



Brace yourself: a flood of water lawsuits is coming

Russell McGlothlin and **Matt Kline** from international law firm O’Melveny & Myers explain why US courtrooms could soon be flooded with lawsuits in an effort to secure scarce water supplies

RESEARCHERS ARE WARNING THE US to brace for a “megadrought,” with large reservoirs in the Colorado River basin already showing signs of another year of alarming declines. As water levels drop in the American West, courtrooms across the country soon could be flooded with lawsuits.

Several factors are culminating to usher more water conflicts. Available supplies have been constrained in recent years. Scientists have found evidence of decades-long droughts in the past and we may be in a similar pattern now. Consequences of anthropogenic climate change, including earlier snow melts, are also making the effects of hydrologic

variability more acute.

Changes in demand are also a factor. In addition to general population growth, demand for water is “hardening.” In many locations, farmers have converted annual crops to permanent crops of higher value, thus eliminating opportunities for periodic fallowing. Courts and regulatory agencies have increased restrictions on water diversions to protect environmental interests. And many urban centers have already tapped low-cost conservation measures, rendering it increasingly more difficult to accommodate population growth without increased demand.

Above: **Lake Mead on the Colorado River in the US during drought**

Above: **Low water levels at Wolford Mountain Reservoir on Muddy Creek, part of the Colorado River watershed**

Raising the stakes

These supply and demand factors have increased the scarcity and value of water, thus raising the stakes and the motivation for legal battles to secure supplies. Regulatory efforts to manage over tapped water supplies may also foster conflicts.

For instance, in California where groundwater supplies have been largely unregulated until recently, new management actions implemented pursuant to the Sustainable Groundwater Management Act (SGMA), adopted in 2014, are causing stakeholders to seek judicial adjudication of groundwater rights as a means of determining relative responsibility for pumping reductions to cure long-term overdraft. Beyond local conflicts, legal wrangling over proportionate access to water is often a source of state-vs.-state litigation, with cases currently before the US Supreme Court that involve Texas, New Mexico, Florida and Georgia.

Such litigation is sometimes necessary to bring clarity to the relative rights and obligations among diverse water users making shared use of a variable and transient resource. But litigants should be mindful of the limits of litigation to achieve optimal solutions.

In water conflicts, the stakeholders are typically repeat players. Thus, a litigated victory today may just instigate a new lawsuit tomorrow. Water

management to procure reliable and cost-effective supplies typically requires support across a broad scope of stakeholders. Whenever possible, potential combatants should diligently pursue a negotiated compromise rather than a knee-jerk resort to the courts. Successful negotiations may yield cooperation and innovation to improve the procedural and physical aspects of water management.

With decades of legal practice in the industry, we appreciate the opportunities for negotiation, and when necessary, litigation. For instance, in the Central and West Coast groundwater basins in southern California, local groundwater users and public water management agencies fought for years, in and out of court, over management authority and rights to use underground storage space in the heart of the Los Angeles region, a consequence of decades of over-pumping in the early twentieth century. Several years of negotiation in the late 2000s led to an agreement for a comprehensive rewrite of governing court judgments that, once approved by the courts, fostered new cooperation in the management of the basins and opportunities to put the previously under utilised groundwater storage space to beneficial use.

As a more recent example, the water district

Below: As water levels drop in the American West, courtrooms across the country soon could be flooded with lawsuits



and private pumpers tapping the Borrego Springs Basin in eastern San Diego appeared to be heading toward litigation over efforts to develop and implement a groundwater sustainability plan (GSP) for the basin under SGMA. Through diligent effort, however, we successfully negotiated a stipulated judgment for presentation to the courts to comprehensively adjudicate all groundwater rights and the management protocol for the basin. The proposed judgment allocates pumping rights and sets forth terms for a steady reduction in groundwater use to cure overdraft. It also includes provisions concerning carry over and transfer of pumping rights, a collaborative process to perform technical studies to improve estimates of the basin's sustainable yield, a watermaster to oversee day-to-day management, and judicial review of any future conflicts. Where protracted litigation once looked likely, the basin

stakeholders are now on the fast-track to effective and efficient groundwater management with clearly defined and transferable water rights. The result is a success for the individual stakeholders and for the broader community that relies exclusively on the local basin to meet its water demands.

Unfortunately, settlement over heated water rights conflicts can often be elusive, and there are times when litigation is necessary to clarify rights and limitations. Our experience in California's Coachella Valley is an example. There, our team recently secured a victory in federal court against a local tribe's effort to restrict the valley's water utilities from storing imported water from the Colorado River underground within the local groundwater basin for later recovery. Such "conjunctive use" of surface water and groundwater resources is an essential practice to manage the region's available supplies. This litigated success could possibly help pave the way to a broader settlement concerning management of the basin.

In assessing any emerging water conflict, prudent stakeholders should thoroughly consider the risks, costs, and delay occasioned by litigation in comparison to the efficiencies that may be achieved through compromise. Experienced water rights counsel can assist in making informed decisions, and together with trained facilitators, may advance efforts to realise creative solutions, often based on similar conflicts that have been resolved. Such efforts are ever more important in an environment of increasing water scarcity. ●

About the authors



Matt Kline is a partner in the Century City, California office of international law firm O'Melveny & Myers. Matt is the leader of O'Melveny's Water Industry Group, which helps clients navigate the transactional, regulatory, and litigation issues implicated by this ever-more vital resource. Matt has twice been named California trial lawyer of the year in this area, having served as lead counsel in numerous high-profile California water cases. As a lecturer at Stanford University, Matt co-teaches a Business of Water class.



Russell McGlothlin is counsel in the Los Angeles, California office at O'Melveny & Myers and a member of O'Melveny's Water Industry Group. Russ has spent decades advising clients on water use and management matters in California and the western United States.

Founded in Los Angeles in 1885, O'Melveny & Myers is an international law firm with 700 lawyers in 15 offices around the world. It has been at the forefront of water litigation for more than a century and has accumulated a record of accomplishment counseling clients in some of the most complex water cases throughout the United States.

For more information see www.omm.com/services/industries/energy-natural-resources-and-utilities/water