



REGULATORY ROUNDUP

NATURAL RESOURCE USERS LAW & POLICY CENTER

COLLEGE OF AGRICULTURE, LIFE AND ENVIRONMENTAL SCIENCES AND COLLEGE OF LAW

REGULATORY ROUND-UP

Issue 10 – September–December 2023

Quick Topics

Climate Change

The US Global Change Research Program (USGCRP) [Fifth National Climate Assessment Report](#) (NCA5) is out and NRULPC Affiliated Faculty Michael Kotutwa Johnson is an author on the Tribal and Indigenous Peoples (Chapter 16). This chapter highlights three key messages with very high confidence: 1) Indigenous Peoples Face Risks to Well-Being and Livelihoods from Climate Change and Barriers to Energy Sovereignty, 2) Self-Determination Is Key to Indigenous Peoples' Resilience to Climate Change and 3) Indigenous Leadership Guides Climate Change Response.

NCA5 Resources:

[NCA5 Companion Podcast](#) or find on your favorite streaming platform.

[See USGCRP NCA5 webinar series for registration and full topics listings.](#) A few dates and topics of possible interest:

Agriculture, Rural Communities, and Food Systems - January 18th, 2024 4:00PM - 5:00PM EST

Tribes and Indigenous Peoples - January 19th, 2024 1:00PM - 2:00PM EST

Southwest - February 23rd, 2024 11:00AM - 12:00PM PST

Western Wildfires - February 23rd, 2024 12:00PM - 12:30PM PST

American Climate Corps

[Listening Sessions registration](#) to gain feedback on shaping this initiative. “The American Climate Corps will put new generations of Americans to work conserving our lands and waters, bolstering community resilience, advancing environmental justice, deploying clean energy, implementing energy efficient technologies, and tackling climate change.” Session dates/times ET: January 11, 10am; January 16, 6pm; January 25, 6pm and February 1, 10am.

WOTUS Revisited

[EPA WOTUS Conforming Rule \(88 FR 61964\)](#). The EPA had amended the “waters of the United States definition in the 2023 Rule” 88 FR 3004 (January 18, 2023), now to comply with the findings of SCOTUS in the May 2023 Sackett decision there is a new amendment. Posted are amending language to 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6). The agency also states that it is relying on



the “APA 553(b)(B) to issue this final rule without prior proposal and opportunity for comment ... as well as an immediate effective date, 5 U.S.C. 553(d)(3), ... because this rule does not impose any burdens on the regulated community.” The amendment removes the *significant nexus* standard, redefines the term *adjacent* to mean “relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection” and removes reference to *interstate wetlands*.

Further stated in the amendment, “the agencies are working to improve coordination among Federal agencies through coordination memoranda and trainings.” EPA and the Corps plan the development of “regionally specific tools to facilitate implementation of the definition of ‘waters of the United States’ and provide trainings to Tribes, States, and the public as appropriate to promote clarity and consistency.” For more information see the [Final Conforming Rule Factsheet](#) for a quick view table of the rule changes or see other materials and webinar announcements at <https://www.epa.gov/wotus>.

The Arizona Department of Environmental Quality Surface Water Protection and Improvement Stakeholder Seminar December 4, 2023 offered some guidance on how the WOTUS Conforming Rule would impact Arizona. Their assessments will rely on a weight of evidence procedure to determine relative permanence terminology with seven tools: flow duration (admittedly a longer process to obtain a year’s worth of data), biological indicators, imagery analysis, 3D modeling, riparian corridor assessment, depth to groundwater and snowpack. They are currently using USGS stream stats for designating permanent, but all new permits are approved on a case by case basis and assessed for risk of pollutant discharge to WOTUS waters. Changes will be with the internal approach when and what tools to use for new or escalated enforcement violations or advice to correct. ADEQ is currently working on a white paper to answer questions specific to Arizona on ephemeral streams and interstate waters, no timeline for completion was expressed.

Clean Water Act (CWA) Revisited

[Environmental Protection Agency CWA: Section 401 final rule revision](#) (88 FR 66558). This rule revises and replaces a 2020 regulation altering section 401 of the Clean Water Act (“CWA”). According to the National Agricultural Law Center, “Section 401 of the CWA provides that EPA may not issue a permit to discharge pollutants into protected waters without certification from the state where the discharge would occur. Under section 401, states may certify a permit as-is, certify a permit with additional conditions that the permittee must adhere to, or decline to certify in which case the permit is not issued. Regulations adopted in 2020 limited the ability of states to decline to certify proposed permits and to mandate conditions. EPA’s new rule rolls back the 2020 regulation and returns the section 401 regulations to where they were prior to the change.” For more information on the section 401 change, read [National](#)

[Agriculture Law Center article “Court Vacates CWA Section 401 Certification Rule](#). An eleven state [lawsuit](#) challenges the new rule. According to the National Agriculture Law Center The Feed, “the plaintiffs argue that the rule change increases the workload of state environmental agencies and leaves states at risk of lawsuits for not considering every possible “water-quality related” impact of a project.”

Mining

[Department of the Interior-led Interagency Working Group on Mining Laws, Regulations, and Permitting \(IWG\)](#) announces mining law revision recommendations. The report, [Recommendations to Improve Mining on Public Lands](#) prepared by a Federal interagency working group proposes a “joint DOI-USDA programmatic EIS process through NEPA that would classify public lands into three categories” designated as Priority I, II or III based on level of resource conflict potential and known mineral content or previous exploration and development. The report states, “with appropriate congressional authority and direction, DOI and USDA could then establish financial, procedural, and substantive incentives consistent with the recommendations contained in this report to prioritize development in Priority I and II areas. Priority III areas, would require additional management stipulations to proactively address avoidance and mitigation needs.” The 169-page report contains 65 suggestions including replacing the General Mining Law with a leasing system including the development of “a fair process for converting claims into leases.” The leases would include a royalty based on a percentage of net proceeds with a floor of 4% and ceiling of 8%. No recommendations were made concerning ancillary uses but only that rights could be acquired “either by a permit, lease, right-of-way authorities or land exchange.”

Public Lands

Corner Crossing Case in [Iron Bar Holdings, LLC, v. Bradley Cape, et al.](#), United States District Court, District of Wyoming (2023) the opinion held that “corner crossing on foot in the checkerboard pattern of land ownership without physically contacting private land and without causing damage to private property does not constitute an unlawful trespass.” The case will be heard on appeal in the U.S. 10th Circuit Court of Appeals. To learn more about some of the issues surrounding this case see the [United Property Owners Of Montana’s amicus curiae brief supporting Iron Bar Holdings](#).

Livestock Grazing decision in [Western Watersheds Project v. Perdue \(2021\)](#) the court found that the U.S. Forest Service’s (“USFS”) authorization of livestock grazing in the Apache-Sitgreaves and Gila National Forests was appropriate. The plaintiffs argued that the USFS failed to adhere to NEPA and consider the impacts on endangered Mexican gray wolves. The court found that the USFS analyzed the expected impacts appropriately, concluding that grazing was likely to minimally affect Mexican Gray Wolves. The court quoted [Earth Island Inst. v. Muldoon](#), -- F.4th --

, 2023 WL 5921619 at *10 (9th Cir. 2023). “Once the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference.” Another case where an agency decision was upheld as appropriate for a decision to thin vegetation prior to a controlled burn in Yosemite National Park.

Solar, Wind & Geothermal on [BLM lands announced \\$4.9 million to gather data on special status species and wildlife](#) impacts for siting renewable energy and transmission proposals while improving conservation outcomes. According to the BLM this effort will result in knowledge pertaining to such topics as: regional inventories of eagles and other migratory bird species and pygmy rabbit habitat; desert tortoise habitat use and connectivity at landscape levels; special status species in areas of high geothermal resource development potential; predictive modeling for big game seasonal habitat use and movement corridors; research on thermal effects of solar facilities to plant life and wildlife habitat; rare plant regional surveys in California and New Mexico.

Prescribed Fire in a [Rural Voices for Conservation Coalition Local Prescribed Fire Capacity Report](#) they surveyed 137 community organizations’ needs for performing prescribed burning to reduce wildfire risk to communities.

Wildland Fire Mitigation, the [USDA Forest Service Wildland Fire Mitigation and Management Commission Report](#) highlights 150 recommendations to modernize the US Forest Service wildland fire fighting programs. This includes preventative measures such as prescribed burning, community resiliency programs and employee recruitment and retention.

Agriculture

[Occupational Safety and Health Administration Hazard Alert for Heat](#). According to the National Agricultural Law Center (Aug 2023), “the Labor Department issued its first-ever **hazard alert for heat** due to record-breaking temperatures nationwide this past summer. The alert noted that under the General Duty Clause of the federal Occupational Safety and Health Act, employers are required to protect workers from known safety hazards, including extreme heat. The Labor Department also stated that it has plans to enhance enforcement in high-risk industries like agriculture and construction, focusing on vulnerable worker populations.” According to [Climate Central](#) one-quarter (1.9 billion) of people experienced dangerous levels of extreme heat this year. The European Union’s Copernicus Climate Change Service predicts that 2023 will be the warmest calendar year on record. “This is the hottest temperature that our planet has experienced in something like 125,000 years.”

Additional Resources

[The Changing Landscape – Everything Agricultural Employers Should Understand About Farm Labor Law Webinar. Webinar recording link – National Agriculture Law Center.](#)

[*USDA FSIS and FDA Cell-Cultured Meat Agreement*](#). The USDA’s Food Safety and Inspection Service (“FSIS”) has issued “grants of inspection” to two companies that produce cell-cultured meats. The grants represent the final stage in the regulatory process for cell-cultured meat and allow the companies to start producing chicken for human consumption. UPSIDE Foods and GOOD Meat are the first two companies to receive FSIS grants of inspection for cell-cultured meat products. To learn more [here about the regulatory process for cell-cultured meats](#).

Additional Resources

[Meat and Poultry Labeling](#) Webinar (National Agriculture Law Center 2023).

[Cell Cultivated meat: An Overview](#) (Congressional Research Service 2023).

[*USDA Agricultural Marketing Service Organics Program Livestock and Poultry Standards \(88FR75394\)*](#). Revisions involve adding rules for handling livestock, transportation, poultry living conditions, and expanding current standards for livestock care, production practices, and non-poultry living conditions. Changes become effective on January 2, 2024. To learn more about the rule and the changes it makes to the organic standards, see the National Agriculture Law Center article [“USDA Publishes Final Rule Amending Organic Livestock and Poultry Standards.”](#)

[*Arizona Department of Agriculture Cage Free Egg Rule*](#) went into effect at the end of 2022. It prohibits the sale of eggs from caged chickens in Arizona. The rule states that eggs sold in the state of Arizona must come from hens that are provided with at least one square foot of floor space. Additionally, the rule provides that starting in January 2025, all egg-laying hens within the state shall be housed in a cage-free manner. *Litigation to watch:* [*Union Hospitality Group and Grant Krueger v. Arizona Department of Agriculture, \(filed November 2023 in Maricopa County Superior Court\)*](#) is a complaint for declaratory and injunctive relief lawsuit regarding the rule.

Executive Orders, Agency Rulemaking & Grants

Executive Orders

[*Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination*](#) Executive Order 14112 of December 6, 2023 (88 FR 86021). Requires federal agencies to take action to ensure federal funding for Tribes is accessible, flexible, and equitable; creates the Tribal Access to Capital Clearinghouse ([see links below](#)); requires assessing unmet federal obligations to support Tribal Nations and annual reports for implementation.

Commerce

[*Bureau of Economic Analysis Outdoor Recreation Statistics 2022*](#). Highlights the outdoor recreation economy accounts for \$563.7 billion, or 2.2 percent of national gross domestic product (GDP). It calculated the percentage of state GDP for Arizona at 2.5%.

Interior

[*Department of Interior announces a National Nature Assessment*](#) in collaboration with The US Global Change Research Program (USGCRP) and other agencies. Technical inputs can be submitted on an ongoing basis through the [USGCRP Public Contribution System](#). According to the [USGCRP, this assessment](#) “will take stock of U.S. lands, waters, wildlife and the benefits they provide to our economy, health, climate, environmental justice, and national security. The Assessment will also look ahead at how nature might change in the future, and what those changes may mean for our economy and our lives.”

[*Dept. of Interior announces new actions for nature-based solutions*](#) to tackle the climate crisis. A new [Roadmap document](#) written by Duke University’s Nicholas Institute for Energy, Environment & Sustainability, highlights barriers, regulatory processes, and cost comparisons between green and grey infrastructure strategies. Nature-based solutions use or mimic natural features or processes to tackle both social and environmental challenges. These solutions can include green infrastructure, natural infrastructure, and natural climate solutions.

[*Dept. of Interior Announces Increasing Co-Stewardship Opportunities, Incorporating Indigenous Knowledge and Protecting Sacred Sites*](#). New steps are to be taken and a [new guidance](#) on the inclusion of Indigenous Knowledge in decision making actions and scientific research.

Additional Resources

[Second Annual Report on Tribal Co-Stewardship](#) (DOI 2023).

[Tribal Co-management of Federal Lands](#), highlights issues, options and types of co-management of natural resources (Congressional Research Service 2023).

[*BLM to Analyze Potential Changes to West-wide Energy Corridors*](#). “As part of a settlement to resolve a lawsuit challenging the corridor designation decisions, the BLM and Forest Service agreed to [review and consider](#) recommendations for revisions, deletions, and additions of the corridors (Section 368). The BLM’s current planning effort will evaluate the recommendations to modify some of the designated West-wide corridors, in part to ensure avoidance of significant known resource and environmental conflicts.” BLM will hold public comment meetings:

Virtual Meetings ([registration](#) required):

- January 9, 2024 (10 a.m. to 11 a.m.)
- January 18, 2024 (10 a.m. to 11 a.m.)
- In person meeting: January 11, 2024 – Phoenix, AZ: BLM National Training Center, 9828 N. 31st Avenue (4 p.m. to 7 p.m.)

[*BLM Blueprint for 21st Century Outdoor Recreation*](#) document guide. The Blueprint is a strategic document to guide the agency’s work in response to the need to better manage increased outdoor recreational visitation to agency lands and to provide new recreational opportunities. The BLM is requesting public feedback on the implementation of the Blueprint. Public



comments closed on September 30, 2023. See the [Recreation Strategy by state webpage](#) for links to other states and the specific [implementation strategy for Arizona](#).

[***BLM announces \\$28 M for restoration partnerships to help advance the America the Beautiful Initiative.***](#) Funding will help implement six “critical conservation projects in sagebrush, forest, grassland, desert, and aquatic ecosystems through a collaborative approach with Tribes, States, and other non-profit partners across the West.” One of the projects is funded for \$1.2 M between the BLM and **Navajo Nation’s Diné Native Plants Program** for a native seed banking and restoration program. Establishing a seed certification program and administrative pathways will enable the program to market and sell native plant materials to Federal and non-Federal agencies, including directly to the BLM. In addition the funding supports outreach and expands cultural plants seed banking.

[***BLM Public Lands Rule Update.***](#) The public comment period is closed now but had over 216,000 comments, 8,000 of which were unique and substantive. The agency hopes to complete the final rule including changes due to comments by end of winter. In the meantime here is a factsheet on how the [conservation leasing](#) might operate.

[***Bureau of Indian Affairs Access to Capital Clearinghouse***](#) database. According to the website, this database is a “multi-agency strategy to improve awareness of, access to, and utilization of federal funding resources for Tribal governments, Tribal enterprises, Native entrepreneurs, and Native Community Development Financial Institutions (CDFIs).”

Bureau of Reclamation (BR)

[***Bureau of Reclamation announces \\$6 Million for Innovative Solar Panel Installation Over Canals in Gila River Indian Community.***](#) According to BR, the agency will work with the Gila River Indian Community to cover “2,782 linear feet of the Casa Blanca canal with approximately 2,556 solar panels. The solar panels are expected to generate 1.31 megawatts of clean energy, providing 2.26 million kilowatt-hours of annual electricity to the Gila River Indian Community. This pilot will serve as a five-year study period and provide vital information for future solar projects over canals and for the Gila River Indian Community as they seek to include solar panels over 18.5 miles of canal.”

[***DOI Resource Grants for Tribal Nations to Address Legacy Pollution***](#) from orphan oil and gas wells on tribal lands. Ten tribes across the west will receive a total of \$40 M to plug approximately 414 wells in phase 1 funding. To plug twenty-one wells the Navajo Nation will receive \$4.9 M.

USDA

[***USFS National report on sustainable forests, 2020.***](#) “Abstract: This report presents a comprehensive assessment of sustainability conditions and trends in forests of the

United States. It is produced in response to the United States' political and institutional commitment to measure, monitor, and report on forest sustainability at national and subnational levels using the Montréal Process Criteria and Indicators (C&I) for the Conservation and Sustainable Management of Temperate and Boreal Forests (Robertson et al. 2011).”

[*USFS Initiates National Forest Plan Amendment to Conserve and Steward Old Growth Forests* \(88 FR 88042\)](#). “The consistent management direction contained in the proposed nationwide forest plan amendment would direct place-based strategies for old-growth forest conservation and management, developed in partnership with Tribal communities and in collaboration with local stakeholders. These strategies will be adaptive and factor in the unique opportunities and challenges of a particular area, which will allow for more flexibility in responding to rapid changes in wildfire behavior, drought, insects and disease. The amendment would prohibit vegetation management within old-growth forest conditions when the primary purpose is to grow, tend, harvest, or regenerate trees for economic reasons.” Public comments can be submitted via webform at www.fs.usda.gov/project/?project=65356, due by February 2, 2024.

[*USFS Carbon Capture and Sequestration Permitting Rulemaking* \(88 FR 75530\)](#). All proposals for permits must also receive permits from the U.S. Environmental Protection Agency, for geologic carbon sequestration wells, also known as the Underground Injection Control Program Class VI injection wells under the Safe Drinking Water Act. Comments for this proposed rule are due by January 2, 2024.

Online Planning Tools

[*Department of Defense Climate Resilience Portal*](#) a one-stop focal point hub for several scientifically credible, neutral, authoritative, and actionable climate change information tools for DOD decision making.

[*Department of the Interior launched a new interactive map*](#) that tracks over \$8.2 billion funds distributed so far from the Bipartisan Infrastructure Law to over 1,300 projects nationwide. The tool is the first of its kind from a cabinet agency, according to Interior. The map shows that seventy-seven projects totaling \$511.6 M have been funded in Arizona so far. Project types range from addressing drought, ecosystem restoration, Indian Water Rights Settlements, Tribal investments and wildland fire.

[*USDA Climate Hub Water Adaptation Techniques Atlas \(WATA\)*](#) compiles information about responses to water scarcity in the southwestern U.S., presented in the form of case studies.

[*USDA Forest Service Climate Risk Viewer*](#) illustrate overlapping values with climate exposure, vulnerability, and current management direction related to National Forest System lands. This information helps resource managers assess climate adaptation needs in order to maintain valued resources.

[*Sage Policy Profiles Tool*](#) “allows researchers to track how their research has been cited in policy from governments, think tanks, and policymakers across the world.”

[*W.A.L.T. Wildlife and Land Trusts*](#): A tool for land trusts to identify federal resources for wildlife conservation created by the Defenders of Wildlife. [See the tool here.](#)



📧 Interested to receive NRULPC’s *Regulatory Roundup* in your email inbox contact: Sheila Merrigan merrigan@cals.arizona.edu or Anne Gondor gondora@arizona.edu.

