2007

ANNUAL REPORT

of the

# WESTERN STATES WATER COUNCIL

42nd Annual Report

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# 2007 ANNUAL REPORT

### OF THE

# WESTERN STATES WATER COUNCIL

## INTRODUCTION

The first official meeting of the Western States Water Council was held on the south shore of Lake Tahoe, at Stateline, Nevada on August 3, 1965. The Western Governors' Conference approved the creation of the Western States Water Council during meetings in Portland, Oregon on June 10-13, 1965. The Governors' resolution explicitly stated: "The future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality." Further, the governors felt that a fair appraisal of future water needs, and the most equitable means of meeting such needs, demanded a regional effort. Water availability and interbasin transfers of water were important issues. Western states found themselves in an era of rapid federal water resources development, and regional or basinwide planning, without a sufficient voice in the use of their water resources. The Western States Water Council has since provided a unified voice on behalf of western governors on water policy issues.

The emphasis and focus of the Western States Water Council has changed over the years as different water policy problems have evolved. However, the commitment towards reaching a regional consensus on issues of mutual concern has continued. The Council has proven to be a dynamic, flexible institution providing a forum for the free discussion and consideration of many water policies that are vital to the future welfare of the West. As envisioned by the Western Governors' Conference, it has succeeded as a continuing body, serving the governors in an expert advisory capacity. Over the years, the Western States Water Council has sought to develop a regional consensus on westwide water policy and planning issues, particularly federal initiatives. The Council strives to protect western states' interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management.

Council membership and associate membership status is determined based on a request from the governor. Originally, Council membership consisted of eleven western states: **ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON and WYOMING**. In 1978, **TEXAS** was admitted to membership, after many years of participation in Council activities in an "observer" status. **ALASKA** requested and received membership in 1984. **NORTH DAKOTA** and **SOUTH DAKOTA** both received membership in 1988 after a long association with the Council. **HAWAII** was a member from 1991-1999. In 1999, **OKLAHOMA** requested and received membership. In 2000, both **KANSAS** and **NEBRASKA** joined the Council at the request of their respective governors. Council membership is automatically open to all member states of the Western Governors' Association. Other states may be admitted by a unanimous vote of the member states.

Associate membership has also been granted states exploring the benefits of membership, experiencing financial hardship, or otherwise temporarily unable to maintain full membership.

Each member state's governor is an ex-officio Western States Water Council member. The governor may appoint up to three Council members or representatives, and as many alternate members as deemed necessary. They serve at the governor's pleasure. (Associate member states are limited to two representatives and two alternates.)

Council officers, including the Chair, Vice-Chair, and Secretary-Treasurer, are elected annually from the membership. State representatives are appointed to working committees, with one representative per state also appointed to an Executive Committee. The Executive Committee attends to internal Council matters with the assistance of a Management Subcommittee, which includes the Council officers, immediate past Chair, and Executive Director. The Council's working committees are the Legal Committee, the Water Quality Committee, and the Water Resources Committee. Each working committee is directed by a committee chair and vice-chair. Committee chairs, in turn, name special subcommittees and designate subcommittee chairs to study issues of particular concern.

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2007, meetings were held in: Sioux Falls, South Dakota on May 2-4th; Bozeman, Montana on August 8-10th; and Phoenix, Arizona on November 14-16th. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office, or visiting our website. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. The dues for FY2007 (ending June 30, 2007) were set at $27,500 per state. A copy of the audit performed for the fiscal year ending June 30, 2007 can be obtained from the Council office. The auditors noted "no matters involving the internal control over financial reporting and its operation that we consider to be a material weaknesses," and "no instances of non-compliance that are required to be reported herein under *Government Auditing Standards*."

During 2007, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Deputy Director; Jeff Taylor, Legal Counsel; and a secretarial staff consisting of Cheryl Redding, and Julie Groat.

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# COMMITTEE AND SUBCOMMITTEE MEMBERSHIP

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Lester Snow - California
Jennifer Gimbel - Colorado
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Norm Semanko - Idaho
Dave Tuthill - Idaho
(Alternate)*
David W. Barfield - Kansas
John Tubbs - Montana
Ann Bleed - Nebraska
Michael Linder - Nebraska
(Alternate)*
Roland Westergard - Nevada
Allen Biaggi - Nevada
(Alternate)*
William Hume - New Mexico
John D'Antonio - New Mexico
(Alternate)*
Ron Curry - New Mexico
(Alternate)*
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Miles Tolbert - Oklahoma
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Garland Erbele - South Dakota
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Jay Manning - Washington
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### Farm Bill Subcommittee

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David Glatt - North Dakota
Phil Ward - Oregon
Walt Baker - Utah
Stephen Bernath - Washington
Sue Lowry - Wyoming

*For purposes of Committee rosters, the designation as "alternate" may not necessarily reflect the person's status regarding Council membership, but rather the person's function on the Committee.

### Management Subcommittee

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Garland Erbele - South Dakota
**(Vice-Chair)**
Weir Labatt - Texas
(Secretary/Treasurer)
Hal Simpson - Colorado
(Past Chair)
D. Craig Bell
(Executive Director)

### WSWC Water Policy Seminar Subcommittee

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Roland Westergard - Nevada

### Endangered Species Act Subcommittee

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Roland Westergard - Nevada
James Davenport - Nevada
Eileen Grevey Hillson - New Mexico
Phil Ward - Oregon
Weir Labatt - Texas
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Sue Lowry - Wyoming

### Western Water Supply Challenges Subcommittee

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Mike Volesky - Montana
Ann Bleed - Nebraska
Tracy Taylor - Nevada
Jim Davenport - Nevada
John D'Antonio - New Mexico
Eileen Grevey Hillson - New Mexico
Duane Smith - Oklahoma
Garland Erbele - South Dakota
Dennis Strong - Utah
Pat Tyrrell - Wyoming

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Susan Cottingham - Montana
Tim Hall - Montana
(Alternate)*
Candace West - Montana
(Alternate)*
Pam Andersen - Nebraska
Roland Westergard - Nevada
Jim Davenport - Nevada
(Alternate)*
Maria O'Brien - New Mexico
**(Vice-Chair)**
Chuck DuMars - New Mexico
(Alternate)*
John Utton - New Mexico
(Alternate)*
Todd A. Sattler - North Dakota
Dean A. Couch - Oklahoma
John Guhin - South Dakota
J.E. (Buster) Brown - Texas
Fred N. Pfeiffer - Texas
(Alternate)*
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Barbara Markham - Washington
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## General Adjudication Fees Subcommittee

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## Federal Reserved Water Rights Subcommittee

Susan Cottingham - **(Chair)** - Montana
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Norman Johnson - Utah

## Legal Education Subcommittee

Candace West - Montana
Norman Johnson - Utah

## Amicus Brief Subcommittee

Jim Davenport - **(Chair)** - Nevada
Candace West - Montana
John Guhin - South Dakota
Norman Johnson - Utah

# WATER RESOURCES COMMITTEE

Richard Mylius - Alaska
Gary Prokosch - Alaska (Alternate)*
Herb Guenther - Arizona
Tom Maddock - California
Jeanine Jones - California (Alternate)*
Harold D. (Hal) Simpson - Colorado
Dave Tuthill - Idaho
David W. Barfield - Kansas
Adrian Polansky - Kansas (Alternate)*
Mike Volesky - Montana
John Tubbs - Montana (Alternate)*
Ann Bleed - Nebraska
Pam Andersen - Nebraska (Alternate)*
Tracy Taylor - Nevada
Eileen Grevey Hillson - New Mexico
John D'Antonio - New Mexico (Alternate)*
Dale Frink - North Dakota
Duane A. Smith - Oklahoma
Phil Ward - Oregon **(Chair)**
Garland Erbele - South Dakota
Thomas Weir Labatt - Texas
David Montagne - Texas (Alternate)*
Larry Anderson - Utah
Dennis Strong - Utah (Alternate)*
Ken Slattery - Washington
Joe Stohr - Washington (Alternate)*
Patrick Tyrrell - Wyoming
Sue Lowry - Wyoming (Alternate)*

## Border Water Issues Subcommittee

Jeanine Jones - California
Dale Frink - North Dakota
Herman Settemeyer - Texas
Ken Slattery - Washington

## Drought/Flooding Issues Subcommittee

Tom Carr - Arizona
Jeanine Jones - California
Ann Bleed - Nebraska
John D'Antonio - New Mexico
Duane Smith - Oklahoma
Dennis Strong - Utah
Kurt Unger - Washington

## Water Transfers and the Public Interest

Jeanine Jones - California
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Tim Hall - Montana
Jim Davenport - Nevada
Duane Smith - Oklahoma
Phil Ward - Oregon
Weir Labatt - Texas
Larry Anderson - Utah
Pat Tyrrell - Wyoming

## Water Information Management and Data Collection Subcommittee

Phil Ward - Oregon **(Chair)**
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Hal Anderson - Idaho
Estevan Lopez - New Mexico
Duane Smith - Oklahoma
Barry Norris - Oregon
Barney Austin - Texas
Larry Anderson - Utah
Sue Lowry - Wyoming

## Water Resources Management and Program Funding Subcommittee

Jeanine Jones - California **(Chair)**
Hal Simpson - Colorado
Norm Semanko - Idaho
Adrian Polansky - Kansas
Mike Volesky - Montana
Eileen Grevey Hillson - New Mexico
John Utton - New Mexico
Duane Smith - Oklahoma
Kevin Ward - Texas
Larry Anderson - Utah

## Water Use Efficiency/Conservation Subcommittee

Sue Lowry - Wyoming **(Chair)**
Herb Guenther - Arizona
Lester Snow - California
Norm Semanko - Idaho
Tim Hall - Montana
Jim Davenport - Nevada
Estevan Lopez - New Mexico
Ann Watkins - New Mexico
Kevin Ward - Texas
Larry Anderson - Utah
Stephen Bernath - Washington

## High Plains Work Group

Hal Simpson - Colorado
Dean Couch - Oklahoma
Duane Smith - Oklahoma
Garland Erbele - South Dakota
Weir Labatt - Texas
Sue Lowry - Wyoming
Pat Tyrrell - Wyoming

# WATER QUALITY COMMITTEE

Lynn Kent - Alaska
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Darlene Ruiz - California
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Toni Hardesty - Idaho
Ron Hammerschmidt - Kansas
Karl Mueldener - Kansas
(Alternate)*
Tom Stiles - Kansas
(**Vice-Chair**) (Alternate)*
Richard Opper - Montana
Michael Linder - Nebraska
Patrick Rice - Nebraska
(Alternate)*
Allen Biaggi - Nevada
Ron Curry - New Mexico
Fred Lujan - New Mexico
(Alternate)*
David Glatt - North Dakota
Miles Tolbert - Oklahoma
Steve Thompson - Oklahoma
(Alternate)*
Lauri Aunan - Oregon
Steve Pirner - South Dakota
Daniel Womack - Texas
David Montagne - Texas
(Alternate)*
Walter Baker - Utah
Jay Manning - Washington
Stephen Bernath - Washington
(Alternate)*
John Corra - Wyoming
John Wagner - Wyoming
(Alternate)*

## Arid West Water Quality Issues Subcommittee

Paul Frohardt - (**Chair**) - Colorado
Steve Pawlowski - Arizona
Tom Stiles - Kansas
Chris Levine - Montana
Susan Braley - Washington
Bill DiRienzo - Wyoming

## Clean Water Act Subcommittee

Paul Frohardt - Colorado
Barry Burnell - Idaho
Tom Stiles - Kansas
Richard Opper - Montana
Walt Baker - Utah
Stephen Bernath - Washington

## Good Samaritan Subcommittee

Paul Frohardt - Colorado
Bill Hume - New Mexico

## Section 518/Tribes as States Subcommittee

Linda Taunt - Arizona
Barry Burnell - Idaho
Bill Hume - New Mexico
Dean Couch - Oklahoma
Derek Smithee - Oklahoma
Tom Laurie - Washington

## Quality-Quantity Interrelationship Subcommittee

Tom Stiles - (**Chair**) - Kansas

# WESTERN STATES WATER COUNCIL
## Committee Assignments

### Executive Committee

| | |
|---|---|
| Richard Mylius | - Alaska |
| Herb Guenther | - Arizona |
| Lester Snow | - California |
| Jennifer Gimbel | - Colorado |
| Hal Simpson (Alternate)* | - Colorado |
| Norm Semanko | - Idaho |
| David W. Barfield | - Kansas |
| John Tubbs | - Montana |
| Ann Bleed | - Nebraska |
| Michael Linder (Alternate)* | - Nebraska |
| Roland Westergard | - Nevada |
| Allen Biaggi (Alternate)* | - Nevada |
| William Hume | - New Mexico |
| John D'Antonio (Alternate)* | - New Mexico |
| Ron Curry (Alternate)* | - New Mexico |
| Dale Frink | - North Dakota |
| Miles Tolbert | - Oklahoma |
| Duane A. Smith (**Chair**) (Alternate)* | - Oklahoma |
| Phil Ward | - Oregon |
| Steve Pirner | - South Dakota |
| Garland Erbele (**Vice-Chair**) (Alternate)* | - South Dakota |
| Thomas Weir Labatt | - Texas |
| Dennis Strong | - Utah |
| Jay Manning | - Washington |
| Patrick Tyrrell | - Wyoming |

### Water Resources Committee

| | |
|---|---|
| Richard Mylius | - Alaska |
| Gary Prokosch (Alternate)* | - Alaska |
| Herb Guenther | - Arizona |
| Tom Maddock | - California |
| Jeanine Jones (Alternate)* | - California |
| Harold D. (Hal) Simpson | - Colorado |
| Dave Tuthill | - Idaho |
| David W. Barfield | - Kansas |
| Mike Volesky | - Montana |
| John Tubbs (Alternate)* | - Montana |
| Ann Bleed | - Nebraska |
| Pam Andersen (Alternate)* | - Nebraska |
| Tracy Taylor | - Nevada |
| Eileen Grevey Hillson | - New Mexico |
| John D'Antonio (Alternate)* | - New Mexico |
| Dale Frink | - North Dakota |
| Duane A. Smith | - Oklahoma |
| Phil Ward (**Chair**) | - Oregon |
| Garland Erbele | - South Dakota |
| Thomas Weir Labatt | - Texas |
| David Montagne (Alternate)* | - Texas |
| Larry Anderson | - Utah |
| Dennis Strong (Alternate)* | - Utah |
| Ken Slattery | - Washington |
| Joe Stohr (Alternate)* | - Washington |
| Patrick Tyrrell | - Wyoming |
| Sue Lowry- Wyoming (Alternate)* | |

### Water Quality Committee

| | |
|---|---|
| Lynn Kent | - Alaska |
| Joan Card (**Chair**) | - Arizona |
| Darlene Ruiz | - California |
| Paul Frohardt | - Colorado |
| Toni Hardesty | - Idaho |
| Ron Hammerschmidt | - Kansas |
| Karl Mueldener (Alternate) | - Kansas |
| Tom Stiles (**Vice-Chair**) (Alternate)* | - Kansas |
| Richard Opper | - Montana |
| Michael Linder | - Nebraska |
| Patrick Rice (Alternate)* | - Nebraska |
| Allen Biaggi | - Nevada |
| Ron Curry | - New Mexico |
| Fred Lujan (Alternate)* | - New Mexico |
| David Glatt | - North Dakota |
| Miles Tolbert | - Oklahoma |
| Steve Thompson (Alternate)* | - Oklahoma |
| Lauri Aunan | - Oregon |
| Steve Pirner | - South Dakota |
| Daniel Womack | - Texas |
| David Montagne (Alternate)* | - Texas |
| Walter Baker | - Utah |
| Jay Manning | - Washington |
| Stephen Bernath (Alternate)* | - Washington |
| John Corra | - Wyoming |
| John Wagner (Alternate)* | - Wyoming |

### Legal Committee

| | |
|---|---|
| Christopher Estes | - Alaska |
| William Staudenmaier (**Chair**) | - Arizona |
| Thomas Maddock | - California |
| Jennifer Gimbel | - Colorado |
| Norm Semanko | - Idaho |
| Susan Cottingham | - Montana |
| Tim Hall (Alternate)* | - Montana |
| Candace West (Alternate)* | - Montana |
| Pam Andersen | - Nebraska |
| Roland Westergard | - Nevada |
| Jim Davenport (Alternate)* | - Nevada |
| Maria O'Brien (**Vice-Chair**) | - New Mexico |
| Chuck DuMars (Alternate)* | - New Mexico |
| John Utton (Alternate)* | - New Mexico |
| Todd A. Sattler | - North Dakota |
| Dean A. Couch | - Oklahoma |
| John Guhin | - South Dakota |
| J.E. (Buster) Brown | - Texas |
| Fred N. Pfeiffer (Alternate)* | - Texas |
| Norman K. Johnson | - Utah |
| Barbara Markham | - Washington |
| Peter Michael | - Wyoming |

# COUNCIL MEMBERS
## Bozeman, Montana
## August 10, 2007

Front Row L to R: Darrel Stordahl (Guest), Meredith Peterson (Guest), Dale Frink, Sue Lowry, Walt Baker, Norm Johnson, Garland Erbele, Joe Busto (Guest), Dave Dillon

2nd Row L to R: Norman Semanko, Eloise Kendy (Guest), Mike Fallon (Guest), Colonel Janice Lembke Dombi (Guest), Paul Frohardt, Roland Westergard, Susan Cottingham, Jeanine Jones, Hal Simpson, Tom Maddock, Anne Watkins, Tom Buchanan (Guest)

3rd Row L to R: David Moon (Guest), Adrian Polansky, Duane Smith, Bill Hume, Stephen Bernath, Phil Ward, Guest (unidentified), Paul Graves, Ken Knox, Joan Card, Dave Tuthill

4th Row L to R: Gene Lilly, Ward Staubitz, Weir Labatt, John Tubbs, John Utton

# STAFF

Back Row: Tony Willardson and Craig Bell
Front Row: Julie Groat and Cheryl Redding

D. Craig Bell . . . . . .Executive Director
Anthony G. Willardson (Tony) . . . . . .Deputy Director
Cheryl Redding . . . . . .Office Manager
Julie Groat . . . . . .Receptionist/Secretary

# COUNCIL MEETINGS

## 153rd Council Meetings
## Sioux Falls, South Dakota
## May 2-4, 2007

On May 2-4, the spring meetings of the Western States Water Council were held in Sioux Falls, South Dakota. The Council adopted two new policy position statements/resolutions. The first supports funding for federal programs to study the water resources-related impacts of climate variability and change and our ability to adapt, stating that to date federal agencies and research "...have concentrated heavily on basic scientific research, research that needs to be translated into decision support applications for water resources management...." It specifically endorses work under the National Oceanic and Atmospheric Administration's (NOAA) Regional Integrated Sciences and Assessment (RISA) Program and urges the Administration and Congress to "give a high priority to funding for federal programs, such as the RISAs that provide the translation function between basic scientific research on climate variability and change and the application of that research to real-world water management situations at the regional, state and local levels."

The second position statement expresses support for legislation to specifically authorize activities under Interior's Water 2025 Initiative and the U.S. Bureau of Reclamation's Challenge Grants Program as an appropriate "proactive, but non-regulatory, approach to encouraging water conservation – with further state and local input – through voluntary federal-state-local partnerships...." It also calls on Reclamation to provide meaningful opportunities for non-federal participation in the development of eligibility criteria and priorities...." It also states that Water 2025 should complement Reclamation's Water Conservation Field Services Program and in no way nullifies the need for that program." Reclamation believes it already has the authority necessary for its past and present activities, but so as to address concerns raised by some in the Congress, Senator Domenici introduced S. 2561 last year to authorize the Secretary of Interior to make cost-shared grants and enter into cooperative agreements to further the goals of the Water 2025 program. A bill has yet to be introduced in this Congress.

The Council also recommended two additional positions for the governors' review, as well as suggested changes to update a Western Governors' Association (WGA) policy resolution.

Two sunsetting positions in the form of letters were revised and replaced. First, the Council reiterated its views on H.R. 135, the Twenty-First Century Water Commission Act, which was reintroduced in this Congress (with the same bill number) on January 4, by Rep. John Linder (R-GA). The bill has fifteen co-sponsors, including Rep. Grace Napolitano (D-CA), chair of the House Natural Resources Committee's Water and Power Subcommittee, to which the bill was referred on February 7. The House has twice passed the legislation, but no significant action was taken in the Senate. Given that it has been "some time since a comprehensive study of the available water supplies and the future water needs of the United States has been undertaken...a study, such as that proposed in H.R. 135, could be of substantial benefit to the West.... If such a commission is to be successful, it will be important that it represent the diverse interests that exist. This is particularly so in the West...." Lastly, the Council reiterates that should it be authorized, the Commission should, "...reflect the long-held Congressional policy of deference to states regarding water management."

The second revised and updated position expresses appreciation to Senators Pete Domenici (R-NM) and Jeff Bingaman (D-NM), the past and present chairs of the Senate Energy and Natural

Resources Committees, for their efforts in securing passage in the last Congress of the Rural Water Supply Act of 2006. The legislation authorizes an assessment of rural water needs and potential projects, but there is no money for construction. It also authorizes federal loan guarantees to help enable Reclamation project sponsors to obtain private financing for necessary, extraordinary operation and maintenance, rehabilitation and replacement costs. These federal project costs are reimbursable, and generally must be repaid in the year the work is completed, often creating a financial obstacle to needed work. Without title to the federal project, non-federal project sponsors have often been unable to secure long-term private financing. The Council looks forward to working with Reclamation to implement the legislation, which directs that it "consult and cooperate" with states and other non-federal interests as it conducts its appraisal investigations and feasibility studies and identifies funding sources.

Each of the above described positions specifically refers to the WGA June 2006 report, "Water Needs and Strategies for a Sustainable Future," and recommendations specific to that report.

The Water Resources Committee, chaired by Phil Ward of Oregon, discussed support for RISA programs. Jeanine Jones of California explained that they are primarily based at universities, with RISA teams also made up of members from federal research facilities, non-profit organizations, and the private sector. In the West, there are RISA programs at the University of Arizona, Colorado, UC San Diego, and Washington. The research is focused on climate sensitive public health issues, as well as impacts on agriculture, water, fisheries and wildlife, etc. Dave Tuthill of Idaho briefed members on the use of Landsat thermal infrared data to measure and monitor consumptive water use, thanking the Council for its efforts to secure FY2008 funding. Idaho has found no comparable alternative technology with the resolution needed for field-by-field investigation.

Robert Hirsch, U.S. Geological Survey (USGS), Associate Director for Water, discussed the Cooperative Water Program (CWP) and National Streamflow Information Program (NSIP), FY2008 funding, and cooperator roundtables designed to gather stakeholder input. He noted recent streamgaging program improvements, such as changing from mechanical measurements to hydroacoustic meters using Doppler radar technology and satellite telemetry to transmit instantaneous streamflow data with real-time quality assurance. He also discussed the USGS Ground Water Climate Response Network (http://groundwaterwatch.usgs.gov). Dan Lawson, USDA, Natural Resources Conservation Service (NRCS), Branch Chief, Conservation and Watershed Planning, explained the Administration's 2007 Farm Bill proposal, specifically changes to the Environmental Quality Improvement Program (EQIP) and the new Regional Water Enhancement Program (RWEP) to assist producers as part of large system-scale, coordinated water conservation projects.

The Committee considered other issues, including snow survey and water supply forecasting, state water plans, water use projections, drought planning and response, water information management, weather modification, and efforts to control invasive quagga and zebra mussel species. Members volunteered to join a proposed WGA working group related to the latter.

The Legal Committee, chaired by Bill Staudenmaier of Arizona, began with a discussion and progress report on Indian reserved water rights settlements, which seem to be gaining more momentum, according to Susan Cottingham, with the Montana Reserved Water Rights Compact Commission. Susan noted that 2008 will mark the 100th anniversary of the Supreme Court's Winters Doctrine recognizing Indian reserved rights. She added, "These are exciting times for some of us that have worked on these settlements for so long." Bill Hume of New Mexico reported

Administration officials visited the Navajo reservation, where some members of the tribe must still haul drinking water. He also noted the Aamodt settlement, and a number of Pueblo Indian agreements have yet to be completed and implemented. Council members and Interior officials will meet later this month to discuss obstacles to further progress.

WSWC Executive Director Craig Bell reported on a number of draft and proposed reports. Two drafts were presented: "The Legal and Institutional Context for Augmenting Existing Water Supplies;" and "The Public Interest and Growth Management Plans." Additional reports will be prepared on state growth initiatives and water planning, and legal and institutional constraints in responding to climate change. The Council will also update its past report, "State Tools to Provide Water for Endangered Species." With regard to the latter, Craig reported that the Council has been unable to engage the Administration in any further discussion of the WSWC's proposal to draft a protocol for acquiring water under state law to meet Endangered Species Act requirements.

Mike Fallon, U.S. Army Corps of Engineers, Program Director for the Southwest Region, discussed the Western Watershed Study, together with Gene Lilly, Project Manager. The Corps has undertaken a number of tasks, in cooperation with the Council, to implement specific recommendations from the WGA Water Report. Various project implementation teams with state and federal agency representatives have been organized.

Of note, the Water Quality Committee did not meet, having met earlier with the Association of State and Interstate Water Pollution Control Administrators in Washington, D.C. in March 2007.

The Full Council meeting began with a presentation by Steve Pirner, Secretary, South Dakota Department of Environment and Natural Resources. He described the varying geography and surface and ground water resources of the state, as well as the challenges meeting the needs of people and the environment, particularly during drought. Aging infrastructure and meeting rural communities water needs were mentioned, together with tapping Missouri River resources. Mary Roth, Project Manager, next described the Corps Missouri River Recovery Implementation Committee (MRRIC) and efforts to save endangered and threatened species, including the pallid sturgeon, piping plover and interior least tern. Robert Johnson, Bureau of Reclamation Commissioner, was the concluding speaker and he announced Reclamation will join in implementing the WGA Water Report recommendations. His remarks covered a range of issues in the Colorado, Columbia, Platte, Middle Rio Grande, Missouri, San Joaquin and Trinity basins – including Reclamation's Managing for Excellence (MFE), infrastructure replacement, rural water programs, climate change, desalination, and research.

**154th Council Meetings**
**Bozeman, Montana**
**August 8-10, 2007**

The Western States Water Council's 154th meetings were held in Bozeman, Montana on August 8-10. The Council considered a position statement on the Clean Water Act Restoration Act (H.R. 2421; S. 1870), but was unable to reach a resolution. A number of governors and others have already taken varying positions in support of or in opposition to the legislation. A joint subcommittee was appointed to further consider the issues, and try to prepare a consensus statement emphasizing areas of common agreement.

The Council agreed to send a letter to Senator Tom Harkin (D-IA), Chair of the Senate Agriculture Committee, expressing our concern over the deletion of some language in the House Farm Bill regarding activities under the new Regional Water Enhancement Program (consistent with our past Farm Bill position expressed in a 2005 letter to Secretary Johanns). The letter, signed by WSWC Chairman Duane Smith of Oklahoma, reads in part: "I am writing to express our strong support for the proposed Regional Water Enhancement Program (RWEP)..., and to stress the need for increased funding for the Rural Utilities Service (RUS) Emergency Community Water Assistance (ECWA) grants.... Our growing population continues to put pressure on scarce water resources, including agricultural uses, which account for around 80%-85% of withdrawals and consumptive use in the West. Water conservation is increasingly important, but shifts in uses are inevitable. Maintaining agricultural production and rural economies and communities, while accommodating other growing water needs and uses (including biofuels production), will be challenging. Farm bill programs and resources should be used to the maximum extent possible to help address related water supply and water quality problems."

The letter continues, "In this regard, the Council supports the [Administration's] requested authorization of $175 million per year in mandatory funding for the RWEP activities by eligible entities. Moreover, we believe the list of eligible activities should be broadly defined to allow the most flexible mix of various incentives to promote greater water conservation and reduce use, including incentives for producers to 'convert to the production of less water-intensive agricultural commodities; or dryland farming.'" The language is taken from the list of allowable activities under the present EQIP Ground and Surface Water Conservation Program. The House Agriculture Committee removed this language from H.R. 2419. "Reducing total net consumptive water use is a practical necessity in some parts of some states in the West where existing uses, given current ground and surface water supplies, are not sustainable. Program participation among producers and water users is voluntary."

Regarding RUS Emergency Community Water Assistance (ECWA) grants, the letter says, "...rural communities are at risk with respect to a wide range of drinking water shortages and water quality problems.... ECWA grants help provide a safety net for some of the Nation's most at-risk small water systems, systems having limited financial capacity to respond to significant public health concerns regarding their drinking water."

A number of special guests addressed members: Mary Sexton, Director of the Montana Department of Natural Resources and Conservation (DNRC); Richard Opper, Director of the Department of Environmental Quality (DEQ); Jeff Hagener, Director of the Department of Fish, Wildlife and Parks; Gary Campbell, Deputy Director, Great Plains Region, U.S. Bureau of Reclamation; and Mike Fallon, Programs Director, Southwestern Division, U.S. Army Corps of Engineers.

Montana is facing a number of water management challenges, which Mary Sexton described as the 3Ds: drought, development and disagreement. After 7-8 years of drought, streamflows are at about 50%, snowpacks are depleted, and wildfires burned a million acres last year. Drought is a problem that "may not go away," given climate change. We must learn to adapt to the impacts on water resources, rural communities and forests. She also said, "Montana has been discovered." Rural housing development has exploded, and people want to live along the wildland/urban interface and along streams, leading to water and fire management challenges. The use and misuse of the state's domestic well exemption (35 gallons per day) by subdivision developers is also creating problems. One proposal included 350 exempt wells on 340 acres.

Richard Opper said that climate change is perhaps the biggest issue facing Montana, and DEQ is leading efforts to reduce greenhouse gas (GHG) emissions. DEQ is also responsible, along with the counties, for approving subdivisions. He said that much of the new development relies on septic wastewater systems, many of which are inadequately maintained. Developers are resisting regulation and permitting. He has gotten more support by telling homeowners that 25% of their well water is coming from neighbors' septic tanks, and that in addition to nitrates and phosphorus problems, "...you could be drinking you're neighbors' Viagra!"

Jeff Hagener talked about streambank development and streamflow issues. Streambank development – with homes, fences, dogs and powerlines – is encroaching on riparian areas that provide wildlife with important habitat and travel corridors. He said 75% of species depend on riparian corridors – which is only 5% of the landscape. Streambank development also leads to rip rap to protect homes, which results in changing flow and flooding patterns. Conflicts with recreationists also arise, despite Montana's law allowing the public to use the bed and banks up to the high water mark. The Department has instituted an education and voluntary building setback program, working with landowners and developers. Montana has state held instreamflow water rights, often junior rights, and leases water. Legislation this year allowed the state to convert six water rights acquired from other users to instreamflows. Managing and protecting these rights is complicated by drought.

Gary Campbell addressed a number of priorities for Reclamation's Great Plains Region, including St. Mary's project rehabilitation. The Corps' Water Resources Development Act (WRDA) includes $140 million for non-reimbursable planning and rehabilitation work. Project irrigators don't have the ability to repay the high costs of rehabilitating projects, and this is a Westwide problem. He talked about the Platte River Endangered Species Recovery Program, which is a joint federal-state effort, raising Pathfinder Dam, Reclamation's rural water project construction backlog and new rules and guidelines, water supplies for Colorado's Front Range, the Red River Valley in North Dakota, funding hydropower operation and maintenance needs, Yellowstone and Republican River issues, drought, and Reclamation's "Managing for Excellence" effort.

Mike Fallon's presentation focused on strategic alliances, including the Western Watersheds Study, as a means to find ways to make the best use of finite water resources. Water needs are a "flash point," nationally and internationally. He discussed principles for water management, including the key role of state government with the Corps providing engineering, environmental and scientific expert assistance. The goal is coordinated, sustainable development on a regional scale. He used the New Orleans flood control system as an example of what can happen when you take a project-by-project, rather than a systems approach, to problemsolving. He briefly referred to the 2007 WRDA bill, which the Congress may complete when it returns from its August recess. He highlighted Sections 2010, 2017 and 2123 respectively addressing watershed-river basin assessments, access to water data, and increasing technical assistance.

The Council's Water Resources and Water Quality Committees met jointly to hear Dr. Alan Hamlet with the University of Washington's Climate Impact Group discuss water-related effects and the need to incorporate long-term climate information into planning. Jeanine Jones also reported on the findings of a WGA-WSWC May workshop on climate change. Water Resources Committee speakers covered the National Integrated Drought Information System (NIDIS), local and regional drought decision support systems, USGS's Cooperative Water Program (CWP), weather modification, the Corps' Western States Watershed Study, and Kansas' issues with Corps 404 regulation. Members also discussed ways to get better data on current and future water uses and

supplies, as well as support federal spending for current data gathering activities involving snow surveys, streamgaging and a Landsat thermal infrared sensor. A brief summary of pending federal legislation covered the National Dam Safety Act (H.R. 3224), 21st Century Water Commission (H.R. 3221 Section 8702), and the Farm Bill.

The Water Quality Committee included a roundtable discussion of current state problems, and state aquifer recharge programs, with updates on Good Samaritan legislation, silviculture practices. The Committee also addressed EPA activities, including treatment of "Tribes as States," the National Pollutant Discharge Elimination System (NPDES) rules and litigation, *Rapanos* guidance, and the Clean Water Restoration Act. The latter was also an item on the Legal Committee agenda, as it raises Constitutional issues. The Legal Committee also talked about recent reserved water rights developments and funding strategies for Indian water settlements. Dr. Eloise Kendy, Nature Conservancy, Environmental Flows Program, discussed integrating ecological needs into water allocation policies. Staff reported on efforts to complete reports on growth management, climate change, domestic well exemptions, water supply augmentation, and other WGA Water Report efforts.

In conjunction with the meetings, a special panel of academic leaders talked about their current research and ways to see it is applied to "real world" water problems. Gretchen Rupp, Montana Water Center, Mac McKee, Utah State University, Reagan Waskom, Colorado Water Resources Research Institute, Howard Neibling, University of Idaho, and Marshall English, Oregon State, described some current projects. Of note, Oklahoma is matching federal water research institute funding dollar-for-dollar with the understanding that their state water plan will guide water center research priorities. More dialogue between state agencies and researchers was encouraged. Prior to the meetings, members enjoyed a float trip down the Yellowstone River hosted by the State of Montana and a number consulting groups, with dinner at Chico Hot Springs.

**155th Council Meetings**
**Phoenix, Arizona**
**November 14-16, 2007**

The 155th meetings of the Council were held in Phoenix, Arizona on November 14-16. The Council adopted one external position in support of the Science and Engineering to Comprehensively Understand and Responsibly Enhance (SECURE) Water Act, introduced by Senator Jeff Bingaman (D-NM). A letter to Senator Bingaman points out that the bill "...addresses a number of longstanding concerns among western states as expressed in the June 2006 Western Governors' Association report, 'Water Needs and Strategies for a Sustainable Future.' Specifically, we support the enhanced spending authority for USGS streamgaging activities, a ground water monitoring system, brackish water study, new methods to estimate and measure water use, a national water use and availability assessment, establishment of an intra governmental panel on climate change and water resources, a Reclamation Climate Change Adaptation Program, hydroelectric power assessment and effects of climate change study, and financial assistance to non-federal entitles for water-use efficiency improvements."

The letter also: (1) suggests additions to the list in the bill of recognized "major reclamation river basins;" (2) notes the threat to our ability to "effectively measure and monitor evapotranspiration and consumptive water uses" due to the lack of NASA funding for a thermal infrared sensor on Landsat 8; (3) points out the importance of defining "net savings in groundwater or surface water resources" so as to take into consideration basin-wide or aquifer-wide saving, "not

simply on-farm water conservation;" (4) expresses appreciation for the explicit recognition that "...States bear the primary responsibility and authority for managing the water resources of the United States" and that "the Federal Government should support the States, as well as regional, local and tribal governments...;" and (5) calls on the Congress to make such sums as are authorized for Reclamation-related programs and purposes available from the Reclamation Fund, with the understanding that amounts authorized are in addition to assistance provided pursuant to other provisions of federal law.

The Council also renewed a sunsetting position (#260) urging the Congress to reaffirm its deference to state water law, provide for the waiver of the United States' sovereign immunity to pay fees in state administrative and judicial proceedings, and provide for the payment of unpaid fees to states that have incurred expenses as a result of processing federal claims or federal objections to private claims in state general stream adjudications.

Herb Guenther, Director of the Arizona Department of Water Resources and a WSWC member, provided a colorful overview of water issues in the State and their efforts to work with the other Colorado River Basin States to achieve greater certainty and flexibility in managing their common water resources. He declared that without the capacity to store interstate and in-state waters in numerous reservoirs, "We couldn't sustain our growth." He noted that from 1970 to 2000, Arizona's population grew from 1.77 million to 6.16 million, and such rapid growth continues. Arizona is still in a serious drought, and Lake Mead and Lake Powell are both at 48% of capacity. Given tree-ring evidence and the fact that the Colorado River Compact was based on perhaps the 30 wettest years of record in the basin, it appears the system has been over appropriated by some two or three million acre-feet (Maf)/year. The Basin States continue to negotiate an acceptable shortage sharing agreement, and are looking at desalination of brackish water and seawater, weather modification for snowpack enhancement, and water reclamation and reuse to fill the gap.

Also addressing the Council were Kathy Jacobs, Executive Director of the Arizona Water Institute, a partnership between Arizona's three universities, and Sharon Megdal, Director of the University of Arizona's Water Resources Research Center. Kathy talked about an "umbrella of opportunity." She said, "If we all work together, we will have a lot more to offer." The Institute has some 30 collaborative projects that bring together some of the expertise of over 400 faculty members. It is a "most unusual organization," directed by three university vice presidents for research, with an advisory board made up of some three dozen public officials and private stakeholder groups. Moreover, the Institute has placed university employees in three state agencies, which also help translate water resource information needs into research objectives. Six themes have been selected to focus on: Arizona hydrologic information systems; energy and water interrelationships and sustainability; emerging water contaminants; climate change; building local watershed group capacities; and salinity management technologies. Tasks involve data access/visualization, collaborative financing, research workshops, and technology transfer/commercialization.

Sharon noted the water resources research institutes across the Nation are supported with limited federal dollars. Each has a different "personality" and relationship with the States. Arizona provides some state money, through a sales tax levy dedicated to education. Their Water Sustainability Program at the University of Arizona has an applied research focus that seeks to maximize its relevance to state water issues. They administer a grant program, publish a newsletter and offer "brown bag" seminars. They are writing a history of Arizona's Ground Water Act, working with the U.S. Geological Survey on a transboundary aquifer assessment program, studying artificial recharge, and preparing a Layperson's Guide to Arizona Water. They try to match

resources and abilities, responding to requests for analysis and information, while looking for opportunities to partner on and off campus.

Meeting jointly, the Water Resources and Water Quality Committees heard presentations on ground water recharge in Arizona from both the Department of Water Resources and Department of Environmental Quality, Drew Swieczkowski and Michelle Robertson, respectively. They explained Arizona's complex system of ground water recharge, storage, recovery, credits and debits and permitting. The State has some 2 Maf of water stored underground in "constructed" and "managed" facilities, using reclaimed waters, imported Colorado River water, and native surface water when it is available. There are 66 active recharge projects and 42 use effluent as at least a partial source of supply, and they range in size from 67 to up to 200,000 acre-feet/year. Most recharge projects are concentrated in the State's Active Management Areas. More and more projects are using effluent, as Central Arizona Project surplus water has "mostly" been exhausted. Smaller projects using a mix of recharge methods are the trend, as land limitations curb larger projects. Recharge will continue to be important for developers to meet state assured water supply requirements, but water quality concerns are emerging, due to pharmaceuticals and other contaminants in reclaimed water.

Roger Patterson, Assistant General Manager, Metropolitan Water District of Southern California and a past WSWC member, briefed the committees on a bill (H.R. 3452) to allow a tax credit related to the purchase of clean renewable water supply bonds as a means to finance capital expenditure by qualified issuers for water reclamation, reuse and desalination projects. Dave Manning, USGS, then described Colorado River salinity control activities and their costs and benefits. Human activities, mostly runoff from irrigation, are a contributing factor at 39% of the sites. Control at these sources is the most cost effective solution. The key point of his presentation was that over time, 70% of the surface waters in the basin had seen improvement.

The Water Resources Committee, chaired by Phil Ward, discussed several topics, including the Corps' Western States Watershed Study, water use and water supply estimates, USGS activities, invasive species, energy and water interrelationships, the Farm Bill and water conservation. The Committee recommended the position adopted on the SECURE Water Act, and also directed staff to prepare a letter reiterating the Council's strong support for thermal infrared imaging as part of NASA's Landsat Data Continuity Mission (LDCM).

Joan Card chaired the Water Quality Committee meeting and Roger Gorke, Environmental Protection Agency, reported on: (1) "Good Samaritan" cleanup legislation; (2) recent Clean Water Act (CWA) testimony; (3) Tribes' CWA "Treatment as a State" (TAS) status; (4) the impact of a Florida case on CWA administration; (5) the status of pollution offsets in light of a recent Ninth Circuit decision; and (6) CWA administration "post *Rapanos*." The Western Governors' Association supports a Good Samaritan bill to limit possible legal liabilities. EPA is working with state and tribal officials to address TAS process "dysfunctionalities." The U.S. Department of Justice (DOJ) is considering whether to appeal the Florida decision to the U.S. Supreme Court. Likewise, EPA is concerned about the substance of the Ninth Circuit decision, but does not believe DOJ will appeal the decision or seek rehearing. Many members had questions regarding *Rapanos* guidance and EPA and the Army Corps of Engineers' interpretations. Walt Baker discussed items raised at a Water Quality Standards Managers Association meeting. The Water Quality Committee will evaluate the EPA's state revolving loan fund (SRF) allocation formula to see if it fairly apportions funds to western states. Further, the Committee will continue working to implement the WGA Water Report recommendations.

Bill Staudenmaier chaired the Legal Committee, which began listening to William Jefferies talk about Corps CWA Section 404 regulation and Kathy Jacobs discuss climate change adaptation to improve water supply reliability. Craig Bell reported on the status of Indian water rights settlements. New Mexico has made multi-million dollar commitments to facilitate further negotiations and to show federal officials the state is actively pursuing settlements. The committee also discussed several staff reports, two that are nearly complete, while another three need additional work. The reports will be consolidated into a work product with an executive summary. The remainder of the meeting was devoted to state reports on significant legal developments, with an emphasis on important litigation.

# OTHER MEETINGS

## Climate Change Research Needs

The Council, Western Governors' Association, and California Department of Water Resources jointly hosted a workshop on Climate Change Research Needs in Irvine, California on May 16-18. The discussion focused on adaptive (or living with climate change) rather than mitigative strategies to avoid warming. Some 70 experts on climate and paleoclimate, economics, engineering, environmental sciences, geography, geohydrology, hydrology and hydrometeorology, oceanography, water resources management and water rights administration discussed the need to be prepared for increasing variability with respect to precipitation, snowpack and snowmelt runoff, droughts, floods and other severe climatic events, rather than debate the causes of climate change. A number of questions were raised in small groups related to data collection and monitoring needs, models and other analytical tools, public policy and institutional issues, strategies for improving communication between academics, water users and decisionmakers, encouraging more applied research, and partnering with federal agencies. Powerpoint presentations are posted online at: www.westgov.org/wswc/climate%20workshop%20agenda.html. A summary of the meeting, can be obtained from the Council office

## Indian Reserved Water Rights Settlement Symposium

The Western States Water Council and Native American Rights Fund held another in a series of symposia on the settlement of Indian water rights claims, August 27-29, in Albuquerque, New Mexico. The speakers included representatives of the Administration, including Michael Bogert, Counselor to Interior Secretary Kempthorne, key congressional committee staff members, as well as state and tribal leaders. The 190 people in attendance were welcomed by John Echohawk, Executive Director of the Native American Rights Fund, and by Duane Smith, Chair of the Western States Water Council. Mr. Echohawk explained the history of these symposia, reiterating their purpose to share and exchange information and advice for those states and tribes interested in pursuing settlement negotiations. Duane Smith referred to the report of the Western Governors' Association (WGA) and the Western States Water Council (WSWC) on "Water Needs and Strategies for a Sustainable Future." He noted that a substantial section of this report was devoted to the subject of Indian water rights, and reiterated longstanding support by these organizations for such settlements. He said that the meeting provided an opportunity to implement the recommendations of the report; namely, to engage Congress in determining a policy for how settlements should be funded, and to pursue a dialogue with the Department of Interior to better define and underscore the importance of the federal facilitating role.

These welcoming remarks were followed by keynote speakers from the Navajo Nation. They began with a video showing the need for water on the reservation. Some 40% of its residents continue to haul water. Ben Shelly, Vice President of the Navajo Nation, underscored the importance of the Navajo settlement recently achieved, and the long process that led to its culmination. Bills to fund the settlement are now pending before the Congress.[2] Stanley Pollack, Counsel for the Navajo Nation, described the benefits that would accrue to the Navajo Nation and non-Indians in the Gallup, New Mexico area.

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[2]*Western States Water*, Issue #1732, July 27, 2007.

The keynote speakers were followed by a panel of presentations on the topic of "Gathering Background Information and the Role of Technicians in Negotiations." The panel consisted of Chris Banet, Trust Resources and Protection Manager, Bureau of Indian Affairs in New Mexico; Jay Weiner, Legal Counsel, Montana Reserved Water Rights Compact Commission; and Woldezion Mesghinna, President and Principal Engineer, Natural Resources Consulting Engineers, Inc. They underscored both the importance and the challenges associated with gathering sufficient data to successfully pursue negotiations. Another panel followed on "Identifying Parties and Issues and How Negotiations Bind Larger Groups." This panel featured John Peterson, Policy Analyst, Native American Affairs Office, Bureau of Reclamation; DL Sanders, General Chief Counsel, Office of the New Mexico State Engineer; and Jeanine Whiteing, Partner, Whiteing and Smith. A central issue that was raised during this panel discussion was the value of early federal involvement in the negotiations. While acknowledging that federal involvement could be valuable, it too often has not been, and instead has been perceived as an obstacle. However, federal engagement will occur sooner or later. Strategies to deal with potential objections from the Office of Management and Budget (OMB) and the Justice Department are important in getting a settlement approved and funded by the Congress.

A new topic at this symposium was addressed by the next panel on "Settlements and the Environment." This panel consisted of John Utton, Attorney, Sheehan, Sheehan and Stelzner; Aaron Miles, Natural Resources Manager, Nez Perce Tribe; and Frank Wilson, Assistant Regional Solicitor, Department of Interior. The Nez Perce settlement in Idaho and the Aamodt and Navajo settlements in New Mexico involve issues associated with the Endangered Species Act. Effectively dealing with environmental issues represents an important component of a successful outcome. Mr. Utton also raised the potential implications of climate change for existing and prospective settlements.

The following day, the Interior Department explained the Administration's approach to settlements, with Michael Bogert being the principal speaker. Jennifer Gimbel, Chair of the Working Group on Indian Water Rights Settlements, and Pam Williams, Director of the Indian Water Rights Office, both participated in the discussion subsequent to his remarks, along with John Bezdek of the Interior Solicitor's Office. Mr. Bogert reiterated the commitment of Secretary Kempthorne to further the process of settlements. This commitment carries over from his success as Governor of Idaho in helping achieve a settlement of the Nez Perce claims prior to his appointment as Secretary. He discussed the Administration's Criteria and Procedures and the issue that has been raised about amending them, noting that they continue to guide the Administration as it evaluates proposed settlements. Mr. Bogert underscored their role as guidance, rather than as a strict test, but nevertheless acknowledged their importance in the process. Ms. Gimbel noted that potentially nine settlements could be introduced over the next year in Congress. Funding continues to be the critical issue, given the significant pressure on discretionary federal funding.

A response panel followed, consisting of: James Mountain, Governor, San Ildefonso Pueblo; William Staudenmaier, Attorney, Ryley, Carlock and Applewhite and Chair, WSWC Legal Committee; and Bob Anderson, Associate Professor of Law and Director of the Native American Law Center at the University of Washington. As was true regarding the Administration's remarks, the main focus of the respondents was on funding. While acknowledging appropriate cost sharing, particularly with regard to the benefits associated with non-Indians, the need for a substantial federal role in this regard was underscored. Professor Anderson explained a rationale for utilizing the Reclamation Fund as a source of funding for settlements. He said that for many years, unquantified and unused Indian water rights had been used to generate part of the revenues that accrue to the fund. He argued Indian settlements therefore represent a legitimate use of Reclamation Fund revenues.

Following the morning session, the group traveled to the Isleta Pueblo for Feast Day. Such events have been a tradition, providing an opportunity to enhance inter-cultural exchange and understanding.

The final session of the symposium consisted of remarks on "Getting Bills Through Congress." A panel featured Congressional staff members, namely Erik Webb, Legislative Assistant to Senator Pete Domenici, and David Mullon, Majority Counsel, Senate Indian Affairs Committee, as well as Mike Connor, Majority Staff, Senate Energy and Natural Resources Committee, who called in to address the group via speaker phone. Mr. Connor discussed the fact that he had found support for utilizing the Reclamation Fund as a source for funding settlements in the water report prepared by the WGA and WSWC. He explained the role of the Fund in the Navajo settlement bill, introduced by Senators Bingaman and Domenici, and now pending before the Congress (S. 1171). He hoped a mark-up would occur this Fall, and was anxious to hear comments and feedback regarding the bill. Following Mike's comments, a video was shown prepared by Senator Bingaman of New Mexico. He commended those in attendance for their efforts in pursuing settlements. He spoke specifically about the Navajo settlement and expressed disappointment in the Administration's position opposing his bill to fund the settlement. He nevertheless recognized and commended the efforts of Secretary Kempthorne and his staff in furthering the process towards negotiated settlements in general and in New Mexico specifically.

Mr. Webb described Senator Domenici's bill (S. 1643) to fund New Mexico settlements, which he distinguished from the bill Domenici jointly introduced with Senator Bingaman by noting that it would intercept revenues that would otherwise go to the Reclamation Fund; namely, 30% of the revenues generated in New Mexico. Further, S.1171 would begin funding from the Reclamation Fund in 2018, so as to circumvent the Congressional "score keeping window."[3] Senator Domenici's bill has no such waiting period. David Mullon underscored the commitment of the Indian Affairs Committee to settlements, while recognizing the substantial challenges of funding in the current fiscal environment.

The response panel began with remarks by Susan Cottingham, Program Manager, Montana Department of Natural Resources and Conservation. Susan recognized the difficulty of funding, but noted that it was a matter of priority. She cited specifically the pending authorization for the Water Resources Development Act for the Corps of Engineers and funding allocations for the Farm Bill as examples. Nelson Cordova, Adjudications Coordinator, Taos Pueblo, described the process of efforts to reach a settlement for the Taos Pueblo. While the process has been long and difficult he felt it provided the best hope for providing water for his people. Bella Sewall described the process within the Administration once a settlement is achieved and forwarded to Washington. Her presentation underscored the significance of OMB's involvement. Tom Gede, Consultant, Bingham Consulting Group, concluded the panel by discussing the impacts of delays in the approval process for settlements. He also described an upcoming meeting to commemorate the 100th anniversary of establishment of the Winters Doctrine by the Supreme Court, affirming the existence of Indian reserved water rights, to be held in June of 2008, also in Albuquerque, New Mexico.

Bill Hume, Policy and Planning Director, Office of New Mexico Governor Bill Richardson, provided a concluding "wrap up," echoing the major themes, noting the substantial funding challenges and the need for a greater appreciation for the benefits that settlements provide. While

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[3] *Western States Water*, Issue #1728, June 29, 2007.

disappointed with the Administration's recent positions on settlements in New Mexico, he commended Mr. Bogert for their positive impact on the process of negotiations. Mr. Hume remains optimistic about the long-term prospects for settlements.

**Water Information Management Systems Workshop**

On September 24-26, the Washington Department of Ecology and WSWC co-hosted the 13th annual Water Information Management Systems (WIMS) Workshop in Seattle. Over 40 water resources and information technology specialists participated, representing twelve states, four federal agencies and three universities. Ken Slattery, Washington's Water Resources Program Manager, welcomed everyone and highlighted water and information management needs and challenges in the state. Thereafter, Mike Norris and Ward Staubitz, with the U.S. Geological Survey (USGS), and Gene Lilly, with the U.S. Army Corps of Engineers, discussed ongoing efforts to better characterize western water resources, in cooperation with the states (via a conference call). An informal roundtable discussion followed. Jeremiah Miller presented an online demonstration of Washington water information, including its water rights data base, with points of diversion, place of use, hydrographic features, etc. All diversions in fish critical basins are metered.

Many interesting points were made at the workshop. Kansas has a mandatory annual water use filing requirement, with a $50 fine for late filings and $250 fine for failure to file. Wyoming is tying its seven major water basin plans into a finished framework, and all their information will be on the internet and available to the public. They are now mapping all irrigated lands using GIS, and spending $5-$6 million on a new indepth look at their ground water resources. Texas has already spent some $56 million on planning and characterizing its water resources. Oregon has undertaken an inventory of potential surface water storage and ground water resources, and is assessing its existing and future water needs and conservation opportunities. Jody Eimers, USGS, outlined the findings in the federal Subcommittee on Water Availability and Quality report.[4] Chuck Hennig and John Osterberg, Bureau of Reclamation, discussed research on evapotranspiration. Phil Pasteris, National Water and Climate Center, highlighted SNOTEL system needs and data, and briefly discussed progress on the National Integrated Drought Information System. Eva Optiz, CDM, explained how the Corps' IWR-Main models future municipal water use. Dr. Alan Hamlet, University of Washington, talked about climate change impacts on water.

**Water Policies and Planning in the West: Ensuring a Sustainable Future**

On October 10-12, the Western Governors' Association (WGA) and Western States Water Council (WSWC), in cooperation with a number of federal, state and local agencies, sponsored a conference in Salt Lake City entitled, "Water Policies and Planning in the West: Ensuring a Sustainable Future." Over 200 participated in plenary sessions, panel presentations and small group discussions designed to further delineate recommendations and specific action items consistent with the 2006 WGA/WSWC report, "Water Needs and Strategies for a Sustainable Future." The latter identified six areas, three of which were addressed by the conference: Water Policy and Growth; Water Planning and State Needs and Strategies (to meet future demands); and Climate Change (and water resources adaptation strategies).

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[4] *Western States Water*, Issue #1739, September 14, 2007

Governor Jon Huntsman welcomed participants and admitted when he was first elected, "I knew very little about water policy." However, he noted, he realized now that one of the "most pressing and hostile issues in the region is water." In Mandarin Chinese, he quoted a saying, "Together we get smart. Together we work. Together we move forward." He referred to the many great civilizations or city states built around water resources, and noted the Western United States is one of the fastest growing regions. In addition to Utah's Wasatch Front, he mentioned Arizona's Maricopa County and Clark County in Nevada. Growth and urbanization have for the first time put more people in cities than rural areas worldwide. He challenged the conference to bring out "good ideas" for policymakers that are "facing unprecedented demands" for water. He referred to the WGA/WSWC water report and its recommendations, highlighting the need for bottom-up "smart" planning, a "heavy dose of water conservation," a new paradigm for identifying appropriate water projects, the settlement of Indian water rights claims, rehabilitating our aging infrastructure, good science and good data, balancing environmental and economic water needs, and facing the water-related challenges due to climate change.

Vice Admiral Conrad Lautenbacher, Administrator of the National Oceanic and Atmospheric Administration (NOAA), spoke next. He praised collaborative NOAA, WGA and WSWC efforts, including work on the National Integrated Drought Information System (NIDIS). He noted the record breaking weather in 2007, including the dearth of precipitation in the Southwest, particularly Los Angeles, and record heat in Salt Lake City. He discussed NOAA products to help monitor and respond to drought, including the Drought Monitor and other tools to assess threats and pinpoint areas of severe drought. He highlighted some of the global short-term, inter-annual and decadal patterns that contribute to drought, and efforts to improve prediction and early warning information in order to help water managers and others make operational decisions. NOAA is working on the NIDIS implementation plan and moving forward with a number of pilot programs, including one in the Colorado River Basin. A web-based portal to access drought information is expected to be up in November.

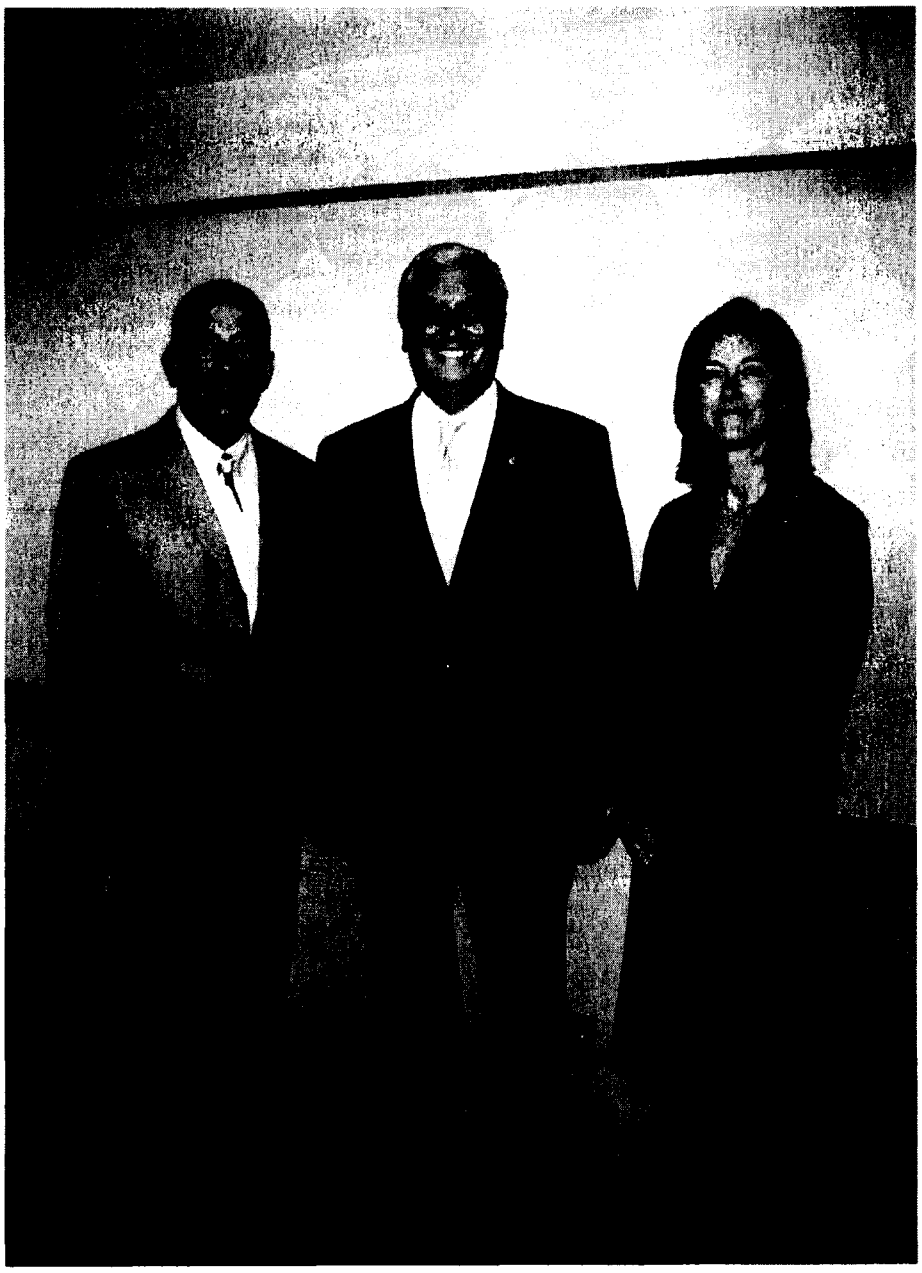
Stephen L. Johnson, Environmental Protection Agency (EPA) Administrator, addressed the conference, thanking the WGA and WSWC for their collaboration in advancing environmental protection. He specifically noted watershed protection as one area of interest, and elaborated on EPA efforts to promote Good Samaritan legislation to deal with the threat to water quality in the West from abandoned hardrock mines. He noted water quality is not just a challenge for EPA, but also state and local governments. He also addressed the issue of sustainable water and wastewater infrastructure, and EPA efforts to improve asset management. While the State Revolving Fund (SRF) program has stretched federal investments, he suggested, "We all need to step up to the plate." Other financial mechanisms will be critical in meeting looming future investment needs.

He also mentioned the need to educate the public, as we too often take clean and inexpensive water supplies for granted. Water is the "lifeblood of the Nation," and water rates need to reflect its value. Topics he touched on were "green" efforts to promote water conservation through EPA's recent WaterStar program, improvements in energy and water use in federal buildings, and better stormwater management through the use of permeable concrete (and other urban surfaces) and innovative landscaping. Lastly, he announced a new initiative to develop regulations as part of the Underground Injection Control program to sequester greenhouse gas emissions.

Commissioner Robert Johnson addressed the conference on Thursday evening. He spoke of the significant Reclamation accomplishments, as well as challenges facing the agency. He began with a focus on the Colorado River and Reclamation's role in facilitating agreement among the Basin

States, the improving relationship and cooperation between Reclamation and the Corps of Engineers on a number of fronts, citing as an example, the work relative to Folsom Dam in California, the "Managing for Excellence" efforts to improve how Reclamation carries out its mission, the new authority to assist rural communities in meeting water supply needs, and the ongoing efforts to address critical areas in the West under the Water 2025 program. He noted the continuing challenges associated with the ongoing drought in the West. Like EPA Administrator Johnson, he also underscored the need for Reclamation to maintain the extensive water infrastructure in the West. Commissioner Johnson took the opportunity to express his desire to enhance the relationship between Reclamation and the western states, whose input he saw as a critical component in developing and carrying out Reclamation programs.

**October 10-12, 2007**
**Salt Lake City, Utah**



Left: Duane Smith, Chairman, Western States Water Council
Middle: Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency
Right: Joan Card, Director, Water Quality Division, Arizona Department of Environmental Quality

## OTHER IMPORTANT ACTIVITIES AND EVENTS

### Council Staff and Membership Changes/News

*California*

Governor Arnold Schwarzenegger appointed **Lester Snow**, Department of Water Resources Director, and **Darlene Ruiz,** a principal with the consulting firm Hunter and Ruiz, as members of the Council. Darlene previously served as an alternate member from April 1987 to February 1991.

**David N. Kennedy** passed away on December 23, at the age of 71. A former WSWC Chairman, he was Director of the California Department of Water Resources for 15 years (1983-1998). During that period, under his leadership, the State addressed what was then the longest statewide drought in California history, as well as major flooding events in 1986, 1995 and 1997. The sixth of DWR's nine directors, Kennedy served longer than any other, appointed originally by Governor George Deukmejian and reappointed by Governor Pete Wilson. "California has lost a great water leader and dedicated public servant," said DWR Director Lester Snow. "Dave's knowledge of California's water issues was unparalleled and his commitment to efficient and reliable operation of the State Water Project tireless. His efforts have permanently improved water management for all Californians. He will be missed by us all."

*Colorado*

**Dick Wolfe** was appointed as the new State Engineer, with **Hal Simpson** retiring, but remaining on the Council. **Jennifer Gimbel** was appointed as the new director of the Colorado Water Conservation Board, replacing **Rod Kuharich**.

*Idaho*

Governor Butch Otter named **Dave Tuthill**, Director of the Department of Water Resources as a WSWC member, replacing **Karl Dreher**, and named **Norm Semanko** as Idaho's Executive Committee member.

*Kansas*

Governor Kathleen Sebelius confirmed the appointment of **Adrian Polansky**, Secretary of Agriculture, as a WSWC member, also adding Chief Engineer **David Barfield**, who replaced **Dave Pope,** and Assistant Chief Engineer **Paul Graves**, as an alternate member.

*Montana*

**John Tubbs,** Administrator of the Montana Division of Water Resources, was appointed a WSWC member by Governor Brian Schweitzer.

*Nebraska*

**Ann Bleed** was named the new Director of the Nebraska Department of Natural Resources by Governor Dave Heineman, after serving since August 2005 as the Acting Director.

*New Mexico*

**DL Sanders**, Chief Counsel, Office of the State Engineer, was appointed as a WSWC member by New Mexico Governor Bill Richardson, replacing **Charles DuMars** and **Fred Lujan**.

*North Dakota*

Governor John Hoeven named **Todd A. Sattler**, Assistant Attorney General, as a member of the Council to serve on the Legal Committee, replacing **Matthew A. Sagsveen**.

*Wyoming*

Governor Dave Freudenthal named **Michael K. Purcell**, Director of the Wyoming Water Development Commission, as an alternate WSWC member, replacing **Mike Besson**.

## Western States Water

Since the first issue in 1974, the Council's weekly newsletter, ***Western States Water***, has been one of its most visible and well received products. Its primary purpose is to provide governors, members and others with accurate and timely information with respect to important events and trends. It is intended as an aid to help achieve better federal, state, and local decisionmaking and problemsolving, improve intergovernmental relations, promote western states' rights and interests, and highlight issues.

Further, it covers Council meetings, changes in Council membership, and other Council business. The newsletter is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key congressmen and their staffs, and top federal water officials. Other public and private agencies or individuals may subscribe for a fee.

The following is a summary of significant activities and events in 2007 primarily taken from the newsletter. However, this does not represent an exclusive listing of all Council activities or other important events. Rather, it seeks to highlight specific topics.

## Bureau of Reclamation

*FY2008 Budget Request*

Reclamation's gross FY2008 budget request totals $958.4 million, with $198 million from the General Fund, $709 million from the Reclamation Fund, and $51 million from the Central Valley Project Restoration Fund. There is $731 million for the Water Resources Account, $39 million for California Bay-Delta Restoration, $59 million for Policy and Administration, and $59 million for CVP Restoration (less $8 million for a proposed San Joaquin River Restoration Settlement). Permanent appropriations, including $96 million from the Colorado River Dam Fund and $17 million from the San Joaquin Restoration Fund, put Reclamation's spending at $1.02 billion.

Reclamation's February 5 budget press release emphasizes $386 million is for facilities' operation and maintenance to ensure reliable water delivery and power generation. Some specific project and program requests include: $77 million for the Dam Safety Program; $58 million for the Animas-La Plata Project as part of the Colorado Ute Settlement Act Amendments of 2000; $51.6 million for Central Valley Project (CVP) fish and wildlife restoration activities; $35.5 million for facilities' site security; $31.8 million for the California Bay-Delta Program; $25 million for Klamath Project studies and initiatives; and $15.4 million for the Lower Colorado River Operations Program to provide long-term Endangered Species Act (ESA) compliance. Further, proposed legislation would create a new San Joaquin River Settlement restoration fund.

Mark Limbaugh, Assistant Secretary of Interior for Water and Science, observed, "The western states are experiencing increasing water supply challenges, and the continuing drought makes these pressures more acute. Being proactive is the best approach to prevent water conflicts." Reclamation's request for Interior's Water 2025 program includes $11 million, a priority for the Department, with another $14 million for other water conservation programs. "These grants will help prevent conflict over the limited water resources in the West by stretching existing supplies and improving aging infrastructure through realistic and cooperative local approaches."

The request includes $1 million to initiate a Loan Guarantee Program approved by the last Congress as part of the Rural Water Supply Act.[5] Robert Johnson, Reclamation Commissioner, said, "As population and competition for water have been growing, we're placing more and more demands on our water infrastructure that in some cases is 100 years old. Maintaining and enhancing the long-term viability and reliability of our facilities is a significant challenge." The new loan guarantee program represents a public-private business-like approach to assist many water districts facing the challenge of financing expensive project repairs. Many districts have found it nearly impossible to secure private financing (without title to the federal projects they have agreed to operate and maintain). The new loan guarantees will address this problem.

Of note, Reclamation Fund spending under the Water Resources Account was $695 million in FY2006, and is estimated to be $578 million in FY2007 and $650 million in FY2008. Similarly, Western Area Power Administration (WAPA) power-related expenditures were $230 million in FY2006, and estimated at $209 million in FY2007 and $191 million in FY2008. General Policy and Administration expenses remain constant between $57-$59 million. Total appropriations from the Reclamation Fund were $973 million in FY2006, and are estimated to be $844 million in FY2007 and $900 million in FY2008.

The unobligated balance in the Reclamation Fund continues to grow, as receipts exceed requested and authorized appropriations for Reclamation purposes. The balance in the Reclamation Fund at the beginning of FY2006 totaled $4.612 billion, with an estimate of $5.671 billion to begin FY2007 and a projected balance at the beginning of FY2008 totaling $6.695 billion growing to $7.823 billion by the end of FY2008.

Receipts from the sale of power through the Bonneville Power Administration and WAPA total $258 million for FY2006 and are estimated to be the same for FY2007, declining to $234 million in FY2008. Royalties from natural resources totaled $1.633 billion in FY2006, and are estimated at $1.472 billion in FY2007 and $1.598 billion in FY2008. Interest from miscellaneous sources brings in $6 million/year. The sale of public lands brought in $12 million in FY2006, and other proprietary receipts $123 million (projected at $113 million and $126 million over the next two years). For FY2008, the Administration estimates receipts of $19 million more each year for the next two years from the sale of timber and other products from public lands. Further, its PAYGO (pay-as-you-go) proposal may bring in $45 million in FY2008. Anticipated receipts exceed estimated expenditures by more than $1 billion annually, over each of the three years.

*House Budget Testimony*

On March 8, Commissioner Robert Johnson testified before the House Natural Resources Committee's Subcommittee on Water and Power, chaired by Rep. Grace Napolitano (D-CA) on Reclamation's budget.[6] He said, "Our FY2008 request has been designed to support Reclamation's efforts to deliver water and generate hydropower, consistent with applicable State and Federal law, in an environmentally responsible and cost-efficient manner. The funding proposed is for key projects and programs that are important to the Department and in line with Administration objectives. The budget request also supports Reclamation's participation in efforts to meet emerging

[5] *Western States Water*, Issue #1703, January 5, 2007.

[6] *Western States Water*, Issue #1709, February 16, 2007.

water supply needs, to address water shortage issues in the West, to promote water conservation and improve water management, and to take actions to mitigate adverse environmental impacts of projects."

He highlighted the $11 million request for Water 2025, saying, "The overarching goal...is to meet the challenge of preventing crises and conflict over water in the West. Water 2025 will contribute to meeting this goal by increasing certainty and flexibility in water supplies, diversifying water supplies, and reducing conflict through the use of market-based approaches and enhancing environmental benefits in many watersheds, rivers and streams consistent with State and Federal laws.... Leveraging limited Federal dollars through the Challenge Grants Program will continue to be a major component of Water 2025.... Beginning with FY2007, a system optimization review component has been added to ensure existing water management systems are operated to maximize water deliveries. Modernization of existing systems will occur within the framework of existing treaties, interstate compacts, water rights, and contracts." He added the Department intends to resubmit permanent authorizing legislation for the Water 2025 program.

Reclamation requested $1 million for the federal loan guarantee program, which the WSWC has supported, authorized last year under the Rural Water Supply Act of 2006, as "...an important component of Interior's strategy to address aging water infrastructure challenges in the West. The loan guarantee program...is a business-like approach that recognizes the inability of many water districts to fund expensive rehabilitative repairs without the capability to use Federal facilities as collateral to obtain bank financing...."

Other specific projects and programs mentioned in the testimony include: $25 million for continuing collaborative efforts to develop a basinwide plan for the Klamath Project; $15.4 million for Lower Colorado River operations to fulfill the Secretary's watermaster responsibilities and measures under a long-term multi-species conservation program; $23.2 million for Reclamation's activities and participation in the Middle Rio Grande Endangered Species Act (ESA) Collaborative Program, as well as repair of priority river maintenance sites; $58 million for the Animas-La Plata project, in Colorado and New Mexico, primarily for Ridges Basin Dam and inlet conduit and the Durango Pumping Plant, as part of the Colorado Ute Settlement Act; $15 million to replace Savage Rapids diversion dam in Oregon with pumping facilities to remove a barrier for the threatened coho salmon; $15 million to address requirements in a December 2000 biological opinion for Columbia/Snake River salmon recovery, including funding for the Nez Perce Water Settlement Act, increased regional coordination, daily-weekly-seasonal system operational changes, acquisition of water for flow augmentation, and habitat improvements; and $9.6 million for the Platte River Endangered Species Recovery Program.

There is also: $13.4 million for innovative science and technology research and development; $35.5 million for Reclamation facilities site security (of which it is assumed $18.9 million for guard and patrol activities will be treated as reimbursable project operation and maintenance costs); $77 million for dam safety work and risk management activities at 361 high hazard dams and dikes, including large-scale corrective work at Folsom Dam in California; and $55 million for ongoing rural water projects, including the Pick Sloan-Missouri Basin Program Garrison Diversion Unit, Mni Wiconi and Lewis and Clark Projects, as well as money to establish a formal rural water supply program, programmatic and eligibility criteria, reporting requirements and criteria for appraisal and feasibility studies, again under the Rural Water Supply Act of 2006.

Further, Commissioner Johnson testified that Reclamation continues to make significant advancements with its Managing for Excellence action plan towards determining the appropriate organizational, management and resources configurations to best meet its construction and related water and power infrastructure management responsibilities for the 21st Century. As of January 2007, Reclamation had completed about half of its 41 action items, with remaining work to be completed by December, followed by ongoing implementation.

*Managing for Excellence*

Reclamation held the fifth in a series of public meetings on Managing for Excellence in Denver, Colorado on May 30-31. The focus of the workshop was "rightsizing," under five conceptual organizational alternatives for the assignment and more efficient management of Reclamation's workload. At present, technical work and expertise is spread across the area, program and regional offices, as well as the Denver Technical Services Center (TSC). Reclamation is looking at the status quo and actual (as well as intended) policy implementation related to its analysis, construction, design, monitoring, planning, environmental and over sight work. In evaluating the alternatives, "Team 12" categorized the engineering and technical services into planning and natural resources (environmental/development); design and analysis; construction management; monitoring and lastly, dam safety. Reclamation's dispersed technical services are intended to be coordinated across the agency with work that an area or program office can't do passed along to the regional offices and TSC, before outsourcing. Actually, it is the area/program office that determines where the work can be done in the most cost effective and efficient manner. Overall resource utilization or maintaining core capabilities may or may not be given consideration.

Traditionally, Reclamation's partners or customers are primarily responsible for designing and managing construction on "transferred" works (when they are in charge of operations, but do not hold title to the project), with Reclamation oversight. Reclamation employs its own in-house engineering and technical service staff for "reserved" works (though some work may be contracted out to consulting firms), as well as for construction of new projects or project features, extraordinary maintenance, replacement and modernization (of reserved works), all safety of dams modifications, and work related to multipurpose projects (including transferred works). Reclamation also does work requested by customers. Some of Reclamation's customers had earlier asked for the workshop in order to consider current workload planning and criteria for workload distribution, as well as oversight costs related to transferred works, periodic operation and maintenance reviews, and extraordinary maintenance and replacement work, under Reclamation's continuing responsibility and liability for federally owned facilities.

There are four different action alternatives under consideration. Under the "enhanced utilization" alternative, a Reclamation Design and Construction Coordination Team (RECCT), as well as Resources Management and Development Work Group (RMWG), would be created to improve resource utilization, transparency and accountability without altering the current organizational structure. The resources of other regions would be considered before outsourcing work through the area office. Under the "corporate utilization" alternative, a corporate "coordination" group would be responsible for all Reclamation's technical workflow and tracking costs, but otherwise there would be no changes in organizational structure, workplace locations or lines of supervision. Best practices would be identified and shared to enhance efficiency and effectiveness. All work would be performed under a "fee-for-service" model, which could be similar to the present TSC model. The coordination group would also make recommendations for when and where to fill vacated technical positions.

Under a "six centers" alternative, Reclamation's technical services would be consolidated under its five Regions, with the current TSC remaining unchanged. All workload planning would be done collaboratively between the program office and coordination group, with fee-for-service work distributed to the appropriate regional service center. Most technical staff would remain in their present locations, but some would report to supervisors in different offices (virtual reorganization). A team leader would be identified to coordinate work within the service center, as well as coordinate technical resources work with other service centers as needed and be the liaison with the program office. Whereas staff now perform multiple technical and program functions, "wearing multiple hats," work would be better matched with staff capability and competence. Workload planning and distribution would be centralized, with decentralized, regional operations.

Reclamation is also considering a "three centers" alternative that would further consolidate and segregate technical resources, avoiding overlapping functions. Under a virtual organization, technical staff would be located in many different geographic locations, but all three centers would report to one "director," under the supervision of the Deputy Commissioner for Operations. The centers would be organized by function, discipline and expertise. One possible division of responsibilities would include a: (1) Center for Dam Safety, Specialty Services and Oversight; (2) Center for Data Collection, Design and Construction; and (3) Center for Planning and Environmental Services. Workload planning would take place between the program office and coordination group and distributed to the appropriate service center (responsible for any outsourcing), again under a team leader. It is the most centralized alternative, with all staff in a particular discipline, performing a particular function, reporting to one center, rather than duplicating technical abilities at multiple centers. The technical workload would not be a direct responsibility of area or regional directors, but they would still be accountable for budget and programs, with their staff using the centers as "smart buyers" under service agreements.

For more information on Managing for Excellence and a related action plan, see www.usbr.gov/excellence.

*Northwest New Mexico Rural Water Projects Act/Reclamation Fund*

On June 27, the Senate Energy and Natural Resources Committee, chaired by Senator Jeff Bingaman (D-NM), held a hearing on S. 1171, the Northwest New Mexico Rural Water Projects Act. The bill would authorize the construction of a water supply pipeline from the San Juan River to the eastern portion of the Navajo Reservation, the City of Gallup, and the Jicarilla Apache Reservation, generally known as the Navajo-Gallup Pipeline Project. It would also reserve up to 26 megawatts of Colorado River Storage Project (CRSP) power for the project, and authorize the rehabilitation of existing irrigation projects, development of ground water wells, and provide other funds for the benefit of the Navajo Nation. Of note, it would create a Reclamation Water Settlements Fund within the Treasury with revenues diverted from the existing Reclamation Fund to fund the Bureau of Reclamation's work under the bill, as well as under other water rights settlement legislation in the West.[7]

In his opening remarks, Senator Bingaman pointed out that the Administration and the Congress have approved some $2.5 billion towards other Indian water rights settlements and some $2.3 billion towards water projects in Iraq, while a large percentage of Navajos must haul water on the reservation due to the lack of readily available drinking water supplies. He also noted the U.S. Supreme Court's reference to the federal government's "moral obligations of the highest

[7] *Western States Water*, Issue #1721, May 11, 2007.

responsibility and trust" related to the tribes. Senator Pete Domenici (R-NM) added he had been working since 1974 to build the Navajo-Gallup Project, calling the Navajo Nation's lack of water infrastructure "deplorable." While expensive, he said the federal contribution to the settlement authorized by the legislation was reasonable, adding that both Indian and non-Indian parties to the settlement would be made whole. He specifically referred to the recent Nez Perce settlement in Idaho and the Arizona Water Rights Settlement Act. He credited Interior Secretary Dirk Kempthorne with making the settlement a priority, but also criticized the Office of Management and Budget's funding offer saying, "We can't settle for what they are talking about."

Assistant Secretary of Interior for Indian Affairs, Carl Artman, and Bureau of Reclamation Commissioner Robert Johnson, made brief statements, referring to a joint written submission, which says, "The Department of the Interior's support for negotiated settlements as an approach to resolving Indian water rights remains strong. The Administration, however, has concerns that S. 1171 would increase mandatory spending, delay the full cost of the legislation beyond the ten year Congressional scorekeeping window, not provide for adequate cost sharing by non-Federal interests, and likely include costs that exceed the Federal government's underlying liability. The Administration did not participate in the drafting of the water rights settlement embodied in S. 1171, and does not support a water settlement under these circumstances. For these reasons, the Administration opposes the cost and cannot support the legislation as written. We would like to work with the Congress and all parties concerned in developing a settlement that the Administration can support."

Their testimony continued, "While the Navajo settlement in the San Juan River is the subject of today's hearing, there are other settlements proposed in New Mexico, as well as in other western states, that require active Federal participation in negotiations. If enacted, the cost of S. 1171 alone is estimated to exceed $1 billion. If the other two proposals from New Mexico, Aamodt...and Abeyta..., about which the Administration also has raised serious concerns, were to be enacted as currently envisioned...total expenditures...are likely to exceed $1.5 billion.... It is important to have an open and full discussion on all aspects of the settlement, including the specific goals of the Navajo Nation and the State of New Mexico...and whether these goals can be met by alternative and potentially less expensive means."

They added, "The Administration has serious concerns regarding the proposal...to establish a Reclamation Water Settlements Fund.... Title II provides that revenues of up to $100 million a year for fiscal years 2018 through 2028, which is a time period outside the Congressional scorekeeping window, be diverted from the Reclamation Fund.... S. 1171 provides that moneys...would be available without further appropriation to fund water supply infrastructure authorized under this bill if there turns out to be insufficient funding available through the regular appropriations process.... The second priority for the Water Settlements Fund would be to implement other Indian water rights settlements approved by Congress, including water supply infrastructure, rehabilitation of water delivery systems, fish and wildlife restoration or environmental improvement. The Reclamation Water Settlements Fund would terminate in 2030 and any remaining balance would be transferred to the General Fund of the Treasury."

On this point they conclude, "We believe the sponsors of this legislation are looking for stable mechanisms to ensure the availability of funding for Indian water rights settlements around the West. We are concerned, however, that this proposal would allow direct spending not subject to further appropriations for future settlements, preventing the future Presidents and Congresses from setting their own priorities with regard to budgeting and appropriating Federal tax dollars. At the

present time, use of monies from the Reclamation Fund are discretionary and subject to annual appropriations by Congress."

In questioning Artman and Johnson, Senator Bingaman expressed his frustration with the Administration, saying that with the State and tribe reaching a settlement agreement in 2005, "It's just not a credible response to come in two years after...and say 'we've got to be involved.' The federal government's been AWOL is essentially what you're saying." Regarding the "grave" concern about use of the Reclamation Fund and binding future Administrations and Congresses, he asked, "Why didn't you take this position with the Arizona Water Rights Settlement Act?" Johnson responded that no two settlements are alike and projects have to be addressed on a case-by-case basis. Domenici also decried the Administration's claim they hadn't been involved in the negotiation process and were not ready, saying, "If the Chairman is ready, I'm ready to proceed and we'll see if you're [the Administration] needed or not. This is long overdue. We've found a source of money. You say it's not ok. We say it is ok. I'm ready."

Testifying in support of the bill were: New Mexico State Engineer John D'Antonio; Navajo Nation President Joe Shirley; Patricia Lundstrom, Executive Director of the Northwest New Mexico Council of Governments; and Mark Sanchez, Executive Director of the Albuquerque Bernalillo County Water Utility Authority. Herb Guenther, Director of the Arizona Department of Water Resources also testified. Herb raised concerns saying, "The Committee should remember that the San Juan River is part of the Colorado River system as defined in the 1922 Colorado River Compact (1922 Compact) approved by all seven Colorado River Basin States.... While generally supportive of this settlement, we cannot support S. 1171 as it has been introduced because we have several concerns about the implications of certain provisions to the existing 'Law of the River,' and about the provisions that relate to uses of water from the...Navajo-Gallup pipeline within Arizona and in portions of New Mexico located in the Lower Colorado River Basin. Specifically..., S. 1171 would violate provisions of the 1922 Compact related to the use of Colorado River water allocated 'exclusively' to the Upper Basin to be used in the Lower Basin. The bill does not [provide] for the proper accounting of water deliveries under the Compact at Lee Ferry. S. 1171 does not specify how the accounting and delivery of water for tribal use in Window Rock, Arizona would be handled. S. 1171 would also set a precedent in that it would subordinate Arizona's share of water in the Lower Basin of the Colorado river to allow new uses in the Lower Basin." Arizona also believes there is an opportunity to include the Hopi Tribe and settle other claims within the Lower Mainstem Colorado River and Little Colorado River basins within Arizona.

Mr. Guenther testified, "The State of Arizona is supportive of the concept for funding that is described in Title II.... This Fund will be used to construct project features that are required to implement a congressionally authorized settlement agreement.... However, we believe that the funding need is worthy of even greater consideration. Indian water rights settlements are being actively negotiated throughout the United States. Funding of these settlement agreements is the single greatest impediment to their successful completion. We believe it is time for Congress to address the funding issue on a more comprehensive basis.... Having a dedicated water rights settlement fund with a dedicated funding source will allow not only the Northwest New Mexico Rural Water Supply Project to be built, but also many other worthy projects in other states. The Committee should look at expanding Title II so that the Reclamation Water Settlements Fund can have even greater potential for dedicated revenues. The timeframe for those deposits should be at least fifty years.... We urge the Committee to explore opportunities to build on the Settlements Fund concept by contacting the Western Governors' Association and the Western States Water Council."

In response to a statement by Senator Domenici, Mr. Guenther observed that Arizona takes the "Law of the River," and its neighbor's water needs, very seriously and offered to sit down with Mr. D'Antonio and Committee staff to resolve Arizona's concerns, as they did with the Arizona Water Rights Settlement Act.

*Rural Water Supply Act*

The Rural Water Supply Act of 2006, authorizing the Secretary of the Interior and Bureau of Reclamation to carry out a program in the Reclamation States to provide a clean, safe, affordable and reliable water supply to rural residents was signed into law by President Bush on December 22, 2006. P.L. 109-451 directs Interior to identify opportunities for, plan the design of, and oversee the construction of water supply projects for small communities and rural areas. Projects that are recommended by the Secretary must be authorized by the Congress. Under Title I, it also directs the Secretary to develop and publish criteria for determining the eligibility of a rural water supply for financial assistance. Further, Title II authorizes the Secretary to make loan guarantees available to lenders for eligible projects to supplement private-sector or lender financing. It limits guarantees by the Secretary to 90% of a project's cost and requires amortization of the guarantee within 40 years.[8]

On August 14, Senator Jeff Bingaman (D-NM) chaired a field hearing in Clovis, New Mexico to take testimony on implementation of the Rural Water Supply Act of 2006, as well as the Eastern New Mexico Water Supply Project. The former authorizes the Secretary of Interior to create a program to assess the water needs of rural communities in the West, and identify projects to meet those needs. The latter is a proposed project that would pipe 16,400 acre-feet of water annually from Ute Reservoir, on the Canadian River, near Logan, New Mexico, about 25 miles from the Texas border. It would supply a number of communities in Curry and Roosevelt counties, as well as Cannon Air Force Base. Senator Pete Domenici (R-NM), the Committee's Ranking Minority Member, who participated in the hearing said, "I urge the U.S. Bureau of Reclamation to actively seek to engage the rural communities of the western United States, such as Clovis and other eastern New Mexico municipalities, and to take leadership in resolving the growing water supply crisis."

Dave Sabo, Assistant Regional Director for the Bureau of Reclamation's Upper Colorado Region, testified regarding the Eastern New Mexico Project. He said that since there is no specific project authorization bill at this point, "Reclamation cannot provide a statement on the relative merits of the project from a policy standpoint. However, we are working with the [Eastern New Mexico Rural Water Authority and their consultants] and the State [of New Mexico] to bring the project to a point where a feasibility determination is possible." He did summarize early concerns with a 2004 bill to authorize the project (H.R. 4623), including project costs and a proposed 80% federal construction cost share. The Congress has provided over $1.76 million for project planning and technical studies. The most recent cost estimates for construction total $436 million, with annual operation and maintenance costs of $8.2 million. The local communities would pay operation and maintenance costs and 10% of the construction costs, with New Mexico paying 25%, and the federal government the remainder.

Senator Domenici said, "I want to caution the communities involved in this project that, while I strongly support finding a solution to the very real water needs of this region of New Mexico, authorization is only the first step. Providing the hundreds of millions of dollars to fund construction of the Ute pipeline will remain a difficult task."

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[8] *Western States Water*, Issue #1699, December 8, 2006.

Next, Mr. Sabo addressed implementation of the Rural Water Supply Act, passed in December 2006 and signed by the President (P.L. 109-451). "We are enthusiastic about this program, as its intent is to enable Reclamation to work cooperatively with rural communities across the West in a consistent manner to identify rural water supply needs and cost effective options for addressing those needs. Prior to the enactment... Reclamation has had no authority to get involved – early in the process – in the analysis and development of solutions for meeting the potable water supply needs of rural communities in the West."

Mr. Sabo said, "To summarize, Title I of the Act requires Reclamation to: (1) develop programmatic criteria for prioritizing requests for assistance...and for determining eligibility for non-Federal entities to participate...; (2) develop criteria for what must be included in both the appraisal studies and the feasibility studies...in terms of data, alternatives, and level of analysis; (3) complete an assessment of the rural water programs that exist in other agencies to ensure that we are filling an unmet niche and to ensure that we coordinate and leverage resources, as well as evaluate the status of rural water projects that are already authorized; and (4) complete an annual report of Reclamation's staff costs for carrying out the Act."

Reclamation expects interest in the program to exceed funding "given the budget realities," precluding involvement in "every worthy project." Moreover, he continued, "...it is important to note that the Act does not authorize project construction. Instead, the focus...is on ensuring thorough analysis of rural water needs and options...that meet program criteria.... In the report that accompanies each study, the Secretary (through Reclamation) will make a recommendation to Congress as to whether the project is technically and economically feasible, and whether it is in the Federal interest...as well as the appropriate non-Federal share of construction costs, which must be at least 25%...and determined based on an analysis of the non-Federal entities' capability-to-pay."

Mr. Sabo said that Reclamation expects to publish proposed and then final rules on criteria in the Federal Register in 2008. A Reclamation team representing all five regions and the Commissioner's office is leading this effort. He added, "We have held conversations with various stakeholder groups and plan to hold dialogues with Native American Tribes. We will continue that outreach and dialogue throughout the process of implementing this new program."

The Western States Water Council and Western Governors' Association pushed for authorization of the program, which is specifically referenced as part of the June 2006 report, "Water Needs and Strategies for a Sustainable Future." WSWC Chairman Duane Smith testified in support of the legislation (S. 895) on May 11, 2005, saying in part, "It should be noted that there are many existing state programs and information compiled by the states that should not be overlooked as part of any assessment.... Various considerations are listed for appraisal and/or feasability reports, including whether water rights exist to supply the project. States must have a say in determining the availability of water rights to support project development and actual water delivery, as well as appropriate conservation measures." He also noted the bill explicitly stated: "Nothing in this title preempts or affects State water law or an interstate compact governing water.... The Secretary shall comply with State water laws in carrying out this title."

## *Water 2025*

On August 30, Secretary of the Interior Dirk Kempthorne announced a new System Optimization Reviews grant program under the Water 2025 initiative to enable water users to perform broad studies of the efficiency of their water delivery systems. "This program will assist

water users in evaluating the most efficient ways to manage their irrigation systems and thus further the goals of Water 2025 to increase water conservation and ensure adequate water supplies for future needs," Secretary Kempthorne said. He added, "The Bureau of Reclamation will award the funds for [reviews], each of which will result in a plan of action that will focus on improving efficiency and operations on a regional or basin perspective. Most improvements identified in the reviews will be eligible to apply to the Water 2025 Challenge Grant Program for additional funding."

Water 2025 encourages voluntary water banks and other market-based measures as authorized under state law, promotes the use of new technology for water conservation and efficiency and removes institutional barriers to increase cooperation and collaboration among federal, state, tribal and private organizations. System Optimization Reviews will involve a multi-step process that will gather information; identify issues and priorities; establish water conservation goals; examine water management, water marketing and ways to prevent conflicts over water; identify and evaluate potential improvements; define a plan of action; and prepare a final report.

To be eligible for the new grants, applicants must represent an irrigation or water district, tribal water authority, state governmental entity with water management authority, or organizations created under state law with water delivery authority. They must also be located in the seventeen western states; provide a 50/50 non-federal cost-share; request no more than a $300,000 federal cost-share; and reviews must be scheduled for completion in 24 months. For more information visit www.doi.gov/water2025.

The press release notes that since 2004, Interior has awarded more than $25 million in Challenge grants for more than 120 projects, which with matching contributions from non-federal partners, represent a combined investment of more than $105 million in water management improvements.

*Reclamation Project Authorization Act*

On December 13, Senator Jeff Bingaman (D-NM) introduced the National Forests, Parks, Public Land and Reclamation Project Authorization Act (S. 2483) and announced an agreement had been reached to move the legislation early in the next session of Congress. The bill is a compilation of nearly 60 bills passed by the House, most of which have been favorably reported by the Senate Energy and Natural Resources Committee, chaired by Bingaman. He said, "I believe everything included within this bill is non-controversial and it is my hope that the Senate will pass this bill expeditiously." The bill was placed on the Senate Calendar as No. 546.

Title V includes fourteen bills authorizing U.S. Geological Survey and U.S. Bureau of Reclamation actions in Alaska, California, Colorado, Idaho, Kansas, Nebraska, New Mexico, Utah and Washington, including: Section 501 - Alaska water resources study (H.R. 1114/ S. 200); Section 501 - Redwood Valley Water District (H.R. 235/S. 1112); Section 503 - American River Pump Station project transfer (H.R. 482); Section 504 - Watkins Dam enlargement (H.R. 839/S. 512); Section 505 - New Mexico water planning assistance (H.R. 1904/S. 255); Section 506 - Yakima Project lands and building conveyance (H.R. 386/S. 235); Section 507 - Juab County, Utah conjunctive water use (H.R. 1736/S. 1110); Section 508 - A & B Irrigation District contract repayment (H.R. 467/S. 220); Section 509 - Oregon Water Resources (H.R. 495); Section 510 - Republican River Basin study (H.R. 1025); Section 511 - Eastern Municipal Water District (H.R. 30); Section 512 - Inland Empire recycling projects (H.R. 122/S. 1054); Section 513 - Bay Area regional recycling program (H.R. 1526/S. 1475). Sec. 514 authorizes Reclamation site security measures at projects westwide (H.R. 1662/S. 1258).

**Clean Water Act/Environmental Protection Agency**

*National Pollutant Discharge Elimination System*

*EPA v. Defenders of Wildlife/National Association of Homebuilders v. Defenders of Wildlife*

On January 5, the United States Supreme Court granted certiorari on two consolidated cases addressing the Environmental Protection Agency's (EPA) obligations under the Endangered Species Act (ESA) while implementing other laws. *EPA v. Defenders of Wildlife* and *National Association of Homebuilders v. Defenders of Wildlife* were appealed from the Ninth Circuit Court, which in 2005 held that EPA must comply with ESA requirements even if the agency complies with all the applicable provisions of the Clean Water Act (CWA). Specifically, EPA must consider the effect on endangered and threatened species of delegating its authority to states to issue National Pollutant Discharge Elimination System (NPDES) permits, despite the fact that the Congress explicitly enumerated criteria for delegation.

On January 14, 2002, Arizona became the 45th state to submit for approval its request to administer its own NPDES permit program and issue water discharge permits within the state under the CWA. CWA §402(b) states, "The Administrator [EPA] shall approve each such submitted program unless he determines that adequate authority does not exist..." to issue permits and inspect, monitor, enter and require related reports, etc. There are nine criteria, and ESA's mandate is not listed.

Fearing that the transfer of permitting authority might affect listed species, EPA regional staff initiated formal consultation with the U.S. Fish and Wildlife Service (FWS) in accordance with the Endangered Species Act. FWS staff determined that the transfer of permitting authority to Arizona would reduce protections for listed species because unlike the federal government, Arizona would not be required to consult with FWS when issuing permits that might affect listed species. Nevertheless, EPA was concerned that under the CWA, it lacked authority to deny the transfer of permitting authority to Arizona based on ESA concerns, which are not enumerated in the CWA as those which EPA can or should consider when reviewing and approving an application to transfer permitting authority to a state.

Given this confusion, EPA and FWS regional staffs elevated Arizona's application to the FWS Director and EPA's Deputy Assistant Administrator for Water. After consulting at the national level, FWS issued a Biological Opinion (BiOp) recommending that the EPA approve the transfer of permitting authority to Arizona. FWS noted in its BiOp that transferring the permitting authority would result in the loss of ESA consultation requirements, which in the past had resulted in conservation measures to protect listed species in Arizona, but noted that the absence of such a requirement "reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements...of the Clean Water Act." Consequently, two days later, EPA approved the transfer of NPDES permitting authority.

Defenders of Wildlife and other environmental groups sued EPA alleging that it violated the ESA by approving the permitting authority transfer without properly considering the impacts that such a transfer would have on listed species. In *Defenders of Wildlife v. EPA*, the Ninth Circuit Court of Appeals ruled in favor of the environmental groups holding that EPA's reasoning for declining to consider impacts on listed species was "internally inconsistent and inadequately explained." Further, the Court found that the ESA required EPA to consider the impacts its transfer approval would have on listed species. In other words, the Court ruled that EPA must comply with

ESA requirements even if a state applicant meets all of the conditions under the Clean Water Act for transferring NPDES wastewater discharge permitting authority.

The Supreme Court will hear arguments on the case in April, and has asked the parties to brief the following two issues: (1) Does the ESA apply to EPA's decision to delegate permitting authority where the CWA explicitly lists the criteria the agency is to consider? (2) Did EPA rely on inconsistent legal theories in rendering its decision and, if so, should the Ninth Circuit have remanded the case to the agency on this ground? A decision on this precedent setting case was expected this summer. In the West, Alaska, Arizona, Idaho and New Mexico do not have approved NPDES programs.

On April 17, the U.S. Supreme Court heard an hour of oral arguments in the consolidated cases of *National Association of Homebuilders and EPA v. Defenders of Wildlife* involving the delegation of Clean Water Act permitting authority to the State of Arizona (06-340 and 06-549). Mr. Edwin Kneedler, representing petitioners, got right to the heart of the matter. "Mr. Chief Justice, and may it please the Court: Section 402 (b) of the Clean Water Act provides that the Environmental Protection Agency [EPA] shall approve an application by a State to administer its own NPDES [National Pollutant Discharge Elimination System] program unless EPA finds that the state's program does not satisfy nine criteria that are addressed to whether the State has the legal authority under State law to carry forward with the program. There's no dispute in this case that Arizona's program satisfies those criteria. The Ninth Circuit nonetheless set aside EPA's approval of Arizona's program. The Ninth Circuit held that EPA could not approve Arizona's application unless it first insured that there would be in place under Arizona's administration protections equivalent [protections] to those that would be applicable under Section 7 of the Endangered Species Act [ESA] when EPA itself issues permits. That...is inconsistent not only with Section 402(b)'s mandatory directive, it's also inconsistent with Section 7 of the ESA itself."

Justice Kennedy asked, "Do we take the case...on the assumption that if the nine – the factors in the statutes are met, that EPA has no discretion to withhold the transfer?" Mr. Kneedler: "Yes, that is our position." Justice Stevens asked: "How long has that been...EPA's position?" Mr. Kneedler: "There had never been consultation...to impose any obligations on a State under Section 7...." Chief Justice Roberts: "So your position is the consultation is a waste of time?" Mr. Kneedler: "Basically, yes. If in the end EPA could not disapprove the State's application, and since consultation is ancillary to the substantive obligation not to jeopardize...."

Justice Ginsburg: "Isn't there a difference between denying the application because the [ESA] hasn't been attended to adequately, and saying you meet the nine criteria, you're going to get your application?" The use of memoranda of agreement between EPA and the states was discussed, which Mr. Kneedler said, "...typically address such things as how the State agency will furnish EPA draft permit[s]...," etc.

Justice Souter: "No, but the point is why can't it be? Doesn't the ESA require something more than voluntary cooperation? You quite rightly emphasize the mandatory nature of the approval under the Clean Water Act. But the ESA mandate seems equally unconditional."

Mr. Kneedler: "It's unconditional with respect in our view to actions that are within the agency's discretion or consequences that the agency will cause. But more fundamentally...Section 7 imposes obligations only on Federal agencies, not on state agencies." However, he later added, "With respect to water quality issues that might affect an endangered species, EPA takes the

position...that EPA can object to a State permit where that permit would not comply with State water quality standards...necessary to protect endangered species."

Justice Scalia raised an issue about a project that "...may be endangering a species, not by reason of change in water quality but, for example, by destroying habitat, constructing a dam or that sort of thing." A discussion of a February 2001 coordinated agreement between Arizona and EPA followed. Mr. Kneedler said, "Justice Scalia is correct that the impacts that would not be covered by this would be non-water quality-related impacts on upland habitat. But in our view that simply reflects the nature of the Clean Water Act...." Further, he said, "EPA's approval of the State program does not result in any immediate on-the-ground consequences." He also referred to the "prohibition against taking endangered species," as protection that would remain.

Justice Breyer questioned whether or not under the petitioners' reasoning "...are you suddenly saying every statute that uses the word 'shall' is not subject to the ESA?" Mr. Kneedler: "Well, I think is would require a statute-by-statute evaluation. But we think this one is particularly clear." Justice Breyer: "Now, my problem with saying it's clear is that they have nine criteria. One...of those criteria is you have to be certain that the State will assure the protection and propagation of a balanced population of shellfish, fish, and wildlife.... I don't think you'd have to be too imaginative a lawyer to figure out ways that they involve everything the ESA involves. So if there ever was an act prefaced by the word 'shall' where the ESA would apply, you would think it would be this one...." Justice Stevens questioned how EPA's statutory authority to establish basic guidelines and minimum standards for a state program under a memorandum of agreement is "consistent with your 'shall' argument?" Mr. Kneedler: "There's a separate authority."

Mr. Eric Glitzenstein, on behalf of respondents, used his time to point out: "EPA's current practice is to consult with the Services where EPA determines that approval of a State's or a Tribe's application to administer the NPDES program may affect federally listed species.... Now this memorandum of agreement, which Mr. Kneedler just presented...specifically provides the mechanisms by which the [CWA] and [ESA] will be reconciled and will be harmonized.... EPA said point blank, we are required to comply with Section 7.... The Government's position now is that it doesn't matter."

Chief Justice Roberts: "That's not quite right. They would look at that in the context of reviewing the permits that are issued by the State agencies.... No what he's suggesting is there isn't going to be any impact on any endangered species until a particular permit is issued by the State agency, and that those permits are submitted to the Fish and Wildlife Service for their review." Mr. Glitzenstein: "That's correct.... They said...we will go to the State under the following circumstances, and say we think this permit is going to cause the jeopardy of the species...." Justice Scalia: "But that has nothing to do...with whether they have to issue the NPDES authorization." Chief Justice Roberts: "The point is that it's the issuance of a permit...that has the potential for jeopardizing endangered species. It is not the administration of the program.... And they don't need to leverage their limited authority, their non-discretionary authority to review the actual act that might jeopardize an endangered species."

On June 25, the Supreme Court[9] overturned the Ninth Circuit's decision invalidating the Environmental Protection Agency's (EPA) transfer of National Pollutant Discharge Elimination

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[9]In a consolidated case, *National Association of Home Builders v. Defenders of Wildlife* (2007 U.S. LEXIS 8312).

System (NPDES) permitting authority to the State of Arizona. The Supreme Court granted certiorari, and held: "The Ninth Circuit's determination that the EPA's action was arbitrary and capricious was not fairly supported by the record."

Respondents contested EPA's interpretation of the statutes, arguing that EPA's decision that §7(a)(2) required consultation regarding the effect of a permitting transfer on listed species in both its preliminary review and in the *Federal Register* notice of final agency action was internally inconsistent. Second, they argued they were denied their rights to participate in administrative proceedings because EPA changed its position while litigation was pending. Third, they argued if the case were remanded, they would raise additional challenges. Fourth, they argued EPA's decision to transfer permitting authority represented an exercise of agency discretion, thereby subjecting it to §7(a)(2) of the Endangered Species Act. A divided Court was not persuaded.

The majority answered respondents' first contention by stating, "...the only 'inconsistency' the respondents can point to is the fact that the agencies changed their minds – something that...they were fully entitled to do." After all, federal courts generally only review final agency decisions. Second, the Court held that the respondents were not deprived of their ability to comment publicly, even though the EPA revised its position. Third, the Court reasoned that any future agency action is separate from the agency's decision to authorize the transfer in the first place. Fourth, though EPA may exercise some judgment in determining that Arizona satisfied the nine criteria, the statute does not authorize the EPA to add an entirely new criterion to the list.

The Court acknowledged, "An agency cannot simultaneously obey the differing mandates set forth in §7(a)(2) of the [Endangered Species Act] and §402(b) of the [Clean Water Act], and consequently the statutory language...does not itself provide clear guidance as to which command must give way." Therefore, it is appropriate to look to the agency's interpretation. Applying a deferential standard of review, the Court reasoned EPA's interpretation that consultation was only required in discretionary actions, and not to mandatory actions, was reasonable in light of the ambiguity. "This interpretation harmonizes the statutes by giving effect to the [Endangered Species Act's] no jeopardy mandate whenever the agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors."

Furthermore, applying ESA §7(a)(2) to the Clean Water Act would "effectively repeal §402(b)'s statutory mandate by engrafting a tenth criterion onto the Clean Water Act." Because §402(b) is mandatory, it does not "...set forth minimum requirements for the transfer of permitting authority; it affirmatively mandates that the transfer 'shall' be approved if the specified criteria are met; these nine requirements are the floor and the ceiling of §402(b)'s scope." Finally, the Court said that reading ESA §7(a)(2) broadly would partially override federal statutes mandating agency action by subjecting it to the additional §7(a)(2) requirement.

Justices Stevens and Breyer both authored dissents. Justice Stevens believed the majority failed to give full effect to both statutes even though doing so was possible. Also, he emphasized the Court's previous decision in *TVA v. Hill,* where the Court stated the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions of federal agencies.'" By limiting the scope of §7(a)(2), the Court "whittles away at Congress' comprehensive effort to protect endangered species from the risk of extinction and fails to give the Act its intended effect." In *Hill*, the Court held that §7(a)(2) "admits of no exception" outside of the limited number of "hardship exemptions." Justice Stevens reasons the majority judicially added a "nondiscretionary-act exception" when the Court previously held that there were no exceptions.

Justice Stevens' dissent further stated that the ESA applies to "all federal agencies" and "all actions authorized, funded, or carried out by them," including the transfer of permitting authority under the Clean Water Act. As a result, §7(a)(2) applies to NPDES transfers regardless of whether they are discretionary or not. EPA's own interpretation of "agency action" include both mandatory and discretionary activity. In addition, the majority's reliance on the EPA's interpretation is improper because agencies are only entitled interpretational deference when they are charged with administering the statute. If any statute should give way, it should be the Clean Water Act. Also, any recent clarification about the applicability of the Endangered Species Act to discretionary and non-discretionary action is invalid because these clarifications were not adopted in formal administrative proceedings.

Justice Stevens also writes that EPA has ongoing regulatory oversight even after it transfers permitting authority. This authority requires states to agree to a Memorandum of Agreement (MOA) whereby the EPA may precondition the transfer. Via the MOA, the EPA can require water quality restrictions to mitigate harmful effects to listed species. Justice Stevens closes his dissent by arguing EPA's decision to transfer permitting authority is discretionary, and thereby subject to §7(a)(2), adding as EPA evaluates the nine CWA conditions, the agency has "significant room for discretion."

Justice Breyer joined Justice Stevens' dissent, but questioned whether or not §7(a)(2) applies to every single agency decision. For example, he is skeptical that §7(a)(2) applies to the IRS and its decision to prosecute or settle a particular tax liability. He also adds an independent reason for dissent stating, "My own understanding of agency action leads me to believe that the majority cannot possibly be correct in concluding that the structure of §402(b) precludes application of §7(a)(2) to the EPA's discretionary action."

*Northern California River Watch v. City of Healdsburg*

On August 6, the Ninth Circuit Court of Appeals upheld a district court decision in *Northern California River Watch v. City of Healdsburg* finding the city in violation of the Clean Water Act (CWA) for discharging wastewater without a National Pollutant Discharge Elimination System (NPDES) permit into a former gravel pit adjacent to the Russian River. The Court's opinion, by Chief Judge Mary Schroeder, referred to *Rapanos* and the narrowing of the CWA's scope, while finding "...the controlling opinion is that of Justice Kennedy who said that to qualify as a regulable water under the CWA the body of water itself need not be continuously flowing, but that there must be a 'significant nexus' to a waterway that is in fact navigable."

Since 1978, Healdsburg's secondary wastewater treatment plant has discharged into Basalt Pond, an old sand and gravel pit, separated from the Russian River by a levee. The pond covers some 58 surface acres. Discharged wastewater amounts to 420-455 million gallons per year, nearly the volume of the pond itself, which would overflow but for the unconfined nature of the alluvial aquifer. The pond serves to "polish" effluent by means of percolation and filtration, as well as the wetlands in and around the pond, effectively reducing "biochemical oxygen demand and removing some pollutants, but the filtration is not perfect." Chloride concentrations in the ground water between the Pond and the Russian River are "substantially higher" than surrounding areas. Upstream concentrations in the river are only 5.9 parts per million (ppm), while seepage from Basalt Pond measures 36 ppm.

The Pond itself is privately owned, and while all excavation operations have ceased, discharges of slurry and sediments from surface mining operations at other locations to the Pond continue.

The plaintiffs filed suit on December 4, 2001 alleging Healdsburg was violating the CWA, and the district court agreed based on its findings of fact, and the legal conclusion that Basalt Pond is a "water of the United States." The city appealed, claiming Basalt Pond is exempt, as the CWA excludes "waste treatment systems" from "waters of the United States," and that there is an exception for active excavation operations. The district court found no merit to the latter, nor did the Ninth Circuit, which also stated, "Basalt Pond may be part of a waste treatment system, but it does not fall under the exemption because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system." Further, the court found no evidence of active excavation operations.

Regarding "waters of the United States," the court found: "It is undisputed that the Russian River is a navigable water of the United States.... The horizontal distance between the edge of the River and the edge of the Pond varies between 50 and several hundred feet.... Usually, there is no surface connection, because the levee blocks it and prevents the Pond from being inundated by high river waters.... Pond water in the aquifer finds its way to the River over a period of a few months...." The court noted the U.S. Army Corps of Engineers issued regulations, in 1978, which included adjacent wetlands, including "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.... The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries." *Riverside Bayview Homes*, 474 U.S. 121; 33 C.F.R. 328.3(a)(1),(4),(7).

The court also stated, "The applicable regulations define wetlands as 'those areas that are inundated or saturated by surface or groundwater.' *See* 33 C.F.R. 328.3(b). The record here reflects that the Russian River and surrounding area, including the Pond itself, rest on top of a vast gravel bed extending as much as sixty feet into the earth. The gravel bed is a porous medium, saturated with water. Through it flows an equally vast under-ground aquifer. This aquifer supplies the principal pathway for a continuous passage of water between Basalt Pond and the Russian River.... Indeed, the parties have [so] stipulated...." The court held, "The Basalt Pond and its surrounding area are therefore regulable under the CWA, because they qualify as wetlands under the regulatory definition...because here, the Pond is not isolated; it contains and is surrounded by wetlands.... The remaining question is whether Basalt Pond is a 'water of the United States' because it is sufficiently adjacent to the navigable Russian River to confer jurisdiction or alternatively because it has a substantial nexus to the River." The court affirmed the district court's determination saying, "In sum...Basalt Pond has a significant nexus to the Russian River."

*Friends of Pinto Creek v. EPA*

In *Friends of Pinto Creek v. EPA*, the Ninth Circuit Court of Appeals vacated a NPDES permit issued by the Arizona Department of Environmental Quality for the Gibson mine and remanded the permit to the Environmental Protection Agency (EPA). The October 4 ruling could impact mining operators throughout the country seeking new NPDES discharge permits. Carlota Copper Company sought a permit allowing mining-related discharges of copper into Arizona's Pinto Creek, a waterway already included on Arizona's list of impaired waters under 303(d) of the Clean Water Act (CWA) due to high levels of dissolved copper. The mining-related discharge would come from two separate surface and ground water diversions designed to prevent seepage into Carlota's proposed open-pit mine. Pursuant to NEPA, the U.S. Forest Service prepared an Environmental Impact Statement (EIS) and the Army Corps of Engineers prepared an Environmental Assessment (EA). After two administrative appeals, EPA issued a NPDES permit to Carlota. Petitioners sought review of EPA's decision.

Petitioners argued that Carlota's discharge into a waterway already impaired by excess copper violated the CWA and that issuing the NPDES permit violated the requirements of 40 C.F.R. § 122.4 (I). It states: "No permit may be issued...to a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." An exception exists if a new discharger demonstrates that: "(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards."

EPA maintained that there were sufficient remaining load allocations because the TMDL provides a method by which the allocations could be established to allow for the discharge under the requirements of *clause (1)* of § 122.4(I). With respect to *clause (2)* of § 122.4(I), EPA argued that the requirement of "compliance schedules" pertains only to point sources of pollution for which there is a permit. If this were not so, EPA argued, § 122.4(i)(2) would essentially ban the discharge of pollution into impaired waters. EPA also contended that the partial remediation of the discharge from the Gibson Mine would offset the pollution discharged by the two proposed diversion channels. There would be no net dissolved copper increase in the Pinto Creek segment.

The Court was not persuaded by EPA's arguments. The unanimous three-judge panel relied upon § 122.4(i) as the principal basis for its decision. The Court stated that there "are no plans or compliance schedules to bring the Pinto Creek segment 'into compliance with applicable water standards,' as required by § 122.4(i)(2)." The Court further emphasized that the purpose of § 122.4 is "not simply to show a lessening of pollution, but to show how the water quality standard will be met if Carlota is allowed to discharge pollutants into the impaired waters." Consequently, EPA was not authorized to issue the final NPDES permit because Carlota failed to demonstrate it had satisfied the compliance schedule clause. Furthermore, the Court wrote "there is nothing in the Clean Water Act...that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water."

*State Revolving Fund*

On January 19, Rep. James Oberstar (D-MN), Chairman of the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment, held a hearing on the need to "replenish" Clean Water State Revolving Fund (SRF) money, which he has identified as a top priority.

Ben Grumbles, EPA Assistant Administrator for Water, testified that developing innovative, market-based, sustainable solutions for water infrastructure financing and management is a top priority for EPA. He stated that EPA is making progress, in collaboration with "...States, Tribal communities and other partners." Over the past 20 years, communities have spent over $1 trillion on wastewater and drinking water treatment, but "...it may not be enough to keep pace with America's aging infrastructure systems." EPA estimates that at the current level of investment, "the potential gap in funding between 2000 and 2019 would be approximately $122 billion (in 2001 dollars) for wastewater infrastructure and $102 billion...for drinking water infrastructure. If revenue grows at 3% per year, a projection that is consistent with long-term growth estimates of the economy, the gap is approximately $21 billion...and $45 billion.... Much of the projected gap is [due to] deferred maintenance, inadequate capital replacement, and a generally aging infrastructure. In addition, populations are increasing and shifting geographically, thus requiring investment in existing and new infrastructure."

Grumbles reiterated EPA's strategy for sustaining water resources infrastructure is based on four pillars – better management, water efficiency, full cost pricing and the watershed approach.... It is a collaborative effort involving drinking water and wastewater utility managers, professional and trade associations, local watershed protection organizations, and federal, state and local officials." Regarding the watershed approach, he added, "In many cases, adoption of watershed-based approaches, such as source water protection, 'green infrastructure,' water quality trading, and watershed permitting, in conjunction with traditional 'hard infrastructure' approaches can help reduce overall infrastructure costs." He said EPA's "unprecedented" national conference, "Paying for Sustainable Water Infrastructure: Innovations for the 21st Century," to be held in Atlanta, Georgia on March 21-23, would be a forum for exchanging and examining ideas about how best to meet the challenges of paying for sustainable water infrastructure.[10]

Kevin Ward, Executive Administrator of the Texas Water Development Board (and a WSWC member) testified on behalf of the Council of Infrastructure Financing Authorities (CIFA), whose members are responsible for the management of the Clean Water and Drinking Water State Revolving Funds. He noted a 2005 CIFA survey identified over 2,000 projects seeking loans totaling almost $9 billion. He stated, "Obviously, a good number of these projects are not going to get underway anytime soon. The past four years have not provided much encouragement in terms of the federal commitment to preserving and improving our water resources.... Funds have been cut in half. Not only does this represent a decline in the dollar amount of funding available to help make these expensive pollution control projects more affordable, it represents an even starker decline in the level of real support since construction costs have rapidly increased...." The WSWC and WGA support continuing stable federal funding of at least $1.35 billion for the Clean Water SRF and $850 million for the Drinking Water SRF.

Others testifying included: Martin Chavez, U.S. Conference of Mayors' Water Council; Dr. Ellen Gilinsky, Association of State and Interstate Water Pollution Control Administrators; and Nancy Stoner, Clean Water Project, Natural Resources Defense Council.

*Section 404/Jurisdiction over Wetlands*

On May 22, Rep. James Oberstar (D-MN), Rep. John Dingell (D-MI) and Rep. Vernon Ehlers (D-MI) introduced the Clean Water Restoration Act (CWRA). H.R. 2421 would "reaffirm the original intent of Congress" in enacting the Clean Water Act (CWA) and to "clearly define the waters of the United States." The bill reasserts CWA jurisdiction where recent Supreme Court decisions have narrowed its reach with regard to wetlands. Since its enactment in 1972, CWA permitting jurisdiction included "navigable waters" which are "the waters of the United States, including the territorial seas." The new definition replaces "navigable waters" with "waters of the United States" and includes "...all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

This change was prompted by *SWANCC v. Corps of Engineers* and *Rapanos v. United States*, recent decisions where the Supreme Court held the federal government lacked authority under

[10] http://www.payingforwater.com

Section 404 of the CWA to regulate dredging and filling of isolated ponds and wetlands. In *Rapanos*, a plurality of the Court determined that CWA permitting authority did not extend to "ordinarily dry channels through which water occasionally or intermittently flows." Rather, the plurality concluded the CWA only extends to "relatively permanent bodies of water connected to traditional interstate navigable waters," or to those wetlands where the wetlands are significantly connected on the surface with a body of water where it is "difficult to determine where the water ends and the wetland begins." Further, the Court said "wetlands may not be considered adjacent to remote waters of the United States based on a mere hydrologic connection." However, Justice Kennedy, in a concurring opinion, rejected this test and used a "significant nexus" test in determining whether the wetland was subject to CWA jurisdiction. The lack of a majority and Justice Kennedy's reliance on the "significant nexus" test has left significant uncertainty as to which waters are subject to CWA jurisdiction.

Citing this confusion and uncertainty, Rep. Dingell said the Supreme Court misinterpreted the intent of the Congress, and H.R. 2421 will clarify which waters are subject to CWA jurisdiction. Rep. Ehlers added, "Congress is obligated to clarify the scope of the Clean Water Act following the regulatory confusion and lawsuits that have arisen out of recent Supreme Court decisions." Rep. Oberstar said the Supreme Court has "muddied the jurisdictional understanding of the CWA" by focusing on the phrase "navigable waters," and the bill seeks to "reestablish [a] commonly held understanding of the CWA prior to these rulings."

While the bill also includes a savings clause that retains existing CWA exemptions for industries like agriculture, mining and silviculture, it will face strong opposition from industry groups. Susan Asmus, Vice President of the National Associations of Home Builders, said the bill will lead to greater regulatory headaches, as it greatly expands CWA jurisdiction "by virtually saying that every drop of water is in." Despite its 158 cosponsors in the House, its fate is uncertain. On the Senate side, one Republican staffer said the bill would have a difficult time achieving a filibuster proof majority as "it does far more than the sponsors claim it does."

*Rapanos and Carabell*

On June 5, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued a joint guidance document in response to jurisdictional uncertainties resulting from the U.S. Supreme Court's decision in *Rapanos v. U.S.*, that addresses the jurisdictional reach of the Corps' permitting jurisdiction under Section 404 of the Clean Water Act (CWA). The Agencies said the guidance document was needed "...to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with [*Rapanos*] and supported by the administrative record." The guidance comes nearly a year after the Supreme Court's plurality decision, was presented as five separate decisions (one plurality, two concurring, and two dissenting). Justice Scalia writing for four members of the Court, concluded that the Corps' permitting jurisdiction only extends to those "relatively permanent bodies of water connected to traditional interstate navigable waters," and wetlands that have a continuous surface connection with waters where it is "difficult to determine where the 'water' ends and the 'wetland' begins." Justice Kennedy, concurred, but also introduced a new test, asking the lower court on remand to determine if a "significant nexus," existed between the wetland and tributary, traditional navigable waterways.

In the guidance document the agencies create classifications of waters that are subject to CWA permitting jurisdiction, waters that may be subject based on a fact-specific analysis, waters where the agencies will apply a "significant nexus" analysis, and features where the agencies will

generally not assert jurisdiction. The agencies will categorically assert jurisdiction over traditional navigable waters and wetlands "adjacent" to traditional navigable waters (TNWs). Under EPA and Corps regulations, and as used in the joint guidance, "adjacent" means "bordering, contiguous, or neighboring." The agencies will rely on Justice Scalia's plurality opinion to assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent, i.e., where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months), and adjacent wetlands that have a continuous surface connection to non-navigable tributaries to traditional navigable waters. The agencies will make fact-specific determinations using Justice Kennedy's "significant nexus" analysis on non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike, or similar feature). In addition, the agencies determined that the following features will generally exceed the scope of their Clean Water Act jurisdiction: (1) swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow); and (2) ditches (including roadside) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The agencies then laid out criteria for determining whether a non-navigable tributary and its adjacent wetlands have a "significant nexus" with TNWs. First, the agencies will determine if an "adjacent wetland" is involved. If not, then the agency will determine if the tributary itself is likely to have a significant effect on the TNW's chemical, physical or biological integrity. If adjacent wetlands are present, the agencies will analyze the ecological relationship between the tributary and its adjacent wetlands to determine if the two affect the TNW. Factors considered will include the volume, duration and frequency of flow, as well as the physical characteristics of the tributary (e.g., reliable ordinary high water mark, channel definition by bed and banks, and shelfing, wracking, water staining, and sediment sorting and scarring). The agencies will also look at contextual factors such as the size of the watershed, average rainfall, average winter snowpack, slope, and channel dimensions. Additionally, the agencies will look at the functions performed by the tributaries and its adjacent wetlands, including the capacity to carry pollutants or floodwaters, or the capacity of the tributaries and adjacent wetlands to reduce the flow of pollutants or floodwaters. Finally, the agencies will determine if the effects from the tributaries and adjacent wetlands are likely to be "more speculative or insubstantial on the chemical, physical, or biological integrity of the TNW." This final factor will increase in weight as the distance from the TNW increases.

While not a rulemaking, the agencies will be accepting public comments on the new guidance document for six months during its implementation. The Guidance Document can be viewed and downloaded at: http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf.

The Environmental Protection Agency and Army Corps of Engineers subsequently extended the public comment period on their interagency joint guidance on the scope of Clean Water Act geographic jurisdiction to January 21, 2008. EPA and the Corps issued the guidance in June 2007, consistent with the Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States,* regarding the scope of the agencies' jurisdiction. According to the notice, the guidance supports a strong regulatory program and ensures no net loss of wetlands, which is a key element of the Bush Administration's wetlands policy. Two other key elements include an active management program to restore, enhance and protect three million acres of wetlands by 2009, and conserving isolated wetlands such as prairie potholes.

During the early implementation of the guidance, the agencies are inviting public comments on case studies and experiences in applying the guidance. Submit comments on docket EPA-HQ-OW-2007-0282 at: http://www.regulations.gov/fdmspublic/component/main. By Spring, the agencies intend to either reissue, revise, or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. For more information see: www.epa.gov/owow/wetlands/guidance/CWAwaters.html.

*Solid Waste Agency of Northern Cook County*

On December 13, the Senate Environment and Public Works Committee, chaired by Senator Barbara Boxer (D-CA), held a hearing on the effect of recent Supreme Court decisions on federal jurisdiction over wetlands. The hearing was the "opening round" in a series of hearings planned in the aftermath of *Solid Waste Agency of Northern Cook County (SWANCC)* and the *Rapanos* and *Carabell* cases, which have redefined "waters of the United States."

Senator Russ Feingold (D-WI) and Rep. James Oberstar (D-MN) have introduced legislation, the Clean Water Restoration Act (H.R. 2421 and S. 1870) to clarify Congressional intent regarding federal jurisdiction over "waters of the United States." Feingold says his bill would "not broaden the scope of the Clean Water Act," but in light of the Supreme Court's recent rulings, is a needed "straight-forward, surgical fix" restoring the "...authority of federal agencies to extend the Clean Water Act protections to certain isolated wetlands traditionally protected based on their use by migratory birds."

On the other hand, Senator James Inhofe (R-OK) declared, "The incredible expansion of federal jurisdiction under the 'Clean Water Restoration Act' contradicts" the Supreme Court's interpretation. He added, "The regulated community has never understood where federal jurisdiction ends and...the agencies [EPA and Corps of Engineers] have in fact gradually expanded the scope without going through the necessary processes to increase the federal reach into local land use decisions." Inhofe said he would insist a separate hearing specifically on the bill be held, before it could be marked up.

Testifying in opposition to the bill was the National Association of Homebuilders (NAHB), represented by Duane Desiderio, Vice President of Litigation. He said, "The Clean Water Act has helped the nation make significant strides in improving the quality of our water resources." However, NAHB believes the proposed legislation goes "too far" and would add significant time and costs for both regulators and builders, without a corresponding environmental benefit. Further, "Clean Water Act regulation cannot go to extreme lengths so as to subvert the Act's purpose to 'recognize, preserve, and protect' the primary rights and responsibilities of states to control water resources and address water pollution within their borders.... It would greatly undermine the careful balance among competing policies that the Congress, the Supreme Court, and the Executive Agencies have been working towards over the past 35 years."

Ron Curry, Secretary of the New Mexico Environment Department, urged lawmakers to pass the Clean Water Restoration Act and restore protections for surface waters. "Nowhere have the limitations created by these Supreme Court decisions been felt more acutely than in the desert Southwest...leaving uncertain protection for closed basins which cover up to one-fifth of New Mexico, non-perennial waters which make up more than 90 percent of our state's water bodies, 4,000 playa lakes, and numerous headwaters, springs, cienegas and isolated wetlands." Governor Bill Richardson has weighed in stating, "The citizens of New Mexico rely on federal and state

protections that ensure a clean environment and a sustainable water supply. This legislation would restore the Clean Water Act and would protect New Mexico's and the nation's waters now and for future generations." The WSWC has taken no position on the legislation.

*WaterSense*

On February 22, as part of its new water-efficiency partnership program, the Environmental Protection Agency (EPA) awarded two certification programs for landscape irrigation professionals its WaterSense label for their adherence to water-saving techniques. "Landscapes can use less water and still be beautiful and healthy," said EPA Assistant Administrator for Water Ben Grumbles. "WaterSense irrigation partners can help you find the solution that makes sense for your lawn or garden – as well as your wallet and the environment."

The WaterSense label has been approved for the Irrigation Association's (IA) Certified Irrigation Designer program and Certified Irrigation Contractor program. To earn the WaterSense label, IA's certification programs test for the ability to design, install and maintain water-efficient landscape irrigation systems, including tailoring systems to the surrounding landscape, selecting water-efficient equipment, tracking local climate conditions, and developing appropriate schedules for watering. Certified contractors and designers are eligible to become WaterSense partners and may use the WaterSense logo to promote their water-efficient landscape and irrigation services to consumers.

WaterSense is a voluntary public-private partnership that identifies and promotes high-performance products and programs that help preserve the Nation's water supply. The WaterSense program seeks to generate support for consumer use of water-efficient products such as high-efficiency toilets, water-saving faucets, and in the future, weather-based controllers and soil moisture sensors for lawns and gardens. For more information visit: www.epa.gov/watersense.

*Good Samaritan*

On June 6, EPA announced that it is issuing new policies that will reduce legal uncertainties for public and private entities, or Good Samaritans, willing to volunteer to help clean up and reclaim hardrock mine sites that are degrading water quality throughout the western United States. "President Bush is clearing legal roadblocks that for too long have prevented the cleanup of our nation's watersheds. Through EPA's administrative action, we are reducing the threat of litigation from voluntary hardrock mine cleanups and allowing America's Good Samaritans to finally get their shovels into the dirt," said EPA Administrator Stephen L. Johnson.

The Western Governors' Association and Western States Water Council have long been active in supporting a legislative remedy to this problem. The Administration announced a new Good Samaritan initiative as part of its 2005 White House Conference on Cooperative Conservation.[11] Under the new set of policies and model tools, EPA and volunteer parties will now be able to enter into "Good Samaritan Settlement Agreements," which will provide key legal protections to Good Samaritans as non-liable parties, including a federal covenant not to sue under the Superfund law -- the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). They will also provide protection from third-party "contribution" suits. Other tools include a model "comfort" letter intended for Good Samaritan parties.

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[11] *Western States Water*, Issue #1633, September 2, 2005.

There are an estimated 500,000 orphan mines in the United States, most of which are former hardrock mines located in the West. At many orphan mine sites and processing areas, disturbed rock and waste piles contain high levels of sulfides and heavy metals. These piles, when exposed to air and water, undergo physical and chemical reactions that create acid drainage. As this drainage runs through mineral-rich rock, it often picks up other metals such as arsenic, cadmium, lead, mercury and zinc. When this runoff enters local streams and rivers, it can severely degrade water quality and damage or destroy insect, plant and animal life. Thousands of stream miles and watersheds are affected and, in many cases, the parties responsible for the pollution no longer exist or are not financially viable.

A variety of parties, including nonprofit organizations and state and local governments, for a variety of reasons, are willing to voluntarily clean up these orphaned and abandoned sites, though they are not responsible for the pollution. However, many potential Good Samaritans have been deterred by concerns that they may be held liable under the Clean Water Act and CERCLA (or Superfund law) for any contributions to discharges that might result from their clean up efforts. Such legal uncertainties have prevented many parties from undertaking cleanup projects. For details see: http://www.epa.gov/compliance/resources/publications/cleanup/superfund/factsheet/goodsam-tools-fs.html.

**Drought/Water Supply**

*Water Supply Outlook/Snowpack*

According to the most recent snowpack summary and drought monitor, the New Year started off with a second consecutive winter storm over the High Plains, improving drought conditions over the affected areas. Snow and blowing snow coupled with icing conditions contributed to hazardous conditions over Colorado, Kansas, Nebraska and as far south as Oklahoma. The last two winter storms have brought much-needed precipitation, but were a mixed blessing, with the Governors of Colorado and Nebraska declaring storm-related disaster emergencies.

Preliminary damage estimates from the Nebraska Emergency Management Agency (NEMA) and public power utilities indicate at least $58 million in damages to public infrastructure, leaving thousands without power. Governor Dave Heineman said, "Because of the size and scope of the disaster, there is a distinct possibility that state and local governments will need assistance in handling the full range of needs that could arise during a disaster recovery effort that could span several months."[12]

Drought designations have been erased in eastern Nebraska, as well as southeastern South Dakota and northwestern Iowa following over two inches of precipitation. Soil moisture profiles are at or near capacity for much of Nebraska except for the far western portions of the state. However, moderate to severe drought conditions persist in western Nebraska, in South Dakota west of the Missouri River, and across much of Wyoming. Only abnormally dry to moderate hydrologic drought conditions generally remain in North Dakota and Montana.

In Kansas, up to 5 inches of precipitation in some areas relieved drought conditions. Oklahoma has been in a relatively wet pattern. With December ending up as one of the wettest

[12]Governor's Office Press Release, 1-3-07.

months on record, the intensity of the drought has been reduced significantly, but severe conditions persist in the northcentral part of the state along the central Kansas border. Much of this region is showing signs of recovering from long-term water deficits. However, across much of central Texas, from the Lower Rio Grande northeast towards Arkansas, severe to exceptional drought conditions remain.

Heavy snows in the southern Rocky Mountains improved the drought status in both Colorado and New Mexico, with up to 50 inches of snow in the region. Dry conditions continue in southern California as precipitation for 2006 was quite sparse. Thermal, California, recorded only 0.23 inches of precipitation for 2006, which is only 7% of normal. Palm Springs recorded only 1.78 inches, which is 34% of normal. Water year precipitation was below 25% percent of normal for almost the entire region. So far in California, almost every watershed in the state is below normal for the water year. Arizona remains afflicted with moderate to extreme drought conditions.

Only Oregon and Washington show no signs of drought, while Idaho and Utah have only relatively small areas of abnormal dryness.

The snow water-equivalent since the start of the 2007 Water Year (October 1, 2006) shows values much above normal over the Washington Cascades and Front Range of the Rockies in Colorado and New Mexico. Near normal values are found over the Northern Rockies and Oregon Cascades. Below normal percentages dominate the remainder of the West, especially over the Sierra Nevada Mountains and in Arizona.

On April 24, the Bureau of Reclamation released a water supply update. March was unseasonably dry and warm. Nearly every western river basin recorded a decline in snowpacks with significant meltouts. According to the Natural Resource Conservation Service's April 1 Western Snowpack Conditions and Water Supply Forecasts, the losses were greatest in the Southwest and central Oregon, where snowpacks declined more than 30%. As a result, snowpacks are extremely low in Arizona, Utah, Nevada, California, and eastern Oregon. Some sites in central Arizona, Utah, northern Nevada, and eastern Oregon had already melted out, which is also true in California's Sierra Nevada. Fortunately, April 1 reservoir storage is above average in California, Colorado, Idaho, Nevada, and Washington, and near average in Oregon and Utah. In contrast, in Arizona, Montana, New Mexico, and Wyoming, reservoir levels are below normal capacities.

"In many areas of the West we continue to face a drought that has had impacts for the past several years," said Reclamation Commissioner Robert Johnson. "The continuation of the drought is cause for concern. Our saving grace is the water storage system we have across the West that has allowed us to efficiently manage water deliveries in times of drought as well as in times of plenty. The system is working but water managers and the public need to continue prudent use of our limited water supplies." The Great Plains Region is an exception, where he says, "Initial signs indicate a spring that is more normal and wetter than what the Region has faced in past years. The State of Oklahoma is drought free for the first time since 2005 and although the drought is far from over in the region, it provides some much-needed short-term relief." All states in the West are gearing up for a potentially early and long fire season as a result of the drought and early snowmelt combination.

In the Mid-Pacific Region's Klamath Basin, Upper Klamath Lake's projected runoff remains below average for the irrigation season at 70%. The Lost River Basin also remains considerably drier with a spring runoff forecast at 41%. However, this year's projected water supply projections should allow Reclamation to continue to meet the water requirements of fish, wildlife and irrigation. The Central Valley Project's Trinity (100%) and Shasta (99%) reservoir storage levels compare well to the 15-year average.

In the Great Plains Region, the spring weather patterns across the northern tier states are bringing several days of cool temperatures and precipitation, followed by warmer and dry conditions. Precipitation has ranged from wet, heavy snow to light misty rainfall. Temperatures have ranged from the low 30s to the upper 60s. Spring crops are beginning to emerge across the region. Although the drought is far from over, the initial signs are for a more normal and wetter spring than in past years.

In the Upper Colorado Region, colder temperatures descended and slowed the snowmelt. While the significant drop in both snowpack and projected runoff has slowed, the deficit in snow accumulation and deceased snowmelt at an earlier than average time frame cannot be recaptured. Runoff into Lake Powell is currently projected at 53% of normal. Colder temperatures and above average precipitation are predicted for this region.

In the Lower Colorado Region, Lake Mead is currently at 53% of capacity at an elevation of 1122.17 feet (97.4 feet below full pool). Based on daily reservoir operations, Lake Mead's elevation is projected to be approximately 1120.58 feet by the end of April. The Salt River Project reservoirs on the Salt and Verde Rivers in central Arizona are currently at 63% of capacity, and runoff is at 30% of normal. The current snowpack in the Gila Basin is only 15% of average, while flows on the Little Colorado River and Virgin River are currently less than 10% and less than 50%, respectively. The near term outlook for the Lower Colorado Region is above average temperatures and below average precipitation.

Lastly, in the Pacific Northwest Region, the first half of April brought typical spring weather – a little bit of everything. The unseasonably warm March was replaced with more normal temperatures along with occasional blustery winds and showers. A strong winter-like storm brought much of the interior of the region cold temperatures and moderate snow in the mountains, helping to reduce irrigation demands or maintain them at normal levels. A continuation of wet weather into May will be needed to materially affect the water supply. Most reservoirs will fill this year, with the exception of several in eastern Oregon.

As of May 1, western snowpacks throughout most of the West are well below normal, with most basins reporting less than 50% of average, largely due to a very dry and warm March. Only parts of the Rockies in Montana and northern Idaho are near normal. Similarly, little has changed in a month with respect to spring and summer streamflow forecasts, though some basins in Nevada, Utah and Colorado have increased by 5%-15% while several basins in Idaho, Oregon, Washington and Wyoming, as well as northern New Mexico, have dropped 5%-15% in the last month. Streamflows in several basins in the Central Sierras of California, Nevada, southwestern Utah, southeastern Oregon, southern Idaho and central Wyoming are expected to be less than 50% of average. Washington Cascade streamflows are projected to be near normal, as are Alaskan streams, with the exception of southeast Alaska, where streamflow forecasts are much above normal. April precipitation was extremely low, with less than 50% of average in western Arizona, extreme southern California, northern Utah, southwestern Oregon, and northern Washington. Well above average April precipitation fell in New Mexico, eastern Colorado, parts of southern Idaho and central Montana, ranging from 110%-150% of normal. Reservoir storage is below average in Arizona, California, Montana, New Mexico, Oregon, Utah and Wyoming, and above average in Colorado, Idaho, Nevada and Washington.[13]

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[13]NRCS Western Snowpack Conditions and Water Supply Forecast, May 10.

By August 16, according to the Weekly Snowpack and Drought Update Report, cooler weather spread over "the West in early August, while monsoon showers continued from the Four Corners States northeastward into parts of Wyoming. Despite the spell of cool weather, wildfires remained active and difficult to contain across the northern Rockies and northern Intermountain West. Year-to-date wildfires across the U.S. had charred 6.0 million acres of vegetation, 134 percent of the 10-year average. Many of the currently uncontained wildfires were located in western Montana and central Idaho. In the latter region, severe drought (D2) was downgraded to extreme drought (D3), due to a variety of impacts. In contrast, showers continued to chip away at dryness and drought across southeastern Arizona and neighboring areas. Despite the summer showers, many Western reservoirs remained unusually low, signaling ongoing hydrological drought. At the end of July, reservoir storage stood at 82 percent of average for this time of year in Arizona. Storage ranged from roughly two-thirds to three-quarters of average in several other Western states, including Idaho, Oregon, Utah, and Wyoming.

The report continues, "During the past seven days, at mountain SNOTEL sites, temperatures ranged from 10°F above normal over portions of the Wyoming and Colorado Rockies to 10°F below normal over the Pacific Northwest (Cascades) (Fig. 1). At lower elevations, these extreme ranges were less.... For the past week, rain was generally light to non-existent except for scattered greater amounts across the Southwestern States and Central Rockies due to some enhanced monsoonal moisture. For the Water Year (which began 1 October 2006), very low totals persist over the Sierra Nevada and Arizona mountains. Slightly above normal totals continue to be reflected over the Cascades, Front Range of the Southern Rockies, and Bighorn Mountains of Wyoming.

*Water Demand, Supply and Allocation*

On March 26, the U.S. Army Corps of Engineers sponsored a discussion in Washington, D.C. on "U.S. Water Demand, Supply and Allocation: Trends and Outlook," a paper commissioned by the Corps' Institute for Water Resources (IWR). Written by Dr. Benedykt Dziegielewski, Southern Illinois University-Carbondale, and Dr. Jack Kiefer, CDM, under contract with the Corps, the discussion paper is intended to review and analyze information and future trends and uncertainties affecting U.S. water resources over the next 30 years. It also addresses the implications for local, state and federal agencies. While the paper concludes the country has abundant water resources, and there is no nation-wide crisis, it recognizes water is unevenly distributed and there are a number of "hot spots."

The paper independently substantiates much of the WGA/WSWC report, "Water Needs and Strategies for a Sustainable Future," though the authors had not seen it until their paper was essentially complete. The paper identifies five major trends: (1) population growth is related to geographic and economic redistribution; (2) increasing water demands for ecological services; (3) global warming and climate change; (4) water for energy production; and (5) aging water supply infrastructure. The paper suggests climate change and ecological water demands may have the most significant impacts. The failure to invest in the rehabilitation and enhancement of existing water storage and conveyance infrastructure is also likely to lead to some decline in the availability and reliability of future water services. But population and economic growth nationwide, and shifts in energy production, are not expected to greatly change the balance in water supply and demand.

There may be local, state and perhaps regional exceptions, but overall municipal, industrial and agricultural water uses are expected to grow at a significantly slower pace than the U.S. population. Unexpected demands for irrigation and more energy production are possible, but the

availability of water and land for biofuels (for example) already appear to present limits on production. The continuing use of fossil fuels is not likely to have a large effect on future withdrawals, assuming closed-loop cooling technologies will likely be required. The greatest threat from climate change will most likely come from climatic extremes, especially severe sustained drought.

The paper recognizes that there are uncertainties with the potential for affecting future water demands and specifically lists: (1) technological advances and break-throughs; (2) unquantified Indian water rights claims; (3) development of new water supply and transmission infrastructure; and (4) international trade or demands for "virtual water," i.e., imports and exports of commodities such as corn, wheat and other crops (that require water). U.S. exports of agricultural products represent the export of "virtual water," and vice versa.

The paper also notes that there are a number of ongoing developments that are already changing the nature of our water supply and demand balance, including new options such as: (1) desalination capacity, especially of interior brackish ground waters; (2) ground water recharge and aquifer storage and recovery; (3) the reclamation of wastewater and water reuse; (4) shifts towards nonstructural, as opposed to structural solutions to water problems; (5) greater water conservation and use efficiency; (6) evolving western water markets and water banks; and (7) new emerging water governance approaches such as integrated water resources management and water resources planning driven by bottom-up initiatives with full stakeholder participation in decisionmaking.

The meeting included some 44 participants – federal officials from the Corps, Department of Agriculture, and Environmental Protection Agency, environmental groups, academics and others. Following Dr. Dziegielewski's presentation, WSWC Deputy Director Tony Willardson and Len Shabman, with Resources for the Future, provided their perspectives on some of the issues and observations in the paper. Copies of the paper will be available from the Council office. It was not publicly released before the meeting, but will be sent to participants. For copies of the paper (and to comment) contact: norman.h.starler@usace.army.mil.

**Endangered Species Act**

*Reform Act of 2007*

On February 16, Idaho Senator Larry Craig (R) and Wyoming Senator Craig Thomas (R) introduced the Endangered Species Reform Act of 2007, a comprehensive bill. Craig underscored the need for the bill saying, "The ESA is plagued with problems ranging from the listing process to the recovery process to the delisting process. It has evolved to have more control over natural resource policy and management than was originally intended... We need comprehensive reform to the ESA – it will be better for our environment, our resources, and the people who enjoy them."

The bill would improve the listing process by requiring adequate science that is field-tested and peer-reviewed, require the Secretary to verify that sufficient biological data exists to support recovery planning, and set minimum requirements for a listing petitions. Further, it would improve states' involvement in the listing and recovery process, require that a recovery plan be published at the time a species is listed, and mandate that a species be delisted when recovery criteria are met. Original cosponsors are Senators Chuck Hagel (R-NE), Mike Enzi (R-WY) and Wayne Allard (R-CO).

*Columbia River Steelhead and Salmon*

On April 9, the Ninth Circuit Court of Appeals issued a decision on a number of consolidated cases, which Judge Sidney Thomas said, "...bring us once more to the Pacific Northwest, for another round in the complex and long-running battle over salmon and steelhead listed under the Endangered Species Act (ESA)." The National Wildlife Federation (NWF) challenged the November 2004 Biological Opinion (BiOp) addressing the effects of proposed operations of the Federal Columbia River Power System (FCRPS) dams and related facilities on the lower Columbia and Snake Rivers. The 2004 BiOp found FCRPS operations would not jeopardize thirteen listed species, nor adversely modify their critical habitat. U.S. District Court Judge James A. Redden, Oregon, determined that the 2004 BiOp was structurally flawed, and the State of Idaho and National Marine Fisheries Service (NMFS) appealed, also challenging certain portions of the district court's remedy. The Ninth Circuit stated, "In short, after a careful review of the record, we affirm...."[14]

Referring to the downstream migration of salmon and steelhead, the court observed, "These fish must pass a number of dams on their journey to the sea and suffer a very high mortality rate in doing so.... A number of federal, state, and tribal entities are involved in the operation of the Columbia River System.... State regulation impacts the system through governance of water diversions from the river and state conservation programs.... The issue before us is application of the ESA on the management of the Columbia River System." The court referred to "reasonable and prudent alternatives," which NMFS explored, including off-site mitigation activities, such as hatchery and habitat initiatives, that it believed would avoid jeopardizing species. Judge Redden found a 2000 BiOp "arbitrary and capricious," in part because it relied on non-federal mitigation actions that were not shown to be "reasonably certain to occur." Judge Redden returned it to NMFS.

On remand, NMFS found that "certain aspects of FCRPS operations were nondiscretionary, given the dams' existence, and...that obligations under statutes besides the ESA – for such things as irrigation, flood control, and power generation – were as immutable as the existence of the dams." NMFS also segregated its analysis, first evaluating whether the proposed agency action – consisting of only the proposed discretionary operation of the FCRPS – would have an appreciable net effect on a species.... By using this so-called comparative approach rather than a more holistic, aggregate approach, NMFS concluded that the proposed action would not jeopardize the continued existence of the listed fishes." Judge Thomas observed the 2004 BiOp did not point to any improvement in the fishes' status, and "omitted any clear consideration of the impact...on listed species' chances of recovery, which had been a prominent feature of earlier analyses."

Judge Redden had invalidated the 2004 BiOp on several grounds, including "NMFS's obligation to make its jeopardy determination based on the full natural and human context of the proposed action...[and] complete omission of recovery needs.... Finally, the court concluded that the 2004 BiOp did not adequately consider the recovery implications of the proposed operation's effects on designated critical habitat...." He then granted a preliminary injunction requiring NMFS to increase flow and spill at certain dams on June 10, 2005 that the Ninth Circuit affirmed. NMFS is revising the 2004 BiOp, on remand, with directions to collaborate with interested states and tribes and to provide a "failure report" if the process appeared unlikely to produce a no-jeopardy finding within the court's timeframe. NMFS appealed.

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[14]No. 06-35011.

The Ninth Circuit's *de novo* review stated NMFS may not use a hypothetical "reference operation" exception to exclude from the proposed action's impact the effects of related operations NMFS deems "nondiscretionary." The court also noted that NMFS and other federal agencies have not previously taken "such a cramped view of § 402.03's reference to "discretionary" federal action, citing *Defenders of Wildlife v. EPA* regarding the transfer of water quality permitting authority to Arizona as triggering Section 7 requirements, even though the transfer satisfied all Clean Water Act requirements. The court stated "...*any* action actually taken by the agency is discretionary..., the only actions not subject to ESA requirements are those the agency does *not* authorize, fund, or carry out." The court adds, "ESA compliance is not optional.... [A]ll FCRPS operations are intertwined and subject to discretionary control.... The continued operation of FCRPS dams constitutes an 'existing human activity' that endangers the fishes' survival and recovery." The court found, "At its core, the 2004 BiOp amounted to little more than an analytical slight of hand, manipulating the variables to achieve a 'no jeopardy' finding." It also found the district court had not overstepped its bounds or authority to exercise oversight and require a NMFS "failure report," should federal agency actions at anytime fall short and advise the court of "additional measures, including the breaching of dams, that may be necessary...."

On June 13, Judge John Coughenour, U.S. District Court for Western Washington, in Seattle, set aside the National Marine Fisheries Service's (NMFS) decision to downlist steelhead populations in the Upper Columbia River from "endangered" to "threatened." The Endangered Species Act allows protection for a evolutionary significant unit (ESU) within a species, and the issue in this case was how to treat hatchery-raised fish in the ESU analysis. In downlisting the steelhead from endangered to threatened, NMFS incorporated hatchery-raised fish into the same ESU population segment as wild fish, and determined the ESU was not in danger of immediate extinction, and was therefore merely "threatened."

Plaintiffs, Trout Unlimited (TU), et. al., argued that the NMFS's decision violated the ESA, as its central purpose is to protect self-sustaining populations in their natural habitat. Judge Coughenour agreed. He was "unpersuaded" by NMFS's decision not to list hatchery fish and naturally-spawning fish separately finding it was "arbitrary and capricious." TU also claimed including hatchery fish in the ESU analysis masked the true abundance, productivity, genetic diversity, and spatial distribution of the naturally occurring, non-supplemented population. Furthermore, TU argued that NMFS failed to rely on the "best scientific and commercial data available," as the ESA requires, when assessing the risk of extinction.

The Building Industry Association of Washington, together with the Coalition for Idaho Water, Idaho Water Users Association and Washington State Farm Bureau, as interveners, argued that the NMFS Hatchery Listing Policy (HLP) allows the agency to distinguish between hatchery fish and wild fish, which is "impermissible under the ESA." They sought to prevent needless listings that impede their members' ability to pursue their livelihoods, and protect their land use, water use and property rights. The NMFS argued that its HLP complies with ESA including hatchery fish "so long as they are no more genetically divergent than the natural population," but applies the HLP "in support of the conservation of naturally-spawning salmon and the ecosystems upon which they depend.... Hatchery fish will be included in assessing an ESU's status in the context of their contributions to conserving natural self-sustaining populations."

Citing extensive legislative history, the court agreed with Trout Unlimited in concluding that "...the central purpose of the [ESA], and the organizing principle upon which ESA listing

determinations must be made, is the protection and promotion of endangered and threatened species to the point of being naturally self-sustaining." Hatchery-raised fish may adversely affect naturally occurring populations and do not directly promote and conserve naturally self-sustaining populations. Further, "...the risks of artificial propagation would not necessarily be revealed in data concerning population abundance for the population as a whole." The court set aside the HLP and ordered that until NMFS promulgates another policy the Interim Hatchery Policy will be in effect.

The court also held that the best scientific data did not suggest that supplementing a population with hatchery-raised fish is an appropriate way of helping the natural population become self-sustaining. "[T]he best available scientific evidence indicates that long-term reliance on hatcheries is at best an unproven strategy for the long-term conservation of species...and may make its prospects for becoming self-sustaining more difficult with the passage of time." Therefore, "...status determinations must be made with the health and viability of natural populations as the benchmark."[15]

Judge John Coughenour acknowledged that his opinion might conflict with *Alsae Valley Alliance v. Evans*.[16] In the *Alsae* case, the district court held that the ESA prevented distinctions below the subspecies or ESU level, which on remand, guided the NMFS's determination that hatchery fish and natural fish cannot be separated within an ESU for listing purposes. NMFS chose not to appeal that decision, and when fishery and conservation organizations intervened in order to appeal, the Ninth Circuit held it was without jurisdiction, concluding that the remand order was not final. Judge Coughenour invited the Ninth Circuit Court of Appeals to resolve any inconsistencies. "To the extent that this Court's order can be read to conflict with *Alsae*, perhaps this will have the happy result of instigating needed appellate review."

*Multi-Species Conservation Program*

On July 24, the Water and Power Subcommittee, House Natural Resources Committee, chaired by Rep. Grace Napolitano (D-CA) held a hearing on a bill to authorize appropriations for the Secretary of Interior to manage and implement the Lower Colorado River Multi-Species Conservation Program (LCR MSCP), a joint effort of the U.S. Bureau of Reclamation and the States of Arizona, California and Nevada. The Senate Energy and Natural Resources Committee held a hearing on companion legislation, S. 300, on July 26.

H.R. 2515, introduced in May by Rep. Dean Heller (R-NV), would provide "such sums as may be necessary to meet the obligations of the Secretary under the Program Documents," which are defined to include the "Habitat Conservation Plan, Biological Assessment, and Biological and Conference Opinion, Environmental Impact Statement/Environmental Impact Report, Funding and Management Agreement, Implementing Agreement, and Section 10(a)(1)(B) [Takings] Permit...." Moreover, it directs the Secretary to enter into "...an agreement with the States for water from the Lower Colorado River for habitat creation and maintenance in accordance with the Program Documents." Unobligated appropriations are to "remain available until expended," and may be invested in U.S. interest bearing obligations, together with any non-Federal contributions. The bill makes all appropriations "non-reimbursable and non-returnable."

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[15]2007 U.S. Dist. LEXIS 42855 (W.D. Wash. 2007).

[16]161 F. Supp.2d 1154 (D. Or. 2001).

H.R. 2515 specifically states: "Nothing in this Act shall impair any right to the delivery or beneficial consumptive use of Colorado River water under any compact, treaty, law, decree, or contract in effect on the date of enactment...." Further, no future ESA amendments "shall have the effect of modifying the Program Documents unless expressly made applicable to the LCR MSCP." However, nothing in the bill would affect the "enforceability" of existing law (as of April 2, 2005) related to the Program Documents. The bill specifically "waives the sovereign immunity of the United States" for purposes of enforcing the Program Documents, but not for claims for monetary damages.

In her introductory remarks, Rep. Napolitano said, "We will hear testimony on H.R. 2515, a bill that will put in place a proactive approach to the preservation of habitat while ensuring continued water deliveries in the Lower Colorado River Basin.... I am concerned that the 50-year term of the MSCP agreement proposed....may be too long. Nobody can predict what the Lower Colorado River might look like fifty years from now. I am also concerned that some of the limitations in the bill effectively immunize water users from future changes to the Endangered Species Act."

Bureau of Reclamation Commissioner Robert Johnson testified that the LCR MSCP is an innovative program developed through a collaborative partnership to address the "needs of threatened and endangered fish and wildlife on the Lower Colorado River while assuring greater reliability of water deliveries and hydropower production...and is designed to allow future water transfers within or among water users for a 50-year period." He said, "The Department supports the LCR MSCP as well as the intent of H.R. 2515.... However, the Department remains concerned about language..." allowing the Secretary to "invest appropriated moneys that are not required to meet current program expenditures...to finance a governmental purpose outside of the normal appropriations process. We are also concerned about...judicial review of program documents. We note that this provision has been modified...clarifying that the United States would not be liable for claims for money damages. Nevertheless, we have been advised by the Department of Justice...that this provision could expand Federal litigation exposure in significant respects and open the door for judicial intrusion into administrative decision making."

Testifying in strong support of H.R. 2515 were: Susan Bitter-Smith, President of the Board of Directors of the Central Arizona Water Conservation District; George Caan, Executive Director of the Colorado River Commission of Nevada; and Gerry Zimmerman, Executive Director of the Colorado River Board of California. Kara Gillon, Defenders of Wildlife, suggested H.R. 2515 goes "beyond what it needed to authorize the MSCP and may limit our options to address future challenges." See http://resourcescommittee.house.gov.

*Platte River Recovery Program*

On October 10, the House Natural Resources Committee ordered reported H.R. 1462, authorizing the Secretary of Interior to participate in the Platte River Recovery Implementation Program and to modify Pathfinder Dam and Reservoir. Sponsored by Rep. Mark Udall (D-CO), it would allow water use and development along the Platte River to continue in compliance with the Endangered Species Act. It authorizes funding for the Interior Department to carry out its responsibilities under an agreement with Colorado, Wyoming, and Nebraska. The agreement's purpose is to assist in the conservation and recovery of several endangered or threatened species, including the whooping crane and the pallid sturgeon, in such a way that will allow existing water-

related activities to continue and some additional water depletions to occur. "This agreement would not involve the creation of Federal water rights or require the grant of water rights to Federal entities," according to Udall.

"This bill protects endangered species without unnecessarily inhibiting the use of the basin of the Platte River for water-related activities," said Udall. "This common sense measure avoids unnecessary bureaucracy that could potentially tie up our ability to utilize a precious water source in Colorado."

The agreement is the result of fourteen years of negotiations, which last year culminated in the signing of an agreement by the governors of Colorado, Wyoming and Nebraska, joined by Secretary of the Interior Dirk Kempthorne. The program is modeled after a somewhat similar program for the recovery of several endangered species of fish in the Upper Colorado River Basin. Udall strongly supports that program because it enables Colorado and other participating states to meet the requirements of the Endangered Species Act while allowing continued development and use of water for other purposes.

The bill authorizes the Secretary of the Interior, through the Bureau of Reclamation and in cooperation with a Governance Committee under the Platte River Recovery Implementation Program Cooperative Agreement, to: (1) participate in the program; (2) carry out any projects or activities that are designated for implementation during the program's 13-year First Increment; (3) acquire interests in land, water and facilities from willing sellers; (4) transfer any acquired interests; and (5) accept or provide grants. It allows the program to be modified before the completion of the First Increment if the Secretary and the States of Nebraska, Wyoming, and Colorado determine that the modifications are consistent with program purposes. The Secretary's authority to implement the First Increment sunsets on September 30, 2020.

The bill also authorizes the Secretary, acting through the Commissioner of Reclamation, to: (1) modify Pathfinder Dam and Reservoir; and (2) enter into one or more agreements with the State of Wyoming to implement the Pathfinder Modification Project. Further, it authorizes the use of Pathfinder Reservoir storage for municipal, environmental, and other purposes, as described in Appendix F to the final settlement stipulation in *Nebraska v. Wyoming*.

A hearing on a companion bill, S. 752, was held on April 25, by the Senate Energy Committee's Water and Power Subcommittee.[17]

## Farm Bill

### *2007 Farm Bill/Regional Water Enhancement Program*

On January 31, U.S. Department of Agriculture Secretary Mike Johanns announced the Administration's 2007 Farm Bill proposal. He said, "We started with the 2002 Farm Bill and propose to improve it by bolstering support for emerging priorities and focusing on a market-oriented approach." He referred to the 52 forum meetings held since 2005, saying, "We listened closely to producers and stakeholders all across the country and took a reform-minded and fiscally responsible

[17]S. Hrg. 110-86.

approach to making farm policy more equitable, predictable and protected from challenge [under international trade agreements]." USDA estimates their proposals will save about $10 billion over the cost of the 2002 Farm Bill, excluding disaster aid, while providing $5 billion more than if the 2002 bill was simply extended.

Conservation funding would increase by $7.8 billion over ten years, with full funding ($4.25 billion, a 30% increase in mandatory spending) on a new Environmental Quality Incentives Program (EQIP) that consolidates existing cost sharing programs to "strengthen, streamline, and improve current assistance while increasing the simplicity, accessibility, and understandability of these services. One program will greatly simplify the application process for landowners, which can be especially burdensome for those with multiple land uses on their farms or ranches." As an example, the Wildlife Habitat Incentives Program (WHIP) focuses on one use. The Ground Water and Surface Water Conservation Program (GSWC) focuses only on water quantity, "...instead of focusing on what is the best for the ecosystem as a whole.... A more comprehensive program would allow [USDA] to work with a landowner to address all the resource concerns identified on America's working lands instead of issuing one contract for one environmental solution and a second contract for another environmental fix."

According to supporting documents, this "new approach would...optimize technical assistance funding...[and] allow for a combination of treatments that effectively target complex agricultural landscape concerns, such as air quality in the San Joaquin Valley, nutrient loading in the Chesapeake Bay, hypoxia in the Gulf of Mexico, or water needs in the Klamath Basin. The program could be utilized to address major resource concerns such as air quality, water quality and quantity, soil erosion, and wildlife yet still effectively target specific concerns such as controlling invasive species, re-establishing native vegetation, managing non-industrial forest land, stabilizing streambanks, protecting, restoring, developing or enhancing unique habitats...and addressing the needs of threatened and endangered species across ecosystems."

Of particular interest, in addition to EQIP, a new Regional Water Enhancement Program (RWEP) would invest $1.75 billion ($175 million in mandatory spending each year) for cooperative approaches to "...address an important missing component in the federal government's conservation delivery system – large-scale [watershed or irrigation district level], coordinated water conservation projects." The program will target working crop, orchard, pasture and grazing lands and focus on one or two key water quantity/quality objectives. A high percentage of producers would be encouraged to participate through incentives, with interim performance targets that must be achieved in order to renew project funding. Using multiple tools, including improved land management practices, easement purchases and assistance for ecosystem restoration, the program would provide "cooperative conservation" partners the flexibility to achieve improved water quantity and quality goals.

In response to a request for Farm Bill language, Secretary Mike Johanns wrote Senator Tom Harkin (D-IA), Chairman of the Agriculture Committee, two separate letters on April 25, outlining the Administration's credit and conservation proposals and attaching specific legislative language. With respect to conservation provisions, Johanns said, "I believe that our comprehensive proposals can be the building blocks for a farm bill that is more equitable, predictable, and better able to withstand challenge. More specifically, the conservation proposals...are reform oriented and would invest heavily in the future...by authorizing an additional $7.825 billion over 10 years above the current conservation baseline. It is intended to serve as a replacement and update of title II of the most recent [2002] Farm Bill...."

He continued, "The Environmental Quality Incentives Program (EQIP) would be adapted to encompass wildlife habitat functions on agricultural working lands and other private lands. This would allow...landowners who have endangered species, or any wildlife, to benefit from the expert knowledge of conservationists about wildlife habitat issues and to receive assistance.... The EQIP proposal also includes a new...Regional Water Enhancement Program, that would fund cooperative projects addressing water quality and water conservation issues.... An additional $4.25 billion above the current conservation baseline would be authorized for this expanded EQIP."

Secretary Johanns concluded, "I believe the Administration's farm bill proposals set the right course for American agriculture and I look forward to continuing to work with Congress as the 2007 farm bill takes shape."

Senator Ron Wyden (D-OR) circulated a letter among his colleagues in support of the Rural Water Enhancement Program (RWEP). Addressed to Senator Tom Harkin (D-IA), Chairman of the Agriculture Committee, it says, "We believe this proposal was conceived to have a significant, positive effect on efforts being made in each of our states to improve river conditions through collaborative, regional efforts. The intent...is to build local partnerships that can improve water quality and quantity in a manner that produces benefits for agricultural producers as well." The letter suggests RWEP should adhere to four fundamental principles.

First, all grant recipients should be accountable to produce measurable outcomes – improvements to water quality and watershed conditions according to scientifically-based restoration priorities. Second, the broadest array of tools, methods, approaches should be allowable – including but not limited to land fallowing, irrigation efficiency, water leasing and transfers, reservoir operation and other methods to increase surface water and ground water supplies and improve water quality. Third, it should allow for the broadest range of partner organizations to include but not be limited to States, counties, municipalities, tribes, special districts (irrigation, conservation), non-governmental organizations, and producer groups. Fourth, tangible benefits should be produced for the agricultural sector, not limited to landowners, but also including the infrastructure that supports them. "For example, piping canals in irrigation districts can improve the reliability of water deliveries to irrigators, reduce energy costs on farms, reduce operations and maintenance costs of districts, generate hydro power and enhance stream-flows."

The Family Farm Alliance and others raised concerns with some of the legislative language in the proposal, specifically the inclusion of "conversion of irrigated lands to less water-intensive agricultural commodities or dry-land farming," as regional water enhancement activities, which also include "improved irrigation systems, water banking and other forms of water transactions, ground-water recharge and other conservation related activities that the Secretary determines will help to achieve the water quality or water quantity benefits on agricultural lands identified in a partnership agreement." The bill also lists "...resource condition assessment and modeling, water quality, water quantity or water conservation plan development, management system and environmental monitoring and evaluation, cost-share of restoration or enhancement projects, incentive payments for land management practices, easement purchases, and conservation contracts with landowners...."

On July 20, the House Agriculture Committee, chaired by Rep. Collin Peterson (D-MN), reported the Farm, Nutrition and Bioenergy Act of 2007 (H.R. 2419). Rep. Peterson declared, "This Farm Bill provides strong programs that will help American agriculture meet the 21st Century needs of the United States and the world with a safe, stable food supply, nutrition assistance, environmental benefits, and renewable energy products. We have incorporated some new ideas and important

reforms..., focusing farm program benefits so they get to real farmers and boosting investment in programs that help those who haven't received benefits...before."

The bill includes significant new investments in popular conservation programs – the Conservation Reserve Program, Wetlands Reserve Program, Environmental Quality Incentive Program (EQIP), and other programs under the Conservation Title. The Committee approved a Regional Water Enhancement Program (RWEP), proposed by the Administration and supported by the Western States Water Council, but stripped from a listing of approved activities language which included, "conversion of irrigated lands to less water-intensive agricultural commodities or dry-land farming." The Family Farm Alliance and a consortium of farming interests opposed such language, which is similar to language in the 2002 Farm Bill authorizing a Ground and Surface Water Conservation Program to carry out eligible activities, including "to convert to – the production of less water-intensive agricultural commodities; or dryland farming" (Title II, Sec. 1240I).

As consideration of the 2007 Farm Bill, H.R. 2419, began on the Senate floor, with regard to the Regional Water Enhancement Program, the current legislative language incorporates provisions for partnership programs in both the existing Ground and Surface Water Conservation Program (Section 2359) under the Environmental Quality Incentives Program (EQIP) and the Comprehensive Conservation Enhancement Program (CCEP). Under the GSWCP, partner is defined to include groups of producers, tribes, or a unit of State or local government, including an irrigation company, water district or canal company. The purposes of the program are to improve irrigation systems, efficiencies, water storage capabilities (water banking and ground water recharge), mitigate drought effects, enhance fish and wildlife habitat, and assist producers in converting to less water-intensive crops or dryland farming, as well as conduct water conservation-related resource assessments and modeling. Under partnership agreements, the Secretary of Agriculture will provide cost-share assistance and incentive payments to producers for water conservation activities, working cooperatively with "partners" on a regional level to "benefit working agricultural land."

Such regional water conservation activities will be selected by a competitive process, with a higher priority given proposals that include a high percentage of producers in the appropriate area; result in high levels of "on-the-ground" water conservation activities; "enhance agricultural activity and related economic development;" allow for monitoring and evaluation, and "assist producers in meeting Federal, State and local regulatory requirements." Regional water conservation activities must be consistent with state law, and may be approved to address water quality issues as well. Of amounts made available, the Secretary is to reserve $2 million for activities in the Eastern Snake Aquifer Region. A total of $60 million from the Commodity Credit Corporation is to be made available annually for FY 2008-FY 2012, in addition to other available funds.

Separately, the Chairman's mark, describes special rules for Regional Water Enhancement Projects, which are "specifically targeted to improve water quality or quantity in an area." Eligible partners include a "water or wastewater agency of a State," and eligible activities are also defined to include development of water quality, water quantity, or water conservation plans, management system and environmental monitoring and evaluation, cost-sharing restoration or enhancement, incentive payments for land management practices, easement purchases, conservation contracts with land-owners, improved irrigation systems, water banking and other forms of water transactions, ground water recharge, stormwater capture, and other water-related activities approved by the Secretary. The Secretary is directed to establish procedures to enter into multi-year agreements, including identifying issues, a baseline assessment, and description of performance measures to gauge the effectiveness of activities.

The Secretary is to coordinate activities with other federal and state agency activities to avoid duplication and evaluate the overall improvements to water quality and quantity. Again, activities must be consistent with state water laws. RWEPs are to be financed by up to 5% of funds made available under the Title II, Subtitle D – Agricultural Resources Conservation Program.

On November 16, Senate Majority Leader Harry Reid (D-NV) pulled H.R. 2419 from the floor following a failed 55-42 vote, to close debate. Sixty votes are needed. Only four Republicans joined the Democrats. Anticipated amendments include efforts to lower the cap on farm payments, cut farm subsidies in favor of a broader crop insurance program, and move food inspection responsibilities back to the Department of Agriculture from the Department of Homeland Security. The House passed its version on July 27 by a 231-191 vote. Both bills include some form of the proposed Regional Water Enhancement Program (RWEP), which the Administration requested and the Council supports.

On the Senate side, Senator Jeff Bingaman (D-NM), joined by Senators Wayne Allard (R-CO), Sam Brownback (R-KS), Pete Domenici (R-NM), Tim Johnson (D-SD) and Ken Salazar (D-CO), have offered an amendment that would strike Section 2359, leaving the GSWCP as it is, with the exception of a provision reserving "to each State the boundaries of which encompass a multi - state aquifer from which documented groundwater withdrawals exceed 16 billion gallons per day [the Ogallala], for conservation or irrigation practices, an amount equal to not less than the greater of – (A) $3 million; or (B) the simple average of amounts allocated to producers in the State under this section..." for FY 2002-FY 2007. The Regional Water Enhancement Program would be separately provided for elsewhere. A coalition of farm and water interests, and most of the Ogallala Plains States, have endorsed the amendment.

On December 6, the Senate leadership reached a unanimous consent agreement clearing the way for consideration of H.R. 2419, to extend federal farm programs through 2012. As written, the Senate version of the bill, under Title II – Conservation, Section 2106, created a Regional Water Enhancement Program (RWEP) within the Environmental Quality Incentives Program (EQIP) that is designed to "enhance performance-based, cost-effective conservation carried out through cooperative agreements entered into by the Secretary of Agriculture with producers, governmental entities, and Indian tribes. The goal of the program is to improve water quality or ground and surface water quantity through coordinated program activities on agricultural lands." The Secretary will develop goals and provide coordinated program assistance "to improve water quality or water quantity on a regional scale to benefit working agricultural land...." The Secretary is to identify priority areas, which shall include Chesapeake Bay, the Upper Mississippi River basin, the Everglades, the Sacramento River watershed, and the Klamath River basin. Up to 50% of available funds are to be reserved for priority areas.

Within 90 days of enactment, the Secretary is to invite prospective partners to submit competitive RWEP grant proposals for activities presently defined to include "...resource condition assessment and modeling, water quality, water quantity or water conservation plan development, management system and environmental monitoring and evaluation, cost-share of restoration or enhancement projects, incentive payments for land management practices, easement purchases, conservation contracts with landowners, improved irrigation systems, water banking and other forms of water transactions, groundwater recharge and other conservation related activities that the Secretary determines will help to achieve the water quality or water quantity benefits on agricultural lands identified in a partnership agreement."

On December 14, the Senate passed its version of the $286B Farm Bill (H.R. 2419), by a 79-14 vote, without making many changes to the Agriculture Committee's funding allocations and crop subsidies, but after adding Senator Tom Harkin's (D-IA) "manager's amendment package" with some 150 different amendments. Harkin declared, "This is a strong, bipartisan bill.... After months of negotiations, we were able to work within a very strict budget allocation to complete our work and pass a farm bill that is good for agriculture, good for rural areas and good for the health of Americans. This is a forward-looking farm bill with greatly strengthened initiatives to support renewable energy, conservation, nutrition, rural development and to promote better diets and health for all Americans. It maintains a strong safety net for farm producers, and strengthens programs that will help agricultural producers of all kinds across our nation."

Senator Saxby Chambliss (R-GA), the Agriculture Committee's Ranking Minority Member, said, "Passage of the farm bill is a real victory for American agriculture. The legislation will strengthen the nation's food security, protect the livelihood of our farmers and ranchers, preserve our efforts to remain good stewards of the environment, and enhance our nation's energy security efforts. I consider a safe, affordable and abundant food supply a critical national security interest and this bill takes us in the right direction...."

## Indian Water Rights

### *Arizona Water Settlement Act*

Tohono O'odham Tribal Chairman Ned Norris, Jr. testified in support of a needed technical amendment to the Arizona Water Settlement Act (AWSA) to delete just ten words that threaten to derail the settlement, which by its own terms takes effect on the "enforceability date," which is the date the Secretary of Interior publishes in the *Federal Register* a statement of findings that certain conditions have been met. There are three interrelated Titles in the Act (P.L. 108-451). Title I relates to the Central Arizona Project, Title II involves the Gila River Indian community, and Title III relates to the Tohono O'odham Indian Nation. All three titles were largely negotiated and drafted separately, and the wording of certain enforceability requirements differ from title to title. Titles II and III require respectively that the Secretary publish a statement of findings that the judgements and decrees attached to the Gila River agreement "have been approved by the respective courts," and the Tohono O'odham settlement "has been approved by the State court having jurisdiction over the Gila River adjudication proceedings, and that judgement and decree have become final and nonappealable."

Chairman Norris testified, "Given the drawn-out nature of water rights litigation, the additional ten words in Title III that require a 'final and nonappealable' judgement make it unlikely that Title III's enforceability requirements can be fully met in time for the Secretary to publish the required findings...before December 31, 2007. If this in fact occurs, Title III would fail and the 1982 Southern Arizona Water Rights Settlement Act would remain in place. Because all three titles...are linked, should Title III be allowed to fail, the entire Arizona Water Settlements Act could fail as well.... H.R. 3739 would remedy the defect in Title III [remove the problematic language] and help to preserve the integrity of the AWSA." Litigation is pending in the Arizona Supreme Court, which has accepted an interlocutory appeal of a Superior Court's approval of the Tohono O'odham settlement. Chairman Norris thanked Rep. Napolitano for the hearing, and added that the bill also has the support of the Arizona Department of Water Resources, Gila River Indian Community, Central Arizona Project, Salt River Project, and City of Tucson.

*New Mexico Settlements - Aamodt, Abeyta and Navajo*

U.S. Senator Pete Domenici in a hearing before the Senate Appropriations Committee on March 20, said that "the administration must end its reluctance to work with Congress to find the money needed to meet federal responsibilities to three Indian water rights settlements in New Mexico." The Senator again questioned Interior Secretary Dirk Kempthorne on three pending Indian water settlements in New Mexico – the Aamodt, Abeyta and Navajo settlements. These settlements, reached after years of negotiations, will require an estimated federal contribution of about $1.1 billion. The Administration's FY2008 budget request for the Interior Department contains just $34 million for the Indian Land and Water Claims Settlement Fund, which funds in part Indian water rights settlements. "We are past the point of merely waiting for the Administration to help identify how to pay for these Indian water settlements in New Mexico. We're working to get Congress to address this, and it would be better for the Administration to be a willing and proactive participant in this process. It should not be left in the lap of the Congress. The Interior Department and Office of Managment and Budget (OMB) must help find the money, too," Domenici said.

Noting that Interior Department staff had recently visited New Mexico on the settlements, Kempthorne pledged to have his staff meet with Domenici and Senator Jeff Bingaman soon. The two New Mexico senators have committed to working jointly on legislation to authorize the settlements, which will include a funding plan. Domenici also submitted questions asking Kempthorne to explain why the Administration seems reluctant to seriously address the New Mexico settlements. Domenici noted that OMB recently gave its approval to the proposed San Joaquin Settlement, which is estimated to cost roughly $650 million. In addition, the Administration did not oppose the Arizona Water Rights Settlement Act which cost roughly $2.4 billion. "Given the importance of our three settlements to our future, New Mexicans would be eager to hear an explanation as to why these Arizona settlements received favorable treatment from OMB while the New Mexico Indian water rights settlements have not," he stated.

*Northwest New Mexico Rural Water Projects Act/Reclamation Water Settlements Fund*

On April 19, New Mexico Senator Jeff Bingaman (D), Chair of the Senate Energy and Natural Resources Committee, introduced the Northwestern New Mexico Rural Water Projects Act, along with Senator and Pete Domenici (R-NM). Title I amends the Colorado River Storage Project Act (CRSP). A Reclamation Water Settlements Fund is created in Title II. Title III authorizes constructions and rehabilitation of water-related infrastructure in northwestern New Mexico. Title IV ratifies the Navajo Nation Water Rights Settlement.

Senator Bingaman declared, "I am pleased today to introduce a bill which attempts to promote good stewardship of our limited water supplies in the San Juan River basin in New Mexico.... Within its scope are a number of provisions relating to and amending Federal statutes that relate to the Bureau of Reclamation and the use of water in the Colorado River basin. There are also new authorizations for the Bureau of Reclamation. Finally, there are provisions that will resolve the Navajo Nation's water rights claims in the San Juan River in New Mexico. This bill is critical for New Mexico's future."

On the same day, Rep. Tom Udall (D-NM) introduced identical legislation, H.R. 1970. Udall said, "This legislation...will ratify the historic San Juan River Settlement Agreement. This agreement, signed by the Navajo Nation and the State of New Mexico, will provide for the development of a rural water system to address the water needs of numerous New Mexicans, many of them members of the Navajo Nation .... [It] will resolve the Navajo Nation's water rights. It will provide a water supply for Gallup, and recognize authorized and existing uses of San Juan River

basin water. In exchange for relinquishing some of their claims to water..., the Navajo Nation will benefit from water development projects which include the Navajo-Gallup project and the Navajo Nation Municipal pipeline. Incredibly, even now in 21st century America, more than 70,000 Navajos must still haul water daily for residential use."

The CRSP amendments, under Title I, allow the Secretary of Interior to create and operate within available storage at Navajo Reservoir a "top water bank," to be administered under terms and procedures for the storage, accounting and release of water in cooperation with the State of New Mexico. The New Mexico State Engineer must approve the storage of banked water, and is to ensure that "impairment of any existing water rights does not occur...." The bill states that "...water in the top water bank be the first water spilled or released for flood control purposes..., on the condition that top water bank water shall not be released or included for purposes of calculating whether a release should occur for purposes of satisfying releases required under the San Juan River Recovery Implementation Program" under the Endangered Species Act. Other changes relate to the Navajo Indian Irrigation Project.

Title II establishes the Reclamation Water Settlements Fund and directs the Secretary of the Treasury to deposit $100M annually, if available, from revenues that would otherwise be deposited in the Reclamation Fund (created in 1902). This money would be available "without further appropriation...." The Secretary of the Interior may request a transfer from the new Fund "...to implement a settlement agreement approved by Congress that resolves, in whole or in part, litigation involving the United States or any other agreement approved by Congress that is entered into by the Secretary, if the settlement or other agreement requires the Bureau of Reclamation to plan, design, and construct – (A) water supply infrastructure; or (B) a project – (i) to rehabilitate a water delivery system to conserve water; or (ii) to restore fish and wildlife habitat or otherwise improve environmental conditions associated with or affected by a reclamation project that is in existence on the date of enactment of this Act."

Under Title III, up to 37,760 acre-feet (af) of water may be diverted from the San Juan River, with up to 7,500 af delivered to the City of Gallup. Navajo Nation water may be used on Navajo Nation lands held in fee or in trust by the United States, and may be used in Arizona. The Nation may not market, lease or transfer contracted water to non-Navajo water users outside New Mexico. The Navajo Nation may use the proposed pipeline to convey their Animas-La Plata Project water as well. The Project also calls for the Secretary to construct or rehabilitate water wells and related pipeline facilities for the diversion and distribution of up to 1,670 af of ground water in the San Juan River Basin, 680 af in the Little Colorado, another 770 af in the Little Colorado in Arizona, and 80 af in the Rio Grande Basin for municipal and domestic uses, in accordance with a conjunctive ground water development plan to be developed with the Navajo Nation. Water from the San Juan shall be part of New Mexico's consumptive use apportionment under the Upper Colorado River Basin Compact. Of note, project water would also supply the Jicarilla Apaches.

Title IV approves, ratifies and incorporates by reference the Navajo Nation Water Rights agreement, consistent with the provisions of the Act. The Nation's total allowable depletions are 293,120 af and may include the reuse of related tailwater, wastewater and return flows. Certain changes in the point of diversion, and purpose of place of use are also allowed. The Nation's water may be contracted out, but not alienated. A Navajo Nation Water Resources Development Trust Fund for the investigation, construction, operation, maintenance, or replacement of water projects and for water conservation measures, including metering and monitoring, would be authorized at $4-$6 million/year for FY 2008-2017.

On June 27, the Senate Energy and Natural Resources Committee, chaired by Senator Jeff Bingaman (D-NM), held a hearing on S. 1171. (For a report on the hearing see page... under Bureau of Reclamation).

On June 18, Senator Pete Domenici (R-NM) introduced S. 1643, the Reclamation Water Settlements Fund Act of 2007. His introductory remarks read: "Mr. President, one unresolved issue that is of grave concern to many in the West is unresolved Indian water rights claims. Over the past century, many parties have sought to determine the extent of Indian water rights in the courts. However, litigation to determine Indian water rights has failed in many respects for both Indians and non-Indians. Unresolved Indian water rights claims are of particular concern in New Mexico which has 23 Indian tribes. As with all litigation, the outcome is uncertain and one party generally loses."

"If the Indian nations were to receive a large award by the courts and those water rights were exercised, the senior priority date of many Indian water rights claims have the potential to displace existing users.... However, in many instances, even if an Indian nation were to receive a water windfall from the courts, many of the Indian nations lack the water infrastructure to make use of the water awarded by the courts. Additionally, Indian water rights litigation often takes decades. For example, the Aamodt litigation in New Mexico was filed in 1966 and is the longest standing litigation in the federal judiciary. Finally, the numerous unresolved Indian water rights claims in many western states such as New Mexico impair our ability to effectively undertake water rights planning as we are unsure of the award that the Indian nations will receive."

"Over the past two decades, many parties have pursued negotiated settlements in lieu of litigation, an approach beneficial to all parties involved.... Many of the settlements...contain authorization for the Federal Government to provide funding to the Indian nations so that the Indian nations involved can make use of the water they are awarded under the terms of the settlement, resulting in economic development and health benefits for the Indian nation. Secretary of the Interior Dirk Kempthorne and his staff deserve a great deal of credit for trying to advance the New Mexico Indian water rights settlements. However, current Federal budgets cannot accommodate the upcoming New Mexico settlements. This is troublesome for several reasons. First, it impairs Congress's ability to resolve Indian water rights claims in a way that keeps all water users whole. Additionally, many of the settlements require the construction of water infrastructure benefitting an Indian nation. Lack of a steady stream of Federal money results in water projects that take far longer to construct, costing taxpayers significantly more money in the long run."

"This bill would establish a reliable source of Federal funding to resolve Indian water rights claims in New Mexico. The bill provides that, over the next 10 years, 30 percent of the revenues generated in New Mexico that would otherwise be deposited in the Reclamation Fund would instead be used to fund Indian water rights settlements. The amounts deposited in this fund could be used to pay for the Aamodt, Abeyta, and Navajo Indian water rights settlements after the parties resolve outstanding issues and the settlements are signed into law. It is important to note that the fund created by this legislation would allow us to fund New Mexico Indian water rights settlements without compromising the sustainability of the reclamation fund."

### *Lummi Nation*

In Seattle, on November 21, U.S. District Court Judge Thomas Zilly signed a judgment and order approving Washington's first-ever tribal-state-federal water rights settlement negotiated by the Washington State Department of Ecology (Ecology), the Lummi Nation, the U.S. Government, and non-tribal water users (including water associations and Winning Is Necessary) to resolve a long-

standing water conflict on the Lummi Reservation. The dispute centered on how water should be allocated on the Lummi Peninsula portion of the Lummi Reservation, northwest of Bellingham. The peninsula's water supply is a fresh-water aquifer bounded by the Strait of Georgia and Bellingham Bay. Over-pumping of the aquifer poses a risk of saltwater intrusion.[18]

In approving the settlement, the judge wrote, "The Settlement Agreement exhibits a balance rarely seen in litigation concerning a precious and potentially scarce commodity; it preserves the resource rights of the Lummi Nation, while guaranteeing existing users a sufficient amount of water for their needs and making water available for a limited number of future users." The agreement recognizes that approximately 900 acre-feet of water can be used each year without risking saltwater intrusion. The Lummi Nation will allocate and monitor the use of this water by tribal members and by non-members who receive water service from the Lummi Nation. Ecology will administer about 120 acre-feet per year used primarily by non-tribal property owners.

"The Lummi Nation is pleased that we have been able to cooperatively resolve this vital issue for a portion of our Reservation," said Chairwoman Evelyn Jefferson. "We look forward to solving similar issues in the rest of the Reservation and in the Nooksack basin." Ecology Director Jay Manning said, "I thank the Lummi Nation and the local water users for coming together to make this happen. For non-tribal water users, this means an end to the uncertainty that has shadowed the use and enjoyment of their property for many years. For all residents, tribal and non-tribal alike, this agreement guarantees sustainable management practices to protect the resource now and into the future."

Other provisions of the agreement include: (1) a court-appointed watermaster to resolve any water conflicts that may arise in the future; (2) under the Ecology allocation, withdrawal limits will be set based on the amount of water allotted for the state to administer; and (3) standards and limits to protect against saltwater intrusion for wells under the Lummi allocation. In order to monitor both water use and water quality, all residents with a well will be required to meter their wells and provide water quality sampling data. Well drilling will require approval from the Lummi Nation or Ecology, whichever has jurisdiction over the applicant's water-use.

The court's approval puts the settlement agreement into effect immediately and authorizes the tribe and state to begin the coordinated management program. More information on the settlement is online at: http://www.ecy.wa.gov/programs/wr/rights/us_lummi_ecy.html.

**Landsat Data Continuity Mission**

Seven western senators signed a June 8 letter to the Senate Appropriations Committee urgently asking that $35 million be included in FY2008 for NASA's Landsat Data Continuity Mission (LDCM) for the addition of a thermal sensor on Landsat 8. A "Dear Colleague" letter from Senators Ken Salazar (D-CO) and Mike Crapo (R-ID), dated May 23, requesting support for Landsat as a critical tool for water resource managers, was sent to all western Senators. It drew the support of Senators Max Baucus (D-MT), Jeff Bingaman (D-NM), Tim Johnson (D-SD), John Thune (R-SD), and Ron Wyden (D-OR). Many WSWC members were instrumental in endorsing the request, and getting their Governor's office to contact their Senators. Some western Senators,

[18]DOE News Release 11-21

including members of the Appropriations Committee, expressed their support for the request, but did not sign the letter.

The letter reads in part, "Water is a precious and scarce natural resource. The prolonged drought over large portions of the United States, particularly the West, has had a range of adverse effects: record wildfires, crop failure, threats to endangered wildlife and municipal water shortages. Recognizing this, it is increasingly critical that we provide the resources necessary to gather the data required to make sound decisions related to our present and future water use.... One such invaluable data source that federal and state agencies have come to rely on is the Landsat Program, a series of satellite missions jointly managed by NASA and the U.S. Geological Survey.... The thermal infrared (TIR) data provided by Landsat 5 and Landsat 7 is used to calculate evapotranspiration and water use on a field-by-field basis, as well as to monitor related land uses and changes over large areas. However, these satellites are failing, having served well beyond their designed useful life.... NASA is scheduled to deploy Landsat 8, a "free-flyer" spacecraft, in 2011. The President's FY2008 request...does not include funding for a thermal infrared sensor.... We respectfully request that the Appropriations Committee add $35 million...and direct NASA to immediately take the necessary steps to ensure a thermal sensor is included on Landsat 8 to continue providing this vital information for current and future natural resources management."

The letter concludes: "No other federal program can provide this information, nor is there any comparable public or private source, locally or internationally. If we fail to act now, we will lose this important tool for the long-term future.... As the drought continues and we struggle to predict and adapt to future water and land use changes, this thermal information becomes increasingly critical. It is vital for evaluating seasonal surface and ground water use, planning water budgets, managing irrigation practices, administering water rights, overseeing USDA conservation-related contracts, studying impacts related to converting agricultural lands to urban uses, evaluating water needs for fish and wildlife, including endangered species, and ensuring that water is used in compliance with state and federal law, interstate compacts, and international treaties.... We cannot afford to lose this tool and the critical information it provides for water resource and infrastructure planning."

On June 28, the Appropriations Committee reported its FY2008 Commerce, Justice and Science bill funding NASA and other agencies.[19] The Committee recommended nearly $17.5 billion for NASA, including almost $1.64 billion for Earth Sciences. The report stated, "Earth science has been a critical part of the balanced space program long advocated by this Committee. The Committee remains fully committed to a robust Earth science program at NASA and the Committee expects NASA to remain fully committed to earth science, with future missions that reflect a serious commitment to Earth science as a vital part of the Nation's space program."[20]

While no funding was specifically added for a thermal infrared (TIR) sensor, as part of the Landsat Data Continuity Mission, the report states: "The Committee is concerned that the LDCM mission does not include a thermal infrared sensor to provide important data for surface and ground water information. NASA shall report to the Committee no later than 60 days after the enactment of this act with a plan to provide continuity of this data."

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[19]S.Rpt. 110-124.

[20]*Western States Water*, Issue #1729, July 6, 2007.

The report also states: "NASA earth science missions are critical to our ability to monitor and provide warnings about climate, weather, and other hazards. To that end, the Committee recommends an additional $25,000,000 to begin studies to implement the National Research Council's recent report 'Earth Science and Applications from Space: National Imperatives for the Next Decade and Beyond.' This decadal report recommends 15 priority NASA earth science missions."[21]

The 2007 NRC report does not appear to directly address the LDCM TIR sensor, but does discuss several federal mission concepts and key contributions to water cycle science. It reads, "Evaporation from land and ocean surfaces is poorly observed from in situ instruments and its climatology is not well known at present. Evaporation is not readily observable using remote sensing. Despite the observation issues, evaporation is central to Earth system science and its constitutive cycles (water, energy, and biogeochemical). Many aspects of climate and weather prediction depend upon accurate determination of these fluxes, as current meteorological products are not advanced enough to provide accurate information. Development of the capability to monitor evaporation directly constitutes a grand challenge for Earth system science."

On December 18, Rep. Mark Udall (D-CO), Chairman of the House Committee on Science and Technology's Subcommittee on Space and Aeronautics, introduced a bipartisan House resolution celebrating 35 years of space-based earth observations by Landsat space-craft, "...an accomplishment that has helped revolutionize our understanding of the Earth's land surface as well as enable a wide range of applications of Landsat data that have had significant societal benefits." The resolution points to the launch of the first Earth Resources Technology Satellite in 1972, later renamed Landsat 1, and the five more spacecraft that have been successfully launched since. "This series of Landsat satellites has established the longest, unbroken record of data on the global land surface."

Rep. Udall said, on introducing the resolution, "The extensive three and a half-decade record of Landsat data has allowed scientists to study changes to the Earth's land cover over time, including changes influenced by both human and natural causes. The applied uses of the data have served numerous purposes, including natural resource management, land use planning, cartography and food security, to cite just a few examples. The data collected through the Landsat program are being used by many federal agencies, academic institutions, state, county, and local governments, private industry, foreign governments, and non-governmental organizations. The broad application of these data for scientific and societal benefit testifies to the nation's sound investment in a public good.... Landsat data has become an indispensable source for a host of beneficial applications that have improved our quality of life and enhanced our economic vitality."

He added, "The U.S. Climate Change Science Program has recognized the significance of the Landsat program, noting that Landsat data are invaluable for studying the land surface and how it affects and is affected by climate."

He concluded, "I urge my colleagues to join me in ensuring that the benefits that are possible from civil space-based land observations, as well as from commercially available remote sensing systems, continue to be realized. By supporting the research, technology, education, and tools required to improve Landsat data collection and applications, we can look forward to further scientific advancements and societal benefits from this critical national asset."

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[21] http://books.nap.edu/catalog.php?record_id=11820.

WSWC members actively supported funding for the Landsat Data Continuity Mission (LDCM), specifically a thermal infrared imaging instrument that state water managers and others are using to measure and monitor evapotranspiration and water use. The FY2008 Consolidated Appropriations Act, signed by the President, includes $1 million and language directing NASA to report to the Congress on its plans for data continuity.

**River Basins**

*Colorado River Basin*

*Agreement on Shortage Sharing/Proposed Interim Operational Guidelines*

On January 18, the Southern Nevada Water Authority (SNWA), authorized General Manager Pat Mulroy to execute an agreement regarding the sharing of annual shortages within the Lower Colorado River Basin as declared by the Secretary of the Interior with the Arizona Department of Water Resources, Arizona Water Banking Authority, and Colorado River Commission of Nevada (including a SNWA obligation to contribute funds to assist Arizona in offsetting the impacts of shortages through 2026). The SNWA Board also authorized the execution of an agreement with Arizona DWR, the Commission, the Colorado River Board of California, the State of Colorado, the New Mexico Interstate Stream Commission, the Utah Division of Water Resources, and the State of Wyoming regarding Colorado River reservoir operations and management.

Seven years of drought, and the lowest 7-year average flows in 100 years, have brought the U.S. Bureau of Reclamation, Seven Basin States, tribes, water users and environmental interests together to discuss future system operations. To date, there has never been a shortage in Colorado River Compact deliveries to the Lower Basin, due to the 60 million acre-feet (Maf) of storage (roughly four times the average annual "natural" flow of the river), including 50 Maf combined in Lake Powell and Lake Mead.

The Secretary of Interior, as watermaster, has consistently released 8.32 Maf from Lake Powell to meet the 7.5 Maf 1922 Compact allocation to the Lower Basin. However, increasing population growth and water use have raised tensions between basin states and water users. River flows are highly variable, ranging from 4-25 Maf and highlight the importance of system storage, but current reservoir operations are only coordinated to meet "equalization" criteria at high water levels. In 2004, then Secretary Gale Norton challenged the Basin States to develop a drought mitigation plan for the Colorado River, which they did, followed in 2005 by initiation of the National Environmental Policy Act (NEPA) review and in 2006 by publication of a scoping report and draft alternatives. Key considerations identified included the importance of encouraging water conservation, looking at coordinated reservoir operations at all levels (high and low), and providing guidelines for an interim period, defined as 2008-2026.

The key elements of the alternative federal actions include a shortage strategy for Lake Mead and the Lower Division states, coordinated operations of Lake Powell and Lake Mead, creation of a mechanism for the storage and delivery of conserved system and non-system water (intentionally created surplus or ICS water) in Lake Mead, and the modification and extension of the existing Interim Surplus Guidelines (ISG) for system operation at high water levels. At present, actions anticipated under the ICS proposal are not allowed.

Discussions to date have included a wide array of federal, non-federal and non-governmental interests, such as the Western Area Power Administration, National Park Service, Bureau of Indian Affairs, Fish and Wildlife Service, and U.S. Section of the International Boundary and Water Commission. Mexico also has vital interests in the basin. However, Interior's EIS process is limited in scope to U.S. concerns, while the U.S. State Department has a parallel process working with Mexico. The Basin States and Tribes have been actively involved and one potential alternative was presented by the States. Another alternative, drawing on the States proposal, was drafted by a consortium of environmental organizations, with input from Defenders of Wildlife, Environmental Defense, the National Wildlife Federation, Nature Conservancy, Pacific Institute and Sonoran Institute.

On February 28, the U.S. Bureau of Reclamation released for public review and comment a Draft Environmental Impact Statement (EIS) on proposed interim guidelines for managing the Colorado River Storage System, particularly under drought and low reservoir conditions. Once approved and in place, the guidelines would be used for determining shortages in the Lower Colorado Basin and coordinating operations for Lake Powell and Lake Mead reservoirs. "Reclamation has developed this draft EIS and the proposed operational guidelines after extensive collaboration with several federal agencies, members of the general public, representatives of the seven Colorado River Basin States, non-governmental entities, Tribes and other stakeholders," said Mark Limbaugh, Assistant Secretary of Interior for Water and Science. "I want to thank...all those who have participated for their contributions to date [and] encourage them to continue to participate fully in this process so we can [have] a Record of Decision completed before the end of this year."

The guidelines are intended to provide mainstream Colorado River water users a greater degree of predictability with respect to future annual water deliveries, as well as provide additional flexibility and new mechanisms related to the storage of water supplies in Lake Mead. The guidelines – which would extend through 2026 – are designed to provide detailed and objective guidance for the operation of Lake Powell and Lake Mead under low water conditions. They also will allow Colorado River water users in Arizona, California, and Nevada to know when, and by how much, water deliveries would be reduced due to drought or other low reservoir conditions. The Draft EIS has four possible alternatives, plus a "No Action Alternative," but does not identify a preferred alternative. A final EIS, with a preferred alternative, will be published in September.

Of the four action alternatives, one was developed by the Seven Basin States, another by a consortium of environmental non-governmental organizations, and two were formulated by Reclamation staff, one in coordination with the National Park Service and Western Area Power Administration. Each addresses coordinated operations of Lake Powell and Lake Mead, shortage guidelines for when to reduce water deliveries from Lake Mead, conserved system and non-system water provisions, and current Interim Surplus Guidelines (ISG) for releases from Lake Mead. These alternative strategies are designed to delay the onset and magnitude of shortages, and maximize the protection afforded to water supply, hydropower production, recreation, and environmental benefits by water storage in Lake Mead and Lake Powell.

Under the No Action alternative, the Secretary would continue to approve reservoir releases and water deliveries through an annual operating plan, based on water supply conditions and demands. Uncertainties would continue, given the wide fluctuations in flows. This year, Lake Powell inflows at the beginning of the year were projected to be 91% of average, but subsequent dry weather has dropped projections to around 50%. Further, additional guidance for operations during low flows is needed. Lake Powell releases would continue at 8.23 Maf, unless storage equalization

was required, and a "two-tier" shortage strategy would likely be adopted to protect power generation at Hoover Dam (with an approximately 80% assurance level) and absolutely protect the Southern Nevada Water Authority intakes at a Lake Mead level of 1000 foot elevation.

The Basin States alternative would minimize the risk of Lower Division shortages and avoid Upper Basin curtailment risks. It calls for reducing deliveries from Lake Mead by 400,000 to 600,000 as reservoir levels drop between an elevation of 1,075 and 1,025. Under high reservoir conditions, releases from Lake Powell would be at least 8.23 million acre-feet (Maf), unless "storage equalization releases" are required. Under lower reservoir conditions, Lake Powell releases would be reduced or volumes balanced depending on respective reservoir levels. The storage and delivery of "conserved system" and/or "non-system water" would be allowed, up to 2.1 Maf in Lake Mead, with a "system assessment" of 5% of such stored water. The ISG would be modified to eliminate the partial domestic surplus condition and extended to 2026. Releases from Lake Powell would be tied to storage in both reservoirs, with three graduated changes in releases in response to Lake Mead levels. If Lake Mead were to drop below 1025 feet, further state consultations would take place. A key element is the recognition of ICS water, and up to 2.1 Maf could be carried over as storage in Lake Mead. Details regarding the definition of ICS water had not yet been worked out, nor had details regarding verification and monitoring of such conserved water savings. One ICS proposal is the "Drop II" structure to be built in conjunction with the lining of the All American Canal to recapture rescheduled water deliveries called for by users for redelivery within the United States. The Basin States proposal assumes the current ISG would be modified and extended (2026).

The environmental coalition's proposed alternative would minimize shortages through voluntary conservation measures with compensation (most likely federal water purchases from willing sellers). It would provide absolute protection for Lake Mead at 1000 feet, and otherwise parallels the Basin States coordinated management proposal. However, it expands allowable ICS storage in Lake Mead to 4.2 Maf, and allows ICS water to be acquired for environmental purposes. The proposal would also allow Mexico to participate in the ICS water program.

The other two action alternatives were developed by Reclamation staff. One would maximize water deliveries, at the expense of water storage, while trying to balance the size and frequency of any shortage. No shortage strategy would be imposed on Lower Division States unless storage was not sufficient to meet full entitlement deliveries. Storage in Lake Powell and Lake Mead would be "balanced" when levels are low, and the existing ISG would be extended through 2026.

On June 18, the Bureau of Reclamation announced it had selected a preferred alternative after reviewing comments related to its Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead. The key elements of a plan submitted by the seven basin states are incorporated. In addition, it creates flexibility for the potential storage of additional conserved water in Lake Mead in the future. Noting that the ongoing historic drought in the Colorado River Basin makes the need for additional operational guidelines clear, it explains how deliveries of water to Lower Basin users would be reduced to conserve water as Lake Mead's level drops.

There are detailed provisions to improve coordinated operations of Lake Powell and Lake Mead through a full range of reservoir levels. Colorado and non-Colorado River waters saved through conservation measures in the Lower Basin, "intentionally created surplus" water, will be credited and made available for release at a later time from Lake Mead. Up to 2.1 million acre-feet (Maf) could be so stored, with a possible future increase of up to 4.2 Maf. Current interim surplus

guidelines would be modified, and extended through 2026, to address Lake Mead operations at a relatively full pool and determine when "surplus" supplies would be available to Lower Basin water users.[22] [23]

On June 20, Reclamation released its final environmental assessment for construction of the Drop 2 storage reservoir project along the All American Canal (ACC) west of Yuma, Arizona. The regulating reservoir will hold some 8,000 acre-feet of water, with ACC inlet and outlet structures, to allow it to recapture waters ordered for delivery, but that exceed demand due to factors such as inclement weather, higher than normal flow periods, etc. It is expected to save an average of about 70,000 acre-feet/year otherwise lost, ultimately reducing future releases from Lake Mead. Construction is scheduled to begin in 2008.[24]

Reclamation held three public hearings on the EIS to receive comments in: Henderson, Nevada on April 3; Phoenix, Arizona on April 4; and in Salt Lake City, Utah on April 5.[25]

In an October 3 letter to Secretary of Interior Dirk Kempthorne, Herb Guenther, Director of the Arizona Department of Water Resources, formally invoked the consultation provisions within the Basin States Agreement (of April 23, 2007), raising concerns over a dispute that had arisen between the Lower Division States and the Upper Division States with respect to the specific provision of the Proposed Interim Guidelines for Colorado River Operations (or the Shortage Sharing Agreement) that address the coordinated operation of Lakes Powell and Mead.... The nature and extent of that dispute is articulated in the letter that I have sent this date to the other Basin States.... A failure to resolve this dispute will seriously jeopardize any cooperative approach to management of the Colorado River."

The letter continues, "Additionally, we are concerned that the Bureau of Reclamation's draft of the guidelines necessary to implement the Intentionally Created Surplus program will so substantially deviate from the Proposed Basin States Guidelines that we will find them unacceptable.... Moreover, it appears that time constraints imposed by Reclamation [for publication of a Final Environmental Impact Statement], apparently at the direction of the Secretary's office, act as an impediment to the thorough and meaningful dialogue that will be necessary if consultation is to be successful. Accordingly, we ask that you consider extending the existing internal timelines.... [W]e will continue to work with the other states and Reclamation in an attempt to resolve the issues we have raised. In this regard, Mr. Secretary, we believe that your assistance would greatly increase the possibility of success."

Arizona's concerns center on Reclamation's rewriting of the Basin States Proposal regarding the Intentionally Created Surplus (ICS) provisions, a draft forbearance agreement, and the calculation

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[22]See http://www.usbr.gov/lc/region/programs/strategies/documents.html.

[23]*Western States Water*, Issue #1716, April 6, 2007.

[24]For more information see www.usbr.gov/lc/yuma.

[25]The draft EIS is available on Reclamation's Lower Colorado Region website at: http://www.usbr.gov/lc/region/programs/strategies.html.

of annual releases from Lake Powell. The latter, Arizona contends must be made in accordance with Colorado River Compact priorities and an algorithm that cannot consider storage to protect hydropower generation, nor recreation, "...because it has a direct and appreciable effect on Arizona's Colorado River supply.... Arizona's beneficial consumptive uses...cannot be shorted in order to protect power." Arizona also believes Upper Basin projected depletion schedules are overstated.

On December 13, at the annual meeting of the Colorado River Water Users Association in Las Vegas, Nevada, Secretary of the Interior Dirk Kempthorne signed the Record of Decision implementing an historic and innovative agreement regarding strategies for management of the Colorado River during shortages. It is a "remarkable consensus" among stakeholders about sharing water during the current drought and charting a water management course for the future, according to an Interior press release. "This is the most important agreement among the seven basin states since the original Colorado River Compact of 1922," said Kempthorne, noting that his decision memorializes an agreement that will not only solve current problems, but also prepare ahead of time for future droughts or surpluses rather than resorting to disruptive litigation. The Seven Basin States firmly commit to address future controversies on the river through consultation and negotiation before initiating any litigation.

"As the Colorado River navigates a 1,500-mile journey down mountains through canyons and across desert landscapes, you have navigated the shoals of history," Kempthorne said in addressing the Colorado River water users' meeting. "You have steered around the cataracts and sharp boulders of litigation and acrimony. You have found the serene waters of partnership and cooperation." The new interim operational guidelines take effect immediately, and will be in place through 2026. "This is truly an historic moment," the Secretary added. "These guidelines not only address the ongoing drought, they also encourage and promote water conservation. The signing of this document is being viewed by everyone in this room today but soon will be reviewed by people across the nation and throughout the world. It is that significant and that historic."

The Secretary noted that representatives at a recent World Bank meeting expressed an interest in innovations contained in the plan. The Record of Decision adopts four key elements of river management. First, the new guidelines establish rules for shortages – specifying who will take reductions and when they take them. This is essential for prudent water planning in times of drought. Second, the new operational rules for Lake Powell and Lake Mead will allow these two massive reservoirs to rise and fall in tandem, thereby better sharing the risk of drought. Third, the new guidelines establish rules for surpluses, so that if there is ample basin runoff, the Department of the Interior will have rules in place to distribute the extra water. Fourth, the new rules will address the ongoing drought by encouraging new initiatives for water conservation.

"I am particularly impressed by the innovative approaches you have taken to conserve water, especially the construction project known as Drop 2," said the Secretary. The Drop 2 project will be located in California, but it is being paid for by Nevada. It will create an important reservoir to conserve additional water for Nevada's use over the next two decades. After that, the additional water will benefit all water users in the lower basin states. "This is truly an innovative example of cooperation among states...that may help other states facing shortages meet their needs," the Secretary added. Other conservation measures in the guidelines include an agreement allowing water users to obtain future credit for conserving water and leaving it in Lake Mead. The Record of Decision also sets up a framework to allow cities to contract with willing farmers to temporarily fallow fields in dry years while respecting the basin's agricultural heritage.

Specifics in the guidelines include the elevations in Lake Mead at which the Secretary would declare shortages in the Lower Basin, as well as what those shortages would be. The guidelines also specify the conditions under which Lakes Powell and Mead will be operated, with the intent of operating the reservoirs to avoid the risk of water curtailments in the Upper Basin and minimize shortages in the Lower Basin. The guidelines provide a mechanism that encourages water conservation in Lake Mead in the Lower Basin to minimize the likelihood and severity of potential future shortages; and modify and extend the Interim Surplus Guidelines, implemented in 2001, through 2026.

Secretary Kempthorne emphasized the importance of the decision, which facilitates setting "...an innovative example of cooperation among states.... As other states – and other countries – struggle to resolve their water issues in the coming decades, they will look to the cooperation among the basin states as a model. A way to embrace consensus rather than conflict. To conserve and share water rather than fight over water. To ensure that everyone walks away from the table a winner." A copy of the ROD is at www.usbr.gov/lc/region/programs/strategies.html under "New Info."[26]

*Drought Management*

On February 21, the National Research Council (NRC) released a report, "Colorado River Basin Water Management: Evaluating and Adjusting to Hydroclimatic Variability." The report states that tree-ring based reconstructions of river flows over hundreds of years show that average annual flows vary more than previously assumed and that extended droughts are not uncommon. Moreover, future droughts may be longer and more severe because of a regional warming trend. It also states that a preponderance of evidence suggests that rising temperatures will reduce the river's flow and water supplies. Further, it observes that coping with water shortages is becoming more difficult because of rapid population growth, and warns that technology and conservation are not a panacea for dealing with limited water supplies in the long run.

The Colorado River basin covers 240,000 square miles and extends over seven states and a portion of northwestern Mexico. Tens of millions of Americans rely on the river for drinking water, hydroelectric power, irrigation, rafting and other recreational activities. The river also provides diverse ecological habitats and hundreds of miles of beautiful vistas that it carved over millions of years, including the Grand Canyon. Regarding preliminary proposals for managing water shortages, the NRC said, "Such interstate cooperation will prove increasingly valuable, and likely essential, in coping with future droughts and water demands. Likewise, a commitment to two-way communication between scientists and water managers will be critical."

Exceptionally dry conditions over much of the Colorado River basin in recent years, along with new streamflow reconstructions based on tree-ring data, prompted the NRC to examine how hydroclimatic trends might affect the river's future flows. "For many years, understanding of the river's flow was based primarily on records from stream gages. But the tree-ring data is transforming that understanding by demonstrating that the river occasionally shifts into decades-long periods in which average flows are lower, or higher, than the 15 million acre-feet average of the gaged record."

The tree-ring reconstructions show that the years 1905-1920 were exceptionally wet, which is significant because the Colorado River Compact that governs the allocation of water between the

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[26]Office of the Secretary, News Release 12-13-2007.

upper and lower basin states was signed in 1922, when it was assumed that annual average river flow was closer to 16.4 million acre-feet (Maf). Tree-ring data indicate that extended droughts are a recurrent feature of the basin's climate. The tree-ring reconstructions, coupled with temperature trends and projections, suggest that extended droughts will recur and may be more severe than recent droughts, the report says. Many different climate models point to a warmer future for the Colorado River region, although projections of future precipitation are more uncertain. Further, significant warming in the region over the past few decades is shifting the peak spring snowmelt to earlier in the year and contributing to increases in water demands, especially during the summer. Warmer temperatures also result in greater losses to evaporation.

The NRC also observed a steadily rising population and related increases in water demand. "Despite some successful water conservation efforts, urban water use in the region has increased significantly along with the expanding population. For example, water consumption in Clark County, Nevada, which includes Las Vegas, doubled between 1985 and 2000." Increasing urban demands are often met through sales, leases, or transfers of water rights from agricultural users. However, the NRC report warns such water transfer agreements may be "inhibited by their potential effects on third parties, such as downstream farmers or ecosystems." Similarly, technology and conservation measures are useful and necessary for stretching existing water supplies, but any gains in water supply will be eventually absorbed by the growing population.

"The combination of limited water supplies, rapidly increasing populations, warmer regional temperatures, and the specter of recurrent drought point to a future in which the potential for conflict among existing and prospective new water users will prove endemic.... This will inevitably lead to increasingly costly, controversial, and unavoidable trade-offs among water managers, policymakers, and their constituents." However, the NRC found that despite advances in understanding of the basin's hydrology and climate, knowledge is lacking on other important topics, such as the environmental effects of water transfers and how best to forecast water demand. Further, the NRC recommended that the federal government should "...ensure that the U.S. Geological Survey has the resources to maintain and expand the Colorado River gaging system, which collects streamflow measurements essential for sound water-management decisions."

Many water managers in western states and cities have developed innovative programs and policies for extending limited urban water supplies, but there have been few attempts to synthesize the results from these efforts across the region, the NRC report notes. The NRC calls for a collaborative, comprehensive basinwide study of urban water practices and pressing issues in water supply and demand, which should be used as a basis for action-oriented water planning. Collaboration and better communication among federal agencies, states, and municipalities is also needed. The proposed study could be conducted by the Colorado basin states, federal agencies, universities in the region, or some combination thereof, working with Congress on a strategy to commission and fund the study. Copies of the report are available at http://www.nap.edu or from the National Academies Press (202) 334-3313 or (800) 624-6242.

*Invasive Species*

Mussels recently found at Lake Mead have been identified as quagga mussels, and the likely source is the Great Lakes. Like zebra mussels they are prodigious filter feeders, rapidly colonize and can clog water pipes and screens disrupting pumping and treatment plants. The National Park Service is taking measures to assess the extent of the colonization and prevent its spread. NPS spokesperson Roxanne Dey said, "We're continuing to assess the extent of the infestation," in

cooperation with the U.S. Bureau of Reclamation, state fish and wildlife officials, and others. Bob Muir, of the Metropolitan Water District of Southern California (MWD), reports the mussels have been found on MWD's Colorado River Aqueduct intake, and at the Gene pumping plant to the west. Quagga mussels are said to be more tolerant of deeper, colder water (than zebra mussels), but they don't tolerate saltwater. Once established, they are "virtually impossible to eradicate and extremely difficult and very expensive to control," according to Bay Institute senior scientist Tina Swanson. "Frankly, California should be scared to death." Andrew Cohen, with the San Francisco Estuary Institute, notes public and private expenditure to control the mussel in the Great Lakes total some $500 million/year. "We'll probably see similar costs in California if they become established. I'd say they're here," declared Bob Muir.

The Metropolitan Water District (MWD) of Southern California shut down its 242-mile long Colorado River Aqueduct for ten days, beginning on July 20, in an effort to control the spread of the invasive quagga mussels that had been found in Lake Mead and downstream water works. "By shutting down the aqueduct, we hope to learn even more about effectively containing the quagga by re-examining specific portions of the aqueduct that are most susceptible to invasion, particularly underground siphons, tunnels, canals and pumps," said Debra Man, MWD Assistant General Manager and Chief Operating Officer. "Along with the inspections, we will dry out 63 miles of open aqueduct to effectively eliminate any quagga larvae that may exist. Drying out larvae has proven to be one of the most efficient methods to control the spread of quaggas."

During a shutdown in March, 750 quaggas were discovered in low concentrations mostly along a string of buried siphons in the initial 21 miles of the aqueduct. According to Man, "Recent inspections, however, indicated that mussels are now 125 miles downstream from our Colorado River intake, after being discovered attached to a pump at the last of our five pumping plants along the aqueduct system. With this latest shutdown, we're being as proactive as possible to control the spread of quaggas not only in our system, but throughout California. When pumping resumes, we will increase chlorination in the aqueduct system to destroy mussel larvae in an attempt to prevent the reintroduction of mussels." Due to the drought, the aqueduct is only about half full. MWD will make up for the loss by taking more Colorado River water later.

*Multi-Species Conservation Program*

On July 24, the Water and Power Subcommittee of the House Natural Resources Committee, chaired by Rep. Grace Napolitano (D-CA) held a hearing on a bill to authorize appropriations for the Secretary of Interior to manage and implement the Lower Colorado River Multi-Species Conservation Program (LCR MSCP), a joint effort of the U.S. Bureau of Reclamation and the States of Arizona, California and Nevada. The Senate Energy and Natural Resources Committee held a hearing on companion legislation, S. 300, on July 26.

H.R. 2515, introduced in May by Rep. Dean Heller (R-NV), would provide "such sums as may be necessary to meet the obligations of the Secretary under the Program Documents," which are defined to include the "Habitat Conservation Plan, Biological Assessment and Biological and Conference Opinion, Environmental Impact Statement/Environmental Impact Report, Funding and Management Agreement, Implementing Agreement, and Section 10(a)(1)(B) [Takings] Permit...." Moreover, it directs the Secretary to enter "...an agreement with the States for water from the Lower Colorado River for habitat creation and maintenance in accordance with the Program Documents." Unobligated appropriations are to "remain available until expended," and may be invested in U.S. interest bearing obligations, together with any non-Federal contributions. The bill makes all appropriations "non-reimbursable and non-returnable."

H.R. 2515 specifically states: "Nothing in this Act shall impair any right to the delivery or beneficial consumptive use of Colorado River water under any compact, treaty, law, decree, or contract in effect on the date of enactment...." Further, no future ESA amendments "shall have the effect of modifying the Program Documents unless expressly made applicable to the LCR MSCP." However, nothing in the bill would affect the "enforceability" of existing law (as of April 2, 2005) related to the Program Documents. The bill specifically "waives the sovereign immunity of the United States" for purposes of enforcing the Program Documents, but not for claims for monetary damages.

In her introductory remarks, Rep. Napolitano said, "We will hear testimony on H.R. 2515, a bill that will put in place a proactive approach to the preservation of habitat while ensuring continued water deliveries in the lower Colorado River Basin.... I am concerned that the 50-year term of the MSCP agreement proposed....may be too long. Nobody can predict what the Lower Colorado River might look like fifty years from now. I am also concerned that some of the limitations in the bill effectively immunize water users from future changes to the Endangered Species Act."

Bureau of Reclamation Commissioner Robert Johnson testified that the LCR MSCP is an innovative program developed through a collaborative partnership to address the "needs of threatened and endangered fish and wildlife on the lower Colorado River while assuring greater reliability of water deliveries and hydropower production...and is designed to allow future water transfers within or among water users for a 50-year period." He said, "The Department supports the LCR MSCP as well as the intent of H.R. 2515.... However, the Department remains concerned about language..." allowing the Secretary to "invest appropriated moneys that are not required to meet current program expenditures...to finance a governmental purpose outside of the normal appropriations process. We are also concerned about...judicial review of program documents. We note that this provision has been modified...clarifying that the United States would not be liable for claims for money damages. Nevertheless, we have been advised by the Department of Justice...that this provision could expand Federal litigation exposure in significant respects and open the door for judicial intrusion into administrative decision making."

Testifying in strong support of H.R. 2515 were: Susan Bitter-Smith, President of the Board of Directors of the Central Arizona Water Conservation District; George Caan, Executive Director of the Colorado River Commission of Nevada; and Gerry Zimmerman, Executive Director of the Colorado River Board of California. Kara Gillon, Defenders of Wildlife, suggested H.R. 2515 goes "beyond what it needed to authorize the MSCP and may limit our options to address future challenges." See http://resourcescommittee.house.gov.

*Klamath River Basin*

Three Ninth Circuit Court judges, affirming a district court's order, have upheld an injunction prohibiting the U.S. Bureau of Reclamation (BOR) from making irrigation diversions for the Klamath Reclamation Project (under a 2002 biological opinion), pending completion of a new biological opinion deemed consistent with the provisions of the Endangered Species Act. Filed on March 26, the memorandum is presented as a disposition that is not appropriate for publication and is not precedent.[27] In the latest in a series of lawsuits, the Pacific Coast Federation of Fishermen's

[27]Except as provided by Ninth Cir. R. 36-3.

Associations (PCFFA), et al, challenged Reclamation's operations of the Klamath Project and water deliveries to farmers to the detriment of ESA protected salmon and steelhead species. While it would appear that current snowpack and reservoir levels will allow Reclamation to meet both its fish flow obligations and irrigation deliveries this year, concerns remained over a future repeat of 2001 events, when water was shutoff to most of some 1,000 farmers.

As co-defendants in the suit, the Klamath Water Users Association (KWUA), et al, had appealed the district court's order, arguing that a supplemental environmental analysis eliminated the legal basis for the injunction. The judges noted that in *PCFFA III*, the Ninth Circuit found that the first two phases of a three-phase, ten-year flow plan issued by the National Marine Fisheries Service (NMFS) were unlawful. Upon remand to the district court, NMFS released a "supplement" to the plan, which made no changes to the 2002-2012 flow plan, and "most importantly, the NMFS and the BOR did *not* reinitiate the ESA-mandated consultation process.... It is well settled that a previous agency determination... cannot be amended or supplemented with post-determination analysis or evidence without reinitiating the consultation process.... Indeed, it is clear that 'post-hoc rationalizations' of agency decisions are not permitted as they provide an inadequate basis for judicial review." The court also referred to new and relevant data cited in the supplement, available since 2002, as evidence of the need to reinitiate consultation.

KWUA also challenged the injunction as an unlawful exercise of agency "...authority beyond that allowed under the ESA. This argument fails for two reasons. First – as we already explained in *PCFFA III* – in determining what percentage of flow is required to avoid jeopardizing coho salmon, '[t]he proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species [(i.e., fifty-seven percent)], but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts. Thus, the inquiry is forward-looking; the proper baseline must incorporate all of the factors relevant to whether jeopardy will result once the project is implemented. KWUA's interpretation...that district courts cannot enjoin federal agencies from taking action that is likely to jeopardize protected species unless the agency is the historical cause of jeopardy is therefore erroneous."

The court also referred to the NMFS's explanation that the proper environmental baseline "includes the past and present impacts of *all Federal, state, or private actions* and other human activities in the action area, and a summary of the conditions faced by threatened and endangered species in the action area." NMFS also found, "Project construction and operation have continued since the early 1900s, and thus in effect are a part of the environmental baseline." Lastly, the Ninth Circuit stated that district courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." The district court did not abuse its discretion as the injunction was "reasonably calculated," and enjoining diversions of water to ensure that the flow limits specified by NMFS are met is an equitable remedy reasonably calculated to prevent BOR from jeopardizing coho salmon in its Klamath Project operations."

On November 28, the National Research Council (NRC) has released a report, Hydrology, Ecology and Fishes of the Klamath River Basin, which concludes that a new comprehensive review of research and management needs is warranted as, according to William Graf, the NRC committee chair, "Science is being done in bits and pieces, and there is no conceptual model that gives a big picture perspective of the entire Klamath River basin and its many components. As a result, the integration of individual studies...into a coherent whole has not taken place, and it is unlikely to take place under the present scientific and political arrangements." Graf, a geography professor at the University of South Carolina, was joined on the committee by: Michael Campana, Oregon State

University; George M. Kondolf, UC Berkley; Jay Lund, UC Davis; Dennis Murphy, University of Nevada; John Pitlick, University of Colorado; Christopher A. Myrick, Colorado State University; Clair Stalnaker, USGS, Fort Collins; and others. David Policansky staffed the effort.

The NRC examined two studies. An "Instream Flow Phase II study (IFS)," conducted to assess flows and useable habitat for coho salmon and other anadromous fishes, was found to use many "innovative and cutting-edge methods" in reaching its conclusion that increased flows would generally aid anadromous fish by increasing available habitat. Despite its strengths, the committee found it inadequate, as it used monthly instead of daily data and excluded analyses of tributaries. Graf said, "It's like trying to understand a tree by only examining its trunk...." The IFS relied on information from a Bureau of Reclamation study of the Natural Flow of the Upper Klamath Basin (NFS), estimating flows that would occur if there were no agricultural development, dams or diversion of flows. Some of the NFS shortcomings, according to NRC, are its inadequate linkages between the Klamath River and Lower Klamath Lake, its basic approach to natural flows, choices of the models for calculations, and the omission of factors likely to influence river flows at the Iron Gate Dam gauge. NFS didn't factor in ground water and marsh drainage. The NFS model indicated that if more water is devoted to agriculture, more water would be returned to the Klamath River, which though possible is counterintuitive.

Interior asked for the NRC review, which concludes that to move forward on science and management in the basin, key agencies, researchers, decisionmakers and stakeholders should work together "with an independent science review mechanism to define a basin-wide science plan that identifies research and management needs and priorities."[28]

*SECURE Water Act*

On December 11, the Senate Energy and Natural Resources Committee, chaired by Senator Jeff Bingaman (D-NM) held a hearing on S. 2156, the SECURE Water Act. Senators Pete Domenici (R-NM), Larry Craig (R-ID), John Barrasso (R-WY), John Salazar (D-CO) and Jon Tester (D-MT) all participated in the hearing, presenting opening comments and asking questions of witnesses. Robert Johnson, Bureau of Reclamation Commissioner, and Robert Hirsch, Associate Director for Water, U.S. Geological Survey (USGS), testified jointly. Their statement read: "This legislation would authorize substantial new investments in our nation's understanding of the water resources vital to our way of life.... While some of the activities authorized...are consistent with initiatives and research areas that are already being pursued..., we have strong concerns that...many of the activities called for in this bill are not in the President's budget." It continues: "We believe, however, that many of the goals of this bill – expanding data acquisition and analysis to improve water management and ensuring that decisionmakers have reliable information about water resources and climate change impacts on water availability and energy production – are critically important. We support these goals...."

John D'Antonio testified on behalf of the Western States Water Council. "The Council supports enactment of the SECURE Water Act.... Specifically, we support the financial assistance to non-federal entities for water use efficiency improvements, enhanced spending authority for USGS streamgaging activities, a ground water monitoring system, brackish water study, new methods to estimate and measure water use, a national water use and availability assessment [and

[28]Copies of the report are online: http://www.nap.edu/catalog.php?record_id=12072#toc.

provisions related to] climate change and water resources...., given the potential effects of climate change. The bill addresses many of the needs identified in the June 2006 WGA Water Report, "Water Needs and Strategies for a Sustainable Future." The testimony highlighted the recommendations of that report, and specific provisions in the SECURE Water Act. It also noted the explicit recognition in the bill that "...States bear the primary responsibility and authority for managing the water resources of the United States" and that the "Federal Government should support the States, as well as regional, local and tribal governments."

Also testifying were: Pat O'Toole, Family Farm Alliance; Jon Lambeck, Metropolitan Water District of Southern California; Brian Richter, the Nature Conservancy; and Dr. David Wunsch, National Ground-water Association. All of their testimony is available on the Committee website at www.energy.senate.gov.

**States**

*California*

On January 17, California's Third Appellate District Court in Sacramento held the State Water Resources Control Board's (SWRCB) water right fee schedule and regulations were unconstitutional and invalid. The California Farm Bureau and other plaintiffs and amici, including the Northern California Water Association, Central Valley Project Water Association, Association of California Water Agencies, growers' groups and individual farmers, challenged the fees as an unlawful tax adopted in violation of the California Constitution, specifically Proposition 13. Applying an independent standard of review, the court rejected the plaintiffs' claims that the fees were facially invalid, but concluded the fees as applied through emergency regulations were unlawful. The court reversed the superior court in part, and remanded the case with directions regarding the adoption of a new fee schedule. The court stayed its decision, ordering SWRCB to adopt a new fee schedule and formulas (in 180 days) and determine the amount improperly assessed. Fees unlawfully collected must be refunded if timely petitions for reconsideration were filed or claims are subject to a related stipulated agreement.

In Fiscal Year 2003-2004, the State Legislative Analyst's Office (LAO) noted that the SWRCB's Water Rights Division was supported almost exclusively from the General Fund. Only 0.5% of its costs were covered by fees. The LAO proposed funding only the first half of the fiscal year, with fees to be increased to cover the remaining $4.4 million needed. The LAO also recommended all Division programs be fee supported in FY 2004-2005. At that time, the SWRCB objected to the proposal, the court noted, arguing: "The LAO's recommendation is based on an assumption that all water right actions benefit the regulated community (water right permit and license holders). This assumption is not true.... If the goal is that the party receiving the benefit pay their proportional share of the costs of the program, individuals who use groundwater and those who use surface water under some other basis of right should pay a portion of the program costs.... Certainly a portion of the SWRCB's regulatory/supervision function can and should be logically supported by the General Fund."

Nevertheless, the Division was required to come up with a fee schedule to raise the $4.4 million immediately and provide a "relatively stable" source of funding, using existing data, with one-time fees not so high as to discourage applicants. The SWRCB found that it cost on average $17,000-$20,000 to process an application to appropriate water. It assessed a $1,000 minimum fee. California water law does not exempt small water users from filing an application, but small

domestic uses fall under expedited permitting system. Approximately 45% of California's water right permit or licenses holders are authorized to divert ten acre-feet (af) of water/year or less, and 70% are for less than 100 af/year. Water users pay a number of different SWRCB fees, but the most money is raised from the imposition of an annual fee on those who hold water right permits and licenses, set at the greater of $100 or $0.03/acre-foot based on annual authorized diversions (whether or not there is water to be diverted). The SWRCB has no permitting authority over riparian, pueblo or pre-1914 appropriative water rights (totaling 38% of surface water use, based on self-reported claims). Also, most ground water use is regulated by local entities, not the State. SWRCB assumed that 40% of water right holders would refuse to pay, calculating the loss into its fees. For FY2003-2004, the period subject to the litigation, the minimum $100 fee covered any diversion up to 3,333 af, including diversions of less than 10 af. It has since changed.

The plaintiffs also challenged the SWRCB levy of fees imposed on persons or entities that contract for water from the U. S. Bureau of Reclamation, which is authorized to use 116 million acre-feet (Maf) of water. SWRCB regulations provided a 50% discount for hydropower, which reduced Reclamation's water rights subject to the fee to 86 Maf (or $2.6 million) for FY 2003-2004, including $2.45 million for the Central Valley Project (CVP). Historically, Reclamation has refused to pay regulatory fees, and the California Legislature therefore anticipated the federal government and others might claim sovereign immunity. It provided other collection options, including allowing SWRCB to pass-through fees to CVP's contractors. Supply contracts for CVP water total only 6.6 Maf. SWRCB calculated Reclamation's fees in the same manner as other water right holders, then prorated the charge to contractors based on their contract amounts. Federal contractors claimed this amounted to a fee of $0.37/af. The court upheld the "pass-through," but observed: "The SWRCB assessed annual fees against federal contractors based on a prorated portion of the total amount...associated with all the Bureau permits and licenses." The court found the calculation of the fees to be unlawful, and limited the amount of the federal government's fees that could be passed through to water supply contractors to that proportionate to the benefits that the contractor receives.

In 1978, California voters approved Proposition 13 limiting real property tax rates and assessments, and state and local government's taxing powers. However, regulatory fees were excepted to the extent that they "do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." A tax, it is generally recognized, is imposed to raise revenue, is compulsory and is unrelated to "a voluntary decision to develop or to seek other government benefits or privileges." When a state fee is challenged as an unlawful tax, the court found the state must show the "estimated costs of the service or regulatory activity, and the basis for determining the manner in which the costs are apportioned...bear a fair or reasonable relationship to...benefits from the regulatory activity."

The court agreed the intent of the fee was not to raise revenue, but to defray the costs of performing the services for which the fees are collected. The court rejected the plaintiffs' claims that the fees were imposed solely on the basis of owners' real property interests and were therefore an unconstitutional ad valorem tax (under Proposition 13's restrictions).

The court determined SWRCB serves many holders of water rights, including those claiming sovereign immunity, but has authority to impose fees on "only 40% of the water held under water rights." In distinguishing the SWRCB's water right fees from other regulatory fees that the courts have upheld, the court concluded that SWRCB offered no evidence to show that "the services and benefits provided to the non-paying water right holders were de minimis." In a 2005 state audit, SWRCB's allocation of resources was estimated to be: (1) processing applications and petitions –

25%; (2) environmental review – 18%; (3) Bay-Delta Project – 6%; (4) licensing and compliance – 21%; (5) hearings – 11%; and (6) overhead – 19%. In the end, the court concluded the SWRCB failed to "sustain its burden" to show the basis for determining the manner in which the costs were apportioned was fair and reasonable.

*Hetch Hetchy*

The FY2008 budget proposal included $7 million to study the costs and benefits of removing O'Shaughessy Dam, a significant source of water and power for San Francisco, and restoring the Hetch Hetchy Valley in Yosemite National Park. Last year, the California Department of Water Resources (DWR) completed a report estimating the cost of restoration to be up to $10 billion, and according to Interior Secretary Dirk Kempthorne, the federal money would be used to continue discussions with the state. A study by the Environmental Defense Fund (EDF) says the water and power supply could be made up in other reservoirs. EDF spokesman Tom Graff says the state study didn't address the benefits of restoring the valley, and the National Park Service can answer that. San Francisco Public Utilities Commissioner Susan Leal says the plan threatens the city's water supply and 20% of its electricity. "It is an absolute waste of taxpayer dollars, especially when we have so many other priorities."

Senator Diane Feinstein (D-CA), a member of the Appropriations Committee said, "We're not going to remove this dam, and the funding is unnecessary." Earlier she had said, "There is no question that Hetch Hetchy Valley is a remarkable environmental treasure. But the decision to put up the dam was made over 80 years ago. To tear it down now simply does not make sense. The bottom line is [it] is a critical source of water and power [360,000 acre feet of high quality water for 2.5 million people and 400 megawatts of power].... Draining the reservoir would be far too expensive and leave the State vulnerable to both drought and blackout." Last year, she said, "The California [DWR] report confirms that dismantling O'Shaughessy Dam and draining the Hetch Hetchy reservoir are unwarranted and the cost is indefensible, particularly given the tremendous infrastructure needs facing our State."[29]

*Sacramento - San Joaquin*

The San Joaquin River Restoration Act (S. 27), sponsored by Senators Barbara Boxer (D-CA) and Feinstein, and H.R. 24 introduced by six California's representatives would help end a decades old dispute between irrigators, environmentalists, and the federal government over Upper San Joaquin River flows below Friant Dam. The dam was completed in 1944 as part of the Central Valley Project (CVP), and has been operated primarily to supply water to irrigators. In 2004, after nearly 20 years of litigation, a federal judge ruled the U.S. Bureau of Reclamation's operation of Friant Dam was violating a provision of California law to protect fish downstream. On September 13, 2006, Reclamation, the Natural Resource Defense Council, and the Friant Dam Water Users Authority reached a settlement to restore flows.

The bills authorize the Secretary of Interior to enter into agreements with the California and environmental parties in order to execute and implement the settlement provisions, including channel and structural improvements on the river to create and restore habitat. The settlement outlines a 20-year plan to restore flows and reintroduce chinook salmon to the river. The bills would also

[29]Feinstein Press Release 5-18-2005 and 7-19-2006.

authorize federal appropriations sufficient to execute the settlement provisions. While the ultimate cost of the project has not yet been determined, estimates range from $250-$800 million. The bills outline how federal, state, and private parties will contribute to the project. Bureau of Reclamation Interim Program Manager Jason Phillips said, "We have authority to do planning activities, but at some point we will not have enough money. It's critical that [the Restoration Settlement Act] passes this year if we want to stay on schedule."

On August 21, California Governor Arnold Schwarzenegger brought together state water experts and over 30 stakeholder groups to discuss plans to fix deteriorating environmental conditions and infrastructure in and around the Sacramento-San Joaquin Bay Delta. "A healthy Delta is vital to our environment and it is vital to our economy today and far into the future." He was joined by Senator Dianne Feinstein (D-CA). She added, "The Delta is on the brink of disaster. And the decline of the Delta smelt is the canary in the coal mine. We must take action to prevent catastrophe in the future.... We cannot wait until we have a Katrina-like disaster to attack this problem. Twenty-five million Californians rely on the Delta for clean, safe water. It also irrigates hundreds of thousands of acres of Central Valley farmland and it is the backbone of California's $32 billion agricultural industry.... I look forward to working with Governor Schwarzenegger to develop immediate and sustainable solutions for the future of the Delta. The stakes are simply too high to fail."[30]

Feinstein has endorsed the Governor's $5.9 billion water infrastructure plan, including: (1) a $4.5 billion investment in additional surface and ground water storage to protect communities against flooding and to capture stormwater and snowmelt runoff to supply cities, farmers and businesses during drought; (2) $1 billion toward Delta restoration; (3) $250 million toward restoration projects on the Klamath, San Joaquin and Sacramento Rivers, and the Salton Sea; with (4) $200 million in grants to communities to help conserve water. The Governor has appointed a Delta Vision Blue Ribbon Task Force to develop a management plan, with a report on its findings and recommendations due January 1, 2008. The Delta Summit fell on the same day as an evidentiary hearing in Fresno before Judge Oliver Wanger related to the Delta smelt and pumping by the State Water Project. A decision, expected later this year, will have significant impacts on the Delta and water deliveries to other parts of the state.[31]

*Sportfishing Protection Alliance*

On March 22, Alameda County Superior Court Judge Frank Roesch issued a proposed decision giving the California Department of Water Resources (DWR) 60 days to get a state permit from the California Fish and Game Department to "take" certain protected fish species, including the Delta smelt and winter-run salmon, or shut down the State Water Project's (SWP) Harvey O. Banks Pumping Plant in the Sacramento-San Joaquin Delta. He gave DWR 15 days to submit additional information for consideration. In December 2006, the California Sportfishing Protection Alliance filed suit alleging DWR did not have the appropriate permits, but DWR asserted a series of documents formalized over some 15 years provided it with the necessary authority to operate the pumping plant. DWR and other state agencies are also engaged in a formal process to develop a comprehensive Delta habitat conservation plan for Delta fish recovery.

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[30]Governor's Press Release 8-21-2007.

[31]*Western States Water*, Issue #1724, June 1, 2007.

DWR Director Lester Snow said, "We're perplexed with the court's ruling in this case. We find the prospect of curtailing pumping to be unacceptable in terms of the economic consequences to the state. We're committed to developing a cutting edge conservation package for the Delta.... We're also working with federal agencies on development of a new biological opinion. We certainly will suggest that the judge reconsider his draft decision and put it in terms that are more logical and acceptable to developing a conservation program for the Delta.... We want to address Delta environmental issues in a comprehensive fashion rather than leaping from one court case to the next court case. We are committed to fixing the problem, we're committed to protecting the Delta smelt and other endangered species, and we're committed to maintaining the economy of the State of California.... Included in the Governor's growth plan is a proposed $1 billion for Delta sustainability issues."

*Oklahoma*

On December 6, the House suspended the rules and unanimously passed H.R. 2085, the McGee Creek Project Conveyance Act, to transfer title of certain facilities in Oklahoma from the United States to the McGee Creek Authority. The bill was introduced by Rep. Mary Fallin (R-OK). Senator James Inhofe (R-OK) has introduced an identical bill (S. 177).

The transfer covers all right, title and interest in a raw water pipeline and associated facilities, including a pumping plant, surge and regulating tanks, maintenance complex and other appurtenances and land associated with the facilities. Prior to conveyance the Secretary of Interior is to complete any actions required under the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and any other applicable laws. Further, the Authority is to comply with all applicable "Federal, State, and local laws (including regulations) in the operation of any transferred facilities." The Authority also accepts responsibility for "all duties and costs associated with the operation, replacement, maintenance, enhancement, and betterment of the transferred land and facilities."

The Act specifically releases the United States from liability for "...damages of any kind arising out of any act, omission, or occurrence relating to any land or facilities conveyed, except for damages caused by acts of negligence committed by the United States (including any employee or agent of the United States) before the date of the conveyance." Lastly, notwithstanding the conveyance of the land and facilities, "the reclamation laws shall continue to apply to any project water provided to the Authority."

**SWAQ Report**

The National Science and Technology Council's Committee on Environment and Natural Resources, Subcommittee on Water Availability and Quality (SWAQ), has released, "A Strategy for Federal Science and Technology to Support Water Availability and Quality in the United States." A cover letter by John H. Marburger, Director, Office of Science and Technology Policy (OSTP), says: "The United States has reaped the benefits of abundant and reliable supplies of fresh water since its founding. However, the impacts of population growth, development, and climate change are placing increasing stress on our Nation's water supplies.... The Subcommittee was charged with: (1) identifying science and technology needs to address the growing issues related to fresh water supplies; (2) developing a coordinated, multi-year plan to improve research to understand the processes that control water availability and quality, and (3) enhancing the collection and availability of the data needed to ensure an adequate water supply for the Nation's future."

Marburger continued, "This report is a result of...interagency collaboration." The Subcommittee consists of 29 representatives from the U.S. Army Corps of Engineers' Institute for Water Resources, Bureau of Reclamation, Geological Survey, Fish and Wildlife Service, USDA's Cooperative State Research and Education and Extension Service, Natural Resources Conservation Service, Department of Commerce, Department of Energy, Environmental Protection Agency, Department of Health and Human Services, Department of State, National Aeronautics and Space Administration, National Science Foundation, Tennessee Valley Authority, Office of Management and Budget and Office of Science and Technology Policy (both the latter in the Executive Office of the President). He added that the report "...provides an overview of the set of challenges that face us in our pursuit of adequate fresh water supplies, lays out the research priorities associated with those challenges, and provides recommendations for a federal science strategy to address this important issue." The report has been posted on the OSTP website.[32]

This SWAQ report adds water quality and builds on a 2004 report, "Science and Technology to Support Fresh Water Availability in the United States," which highlighted the need for coordinated efforts. The new report does not contain an inventory of current programs, but rather focuses on topics and the benefits to be realized from greater "interagency and public/private collaboration and/or increased resources." The report recognizes, "Authority to manage water resources is largely delegated to States, Tribes, and local municipalities. SWAQ is committed to productive collaboration with these water managers." SWAQ has already begun work on implementation plans for some of the priorities identified in the report.

Among the new challenges identified in the report are climate variability and change, ground water mining, and water quality degradation. It also adds increasing competition between water users, which will result in critical decisions about allocating water for "agricultural use and consumption by cities, for maintaining water reservoirs and ensuring in-stream flows for aquatic ecosystems, and for industrial and energy production and recreational uses." It suggests, "[T]he Nation will again rely on opportunities and tools offered by science and technology. Federal water research and development will increase the range of options and will inform the public, water managers, policymakers, and the private sector about the benefits, costs, and risks of the variety of decisions they face."

What is our current water use? We have estimates for instream use for hydropower, and withdrawals from surface and ground water for off-stream uses, but no nationwide estimates for instream uses to support ecological needs, nor estimates of precipitation that never reaches our river, streams and aquifers (such as crop and vegetation uses due to evapotranspiration from non-irrigated lands). For total off-stream withdrawals, for 2000, "our best guess" is 408,000 million gallons per day (mgd). This figure includes freshwater withdrawals of 344,1000 mgd and saline water withdrawals of 62,270 mgd. The latter includes 59,500 mgd for thermoelectric power uses, 1,280 mgd for industrial use and 1,490 mgd for mining. Fresh water withdrawals were dominated by irrigation (137,000 mgd) and thermoelectric use (136,000 mgd), followed by public water supply (43,300 mgd), industrial use (18,500 mgd), aquaculture (3,700 mgd), domestic self supply (3,590 mgd) and mining (2,010 mgd). Surface water accounted for 79% and ground water 21%.

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[32]http://www.ostp.gov/nstc/html/_reports.html. Comments could be sent to Jo Leslie Eimers, SWAQ Co-Executive Secretary at jleimers@usgs.gov.

Our consumption of water resources, the difference between withdrawals and water returned to surface or ground water sources, was last "systematically estimated nationwide in 1995, when about 30% of freshwater withdrawals were used consumptively."

"Simply stated, quantitative knowledge of U.S. water supply is currently inadequate." The first challenge is to accurately assess the quantity and quality of our water resources, accurately measure and monitor how water is used, and know how water supply and use changes over time. This includes information on surface and ground water, rainfall and snowpack in terms of quantity, quality, timing and location. "A comprehensive assessment of U.S. water resources should build upon significant monitoring programs by water management authorities, States, and Federal government agencies to ensure that regional and national water resources are measured accurately. Data and information...should be relevant to decisionmakers, from the individual homeowner to regional water managers...[which] will allow more efficient and equitable allocation...and minimize over allocation of limited supplies."

The report continues, "To manage water effectively, we should know our present and future demands.... Furthermore, data and information about...demand for water should integrate physical and social sciences.... Water-use studies should encompass combined surface-water and ground-water management. Water-use data should have seasonal resolution, and should be collected using a combination of measurement and statistical estimation." Other needs include knowing the role of ecosystems in maintaining water availability and quality, and how to maximize the use of our existing infrastructure to better meet current water needs.

The second challenge is developing methods that will allow expansion of fresh water supplies while using existing supplies more efficiently in agriculture, buildings and homes, energy production, industry and other uses. The report addresses the potential for science and technology to expand water supplies, by adopting new approaches to storage, new water management techniques, new treatment technologies, and other tools. It says, "Storage and recovery of water should also be improved so that water not immediately needed for in-stream use may be saved for future use.... Aquifer storage and recovery is becoming more common." It adds, "Using behavioral and management sciences, we should develop a 'toolbox' of public awareness and education, technology transfer, incentives, legal, institutional, and economic systems that affect water use to gain acceptance for water-saving technologies, water reuse, and markets for water quantity and quality." There is a need to "reduce conflict and better manage competing demands [and] develop ways to better incorporate scientific and technical information into water-resource decisionmaking."

A third challenge is developing and improving predictive water management tools to help anticipate the outcomes of both long-term policy and planning decisions, and short-term decisions about water releases, withdrawals, storage and uses. The report observes, "Improved forecasts will prevent costly mistakes and stretch the utility of existing supplies and infrastructure." The goal is to reduce uncertainty and risk, and "...support decisions such as to store or release water, divert water for off-stream use, treat water, or, in times of flood or water-quality incidents, keep the public and water users out of harms way." Further, "Communities of water users and water resource managers should anticipate long-term water availability and quality on time scales of years to decades. They should base resource-management, planning, and policy decisions both on historical data and on predictions about future hydrologic, meteorologic, and ecologic conditions." Both probabilistic and physical modeling capabilities are needed, as well as better ways to communicate with decisionmakers and stakeholders.

Briefly, the proposed "strategy," building on past SWAQ work, includes seven key actions: (1) implement a National Water Census; (2) develop a new generation of water monitoring techniques; (3) develop and expand technologies for enhancing reliable water supply; (4) develop innovative water-use technologies and tools to enhance public acceptance; (5) develop collaborative tools and processes for U.S. water solutions; (6) improve our understanding of the water-related ecosystem services and ecosystem needs for water; and (7) improve hydrologic prediction models and their applications. An important component of the National Water Census would be a water quality monitoring network, together with an inventory of water supplies, water use and infrastructure. The census would be undertaken in partnership with State, regional and local water agencies and develop and adopt uniform data collection, communication and availability standards and protocols integrating existing monitoring networks. It would also establish regional and national priorities for data needs.

The SWAQ also identified a number of critical actions for water monitoring, including developing sensors and systems to "...remotely measure water volumes and movement - inexpensively, precisely, and in real time - in rivers, lakes, aquifers, wetlands, estuaries, snowpack, and soil...[and]...measure water quality inexpensively in real time." The report also says appropriate agencies should develop innovative technologies to use water more efficiently, provide tools to "deal with the human impacts of changing water availability and use," and increase investment in public education and outreach. It further suggests pilot studies to integrate decision tools, expanding ecosystem monitoring with non-federal partners, and ways improve and apply hydrologic models. SWAQ will next convene multi-agency teams to review needs, and benchmark skills, capabilities and tools currently available.

**U.S. Geological Survey**

*Streamgaging*

On March 8, Robert Hirsch, Associate Director for Water, U.S. Geological Survey (USGS), testified before the House Natural Resources Committee's Subcommittee on Water and Power, regarding USGS streamgaging. Dr. Hirsch stated that during the 1990s, "inflation and other factors, in both the USGS and in partner agencies, caused USGS to discontinue operations at about 2% of its long-term streamgages each year. These streamgages, with 30 or more years of record, are essential for engineering design and scientific analysis. In particular, as we consider questions of climate change and the potential impact on water supply, these...are crucial.... The National Streamflow Information Program (NSIP) plan calls for Federal investment to fund a core network of streamgages that meet national needs. The proposed $1.4 million, coupled with the increase proposed in the FY2007 budget [$2.8 million], will begin to stabilize this national network...."

The USGS budget request totals $975 million, up about $30 million. There is $62.38 million for streamgaging under the Cooperative Water Program (CWP), which is a $4.2 million decrease (6.7%) that only affects hydrologic studies and not data collection. There is a seemingly corresponding $4.2 million increase (30%) for the National Streamflow Information Program (NSIP) of fully-federally funded streamgages, with about $1.2 million directed towards the USGS Hazards Assessment and Mitigation Initiative with $100,000 to install three new streamgages in southern California to provide data for improved regional flood and debris flow warnings and forecasts, especially in the aftermath of wildfires. USGS already operates more than 100 streamgages in the region. There is another $150,000 for USGS to deploy storm surge monitors along coastlines subject

to hurricanes for near-real-time visualization of flooding. Essentially all the earmarks enacted for FY2006 are removed in the budget request, leading to the following decreases: Tar Creek, Oklahoma $1.2 million; Tongue River coalbed methane water quality impacts $900,000; Upper San Pedro Partnership, Arizona $300,000; and Hood Canal, Washington dissolved oxygen study $100,000.

Budget documents explain that in 2005, USGS operated some 7,450 streamgages, falling for the first time since 1977 from the 7,627 gages operated in 2004. In addition to USGS NSIP and CWP funds, other federal agencies (primarily the U.S. Army Corps of Engineers and U.S. Bureau of Reclamation) and some 800 state and local partners cover the cost of the streamgaging network. Non-USGS sources pay over 69% of the cost, under changing agreements that often result in significant year-to-year reductions or increases in the number of gages. Currently, there are nearly 200 gages at risk of being discontinued or that have been shut down since October 2005. Some of these gages represent 70-98 years of record, and such long-term information is vital for regional hydrologic surveys, infrastructure design, environmental assessments, flood hazard and water supply planning. Long periods of record are also essential for documenting and understanding changes in streamflow due to changes in land use, water use, ground water development and climate change. For a list of threatened streamgages go to: http://water.usgs.gov/osw/lost_streamgages.html.

Also of note, the Administration, as in past years, has again proposed cutting all grants ($6.4 million) for the Water Resources Research Institutes. The Congress has always restored funding for this popular program.

**Water Resources Development Act**

On March 29, the Water Resources Development Act (WRDA) of 2007, authorizing U.S. Army Corps of Engineers projects and programs, was reported and sent to the floor in both the House (H.R. 1495) and the Senate. The Senate's WRDA 2007 is virtually unchanged from the measure that passed the Senate last year, but a number of amendments will be offered on the Senate floor. Majority Leader Harry Reid has stated that WRDA is one of his priorities, but it is unclear when the bill might be taken up. Referring to the time and effort it has taken to get this far, Senator Kit Bond (R-MO) quipped, "If we can pass a 2002 WRDA bill no later than 2007, it will be a great step forward for mankind!"

The as yet unnumbered Senate bill includes 122 project specific provisions, and 52 deauthorizations. It lists 18 studies and 39 new project authorizations including: Alaska - Haines Harbor; Arizona - Tanque Verde Creek, Salt River (Va Shlyay Akimel in Maricopa County); California - Hamilton City, Imperial Beach, Matilija Dam (Ventura County), Middle Creek (Lake County), and Napa River Salt Marsh; Colorado - South Platte River Denver County Reach; New Mexico - Southwest Valley Albuquerque; Texas - Corpus Christi Ship Channel, Brazos River-Matagorda Bay Re-Route, High Island to Brazos River-Intracoastal Waterway, and Fort Worth Riverside Oxbow; and finally Washington - Chehalis River Centralia.

With regard to planning reforms, the bill amends WRDA 86 and requires that for all 2006 feasibility reports and beyond the Secretary of the Army "shall assess whether - (1) the water resource project and each separable element is cost-effective; and (2) ...complies with Federal, State, and local laws (including regulations) and public policies." Further, reports are to be completed no more than two years after a study cost-sharing agreement is signed (subject to appropriations) with up to four years for a complex or controversial study. A risk analysis approach is required for project

cost estimates. With respect to the calculation of benefits and costs for flood control projects, the feasibility study must include post-project residual flood risk, including loss of life and human safety. The upstream and downstream impacts of the proposed project must also be included. It also allows the Secretary to establish centers to provide specialized expertise to enhance and supplement Corps districts' technical and managerial abilities to plan, develop and implement projects. The centers would also provide peer reviews of new major scientific, engineering or economic methods, models or analyses, as well as provide support for external peer review panels convened by the Secretary.

Feasibility and other studies and assessments are also to include alternative non-Federal recommendations that promote integrated water resources management, where the non-Federal interest is willing to share the cost of the studies or assessments. Reports of the Chief of Engineers are not to be constrained by budgetary or other policy considerations as a result of including such non-Federal recommendations, and are to be based solely on the "best technical solutions to water resource needs and problems." Completed reports would be submitted to the House/Senate authorizing committees.

The legislation directs the President to establish a Water Resources Planning Coordinating Committee, composed of the Secretary (or a designee) for Interior, Agriculture, Health and Human Services, Housing and Urban Development, Transportation, Energy, Homeland Security, Commerce, the Administrator of the Environmental Protection Agency (EPA) and the Chair of the Council on Environmental Quality (CEQ). One member of the Coordinating Committee is to be appointed as Chair, for a two-year term, by the President, who will also appoint an Executive Director. The function of the Committee would be to carry out a National Corps Water Resources Planning and Modernization Policy to ensure all projects shall: (1) reflect national priorities; (2) avoid the unwise use of floodplains; (3) minimize vulnerabilities when a floodplain must be used; (4) protect and restore the functions of natural systems; and (5) mitigate any unavoidable damage to natural systems.

The Committee is also to prepare and submit to the President and Congress a Water Resources Priorities Report, within two years of enactment, describing our vulnerability to flood and storm damage, including the risk to human life and property, and comparative risks faced by different regions of the United States. The report is to include "an assessment of the extent to which programs...relating to flooding address flood risk reduction priorities; ...the extent to which those programs may be unintentionally encouraging development and economic activity in floodprone areas; ...recommendations for...reducing and responding to flood risks; and...proposals for implementing the recommendations."

The Committee, in collaboration with each other and in consultation with the National Academy of Sciences is also to review, update and modernize the "planning principles and guidelines, regulations and circulars" the Corps uses to evaluate projects. The Committee shall consider requiring the use of "modern economic principles and analytical techniques, credible schedules for project construction, and current discount rates...." The revisions should also eliminate disincentives and biases against projects for low-income communities (and fully account for the prevention of loss of life), or that "discourage the use of nonstructural approaches to water resources development and management, and fully accounting for the flood protection and other values of healthy natural systems." Other considerations include promoting environmental restoration, assessing project impacts "in the context of other projects within a region or watershed," incorporating lessons learned from "recent disasters such as Hurricane Katrina and the Great Midwest Flood of 1993," and encouraging wetlands conservation. Public participation is to be

solicited regarding any proposed revisions, with a report to Congress, and publication in the *Federal Register*.

An Independent Peer Review process would also be established, with a Director of Independent Review appointed by the Secretary. An independent panel of experts would review any project with an estimated cost, including mitigation costs, of over $40 million. A governor of a state in which a project is located, in whole or in part, or within a basin and that would be "directly affected economically or environmentally" as a result of a project could also request in writing an independent review. Similarly, the head of a Federal agency with review authority that determined a project "is likely to have a significant adverse impact on public safety, or on environmental, fish and wildlife, historical, cultural, or other resources under the jurisdiction of the agency" may request such a review in writing. The Secretary of Army could also initiate an independent review based on receipt of a written request by any party that the project is controversial because: "(1) there is a significant dispute regarding the size, nature, potential safety risks, or effects of the project; or (2) there is a significant dispute regarding the economic, or environmental costs or benefits of the project."

Separate panels of experts would be established for each project subject to review, composed of five to nine members, representing a range of areas of expertise, with at least one engineer, one hydrologist, one biologist and one economist. Panelists would be selected by the Director of Independent Review applying National Academy of Science's policy and ensuring members have no conflict of interest. The panels are to review and report on economic and environmental assumptions projections and analyses, project evaluation data, engineering analyses, formulation of alternative plans, methods for integrating risk and uncertainty, models used in evaluation of proposed projects, and any related biological opinions. Any recommendations made by the panel must be considered by the Secretary, who shall explain in writing why any are not adopted. Any rejected "without good cause shown, as determined by judicial review, shall be given equal deference as recommendations and findings of the Secretary during a judicial proceeding relating to the water resources project."

Project Planning Review Panel Studies are to be completed within 180 days of establishment of the panel or 90 days after the close of the project comment period on a draft project study with a preferred alternative, whichever is later, but may be extended by the Secretary for good cause. If a report is not submitted by the deadline, the Chief of Engineers may continue project planning without delay.

The bill would also amend Section 22 of WRDA 74 to authorize $10 million/year for technical and planning assistance to states, with up to $500,000 spent/year in any one state, and up to $2 million/year "to enter into cooperative agreements with nonprofit organizations and State agencies to provide assistance to rural and small communities." Such technical assistance, at Federal expense, may include provision and integration of hydrologic, economic and environmental data and analyses. Each year the Secretary is to list in the Civil Works budget individual activities proposed for funding.

Other general provisions in the bill relate to providing public access to Corps' water resources and related water quality data, cost sharing for monitoring, project and program administration, in-kind contributions, fiscal transparency, fish and wildlife mitigation, Corps' reservoir management improvements, construction of flood control projects by non-Federal interests, nonprofit organizations as project sponsors, electronic submission of permit applications, funding

to expedite the evaluation and processing of permits, and interagency and international support authority, as well as other provisions for regional sediment management, shore protection projects, etc.

Title II-Subtitle C creates a National Levee Safety Program to provide a periodic engineering and risk-based performance evaluation of levees, taking into consideration potential consequences of failure or over-topping. It establishes a committee composed of Federal agencies and State, tribal and local governments chaired by the Secretary of Army to provide advice on implementing a program and effective policies and guidelines to enhance levee safety to protect life and property, support coordination and information exchange among agencies with common responsibilities and problems, and prepare a strategic plan to ensure new and existing levees are safe, with goals, priorities and target dates.

On April 19, the House approved the Water Resources Development Act of 2007 (H.R. 1495) by a vote of 394 to 25.[33] It authorizes approximately $15 billion for water resources studies and construction projects by the U.S. Army Corps of Engineers. Similar legislation passed the House in the last Congress, but stalled in House-Senate conference negotiations. No water resources authorization legislation has been enacted since 2000. Rep. James L. Oberstar (D-MN), Chairman of the Committee on Transportation and Infrastructure, said, "The nation was founded along the waterways. It has been the Federal government's task from the very beginning to ensure the movement of people and goods, first through, the waterways, then later the highways, railways, and now, the airways."

"Last year, we came very close to resolving our differences with the other body in conference negotiations, but we ultimately ran out of time," said Rep. Eddie Bernice Johnson (D-TX), Chairwoman of the Subcommittee on Water Resources and Environment. "However, I hope H.R. 1495 can take us to that point and further, releasing this backlog of authorizations to fix our existing infrastructure and to authorize new flood control, navigation and environmental restoration projects."

New project authorizations were stripped from the bill to ensure passage, but Chairman Oberstar and Chairwoman Johnson intend to return to the traditional biennial water resources authorization cycle, because it provides stability to the program and assurance to the non-federal sponsors that support Corps projects. "In the 110th Congress, the Transportation Committee intends to move two water resources bills. This first one contains the logjam of six years of projects. The second bill would consider new projects and policy changes that we were not able to add to the legislation we considered today," concluded Chairwoman Johnson. "This approach may not be traditional, but it is necessary."

"Hurricanes Katrina and Rita have greatly increased the need for investment in water infrastructure in the Gulf Coast region. This legislation authorizes significant funding to restore wetlands in coastal Louisiana and to improve hurricane protection in the region," said Chairman Oberstar. "It also authorizes funding for ecosystem restoration and seven new locks on the Upper Mississippi River-Illinois Waterway, as well as the first three projects for the restoration of the Florida Everglades. I look forward to working with the Senate to enact WRDA legislation."

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[33] *Western States Water*, Issue #1718, April 20, 2007.

The bill reaffirms a commitment to the nation's water resources infrastructure, to addressing new water resources needs and to fine-tune the Army Corps' missions and responsibilities. It authorizes projects with Chief's reports relating to flood damage reduction, navigation, hurricane and storm damage reduction, and environmental restoration. It also authorizes project modifications and investigations related to the Army Corps' civil works program. It includes provisions for the improvement of the Army Corps' planning and project development process, including independent peer review of larger and more controversial studies and direction to the Corps to revise the current Principles and Guidelines. The bill easily passed over White House objections.

On May 16, the Senate passed H.R. 1495, the Water Resources Development Act of 2007, by a 91-4 vote. Senators Barbara Boxer (D-CA), Max Baucus (D-MT) and James Inhofe (R-OK) are among the eleven Senate conferees named to address differences with the House. WRDA authorizes the Secretary of the Army, acting through the Chief of Engineers, to carry out specified water projects for navigation, environmental restoration, ecosystem restoration, hurricane and storm damage reduction, and flood damage reduction.

Senator Boxer, Chair of the Environment and Public Works Committee, declared, "This bill meets our communities' and our nation's acute and unmet water infrastructure needs...in a fiscally responsible way. One of the lessons of Hurricane Katrina is that we ignore our water infrastructure needs at our nation's peril.... Some of the communities this bill will protect have waited seven years or more for these projects [since the last WRDA authorization]. This bill will end that wait, but it will also ensure that we avoid the mistakes of the past by making sure future projects receive the serious analysis and careful implementation they deserve."

Senator Inhofe added, "In passing WRDA...the Senate meets many of the most critical water resource needs facing our nation today...to increase hurricane and storm damage protection through wetlands preservation and restoration, and creates an inventory of the nation's levees with assessments of high risk levees in order to protect people and property." Senator Johnny Isakson (R-GA) said, "The passage of this bi-partisan, fiscally responsible bill is a tremendous step for our nation. It is an investment in safe drinking water. It is an investment in stormwater management. It is an investment in flood control and water resources of the United States of America. [It is a]...long overdue step forward in the investment to protect our water resources, enhance our environmental restoration and spur economic development."

H.R. 1495, as passed by the Senate, includes these and other sections, under Title II - General Provisions. Section 2001 requires execution of a written partnership agreement with non-federal project sponsors, which in the case of a state (or political subdivision of a state) may reflect it does not obligate future appropriations inconsistent with constitutional or statutory limitations. It allows credit for non-federal in-kind contributions, including costs of planning, data collection, design, management, mitigation, construction and related services, as well as materials.

Section 2004 calls for an annual fiscal transparency report to Congress with data on projects currently under construction, signed cost-sharing agreements and completed planning, design and engineering work. It is to include the number of years expected to complete a project, and the estimated annual federal cost to maintain that schedule. It also calls for the number of initiated and active studies, the number completed during the fiscal year, and completed studies for projects not yet authorized. The Corps is also to report on recreation fees and lease payments, hydropower and water storage fees, deposits into the Inland Waterway Trust Fund and the Harbor Maintenance Trust Fund, and other revenues. The report is also to include a list of authorized but unfunded projects

with information as to the date of authorization, last allocation date, percent of construction completed, estimated completion cost, and a brief explanation of the reasons for the delay. It further requires a listing of individual permit applications and nationwide permit notifications, as well as the date of application, date each application is determined to be complete, and the date each is granted or denied.

Section 2005 outlines matters to be addressed in planning, including cost-effectiveness and compliance with federal, state and local laws, regulations and public policies. Process improvements include deadlines for completion of feasibility studies, and adoption of a risk analysis approach to project cost estimates. Benefit cost analyses for flood damage reduction projects is to include calculation of residual risk of flooding upon completion of the project, to human life and safety, and a calculation of any upstream or downstream impacts. Also, the Secretary may establish "centers of specialized planning expertise" to provide technical and managerial assistance, provide peer reviews of new major scientific, engineering or economic methods or analyses, provide support for external peer review panels convened by the Secretary, and carry out other prescribed duties. Corps reports are to include recommendations for alternatives suggested by non-federal interests to promote integrated water resources management, for which they are willing to pay the non-federal cost share.

Section 2006 would create a cabinet-level Water Resources Planning Coordinating Committee with the chairperson and executive director appointed by the President. It establishes a National Water Resources Planning and Modernization Policy to: (1) reflect national priorities; (2) seek to avoid the unwise use of floodplains; (3) minimize flooding vulnerabilities; (4) protect and restore the functions of natural systems; and (5) mitigate any unavoidable damage to natural systems. The coordinating committee is also to submit an annual report of vulnerabilities to flooding and related storm damage that includes the risk to human life and property, as well as the comparative risks faced by different regions of the United States. The report is to include flood risk reduction priorities, an assessment of the extent to which programs unintentionally encourage development in floodprone areas, and recommendations for improving those programs. Within two years, the coordinating committee is also to propose revisions to the Corps' planning principles and guidelines.

Section 2007 creates, within the Office of the Secretary, a Director of Independent Review to ensure sound project planning. Any project with an estimated cost of more than $40 million will be subject to review by an independent panel of experts. Further, the governor of any state within the drainage basin in which a project is located that would be directly affected economically or environmentally as a result of a project may request in writing an independent project review. The head of a federal agency with project review authority may request such a review, or the Secretary of Defense may initiate such a review where there is significant dispute regarding the size, nature, potential safety risks, or effects of the project; or the economic or environmental costs or benefits. Project planning review panels of five to nine experts would be established with at least one engineer, hydrologist, biologist and economist. Separately, projects would also be subject to an independent safety assurance review.

On August 1, the House passed a conference report on H.R. 1495, the Water Resources Development Act (WRDA) of 2007, by an overwhelming 381-40 margin. The President has threatened to veto the $21 billion bill, which authorizes more than 800 project modifications and new projects. It also authorizes 100 new studies. Rep. James Oberstar (D-OH) declared, "Critics of this bill may say the cost is too high, but they must consider that this is not just one WRDA bill. Divide the cost by the number of years that have passed since we last passed this critical legislation [almost seven years ago] and the cost is understandable." He added, "WRDA 2007 addresses many of the

concerns raised by outside stakeholders on the policy issues collectively known as 'Corps reform.' Our recommendation on programmatic changes to the way the Corps formulates project studies represents an improvement to both the initial House and Senate positions, and creates a meaningful and legitimate way to improve the development of future projects from study to completion."

On September 24, the Senate voted 81-12 to approve the conference report for H.R. 1495, clearing the $23.2 billion measure for the President, who has said he will veto the bill due to its cost, despite heavy lobbying by Republicans, including Senator James Inhofe (R-OK), the ranking minority member on the Senate Environment and Public Works (EPW) Committee with jurisdiction over the mammoth bill. The bill authorizes hundreds of U.S. Army Corps of Engineer projects for flood control, navigation, hurricane protection and ecosystem restoration. It would appear the votes are there to override a veto. Congress has not passed a WRDA authorization since 2000.

Senator Barbara Boxer (D-CA), said, "Senator Inhofe and I share a commitment to shoring up our nation's infrastructure. We have a true partnership on this issue and we stood shoulder to shoulder to get this bill done.... This is a truly bipartisan bill that meets our communities' and our nation's water infrastructure needs and it does it in a fiscally responsible way. Some of the communities this bill will protect have waited years for these projects – and many of them are vital to protecting lives and communities from floods and storms. This bill makes a substantial commitment to protecting our nation's wetlands, navigation routes, and recreation opportunities. It is crucial to our country's economy.... If the President chooses to veto the bill, as he has threatened to do, we are committed – on a bipartisan basis – to move to override his veto."

Senator Mary Landrieu (D-LA) declared, "If we had passed a $5 billion bill every two years, we are not out of step with where we should be. We spent $120 billion in just one year in Iraq."

Senator Inhofe said, "The argument that no one will listen to, although I tried again on the floor today, is that authorization is not appropriation." He added that the overwhelming bi-partisan vote for the bill "...sends a clear message to the President: don't veto this critically important infrastructure bill.... The WRDA bill, which is actually WRDA 2002, 2004, 2006 and now 2007 all rolled into one, is long overdue.... As the most fiscally conservative member of the...Senate..., I have long argued that the two most important functions of the federal government are to provide for the national defense and...improve public infrastructure.... Hurricane Katrina in August 2005 was one wake up call as to the tragic consequences of ignoring our shortchanging our nation's infrastructure needs. The bridge collapse in Minneapolis last month is another example of why we cannot take our aging infrastructure for granted. Investments in infrastructure prior to any disaster can actually save us money. For instance, during this summer's flooding events in the Oklahoma-Texas-Arkansas region, Corps of Engineers projects prevented an estimated $5.4 billion in damages. We must be willing to spend sufficient taxpayer dollars to properly maintain, repair and replace our critical infrastructure."

He went on to point out that "approximately 40% of the cost of this bill can be accounted for in just four locations – Louisiana, the Everglades, the Upper Mississippi River and Illinois Waterway System and California." The conference report includes several billion for southern Louisiana for flood damage reduction, hurricane and storm damage reduction and coastal restoration activities. There is about $750 million for the $8 billion comprehensive Everglades Restoration Plan. It authorizes $3.9 billion for the Upper Mississippi-Illinois Waterway, with $2.2 billion for "desperately needed navigation improvements" and $1.7 billion for an environmental restoration program. There is also $444 million for a flood damage reduction project at Folsom Dam in

California. "Sacramento currently is the major metropolitan area with the most limited flood protection in the nation. Providing adequate flood protection in this area will not only benefit the people and businesses of Sacramento, but it will also help protect the drinking water supply for two-thirds of the population of the entire state."

"Finally," he said, "I would like to comment on the Corps Reform provisions.... I know there are some who will complain that these provisions do not go far enough. There are others who will complain that these provisions go too far and will unnecessarily hamstring the Corps of Engineers and further delay infrastructure improvements. To me, that means the Conference Committee has probably done a pretty good job of putting in place a process that ensures the technical and scientific validity of Corps projects while also allowing us to find solutions to our water resources needs and problems in a less time-consuming and burdensome manner."

Senator Russell Feingold (D-WI) opposed the Conference Report saying, "[T]he American people deserve meaningful reforms to ensure that the projects the Corps builds are safe, appropriate, environmentally responsible, and fiscally sound. The urgency and necessity could not be clearer. Unfortunately, the conference report includes weak reforms.... [T]he conference report we are about to vote on has been stripped of important safeguards that would ensure accountability and prevent the Corps from manipulating the process.... I am particularly troubled by the changes made to the bill's independent review provision during negotiations between the House and the Senate.... Under the conference report, the supposedly 'independent' review is not independent. The review process is run by the Corps rather than outside the agency.... The Corps' Chief of Engineers is given significant authority to decide the timing of review, the projects to be reviewed, and whether to implement a review panel's recommendations, and apparently even has the ability to control the flow of information received by the review panel. The Corps was not given the authority to determine the scope of the review...." The independent review provision sunsets after seven years.

Feingold also points out, "[T]he conference report gives the Corps fairly broad discretion to decide what projects get reviewed. It expands the House's loophole allowing the Corps to exempt projects that exceed the 'mandatory' $45 million cost trigger. The Corps can exempt Continuing Authority Program projects, certain rehabilitation projects, and, most egregiously, projects that it determines are not controversial and only require an Environmental Assessment rather than a full-blown Environmental Impact Statement. It is this very decision – whether to do an EA and EIS – that is often in need of review. Furthermore, a project's economic justification, engineering analysis, and formulation of project alternatives are critical elements that should be looked at for all major projects, not just those with significant environmental impacts. The conference report also prevents review of most ongoing studies.... The conference report also eliminates the requirement that a review is mandatory if requested by a federal agency.... I am pleased that the conference report contains some modest reforms, but we can do much better than that. In fact, we did much better than that when we passed the Senate bill not long ago. Congress needs to get this right – the stakes are too high."

Feingold added, "I also want to express my concerns with the cost of the bill, which has ballooned to $23.2 billion...and is a significant increase from the approximately $14 to $15 billion cost of the House and Senate versions. Nearly $1 billion of the additional costs is for nineteen projects added during conference.... My colleagues have...stood...and said the cost of the bill does not matter because WRDA is merely an authorizing bill and not an appropriations bill. We will sort out priorities later.... There is already a $58 billion backlog of construction projects previously authorized, and with only $2 billion annually appropriated for project construction, this means that

the nation's most pressing needs face significant competition for funding and likely delays. Furthermore, this bill authorizes a significant number of projects and studies that are beyond the Corps' primary mission area. The Corps cannot be everything to everyone, and Congress needs to discipline itself and set priorities.... Rather than overriding a veto, I hope that Congress will use that veto...to re-think the flawed mindset that resulted in this bill...."

On November 2, as promised, President Bush vetoed WRDA 2007, without immediately releasing a statement.[34] Senator Harry Reid promised a quick override of his "irresponsible veto," as did House Majority Leader Steny Hoyer (D-MD). H.R. 1495 had passed the Senate 81-12 and the House 381-40.

The House overrode the President's veto of the Water Resources Development Act (WRDA) by a 361-54 vote. Well over a two-thirds majority. The House Majority Leader, Steny Hoyer (D-MD), declared, "This President has sent down to us a request for $196.4 billion in expenditures, not in Anchorage, not in Baltimore and not in Mississippi or California, ...[but in] Baghdad and Kabul. But, he says, water resources development is too much for America.... But the point is it covers investment in our country.... It is critical to the health of our people, to economic development in this country, and the safety of our communities.... Fiscally responsible people invest in their future. Fiscally responsible people maintain their infrastructure."[35]

On November 8, the Senate voted to override the President's veto by a 79-14 margin. Senator Trent Lott (R-MS), the Assistant Minority Leader, said, "I believe, actually, the WRDA bill, the Water Resources Development Act, is one of the few things we can look at and say we did something good for our country and for our constituents this year. It is bipartisan. It has been laboriously developed over the last 5 or 6 years – a long time coming. It is one of the few areas where we actually do something constructive.... It creates jobs. It provides safety and protection, safe drinking water. It is one of the only bills that I think actually produces a positive result.... The Corps of Engineers is one of the few Government entities that actually does something, produces something – something you can see and feel and helps the quality of life. We are always involved in social welfare programs, giveaway programs, and we are always trying to find a way to raise taxes and do things that are not good for our constituents. This one actually does something good."[36]

## Water Rights

### *Colorado River Shortage Sharing Agreement*

On December 13, at the annual meeting of the Colorado River Water Users Association in Las Vegas, Nevada, Secretary of the Interior Dirk Kempthorne signed the Record of Decision implementing an historic and innovative agreement regarding strategies for management of the Colorado River during shortages. It is a "remarkable consensus" among stakeholders about sharing

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[34] *Western States Water*, Issue #1742, October 5, 2007.

[35] *Western States Water*, Issue #1745, October 26, 2007.

[36] Cong. Rec., 11-8-07, p.S14114.

water during the current drought and charting a water management course for the future, according to Interior's press release. "This is the most important agreement among the seven basin states since the original Colorado River Compact of 1922," said Kempthorne, noting that his decision memorializes an agreement that will not only solve current problems, but also prepare ahead of time for future droughts or surpluses rather than resorting to disruptive litigation. The Seven Basin States firmly commit to address future controversies on the river through consultation and negotiation before initiating any litigation.

"As the Colorado River navigates a 1,500-mile journey down mountains through canyons and across desert landscapes, you have navigated the shoals of history," Kempthorne said in addressing the Colorado River water users' meeting. "You have steered around the cataracts and sharp boulders of litigation and acrimony. You have found the serene waters of partnership and cooperation." The new interim operational guidelines take effect immediately, and will be in place through 2026. "This is truly an historic moment," the Secretary added. "These guidelines not only address the ongoing drought, they also encourage and promote water conservation. The signing of this document is being viewed by everyone in this room today but soon will be reviewed by people across the nation and throughout the world. It is that significant and that historic."

The Secretary noted that representatives at a recent World Bank meeting expressed an interest in innovations contained in the plan. The Record of Decision adopts four key elements of river management. First, the new guidelines establish rules for shortages – specifying who will take reductions and when they take them. This is essential for prudent water planning in times of drought. Second, the new operational rules for Lake Powell and Lake Mead will allow these two massive reservoirs to rise and fall in tandem, thereby better sharing the risk of drought. Third, the new guidelines establish rules for surpluses, so that if there is ample basin runoff, the Department of the Interior will have rules in place to distribute the extra water. Fourth, the new rules will address the ongoing drought by encouraging new initiatives for water conservation.

"I am particularly impressed by the innovative approaches you have taken to conserve water, especially the construction project known as Drop 2," said the Secretary. The Drop 2 project will be located in California, but it is being paid for by Nevada. It will create an important reservoir to conserve additional water for Nevada's use over the next two decades. After that, the additional water will benefit all water users in the lower basin states. "This is truly an innovative example of cooperation among states that may help other states facing shortages meet their needs," the Secretary added. Other conservation measures in the guidelines include an agreement allowing water users to obtain future credit for conserving water and leaving it in Lake Mead. The Record of Decision also sets up a framework to allow cities to contract with willing farmers to temporarily fallow fields in dry years while respecting the basin's agricultural heritage.

Specifics in the guidelines include the elevations in Lake Mead at which the Secretary would declare shortages in the Lower Basin, as well as what those shortages would be. The guidelines also specify the conditions under which Lakes Powell and Mead will be operated, with the intent of operating the reservoirs to avoid the risk of water curtailments in the Upper Basin and minimize shortages in the Lower Basin. The guidelines provide a mechanism that encourages water conservation in Lake Mead in the Lower Basin to minimize the likelihood and severity of potential future shortages; and modify and extend the Interim Surplus Guidelines, implemented in 2001, through 2026.

Secretary Kempthorne emphasized the importance of the decision, which facilitates setting "...an innovative example of cooperation among states. As other states – and other countries – struggle to resolve their water issues in the coming decades, they will look to the cooperation among the basin states as a model. A way to embrace consensus rather than conflict. To conserve and share water rather than fight over water. To ensure that everyone walks away from the table a winner." For a copy of the Record of Decision see: www.usbr.gov/lc/region/programs/strategies.html under "New Info."[37]

*Montana v. Wyoming*

On February 1, the State of Montana filed suit in the U.S. Supreme Court over Wyoming's use of water in the Tongue and Powder Rivers under the Yellowstone River Compact, signed by both states and North Dakota in 1950. While Montana interprets the compact to allocate the waters that were in actual use in each state at the time of the compact. Wyoming asserts that "pre-1950" water rights are recognized under the compact. In a press release, Montana Governor Brain Schweitzer declared, "In the West, a deal is still a deal." Wyoming signed a compact that said Montana would get its fair share of water and Wyoming has not been holding up its end of the deal. "Whiskey is for drinking and water is for fighting," said Montana Attorney General Mike McGrath. "That's where we are with Wyoming on a number of levels. Montana is faced with an upstream neighbor that denies it has any obligation to supply water to Montana. Without the water allocated to Montana by Compact, Montana's water users will continue to suffer."

Montana has no quarrel with North Dakota, but the state is named in the suit as a signatory to the Compact.

Wyoming Governor Dave Freudenthal expressed his disappointment saying, "Since territorial times, Wyoming and Montana have shared the waters in the Tongue and Powder Rivers. Since 1950, the apportionment of these waters has been controlled by the Yellowstone River Compact which Wyoming has strictly honored. Prior to 2004, Wyoming and Montana agreed on how the compact operated. Since 2004, Montana has been agitating for a fight. I guess they finally threw the first punch. I am confident that Wyoming will prevail on this claim, but I am disappointed that Wyoming will be forced to expend millions of dollars to defend a claim that has no merit. Their lawsuits drag out for years and consume vast resources and rarely result in any significant shift of water rights."

Freudenthal added, "Since 2003, Montana has passed water quality standards on the Tongue and Powder Rivers which they are seeking to enforce in Wyoming. Recently, Montana Senator Baucus proposed legislation...concerning the operation of Yellowtail Dam that would be contrary to the Yellowstone River Compact and existing rules, regulations and contracts of the Bureau of Reclamation. Now, Montana has filed this lawsuit trying to direct how we apportion water to our Wyoming irrigators. The last time I checked we were more than competent to administer our own laws and problems without any help or guidance from Montana. I am perplexed why Montana officials have spent so much time and energy since 2003 poking Wyoming in the eye. We will vigorously defend our water rights and our sovereign interests to control our own destiny."

For a copy of Montana's complaint see: www.doj.mt.gov/news/releases2007/20070201complaint.pdf.

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[37]Office of the Secretary, 12- 13-2007.

*Tarrant Regional Water District v. Oklahoma Water Resources Board*

On January 11, the Tarrant Regional Water District (TRWD), a governmental entity serving water to several large public entities in Tarrant County, Texas, filed three applications with the Oklahoma Water Resources Board (OWRB) seeking permits to appropriate and divert a total of 460,000 acre-feet of water per year with points of diversion on three major rivers within the State of Oklahoma. On the same day, TRWD filed a complaint, along with a petition for a temporary restraining order and preliminary injunction, with the U.S. District Court for the Western District of Oklahoma. The lawsuit seeks a declaration that an Oklahoma moratorium prohibiting the out-of-state sale or use of water from Oklahoma violates the Red River Compact (to which the States of Texas, Oklahoma, Arkansas and Louisiana are parties) and the Commerce Clause of the United States Constitution.

Under the Red River Compact, all four states have equal rights to water within one of the Red River's sub-basins when certain conditions are met. TRWD asserts that as a Texas entity, it has a right to a portion of Texas' 25% share, and that the water can be diverted from any location within the subbasin regardless of state political boundaries. Therefore, TRWD asserts that Oklahoma's moratorium prohibiting the out-of-state use of water violates Texas' apportionment under the compact. Further, TRWD claims that Oklahoma's moratorium violates the Commerce Clause, citing the Supreme Court decision in *Sporhase v. Nebraska ex rel. Douglas*, which held that water is an article in interstate commerce, and that a state cannot unreasonably interfere with its use. TRWD contends that Oklahoma's moratorium, in effect until 2009 or a until a comprehensive state water plan is conducted, is an unreasonable interference with interstate commerce.

The lawsuit also raises issues concerning Indian tribes in Oklahoma. Nearly ten years ago, then Governor Frank Keating negotiated a draft compact with two major Indian tribes that were interested in a proposed water sale to the North Texas Water Agency, of which TRWD was a member. Those negotiations and the proposal to sell water prompted the Oklahoma Legislature to enact the moratorium in 2002. It is not clear how TRWD would address the potential Indian water rights claims as a result of its proposed appropriations.

# RESOLUTIONS AND POLICY POSITIONS

From time to time, the Council adopts policy positions and resolutions, many of which address proposed federal laws, rules and regulations or other matters affecting the planning, conservation, development, management, and protection of western water resources. Policy positions sunset after three years, and are then reconsidered, reaffirmed, revised and readopted, or allowed to expire. The following actions were taken in 2007, during the regular Council meetings.

Position No. 285, was adopted on May 4, and declared the Council's strong support for funding for federal programs to study the water resources-related impacts of climate variability and change and our ability to adapt, specifically Regional Integrated Science Assessments.

Position No. 286, also adopted by the Western Governors' Association as Policy Resolution 07-3, reiterates a long standing policy regarding negotiation, implementation and funding of Indian water rights settlements.

Position No. 287, conveyed in the form of a letter, dated May 11, to the Honorable Grace Napolitano, Chairwoman, and the Honorable Cathy McMorris, Ranking Member of the Senate Water and Power Subcommittee, expressed the Council's views on H.R. 135, to establish the "Twenty-First Century Water Commission."

Position No. 288, expressed the Council's appreciation to Senator Jeff Bingaman, Chairman, and Pete Domenici, Ranking Member, of the Senate Energy and Natural Resources Committee for their efforts in the last Congress in securing passage of S. 895, the Rural Water Supply Act of 2006.

The Council adopted Position No. 289 in support of the proposed Water Conservation, Efficiency and Management Act, to specifically authorize the Bureau of Reclamation's water conservation programs.

Position No. 290, in the form of a letter, dated May 17, to the Honorable Robert C. Bryd, Chairman of the Senate Committee on Appropriations, expressed the Council's concern over the Administration's decision to zero out funding for the U.S. Bureau of Reclamation's Technical Assistance to States (TATS) Program.

Separately, Position No. 291, represented the Council's endorsement of a draft letter to be signed by various organization in support of the Administrations proposed Regional Water Enhancement Program (RWEP). However, due to subsequent changes the Council chose later not to sign.

Position No. 292, addressed to the Honorable Tom Harkin, expressed the Council's strong support for the proposed RWEP as part of the 2007 Farm Bill, while stressing the need for increased funding for the Rural Utilities Service's (RUS) Emergency Community Water Assistance (ESWA) grants for small communities and attaching an earlier Council letter commenting on the Farm Bill (Position No .270)

Position No. 293, in the form of a letter, dated November 16, to the Honorable Jeff Bingaman, Chairman of the Senate Energy and Natural Resources Committee, expressed the Council's support for S. 2156, the Science and Engineering to Comprehensively Understand and Responsibly Enhance (SECURE) Water Act.

Lastly, the Council revised and again readopted Position No. 294 urging Congress to reaffirm its deference to state water law, provide for the waiver of the United States' immunity to participation in state administrative and judicial proceedings, and provide for payment of fees requested by state law.

Position No. 285

**RESOLUTION**
**of the**
**WESTERN STATES WATER COUNCIL**
**urging the**
**CONGRESS AND ADMINISTRATION**
**TO SUPPORT FUNDING FOR FEDERAL PROGRAMS**
**TO STUDY THE WATER RESOURCES-RELATED IMPACTS**
**OF CLIMATE VARIABILITY AND CHANGE**
**AND OUR ABILITY TO ADAPT**

**Sioux Falls, South Dakota**
**May 4, 2007**

**WHEREAS**, climate variability and change have serious potential consequences for water resources planning and management, water rights administration, and future water use; and

**WHEREAS**, there is growing concern, particularly in the Arid West, over our ability to continue to supply water of adequate quality in quantities needed to sustain current and future uses, including environmental uses; and

**WHEREAS**, the failure to provide for such needs would have significant regional and national consequences; and

**WHEREAS**, present water resources planning and sound future decision-making depends on our ability to understand, monitor, anticipate and adapt to changing climatic conditions; and

**WHEREAS**, climate variability and change present substantial obstacles and uncertainties to present and future water resources planning and management; and

**WHEREAS**, more frequent and severe droughts, storms, floods and other weather-related events and changes are predicted; and

**WHEREAS**, changing precipitation, snowmelt, runoff and streamflow patterns are expected, and are already evident, while the magnitude and consequences for society are not well understood; and

**WHEREAS**, most state, local and tribal water managers and water providers have a limited ability to undertake the necessary research to understand and develop adaptation strategies for future climate variability and change; and

**WHEREAS**, the federal agencies participating in the Climate Change Science Program (CCSP) have concentrated heavily on basic scientific research, research that needs to be translated into decision support applications for water resources management and needs to be communicated to water managers through technology transfer institutions such as NOAA's RISAs; and

**WHEREAS**, federal spending for many important programs, such as the National Oceanic and Atmospheric Administration's Regional Integrated Sciences and Assessments (RISA) program, in the Climate Program Office (CPO), support research that addresses complex climate sensitive issues of concern to water managers and administrators at the regional level; and

**WHEREAS**, the Western Governors' Association's June 2006 report, "Water Needs and Strategies for a Sustainable Future," specifically refers to the importance of preparing for climate change impacts;

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council urge the Administration and the Congress to give a high priority to funding for federal programs, such as the RISAs that provide the translation function between basic scientific research on climate variability and change and the application of that research to real-world water management situations at the regional, *state,* and local levels.

WESTERN GOVERNORS' ASSOCIATION

# Western Governors' Association
# Policy Resolution 07-3

## *Negotiated Indian Water Rights Settlements*

## A. BACKGROUND

Position No. 286

1. The Western Governors have consistently supported negotiated settlement of Indian land and water rights disputes as stated in Western Governors' Association Resolutions 87-007, 89-011, 92-008, 95-006, 98-029 and 01-10. The advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities that provide practical solutions to water supply issues for all parties. *Further, as the Governors state in the June 2006 report on "Water Needs and Strategies for a Sustainable Future," negotiated settlements save "millions of dollars through avoidance of prolonged and costly litigation...."*

2. The Ad Hoc Group on Indian Water Rights is comprised of the Western Governors' Association, the Native American Rights Fund, the Western Regional Council and the Western States Water Council. Since 1981, the Ad Hoc Group has generally agreed that there is a need to quantify Indian water rights, and that negotiated settlements are preferable to litigation for purposes of quantifying these rights. Additionally, it has agreed that such settlements should be encouraged and facilitated by the federal government, both in terms of assisting in the negotiations, as well as in providing appropriate funding for the settlements. Over the years, a process has evolved with the help of the Ad Hoc Group that has contributed to the approval of several Indian water rights settlements. However, funding continues to be a key barrier to settling Indian land and water claims.

3. While the Department of Interior, consistent with its longstanding policy, continues to espouse settlement, it has taken an increasingly narrow view of its trust responsibilities to tribes and its willingness to fund settlements that benefit non-Indians as well.

4. Under current budgetary policy, funding of land and water right settlements must be offset by a corresponding reduction in some other discretionary component of the Interior Department's budget. It is difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be funded because funding can occur only at the expense of some other tribe or essential Interior Department program.

## B. GOVERNORS' POLICY STATEMENT

1. The Western Governors continue to support negotiated rather than litigated settlement of Indian water rights disputes. The federal government has major responsibility for ensuring successful conclusion of the process, including providing information and technical assistance to tribes, providing federal negotiating teams to represent one federal voice and further the process, seeking approval of agreements, fully funding the federal share and ensuring that the settlements are implemented.

2. Negotiations shall include the federal agencies, states, tribes and local governments.

3. The Western Governors believe that the funding of land and water right settlements is an important obligation of the United States government. The obligation is analogous to, and no less serious than, the obligation of the United States to pay judgments which are rendered against it.

4. The Governors urge the Administration to support its longstanding policy in favor of Indian land and water settlements with a strong federal fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States government. The Governors also ask that steps be taken to create budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded and implemented without a corresponding offset to some other tribe or essential Interior Department program.

## C. GOVERNORS' MANAGEMENT DIRECTIVE

1. This resolution is to be posted on the Western Governors' Association Web site and it should be referenced and used as appropriate by Governors and staff.

2. The Western Governors' Association shall work with the Ad Hoc Group on Indian Water Rights for purposes of educating key congressional and committee staff and key federal agency staff, and in order to review and advocate steps to facilitate and implement negotiated settlements of Indian land and water rights disputes.

*This resolution was originally adopted in 1987 and readopted as WGA Resolutions 87-007, 89-011, 92-008, 95-006, 98-029, 01-10 and 04-07*

WESTERN STATES WATER COUNCIL

*942 East North Union Avenue, Suite A-201 / Midvale, Utah 84047-1764 / (801) 561-5300 / FAX (801) 255-9642*

*Web Page: www.westgov.org/wswc*

Position No. 287

May 11, 2007

The Honorable Grace Napolitano
Chair, Water and Power Subcommittee
Natural Resources Committee
1522 Longworth House Office Building
Washington, DC 20515

The Honorable Cathy McMorris
Ranking Republican Member
Water and Power Subcommittee
1329 Longworth HOB
Washington, DC 20515

Dear Madam Chair:

I'm writing as Chairman of the Western States Water Council to express the Council's views on H.R. 135, to establish the "Twenty-First Century Water Commission." The Council consists of member state representatives appointed by eighteen governors.

The Council's mission is to promote cooperation among its member states in the management and development of water resources in the West. In this capacity, the Council has recognized and documented the need for additional supplies to meet growing consumptive use demands and also to support existing water infrastructure rehabilitation. The Western Governors' Association adopted a June 2006 report, "Water Needs and Strategies for a Sustainable Future," prepared by the Council, with 28 recommendations for addressing future challenges. A copy of the report is enclosed, and is available at www.westgov.org.

Because the West is often subject to wide swings in water supplies, Council member states have identified drought planning and response as a priority problem, and similarly flagged flood emergency planning and response. Council member states also recognize as a significant challenge the need to sustain instream values generally, and specifically for maintaining and enhancing water quality, and for protecting endangered species. Overlying many of the above challenges are legal and institutional conflicts facing western states, many involving federal/state relationships, conflicts between states, and disputes among water users.

Given this context, it has been some time since a comprehensive study of the available water supplies and the future needs of the United States has been undertaken. Thus, a study, such as that proposed in H.R. 135, could be of substantial benefit to the West. The House has twice passed this legislation, but no action was taken in the Senate.

If such a commission is to be successful, it will be important that it represent the diverse interests that exist. This is particularly so in the West, which by its very nature is a semi-arid climate where there is heavy reliance on the ability to capture run-off from snowmelt and storage reservoirs. To assure that such representation exists, the Western States Water Council would be happy to be of assistance as members of the Commission are selected.

We appreciate the legislation's reference to the importance of state rights with regard to water resources. The last congressionally authorized commission on water, the Western Water Policy Review Advisory Commission established in 1996, was perceived to be flawed in this respect. In a very real way, state efforts collectively represent a "national water strategy." We encourage you to refer to the WGA Water Report, which underscores state priorities.

Nevertheless, the federal government's role is vital. There are numerous federal programs that deal with water resources development, management and protection. As a result, the issue of coordination of these programs and related federal projects to improve efficiency and their ability to assert states in the primary role in water management would be a useful focus for the Commission.

In summary, we believe that the work that is contemplated for the Twenty-First Century Water Commission under H.R. 135 could be beneficial. If it is to be successful, it will be vital that there be appropriate representation on the Commission to reflect the diverse interests across the nation in water resources, and that in its recommendations, the Commission reflect the long-held Congressional policy of deference to states regarding water management.

We appreciate your consideration of the Council's views on these matters.

Sincerely,

Duane Smith, Chairman
Western States Water Council

WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

Position No. 288

May 11, 2007

Senator Jeff Bingaman, Chairman
Energy and Natural Resources Committee
United States Senate
SD-364 Dirksen Senate Office Building
Washington, DC 20510

Senator Pete Domenici, Ranking Member
Energy and Natural Resources Committee
United States Senate
SD-312 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

On behalf of the Western States Water Council, which represents eighteen states, I am writing to express our appreciation for your efforts in the last Congress in securing passage of S. 895, the Rural Water Supply Act of 2006. Much of the West is characterized by its aridity, and the continuing drought highlights the fact that water availability is an ever present constraint defining our economic and environmental well being and quality of life. This is particularly true in many small rural communities.

The Western Governors' Association's June 2006 report, "Water Needs and Strategies for a Sustainable Future," specifically endorsed the legislation and referred to the need to assess rural water supply needs and authorize federal loan guarantees...to better enable non-federal project sponsors to obtain private financing for reimbursable extraordinary operation and maintenance, rehabilitation and replacement costs."

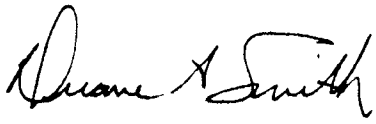
We look forward to working with the Bureau of Reclamation, under your Committee's oversight, to review the status of rural water supply projects and the demand for new projects, as well as to develop guidelines and criteria for determining program eligibility and establishing project priorities. As the legislation specifically states, it is important that Reclamation "...consult and cooperate with appropriate Federal, State, tribal, regional, and local authorities" as it conducts appraisal investigations and feasibility studies, prepares feasibility reports, and identifies funding sources.

Moreover, again as recognized in the legislation, the program must be coordinated with "...existing federal and State rural water and wastewater programs to facilitate the most efficient and effective solution to meeting the water needs of the non-Federal project sponsors." Further,

we appreciate the recognition that compliance with State water laws and interstate compacts is vital. Upgrading and replacing inadequate rural water systems may require finding new water supplies, which will entail acquiring necessary state water rights.

Again, we applaud your efforts to address these problems and look forward to working together to fund and implement the program.

Sincerely,



Chairman
Western States Water Council

Position No. 289

**POSITION STATEMENT**

**of the**
**WESTERN STATES WATER COUNCIL**
**in support of**
***THE BUREAU OF RECLAMATION***
***WATER CONSERVATION, EFFICIENCY AND MANAGEMENT ACT***

**Sioux Falls, South Dakota**
**May 4, 2007**

**WHEREAS**, the Administration has requested legislation to specifically authorize a program of cost-shared grants to non-Federal entities, including States, for projects to conserve water, increase water use efficiency, facilitate water markets, enhance water management, or implement other actions to prevent water-related crises or conflicts in watersheds that have a nexus to Federal water projects within Reclamation States; and

**WHEREAS**, the Western States Water Council and its member States have long supported appropriately designed water conservation projects and programs, and entities within Council-member States have cooperated with the U.S. Bureau of Reclamation (Reclamation) to encourage water conservation; and

**WHEREAS**, Reclamation has adopted an approach to promoting water conservation that appropriately focuses on the development of incentive-based programs of technical and financial assistance in lieu of mandatory regulations and top-down, command-and-control approaches to water conservation; and

**WHEREAS**, Reclamation's Water 2025 Initiative and Challenge Grants encourage the efficient use of water on federal water projects and, in cooperation with States and other entities, provide a non-regulatory, incentive-based approach to assisting water districts, in accordance with state law, develop and implement effective water conservation plans and programs;

**WHEREAS**, the Western Governors' Association's June 2006 report, "Water Needs and Strategies for a Sustainable Future," specifically refers to the need to explore the relative merits of water conservation and water use efficiency (demand management), and "optimize appropriate opportunities to ensure that adequate supplies of suitable quality are available to sustain the growth and prosperity of western states;"

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council supports legislation to specifically authorize such activities and Reclamation's commitment to a proactive, but non-regulatory, approach to encouraging water conservation -- with further state and local input -- through voluntary federal-state-local partnerships, as an appropriate long-term role for Reclamation; and

**BE IT FURTHER RESOLVED**, that the Western States Water Council urge the Bureau of Reclamation to provide meaningful opportunities for state, local and tribal water agencies to participate in the development of eligibility criteria and priorities for Water 2025 Challenge Grants, and other similar activities; and

**BE IT FURTHER RESOLVED,** that the Water 2025 Program is complementary to Reclamation's Water Conservation Field Services Program and in no way nullifies the need for that program.

WESTERN STATES WATER COUNCIL

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*Web Page: www.westgov.org/wswc*

May 17, 2007

Position No. 290

The Honorable Robert C. Byrd, Chairman
Senate Committee on Appropriations
United States Senate
311 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Byrd:

On behalf of the Western States Water Council, representing eighteen states, including the seventeen Reclamation States, I am writing to express our concern over the Administration's decision to zero out funding for the U.S. Bureau of Reclamation's Technical Assistance to States (TATS) Program. Similarly, we are disappointed with the $11 million request for Reclamation's Water 2025 program, which is a $3.5 million reduction from the Administration's FY 2007 request of $14.5 million.

The Council supports Water 2025 and the Challenge Grants Program, which provides cost-shared grants to non-Federal entities, including States, for projects to conserve water, increase water use efficiency, facilitate water markets, enhance water management, or implement other actions to prevent water-related crises or conflicts in watersheds that have a nexus to Federal water projects within Reclamation States.

Reclamation's Water 2025 Challenge Grants Program, in cooperation with States and other entities, provides a non-regulatory, incentive-based approach to assisting water districts, in accordance with state law, develop and implement effective water conservation plans and programs. Since it is a cost-shared program leveraging federal funds, any reduction in spending also results in a related reduction in non-federal contributions and adds to the current backlog of eligible, worthwhile conservation projects.

The TATS Program is designed to enable Reclamation to assist states, state-chartered entities, legislatively authorized political subdivisions of a state, and Indian Tribes in addressing water and related resource issues. Technical assistance is provided only by Reclamation personnel upon an official request by a state or tribe.

In FY 2007, $1.8 million was requested to assist a number of our member states. In general, assistance is limited to no more than $75,000 and is completed within 12 months. Some of the activities funded include providing data, technical knowledge and expertise, to aid in the

conservation and allocation of resources. Such assistance may be provided in both the evaluation and management of water resource programs and projects. Some typical areas of assistance include, but are not limited to environmental, economic, engineering, and social analysis.

Reclamation's Area Managers and Regional Directors enter into agreements to provide appropriate assistance, unrelated to a funded Reclamation project, on a nonreimbursable basis. Typically, the requested assistance or analysis must be to provide input into a larger state or tribal study or activity. Such assistance is not provided for final design, construction or the purchase of capital equipment. Further, the TATS program is not used to supplement efforts under other ongoing Reclamation programs.

TATS allows Reclamation to actively participate as an important partner in water related state and tribal activities, but the promise and products of such cooperative and collaborative work will come to an end without Congressional action to restore funding. Without significant appropriations for the Water 2025 Program, it will similarly fail to achieve its potential benefits at a time when western water resources challenges are increasingly difficult.

Both these programs are consistent with the Western Governors' Association's June 2006 report, "Water Needs and Strategies for a Sustainable Future," which specifically refers to the need to explore the relative merits of water conservation and water use efficiency (demand management), and "optimize appropriate opportunities to ensure that adequate supplies of suitable quality are available to sustain the growth and prosperity of western states."

Thank you for your consideration of this request.

Sincerely,

Duane A. Smith, Chairman
Western States Water Council

Position No. 291

Dear Congressional Member:

The lasting stewardship of both the nation's agricultural lands and water resources depends on agricultural producers, farmers and ranchers, working together with other partners to address water resource issues in the basins and watersheds in which they reside. To achieve this goal, a new "regional" approach to water conservation is needed to encourage and support collaboration between agriculture and other segments of the community to protect and enhance our precious water resources.

We are writing to support the **Regional Water Enhancement Program (RWEP)**. **RWEP** is an important new component of the Conservation Title in the 2007 Farm Bill, focused on improving the quality and quantity of our water resources across the country. **RWEP** is targeted to both significantly and effectively improve water quality, and provide for measurable and meaningful improvements in water quantity, in ways that take advantage of regional partnerships and priorities.

Under **RWEP**, farmers, ranchers and a wide variety of other partners would be encouraged to identify water quality or water conservation priorities for their watershed, and to develop specific strategies for addressing those priorities and achieving measurable outcomes. Partnerships would be allowed flexibility in funding and using the tools most appropriate to reach their desired outcomes. **RWEP** grants would be awarded to partnerships that demonstrate broad collaboration, are seeking significant water quality or quantity benefits, and have measurable outcomes. Further grants would be based on measurable progress in achieving these identified outcomes. Higher levels of participation by producers and others that lead to improved stream flows and groundwater levels or water quality, consistent with state water laws, would be rewarded.

The heart of **RWEP** is the cooperation that it would engender. Farmers and ranchers would work with their neighbors and local communities, and non-profits, water districts, tribes, and government agencies to achieve shared water quality and conservation goals at the watershed scale that they know best. Such cooperation is our best hope for the conservation of our nation's precious water resources.

We therefore strongly urge that you incorporate the **Regional Water Enhancement Program** into the 2007 Farm Bill.

**California Cattlemen's Association**
**Coalition for Sustainable Agriculture (Sonoma County CA.)**
**Family Farm Alliance**
**Mississippi River Trust**
**The Nature Conservancy**
**Trout Unlimited**
**Wildlife Mississippi**

WESTERN STATES WATER COUNCIL

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August 10, 2007

Position No. 292

Senator Tom Harkin, Chair
Senate Agriculture Committee
United States Senate
Room SR-328A Russell Building
Washington, D.C. 20510-6000

Dear Mr. Chairman:

On behalf of the Western States Water Council, appointed by the Governors of eighteen states, I am writing to express our strong support for the proposed Regional Water Enhancement Program (RWEP) as part of the 2007 Farm Bill, and to stress the need for increased funding for the Rural Utilities Service's (RUS) Emergency Community Water Assistance (ECWA) grants for small communities. The proposed RWEP, under the Conservation Title's Environmental Quality Incentives Program (EQIP), builds on the existing success of the present Ground and Surface Water Conservation Program by expanding opportunities for broader watershed or basinwide or aquifer-wide partnerships to include, among other entities, State and local government units and Tribes. It is designed to replace the current program and achieve multiple conservation benefits related to ground and surface water supplies, water quality, fish and wildlife habitat, wetlands, etc. Unfortunately, the House Agriculture Committee has narrowed the reach of eligible activities to exclude current state programs designed to reduce total water use to sustainable levels.

In past comments (attached), the Council has emphasized the important role of agriculture, particularly irrigated agriculture, in the economic, environmental and social panorama of the West. Our growing population continues to put pressure on scarce water resources, including agricultural uses, which account for around 80-85% of withdrawals and consumptive use in the West. Water conservation is increasingly important, but shifts in uses are inevitable. Maintaining agricultural production and rural economies and communities, while accommodating other growing water needs and uses (including biofuels production), will be challenging. Farm bill programs and resources should be used to the maximum extent possible to help address related water supply and water quality problems.

In this regard, the Council supports the requested authorization of $175 million per year in mandatory funding for the RWEP activities by eligible entities. Moreover, we believe the list of eligible activities should be broadly defined to allow the most flexible mix of various

incentives to promote greater water conservation and reduce use, including incentives for producers to "convert to the production of less water-intensive agricultural commodities; or dryland farming." This language is taken from the list of allowable activities under the present EQIP Ground and Surface Water Conservation Program. However, the House Agriculture Committee removed this language from H.R. 2419. Reducing total net consumptive water use is a practical necessity in some parts of some states in the West where existing uses, given current ground and surface water supplies, are not sustainable. Program participation among producers and water users is voluntary.

As the Council has also stressed, in its position on the Farm Bill reauthorization, rural communities are at risk with respect to a wide range of drinking water shortages and water quality problems. We wish to reiterate our support for increasing authorization for Emergency Community Water Assistance (ECWA) grants over present Farm Bill levels. ECWA grants help provide a safety net for some of the Nation's most at-risk small water systems, systems having limited financial capacity to respond to significant public health concerns regarding their drinking water.

We appreciate your consideration of our concerns. We hope the Senate will retain language under the Farm Bill's proposed Regional Water Enhancement Program to support existing state programs designed to reduce ground and surface water use to sustainable levels without sudden and serious impacts to rural communities due to avoidable water shortages. Further, we hope the Senate will augment authorization of funding for Emergency Community Water Assistance grants.

Sincerely,

Duane A. Smith, Chair
Western States Water Council

WESTERN STATES WATER COUNCIL

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October 28, 2005

(in attachment to Position No 292)
Position No. 270

Secretary Mike Johanns
U.S. Department of Agriculture
Room 200-A Whittenburg Building
1400 Independence Avenue, SW
Washington, DC 20250

Dear Secretary Johanns:

The WSWC appreciates the opportunity to respond to your Federal Register notice requesting comments on the scope of a potential 2007 Farm Bill. The Western States Water Council has a keen interest in reauthorization of the Farm Bill, particularly those conservation and other provisions that affect or have the potential to affect water management in the West. As a former western governor, you are well aware of the water supply and water quality management challenges that are facing western states. Agriculture, rural communities, growing metropolitan areas, recreation-related interests and fish and wildlife often struggle to find sufficient water of adequate quality to meet their needs. Recurring drought only exacerbates the perennial problems related to water scarcity. In some areas, all existing uses may no longer be sustainable as ground water levels and spring flows decline and rivers and streams dry up. Further, the continuing evolution of non-point source pollution control programs presents the agricultural community with new regulatory challenges.

Agriculture has played and will continue to play an important role in the western states. The eighteen states that are members of the Council stand ready to work with producers, agricultural water user associations, and agricultural water districts to help them ensure the continued reliability of their water supplies and comply with federal and state water quality regulations. Our member states are also committed to working with rural communities to help them improve the reliability and quality of their drinking water supplies. We would encourage the inclusion of state water planning and management, water rights administration, and water pollution control agency representatives on USDA state technical committees.

Any successful strategy for meeting our future water needs will require a mix of various incentives to promote greater water conservation and reduce use, while increasing available supplies and providing more storage to help us get through temporary shortages. This may require a shift in uses and a reallocation of some water rights, which must be accomplished in complete compliance with both substantive and procedural requirements of state water law pertaining to water right transfers and the subsequent administration of transferred water rights.

Maintaining agricultural production and rural economies while accommodating other growing needs and uses will be challenging and the programs and resources provided through the Farm Bill should be used to help western producers, rural communities, and states address problems related to both the quantity and quality of our water resources. The reauthorization of

the Farm Bill in 2007 will present an important opportunity to help producers sustain their operations while also encouraging and facilitating better stewardship of our water resources. In this regard, the Council desires to forge a closer partnership with USDA in addressing water issues.

The following comments address a number of opportunities where the Administration and the Congress may act to encourage better water management.

First, water conservation and the management of agricultural drainage to protect both surface and ground waters must be national priorities, separate and distinct from the existing priority for the control of non-point source pollution of water. These priorities should be specifically included in Commodity Credit Corporation regulations for financial assistance under the Environmental Quality Improvement Program (EQIP). Similarly, contracts should generally be tailored on a case-by-case basis to achieve net water savings by reducing total water use. In this regard, water conservation benefits must be evaluated in view of their cumulative impact on surface and ground water supplies. This generally requires a site or case specific analysis, as not all efficient water application practices actually result in a reduction in total water use, and in some instances can reduce water supplies available for other uses.

Second, EQIP's Surface and Ground Water Conservation Program should be expanded and funded at a level sufficient to meet the demand for related contracts. The 2002 Farm Bill added this program to provide cost-share payments, incentive payments, and loans to producers to carry out eligible water conservation activities including: (1) improvements to irrigation systems; (2) enhancement of irrigation efficiencies; (3) conversion to the production of less water-intensive agricultural commodities; (4) conversion to dryland farming; (5) improvement of the storage of water through measures such as water banking and ground water recharge; or (6) mitigation of the effects of drought. The benefits of such action have yet to be fully realized. The Secretary is to provide EQIP assistance to a producer only if it will facilitate a conservation measure that results in a "net savings" in ground water or surface water resources in the agricultural operation of the producer. However, on-farm savings may or may not result in a reduction in total water use, when measured off-farm, given the overall impact on ground water levels or surface streamflows. More efficient on-farm water use can in some instances lead to even greater overall water use as producers seek to apply more water on existing acreage or expand their acreage to increase production.

Third, it is important to recognize that salt is the single most common water pollutant across the West, and one that can have serious impacts on continued agricultural productivity. The 2007 Farm Bill must provide authorizations and funding for salt management activities. For example, the Colorado River Salinity Control Program is successfully managing this threat to the water supply of some 26 million residents of the Southwest in Arizona, Nevada and California. While authorized by separate legislation, it is funded under the EQIP program through an earmark, and should continue to be funded at its FY06 level.

Fourth, an additional western water quality priority related to agricultural activities is selenium impacts. Much like salinity, the source of selenium typically is native shale, although

human disturbance can exacerbate the quantity of selenium reaching western streams. The EQIP program should also give priority to projects that result in selenium control, particularly where necessary to achieve compliance with water quality standards. This topic has been the subject of recent discussions between federal, state and local interests involved with selenium control efforts.

Fifth, western states are concerned with the apparent difficulty in getting EQIP funds to address problems related to Confined Animal Feeding Operations (CAFOs), in spite of the fact that nonpoint source water pollution control is an existing national EQIP priority. Moreover, USDA, EPA and states should work in partnership to coordinate activities under EQIP, Section 319 of the Clean Water Act and state water quality related programs so as to help producers come into compliance.

Sixth, the Conservation Reserve Program (CRP), Conservation Reserve Enhancement Program (CREP), Wetlands Reserve Program (WRP) and Wetlands Reserve Enhancement Program (WREP) have all proven to be popular and effective tools for promoting stewardship, and offer great promise in helping address water management issues. About two-thirds of our member states have or are in the process of signing CREP agreements with USDA. Nebraska recently entered in to an agreement to use CREP contracts to reduce ground water use in order to comply with a negotiated settlement of a dispute over compliance with the Republican River Compact. Similar approaches to the use of CRP-related programs to help solve water problems should be encouraged. In this regard, the Council recommends that acreage and funding caps for the CRP, WRP, CREP, and WREP be increased over the levels now contained in the 2002 Farm Bill. In general, CRP programs should carefully consider and give priority to enrolling lands where ground water levels and surface water resources are stressed. Reducing overall depletions of surface and ground water would lead to more sustainable use and long-term economic and environmental benefits.

Further, the 2007 Farm Bill should authorize CREP enrollment of irrigated lands that could be converted to dryland farming. While irrigated lands are not excluded from participation in CRP programs, relatively few contracts have been executed due to cost and other considerations. Moreover, retiring irrigated lands may not be the best alternative as much of this land may not be suitable for native grasses, but could be dry farmed with the possibility of greater benefits for water conservation and aquifer sustainability in certain areas of the West. Dryland farming would also provide for some additional income for farmers and would assist the local economy more than retiring the land from all production. Additionally, the existing statute should be amended to permit the Secretary to target and prioritize enrollment of lands in a CREP or WREP to best achieve the goals for which a CREP or WREP was established.

Seventh, in the interest of better integrating state water management technical expertise with NRCS' delivery of USDA programs to producers, we recommend that the 2007 Farm Bill authorize NRCS to fund state agencies to work with producers and local water agencies or conservation districts to help develop regional water management programs and projects.

Eighth, invasive non-native species are a growing problem for western water users and should receive greater emphasis and funding for control under Farm Bill conservation programs. Salt cedar (*tamarisk spp.)* has invaded some 1.2 million acres of riverbanks in the West according to USDA estimates. The trees displace native vegetation and wildlife habitat, consume large amounts of water, degrade water quality, increase soil salinity, and increase threats from fires and floods. Similarly, other invasives such as purple loosestrife, hydrilla, eurasian water milfoil, caulerpa, giant salvinia, common water hyacinth, zebra mussels, New Zealand mud snails, Chinese mitten crabs, European green shore crabs and other non-indigenous fish and mollusk species compete for food and habitat. Through competition and predation, these species have a tremendous negative impact on threatened and endangered native species, and also impact western water management. We ask that USDA conservation programs explicitly recognize the need to control non-native nuisance species and help producers do so.

Ninth, we recommend that the research and development authorizations in the 2007 Farm Bill include an emphasis on water-related research activities that will benefit agricultural water users. Such research could include effects of climate change on water supplies and evapotranspiration, use of weather modification for supply enhancement and suppression of hail, water conservation technologies, agricultural drainage water treatment technologies, affordable desalination and treatment of brackish waters, and salt tolerant crops, etc.

Tenth, small rural communities are the most at risk with respect to a wide range of drinking water problems, including inadequacy of their existing surface or ground water supplies, contamination from pollution, and difficulty complying with Safe Drinking Water Act regulations. Authorized appropriations for the 2007 Farm Bill should be increased over current levels to provide a safety net for America's most at-risk communities through the Emergency Community Water Assistance Grant Program for Small Communities. Further, USDA Rural Development's Rural Utilities Service (RUS) should be authorized to fund state agencies to work with rural water systems to bring them into compliance with federal and state drinking water regulations. Similarly, RUS should have the same authority to fund state agency programs as it does for non-profit organizations in providing support to rural water systems through the Rural Water Circuit Rider Program, in coordination with rural water associations.

We appreciate the opportunity to comment on these matters related to the 2007 Farm Bill and we hope to forge a closer working partnership with USDA in addressing water needs.

Sincerely,

Hal Simpson, Chairman
Western States Water Council

WESTERN STATES WATER COUNCIL

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November 16, 2007

Position No. 293

The Honorable Jeff Bingaman, Chairman
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Building
Washington, DC 20510

Dear Chairman Bingaman:

On behalf of the Western States Water Council, representing eighteen states, I am writing in support of S. 2156, the Science and Engineering to Comprehensively Understand and Responsibly Enhance (SECURE) Water Act. As introduced, the bill addresses a number of long standing concerns among western states as expressed in the June 2006 Western Governors' Association water report, "Water Needs and Strategies for a Sustainable Future."

Specifically, we support the enhanced spending authority for USGS streamgaging activities, a ground water monitoring system, brackish water study, new methods to estimate and measure water use, a national water use and availability assessment, establishment of a intra-governmental panel on climate change and water resources, a Reclamation Climate Change Adaptation Program, hydroelectric power assessment and effects of climate change, and financial assistance to non-federal entities for water-use efficiency improvements.

We strongly support and are particularly interested in the Section 9 – Water Use and Availability Assessment Program, which would provide grants to assist State water resource agencies. Moreover, this section should include gathering information on environmental water uses, including instream uses and outflows for bays and estuaries, as well as traditional consumptive water uses.

We appreciate the explicit recognition that "...States bear the primary responsibility and authority for managing the water resources of the United States" and that "the Federal Government should support the States, as well as regional, local and tribal governments...." We also appreciate the other provisions in the bill requiring federal agencies to "consult and coordinate with the applicable State water resource agency with jurisdiction." Lastly, the savings clause is important which states that: "Nothing in this Act preempts or affects any – (A) State water law; or (B) interstate compact governing water." So is the requirement that the Secretary comply with applicable State water laws.

While recognizing the jurisdiction limits of the Committee, we would also urge you to ensure that water quality issues, which are inextricably linked to water quantity issues, are considered together in collaboration with all applicable federal and state agencies.

Further, we would urge you to consider including in the definition of "major reclamation river basin" the Arkansas, Republican and Pecos River Basins, and the Great Basin. It may be that the definition of a "nationally significant watershed and aquifer" needs to be better delineated under Section 7(a)(4)(A).

We would add to the list of risks to river basins under the Reclamation Climate Change Adaptation Program under Section (4)(b)(2)(C) the "rate of evapotranspiration." Moreover, it should be noted that the ability of USGS and western states to most effectively measure and monitor evapotranspiration and consumptive water uses is now threatened by the lack of funding and potential loss of a thermal infrared (TIR) sensor on Landsat 8, as part of NASA's Landsat Data Continuity Mission (LDCM).

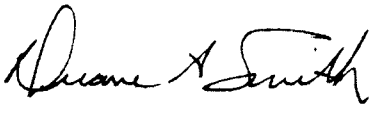
With respect to reference in the bill to "net savings in groundwater or surface water resources in the agricultural operation of the eligible applicant," we would like to point out that financial assistance decisions should take into consideration the basin-wide or aquifer-wide net water savings, and not simply on-farm water conservation.

We support authorization for continuing actions taken under such programs as the Bureau of Reclamation's Water 2025 Challenge Grants, Field Services Program and the Bridging-the-Headgate Partnership, of which the WSWC is a signatory. Further, we strongly support the inclusion of in-kind services in calculating non-federal cost sharing contributions.

May we suggest that such sums as are authorized for Reclamation-related programs and purposes should be made available from the Reclamation Fund. It is our understanding the amounts authorized for expenditure under the bill are in addition to assistance authorized and provided pursuant to other provisions of federal law. In general, we are concerned that the amounts authorized be sufficient to reasonably support the mandated activities.

We would hope in the future to continue to work with Interior and other federal agencies to improve western water management under the new authorities and funding provided by S. 2156 and will work to encourage our members, states and congressional delegations to support enactment of this important legislation, as well as sufficient subsequent appropriations to effect its purposes.

Sincerely,



Duane A. Smith, Chairman
Western States Water Council

Position No. 294
Revised and Readopted
*(Originally adopted Nov. 17, 1995, readopted Nov. 20, 1998 and revised and readopted Nov. 16, 2001, and Oct. 29, 2004)*

**RESOLUTION**
**of the**
**WESTERN STATES WATER COUNCIL**
**URGING CONGRESS TO REAFFIRM ITS DEFERENCE TO STATE WATER LAW, PROVIDE FOR THE WAIVER OF THE UNITED STATES' IMMUNITY TO PARTICIPATION IN STATE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS, AND PROVIDE FOR PAYMENT OF FEES REQUIRED BY STATE LAW**

**WHEREAS**, water is the lifeblood of each of the arid Western States, the allocation of which determines the future of each Western State's economic, environmental, social and cultural fortunes; and

**WHEREAS**, each Western State has developed comprehensive systems for the appropriation, use and distribution of water tailored to its unique physiographic, hydrologic and climatic conditions found within that state;

**WHEREAS**, the United States does not have a water management system that is equivalent to those of the Western States for the appropriation, use or distribution of water; and

**WHEREAS**, Congress has consistently recognized the primacy of state water law because of the need for comprehensive water management systems tailored to the unique needs and characteristics of the individual states; and

**WHEREAS**, Congress enacted the McCarran Amendment, 43 U.S.C. § 666, to allow the joinder of the United States in state general stream adjudications, and Congress intended the United States to be subject to the same procedures as all other water right claimants joined in state general stream adjudications; and

**WHEREAS**, many of the Western States are conducting general stream adjudications for the purpose of quantifying all water right claims in accordance with the McCarran Amendment; and

**WHEREAS**, the United States is often the largest claimant of water rights in these general stream adjudications, and the adjudication of federal water right claims requires a large commitment of time, effort and resources by the state courts and by state agencies; and

**WHEREAS**, the adjudication of water rights claims is absolutely essential for the orderly allocation of water in all the Western States where state law is based on the prior appropriation doctrine; and

Position No. 294
Revised and Readopted
*(Originally adopted Nov. 17, 1995, readopted Nov. 20, 1998 and revised and readopted Nov. 16, 2001, and Oct. 29, 2004)*

**WHEREAS**, many of the Western States' general stream adjudication procedures require claimants to pay a fee to offset the states' expenses arising from state general stream adjudications; and

**WHEREAS**, citing to *United States v. Idaho* the United states claims immunity from the payment of adjudication filing fees required of all other claimants to offset the state's judicial and administrative expenses in conducting general stream adjudications; and

**WHEREAS**, for the United States to be immune from sharing in the expenses of these proceedings constitutes an unfunded federal mandate to the states; and

**WHEREAS**, that drawn out adjudications are having a detrimental impact on the willingness of stakeholders in watersheds to collaborate on joint management and planning for water supply and water quality.

**WHEREAS**, the United States contends that it cannot be joined in state administrative or judicial proceedings with respect to water rights it has acquired under state law other than pursuant to the McCarran Amendment, 43 U.S.C. § 666; and

**WHEREAS**, it is inefficient and wasteful to require that a separate lawsuit be commenced for the sole purpose of regulating water rights acquired by the United States under state law; and

**WHEREAS**, the United States claims it is also immune from paying fees to states that are required of all other water users for the appropriation, use or distribution of water; and

**WHEREAS**, equity and fairness dictate that federal agencies who voluntarily seek to appropriate water pursuant to state law, or who acquire water rights based on state law, should be required to comply with state law, including the payment of fees, to the same extent as all other persons.

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council supports passage of legislation that at a minimum provides for the following:

1. Requires the federal government to participate in all state administrative and judicial proceedings with respect to water rights it acquires to the same extent as all other persons.

2. Requires the federal government (not Native American tribes) to pay filing fees as well as comply with all other state substantive and procedural water right adjudication laws to the same extent as all other persons.

3. Requires the federal government to pay applicable fees as well as comply with all other state substantive and procedural laws for the appropriation, use and distribution of water rights to the same extent as all other persons.

4. Provides for state administration of all water rights.

**BE IT FURTHER RESOLVED** that the Western States Water Council also urges Congress to appropriate moneys for payment of unpaid fees to states that have incurred expenses as a result of processing federal claims or federal objections to private claims in state general stream adjudications.

**BE IT FURTHER RESOLVED** that the Western States Water Council shall send a copy of this resolution to the congressional delegations representing the states and territories who are members of the Western States Water Council, to President George W. Bush, and to the President Pro-Tem of the United States Senate and the Speaker of the United States House of Representatives.

## RULES OF ORGANIZATION

Article I - Name

The name of this organization shall be "THE WESTERN STATES WATER COUNCIL."

Article II - Purpose

The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources.

Article III - Principles

Except as otherwise provided by existing compacts, the planning of western water resources development on a regional basis will be predicated upon the following principles for protection of states of origin:

(1) All water-related needs of the states of origin, including but not limited to irrigation, municipal and industrial water, flood control, power, navigation, recreation, water quality control, and fish and wildlife preservation and enhancement shall be considered in formulating the plan.

(2) The rights of states to water derived from the interbasin transfers shall be subordinate to needs within the states of origin.

(3) The cost of water development to the states of origin shall not be greater, but may be less, than would have been the case had there never been an export from those states under any such plan.

Article IV - Functions

The functions of the Western States Water Council shall be to:

(1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.

(2) Investigate and review water related matters of interest to the Western States.

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These rules incorporate the last changes that were adopted in November 1997 at the Council's 125th meetings in Carlsbad, New Mexico.

(3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.

(4) Sponsor and encourage activities to enhance exchange of ideas and information and to promote dialogue regarding optimum management of western water resources.

(5) Authorize preparation of amicus briefs to assist western states in presenting positions on issues of common interest in cases before federal and state courts.

Article V - Membership

(1) The membership of the Council consists of not more than three representatives of each of the states of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming appointed by and serving at the pleasure of the respective Governors. Member states of the Western Governors' Association, which are not members of the Council, shall be added to membership if their respective Governors so request. The Executive Committee may, upon unanimous vote, confer membership upon other western states, which are not members of the Western Governors' Association, if their respective Governor so requests.

(2) Member states may name alternate representatives.

(3) Any state may withdraw from membership upon written notice by its Governor. Further in the event any state becomes delinquent in paying dues as set forth in Article V (5) for a period of three years, the state will be excluded from Council membership unless and until the current year's dues are paid.

(4) The Executive Committee of the Council may, by unanimous vote, confer the status of Associate Member of the Council upon states it deems eligible. Associate Membership may be granted for a period of up to three years, during which time the state may appoint two official observers to participate in Council activities and receive all printed material disbursed by the Council. Associate Member states shall have no vote in Council matters. The Executive Committee shall, through regular Council voting procedures, establish the appropriate level of dues for Associate Member states. In addition to determinations concerning Associate Member states, the Executive Committee may, when appropriate, establish fees for participation in Council activities by non-members.

(5) If any state fails to pay the appropriate level of dues established by the Executive Committee of the Council, the privilege afforded by virtue of its membership to participate in Council activities and to receive all printed materials dispersed by the Council shall be withheld pending the payment of dues, beginning at the start of the fiscal year following the delinquency.

Article VI - Ex-Officio Members

The Governors of the member states shall be ex-officio members and shall be in addition to the regularly appointed members from each state.

Article VII - Officers

The officers of the Council shall be the Chair, Vice-Chair and Secretary-Treasurer. They shall be selected in the manner provided in Article VIII.

Article VIII - Selection of Officers

The Chair, Vice-Chair and Secretary-Treasurer, who shall be from different states, shall be elected from the Council by a majority vote at a regular meeting to be held in July of each year. These officers shall serve one-year terms. However, the Chair and Vice-Chair may not be elected to serve more than two terms consecutively in any one office. In the event that a vacancy occurs in any of these offices, it shall be filled by an election to be held at the next quarterly Council meeting.

Article IX - Executive Committee

(1) Each Governor may designate one representative to serve on an Executive Committee which shall have such authority as may be conferred on it by these Rules of Organization, or by action of the Council. In the absence of such a designation by the Governor, representatives of each state shall designate one of their members to serve on the Executive Committee. Any Executive Committee member may designate an alternate to serve in his/her absence.

(2) The Council may establish other committees which shall have such authority as may be conferred upon them by action of the Council.

Article X - Voting

Each state represented at a meeting of the Council shall have one vote. A quorum shall consist of a majority of the member states. No external policy matter may be brought before the Council for a vote unless advance notice of such matter has been mailed to each member of the Council at least 30 days prior to a regular meeting and 10 days prior to a special meeting at which such matter is to be considered; provided, that such matters may be added to the agenda at any meeting by unanimous consent of those states represented at the meeting. In any matter put before the Council for a vote, other than election of officers, any member state may upon request obtain one automatic delay in the voting until the next meeting of the Council. Further delays in voting on such matters may be obtained only by majority vote. No recommendation may be issued or external position taken by the Council except by an affirmative vote of at least two-thirds of all member states; provided that on matters concerning out-of-basin transfers no recommendation may be issued or external position taken by the Council except by a unanimous vote of all member states. On all internal matters; however, action may be taken by a majority vote of all member states.

Article XI - Policy Coordination and Deactivation

With regard to external positions adopted after being added to the agenda of the meeting by unanimous consent, such external policy positions shall be communicated to the member governors of the Western Governors' Association (WGA) and the WGA Executive Director for review. If after 10 days no objection is raised by the governors, then the policy position may be distributed to appropriate parties. In extraordinary cases, these procedures may be suspended by the Executive Director of the WGA, who will consult with the appropriate WGA lead governors before doing so.

Policy positions will be deactivated three years after their adoption. The Executive Committee will review prior to each regular meeting those policy statements or positions due for sunsetting. If a majority of the Executive Committee members recommend that the position be readopted by the Council, then such position shall be subject to the same rules and procedures with regard to new positions that are proposed for Council adoption.

Article XII - Conduct of Meetings

Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised. A ruling by the Chair to the effect that the matter under consideration does not

concern an out-of-basin transfer is an appealable ruling, and in the event an appeal is made, such ruling to be effective must be sustained by an affirmative vote of at least 2/3 of the member states.

Article XIII - Meetings

The Council shall hold regular meetings three times each year at times and places to be decided by the Chair, upon 30 days written notice. Special meetings may be called by a majority vote of the Executive Committee, upon 10 days written notice.

Article XIV - Limitations

The work of the Council shall in no way defer or delay authorization or construction of any projects now before Congress for either authorization or appropriation.

Article XV - Amendment

These articles may be amended at any meeting of the Council by unanimous vote of the member states represented at the meeting. The substance of the proposed amendment shall be included in the call of such meetings.