

Colorado River Water Sharing Agreement Likely Dodges Legal Fight

By Bobby Magill 2023-05-23T10:53:20000-04:00

- Agreement's respect for water rights likely avoids litigation
- Measures funded using climate law dollars

A messy Colorado River legal fight is much less likely in the near term now that the seven river basin states have reached consensus on how to conserve water amid a historic 23-year drought, legal observers say.

The [consensus proposal](#) respects water rights by relying mainly on voluntary conservation and “goes a very long way to avoiding what would have been costly and divisive litigation,” said Jay Weiner, of counsel at Rosette LLP, who represents the Fort Yuma Quechan Indian Tribe.

The Colorado River water conservation proposal announced Monday to cut at least 3 million acre-feet of water use in the basin through 2026 would prevent the Interior Department from needing to impose federally mandated water cuts that the states were trying hard to avoid.

Many water users will be compensated for their conservation measures using some of the \$4.6 billion in federal drought contingency funding provided by Congress in last year's climate law (Public Law 117-169).

As California clashed with the other six basin states about where and how they should cut Colorado River water use to save the hydroelectric dams on the quickly drying river, the Interior Department's Bureau of Reclamation in April proposed options for mandated cuts that the states saw as possibly illegal.

The bureau said Monday that it has temporarily withdrawn those options while it reviews the details of the consensus agreement. The options were alternatives proposed in the bureau's draft supplemental environmental impact statement, or SEIS, of a proposed update to the agency's 2007 drought contingency guidelines for the river.

The consensus agreement isn't final, and it must be reviewed by the bureau before the agency announces next steps. The bureau said it would now focus on new Colorado River drought contingency guidelines that would take effect after the current ones expire in 2026.

Though the bureau must approve the deal, it's likely pretty close to the final plan that will be implemented, representing how states can come together to avoid a legal fight, John Entsminger, general manager of the Southern Nevada Water Authority and Nevada's representative in the negotiations, said Monday.

"I think it's going to be the final agreement," he said. "I think it's a solid plan. It's implementable, and ultimately it will" take effect.

Buying More Time

Litigation over the water shortage in the Colorado River Basin seems less imminent now, but more challenges will lie ahead if the drought continues beyond this year's wet winter and spring, said Heather Tanana, a law professor at the University of Utah.

"The agreement buys us more time," but time may run out if funding for water conservation measures dries up if Congress doesn't want to spend more, she said.

If the bureau adopts the consensus agreement, it will cast aside its proposals in its draft environmental review, including one that called for water cuts to be shared equally among all water users regardless of their water rights, straying from established legal precedent.

Weiner said the Quechan Tribe doesn't believe Interior Secretary Deb Haaland has the unilateral authority to impose water cuts that don't respect the tribe's water rights, which is something the bureau in the draft review said Haaland could do.

"That's a litigation risk the consensus proposal would entirely obviate," Weiner said.

Many of the water conservation measures would be voluntary, and were offered by at least eight Arizona cities, two tribes and other agricultural users, Brenda Burman, general manager of the Central Arizona Project, the state's primary water provider, told reporters Monday.

The agreement is “more equitable” than any other possible solution previously proposed, she said.

Endangered Species

Thomas Jensen, a partner at Perkins Coie LLP, said he’ll be watching whether the consensus agreement represents a serious step toward a new approach to long-term operating regime for the Colorado River.

He said he’ll also be watching whether the agreement fails to do that and “just buys time to avoid answering the incredibly hard questions about how to deal with chronic and worsening shortages amid increasing demands.”

The Colorado River provides water to about 40 million people between Denver and Los Angeles, numerous farms in the Southwest, and many imperiled fish and other aquatic species in the Grand Canyon and elsewhere in the river.

The consensus also raises questions about how the river will be managed for endangered species, including the condition of the beaches in the Grand Canyon that serve as critical habitat for those species, and for the Colorado River Delta in Mexico, Jensen said.

The Colorado River Delta in Mexico has been dry for years, and the river no longer reaches the Sea of Cortez.

“Millions of dollars and lots of hopes have been pinned on restoring the delta,” Jensen said, but it’s still unclear whether water will reach it.

To contact the reporter on this story: Bobby Magill at bmagill@bloombergindustry.com

To contact the editors responsible for this story: Renee Schoof at rschoof@bloombergindustry.com; Zachary Sherwood at zsherwood@bloombergindustry.com

Related Articles

[Colorado River States Agree on Water Use Cuts Amid Drought \(1\)](#)

[‘Alarming’ Colorado River Cuts Plan Seen as Tactic to Spur Talks](#)