streambeds that are privately owned, including precluding using private streambeds for hunting or wading. Following that enactment, VR Acquisitions prohibited public access to the stretch of Provo River flowing over Victory Ranch. USAC filed the action claiming that the PWAA violates article XVII, section 1 and article XX, section 1 of the Utah Constitution and federal common law. In a prior appeal, the Court remanded for determination of the threshold issue of whether there was a historical basis for the claimed easement, recognized in *Conaster*. The district court granted summary judgment in favor of VR Acquisitions and the State.

After holding there were no genuine issues of material fact, the Court held that USAC had not demonstrated a 19th-century basis for a *Conaster* easement. USAC could not rely on modern caselaw; USAC had not identified a legal basis on which a 19th-century *Conaster* easement could have been based; the historical absence of a statutory prohibition of trespass did not confer a right-of-way on the public; and the federal law on which USAC relied did not establish a 19th-century *Conaster* easement.

***Metropolitan Water District of Salt Lake & Sandy v. Sorf*, 2023 UT App 146**

This is the latest appellate decision in a dispute over Mr. Sorf's use of the portion of his backyard encumbered by an easement for the construction, reconstruction, operation, and maintenance of a pipe or pipelines held by MWDSLS. The easement is for the Salt Lake Aqueduct, a large-diameter aqueduct that runs approximately 42 miles from Deer Creek Dam to near the mouth of Parleys Canyon. Mr. Sorf had erected several improvements within the easement, including a Tuff Shed Barn, a smaller shed, hot tub/swim spa, large covered deck, an uncovered deck, a koi pond and water feature, decorative rock wall, and rock retaining wall. MWDSLS filed suit seeking a declaration that the improvements unreasonably interfered with its use and enjoyment of its easement and an injunction requiring Mr. Sorf to remove the improvements, which were largely constructed after MWDSLS had attempted to stop work. Following two prior appeals, the case proceeded to a jury trial. The jury found that none of Mr. Sorf's improvements, when considered individually, unreasonably interfered with the MWDSLS's easement. On appeal, MWDSLS argued, among other things, the district court had erred in refusing to give an instruction that permanent improvements constitute an unreasonable interference with an easement of definite scope and location. Such an instruction is consistent with what the Idaho Supreme Court described as the majority rule in *Johnson v. Highway 101 Investments, LLC*, 156 Idaho 1. MWDSLS asked the Court of Appeals to adopt the per se rule for permanent structures for many of the policy reasons articulated in *Johnson*. The Court of Appeals declined to do so in the context of an easement for an underground pipeline. It noted that the per se rule has primarily been applied to ingress/egress easements, and that it was not convinced a per se rule in this context would cause any measurable reduction of the amount of litigation regarding the SLA.

MWDSLS filed a petition for writ of certiorari. Mr. Sorf's response to that petition, requested by the Utah Supreme Court, is due on March 15.

***Utah Physicians for a Healthy Environment v. Department of Natural Resources*, Case No. 230906637 (3d District)**

Plaintiff Utah Physicians for a Healthy Environment filed this action seeking a declaration that the public trust doctrine imposes a duty on the Department of Natural Resources, Division of Water

Rights, and Division of Fire, Forestry, and State Lands to take actions to ensure a minimum lake level of the Great Salt Lake of 4,198 feet. UPHE additionally seeks a declaration that the State Defendants “must review all existing water diversions from the Great Salt Lake watershed and determine feasible means to ensure compliance with their mandatory public trust duties” and “then modify any diversions that are inconsistent with the restoration and maintenance of the Lake.” This case will be discussed in greater detail by Mike Begley and Gordon Rowe.

***Water Horse Resources, LLC v. Wilhelmsen*, Case No. 210800001 (8th District), Appellate Case No. 2024**

Plaintiff Water Horse Resources, LLC sought judicial review of an application to appropriate (A81080 (WRN41-3747)) that the State Engineer denied. That application sought approval to appropriate 55,000 acre-feet from two points of diversion on the Green River for use on the Colorado Front Range, with the water being conveyed by pipeline along the I-80 corridor through Wyoming into Colorado. Water Horse argued that the State Engineer (and the district court sitting as the State Engineer) is required by the Upper Colorado River Compact to approve its application. The district court granted summary judgment in favor of the State Engineer, holding the Upper Compact does not disallow Utah from applying its water laws and does not supersede Utah water law. Water Horse appealed. This case will be discussed in greater detail by Marty Bushman.

FEDERAL CASES

***Audubon of Kansas v. United States Department of Interior*, 67 F.4th 1093 (10th Cir. 2023)**

The Audubon of Kansas brought this action under the National Wildlife Refuge System Improvement Act and National Environmental Policy Act seeking declaratory, injunctive, and mandamus relief to require state agencies to enforce Fish and Wildlife Services’ senior water right in the Quivira Wildlife Refuge. FWS has known for decades that junior water right holders are impairing its senior water right, threatening endangered species at the Refuge, but not taken action to enforce its senior rights. Following oral argument in the appeal, FWS did act by requesting full administration of its water right. The Tenth Circuit first addressed whether this request mooted the claims; the unlawful agency action claims under 5 U.S.C. § 706(2) are moot, but the Audubon’s National Wildlife Refuge System Improvement Act failure-to-act claim under § 706(1) is not moot because it is capable of repetition but would evade review. Nevertheless, the Tenth Circuit held that FWS’s decision to temporarily refrain from enforcing its water right is not reviewable under § 706(1) of the Administrative Procedures Act. Audubon had not pointed to a discrete, legally required action in the National Wildlife Refuge System Improvement Act that FWS had failed to perform; instead, FWS has discretion in how to fulfill the fourteen statutory duties under the National Wildlife Refuge System Improvement Act.

***Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023)**

In this case, which has been the subject of several in-depth presentations, the Supreme Court held that the Clean Water Act extends only to those “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that they are ‘indistinguishable’ from those waters.” *Id.* at 684.

***Arizona v. Navajo Nation*, 599 U.S. 55 (2023)**

In this case, which has been the subject of several in-depth presentations, the Supreme Court held that the peace treaty establishing the Navajo Reservation did not require the United States to take affirmative steps to secure water for the Tribe; language in the treaty establishing the Reservation

as a “permanent home” did not mean the United States agreed to take affirmative steps to secure water for the Tribe; treaty provision in which the United States agreed to provide the Tribe with seeds and agricultural implements did not include a duty to take affirmative steps to secure water; and the United States’ opposition to the Tribe’s intervention in Colorado River water rights litigation could not support the Tribe’s breach of trust claim.

***Cetner for Biological Diversity v. United States Department of Interior*, 72 F.4th 1166 (10th Cir. 2023)**

Several conservation groups sued the Bureau of Reclamation and Department of the Interior alleging violations of the National Environmental Policy Act and Administrative Procedures Act in connection with Reclamation’s Environmental Analysis of the “Green River Block Exchange contract” between Reclamation and the State. Under that contract, Utah can draw water in an equal amount from releases from Flaming Gorge Reservoir instead of depleting water from the Green River and its tributary flows to which Utah is entitled under Article XV(b) of the Upper Colorado River Basin Compact of 1948. The district court found that Reclamation’s NEPA analysis was not arbitrary and capricious, took a “hard look” at cumulative impacts, and properly determined that an Environmental Impact Statement was not required. The Tenth Circuit affirmed, holding the record adequately demonstrated that Reclamation took a hard look at the proposed action and provided a reasoned explanation of its decision. “In short, the agency concluded the exchange contract would not significantly affect the water or fish resources in the Green River Basin, and adequately explained the methodology and scope of its decision.” *Id.* at 1172.

***Stone v. High Mountain Mining Co.*, 89 F.4th 1246 (10th Cir. 2024)**

Defendant High Mountain Mining Co. operates a gold mine in Colorado, within the South Platte River floodplain. It hauls excavated material to a processing plant where it is washed with river water to recover gold, with the wastewater discharged to 4 unlined settling ponds. The Plaintiffs filed a citizen suit under the Clean Water Act alleging, among other things, that High Mountain violated the CWA because seepage of pollutants from the ponds flowed into the groundwater and then migrated into the Middle Fork of the South Platte River. Under *County of Maui v. Hawaii*, 140 S. Ct. 1462 (2020), discharge to groundwater can be the functional equivalent of a direct discharge in certain circumstances, depending on the interplay of the point source, seepage, ground water, subsurface conditions, and the navigable water. Following a bench trial, the district court held that the settling ponds were a point source, and High Mountain’s operation constituted an unpermitted discharge of pollutants into navigable waters, in violation of the CWA. On appeal, the Tenth Circuit discussed *Maui*, and then applied the *Maui* factors to the evidence presented at trial. It concluded the district court failed to consider all of the relevant geophysical factors relevant to the circumstances of the case. Because of the “broad application of the CWA to mines throughout the Mountain West,” it remanded to the district court for further proceedings consistent with *Maui*. *Id.* at 1249.

Petitions for Review of Agency Action – “S.R. 210: Wasatch Boulevard Through Town of Alta Project”

Three petitions for review of agency action have been filed in connection with the environmental analysis for the “S.R. 219: Wasatch Boulevard Through Town of Alta Project”: (1) *Friends of Alta v. Utah Department of Transportation*, Case No. 2:23-cv-00876 (D. Utah); (2) *Salt Lake City Corporation v. Shepherd*, Case No. 2:23-cv-00893 (D. Utah); and (3) *Citizens’ Committee to Save Our Canyons v. Braceras*, Case No. 2:23-cv-00894 (D. Utah). Among other things, these petitions assert that the final Environmental Impact Statement failed to adequately analyze water supply impacts of the Project and water quality impacts from the Project.