

**2010**

**ANNUAL REPORT**

**of the**

**WESTERN STATES WATER COUNCIL**

**45th Annual Report**

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# 2010 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. Washington is currently an Associate Member.

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 2010, meetings were held in: Washington, D.C. on March 23-25; Stateline, Nevada on July 21-23; and San Diego, California on October 27-29. 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 FY2010 (ending June 30, 2010) were set at \$30,000 per state. A copy of the audit performed for the fiscal year ending June 30, 2010 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 2010, the Council staff was comprised of: Anthony G. (Tony) Willardson, Executive Director; Nathan Bracken, Legal Counsel; and a secretarial staff consisting of Cheryl Redding and Julie Groat. In September, Dwane Young was selected to serve as the next WSWC Federal Liaison, representing the nine federal agencies under an intergovernmental agreement creating a Western Federal Agency Support Team (WestFAST). Dwane replaced Jonne Hower, the first person to serve as the WestFAST Liaison. Jonne returned to the Bureau of Reclamation's Upper Colorado Region Office.

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# WESTERN STATES WATER COUNCIL

## Committee Assignments

### EXECUTIVE COMMITTEE

Richard Mylius - Alaska  
Herb Guenther - Arizona  
Lester Snow - California  
Jennifer Gimbel - Colorado  
Hal Simpson - Colorado  
(Alternate)\*  
Jerry Rigby - Idaho  
David W. Barfield - Kansas  
Mary Sexton - Montana  
Brian Dunnigan - Nebraska  
Michael Linder - Nebraska  
(Alternate)\*  
Roland Westergard - Nevada  
Leo Drozdoff - Nevada  
(Alternate)\*  
John D'Antonio - New Mexico  
Ron Curry - New Mexico  
(Alternate)\*  
Todd Sando - North Dakota  
J.D. Strong - Oklahoma  
Phil Ward - Oregon  
**(Vice-Chair)**  
Steve Pirner - South Dakota  
Garland Erbele - South Dakota  
(Alternate)\*  
Thomas Weir Labatt - Texas  
**(Chair)**  
Dennis Strong - Utah  
Ted Sturdevant - Washington  
Patrick T. Tyrrell - Wyoming

### Farm Bill Subcommittee

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

### Management Subcommittee

Weir Labatt - Texas  
**(Chair)**  
Phil Ward - Oregon  
**(Vice-Chair)**  
Patrick Tyrrell  
(Secretary/Treasurer)  
Garland Erbele - South Dakota  
(Past Chair)

### WSWC Water Policy Seminar Subcommittee

Richard Opper - Montana  
Roland Westergard - Nevada

### Endangered Species Act Subcommittee

Dean Couch - **(Chair)** - Oklahoma  
Roland Westergard - Nevada  
James Davenport - Nevada  
Eileen Grevey Hillson - New Mexico  
Phil Ward - Oregon  
Weir Labatt - Texas  
Sue Lowry - Wyoming

### Western Water Supply Challenges Subcommittee

Sue Lowry - **(Chair)** - Wyoming  
Hal Simpson - Colorado  
Mike Volesky - Montana  
Tracy Taylor - Nevada  
Jim Davenport - Nevada  
John D'Antonio - New Mexico  
Eileen Grevey Hillson - New Mexico  
Garland Erbele - South Dakota  
Dennis Strong - Utah  
Pat Tyrrell - Wyoming

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

## **LEGAL COMMITTEE**

Christopher Estes - Alaska  
William Staudenmaier - Arizona  
Lester Snow - California  
Jeanine Jones - California  
(Alternate)\*  
Jennifer Gimbel - Colorado  
Jerry Rigby - Idaho  
John Simpson - Idaho  
(Alternate)\*  
Vacant - Kansas  
Bill Schultz - Montana  
Candace West - Montana  
(Alternate)\*  
Vacant - Nebraska  
Roland Westergard - Nevada  
Jim Davenport - Nevada  
(Alternate)\*  
Maria O'Brien - New Mexico  
(Chair)  
John Utton - New Mexico  
(Alternate)\*  
Jennifer Verleger - North Dakota  
Dean A. Couch - Oklahoma  
Phil Ward - Oregon  
John Guhin - South Dakota  
Vacant - Texas  
Norman K. Johnson - Utah  
Barbara Markham - Washington  
Peter Michael - Wyoming

## **Federal Reserved Water Rights Subcommittee/Ad Hoc Group**

William Staudenmaier - Arizona  
Bidtah Becker - New Mexico  
John Utton - New Mexico  
Norman Johnson - Utah

## **Water Reuse Subcommittee**

Rick Huddlesten - Idaho  
Tracy Hoffman - New Mexico  
John Kennington - Utah  
Jim McCauley - Washington

## **WATER RESOURCES COMMITTEE**

Richard Mylius - Alaska  
Gary Prokosch - Alaska  
(Alternate)\*  
Herb Guenther - Arizona  
(Chair)  
Lester Snow - California  
Jeanine Jones - California  
(Alternate)\*  
Harold D. (Hal) Simpson - Colorado  
Alexandra Davis - Colorado  
(Alternate)\*  
Dick Wolfe - Colorado  
(Alternate)\*  
John Simpson - Idaho  
Jerry Rigby - Idaho  
(Alternate)\*  
David Barfield - Kansas  
Mike Volesky - Montana  
Brian Dunnigan - Nebraska  
Tracy Taylor - Nevada  
Eileen Grevey Hillson - New Mexico  
John D'Antonio - New Mexico  
(Alternate)\*  
Todd Sando - North Dakota  
JD Strong - Oklahoma  
Phil Ward - Oregon  
Garland Erbele - South Dakota  
Thomas Weir Labatt - Texas  
Herman Settemeyer - Texas  
(Alternate)\*  
Larry Anderson - Utah  
Dennis Strong - Utah  
(Alternate)\*  
Ken Slattery - Washington  
Evan Sheffels - Washington  
(Alternate)\*  
Patrick Tyrrell - Wyoming  
Sue Lowry - Wyoming  
(Alternate)\*

### **Border Water Issues Subcommittee**

Jeanine Jones - California  
Herman Settemeyer - Texas  
Ken Slattery - Washington

### **Climate Variability and Change Subcommittee**

Jeanine Jones - California (Chair)  
Paul Graves - Kansas

### **Drought/Flooding Issues Subcommittee**

Jeanine Jones - California  
John D'Antonio - New Mexico  
Ken Slattery - Washington

## **Water Transfers and the Public Interest**

Jeanine Jones - California  
Tom Stiles - Kansas  
Jim Davenport - Nevada  
Phil Ward - Oregon  
Weir Labatt - Texas  
Larry Anderson - Utah  
Pat Tyrrell - Wyoming

### **Water Information Management Systems and Data Collection Subcommittee**

Phil Ward - Oregon (Chair)  
Hal Simpson - Colorado  
Hal Anderson - Idaho  
Paul Graves - Kansas  
Estevan Lopez - New Mexico  
Barry Norris - Oregon  
Robert Mace - Texas  
Sue Lowry - Wyoming

### **Water Resources Management, Program Project Funding Subcommittee**

Jeanine Jones - California (Chair)  
Hal Simpson - Colorado  
Mike Volesky - Montana  
Eileen Grevey Hillson - New Mexico  
John Utton - New Mexico  
Kevin Ward - Texas  
Larry Anderson - Utah

### **Water Use Efficiency/Conservation Subcommittee**

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

### **Water Resources and Energy Subcommittee**

Alex Davis - Colorado (Chair)  
Herb Guenther - Arizona  
William Staudenmaier - Arizona  
Jeanine Jones - California  
John Simpson - Idaho  
Eileen Hillson - New Mexico  
Todd Sando - North Dakota  
Dennis Strong - Utah  
Robert Mace - Texas  
Sue Lowry - Wyoming

### **High Plains Work Group**

Hal Simpson - Colorado  
Dave Barfield - Kansas  
Estevan Lopez - New Mexico  
Dean Couch - Oklahoma  
Garland Erbele - South Dakota  
Weir Labatt - Texas  
Robert Mace - Texas  
Sue Lowry - Wyoming  
Pat Tyrrell - Wyoming

### **Landsat Thermal Infrared Subcommittee**

Tony Morse - Idaho  
DL Sanders - New Mexico  
David Rodriguez - New Mexico  
Dennis Strong - Utah  
Ken Slattery - Washington  
Stephen Bernath - Washington  
Pat Tyrrell - Wyoming  
Sue Lowry - Wyoming

### **USGS Cooperative Water Program Subcommittee**

Todd Sando - North Dakota  
Robert Mace - Texas



## **WATER QUALITY COMMITTEE**

Lynn Kent - Alaska  
Ben Grumbles - Arizona  
Darlene Ruiz - California  
Paul Frohardt - Colorado  
Steve Gunderson - Colorado  
(Alternate)\*  
Toni Hardesty - Idaho  
Tom Stiles - Kansas  
(Alternate)\*  
Richard Opper - Montana  
Michael Linder - Nebraska  
Patrick Rice - Nebraska  
(Alternate)\*  
Allen Biaggi - Nevada  
Ron Curry - New Mexico  
David Glatt - North Dakota  
J.D. Strong - Oklahoma  
Steve Thompson - Oklahoma  
(Alternate)\*  
Neil Mullane - Oregon  
Steve Pirner - South Dakota  
Carlos Rubinstein - Texas  
Herman Settemeyer - Texas  
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Walter Baker - Utah  
(Chair)  
Ted Sturdevant - Washington  
Stephen Bernath - Washington  
(Alternate)\*  
John Corra - Wyoming  
John Wagner - Wyoming  
(Alternate)\*

## **Arid West Water Quality Issues Subcommittee**

Paul Frohardt - Colorado (Chair)  
Tom Stiles - Kansas

## **Clean Water Act Subcommittee**

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

## **Good Samaritan Subcommittee**

Paul Frohardt - Colorado  
John Kennington - Utah

## **Section 518/Tribes as States Subcommittee**

Barry Burnell - Idaho  
Dean Couch - Oklahoma  
Derek Smithee - Oklahoma

## **Quality-Quantity Interrelationship Subcommittee**

Tom Stiles - Kansas (Chair)

## **Water Reuse Subcommittee (joint w/Legal)**

Rick Huddleston - Idaho  
Tracy Hoffman - New Mexico  
John Kennington - Utah  
Jim McCauley - Washington

**WESTERN STATES WATER COUNCIL**  
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 Herb Guenther - Arizona  
 Lester Snow - California  
 Jennifer Gimbel - Colorado  
 Hal Simpson - Colorado  
 (Alternate)\*  
 Jerry Rigby - Idaho  
 David Barfield - Kansas  
 Mary Sexton - Montana  
 Brian Dunnigan - Nebraska  
 Michael Linder - Nebraska  
 (Alternate)\*  
 Roland Westergard - Nevada  
 Leo Drozdoff - Nevada  
 (Alternate)\*  
 John D'Antonio - New Mexico  
 Ron Curry - New Mexico  
 (Alternate)\*  
 Todd Sando - North Dakota  
 J.D. Strong - Oklahoma  
 Phil Ward - Oregon  
 (Vice-Chair)  
 Steve Pirner - South Dakota  
 Garland Erbele - South Dakota  
 (Alternate)\*  
 Thomas Weir Labatt - Texas  
 (Chair)  
 Dennis Strong - Utah  
 Ted Sturdevant - Washington  
 Patrick Tyrrell - Wyoming

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 Lester Snow - California  
 Jeanine Jones - California  
 (Alternate)\*  
 Harold D. (Hal) Simpson - Colorado  
 Alexandra Davis - Colorado  
 (Alternate)\*  
 Dick Wolfe - Colorado  
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 John Simpson - Idaho  
 Jerry Rigby - Idaho  
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 (Alternate)\*  
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 (Alternate)\*

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 Steve Gunderson - Colorado  
 (Alternate)\*  
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 Vacant - Kansas  
 Bill Schultz - Montana  
 Candace West - Montana  
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**Dwane Young**

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**COUNCIL MEMBERS**  
**San Diego, California**  
**October 29, 2010**



Front Row (left to right):

Ted Kowalski, Jerry Rigby, Maria O'Brien, Jeanine Jones, Betty Olson, Herman Settemeyer, Herb Guenther, Curtis Seaton

Second Row (L to R)

Alexandra Davis, J.D. Strong, Dennis Strong, Walt Baker, Pat Tyrrell, Sue Lowry, Weir Labatt, Jennifer Verleger

Third Row (L to R)

John Utton, Paul Graves, John Simpson, Brian Dunnigan, Phil Ward

## STAFF



From left to right:

Cheryl Redding, Julie Groat, Jonne Hower, Tony Willardson and Nathan Bracken

Anthony G. Willardson (Tony)	.....	Executive Director
Nathan Bracken	.....	Legal Counsel
Jonne Hower	.....	WestFAST, Federal Liaison
Cheryl Redding	.....	Office Manager
Julie Groat	.....	Receptionist/Secretary

## COUNCIL MEMBERSHIP CHANGES/NEWS

### Kansas

**Joshua Svaty** was unanimously confirmed by the Kansas Senate as the new Secretary of Agriculture on January 21. He had been acting in the position for sometime, and as such was appointed by Governor Mark Parkinson to the WSWC.

### Montana

**Mary Sexton**, Director of the Montana Department of Natural Resources and Conservation, was appointed as an alternate member to the WSWC by Governor Brian Schweitzer.

### Nevada

**Allen Biaggi**, Director of the Nevada Department of Conservation and Natural Resources and a WSWC member, retired April 30. Allan served since January 2000 as a representative from Nevada and made valuable contributions to the work of the Council during his tenure of service.

### North Dakota

North Dakota State Engineer and WSWC member **Dale Frink** announced his retirement effective June 30, 2010. Dale served since July 2001 as a representative from North Dakota and made valuable contributions to the work of the Council as member of the Executive and Water Resources Committees during his tenure of service.

Governor John Hoeven appointed **Todd Sando** to the WSWC to serve as North Dakota's Representative on the Executive Committee. Governor Hoeven also appointed Assistant Attorney General **Jennifer Verleger** to the WSWC as North Dakota's representative on the Legal Committee, replacing fellow Assistant Attorney General **Todd Sattler**.

### Oklahoma

**Duane Smith**, Oklahoma Water Resources Board Executive Director, and WSWC member and former Chair, announced his retirement after 32 years of public service effective July 2010. In February 2010, Duane began a six-month leave of absence working for the U.S. Army Corps of Engineers in Afghanistan overseeing water and infrastructure development. Oklahoma's Secretary of Environment, **JD Strong**, also a WSWC member, served as OWRB's interim director in Duane's absence and was later unanimously approved as its new Executive Director.

## **COUNCIL MEETINGS**

### **162<sup>nd</sup> Council Meetings Washington, D.C. March 23-25**

The WSWC held its 162<sup>nd</sup> meeting in Washington, D.C. at the L'Enfant Plaza Hotel on March 23-25. During the meeting, it agreed to send the Council on Environmental Quality (CEQ) comments based on existing positions regarding CEQ's proposed Principles and Standards for federal water projects and programs.

The Council also considered a number of sunseting positions. It continued Position #285, in support of federal funding for studies on the water resources-related impacts of climate change and adaptation efforts, as well as Position #288, in support of implementation of the Rural Water Supply Act of 2006. The Council further recommended that the Western Governors' Association (WGA) continue its positions regarding the clean-up of abandoned mines, Indian water rights settlements, and federal non-tribal fees in general water right adjudications. At the same time, the Council did allow the following positions to sunset as outdated: (1) #287 setting forth the Council's past perspectives on a proposed "Twenty-First Century Water Commission;" (2) #289 regarding the proposed "Bureau of Reclamation Water Conservation, Efficiency and Management Act;" (3) #290 in support of Reclamation's unfunded Technical Assistance to States (TATS) Program; and (4) #291 and #292 regarding the proposed and since enacted Agricultural Water Enhancement Program.

Bureau of Reclamation Pacific Northwest Regional Director Bill McDonald, a former Council member and Chair, provided an overview of Reclamation's FY2011 budget request and related programs on behalf of Commissioner Mike Connor. Bill explained that the \$1.1 billion request is intended to promote "certainty and sustainability" in the use of water in the West. He also said climate change is "immensely important" to Reclamation, and that implementing Indian water rights settlements is also a "very high priority." However, he acknowledged that authorized settlements lack sufficient funding. These and other project backlogs have created "incredible" budgetary pressures.

Richard Rankin of the Idaho National Laboratory (INL) also addressed the full Council, and gave a presentation on the Mountain West Water Institute. It is a regional science and technology research institution created to deliver science-based solutions for sustainable water-energy resource management in the Mountain West region. Mr. Rankin said the Institute is a vehicle for collaboration among western water users and offered the INL as a resource to the Council.

Rollie Wilson, Senior Counsel for the Senate Committee on Indian Affairs (Majority), updated the Legal Committee on the status of Indian water right settlement legislation in the Senate. He said there are four to five active settlements and that his Committee has reported the Aamodt (S. 1105), Taos (S. 965), White Mountain Apache (S. 313), and Crow (S. 375) bills. Next, Camille Calimlim Touton of the House Natural Resources Committee's Subcommittee on Water and Power



(Majority) stressed the importance of justifying the costs of Indian water rights settlements to the federal government and involving federal partners in settlement negotiations. She also said the Subcommittee depends on the Council for information regarding tribal water rights and other issues, including streamgages.

Officials from the Environmental Protection Agency (EPA) addressed the Water Quality Committee regarding a number of issues. Evelyn Washington gave an update on EPA's efforts to address nutrient pollution. She said EPA has been involved with a Nutrients Innovation Task Group that consists of each of EPA's Office of Water offices, nine states, and three associations. In August 2009, the Group released a report with a number of findings and recommendations. One key finding is that national leadership is "vital" to supporting and requiring a more consistent and fuller utilization of existing tools to address nutrient pollution. Ms. Washington further explained that EPA intends to release proposed changes to its water quality standards in June 2011. As part of this effort, she said EPA is looking at ways to address anti-degradation, but is trying to limit any changes to those issues that "absolutely must be done by regulation." She further explained that EPA is considering the possibility of using improved regulatory guidance as opposed to regulatory changes to address anti-degradation issues.

Allison Wiedeman, EPA Office of Water, discussed development of a general permit for pesticides, which will apply to industries that apply pesticides directly to water, over water, and near water. EPA will propose the permit by May 7, followed by a short comment period.

EPA environmental scientist Ryan Albert said EPA is reconsidering its water transfers rule, which exempts transfers from the National Pollutant Discharge Elimination System (NPDES). He explained that EPA has formed an interagency workgroup to explore options for addressing the rule that includes representatives from EPA, the U.S. Department of Agriculture (USDA), the Department of Interior, and the Corps. Mr. Albert said the group is trying to get a better understanding of the actual number of transfers and their impacts.

Mr. Albert also discussed an "EPA Desk Statement on Water Transfers," which reads: "Because the [EPA] has concerns about the water quality impacts of some water transfers, the Agency intends to reconsider the Water Transfers Rule.... While EPA undergoes a process to reconsider the Water Transfers Rule, that Rule is in effect and will remain so until EPA rescinds it, Congress overrides it, or it is vacated by a court. The public will have an opportunity to review and comment on any changes EPA might propose for this rule.... No regulatory action EPA might take will change the provisions in the Clean Water Act which make clear that a permit is not necessary for either return flows from irrigated agriculture, or agricultural 'stormwater runoff.'"

Separately, on March 25, Council members met with lead officials from WestFAST agencies and stressed the importance of collaboration, highlighting WestFAST's accomplishments. The Council thanked the agencies for their participation and urged them to continue their support for a Federal Liaison position in our office.

WSWC members and staff also met with Congressional staff to discuss the need for Good Samaritan legislation to address water pollution from abandoned hard rock mines. The Ad Hoc Group on Indian Water Rights, including representatives from the WGA, WSWC, and Native American Rights Fund, also met a number of congressional offices in support of the WGA and WSWC's positions on Indian water rights settlements.

### WSWC/ICWP DC Roundtable

On March 24, the Council and Interstate Council on Water Policy co-sponsored a roundtable discussion that focused on the role of the federal government in support of state water planning for a sustainable future, which included the participation of a number of Administration officials and Congressional staff.

Matt Larsen, Associate Director for Water, U.S. Geological Survey, described the work of CEQ's Climate Change Task Force, which is developing recommendations for climate change adaptation. It includes members from over 20 agencies. A March 16 interim progress report includes recommendations regarding the following components for a national strategy on climate change adaptation: (1) integration of science into decisions and policy; (2) communications and capacity building; (3) coordination and collaboration; (4) prioritization; (5) a flexible framework for agencies; and (6) evaluation.

Nancy Stoner, EPA's Deputy Assistant Administrator for Water, discussed a number of efforts regarding sustainable communities, smart growth, water efficiency (WaterSense), green infrastructure, and climate and water. Ms. Stoner also discussed the problems associated with a lack of potable water supplies and stated, "We want people to know that they are going to have the water they need."

Anne Castle, Assistant Secretary for Water and Science, Department of the Interior, described the WaterSMART program, Reclamation's basin studies and the development of environmentally sustainable hydropower. She also said Interior hopes to move toward a 50%-50% partnership cost-share match for Cooperative Water Program streamgaging when the economy recovers.

Terrence (Rock) Salt, Principal Deputy Assistant Secretary of the Army for Civil Works, described CEQ's effort to revise the Principles and Guidelines for federal water projects. He also addressed the "staggering" length of time needed for the Corps of Engineers to complete its project studies, which has a negative impact on project costs and quality, noting that "data gets stale."

Harris Sherman, Under Secretary for Natural Resources and Environment, within the U.S. Department of Agriculture, said that forest health is a key to water quality. The Forest Service is "aggressively" trying to restore forests through a number of efforts, including the downsizing of road systems to improve water quality and the removal of culverts to improve fish passage. He further noted that the Natural Resources Conservation Service is "increasingly becoming the conservation agency in America" and will be a "major player" in the future working with agricultural communities.

Gary Carter, Director of the National Oceanic Atmospheric Administration's (NOAA) Office of Hydrologic Development, said his agency is expanding its hydrology program and leveraging its resources to move into water resource programs holistically. He also mentioned NOAA's collaborative efforts with the Western Governors' Association (WGA) in developing the National Integrated Drought Information System (NIDIS).

The roundtable concluded with a Congressional panel of majority and minority staff from the Senate Energy and Natural Resources Subcommittee on Water and Power; House Transportation and Infrastructure Subcommittee on Water Resources and Environment; and House Natural Resources Subcommittee on Water and Power. Among other things, the panel discussed the status of the next Water Resources Development Act, the SECURE Water Act, the energy-water nexus, and Indian water rights settlements. In response to questions, Ted Illston, majority staff for the House Subcommittee on Water Resources and Environment, said there is no timeline to introduce a House version of the Clean Water Restoration Act, or the House's proposed Sustainable Watershed Planning Act.

**163<sup>rd</sup> Council Meetings**  
**Stateline, Nevada**  
**July 21-23**

On July 21-23, the WSWC commemorated its 45<sup>th</sup> anniversary by holding its 163<sup>rd</sup> meeting in Stateline, Nevada, where it first met in 1965. New WSWC officers were elected, with Weir Labatt of Texas selected as Chairman; Phil Ward of Oregon, Vice Chairman; and Pat Tyrrell of Wyoming, Secretary/Treasurer. Members expressed their sincere thanks to Garland Erbele of South Dakota, who served as Chairman for the past two years. As Chairman, Weir named Herb Guenther of Arizona as the Chair of the Water Resources Committee and Maria O'Brien of New Mexico as Legal Committee Chair. Walt Baker of Utah will remain as Water Quality Committee Chair. The meetings also honored past WSWC chairs and long-time members, including former Nevada State Engineer Roland Westergard, who received a plaque for his unprecedented 42 years of service to the WSWC. The State of Nevada hosted a pre-meeting field trip that focused on Lake Tahoe operations and water quality protections, Truckee River water rights, and the U.S. Geological Survey's (USGS) streamgauge program.

On July 23, at the Full Council Meeting, the WSWC modified Position #319 to call for a "shared vision on water planning and policy" instead of a "national water policy vision." It also adopted a position urging the Administration and Congress to support Department of Energy hosted energy-water and other collaborative water programs conducted at national laboratories, including but not limited to the Idaho National Laboratory and its Mountain West Water Institute, and Sandia National Laboratories in New Mexico, both of which are working with the WSWC. The position observes that these programs "...provide an essential link between federal energy research programs and water issues of concern to the western states."

Anne Castle, the Department of Interior's Assistant Secretary for Water and Science, discussed her agency's water activities. "Obviously, the states have their hands on the controls of water allocation and policy about use of water," she said. "But I believe that the federal government also has an obligation to provide leadership, to promote water conservation and to help provide water supplies in a sustainable manner." Castle said the Bureau of Reclamation's WaterSMART program will expand the agency's cost share grants and basin studies programs, give a "big boost" to the USGS' National Water Census, and provide a "national commitment" to use available federal resources to work toward a sustainable national water strategy. She also noted that WaterSMART "maps very closely" with the WGA's Next Steps report, which was an "...important guide to the efforts of the new Administration in the water policy arena." She further challenged states to enact the report's land use planning recommendations and to regulate ground water withdrawals. As for USGS streamgauge activities, Castle said Interior is working on the erosion of federal funding and that the issue is not "getting lost in the shuffle." In addition, Castle said Interior has requested increased funding of \$13.4 million for the ground system requirements for Landsat 8 and its thermal infrared imager.

Allen Biaggi, a former Director of the Nevada Department of Conservation and Natural Resources, WSWC member and Chair of the Tahoe Regional Planning Agency, discussed efforts to protect Lake Tahoe's water quality, such as banning 2-stroke watercraft engines, instituting best land management practices, and exporting sewage effluent out of the basin. Invasive species, algae growth, and catastrophic wildfires continue to pose problems. Biaggi, former Administrator of the Nevada Division of Environmental Protection, also said complying with federal arsenic regulations has been a "real squeeze," because of Nevada's high levels of naturally occurring arsenic. He declared Nevada is "adamantly" opposed to federal legislation like Rep. James Oberstar's America's Commitment to Clean Water Act (H.R. 5088), which he said could subject ground water to Clean Water Act (CWA) jurisdiction. Lastly, Nevada State Engineer Jason King discussed a Nevada Supreme Court decision that will require his office to republish and rehear applications that the Southern Nevada Water Authority filed as part of a proposal to pump ground water to Las Vegas from the Snake Valley Aquifer on the Nevada-Utah border.

Edwin Sheffner, of the National Aeronautics and Space Administration (NASA), described the capabilities of his agency's Earth Science Division, which includes earth observations, earth system modeling, and systems engineering. As one of the newest members of WestFAST, Sheffner said NASA is interested in working with the WSWC to address "critical" western water issues and leveraging projects and activities.

During the Water Resources Committee meeting, Jennifer Jorge, with the Idaho National Laboratory's Mountain West Water Institute, said her organization has a number of capabilities that could be of interest to western states, including system dynamic modeling for reservoir operations and thermal ground water resources calibration to increase model accuracy and predictive ability. Vince Tidwell of Sandia National Laboratories described efforts to develop and refine a model to help water resources and energy planners analyze water requirements for various types of electric power generation and the potential implications of water stress for power generation and

transmission planning. Ward Staubitz, USGS, discussed federal streamgaging programs. He said the Administration's FY2011 budget request is \$63.6 million for the Cooperative Water Program and \$27.1 million for the National Streamflow Information Program, representing reductions of \$1.96 million and \$585,000 from FY2010 levels. Next, Eric Evenson of USGS gave an overview of the National Water Census, which aims to help stakeholders develop a water budget and answer water availability questions by providing technical information and tools. Of note, WSWC staff then described a recent letter to the Federal Communications Commission (FCC) that expressed concerns regarding an Administration proposal to open up the 1675-1710 MHz frequency for commercial use. This same frequency is used to relay streamgage data and emergency management response information.

The Legal and Water Quality Committees combined to hear a presentation from Peter Nichols, an attorney from Colorado, who described the Environmental Protection Agency's (EPA) potential review of its water transfers rule, which exempts transfers from permitting under the CWA's National Pollutant Discharge Elimination System (NPDES). Nichols said EPA has formed a workgroup to develop information for the agency as it considers further action regarding water transfer regulation. He also said increased regulation will be expensive and that states already have authority to address the water quality concerns associated with transfers. To illustrate his point, Nichols said engineers from large water providers from a number of western states have analyzed the effects of requiring NPDES permits for water transfers. It could mean a capital investment of \$20 billion, and annual operating costs of another \$7 billion to treat transferred water to the quality of the receiving waters (for the systems analyzed).

Separately, the Water Quality Committee met and listened to David Hindin with the Office of Enforcement and Compliance Assurance describe EPA's efforts to improve NPDES compliance. Hindin said EPA teams focused on new approaches and data analysis have prepared 22 papers and over 50 recommendations for consideration. EPA intends to make decisions on possible actions in September. Bill Moore and John Jennings from the Washington Department of Ecology discussed their state's efforts to address pollution from stormwater and pesticides. Tom Iseman described a pending EPA study on hydraulic fracturing and possible impacts on drinking water. Tom said the WGA has adopted a resolution encouraging EPA to collaborate with stakeholders in conducting the study and to leverage existing state knowledge and policies. Lastly, Committee Chair Walt Baker discussed the impacts of requiring nutrient discharge standards, as well as a Utah study assessing wastewater treatment plants' capacity and capability, and the potential capital and O&M costs related to nutrient removal.

At the Legal Committee meeting, Susan Cottingham from Montana provided an update on Indian water rights settlements and mentioned a recent letter from Interior supporting a modified version of the Crow settlement in Montana (H.R. 3563). Interior worked with the Tribe to develop the modifications, which reduce the total federal cost of the settlement from an estimated cost of over \$600 million to \$460 million. WSWC Legal Counsel Nathan Bracken described a 2006 Government Accountability Office opinion that reasoned that the Forest Service was not required to pay stormwater management fees assessed by King County, Washington because the fees constituted a

local tax. Nathan said there have been scattered instances across the country where federal entities have refused to pay stormwater fees, and that Senator Benjamin Cardin (D-MD) has introduced S. 3481 to clarify that such fees are not a tax.

The meetings also included a number of updates from WestFAST. Vice Chair Ward Staubitiz noted that the team has entered its second year and has completed an inventory of federal climate change programs that relate to water science and adaptive water management. The purpose of the inventory is to help the western states better understand the nature and scope of these programs and inform the discussion between the WSWC and the WestFAST agencies on how to proceed in developing a common, integrated approach to adapting water resources management given climate change and variability. Team members also reported on agency actions that may be of interest to the WSWC, including: (1) a Forest Service rule development on how the agency creates forest plans; (2) a partnership between the U.S. Army Corps of Engineers and the Natural Resources Conservation Service to improve management of water and related resources; and (3) a reorganization of USGS that will eliminate a management layer and effect a change in leadership. Ward noted Bill Werkheiser would replace Matt Larsen as Associate Director for Water, and Matt would oversee climate change efforts.<sup>2</sup>

**164th Council Meetings  
San Diego, California  
October 27-29**

On October 26-29, the WSWC held its 164<sup>th</sup> meetings in San Diego, California. The State of California hosted a pre-meeting field trip that included visits to the International Boundary and Water Commission's South Bay International Wastewater Treatment Plant, a brackish ground water desalination plant, the San Diego Mission Dam, and the site of a proposed seawater desalination plant. It concluded with a boat tour of San Diego Harbor. The meetings also included two special sessions on activities related to NASA's remote sensing capabilities and the USGS's National Water Census.

The WSWC adopted one external position urging the Administration to enhance NASA's "...focus areas on research for water resources applications, and to promote long term engagement with the [WSWC] and the state and regional agencies in the western U.S. responsible for water management and water policy to maximize benefits to the public from NASA's existing and future investments in Earth observations, Earth system models and systems engineering." The WSWC also modified Position #293 to discuss implementation of the SECURE Water Act and to express concern that many of the programs and activities that the Act authorizes, including USGS streamgaging activities, remain unfunded or underfunded. Lastly, the WSWC readopted Position #294, which supports legislation requiring the federal government to pay state filing fees in general stream adjudications.

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<sup>2</sup><http://www.westgov.org/wswc/163%20council%20mtg%20-%20nv%20july2010.html>.

Jane Lyder, the Department of Interior's Deputy Assistant Secretary for Fish, Wildlife, and Parks, discussed U.S. Fish and Wildlife Service activities that pertain to water. Lyder said a sustainable water strategy is a priority for the Administration and that threats to water are a leading indicator of impacts related to climate change. She specifically discussed Interior's Landscape Conservation Cooperatives (LCCs), which are management-science partnerships that inform integrated resource-management actions addressing climate change and other stressors within and across landscapes. The cooperatives will involve federal, state, local and tribal officials, as well as academia and the public. Lyder said the "mantra" for the LCC effort involves representation and collaboration between federal, state, and other partners. She also said the Endangered Species Act (ESA) drives instream flows for environmental purposes. However, she said it is best for the federal government and states to develop tools together to determine such needs. Lyder further said the Administration has asked the Service to propose a FY2012 budget that is less than its FY2011 budget.

Jeanine Jones discussed California's response to climate change. Among other things, she described an executive order that Governor Arnold Schwarzenegger signed in 2005. It recognized global climate change, established greenhouse gas emissions reduction targets, required biennial assessments of climate change impacts, as well as the development of impact mitigation/adaptation plans, and formed an interagency "Climate Action Team" (CAT) to implement the order. CAT serves as a forum for California state agency coordination on climate policy and planning and operates through a number of subgroups known as "kittens." Additional state climate planning activities and mechanisms include the West Coast Governors' Global Warming Initiative, the Global Warming Solutions Act of 2006, a 2008 executive order, and the California Adaptation Strategy. Jeanine further said California is expected to get warmer and could see an 80% loss in Sierra Nevada snowpack by the end of the century.

On October 28, the Water Resources, Water Quality, and Legal Committees held a joint session to discuss a number of topics of mutual interest. The session included a roundtable discussion on state climate change efforts pertaining to water resources. The committees decided that the WSWC will circulate a short questionnaire among its member states to gather more information on the state efforts discussed during the roundtable. The joint session also included a roundtable discussion on the need to share data between the water quantity and water quality communities. One observation that emerged from the discussion was that data sharing needs to be a "two way street," and that there is a need to ensure "good data and quality control."

The joint session also included a presentation by Betty Olson of California on threats related to residues from emerging contaminants in water supplies, such as pharmaceuticals and personal care products (PPCPs). She specifically noted that Ibuprofen constitutes 20% of the \$2.5 billion over-the-counter medicine market. She added that a significant portion of the population is over 50 years old and will likely use increasingly significant amounts of PPCPs. She also mentioned that the USGS has found detectable, yet minute quantities of PPCPs in 80% of 139 susceptible streams in 30 states. Betty further opined that water resource managers need to be aware of these compounds in situations where water levels are low and contaminant concentrations could be greater.

Matthew Landon, a USGS hydrologist, discussed the Priority Basin Project, which is part of the California State Water Resources Control Board's Groundwater Ambient Monitoring and Assessment Program. The project evaluated untreated water from California's aquifer system and sampled over 2,000 wells for contaminants. The trace elements and minor ions most commonly detected above drinking water standard benchmarks were arsenic, boron, uranium, vanadium, molybdenum, fluoride, strontium, and lead. Of note, the study found pharmaceuticals in 2.5% of 1,231 groundwater samples. Half of the detections were in the Los Angeles area. It also found perchlorate from natural and anthropogenic sources in varying concentrations across the state.

Alex Davis of Colorado discussed the litigation surrounding the EPA's water transfers rule, which exempts water transfers from NPDES permitting under the Clean Water Act (CWA). A recent 11<sup>th</sup> Circuit decision upheld the rule, reasoning that the CWA is ambiguous as to whether it requires NPDES permits without the addition of a pollutant, and that the EPA rule was a reasonable interpretation entitled to deference. The plaintiffs have petitioned the U.S. Supreme Court to overturn the decision. Colorado has filed an amicus brief that argues that the decision authorizes EPA to change the rule and require permits, contrary to Congress' long-standing deference to state water allocation law under the CWA. The brief also argues that requiring permits may impede or supercede the ability of states to exercise their legal entitlements to water under Supreme Court water apportionments, interstate compacts, and congressional acts. Alaska, California, Florida, Idaho, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah, and Wyoming joined the brief.

At the Water Resources Committee, Mike Inamine, California Department of Water Resources, discussed levees and vegetation in California. He noted that many deep floodplains in the Central Valley are now urbanized and that "legacy" levees, which are often covered in vegetation, should be dealt with in a separate manner than new levees. Next, Stephanie Granger of the Jet Propulsion Laboratory discussed some of NASA's remote sensing capabilities. These include the Terrestrial Observation and Prediction System (TOPS), which measures evapotranspiration, and the Moderate Resolution Imaging Spectroradiometer (MODIS) instrument, which measures snow water equivalents and is used to model snow cover depletion. The meeting also included updates on the National Integrated Drought Information System, the Corps' recent national water planning report, and Committee efforts to help the Western Governors' Association (WGA) develop water demand and availability models as part of an energy transmission planning project the WGA is implementing under a grant from the Department of Energy.

The Water Quality Committee meeting included a presentation on EPA actions related to its arsenic drinking water standard by Jim Taft, Executive Director of the Association of State Drinking Water Administrators. He said EPA is preparing a risk assessment for arsenic and will make a decision on whether to revise the standard after it is completed. EPA is also seeking comments on the standard through December 13, as part of a review that it is conducting under Section 610 of the Regulatory Flexibility Act. Although EPA is under no obligation to revise the standard, Taft said it would be worthwhile for states to provide comments. John Wagner of Wyoming also discussed three bills (S. 3735, H.R. 6087, and H.R. 6273) aimed at overturning a Sixth Circuit decision that



struck down an EPA rule that exempted pesticide applications from NPDES permitting. The bills would prohibit any additional permits for applications applied in accordance with Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requirements.

During the Legal Committee meeting, MaryLou Smith with the Colorado Water Institute discussed the efforts of a water sharing group that she has facilitated. MaryLou said the group, which included participation from the WSWC and WGA, is finalizing recommendations and a report to help states and other stakeholders minimize the impacts of ag-to-urban transfers on environmental values and agricultural communities. Candace West of Montana and Jean Thomas, WestFAST's Forest Service representative, then participated in a panel discussion that focused on how states and federal agencies can collaborate with respect to federal water rights. The Committee agreed to create a subcommittee to explore the issue of collaboration further. Bidtah Becker of New Mexico also provided an update on Indian water rights settlements legislation. Lastly, Brian Dunnigan of Nebraska discussed *Keating v. Nebraska Public Power District*, an Eighth Circuit case in which junior appropriators are claiming that Nebraska violated their due process rights by closing their headgates to protect a senior appropriator without holding a pre-deprivation hearing.<sup>3</sup>

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<sup>3</sup><http://www.westgov.org/wswc/164%20council%20mtg%20-%20ca%20oct2010.html>.

## OTHER MEETINGS

### National Integrated Drought Information System Workshops

San Francisco, California

The second in a series of WGA/WSWC National Integrated Drought Information System (NIDIS) workshops was held in San Francisco on March 31-April 1. One consistent comment about the workshop was the quality, diversity, and expertise of the panelists and meeting participants. It was clear from the workshop that drought affects a range of resources and management decisions in the West, with significant impacts and costs. Participants urged the development of more responsive and regionally tailored information services to address future management decisions. They also recognized their obligation, as managers, to be willing to make decisions in the face of uncertainty, both for climate and ecological systems.

As the workshop proceeded, the discussion moved from drought and NIDIS toward the ongoing development of climate services. David Behar of the Water Utility Climate Alliance highlighted water managers' priority needs for climate services and identified key goals that a "climate service" should promote, including "actionable science." Robin Webb of NOAA described the goals and roll-out of the recently established NOAA Climate Service Program and emphasized the significance of the upcoming report on climate services by the National Academy of Public Administration.

There was agreement that NIDIS could serve as a model for a National Climate Service, both in terms of how NIDIS is getting it right and places where NIDIS needs to improve. Participants urged WGA and the WSWC to work to ensure that national climate services meet the needs of western stakeholders and resource managers.

Key messages from the workshop included:

A Range of Key Decisions: Participants noted a wide-range of critical decisions that are affected by drought and should be informed by drought and climate information. These include reservoir management and water allocation, agricultural use, municipal water supply, land-use planning, forest management, flood control, hydropower and energy, fish and wildlife management and species conservation, as well as navigation. As Sebastian Degens observed, "A 900 foot ship needs at least a foot or two of draft."

Basic Data and Forecasts: Increased resources are needed to collect fundamental drought and climate data and to improve the accuracy and utility of drought monitoring. This includes streamgages and SNOTEL sites, but also higher-resolution run-off and climate forecasts, a better understanding of population trends, and more information on the growing economic impacts of drought. We also need more

information on groundwater levels and trends. Basic data is essential to a true “early warning system” for drought, and it needs to be more available to the public, in order to facilitate “risk-based” decision making.

Socio-Economic Data: Socio-economic impacts, not just physical data, need to be incorporated in the decision-making process. Currently, we have anecdotal information in specific sectors and places. For example, an estimated \$4 billion was lost to the agricultural sector in Texas in the 1990s due to drought. However, we need to develop comprehensive socio-economic data for a full range of the economic impacts of drought. As Kelly Redmond asked, “Is it a drought if it doesn’t affect anyone?”

Ecological Data: There is as much (if not more) uncertainty in ecological systems and responses as there is in climate forecasts. We need to do more to understand the ecological impacts of drought and climate change, and how multiple stressors (including levees, invasive species, water quality, etc.) may be interacting to influence ecosystems. As Chuck Bonham noted, “Is there a difference between drought and climate change? To trout, probably not.”

Decision-Making: Perfect information is not available. We need to understand what forecasts mean, assess how we can best use them, and make decisions under uncertainty. We need to educate decision-makers and the public on the meaning of information and forecasts. We will need to build public private partnerships and provide relevant, user-friendly information.

Regionalization of Services: The emerging NIDIS pilots demonstrate the utility and effectiveness of providing drought services that are tailored to a specific regional issue and respond to the needs of local managers. To date, NIDIS has commenced pilots in the Colorado River Basin and U.S. Southeast. NIDIS is just undertaking a pilot in California. To the extent possible, regional pilots and services should continue to be an emphasis for NIDIS and should be a model for vertical integration of drought and climate services.

Coordination of Services: As we look towards the development of a broader set of climate services, we should build on the federal climate service enterprise that is already in place, including NIDIS, but also NOAA supported Regional Integrated Science and Assessment (RISA) programs, Regional Climate Centers, and Regional Forecast Centers. In addition, federal climate services should recognize and be coordinated with state and local services and plans.

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NIDIS as a Model: In many ways, NIDIS can serve as a model for how the federal government develops and implements climate services. Key aspects of the NIDIS model include engagement of state and local stakeholders in identifying needs and

priorities; vertically integrated services that include national data but also tailored, regional and local pilots and services; development of new information and forecasts in response to user needs; coordination among federal agencies and establishment of a single drought information portal; and on-going engagement with stakeholders and users of the system to improve delivery of services.<sup>4</sup>

#### Washington, DC

The WSWC and WGA held their last in a series of drought workshops (held over a two-year period) in Washington, D.C. on September 13-14. It brought together a diverse group of about a hundred federal, tribal, state and local partners from the public and private sectors to solicit decision-makers' priorities related to drought and water information needs. Particular attention was focused on drought and related climate services and responses among government agencies and non-governmental organizations, with a goal of developing specific recommendations to improve drought information coordination, delivery and response in a changing environment.

WSWC Executive Director Tony Willardson and WGA Executive Director Pam Inmann welcomed participants and provided introductory remarks. They were followed by Deputy Assistant Secretary of the Interior for Water and Science, Deanna Archuleta, who began quoting Mark Twain saying, "Climate is what we expect, weather is what we get..." She continued, "It is not surprising that the issue of water is on the leading edge of the climate change debate because we're feeling the water impacts of climate change before we feel anything else.... Climate change impacts on water can be downright frightening — diminished snowpack, more extreme weather patterns, rising sea level, higher air/water temperatures impacting ecosystem health, drought and increased uncertainty for everyone, A report from UN Water – the UN sponsored group of 80 nations concerned with water issues – concluded that 'water is the primary medium through which climate change influences the earth's ecosystem, and thus the livelihood and well-being of societies.'" She challenged participants to work together to achieve sustainable solutions to water problems, realize the recommendations in the WGA 2008 Water Report, and partner with Interior on their new WaterSMART and climate change programs.

The keynote address was delivered by Dr. Jan Lubchenco, Administrator, National Oceanic and Atmospheric Administration (NOAA). She recognized the WGA and WSWC for their "long history of leadership in championing environmental stewardship programs that balance caring for natural resources with protecting the economy and the way of life of affected citizens." She observed, "Very few environmental events affect our economy, natural resources or citizens' lives more than climate. Up to one-third of the U.S. gross domestic product is directly influenced by weather and climate.... In the U.S., climate-related changes are already being documented, such as more frequent extreme weather events, longer growing seasons, shifting ranges of plant and animal species and record low Arctic sea ice coverage in the summer. Future changes in climate are projected to be larger and more rapid than those experienced over the past century and will have impacts that extend across all economic sectors, including water resources, energy, transportation, agriculture, forestry, coasts, fisheries, and human health."

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<sup>4</sup><http://www.westgov.org/wswc/nidis%20sf%202010%20workshop%20presentations.html>.

The Administrator reported, “Growing concerns about the potential impacts of climate variability and change are fueling an exponential growth in the demand for climate related information from NOAA. State and local governments are calling for easy and timely access to scientific data and information about the state of our climate today, how it may change in the future, and what impacts any anticipated changes may have on our environmental, social and economic systems. This information is crucial to help them make informed decisions in their lives, businesses, and communities.”

Dr. Lubchenco continued, “We have heard loudly and clearly that the nation needs an authoritative and consistent source of timely and reliable climate information, based on the best available science, to support decision-making at national, regional, state, and local levels.” She referred to a National Academy of Public Administration (NAPA) analysis of the organizational options for a National Climate Service in NOAA, prepared at the request of Congress. It concluded that a NOAA Climate Service, properly configured and implemented, would be uniquely qualified to serve the public and private sectors as a lead federal agency for climate research and services, and to provide an ongoing accessible, authoritative clearinghouse for all federal science and services related to climate.”

She concluded, “We need your input on prioritizing the services and information that will be most useful to the end users. While we work toward long-term benefits resulting from our efforts, we also must focus on successes in the short-term. We want to hear from you at every stage of the development process to ensure that we are on target in our planning. It is important that you and your peers around the country feel some ownership in this new activity because it is intended to be in service to you.”

The three principle objectives of the meeting were to: (1) strengthen NIDIS and drought information services generally; (2) promote the development of a comprehensive and integrated drought preparedness policy; and (3) explore opportunities to use drought preparedness strategies and NIDIS as a model for delivering other climate information and services. The workshop proceedings and discussions were intended to help form the foundation for a summary report with recommendations to the Governors.<sup>5</sup>

## **Western Governors’ Association**

### **Annual Meeting**

The Western Governors’ Association (WGA) held its 2010 Annual Meeting on June 26-28, in Whitefish, Montana. Entitled “100 Years of Common Ground,” the meeting commemorated the first time the western governors met to discuss natural resources issues in 1910. It focused on managing water and energy demands while protecting water supplies, landscapes, and wildlife. The Governors of Colorado, Idaho, Montana, New Mexico, Nevada, Oklahoma, South Dakota, Utah, Washington, and Wyoming attended. During the meetings, the governors readopted resolutions on

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<sup>5</sup>More information and speaker presentations were posted online at [www.westgov.org](http://www.westgov.org) (Click on the Initiatives, then Water sublinks).

the negotiated settlement of Indian water rights claims, federal non-tribal fees in general water adjudications, cleanup of abandoned hardrock mines, and implementation of the Endangered Species Act. They also adopted a resolution commenting on the use of hydraulic fracturing for oil and natural gas recovery, and the need to protect drinking water supplies.

The governors approved their 2010 Annual Report, which acknowledges WSWC efforts saying: “Two reports - ‘Water Needs and Strategies for a Sustainable Future’ and a subsequent ‘Next Steps’ report - developed by WGA and its affiliate, the Western States Water Council, continue to guide WGA’s water program activities. In addition, they’ve become an essential reference to federal agencies and water managers across the West and in the nation’s capital. More than once, officials in Washington have held up dog-eared copies of the reports to acknowledge their value and utility.”

Separately, a WSWC 2010 Progress Report on implementation of both reports was also accepted.<sup>6</sup>

With respect to climate change, the governors adopted a scoping report that emphasizes the need for state and federal agencies to work together to identify key science needs that are western-specific and begin to share and implement smart adaptation practices. The report was prepared by a WGA Climate Adaptation Work Group to address appropriate uses of climate adaptation modeling to inform natural resources, economic and infrastructure planning and policies, as well as identify and fill existing gaps in WGA climate adaptation efforts. The Climate Adaptation Work Group consists of western state experts in air, forests, wildlife and water, including WSWC members and staff.

The opening plenary session also focused on water management challenges and opportunities. WGA Chair and Montana Governor Brian Schweitzer (D) reported that demand for water across the West is beginning to outstrip supplies and said, “As a region, we have to become more aggressive and a lot smarter in how we manage this resource.” WGA Vice Chair Butch Otter (R-ID) said, “Although water may go to the higher-value uses through market transfers, we need to make sure we protect agricultural communities and economies, the environment and food security.” Bureau of Reclamation Commissioner Mike Connor discussed Department of the Interior priorities. He said the WaterSMART Initiative is an example of how the federal government can “...work with the states and other parties to find solutions for the future.” Of note, Susan Cottingham, a WSWC member and Montana Reserved Water Rights Compact Commission Program Director, discussed the need to increase appropriations for authorized Indian water rights settlements, saying, “It is clear that if funding cannot be found these incredible settlements cannot be finalized.”

### Winter Meeting

The Western Governors’ Association (WGA) winter meeting was held December 6-8, in Las Vegas, Nevada. Attending and participating in the meetings were: Chairman C. L. “Butch” Otter, Governor of Idaho; Colorado Governor Bill Ritter and Governor-Elect John Hickenlooper; Montana Governor Brian Schweitzer; Nevada Governor Jim Gibbons; Utah Governor Gary Herbert; Wyoming

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<sup>6</sup>The report is available at <http://www.westgov.org/wswc/publicat.html>.

Governor Dave Freudenthal and Governor-Elect Matt Mead. Before the opening panel on “Ensuring Adequate Water Supplies for the West,” Otter said, “Nothing is more near and dear to the heart of any past, present or future governor than water.”

Governor Schweitzer added, “I don’t think there’s been a WGA meeting where we haven’t talked about water, nor should there be.” He talked about his bull ranch on the Continental Divide and efforts to update its irrigation system by constructing new headgates and ditches, and screening diversions and fencing streams to protect fish. It wasn’t long before he got calls from three state and two federal agencies that wanted to know what he was doing. An Army Corps of Engineers wetlands expert was dispatched from Omaha to ensure he had complied with the Clean Water Act’s Section 404 requirements. He took a quick look and concluded what the Governor already knew, that all the work that had been done fell under an agricultural exemption.

The panelist speaking to the Governors included: Anne Castle, Assistant Secretary of the Interior for Water and Science; Patricia Mulroy, General Manager, Southern Nevada Water Authority; American Water (a private company) President, Jeff Sterba; and Debra G. Coy, with Svanda & Coy, a consulting firm serving companies and investors in the water sector.

Mulroy talked about sharing water in the very contentious Colorado River basin, with impacts related to use stretching from Wyoming to Mexico and including the California Bay-Delta. It is all interconnected. She described Southern Nevada’s efforts to promote water conservation, achieve drought resiliency and reach agreements with other Basin States. There is no other alternative to cooperation. “We know how deep the cuts would be [to water supply] and what the consequences would be.” With regard to the current Shortage Sharing Agreement, which triggers actions based on the level of Lake Mead, she said: “My message is that ‘beginning agreement’ is the only thing that is going to get us through future droughts.” Lake Mead could reach the initial trigger level at 1075 elevation, with increasingly serious cuts down to elevation 1025. “We don’t know what happens after that,” she declared. “It affects everyone in the watershed.” Some 30 million people and a productive agricultural economy depend on the waters of the Colorado River. She also noted that discussions with Mexico have been going on for some time, and will be part of the solution.

Sterba noted American Water serves communities in two Canadian provinces, and 35 states, from Florida to the arid Southwest. The West is “ahead of the curve” in that we’ve already learned a lot of lessons related to scarcity and the value of water. His remarks focused on water use efficiency and conservation, describing the latter as more of a “state of mind” than a technological challenge. He also talked about the “D-“ grade given our water resources infrastructure, and the question of how we pay for improvements. American Water invests \$800 million-\$1 billion annually in its systems. He further discussed the energy-water nexus, saying that water-related energy use across the U.S. is only about 4%, but that figure is 18% in California. Nationwide energy uses consume 25% of our water, and account for 41% of all diversions. American Water is working on projects in Arizona, California and New Mexico.

Deborah Coy stated that there are billions in private money available to invest in water and related infrastructure needs which amount to some \$500 billion. In general, private investors see the water sector as stable over time, but they also need to see a profit. Pension and other funds are interested, but much of the money remains on the sidelines. Many view private sector capital as too expensive, but with declining public sector spending we need to overcome the inertia and find ways to encourage more private spending with appropriate incentives. What is the true cost of capital? Public subsidies distort our view of the true cost of water. She would love to see the private sector more involved in the public dialogue over water. Water is a growing cost for the food and beverage, pharmaceutical, energy and other industries, which need to pay more attention. At present, the municipal bond market is concerned about future risk, given past stimulus spending.

Castle suggested that water is always on the Governors' agenda because in some places we are already at the limit of supplies, and we are looking at continuing increases in demands from population growth, energy development, instream and ecosystem needs, and climate change. There is a "fundamental imbalance" between water supplies and demands. Interior is focused on both structural and nonstructural alternatives. The WaterSMART initiative is designed to help achieve sustainability through greater efficiency, in both water and energy use, which are inextricably linked. The U.S. Bureau of Reclamation (USBR) received about \$1 billion for stimulus spending, but is "not likely to get a big boost in the future." We need to leverage our resources. She noted that Interior is trying to work out an agreement with the Office of Management and Budget over authorized loan guarantees for non-federal operators of federal projects to encourage private lending. USBR and USDA's Natural Resources Conservation Service are also working together to leverage their resources to help farmers improve both on-farm and off-farm water delivery and management systems. "Pricing is the key to water conservation," she declared, adding that we need to "marry" land use, energy and water policies.

Dr. James Horne, Australia's Deputy Secretary of the Department of Sustainability, Environment, Water, Population and Communities, also joined the Governors and noted, "We've just come through the toughest 10-year drought experienced in Australia," requiring the federal government, industry and others to work together to face head on the structural imbalance between their water supplies and demand. Their approach has been to introduce water markets into rural Australia and move towards full cost pricing, including in the cost of service capital charges. You have to recognize water as a valuable resource, and not a "free good." Markets are their central mechanism for allocating water and moving from low to high value use as a means to ensure economic survival.

Horne stressed the need for good water information and good science for decision making. Further, climate change has been incorporated into their models looking 10, 20 and 30 years ahead. He stated, "We think we're already being affected," and there is a need to take concrete adaptation measures while there is time. "We live in a different world where there are resource constraints." Addressing water resources challenges takes "a concerted effort over a long period of time. The time to start educating the public is now." The government is helping farmers do more with less, making irrigation systems more efficient. It's making a difference in communities. Australia's population



is about 22 million and on the municipal water supply side, they are moving to supply about four million with desalted water. In addition, they are building 50 water reuse and recycling projects.

## **2010 Water Management Symposium**

On November 8-10, the WSWC held its 2010 Water Management Symposium in San Antonio, Texas. Entitled “Western Water Resources Infrastructure Strategies: Identifying, Prioritizing and Financing Needs,” the symposium brought together over 100 federal, state and local officials, consultants and bankers, as well as other stakeholders to discuss infrastructure related challenges facing the West and the Nation. The Texas Water Development Board (TWDB) and WestFAST agencies co-hosted the meeting, with WGA participation. RBC Capital Markets was an underwriting sponsor, with contributions from the Associated General Contractors of Texas, CDM, CH2M Hill and HDR. We appreciate their support.

The 2006 WGA Water Report, “Water Needs and Strategies for a Sustainable Future,” included the following recommendation: “The WSWC should organize a series of ongoing biennial symposia designed to: (a) bring stakeholders together to try and find ways to meet our growing western water, wastewater, watershed protection and restoration, and public safety-related infrastructure funding needs; (b) find ways to quantify, evaluate and prioritize funding those needs; and (c) highlight the benefits of integrated watershed, riverbasin, regional and interstate planning and management.” A March 2008 Water Infrastructure Financing Workshop cosponsored by the WSWC and Interstate Council on Water Policy (ICWP) in Washington, D.C. was intended as a beginning. The 2010 symposium built on that first step, and was planned to implement in part some of the recommendations in the Western Governors’ Association’s 2008 “Next Steps” Report related to water and wastewater infrastructure needs and strategies.

Among other things, the WGA’s 2008 Next Steps Report recommended, “All levels of government, along with appropriate private sector involvement, should cooperate in the development and implementation of appropriate criteria for prioritizing infrastructure needs, asset management strategies, [and related] policies, standards, techniques and technologies.” It recommended, “States should encourage adequate and progressive local asset management plans, programs and best management practices through technical and financial assistance.” Further, “States, with assistance from relevant federal agencies, should provide institutional mechanisms and otherwise encourage regional water and wastewater projects to maximize economies of scale and minimize environmental impacts from smaller, piecemeal project development.” It also suggested that “...public-private financial partnerships can be useful and should be encouraged.” Other recommendations were directed to the Congress and utilities.

Over the course of the symposium, speakers from public and private entities discussed ways to identify, evaluate, and prioritize the nation’s water infrastructure needs, as well as ways to fund and finance present and future projects, including public/private partnerships. Capital budgeting and life-cycle asset management were other areas of emphasis. Senior state officials from California, Colorado, New Mexico, Texas, Utah and Wyoming addressed water resources planning and development activities, focusing on project and program funding mechanisms, such as the use of

sales tax and general fund appropriations, bonding, and dedicated trust funds financed from oil, gas and mineral leasing on public lands. Top federal agency leaders from the U.S. Army Corps of Engineers, U.S. Bureau of Reclamation, Environmental Protection Agency (EPA), and USDA's Natural Resources Conservation Service (NRCS) also participated. Others attending represented state legislators, municipalities, local governments, river authorities, groundwater districts, utilities, water companies, consultants, contractors, construction companies, and the financial community.

On the first day, Michael Deane, Executive Director of the National Association of Water Companies, discussed a number of the factors driving water infrastructure needs, including an aging inventory of projects and population growth. He particularly addressed the sizable gap between infrastructure needs and current funding. He said, "we paralyze ourselves" by focusing on the huge overall projected costs. He also said EPA has found that their estimated spending gap would "disappear" in 20 years if water and wastewater rates were raised by 3% (over and above inflation rates). Although the construction of water infrastructure can create jobs in the short term, Deane said there is a need to underscore the fact that "very few jobs" can exist without a sustainable water supply and that reliable water systems create and allow for reliable job growth.

A panel of state and local water managers discussed water resources planning and development in Texas. TWDB Executive Director Kevin Ward provided an overview of his agency's infrastructure efforts, noting that it committed \$1.5 billion for water and wastewater projects in 2010, and has provided \$12.4 billion for such projects to date. Commissioner Carlos Rubinstein, Texas Commission on Environmental Quality (TCEQ), and a WSWC member, discussed his agency's efforts regarding water conservation and municipal and industrial water use. He said EPA's decision to revisit whether National Pollutant Discharge Elimination System (NPDES) permits are required for water transfers is "troubling" to Texas, which does not need additional authority to regulate transfers. Robert Puente, CEO and President of the San Antonio Water System, said his System has seen an increase in customer connections, but also a decrease in treated sewage discharges due to conservation. Perry Fowler with the Associated General Contractors of Texas said "we have to invest" to address the Nation's infrastructure needs. Conservation alone will not be sufficient. He added that construction costs are lower than they have been in the past, and that now is a good time to build. All of the panelists identified infrastructure funding as a principal challenge.

A second panel of experts from the finance industry addressed ways to fund current and future infrastructure needs. Sharlene Leurig, a Senior Manager with Ceres Investors and Environmentalists, discussed a model that her company created to help investors evaluate a company's water-related risks, including the reliability of their water supplies. Consultant David Yanke, with RW Beck, described financing options for the public sector, including revenue bonds, general obligation bonds, certificates of obligations, cash, and the state revolving funds. Public Werks, Inc. President John Crew described a "basic investment cycle" that he had used to raise \$40 million for infrastructure projects from the private sector last year. He also noted that risk capital is profit driven and is generally intolerant of bureaucratic processes. Shawn Dralle, Treasurer/Managing Director for RBC Capital Markets, said there is an "enormous gap" between large and small systems with respect to financing. The latter will need the most help. She described

recent fundamental changes in the capital and credit markets, as well as the use of traditional debt instruments.

A panel of state experts, all WSWC members, described western state water plans and resources development programs. Jeanine Jones, the California Department of Resources' Interstate Resources Manager, discussed how her state has funded water infrastructure projects through voter-approved bond acts, initiated by the Legislature or voter initiatives. She noted that 10% of California's water systems serve over 90% of the population, and the remainder are small systems that often lack the resources to fund projects or participate in the political process (which means that they are often ignored). She added that catastrophic flooding and drought have served as a catalyst for planning in California.

Utah Division of Water Resources Director Dennis Strong said his state uses a number of methods to fund infrastructure, including grants and low or no interest loans (as part of a revolving loan program), an interest buy down program and bonding, among other mechanisms. General fund appropriations and a dedicated portion of the state sales tax help fund financial assistance, but projects are proposed by local decisionmakers. A separate board with lay members reviews and approves project assistance mainly to small cities and irrigation districts. The State of Utah is also designing and planning to construct a couple of large projects to develop and transport water to municipalities from the Bear River in the North, and Lake Powell in the South.

Colorado Water Conservation Board Director Jennifer Gimbel discussed a number of observations pertaining to water planning and infrastructure, including the need to develop a closer connection between land use planning and water supplies. Recent "roundtable" planning efforts have focused attention on meeting the State's future water needs. Of note, drying up agriculture is not an acceptable alternative in Colorado. The State has identified a number of projects in various stages of development, and provides some financial assistance (funding waxes and wanes). Even taking into account aggressive water conservation, more water projects will have to be built to meet projected demands for a growing population.

Wyoming Water Development Commission Director Michael Purcell said, "We have water to develop!" The State provides project loans financed by an energy resources severance tax. He noted they have never had a "bad loan." Loans are secured by the project and water rights. He discussed the Commission's responsibilities in making study and project recommendations to the state legislature regarding planning and construction. The Governor reviews requests presented to the Legislature, and individual projects are approved through a Select Water Committee composed of twelve state legislators, equally divided between both Houses. A benefit of this process is that the Governor and these legislators also act as advocates for funding for approved projects.

New Mexico State Engineer John D'Antonio said that the reason for state water planning was to put water to beneficial use, and you need infrastructure to do that. The State uses sixteen planning regions, based on geopolitical boundaries. Western water law is designed to provide certainty of supply. D'Antonio chairs the Water Trust Board, which oversees the distribution of grants and loans

from three separate funds. Money from severance taxes capitalizes these funds. Default rates on infrastructure loans secured by water rights are extremely rare. While mostly small projects are financed, there is money available for larger storage projects and conveyance systems. The Board may also fund watershed restoration projects, collaborative Endangered Species Act-related programs, as well as flood prevention, water treatment, water reuse, recycling and water conservation projects.

Patrick Natale, the Executive Director of the American Society of Civil Engineers (ASCE), spoke on a panel focused on ways to identify and prioritize water project needs. He described an ASCE “report card” that gives the Nation’s infrastructure an overall “D” grade. ASCE has a number of legislative priorities, including the Water Resources Development Act (WRDA) of 2010 (H.R. 5892). He also said leadership at the state and local level is key. Richard Normet, Executive Director of the National Council for Public-Private Partnerships (PPPs), discussed the benefits of such partnerships, primarily between the private sector and municipalities. He noted PPPs are not a new or revolutionary concept, nor are they synonymous with privatization. They are contractual agreements that can vary with different purposes and needs, which should be clearly defined. He also advised, “Pick your partner carefully!” CDM Senior Vice President Rodney Chapin described alternative delivery methods to the traditional design-bid-build process, which when properly applied, can be effective in accelerating project development and financing, as well as shift risk. He noted water projects are increasingly more complex and difficult to build and finance, creating problems for owners in terms both of cost and scheduling.

Claudia Copeland, of the Congressional Research Service, discussed how changes in the House leadership resulting from the mid-term elections could impact infrastructure projects. She said Rep. John Mica (R-FL), a fiscal conservative, will chair the House Transportation and Infrastructure Committee, which has jurisdiction over the Corps of Engineers and EPA’s State Revolving Fund (SRF) programs. Although Mica has a strong history of supporting infrastructure, he and other Republicans have not supported a 2010 WRDA bill, stressing that the Nation needs to address the backlog of unfunded projects before authorizing new ones. Copeland also reported that Rep. Doc Hastings (R-WA) will chair the House Natural Resources Committee, which authorizes Bureau of Reclamation projects and programs. She said Hastings is a fiscal conservative and is not known for his interest in water issues. He also “is not a fan” of Reclamation’s Title XVI Water Recycling and Reuse Program, and may want beneficiaries of projects to pay a greater share of project costs.

A panel of federal officials and other speakers discussed capital budgeting and life cycle management. Steve Allbee, of EPA’s Office of Water, said that it will be more difficult to secure funding for infrastructure projects given federal budget deficits and that greater care will need to be given up-front in determining whether to replace or rehabilitate an asset. Dr. Elliot Ng, from of Corps of Engineers, discussed asset management, saying we need to collaborate more and look at infrastructure needs from a holistic perspective. Ella Mae Herrera, with the Bureau of Reclamation, noted many facilities were built in rural areas now urbanized, raising risks of failure. A recent federal canal inventory found that 13% are in urban areas. Lastly, John Maxwell, Director of

Integrated Water Planning with HDR Engineering, said that most states have some form of water planning, but most do not require utility planning, which he believes states should promote through incentives, along with asset management best management practices. “Utilities are a business,” and need a business plan.

Another panel focused on multipurpose and multiple agency projects. Roger Figard, City Engineer for Lincoln, Nebraska, provided an overview of the Antelope Valley/Creek Project, which was a partnership between Lincoln, the University of Nebraska, the Corps, and the Lower Platte South Natural Resources District. It addresses flood control, transportation, recreation and community revitalization needs. Mark Pifher, Deputy Director for Water in Aurora, Colorado, described the Prairie Waters Project. Working closely with the Corps and the Fish and Wildlife Service to avoid environmental issues, as well as other interested non-regulatory third parties, the pipeline will transport and treat water from alluvial river bank wells along the South Platte River. Continuous value engineering reviews, and partnering among the owner, designer, construction manager and contractors have helped promptly and equitably resolve problems. Suzanne Scott, San Antonio River Authority (SARA) General Manager, described the San Antonio Improvement Project, a 13-mile long flood protection project undertaken in collaboration with the Corps. The effort involves restoring the channelized river with a “more naturalized setup” with aquatic features and riparian woodlands. The San Antonio River flood control system is an internationally recognized engineering marvel, though few residents recognize the extent of the infrastructure underground beneath their feet.

On the final day of the Symposium, a panel of senior Administration officials, all with careers of over 30 years, discussed federal water resource infrastructure program challenges and priorities. Steve Stockton, Director of Civil Works for the Corps, said his agency is looking at considerable reductions in its budget and that the days in which the Corps could fully fund projects are over. He also said there is a need for water resources managers to educate the political leadership about infrastructure priorities. He also mentioned the Corps’ recently released National Report on Responding to National Water Resources Challenges, and collaborative workshops leading up to the publication of the report, one held in conjunction with the WSWC’s Spring 2009 meetings in Kansas City, Kansas.

Steve Allbee, EPA Project Director for Gap Analysis, said you cannot have a sustainable community without discussing infrastructure and noted that it is essential to distinguish between essential projects and those that “would be nice.” He described the multi-generational challenges of urbanization and need to upgrade and expand water and wastewater systems. He discussed EPA’s capitalization of state revolving loan funds and the American Recovery & Reinvestment Act spending. He noted that sustainability requires investment to support long term outcomes.

Michael Gabaldon, Reclamation’s Director of Technical Resources, described challenges related to aging infrastructure and invasive species, focusing on Reclamation’s projects and activities related to canals, quagga mussels, and increasing hydropower production. He reviewed the

provisions of a memorandum of understanding between the Departments of the Interior and Energy and the Corps of Engineers related to the latter.

Tom Christensen, Natural Resources Conservation Service (NRCS), Regional Conservationist – Central, discussed the Department of Agriculture’s efforts related to water, noting that NRCS activities impact 80% of the Nation’s waters. He said NRCS believes conservation must be done on a landscape scale, and that you can’t isolate natural resources concerns, saying soil, wildlife, air and water are all interrelated. Management needs to be based on good science and a systematic approach, “not just random acts of conservation.” He talked about USDA’s watershed rehabilitation program, watershed operations, floodplain easements, and its aging infrastructure in the form of small dams, many now considered hazards due to increasing threats to life and property, should they fail.

Sue Lowry, Wyoming State Engineer’s Office and a WSWC member, provided a wrap-up summary of the meeting, followed by a plenary discussion engaging those attending related to what they had heard and learned, and suggestions for next steps.<sup>7</sup>

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<sup>7</sup>Presentations are posted online at: <http://www.westgov.org/wswc/2010%20awms.html>.  
A summary of the proceedings is also available at:  
[http://www.westgov.org/wswc/infrastructure%20report\\_final\\_lowresolution.pdf](http://www.westgov.org/wswc/infrastructure%20report_final_lowresolution.pdf).

## CONGRESSIONAL TESTIMONY

### House Subcommittee on Water and Power FY2011 Budget Oversight Hearing

The WSWC was invited to testify before the House Resources Committee's Water and Power Subcommittee on March 11, 2010 with regard to the President's budget request for the U.S. Bureau of Reclamation and U.S. Geological Survey. The testimony presented was based on the WGA Water Reports and previous positions and statements. It touched on a number of topics, including the need for more and better information for decision-making, climate change and the need to quantify Indian water rights by means of settlements, and use of the federal Reclamation Fund for authorized purposes.

Selected statements from the testimony follow: "Without the Bureau of Reclamation and federal investment in past water projects, the West would not be what it is today. Continuing investments and sacrifices will be needed to maintain our quality of life and protect our environment. Difficult choices have to be made at both the federal and state agency levels."

"As we plan for the future, states are well aware of the importance of maintaining our existing assets and prioritizing future infrastructure investments. States are in the best position to identify, evaluate and prioritize their needs. State water plans should help form the basis for federal decisions. We must work together as partners."

"The Reclamation Act of 1902, recognizing the vital need to invest in Western water resources, created the Reclamation Fund as a means to finance such investments. The unobligated balance at the end of FY2011 will be over \$10B (but spending from this special Treasury fund is still subject to appropriations and pay-go rules). Receipts are more than sufficient to fund all current Reclamation expenditures and more. In essence, the unobligated balance grows as fund receipts are used to finance other government purposes. We continue to urge the Congress to increase spending from the Reclamation Fund for authorized purposes.... Congress has authorized future transfers from the Reclamation Fund for construction of projects related to Indian water rights settlements, the resolution of which has been a longstanding goal of the Council."

"The Council has often supported technical and financial assistance to states and local watershed groups and water districts as an appropriate federal role. We are encouraged by Secretary Salazar's \$62 million request for Interior's WaterSMART Program, and recognize the importance of the proposal in an increasingly tight federal budget. The WaterSMART program is in part designed to make water available through conservation for other uses. It is important to note that the allocation of water is primarily a state prerogative, and water transfers are subject to state water law and policy."

"Without timely and accurate water resources information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss. The USGS has been a leader in developing and realizing the potential of state-of-the-art technology to provide real or near real-time data with the promise of vastly improving the quantity and quality of

water-related information available to decision makers in natural resources and emergency management, with the States as essential partners.”

“While recognizing USGS has made a very substantial and significant increase in its request for water-related information gathering, we are nonetheless disappointed that requested funding was reduced for the National Streamflow Information Program (NSIP), which is fully federally funded (cut about \$578,000 to \$27 million), and the Cooperative Water Program (cut some \$1.9 million to \$63.6 million). Cooperative Water Program (CWP) partners now fund about two-thirds of program costs.”

“The proposed cuts, if not restored by the Congress, will undoubtedly lead to the loss of important streamgages – many with over 30 years of record. The Council and many other stakeholders have repeatedly called for full NSIP funding (\$110 million) and sufficient appropriations to support a 50%-50% CWP match (\$95 million). Together, these two programs support much of our national streamgaging system, which is critical for water resources and emergency management, planning and decision-making; water supply project and transportation infrastructure design; long-term planning related to climate change and variability; and other essential uses.”<sup>8</sup>

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<sup>8</sup><http://naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=174617>.



## WESTERN STATES FEDERAL AGENCY SUPPORT TEAM

The Western States Federal Agency Support Team (WestFAST) is a collaboration between eleven Federal agencies with water resources responsibilities in the West. WestFAST was established in 2008 to support the Western States Water Council (WSWC), and the Western Governors' Association (WGA) in coordinating Federal and state efforts to address water resources needs.

In 2010, WestFAST continued to grow as a collaborative organization, and continued to provide federal support to the WSWC. WestFAST focused on several major federal initiatives, including collaborating on climate change and drought initiatives, as well as completing a number of other key activities. Some highlights include:

- **WestFAST Agencies Water Climate Change Program Inventory:** In 2010, WestFAST compiled an inventory of WestFAST agency climate change programs. The purpose of this inventory is to share information on Federal climate change programs that are relevant to western water managers and facilitate closer coordination between Federal agencies and State water scientists and managers. This inventory is available at: <http://www.westgov.org/wswc/westfast/reports/climateinventory.pdf>.
- **Expanded WestFAST Membership from 9 to 11 Agencies:** During 2010, both NASA and DOE joined the WestFAST team. The addition of these two agencies provides additional perspective to WestFAST, and allows WestFAST to better support the WSWC.
- **Interagency Collaboration:** Throughout 2010, WestFAST continued to facilitate interactions between the WestFAST agencies. WestFAST agencies participated in the Climate Change and Water Working Group (CCAWG) as well as in the National Integrated Drought Information System (NIDIS). The U.S. Army Corps of Engineers (USACE), in collaboration with WestFAST and the WSWC, developed a report entitled "Building Strong Collaborative Relationships for a Sustainable Water Resources Future." WestFAST also helped encourage collaboration through the Department of the Interior's Landscape Conservation Cooperatives as well as through Reclamation's Basin Studies. Lastly, the USACE helped establish a liaison position with the State of Kansas that will help coordinate federal efforts with state efforts.
- **Supported the Goals of the WSWC Committees:** WestFAST's core mission is to support the efforts of the WSWC, and to bring federal insight and coordination to initiatives identified by the WSWC in their work plan. In 2010, some particular highlights included:
  - worked with the WSWC on NIDIS;
  - participated in an Ag-to-Urban water transfer work group;
  - worked with the WSWC as part of an Ad Hoc Group on the National Water Assessment;
  - NASA provided a special session on remote sensing capabilities to the WSWC;

- provided input on federal claims in non-tribal water rights adjudication;
  - supported and helped plan WSWC's Infrastructure Symposium; and
  - worked with the WSWC on estimating water needs for energy production.
- **Supported the goals in the 2008 Next Steps Report:** WestFAST was formed in part as a response to a recommendation in the Next Steps Report. WestFAST has continued to focus on the recommendations in this report to guide its work. In 2010, WestFAST particularly focused on areas of the Next Steps report related to climate change and drought. Particular efforts were in support of:
    - Objective 8c - Development of a Federal Toolbox to support state water plans;
    - Objective 20 - Work with the State of Kansas to develop innovative ways to encourage better collaboration between federal and state agencies at the state level;
    - Objective 32 - Implementation of NIDIS; and
    - Objective 33 - Development of the WestFAST Agencies Climate Change Program Inventory (mentioned earlier).

## **OTHER IMPORTANT ACTIVITIES AND EVENTS**

### **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 2010 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.

### **Ag-to-Urban Transfers**

The Walton Family Foundation funded a two-day forum in Castle Rock, Colorado to identify effective and innovative ways to transfer and share water among the agricultural, urban, and environmental sectors, while avoiding or mitigating damages to agricultural economies and the environment. Over 30 representatives from water user groups and organizations from across the basin attended the forum, including Audubon New Mexico, the Maricopa/Stanfield Irrigation District, the San Diego County Water Authority, and others. Colorado State Engineer and WSWC member Dick Wolfe was also in attendance. The forum's goal is to develop recommendations that can be presented to the Western Governors' Association (WGA), U.S. Bureau of Reclamation, and others for their consideration.

The forum utilized a series of small break out sessions consisting of representatives from the three sectors. The first session clarified the water needs of each sector, as well as what each sector could lose or gain by not sharing water resources. The second session discussed ways to develop effective collaborative processes for sharing water, how to improve water management flexibility, transaction strategies, and regulatory/oversight processes. The final session focused on ways to overcome water sharing obstacles. The forum concluded by identifying those "next steps" for which there was consensus among attendees. These recommendations will be further refined and presented for approval to attendees and their respective organizations before they are distributed to the WGA and Reclamation for possible consideration.

Of note, the forum agenda was developed by a work group consisting of representatives from the WGA, WSWC, the Family Farm Alliance, the Nature Conservancy, the Metropolitan Water District of Southern California, and others. This group was formed in response to the WGA's 2008

“Next Steps” Report, which recommended: “States...working with interested stakeholders, should identify innovative ways to allow water transfers from agricultural to urban uses while avoiding or mitigating damages to agricultural economies and environmental values.” The forum was intended to address this recommendation. The group’s facilitator, MaryLou Smith of Colorado State University, presented the forum’s recommendations at the WSWC’s meeting in October in San Diego.

## **Bureau of Reclamation**

### FY2011 Budget Request

The Department of Interior requested \$12.2 billion in funding for FY2011, a 0.3% decrease from 2010 levels. Within Interior, the Bureau of Reclamation would see a funding decrease of about \$23 million, down to \$1.1 billion. Of this amount, \$489.9 million would go to water, energy, and other resource management and development activities; \$423.7 million would fund operation, maintenance and rehabilitation activities at Reclamation facilities, including dam safety; \$62 million would be Reclamation’s share of the WaterSMART Program (encompassing \$27 million for grants, \$6 million for basin studies, and \$29 million for Title XVI projects); and \$11.5 million in science and technology funding to support the establishment of Interior’s Climate Science Centers.

Reclamation’s budget also seeks funding for a number of projects in California, including \$171.7 million for the Central Valley Project; \$40 million for the California Bay-Delta Program; and \$49.9 million for the Central Valley Project Restoration Fund. Funding for other programs of note includes \$25.1 million for the Middle Rio Grande Project in New Mexico; \$22.5 million for the Klamath Project in California and Oregon; and \$62 million for ongoing construction on seven rural water projects in North Dakota, South Dakota, Montana, and New Mexico. Separately, the Central Utah Project request is \$43 million, which includes \$2.5 million for environmental mitigation and conservation.

With respect to tribal projects, Reclamation is seeking \$12.5 million for the Animas La Plata Project in Colorado and New Mexico; \$10 million for the Navajo-Gallup Water Supply Project in New Mexico and Arizona; and \$4 million for the Soboba Water Rights Settlement Project in California. Another \$7.4 million would go to Reclamation’s Native American Affairs Program, which provides technical support for Indian water rights settlements and helps tribes protect, manage, and develop water and related resources. The Bureau of Indian Affairs would also receive \$46.5 million for Indian land and water settlements under Interior’s budget request.

Estimated FY2011 appropriations from the Reclamation Fund total \$867 million. Total estimated Fund receipts are \$1.892 billion. The bulk of the receipts come from mineral leasing revenues from federal lands. Estimated Fund receipts for FY2010 total \$1.6 billion and expenditures \$948 million. Actual Fund receipts for FY2009 were \$1.822 billion, and expenditures were \$1.869 billion (with Reclamation’s Water and Related Resources Account receiving \$1.6 billion – due to Stimulus spending – which is nearly twice the \$806 million request for FY2011). The estimated unobligated balance at the end of FY2011 is \$10.312 billion, compared to \$9.638 billion in FY2009.

## Title XVI Projects

The Senate Committee on Energy and Natural Resources' Subcommittee on Water and Power held a hearing on April 27, to discuss eight bills that authorize new programs in Arizona, California, Oregon, Texas, and Utah under Reclamation's water reuse and recycling program, otherwise known as Title XVI. "We're seeing an increased demand for a finite existing supply of water and how we manage that water is a very important question for all of us today," said Subcommittee Chair Senator Debbie Stabenow (D-MI). "The Subcommittee's goal will be to ensure that the bills we move forward are consistent with the criteria required by legislation authorizing Title XVI projects. Accordingly, we'll be looking for projects that are technically and economically feasible."

Reclamation's Deputy Commissioner for External and Intergovernmental Affairs Kira Finkler, a WestFAST member, testified against the bills. "We recognize that water reuse is an essential tool in stretching the limited water supplies in the West, and I believe the FY2011 Budget request on top of the [Stimulus] funding has demonstrated the emphasis placed by this Administration on this Program," she said. "However, given that there are 53 already authorized Title XVI projects and numerous competing mission priorities and demands on Reclamation's budget, the Department cannot support the authorization of new Title XVI projects or extensions of existing cost ceilings at this time. Reclamation will, however, continue to work with project proponents to evaluate the completeness of feasibility studies of their projects."

With respect to the FY2011 budget proposal, Kira noted that it includes \$29 million for the Title XVI program, a 113% increase over the 2010 enacted level. Of that amount, she said Interior is requesting \$20 million for Title XVI projects that will be selected using funding criteria Reclamation is currently developing. These criteria will help address the Title XVI backlog "...by providing some useful metrics that we can [rely on to] review and rank and prioritize proposed projects that will give us the best bang for our buck." The bills addressed at the hearing include S. 745/H.R. 2265, S. 1138/H.R. 2442, S. 1573/H.R. 2741, H.R. 325, H.R. 1120, H.R. 637, H.R. 2522, and H.R. 1393.<sup>9</sup>

## SECURE Water Act

On February 9, the Senate Energy and Natural Resources Committee held a hearing on Reclamation's implementation of the SECURE Water Act.<sup>10</sup> Chairman Jeff Bingaman (D-NM) called the oversight hearing to also address Reclamation's Water Conservation Initiative, including the Challenge Grants, Basin Study, and Title XVI Programs, as well as water reuse projects. Because of the limited amount of time available for the hearing, only a few witnesses were invited to testify in person, but others had been encouraged to submit written testimony for the record.

The witness list included: Commissioner Michael Connor; Melinda Kassen, Trout Unlimited; Dan Keppen, Family Farm Alliance; Pat Mulroy, Southern Nevada Water Authority, representing

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<sup>9</sup>[http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=164a9cf7-bf7b-277d-10bd-505ddffb252f](http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=164a9cf7-bf7b-277d-10bd-505ddffb252f).

<sup>10</sup>(P.L. 111-11, Title 9501).

the Colorado River Basin States; and Tony Pack, Eastern Municipal Water District, which is a freshwater, wastewater and recycled water service provider in the Moreno Valley and the 5<sup>th</sup> largest water district in California.<sup>11</sup>

## Basin Studies

The Bureau of Reclamation sought letters of interest from non-Federal entities throughout the 17 western states to conduct river basin or sub-basin studies where water supply and demand imbalances may exist. The request was part of the Department of Interior's WaterSMART Program and is a key component of Reclamation's plan for implementing the Secure Water Act (SWA). The studies will include assessments of the impacts of climate change on water resources and will consider other risks to water supplies. The basin studies will be cost-shared on a 50/50 basis with willing state, tribal and local partners. They will generally be two years in duration. However, because this is not a financial assistance program, Reclamation's share of the study costs may only be used to support work done by Reclamation or its contractors. Reclamation also may not pass funding through to cost-share partners in the form of grants or cooperative agreements.

On August 12, Bureau of Reclamation Commissioner Mike Connor announced \$3.3 million in funding for six basin studies and two plans of study to begin in fiscal year 2010. The studies will match over \$4 million in non-federal funding from state, tribal, and local partners. The six basin studies that Connor announced include: (1) the Truckee River Basin Study in California and Nevada; (2) the Deschutes River Basin Study in Oregon; (3) the Henry's Fork of the Snake River Basin Study in Idaho; (4) the Niobrara River Basin Study in Nebraska; (5) the Santa Ana Watershed Basin Study in California; and (6) the Southeast California Regional Basin Study. The studies will assess climate change impacts on water resources and consider risks to water supplies, including changes to snowpack and runoff timing and quantity.<sup>12</sup>

Two plans of study include a Klamath Basin Study in California and Oregon and a Taos Pueblo Water Supply and Demand Basin Study in New Mexico. The plans of study will define outcomes and set the scope and focus for potential future basin studies. Partners will develop the plans of study with Reclamation and submit proposals for basin studies during the next funding opportunity announcement.<sup>13</sup>

## Water Supply

### Northwest Area Water Supply Project

On March 9, a federal district court judge ordered Reclamation to conduct further environmental studies on the potential impacts of the Northwest Area Water Supply Project. The project would pipe 3.5 billion gallons of water per year from Lake Sakakawea, a Missouri River reservoir in central North Dakota, to the North Dakota city of Minot, located in the Hudson Bay Basin, which includes central Canada and portions of the Great Plains within the United States. The

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<sup>11</sup>[http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=57f8252f-c018-10c9-61cf-04fcb37a989a](http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=57f8252f-c018-10c9-61cf-04fcb37a989a).

<sup>12</sup><http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=33410>.

<sup>13</sup>*Western States Water*, #1844, September 18, 2009, and #1868, March 5, 2010.

water would then be distributed to ten North Dakota counties. Although most of the planned 45-mile pipeline has been finished, the Canadian province of Manitoba filed a lawsuit, in 2002, claiming that Reclamation failed to consider the project's environmental impacts as required by the National Environmental Policy Act (NEPA). Missouri, has filed a separate suit over concerns about impacts on downstream water levels.

In response to Manitoba's lawsuit, Reclamation argued that it was not required to conduct a study of the consequences of a species transfer, which it said was unlikely. Reclamation further argued that federal law did not require it to investigate the potential impacts of the project on other countries and that a previous court order and recommendation from EPA had determined that the project's environmental safeguards were adequate. Reclamation also revised the project to incorporate a plan to disinfect the Missouri River Basin water prior to transfer.

However, the changes were not enough for Judge Rosemary Collyer of the U.S. District Court for the District of Columbia, who found that the agency had taken steps to reduce environmental impacts, but had not studied the potential consequences. "The Court is acutely aware that Reclamation and North Dakota have built miles of pipeline and that the citizens of the area want the Project completed. These facts do not excuse Reclamation's failure to follow the law," she wrote. "This case demonstrates the adage that it is better to do something right the first time. Reclamation has wasted years by cutting corners and looking for shortcuts." Collyer further wrote that an existing injunction will remain in place as Reclamation studies the effects of the transfer. The agency must also study the consequences of potential species transfers into the Hudson Bay Basin.<sup>14</sup>

#### Delta-Mendota Canal/California Aqueduct Intertie

On April 13, the Department of Interior announced that Reclamation will provide \$20.7 million in Stimulus funds for the Delta-Mendota Canal/California Aqueduct Intertie, which is intended to provide more reliable water supplies to farmers in the San Joaquin Valley and other communities throughout California. The project is scheduled to be online in the Fall of 2011 and will connect the Delta-Mendota Canal and the California Aqueduct via a new pipeline and pumping plant designed to improve conveyance, allow for maintenance and repair activities, and improve the flexibility of operations between Reclamation's Central Valley Project and California's State Water Project.

"The intertie...will facilitate more efficient movement of water," said Secretary of the Interior Ken Salazar. "This will help alleviate some of the difficulties caused by the three-year drought."<sup>15</sup> Senator Barbara Boxer (D-CA) also praised the project, saying, "This Delta Mendota Intertie will get water where it's needed, when it's needed. This project will help provide much needed water supplies while creating hundreds of jobs."<sup>16</sup>

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<sup>14</sup><http://www.glelc.org/glelc/NAWS%20Memorandum%20opinion.pdf>.

<sup>15</sup><http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=32181>.

<sup>16</sup>*Western States Water*, #1859, December 31, 2009, and #1863, January 29, 2010.

## Rural Water Supply Act

On May 13, the Bureau of Reclamation announced the next step in implementation of the Rural Water Supply Act. Reclamation will work with communities of less than 50,000 people in rural areas to assess their potable water supply needs and identify options to address those needs. A program has been created to help investigate opportunities to ensure safe and adequate water supply projects for domestic, municipal, and industrial use. Reclamation will help plan rural water supply projects through appraisal investigations and feasibility studies. However, actual project design and construction would require Congressional authorization.

As part of the program, Reclamation announced the availability of at least \$2 million in grants to help rural communities conduct appraisal investigations and feasibility studies. For an appraisal investigation, Reclamation will pay 100% up to \$200,000 and 50% for all costs above that amount. Funding for feasibility studies will be cost-shared with Reclamation paying 50%. The non-federal cost sharing required may be provided in the form of money or in-kind services that Reclamation determines are necessary and reasonable to conduct and complete an investigation or study. Following completion of an appraisal investigation and feasibility study, Reclamation will report to the Congress with recommendations regarding the construction of a rural water supply project, and the appropriate non-Federal share of construction costs. Again, the program provides authority for appraisal investigations and feasibility studies, but Congressional authorization is required for project construction.

Eligible applicants include states, political subdivisions of states, tribes, and other entities with water management and water delivery authority. Reclamation will review the statements of interest to determine if applicants satisfy the eligibility and prioritization criteria for the funding.<sup>17</sup>

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

### America's Commitment to Clean Water Act

On April 21, Rep. James Oberstar (D-MN), Chair of the House Transportation and Infrastructure Committee, introduced the America's Commitment to Clean Water Act (H.R. 5088).<sup>18</sup> The bill is the latest attempt at amending the CWA to overturn the Supreme Court's *SWANCC* and *Rapanos* decisions, which Oberstar and others believe created confusion over the types of waters subject to CWA jurisdiction and left certain waters without adequate protection.

The bill would replace the term "navigable waters" (used to determine CWA jurisdiction) with "waters of the United States," which it would then define as: (1) "all waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (2) "all interstate and international waters, including interstate and international wetlands;" (3) "all other waters, including intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which does or would affect interstate or foreign commerce, the obligations of the United States under a

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<sup>17</sup>[www.usbr.gov/ruralwater](http://www.usbr.gov/ruralwater).

<sup>18</sup><http://transportation.house.gov/>.



treaty, or the territory or other property belonging to the United States;” (4) “all impoundments of waters otherwise defined as waters of the United States [under the bill];” (5) tributaries of waters identified in the bill; (6) “the territorial seas;” and (7) “waters, including wetlands, adjacent to waters identified [in the bill].”

As for ground water, the findings section of the bill states: “Administrative and judicial interpretations of the [Clean Water Act] have treated ground water separately from ‘waters of the United States’ as that term is used in such Act, and ground water has not been considered to be ‘waters of the United States’ under such Act. This Act and the amendments made by this Act do not affect those administrative and judicial interpretations.” The findings also say the bill and its amendments do not affect the authority of the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers, which have permitting authority under sections 402 and 404 of the CWA, as interpreted or applied as of January 8, 2001, the day before the *SWANCC* decision.

The bill marks the fifth attempt in the House to overturn the Supreme Court decisions. However, it differs from past efforts by deleting language suggesting that any “activities,” as opposed to “discharges,” would require regulation. It also codifies exemptions for wastewater treatment systems and prior converted cropland and attempts to clarify federal jurisdiction by identifying the Commerce Clause, Treaty Power, and Property Clause of the U.S. Constitution as the underlying authorities for CWA regulation.

On April 21, Oberstar and co-sponsors Rep. John Dingell (D-MI) and Rep. Vernon Ehlers (R-MI) held a press conference to discuss the bill. “[The bill] is not an expansion of the CWA,” said Oberstar. “The bill will not require permits for every wet area. Simply put, if it was not regulated before 2001, it will not be regulated with the enactment of this legislation.” Dingell, one of the few current members of Congress to have voted for the original version of the CWA, discussed the laws legislative history saying, “We made it clear that we were protecting all of the waters of the United States.... The bill is simple. It makes it perfectly clear what the Congress intended in 1972.” Rep. Vernon Ehlers (R-MI) also said, “Our purpose here is to clarify without any doubt what the Congress originally intended to do all those many years ago, and to write the bill in a way that everyone, all the users of water, all the judges who will be asked to review the law, clearly understand our intent...so that this will be the final version of the [CWA] that will guide this nation for years to come.”

However, Transportation and Infrastructure Ranking Member John Mica (R-FL) issued a statement saying, “The added confusion, delays, and endless litigation created by this bill will heap new costs on American agriculture, manufacturing, housing and other businesses, and our already grim unemployment picture will worsen.” In addition, Water Resources and Environment Subcommittee Ranking Member John Boozman (R-AR) criticized the bill as “an undeniable and considerable expansion of federal authority.”<sup>19</sup> House Natural Resources Committee Ranking Member Rep. Doc Hastings (R-WA) said it would risk jobs and “the very viability” of farms and small businesses in rural America. Representatives Tom McClintock (R-CA), Rob Bishop (R-UT), Jason Chaffetz (R-UT), Cathy McMorris Rodgers (R-WA), and Adrian Smith (R-NE) have also similarly criticized the bill.

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<sup>19</sup><http://transportation.house.gov/news/PRArticle.aspx?NewsID=848>.

Oberstar had indicated that he would like to begin moving the bill by June and hoped to bring it to the House floor by September. Of note, a similar bill (S. 787) passed the Senate Environment and Public Works Committee last June, by a 12-7 vote, with strong Republican dissent.<sup>20</sup>

On June 22, Representatives Doc Hastings (R-WA), Frank Lucas (R-OK), and Sam Graves (R-MO) sent a letter to Rep. James Oberstar, Chair of the House Transportation and Infrastructure Committee and other Democratic leaders asking for hearings on H.R. 5088.<sup>21</sup> The letter said the bill would have “...a great impact on Western irrigation projects, farming and ranching operations, mining, and small businesses.... At a time when creating and protecting jobs should be our top priority, we need to gain a full understanding of the effects that this bill will have on the economies of rural communities and the nation as a whole.... Unfortunately, no hearings had been scheduled on H.R. 5088 during the 2nd Session of the 111th Congress to debate this legislation. In fact, according to the Bureau of National Affairs, a Democrat majority staff member has explicitly stated ‘no hearings would be held.’ This is disconcerting and we hope it is not indicative of how this bill will be considered and debated in this body.... We stand ready to work with you to ensure that the voice of the people is heard on this legislation.”<sup>22</sup>

### Clean Water Act Action Plan

On June 22, the EPA’s Office of Water and Office of Enforcement and Compliance Assurance issued an interim guidance document directing the agency’s regional directors to implement two actions outlined in EPA’s Clean Water Act Action Plan. The Plan is intended to establish clear expectations for state performance, hold states consistently accountable, and set the same expectations for EPA where it implements programs. The document notes that the actions are intended to help test the Plan’s direction and additional changes to EPA’s oversight of state programs may be needed.

The first action asks EPA regions to expand their National Pollutant Discharge Elimination System (NPDES) annual planning to include “...consideration of enforcement and permitting in an integrated way, using data and analyses from other CWA programs (such as water quality standards, assessment and monitoring), and working together with states to ensure that planned activities combine to improve water quality and that our limited resources address the most serious problems.” The second states that “...EPA regions across the country should take action where states have demonstrated long-standing problems with their permit quality or enforcement programs to demonstrate the deterrent value of enforcement, ensure a fair and level playing field across states, and equal protection for all citizens.” The document also asks regions to identify the most serious sources of pollution, conduct routine and regular meetings with states to discuss progress, and carry out regular reviews of state performance.

Of note, a memorandum accompanying the document directs regions to work with state partners to “...identify water quality priorities at the national, regional and state level and to use those priorities to guide the investment of our limited resources toward addressing the most significant

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<sup>20</sup>*Western States Water*, #1831, June 19, 2009, #1842, September 4, 2009, and #1856, December 11, 2009.

<sup>21</sup><http://naturalresources.house.gov/News/DocumentSingle.aspx?DocumentID=191758>.

<sup>22</sup>*Western States Water*, #1876, April 30, 2010.

water quality problems and the most serious violations. Where states are experiencing significant resource reductions, regions and states should engage in discussions about how to get the most important work done by exploring work-sharing and other creative approaches.”

### Green Infrastructure

In July, Senator Tom Udall (D-NM) introduced the “Green Infrastructure for Clean Water Act of 2010” (S. 3561),<sup>23</sup> which seeks to encourage the research, development and promotion of “green infrastructure” management techniques that use natural processes to address stormwater runoff. The bill would establish up to five regional centers that would research and develop these techniques and provide technical assistance to state, tribal, and local governments relating to the construction, operation, and maintenance of green infrastructure projects. The bill would also create a green infrastructure program within EPA’s Office of Water to coordinate and promote the use of new stormwater techniques, and integrate green infrastructure into permitting programs.

As for funding, the bill would authorize EPA to provide competitive grants to states, tribes, local governments, and local wastewater utilities to carry out green infrastructure projects. Grants would be limited to \$200,000 for planning and development and \$3 million for implementation activities. Although the federal cost share would not exceed 65% of a project’s total cost, EPA would be able to waive this limitation for eligible entities that adequately demonstrate financial need. The Association of State and Interstate Water Pollution Control Administrators, the National Association of Clean Water Agencies, American Rivers, and others have supported the bill.

### National Pollutant Discharge Elimination System

#### Federal Insecticide, Fungicide, and Rodenticide Act

On August 6, Senate Agricultural Committee Chair Blanche Lincoln (D-AK) and Ranking Member Saxby Chambliss (R-GA) introduced S. 3735 to clarify that National Pollutant Discharge Elimination System (NPDES) permits under the CWA would not be required for pesticide applications carried out in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The bill seeks to overturn a 2009 Sixth Circuit Court of Appeals’ ruling in *National Cotton Council v. EPA*, which struck down a George W. Bush-era EPA rule that exempted pesticide applications over water, which the judge found was an unreasonable interpretation of the CWA. The case consolidated challenges that environmental groups filed in eleven different federal circuits and therefore has national implications. The court gave EPA and states until April 2011 to develop and issue general permits for pesticide applications. The U.S. Supreme Court declined to review the decision earlier this year.

“Our legislation is very simple: as long as a producer is complying with FIFRA, then no [CWA] permit will be required,” said Lincoln in a press release. “During the more than 35 years since the enactment of the [CWA], the EPA has never required a permit for the application of FIFRA-registered crop protection products. Our bill would extend this common-sense approach and avoid duplicative, unnecessary burdens on our farmers, foresters, and ranchers.” Chambliss added,

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<sup>23</sup>[http://tomudall.senate.gov/?p=press\\_release&id=590](http://tomudall.senate.gov/?p=press_release&id=590).

“Our legislation would simply prevent the EPA from imposing an erroneous regulation that does absolutely nothing to further protect or enhance the environment.”

Of note, EPA issued a draft general permit for pesticides in June to comply with the court ruling. It would regulate biological pesticides and chemical pesticide discharges that leave a residue, and would cover a number of pesticide use patterns, including mosquito and other flying insect control, aquatic weed and algae control, aquatic nuisance animal control, and forest canopy pest control.<sup>24</sup>

On September 29, House Agriculture Committee Chairman Collin Peterson (D-MN) introduced H.R. 6273, which amends the FIFRA and the CWA to prohibit additional permits for pesticide application when pesticides are applied consistent with FIFRA. The bill is similar in purpose to S. 3735 and H.R. 6087, which Senator Blanche Lincoln (D-AR) and Frank Lucas (R-OK) introduced last month. However, those bills only amend FIFRA, while Peterson’s bill includes a conforming amendment to the CWA that states: “The Administrator [of the EPA] shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for the application of any pesticide subject to [FIFRA] if the pesticide is applied in conformance with that Act.”<sup>25</sup>

“This legislation will make clear that Congress never intended for farmers and ranchers to meet additional permit requirements for pesticide applications under FIFRA,” Peterson said.<sup>26</sup>

On December 16, twelve Republican Senators sent a letter to the Office of Management and Budget (OMB), expressing concern over EPA’s pesticides general permit (PGP). OMB is currently reviewing the PGP and the letter expresses concern over: (1) its scope; (2) the “...short timeline for states to implement and regulated entities to comply with the new regulatory scheme;” and (3) “...the extraordinary cost the new regulation will impose on affected stakeholders for minimal environmental benefit.” It also urges the Administration to “...either seek a delay from the court or use its authority to suspend enforcement of the new permit.” The following Senators signed the letter: Saxby Chambliss (GA), James Inhofe (OK), Pat Roberts (KS), David Vitter (LA), Mike Johanns (NE), Dick Lugar (IN), John Thune (SD), Chuck Grassley (IA), Lamar Alexander (TN), John Barrasso (WY), Thad Cochran (MS), and Mike Crapo (ID).<sup>27</sup>

### Water Transfers Rule

In a November 4 letter to EPA Administrator Lisa Jackson, the Western Governors’ Association (WGA) supports the agency’s water transfers rule and opposes changes. The EPA rule clarifies that water transfers are exempt from NPDES permit requirements under Section 402 of the CWA. EPA has indicated that it is reconsidering the rule. The letter states, “Western Governors support the rule in its current form and believe that transporting water through constructed conveyances to supply beneficial uses should not trigger NPDES permit requirements simply because the source and receiving water contain different chemical concentrations and physical

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<sup>24</sup>*Western States Water* #1881, June 4, 2010.

<sup>25</sup><http://agriculture.house.gov/inside/Legislation/111/HR6273.pdf>.

<sup>26</sup>*Western States Water*, #1881, June 4, 2010, and #1891, August 13, 2010.

<sup>27</sup>*Western States Water*, #1898, October 1, 2010, and #1899, October 8, 2010.

constituents. Historically, water transfers have not been subject to NPDES permitting and the federal government has deferred to the states' control of water allocation and administration within their borders.”

The letter also notes that states already have authority to address the water quality issues associated with transfers and that Congress did not intend the NPDES program to govern transfers. “To the contrary, Section 101(g) expressly states that the CWA will not supercede or abrogate the rights of states to allocate water quantities with their jurisdiction.... NPDES permitting requirements could have the effect of forcing water suppliers to forgo the full exercise of their state water rights which would directly abrogate or supersede state water law and the allocation of state water rights. This would contradict Section 101(g) and upset the long-established state-federal balance regarding water quality protections and rights to water use.”

### Cooling Water Intake Structures

EPA Administrator Lisa Jackson provided new insight into a rule her agency is developing for cooling water intake structures at existing electric power plants. In a December 16 letter to incoming House Energy and Commerce Chairman Fred Upton (R-MI), Jackson said: “I do not favor a one-size-fits all federal mandate. The proposal that EPA issues next March will reflect a common-sense approach that reasonably accommodates site-specific circumstances while keeping faith with the need to minimize adverse environmental impacts. Then EPA will invite all members of the public to offer suggestions for improving the proposal. The agency will consider those suggestions carefully before taking final action.” The letter responds to a December 3 letter from Upton, which expressed concern that the rule could impact over 400 power plants and require retrofits costing \$200 million to \$300 million per unit for coal-fired plants and \$700 million to \$1 billion for nuclear plants.

For years, EPA has been involved in multiple lawsuits regarding its effort to establish rules for cooling water intake structures under CWA Section 316(b), which requires that the location, design, construction, and capacity of cooling water intake structures reflect the best available technology for minimizing adverse environmental impact. To resolve this litigation, EPA has agreed to propose a rule covering existing power plants by March 14, 2011, with final action taking place by July 2012.<sup>28</sup>

## Corps of Engineers

### Water Planning Initiative

On September 12, the U.S. Army Corps of Engineers released its final “National Report: Responding to National Water Resources Challenges,” as part of its two-year Building Strong Collaborative Relationships for a Sustainable Water Resources Future Initiative. The document sets forth general recommendations and suggested actions for advancing integrated water resources management. The Corps prepared the report after reviewing the water plans of the 50 states,

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<sup>28</sup>*Western States Water*, #1821, April 10, 2009.

interviewing state and federal water officials, and holding three regional conferences and one national conference. WSWC representatives and other water officials participated. It also follows on a number of other assessments that described water resources needs, including the Western Governors' Association's (WGA) 2008 "Next Steps" report.

The report identifies nine overarching water resources themes and includes recommendations and suggested actions to: (1) "make integrated water resources management [IWRM] more understandable and a preferred way to plan and manage public water and related land resources as a system;" (2) "strive to revitalize and/or reshape means at all levels of government to improve water resources management, decision making and evaluation in ways that build the public will to act for integrated water resources planning and management;" (3) "foster continued dialogue about a sustainable national water resources future direction and develop supporting strategies to elevate water resources and related infrastructure as a critical national priority;" (4) "promote opportunities and mechanisms for collaborative water resources planning and management;" (5) "promote and develop innovative and sustainable financing mechanisms for public water resources solutions, including water infrastructure, at Federal and state levels;" (6) "increase the ability to anticipate risks and manage emergency and evolving natural or man-made disasters, especially as related to water resources;" (7) "base the development of water resources plans and decision making upon good science and the sharing of information and technology," while increasing scientific and management knowledge and technological capabilities at all levels of government; (8) "build and reinforce leadership and stewardship for responsible water resources management among water professionals across Federal, tribal, interstate and state agencies, and at large;" and (9) enhance the ability of public officials and stakeholders to understand and communicate priorities "...through awareness-building, formal and informal education, learning initiatives, public outreach, and communication activities."

The report also notes: "A Federal Support Toolbox of Federal authorities, programs, technical tools, and scientific and management information would facilitate Federal agencies to support water planning across the Nation. There are opportunities to begin collaborating: the need for a national water resources direction to include a water resources vision and unified principles and policies requires continued discussion; governance issues must be addressed to clarify roles and responsibilities and to promote integration instead of fragmentation; data and information must be probed and shared for better planning; implications of risk must be effectively communicated and built into decision models; and vehicles to share information across levels of government must be developed."

It continues: "The Federal government, tribes, states, interstate organizations and nongovernmental organizations have important roles in the stewardship of our Nation's water resources, which can be made even more effective through collaboration. Appropriate roles and responsibilities for water planning and management can be more clearly defined in the context of the national interest. The Federal government has a legitimate role to ensure consistency and equity across groups, especially to protect the disadvantaged, and to conduct assessments for economic and environmental needs. To foster IWRM, an appropriate role for the Federal government may be that of integrator. Many participants in this initiative extolled the supporting role of the interstate organizations as vanguards in furthering integrated approaches and outcomes. The fragmentation of governance mechanisms at all government levels hinders government ability to support states'

water resources planning and [IWRM] in collaborative ways.... The Corps desires to continue the dialogue with a national team of strategic allies joined by shared goals for the protection and enhancement of the Nation's water resources."<sup>29</sup>

## Water Resources Development Act

### Principles and Guidelines

On March 3, the House Committee on Transportation and Infrastructure held a hearing to receive testimony on the implementation of the Water Resources Development Act of 2007 (WRDA). Among other things, WRDA called upon the Corps to update its Principles and Guidelines (P&Gs), which govern water and related resources implementation studies for the Corps and all other federal water projects.

In his opening statements, Committee Chair James Oberstar (D-MN) said, "The revisions to the planning [P&G] are woefully behind schedule. According to the President's budget, the revisions will be four years late, and that is if the current timetable is met. While these delays are due in part to the involvement of the [Office of Management and Budget] and [the Council on Environmental Quality], the Secretary has the statutory responsibility to meet the Congressional deadline." Eddie Bernice Johnson (D-TX), Chair of the Water Resources and Environment Subcommittee, also said, "...we mandated that the Corps assign a unique tracking number for each water resources project – again, our research shows that this has yet to be implemented."

Assistant Secretary of the Army Jo-Ellen Darcy discussed the Corps' implementation of WRDA. She said the revisions to the P&Gs, known as "The Proposed National Objectives, Principles and Standards for Water and Related Resource Implementation Studies" (P&S), are undergoing a National Academy of Science review and could be released in final form in the spring of 2011. She further said, "The proposed P&S include a number of important changes that modernize the current approach to water resources development in this country, which include achieving co-equal goals of economic and environmental sustainability; considering monetary and non-monetary benefits; reflecting the value of water resources projects to low income communities; avoiding the unwise use of floodplains; and increasing transparency." The public comment period for the P&S was extended to April 5.<sup>30</sup>

Of note, the Committee released a briefing paper on the same day as the hearing, criticizing the Corps' implementation of WRDA. It found that "...rather than swiftly and enthusiastically embracing the reforms of WRDA 2007, the Corps has been slow in its implementation, and has often modified its implementation to fit its intended results at the expense of the language of the statute and Congressional intent." The report further said that the Corps has failed to follow its mitigation requirements, submit larger and controversial project proposals to an independent review, improve

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<sup>29</sup><http://www.building-collaboration-for-water.org/>. *Western States Water*, #1859, December 31, 2009, and #1862, January 22, 2010.

<sup>30</sup><http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG>.

the quality of modeling and analysis, update the P&Gs, and streamline its project formulation and delivery process.<sup>31</sup>

On April 5, the WSWC sent a comment letter to the Council on Environmental Quality (CEQ) regarding its new draft Principles and Guidelines (P&Gs) for federal water projects and programs. The letter says states and tribes should be recognized as governments and that the P&Gs should acknowledge the states' role in allocating and administering water rights. It also cites the WSWC and Western Governors' Association's 2008 Next Steps Report, which calls for state and local government participation in the federal decisionmaking process, and urges federal agencies to use state water plans when determining national water policy and making decisions on regional water issues.

The letter endorses various aspects of the P&Gs, including the consideration of state plans in selecting alternatives, collaboration with states, the sharing of information, and the use of state planning boundaries to define study areas. It also reiterates, "We concur that National Economic Development (NED) should not be the only national planning objective, but other benefits should be recognized and taken into account in project formulation and in determination of the justification to proceed with authorization and implementation. Planning for water projects based strictly on a NED objective...would not be compatible with existing state water plans and planning efforts in many of the states. If the states are asked to cost share in a project, then the plan must reflect the states' objectives."

The letter continues: "It should be noted that cost-sharing requirements are one of the biggest changes in Federal water resources planning and implementation, since the 1983 P&Gs, and have risen from an initial proposal for a non-Federal share of only 5% of projected project costs, to a general minimum cost-sharing requirement of 35% under the 1986 Water Resources Development Act, and much more under some Federal programs. Cost sharing has become accepted evidence of a State's or other project sponsor's willingness-to-pay, as compared to other economic valuation theories and strategies for prioritizing Federal projects and programs."<sup>32</sup>

On July 1, seven western Congressmen sent a letter to Rep. Nick Rahall (D-WV), Chair, House Committee on Natural Resources, and Subcommittee on Water and Power Chair Grace Napolitano (D-CA), requesting an oversight hearing on the CEQ's revision of the P&Gs are intended to apply to all federal water resources planning efforts by all agencies. The old P&Gs governed water and related resources implementation studies for the U.S. Army Corps of Engineers and U.S. Bureau of Reclamation.

"While no one disagrees that the law must be implemented, there are many questions why the Administration is seeking to expand its reach to include other agencies outside of the [Corps] and the role of these agencies in this process," the letter said. "There are also concerns that the first draft of this effort elevates the consideration of non-structural and environmental elements over economic and human benefits and safety in the planning phase of project development. Many believe that this

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<sup>31</sup>*Western States Water*, #1833, July 3, 2009, and #1835, July 20, 2009.

<sup>32</sup>*Western States Water*, #1855, December 4, 2009.



supersedence was never the intent of [WRDA]. For this reason, many western water interests who depend on multi-purpose [Reclamation] facilities and irrigation projects are concerned that the Obama Administration's new draft standards will undermine efforts to rehabilitate current projects and that some future water projects will never come to fruition."

The letter continues: "We simply believe that it is possible to balance the needs of humans and the environment when it comes to protecting and promoting traditional water infrastructure (including dams, clean and emissions-free hydropower, irrigation canals, river navigation aids and levees). For over a century, these projects have provided benefits to millions of Westerners and affordable food for Americans nationwide. An examination of the impacts of the proposed [P&Gs] is not only necessary for these successes to continue but is one of the most important oversight responsibilities of this Congress." Republican Representatives Doc Hastings (WA), Tom McClintock (CA), Rob Bishop (UT), Cathy McMorris Rodgers (WA), Adrian Smith (NE), Jason Chaffetz (UT), and Mike Coffman (CO) signed the letter.<sup>33</sup>

### **Endangered Species Act**

#### Bull Trout/Critical Habitat

The U.S. Fish and Wildlife Service has proposed a revision to its 2005 designation of critical habitat for the bull trout, a threatened species protected under the Endangered Species Act (ESA). In total, the Service is proposing to designate about 22,679 miles of streams and 533,426 acres of lakes and reservoirs in Idaho, Oregon, Washington, Montana, and Nevada. Estimated costs for the proposal include \$5 million to \$7 million per year for the next 20 years, primarily for additional federal agency consultation requirements, and \$2.1 million to \$2.5 million per year for fish passage improvements at more than 70 federal and non-federal dams. Forest management changes could run an additional \$400,000 to \$1.65 million per year. Approximately 58% of the proposed critical habitat occurs on federal land, while 36% and 2% are found on state and tribal land respectively.

"This proposed revision is the result of extensive review of our earlier bull trout critical habitat proposals and 2005 designation, public comments and new information," said Robyn Thorson, director of the Service's Pacific Region. "We voluntarily embarked on this re-examination to ensure that the best science was used to identify the features and areas essential to the conservation of the species."<sup>34</sup>

#### Delta Smelt

The U.S. Fish and Wildlife Service (FWS) recommended reclassifying California's delta smelt as "endangered," from "threatened," under the Endangered Species Act (ESA). Although FWS is unable to determine which threats are directly responsible for the decrease in smelt populations, it says the fish meets the definition of an endangered species because its low numbers, in concert with ongoing threats, indicates that it is now in danger of extinction.

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<sup>33</sup>*Western States Water*, #1855, December 4, 2009.

<sup>34</sup><http://www.fws.gov/pacific/bulltrout>.

However, FWS said the need to address other, higher priority species first, precludes reclassification at this time. Reclassification is a lower priority because current protections already prohibit “take” of the threatened smelt in the same way as an endangered species. Thus, the recommendation will have no practical effect on protections for the smelt, existing federal actions, or water flows in the delta smelt habitat.<sup>35</sup>

### San Joaquin-Sacramento Delta Pumping Restrictions

On February 10, Judge Oliver Wanger of the U.S. District Court for the Eastern District of California denied a request by the Westlands Water District and other water agencies to temporarily postpone new pumping restrictions for the San Joaquin-Sacramento Delta. The U.S. Fish and Wildlife Service (FWS) ordered the restrictions under a standing federal biological opinion (BiOp) designed to protect the endangered Delta smelt pursuant to the ESA.

Interestingly, a week prior, Wanger issued a decision that temporarily suspended another BiOp aimed at protecting migrating salmon in the Delta. However, that decision led to an increase in pumping that entrained smelt, thereby prompting FWS to impose the new restrictions. Since the smelt BiOp requires lower pumping rates than the salmon BiOp, Wanger’s decision this week renders moot his prior decision to suspend the salmon BiOp. San Joaquin Valley water agency representatives say the restrictions will result in the loss of 90,000 acre-feet of water. They also indicated that they will try again to get Wanger to lift the restrictions next week.<sup>36</sup>

On May 25, Judge Oliver Wanger temporarily lifted the pumping restrictions in Sacramento-San Joaquin Delta that are intended to protect native salmon and steelhead trout, until June 15. Some farm groups have estimated that it could mean an extra 200,000 acre-feet of water for farmers, many of whom have left large tracts of land fallow because of the extended drought and Delta pumping restrictions. The ruling follows a May 18 decision in which Wanger said the National Marine Fisheries Service, which developed the restrictions as part of a biological opinion, had acted “...arbitrarily and capriciously in formulating [pumping limits] to protect threatened species under the ESA that lack factual and scientific justification, while effectively ignoring the irreparable harm those actions have inflicted on humans and the human environment.” He also said the limits were the “product of guesstimations.” Of note, Wanger is expected to issue a ruling in a similar case involving pumping restrictions aimed at protecting the Delta smelt, which is also listed under the ESA. Such a ruling could have an additional impact on pumping in the Delta.

### Columbia River/Salmon

Judge James Redden of the U.S. District Court for the District of Oregon, the federal judge overseeing efforts to make the Columbia River Basin’s hydroelectric dams safer for salmon has given National Oceanic and Atmospheric Administration’s (NOAA) Fisheries until February 19 to

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<sup>35</sup><http://www.fws.gov/cno/press/release.cfm?rid=69>.

<sup>36</sup>*Western States Water*, #1808, January 9, 2009, #1821, April 10, 2009, and #1830, June 12, 2009.

decide whether to voluntarily take back its proposed improvements to a George W. Bush-era biological opinion. In litigation stretching back over 15 years, the federal government has attempted to determine how to best balance water needs for hydroelectric power and wild salmon in the Columbia Basin. In September, the Obama Administration set forth a conservation plan, known as the “Adaptive Management Implementation Plan,” which included climate change monitoring and proposed removing dams as a “last resort.”

Judge Redden said he cannot consider the revisions until they are formally included in the overall biological opinion. He also urged the agency to produce a stronger plan, saying: “I will not sign an order of voluntary remand that effectively relieves Federal Defendants of their obligation to use the best available science and consider all important aspects of the problem. This court will not dictate the scope or substance of Federal Defendant’s remand, but Federal Defendants must comply with the ESA in preparing any amended/supplemental biological opinion.”

Redden has found twice before that federal plans violated the ESA for not adequately protecting salmon, thereby forcing the government to devote more water to fish and less to power production. He has also urged NOAA Fisheries to work with Oregon and the other parties in the case.<sup>37</sup>

The federal government will spend an additional three months revising its plan on how to operate dams in the Columbia River Basin, while also protecting salmon, which are listed as threatened under the ESA. In a statement, NOAA Administrator Jane Lubchenco said, “We look forward to moving out of the courtroom and focusing on the protection and restoration efforts that make the most difference for Northwest salmon and the communities that rely on them.”

### Jollyville Plateau Salamander

On September 9, the Center for Biological Diversity (CBD) and the Save Our Springs Alliance notified the Fish and Wildlife Service (FWS) of their intent to sue to obtain emergency ESA protections for the Jollyville Plateau salamander, which is found in Texas. At issue is the construction of an Austin water treatment plant and associated transmission tunnels. The groups claim the construction poses an “urgent threat” to the salamander’s survival because it will take place in the “heart” of its habitat. “The Jollyville Plateau Salamander needs immediate protection under the Endangered Species Act,” said CBD attorney Collette Adkins Giese. “The fact that one population has already been lost to drilling demonstrates there is a significant risk....”

In 2007, the FWS determined that the salamander warranted listing as a threatened or endangered species under the ESA. However, it also found that such a listing was precluded and delayed protection of the species. The ESA requires FWS to monitor precluded species and provide emergency protections if their survival is threatened. A CBD press release says such emergency protections are warranted, citing a letter three University of Texas scientists sent FWS in April, expressing concerns that constructing the plant could “...pose a major threat to the species, both in the short and long-term.” The letter also said, “If the City cannot prove the project will have no

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<sup>37</sup>*Western States Water*, #1785, August 1, 2008, and #1804, December 12, 2008.

adverse effects, the Service should proceed with listing the salamander as endangered so as to force necessary conservation measures on the City's activities.”

## **Energy and Water**

The WSWC is working with the WGA and the National Laboratories under a contract with the Department of Energy (DOE) to develop water demand projection and water availability models as a basis for estimating and evaluating water needs for electric power generation and other energy uses. The WSWC and WGA will also evaluate the impacts of those demands on other water use sectors. As part of this effort, the WSWC is providing expert advice and state-generated data, and is preparing and gathering information on the state institutions, statutes, policies and processes that govern water rights and control the allocation and use of water in the West.

Specific actions in 2010 included a joint effort with Sandia National Laboratories and Arizona, Colorado, Oregon, and Texas to begin gathering the state water data needed to develop the project's water demand and availability models. Among other efforts, WSWC and WGA staff also worked with Sandia and DOE to develop a study on the potential impacts of drought on electric generation for consideration in long-term transmission modeling and planning by the Western Electricity Coordination Council and Electric Reliability Council of Texas.

## **Exempt Wells Report**

The WSWC prepared a report that discusses the costs and benefits of monitoring exempt wells and potential approaches to mitigate their impacts. The Lewis and Clark Law School's "Environmental Law" journal published the report in March 2010.

The report found that all but two western states exempt certain amounts of ground water used for domestic and livestock purposes from their permitting and/or adjudication procedures. These "exempt" wells have the potential to create significant regulatory and administrative challenges and could impact the sustainability of water supplies, surface flows, and water quality.

Among the key findings were the following:

There is no single approach for addressing exempt well use and each state's individual circumstances will determine how and if it should mitigate exempt well impacts.

Permitting and monitoring exempt wells on a statewide basis may not be politically or administratively feasible for all states.

Some states may need to use narrow approaches that address specific concerns as opposed to efforts with statewide applications.

States may also need to work with stakeholders to create negotiated solutions that address concerns while allowing responsible exempt uses.

Efforts to mitigate the adverse impacts of existing exempt wells will likely be more costly and difficult than prospective measures that prevent future impacts.

Examples of possible prospective measures include water banks, limiting the number and type of exempt uses, ensuring proper well construction, and restricting new exempt wells in areas with community water systems and/or limited water supplies.

Metering exempt wells will not show how much water exempt wells consume and will not curtail exempt use because most users appear to comply with exemption limits.<sup>38</sup>

## **Indian Water Rights**

### **Blackfeet Settlement**

On April 29, Senators Max Baucus (D-MT) and Jon Tester (D-MT) introduced legislation (S. 3290) that would authorize the Blackfeet Indian Tribe's water settlement. The settlement is the result of over 20 years of negotiations between the Tribe, Montana, the federal government, and local communities. If approved, it would quantify the Tribe's water rights and protect existing water users. It would also authorize \$591 million in federal funding to build drinking water systems, irrigation systems, and water storage projects.

"This is an historic moment for the Blackfeet tribes and for the Montanans who call these communities home," Baucus said. "Montanans of all stripes worked together on this plan. Now we're taking the ball and moving it closer to the goal line to finally solve these long-standing disputes. Likewise, Tester said, "Now its time for Congress to honor this agreement by setting it in law. We're going to work hard to get it done."<sup>39</sup>

### **Crow Settlement**

In June, the Department of Interior sent a letter to House and Senate Committee leaders with jurisdiction over Indian water rights settlements in support of changes to legislation (H.R. 3563) that would authorize the Crow settlement in Montana. The letter comes after two and a half months of negotiations between the Crow Tribe and Interior to address a number of Administration concerns, including the total federal cost of the settlement, which the modified legislation would reduce from over \$600 million to no more than \$460 million. The letter also said negotiations began after the Tribe offered to work with Interior to address concerns and agreed to put all issues on the table, including the settlement's overall cost.

The modified legislation would further address Administration concerns that the settlement would benefit non-Indians, but contained no cost-sharing provisions other than a \$20 million

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<sup>38</sup>WGA 2008 Next Steps Report, p. III, 3.(d).

<sup>39</sup>[http://tester.senate.gov/Newsroom/pr\\_042910\\_blackfeet.cfm](http://tester.senate.gov/Newsroom/pr_042910_blackfeet.cfm). *Western States Water*, #1828, May 29, 2009.

contribution from Montana. In particular, it would include language that would provide for further discussions with Montana and other non-Indian beneficiaries to determine whether a non-federal contribution to a municipal, rural and industrial water system proposed in the settlement would be appropriate based on the extent of utilization of the proposed system by non-federal parties, if any. Other changes are intended to ensure that allottees have “appropriate access” to settlement benefits and make technical corrections to reflect the intent of certain provisions.

“In conclusion, the Administration believes that most of its major policy objections to H.R. 3563 are satisfactorily addressed in the revised legislation, and that the revisions substantially improve the bill,” the letter said. “Given the budget challenges facing the Federal Government over the next several years, the revised bill would allow the Government to fulfill the Federal trust responsibility while also acting with proper regard for fiscal limitations that exist both now and in the foreseeable future. We are pleased to express our support for H.R. 3563 as the Tribe proposes to amend it.... The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the President’s program.” Counselor to the Deputy Secretary Letty Belin and Bureau of Reclamation Commissioner Mike Connor signed the letter.<sup>40</sup>

### Pechanga Settlement

On September 16, the House Natural Resources Committee, Subcommittee on Water and Power held a legislative hearing on H.R. 5413, which would authorize a settlement of the water rights of the Pechanga Band of Luiseno Mission Indians in southern California. The settlement as proposed in the bill would recognize a “tribal water right” to 4,994 af/year from a number of sources, including 1,575 af/year of local ground water, 525 to 700 af/year of imported recycled water, and up to 3,000 af/year of imported potable water. It also calls for \$50.2 million in federal funding, including \$25.38 million to help the Band purchase potable water from the Metropolitan Water District of Southern California and \$24.86 million for infrastructure to treat and deliver water imported to its reservation.

In her opening statement, Subcommittee Chair Grace Napolitano (D-CA) said, “While we see many positive aspects of this settlement, we also have concerns regarding Allottee protections and the costs associated with the legislation.” Napolitano further addressed the concept of having the Department of Justice (DOJ) certify that each settlement is a “net benefit” to taxpayers. “This belief is a fundamental misunderstanding of the settlement process,” she said. “We recognize the importance of DOJ’s opinion, but it is simply that – only DOJ’s opinion and only addresses specific issues and narrow concerns – primarily litigation outcomes. It does not represent the view of the entire Administration, from all the agencies – including [the Office of Management and Budget] – and departments involved. Asking for DOJ’s approval of water settlements substitutes the views of a federal agency in Washington for the opinions of the tribe, their non-tribal neighbors, and local governments who have come together to find certainty in their community’s water supply and finality to ongoing litigation. Binding Congress to DOJ’s opinion also abdicates congressional authority to the executive branch, something we will not support.”

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<sup>40</sup>*Western States Water*, #1845, September 25, 2009, and #1888, July 26, 2010.

George Skibine, Acting Principal Deputy Assistant Secretary for Indian Affairs, testified on behalf of the Administration. “A fundamental issue is the cost to supply the Reservation with the quantity of water proposed in the settlement,” he said. Skibine also discussed the settlement’s proposal to build infrastructure to reduce the salinity of the recycled water the Band would receive, stating, “The Administration believes that there may be more cost efficient ways to deal with the salinity of the Band’s settlement water, and discussions about that issue are on-going...” Other concerns pertain to the bill’s waivers, the non-federal cost-share, and the fact that the settlement covers the Band’s water rights in only one of the two watersheds in which its reservation is located.

The Band’s Chairman Mark Macarro said the Band “...is settling its longstanding claims against the United States and other parties, and is accepting less water than it could otherwise obtain in exchange for a commitment for the delivery of ‘wet’ water in replacement for its ‘paper’ water rights. The Federal contribution is commensurate with the Federal government’s unfulfilled responsibilities with respect to the Band’s water rights and its liabilities relating to the same.”<sup>41</sup>

### Claims Resolution Act of 2010

On November 19, the Senate passed the Claims Resolution Act of 2010 (H.R. 4783), an omnibus bill that would authorize the Aamodt, Crow, Taos, and White Mountain Apache water rights settlements, as well as over \$1 billion in federal funding. It would also authorize the *Cobell* settlement, a \$3.4 billion agreement that would resolve a class action lawsuit regarding the federal government’s alleged mismanagement of more than 300,000 individual Indian trust accounts. The House previously passed earlier versions of the water settlements. Interior has worked with tribes over the last year to address Administration concerns and issued letters supporting each of the water rights settlements.

Title III of the bill authorizes \$292 million for the White Mountain Apache settlement in Arizona, including the construction of a rural water system as its centerpiece. Of this amount, the bill includes “mandatory appropriations” of \$126 million to plan, design, and construct the water system. It would also recognize a tribal entitlement to 23,782 af/year of Central Arizona Project (CAP) water, which the Tribe could lease to cities in the Phoenix metro area. Secretary Salazar announced the release of an Administration letter supporting the settlement during last week’s National Congress of American Indians’ Annual Convention in New Mexico. “The message from this Administration is clear,” he said. “We want to settle Indian water rights disputes and we will support good Indian water settlements that result from negotiations with all stakeholders including the Federal government, and that come with a reasonable federal price tag and good cost share contributions from states and other benefitting parties.”<sup>42</sup>

Title IV outlines the provisions of the Crow Settlement in Montana, which is intended to ensure safe drinking water for the reservation and provide for the rehabilitation of the Crow

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<sup>41</sup><http://naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=205470>. *Western States Water*, #1862, January 22, 2010.

<sup>42</sup><http://www.doi.gov/news/pressreleases/Salazar-Outlines-Progress-of-Empowerment-Agenda-in-Speech-to-National-Congress-of-American-Indians.cfm>.

Irrigation Project. The reservation's existing drinking water system has significant deficiencies in capacity and water quality that have resulted in health problems. The bill would authorize up to \$460 million in federal funding, and would direct immediate spending of \$301 million.

The details of the Taos settlement in New Mexico are outlined in Title V. This settlement solidifies and makes permanent water-sharing arrangements between the Pueblo of Taos and neighboring communities. It also protects and restores the Pueblo's Buffalo Pasture, a culturally sensitive and sacred wetland. The overall cost is \$144 million, with a federal contribution of \$124 million. The bill also includes \$66 million in immediate spending to purchase water rights and construct projects to help improve water use efficiency, ground water management, and water quality in the Taos Valley.

The Aamodt settlement in New Mexico comprises Title VI and would end one of the longest running water rights cases, after nearly 43 years of litigation. The settlement provides for the construction of a regional water system to serve the Pueblos of Tesuque, Nambe, Pojoaque, and San Ildefonso, as well as surrounding communities in northern New Mexico. The total cost of the settlement is estimated to be \$291.2 million, with a federal contribution of \$174.3 million to be paid over 13 years. State and local contributions will total about \$116.9 million. This represents a 60%/40% federal and non-federal cost share. The bill immediately makes available \$81.8 million to implement the settlement.

Of note, the package immediately provides \$180 million to the Reclamation Water Settlements Fund to implement the Navajo Nation's settlement with New Mexico, which Congress authorized as part of the Omnibus Public Lands Management Act of 2009. The funds will be used to construct the Navajo-Gallup pipeline.

President Obama praised the bill's passage in a statement, saying, "I support these settlements and my Administration is committed to addressing the water needs of tribal communities." Likewise, Secretary of the Interior Ken Salazar said, "I am also deeply proud of the passage of the four water rights settlements that will deliver clean drinking water to Indian communities, end decades of controversy and contention among neighboring communities, and provide certainty to water users across the West." Assistant Secretary for Indian Affairs Larry Echo Hawk said the water settlements were "...nothing less than historic for Indian nations."

Senators Jeff Bingaman (D-NM) and Tom Udall (D-NM), who introduced earlier bills to authorize the Taos and Aamodt settlements, also issued a joint statement. "Under these settlements, thousands of New Mexicans will have...certainty about their water rights – a goal that is 40 years in the making," said Bingaman. Udall said, "In an arid state like ours the importance of water rights cannot be overstated and this resolution is mutually beneficial to all water users in the Pojoaque and Taos valleys." Senator Jon Kyl (R-AZ), who introduced authorizing legislation for the White Mountain Apache settlement, said it will provide certainty to Arizona water users and will provide the tribe with a "...clean, reliable source of drinking water." Senator Jon Tester (D-MT) said passage of the Crow settlement was "long overdue."<sup>43</sup>

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<sup>43</sup>*Western States Water*, #1895, September 19, 2010, and #1862, January 22, 2010.



On November 30, the House passed the Claims Resolution Act of 2010 (H.R. 4783) by a vote of 256-152. Only 16 House Republicans voted for the bill. Rep. Tom McClintock (R-CA), the current Ranking Member of the House Subcommittee on Water and Power, which has jurisdiction over Indian water rights settlements, voted against the bill. In a floor speech, he expressed concern that the settlements will cost more than if the tribes had litigated their water rights in court. He also said, “I believe Congress needs to demand that the Administration be candid and forthcoming in all claims for settlement, and that Congress insists that before it begins deliberating on a settlement, that the Attorney General has conducted and completed the negotiations, determined all the details, certified that the settlement is within the legal liability of the government and only then submits that settlement for consideration by Congress. Anything less is breaching the fiduciary responsibility that we hold to the people of the United States.”<sup>44</sup>

The bill was sent to President Obama, who signed it on December 8. “This bill...provides funding for settlements reached in four separate water rights suits brought by Native American tribes, and it represents a significant step forward in addressing the water needs of Indian Country,” the President said in a statement. “[This]...represents a major step forward in my administration’s efforts to fulfill our responsibilities and strengthen our government-to-government relationship with the tribal nations,” he said. “Yet, while today’s vote demonstrates important progress, we must remember that much work remains to be done.”

## **Interior/WaterSMART**

### National Water Census and WaterSMART

On February 22, Department of the Interior (DOI) Secretary of the Interior Ken Salazar signed a secretarial order establishing an initiative known as WaterSMART (Sustain and Manage America’s Resources for Tomorrow). “The federal government’s existing water policies and initiatives simply aren’t built for 21<sup>st</sup> century pressures on water supplies,” Salazar said. “I believe it is time for the federal government to join the movement toward a more sustainable water future.”<sup>45</sup> Salazar’s order will help implement portions of the SECURE Water Act, which President Obama signed into law last year, as part of the Omnibus Public Lands Management Act.

Among other things, WaterSMART calls for water conservation actions to increase available water supplies by 350,000 acre-feet by 2012 for agricultural, municipal, industrial, and environmental uses. Several parts of the order are aimed at improving water management through conservation and helping water managers make wise decisions about water use.

First, it calls for a national framework to integrate and coordinate the water sustainability efforts of the Department and its state, federal, and private partners. To do this, the Initiative will: (1) coordinate with the Task Force on Energy and Climate Change to identify the water footprint of energy technologies; (2) work with the Energy and Climate Change Council, the DOI Climate Science Centers, and the Landscape Conservation Cooperatives to obtain the best available climate

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<sup>44</sup>*Western States Water*, #1862, January 22, 2010, and #1906, November 26, 2010.

<sup>45</sup>[http://www.doi.gov/news/pressreleases/2010\\_02\\_22\\_release.cfm](http://www.doi.gov/news/pressreleases/2010_02_22_release.cfm).

change science on water impacts and integrate sustainable water strategies within the field offices of the Department's bureaus and agencies; and (3) establish a water footprint reduction program to reduce the Department's potable water consumption by 26% by 2020 and its industrial, landscaping, and agricultural consumption by 20% by 2020.

Second, it will create a WaterSMART clearinghouse to "...convene interested governmental entities, water user and supplier organizations, conservation and scientific organizations, and others to identify best practices in water conservation, incentives, the most cost-effective technologies that stretch existing water supplies, and actions that integrate energy and water policies...."

Third, with respect to the energy-water nexus, the Initiative will ensure that Interior "...applies criteria that identify and support projects and actions that promote sustainable water strategies, and support development of incremental hydroelectric power generation."

Fourth, the Initiative "...will evaluate the information needed for sound decision-making on sustainable water and will determine whether there is adequate information about the availability, quality, and use of water across the Nation for this purpose. The Initiative will make recommendations for enhancements to information collection analysis and delivery where needed."

The WaterSMART Initiative expands existing Bureau of Reclamation grant programs and river basin studies, and provides funding to the U.S. Geological Survey (USGS) to conduct a National Water Census (for the first time in some 30 years). President Obama's proposed FY2011 budget request for WaterSMART is \$72.9 million, representing an increase of \$36.4 million over similar 2010 programs. The Administration's FY2011 budget request included \$9 million to fund WaterSMART's availability and use assessment and the USGS has organized an ad hoc committee of which the WSWC is a member in order to draft a conceptual framework for such an undertaking.

The WaterSMART program will be implemented by a Task Force chaired by Assistant Secretary of Water and Science, Anne Castle, with help from Interior's other Assistant Secretaries, bureau heads, and the Solicitor's Office. The Secretary and the Deputy Secretary will serve as ex-officio members.

Assistant Secretary Castle, kicked off the Initiative at a workshop in Las Vegas on February 23-24. About 160 stakeholders from across the seven Colorado River Basin States came together to help frame the new Initiative and discuss issues and ideas on how to improve water conservation and water management as a means of addressing future challenges.

## **Landsat Data Continuity Mission**

### **Thermal Infrared Sensor**

In February 2010, the WSWC and WGA were successful after years of effort working tirelessly with the Administration and the Congress, in securing a FY2011 budget request from the National Aeronautics and Space Administration (NASA) to include a thermal infrared sensor (TIRS) as part of its Landsat Data Continuity Mission (LDCM) scheduled for launch in 2012. Thermal data

is used by more and more states to accurately measure various consumptive water uses, particularly agricultural uses.

The Council also worked extensively with western Senators and members of the House to secure bipartisan support for federal funding for TIRS.

## **Litigation/Water Rights**

### Snake Valley Aquifer

On January 28, the Nevada Supreme Court issued a decision that could delay or upend a Southern Nevada Water Authority (SNWA) proposal to pump 50,000 acre-feet of water per year from the Snake Valley aquifer on the Nevada-Utah border to Las Vegas via a 285-mile, \$3.5 billion pipeline. In turn, the decision could impact a related, possible agreement between Nevada and Utah over how to divide groundwater in the aquifer.

At issue is the timing of the Nevada State Engineer's approval of the water rights applications that SNWA filed for the pipeline in 1989. When SNWA filed its applications, Nevada law required the State Engineer to process water right applications no later than one year after the end of a formal protest period. The State Engineer did not process the applications within the necessary time period. In 2003, the Nevada Legislature amended the law to let him postpone action on water-rights applications for municipal use. However, the Legislature did not make its changes retroactive, raising legal questions as to the status of SNWA's filings.

In a unanimous decision, the court stated, "Because we determine that the 1989 water appropriation applications were not pending in 2003, we conclude that the (Nevada) State Engineer violated his statutory duty by failing to take action within one year after the final protest date. Thus, we reverse the order of the district court and remand for a determination of whether SNWA must file new groundwater appropriation applications or whether the State Engineer must re-notice SNWA's 1989 applications and reopen the period in which appellants must file protests."<sup>46</sup>

As a result of the ruling, Utah Governor Gary Herbert (R) has put the Snake Valley negotiations on hold. "This ruling significantly changes the landscape upon which our ongoing discussions have been based," he said. "It also allows us to revisit the proposed agreement with the state of Nevada and ensure that our continued desire to protect Utah's water interests and the environment is met." He further stated, "Based on the additional requirements imposed by the Nevada Supreme Court, an agreement, at this time, is premature."<sup>47</sup>

Of note, SNWA has spent millions on studies, preliminary designs, and legal work for the pipeline project, which is expected to supply enough water for more than 250,000 homes and reduce Las Vegas' reliance on the Colorado River. Nevada Department of Conservation and Natural Resources Director Allen Biaggi, a WSWC member, has expressed concern that the ruling could call into question other water permits issued before 2002 and could impact hundreds of pending

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<sup>46</sup><http://www.nevadajudiciary.us/images/advanceopinions/126nevadvopno2.pdf>.

<sup>47</sup>[http://www.utah.gov/governor/news\\_media/article.html?article=2950](http://www.utah.gov/governor/news_media/article.html?article=2950).

applications. Allen crafted a legislative fix for state lawmakers to consider. Nevada Governor Jim Gibbons (R) will determine whether or not to ask that it be added to the session's agenda.<sup>48</sup>

A petition filed on March 15 with the Nevada Supreme Court on behalf of the Nevada State Engineer asked the court to reconsider its January 28 decision. The petition argues that the decision could impact thousands of other water rights in Nevada and asks the court to reconsider the decision so that it only affects SNWA. At the same time, it also asks the court to indicate that the State Engineer should not re-open approved water right cases where there is no documented evidence that there was an unheard protestor.

Of note, the Nevada Legislature did not issue a "legislative fix," but WSWC member Allen Biaggi, the Director of the Nevada Department of Conservation and Natural Resources, has not ruled out the possibility of the Governor requesting another session to address the subject.<sup>49</sup>

A June 17 Nevada Supreme Court decision led to the reopening of the protest periods for ground water applications associated with the SNWA proposal. In 2006, a number of parties in Nevada and Utah petitioned the State Engineer to re-notice SNWA's applications and to re-open the protest period. The State Engineer denied the request and the parties filed a petition for judicial review, which the district court denied. The parties then appealed and the Nevada Supreme Court has reversed the district court, finding that the 2003 amendment did not apply retroactively and that the State Engineer had not acted within the one-year time period as required by law. The court also remanded the case to the district court for further consideration as to whether SNWA needed to re-file its applications or if the State Engineer need only re-open the protest period. SNWA and the State Engineer subsequently filed petitions with the Nevada Supreme Court for a rehearing.

On rehearing, the court reaffirmed that the 2003 amendment is not retroactive and that the State Engineer did not act in a timely manner. However, it clarified that the "proper and most equitable remedy" is for the State Engineer to re-notice the applications and re-open the protest period. "Voiding the State Engineer's ruling and preventing him from taking further action would be inequitable to SNWA and future similarly situated applicants. And applicants cannot be punished for the State Engineer's failure to follow his statutory duty," it said. "Similarly, it would be inequitable to the original and subsequent protestants to conclude that the State Engineer's failure to take action results in approval of the applications over 14 years after their protests were filed."<sup>50</sup>

## Oklahoma

### Tarrant Regional Water District

In February, the Tarrant Regional Water District in Texas renewed its 2007 challenge to an Oklahoma embargo on out-of-state water sales. Tarrant had been trying to appropriate Oklahoma water that feeds into the Red River and filed a lawsuit in federal court against the Oklahoma Water

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<sup>48</sup>*Western States Water*, #1837, July 31, 2009, and #1840, August 21, 2009.

<sup>49</sup>*Western States Water*, #1865, February 12, 2010.

<sup>50</sup><http://www.nevadajudiciary.us/images/advanceopinions/126nevadvopno20.pdf>. *Western States Water*, #1865, February 12, 2010, and #1870, March 19, 2010.

Resources Board (OWRB), alleging that the embargo violates the Commerce and Supremacy Clauses of the U.S. Constitution. In November 2009, a federal district court reasoned that the Red River Compact (RRC), which apportions water between Arkansas, Louisiana, Oklahoma, and Texas, insulated the embargo from a Commerce Clause challenge. It also found that the embargo did not raise preemption issues under the Supremacy Clause because it did not conflict with the RRC.

Since the court limited its ruling to waters that are subject to the RRC, Tarrant filed an amended complaint that asserts the same constitutional challenges, but does so with respect to an agreement with the Apache Tribe of Oklahoma that Tarrant says is not within the scope of the RRC. The OWRB filed a motion to dismiss.<sup>51</sup>

In a July 16th ruling, the U.S. District Court for the Western District of Oklahoma rejected another attempt by the Tarrant to appropriate water in Oklahoma. Tarrant alleged that it had made arrangements to purchase Oklahoma water that is not subject to the Compact, including a 10-year option to purchase ground water in Stephens County and a memorandum of understanding (MOU) with the Apache Tribe of Oklahoma, which states that Tarrant would “work cooperatively” with the Tribe to further quantify its reserved water rights and develop terms for the purchase or lease of certain amounts of its water.

The court held that neither of Tarrant’s allegations made out a case or controversy. First, the court found that the statutes in question do not apply to groundwater and therefore do not obstruct Tarrant from appropriating the water subject to its 10-year option. Second, the court held that the MOU with the Apache Tribe was not an enforceable agreement and reasoned that “...it is very much an open question whether the Tribe has any water rights at all which are pertinent to plaintiff’s needs and, if so, what those rights are.... And even if, at some point, the Apache Tribe is able to establish that it in fact has reserved water rights as a general matter, its obligation to pursue any further arrangement with plaintiff is made expressly contingent on the ‘quantification’ of those rights.... The court concludes such a scenario is far too speculative and subject to too many contingencies to set out a controversy ripe for judicial resolution.”<sup>52</sup> Acting OWRB Executive Director and Oklahoma Secretary of Environment J.D. Strong, also a WSWC member, praised the decision. “This important ruling once again strengthens Oklahoma’s right to control the use of its most precious natural resource and enables the state to meet its interstate water obligations.”<sup>53</sup>

### City of Hugo

On April 30, the U.S. District Court for the Eastern District of Oklahoma dismissed the latest challenge to an Oklahoma embargo on out-of-state water sales. The case stemmed from a claim by the City of Hugo in Oklahoma, which had agreed to sell Kiamichi River water to Irving, Texas, that Oklahoma’s embargo violated the U.S. Constitution’s dormant Commerce Clause.

Although the dormant Commerce Clause generally prevents states from giving their residents a preferred right of access to waters within their borders, the court found that the water in question

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<sup>51</sup> *Western States Water*, #1800, November 14, 2008, and #1854, November 27, 2009.

<sup>52</sup> <http://www.narf.org/nill/bulletins/dct/documents/tarrant.pdf>.

<sup>53</sup> *Western States Water*, #1864, February 5, 2010.

was subject to the Red River Compact, which apportions surface water among Arkansas, Louisiana, Oklahoma, and Texas. “The Compact here explicitly provides for the allocation of resources along a rational and consistent basis among the relevant states,” it said. “The Compact is openly and unapologetically protectionist. Congress approved the Compact, and it is not subject to any dormant Commerce Clause challenge. That approval necessarily constituted Congress’ consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny.... The relevant Oklahoma statutes are not inconsistent with the Compact where they address the waters allocated and apportioned to Oklahoma under the Compact, and that state’s right to control waters within its borders is not inconsistent with the Compact.”<sup>54</sup>

Of note, the case follows a November 2009 decision that the Eastern District issued in *Tarrant v. Sevenoaks*, which also dismissed a Commerce Clause challenge to Oklahoma’s embargo. “We have been successful thus far in these cases but we know the water wars [are] not yet won,” said Oklahoma Attorney General Drew Edmondson in a statement.”<sup>55</sup>

### Republican River Compact

On May 3, the Kansas Attorney General filed a pleading with the U.S. Supreme Court regarding the Republican River Compact, which allocates water among Colorado, Kansas, and Nebraska. The pleading alleges that Nebraska violated a 2003 decree that approved a settlement outlining the states’ rights to water from the Republican River Basin; that Nebraska exceeded its Compact allocation by 78,960 acre-feet in 2005 and 2006; and that its current plan for achieving compliance is inadequate. Among other things, the filing also asks the Court to hold Nebraska in contempt, order it to pay damages, and require it to take certain steps to comply with the Compact.

“Our state’s actions in this matter are, and always have been, to ensure that we get the water we are due under the compact and settlement,” said Kansas Chief Engineer Dave Barfield, a WSWC member. “We’re not trying to be litigious; we just want Nebraska to be fair.” Nebraska Attorney General Jon Bruning issued the following statement: “Thanks to the hard work of Nebraska’s irrigators, the State has been in compliance since 2006. We are working with local natural resources districts to ensure we stay in compliance. We are prepared to vigorously defend the State.”

The filing follows a June 2009 arbitrator’s ruling that affirmed Kansas’ estimate of Nebraska violations for 2005 and 2006 and recommended certain actions to ensure compliance in water short years. At the same time, the arbitrator found that Kansas had not adequately proven its claim for monetary damages. However, Colorado, Kansas, and Nebraska were unable to accept every aspect of the decision, which exhausted Kansas’ options under the Compact’s dispute resolution provision and cleared the way for the filing.<sup>56</sup>

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<sup>54</sup>[http://www.oag.state.ok.us/oagweb.nsf/0/6c8419033e219970862577180079f549/\\$FILE/water%20-%20hugo%20case%20dismissed.pdf](http://www.oag.state.ok.us/oagweb.nsf/0/6c8419033e219970862577180079f549/$FILE/water%20-%20hugo%20case%20dismissed.pdf).

<sup>55</sup>*Western States Water*, #1854, November 27, 2009.

<sup>56</sup>[http://www.ksda.gov/includes/document\\_center/interstate\\_water\\_issues/RRC\\_Docs/20100504USSCFiling.pdf](http://www.ksda.gov/includes/document_center/interstate_water_issues/RRC_Docs/20100504USSCFiling.pdf). *Western States Water*, #1514, May 23, 2003, and #1834, July 10, 2009.

On July 7, the Colorado Attorney General's office filed a response to Kansas' petition before the Supreme Court that alleges that Nebraska had exceeded its Republican River Compact allocation. Kansas' suit does not make any direct claims against Colorado and Colorado's brief takes no position on Kansas' petition. However, Attorney General John Suthers issued a statement saying, "Though the U.S. Supreme Court ultimately will decide whether to take this case, I continue to believe that here, as with all interstate disputes, Nebraska and Kansas can resolve their disagreements without subjecting all of the states to the costs and uncertainties of litigation."<sup>57</sup>

On October 7, Arbitrator Martha Pagel issued two non-binding decisions on disputes involving the Republican River Compact, which allocates water between Kansas, Nebraska, and Colorado. The first involved a Nebraska proposal to adjust the procedures that determine Compact compliance to reflect payments of monetary damages paid by one state to another. Nebraska maintained that the proposal was needed to ensure that the compliance procedures did not allow for a "double recovery." Kansas objected that the proposal was contrary to the Compact, would encourage future violations, and would deprive Kansas users of water. The Arbitrator concluded that Nebraska's proposal was not necessary to avoid a double recovery for damages and was contrary to the Compact because it would substitute money for water. She also found that the proposal was incomplete, but would not deprive Kansas of water or encourage future Compact violations.

The second decision addressed a pipeline project that Colorado has proposed to offset the effects of groundwater depletion on streamflows as a means of achieving future Compact compliance. Kansas raised eight issues of concern and withheld its consent, which Colorado argued was unreasonable. "The [proposal], in general, provides a reasonable and necessary approach for meeting Colorado's Compact obligations," the Arbitrator's decision stated. "With changes as recommended herein, the revised Proposal should be approved. However, the facts...do not support a conclusion that Kansas has acted in bad faith or has breached a duty of fair dealing in questioning and challenging key aspects of the proposed augmentation plans. To be sure there is a risk that, at some point in the future, continuing objections by Kansas may suggest there is nothing Colorado can do to develop a plan that would meet with approval by Kansas. At this stage, however, there is no basis for concluding that Kansas has acted unreasonably or that Colorado is entitled to a recommendation from the Arbitrator that the [proposal] should be approved."

Kansas Chief Engineer David Barfield, a WSWC member, praised the decisions, saying, "We are greatly encouraged by the arbitrator's ruling, particularly with regard to Nebraska's attempts to claim monetary damages as an offset of the unauthorized and expanding consumption of water." Nebraska Attorney General Jon Bruning said, "We are pleased the arbitrator recognized the importance of preventing a double recovery by Kansas, but disappointed the proposed crediting issue was not accepted." Colorado Attorney General John Suthers expressed disappointment in the ruling, but noted it recognized his state's "...fundamental right to proceed with a pipeline to assist in

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<sup>57</sup>[http://www.coloradoattorneygeneral.gov/press/news/2010/07/07/attorney\\_general\\_files\\_reply\\_brief\\_republican\\_river\\_case\\_us\\_supreme\\_court](http://www.coloradoattorneygeneral.gov/press/news/2010/07/07/attorney_general_files_reply_brief_republican_river_case_us_supreme_court). *Western States Water*, #1834 July 10, 2009, and #1877, May 7, 2010.

Compact compliance, that the proposal provides a reasonable and necessary approach by Colorado, and that Kansas does not have an unfettered ability to block the project.”<sup>58</sup>

### *Keating v. Nebraska Public Power District*

Nebraska is seeking amicus support for its position in *Keating v. Nebraska Public Power District* before the Eighth Circuit Court of Appeals. The case stems from a lawsuit that a group of farmers and ranchers with junior rights on the Niobrara River brought in federal court against the Nebraska Department of Resources (DNR), arguing the agency violated their due process rights by not providing a pre-deprivation hearing before closing their headgates during a period of water scarcity in favor of a senior appropriator. The plaintiffs wanted the hearing to challenge DNR’s scarcity determination and the validity of the senior appropriator’s water rights. A federal district court dismissed the plaintiff’s suit, finding that they did not have a property right to be free from DNR’s regulation of the prior appropriation system.

The plaintiffs appealed, asking the Eighth Circuit to direct the district court to order DNR to provide the plaintiffs with pre-deprivation notice and hearing before requiring them to stop using waters on the Niobrara. In a brief filed earlier this month, the plaintiffs argued, “It is the right to use the water of the Niobrara that must be given due process protection, a right the district court wholly ignored in its analysis of the deprivation issue.” Nebraska is preparing a brief that will argue, among other things, that the district court correctly concluded that the plaintiffs took their property rights subject to senior rights and did not have a legitimate claim of entitlement to water during times of scarcity when a senior appropriator was not receiving its full allocation. Nebraska has also opined that the case could impact other states that rely on the prior appropriation doctrine. Nebraska circulated a request for amicus briefs among the Conference of Western Attorneys General and WSWC member states in October.

## **River Basins**

### Yakima Basin Study

In January, the Bureau of Reclamation and the Washington State Department of Ecology announced the Yakima River Basin Study to build on previous efforts performed as part of the Yakima River Basin Water Enhancement Project (YRBWEP.) Reclamation and Ecology would jointly conduct the study under the U.S. Department of the Interior’s Water Conservation Initiative Basin Study Program. This one-year comprehensive study sought to further define future options for water supply development, while improving conditions for anadromous fish. The study, to be cost-shared on a 50/50 basis between Reclamation and Ecology, would also evaluate the potential impacts of climate change on water supplies and demands.

A YRBWEP Workgroup - comprised of state and federal agencies, county commissioners from the three Yakima Basin counties, the City of Yakima, the Yakima Nation, irrigation districts, fisheries managers, and American Rivers - are collaborating on the study. The workgroup has also

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<sup>58</sup>[http://www.ksda.gov/interstate\\_water\\_issues/content/142](http://www.ksda.gov/interstate_water_issues/content/142). *Western States Water*, #1885, July 2, 2010, and #1887, July 16, 2010.



developed a preliminary outline aimed at developing new water supplies, storage, and improving habitat and passage for fish in the basin.

The Yakima Basin Study Program aims to incorporate the latest science, engineering technology, climate models, and innovation. Desired outcomes include basin-specific plans that recommend collaboratively-developed solutions to meet water demands and foster sustainable development.<sup>59</sup>

USGS also presented the preliminary results of a study on ground water resources in Washington's Yakima River Basin. It estimated that, on average, ground water pumping reduced river flows by 200 cubic feet per second by the time the Yakima River drains into the Columbia River. "The numbers are sobering," said Ken Slattery, the Washington Department of Ecology's Water Resources Program Manager and a WSWC member. "Ground water pumping and depletion of this magnitude means there's less water available to meet federally mandated target streamflows and the irrigation delivery obligations in the basin. This certainly adds urgency to our efforts to tackle the basin's water supply needs, particularly for junior users."

Ecology, the Yakima Nation, and the Bureau of Reclamation commissioned the study in a 1999 Memorandum of Agreement related to ground water management in the Basin. USGS reports that the study results were not final and were subject to revision. USGS is also reviewing a draft report documenting a computer model that simulates large portions of the ground water system in the Basin that can be used as a water management tool.<sup>60</sup>

### Klamath Basin Restoration Agreement

On January 8, the parties involved in the Klamath River Basin negotiations released the final draft of the Klamath Basin Restoration Agreement (KBRA). The Basin's water and fisheries resources have been the subject of decades of negotiations between California, Oregon, federal agencies, tribes, environmental groups, agricultural interests, and others over the water available for irrigation, national wildlife refuges, fish and wildlife, and other uses within the Basin.

The KBRA is intended "...to result in effective and durable solutions which: (1) restore and sustain natural production and provide for Full Participation in Harvest Opportunities of Fish Species throughout the Klamath Basin; (2) establish reliable water and power supplies which sustain agricultural uses and communities and National Wildlife Refuges; and (3) contribute to the public welfare and the sustainability of all Klamath Basin communities [to resolve disputes]." As for funding, estimated costs to implement the agreement in its first year total about \$41 million, while long-term costs would run about \$97 million per year. Of the total, over 90 percent is budgeted for fisheries restoration and reintroduction and actions to enhance the amount of water for fish.

To accomplish the KBRA's goals, the agreement would create a number of programs, including schedules, plans, and other provisions to change the management of delivered water supply for irrigation and related uses in the Klamath Reclamation Project, upper Klamath Basin, and the national wildlife refuges. The KBRA also contains a fisheries program that would, among other

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<sup>59</sup>*Western States Water*, #1844, September 18, 2009.

<sup>60</sup><http://www.ecy.wa.gov/news/2010news/2010-245.html>.

things, reintroduce anadromous fish, establish conditions to contribute to fishery sustainability, assess the effectiveness of actions, and provide for adaptive management. The KBRA would further establish the Klamath Basin Coordinating Council to facilitate coordination, cooperation, collaboration, and accountability by the parties to ensure that elements of the agreement are carried out effectively.

Federal authorizing legislation is needed before the federal government and its agencies can become parties to the KBRA and be required to implement any of its provisions.<sup>61</sup>

On February 18, Oregon Governor Ted Kulongoski, California Governor Arnold Schwarzenegger, Secretary of the Interior Ken Salazar, PacifiCorp, tribal leaders, and other stakeholders signed the Klamath Basin Restoration Agreement and the Klamath Hydroelectric Settlement Agreement. In particular, the Restoration Agreement provides for salmon habitat improvements on Klamath tributaries, allocates water rights, and guarantees water deliveries for both farmers and fish.

The agreement is also meant to complement the Klamath Hydroelectric Settlement Agreement (KHSA) released in September 2009, which establishes a process for the potential removal of four PacifiCorp dams on the Klamath River to allow salmon and steelhead trout greater access to spawning habitat.

#### Niobrara River

The Nebraska Department of Natural Resources had announced that it would receive a \$350,000 grant from Reclamation's Basin Studies Program to study water management options in the Niobrara River. The study will model surface and ground water interaction, as well as the economic effects of water management strategies to provide options that optimize both surface and groundwater resources. It will also include involvement from state, local, and federal interests. The 2-year study will include the Niobrara River from its headwaters in Wyoming to its confluence with the Missouri River in northeast Nebraska. It will begin in January 2011.<sup>62</sup>

### States

#### California

##### Central Valley Project

On January 26, Interior Secretary Ken Salazar announced that 350,000 to 400,000 acre-feet of water would be made available for Central Valley Project (CVP) water users, particularly, farmers on the west side of California's San Joaquin Valley, by March 1. "The recent storms in California are a welcome relief for farmers, water users, and watersheds that have been hit hard by three years of drought, but we are not out of the woods yet," said Salazar. "We must keep all hands on deck to stretch water supplies, move water to where it is needed most, provide certainty for growers in the year ahead, and build long-term water solutions in partnership with the State."

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<sup>61</sup>*Western States Water*, #1847, October 9, 2009.

<sup>62</sup>[http://dnr.ne.gov/dnrnews/news2010/October\\_2010.pdf](http://dnr.ne.gov/dnrnews/news2010/October_2010.pdf).

The announcement is the result of two decisions by Reclamation. First, the Mid-Pacific Region issued guidelines that allowed farmers to hold water over for the 2010 growing season. Second, Reclamation has determined that it could deliver non-CVP water currently stored in the San Luis Reservoir under Warren Act contracts and approve requests to reschedule CVP supplies from the 2009 contract year for delivery in 2010.

On April 15, Salazar announced increased water supply allocations for the Bureau of Reclamation's Central Valley Project as a result of improved hydrologic conditions. "For the second consecutive month, we are accelerating our reporting of updated allocations, in an effort to get the best available information to our contractors...to aid in their planning decisions for the upcoming season," he said.

Municipal and industrial contractors and agricultural water service contractors north of California's Bay Delta saw their allocations increase to 100% from 75% and 50% respectively. Allocations for agricultural service contractors south of the Delta were increased from 25% to 30%, while Class 2 allocations to Friant Division agricultural water service contractors moved from 10% to 15%. Class 1 allocations to Friant agricultural contractors remained at 100%, as did allocations to Eastside Division agricultural contractors, contractors with senior water rights claims along the Sacramento and San Joaquin Rivers, and wildlife refuges north and south of the Delta. Allocations for municipal and industrial contractors south of the Delta remained at 75%.

Despite the increased allocations, Salazar acknowledged that water supply challenges still exist for agricultural contractors south of the Delta. "As I announced in March of this year, we are committed to efforts to secure an additional 8 to 10 percent supply for agricultural contractors south of the Delta. We are expecting that up to 150,000 to 200,000 acre-feet can be secured to help supplement the South-of-Delta supplies." These amounts were not previously available for the west side of the San Joaquin Valley.<sup>63</sup>

## Montana

### Exempt Wells

The Montana Department of Natural Resources and Conservation (DNRC) scheduled a public hearing on June 17 to discuss whether an agency rule governing exempt wells is consistent with state law. Under Montana statute, ground water permits are not needed for wells outside the boundaries of controlled ground water areas if they appropriate less than 35 gallons a minute or 10 acre-feet a year. However, a "combined appropriation" from the same source from two or more wells that exceeds these limitations does require a permit. Montana law does not define "combined appropriation" and the rule clarifies that the term refers to "...the appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system."

In December 2009, the Western Environmental Law Center filed a petition on behalf of five senior water rights holders, asking DNRC to declare the rule invalid. The petition took particular exception to the "physically manifold" requirement, arguing "...because very few, if any,

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<sup>63</sup>*Western States Water*, #1868, March 5, 2010.

groundwater developments in Montana are ‘physically manifold,’ DNRC’s definition effectively renders the Act’s combined appropriation exception superfluous. Indeed, there is absolutely no reason why a developer would install a groundwater system that is ‘physically manifold’ and go through DNRC’s permitting and environmental review process when he can simply install hundreds of individual wells for free, without a permit and without any environmental review.” The petition also asked DNRC to adopt a new definition of the rule.

“The use of exempt wells is an issue of statewide importance, with statewide implications,” said DNRC Director and WSWC member Mary Sexton. “This briefing and public hearing process will allow formal input from all interested parties.” Mary also acknowledged that this process may not be the “final step” in determining the appropriate use of exempt wells and that further court or legislative action may be necessary. DNRC will refrain from taking up the petition’s request to amend the rule until after a determination is made on the declaratory ruling, which is expected in July.<sup>64</sup>

On August 18, the Montana Department of Natural Resources and Conservation issued a declaratory ruling, stating that it would initiate rulemaking within eight months to develop a new administrative definition for a key provision of the state’s exempt well statute. The Department believes the ruling is consistent and not in conflict with the statutory exemption, but also found that increasing demands on the state’s water resources warranted a new definition.

The ruling responded to the 2009 petition by senior water right owners and other parties, which asked that the Department declare the current rule invalid and adopt a new rule. The petition focused particularly on the rule’s “physically manifold” language, which it said allows developers to circumvent the state’s ground water permitting process by installing individual exempt wells instead of constructing a “physically manifold” ground water system. As a result, the petition maintained that there was a surge in the installation of exempt wells in closed basins that threatened senior water rights.

Of note, the ruling indicated that the Department is evaluating a possible rule that would allow an exempt well to serve up to twelve residential lots with a maximum appropriation of 35 gallons per minute and not to exceed 10 acre-feet per year. As Water Resources Division Acting Administrator, Tom Schultz stated, “We want to give the Department as well as legislators time to analyze the issues and provide input as we go forward. The new definition will take into account the original intent of the statute, along with the fact that we have a number of basins closed to appropriations, where we have seen an increase in groundwater development.” For more information on the ruling, please see: [http://dnrc.mt.gov/news/news\\_releases/2010/18Aug.asp](http://dnrc.mt.gov/news/news_releases/2010/18Aug.asp).

In November, a Montana court adopted a settlement between the State’s DNRC and plaintiffs regarding an administrative definition for a key part of the State’s exempt well statute. Under the settlement, DNRC will develop a broader definition within 15 months and will consider amending the definition to consider cumulative or collective impacts from multiple, unconnected wells in a single aquifer for a single project.<sup>65</sup>

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<sup>64</sup>[http://dnrc.mt.gov/news/news\\_releases/2010/15March.asp](http://dnrc.mt.gov/news/news_releases/2010/15March.asp). *Western States Water*, #1836, July 24, 2009, #1837, July 31, 2009, and #1872, April 2, 2010.

<sup>65</sup>*Western States Water*, #1894, September 3, 2010.

Exempt Wells

On October 29, the New Mexico Court of Appeals had issued a decision in *Bounds v. San Lorenzo*, upholding the state's domestic well statute, which provides that the New Mexico State Engineer shall issue permits to withdraw groundwater for domestic use "[u]pon the filing of each application." Although the statute requires the State Engineer to issue a permit without notice and evaluation of the effect of such use on senior water rights, the State Engineer's Office enacted regulations in 2006 that include authority to reduce domestic well pumping in some cases. The Court of Appeals' ruling overturns a state district court decision that the statute violated the New Mexico constitution because it was an impermissible exception to the prior appropriation doctrine. The lower court had also ordered the State Engineer to administer domestic well applications in the same manner as all other ground water applications.

The court reasoned that the State Engineer had sufficient administrative authority to protect pre-existing water rights from domestic well use. It also found that the New Mexico Constitution established a "broad priority principle" that does not set forth a particular priority administration system from which the Legislature cannot deviate. "The Legislature has enacted statutes intended to limit appropriation and use in circumstances in which the State Engineer determines that a basin is fully appropriated with no available water for new appropriations," it said. "Yet, we see no reason why the Legislature cannot enact exceptions to or variations of the laws. The [statute] is such an exception or variation, ultimately leaving for the State Engineer, as difficult as it looks to be, the administrative determination whether to curtail domestic use when senior water rights are impaired or threatened with impending impairment because of water shortages."<sup>66</sup>

**Water Supply Outlook**

The Natural Resources Conservation Service's (NRCS) Snowpack/Drought Monitor Update for the week of January 7 reported that most of the West was "at or below normal values" despite above normal snow water equivalent (SWE) over much of the Southwest. NRCS also said many basins were running at 60-75% of normal. The only exceptions were southwest and southeast Utah, Arizona's high country, parts of New Mexico, and central Montana.

As for drought, a favorable storm trend had led to the removal of abnormally dry conditions in extreme northwest North Dakota and eastern Montana. Likewise, recent precipitation in and around the Shasta-Trinity Forest in northern California led to a slight reduction in the northwestern area of severe drought. However, extreme and severe drought blanketed Arizona, while severe and moderate drought persisted throughout California, the western half of Nevada, southern Texas, and northcentral Washington. Moderate drought also expanded in southwestern Wyoming and emerged to the north of the Bitterroot Range along the Montana and Idaho borders. Similarly, abnormally dry conditions expanded in western Wyoming, northeastern Utah, eastern/southeastern Idaho, and western/southwestern Montana.<sup>67</sup>

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<sup>66</sup><http://coa.nmcourts.gov/documents/opinions/October10.htm>. *Western States Water*, #1786, August 8, 2008.

<sup>67</sup><ftp://ftp.wcc.nrcs.usda.gov/support/drought/dmrpt-20100107.pdf>.

A June 24 report found that abnormally dry and/or moderate drought conditions existed in parts of every western state except the Dakotas, Kansas, Nebraska, and Washington. Small pockets of severe drought conditions persisted in northeast Arizona, southern Oregon, and western Wyoming, while abnormally dry conditions have expanded in four counties in Colorado and one county in Arizona. However, severe drought conditions were no longer evident in the Idaho panhandle and western Montana.

For the 2010 water year, which began on October 1, 2009, Arizona, southern New Mexico, eastern Nevada, southwest Utah, the Olympic Range in Washington, central Montana, and central-eastern Wyoming had the largest surpluses. The northern and Upper Snake River regions of Idaho and the northern Wasatch region in Utah had the greatest deficits.<sup>68</sup>

### Yakima River Basin

Reclamation released its March 2010 forecast for irrigation water supply in the Yakima Basin. Among other things, Reclamation found that system storage was 49 percent full and 90 percent of average as of March 1, and that junior users were expected to receive 77 percent of their entitlement from the beginning of prorating until September 20. “We are expecting a below normal water supply at this time,” said Chuck Garner, Yakima Project River Operations supervisor. “It would be very difficult for the snowpack and reservoir storage to recover sufficiently to provide a full supply for all users this season.” Post 1905 water users must cease diverting water as soon as prorating is implemented.

### Drought Declaration/Klamath Basin

On March 17, Oregon Governor Ted Kulongoski issued a drought declaration for six Klamath Basin counties, which will provide flexible water management strategies that are not generally available under Oregon law to assist irrigators, municipalities, and other water users. In particular, the declaration will allow irrigators in the affected counties to begin work with the Oregon Water Resources Department to apply for temporary emergency permits that are valid during the length of the declared drought. In general, these permits allow water users to use supplemental ground water sources in lieu of their surface water rights and for emergency transfers of water from one parcel of land to another.

The declaration comes as Oregon waits for the federal government to determine how much Klamath Project surface water will be available this irrigation season without harming species that are listed under the Endangered Species Act, such as the Lost River sucker and shortnose sucker that spawn in Upper Klamath Lake, and coho salmon downstream.

Kulongoski also wrote U.S. Secretary of Agriculture Tom Vilsack on March 16, requesting a federal natural resource disaster determination to provide eligible farmers and ranchers with federal aid. The letter detailed basin water conditions saying, “Due to ongoing drought conditions, reservoir storage in the Klamath Basin is currently 51% of normal. Snowpack is 71% of normal and precipitation is 81% of normal. Water surface elevations and storage in Upper Klamath Lake are near record lows. If Clear Lake and Gerber Reservoir only receive the runoff predicted by federal

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<sup>68</sup><http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20100624.pdf>.

officials, irrigation water will ultimately be available only from Gerber Reservoir. A result of such conditions has led the Bureau of Reclamation to estimate that irrigation water will be in short supply this season and may not be available until late in the irrigation season which will be too late to be of significant value to agriculture....”

On March 18, the Obama Administration announced a coordinated effort aimed at providing meaningful water deliveries to drought-stricken users in the Klamath Basin who receive water deliveries from the Bureau of Reclamation’s Klamath Project. Secretary of the Interior Ken Salazar announced expected allocations from the Klamath Project will be 30% to 40% of average annual releases (about 150,000 acre feet) for Upper Klamath Lake irrigators. An additional 50,000 acre-feet or more could be added through a water bank funded by Reclamation, boosting overall deliveries to approximately 50 percent of average annual deliveries. Reclamation also estimates that irrigation deliveries could begin by May 15, depending upon precipitation in the Klamath Basin and Upper Klamath Lake levels.

At the same time, the U.S. Department of Agriculture’s Natural Resources Conservation Service (NRCS) has made available \$1 million in California and \$1 million in Oregon for a special drought initiative under the Environmental Quality Incentives Program (EQIP) in the Klamath Project area. Under the initiative, eligible farmers can apply for technical and financial assistance and receive EQIP payments of up to 75% of the average estimated cost for approved conservation practices.

Secretary Salazar praised the effort, saying, “I am grateful for the leadership shown by Bureau of Reclamation Commissioner Mike Connor and our other Federal agency partners in optimizing the limited water resources available this year.” Secretary Tom Vilsack also said the announcement “...is part of our ongoing work to address both the short and long term impacts from limited water resources in rural agriculture-based communities.”

## 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 2010, during the regular Council meetings.

Position No. 321 is in the form of a resolution that urges the Administration and Congress to give a high priority to funding for federal programs, such as the Regional Integrated Science and Assessment (RISA) programs and national climate service activities that provide the translation function between basic scientific research on climate variability and change and the application of that research to real-world water management situations at the regional, state, and local levels.

Position No. 322 is in the form of a letter, dated March 23, to the Honorable Jeff Bingaman, Chairman, and the Honorable Lisa Murkowski, Ranking Member, of the Senate Energy and Natural Resources Committee, expressing the Council's support for the implementation of programs and activities authorized by the Rural Water Supply Act of 2006.

Position No. 323 is a resolution modified to call for a "shared vision on water planning and policy" instead of a "national water policy vision." The resolution expresses the WSWC views regarding the importance of protecting and wisely managing our national water resources for the benefit of our present and future generations, including our environment. It declares that any vision for any water policy, water plan or planning process must recognize, defer to and support State, tribal and local government water plans and planning process.

Position No. 324 is a resolution urging the Administration and Congress to support Department of Energy hosted energy-water and other collaborative water programs conducted at national laboratories, including but not limited to: the Idaho National Laboratory and its Mountain West Water Institute; Lawrence Berkeley and Lawrence Livermore National Laboratories in California; and Los Alamos and Sandia National Laboratories in New Mexico. The position observes that these programs "...provide an essential link between federal energy research programs and water issues of concern to the western states."

Position No. 325 is an external position urging the Administration and National Aeronautics and Space Administration (NASA) to enhance the agency's focus areas on research for water resources applications, and to promote long-term engagement with the Council and the state and regional agencies in the western U.S. responsible for water management and water policy to maximize benefits to the public from NASA's existing and future investments in Earth observations, Earth system models and systems engineering.

Position No. 326 is in the form of a letter, dated October 29, to the Honorable Jeff Bingaman, Chairman of the Senate Energy and Natural Resources Committee, and discusses implementation of the SECURE Water Act and expresses concern that many of the programs and activities that the Act authorizes, including USGS streamgaging activities, remain unfunded or underfunded.



Position No. 327 is a resolution, revised and readopted, which supports legislation requiring the federal government to pay state filing fees in general stream adjudications.

Position No. 328 is an external position stating that pesticide applications made in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) should not require National Pollutant Discharge Elimination System (NPDES) permits. The position also urged Congress to amend the Clean Water Act and FIFRA accordingly.

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

**Washington, D.C.**  
**March 23, 2010**

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

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

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

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

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

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

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

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

**WHEREAS**, the federal agencies participating in the U.S. Global Change Research Program have historically concentrated heavily on basic scientific research, research that needs to be translated into decision support applications for water resources management and needs to be communicated to water managers through technology transfer institutions such as NOAA’s RISAs; and

**WHEREAS**, the federal government, led by NOAA, has now begun developing a national climate service that would provide a central point of contact for users of climate information and would develop and provide climate science products to support decision-makers; and

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

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

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

March 23, 2010

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

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

Dear Senators:

On behalf of the Western States Water Council, which represents eighteen states, I am writing to express our support for the implementation of programs and activities authorized by the Rural Water Supply Act of 2006. Much of the West is characterized by its aridity, and the continuing drought across much of the region highlights the fact that water availability is an ever present constraint defining our economic and environmental well being and quality of life. This is particularly true for many small rural communities struggling to comply with present federal mandates and meet future water supply needs.

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

It is our understanding that under the prior Administration, the Office of Management and Budget determined that the authorized Title II loan guarantees must be backed, dollar-for-dollar, by appropriated funds. This position effectively negates the purpose for the guarantees, which is to leverage non-federal funding to ensure that water districts which operate and maintain facilities that are part of federal projects can access private sources of financing. This is problematic due to the fact that while they depend on these facilities for their livelihood, they do not own the projects. Given the low anticipated default rate for such loans, we believe the risk to the Federal Treasury is minimal. OMB's past position is a serious obstacle to fulfilling the intent of the Congress.

Under Title I, we look forward to continuing to work with the Bureau of Reclamation to compile a list of rural water needs, and look forward to collaborating with Reclamation, on the review of the status of rural water supply projects and the demand for new projects, as well as to further develop guidelines and criteria for determining program eligibility and establishing project priorities.

As the legislation specifically states, it is important that Reclamation "...consult and cooperate with appropriate Federal, State, tribal, regional, and local authorities" as it conducts appraisal investigations and feasibility studies, prepares feasibility reports, and identifies funding sources.

Moreover, again as recognized in the legislation, the program must be coordinated with "...existing federal and State rural water and wastewater programs to facilitate the most efficient and effective solution to meeting the water needs of the non-Federal project sponsors." Further, we appreciate the recognition that compliance with State water laws and interstate compacts is vital. Upgrading and replacing inadequate rural water systems may require finding new water supplies, which will entail acquiring necessary state water rights.

We would appreciate your help in addressing the prior Administration's position on Title II loan guarantees and look forward to working together to take appropriate actions to fund and implement the Title I program.

Sincerely,

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

Garland Erbele  
Chairman  
Western States Water Council

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**Regarding**  
**A SHARED VISION ON WATER PLANNING AND POLICY**  
**Stateline, Nevada**  
**July 23, 2010**

**WHEREAS**, the Western States Water Council has long recognized the importance of planning and policy in protecting and wisely managing our national water resources for the benefit of our present and future generations, including our environment; and

**WHEREAS**, different entities are currently evaluating the need for a shared vision on water policy and new federal legislation to advance water resources planning and management at all levels; and

**WHEREAS**, States and their political subdivisions share primary responsibility for planning and managing our nation's water resources, both surface and ground water, quantity and quality; and

**WHEREAS**, States are primarily responsible for allocating and administering rights to the use of water for myriad uses; and are in the best position to identify, evaluate and prioritize their needs; and

**WHEREAS**, the focus should be on a grassroots, small watershed approach to identifying water problems and potential solutions from the ground up, integrating these efforts into individual state plans; and

**WHEREAS**, regional or multi-state and multiple river basin planning and strategic plans should be comprised of these building blocks, i.e., state, local and tribal water resource plans; and

**WHEREAS**, it is paramount to move state, local and tribal government participation back into the process of federal decisionmaking, as the U.S. Army Corps of Engineers is attempting to do under its Shared Vision Planning initiatives, before too much momentum has been built toward federal policy decisions; and

**WHEREAS**, the federal government should support States and their planning efforts by providing technical and appropriate financial assistance; and

**WHEREAS**, developing optimal solutions to our water-related challenges will require an integrated approach and greater partnerships – sharing roles and responsibilities – among state, local, tribal and federal agencies; and

**WHEREAS**, the above approach should consider all needs together, develop effective solutions which are complementary rather than conflicting, and provide direction for selecting the most appropriate governmental entities or organizations for implementing solutions; and

**WHEREAS**, comprehensive plans developed under state or tribal leadership with federal assistance should (a) reduce inefficiencies caused by project-specific responses to competing demands, (b) reduce contradictory actions by multiple state, local and federal agencies, and (c) minimize hastily conceived reactions to the latest real or perceived crisis; and

**WHEREAS**, Federal agencies should use state water plans (a) to help determine water policy and planning priorities that best align federal agency support to states, (b) to inform decision making regarding regional water issues, and (c) to coordinate investment in water infrastructure;

**NOW THEREFORE BE IT RESOLVED**, that any vision for any water policy, water plan or planning process must recognize, defer to and support State, tribal and local government water plans and planning processes;

**BE IT FURTHER RESOLVED**, that any federal legislation should explicitly recognize and provide support for ongoing watershed efforts in and between the states, tribes and local entities and closely consult with the states in the implementation of any new federal program(s); and

**BE IT FURTHER RESOLVED**, that Congress should direct federal water resource agencies to include integrated water resources management, planning and planning assistance as one of their primary missions; and

**BE IT FURTHER RESOLVED**, that the Administration and Congress should look at the WSWC/WestFAST partnership as a model for a better way to focus federal support on state priorities; and

**BE IT FURTHER RESOLVED**, that any federal legislation should avoid strategies that increase mandates on state, tribal and local governments; and

**BE IT FURTHER RESOLVED**, that nothing in any act of Congress should be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to: (a) water or watershed planning; (b) the control, appropriation, use, or distribution of water used in irrigation or for municipal or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interstate compact, decree or negotiated water rights agreement.

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**urging the**  
**ADMINISTRATION AND CONGRESS**  
**TO SUPPORT WATER RESEARCH AND DEVELOPMENT PROGRAMS**  
**at the**  
**DEPARTMENT OF ENERGY NATIONAL LABORATORIES**  
**Stateline, Nevada**  
**July 23, 2010**

**WHEREAS**, the Western States Water Council (the Council) has long recognized the importance of protecting and wisely managing our national water resources for the benefit of our present and future generations, including our environment; and

**WHEREAS**, one purpose of the Council is to accomplish effective cooperation among western states in the conservation, development and management of water resources; and

**WHEREAS**, a second purpose of the Council is to maintain vital state prerogatives, while identifying ways to accommodate legitimate federal interests; and

**WHEREAS** many watersheds are already over-appropriated, and new stresses are emerging from climate, population growth, land use changes and water needs for energy development and in-stream uses; and

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

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

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

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

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council urges the Administration and the Congress to support Department of Energy hosted energy-water programs conducted at National Laboratories and other collaborative water programs, including but not limited to work at: the Idaho National Laboratory (INL) and its Mountain West Water Institute; Lawrence Berkeley and Lawrence Livermore National Laboratories in California; Los Alamos and Sandia National Laboratories in New Mexico; the National Renewable Energy Laboratory (NREL) in Colorado; and Pacific Northwest National Laboratory (PNNL) in Washington, that provide an essential link between federal energy research programs and water issues of concern to the western states.



**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
NASA'S APPLIED SCIENCE RESEARCH PROGRAM  
San Diego, California  
October 29, 2010**

**WHEREAS**, the Western States Water Council is a policy advisory body representing eighteen states, and has long been involved in western water conservation, development, protection, and management issues, and the member states and political subdivisions have long been partners in cooperative federal water and climate data collection and analysis programs; and

**WHEREAS**, in the West, water is a critical, vital resource (much of which originates from mountain snows) and sound decision making demands accurate and timely mapping of, and data on, altimetry, precipitation, temperature, snow water content, groundwater, land use and land cover, water use, water quality parameters, and similar information; and

**WHEREAS**, the demands for water and related climate data continue to increase along with the West's population, and this information is used by federal, state, tribal, and local government agencies, as well as private entities and individuals to: (1) forecast flood and drought occurrence; (2) project future water supplies for agricultural, municipal, and industrial uses; (3) estimate streamflows for hydropower production, recreation, and environmental purposes; (4) facilitate water management and administration of water rights, decrees, interstate compacts, and international water treaties; (5) assist in disaster response; (6) assess impacts of climate variability and change; and

**WHEREAS**, thermal infrared imaging data available from Landsat 5, Landsat 7 and as part of the Landsat Data Continuity Mission (LDCM) is used to measure and monitor agricultural and other outdoor water uses and needs, is increasingly important for present and future management of our scarce water resources, and is an example of the application of basic science pioneered by the National Aeronautics and Space Administration (NASA); and

**WHEREAS**, airborne and spaceborne remote sensing research missions have a potential to provide other information on varied temporal and spatial scales that could with sustained engagement ultimately be useful for water resources planning, management and decision-making; and

**WHEREAS**, NASA identifies "water and energy cycle" and "water resources" as topics to support in the agency's research and applications programs respectively; and

**WHEREAS**, NASA's ARRA demonstration project on California applications for use of remote sensing information has illustrated that potential exists for repurposing data collected from certain present NASA missions for water management applications, and that additional potential exists for research applications with sensors planned in future Decadal Survey missions; and

**WHEREAS**, the successful transfer of technology from the research domain to the applications domain is dependent, in part, on on-going communication between researchers and those responsible for resource management and policy decisions and a long term commitment to maintain such communication;

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council urges the Administration and NASA to enhance the agency's focus areas on research for water resources applications, and to promote long term engagement with the council and the state and regional agencies in the western US responsible for water management and water policy to maximize benefits to the public from NASA's existing and future investments in Earth observations, Earth system models and systems engineering.

October 29, 2010

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

**via fax: (202) 224-6163**

Dear Chairman Bingaman:

The Western States Water Council actively supported enactment of the SECURE Water Act, which deals with a number of long standing concerns among western states as expressed in the June 2006 Western Governors' Association water report, "Water Needs and Strategies for a Sustainable Future," and subsequent 2008 "Next Steps" Report. We appreciate your continuing leadership in addressing the serious water-related challenges facing the West and the Nation.

We especially appreciate the explicit recognition that "...States bear the primary responsibility and authority for managing the water resources of the United States" and that "the Federal Government should support the States, as well as regional, local and tribal governments..." We also appreciate the other provisions in the bill requiring federal agencies to "consult and coordinate with the applicable State water resource agency with jurisdiction," as well as comply with applicable State water laws and interstate compacts.

Western water law and policy are based on the reality of scarcity and the need to use water wisely. States continue to seek to increase efficiency and reduce water use, while at the same time effectuating sound infrastructure improvements and additions, particularly new water storage opportunities. We cannot ignore supply-side solutions to water shortages. The Council recognizes the difficult challenges facing the Nation related to our current economic woes and the federal budget deficit. However, we are concerned with the lack of investment in our Nation's water resources infrastructure.

Without the Bureau of Reclamation and federal investment in past water projects, the West would not be what it is today. Continuing investments and sacrifices will be needed to maintain our quality of life and protect our environment. Difficult choices have to be made at both the federal and state agency levels. As we plan for the future, states are well aware of the importance of maintaining our existing water-related infrastructure and prioritizing future capital investments. States are in the best position to identify, evaluate and prioritize their needs. State water plans should help form the basis for federal decisions, and the federal government should support States by providing technical and appropriate financial assistance.

We are also concerned that the lack of basic data and information on surface and ground water supplies, and present and projected water demands and consumptive uses, threatens both public and private planning and decisionmaking at all levels. Real-time water resources data are critical for timely actions in response to droughts, flooding and other extreme weather events, as well as climate adaptation. Moreover, our present day-to-day planning and management decisions depend on this information. We need better information now, as well as improved projections of future supplies and demands. The SECURE Water Act recognized and attempted to address many of these needs.

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

We strongly supported the USGS Water Use and Availability Assessment Program, which would provide grants to assist State water resource agencies. We are working with an Ad Hoc USGS group to implement this program, which includes gathering data and information on environmental water uses, including instream uses and outflows for bays and estuaries, as well as traditional consumptive water uses.

Unfortunately, many of the programs and activities authorized in the SECURE Water Act have largely gone unfunded or are underfunded. It is our understanding that amounts authorized for expenditure under the bill are in addition to assistance authorized and provided pursuant to other provisions of federal law. In general, we are concerned that the amounts authorized and subsequent appropriations must be sufficient to reasonably support the authorized activities.

Without timely and accurate water resources information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss. The USGS has been a leader in developing and realizing the potential of state-of-the-art technology to provide real or near real-time data with the promise of vastly improving the quantity and quality of water-related information available to decisionmakers in natural resources and emergency management, with the States as essential partners.

We must work together as partners, and we very much appreciate Interior's support for the Western Federal Agency Support Team (WestFAST), which is working in concert with other Cabinet Departments, the Council and Western Governors' Association (WGA) to implement many of the recommendations in the WGA Water Reports. Increasing demands related to our growing population in the West, environmental protection imperatives, as well as uncertainty related to climate and unquantified Indian water right claims (and unfunded tribal settlements), make present and future western water resources planning and management particularly challenging. Other areas of the Nation are facing similar challenges. WestFAST is a model for state and federal cooperation and collaboration.

The Reclamation Act of 1902, recognizing the vital need to invest in Western water resources, created the Reclamation Fund as a means to finance such investments. The unobligated balance at the end of FY2011 is projected to be about \$9.35 billion (but spending from this special Treasury account is well below receipts and subject to appropriations and pay-go-rules). Receipts are more than sufficient to fund all current Reclamation expenditures and more. In essence, the unobligated balance grows as fund receipts are used to finance other government purposes.

There is a continuing need to highlight the importance of water to our Nation's economic vitality and environmental health, and we continue to urge the Congress to increase spending from the Reclamation Fund for authorized purposes. We recognize and appreciate your leadership in enacting separate legislation that authorizes future transfers from the Reclamation Fund for construction of projects related to Indian water rights settlements, which has been a longstanding goal of the Council.

The Council has been a proponent of watershed and basin-wide coordination and a commitment to involving all governmental entities and stakeholders with an interest in finding solutions to present and future water management challenges. The Council supports technical and financial assistance to states and local watershed groups and water districts as an appropriate federal role, authorized Reclamation program, and suitable Reclamation Fund expenditure.

We are encouraged by the requests for Interior's WaterSMART Program, and recognize the importance of the proposal in an increasingly tight federal budget. The program includes studies intended to identify basin-wide water supply issues, and in partnership with basin States, Tribes and stakeholders define options for meeting future water demands and related challenges. Three of the proposed basin studies involve several Council-member states, and we appreciate Reclamation's invitation to collaborate.

The WaterSMART program is in part designed to make water available through conservation for other uses. It is important to note that the allocation of water is primarily a state prerogative, and water transfers are subject to state water law and policy. The use of any WaterSMART program water savings will be subject to state law.

We would hope in the future to continue to work with you, your Committee, staff and the Congress to improve western water management under the new authorities provided by the SECURE Water Act.

Sincerely,

A handwritten signature in black ink that reads "Weir Labatt, III". The signature is written in a cursive style with a stylized "W" and "L".

Weir Labatt, III  
Chairman  
Western States Water Council

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Requires the federal government to participate in all state administrative and judicial proceedings with respect to water rights it acquires to the same extent as all other persons.
2. Requires the federal government (not Native American tribes) to pay filing fees as well as comply with all other state substantive and procedural water right adjudication laws to the same extent as all other persons.
3. Requires the federal government to pay applicable fees as well as comply with all other state substantive and procedural laws for the appropriation, use and distribution of water rights to the same extent as all other persons.
4. Provides for state administration of all water rights.

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

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

**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
PESTICIDE APPLICATIONS  
and  
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM  
DISCHARGE PERMITS  
December 14, 2010**

**WHEREAS**, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) has long protected water quality from pesticide applications by requiring registration of pesticides, mandating detailed label instructions, limiting the number of pesticides available to the general public, restricting application of hazardous pesticides to certified applicators, and monitoring the distribution of restricted pesticides, among other measures; and

**WHEREAS**, the Environmental Protection Agency (EPA) has historically not required National Pollutant Discharge Elimination System (NPDES) permits for pesticide applications made in compliance with FIFRA; and

**WHEREAS**, in *National Cotton Council v. Environmental Protection Agency*, 553 F.3d 927 (6<sup>th</sup> Cir. 2009), the Sixth Circuit Court of Appeals vacated an EPA rule that exempted pesticide applications made in compliance with the FIFRA from the need to obtain NPDES permits; and

**WHEREAS**, the Sixth Circuit did not analyze FIFRA's water quality protections or its relationship with the Clean Water Act (CWA), but based its ruling on a technical finding that the statutory text of the CWA foreclosed EPA's rule; and

**WHEREAS**, the decision has national implications because it consolidated challenges to the rule filed in eleven circuits, and because the U.S. Supreme Court denied certiorari to review the decision in February 2010; and

**WHEREAS**, the Sixth Circuit stayed its decision until April 9, 2011, after which time EPA and states with delegated NPDES authority must issue NPDES permits for all point source discharges to waters of the United States of biological and chemical pesticides that leave a residue even if the application is performed in compliance with FIFRA; and

**WHEREAS**, EPA estimates that the ruling will affect approximately 365,000 pesticide applicators nationwide who perform 5.6 million applications annually; and

**WHEREAS**, the ruling will create an unnecessary and duplicative level of regulation without providing clear environmental benefits; and



**WHEREAS**, the burden of implementing NPDES programs to regulate pesticides will fall almost entirely on state water quality agencies, as most states have delegated NPDES authority; and

**WHEREAS**, implementing and operating programs to regulate pesticide applications under the NPDES program will require substantial site monitoring, record keeping, annual reporting, and other efforts that will impose significant costs upon states at a time when many are facing budget shortfalls and are struggling to provide other more important and necessary environmental services; and

**WHEREAS**, it is EPA's position that states with delegated NPDES authority are obligated to regulate applicable pesticide applications under the NPDES program even though no additional federal funding accompanies the mandate; and

**WHEREAS**, the preferred manner of resolving this issue is through future legislation that clarifies that pesticide applications applied in compliance with FIFRA are exempt from NPDES permitting, rather than creating a new permitting program.

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council declares that pesticide applications made in compliance with FIFRA should not trigger NPDES permitting requirements; and

**BE IT FURTHER RESOLVED** that the Council urges Congress to enact legislation that amends FIFRA and the CWA to clarify that pesticide applications performed in compliance with FIFRA are not subject to NPDES permitting.

Note: Oregon voted no and Washington opposed the position, but is a non-voting member.

## **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 sunset. 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.