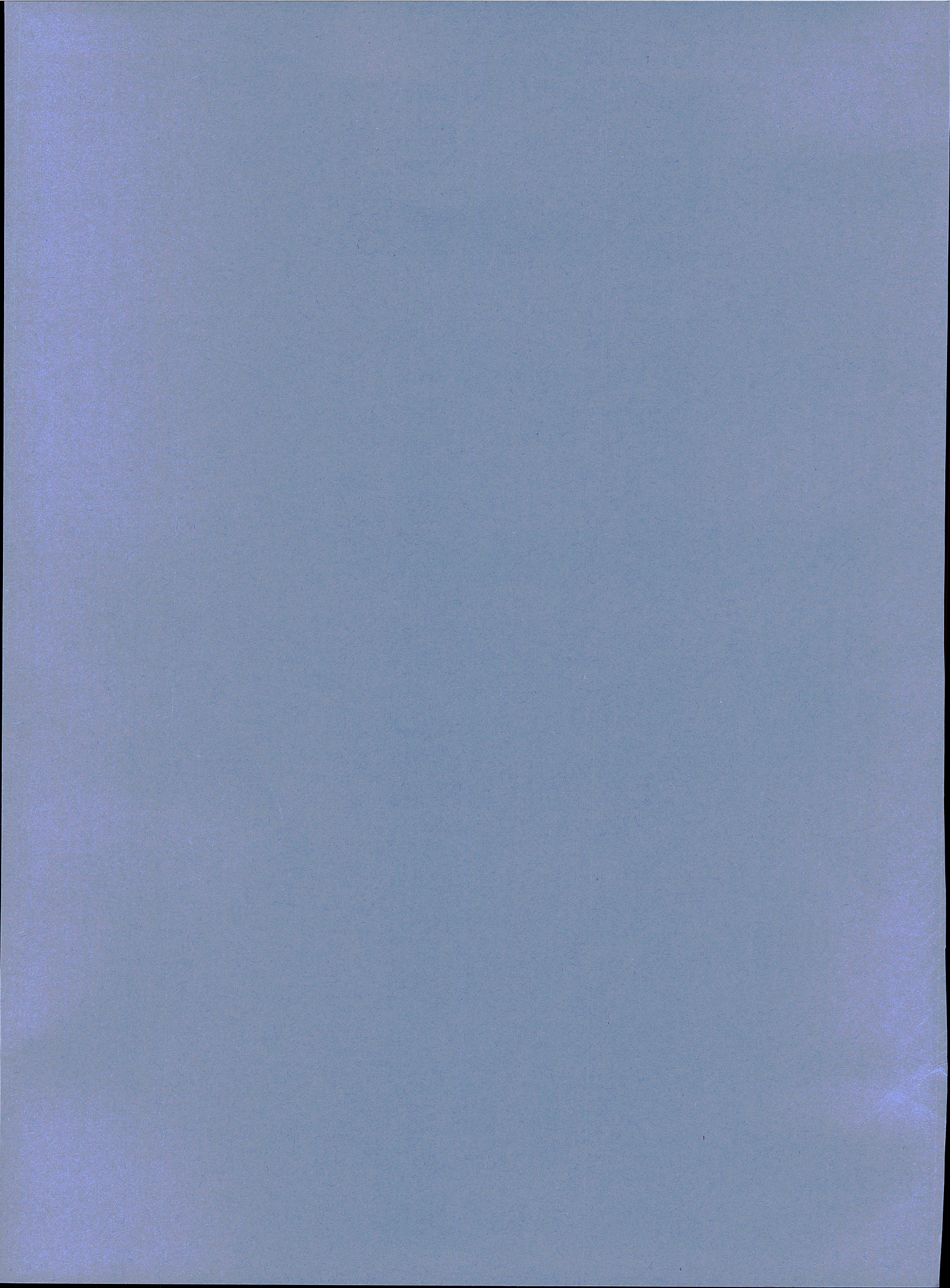


**WESTERN STATES WATER COUNCIL**

**Annual Report  
2008**









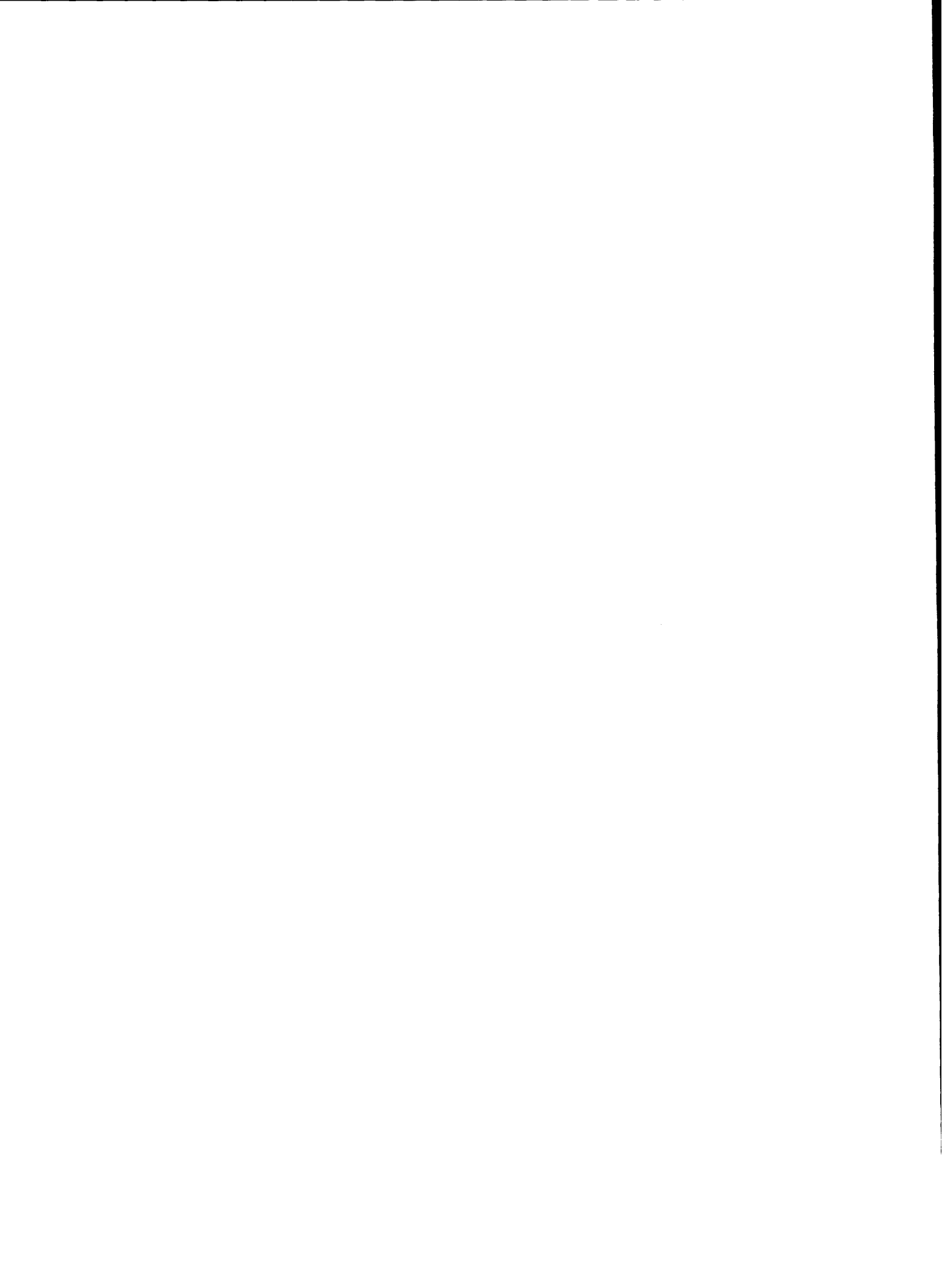
**2008**

**ANNUAL REPORT**

**of the**

**WESTERN STATES WATER COUNCIL**

**43rd Annual Report**





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# 2008 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 toward 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 2008, meetings were held in: Arlington, Virginia on March 3-7; Medora, North Dakota on July 9-11; and Oklahoma City, Oklahoma on October 14-17. 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 FY2008 (ending June 30, 2008) were set at \$30,000 per state. A copy of the audit performed for the fiscal year ending June 30, 2008 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 2008, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Deputy Director; Jeff Taylor and then Nathan Bracken, Legal Counsel; and a secretarial staff consisting of Cheryl Redding and Julie Groat. In October, Jonne Hower, joined the office as a Federal Liaison representing nine federal agencies under an intergovernmental agreement creating a Western Federal Agency Support Team (WestFAST).

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Jennifer Gimbel - Colorado  
Hal Simpson - Colorado  
(Alternate)\*  
Dave Tuthill - Idaho  
David W. Barfield - Kansas  
John Tubbs - Montana  
Brian Dunnigan - 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)\*  
Dale Frink - North Dakota  
J.D. Strong - Oklahoma  
Duane A. Smith - Oklahoma  
(Alternate)\*  
Phil Ward - Oregon  
Steve Pirner - South Dakota  
Garland Erbele - South Dakota  
(Chair) (Alternate)\*  
Thomas Weir Labatt - Texas  
(Vice-Chair)  
Dennis Strong - Utah  
Jay Manning - Washington  
Patrick T. Tyrrell - Wyoming

**Farm Bill Subcommittee**

Jeanine Jones - (Chair) - California  
Paul Frohardt - Colorado  
Adrian Polansky - Kansas  
David Glatt - North Dakota  
Phil Ward - Oregon  
Walt Baker - Utah  
Stephen Bernath - Washington  
Sue Lowry - Wyoming

**Management Subcommittee**

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(Chair)  
Weir Labatt - Texas  
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Phil Ward - Oregon  
(Secretary/Treasurer)  
Duane Smith - Oklahoma  
(Past Chair)  
D. Craig Bell  
(Executive Director)

**WSWC Water Policy Seminar Subcommittee**

Richard Opper - Montana  
Roland Westergard - Nevada

**Endangered Species Act Subcommittee**

Dean Couch - (Chair) - Oklahoma  
Tom Maddock - California  
Roland Westergard - Nevada  
James Davenport - Nevada  
Eileen Grevey Hillson - New Mexico  
Phil Ward - Oregon  
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Sue Lowry - Wyoming

**Western Water Supply Challenges Subcommittee**

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Mike Volesky - Montana  
Tracy Taylor - Nevada  
Jim Davenport - Nevada  
John D'Antonio - New Mexico  
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Dennis Strong - Utah  
Pat Tyrrell - Wyoming

**Federal Agency Support Team**

**Army Corps of Engineers** - Michael Fallon  
**Bureau of Land Management** - Nancy Dean  
**Bureau of Reclamation** - Roseann Gonzales  
**Environmental Protection Agency** - Roger Gorke  
**Fish and Wildlife Service** - David Diamond  
**Forest Service** - Jean Thomas  
**Geological Survey** - Ward Staubitz  
**National Oceanic and Atmospheric Administration** - Roger Pulwarty  
**Natural Resources Conservation Service** - Shirley Hughbanks

\*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.

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Candace West - Montana  
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Pam Andersen - Nebraska  
Roland Westergard - Nevada  
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(Alternate)\*  
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Fred N. Pfeiffer - Texas  
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Norman K. Johnson - Utah  
Barbara Markham - Washington  
Peter Michael - Wyoming

## **General Adjudication Fees Subcommittee**

Roland Westergard - Nevada  
Norman Johnson - Utah

## **Federal Reserved Water Rights Subcommittee**

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Christopher Estes - Alaska  
Norman Johnson - Utah

## **Legal Education Subcommittee**

Candace West - Montana  
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## **Amicus Brief Subcommittee**

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Norman Johnson - Utah

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John Mitchell - Kansas  
Karl Mueldener - Kansas  
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Barbara Markham	- Washington
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**COUNCIL MEMBERS**  
**Medora, North Dakota**  
**July 11, 2008**



Front Row (left to right):

Bidtah Becker, Pat Tyrrell, Jean Thomas (USFS), Herb Guenther, Sue Lowry, Roland Westergard, Joan Card

Second Row (L to R)

Jennifer Gimbel, Guest, Hal Simpson, Bill Staudenmaier, John Brenner (NRCS), Dale Frink, Dennis Fewless, Tom Maddock, Phil Ward, Ken Slattery, Dave Dillon

Third Row (L to R)

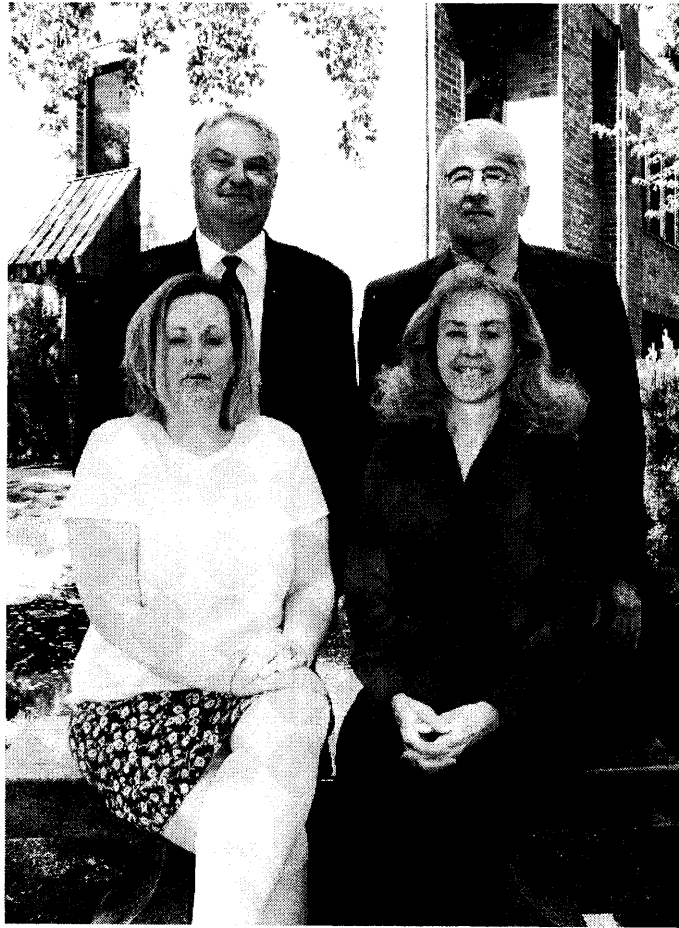
John Utton, Larry Anderson, Norm Johnson, Todd Sattler, Guest, Weir Labatt, Mike Fallon (USACE)

Fourth Row (L to R):

Garland Erbele, Paul Graves, John Tubbs, Ward Staubitz (USGS), Dave Tuthill



## 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

### 156<sup>th</sup> Council Meetings Arlington, Virginia March 3-7, 2008

On March 7, the 156<sup>th</sup> Council meeting was held in Arlington, Virginia. Dr. Michael Freilich, Earth Science Division Director, National Aeronautics and Space Administration (NASA), reported there is no plan now to include a thermal infrared sensor (TIRS) on Landsat 8, to be launched in 2011. However, the FY2008 consolidated appropriations package stated: "NASA is directed to provide a plan on all continuity of data for the Landsat Data Continuity Mission (LDCM) to the Appropriations Committees no later than 120 days after enactment.... The amended bill provides \$1 million above the budget request for this mission to ensure data continuity." The report is due April 25.<sup>2</sup>

Dr. Freilich said NASA intends to report on future alternatives for acquiring TIR data from foreign sources, a separate free-flyer satellite or missions of opportunity where TIR might be added. He reported that if NASA were directed to include TIR today, it would likely delay the launch of Landsat 8 until December 2012, which would be unacceptable for most Landsat Science Team members. However, in a January 2007 letter to NASA Administrator Michael Griffin and USGS Director Mark Myers, the team leader, Dr. Curtis Woodcock wrote: "The Landsat Science Team strongly and unanimously recommends that the thermal imager option...be fully funded and implemented.... [I]t is clear that the absence of a thermal imaging capability compromises many important applications, particularly water resources management. Land-surface temperature is a fundamental quantity in Earth science and measuring it is critical to the management and operation of water resources systems of the U.S." Dr. Freilich stated that a "consistent, sustained" effort will be needed to demonstrate support for TIR, and there are no plans for what comes after Landsat 8. Given the lack of a viable alternative and its importance for water management, the WSWC strongly supports including the TIR imager and members fear if it isn't included, it may be a decade before such a capability and TIR data are restored.

Of note, the Council acted to update a sunset position on drought, reiterating its support for a National Drought Council and standing federal authority for pro-active drought preparedness, response and mitigation assistance. It also approved sending two letters related to funding for the Environmental Protection Agency's Clean Water and Drinking Water State Revolving Funds (SRFs), with one specifically questioning recent efforts to deny states their long-standing ability to use SRF funds to repay state bonds issued to match federal capitalization grants. Twenty states, including several western states, now take advantage of this practice which has been approved in the past by EPA, but is facing opposition from EPA's Inspector General and the Office of Management and Budget (OMB). Separately, the Council discussed a possible letter regarding funding for the Administration's Water for America Initiative, which will be further refined and presented to the Western Governors' Association for review before it is distributed.

The Water Resources Committee's meeting on Thursday, March 6, chaired by Phil Ward of Oregon, included a number of special guests. Rep. Grace Napolitano (D-CA), Chair of the House Committee on Natural Resources, Water and Power Subcommittee, covered a number of issues. She said, "I hear a lot of good things about your organization.... You're out ahead on climate change.

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<sup>2</sup>*Western States Water*, Issue #1753, December 21, 2007.

We do have it.... We need to deal with it.” She praised the WGA Water Needs and Strategies Report, saying Congress should read it and “take it to heart.” She discussed the Water 2025 and Water for America Initiatives, neither of which have been authorized by the Congress, and lamented the requested funding was “a drop in the bucket,” given the needs. She added, “Water is critical to our economy.” Speaking about California, she noted that through conservation, recycling and desalination they have maintained the same water use as 10 years ago, despite growth. Regarding short and long-term actions, she conceded we will need more dams in the future, but should now focus on underground water storage, recycling, brackish water treatment, and other water supply alternatives. She touched on aging infrastructure needs and Indian water rights, saying, “Every area has the right to potable water and assistance when they can’t afford it.” She encouraged the Council to reach out and “talk about your issues. If you don’t, you’re not getting our attention. Be vocal and engaged. Water is not a sexy issue.... I’d like to know your priorities.”

Tom Ryan, Metropolitan Water District of Southern California, summarized current bills authorizing weather modification research. Karl Wirkus, U.S. Bureau of Reclamation, Deputy Commissioner, described the Water for America Initiative, the FY2009 budget, and ESA challenges in California’s Central Valley, and the Columbia-Snake, Klamath, Middle Rio Grande and Platte River Basins. He also reviewed Reclamation’s (MFE) Managing for Excellence efforts. Half the recommendations have been implemented, and a final report is under review. Barney Austin Director, Surface Water Resources, Texas Water Development Board, discussed federal and state roles and programs related to water data needs. Jeanine Jones, Interstate Resources Manager, California Department of Water Resources, briefly mentioned work on climate change and upcoming workshops. Ray Byrnes, U.S. Geological Survey (USGS) Liaison for Satellite Missions discussed support for LDCM and TIRS. He observed, USGS and NASA have heard from you. “If Congress says build it and put it on the satellite [Landsat 8], we would make it happen.” Next, Jason Albritton, Nature Conservancy, and David Anderson, Natural Resources Results LLC, talked about efforts to include some type of Regional Water Enhancement Program (RWEP) with competitive performance measures to benefit watersheds as part of the Farm Bill. Lastly, Catherine Shrier, Watercat Consulting, described a National Academy of Sciences study of managed underground water storage and an upcoming forum on ways to communicate study findings and implement study recommendations.

The Legal Committee, chaired by Norm Johnson of Utah, also met on Thursday, March 6. John D’Antonio, New Mexico State Engineer, discussed New Mexico’s approach to regulating exempt wells, which is a politically sensitive topic in the state. Nevertheless, unregulated exempt wells in densely populated areas can adversely impact hydrologically connected surface waters, including those regulated by interstate compact. This is particularly true along the Middle Rio Grande. Several regulatory measures have been challenged in state court, including the New Mexico Supreme Court. Susan Cottingham, Montana Reserved Water Rights Compact Commission, provided a brief update on the status of Indian water rights settlements. Negotiating teams are stretched thin, but progress is being made. Funding remains a major obstacle for implementing settlements. Susan and others met with congressional staff earlier in the week and remain optimistic about the prospect for future settlements. The Committee also discussed combining the existing legal reports into a single document that would represent a staff product, to be appended to the WGA Progress Report. The committee concluded with a short roundtable discussion of legal developments in member states.

Also, on Thursday afternoon, Michael Connor, Majority Counsel for the Senate Energy and Natural Resources Committee, chaired by Senator Jeff Bingaman (D-NM), arranged for a Western

Water Briefing in a Senate hearing room where several WSWC members briefed about a dozen congressional staff on the 2006 WGA Water Report and WSWC legislative priorities, including funding for TIRS, snow survey and streamgaging programs, Indian water rights settlements, and challenges related to growth, climate change, endangered species, and infrastructure.

On March 5, the Water Quality Committee met with Joan Card of Arizona as chair. Benjamin Grumbles, EPA's Assistant Administrator for Water, discussed several matters including further *Rapanos* guidance on federal wetlands jurisdiction, which should be available in the near future. He was unable to talk about the exact nature of the guidance, but said changes will soon be published in the *Federal Register*. Mark Sudol, U.S. Army Corps of Engineers' Washington, D.C. regulatory office, gave the Corps' perspective on the guidance. While *Rapanos* complicates jurisdictional determinations in many instances, the Corps and EPA are cooperatively processing applications. Brian Frazer, EPA, said that relatively few applications are "stuck" at headquarters. He suggested the majority of the backlog involves a series of applications from a single region.

Next, Shari Barash, EPA Water Quality Standards Program, discussed the regulation of effluent-modified waters. She said Wyoming has taken some significant steps toward classifying such waters, largely based upon the present aquatic biological community. EPA is still evaluating the status of effluent-modified waters and no final regulatory decisions have been made. Ryan Seiger, Majority Staff Director, House Transportation and Infrastructure, Water Resources and Environment Subcommittee, discussed the status of the Clean Water Restoration Act (CWRA), which he said is designed to return CWA jurisdiction to pre-*SWANCC* conditions. Some members expressed concern over the potential breadth of the CWRA, including its application to ground water, given the lack of limiting language. The committee concluded with a brief update on mercury monitoring in various member states, and a roundtable discussion of current state water quality priorities.

Separately, the Council was joined by the Interstate Council on Water Policy (ICWP) and Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) in a series of meetings covering various topics, plus two special sessions addressing our water infrastructure needs. All these meetings were well attended and well received. A joint luncheon of the organizations leadership offered an opportunity to address shared interests, and a joint reception also brought members together (with Congressional staff invited).

**157<sup>th</sup> Council Meetings  
Medora, North Dakota  
July 9-11, 2008**

The 157<sup>th</sup> WSWC meetings were held in historic Medora, North Dakota on July 9-11 and members toured the adjacent Teddy Roosevelt National Park. New Council officers were elected, with Garland Erbele of South Dakota, selected as Chairman; Weir Labatt of Texas, Vice Chairman; and Phil Ward of Oregon, Secretary/Treasurer. Members expressed their sincere thanks to Duane Smith of Oklahoma, who had served as Chairman for the past two years. The Council adopted three position statements, one related to aging infrastructure, another related to support for watershed groups, a third commenting on H.R. 135, to establish a "Twenty-First Century Water Commission," and also revised and renewed a number of sunseting positions.

The first new position in the form of a letter supports enactment of S. 2842, the Aging Water Infrastructure and Maintenance Act, introduced by Senate Majority Leader Harry Reid (NV). It



states: "The safety and prosperity of many of our western communities depend on our aging, rapidly deteriorating and increasingly vulnerable water supply infrastructure.... Westwide there are many transferred works with the facilities operated and maintained by non-federal entities, while title to the project is retained by the federal government.... The legislation would fill an important gap in the protection of infrastructure owned by the United States, but often operated by local entities and not covered under the Reclamation Safety of Dams Act.... S. 2842 provides for the inspection of all [Bureau of] Reclamation project related facilities, both reserved and transferred works, within two years.... Data collected will be used to prepare detailed regular maintenance schedules and guidance, as well as a national priorities list of facilities requiring urgent action...."

The second position, also in the form of a letter, provides comments on S. 3085, the Cooperative Watershed Management Act, recently introduced by Senators Jon Tester (D-MT), Max Baucus (D-MT), Mike Crapo (R-ID) and Larry Craig (R-ID). It is designed to provide grants to support grassroots, non-regulatory watershed management groups to address local water availability and quality issues. It reads, in part, "States have primary responsibility for managing their water resources, both quantity and quality, and the legislation should explicitly recognize and provide support for ongoing watershed efforts in the states and close consultation with the states in the implementation of any new federal program. States are in the best position to evaluate and prioritize their needs and the governor of a state should be consulted in the selection and prioritization of funding for watershed groups."

A third letter commenting on H.R. 135 declares that if a new water commission is to be created, "it will be important that it represent the diverse interests that exist, including State and Native American involvement." It says the WSWC "...should be involved in the selection of members." Lastly, it also suggests that a mandated review of current water management programs should include tribes, as well as Federal, interstate, State and local agencies' and private sector entities' programs.

The Council replaced a position in support of S. 895, since enacted (P.L. 109-451), and reiterated its support for an assessment of rural water supply needs by the Bureau of Reclamation in cooperation with the states and other federal agencies (No. 263). The new letter expresses disappointment with the Administration's failure to request sufficient funding to implement the act. Further, it strongly takes exception to a recent directive from the Office of Management and Budget (OMB) that essentially negates the benefits of an authorized federal loan guarantee program (under Title II) that is intended to help non-federal project sponsors and operators of "transferred projects" obtain private financing for extraordinary project operation and maintenance and rehabilitation and betterment costs, where title to a project remains with the United States.

OMB is requiring that the Bureau of Reclamation "...record obligations up-front for the *full Governmental contingent liability* of loan guarantees issued to finance improvements to Federally owned assets, reflecting the Government's ownership and its full risk for repayment of the loans...." For example, Reclamation would have to budget \$8 million up-front to fund an 80% guarantee on a \$10 million loan. The letter points out, "Title II addresses guarantees of the non-federal financing of the non-federal share of the cost – not the government's share. The effect of this OMB interpretation is to eviscerate Title II and negate the Congress' intent to fill a critical gap in federal and non-federal financing capabilities by supplementing direct federal funding and leveraging federal spending by making it easier for non-federal beneficiaries to fund projects through private lenders...."

The letter adds, "[The Congressional Budget Office] CBO scored the loan guarantees at only 1%-2% for future appropriation purposes. The value of non-federal real private property rights are

directly dependent on the federal assets, maintained privately through contractual legally binding agreements. The non-federal water districts...are essentially 'public' entities' [that] bear substantial economic and social trust responsibilities. They are credit-worthy local entities, private collateral is pledged as security and the government has significant recourse to recover its costs if there is a default. The minimal federal investment through federal loan guarantees promises to substantially reduce the rising risks to life and property that are a result of the current inability to privately finance the proper maintenance, repair and rehabilitation of these federal facilities, operated by non-federal entities. We urge the Congress [and the Administration] to address this issue promptly and clear the way for implementation of the law...."

Position statement No. 264 was revised to renew strong WSWC support for legislation to develop and implement a comprehensive and coordinated national policy and cooperative federal program to enhance research and development by both private and public entities related to weather modification and mitigation, including snowpack augmentation, rainfall enhancement and hail suppression. It notes that western states support many operational weather modification projects and permit such activities for various purposes under varying state statutes. There is strong physical and statistical evidence that weather modification can create additional snowpack in watersheds, but a coordinated national program would help further our understanding of the utility of weather modification and advance the science related to the "reasonable and responsible development and control of our atmospheric resources."

Position statement No. 265 was revised slightly and renewed to ask the Administration and the Congress to "fully utilize the funds [in the Reclamation Fund] provided through the Reclamation Act and subsequent acts for their intended purpose in the continuing conservation, development and wise use of western water resources to meet western water-related needs...and work with the States to meet the challenges of the future. Such 'needs' may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlement, rehabilitation of aging infrastructure, appropriate environmental restoration efforts in consultation with affected states, and other legitimate needs that may be financed by these reserves." According to the FY2009 budget request, actual and estimated appropriations from the Reclamation Fund are \$981 million for FY2007, \$1.05 billion for FY2008, and \$870 million for FY2009 – compared to actual and estimated receipts of \$1.85 billion, \$2.09 billion and \$2.49 billion respectively – and the unobligated balance continues to grow from an actual balance of \$5.67 billion at the end of FY2006 to an estimated \$9.23 billion by the end of FY2009. The Council position also calls for an investigation of the "advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit."

Position No. 266 reiterates support for the Water Resources Research Institutes, which "assist our state water agencies in a number of ways as they seek to address the increasingly complex challenges associated with water management in the West. The challenges are exacerbated by the uncertainty surrounding climate change, population growth, economic and environmental water demands. The Council has been working with the institutes and other academic water research centers to ensure research investments are relevant to our most pressing water problems.... This is a very worthwhile partnership and we respectfully request...that appropriations for the state water resources research program be maintained and increased."

The Council again reiterated its very strong support for full funding of the U.S. Geological Survey's National Streamflow Information Program (NSIP) at \$110 million/year and restoring the Cooperative Water Program (CWP) to a 50%-50% match, which would require more than twice the

USGS FY2009 request of \$62.3 million. The letter states that "...flat or nearly flat federal spending in the face of continually rising federal costs – has inappropriately shifted to the states the lion's share of the financial burden for maintaining the national streamgaging system. States are willing to fund their share of this important program, but the federal share is critical." In FY2007, cooperators in WSWC member states provided \$67,870,000 for CWP compared with the USGS match of \$32,766,000 (or \$35,104,000 short).

The Council also adopted a special resolution of appreciation in memory of John W. Keys III, who died in a tragic small plane accident, as a "most distinguished citizen, friend and colleague." John served in the U.S. Bureau of Reclamation for nearly 40 years, including 12 years as the Pacific Northwest Regional Director and five years as Commissioner. It states: "John contributed greatly to the management and protection of water resources throughout the West during his distinguished career.... Council members express their sympathy and sincere condolences to his wife and family."

Three past position statements were allowed to sunset without Council action.

**158<sup>th</sup> Council Meetings  
Oklahoma City, Oklahoma  
October 15-17, 2008**

The 158<sup>th</sup> WSWC meetings were held in downtown Oklahoma City, Oklahoma on October 14-17. Duane Smith, Executive Director of the Oklahoma Water Resources Board (OWRB) and the Council's immediate past Chairman, hosted the meeting. The Council presented Duane with a gavel honoring him for his service over the last two years. The Council also recognized the service of Norm Semanko of Idaho for his eight years of service on the Council as a member of the Legal Committee. The WSWC also welcomed Jerry Rigby, Chairman of the Idaho Water Resources Board, as a newly appointed member. Jerry's father, Ray Rigby, is a former WSWC Chairman.

The Council adopted one new position statement in the form of a letter related to S. 3213, the Omnibus Public Land Management Act of 2008, introduced by Senator Jeff Bingaman (D-NM), Senate Energy and Natural Resources Committee Chairman. It states: "Section 1061 would establish in the U.S. Treasury a Reclamation Water Settlements Fund to which would be deposited \$120 million/year...from revenues available to the Reclamation Fund.... These amounts would be available without further appropriation and would be in addition to amounts otherwise appropriated by law" to implement Indian settlement agreements approved by Congress that require financial assistance from the Bureau of Reclamation (Reclamation). The bill also includes many state-specific land and water provisions, including settlement of New Mexico Indian water rights and California's San Joaquin/Central Valley water rights settlement.<sup>3</sup> The letter says, "We leave it to our state members to express their individual interests in the bill, but wish to express our strong support for the increased use of Reclamation Fund revenues to meet western water needs."

The Council reviewed eight sunsetting positions, allowing a number to expire, given subsequent events that made them outdated. The Council allowed Position No. 270 regarding the 2007 Farm Bill to sunset with enactment of new legislation. The new law created an Agricultural Water Enhancement Program, supported by the Council, and its efforts will be focused in the future on implementing this provision of the law, which will provide future financial assistance for better water management on a regional scale.

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<sup>3</sup>*Western States Water*, Issue #1784, July 25, 2008.

Second, Position No. 271 regarding support for the National Aeronautics and Space Administration's (NASA) Landsat Data Continuity Mission (LDCM) and calling for continued funding to include a thermal infrared sensor, has been superceded by WSWC Position No. 283 and was therefore allowed to sunset.

Third, the Council renewed Position No. 272, which sets forth the WSWC's position regarding general stream adjudications. In relevant part, the position states that federal agencies should pay their fair share of the costs associated with their claims in state adjudications, and that the federal government should not initiate claims in federal court that deal with the subject matter of a state adjudication (under the McCarran Act).

Fourth, the Council allowed Position No. 273 to sunset as no longer timely. The Office of Management and Budget had at the time proposed cutting Section 319 planning grants administered by the Environmental Protection Agency (EPA) related to non-point source pollution, given the availability of related federal Farm Bill programs. The Council commented on the importance of these grants to state water quality programs.

Fifth, the Council revised Position No. 274, stating that "...any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding." A new clause was added that reads: "Whereas, the regulatory reach of the Clean Water Act was not intended and should not be applied to the management and protection of ground water resources contravening state water law, policies, and programs."

Sixth, the Council reaffirmed Position No. 275, which supports Indian water rights settlements and recommends that the federal government provide appropriate funding for such settlements. The Council revised the position to include language in the Western Governors' Association 2008 "Next Steps" Report saying, "Congress should explore opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, recognizing the existence of other legitimate needs that may be financed by these reserves."

Seventh, the Council allowed Position No. 276 to sunset as it has been superceded by adoption of WGA Policy Resolution 08-20, related to recognizing and maintaining States' mandatory conditioning authority, as part of the federal hydropower licensing process, under Section 401 of the Clean Water Act (CWA). Further, the WGA observed: "FERC's new Integrated Licensing Process is a positive step and incentive, which will help restore the efficient and effective interaction of our federal/state system of governance."

Eighth, the Council allowed Position No. 277 to sunset. It was a letter to EPA's American Indian Environmental Office in support of efforts to establish a Tribal Water Program Council, which had since been created to "offer an ongoing opportunity for state-tribal cooperation on issues of mutual interest."

Of note, on Wednesday morning members met to review in depth proposed committee work plans, which focus on implementation of the 2008 WGA/WSWC "Next Steps" report. A memorandum identifying WSWC priorities was presented, discussed and later revised and approved by the Council. Also, the Western States Federal Agency Support Team (WestFAST) met for the first time and interim Chair Mike Fallon, Army Corps of Engineers Southwest Division, was selected as Chair, with Roger Gorke, Environmental Protection Agency (EPA), Vice-Chair (through June



2009). Mike said WestFAST had also identified some possible priorities. A draft work plan will be submitted for WSWC approval. WestFAST intends to connect it with the WSWC committee work plans.

Ada Benavides, Deputy Chief, U.S. Army Corps of Engineers (Corps), South Pacific Division outlined a study of the water plans of all fifty states. The Corps has contracted with Camp, Dresser & McKee (CDM) to complete an assessment and summary report. A timeline includes conducting interviews with western state representatives by January 2009, holding a regional meeting in the West in April 2009, followed by a national meeting with all 50-state governors invited, and a final report by December 2009. Dr. Joe Manous, with the Corps' Institute on Water Resources (IWR), expanded on the Corps' purpose in commissioning this study at the full Council meeting. He emphasized the intent is to work cooperatively with the States and identify opportunities for the Corps to support state water planning efforts (not to critically evaluate and recommend changes in state water plans).

Duane Smith and Kyle Arthur, OWRB, outlined the Oklahoma Comprehensive Water Plan and discussed the development process, including partnering with federal agencies, public participation, and expert analysis to determine Oklahoma's priority water issues. Oklahoma believes this process can serve as a model for the Nation. OWRB has made a concerted effort to involve the public by holding 42 local input meetings and reviewing thousands of public comments. The state also expects water purveyors to prepare 50-year water plans. Noel Osborn, an OWRB geologist, discussed a current study of the Arbuckle-Simpson Aquifer in southcentral Oklahoma. It provides water for a number of springs and streams. Requests to pump some 88,000 acre-feet of water have been filed, and the Oklahoma Legislature placed a moratorium on these applications until OWRB can determine the maximum amount of yield that would not damage the aquifer and its springs.

In addition to the proposed and sunseting positions, the Water Resources Committee discussed pending federal legislation, as well as a recent climate workshop and next month's water related information symposium. Dr. Cat Shrier, Aquifer Storage Issues, LLC, talked about aquifer storage and recovery issues, and its potential role in climate change adaptation. Jim Hess, Associate Director of Operations, Bureau of Reclamation, described an interim rule implementing the Rural Water Supply Act related to project eligibility, cost sharing, appraisal and feasibility reports and criteria. The Committee also adopted a 2009 work plan, with emphasis on basic data gathering and maintaining a viable streamgaging network, water conservation, emerging water/energy issues, and reevaluating the prospects for a national drought policy.

The Water Quality Committee also addressed a number of sunseting positions. Derek Smithee, OWRB, provided an update of litigation in Florida, Louisiana and Tennessee related to nutrients and antidegradation requirements. Roger Gorke, EPA Office of Water, next discussed climate change strategy, *Rapanos* guidance, and water quality standards. The Committee adopted a 2009 work plan that anticipates preparing reports that will compare the states' water quality standards, discuss infrastructure issues impacting clean drinking water, and assess anticipated effects of climate change on water quality.

The Legal Committee acted to update two sunseting positions, and adopted a 2009 work plan with proposed reports examining the legal aspects of "Ag-to-Urban" transfers, describing the administrative and legal considerations for implementing and/or improving water conservation and water reuse programs, and assessing the legal issues associated with exempt livestock and domestic wells. DL Sanders of New Mexico reported on the latter, with Dean Couch, OWRB, addressing water conservation. A roundtable discussion included pending litigation.

A pre-meeting field trip, included a visit to the National Severe Weather Center located on the campus of the University of Oklahoma in Norman, with a discussion of the State's Mesonet System, which uses a number of solar powered sites to transmit weather and water-related data (precipitation, temperature, wind, soil moisture and ground water levels) using the State's police communications system. The tour ended at the Oklahoma City National Memorial honoring the victims of the 1995 bombing.

## **OTHER MEETINGS**

### **Climate Change Adaptation Policy Workshop**

The Council, Western Governors' Association, and California Department of Water Resources jointly hosted a workshop on Climate Change Adaptation Policy in Irvine, California on September 24-26. The focus of the workshop was on tools for adaptation to climate change and variability, including beginning development of a set of tools that states could use as a standard of practice for climate change adaptation. Specific topics covered in the workshop included improvements in weather/climate prediction, revised hydrologic design criteria, modification of reservoir flood control rule curves, and risk management techniques.

The workshop is one aspect of implementing the recommendations in the WGA's June 2006 report, Water Needs and Strategies for a Sustainable Future, and June 2008 Next Steps report. The latter notes that the "undefined and undefinable climate and other variables mean continuing uncertainty and highlight the necessity of taking incremental steps and the need for adaptive management approaches." Powerpoint presentations are posted online at: <http://www.westgov.org/wswc/08%20cc%20policy%20workshop.html>.

### **The West's Water Future: Water Information Needs and Strategies**

The State of Utah hosted the WSWC's 2008 Water Management Symposium in Salt Lake City, on November 17-19. Nearly 100 experts from federal, state and local governments, as well as academia and private industry, attended. WSWC member states represented included California, Idaho, Montana, Oklahoma, Oregon, South Dakota, Texas, Utah and Wyoming. Participants listened to senior federal officials discuss our water information needs, and other experts make panel presentations focused on both water quantity and water quality data and information. Small groups addressed 20 questions designed to help better define the scope of the problem and possible solutions. Participants were also asked to add their own questions and develop recommendations for future action.

While unable to attend in person, Utah Governor Jon Huntsman, Chairman of the Western Governors' Association (WGA), provided a video presentation. The following is the text of his message:

As Governor of the greatest state in America, it is a pleasure to welcome you here. You meet in a place like others in the arid West where history has been defined and shaped by water. Our future will likewise be determined in large part by the availability and quality of this precious and vital resource. Utah's population along with the entire region is growing rapidly. Meeting the needs for water for our growing cities, rural communities and agricultural areas is critical to our economic well being.

In the context of these growing and competing demands for water, the Western Governors directed WGA and its affiliate organization, the Western State Water Council, to develop strategies for providing sustainable water supplies in the West. As a result, we have developed a road map to fundamentally improve the way states and the federal government carry out their respective responsibilities regarding water management in the West.

We are committed to crafting a comprehensive plan to significantly enhance our ability to gather, coordinate and effectively disseminate information to decisionmakers regarding water supply, water quality, water uses and projected demands. This will require a coordinated effort by all levels of government, as well as participation by the private sector, in other words an effort by individuals in this group.

I wish you the best of success and look forward to reviewing the results of your work.

Thank you so very much for being here.

Garland Erbele, the WSWC Chair from South Dakota, outlined the purpose of the meeting, which was to highlight the importance of good data and sound science for water resources management and decisionmaking. He stated, "Given the West's phenomenal population growth, ever increasing water demands for economic and environmental purposes, and the uncertainty surrounding the impacts of climate change on our future water supplies, providing timely and accurate water information for decisionmakers and planners has never been more important. Improving our ability and skill in analyzing, predicting and managing changes related to water will be critical, and this symposium will explore data gathering, decision support and water planning tools.... We intend to use your expertise and these discussions to help produce a plan and set priorities for future research, data gathering and analytical activities, as well as recommend steps to better define appropriate governmental roles and responsibilities."

WSWC Vice Chair, Weir Labatt, of Texas, summarized the water information needs identified in the WSWC/WGA 2006 Water Needs and Strategies for a Sustainable Future Report, and subsequent 2008 Next Steps Report. These reports observe that decisions about where and how to grow are rarely influenced by water policy or by the availability of water. They promote increased support and funding from federal and state agencies for basic water data gathering activities, identifying gaps in data, and creation of a broad integrated water resources information system, "which would serve as a basis for water-related planning, preparedness and response activities." Moreover, they call for a state-by-state and westwide summary of existing water uses, water plans and current water supplies, as well as anticipating future demands and evaluating trends. The 2008 Next Steps Report declared, "Decision makers at all levels need more reliable, basic water resources information, better visualization and analytical tools, and improved models that are dependable and scaled to fit the watershed or problemshed, requiring greater communication with academic, governmental and private research and development organizations." Weir went on to describe data collection activities in Texas, including water use surveys, ground water monitoring, funding for streamgaging, and lake sediment surveys (including related changes in reservoir storage capacity). Texas has developed Ground Water Availability Models (GAMs) for every major aquifer, and Water Availability Models (WAMs) for its river basins. This information, along with population projections, was incorporated into its Water for Texas 2007 plan.

Among the special guests were: Brigadier General John R. McMahon, Commander, South Pacific Division, U.S. Army Corps of Engineers (USACE); Robert S. Webb, Chief, Climate Analysis Branch, National Oceanic and Atmospheric Administration (NOAA); Robert W. Johnson, Commissioner, Bureau of Reclamation; Arlen Lancaster, Chief, USDA's Natural Resources Conservation Service (NRCS), Benjamin H. Grumbles, Assistant Administrator for Water, Environmental Protection Agency (EPA); and Robert M. Hirsch, Senior Scientist (and former Associate Director for Water), U.S. Geological Survey (USGS). They provided a broad overview of many water-related issues.

General McMahon focused his remarks on the Corps' water management capabilities and ways the Corps can support state water plans and visions by building strong collaborative relationships for a sustainable water resources future (consistent with the WSWC/WGA reports). He noted that the world is changing, and so is USACE. "The paradigm has shifted and continues to evolve for the Corps – moving from projects to comprehensive plans (integrated with those of local and state partners)...." He observed that the Corps is seeking "horizontal alignment with stakeholders, from knowledge is power to sharing knowledge, from following the cookbook recipe to thinking creatively and innovatively using a systems-based approach that considers risk, from reducing federal expenditures and minimizing exposure to leveraging resources and authorities with those of others, and from a plan-build-turnover and forget approach to a full life cycle approach. USACE is listening intently to the voices of states and regional entities about your water resources concerns and priorities and we want to help...." He added that it's clear water supply, water quality, flood damage reduction, sedimentation, ecosystem health, public safety and health are all interrelated. In evaluating needs in a watershed or basin, he said, "I like to ask a set of fundamental questions: What's the situation? What infrastructure exists? How well do we understand the system? What is the vision for the future of the watershed? What's the roadmap for getting there? What are the issues? Who are the stakeholders and players? What are their priorities?"

He declared, "I want you to know that we are listening and that we have heard you.... We all clearly see the challenges.... There is the obvious disconnect between where and how growth is allowed to occur and water policy and availability. This is a contentious issue.... There's a new paradigm emerging which features a bottom up approach that relies on local stakeholders, often on a watershed basis, coming together to define and bring to state and federal agencies their perceived needs and most preferred solutions – which can be compiled and reconciled with adjacent communities' needs in the form of a general state water plan." He added, as the Reports note, that the "...federal agencies' water supply policies, programs and projects need to take into account those watershed planning efforts and ensure their mission related activities are as consistent as possible." He explained, "To this end, the Corps has begun an assessment [of state water plans] – whose goal is to identify opportunities for federal support to the states through a process of close collaboration and consultation with all [including] conducting a series of interviews and regional conferences with state and federal partners to validate issues/trends and identify areas where the federal government can focus our effort to support States." He also noted the creation of the Western Federal Agency Support Team (WestFAST), chaired by Mike Fallon with the Corps, and the new WestFAST liaison, Jonne Hower, working out of the WSWC's office to facilitate collaboration. He concluded, "These are clearly exciting times!"

Robert (Robin) Webb described the events and activities leading up to creation of a National Integrated Drought Information System (NIDIS), including the Western Governors' Association's 2004 National Drought Policy Report, which called for proactive mitigation. Droughts are diverse on a temporal and spatial scale, and vary in their severity and impacts. We have seen modern decadal droughts, and we hope not to see centennial droughts, but we have in the past. At any one time half the country is in drought, but is it the same drought? The WGA report concluded that there is "no systematic collection and analysis [of drought impacts information that] exists today." The idea behind NIDIS is to address drought as a critical hazard and empower people to create more "resilient" communities. NOAA was charged by Congress with "leading the cats." He noted that more information is now available through the publication and dissemination of a regular weekly U.S. Drought Monitor and U.S. Drought Outlook, which are multi agency contributions. A U.S. Drought Portal has also been established, and though a critical step, it was only part of NIDIS. There are still issues involving communication and adaptation. Separately, NOAA is also moving forward



with creation of a National Climate Service to similarly bring together in one place information on climate and climate changes.

Robert Johnson offered observations related to the transition with the new Obama Administration. David Hayes, John Leshy and John Echohawk are names that have been mentioned as part of the Interior transition team. Briefings with the teams are beginning. Early next year, an acting Commissioner will be named for the Bureau of Reclamation. Robert expects a smooth transition, with the many excellent career staff remaining. He declared, "I don't believe that water is a partisan subject.... I've seen Administrations come and go.... When it comes to making on the ground decisions, there isn't much difference." Decisions are dictated more by the circumstances. Robert spoke frankly about one of his biggest frustrations – the federal budget process. "We've never had a congressman tell us we're wasteful and inefficient, or that we don't like what you're doing.... It's you're not asking for enough money.... It's a tight rope to walk sometimes to defend the President's budget." Each year we get a target from the Office of Management and Budget (OMB) and we have to budget for that amount, regardless of our needs and wants. We try to do the best we can, but can fund nothing at an adequate level, given the needs. In 1985, Reclamation had its first billion dollar budget, compared to OMB's \$900 million FY2009 target for Reclamation. We're underfunding our potential. You've asked for funding for our Technical Assistance to the States (TAS) program, which was cut. Organizations like yours can have an impact. Congress has narrowly focused parochial interests. Only the White House can make western water a national priority. You can help.

"Now to my speech!" Bob discussed some contemporary water problems, some tools to solve those problems and some broad observations about issues. Drought and climate change remain major challenges. While last year was a good water year, drought remains a cause of concern, as it has been since 2000. Climate change models help us better define our future expectations, and for the most part the West is "red" or drier, with the exception of the Northwest, which is "blue" or wetter. On the other hand, nine of the twelve fastest growing states in the nation are in the West, as are eight of the fourteen most populous cities. Conflict over water supply and water use are growing. The Southeast's experience with trying to resolve their interstate disputes over water have been unsuccessful. They are a hundred years behind the West. In the West, we face stress on our water supplies not only due to rapid population growth, but also due to environmental demands related to compliance with the Endangered Species Act, Clean Water Act, National Environmental Policy Act and state environmental laws. California is in a crisis, with operations changing how projects are operated and restrictions on water projects under ESA biological opinions to protect salmon and Delta smelt – in addition to the challenges due to drought. Without a good water year this year, there will be significant problems in California. Indian water rights issues place demands on top of existing water uses. Further, Reclamation faces a \$3.2 billion backlog of aging infrastructure needs.

With respect to tools to meet our needs and examples of successes, the Commissioner declared that water conservation is first on "everybody's list." A lot has been done, and there are a lot of things that can still be done. Water reuse projects are particularly important to California, where about three million acre-feet of water flows out into the Pacific Ocean. Desalination technology is important and we are improving. Desalination is 50% cheaper in real terms than 50 years ago, but it is still relatively expensive, though not out of the price range for urban municipal and industrial needs. Reclamation has its Tularosa desalination plant in New Mexico testing membrane technologies. There is talk of building desalination plants in Mexico, paid for by U.S. interests, with related water exchanges upstream for Upper and Lower Colorado River Basin cities. Regarding river restoration, Reclamation's budget includes some \$150 million/year. Project

operations are changing in the Colorado, Rio Grande and other river basins. An agreement in principle has been announced in the Klamath Basin. Water transfers are a viable tool, that if applied the right way, can be effective without hurting agriculture. The Palo Verde exchange is an example of a win-win solution, with farmers only selling water for dry year uses. The farmers are getting more money. Agriculture still accounts for about 80% of the water use in the West. There have also been successes involving Indian water rights settlements, such as the Gila and Rocky Boy and many, many more. These have been the result of tough negotiations. Other negotiated settlements include the Colorado River shortage sharing agreement, Truckee River operating agreement, and Elephant Butte/El Paso agreement. These involved states, tribes and other parties for several years, even decades.

Finally, new infrastructure development is important and sometimes the only long term solution. California is pursuing a \$9 billion bond to build more water facilities. Other parts of the country also need new infrastructure. There is the Ridges Basin Dam just completed on the Animas La Plata River. "It's a darn good looking dam!" Reclamation and the Corps are spending \$1.5 billion on Folsom Dam to provide a 200-year level of flood control for the Sacramento area. There is still a \$2 billion backlog for rural water program projects. Reclamation's making its first delivery of water to the Ogallala Sioux in South Dakota. Reclamation has released an interim rule to implement the new rural water supply act, to assist communities under 50,000. Reclamation has completed the All American and Coachella canal lining projects, and begun construction of the Drop 2 structure in the Colorado River Basin. It is a re-regulating reservoir project. There are many more examples of the need for new infrastructure. In conclusion, Robert listed some personal observations. "One size doesn't fit all. There are different facts involving different basins and different people." Finding the right combination of tools to address individual problems is the challenge.

Robert Hirsch, former Associate Director for Water, U.S. Geological Survey (USGS) and now a Senior Research Hydrologist, discussed the role science plays in water in the West and the Nation. He began addressing the concept of stationarity, or the idea that water resource parameters have a statistical mean and standard variation that allows us to do a lot mathematically with respect to planning and decisionmaking, using a variety of tools, such as cost-benefit analysis and risk assessment. "However, it is more and more apparent that we don't live in a stationary world," partly because of climate change, but also due to land use changes, urbanization, wildfire, beetles and other variables, etc. Rainfall, snowfall and runoff have been the primary variables in equations explaining hydrology, but there is a growing need to look at other variables, and the relationship between climate and hydrology. Ground water mining is another parameter and one of the most important realities that we face in the West. Ground water is both a renewable and non-renewable resource, and where mining is "taking the top off the aquifer," perennial streams are drying up. Hydrology is affected by a number of climatic events, such as El Niño and La Niña, ENSO, AMO, etc. "We don't know why they start, and we don't know why they end." The granddaddy of them all are the periodic Ice Ages. Now we are concerned with greenhouse gases (GHGs) building up and a warmer world as the driver for climate change, with such effects as greater evapotranspiration. We are seeing changes in precipitation and runoff, which are expected to be greater in the Northwest and less in the Southwest. But what is it we don't know? What may be the effects of unexplained phenomena?

Bob asked, "What can we really say about global warming?" He answered, "I can only say we've seen a change in runoff in snowmelt dominated areas. That's a direct result of warming and reduced snowpack, but there is no indication of a change in the overall amount of runoff." Given changes in the timing of runoff, does this portend a change in flood risk? Will it be greater or

smaller? What does this warming mean for ground water recharge? Much of it occurs at the foot of the mountain fronts from snowmelt. There are a number of unanswered questions and the best we can answer as experts is: "We don't know. We don't know in any detail what's going to happen."

Bob suggested we need to look at our water management problems differently and referred to a paper he coauthored that declares, "We assert stationarity is dead...." It goes on to address the problem of finding an adequate substitute, which will be critical to climate adaptation. We need to further develop nonstationarity optimization models. However, "Modeling can never replace observation." In a nonstationary world, observation and continuity are critical. We need to update our analytical strategies. We need more research into decisionmaking under uncertainty. What's the answer? We don't have an answer at this time, but we can suggest some guiding principles. We can't have blinders on, climate change is happening. We can't be arrogant, as scientifically we are far from predicting climate. Our decisions can be informed, but should not be slaves to history and models. Keep up data collection and analysis. Lastly, we should be prepared for surprises.

Dr. Hirsch expressed his pleasure in working on the science. He described some of the new demands on "the system," including tremendous urban growth (and the need for water conservation). He discussed transfers of water from agriculture and its impacts. While we can reach willing buyer/willing seller agreements, what is the impact on the local economy and national food security? There is a potential for an agricultural shift again to the East from the West. What would be the impact? Energy development affects water demands. In addition to the demands for water for energy production from our traditional sources, there are new sources of energy, such as biofuels, which raise more questions related to water use. There is anecdotal evidence that ground water pumping and mining in some areas had stopped due to economics, but restarted with the rising price of corn. Geologic carbon sequestration is another challenge. There is some research suggesting that the capture and injection of carbon dioxide could require between 30%-50% more energy production. What if we have to burn 30%-50% more coal? Injection of carbon dioxide by the oil and gas industry for secondary recovery purposes totals some 30 million tons/year, compared to some climate change mitigation goals of perhaps 3.5 billion tons/year. While we have some experience replacing extracted hydrocarbons with carbon dioxide, we have no experience with disposal of CO<sub>2</sub> into saline aquifers. What are the implications of displacement? Where is the water going to go? We don't know what pressure and temperature changes will do. What will be the impact on freshwater aquifers and streams?

Ecological instreamflow demands are changing. We developed our water supplies for agriculture, municipal and industrial uses with little thought of the ecosystem. A paradigm shift is going on. Engineers once asked, "How much water can I withdraw from the river." Now they ask, "How much water do I need to leave in the river?" We've tried to set minimum streamflows, and thought everything is ok. But science is telling us that we have to look at variability and the ecological needs for high and low flows. "It's still an art form." We want a hydrograph to look as close as possible to what it was. There are also dynamic streambed and sediment issues related to flows. It is important to set "ecological flows." There are other ecosystem demands for water. "We have to recognize that the Endangered Species Act and Clean Water Act demand that we maintain and restore our ecosystems." What are the effects of different flows on channel characteristics, endangered and invasive species, etc. We need to get at the right causes. The challenge is looking at the orientation of a whole biological community with conflicting single species needs. There is the issue of endocrine disrupting compounds, antibiotics, hormones, and other pharmaceuticals and personal care products in our waters. They may not be killing aquatic organisms, but at low levels these chemicals can have reproductive impacts. There are some treatment strategies. Are we ready to regulate these compounds? Absolutely not!

We will never be able to predict all the variables involved in managing water and meeting our related needs, so we have to take an adaptive management approach. We already have some tools, such as area modeling, ground water and surface water flow modeling, salt water and fresh water interface models, and regional inference and statistical models. We can't measure everything. USGS StreamStats is a point and click extrapolation from existing streamgages. USGS is developing acoustic Doppler profiles for streamflow, using fiberoptic cable on streambeds to find temperature changes that indicate ground water inflow, and other tools. USGS is studying age dating of ground water, as well as mining, and the movement of chemicals in ground water. USGS is also working on different data bases, and web services to directly deliver data. Summarizing his thoughts, Robert said that in meeting the challenges of the future, we need to continue collecting and analyzing data. Climate change overwhelms the scientific discussion of other factors. Climate is only one factor related to change and natural resources management.

Arlen Lancaster, Chief, Natural Resources Conservation Service (NRCS), declared that of all our natural resources challenges, water availability is the most under appreciated. If we can make the economics work, we can really encourage water conservation on the ground. Good policy decisions require sound science. The challenge is "getting the right tools in our hands so we can make those decisions." We also need tools to account for the benefits provided by conservation. Collaborative conservation is essential because two-thirds of the land is in private ownership. Urban growth and sprawl have had a significant impact on our land and water resources. We need to keep farmers on the land. It is critically important to remember that these are landscape-based concerns and solutions." Arlen described the status of the Snow Survey and Water Supply Forecasting Program with its SNOTEL (snow telemetry) system and Soil and Climate Analysis Network (SCAN). Both face a flat budget and ever increasing cost of living adjustments for federal personnel. He mentioned the history of the snow survey program, and a recent economic analysis. Realtime data adds real value to the public. NRCS needs to reach out to state and federal agencies and businesses as partners. We need to work collaboratively to continue to collect this data and keep SNOTEL sites operating.

Arlen next addressed the NRCS watershed-based approach to management, and its "rapid watershed assessments" as a means to gather information collaboratively. We need to move beyond the farm and look at issues at the watershed level. He mentioned water quality, using as an example a Conservation Effects Assessment Project (CEAP) in Kansas at Cheney Reservoir, the City of Wichita's water supply. Grasslands around the reservoir help keep inflows clean and clear. Ephemeral gullies contribute 80% of the sediment, but we are not spending a proportionate amount on the sources. "We need to put a value on specific resource solutions." The 2008 Farm Bill included a 38% increase in spending on working lands. He specifically mentioned the Agricultural Water Enhancement Program, which is designed to look at resource management concerns on a watershed basis. As enacted, it authorizes expenditures of about \$73 million/year. NRCS is requesting proposals, and is looking at how this new program fits. Cost sharing requirements ensure "buy-in" from local communities. He also mentioned the Cooperative Conservation Partnership Initiative that targets assistance through public/private partnerships and collaborative team building.

NRCS promotes market-based solutions that don't focus solely on production. "There's value to clean water. Conservation has a dollar value associate with it.... Good conservation is good economics.... Overall farm income is going to benefit." Ecosystem services that can be marketed include carbon credits, water quality, wildlife habitat, etc. "As a government, we recognize the value of ecosystem services.... We need to find markets to protect lands." There are a variety of tools, but you need good data and you need to know the benefits. "How do you peg a value to ecosystem services? How do you build a market system where that is easily traded?" Arlen expressed confidence that it can be done easily for water and water conservation. "How do we reward farmers?"

Keeping landowners on the land is good for water quantity and for water quality.” He concluded extolling the “power of partnerships.” NRCS doesn’t have enough employees to do what needs to be done alone. “We need to empower local decisionmakers. We’re going to do our part with SNOTEL and SCAN.”

Ben Grumbles, Assistant Administrator for Water, Environmental Protection Agency (EPA), thanked the WSWC and WGA for being an important partner over the last several years on issues such as Good Samaritan protections related to cleaning up mining wastes that threaten water quality and tailoring clean water regulations to meet regional needs in the West where there are many effluent dependent and dominated streams. The role of science and water data needs in protecting water quality is critical as we address challenges related to climate change, ground water and GHG sequestration, coalbed methane development and other issues. “Good decisions depend on good information. It’s all about science.” He continued stating that America cannot be a world leader, without being a leader in providing clean water and power. America must be a leader in conceptualizing how to protect water quality in the face of climate change. “Water is at the heart and soul of the climate change challenge.... Adaptation is the name of the game. We know how much is at stake. Climate change jeopardizes the water quality gains we’ve made over recent decades.” Climate change has “potentially staggering implications” for ecosystems, as well as sea level rise and the loss of water supplies. “We need to focus on adaptation as well as mitigation.” We need to take a watershed approach, with improved monitoring, particularly for water quality. He noted EPA’s climate change strategy was released on September 30, and is available at [www.epa.gov/water/climatechange](http://www.epa.gov/water/climatechange). While the focus is on GHG mitigation, it is a practical proactive strategy that includes adaptation and efforts to “connect drops and watts.” There are 44 specific EPA recommendations for both long and near-term actions.

Ben also reported that the carbon geosequestration rule announced at the WSWC/WGA’s symposium last year was proposed in July and has had its comment period extended through December 24. Such wells will be regulated under the Safe Drinking Water Act’s Underground Injection Control (UIC) program to maintain safety and protect underground supplies of drinking water. “It may not be a silver bullet, but it may be an ace in the hole.” He outlined EPA’s WaterSense program to promote water use efficiency and the use of federal technological leadership to embrace water conservation. “It really does make a difference,” in water and energy savings. EPA is also working to increase water and wastewater treatment efficiencies. “I really do get excited about biogas!” We can save energy through the use and reuse of methane from sewage sludge. Climate change adaptation has to be the real focus. “We need information” on use attainability analysis, ground water monitoring, drilling, mining, waste disposal and other topics. “Information is important!” “Water managers need base line information.” We need to get out more data, information and analytical tools. We need data to address climate change impacts, and we need to make data useful not only to technical experts. We need to be prepared for extreme water events. “Climate change will increase the frequency and severity of these events.” We need to take a watershed approach to protection, and adapt to the gradual warming of waters, changing ocean chemistry and water body boundaries. “We need to develop defensive measures that buffer and soften the blows.” We’ve battled over wetlands. “We need to know that wetlands are hard working habitat...” nurturing wildlife and providing clean water.

Mr. Grumbles described some of EPA’s tools, including the stormwater permitting program. EPA is required by court order to propose new effluent guidelines for construction developments by December 1, with a final rule by December 1, 2009. This will include numeric criteria and active treatment for developments over 30 acres, but will not limit state initiatives to require more stringent standards. He encouraged building our capacity to adapt to climate change. He mentioned market-based approaches such as wetlands mitigation banking, and water quality trading for nutrient control.



He noted the need for a utility climate variability handbook to help with self assessments, that EPA hopes to release early next year. He also highlighted the need for and lack of climate down scaling models that would help anticipate temperature increases, precipitation changes and sea level rises at a local level. However, the "...lack of perfect data should not prevent us from taking simple actions." We need to factor climate changes into planning for new facilities. EPA needs to increase its interactions with other federal agencies, and he mentioned a meeting last March of key water agencies' political appointees to improve coordination on water and climate issues. In August, EPA signed a joint memorandum of agreement with 15 focus areas relate to climate change.

Ben applauded the formation of the WestFAST team and WSWC federal liaison position as an "unprecedented collaboration effort and model" for other areas of the country. "Out in the West, you are facing the greatest challenges. It makes sense, it's practical and proactive and doesn't require a huge commitment of federal dollars." He quoted a Chinese proverb saying, "Unless we change our direction, we are likely to end up where we are headed!" He recognized the "staggering gap between the needs and the dollars being spent on infrastructure." EPA is also very much aware of the challenges in stormwater and nonpoint source pollution control. There needs to be flexibility for states to address these challenges. We need to invest in water quality monitoring. "We need to help public policymakers connect the dots.... These are very exciting times...."

He continued discussing the "whole water quantity, water quality nexus," noting they are inextricably linked. With respect to state revolving funds (SRF) and loans, he said EPA is required to prepare a new needs survey and is working on the numbers. What role will climate change play in this? "We don't have an answer." EPA will work with water utilities and states to improve the needs survey. The big debate in Washington right now is on an economic stimulus bill, which may include spending on water and wastewater projects. The SRFs have been an "important and sustainable approach" to meeting water quality needs.

Another challenge he mentioned was the issue of requiring National Pollutant Discharge Elimination System (NPDES) permits for water transfers, which the new Administration will have to deal with. He said, "It is one of the most difficult rules, I've been involved in." EPA's position is that you don't need an NPDES permit under the Clean Water Act (CWA) to move water from one water of the United States to another without an interim use. That doesn't mean there are not adverse water quality impacts. "We knew the rule would be legally challenged. I'm not confident it will be upheld. It's a close call." Another big issue is what types of water bodies are subject to CWA jurisdiction. EPA and the Corps are working on additional *Rapanos* guidance, hopefully before the end of the year, addressing "adjacency" and "tributariness." There is a legislative movement to remove "navigable" from the Clean Water Act. "The CWA can only go so far. It doesn't cover ground water." The Supreme Court requires a "significant nexus," between ephemeral and intermittent streams and "navigable" waters. Lastly, he noted EPA is revisiting Concentrated Animal Feeding Operations (CAFOs) and intends to issue a final rule on compliance by February 27, 2009. CAFOs are one of the greatest challenges to water quality. CAFOs in some basins are the greatest threat to water quality and public health. Emerging contaminants are also of concern, with monitoring of streams and sewage sludge for pharmaceuticals. "So much of it is driven by the data."

There were also dozens of presentations as part of six panels addressing various aspects of data/information on water availability, water use and water quality. Following each panel, attendees discussed a number of questions and issues raised in small groups. Their findings and recommendations are still being compiled, and will be presented as part of implementation of the WGA 2008 Next Steps report. As a first step, a group volunteered to begin compiling a list of available water-related data sets, models, portals, other decision support tools, and state and federal programs.

## WATER NEEDS AND STRATEGIES FOR A SUSTAINABLE FUTURE

*Water Needs and Strategies for a Sustainable Future: Next Steps* is a report prepared by the Council and adopted by the Western Governors' Association (WGA) at its 2008 Annual Meeting, June 29-July 1, in Jackson, Wyoming. Available on the WGA website, [www.westgov.org](http://www.westgov.org), the report highlights Council actions undertaken to implement the WGA's 2006 Water Report. The Executive Summary includes 42 specific recommendations for not only states, but local and federal agencies, as well as the U.S. Congress. It focuses on three priorities.

Both the 2008 and 2006 Water Reports conclude that western water resources are under substantial stress. Many states, river basins and watersheds are experiencing increasingly serious water shortages. New stresses are coming from population growth, land use changes, water needs for in-stream and other environmental uses, and climate change. The reports include consensus recommendations for how the Western states can work with federal, local, and private sector partners to address these challenges. The reports address a wide range of issues, including providing water supply to meet future demands, largely related to population growth, gathering water resources data and information, maintaining and enhancing water supply infrastructure, resolving Indian water rights claims through negotiated settlements, adapting to climate change/increasing climate variability, and conserving endangered species within state water law.

The *Next Steps* report includes a summary of symposia, conferences, workshops and studies sponsored by the Council, as well as collaborative work funded by the U.S. Army Corps of Engineers under a "Western States Watershed Study," which was intended to forward the 2006 Water Report recommendations in partnership with the western states. Significantly, the *Next Steps* report recognizes that "success in this endeavor will depend in large part on state initiative and innovation, since states have the pivotal role in water planning, as well as allocating and protecting the resource."<sup>4</sup> WGA and the Council continue to work with stakeholders to advance water supply and water management strategies for a sustainable future, consistent with the 2006 Water Report and 2008 *Next Steps* Report recommendations.

### Western States Federal Agency Support Team

The creation and organization of a Western States Federal Agency Support Team (WestFAST) was the number one recommendation in the "Next Steps" Report. In 2008, nine federal agencies signed a "Declaration of Cooperation" for working together to promote and educate the public on the benefits of sustainable and efficient use of western water resources. The Declaration expressed a commitment to collaboration, and to work with "local, Tribal and other stakeholders, to improve the effectiveness of collaboration to seek watershed solutions.... This effort emphasizes proactive, voluntary, participatory and incentive-based approaches to water resources management and conservation assistance programs throughout the Western States." It also declared that the WestFAST agencies would collaborate with the Western States Water Council to develop an appropriate work plan for the partnership. The nine signatory agencies also supported the establishment of a WestFAST Federal Liaison Officer, to work in the Council's office and help develop a collaborative plan to carry forward joint water resources initiatives. A Federal Liaison Officer was selected, a Bureau of Reclamation employee, and reported to the Council office in October 2008.

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<sup>4</sup>*Water Needs and Strategies for a Sustainable Future: Next Steps*, June 2008, p. 1

## OTHER IMPORTANT ACTIVITIES AND EVENTS

### Council Staff and Membership Changes/News

In August, Bureau of Reclamation Commissioner Bob Johnson announced that the Western States Federal Agency Support Team (WestFAST) selected Ms. **Jonne Hower** to serve as the first WSWC Federal Liaison Officer/Intergovernmental Program Coordinator. Ms. Hower will work with WSWC and WestFAST members, as well as senior federal agency leaders, assisting the WSWC Executive Director in the formulation and implementation of policies, practices and programs as they relate to intergovernmental relations.

#### California

Governor Arnold Schwarzenegger appointed **Dr. Betty Olson** to the Western States Water Council. Dr. Olson is a professor of civil and environmental engineering at the University of California, Irvine, and is the founding director of the Urban Water Research Center.

#### Idaho

Governor C.L. "Butch" Otter, appointed **Jerry R. Rigby**, Chairman of the Idaho Water Resources Board, to replace **Norm Semanko** as a member of the Western States Water Council. He also appointed **John Simpson** of Barker, Rosholt & Simpson, and **John Chatburn**, Special Assistant for Energy and Water, Office of the Governor, as alternate members.

#### Nebraska

Governor Dave Heineman named **Brian Dunnigan**, Acting Director, Nebraska Department of Water Resources to replace **Ann Bleed** (who retired) as Nebraska's representative on the Western States Water Council.

#### Washington

Governor Christine Gregoire named **Evan Sheffels**, Special Assistant to the Director of the Washington Department of Ecology, as an alternate member of the Western States Water Council, replacing **Joe Stohr**.

## **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 2008 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**

### *FY2009 Budget Request*

The Bureau of Reclamation's FY2009 budget request is \$919.3 million, which added to separate funding for the Central Utah Project Completion Act totaled \$961.3 million (down \$189.6 million from FY2008 appropriations). Testifying before the Senate Energy and Natural Resources Committee on February 13, Interior Secretary Dirk Kempthorne said, "This request supports Reclamation's mission of managing, developing, and protecting water and related resources in an environmentally and economically sound manner in the interest of the American people." He highlighted four new Interior initiatives, including one related to water. "We request an increase of \$21.3 million for the Water for America initiative that will enhance knowledge of water resources and improve the capacity of water managers to avert crises caused by water supply issues and better manage water resources to assist in endangered species recovery."

He continued, "Knowing how much water is available – and how much we consume – lies at the foundation of good water management. Yet this Nation has not completed a water census in over three decades. Our Water for America initiative will fill this void.... The census...will generate information to assist others in managing water in a context of competing demands. The census will provide a national ground water information system, new technology that integrates surface and ground water information, and better measurements that result in better management of water resources."<sup>5</sup>

Under the initiative, he explained, "The Bureau of Reclamation will recast its water conservation programs and will merge Water 2025 and the Water Conservation Field Services program to stimulate water conservation and improved water management through an integrated

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<sup>5</sup>*Western States Water*, Issue #1760, February 8, 2008.

approach that addresses urban, rural, and agricultural uses of water throughout the West. Through the use of West-wide criteria to competitively award grants, this new water conservation challenge grant program will stretch water supplies through water conservation, technology, reuse and recycling, and new or improved infrastructure development. This program will leverage \$15 million in Federal dollars with State and local funds.” Reclamation’s total request for the Initiative is \$19 million.

The FY2008 request for Water 2025 was \$5.93 million and \$6.51 million for the Water Conservation Field Services Program. The Secretary noted Interior has “leveraged a four-to-one investment through a water conservation challenge grant program, generating more than \$96 million for 122 water delivery system improvements and conserving over 400,000 acre-feet of water to help meet the water needs of people across the West.”

Under the Initiative, Kempthorne said, “We will also protect endangered species and their habitats while protecting water for traditional purposes with an increase of \$8.9 million. Funding will be used to acquire water to increase flows in the Platte River; improve tributary habitats for spawning on the Columbia and Snake Rivers; restore habitats on the Yakima River basin, the Middle Rio Grande River, and the Klamath basin, and improve endangered species conditions in the California Bay-Delta.” Reclamation intends to partner with water users to stretch existing water supplies and implement measures to protect endangered species in high risk watersheds. Separately, Reclamation has asked for \$8 million for basin watershed planning and smaller-scale geographical studies.

Commissioner Bob Johnson recently said, “As part of the Water for America initiative, Reclamation is examining how climate change information can be considered in our water and power operations and planning through several project-specific studies. Additionally, through collaborative research with other Federal agencies and non-Federal entities that have complementary expertise and a common stake in Western water, Reclamation is well positioned to obtain the most relevant climate information and manage our water resources under changing conditions.”

With respect to other Reclamation-wide programs, research and development spending would decrease to \$10.98 million (compared to \$14.66 in FY2008), with \$1.98 million for desalination and water purification, including \$1.6 million for facility operation (compared to \$5.8 million in FY2008). There was \$1.42 million for emergency planning and disaster response (up slightly from FY2008) and another \$500,000 for drought emergency assistance (up from \$429,000 in FY2008). There was a substantial increase for corrective dam safety action at \$71.5 million (up from \$56.2 million) and another \$18.5 million for dam safety evaluations (\$18.2 million in FY2008). Reclamation’s site security request was \$28.6 million (compared to FY2008 spending of \$34.9 million). No money was requested this year for salt cedar and Russian olive control or wetlands.

No money was requested for Technical Assistance to States (TAS). In FY2007, \$1.83 million was requested, but no money was requested in FY2008.

Reclamation requested \$1 million to begin implementing the Rural Water Supply Act’s Title I, which authorizes an assessment of rural water needs and programs (and identification of potential projects), but no construction spending. Last year, Reclamation received just under \$1 million to implement the Title II loan guarantee provisions, which are a critical component of Interior’s strategy to address aging water infrastructure challenges by helping many water districts obtain private investment bank financing that have been unable to finance expensive system repairs and project rehabilitation work (without title to Federal facilities to use as collateral).

Region specific budget highlights included: \$50 million for the Animas-La Plata Project to implement the Colorado Ute Settlement Act; \$25 million for the Klamath Project to fund studies and actions to improve water supplies and assist endangered species recovery and environmental restoration efforts; \$22.7 million for Middle Rio Grande Project rehabilitation and endangered species protection and recovery; \$32 million for the California Bay-Delta Program to fund the environmental water account, storage program, water conveyance, ecosystem restoration, water quality, science and program oversight; \$48.6 million for the Central Valley Project Restoration Fund for a variety of activities; and \$16.4 million for the Lower Colorado River Operations Program, including providing long-term multiple-species Endangered Species Act compliance and carry out the Secretary's watermaster role. There is also \$7 million under a proposal to implement the San Joaquin litigation settlement that would establish a new San Joaquin River Restoration Fund.

Of note, Secretary Kempthorne testified, "The lands and waters we manage generate one-third of the Nation's domestic energy production. Managing these areas, Interior generates \$18 billion annually in revenues that exceeds Interior's \$10.7 billion appropriated budget." Nearly 80% of Reclamation's total net appropriation is a debit to the Reclamation Fund, which finances all Policy and Administration expenses and 89% of the net Water and Related Resources Account (with General Fund spending accounting for the rest). The actual Reclamation Fund balance at the beginning of FY2007 was \$5.67 billion and the estimated balance at the end of FY2009 is \$9.23 billion. The FY2007 actual and FY2008-FY2009 estimated receipts are \$1.85 billion, \$2.09 billion and \$2.49 billion respectively, with by far most of the money from mineral leasing royalties (\$1.46 billion, \$1.72 billion and \$1.82 billion). Actual and estimated appropriations from the Reclamation Fund for FY2007-FY2009 are \$981 million, \$1.05 billion and \$870 million respectively.

#### *Water for America Initiative/National Water Census*

On February 4, a multi-agency \$21.3 million Water for America Initiative was announced with the release of the President's FY2009 Budget Request. Interior Secretary Dirk Kempthorne said the Bureau of Reclamation and U.S. Geological Survey (USGS) will partner with state, tribal and local governments to secure critical water supplies. "In 2006, the National Science and Technology Council reported that abundant supplies of clean, fresh water can no longer be taken for granted. Water wars have spread to the Midwest, East, and South. Competition for water is increasing because of rapid population growth and burgeoning environmental and energy needs," said Kempthorne. "As this competition escalates during a time of chronic drought and changing climate, water conflicts are occurring within states, among states, between states and the Federal government and among environmentalists and state and Federal agencies." Kempthorne also is working on behalf of the President to resolve regional water issues in Georgia, Alabama and Florida.

The Water for America Initiative will merge Reclamation's Water 2025, Water Conservation Field Services and Investigations Programs into one, and add the USGS scientific expertise in monitoring water quality, streamflows and the condition of the Nation's major aquifers. Interior will also partner with state, local and tribal governments to use the latest technologies in water planning and management to help communities respond to their changing water needs. Moreover, Interior agencies will work with urban, rural and agricultural water users at the watershed level to stretch existing water supplies and protect endangered species, thereby averting water crises.

Kempthorne added, "The initiative also will begin a nationwide assessment of water availability, water quality, and human and environmental water use to be completed by 2019." It has been some 30 years since the last national water census. "We will conduct the long-overdue



inventory of our nation's water resources so that we have the information we need to plan for the nation's water future, working with states and others to manage water sustainably," Kempthorne said.

Reclamation's budget request includes \$13.1 million for the initiative to fund basin watershed planning and smaller-scale geographical studies, and use existing Challenge Grants to improve local water management through real-time water monitoring, measurement and control. Reclamation will also continue canal lining and piping to save water, and support research and new technologies to reduce the cost of desalination of sea and brackish water. As part of the Initiative, Reclamation plans to manage and protect endangered species in major river systems; examine climate change and its water and power operations through several project-specific studies; and collaborate with other federal and non-federal agencies with complementary expertise and a common stake in western water resources.

The USGS role includes \$8.2 million to begin work on a national water census, as well as upgrade and restore its streamgaging network and increase its research related to ground water resources with a goal of providing water managers with the critical data needed for sound future decisionmaking.

On October 20, Robert Johnson, Commissioner, Bureau of Reclamation requested proposals for the first Water for America grants for FY2009. Up to \$300,000 will be available for eligible irrigation and water districts, tribal water authorities, and state agencies seeking funding to create water markets/banks or to make more efficient use of existing water supplies. There is a 50% matching requirement and eligible entities must be located in the western United States or territories. Reclamation estimated that it would award 15-50 grants, notify successful applicants in April 2009, and issue the grants no later than September 2009. He explained the grants are "...aimed at helping communities address the twenty-first century water challenges and ensur[ing that] they have adequate water supplies now and into the future." The grant program is designed to help communities "leverage their money and resources" when creating water banks or improving existing water supplies, which Reclamation hopes will "help significantly increase future water supplies for farms, cities, people, and the environment." In prior years, Reclamation's similar Water 2025 grant program funded 137 projects, representing a combined investment of more than \$127 million in water improvements, including a non-federal cost share of \$97.7 million. For details on the Water for America Initiative see [www.usbr.gov/wfa](http://www.usbr.gov/wfa).

### *Managing For Excellence*

The last in a series of public workshops on the Bureau of Reclamation's Managing for Excellence (M4E) initiative was held in Las Vegas, Nevada at the Monte Carlo Resort and Casino on February 29. The workshop followed the annual meeting of the Family Farm Alliance, which has been active in reviewing Reclamation's M4E work. Reclamation's final M4E report will cover each of 41 recommendations for improvements in eight functional areas: relationships with customers and other stakeholders, policies and organization, engineering and design services, major repair challenges, project management, asset sustainment, research and laboratory services, and human resources/workforce. Final products for 36 of the recommendations are complete, and another is ongoing, leaving only four remaining. Two of those involve a review of desalination research and development, and agency "right-sizing" recommendations. For an overview or access to completed products and recommendations, go to [www.usbr.gov/excellence/overview.html](http://www.usbr.gov/excellence/overview.html).

In October, Reclamation released its "Managing for Excellence: Concluding Report." Commissioner Johnson declared, "This report documents the conclusion of the initiative and charts the course for ongoing implementation of the resulting decisions. In 2004, the Bureau of Reclamation requested a comprehensive evaluation by the National Academy of Sciences. The resulting report and its recommendations were addressed in the formulation of the Managing for Excellence Action Plan. Over the last 2 years, Reclamation has worked through that action plan with the help of many dedicated employee teams and during numerous meetings with [employees], customers, and other stakeholders." He extended his sincere thanks to all those that have helped make this initiative a success.

Johnson observed, "The efforts over the last 2 years have resulted in great insight into Reclamation's challenges and opportunities, numerous decisions on recommendations for improvement, and detailed implementation plans to help us accomplish the goals we've identified and committed to, resulting in a focus on collaboration with stakeholders and business practices to make us more efficient. Reclamation now looks forward to working closely with [employees], its customers, and other stakeholders to realize the goals of Managing for Excellence. Reclamation is committed to self-evaluation accompanied by necessary change. Managing for Excellence is the latest example of this effort." The final report may be found at [www.usbr.gov/excellence](http://www.usbr.gov/excellence).

The initiative highlighted making a priority of improving Reclamation's stakeholder relationships. Reclamation proactively sought customer and stakeholder input through a comprehensive outreach strategy that included several public meetings, numerous conference calls, and a web site to obtain input and explain process developments.

### Water 2025

On May 27, Interior Secretary Dirk Kempthorne announced \$1.8 million in grants to water districts to improve delivery systems under the Bureau of Reclamation's Water 2025 program. Grants were awarded to ten projects in four states (California, New Mexico, Oregon, and Utah). Total investment in these projects, including non-federal matching funds, was more than \$3.77 million. The "System Optimization Review Grants" will help water districts take a broad look at their water delivery systems. Grants will also help improve efficiency on a regional or watershed scale. Future Water 2025 grant opportunities will be part of the Department of the Interior's Water for America Initiative. The Bureau will focus on two of the initiative's three main strategies – "Plan for our Nation's Water Future" and "Expand, Protect, and Conserve our Nation's Water Resources."

In California, five water districts received grants. The Semitropic District received \$300,000 for both structural and non-structural improvements. The Arvin-Edison District received \$290,000 to conduct a system inventory of watering, scheduling, and measurement. The District will identify ways to control expenses, increase revenues, and increase the District's involvement in water banking, exchanges, and transfers. The Pixley District received \$300,000 to evaluate ways to improve conjunctive use. The Contra Costa District received \$48,826 to perform a comprehensive water audit of treated and untreated water service areas. The Henry Miller District received \$100,000 to examine water salinity balance and other hydraulic attributes. Understanding these factors more thoroughly will help the District prioritize efforts to modernize.

In New Mexico, the Elephant Butte Irrigation District received \$265,000 to research consumptive uses of crops, which is part of a more comprehensive water budget. In Oregon, two districts received grants. The Talent Irrigation District received \$61,512 to promote conservation

by reducing seepage, re-regulating basins, adjusting reservoir storage, and completing a water budget. The West Extension Irrigation District received \$22,000 to study water management problems and opportunities to conserve by enclosing open laterals, prioritizing projects, and preparing a planning report to incorporate the District's water management and conservation plan.

Finally, two Utah water districts received federal grants. The Weber Basin Water Conservancy District received \$272,000 to analyze conservation opportunities, including the possibility of lining canals, installing meters on irrigation water distribution systems, system automation, installing new pressurized piping, ground water recharge possibilities, and other system improvements. The Duchesne County Water Conservancy District received \$167,825 to examine and test the benefits of operating on a basin-wide level, rather than on an individual facility level. For more details, visit <http://www.usbr.gov/water2025>.

On August 13, Secretary of the Interior Dirk Kempthorne announced another \$4.5 million in new Water 2025 Challenge grants for water conservation projects in the West. "These grants will help quench the West's thirst for water in eight states by providing funds to fifteen projects that will improve the efficient use of existing water supplies. The variety of projects includes water conservation, efficiency and water market projects and demonstrates the importance of this Bureau of Reclamation program in looking toward future water needs." The total investment exceeds \$31.8 million when non-federal matching contributions are added.

Five water districts in California received grants: Fresno Irrigation District – \$300,000 to upgrade an existing diversion structure to improved management of the Enterprise Canal (total cost \$1.1 million); Irvine Ranch Water District – \$300,000 to develop the Strand Ranch ground water banking facilities to help during dry years (\$15 million); James Irrigation District – \$300,000 to expand an existing storage and recharge basin (\$1.6 million); Solano Irrigation District – \$300,000 to line currently unlined canal sections (\$901,500); and West Basin Municipal Water District – \$300,000 to help install evapotranspiration (ET) irrigation controllers for urban landscapes one acre or greater in size (total cost \$899,198).

Other grants include: the Upper Arkansas Water Conservancy District in Colorado – \$296,724 to install a telemetry data collection system and gauges to improve water flow measurements (\$847,784); Roza Irrigation District in Washington – \$300,000 to replace some eight miles of laterals with PVC pipe and add weirs with flow meters (\$1.2 million); Preston Whitney Irrigation Company in Idaho – \$300,000 to replace earthen canals with high-pressure plastic irrigation pipe, convert 200 acres from flood irrigation to sprinklers and install inline master meters at each reservoir and McCrometer propeller-type meters at points of delivery (\$2.1 million); Navajo Agricultural Products Industry in New Mexico – \$300,000 to create a canal gate operating system to reduce canal spills and improve irrigation efficiency (\$1.1 million); Swalley Irrigation District in Oregon – \$300,000 to pipe 1.9 miles of open canals with seven cubic-feet per second dedicated to instream flows in the Deschutes River (\$1.5 million); Oregon's Three Sisters Irrigation District – \$300,000 to replace canals and ditches with pipes to eliminate excessive seepage losses (\$700,000); and the Jordan Valley Water Conservancy District in Utah – \$300,000 to install a new diversion structure on the Middle Fork of Dry Creek and connect it to an existing raw water supply pipeline (total cost \$880,154).

Three water districts in Texas received grants: Brownsville Irrigation District – \$300,000 to pipe 1,800 linear feet of earthen canal, install two vertical gate structures and install three transducers to measure water levels in storage reservoirs (\$602,048); Cameron County Irrigation

District No. 2 – \$262,923 to install ten Rubicon standard flume gate structures and remote flow measurement and control features (\$534,843); and City of McAllen Public Utility – \$300,000 to install 6,000 linear feet of underground pipeline and a magnetic meter at the intake side to remotely monitor the amount of water received from the water supplier (total cost \$2,604,000). For more information on Water 2025, please visit <http://www.usbr.gov/water2025>.

### Omnibus Public Lands Management Act

Pending on the Senate Calendar (No. 855) is a bill introduced on June 27 by Senator Jeff Bingaman (D-NM) to authorize certain programs and activities in the Departments of the Interior and Agriculture. S. 3213 is a collection of over 90 individual bills that have been reported by the Senate Energy and Natural Resources Committee. It follows the successful enactment of the Consolidated Natural Resources Act (S. 2739), signed into law last month (P.L. 110-229), which included a number of sections authorizing water-related activities in several states.<sup>6</sup> Similarly, S. 3213 includes several titles and sections authorizing significant water related programs, projects and activities across the West.

Section 901 authorizes up to \$3 million for the Bureau of Reclamation to conduct a feasibility study on projects to address water shortages within the Snake, Boise and Payette River systems in Idaho. Section 902 authorizes \$1.26 million for up to 45% of the Sierra Vista Subwatershed Feasibility Study in Arizona. Section 911 authorizes \$4 million for the federal share of up to 25% of the cost of the Tumalo Irrigation District Water Conservation Project in Oregon, and Section 912 \$22.5 million or 25% (whichever is less) of the cost of the Madera Water Supply Enhancement Project in California. Section 913 authorizes \$327 million for up to 75% of the cost of the Eastern New Mexico Rural Water System Project. Section 914 authorizes \$20 million or 25% (whichever is less) for a Rancho California Water District Project that may include design, planning and construction of permanent facilities for water recycling, demineralization, and desalination, and distribution of non-potable water supplies in southern Riverside County, California.

Under Title Transfers and Clarifications, Section 921 authorizes the transfer of certain facilities under an agreement with the McGee Creek Authority in Oklahoma, subject to applicable federal law, including the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and National Historic Preservation Act, and any other applicable federal state and local laws. Moreover, notwithstanding the conveyance of the land and facilities, Reclamation Law “shall continue to apply to any project water provided by the Authority.” Section 922 conveys title to certain lands that include Tingley Beach, San Gabriel Park and the BioPark to the City of Albuquerque by quitclaim deed, but except as expressly provided, nothing is to be construed to affect any rights to any land within the Middle Rio Grande Project, nor affect or otherwise interfere in the pending *Rio Grande Silvery Minnow* case.

Section 931 authorizes \$146.2 million for the San Gabriel Basin Restoration Fund in California, with \$21.2 million set aside to carry out the Central Basin Water Quality Project, and requiring that non-federal entities match amounts after \$85 million has been cumulatively appropriated.

Sections 941-944 relate to the Lower Colorado River Multi-Species Conservation Program implementation, water accounting, enforceability of program documents and appropriation of “such sums as may be necessary” with all amounts “non-reimbursable and non-returnable.”

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<sup>6</sup>*Western States Water*, Issue #1772, May 2, 2008.

## *San Joaquin River Restoration Settlement Act*

Title X - Part I, authorizes the San Joaquin River Restoration Settlement Act, in cooperation with the State of California, including channel and structural improvements, modification of Friant Dam operations, acquiring water, water rights or options from “willing sellers and not through eminent domain,” and specific measures that involve the recirculation, recapture, reuse, exchange or transfer of water released for Restoration Flows or Interim Flows. Such measures are subject to applicable provisions of California water law and other limitations. The Secretary of the Interior is to identify the impacts associated with implementation of the Settlement and measures to mitigate impacts on adjacent and downstream water users and landowners. Section 1006 says, “Nothing in this part shall preempt State law or modify any existing obligation of the United States under Federal reclamation law to operate the Central Valley Project in conformity with State law.” Section 1007 requires compliance with the Central Valley Project Improvement Act. Section 1008 denies any entity not a party to the Settlement a private right of action or claim for relief to interpret or enforce the provisions of the Settlement, but preserves rights of action under any other applicable law.

Settlement funding is complex, with non-federal parties providing payments and in-kind contributions estimated to total \$440 million, additional federal appropriations of \$250 million and at least \$110 million from the State of California. A San Joaquin River Restoration Fund would be created within the U.S. Treasury into which certain moneys are to be “deposited and used solely for the purpose of implementing the Settlement” including payments pursuant to the Reclamation Projects Authorization and Adjustments Act of 1992, certain construction cost payments pursuant to long-term water service contracts, proceeds from the sale of water or property pursuant to the Settlement, and non-federal contributed funds. Other provisions address repayment contracts and acceleration of repayment of construction costs.

Of note, Section 1011 states: “Congress finds that the implementation of the Settlement to resolve 18 years of contentious litigation regarding restoration of the San Joaquin River and the reintroduction of the California Central Valley Spring Run Chinook salmon is a unique and unprecedented circumstance that requires clear expressions of Congressional intent regarding how the provisions of the Endangered Species Act...are utilized to achieve the goals...” and goes on to direct that a final rule under ESA Section 4(d) governing the incidental take of reintroduced salmon, prior to reintroduction, “will not impose more than de minimus: water supply reductions, additional storage releases, or bypass flows on unwilling third parties due to such reintroduction.” It goes on to state that this is not intended to “establish a precedent with respect to any other application of the Endangered Species Act.”

Separately, this same section reserves the right of the Secretary of Commerce under Section 18 of the Federal Power Act to prescribe fishways requirements as part of proceedings before the Federal Energy Regulatory Commission for projects licensed on the Calaveras, Stanislaus, Tuolumne, Merced and San Joaquin Rivers.

Title X - Part II directs \$1 million in direct financial assistance for a study of an Integrated Regional Water Management Plan addressing: water quality; water supply (both surface, ground water banking and brackish water desalination); water conveyance; water reliability; water conservation and efficient use (by distribution systems and end users); flood control; water resource-related environmental enhancement; and population growth. It directs that the Plan “shall serve as a guide for the counties in the study area...to use as a mechanism to address and solve long-term water needs in a sustainable and equitable manner.”

Title X - Part III authorizes and directs feasibility studies on federal facility improvements in coordination with appropriate federal, state, regional and local authorities, as well as federal financial assistance for local projects (under specified circumstances) to secure necessary storage, extraction, and conveyance rights for water. Federal assistance is not to exceed 50% of the costs associated with planning, environmental compliance, design and construction.

#### *Northwestern New Mexico Rural Water Projects*

Title X also amends the Colorado River Storage Project Act of 1956 to authorize the Navajo-Gallup Water Supply Project and allow the Secretary of the Interior to create a Navajo Reservoir top water bank for purposes other than irrigation under terms or conditions developed in cooperation with the New Mexico Interstate Stream Commission and subject to approval under State law by the State Engineer providing for the storage, accounting and release of water from the bank. These terms are to protect existing water rights, account for evaporation and other losses, provide for releases and deliveries to water users subject to reasonable scheduling requirements, and may include federal fees sufficient to cover the costs of administering the bank. Further, water eligible for banking shall be “water that otherwise would have been diverted and beneficially used in New Mexico that year.”

Section 1052 authorizes the Secretary to construct, operate and maintain the Navajo Indian Irrigation Project and divert up to a 10-year average of 508,000 acre-feet of water/year to a service area of up to 110,630 acres. Within this area, the water may also be used for aqua-culture (as part of the San Juan River Basin ESA Recovery Implementation Program), domestic, industrial, commercial, hydroelectric purposes and other alternative water source provisions. It also allows for the transfer of water “within or outside” the Navajo Nation and the irrigation project under certain circumstances for any beneficial use, including deliveries for uses in the State of Arizona under the Navajo-Gallup Water Supply Project. It also addresses curtailing releases and deliveries to address shortages, as determined by the Secretary. Further, aquifer storage and recovery of water are addressed.

#### *Reclamation Water Settlements Fund*

Section 1061 would establish in the U.S. Treasury a Reclamation Water Settlements Fund with deposits of \$120 million for FY2010-FY2023 from revenues available to the Reclamation Fund, which amounts would be available without further appropriation and in addition to amounts appropriated pursuant to other provisions of law to “implement a settlement agreement approved by Congress that resolves, in whole or in part, litigation involving the United States...[that] requires the Bureau of Reclamation to provide financial assistance for, or plan, design and construct – water supply infrastructure; or a project to rehabilitate a water delivery system to conserve water; or restore fish and wildlife habitat or otherwise improve environmental conditions associated with or affected by, or located within the same river basin, or a Federal reclamation project that is in existence on the date of enactment of this Act.” It sets priorities for funding settlements.

The bill further addresses details of the Navajo-Gallup Project and other Navajo Nation agreements.

#### *Aging Water Infrastructure Act*

On July 8, the Senate Committee on Energy and Natural Resources held a hearing on four bills, including the Aging Water Infrastructure and Maintenance Act (S. 2842). The bill would



require the Secretary of the Interior to carry out annual inspections of canals, levees, tunnels, dikes, pumping plants, dams and reservoirs under his jurisdiction. Witnesses included Robert Johnson, Commissioner, U.S. Bureau of Reclamation and Dan Keppen, Family Farm Alliance.

Commissioner Johnson said, "While we share the sponsors' goals of reliable and safe facility operations, the Department does not support S. 2842." This is due in part to the Bureau's belief that the bill potentially imposes new costs to the agency. "In addition, the bill presents feasibility concerns because the Department's assets do not fit into 'one size fits all' standards that are prescribed in the legislation.... Creating additional obligations may limit the Bureau's effectiveness in other key areas [such as delivering water and power]." In follow-up, Senator Johnson (SD-D) asked the Commissioner about prioritizing safety inspections. The Commissioner said there are three primary risk factors to consider: (1) potential loss of life; (2) risk of property damage; and (3) risk associated with the loss of water services. In prioritizing which facilities should be examined under S. 2842, Senator Tester (MT-D) asked how the Bureau would like Congress to proceed if the Bureau doesn't support this bill. Commissioner Johnson said the Bureau should focus on inspecting urban canals rather than conducting a comprehensive safety review of all facilities. Johnson said existing dam safety programs are working well. He was also concerned about the bill's federal and non-federal cost sharing.

#### *Title Transfer Act*

On September 25, the House Committee on Natural Resources, Water and Power Subcommittee, chaired by Rep. Grace Napolitano (D-CA), held a hearing on the Reclamation Title Transfer Act of 2008 (H.R. 6992). H.R. 6992 would give the Secretary of the Interior standing authority to facilitate the transfer of small-scale, single purpose Bureau of Reclamation projects or facilities to non-federal ownership. Witnesses included Dan Keppen, Executive Director of the Family Farm Alliance, and Kris Polly, Deputy Assistant Secretary for Water and Science, Department of the Interior. Mr. Keppen testified in support of the bill. "Experience throughout the West demonstrates that when control of projects is assumed by local interests, the projects are run more effectively and with far fewer items of deferred maintenance." He also explained the need for the bill, saying that "...local water agencies are discouraged from pursuing title transfers because the process is expensive and slow [because] environmental impact analyses can be time-consuming, even for uncomplicated projects that will continue to be operated in the same manner they have always been, [and] every title transfer requires an act of Congress to accomplish, regardless of whether the project covers 10 acres or 10,000 acres."

Of note, given the short notice prior to the hearing, the Administration did not provide written testimony.

In follow-up questioning, Chairwoman Napolitano raised her concerns that private entities might profit from the use of public lands and that entities that benefit should share the associated costs. Mr. Keppen offered to work with the Committee to add clarifying language that would ensure that transferred lands are not utilized for profit, while also explaining his belief that the bill in its current form does require entities benefitting from a transfer to share in the costs. Chairwoman Napolitano also asked Mr. Polly to explain what criteria the bill uses to ensure that the projects to be transferred are small in scale and uncontroversial in nature. Mr. Polly explained that the bill contains provisions requiring compliance with the Endangered Species Act (ESA) and other environmental laws and protects power users, thereby lessening the chances of controversial transfers.

Lastly, Chairwoman Napolitano asked Mr. Keppen and Mr. Polly whether the bill would allow a transfer to occur without Congressional approval in the event that an Indian tribe objected to the transfer. Both Mr. Keppen and Mr. Polly stated that Section 5 of the bill would require Congressional approval in such an instance.

Section 5 of the bill directs the Secretary to use the following criteria in determining the appropriateness of a transfer: (1) a qualifying entity agrees to accept title of the property to be transferred; (2) the transfer will not have an “unmitigated significant effect on the environment;” (3) the qualifying entity intends to use the property for “substantially the same purposes;” (4) the transfer protects “land and water resources held in trust for federally recognized Indian tribes;” (5) the transfer ensures compliance with international treaties and interstate compacts; (6) the qualifying entity agrees to provide compensation worth the equivalent of the net present value of any repayment obligation to the U.S. or other income stream the U.S. derives from the assets to be transferred; (7) any water rights being conveyed are in connection with a conveyance of title to associated land or infrastructure, and the entity receiving title has a “contractual right to delivery or other interest or use right in the water being considered for conveyance;” and (8) the conveyance does not “adversely impact power rates or repayment obligations,” and does not include “a federal facility that produces power that is sold to or eligible to be sold to power customers pursuant to section 9(c) of the Reclamation Project Act of 1939.”

### Water Project Financing

On October 6, the Bureau of Reclamation published a proposed rule (43 CFR Part 403) to establish eligibility criteria and program requirements for non-federal entities seeking loan guarantees for qualifying projects under the Twenty-First Century Water Works Act. Non-federal entities that operate and maintain Reclamation-owned facilities have had difficulty obtaining financing to make repairs or improvements because they do not own the facilities and cannot use them as collateral. The Act authorizes Reclamation to provide loan guarantees, which would be backed by the full faith and credit of the United States, for “...up to 80 percent of the principal and up to 90 days of accrued interest from the first missed payment for eligible losses.”

Non-federal entities eligible for a loan guarantee under the proposed rule include states, conservation districts, irrigation districts, canal companies, water user associations, Indian tribes, interstate compact agencies, and “any other entity that has the capacity to contract with the United States under Reclamation law.” Qualifying entities could obtain loan guarantees for: (1) rural water projects; (2) an “extraordinary operation and maintenance activity” for Reclamation project facilities; and (3) improvements to “water infrastructure directly associated with a Reclamation project.”

Borrowers must show that they are creditworthy and have the ability to repay the financing costs, as well as all of the operation, maintenance, and replacement costs associated with the project. Reclamation would also prioritize applications by giving “greater weight...to applicants with the greatest engineering need,” while also considering a number of other factors, including the extent to which the borrower has considered viable alternatives and an applicant’s demonstration “that it is infeasible...to finance the project using its current resources (e.g. reserve funds, tax base, etc.)” Lenders must adhere to a number of requirements such as notifying Reclamation of financial problems that a borrower has experienced that would cause it to be delinquent in its payments, issuing quarterly reports to Reclamation regarding the outstanding principal and interest balance of an outstanding loan, and inspecting collateral “...as often as necessary to ensure the proper maintenance of its value.”

On July 22, 2005, the WSWC wrote to Senator Pete Domenici (D-NM), then Chairman of the Natural Resources Committee, thanking him for his support of the Act (Position No. 263). In relevant part, the letter stated, "We hope to see this legislation enacted soon to create a systematic, integrated approach to investigating, authorizing and constructing projects to meet rural western needs in close cooperation with State, local and regional entities, as well as tribes. We strongly believe states should play a key role in the development and establishment of guidelines and criteria for determining program eligibility and in selecting project priorities. Moreover, federal efforts should be coordinated with state and local watershed plans. It is also important that non-Federal entities retain title to projects."

### Rural Water Supply

On November 17, the Bureau of Reclamation published an interim final rule establishing criteria for the Rural Water Supply Program authorized by the Rural Water Supply Act of 2006. It authorizes Reclamation to participate in projects to develop and deliver municipal and industrial water supplies to rural communities in the West. It is designed "...to serve a community or group of communities, including Indian tribes and tribal organizations, each of which has a population of no more than 50,000 people, with domestic, industrial, municipal, and residential water." States, Indian tribes and "entities, created under state law, with water management authority" can seek financial and technical assistance to undertake appraisal investigations and feasibility studies to explore water supply needs and options for addressing those needs. Reclamation is not authorized to construct water delivery facilities, but rather recommend projects for construction, which would require a separate act of Congress.

The interim final rule took effect on December 17, 2008. However, comments could be submitted through January 16, 2009 and changes may be made in a final rule.

Since 1980, Congress has authorized Reclamation to undertake ten specific rural water projects, but prior to the passage of the Act in 2006, Reclamation did not have a formal rural water program. The new program will allow Reclamation to be involved in planning and prioritizing rural water projects to ensure that they are cost-effective and that they are in the Federal interest. The Act explicitly authorizes the Secretary to: (1) investigate opportunities to ensure safe and adequate rural water supply projects for domestic, municipal, and industrial use in small communities and rural areas of the Reclamation States; (2) plan the design and construction of rural water supply projects by conducting appraisal investigations and feasibility studies; and (3) oversee, as appropriate, construction of rural water supply projects subsequently authorized by Congress.

Subpart A of the rule contains definitions, eligibility criteria, as well as criteria and the process for prioritizing requests for assistance. Subpart B includes cost-sharing requirements for appraisal investigations and feasibility studies. Subpart C explains how appraisal investigations will be evaluated. Subpart D covers feasibility study evaluation, and Subpart E miscellaneous requirements.

An appraisal investigation is an analysis of domestic, municipal and industrial water supply problems and needs and opportunities, using primarily existing data. It includes a preliminary assessment of alternatives to meet identified needs. Reclamation will pay 100%, up to \$200,000 and 50% of any additional costs. Feasibility studies are a detailed investigation, including a technical and economic analysis, and require the acquisition of primary data. There must be an analysis of a reasonable range of alternatives, with the selection of a preferred alternative. Generally, there will be a 50% non-federal cost share, but Reclamation can pay more in cases of financial hardship. Based

on its findings, Reclamation will make recommendations to Congress on construction costs and a non-federal cost share (at least 25%), based on an analysis of their capability to pay. Tribal project beneficiaries may have part or all of their construction costs deferred. Once built, non-federal project sponsors must generally pay 100% of operations and maintenance costs, as well as all repair costs.

Eligible entities have three options for completing appraisal investigations and feasibility studies: (1) they can ask Reclamation to do the work; (2) they can seek a grant or enter into a cooperative agreement to do it themselves or hire their own contractor; or (3) they can submit work prepared without any financial or technical support for Reclamation to review and include. All three options involve cooperation with Reclamation.

The 2006 Act authorized the appropriation of up to \$15 million/year for four years. The FY2009 budget request included \$1 million, but the current Continuing Resolution includes no money, so the future is uncertain. If funds are available, Reclamation anticipates issuing a request for proposals early next spring. Requests for assistance are expected to be significantly greater than available funds. Criteria for prioritizing projects take into account an "urgent and compelling" need to address present or future water supplies or promote "public health and safety by addressing present and preventing future violations of drinking water standards; application of regional or watershed water management approaches; financial need; unique Reclamation qualifications; legal requirements; serving Indian tribes with nonexistent or inadequate water systems; ineligibility for other federal program assistance; state, tribal and local government priorities; the application of innovative technology or creative administrative or cooperative solutions; and other criteria Reclamation may deem appropriate.

Project features may include: pumps, pipes, wells, surface water intakes and other diversion, transmission or distribution systems; small impoundments and storage tanks (no major impoundments); potable water treatment facilities, including desalination; necessary buildings for equipment and operations centers; related power transmission; water conservation, ground water recovery, and water reuse and recycling equipment and management tools; "associated features to mitigate adverse environmental consequences of a project;" and appurtenances. A project may not include facilities to deliver water for commercial irrigation.

The rule states: "Reclamation will only recommend a...project to Congress for construction if the project is determined to be economically feasible.... Economic feasibility means that the estimated national economic benefits of a project exceed the costs. Analysis of rural water projects that have been authorized in the past indicates that they have not met [this standard]." The rule also states: "The Principles and Guidelines for Water and Related Land Resources..., published in 1983 by the Water Resources Council pursuant to the Water Resources Planning Act of 1965 (Pub. L. 89-80) as amended, is incorporated by reference." Project evaluation will take into account "...changes in regional economic activity associated with each project, as measured by regional income and employment."

The interim rule does not apply to any projects previously authorized by the Congress. It also declares that "...neither the Act nor this rule preempts or affects state water law or any interstate compact governing water. Reclamation will comply with state water laws in carrying out this rule." For more information go to: <http://www.usbr.gov/ruralwater>.

The Bureau of Reclamation held a number of public meetings for comment on the interim final rule. Reclamation will solicit proposals, first asking for a statement of interest, which Reclamation would review in its area or regional offices to determine eligibility and priority before

asking the project sponsor to submit a full proposal. A Reclamation-wide review team would then rank proposals based on the following criteria: (1) urgent and compelling need; (2) a regional or watershed perspective, including combinations of projects; (3) financial need; (4) Reclamation's technical ability to plan and design the project; (5) legal issues; (6) tribal needs; (7) other available federal funding sources; (8) state or local priority; (9) innovative project approaches; and (10) other appropriate criteria. No weighting of these criteria has yet been made. Of note, any changes to the federal Principles and Guidelines would apply to project feasibility studies. Reclamation is also working on more detailed program "directives and standards" that will supplement the interim rule, and public workshops are planned in 2009 after the rule is final.

Under Section 104 of the Act, Interior is to report to Congress after assessing rural water needs, consulting with other federal agencies, and soliciting comments from States with "identified rural water needs." This program's assessment is to include: (1) the status of Interior's currently authorized rural water projects, as well as anticipated costs and obstacles to completion; (2) current completion plans; (3) the "demand for new rural water supply projects;" (4) "rural water programs within other agencies and a description of the extent to which those programs provide support for rural water supply projects and water treatment programs in Reclamation States, including an assessment of the requirements, funding levels, and conditions of eligibility...;" (5) the extent of demand that can be met with Interior's program; (6) how the program will complement other authorities; and (7) any suggested improvements to coordinate and integrate agencies' authorities.

Reclamation is meeting with other federal agencies with rural water programs. EPA is also required by law to estimate similar rural water needs, and EPA is working with Reclamation to "break out" those figures for Reclamation States. Reclamation is also working with information from the Bureau of Indian Affairs (BIA) on identified rural water needs. Reclamation intends to provide its draft assessment for review to the states.

#### *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, No. 546.

Title V covers 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); and Sec. 514 authorizes Reclamation site security measures at projects westwide (H.R. 1662/S. 1258).

## **Clean Water Act/Environmental Protection Agency**

### *State Revolving Funds*

On January 30, Rep. James L. Oberstar (D-MN), House Transportation and Infrastructure Committee Chairman, joined Rep. Eddie Bernice Johnson (D-TX), Chairwoman of the Subcommittee on Water Resources and Environment, and Rep. Earl Blumenauer (D-OR), a member of the Ways and Means Committee, in writing the General Accounting Office (GAO) asking for a study of ways to meet the Nation's water infrastructure needs, including potential funding sources to establish a Clean Water Trust Fund, by January 15, 2009.

Oberstar said, "The Environmental Protection Agency's own data shows that the ever-increasing need for water infrastructure investment is not being met. Federal appropriations are on the decline, and I fully expect that the President's budget request will, again, miss the mark on addressing the nation's water infrastructure needs. It is imperative that we address this funding gap for water systems now and into the future, because our aging infrastructure is literally crumbling." Oberstar added, "To guarantee consistent long-term funding for water infrastructure, we must identify a dedicated source of revenue that is both logical and sustainable. We know it is possible, because we already have the Highway Trust Fund and Aviation Trust Fund. Once a sustainable funding source for water infrastructure investment is identified, I hope to take up legislation creating a new Clean Water Trust Fund in the next Congress."

Rep. Johnson added: "Government estimates show that \$300-500 billion must be spent over the next 20 years in order to maintain and upgrade our nation's water infrastructure, and there is concern that this infrastructure funding gap is widening. It is time we make our domestic infrastructure a priority, and we must make the investment now. While the House passed a bill last year that authorizes a study about funding sources for water systems, the legislation stalled in the Senate. Because the need for investment is increasing every day, we are requesting that GAO study the issue now, rather than waiting for Senate action. As an independent, nonpartisan agency, the GAO can identify appropriate sources of revenue that will lead to bipartisan legislation establishing a Clean Water Trust Fund."

Last year, the House passed H.R. 720, the Water Quality Financing Act of 2007, with \$14 billion to re-capitalize the Clean Water State Revolving Fund program. "While water infrastructure is often out of sight and out of mind, communities across the country, both urban and rural, are dealing with aging water infrastructure that is in need of repair, replacement, and upgrading," said Blumenauer. "The Federal government has historically played an important role in helping to pay for clean and safe drinking water, but the overall contribution to clean water has shrunk from 78% in 1978 to 3% today. This is wrong. It's time for Congress to start making the tough decisions about investment in water infrastructure. I hope the GAO will be able to help identify sustainable, reliable, and dedicated revenue sources that can support a water trust fund."

Separately, it has been reported that the President's FY2009 budget request will include language directing the Environmental Protection Agency (EPA) to stop the practice of allowing revenues from State Revolving Funds (SRFs) to be used to repay State Match Bonds to Capitalization Grants (cap grants) in the Clean Water SRF and perhaps even the Drinking Water SRF. For example, in Texas, state legislation required that the respective funds be administered in a manner that would repay any state bonds deposited to meet the required non-federal match. If the proposed policy were to take effect, the Texas Water Development Board would be faced with



requesting up to \$46.8 million for the next biennium from general revenues to meet the required 20% on a combined estimated federal grant of \$234 million. Other states have likewise chosen to issue bonds to meet the federal matching requirement, and cover the debt service with SRF revenues, as allowed by published EPA guidance since 1987.

*National Pollutant Discharge Elimination System/Water Transfers Rule*

On June 13, the Environmental Protection Agency (EPA) published a final rule related to the National Pollution Discharge Elimination System (NPDES) to clarify “that water transfers are not subject to regulation under the [NPDES] permitting program.” The summary in the *Federal Register* states, “This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements. This rule is consistent with EPA’s June 7, 2006, proposed rule, which was based on an August 5, 2005, interpretive memorandum entitled ‘Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers.’” The rule addresses unanswered questions from the 2004 U.S. Supreme Court case, *South Florida Water Management District v. Miccosukee Tribe of Indians*.

Assistant Administrator Benjamin Grumbles said, “EPA’s Water Transfer Rule gives communities greater certainty and makes clear they have the flexibility to protect water quality and promote the public good without going through a new federal permitting process. Clean water permits should focus on water pollution, not water movement. EPA is committed to working with our state, tribal, and local partners to reduce environmental impacts associated with transfers and will continue to use all appropriate tools such as standards, best management practices, and watershed plans.”

On July 21, 2006, the Council adopted a position on the matter stating, “[the WSWC] declared its position that the transport of water through constructed conveyances to supply beneficial uses should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents...” and resolved that “[the WSWC] generally supports EPA’s proposed amendment to its Clean Water Act regulations as published in the June 7, 2006 *Federal Register*.” (Position No. 278) The final rule, 73 Fed. Reg. 33697-33708, went into effect on August 12, 2008.

*New York, et al v. EPA*

On October 2, the New York Attorney General’s Office filed a lawsuit against the EPA, alleging that a June 9 decision to promulgate a rule (40 CFR Part 122) that exempts water transfers from the permitting requirements of the National Pollutant Discharge Elimination System (NPDES) violates the Clean Water Act (CWA). The New York Attorney General’s Office filed the lawsuit in the U.S. District Court for the Southern District of New York, along with a companion filing in the U.S. Court of Appeals for the Second Circuit. Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and the State of Washington, plus the Canadian province of Manitoba, have joined the lawsuit.

The plaintiffs seek to require EPA to create NPDES permitting requirements for water transfers, claiming, “No provision in the [CWA] exempts ‘water transfers’ from NPDES permit requirements [and] no provision in the [CWA] grants EPA rulemaking authority to establish additional exemptions to the NPDES permitting requirement.” The complaint further alleges that

the rule fails to address the impact of allowing unregulated transfers of polluted water into clean water, and is inconsistent with a 2005 federal executive order preventing federal agencies from authorizing or carrying out actions that "...are likely to cause or promote the introduction or spread of invasive species."

The rule states that a water transfer will not be subject to the CWA's permitting requirements if it conveys or connects "...waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." The conveyance itself also must not introduce pollutants into the water being conveyed. CWA Section 402 prohibits "the addition of any pollutant to navigable waters from any point source" without a NPDES permit. EPA claims the rule is consistent because water transfers that satisfy the criteria "do not result in the 'addition' of a pollutant." The EPA further claims that "taken as a whole, the statutory language and structure of the [CWA] indicate that Congress generally did not intend to subject water transfers to the NPDES program."

In a press release, New York Attorney General, Andrew M. Cuomo, declared, "The Bush EPA continues to create environmental loopholes that will degrade New York's waterways, prevent fisherman and others from enjoying our streams, and put the Great Lakes at risk." Katherine "Kit" Kennedy, Special Deputy Attorney General for Environmental Protection, challenged EPA's legal analysis stating: "Federal courts in New York and Florida have said that these types of transfers require a permit under the Clean Water Act." Ms. Kennedy further claims that moving water from one body to another can introduce a number of pollutants that can be harmful to the receiving body of water, including chemical pollution, invasive species, oxygen-depleting nutrients, and waters of different temperature, which can have consequences for cold-water fish.

On August 1, 2003, the WSWC adopted a position regarding water transfers, which states that the "transport of water through ditches, canals, tunnels, pipelines and other constructed water conveyances in order to supply municipal, agricultural, industrial and other beneficial uses, as opposed to waste disposal purposes, in compliance with state law, should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents." An updated statement in 2006 reiterated that position.

On October 31, the Colorado Attorney General's Office filed a motion to intervene in support of EPA's Water Transfers Rule, generally exempting water transfers from CWA NPDES permitting requirements. Environmental groups challenging the rule include EarthJustice, Environment America, the Sierra Club, and the National Wildlife Federation. Four different petitions have been filed in three different circuits. The petitions will be consolidated in the 11<sup>th</sup> Circuit Court of Appeals.<sup>7</sup> Alaska, Idaho, Nebraska, Nevada, New Mexico, South Dakota, Utah and Wyoming joined Colorado in the motion to intervene.

Prior to filing its motion, Colorado sought support from other Western states in a letter, stating: "The issue addressed by the rule (and now before the circuit court reviewing the rule) is whether the mere movement of pollutants from one body of water to another (such as via a pipe), without the movement itself adding pollutants, is an 'addition' of pollutants subject to the permitting requirements of section 402 of the Clean Water Act (CWA)... EPA's position is that state water management agencies should handle the issue under non-permitting authorities. Similarly, the State of Colorado's position is that Congress did not intend for the CWA to supersede the states' authority

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<sup>7</sup>*Western States Water*, Issue #1795, October 10, 2008.

to regulate water allocation. Indeed, Colorado has other mechanisms in place to address water quality issues relating to engineered water transfers including, *inter alia*, the authority to adopt specific 'control regulations' for any transfers that may cause water pollution. Colorado considers the rule an appropriate recognition of states' rights, and the proper application of federalism in the context of the CWA."

The letter adds, "Colorado believes that it is important for those states that support the EPA's rule to seek intervention, so that there is parity in front of the Court. Moreover, intervention will protect such states' ability to appeal any adverse decision and avoid [future] uncertainties that may arise under a future administration.... Water transfers play an important role in many western states. In Colorado alone twenty-eight major engineered transfers move an average of 550,000 acre-feet per year to supplement water supplies among basins. There are also hundreds of intra-basin transfers. The ability to divert, transport, store, and use water is critical to the social and economic well-being of the West.... Extension of the CWA permit program to engineered transfers threatens the continued viability of this system." If Colorado's motion is denied, the state intends to seek states interested in joining an *amicus* brief.

The Texas Water Development Board (TWDB) wrote the Texas Attorney General on October 28, urging Texas to join Colorado's motion, and referred to support for EPA's rule from the Western States Water Council, National Water Resources Association, and Texas Water Conservation Association. The letter says the rule "appropriately defers to the state in the allocation and management of its waters," adding "Texas' interests are aligned with Colorado on this issue." If EPA's rule is invalidated, "...water management strategies...that involve water transfers would likely increase in cost and in the length of time to develop."

#### *Permit Fee Incentive*

On September 4, the Environmental Protection Agency (EPA) issued a new rule that will provide financial incentives for states to use fees to help pay the cost of administering a clean water permit program. EPA will provide \$5.1 million to states that have adequate permit fees for their National Pollutant Discharge Elimination System (NPDES) programs. The rule is designed to encourage states to voluntarily implement adequate fee programs and shift part of the financial burden to those who benefit from the permits. It will also allow states to move funds to other critical water quality program activities. The increasing expense of administering clean water permit programs has already prompted some states to implement fee programs to cover some costs. A number of states, however, still operate with little or no reliance on permit fees.

The NPDES Voluntary Permit Fee Incentive for Clean Water Act Section 106 Grants Allotment Formula rule provides financial incentives to states to utilize an adequate fee program when implementing an authorized NPDES permit program. This incentive gives EPA the flexibility to allot up to three percent of Congressionally appropriated CWA § 106 state water quality program funds to states that have adequate NPDES permit fee programs. The rule provides a monetary incentive for states to implement adequate NPDES fee programs, moving them toward greater sustainability in the way they manage and budget for environmental programs, and shifting part of the financial burden to those who benefit from NPDES permits. Funding permit programs with the support of permit fees also allows states to use CWA § 106 funds for other critical water quality programmatic activities. The rule defines eligibility for the incentive, identifies the process for determining the amount each eligible state will receive, and establishes procedures and guidelines – including reporting requirements – for eligible states to follow when applying for the incentive.

The permit fee incentive will only be made available if federal funding for state water pollution control programs is more than the FY2008 level. Therefore, state grants will not decrease as a result of this rulemaking. The rule will be in effect for the FY2009 grant cycle and beyond. For more information go to: [www.epa.gov/owm.cwfinance/npdes-permit-fee.htm](http://www.epa.gov/owm.cwfinance/npdes-permit-fee.htm).

### Effluent Limitations Guidelines

#### *Natural Resources Defense Counsel v. EPA*

On September 18, the Ninth Circuit Court of Appeals decided a case regarding whether the Clean Water Act (CWA) requires the Environmental Protection Agency (EPA) to create effluent guidelines for pollution discharges caused by the construction industry. In *Natural Resources Defense Counsel v. United States Environmental Protection Agency (NRDC v. EPA)*, the court held that “once the EPA listed the construction industry as a point-source category [of pollution discharges], it was required to promulgate” water pollution guidelines known as “effluent limitations guidelines” (ELG) and “new source performance standards” (NSPS). ELGs apply to existing sources of pollution and NSPSs pertain to new point-sources of pollution, while both guidelines aim to reduce water pollution “given current technology.”

The CWA prohibits the discharge of any pollutant into navigable waters of the U.S. without a permit issued pursuant to the National Pollution Discharge Elimination System (NPDES). Such permits “place limits on the type and quantity of pollutants that can be released into the Nation’s waters” and must set “effluent limitations,” which the ELGs and NSPS guidelines determine. Moreover, CWA Section 304(m) requires EPA to publish a plan every two years that identifies “categories of sources” of pollutants for which it has not published ELGs and NSPSs. Once the EPA has identified a pollutant source, Section 304(m) states that “promulgation of [the ELGs and NSPSs] shall be no later than...3 years after the publication of the plan.”

In *NRDC v. EPA*, the EPA published final notice of an effluent guideline plan in 2000 that identified storm water discharge associated with construction activities as a point-source category of water pollutants requiring ELGs and NSPSs under Section 304(m). EPA later issued three proposed rules regarding the establishment of ELGs and NSPSs for the construction industry in 2002. However, in 2004, EPA withdrew its proposals to promulgate ELGs and NSPSs, explaining that existing standards were sufficient and that promulgating new ELGs and NSPSs would be too expensive. The NRDC and a number of state interveners brought suit against EPA and filed a motion for partial summary judgment, which claimed that EPA improperly withdrew its proposed rules, because it has a mandatory duty to promulgate ELGs and NSPSs once it has identified a point-source category of pollutants. The district court agreed, granting the plaintiffs’ summary judgment motion, and requiring EPA to promulgate ELGs and NSPSs “no later than December 1, 2009.”

In affirming the district court’s decision, the Ninth Circuit held that the language of the CWA “is clear that the EPA must promulgate ELGs and NSPSs for the point-source categories it lists in any plan it publishes under § 304(m).” The court reasoned that Congress’ inclusion of the term “shall” in Section 304(m)’s three year deadline to publish ELGs and NSPSs “connotes a mandatory command.” Further, the court found, “Nothing in the CWA expressly *grants* the EPA the authority to remove a point-source category from a § 304(m) plan” because the three year deadline “would be rendered meaningless as the EPA could delist any point-source category to avoid the deadline....” The court also reasoned that “by the time a point-source category is listed in a § 304(m) plan, the EPA must have already engaged in a review process to consider *whether* the category should be listed.” Therefore, “the three-year delay...is not to decide *whether* to list a point-source category, but to allow the EPA to consider what the *substance* of what the ELGs and NSPSs should be.”

The Ninth Circuit Court of Appeal's opinion can be found in its entirety online at: <http://www.ca9.uscourts.gov>.

### Wetlands Jurisdiction and Navigable Waters

#### *Rapanos and McWane*

On December 1, the U.S. Supreme Court refused to review two appeals stemming from its divided 4-1-4 decision in *Rapanos v. U.S.* and to provide more guidance regarding the types of wetlands that qualify as "navigable waters" subject to CWA jurisdiction. In particular, the Court denied review of *U.S. v. McWane*, an 11<sup>th</sup> Circuit case in which managers of a pipe manufacturing plant were convicted on a number of counts for violating the CWA by improperly disposing of wastewater into a creek. The defendants challenged their convictions by claiming that the creek was not a "navigable water" under *Rapanos*. The 11<sup>th</sup> Circuit found jury instructions used to convict the defendants were erroneous under *Rapanos* and reversed one conviction, while ordering new trials for the remaining counts. Federal attorneys appealed to ask the Court to clarify what types of wetlands qualify as "navigable waters" under *Rapanos*.

The Court's refusal leaves it to the lower federal courts to interpret the fractured *Rapanos* decision, which set forth three different tests for determining the types of wetlands that qualify as navigable waters. Two of these have gained prominence among the lower courts. The first, by Justice Antonin Scalia, requires a continuous surface connection between a wetland and a relatively permanent body of water that is connected to traditional navigable interstate waters. The second, by Justice Anthony Kennedy, requires a "significant nexus" or connection, between wetlands and navigable waters. These differing opinions have created a split among the federal circuit courts, with the 7<sup>th</sup> and 9<sup>th</sup> Circuits adopting Justice Kennedy's test and the 1<sup>st</sup> Circuit concluding that either test applies. The 11<sup>th</sup> Circuit sided with the 7<sup>th</sup> and 9<sup>th</sup> Circuits in *McWane* and concluded that Kennedy's "significant nexus" test applies.

This jurisdictional uncertainty has resulted in a decline in EPA's enforcement activities. Wetland advocates have criticized *Rapanos* for improperly narrowing the definition of "navigable waters." Senator Russ Feingold (D-WI) intends to reintroduce a wetlands protection bill to redefine CWA protections in light of *Rapanos*. Rep. James Oberstar (D-MN) also introduced a similar bill this summer and Democratic gains in the House have increased its chances of passing in the next session. However, opponents, including Senator James Inhofe (R-OK), the Ranking Member of the Environment and Public Works Committee, believe Feingold's bill would lead to more lawsuits by expanding the CWA definition of "navigable waters" beyond the CWA's intent.

## **Water Supply/Drought**

### Water Supply Outlook

The 2008 New Year started off with storms that raised snowpacks dramatically across many western mountain ranges and areas, including the Cascades, Sierras, Wasatch and Southern Rockies, which received several feet of new snow. The USDA/NRCS Weekly Report-Drought Monitor Update, notes an impressive orographic effect over the Southern Sierra nearly doubled estimated snow water equivalence. Statewide California figures jumped from 60% of normal to 111%. Similarly, snow-water numbers jumped in Oregon's Willamette Basin from 45% to 159%, the

Rogue/Umpqua 32% to 130%, and the Klamath 24% to 109%. Heavy mountain snows and valley rain/snow fell across parts of Arizona, northern New Mexico, Nevada, Utah and Colorado. Water supply conditions improved across much of southern and central coastal California, western Nevada, central and southern Utah, and northwestern Arizona.

Well above normal snow-water equivalences were also recorded over portions of the Cascades in Oregon and Washington, Southern Rockies of Colorado and New Mexico, and other ranges in Arizona and New Mexico. Below normal numbers exist over the east slope of Montana's Rockies, the Snake River Basin of Wyoming and Idaho, and other parts of southwestern and central Wyoming. However, the report warns that despite these impressive gains, each day without snowfall ultimately can result in a daily loss in total spring-summer runoff of 0.5% to 1.0% and a strong, persistent high pressure ridge is forming across the West. As a result, current snowpack numbers will probably decrease due to sublimation and/or earlier seasonal melting.

### *Flooding*

On January 8, the White House declared a major disaster in Lyon County in Nevada, making Federal funding and assistance available. On January 7, Nevada Governor Jim Gibbons wrote the President requesting a major disaster declaration under the Stafford Disaster Relief and Emergency Assistance Act saying, "Flooding, due to severe winter storms, ...has caused catastrophic damage...in the State of Nevada. The flooding began on January 5, 2008 and continues to be of significant concern. A canal breach in the City of Fernley...resulted in moderate to severe flooding of two square miles of mostly residential structures. At this time, it is reported that up to 264 residences and one elementary school have been adversely affected, most of which are not required to have and do not have flood insurance. It is estimated that approximately 3,800-4,000 residents were displaced."

The Governor added, "While aerial over flights suggested widespread flooding, the actual residential damages were reduced due to good mitigation practices.... Had such practices not been employed, as many as 2,000 homes may have been damaged or destroyed.... While the community is not traditionally 'low income' all of the families are middle class working individuals who do not have excess funds to recover from this event.... The decline in property value, the residential mortgage crisis, and the limited financial resources of the citizens of Fernley have limited the options for financing repairs.... I certify that...State and local governments will assume all applicable non-Federal share of the costs required by the Stafford Act. I request direct Federal assistance for work and services to save lives and protect property."

As of March 27, the Drought Monitor Update and weekly snowpack report showed wet weather had left more than a foot of snow across the Cascades and lesser amounts across the Northern Rockies, increasing preliminary streamflow runoff forecasts over Montana and Wyoming, while forecasts dropped more than 10% in the Four Corners region. Conditions typical of a La Niña weather pattern were evident as the Pacific Northwest and Northern Rockies were cooler and wetter than normal, and the Southwest drier and warmer. Seasonal precipitation as a percent of normal since last October remained well above normal over much of Arizona, northern New Mexico, and southern Colorado. Snow water equivalent (SWE) percentages were well above normal over portions of the Cascades and Coastal Ranges in Oregon and Washington, but were down over portions of Arizona and New Mexico, which together with California and Nevada, had little precipitation over the previous week. March had "only been holding serve as far as late season precipitation," according to USDA-NRCS. SWE east of the Sierras are only at or just below 100%



of normal, leaving much of the West vulnerable as the snow season ends. Some late-season storms could boost SWE levels.

### *Drought*

With respect to drought conditions, the Southwest's Mohave and Yuma Desert regions improved with above-normal precipitation for the water year, but were still experiencing moderate drought conditions. There were improvements in the South Lahontan Basin in eastern California along the Nevada border and across west-central Nevada. Northeastern South Dakota and southeastern North Dakota saw improvement with about an inch of water from heavy snows, but the precipitation missed the western Dakotas and eastern Montana, leading to some expansion of drought conditions. Moreover, the lack of snow cover and rain, together with high winds, stoked several pre-season fires. Fire risks were also critically high in west and south Texas, along with parts of western Oklahoma. Wet weather continued in west-central Texas. Along the lower Rio Grande, towards Brownsville, severe to extreme drought persisted, as less than 50% of normal precipitation had fallen for the water year since October 2007.

Elsewhere a couple of small pockets of extreme drought remained in northwestern Nebraska and north-central North Dakota, and severe hydrologic drought conditions persisted over the western Dakotas and parts of Montana, as well as most of Nevada, southeastern Oregon, southern Idaho across the Snake Plain, northern Utah and southwestern Wyoming. Of note, the Southeast States of Alabama, Georgia, South Carolina, North Carolina and Tennessee also continued to suffer from extreme drought conditions.

On June 4, California Governor Arnold Schwarzenegger proclaimed a statewide drought and issued an Executive Order to deal with the worrisome water outlook. The proclamation came after two years of below-average precipitation, low runoff, and the largest court-ordered water transfer restrictions in California history (to comply with the Endangered Species Act). Dry conditions were even prompting some communities to ration water. Farmers were also facing significant water shortages and fire danger throughout the state increased. The Executive Order encouraged local water districts and agencies to promote water conservation and directed the California Department of Water Resources (DWR) to take a variety of actions. Specifically, DWR was directed to: (1) expedite grant programs to help local water districts and agencies conserve; (2) facilitate water transfers to respond to emergency shortages across the state; (3) work with local water districts and agencies to improve coordination; and (4) coordinate with state, federal and local partners to assist water suppliers, identify potential risks to water supply and help farmers suffering losses.

On June 11, Kansas Governor Kathleen Sebelius declared drought warnings and watches in several Kansas counties. The U.S. Drought Monitor showed extreme drought in five southwest counties with abnormally dry to severe drought in the most western and southwestern parts of the state. The Governor's order authorized water agencies to implement appropriate drought watch or warning level drought responses assigned to them in the Operations Plan of the Governor's Drought Response Team. At the same time, eastern portions of the state faced continuing flood risks.

The Drought Monitor Update noted, "With the exception of some of the highest peaks in the Cascades and Northern Rockies, the snowpack has essentially melted out for the season.... Snow-water equivalent percent for this Water Year as of June 19 shows exceptionally late snow melt over the northern states in the West." Further, "In the dry areas across the West, weekly precipitation totals in excess of 0.5 inch were restricted to western Wyoming and isolated sites in southern Idaho.... [S]ome areas of deterioration were noted, primarily across California, where all but the

northwestern and southwestern extremities of the state are now experiencing at least moderate drought.” Exceptional drought conditions afflict the Oklahoma Panhandle and adjacent areas of Colorado, Kansas, New Mexico and Texas. Large parts of Southern New Mexico and southern and southwest Texas show severe to extreme drought conditions. Of note severe drought continued in the U.S. Southeast.

## **Endangered Species Act**

On July 8, the Senate Committee on Energy and Natural Resources held a hearing on four bills, including the Aging Water Infrastructure and Maintenance Act (S. 2842) and the Endangered Fish Recovery Programs Improvement Act (S. 3189). S. 2842 would require the Secretary of the Interior to carry out annual inspections of canals, levees, tunnels, dikes, pumping plants, dams and reservoirs under his jurisdiction. S. 3189 would amend Public Law 106-392 to require the Administrator of the Western Area Power Administration and the Commissioner of Reclamation to maintain sufficient revenues in the Upper Colorado River Basin Fund for endangered species purposes. Witnesses included Senator Wayne Allard (CO-R); Robert Johnson, Commissioner, U.S. Bureau of Reclamation; Dan Keppen, Family Farm Alliance; Bill Long, Arkansas Valley Conduit Committee; and WSWC member Jennifer Gimbel, Colorado Water Conservation Board.

Commissioner Johnson said, “While we share the sponsors’ goals of reliable and safe facility operations, the Department does not support S. 2842.” This is due in part to the Bureau’s belief that the bill potentially imposes new costs to the agency. “In addition, the bill presents feasibility concerns because the Department’s assets do not fit into ‘one size fits all’ standards that are prescribed in the legislation.... Creating additional obligations may limit the Bureau’s effectiveness in other key areas [such as delivering water and power].” In follow-up, Senator Johnson (D-SD) asked the Commissioner about prioritizing safety inspections. The Commissioner said there are three primary risk factors to consider: (1) potential loss of life; (2) risk of property damage; and (3) risk associated with the loss of water services. In prioritizing which facilities should be examined under S. 2842, Senator Tester (D-MT) asked how the Bureau would like Congress to proceed if the Bureau doesn’t support this bill. Commissioner Johnson said the Bureau should focus on inspecting urban canals rather than conducting a comprehensive safety review of all facilities. Johnson said existing dam safety programs are working well. He was also concerned about the bill’s federal and non-federal cost sharing.

Jennifer Gimbel testified in support of S. 3189 saying that the proposed amendments to Public Law 106-319 will provide necessary authorization to the Secretary of the Interior to complete critical projects. The amendments will also authorize funding to protect important habitat. Specifically, the amendments would authorize an additional \$12 million in federal expenditures for capital projects for the San Juan Program for the purposes of (a) protecting critical habitat of endangered fish species (\$7 million); and (b) repair, rehabilitation and replacement of constructed capital facilities (fish passages, fish screens, habitat, hatcheries) as needed through 2023 (\$5 million); authorize an additional \$15 million in federal expenditures for capital projects for the Upper Colorado Program for the purposes of (a) constructing a fish screen on the Green River; and (b) for repairs, rehabilitation and replacement of constructed capital facilities. Further, it includes additional non-federal cost sharing of \$56 million through 2023. Due to tight federal budgets, she noted, “Appropriations will only be requested as needed and any requests would be subject to Congressional scrutiny.”

Commissioner Johnson said the Bureau supported S. 3189 but recommended a few changes. First, he expressed concern about the duration of the authorization, which as amended would last until 2023. “Although a longer-term authorization may be warranted, we also believe that it is prudent to reassess the program and its goals so that adaptive management practice can be applied to ensure the best outcomes for this program.” Second, the Administration recommends that the bill be revised to raise the authorization in Section 3(c)(1) of Public Law 106-392 for non-federal contributions to capital projects, to ensure that the federal cost-share of program implementation does not escalate further in light of increased construction material costs. Third, the Administration does not endorse designating base funding derived from power revenues as non-federal contributions for the purposes of cost-sharing for restoration projects. Finally, the Administration opposes granting new borrowing authority for operations and maintenance purposes.

### Westslope Cutthroat

On July 8, the U.S. Court of Appeals for the D.C. Circuit upheld the U.S. Fish and Wildlife Service’s decision not to list the westslope cutthroat trout (*Oncorhynchus clarki lewisi*) as a threatened species. The historic range of westslope cutthroat trout (WCT) includes parts of Montana, Wyoming, Idaho, Oregon, and Washington. Fishermen and several environmental groups (plaintiffs) argued that hybridization has so imperiled the trout’s existence that it should be protected under the Endangered Species Act (ESA). The court held that while new data might require a future listing of the subspecies as threatened, the agency engaged in reasoned decisionmaking based upon the best available science.

Plaintiffs argued that hybridization jeopardizes the trout as a subspecies and endangers its ability to survive harsh conditions. Gene introgression, defined as the “entry or introduction of a gene from one gene complex into another,” occurs when species hybridize. When assessing the risk of introgression, the Service adopted the following rule: “For populations for which molecular genetic data may be the only data available, populations with less than 20 percent introgression will be considered WCT under the [ESA], whereas populations with more than 20 percent introgression will generally be excluded from the WCT subspecies.” The Service settled on the 20% threshold after reviewing the scientific evidence and concluded that a natural population of WCT with less than a 20% introgression level is most likely morphologically indistinguishable from populations of WCT with no hybrid ancestry. While acknowledging “hybridization remains the greatest threat” to WCT, the Service decided that the risk did not yet warrant listing.

Plaintiffs challenged the Service’s decision under the Administrative Procedure Act, claiming that the decision to include hybridized fish in the population estimate was arbitrary and capricious. Specifically, they argue that the Service’s reliance on morphological data wrongly assumed that fish morphologically conforming to WCT will only be slightly hybridized. According to plaintiffs, the record shows that fish can have introgression levels up to 50% and still morphologically conform to the WCT subspecies. The Service acknowledged that populations that morphologically conform to the WCT subspecies may have introgression levels higher than 20%, but argued that its methods were still reasonable. The court held that “...in the absence of genetic data, the Service reasonably included fish morphology conforming to WCT in the population.” Furthermore, the court said, “To agree with the plaintiffs would be to require the Service to make its decision only on the basis of genetic data. This rule would demand the absurd result that the service must deem threatened any species for which it lacks genetic data. Absent a statutory mandate requiring the Service to collect genetic data, the Service’s method was reasonable.”

### Proposed Changes to the Consultation Process

On August 15, the Department of the Interior published proposed changes to the consultation process of the Endangered Species Act (ESA) in the *Federal Register* (73 FR 47868–47875). According to an Interior press release, “Today’s proposal is intended to update a portion of the ESA regulations dealing with section 7 of the Act.... The purpose of these proposed changes is to clarify process, replace ambiguous definitions, explain when formal consultation is applicable, and improve the informal consultation process.”

Further, “These changes are designed to reduce the number of unnecessary consultations under the ESA so that more time and resources can be devoted to the protection of the most vulnerable species. Under the proposed rule, agency actions that could cause an adverse impact to listed species are still subject to the consultation requirement.” The rules are also designed to curb the applicability of ESA protections to greenhouse gas (GHG) emissions. The Department of the Interior maintains that, “...it is inappropriate to consult on a remote agency action involving the contribution of emissions to global warming because it is not possible to link the emissions to impacts on specific listed species such as polar bears.” The changes would also add timelines to help limit the duration of informal consultation. “It would allow agencies to terminate consultation if the Fish and Wildlife Service has not acted on its request for concurrence within 60 days.” However, the Service may request an additional 60 days if more time is required.

Interior Secretary Dirk Kempthorne said, “ESA consultations in the 21st century address increasingly complex issues. We need a regulatory framework to guide those consultations that is consistent with the ESA and will address new challenges such as climate change. The existing regulations create unnecessary conflicts and delays. The proposed regulations will continue to protect species while focusing the consultation process on those federal actions where potential impacts can be linked to the action and the risks are reasonably certain to occur. The result should be a process that is less time-consuming and a more effective use of our resources.”

### Environmental Assessment

The U.S. Fish and Wildlife Service and National Marine Fisheries Service announced on October 27, that a Draft Environmental Assessment (EA) is available for public review and comment on proposed revisions to interagency consultation procedures under Section 7 of the Endangered Species Act (ESA). The EA was available online at [www.doi.gov/issues/esa.html](http://www.doi.gov/issues/esa.html). The Administration, which has been accused of violating the ESA for suggesting changes to the federal consultation process, says that in reality the ESA does not define consultation and Congress left crafting the process to the agencies. The proposed regulations are intended to better clarify for federal “action” agencies when and how they are required to consult, if their actions are expected to harm listed species. The proposed regulations say that agencies do not have to consult if their actions have no effect, an insignificant effect, a beneficial effect, or an indeterminable effect on ESA-listed species or critical habitat. For example, if an agency is building a fish ladder to allow listed species to circumnavigate a dam, and no “taking” is anticipated related to the ladder’s construction and operation, consultation would not be necessary under the proposed rule.<sup>8</sup>

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<sup>8</sup>*Western States Water*, Issue #1787, August 15, 2008.

## Farm Bill

### Regional Water Enhancement Program

The House began the 2<sup>nd</sup> Congressional session on January 15, and the Senate on January 22. On December 14, 2007<sup>9</sup> the Senate passed a conference report on the Farm Bill, H.R. 2419. There are a number of differences between the two versions of the bill, including provisions authorizing the Administration's proposed Regional Water Enhancement Program (RWEP), under the Title II – Conservation and the Cooperative Conservation Partnership Initiative, as well as the Environmental Quality Enhancement Program (EQIP). Both the House and Senate designated priority areas, with the Senate having a larger number. Further, funding mechanisms in the bills were very different.

In a January 17 letter to House and Senate leaders, a coalition of groups wrote, "We greatly appreciate the inclusion of the [RWEP] in the House and Senate farm bills, and we support passage of a conference bill that maintains a strong program...including these critical new incentives for regional, performance-based water quality and water quantity conservation projects.... As you work to reach a consensus approach, we would respectfully suggest the following priorities, which the undersigned organizations unanimously endorse. Foremost, we support guaranteed funding of RWEP...so that USDA is certain to implement a robust program. The coalition has not advocated for priority areas, instead preferring a national competitive approach.... We support allowing the Secretary to...determine what, if any, caps should be placed on payments.... The program will be implemented best if the list of eligible partners is broad – so we support Secretarial discretion to include NGOs as partners.... The final version should maintain flexibility to use all the conservation tools available within the Conservation Title and to require partnerships to set clear objectives for water quality and water quantity conservation goals, as both bills currently do."

The letter was endorsed by the Association of California Water Agencies, American Water Works Association, Association of Metropolitan Water Agencies, Colorado River Water Conservation District, Family Farm Alliance, Idaho Water Users Association, National Association of Clean Water Agencies, National Water Resources Association, Nature Conservancy, Trout Unlimited, and Water Environment Federation.

Negotiations continued between House and Senate leaders and the Administration over a Farm Bill. The main point of contention was the total price tag. On December 14, after the Senate passed its version of H.R. 2419, by a 79-14 margin, the White House announced it would not sign it saying it did not represent "wise stewardship of taxpayer dollars." It criticized both the Senate and House passed bills, stating that combined they "approved \$22.4 billion dollars in new taxes that increase the size and scope of the Federal government and damage the credibility of farm programs. In addition, Congress refused to significantly limit farm income subsidies for the wealthiest Americans." The House likely would not override a veto, having passed its bill in July 2007 by a 231-191 vote.

House and Senate leaders met with new U.S. Department of Agriculture Secretary Ed Schafer on February 14, and made some significant progress. Schafer declared, "I think we are going in the right direction." House Agriculture Committee Chairman Collin Peterson (MN) and Rep. Bob Goodlatte, the Committee's Ranking Republican Member, offered a compromise that cut some \$8 billion in subsidies and energy and conservation payments, but still comes in \$6.1 billion over the current baseline budget over ten years. Senate leaders are "way beyond" that figure, according to

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<sup>9</sup>*Western States Water*, Issue #1754, December 28, 2007.

Agriculture Committee Chairman Tom Harkin (D-IA). Senate Budget Committee Chair, Kent Conrad (D-ND) said the number was closer to \$12.5 billion.

The American Farm Bureau and National Farmers Union, joined by 40 other farm groups (mostly producer associations) stated in a February 14 letter "...the framework negotiated between the House committee leadership and the Administration is seriously under-funded. The Commodity Title has already experienced a 60% decrease in baseline spending. To strain the safety net for American agriculture with a further \$6.5 billion cut is excessive." Decrying the Administration's demand for no more \$6M in "offsets," the groups wrote, "...we believe that providing less than \$12.5 billion in additional funding will require the farmer safety net to bear the unfair burden of paying for increases in spending in other areas of the bill."

Under the Conservation Title II, differences remained over authorization of the Administration's proposed Regional Water Enhancement Program (RWEP), which the Western States Water Council supported. The Administration proposed creating the new RWEP under the Environmental Quality Improvement Program (EQIP), while eliminating the current Ground and Surface Water Conservation Program (GSWCP) and consolidating other EQIP programs. The Senate version (Section 2359) would maintain the GSWCP, which helps producers to improve irrigation systems or convert to less water-intensive crops or dryland farming, as well as improving water storage through banking and recharge programs. It also supports drought mitigation activities. Second, it creates the RWEP under the Partnerships and Cooperation (Section 2405), with special rules and procedures.

The House bill's Regional Ground and Surface Water Enhancement Program (Section 2106) encouraged grants under the Cooperative Conservation Partnership Initiative (Section 2403) "...to support State activities to efficiently manage and utilize their water resources in regions, States or local areas where water quantity is a concern." It explicitly defines Section 2106 activities to include "...resource condition assessments and modeling, water quality, water quantity or water conservation plan development, ...cost share of restoration or enhancement projects, incentive payments for land management practices, ...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 quantity benefits on agricultural lands identified in a partnership agreement."

In a February 8 letter, Senators Wayne Allard (R-CO), John Barrasso (R-WY), Jeff Bingaman (D-NM), Sam Brownback (R-KS), Pete Domenici (R-NM), Tim Johnson (D-SD) and Ken Salazar (D-CO) wrote House Agriculture Committee leaders strongly supporting two provisions in the Senate-passed bill "aimed at extending the life of the Ogallala Aquifer." Section 2359 allocated minimum annual funding to the eight states overlying the High Plains [Ogallala] Aquifer. "It is important to note, however, that providing a minimum level of funding for these states does not decrease other states' funding levels." Second, they strongly supported establishing the RWEP (Section 2405) "...as well as the identification of the Ogallala Aquifer as a priority area for this program."

The letter stated, "The withdrawals from the Ogallala Aquifer for agricultural purposes are extra-ordinary in their magnitude – some 17 billion gallons per day, according to the U.S. Geological Survey – outpacing agricultural use of any other aquifer in the country by nearly 90 percent. Ninety-seven percent of the withdrawals from the Ogallala are used for irrigation. The Aquifer has experienced alarming depletions with some areas experiencing a decline of 100 feet over 20 years.

We believe the two provisions described above could greatly assist efforts to protect and restore the Ogallala Aquifer.”

The week of May 12, both Houses of Congress passed the Farm Bill Conference Substitute (H.R. 2419) by bipartisan, veto-proof margins. The House passed the bill 318 to 106 and the Senate passed the bill 81 to 15. The five-year, \$289 billion legislation was sent to the White House, where the President threatened to veto the measure. The bill included a new disaster assistance program, increased commodities support, provided new energy incentives for cellulosic ethanol production, reformed livestock marketing, provided for additional conservation improvements, supported rural development, and devoted substantial funds towards nutrition programs. The bill also included incentives for voluntary endangered species conservation.

Senator Kent Conrad (D-ND) said, “The bill we’ve put together is good for consumers, good for the environment, good for taxpayers, and very good for North Dakota. It is well-deserving of the broad bipartisan support it received.” Fiscal conservatives criticized the bill. Senator Richard Lugar (R-IN) said, “The 2008 Farm Bill contains many worthwhile policies, including valuable investments in conservation and nutrition programs. However, it fails to provide meaningful crop subsidy program reforms that most Americans would support.”

President Bush vetoed H.R. 2419 on May 21. He said, “At a time of high food prices and record farm income, this bill lacks program reform and fiscal discipline.... In January 2007, my Administration put forward a fiscally responsible farm bill proposal that would improve the safety net for farmers and move current programs toward more market-oriented policies. The bill before me today fails to achieve these important goals.” On May 22, the House and Senate overturned the President’s veto by a margin of 316-108 and 82-13, respectively. Of note, a procedural defect omitted one of the bill’s thirteen titles, on trade, which the Congress subsequently passed after the Memorial Day recess. Despite the President’s protest and a second veto, proponents believed the bill represents a strong, bipartisan effort to reauthorize crop supports, conservation programs, nutrition assistance, and support for cellulosic ethanol biofuels.<sup>10</sup>

With respect to the Administration’s proposed Regional Water Enhancement Program (RWEP), the Conference substitute bill adopted the House provisions, with an amendment creating an American Water Enhancement Program (AWEP) and modifying the existing Ground and Surface Water Conservation Program within the Environmental Quality Incentives Program to “allow cooperative agreements between the Secretary, producers, government entities, and Tribes to achieve regional water quality or quantity goals in water quality priority areas.”<sup>11</sup> The House provision requires the Secretary to “invite prospective partners to submit competitive grant proposals....” Awards will be based on “...the inclusion of the most lands and producers; the most activities versus costs; contribution to sustaining or enhancing agricultural production or rural economic development; development of performance measures to measure long term effectiveness; the capture of surface water runoff; the participation of multiple interested persons in improving issues of concern; and the assistance provided to producers to meet regulatory requirements that reduce the economic scope of their operation.”

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<sup>10</sup>*Western States Water*, Issue #1774, May 16, 2008.

<sup>11</sup>Section 2106(a) of the House bill.



The conference substitute also added \$40 million in AWEP mandatory funding to the \$60 million for GSWCP. The Senate proposal would have added \$5 million to GSWCP, with a minimum of \$3 million/state set aside for states over the Ogallala Aquifer.

The Conference Managers "...expect the Department to balance its resources among the needs of producers in performing water quantity and quality activities...and manage the program so that a producer who chooses to participate as an individual has the same opportunities as one who chooses to participate with a partner. The purpose of authorizing partners in AWEP is to leverage federal funds and to encourage producers to collectively address specific water quality or quantity concerns. The Managers intend for the program to be delivered according to applicable program rules. Any federal funding must be delivered to producers; no federal funding may be used to cover the administrative expenses of partners." Partners would also be expected to clearly state their objectives, and the Secretary to set performance measures.

Regarding the Ogallala, the report read: "The Managers recognize that water quantity conservation is a significant nationwide concern. The Ogallala Aquifer is a critical source of ground water for agricultural and municipal uses. Due to the scope and significance of the aquifer, there is a need for regional efforts to address ground water management in the region. The Managers urge the Department to work with States and agricultural producers in the Ogallala region to coordinate Federal assistance with State programs and to encourage cooperation among States in implementing conservation programs and water reduction practices."

Regarding water conservation, the report reads: "The Managers recognize that water use efficiency projects are an important means to encourage water conservation and expect the Department to continue to support such activities. The Managers intend that additional significance should be placed on water conservation practices that convert irrigated farming to dryland farming to encourage substantial water savings." To facilitate this, the Managers included provisions to allow contracts for a period of up to five years, stating the Secretary should also take into account the change in land value of conversion from irrigation to dryland farming. AWEP would also allow for the construction of small on farm reservoirs (under 40 acres) in drought-stricken areas, using a two-month Drought Monitor D4 designation as a standard for eligibility. The intent is to capture "on farm" surface water runoff for the benefit of wildlife and the environment. The report language states: "The Managers do not intend for any State water regulation or law to be waived."

Finally, under AWEP, the Secretary is to give priority to producers in six priority areas: the Eastern Snake Plain Aquifer; Puget Sound; the Ogallala Aquifer; the Sacramento River watershed; Upper Mississippi River Basin; the Red River of the North Basin; and the Everglades.<sup>12</sup>

On June 18, the House voted to override President Bush's second Farm Bill veto by a bipartisan vote of 317-109. "Today's vote will ensure that all parts of the Food, Conservation and Energy Act are enacted into law," Agriculture Committee Chairman Collin Peterson said. "Particularly considering the serious concerns about rising food prices and severe flooding affecting crops in the Midwest, this Farm Bill provides a critical safety net for families and farmers." Congress approved the conference report for H.R. 2419, but when the bill was sent to the White House, one of its 15 titles was inadvertently left out of the official copy vetoed by the President.

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<sup>12</sup>Section 2510 of Conference Substitute.

Congress overrode the veto and enacted 14 of the bill's 15 titles into law. To ensure that all 15 titles were properly enacted, the House passed the Farm Bill a second time with a new bill number (H.R. 6124). That bill was sent to the White House, and following President Bush's second veto, the House again voted to override that veto.

Finally, Title II - Conservation, Section 2510, established what is now called the Agricultural Water Enhancement Program (AWEP) to help producers and partners achieve ground and surface water conservation and improve water quality on agricultural and silviculture lands. Partners are defined to include groups of producers or producer associations, a State or unit of local government, or a federally recognized Indian tribe. The law provides that the Secretary of Agriculture may enter into contracts with producers or into partnership agreements on a regional level that select from among proposed activities such as: (1) resource assessment and modeling; (2) water conservation, restoration or enhancement projects, including "conversion to the production of less water-intensive agricultural commodities or dryland farming;" (3) water quality restoration or enhancement; (4) irrigation system improvements and irrigation efficiency enhancement; (5) drought mitigation; or (6) "related activities that the Secretary determines will help achieve water quality or water conservation benefits on agricultural lands."

The Secretary is to conduct a competitive process to select partners with transparent criteria for evaluating applications, and may give greater priority to proposals that include a high percentage of agricultural lands and producers, result in high levels of applied conservation activities, significantly enhance agricultural activity, allow for monitoring and evaluation, and "assist producers in meeting a regulatory requirement that reduces the economic scope of the producer's operation."

Moreover, the Secretary is to give a higher priority to proposals from partners that include conversion to dryland farming, leverage federal funds with funds provided by partners, and "assist producers in States with water quantity concerns, as determined by the Secretary." The Secretary "shall consider as an eligible agricultural water enhancement activity the use of a water impoundment to capture surface water runoff on agricultural land if...[it] - (1) is located in an area that is experiencing or has experienced exceptional drought conditions during the previous two calendar years; and (2) will capture surface water runoff through the construction, improvement, or maintenance of irrigation ponds or small, on-farm reservoirs." Separately, in states with water quantity concerns, the Secretary is also authorized to provide payments to participating producers for up to five years "in an amount sufficient to encourage producers to convert from irrigated farming to dryland farming."

The law specifically requires consistency with state law. "Any agricultural water enhancement activity conducted under the program shall be conducted in a manner consistent with State water law."

The law authorizes, in addition to other funds, the use of funds from the Commodity Credit Corporation totaling \$73 million for FY2009-FY2010, \$74 million for FY2011 and \$60 million for FY2012 and thereafter. Again, none of the funds "may be used to pay for the administrative expenses of partners."

## Indian Water Rights

### Arizona Water Rights Settlement Act

On March 18, the U.S. Department of Interior issued a press release stating that the Arizona Water Rights Settlement Act, the largest Indian water rights settlement in U.S. history, was in full effect after Secretary Dirk Kempthorne signed two Statements of Findings on December 10, 2007. These findings related to the Gila River Indian Water Rights Settlement and the Southern Arizona Water Rights Settlement Act. Assistant Secretary for Indian Affairs, Carl Artman called the Settlement "...a triumph of cooperation and consensus over conflict and litigation. This landmark agreement offers us a model of how states, Indian tribes, cities, farmers and the federal government – working together as neighbors and partners – can overcome deep-seated disputes with creative solutions that allow equitable benefits for all water users."

Artman continued, "The Settlement Act provides the Gila River Indian Community and the Tohono O'odham Nation access to assured water allocations and the financial resources necessary to develop their land and water resources, expand their economies and ensure a better quality of life for tribal members, their children and grandchildren. Now that the legislation is fully and finally effective, all of the benefits promised can be delivered and these tribal water rights claims, among the largest in the West, can be put to rest.... [One] of the greatest challenges facing us as state, regional and national leaders...is meeting the increasing and often competing water needs of our dynamic communities.... And as Secretary Kempthorne has said, 'Though the process can succeed only through compromise, all of us at Interior fully appreciate how exceedingly difficult it is to accept a lesser benefit in order to achieve a greater good.' Yet the hard reality is that years-long litigation over water rights works to no party's benefit, exacts enormous financial costs and creates further obstacles to long-range economic planning and development. With good faith and perseverance, using our best science and technology and working in a spirit of enlightened compromise, we can reconcile the seemingly irreconcilable. The Arizona Water Rights Settlement Act reflects such a vital accomplishment."

Artman thanked Governor Janet Napolitano, Senators Jon Kyl (R-AZ) and John McCain (R-AZ), former Rep. J.D. Hayworth, Gila River Governor William R. Rhodes, and Tohono O'odham Chairman Ned Norris for their efforts in reaching a settlement. He suggested this and similar agreements across the West might well serve as models for other states and regions struggling with water shortages, drought and adapting to long-term climate change. Artman declared, "the simple fact is that the Earth is warming, and drought is not just a Western problem."<sup>13</sup>

### House Settlements Hearing

On April 16, Rep. Napolitano (D-CA) chaired a historic, first-of-its-kind general oversight hearing on Indian water right settlements by the House Natural Resources Committee, Subcommittee on Water and Power, to examine the geographic and fiscal scope of pending settlements, as well as the "criteria and procedures" used by the Department of Interior in negotiations to determine its financial obligation. Featured witnesses included: Michael Bogert, Chairman of Interior's Working Group on Indian Water Settlements; Susan Cottingham, Director, Montana Reserved Water Rights

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<sup>13</sup>DOI News, March 18, 2008.

Compact Commission, on behalf of the Western Governors' Association (WGA) and Western States Water Council (WSWC); John Echohawk, Executive Director, Native American Rights Fund; John Sullivan, Associate General Manager, Salt River Project; Jeanne Whiteing, Blackfeet Tribal Counsel; Rodney Lewis, for the Gila River Indian Community; and the Honorable Joe Shirley, Jr., President of the Navajo Nation.

Susan testified in support of "the negotiated settlement of Indian reserved water rights." However, she expressed concern that federal policies are making settlements more difficult. "Under the 'Criteria and Procedures' adopted in 1990, the Department of Interior has continued to espouse settlement while the administration has taken an increasingly narrow view of its trust responsibilities to tribes and its willingness to fund settlements that benefit non-Indians. In coordination with the Office of Management and Budget and the Department of Justice, ...Interior has been asserting that its contribution to settlement should be no more than its calculable legal exposure. Even this can be narrowly drawn so that often its financial obligation is little or none."

She added, "In addition to a narrow view of trust responsibilities, budgetary policy can also frustrate the settlement process. Under current budgetary policy, funding of 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 funding may only occur at the expense of some other tribal or other essential Interior Department program. The WGA and WSWC believe that Congress should take steps to ensure that any settlement authorized by the Congress and approved by the President will be funded and implemented without a corresponding offset to some other tribal or essential Interior Department program."

She said, "It has long been the accepted premise that meeting the cost of Indian water and infrastructure in Indian water rights settlements is the trust responsibility of the federal government. In this regard, the WGA and the WSWC believe opportunities to more fully utilize revenues accruing in the Reclamation Fund should be explored as an appropriate source for this funding." She recognized the states' role to help finance settlements and cited Montana's \$56 million commitment and New Mexico's \$36 million commitment as evidence that western states are taking Indian water rights settlements seriously. However, she warned, "State and tribal commitment to pursue these settlements may be jeopardized if federal support is not forthcoming."

Susan also noted, "Granting greater decision-making authority to federal negotiating teams throughout the settlement process could significantly streamline future negotiations and administration approval." She presented examples from her own experience that illustrated how administration approval or disapproval can either hamper or facilitate the settlement process. In conclusion, she said, "We sincerely hope this Subcommittee's historic hearing will call attention to the difficulties we are facing and help to foster a new dialogue on how to fund these settlements so vital to our Western future."

#### *Soboba Band of Luiseno Indians Settlement Act*

The House Subcommittee on Water and Power sent the Soboba Band of Luiseno Indians Settlement Act (H.R. 4841) to the full Natural Resources Committee, which marked up the bill on April 30. The bill would "...approve, ratify, and confirm the settlement agreement...." The Tribe filed a lawsuit against the Metropolitan Water District of Southern California on April 20, 2000 in the U.S. District Court for the Central District of California. The bill provides that: (1) three local

water districts “acknowledge and assure the Tribe’s prior and paramount right, superior to all others, to pump 9,000 acre-feet of water annually from the San Jacinto River basin...;” (2) participating districts will cooperate to “recharge water supplies into the basin;” and (3) the three water districts will make substantial additional contributions, “including the conveyance of certain replacement lands and economic development funds to the Tribe, to carry out the Settlement Agreement’s provisions.”

The bill authorized \$10 million for the San Jacinto Basin Restoration Fund “...to pay or reimburse the costs associated with constructing, operating, and maintaining the portion of the recharge project that the United States is responsible for under the Settlement Agreement.” The bill also authorized \$5.5 million for the Soboba Indian Water Development Fund in FY2009 and FY2010 “...to pay or reimburse costs associated with constructing, operating, and maintaining water and sewage infrastructure, and other water-related development projects.”

On May 21, the House passed the Soboba Band Settlement (H.R. 4841). The bill resolved the lawsuit over water resources in Riverside County, California, and developed new sources for local residents.<sup>14</sup> Congresswoman Mary Bono Mack, who introduced the bill said, “Passage of this bill today is a strong step forward not only for the Soboba Tribe, but also for residents of Southwest Riverside County. From cultivating crops to sustaining life, water is a vital resource for any community – especially in Southern California. I am pleased that an end is finally in sight for the people who have been so tragically affected by this ongoing water dispute.”

Soboba Tribe Chairman Robert Salgado, Sr., said, “This is an important and historic milestone for Soboba. This settlement will usher in a new era for the Soboba people by ensuring a sustainable and independent homeland for our Tribe and bring to a close a 70-year old struggle over our Tribe’s water resources. On behalf of the Soboba Band of Luiseño Indians, I wish to thank Representatives Bono Mack, Joe Baca and Jerry Lewis, as well as our other Congressional supporters for their leadership in passing the historic Soboba Settlement from the House today.” The act will provide long-term sustainability of the San Jacinto River Valley’s water supply by bringing new sources of water to local residents and assist both the Tribe and local residents with critical water infrastructure needs. The Senate received the bill on May 22 and passed it.

#### *Aamodt and Taos*

Senators Pete Domenici (R-NM) and Jeff Bingaman (D-NM) and Representative Tom Udall (D-NM) introduced the Aamodt and Taos Pueblo Indian Water Rights Settlement Act (S. 3381, H.R.6768) in both the House and the Senate. The bill would resolve Indian water rights disputes in the Rio Pojoaque Basin and among the Taos Pueblo. The bill represents a negotiated compromise between Indians, local, state and federal parties and would authorize the Secretary of the Interior to develop water infrastructure in the Rio Grande Basin and to settle the water rights of the Nambé, Pojoaque, San Ildefonso, Tesuque and Taos pueblos. The legislation would provide water for the pueblos and non-Indians in northcentral New Mexico.

The Aamodt settlement would create a water system for pueblo and non-pueblo residents near Santa Fe. The federal government would contribute \$160 million over ten years while state and local governments would contribute \$70 million. The Taos settlement includes funds to improve water-use efficiency, ground water and surface water management, and water quality in the Taos

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<sup>14</sup>*Western States Water*, Issue #1772, May 2, 2008.

Valley. The federal government would pay \$114 million and New Mexico would contribute an additional \$15 million.

Senator Domenici said, "These negotiated settlements demonstrate that multiple parties can successfully work together to best determine how to allocate scarce water supplies among diverse parties in a way that ensures that our obligations to the pueblos are met and that they, along with other users, will have safe and reliable water systems. This bill sets the stage for the next Congress to enact these settlements, which will also improve the ability of New Mexico to effectively undertake water rights planning in the near and long-term future." Senator Bingaman added, "These water claims languished for decades in federal court, leaving New Mexicans uncertain about the future. This legislation would enact into federal law the negotiated settlements that pueblos, local government and other interested parties have worked so hard to produce."

Rep. Udall said, "This legislation is evidence that all of the groups and cultures that depend on New Mexico's scarce water supply can come together to find solutions to our common challenges. I was pleased to work with pueblos, historic acequia associations and growing communities to develop this mutually beneficial plan for New Mexico's future. This legislation will set a precedent of respect and compromise – a precedent that will help us move into the future with well established partnerships and a commitment to conserve and manage our vital resources to the benefit of all."

#### Indian Water Projects

On September 25, the House Natural Resources' Subcommittee on Water and Power held a hearing on three bills (H.R. 883, H.R. 6754, and H.R.6768) that dealt with complicated Indian water rights settlements and provide funding for water infrastructure projects. Kris Polly, Deputy Assistant Secretary of the Interior for Water and Science, and Michael Bogert, Counselor to the Secretary, testified that the Bush Administration opposed the bills for monetary and legal reasons, while representatives from various Indian tribes testified that the bills were essential to economic development and sustainability. Tribal witnesses included John Yellow Bird Steele, President, Oglala Sioux Tribe; Ronnie Lupe, Chairman, White Mountain Apache Tribe; Charlie Dorame, Chairman, Northern Pueblos Tributary Water Rights Association; Nelson J. Cordova, Councilman and Water Rights Coordinator, Pueblo of Taos; and others.

H.R. 883 would direct the Secretary of the Interior to rehabilitate and improve the Angostura Project, a component of the Pick Sloan Missouri Basin Program, while also establishing a \$92.5 million trust fund to benefit the Oglala Sioux Tribe of the Pine Ridge Indian Reservation. Mr. Polly said the fund was "not warranted at this time." He expressed concern that the \$3.25 million to \$4.66 million cost of improvements would not be reimbursable to the United States and that the bill's funding arrangement "would delay the assessment of the full cost of the legislation." In contrast, President Steele testified that the Angostura Project "...has been disastrous for the...Pine Ridge Reservation" and that the improvements to the project would "enhance the efficiency of water use at the Angostura District.... The establishment of a trust fund...would enable the [Oglala Sioux Tribe] to proceed with environmental restoration and mitigation and economic development along the Cheyenne River."

H.R. 6754 directs the Secretary to loan \$9.8 million to the White Mountain Apache Tribe for a rural water system in Arizona's Salt River Basin, which is to be the centerpiece of a future settlement. Mr. Bogert said the Administration is concerned that the bill does not require the Tribe to reimburse the federal government, and further that the federal government should not contribute

money to a possible future settlement until “a final settlement of the Tribe’s claims has been reached and enacted by Congress.” Chairman Lupe stated that providing funding up front, before Congress ratifies a final settlement, “will save up to \$15 million in construction inflation costs.”

H.R. 6768 would require the Secretary of the Interior to spend \$275.3 million to build water infrastructure projects in New Mexico’s Rio Grande Basin that would resolve the longstanding Aamodt and Taos claims, which involve five Pueblo tribes and the State of New Mexico. Mr. Bogert testified that the Administration reviewed the bill in light of the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims and concluded that its “...calculable legal exposure plus costs...do not justify the federal contribution” for both settlements. Moreover, Mr. Bogert stated that the bill’s waiver provisions for both settlements are of “significant” and “serious” concern to the Administration because they do not “adequately protect the United States from future liability and do not provide the measure of certainty and finality that the proposed federal contribution should afford.” On the other hand, Chairman Dorame, testifying on behalf of the Aamodt settlement, stated that the bill “satisfies the material conditions of the Criteria and Procedures” for a number of reasons, including resolving “the Pueblo claims with finality” and providing a “total cost of the settlement to all parties [that] does not exceed the value of the existing claims.”

#### *White Mountain Apache Rural Water System Loan*

On September 29, the Congress approved the White Mountain Apache Tribe Rural Water System Loan Authorization Act, which provides a federal loan of \$9.8 million to the White Mountain Apache Tribe for the planning and engineering of a dam and reservoir known as the “Miner Flat Project.” The project will provide clean drinking water to the Tribe in Arizona’s Salt River Basin. The Tribe will repay the loan over a term of 25 years. The Tribe claims that it needs the project because its members currently receive the majority of their drinking water from a small well field, which has experienced decreased production. Senator Jon Kyl (R-AZ), who introduced the legislation in the Senate (S. 3128), stated: “I am pleased that we were able to pass this important legislation before the end of the congressional session, making possible a long-term, reliable solution to the Tribe’s drinking water needs.” The bill was sent to President Bush for his signature on October 2, 2008.<sup>15</sup>

#### **Landsat Data Continuity Mission**

##### *FY2009 NASA Budget Request*

On February 13, the House Science and Technology Committee, Chaired by Rep. Bart Gordon (D-TN), held a hearing on the FY2009 budget request for the National Aeronautics and Space Administration (NASA), with Administrator Griffin testifying. Chairman Gordon noted this year marks the 50th anniversary of the “dawn” of the U.S. space program and establishment of NASA. “I think that this Committee needs to take a hard look at where NASA is headed.... We need to develop a congressional consensus on what NASA should be doing, and equally importantly, on what level of resources we [are] willing to commit to NASA.... The good news is that NASA has at last taken steps – to initiate new Earth science missions recommended by the National Academies

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<sup>15</sup>*Western States Water*, Issue #1793, May 9, 2008.



in its recent Decadal Survey. The bad news is that the funding...doesn't reflect any new commitment on the part of the Administration to enhancing NASA's overall science program."

In his opening statement, Rep. Mark Udall (D-CO), Chair of the Space and Aeronautics Subcommittee, added: "It is clear that NASA faces significant challenges in carrying out the tasks that the nation has asked it to assume.... This budget request continues the under-funding of the agency.... NASA did take steps...to attempt to respond to concerns expressed by many in the science community and in Congress. The budget request contains new starts for high priority Earth Science missions..., something I strongly support."

Funding for the Landsat Data Continuity Mission (LDCM) is cut, and there is no mention of the thermal infrared (TIR) imaging sensor. Rep. Dana Rohrabacher (R-CA) asked Administrator Griffin if he was aware of western governors' interest in ensuring the sensor is included on Landsat 8, specifically mentioning its use in measuring and monitoring water use and improving water management. Dr. Griffin responded he was not aware of the issue, but offered to respond in writing to Mr. Rohrabacher's question. Chairman Barton said that the Committee would be spending a "lot more time" on water conservation and technology issues in the future.

On April 3, Senators Ken Salazar (D-CO) and Mike Crapo (R-ID), circulated a "Dear Colleague" letter to be sent to Appropriations Committee leaders. The letter read: "We are writing to request inclusion of \$35 million in NASA's budget for FY2009, to design, construct and deploy a thermal infrared (TIR) instrument on Landsat 8 that will provide data continuity consistent with that now available from Landsat 5 and Landsat 7. The total funding commitment required for a TIR instrument on Landsat 8 should be between \$90 and \$100 million over three years."

"The future of our Nation's water resources is increasingly unclear. Conflicts over water use are growing, and the serious situation in the Southeast demonstrates that scarcity isn't just a problem in the West, where water has always been a scarce resource and roughly 80% of all consumptive water use is for irrigation. Across the U.S. water demands for agriculture, energy production, and municipal and industrial uses are rising, while reservoir and ground water levels are falling. It is clear that more data on water supplies and water uses will be needed to address present and future water problems."

"Today, TIR data is essential for measuring and monitoring evapotranspiration and calculating consumptive water usage, particularly for agriculture. This data stream has been the gold standard for administration of water transfer agreements as it provides a cost effective means of determining not only present, but past consumptive use, given the U.S. Geological Survey's (USGS) archive of TIR data collected since 1982.... We are grateful that the Appropriations Committee is committed to ensuring the continuity of these unique and fundamentally valuable data streams. In particular, the FY 2008 Consolidated Appropriations Act included the following language: 'NASA is directed to provide a plan on all continuity of data for the Landsat Data Continuity Mission (LDCM) to the Appropriations committees no later than 120 days after enactment of this Act. The amended bill provides \$1 million above the budget request for this mission to ensure data continuity.'"

"Unfortunately there is evidence that NASA does not share the Committee's priorities. Although NASA plans to present its report to the committees later this month, in a December 19, 2007 letter, Administrator Michael Griffin stated, 'While thermal data is scientifically relevant, analysis of the mission development cost and schedule indicates that LDCM cannot be implemented

with the thermal capability within the present budget constraints. Additionally, if the thermal infrared sensor were added, it is likely that NASA would be unable to maintain the current launch readiness date and, consequently, the undesirable gap in data continuity between existing Landsat capability on-orbit and the launch of LDCM would be increased.”

“Administrator Griffin omits the fact that a thermal infrared (TIR) instrument was included on Landsat 4 in 1982, Landsat 5 in 1984, Landsat 6 in 1993 and Landsat 7 in 1999. Without TIR on the next spacecraft, the Landsat Data Continuity Mission will not be complete, and we fear none of the TIR alternatives under NASA review will prove acceptable. A delay in the launch of Landsat 8 merits serious NASA consideration, rather than prematurely eliminating what has become an invaluable practical application of our nation’s investment in NASA-pioneered research and development.... Unless NASA is directed to include TIR on Landsat 8 and sufficient funds are appropriated, we will be without perhaps the single most important instrument capable of measuring by far the largest use of water in the West.”

### *FY2009 Commerce/Science Appropriations*

On June 19, the Senate Appropriations Committee marked up its FY2009 Commerce/Science/Justice appropriations bill (S.3182), and on June 25, the House Committee marked up its version. With respect to funding for a Landsat 8 thermal infrared sensor (TIRS), the Senate provided no new money, but the House reportedly included \$20 million specifically for TIRS. While the House Committee report is not yet available, the Senate Committee report includes this: “Landsat Data Continuity Mission [LDCM] - The Committee supports the development and flight of a thermal infra-red sensor [TIRS] to maintain continuity of the critical measurements made by this Landsat sensor for scientific research and water management applications. The Committee urges NASA to initiate development of TIRS within available funds, and to identify the earliest and least expensive development approach and flight opportunity for the TIRS. NASA should report back to the Committee on this development approach no later than October 31, 2008.”

The Committee report also states: “Earth science is a critical part of the balanced space program.... The agency is directed to ensure that these missions include the full complement of data collection capabilities as recommended by the National Academies’ Earth science decadal report.... The Committee continues to expect NASA’s Earth science portfolio to have...Earth science missions that guarantee regular and recurring flight opportunities for the Earth science community.” The Committee added \$47 million to the budget request for a total of \$150 million to accelerate Earth science missions.

## **River Basins**

### *Klamath Basin*

After two years of discussions, representatives of diverse communities in the Klamath Basin, working with federal, state, and county governments, have developed a “Proposed Klamath Basin Restoration Agreement” to rebuild fisheries, sustain agricultural communities, and resolve other longstanding disputes related to the allocation of water resources. The non-Federal parties released the Proposed Agreement on January 15, to inform the public and seek comments as part of the collaborative effort to seek solutions among key stakeholders. The “Klamath Settlement Group” is presently negotiating with PacifiCorp in an effort to reach agreement on the removal of four lower basin dams, as a necessary part of the overall restoration effort.

The non-federal, non-governmental members of the Settlement Group include: the Klamath Water Users Association and Off-Project Water Users; the Hoopa Valley, Karuk, Klamath and Yurok Tribes; and American Rivers, California Trout, Friends of the River, Klamath Forest Alliance, Northcoast Environmental Center, Northern California/Nevada Council Federation of Fly Fishers, Pacific Coast Federation of Fishermen's Associations, Salmon River Restoration Council, and Trout Unlimited.

According to the Group, the Proposed Agreement has the potential to provide a comprehensive solution for the Basin. Key provisions include: (1) a program to rebuild fish populations sufficient for sustainable tribal, recreational, and commercial fisheries – with elements to restore fish populations and habitats, reintroduce anadromous species in currently-blocked parts of the basin and improve fish survival by enhancing the amount of water available for fish, particularly in drier years; (2) a reliable and certain allocation of water sufficient for a sustainable agricultural community and national wildlife refuges; (3) a program to stabilize power costs for the Upper Basin's family farms, ranches, and for the two national wildlife refuges; and (4) a program intended to insure mitigation for counties that may be impacted by the removal of the hydroelectric facilities. The estimated cost of these actions over ten years is \$960 million, excluding any costs to PacifiCorp of removing the four dams. For details see: <http://www.edsheets.com/Klamathdocs.html>.

PacifiCorp is presently involved in the process of relicensing its seven Klamath Basin hydropower facilities built between 1908 and 1962, which produce 151 megawatts of renewable energy.

On November 13, the Department of the Interior announced an Agreement in Principle (AIP) between the federal government, Oregon, California and PacifiCorp that sets forth a process that could lead to the removal of four hydroelectric dams on the Klamath River by 2020. The dams block access to some 300 miles of salmon spawning habitat. Some biologists estimate that the current salmon population is now at only 10% of its historic level. Under the Federal Power Act, as part of the Federal Energy Regulatory Commission's (FERC) licensing and relicensing process, the Secretary of the Interior and Secretary of Commerce may require fish passage facilities as a mandatory condition. Federal fisheries agencies have demanded that PacifiCorp install fish ladders and other improvements. Interior Secretary Dirk Kempthorne praised the AIP stating, "This is a historic announcement and the culmination of years of hard work from the numerous negotiators...who have worked toward a common goal of how to protect the uniqueness of this region. We have agreed to a path forward that will protect fish, PacifiCorp customers and the local cultures and communities in the two state Klamath River basin."

Conservation groups, various Indian tribes and fishermen want the private dams removed. The AIP does not require removal of the dams, but rather a review of the public interest and a timeline for a final agreement by June 2009. It calls for legislation authorizing the federal government to complete a scientific assessment of the costs and benefits of removing the dams by March 2012. If it supports removal, the government will designate a non-federal dam removal entity (DRE) and PacifiCorp will transfer ownership to the DRE. Interior estimates that removing the dams would cost less than making needed improvements. The AIP calls for a non-federal contribution of \$450 million (\$250 million that California would raise from voter-approved general obligation bonds, and \$200 million from PacifiCorp through a state-approved surcharge on its California and Oregon customers). If the assessment does not support removal, PacifiCorp will return to the FERC re-licensing process.

California Governor Arnold Schwarzenegger said, "The health of the Klamath River is critical to the livelihood of numerous Northern California communities, and...with this groundbreaking agreement we have established a framework for restoring an important natural resource for future generations." Oregon Governor Ted Kulongoski declared, "With Oregon's best interests in mind..., I will be taking the first step in implementing this agreement by offering legislation to support the dam decommissioning and removal process."<sup>16</sup>

### Colorado River

#### *Multi-Species Conservation Program*

On March 12, the House Natural Resources Committee considered, marked-up and ordered reported H.R. 2515, the Lower Colorado River Multi-Species Conservation Program (LCR MSCP) Act, introduced by Rep. Dean Heller (R-NV). It directs the Secretary of the Interior to manage and implement the LCR MSCP and to enter into an agreement with Arizona, California, and Nevada providing for the use of water for habitat creation and maintenance under "Program Documents" (i.e., the Habitat Conservation Plan, Biological Assessment and Biological Opinion, Environmental Impact Statement/Environmental Impact Report, Funding and Management Agreement, and Implementing Agreement). It permits any party to an agreement entered into with the United States pursuant to the Program to commence a civil action in U.S. district court to enforce the agreement or to declare the rights and obligations of the parties under the program documents – and grants the district court jurisdiction. It 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." The bill also authorizes the appropriation of "such sums as may be necessary to meet the obligations of the Secretary," which are defined as non-reimbursable and non-returnable. Further it provides for the investment of such sums and non-Federal contributions not required by the Secretary to meet current expenditures.

#### *Drop 2 Reservoir*

On April 8, the California Metropolitan Water District of Southern California (MWD) announced it is co-operating with agencies in Arizona and Nevada to fund construction for a new reservoir. MWD has authorized \$27.8 million to help build the Drop 2 Reservoir adjacent to the All American Canal in Imperial County, California. In exchange, MWD will receive 100,000 acre-feet of water. Metropolitan Board Chairman Timothy F. Brick said, "These are exactly the types of creative partnerships that were outlined under the landmark federal conservation and reservoir operations plan for the Colorado River that was finalized last December. By states working together, we will be able to conserve and store up to 70,000 acre-feet of water annually in future years along the Colorado River." MWD General Manager Jeff Kightlinger said, "The real significance of this partnership is that the benefits are spread among all Colorado River users. In addition to operational flexibility and additional supplies, this resourceful approach offers an innovative solution that could delay or prevent shortage conditions in the future for all Colorado River Basin states."

Water administrators expect the Drop 2 Reservoir to be completed by 2010. The reservoir will store water released from upstream reservoirs that would otherwise be lost. Over the course of 50 years, planners expect the reservoir to generate up to 3.5 million acre-feet (Maf) of water. The agreement requires MWD and the Central Arizona Water Conservation District (CAWCD) to

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<sup>16</sup>*Western States Water*, Issue #1801, November 21, 2008.

reimburse the Southern Nevada Water Authority (SNWA) for their share of the \$172 million to build the reservoir. In return for state financing, the Bureau of Reclamation will provide 600,000 af of water to the participating agencies through 2036. MWD and CAWCD will each receive 100,000 af and SNWA will receive 400,000 af. If Colorado River shortages are not declared, MWD will take the first delivery in 2010.

### *Interim Guidelines for Lower Basin Shortages*

On April 11, the Bureau of Reclamation announced that high snowpack in Upper Basin states will result in increased Colorado River releases from Lake Powell to Lake Mead. The increased releases are a result of the Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations of Lake Powell implemented last fall. The Guidelines provide "a more equitable distribution of water between [Lake Powell and Lake Mead]." The National Weather Service predicts that spring runoff into Lake Powell will be 122% of average. Using this prediction, Reclamation forecasts that Lake Powell will rise by approximately 50 feet by mid-July, which would be the highest level in six years.

Given the forecast, Reclamation is currently projecting a release of approximately 653,000 af of additional water from Lake Powell, increasing the 8.23 Maf released during each of the past seven years to 8.88 Maf. While this initial forecast is promising, Reclamation will need to adjust this prediction upward or downward in upcoming months based on changing hydrologic conditions and observed spring snowmelt. Reclamation noted that the quantities released during the 60-hour high flow experiment in March are part of the projected 8.88 Maf. Still, drought has taken its toll. At the end of the calendar year, Reclamation predicts that Lake Powell will be at 62% of capacity while Lake Mead will be at 48% [even after the above-average runoff this year].

### *Sustainability and Water Rights Protections*

On July 16, the Bureau of Reclamation published a proposed rule focused on Lower Colorado River sustainability and water rights protections (73 *FR* 40916-40932). The summary of the rule says, "The Bureau of Reclamation (Reclamation) proposes to address and eliminate the use of Colorado River water from the mainstream in the lower Colorado River basin (Lower Basin) without an entitlement. For the last eight years, the upper and lower Colorado River basins have experienced the worst drought conditions in approximately one hundred years of recorded history. This drought is the first sustained drought to be experienced on the Colorado River when all major storage facilities are in place and when Arizona, California, and Nevada (Lower Division States) are fully utilizing their basic Colorado River water apportionment of 7.5 million acre-feet per year. Reclamation believes that development of such a rule will help ensure the long-term sustainability of the lower Colorado River and in doing so will protect the water rights of lower Colorado River water entitlement holders. The rule establishes procedures that Reclamation will follow in making determinations of unlawful use of lower Colorado River water. The rule includes notice and appeal procedures for those persons or entities whose use of lower Colorado River water is identified as unlawful."

According to Lower Colorado Regional Director Lorri Gray, "Reclamation is legally obligated to ensure that all Colorado River water use in the Lower Basin is covered by an entitlement and correctly accounted for. If someone is using Colorado River water without an entitlement, that harms the entitlement holders in Arizona, California, and Nevada who do have one, so this proposed rule is necessary and appropriate." Current data suggests 9,000 to 15,000 acre-feet of water is used in the lower basin by users who do not have an entitlement. Most of this is drawn by wells located

in the river's floodplain. The proposed rule would establish: (1) methods to determine if wells pump water that is replaced by Colorado River water; (2) criteria a water user must satisfy to show that his well does not pump water that is replaced with Colorado River water; and (3) an appeals process for determinations that well water is replaced by lower Colorado River water.

### Columbia River

On June 27, Earthjustice sent a letter to federal agencies charged with administering hydroelectric and irrigation facilities in the Columbia River basin, stating that it intends to sue the agencies for violating section 401 of the Clean Water Act (CWA). Written on behalf of several environmental organizations, the letter states that the U.S. Army Corps of Engineers (the Corps), the Bureau of Reclamation (Reclamation), and the Bonneville Power Administration (BPA) are violating section 401 because they "...did not secure the required state certifications for the continued maintenance and operation of the fourteen major hydroelectric dams of the Federal Columbia River Power System and the numerous dams involved in nine [Reclamation]-operated irrigation projects prior to receiving a federal permit from the [National Oceanic and Atmospheric Administration] Fisheries Service." The letter further states, "Similarly, the NOAA Fisheries is in violation of section 401 of the CWA because it did not obtain or receive the required state certifications before issuing a federal permit to the [administering agencies] allowing them to continue operating, maintaining, and hence discharging water from the Columbia River Projects." To support its argument, EarthJustice cites the 2006 U.S. Supreme Court case of *S.D. Warren Co. v. Maine Board of Environmental Protection*, which held, "...a dam does raise a potential for a discharge, and state approval is needed." The letter argues, "In so doing, the Court accorded the term 'discharge' a very broad meaning instead of confining it to the 'addition of any pollutant to navigable waters from any point source,' as 'discharge of pollutant' is defined in the CWA...."

NOAA Fisheries issued a biological opinion in 2008 (2008 BiOp) which said that the operation and maintenance of projects on the Columbia River will likely jeopardize anadromous fish species listed under the Endangered Species Act (ESA) unless mitigation measures are implemented. The 2008 BiOp offered many "reasonable and prudent" measures to reduce jeopardy to the species but recognized that there will be some "incidental take" of listed species. As a result, NOAA Fisheries issued an incidental take statement (ITS) that authorizes the "take" of a limited number of anadromous fish each year.

EarthJustice maintains that the ITS issued by NOAA Fisheries is a federal permit and that the operation of the Columbia River Projects, including dams, discharges water to navigable waterways and is subject to the CWA. Consequently, it argues that administering agencies charged with operations and maintenance "...were required to secure certifications from [Idaho, Montana, Oregon and Washington] for the continued operation of the projects and provide the certifications to NOAA Fisheries before the agency issued the 2008 ITS. Likewise, NOAA Fisheries was required to obtain state certifications before issuing the 2008 ITS. Despite these statutory requirements, the [administering agencies] have not secured state certifications for the continued operation of the Columbia River Projects and NOAA Fisheries failed to obtain the certifications before issuing the 2008 ITS. As such, NOAA Fisheries, the Corps, [Reclamation] and BPA are in violation of section 401 of the Clean Water Act."

EarthJustice offers several examples of how releases from dams arguably result in "discharges" that potentially affect water quality, including "...heating the water, causing dissolved gas supersaturation during periods of involuntary spill and drastically reducing turbidity and sediment transport." EarthJustice asserts that "Under *S.D. Warren*...the Columbia River Projects

unquestionably cause 'discharges' for purposes of 401 of the CWA...just as privately owned dams have been consistently held to do..." The letter concluded, "We intend to pursue federal court litigation if NOAA Fisheries does not promptly rescind its 2008 Incidental Take Statement pending full completion of the state certification process as set forth in section 401 of the Clean Water Act..."

## States

### California

On January 11, Secretary of the Interior Dirk Kempthorne, joined by California Governor Arnold Schwarzenegger and other dignitaries, held an historic groundbreaking ceremony to launch construction of the Folsom Dam Joint Federal Project, which is an unprecedented partnership involving the Department of the Interior's Bureau of Reclamation, the U.S. Army Corps of Engineers, the Central Valley Flood Protection Board and the Sacramento Area Flood Control Agency. For the first time ever, the two federal agencies – the Bureau of Reclamation and the Army Corps of Engineers – are joining forces on a major dam project. It is the largest dam project currently being undertaken by the Bureau of Reclamation anywhere in the country, according to an Interior press release announcing the groundbreaking.

"We are protecting the one million Americans who live in the Sacramento area from the threat of a devastating flood," Secretary Kempthorne said. "We are protecting the capitol of the state of California and its economy – by itself the world's 8th largest economy. We are doing this at a savings of nearly \$1 billion below the original estimated cost. We are doing it seven years faster than originally estimated." The \$1.3 billion project will shore up dikes and build a new spillway to pass flood flows from heavy storms that otherwise might threaten the integrity of Folsom Dam and the citizens of Sacramento. The project will be constructed in three phases. A contract for the first phase was awarded last September. In addition to the joint project, the Bureau of Reclamation will complete dam safety work on Dikes 4, 5, and 6, and the Mormon Island Auxiliary Dam.

When completed in 2015, the Folsom Dam Joint Federal Project will protect Sacramento from a 200-year flood, twice the current level of protection. In February 1986, major storms in northern California caused record flood flows in the American River basin. Outflows from Folsom Reservoir, together with high flows in the Sacramento River, caused water levels to rise above the safety margin on levees protecting the Sacramento area. The effects of the 1986 storms raised concerns over the adequacy of the existing flood control system. This led to investigations into the need to provide additional flood protection to the Sacramento area. Currently, Folsom Reservoir does not have sufficient outlet capacity to make significant releases in advance of an anticipated flood event. The proposed enlargement and addition of Folsom Reservoir outlets will remedy that deficiency and allow Reclamation to make more efficient use of both the additional release capacity and the American River stream flow forecasting to provide additional flood protection and, potentially, maximize multiple-purpose benefits.

### South Dakota

In March, due to severe drought conditions and a call by senior water right holders, the South Dakota Department of Environment and Natural Resources (DENR) issued shutoff orders to 52 junior water right holders in the western part of the state along the Cheyenne River and tributaries to Angostura Reservoir, as well as the Belle Fourche River. The orders had a limited scope, and did



not apply to domestic use and livestock watering. The U.S. Bureau of Reclamation holds senior rights for the Angostura and the Belle Fourche Reservoir, and delivers water to the Angostura and the Belle Fourche Irrigation Districts. Reclamation asked for the shutoff orders because neither reservoir filled and senior rights could have potentially gone unfulfilled, causing shortages to the irrigation districts. Garland Erbele, DENR Chief Engineer, said, "Western South Dakota has experienced several years of drought. Conditions at this time indicate another year of below normal spring precipitation. Without appreciable amounts of rain, water availability in the state's surface waters may reach critically low levels. At some point, additional shutoff orders may be issued for other rivers and streams and remain in effect until surface water flows recover."

### Arizona

On April 9, Joan Card testified in her capacity as Director of the Water Quality Division of the Arizona Department of Environmental Quality in a Senate hearing on the Clean Water Restoration Act.<sup>17</sup> The Council has not taken a position on this or any other similar bill. Ms. Card testified that *Rapanos* "could minimize, if not devastate surface water quality protections that have been implemented in Arizona at least since the 1972 [Clean Water Act] amendments." Furthermore, Ms. Card testified that *Rapanos* guidance implemented by the Environmental Protection Agency and the U.S. Army Corps of Engineers "...puts Arizona's waters at great risk."

Ms. Card referred to a letter of support written by Arizona Governor Janet Napolitano stating: "The implementation of the Clean Water Act [CWA] in Arizona long has protected Arizona's wetlands, streams, canals, and lakes for drinking, wildlife, recreation, tourism and irrigation, to name a few important uses of our water resources. Arizona and the federal government...have spent millions since the enactment of the Federal Water Pollution Control Act to assess water quality throughout our state and to protect those uses through point source permitting, Total Maximum Daily Load studies and monitoring, Section 319 nonpoint source grants, and other [CWA] programs. The Clean Water Restoration Act of 2007 offers a recognition and ratification of these critical efforts to protect the scarce and precious water resources in our arid state."

Ms. Card concluded by saying, "In sum, the impacts of the *Rapanos* decision and guidance in Arizona may be widespread, impacting surface water quality standards for nearly all of our surface streams and nearly all of our 160 Section 402 permits for wastewater and stormwater discharges to waters other than the Colorado River. Without these federal [CWA] protections, which have been in place for 35 years, my agency may not be able [to] protect Arizona streams for aquatic life uses, including Endangered Species Act species like Arizona's native Gila and Apache Trout; we may not be able to protect surface streams for agricultural irrigation use or livestock watering; and we may not be able to prohibit wastewater discharges to our most pristine, high quality streams, like Sabino Creek and the Little Colorado River. Our Governor and the Arizona Department of Environmental Quality support the Clean Water Restoration Act of 2007 because it ensures the longstanding, pre-*Rapanos*, [CWA] programs and protections remain in place to protect the surface water resources in our state. In the Governor's words, in times of explosive growth, long term drought and the impacts of climate change, these water resources are 'far too precious to waste.'"

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<sup>17</sup>*Western States Water*, Issue #1768, April 4, 2008.

## Washington

On December 17, Washington State Governor Christine Gregoire announced the adoption of two historic agreements with the Confederated Tribes of the Colville Reservation and Spokane Tribe in Eastern Washington, clearing the way to deliver more Columbia River water from Lake Roosevelt to Columbia Basin project farmers, including irrigators of some 10,000 acres east of Moses Lake, who now rely on ground water and an aquifer that has been dropping by an average of seven feet each year for decades. The Bureau of Reclamation is also a partner in the agreements, which will also benefit cities that have been waiting for years for new water supplies. Further, streamflows for endangered salmon will be improved through the release of additional water during the critical late-summer period. "Today's historic agreement ensures a water supply that sustains farming, supports growing communities and enhances our precious salmon resource," said Gregoire. "I appreciate and applaud the leadership of farmers, environmental groups, county commissioners, legislators, federal officials and tribal governments in creating a lasting water-supply partnership."

The Governor asked the 2008 Washington Legislature to approve the agreements, and annual payments to the Spokane Tribe of \$2.25 million and to the Colville Tribes of \$3.6 million (\$3.8 million in 2008) for a total of nearly \$5.9 million/year indefinitely – in return for their support for the incremental release of up to 132,5000 acre-feet of water from storage in Lake Roosevelt Dam on the Columbia River. The tribes will use the payments to mitigate the damage on fish and wildlife, recreation and cultural activities resulting from the releases, and for economic development investments to benefit the local tribal economy. Chairman Mike Marchand said, "The Colville Tribes are very gratified that the governor has worked with us as a co-equal sovereign to come to an agreement that protects our important interests in the Columbia River and Lake Roosevelt." Spokane Tribal Chairman Richard Sherwood said, "Grand Coulee Dam inundates our boundary rivers and uplands within the Spokane Indian Reservation. Our conceptual agreement will provide major benefits downstream while helping the tribe to address some of the impacts from storage and use of that water on our lands."

Among the beneficiaries of the agreements are: (1) irrigators of 10,000 acres over the Odessa Ground Water Management Subarea; (2) as many as 379 water right holders subject to curtailment during drought, most of whom are irrigators, through the addition of 33,000 acre-feet of "drought insurance" water, for use in dry years; (3) some 128 applicants for municipal and industrial water rights; (4) instream uses, including endangered salmon, through the dedication of 27,500 acre-feet of water to improve the Columbia River health, and an additional 17,000 acre-feet during critical drought years; and (5) local governments around Lake Roosevelt with the Governor asking for \$2 million to address priority water issues.

New water use permits may be issued by the Department of Ecology as early as this spring, with the East Columbia Basin Irrigation District working with local farmers to deliver new surface water supplies to lands now dependent on dwindling ground water. A number of cities and industrial water users with pending permit applications will have to finance the necessary water delivery infrastructure.

### **Water Resources Development Act**

On April 30, the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, conducted a hearing on proposals for a Water Resources

Development Act of 2008. Rep. John Salazar (D-CO) testified he wants the Corps of Engineers to have the ability to develop water infrastructure for environmental purposes in Colorado, as they do in other states. He addressed the needs of rural communities, such as Alamosa, to redevelop their aging infrastructure and water supply facilities. Rep. Doris Matsui (D-CA) expressed her concern over flood control and other water facilities in the Sacramento River basin. She said her legislative district has been a "poster child" for flood control since a serious flood in 1986, remains "fully committed to flood protection," and encourages federal agencies to craft water policy that recognizes the significant efforts of state and local authorities.

Assistant Secretary of the Army (Civil Works) John Woodley testified about the role of the Corps of Engineers in managing water resources and infrastructure. The Corps faces a backlog of projects, and he encouraged Congress to prioritize projects to maximize safety, environmental, or economic benefits. He emphasized the need to "invest, and not only spend," and encouraged Congress to take a long-term view. He also emphasized a need to consider the relationship of multiple jurisdictions and watershed boundaries in the planning process because the two rarely overlap. All levels of governments should consider safety and life-cycle planning for water infrastructure projects. Rep. James Oberstar (D-MN), the Committee Chair, stated it was "disingenuous" to suggest that proposed Corps expenditures are excessive.

In follow-up questioning, Rep. Matsui asked the Corps to expedite environmental and regulatory reviews in the Sacramento River basin. Mr. Woodley said he was mindful of the needs of the basin and had sought to expedite necessary approvals. Rep. Grace Napolitano (D-CA), the Subcommittee Chair, asked about the role of water recycling, reuse, and desalination for meeting future water demands. Mr. Woodley said he has "championed water recycling." Rep. Napolitano urged the Corps to discuss efforts to promote water reuse and recycling with Reclamation. Rep. Napolitano also asked how the Corps was preparing for the hydrological effects of climate change. Mr. Woodley said the Corps is working with Reclamation to evaluate the effects of climate change on hydrology.

Rep. Brian Baird (D-WA) asked what the Corps could do to protect small harbors. Mr. Woodley responded that in the Corps' current posture, "...the ability to reach these is very minimal," and encouraged new mechanisms to better leverage funds to manage harbors that need dredging. Rep. Baird also noted the two-year duration of Corps leaders, and suggested that the quick duty rotations make it difficult to coordinate long-term planning. Mr. Woodley said that the two-year rotations are standard Army policy. Treating members of the Corps differently than other commissioned military servicemen would put them at a disadvantage for advancement compared to their peers.

## **Water Rights Litigation**

### *Shipe v. PWWS*

The Kansas Supreme Court agreed to resolve a dispute over the use of 1.2 billion gallons of water in the Kansas River Valley. On April 14, the District Court of Douglas County, Kansas, issued a memorandum decision, subsequently appealed, which read: "Public Wholesale Water Supply District No. 25 (hereinafter, PWWS), brought an eminent domain action...seeking to condemn a temporary easement to drill test wells on property owned by plaintiffs and others. The plaintiffs filed...to enjoin the defendant's eminent domain proceeding temporarily and permanently. While the eminent domain proceeding only seeks to drill test wells, all parties agree that the defendant is

seeking a source of water to supply the needs of the rural water districts that came together to form the defendant. Ultimately, unless it finds a better source of water elsewhere, defendant will seek to condemn the water right[s] of plaintiffs and other landowners.” The district court sided with PWWSD and denied plaintiff’s motion for temporary and permanent injunctions. The Kansas Supreme Court accepted the case without any intermediate appeal.

Greg Shipe, the owner and operator of Davenport Orchards & Winery, along with other area farmers argue that Kansas law doesn’t allow PWWSD to condemn property to obtain water rights. The appeal will have significant implications for the law of eminent domain in Kansas. Shipe is pursuing the case to protect his agricultural livelihood. Many neighboring farmers grow high value fruits and vegetables, but those crops need to be irrigated. According to Shipe, granting the amount of water the district is seeking would make it impossible for farmers to switch to more valuable types of agricultural production. Shipe said, “The term that is used is dewatering the valley. We basically would have to go to dryland farming, and the value of the property would just go through the floor.” At trial, Shipe argued that the amount of water proposed by PWWSD would total the entire appropriation in the Kansas River Valley. The district court did not address the argument, saying that the Kansas Division of Water Resources was a more suitable forum for regulating the use of ground water in the state.

#### Montana v. Wyoming

U.S. Solicitor General Paul Clement submitted a brief expressing the views of the United States in the dispute between Montana and Wyoming over the Yellowstone River Compact. The U.S. Supreme Court invited the Solicitor to brief the matter on May 14, 2007. The Solicitor filed his brief, as a “friend of the Court,” on January 2. The dispute involves varying interpretations of the Yellowstone River Compact and the rights to waters of two tributaries, the Tongue and Powder Rivers.<sup>18</sup> The Solicitor approached the matter cautiously. Ultimately, he suggested “that the Court grant Montana leave to file its complaint, and simultaneously grant Wyoming leave to file a motion, in the nature of a motion [to dismiss], with respect to the issue of compact interpretation....” However, Wyoming’s motion to dismiss would not necessarily dispose of the case in Wyoming’s favor. Rather, it would provide the Court an opportunity to decide potentially dispositive legal issues regarding the interpretation of the Compact.

The Solicitor’s analysis and recommendations would significantly shape the case if the Court chooses to follow them. First, the Solicitor General suggests the dispute is properly within the Court’s original jurisdiction. “In claiming that Wyoming is depriving it of its lawful share of the water of an interstate stream, Montana asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court’s original jurisdiction.” Furthermore, the Solicitor wrote “the jurisdiction of the Compact Commission does not warrant this Court’s staying its hand and denying Montana’s motion for leave to file its complaint,” at least in part because the Compact Commission lacks “the authority to render binding interpretations of the Compact and thereby to resolve the dispute between the two States over its construction.” In its briefs, Wyoming contested the Court’s original jurisdiction partly because it felt the Compact Commission provided an adequate alternative forum.

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<sup>18</sup>*Western States Water*, Issue #1707, February 2, 2007.

Second, the Solicitor General urged the Court to resolve “preliminary or controlling legal issues before, or in lieu of, referring the case to a [Special] Master.” This includes the legal interpretation of the Compact itself. According to the Solicitor, a similar approach in two comparable original jurisdiction cases “narrowed or even resolved the issues before appointment of a Special Master.” This approach is particularly appropriate because “the complaint seeks a definitive interpretation of an interstate compact.” He urged the Court to employ “well-established tools of construction” including the Compact’s text, “other reliable documentary indicia of the parties’ intent, ...judicial notice of historical documents,” and “appropriate documentation, such as the Compact Commission’s annual reports,” to determine the Compact’s proper interpretation. Finally, the Solicitor said “an interstate water dispute of this type is particularly likely to benefit from an early judicial determination narrowing or even resolving the contested legal issues before the parties engage in fact development” due to the latter’s likelihood to be complicated, time-consuming, and expensive.

While the Solicitor’s brief support’s Montana’s claim that original jurisdiction is proper, it does not necessarily undermine Wyoming’s ultimate position. The Solicitor wrote, “Although Wyoming appears to be correct that this case may turn on interpretation of the Compact, the question whether Montana has properly invoked this Court’s jurisdiction is distinct from the question whether Montana has stated a claim.” Consequently, Wyoming can still prevail because, “The majority of Wyoming’s objections...are premised on the notion that Montana has failed to state any injury under a proper interpretation of the Compact.” If the Court determines that Wyoming’s interpretation of the Compact is correct as a matter of law, Wyoming could still prevail on a motion filed with the appropriate body (either the Supreme Court or a Special Master, as the case might be), should the Court adopt the Solicitor’s reasoning. For a copy of the Solicitor’s brief, go to: <http://www.usdoj.gov/osg/briefs/2007/1original/toc3index.html>.

In another action, on January 4, in response to news reports that Montana Governor Brian Schweitzer would reject a proposed water quality agreement on the Yellowstone with Wyoming, Governor Dave Freudenthal issued the following statement: “I was surprised to hear about it from the newspapers, since my office was not previously informed. Wyoming’s Department of Environmental Quality was awaiting a response from its Montana counterpart.... I guess we have our answer. Under no circumstances does Governor Schweitzer view it to his political advantage to work with us. So, we’ll continue in court....”

He added, “I discussed with Governor Schweitzer a November 20, 2007 draft agreement reached by the relevant Wyoming and Montana state agencies and EPA. He expressed a concern about more specific treatment of the two tributaries [the Powder and Tongue Rivers]. Based on these conversations, the negotiators were instructed to develop additional specific language related to the two tributaries. The language was developed by the negotiators. As part of the review of the new language which was offered by the State of Montana, we asked whether the new language addressed Governor Schweitzer’s concerns. We viewed these as good faith, ongoing negotiations and were awaiting further discussions. The next thing we hear is a request from the media for a response to Governor Schweitzer’s rejection of an agreement. I do not know whether he rejected the November 20, 2007 agreement, the new language under consideration or simply concluded that he wants all of the assimilative capacity of the tributaries on the Montana side of the border to accommodate expanded CBM [Coalbed Methane] development in Montana.”

On May 16, the U.S. Office of the Solicitor General filed a brief with the U.S. Supreme Court in opposition to Wyoming’s motion to dismiss. The Solicitor wrote, “Montana’s basic claim [that

when Montana's first-tier users are short of water, there is no unused and unappropriated water, and the appropriated water must flow to the pre-1950 users who appropriated it] is correct, but Montana's right to redress under [Article V(A)] is a limited one, for it depends on showing that its own pre-1950 users are receiving insufficient water *and* that users in Wyoming are diverting water to post-1950 uses."

He adds, "Montana's complaint sufficiently pleads cognizable injury to pre-1950 rights. The allegations that Wyoming has permitted new storage and irrigation of new acreage, and allowed the depletion of the Yellowstone System waters through ground water pumping, state a claim under the Compact. Wyoming is correct that Montana does not state a claim by complaining about increased consumption of water on existing acreage; however, because Montana satisfies its pleading burden without depending on that allegation, Wyoming's argument on that point is not a sufficient basis on which to grant the motion to dismiss the complaint.... Montana also pleads facts that, if proven, would show a Compact violation." He concludes that "...because Montana's three remaining allegations are sufficient to state a claim for a violation of the [Compact], [Wyoming's] motion to dismiss should be denied." The Solicitor maintained that this result is consistent with the Federal Rules of Civil Procedure, which govern the procedural aspects of U.S. Supreme Court litigation. He argued that the case should proceed, but did not endorse a particular result or position of any of the respective parties.

On October 20, the U.S. Supreme Court appointed attorney Barton H. Thompson to be the special master in *Montana v. Wyoming* - a water rights dispute regarding the Yellowstone River Compact of 1950. The Compact outlines how Montana, North Dakota, and Wyoming will divide water from the Tongue and Powder Rivers. In a complaint filed in early 2007, Montana claims Wyoming has prevented it from receiving its share of water for a number of reasons, including allowing the "construction and use of ground water wells for irrigation" and the "pumping of ground water associated with coalbed methane production." The complaint also named North Dakota as a party to the dispute because it is a signatory state to the Compact. Wyoming contends that the Compact only applies to surface water and does not cover ground water.<sup>19</sup>

As special master, Mr. Thompson will have broad powers and will be responsible for conducting the fact finding portion of the case by summoning witnesses and issuing subpoenas. The Court's order also gives Mr. Thompson the "...authority to fix the time and conditions for the filing of additional pleadings...and to take such evidence as may be introduced...." Mr. Barton will also provide the Court with a non-binding recommendation regarding the outcome of the case, which the states will debate in oral arguments. Both parties shall share Mr. Thompson's expenses.

Mr. Thompson is a Stanford Law School professor and an expert in environmental and natural resources law and policy. Like many other special masters, he is a former Supreme Court law clerk, having clerked for the late Chief Justice William H. Rehnquist. Stanford Law School colleague Pamela Karlan says, "He's smart, fair, and a good listener, so combined with his expertise in property, water law, and natural resources law, he's a natural for this kind of work." For the order, go to: <http://www.supremecourtus.gov/docket/22o137.htm>.

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<sup>19</sup>*Western States Water*, Issue #1707, February 2, 2007.

Tarrant Regional Water District v. OWRB

In November, the 10<sup>th</sup> Circuit Court of Appeals ruled that the Tarrant Regional Water District's lawsuit challenging the constitutionality of Oklahoma's embargo on out-of-state water sales can continue. Tarrant, a Texas water agency with an application before the Oklahoma Water Resource Board (OWRB), is suing OWRB because it believes that the embargo violates the Commerce and Supremacy Clauses of the U.S. Constitution. In response, OWRB filed a motion to dismiss, claiming that a case in controversy did not exist, that it enjoyed immunity under the 11<sup>th</sup> Amendment, and that the district court should have abstained from hearing the case. The district court denied the motion and the 10<sup>th</sup> Circuit confirmed, ruling in Tarrant's favor on all points.

The Circuit Court found that a case in controversy does exist because the embargo precludes OWRB from granting Tarrant's application. Similarly, it rejected the OWRB's claim that it enjoys 11<sup>th</sup> Amendment immunity because Tarrant's request to overturn the embargo was a request for prospective relief that would only place Tarrant on the same footing as instate applicants. It also ruled that the denial of the OWRB's abstention claim was not appealable on an interlocutory basis because the district court's decision not to abstain "is capable of effective review upon entry of a final judgment in the case." The 10<sup>th</sup> Circuit's decision did not address the merits of the case, which can now resume in the lower federal court.

City of Hugo v. Nichols

In another case, the City of Hugo, Oklahoma, filed suit in the U.S. District Court for the Eastern District of Oklahoma, claiming that Oklahoma's embargo on out-of-state water sales infringes on the city's rights under the Commerce Clause of the U.S. Constitution to sell water interstate. The complaint seeks injunctive relief prohibiting OWRB from enforcing the embargo. Hugo and Irving, Texas entered into a contract in which Hugo agreed to provide Irving with 25,000 acre-feet of water/year for 60 years. In exchange, Irving has contributed \$500,000 to help Hugo in its legal challenge, and has agreed to pay Hugo \$3.8 million while a pipeline from Texas to Oklahoma is designed and built. If the pipeline becomes operational, Irving would pay Hugo \$1.7 million per year, not including the money it would pay to buy the actual water. This agreement represents the principal difference between the Hugo and Tarrant cases, and is believed to be the first of its kind between an Oklahoma water authority and a Texas customer.



## 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 2008, during the regular Council meetings.

Position No. 295 is in the form of a letter, dated March 7, to the Honorable Eddie Bernice Johnson, Chairwoman, and the Honorable John Boozman, Ranking Member, of the House Subcommittee on Water Resources and Environment. It expressed the Council's concern over the budget request as it relates to federal funding for water and wastewater treatment needs, specifically EPA's State Revolving Fund Capitalization Grants.

Position No. 296 is in the form of a letter, dated March 13, to the Honorable Stephen Johnson, Administrator, U.S. Environmental Protection Agency. It expressed the Council's concern with an Office of Management and Budget and Office of Inspector General directive to EPA disallowing the use of State Revolving Fund (SRF) revenues to repay bonds issued by some 20 states to meet the required 20 percent match for federal SRF capitalization grants.

Position No. 297 is in the form of a letter, dated March 13, to the Honorable Jeff Bingaman, Chairman, and the Honorable Pete Domenici, Ranking Member, of the Senate Committee on Energy and Natural Resources. It reiterated the Council's strong support for legislation to improve national drought preparedness, mitigation, and response efforts.

Position No. 298, adopted in cooperation with the Interstate Council on Water Policy, was conveyed in a letter, dated March 31, to Dr. Robert Hirsch, USGS Associate Director for Water, expressed strong support for increased funding for the Cooperative Water Program and the National Streamflow Information Program.

Position No. 299 is in the form of a letter, dated July 11, to the Honorable Jeff Bingaman, Chairman of the Energy and Natural Resources Committee, and expressed the Council's support for S. 2842, the Aging Water Infrastructure and Maintenance Act.

Position No. 300, in the form of a letter, dated July 11, expressed the Council's appreciation to Senator Jon Tester for his efforts in introducing the Cooperative Watershed Management Act of 2008 (S. 3085).

Position No. 301 is in the form of a letter, dated July 11, to the Honorable Nick Rahall, Chairman, and the Honorable Don Young, Ranking Member, of the House Natural Resources Committee and the Honorable Grace Napolitano, Chairwoman, and Cathy McMorris Rodgers, Ranking Member, of the Water and Power Subcommittee. It provided comments on H.R. 135, to establish the "Twenty-First Century Water Commission."

Position No. 302 is in a form of a letter, dated July 11, to the Honorable Jeff Bingaman, Chairman, and the Honorable Pete Domenici, Ranking Member, of the Senate Committee on Energy and Natural Resources. It urged the Congress to address funding issues related to our nation's rural water supply needs.

Position No. 303 is a revised resolution to renew expression of strong WSWC support for legislation to develop and implement a comprehensive and coordinated national policy and cooperative federal program to enhance research and development by both private and public entities related to weather modification and mitigation, including snowpack augmentation, rainfall enhancement and hail suppression.

Position No. 304 is also a statement revised slightly and renewed asking the Administration and the Congress to fully utilize the funds [in the Reclamation Fund] provided through the Reclamation Act and subsequent acts for their intended purpose in the continuing conservation, development and wise use of western water resources to meet western water-related needs and work with the States to meet the challenges of the future.

Position No. 305 is in the form of a letter, dated July 11, to the Honorable Dianne Feinstein, Chairwoman, and the Honorable Wayne Allard, Ranking Member, of the Senate Appropriations Subcommittee on Interior, Environment and Related Agencies. It expressed continuing support for the base federal appropriation for the state water resources research institutes program under provisions of the Water Resources Research Act.

Position No. 306 is in the form of a letter, dated July 11 to the Honorable Robert Byrd, Chairman, and the Honorable Thad Cochran, Ranking Member, of the Senate Appropriations Committee and the Honorable Dianne Feinstein, Chairwoman, and the Honorable Wayne Allard, Ranking Member, of the Senate Appropriations Subcommittee on Interior, Environment and Related Agencies. It urged support for FY2009 USGS funding of \$110 million for the National Streamflow Information Program and sufficient funding for the Cooperative Water Program to match non-USGS contributions.

Position No. 307 is in the form of a letter, dated October 17, sent to the Honorable Jeff Bingaman, Chairman, of the Senate Energy and Natural Resources Committee. It expressed the Council's interest in S. 3213, the Omnibus Public Lands Management Act. Many of the sections in Title IX address specific western water needs, and the letter highlighted those provisions that are consistent the recommendations of the WGA 2008 *Next Steps* Report.

The Council also revised and again readopted the following three resolutions.

Position No. 308 recommends policy changes at the federal level regarding general stream adjudications, which reiterates the Council's longstanding position that federal agencies should pay a fair share of the costs of adjudicating their water rights claims, which should have a sound basis in fact and law, as well as calling for the involvement of high level federal officials with decision-making authority in negotiations and requiring the federal government to provide whatever evidence it may have to substantiate its claims at the time of filing.

Position No. 309 recognizes ground water is a critically important natural resource and that its protection and management requires cooperation among all levels of government. However, it states that the regulatory reach of the Clean Water Act was not intended and should not be applied to ground water, contravening state water law, polices and programs. Rather any federal strategy must reflect a true state-federal partnership and provide adequate funding.

Position No. 310 reiterates WSWC support for negotiated Indian water rights settlements as the best solution to a critical problem. It urges the federal government to provide a "strong fiscal commitment" to meaningful funding without corresponding offsets to other essential tribal or

Department of the Interior programs, recognizing the federal trust responsibility that exists. It also suggests that revenues accruing to the Reclamation Fund be used for this purpose.

Lastly, the Council adopted Position No. 311 in the form of a letter, dated November 4, to Steven Stockton, Director of Civil Works, U.S. Army Corps of Engineers, expressing a willingness to work with the Corps on their water planning initiative and applauding the Corps' interest in determining how best to assist states with implementing their planning efforts. It stated that every western state has some form of a state water plan or planning process. It referenced the 2006 WGA Water Report and 2008 *Next Steps* Report, observing that the Council was not yet "persuaded" that the "current direction of the Corps' effort was in harmony with the Governors' vision and Mr. Stockton's "oft expressed support for collaborative partnerships.



WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

March 7, 2008

Position No. 295

The Honorable Eddie Bernice Johnson, Chairwoman  
Subcommittee on Water Resources & Environment  
House Transportation and Infrastructure Committee  
U.S. House of Representatives  
2165 Rayburn House Office Building  
Washington, DC 20515

The Honorable John Boozman, Ranking Member  
Subcommittee on Water Resources and Environment  
House Transportation and Infrastructure Committee  
U.S. House of Representatives  
2165 Rayburn House Office Building  
Washington, DC 20515

Dear Chairwoman Johnson and Rep. Boozman:

On behalf of the Western States Water Council, representing the governors of eighteen western states, we would like to express our deep concern over the budget request as it relates to federal funding for water and wastewater treatment needs, specifically EPA's State Revolving Fund (SRF) Capitalization Grants. The Western Governors' Association, in its June 2006 report "Water Needs and Strategies for a Sustainable Future," called for stable continuing federal SRF appropriations of \$1.35 billion for the Clean Water SRF and \$850 million for the Drinking Water SRF, increased annually by a construction inflation index. Further, it called for greater flexibility and fewer restrictions on state SRF management.

While the Administration's request for \$842.2 million for the Drinking Water SRF is near that mark, the \$555 million requested for the Clean Water SRF is woefully inadequate to help states address the enormous gap identified by EPA in its recent report on clean water infrastructure needs. EPA estimates a total capital investment need of \$202.5 billion nationwide over the next 20 years – including \$134.4 billion for wastewater treatment and collection systems, \$54.8 billion to correct combined sewer overflow problems, and \$9 billion for stormwater management.

States and communities are already struggling to meet their water and wastewater treatment challenges in the face of our growing population and aging infrastructure. Reducing the critical federal investment in our water infrastructure now is short sighted.

We appreciate your consideration of our concerns and these comments. We must continue to work together at all levels of government to meet our water and wastewater treatment needs in the most efficient and effective manner possible.

Respectfully,

A handwritten signature in black ink that reads "Duane A. Smith".

Duane A. Smith, Chairman  
Western States Water Council

cc: Rep. Brian Baird, Rep. Doris Matsui, Rep. John Salazar, Rep. Harry Mitchell, Rep. Jerry McNerney, Rep. Bob Filner, Rep. Ellen Tauscher, Rep. Grace Napolitano, Rep. Gary Miller, Rep. Rick Larsen, Rep. Nick Lampson, Rep. Don Young, Rep. Jerry Moran, Rep. Ted Poe, Rep. David Reichert, Rep. Mary Fallin, and Benjamin Grumbles, EPA Office of Water



**WESTERN STATES WATER COUNCIL**

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March 13, 2008

Position No. 296

The Honorable Stephen L. Johnson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

Dear Administrator Johnson:

The Western States Water Council, representing the governors of eighteen western states, is concerned with an Office of Management and Budget (OMB) and Office of Inspector General (OIG) directive to EPA disallowing the use of State Revolving Fund (SRF) revenues to repay bonds issued by some 20 states to meet the required 20 percent match for federal SRF capitalization grants. Such action would disproportionately impact western states' ability to raise matching funds, and is contrary to longstanding EPA policy and practice. Further, OMB acknowledged the practice of using state-match bonds in Circular A-133, which directs the audit and administrative oversight for federal funds. Such a change would be drastic and highly detrimental to our ability to raise matching money.

This change would adversely affect Alaska, Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, and Texas, which all rely on SRF revenues to repay bonds and match SRF capitalization grants. For example, the Texas Water Development Board estimates it could be faced with either – requesting state general revenue (up to \$46.8 million for the next biennium) to provide the required 20 percent state match to an estimated combined \$234 million in anticipated capitalization grants over a two-year period – or seeking state legislation and appropriations to allow Texas to pay the debt service on the bonds. Moreover, replacing bond proceeds with general revenue would result in a charge to the entire populace rather than a user-based charge on specific projects. In effect, under the current arrangement, SRF loan beneficiaries help pay for the state match through loan interest payments. Texas is proud of its programs and believes that both funds are currently administered in the most appropriate and effective manner.

States – large and small – face different fiscal challenges, and need to have the flexibility to meet their required match in accordance with their individual situation. For example, Montana and other states do not have access to state appropriated funds and absent the use of state match bonds and SRF interest repayments would be unable to participate in the SRF program. The policy change would thus exclude some of those states most in need of assistance and have the opposite effect on SRF borrowers than may be intended by OIG and OMB. We understand the OIG has called for the appointment of an Audit Review Committee to reach closure on this issue at EPA. We ask that these comments be considered in the resolution of this issue.

Administrator Johnson  
March 13, 2008  
Page 2

We appreciate your attention to our concerns. We must continue to work together at all levels of government to meet our water and wastewater treatment needs in the most efficient and effective manner possible.

Respectfully,



Duane A. Smith  
Chairman  
Western States Water Council

cc: Benjamin Grumbles, EPA Office of Water  
Jim Nussle, Office of Management and Budget  
EPA Office of Inspector General



WESTERN STATES WATER COUNCIL

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March 13, 2008

Position No. 297

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

The Honorable Pete Domenici, Ranking Member  
United States Senate  
Committee on Energy and Natural Resources  
364 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Bingaman and Ranking Member Domenici:

The Western States Water Council has strongly supported legislation in the past to establish a National Drought Council to improve national drought preparedness, mitigation, and response efforts. We supported S. 802, the National Drought Preparedness Act of 2005, and H.R. 1386, which Rep. Alcee Hastings (D-FL) introduced in the House on March 17, 2005. We would like to reiterate our support for such legislation.

Extended drought conditions continue to afflict many parts of the West, as well as the Southeast and other areas. Federal legislation is needed to promote coordination of proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought in the United States. Western governors have had a hand in drafting past legislation and have also called on the Congress and the President to support its enactment.

In the past, we also supported enactment of S. 648, by Senator Gordon Smith (R-OR), to extend the authority for drought assistance under the Reclamation States Drought Assistance Act of 1991. While renewed temporarily, we support making this authority permanent. It directs the Secretary of the Interior, and U.S. Bureau of Reclamation, to provide specific drought preparedness and planning assistance, as well as mitigation and response services, and will expire on September 30, 2010.

Moreover, we support the appropriation of \$20 million for such assistance. The President's FY2009 budget request for the U.S. Bureau of Reclamation includes only \$500,000 for the approved Drought Emergency Assistance Program.

The Western States Water Council is an organization representing eighteen states. Its members are appointed by their respective governors to address a broad range of water policy issues affecting the West. The West is characterized by its aridity, and the current, continuing drought has highlighted the fact that water availability circumscribes our economic and environmental well being and quality of life. Drought is a continuous threat. We need standing federal authority to address drought preparedness and response needs, in cooperation with the states, and sufficient funding to mitigate drought impacts.

Sincerely,

A handwritten signature in black ink that reads 'Duane A. Smith'.

Duane A. Smith, Chairman  
Western States Water Council

cc: Bob Johnson, Commissioner, Bureau of Reclamation





March 31, 2008

Position No. 298

Dr. Robert Hirsch  
USGS Associate Director for Water  
409 National Center  
12201 Sunrise Valley Drive  
Reston, VA 20192-0002

Dear Dr. Hirsch:

As you know, the Interstate Council on Water Policy and the Western States Water Council have been focused upon increasing funding support for the Cooperative Water Program and the National Streamflow Information Program (NSIP) for several years. The federal role in gathering and analyzing basin water data is crucial and we continue to believe that we need to work diligently toward full funding of the NSIP gaging network.

The President's Fiscal Year 2009 budget request includes the new Water for America initiative. We understand this will include regional scale assessments of the Nation's 21 water resources regions, and intensive studies within those regions. We urge you to work closely with our two organizations and our member states and interstate entities as you develop the scope and schedule of these intensive and regional studies.

We don't oppose these regional assessments and water availability and use analyses, but we are concerned that \$2.25 million for this new initiative has been added in the NSIP budget line item, which could have adverse future ramifications, if these studies were to compete for funding with streamgages.

Of the \$5 million increase in the NSIP budget, we understand that only about \$750,000 will go towards new or reactivated streamgages, and \$2 million will be used to accelerate the radio transmitter upgrades, which helps maintain the long-term stability of the network. We support these expenditures as part of the NSIP budget line item.

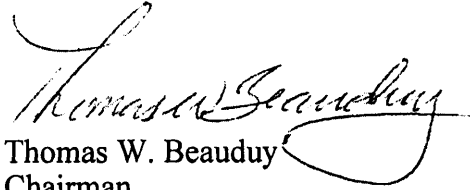
We do not support funding Water for America programs at the expense of the streamgaging network. We find it troubling that NSIP spending is only about 20% of the USGS full operational cost estimate, and that federal CWP expenditures continue to decline. Every effort needs to be made to ensure that the streamgaging network is not further compromised.

We appreciate the briefing you provided our organizations on this new initiative in Washington DC in early March and look forward to working with you and your staff to make sure that the USGS data collection programs continue to be supported to the maximum extent possible.

With best regards,



Duane A. Smith  
Chairman  
Western States Water Council



Thomas W. Beauduy  
Chairman  
Interstate Council on Water Policy



## WESTERN STATES WATER COUNCIL

5296 South Commerce Drive, Suite 202 / Murray, Utah 84107 / (801) 685-2555 / FAX (801) 685-2559

Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

July 11, 2008

Position No. 299

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

Dear Chairman:

On behalf of the Western States Water Council, representing eighteen states, I am writing in support of S. 2842, the Aging Water Infrastructure and Maintenance Act, introduced by Senator Reid, you and Senators Salazar and Tester. The legislation would fill an important gap in the protection of infrastructure owned by the United States, but often operated by local entities and not covered under the Reclamation Safety of Dams Act of 1978.

Westwide there are many transferred works with the facilities operated and maintained by non-federal entities, while title to the project is retained by the federal government. With the continuing growth and development of western communities, lives and property are at increasingly greater risk of loss from the failure of these facilities, which include canals, levees, tunnels, dikes, pumping plants, dams or reservoirs that are part of a federal reclamation project and related water distribution works.

As you know, on January 5<sup>th</sup>, the community of Fernley, Nevada awoke to a freezing flood due to the failure of the Truckee Canal. The flooding damaged 590 homes and many businesses with standing water up to eight feet in some places. This was the 9<sup>th</sup> failure in the history of the canal, and the most devastating as most of the homes damaged or destroyed were built on what was once undeveloped land. This tragedy could have been avoided.

The U.S. Bureau of Reclamation owns some 673 facilities and many are over 50 years old and some are nearly 100 years old. Reclamation has recently surveyed roughly 8,000 miles of canals it owns. Reclamation has also undertaken a comprehensive facilities review as part of its Managing for Excellence program. S. 2842 will ensure inspections are regularly completed and expedite and assist with project assessments and repairs.

S. 2842 provides for the inspection of all Reclamation project related facilities, both reserved and transferred works, within two years and periodically thereafter. Data collected will be used to prepare detailed regular maintenance schedules and guidance, as well as a national priorities list of facilities requiring urgent action. The latter is to be included annually in the Department of Interior's budget justification. Notably, the bill specifically directs Interior to notify and allow the appropriate State agency to participate in inspections, and provide the State agency with an inspection report.

Moreover, the bill directs Interior to promulgate final regulations to establish standards for the condition and maintenance of project facilities to ensure that they function properly and are operated in a safe manner. The Secretary is also to establish guidelines to implement the Act and ensure compliance with the regulations, which are to reflect an agency-wide policy taking into account non-Federal capabilities and any economic benefit. States should be consulted in drafting these regulations.

Chairman Bingaman  
July 11, 2008  
Page 2

The Secretary is also to carry out or provide financial support to a non-Federal entity to carry out any necessary modification to project facilities to reasonably preserve their structural safety. While inspection costs are non-reimbursable, federal cost sharing of project repairs (up to 65%) depends on non-Federal entities' compliance with the promulgated operation and maintenance regulations. The Secretary may carry out any repairs determined to be "necessary to minimize the risk of imminent harm to public health or safety, or property" after consulting with a non-Federal entity responsible for operation and maintenance of transferred works that is non-compliant and may seek reimbursement.

The bill provides \$5 million for fiscal year 2009, and \$1.5 million per year thereafter through fiscal year 2013.

The safety and prosperity of many of our western communities depend on our aging, rapidly deteriorating and increasingly vulnerable water supply infrastructure. As Senator Reid recently observed, "We all know that prevention is better than cure."

Again, we appreciate your attention to this important matter and look forward to working with you towards enactment and implementation of this bill.

Sincerely,



Garland Erbele, Chairman  
Western States Water Council



WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/lswc](http://www.westgov.org/lswc)

July 11, 2008

Position No. 300

The Honorable Jon Tester  
United States Senate  
204 Russell Senate Office Building  
Washington, DC 20510-2604

Dear Senator Tester:

We appreciate your efforts in introducing the Cooperative Watershed Management Act of 2008 (S. 3085) and look forward to working with you on this legislation. The Council has a long history of promoting local watershed planning, having published a 1998 State Watershed Strategy Guidebook. States have primary responsibility for managing their water resources, both quantity and quality, and the legislation should explicitly recognize and provide support for ongoing watershed efforts in the states and close consultation with the states in the implementation of any new federal program. States are in the best position to evaluate and prioritize their needs and the governor of a state should be consulted in the selection and prioritization of funding for watershed groups.

Our June 2006 report, "Water Needs and Strategies for a Sustainable Future," adopted by the Western Governors' Association included a number of references to watersheds, collaborative decisionmaking and related recommendations. Specifically, the report says, "States should facilitate collaborative watershed-focused planning that balances desirable growth and protection of the natural environment that depends on surface and ground water quantity and quality." Further, "The WSWC should encourage states to develop and implement strong state water plans.... The focus should be on a grassroots, watershed approach to identifying water problems and potential solutions from the ground up, integrating these efforts into individual state plans. Similarly, regional or multi-state and multiple river basin strategic plans should be comprised of these building blocks.

Also with respect to water resources planning the June 2006 Water Report said: "States should maintain various water-related plans, including state water plans, watershed plans, state drought plans, reservoir management plans, flood plans, etc. These plans should be expanded or enhanced accordingly to include climate change scenarios. Particular emphasis should be placed on climate change within the context of watershed planning."

CWMA could be an important tool for watershed groups and managers, consistent with our ongoing efforts and those of the governors. However, we would make the following suggestions for your consideration. The bill would benefit from a statement of purpose and need. Similarly, there needs to be some definition of the approximate size of a watershed, which in general would likely be a relatively small watershed, say the Bitterroot or Lemhi basin, as opposed to the Missouri or Columbia river basins.

Next, the term "management group" in Section 2(3)(A) needs to be better defined and "watershed group" may be better as that is a more generally accepted term. Further, "management entity" should be defined. Management may convey a presumptive and negative message to existing "water managers" at various levels. It should be emphasized that participation in a watershed group is voluntary, "grassroots," "cooperative," and "nonregulatory." "Management group" may appear to imply some sort of regulatory authority and function.

Similarly, the bill requires that a “watershed-wide management group” be “capable of managing in a sustainable manner the water resources of the watershed that is the subject of the management group....” under Section 2(3)(D). Most watershed groups are without regulatory authority and are primarily advisory groups that may not be “capable” of management of the watershed as envisioned, but still merit technical and financial assistance. For example, they obviously would not and should not be “capable” of administering and reallocating existing water rights protected under state law.

“Watershed groups” generally are thought of as a dynamic approach to bring to bear the various regulatory and non-regulatory authorities of their participants, as well as technical and financial resources, to identify and resolve specific problems within the watershed. They are not generally a means to address any and all problems. Perhaps an alternative phrase would be a “self-sustaining, cooperative watershed group” that is capable of “promoting the sustainable use of the water resources of the watershed....” under Section 2(D).

Our June 2008 Water Needs and Strategies “Next Steps” Report, adopted recently by the WGA, suggests that “States may wish to consider empowering local watershed groups with more authority.” However, at present, these groups have little if any authority other than planning. What authority such groups should have is a function of their needs and purposes, and should be determined by the group or state and local officials.

Also, we would respectfully suggest rewording Section 2(3)(A) to read: “...is comprised of each and every affected stakeholder of the watershed that is the subject of the watershed group that chooses to participate.” The point is that any entity threatening not to participate might otherwise hold the remainder “hostage,” or purposely derail the program by sitting out. Similarly, while it is important that a wide range of interests be represented, it is not possible to include every variation of each interest, and the bill would benefit from a few major criteria related to different interests’ credentials or organizational standing. This problem appears to be recognized in Section 3(b) ELIGIBILITY where public and private entities are to be included “...to the maximum extent practicable.” The requirement should apply to the “management group” seeking funding.

Under 3(b)(1), we would add something like “potable water purveyors and industrial water users” as not all municipal water providers are public entities, which we assume are intended to be included under 3(b)(3), and many mining and manufacturing entities are “self-supplied.” It may be best to include a category for private interests such as oil, gas and mining. There should be a separate category for any state representative that has authority or an interest in the watershed, and another category for any local authorities.

Moreover, in general, there should be some encouragement for using existing groups, as opposed to the formation of competing forums, while establishing new groups where none now exist. Similarly, competition for funding among similar programs would be a concern. There are a number of examples of existing groups such as the Blackfoot Challenge, Colorado’s basin roundtables, Idaho’s watershed advisory groups, the Santa Fe Watershed Association, etc.

There should be a strong mandate for federal interagency cooperation. Under 3(b)(2) you might consider adding (D) the Environmental Protection Agency; and under (C) after NOAA Fisheries, add “...or the U.S. Fish and Wildlife Service.” NOAA Fisheries and USFWS each have Endangered Species Act (ESA) responsibilities. The Environmental Protection Agency’s Office of Water and Office of Wetlands, Oceans and Watersheds shouldn’t be overlooked, nor USDA’s Natural Resources Conservation Service (NRCS) and their resource assessments. While recognizing that there may be Committee jurisdiction issues, it is important to coordinate watershed planning and management at the federal level.

Senator Tester  
July 11, 2008  
Page 3

With respect to Sec. 3(c)(1)(B) and the program application process and eligibility criteria, it may be well to explicitly include as criteria "as recommended by the governor," or perhaps as "developed in consultation with the states." Ideally, local watershed plans and programs will be built with state collaboration and support, and should be consistent with state water and watershed plans and programs. Moreover, it is the States' role to reconcile "instate" disputes or conflicts between "intrastate" watershed groups over resources or proposed actions.

The greatest benefit from the bill may be increasing the resources available through the Department of Interior and its agencies (U.S. Bureau of Reclamation, U.S. Geological Survey and U.S. Fish and Wildlife Service) to participate and support local watershed groups. The phased approach to federal support taken in the bill is appropriate and the emphasis on results could be strengthened.

Appropriations will be a concern, and out year funding is likely to be inadequate if many of the groups move past Phase I. Ultimately, we would like to see fewer studies and more solutions, results and projects.

Again, we appreciate the opportunity to comment on the bill and look forward to working with you on it in the future.

Sincerely,



Garland Erbele, Chairman  
Western States Water Council





WESTERN STATES WATER COUNCIL

5296 South Commerce Drive, Suite 202 / Murray, Utah 84107 / (801) 685-2555 / FAX (801) 685-2559

Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

July 11, 2008

Position No. 301

The Honorable Nick J. Rahall, II, Chair  
House Natural Resources Committee  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

The Honorable Don Young, Ranking Member  
House Natural Resources Committee  
U.S. House of Representatives  
1329 Longworth House Office Building  
Washington, DC 20515

The Honorable Grace F. Napolitano, Chair  
Water and Power Subcommittee  
House Natural Resources Committee  
U.S. House of Representatives  
1522 Longworth House Office Building  
Washington, DC 20515

The Honorable Cathy McMorris Rodgers  
Ranking Member, Water and Power Subcommittee  
House Natural Resources Committee  
U.S. House of Representatives  
H2-186 Ford House Office Building  
Washington, DC 20515

Dear Chairman Rahall, Ranking Member Young, Chairwoman Napolitano and Ranking Member Rodgers:

On behalf of the Western States Water Council and our 18 member states, I'm writing to again comment on H.R.135, to establish the "Twenty-First Century Water Commission." As previously communicated, the Council's mission is to promote cooperation among its member states in the sustainable management and development of water resources in the West.

To this end, the Council and the Western Governors' Association adopted a June 2006 report, "Water Needs and Strategies for a Sustainable Future," and recently the governors adopted a June 2008 "Next Steps" report further refining current needs and strategies.

As we have said in the past, if such a commission is to be created, it will be important that it represent the diverse interests that exist, including State and Native American involvement. The Western States Water Council should be involved in the selection of members.

Further, the Commission should study the current water management programs of tribes (under Section 1(b)(2), as well as Federal, interstate, State and local agencies and private sector entities).

We look forward to working with you on this legislation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garland Erbele".

Garland Erbele, Chairman  
Western States Water Council



WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

July 11, 2008

Position No. 302

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

The Honorable Pete Domenici, Ranking Member  
Energy and Natural Resources Committee  
United States Senate  
304 Dirksen Senate Building  
Washington, DC 20510

The Honorable Tim Johnson, Chairman  
Subcommittee on Water and Power  
Energy and Natural Resources Committee  
United States Senate  
304 Dirksen Senate Building  
Washington, DC 20510

The Honorable Bob Corker, Ranking Member  
Subcommittee on Water and Power  
Energy and Natural Resources Committee  
United States Senate  
312 Dirksen Senate Building  
Washington, DC 20510

Dear Chairman Bingaman, Ranking Member Domenici, Chairman Johnson and Ranking Member Corker:

The Western States Water Council (WSWC) and Western Governors' Association (WGA) supported the enactment of S. 895 (P.L. 109-451) to provide the U.S. Bureau of Reclamation with authority to assess rural water supply needs – in cooperation with the states and other federal agencies – and provide loan guarantee authority to address the financing needs of non-federal entities responsible for operation and maintenance of “transferred projects.” Extraordinary O&M costs and rehabilitation and betterment projects often exceed the resources available to local water districts, but private financing opportunities are limited given title to these projects remain with the United States. Title II loan guarantees address this problem.

We understand that the Administration has requested \$1 million for FY 2009 to implement the legislation, apparently to begin the process of writing rules for the needs assessment. However, no money appears in “out year” requests. This is disappointing.

Moreover, in an April 3<sup>rd</sup> memorandum to Interior, the Office of Management and Budget (OMB) says that loan guarantees to finance improvements and major rehabilitation involving federal assets must be treated for budgetary purposes as up front obligations. “Agencies are required to record obligations up front for the *subsidy cost* of loan guarantees issued to finance non-Federal assets, reflecting the private ownership and risk-sharing between the private sector and the Federal Government. Similarly, agencies are required to record obligations up front for the *full Government contingent liability* of loans that are guaranteed by the Government and used to finance improvements to Federally owned assets, reflecting the Government’s ownership and its full risk for repayment of the loans...consistent with the Congressional Budget Office’s stated position on the budgetary treatment of similar financings....”

OMB misinterprets CBO’s issue brief on Third Party Financing of Federal Projects, which addresses raising money on behalf of a federal program to be later repaid by some kind of long-term federal commitment. Title II addresses guarantees of the non-federal financing of the non-federal share of the cost – not the government’s share. The effect of this OMB interpretation is to eviscerate Title II and negate the Congress’ intent to fill a critical gap in federal and non-federal financing capabilities by supplementing direct federal funding and leveraging federal spending by making it easier for non-federal beneficiaries to fund projects through private lenders.

OMB also erroneously suggests that the "...Government bears the full risk of a loan guarantee issued to finance a Federally owned asset because it owns the asset.... The water district lacking any ownership interest does not have a comparable economic stake in the overall success of the project...."

OMB erroneously says, "Such financing arrangements are equivalent to direct Federal borrowing to finance the improvements and using receipts from water users to repay the Federal debt.... Direct Federal borrowing is generally less expensive for the taxpayer because the rates on Treasury bonds are lower than the rates on private-sector, third-party financing.... [The] cost of a loan guarantee to finance improvements to Federally-owned assets would be 100 percent of the guaranteed amount. Thus, an 80 percent loan guarantee of a \$10 million loan would require an appropriation of \$8 million of budget authority, up front."

In fact, the government bears only contingent liability and realistically only a small percentage of loans are likely to default. In fact, CBO scored the loan guarantees at only 1%-2% for future appropriation purposes. The value of non-federal real private property rights are directly dependent on the federal assets, maintained privately through contractual legally binding agreements. The non-federal water districts named in the OMB memo are essentially "public" entities, either organized as an instrumentality on the states in which they are located or as special tax-exempt public-purpose organizations. They bear substantial economic and social trust responsibilities. They are credit-worthy local entities, private collateral is pledged as security and the government has significant recourse to recover its costs if there is a default.

The minimal federal investment through federal loan guarantees promises to substantially reduce the rising risks to life and property that is a result of the current inability to privately finance the proper maintenance, repair and rehabilitation of these federal facilities, operated by non-federal entities.

We urge the Congress to address this issue promptly and clear the way for implementation of the law as the Congress intended in a timely manner. Moreover, we ask that sufficient funds be requested and appropriated to make meaningful progress towards identifying and addressing our Nation's rural water supply needs.

Respectfully,



Garland Erbele  
Chairman  
Western States Water Council

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**in support of the**  
**Weather Modification Research and Technology Transfer Act**  
**Medora, North Dakota**  
**July 11, 2008**

**WHEREAS**, the 110th Congress is considering S. 1807 and H.R. 3445, introduced respectively by Senator Kay Bailey Hutchison as the Weather Mitigation and Research Development Policy Authorization Act and by Rep. Mark Udall as the Weather Mitigation Research and Technology Transfer Authorization Act, to develop and implement a comprehensive and coordinated national policy and cooperative program, and authorizes \$10 million per year for 10 years to enhance federal support for weather modification, promote research and development, and provide financial assistance to private and public entities; and

**WHEREAS**, western states support operational weather modification projects, realize the benefits derived from weather modification, and permit weather modification activities for various purposes ranging from snow augmentation to hail suppression, under varying state statutes and programs; and

**WHEREAS**, much of the West depends on water that originates from snow, and the American Meteorological Society (1998), World Meteorological Organization (2001), and the National Academy of Sciences (2003) have all found that there is strong physical and statistical evidence that wintertime weather modification activities can create additional snowpack in watersheds; and

**WHEREAS**, the Weather Modification Association and the North American Interstate Weather Modification Council support a “coordinated national program” to further the science, understanding, and utility of weather modification; and

**WHEREAS**, several Council member states are also members of the North American Interstate Weather Modification Council (Arizona, California, Colorado, Utah, Wyoming, North Dakota, Nevada, Texas, Oklahoma, Idaho, and Kansas) and work together to facilitate the exchange of interstate atmospheric resource management information; and

**WHEREAS**, western states would benefit greatly from a coordinated national program that advances the field of weather modification as it relates to precipitation enhancement for water management – and assists in the scientific evaluation of western states weather modification operations, while complying with related state laws.

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council strongly supports enactment of federal legislation to promote research and reasonable and responsible development and control of our atmospheric resources in compliance with applicable state laws.

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**regarding the**  
**THE RECLAMATION FUND**  
**Medora, North Dakota**  
**July 11, 2008**

**WHEREAS**, in the West, water is indeed our “life blood” - a vital and scarce resource the availability of which has and continues to circumscribe growth, development and our economic well being and environmental quality of life - the wise conservation and management of which is critical to maintaining human life, health, welfare, property and environmental and natural resources; and

**WHEREAS**, recognizing the critical importance of water in the development of the West, the Congress passed the Reclamation Act on June 17, 1902 and provided monies “reserved, set aside, and appropriated as a special fund in the Treasury to be known as the ‘reclamation fund,’ to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land...” in seventeen western states, to be continually invested and reinvested; and

**WHEREAS**, then President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children’s children...;”<sup>20</sup> and

**WHEREAS**, the Secretary of the Department of the Interior was authorized and directed to “locate and construct” water resource projects to help people settle and prosper in this arid region, leading to the establishment of the Reclamation Service – today’s Bureau of Reclamation; and

**WHEREAS**, western states and the Bureau of Reclamation have worked in collaboration to meet the water-related needs of the citizens of the West, and protect the interests of all Americans, recognizing changing public values and the need to put scarce water resources to beneficial use for the “ultimate greatest good of the greatest number;” and

**WHEREAS**, the Bureau of Reclamation has built facilities that include 348 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation’s vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 42 billion kilowatt hours of energy each year from 58 hydroelectric power plants for some nine million people, and further providing flood control, recreation, and fish and wildlife benefits; and

**WHEREAS**, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return about \$600 million to the United States Treasury, prevent some \$500 million in damages due to floods each year, and generate billions of dollars in economic returns from agricultural production; and

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<sup>20</sup>State of the Union Address, 1907

**WHEREAS**, the water and power resources developed under and flood control provided by the Reclamation Act over the last century supported the development and continue to be critical to the maintenance of numerous and diverse rural communities across the West and the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities; and

**WHEREAS**, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present water needs in the West and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902; and

**WHEREAS**, according to the Administration's FY 2009 request actual and estimated appropriations from the Reclamation Fund are \$981 million for FY 2007, \$1.05 billion for FY 2008, and \$870 million for FY 2009 -- compared to actual and estimated receipts of \$1.85 billion, \$2.09 billion and \$2.49 billion respectively; and

**WHEREAS**, the unobligated balance in the Reclamation Fund continues to grow from an actual balance of \$5.67 billion at the end of FY 2006, to an estimated \$9.23 billion by the end of FY 2009; and

**WHEREAS**, under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means to finance federal western water and power projects with revenues from western resources and its receipts are derived from water and power sales, project repayments, certain receipts from public land sales, leases and rentals in the 17 western states, as well as certain oil and mineral-related royalties - but these receipts are only available for expenditure pursuant to annual appropriation acts; and

**WHEREAS**, with growing receipts in part due to high energy prices and declining federal expenditures for Reclamation purposes, the unobligated figure gets larger and larger, while the money is actually spent elsewhere for other federal purposes contrary to the Congress' original intent.

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council asks the Administration and the Congress to fully utilize the funds provided through the Reclamation Act and subsequent acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs -- recognizing and continuing to defer to the primacy of western water laws in allocating water among uses -- and work with the States to meet the challenges of the future. Such "needs" may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlements, rehabilitation of aging infrastructure, appropriate environmental restoration efforts in consultation with affected states, and other legitimate needs that may be financed by these reserves.

**BE IT FURTHER RESOLVED**, that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).



WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

July 11, 2008

Position No. 305

The Honorable Dianne Feinstein, Chair  
Appropriations Subcommittee on Interior,  
Environment and Related Agencies  
United States Senate  
131 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Wayne Allard, Ranking Member  
Appropriations Subcommittee on Interior,  
Environment and Related Agencies  
United States Senate  
123 Hart Senate Office Building  
Washington, D.C. 20510

Dear Madam Chairman and Senator Allard:

As the Chairman of the Western States Water Council, which consists of representatives appointed by the governors of eighteen western states, I am writing on behalf of the Council to express our strong continuing support for the base federal appropriation for the state water resources research institutes program under provisions of the Water Resources Research Act. While this and past Administrations continue to propose elimination of this program, funding water resources research is increasingly important to meeting our present and future water needs.

Members of the Council are familiar with the work of the Water Resources Research Centers and Institutes located in their respective states. Many of these centers have assisted our state water agencies in a number of ways as they seek to address the increasingly complex challenges associated with water management in the West. The challenges are exacerbated by the uncertainty surrounding climate change, population growth, economic and environmental water demands. The Council has been working with the institutes and other academic water research centers to ensure research investments are relevant to our most pressing water problems.

The Water Resources Research Centers and Institutes provide important support to western state water agencies in long-term water planning, policy development, and management. They provide a research infrastructure that utilizes the capabilities of universities in our states to address the water resources challenges we face. Most importantly, their research agenda are determined in consultation with an advisory committee of the respective State officials and stakeholders that allows each state to solve its own problems by methods most appropriate to its own situation. In addition, their outreach and information-transfer activities are very valuable to the water communities in the various western states.

This is a very worthwhile partnership and we respectfully request you and your Subcommittee take the lead in ensuring that appropriations for the state water resources research program be maintained and increased.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Garland Erbele'.

Garland Erbele, Chairman  
Western States Water Council



WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

July 11, 2008

Position No. 306

The Honorable Robert C. Byrd, Chairman  
Appropriations Committee  
United States Senate  
The Capitol S-131  
Washington, D.C. 20510

The Honorable Thad Cochran, Ranking Member  
Appropriations Committee  
United States Senate  
The Capitol S-206  
Washington, D.C. 20510

The Honorable Dianne Feinstein, Chairwoman  
Appropriations Subcommittee on Interior,  
Environment and Related Agencies  
United States Senate  
131 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Wayne Allard, Ranking Member  
Appropriations Subcommittee on Interior,  
Environment and Related Agencies  
United States Senate  
123 Hart Senate Office Building  
Washington, D.C. 20510

Dear Chairman Byrd, Ranking Member Cochran, Chairwoman Feinstein and Ranking Member Allard:

On behalf of the Western States Water Council, I am writing to urge you to support full FY2009 U.S. Geological Survey (USGS) funding of \$110 million for the National Streamflow Information Program (NSIP) and sufficient funding for the Cooperative Water Program (CWP) to match non-USGS contributions. Full NSIP implementation requires substantially more than the \$23.8 million requested by the President (\$20 million was appropriated for FY2008). The \$62.3 million requested by the President (and \$62.8 million appropriated for FY2008) would be less than half what is needed by the Cooperative Water Program to reverse the slow erosion in spending that is robbing us of streamgages and data that is vital for the sound management of our western water resources. The President's FY2009 request is not sufficient to reverse the continuing decline in real federal spending due to unfunded or only partially funded federal salary and other cost increases.

Our members are critical partners in the Cooperative Program, and we believe this should be the highest USGS funding priority related to water. However, the failure of the Administration and the Congress to match state contributions on a 50%-50% basis – with flat or nearly flat federal spending in the face of continually rising federal costs – has inappropriately shifted to the states the lion's share of the financial burden for maintaining the national streamgaging system. In FY2007, our member states provided \$67.87 million, while matching federal appropriations totaled only \$32.766 million -- \$35.104 million short. On a national level, the USGS share of the Cooperative Water Program has been far less than the approximately \$138 million contributed annually by Cooperators since FY2004 – and cutting funds from the CWP budget to enhance the NSIP has not helped. Federal funding has been allowed to erode to the point that it threatens the availability, quantity, quality and timeliness of this basic data. States cannot continue to bear this increasing financial burden, which threatens this long-time partnership.

With the number of streamgages declining and the need for streamflow data increasing, human life, our quality of life, our security, and our property are at considerably greater risk. Myriad federal, state, tribal, and local government agencies, as well as private entities and individuals, use this data to manage flooding and drought, assess water quality and predict future water supplies for our agricultural, municipal and industrial needs, plus energy/hydropower, recreation and environmental uses (including



protecting endangered species). The data from streamgages with over 30-years of record is also vital to measuring and monitoring long-term changes that may be related to climate change. Water resources planning, water rights administration, project operation and flow forecasting capabilities, emergency response and water quality assessments depend on this data that is so important to so many people, businesses and agencies nationwide.

Recognizing the Nation's fiscal challenges, with record drought in the West and Southeast, earlier and earlier melting snowpacks, and record flooding in the Midwest, timely and accurate streamflow information for sound water resources and emergency management has never been more important.

Sincerely,



Garland Erbele, Chairman  
Western States Water Council



WESTERN STATES WATER COUNCIL

5296 South Commerce Drive, Suite 202 / Murray, Utah 84107 / (801) 685-2555 / FAX (801) 685-2559

Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

October 17, 2008

Position No. 307

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 to express our interest in S. 3213, the Omnibus Public Lands Management Act. As introduced, the bill addresses a number of water-related concerns among western states as expressed in the June 2008 Western Governors' Association report, "Water Needs and Strategies for a Sustainable Future: Next Steps." Many of the Title IX sections address specific water needs in western states. A number authorize water conservation and water reuse projects.

The Next Steps report states: "The Congress and the Administration should support more spending for research and development related to innovative water conservation and supply augmentation strategies, including ground water recharge and recovery, desalination, recycling and reuse, and weather modification. Financial assistance should be provided as well where there is a significant national or regional benefit." [footnote, p. VI, No. 28-29.]

Title X authorizes two important settlement agreements. Section 1061 would establish in the U.S. Treasury a Reclamation Water Settlements Fund to which would be deposited \$120 million/year for FY2009-FY2023 from revenues available to the Reclamation Fund. These amounts would be available without further appropriation and would be in addition to amounts otherwise appropriated by law to "...implement a settlement agreement approved by Congress that resolves, in whole or in part, litigation involving the United States...[and that] requires the Bureau of Reclamation to provide financial assistance for, or plan, design and construct – water supply infrastructure; or a project to rehabilitate a water delivery system to conserve water; or restore fish and wildlife habitat or otherwise improve environmental conditions associated with or affected by, or located within the same river basin, a Federal reclamation project that is in existence on the date of enactment of this Act." It sets certain priorities.

The Next Steps report states: "Congress should ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded and implemented in a timely manner without a corresponding offset to some other tribe or essential Interior Department program. Congress should explore opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, recognizing the existence of other legitimate needs that may be financed by these reserves." [footnote, p. V, No. 11.]

Senator Bingaman  
October 17, 2008  
Page 2

We commend the Committee for its work in address important water needs in the West, and look forward to working with you in the future on further legislation, recognizing this bill does not and can not address all western water needs in which there is a legitimate federal interest. We leave it to our state members to express their individual interests in the bill, but wish to express our strong support for the increased use of Reclamation Fund revenues to meet western water needs.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garland Erbele".

Garland Erbele, Chairman  
Western States Water Council

**RESOLUTION**  
**on the**  
**FEDERAL GOVERNMENT'S ROLE IN EXPEDITING**  
**STATE GENERAL STREAM ADJUDICATIONS**  
**Oklahoma City, OK**  
**October 17, 2008**

**WHEREAS**, the Western States Water Council, representing eighteen western states, most of which are actively engaged in general stream system adjudications, wish to hereby communicate their recommendations on how the federal government might help expedite such adjudications in the West; and

**WHEREAS**, states in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including rights to waters claimed by the United States under either state or federal law; and

**WHEREAS**, these adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants, but such adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for water rights in the West; and

**WHEREAS**, Congress recognized the benefits of state general adjudication systems and by adoption of the McCarran Amendment (43 U.S.C. §666), required the federal government to submit to state court jurisdiction for the adjudication of its water right claims; and

**WHEREAS**, although water right claims by federal agencies are often the largest and/or most complex claims in state general adjudications, the United States Supreme Court, in the case of *United States v. Idaho*, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay filing fees, which pay for a portion of the costs associated with conducting adjudications; and

**WHEREAS**, this holding means that the cost of adjudicating some of the most difficult claims in a state general adjudication has shifted entirely to private water users and state taxpayers, representing a drain on the resources of states which significantly inhibits the ability of both state and federal agencies to protect private and public property interests; and

**WHEREAS**, because they are not subject to fees and costs like other water users in the adjudication, federal agencies have filed questionable claims that may have been otherwise tempered;

**WHEREAS**, western states have attempted to address this problem in the Congress, where bills have been introduced to require all federal agencies filing water right claims in state adjudications to pay fees and costs to the same extent as a private party to the same proceeding; however, this proposal, as well as alternative legislation developed by New Mexico to provide federal funding support to states for general stream adjudications, based on a formula assessing the relative need for such support, have not advanced within Congress as yet.

**NOW THEREFORE BE IT RESOLVED** that the Western States Water Council recommends policy changes at the federal level as follows:

1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. One alternative would be to establish a uniform federal fee structure, which we recognize may require that the money for such fees be diverted from some other federal programs. A federal representative should be designated to work with western state water administrators either to establish an equitable uniform fee structure for adjudicating federally held water rights or to devise some other means of providing for federal payment of a fair share of adjudication costs, and to help identify sources of federal funds for such fees. Importantly, the federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho.
2. The federal government should not pursue separate actions in federal court that deal with the subject matter of a state court adjudication during the pendency of the adjudication, such as the Lower Rio Grande quiet title action filed in 1997 in federal district court in New Mexico and the 2001 Adair filings in federal district court in Oregon. Such actions divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. Negotiations and mediation often occur with regard to federal claims within the context of ongoing adjudications. To be effective, there must be high-level federal involvement in such negotiations. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter claims by the Forest Service which are entirely inconsistent with the United States Supreme Court holding in *United States v. New Mexico*. We believe that direction to follow the holding of *United States v. New Mexico* would avoid questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.
5. Another way to ensure that claims have a sound basis in fact, and also to facilitate timely review of those claims is to require that the federal government provide whatever evidence it may have to substantiate its claims at the time of filing. Given the complexity and the contentiousness involving such claims, we believe states are justified in asking the federal government to take this step. Doing so will expedite the process in two ways: (1) it will minimize the filing of questionable claims in the first place; and (2) it will provide a basis for states to ascertain early on the level of resources that states need to commit to the investigation of such claims.

**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
on  
PROTECTING GROUND WATER QUALITY  
Oklahoma City, OK  
October 17, 2008  
*(revised and reaffirmed)***

**WHEREAS**, ground water is a critically important natural resource, especially in the mostly arid West; and

**WHEREAS**, ground water management - the protection of its quality and its orderly, rational allocation and withdrawal for beneficial use - requires cooperation among all levels of government; and

**WHEREAS**, states recognize the importance and role of comprehensive ground water planning in overall water management; and

**WHEREAS**, the federal government has a longstanding policy of deferring to the states to develop and implement ground water management and protection programs; and

**WHEREAS**, most western states have legal systems to allocate ground water rights and all further have the responsibility for ground water quality protection; and

**WHEREAS**, the regulatory reach of the Clean Water Act was not intended and should not be applied to the management and protection of ground water resources contravening state water law, policies and programs.

**NOW THEREFORE BE IT RESOLVED** that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities.

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**in support of**  
**INDIAN WATER RIGHTS SETTLEMENTS**  
**Oklahoma City, OK**  
**October 17, 2008**

**WHEREAS**, the Western States Water Council, an organization of eighteen western states, and adjunct to the Western Governors' Association has consistently supported negotiated settlement of Indian water rights disputes; and

**WHEREAS**, the public interest and sound public policy require the resolution of Indian water rights claims in a manner that is least disruptive to existing uses of water; and

**WHEREAS**, negotiated quantification of Indian water rights claims is a highly desirable process which can achieve quantifications fairly, efficiently, and with the least cost; and

**WHEREAS**, 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; and

**WHEREAS**, the successful resolution of certain claims may require "physical solutions," such as development of federal water projects and improved water delivery and application techniques; and

**WHEREAS**, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

**WHEREAS**, the settlement of Native American water claims, and land claims, is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole; and

**WHEREAS**, current budgetary policy makes it difficult for the Administration, the states and the tribes to negotiate settlements knowing that the settlements may not be funded because funding must be offset by a corresponding reduction in some other tribe or essential Interior Department program.

**NOW, THEREFORE, BE IT RESOLVED**, that the Western States Water Council reiterates its support for the policy of encouraging negotiated settlements of Indian water rights disputes as the best solution to a critical problem that affects almost all of the Western States; and

**BE IT FURTHER RESOLVED**, that the Western States Water Council urges the Administration to support its stated policy in favor of Indian land and water settlements with a strong fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States government; and

**BE IT FURTHER RESOLVED**, that Congress should explore opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, recognizing the existence of other legitimate needs that may be financed by these reserves.

**BE IT FURTHER RESOLVED**, that steps be taken to change current budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset to some other tribe or essential Interior Department program.



WESTERN STATES WATER COUNCIL

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November 4, 2008

Position No. 311

Mr. Steven L. Stockton, P.E.  
Director of Civil Works  
Department of the Army  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Dear Mr. Stockton,

I wish to acknowledge receipt of your letter of October 23, 2008, and to express appreciation for your invitation to be of assistance to the Corps in their water planning initiative. We look forward to working with you and will designate a contact person in the near future for this purpose. In the meantime, we wish to convey the sense of the concern expressed at our recent meetings held in Oklahoma City to which you alluded. While the remainder of this letter was prepared prior to receipt of your letter, we did not alter the language, since we want to convey the nature of the concerns expressed at our meeting, as well as the desire of our members to be of assistance.

We applaud you for your interest in determining how federal assistance can best support states with implementing their planning efforts and presenting a "snapshot" of planning steps they are taking to meet their present and future water-related needs. However, the states need to be involved in any study up front.

We understand there may be an interest in completing a report in time to be of use to the new Administration and the new Congress -- but any unilateral, prescriptive evaluation of state water plans across the Nation is not likely to be effective and could be counterproductive to cooperative federal-state relationships. To be successful and useful the report must include states' input. With the limited time available it is imperative that the Corps meet soon with each state to obtain information, then each state and the Council must be given a reasonable amount of time to review and comment on the report.

Every western state has some form of a state water plan, or planning process, which has developed over time in response to evolving resource needs and financial and political constraints. The study should focus on opportunities to provide financial and technical assistance for state water planning, as opposed to a critical analysis of state water plans and administrative functions. There are valid reasons for the differences in state water planning processes, and federal incentives should focus on promoting strategic, integrated water resources planning to meet future needs, including infrastructure needs to adapt to climate change and facilitate sustainable growth.

The Western Governors' Association has adopted the 2006 Water Needs and Strategies for a Sustainable Future and 2008 "Next Steps" Reports. The 2006 Water Report encourages member states to "develop and implement strong state water plans" and directs that the WSWC compile a state-by-state and Westwide summary of existing water uses, water plans and planning efforts, current ground and surface water supplies, and anticipated future demands, then identify and evaluate trends and common themes." It adds, "The focus should be on a grassroots, watershed approach to identifying water problems and potential solutions from the ground up, integrating these efforts into individual state plans. Similarly, regional or multi-state and multiple river basin strategic plans should be comprised of these building blocks."



Our first attempt at gathering western water use information revealed that many states lack the basic data on water supplies and demands, especially consumptive uses, needed to produce an effective water budget for future water planning and sound decisionmaking. The 2008 Next Steps Report identified a number of interim steps to help provide states with some of the data that is lacking and tools to better assess their water resource supplies and future needs, "recognizing that a truly national assessment must begin at the state and local level with appropriate technical and financial support from the federal government."

We are not yet persuaded that the current direction of the Corps effort is in harmony with the Governors' vision, and your oft expressed support for collaborative partnerships. We would also like to better understand what current statutory authority the Corps has available to implement their recommendations that emerge from this study that might be useful to the states. We would appreciate the opportunity to work with you to review the purposes and processes envisioned for this project, including the survey or interview questions, date and place for the Western regional conference and format for the National meeting, among other study details. In this regard, the anticipated West regional planning conference could be held prior to or in conjunction with the Council's next regularly scheduled meetings in Kansas City, Kansas on April 22-24, 2009. An appropriate first step would be to define the West study region to include the 17 WSWC member states. We believe this is an opportunity to use the Council and recently created Western States Federal Agency Support Team (WestFAST) to enlist the support of the western states and other federal agencies for this effort and add value to the final product.

We sincerely appreciate our past working relationship and look forward to exploring ways to more effectively collaborate on this study now and in the future.

Sincerely,



Garland Erbele, Chairman  
Western States Water Council

cc: Jonne Hower, Federal Liaison Officer

## 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.
- (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.

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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.

## 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 sunseting. 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.

