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Lead NEPA Story: Judge backs federal approval of massive lithium mine

(*Greenwire*, 2/7/2023), Hannah Northey, E&E News Reporter

A federal judge in Nevada on Monday upheld the federal government's approval of the largest proposed lithium mine in the nation, dismissing arguments that the Thacker Pass project would degrade nearby aquifers, air quality, and habitat for the imperiled greater sage grouse.

But U.S. District Judge Miranda Du in her ruling also asked the Bureau of Land Management to revisit a portion of its environmental analysis. The agency violated federal law by failing to validate that developer Lithium Americas Corporation has the rights to dump waste and tailings on about 1,300 acres at the site in Humboldt County, the judge concluded.

While the court's decision is a setback for environmental groups, nearby Indigenous communities and a local rancher opposed to the project, it marks a significant milestone for the mine, which would be built on 5,700 acres of federal land in north Nevada.

Lithium Americas in a statement hailed the ruling as "favorable" and said it confirms that the permitting process was conducted thoroughly and responsibly. The company has said it wants to begin construction this year.

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Clean Water Act: Solar farms pose water quality challenges

(*Greenwire*, 2/15/2023) E. A. Crunden, E&E News Reporter

Improving water quality at large-scale solar energy sites may require looking beyond current regulations, according to a new government-funded study analyzing the unique characteristics of those projects.

Stormwater management practices, along with permitting and regulations, are failing to account for the layout and needs of larger solar power installations, per the findings of the new analysis published Wednesday. Funded by the Department of Energy, the study is being offered as the first to probe how solar development interacts with stormwater management, a key consideration as the federal government expands its renewable energy push.

EPA's standards for stormwater, implemented under the Clean Water Act, play an important role in safeguarding both surface and groundwater from nearby land development, which can significantly alter a watershed's

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functions. But those regulations were developed for very different types of projects than the kind now underway at solar farms.

"Solar development land change can differ considerably in form from other types of residential and commercial development practices," the report observed.

Some notable distinctions include the presence of vegetated areas underneath solar panels, along with vegetated soil between arrays, or panel rows. Failing to account for these distinctions can pose major problems, the analysis found, ramping up costs and yielding "diminishing water quality outcomes."

Carried out by the Great Plains Institute, DOE's National Renewable Energy Laboratory, the University of Minnesota, and the nonprofit group Fresh Energy, the study looked closely at the characteristics of photovoltaic technologies — or solar panels — and how they interact with stormwater runoff.

Ultimately, the authors concluded that major drivers of stormwater runoff at those sites are not accounted for in current regulations, posing a hurdle for the government and developers alike.

"One of the permitting challenges is uncertainty and concern about how solar farms affect surface and groundwater," said Brian Ross, GPI's vice president of renewable energy, in a statement. Addressing any problems, he added, can "both improve water quality and help meet our nation's climate goals."

Some of the elements not accounted for in current regulations include soil compaction and depth, along with distance between arrays and ground cover establishment. But the report also offered that additional stormwater infrastructure might not be needed at some solar farms if a range of practices and precautions are put in place.

Those can include intensive soil management, along with installing and maintaining "appropriate vegetated ground cover" like bare dirt and native prairie grasses. Sites that are dealing with shallow soil can meanwhile account for that by widening distance between arrays. Assembling "ideal site conditions" can be enormously helpful, the researchers found, even designs that account for 100-year frequency storms — a broad definition that accounts for rainfall with only a 1 percent chance of occurring in a given year.

Conversely, failing to account for those recommendations could prove dire. "When best practices are not followed, significant additional stormwater management may be needed," the report warned.

But the entities behind the study support more investments in solar power, and the authors are hopeful that their work will help pave the way for more successful projects. They have made a "solar runoff calculator" available to help developers account for possible issues.

James McCall, an NREL analyst and a principal investigator for the report, said the findings "will help create a more transparent and predictable permitting process" for big solar projects.

"We are simultaneously removing barriers to accelerated solar deployment by reducing stormwater permitting uncertainty and creating host community benefits from better stormwater outcomes at solar sites," McCall said.

Editor's Note: The January 2023 Great Plains Institute report, *Best Practices: Photovoltaic Stormwater Management Research and Testing (PV-SMaRT)*, may be viewed at https://betterenergy.org/wp-content/uploads/2023/01/PV-SMaRT-Best-Practice.pdf.

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Clean Air Act: EPA undoes Trump-era power plant rollback

***(Greenwire*, 2/17/2023*)* Sean Reilly, E&E News reporter**

A quixotic and clamorous regulatory saga perhaps unmatched in Clean Air Act history has ended — at least for now.

In a final rule unveiled Friday, EPA restored the legal underpinnings of a 2012 set of regulations for emissions of mercury, a neurotoxin that's particularly dangerous to babies, and a host of other dangerous pollutants from coal-fired power plants.

The rule will now be key to any effort by President Joe Biden's administration to strengthen those regulations and clamp down on a controversial source of climate change-inducing air pollution. More broadly, it could provide a foothold for better incorporating expected environmental justice benefits into the rationales for future efforts to curb pollution.

The rule's release comes almost three years after then-President Donald Trump's administration scrapped that legal foundation. While utilities and other electricity producers continued to abide by the emissions limits, the agency's decision to again formally find that it is "appropriate and necessary" to limit hazardous power plant releases removes a potentially serious legal vulnerability.

Even though the power industry had already complied with what are formally known as the Mercury and Air Toxics Standards, the Trump administration argued that the cost-and-benefit forecast originally used to justify them was fatally flawed.

The Trump-era decision was a rare deregulatory move that sparked opposition from both industry and environmental groups.

Under Biden, EPA then made a priority of reinstating the appropriateness finding. But the release of the new rule could lead to a restart in two sets of legal challenges that have been on hold: Republican-leaning states and some power companies launched the first; the second was brought by a Colorado-based coal company. Both are pending in the U.S. Court of Appeals for the District of Columbia Circuit.

Editor's Note: The *Final Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Supplemental Finding*, may be viewed at https://www.epa.gov/stationary-sources-air-pollution/mercury-and-air-toxics-standards.

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NEPA: Could Colorado River cuts trigger a flood of lawsuits?

(*Greenwire*, 2/8/2023) Jennifer Yachnin, E&E News reporter

Amid the showdown over how best to utilize a shrunken Colorado River — a debate that pits the waterway's largest user, California, against its six other states — some top officials are expressing worries the fight could devolve into an endless legal battle.

The Interior Department is expected to unveil its plan for cuts to water allocations as early as May. The effort is focused on protecting federal hydropower operations at the river's two major reservoirs, both now significantly reduced, as well as ensuring water deliveries to some 40 million individuals and 5.5 million acres of agricultural lands.

The prospect of a major federal lawsuit in response — whether between individual states or against the Interior Department and its agencies — could further complicate negotiations over the river by tying up resources and delaying potential resolutions for decades to come.

"The way we've avoided having to either legislate, impose [cuts] by the federal government or litigate, is to allow everyone to take more water out of the reservoirs," said John Fleck, a writer-in-residence at the University of New Mexico Law School's Utton Transboundary Resources Center. "Now that the reservoirs are empty, we have to deal with it."

Bureau of Reclamation Commissioner Camille Touton in June directed Western states to cut their use of river water by as much as 4 million acre-feet, or some 25 percent of the river water apportioned under a 1922 compact.

But the seven Colorado River Basin states — Arizona, California and Nevada in the Lower Basin and Colorado, New Mexico, Utah and Wyoming in the Upper Basin — have struggled to find agreement on how to make those cuts, particularly when it comes to which states must absorb the pain the soonest.

The details of those divisions became clear last week in two competing proposals for how to drastically cut their reliance on the waterway.

California put forth its own proposal, a plan that would provide for up to 2 million acre-feet of cuts while defending its status as the river's senior water user. The Golden State plan would require Arizona and Nevada to make reductions before it had to do so, enforcing the junior status of those states.

But the other six states want to grant Arizona and Nevada parity with California, requiring all three to account for water lost to evaporation and seepage as it moves through the Lower Basin.

In a worst-case scenario under that plan, California would have to forfeit 32 percent of its river water allocation, or more than 1.4 million acre-feet of its 4.4-million-foot annual claim. Under the same circumstances, Arizona would forgo 45 percent of its allocation and Nevada 22 percent of its claim.

The Biden administration will consider both plans as it prepares to overhaul the 2007 Colorado River Interim Guidelines, the rules that dictate how much water is withdrawn from each reservoir based on its current surface elevation.

Following the supplemental environmental impact statement, a final record of decision will be issued this summer.

But Amy Haas, who serves as executive director of the Colorado River Authority of Utah, asserted that whatever the result of the Biden administration's actions, the final decision is all but guaranteed to raise objections in federal court.

"I do believe that litigation, sadly, is going to be inevitable with respect to this [National Environmental Policy Act] process," Haas said Thursday in an event sponsored by the University of Utah's College of Law.

While those disputes could be lodged by local or regional water users, Haas said she is most concerned about "original action" cases, or lawsuits between individual states that are adjudicated by the Supreme Court.

"There's always litigation on the river," Haas said, but warned that a major conflict like the decadelong Supreme Court battle *Arizona v. California* could short-circuit efforts to address the river's future.

In that case, the court ruled for Arizona in 1964, declaring the state had a right to 2.8 million acre-feet of water from the Colorado River, and refuting California's claim that it had a right to those same waters.

"If we bring it to an order of magnitude, such as original action, we'll never be able to deal with the short-term crisis on the river. We're going to be mired in litigation, and that's not a solution," Haas added.

Haas pressed fellow basin states to hew to the "Law of the River," or the body of rules and regulations based on the Colorado River Compact of 1922, to avoid entrenched court battles.

"We have come up with a lot of very elaborate rules, criteria to govern this river, because we don't want our destiny controlled by the courts," Haas said. "And we don't want Congress to dictate outcomes."

Tensions about 'Law of the River'

In fact, Congress weighed in on the *Arizona v. California* decision in 1968, when it authorized the construction of the Central Arizona Project, which delivers Colorado River water to the state. In the same legislation, lawmakers designated Arizona's water rights as "junior," making it first in line for supply cuts in times of drought.

That designation has become a key point of contention in the current negotiations, as Arizona officials have pressed to ensure California must absorb cuts along with them. California has resisted that idea, asserting the protection provided by its senior status must be respected.

"Physics and math are winning out over the Law of the River," said Tom Buschatzke, director of the Arizona Department of Water Resources.

Buschatzke argued that the six-state proposal to account for water lost to evaporation and seepage is critical, given that the Colorado River is not flowing at the rates dictated by its 100-year-old compact. More recent estimates put the river as low as 11 million acre-feet per year.

"The system is being drained by 1.5 million acre-feet a year because we're not recognizing the physical reality," Buschatzke told E&E News last week.

Buschatzke added that Arizona is "committed" to continuing negotiations with all seven states, but acknowledged that he was "very concerned" the discussions are ultimately headed to the courthouse.

"It would be very, very difficult for conversations to go on while litigation is going on," Buschatzke said. "Certainly in litigation, as it proceeds, parties find ways to talk and settle their differences before a judge makes a ruling, but that's going to just create — compared to where we're at today — an exponentially more difficult set of discussions."

Buschatzke also acknowledged his concern that even with a lawsuit pending, decisions will still need to be made about the river's continued operations, whether by a federal edict or other agreement.

Still, Buschatzke said he also doesn't see an immediate role for Congress to play, noting continued divisions among stakeholder groups — which, in addition to state, regional and local water authorities, includes environmental and agricultural lobbies — would likely create a roadblock to speedy action.

"California still has a big delegation compared to Arizona, just as it did in 1968," he said. "I'm not sure where any of that would lead. ... I would prefer to see continued efforts by the states to talk."

California Natural Resources Agency spokesperson Lisa Lien-Mager said state officials plan to continue working with the other basin states, but did not directly address inquiries about potential court battles.

"We are focused on a constructive approach that we believe is implementable, fair and achievable," Lien-Mager told E&E News. "We will continue to collaborate with the Bureau of Reclamation and the other six basin states to develop an implementable solution that can keep adequate supplies in Lake Mead in the near term and avoid an untenable situation that would affect the entire lower basin. "

But in public comments filed to Reclamation in December, the Colorado River Board of California alluded to potential litigation if the Biden administration agrees to consider evaporative or other losses.

"Any other application of losses may face considerable legal and technical challenges, and endanger existing water transfer agreements, which could interfere with voluntary proposals and halt forward momentum at a time when collaboration and decisive action is most needed," wrote Christopher Harris, the board's executive director.

A major lawsuit would also end a long-running peace in the Colorado River Basin, said Jennifer Gimbel, who served as Interior's principal

deputy assistant secretary for water and science in the Obama administration.

"We've gone so long on this river and have met so many challenges without the lawsuits," said Gimbel, now a senior water policy scholar at Colorado State University's Colorado Water Center. "There are so many technicalities that could be erasing the good we've done in the last 20 years."

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NEPA: Judge blocks Montana coal mine expansion

(*Greenwire*, 2/14/2023) Hannah Northey and Niina H. Farah, E&E News reporters

A federal judge in Montana has halted the expansion of a controversial underground coal mine on public land north of Billings, ordering the Interior Department to conduct a deeper and more comprehensive environmental review.

Senior Judge Donald Molloy of the U.S. District Court for the District of Montana in a decision on Friday faulted an earlier National Environmental Policy Act analysis of the Bull Mountains mine and warned that Signal Peak Energy's planned 175-million-ton expansion of the site may not proceed. "A properly conducted [environmental impact statement] does not necessarily mean federal mining in the Expansion Area will proceed as Signal desires," Molloy wrote.

Interior declined to comment. Signal Peak Energy did not immediately respond when asked to comment.

The court ruling came nearly three years after Molloy, a Clinton pick, had tossed out the Interior Office of Surface Mining Reclamation and Enforcement's 2018 analysis of the project and ordered the agency to conduct a new environmental assessment for the planned expansion of the mine.

While rejecting most of the environmental groups' claims at the time, Molloy had agreed that OSMRE had violated NEPA by not considering the risk of train derailments from increased train traffic during its analysis of the project.

On appeal of the ruling from the Trump administration, the 9th U.S Circuit Court of Appeals had directed Molloy to review whether tossing out the analysis was necessary.

In the meantime, OSMRE had announced it planned to conduct a more rigorous analysis for the project, leaving Molloy just with the task of deciding whether it was appropriate to toss out the 2018 analysis.

In the ruling on Friday, Molloy ruled that the agency's voluntary decision to more thoroughly review the project was not enough.

"The Enforcement Office's errors cast substantial doubt on the agency's decision to approve the Mine Expansion in the first instance," he wrote.

"That doubt is then augmented, not assuaged, by the agency's unilateral decision to prepare an EIS at this stage of the proceedings," he continued. "Therefore, the agency's errors are sufficiently serious to warrant vacatur."

Environmental groups celebrated Molloy's order, accusing the Trump administration of ignoring the effects of expanding the site into what they said would have been the largest underground mine in the nation.

The project has been dogged by legal challenges and opposition, and Signal Peak pleaded guilty in recent years to intentionally violating health and safety standards at the Bull Mountains mine, including forcing workers not to report injuries — and paid a $1 million fine.

"The court's order brings long-sought accountability to a mine that has operated with utter disregard for area ranchers and the water supplies they depend on for decades," said Melissa Hornbein, senior attorney with the Western Environmental Law Center. "Signal Peak's bad behavior has driven this community to the brink — we hope this outcome represents

a turning point for families who have worked and looked after this land for generations."

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Lead NEPA Story **(continued from page 1)**

"The favorable ruling leaves in place the final regulatory approval needed in moving Thacker Pass into construction," said Jonathan Evans, the company's president and CEO.

Thacker Pass could help the United States transition away from gasoline-powered cars by giving automakers a domestic supply of lithium carbonate chemicals needed for electric vehicle batteries. Lithium is a critical component in EV batteries and renewable technologies, and demand is expected to triple in coming years.

Just last month, General Motors Co. announced it was investing $650 million in the project if it survived the lawsuit, marking the largest single investment to date by an automaker in a lithium mining project. Developers have estimated that the mine could produce enough lithium to support the production of as many as 1 million EVs annually.

Currently, there is only one lithium mine operating in the United States.

But the Thacker Pass project has faced multiple challenges after receiving a "record of decision" from BLM in 2020 under the Trump administration, arguments that Du acknowledged and addressed in her order.

"While this case encapsulates the tensions among competing interests and policy goals, this order does not somehow pick a winner based on policy considerations," she wrote. "That is not this Court's role."

Instead, Du said, the court's role is "to carefully apply the applicable standard of judicial review" to consider BLM's decision, an agency that is "generally entitled to deference."

Du remanded — but did not vacate — BLM's so-called record of decision, saying the records suggest the agency could address the lack of a mining rights validity determination.

"The Court will remand for BLM to fix the error — to determine whether Lithium Nevada possesses valid rights to the waste dump and mine tailings land it intends to use for the Project," she wrote.

BLM did not immediately respond to a request for comment.

Parallels to Rosemont

The order highlights an ongoing legal debate over the reach of the 1872 General Mining Act and the responsibility federal agencies and developers face when it comes to handling and dumping mine waste and tailings.

At the center of the argument is BLM's approval of the Thacker Pass mine in 2020 upon conducting an environmental review under the National Environmental Policy Act and the Federal Land Policy and Management Act.

In months that followed, environmental groups, an Orovada rancher, and the Reno-Sparks Indian Colony and Burns Paiute Tribe sued and argued that the agency had failed to analyze the project's effect on the environment. They also argued that BLM failed to fully consult Indigenous tribes.

Du in her order found that the groups were persuasive in arguing that BLM had violated federal law by failing to make a "mining rights validity determination" around Lithium Americas Corporation's plan to dump waste on 1,300 acres before issuing a record of decision.

Specifically, environmental groups including the Western Watersheds Project, WildLands Defense, Great Basin Resource Watch, and Basin and Range Watch based their arguments in part on a precedent-setting case in Arizona tied to the open-pit Rosemont copper mine near Tucson in the Coronado National Forest and Santa Rita Mountains.

In the Rosemont case, the 9th U.S. Circuit Court of Appeals last year reiterated that the 1872 law requires a company to discover valuable minerals before permanently occupying any land — and that includes waste dumps and tailing piles.

The appeals court's decision ultimately scrapped the Forest Service's approval for developers of the Rosemont mine to store waste rock on nearly 2,500 acres of national forest lands where no mill sites have been built and no valuable minerals are located, sending the decision back to the agency.

Du in her order identified parallels between the Rosemont case and that of Thacker Pass.

"Rosemont is about a copper mine on Forest Service land, not a lithium mine on BLM land," she wrote. "But the language of the regulations at issue in Rosemont is so similar to the language of the regulations at issue here, and the reasoning of Rosemont otherwise so applicable to these facts, that the Court finds Rosemont controlling."

'Green light' or 'illegal'?

Lithium Americas in its statement noted that the court remanded the decision to BLM to decide whether the company possesses adequate mining-claim rights to the lands for waste storage and tailings.

The company also said it "intends to work closely with the BLM to complete the required follow-up."

But Greta Anderson, deputy director of the Western Watersheds Project, said in an email that her group is still reviewing the decision and that it would be "premature" for Lithium Nevada to consider this a "green light."

"The court properly found the Bureau's decision was unlawful and so moving forward with the mine would still be illegal," said Anderson. "There's nothing 'green' about species extinction, groundwater contamination, devastation of important Indigenous sites, and habitat loss."

Anderson vowed to continue working with tribes to protect the land they call Peehee Mu'huh, or "rotten moon." Some local tribal members have said they are direct descendants of Ox Sam, believed to be one of the few survivors of a 1865 massacre of Native Americans at that location.

Du in 2021 said there wasn't enough evidence to support tribal contentions that the mine will be built at the massacre site.

In her latest ruling, Du dismissed other arguments raised by the mine opponents, including concerns about groundwater aquifers and air quality. She noted that the company under BLM's record of decision will not be allowed to violate state water quality standards or federal and state air quality standards.

Du also dismissed environmental groups' assertions about there being a lack of data around sage grouse habitat as "simply inaccurate," noting that BLM had conducted baseline surveys and included those findings in its environmental review, as it did for springsnails and pronghorn.

She also concluded that the agency had not violated federal law by not consulting two tribes that claim a connection to the land — the Reno-Sparks Indian Colony, or RSIC, and the Burns Paiute Tribe in Oregon — before issuing the record of decision. The Fort McDermitt Paiute and Shoshone Tribe, which is located about 40 miles away from the project, has not joined the lawsuit, and signed a "community benefits agreement" with Lithium Americas, according to the company.

"BLM made a reasonable decision not to consult RSIC or Burns Paiute Tribe on the Project before issuing the ROD," she wrote. "BLM did not violate [the National Historic Preservation Act] in making that decision."

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