

Richard Frank April 9, 2019

Trump Administration's Cold Water War With California Turns Hot

Feds' Curious New Lawsuits Against State Water Board Likely Just the Opening Litigation Salvo

When it comes to California water policy, the federal-state relationship has always been both strained and challenging. That intergovernmental tension harkens back at least to the Reclamation Act of 1902. In section 8 of this iconic federal statute that transformed the American West, Congress declared that the federal government “shall proceed in conformity with” state water rights law. And, in its 1978 *California v. United States* decision, the U.S. Supreme Court expressly held that the federally-constructed and operated Central Valley Project (CVP) in California is subject to the water rights jurisdiction of (including permit conditions imposed by) California’s State Water Resources Control Board. Finally, in the 1992 Central Valley Project Improvement Act, Congress underscored the *California v. United States* precedent when it legislated environmentally-friendly reforms to the CVP’s operations.

At the operational level, federal and state water managers have coordinated operations of the CVP and the parallel State Water Project for many decades. That’s been consistently true over the years, despite shifting Republican and Democratic presidential and gubernatorial administrations. Such federal-state water project coordination is generally a good thing, ensuring efficiencies and avoiding conflicts in the day-to-day operation of these two mammoth water delivery systems, upon which most Californian residents and the state’s robust agricultural sector depend.



Then-candidate Donald Trump speaks at a June 2016 rally in Fresno, CA. (Photo courtesy of Spencer Platt/Getty Images).

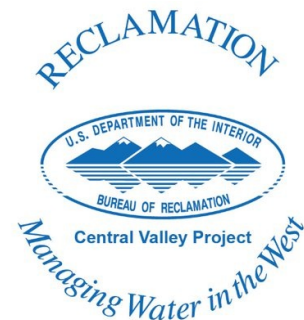
But this intergovernmental water policy Era of Good Feeling (relatively speaking) has come to a sudden and dramatic end with the ascension of the Trump Administration.

The trouble began in 2016, when presidential candidate Donald Trump told a campaign rally in California’s Central Valley that there’s plenty of available California water, if only California water managers would halt their “insane” practice of letting water be “wasted” by

allowing some of it to flow, unconsumed, out to sea. (This ignores the fact that if all of California's water runoff was diverted for human uses before reaching the Sacramento-San Joaquin Delta, diversions from the Delta upon which 23 million Californians and state agriculture depend would become too saline for human consumption or agricultural irrigation purposes. But that's another story...)

One defining characteristic of President Trump: he tries very hard to make good on his campaign pledges. It's his administration's efforts to do so that are putting the federal government and the State of California on a war footing when it comes to water policy.

Several parallel and related Trump administration water initiatives over the past year have ratcheted up the California-U.S. water wars. The first volley was fired by U.S. Bureau of Reclamation Director Brenda Burman against the State Water Resources Control Board. In a [July 27, 2018 letter](#), Commissioner Burman strongly criticized on both legal and policy grounds the Board's proposed Bay-Delta Plan Update, designed to increase flows in the Lower San Joaquin River and Southern Sacramento-San Joaquin Delta. Her letter declared that if the Board did not substantially revise its proposal, "the Secretary [of the Interior] will request the Attorney General of the United States bring a [lawsuit] against the Board."



Second, on August 17, 2018, then-Secretary of the Interior Ryan Zinke wrote a "[California Water Infrastructure](#)" memo to his senior staff declaring that the CVP is in "a desperate state of disrepair"; blaming the State of California for the problem as a result of ill-conceived conditions on CVP operations imposed by the State Water Board under its *California v. United States/Reclamation Act* authority; and directing his Department subordinates to, among other things, take immediate action to maximize CVP water deliveries to California farmers and ranchers; and to build new water storage facilities in California.

Third, President Trump on October 19, 2018 issued a "Presidential Memorandum" to members of his Cabinet entitled, "[Promoting the Reliable Supply and Delivery of Water in the West](#)." President Trump announced the Memorandum in the heat of the 2018 midterm elections, during a campaign stop designed, in principal part, to support incumbent Republican members of Congress in California and other Southwestern states locked in close reelection races. (If the Memorandum was intended to bolster his party's congressional incumbents from California's Central Valley, the strategy failed miserably: [two] of those Central Valley Republican incumbents were turned out of office by the voters.)

The Trump Memorandum declares that "[d]ecades of uncoordinated, piecemeal regulatory actions have diminished the ability of our Federal infrastructure...to deliver water and power in an efficient, cost-effective way." It directs his Cabinet secretaries to take multiple, immediate steps to "streamlin[e] Western water infrastructure regulatory processes and remov[e] unnecessary burdens." Specifically, the Memorandum orders his senior officials to expedite environmental reviews of existing and proposed federal water infrastructure

projects under both the federal Endangered Species Act and the National Environmental Policy Act.

Fourth, Congress passed and on October 23, 2018, President Trump signed into law “[America’s Water Infrastructure Act of 2018](#).” That legislation includes federal funding for two controversial Northern California water projects: the proposed raising of the level of Shasta Dam and Shasta Reservoir (the centerpiece of the CVP) by 18-20 vertical feet; and the construction of the proposed Sites Reservoir, an off-stream storage facility in the upper Sacramento Valley that would help store much of the additional water supplies captured by a raised Shasta Dam.

Fifth, finally and most recently, the Trump administration’s Justice Department on March 28, 2019, made good on its July 2018 threat to sue the State Water Resources Control Board if the Board did not back off of its plans to increase San Joaquin River and Southern Delta flows. (The Board, wisely, had refused to do so, formally adopting those plans in late 2018.)

But the legal theory upon which the Trump administration relies in mounting this legal challenge is both curious and unprecedented: it filed [parallel lawsuits in federal and state courts](#) in Sacramento, arguing that the Board violated the California Environmental Quality Act (CEQA) when it adopted the San Joaquin River/Southern Delta revised flow standards. Specifically, alleges USDOJ, the State Water Board’s environmental analysis of those proposed standards was deficient *in not allowing more diversions from the river and Delta*.

In the nearly 50 year history of CEQA, this is apparently the first lawsuit under that foundational California environmental law the federal government has filed against the State of California. And, at a time when many industry and developer critics rail against perceived “abusive CEQA litigation” brought to further non-environmental objectives, the Trump administration’s newly-filed CEQA lawsuits do just that.

While USDOJ lawyers declare in their dual complaints that they’d prefer their CEQA claims be resolved in federal court, it seems far more likely that the assigned federal district judge will abstain in favor of state court resolution of those state law claims. And—to this longtime CEQA practitioner, at least—this seems a weak CEQA lawsuit at best. Put plainly, is this the best legal theory the Trump administration could come up with to challenge California state water policies with which it so fundamentally disagrees?

What’s more troubling is the larger legal and policy picture. The Trump administration has quite dramatically moved to a war footing in bringing its CEQA challenges to State Water Board actions affecting the CVP. It most certainly won’t be the last such litigation challenge.

Meanwhile, the federal government is straining mightily to expedite its efforts to launch new water projects in California that are extremely controversial and likely to generate substantial new litigation *against* the Trump administration. The proposal to raise Shasta Dam is



Shasta Dam, Shasta County, CA

particularly contentious: last year California's Secretary for Natural Resources wrote to the Congressional leaders of both parties urging it not to authorize the project, declaring that the project, if constructed, would violate the California Endangered Species Act and other state environmental laws due to its adverse effects on California waterways and fisheries resources. Native American tribes and environmental groups also are vigorously opposed to the Shasta Dam proposal.

These Trump administration water policy initiatives are infected with the same flaws contained in numerous administration environmental and non-environmental policies: attempting to change federal law via executive order, memoranda and letters rather than through adherence to the requirements of the federal Administrative Procedure Act. That questionable approach has generated a harsh reception in the courts, which have rather consistently invalidated the Trump administration's efforts to evade the requirements of the APA. If California chooses to challenge some or all of the federal government's recent water initiatives in court, they seem likely to suffer a similar fate.

Some observers darkly predict that all of the above-described water policy machinations by the Trump administration have a more sinister objective: to elevate one or more of these federal-state water disputes to the U.S. Supreme Court, in order to seek reversal of the High Court's landmark *California v. United States* precedent and thereby establish federal primacy when it comes to legal conflicts between federal water projects and state water law.

In any event, the Trump administration appears spoiling for a fight—on multiple legal and policy fronts—with state water regulators over water law, water policy and the operation of federal water infrastructure in California. It's equally apparent that the State of California and its environmental allies will not shrink from what is becoming an increasingly hot federal-state water war.

[Bureau of Reclamation, California, California State Water Resources Control Board, California v. United States, Central Valley Project Improvement Act, Reclamation Act of 1902, Ryan Zinke, Shasta Dam, Trump Administration](#)

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