

2011

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

46th Annual Report

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.	iii
MEMBERS ADDRESSES AND PHONE NUMBERS.....	1
COMMITTEE AND SUBCOMMITTEE ASSIGNMENTS.	9
WESTFAST MEMBERS.	14
COUNCIL MEMBERS.	16
STAFF.....	17
COUNCIL MEMBERSHIP CHANGES/NEWS.	18
COUNCIL MEETINGS	
Spring - Santa Fe, New Mexico.....	20
Summer - Bend, Oregon.	22
Fall - Idaho Falls, Idaho.	25
OTHER MEETINGS	
2011 Washington, DC Visits.	28
WSWC-California Department of Water Resources Climate Workshop.	29
Symposium on the Settlement of Indian Reserved Water Rights Claims.....	30
WGA-WSWC Water Transfers Workshop.	34
Western Governors' Association	
Annual Meeting - Coeur D'Alene, Idaho.	35
REPORTS AND PUBLICATIONS.	37
CONGRESSIONAL TESTIMONY	
House Water and Power Subcommittee Hearing on San Joaquin Valley Water Reliability Act	38
Senate Water and Power Subcommittee Oversight Hearing on Domestic and Global Water Supply Issues....	41
WESTERN STATES FEDERAL AGENCY SUPPORT TEAM.	49
OTHER IMPORTANT ACTIVITIES AND EVENTS	
Western States Water.	50
Bureau of Reclamation.	50
FY2012 Budget.....	50
SECURE Water Act of 2009.....	51
Title XVI Water Reuse Projects.	52
Desalination.....	52
Colorado River Basin Study.	53
Clean Water Act/Environmental Protection Agency.	53
Pesticides/ <i>National Cotton Council v. EPA</i>	53
Federal Insecticide, Fungicide, and Rodenticide Act.	54
Clean Water Cooperative Federalism Act of 2011.	57
Silviculture Regulatory Consistency Act/ <i>NEDC v. Brown</i>	58
Endangered Species Act.	59
San Juan River.....	59
Chinook Salmon.....	59

Endangered Species Act Implementation	60
<i>San Luis and Delta-Mendota Water Authority v. Salazar.</i>	61
Federal Columbia River Power System.	61
Cooperative Endangered Species Conservation Fund.	62
Indian Water Rights	62
Crow Settlement.	62
Aamodt Settlement.	62
White Mountain Apache.	63
Blackfeet Settlement.	63
Soboba Settlement.	64
Interior.	65
Strategic Plan/WaterSMART.	65
CALFED Water Use Efficiency Grant Programs.	66
Basin Studies.	66
Climate Applied Science Projects.	67
Landscape Conservation Cooperatives.	67
Landsat.	68
USGS/NASA Satellite Imagery.	68
Landsat 5.	68
Litigation/Water Rights.	69
Republican River.	69
Yellowstone River Compact.	69
Oklahoma.	70
States.	70
New Mexico.	70
Drought and Climate Impacts on Water.	70
California/Nevada.	71
Lake Tahoe.	71
Colorado/Wyoming.	71
Flaming Gorge Pipeline Project.	71
Washington.	73
Elwha and Glines Canyon Dam Removal.	73
<i>Five Corners Family Farmers v. Washington.</i>	73
Water Supply Outlook.	73
Flooding.	75

RESOLUTIONS AND POLICY POSITIONS

The National Levee Safety Act of 2007 – Levees and Water Supply Canals.	78
Clean Water State Revolving Fund and the Drinking Water State Revolving Fund.	80
Draft Guidance on Identifying Waters Protected by the Clean Water Act.	82
Preemption of State Law in Federal Legislation.	85
Federal Research and Development of Hydroclimate Guidance for Extreme Meteorological Events.	87
The Reclamation Fund.	89
Water Resources Research Institutes.	91
Federal Government’s Role in Expediting State General Stream Adjudications.	92
Indian Water Rights Settlements.	94
Protecting Ground Water Quality.	96

RULES OF ORGANIZATION.	97
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OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

The first official meeting of the Western States Water Council (WSWC) 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 WSWC 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 WSWC has since provided a unified voice on behalf of western governors on water policy issues.

The emphasis and focus of the WSWC 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 WSWC 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 WSWC 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 to states exploring the benefits of membership, experiencing financial hardship, or otherwise temporarily unable to maintain full membership. Nevada and Washington currently are Associate Members.

Each member state's governor is an ex-officio WSWC member. The governor may appoint up to three WSWC 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.)

WSWC 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 WSWC matters with the assistance of a Management Subcommittee, which includes the WSWC officers, immediate past Chair, and Executive Director. The WSWC'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 WSWC are held on a regular basis, rotating among the member states, with state representatives hosting WSWC members and guests. In 2011, meetings were held in: Santa Fe, New Mexico on April 13-15; Bend, Oregon on July 27-29; and Idaho Falls, Idaho on October 5-7. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The WSWC meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the WSWC's office, or visiting our website. Included herein are reports on each of the WSWC meetings, positions and resolutions adopted by the WSWC, and a discussion of other important activities and events related to western water resources. Other information about the WSWC and its members is also included.

The WSWC relies almost exclusively on state dues for funding the organization. The dues for FY2011 (ending June 30, 2011) were set at \$30,000 per state. A copy of the audit performed for the fiscal year ending June 30, 2011 can be obtained from the WSWC 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 2011, the WSWC staff was comprised of: Anthony G. (Tony) Willardson, Executive Director; Nathan Bracken, Legal Counsel; Dwane Young, Western Federal Agency Support Team (WestFAST) Liaison; and a secretarial staff consisting of Cheryl Redding and Julie Groat.

The WSWC offices are located in the metropolitan Salt Lake City area:

5296 South Commerce Drive, Suite 202

Murray, Utah 84107

(801) 685-2555

Fax (801) 685-2559

<http://www.westernstateswater.org>

E-mail: twillardson@swsc.utah.gov

MEMBERS ADDRESSES AND PHONE NUMBERS⁺

ALASKA

***Honorable Sean Parnell**

Governor of Alaska
P.O. Box 110001
Juneau, AK 99811-0001
(907) 465-3500

†**Brent Goodrum**, Director
Division of Mining, Land & Water
550 West 7th Avenue, Suite 1070
Anchorage, AK 99501-3579
(907) 269-8600
(907) 269-8904 (fax)
brent.goodrum@alaska.gov

†**Michelle Bonnet**, Director (Alt.)
Division of Water
Department of Environmental Conservation
555 Cordova Street
Anchorage, AK 99501
(907) 269-6281
(907) 334-2415 (fax)
michelle.bonnet@alaska.gov

†**Gary Prokosch** (Alt.)
Chief, Water Resources Section
Division of Mining, Land & Water
550 West 7th Avenue, Suite 900A
Anchorage, AK 99501-3577
(907) 269-8645
(907) 269-8947 (fax)
gary.prokosch@alaska.gov

ARIZONA

***Honorable Janice K. Brewer**

Governor of Arizona
Statehouse
Phoenix, AZ 85007
(602) 542-4331

†**Sandra A. Fabritz-Whitney**, Director
Department of Water Resources
3550 North Central Avenue, 2nd Floor
Phoenix, AZ 85012-2105
(602) 771-8426
(602) 771-8681 (fax)
safabritz@azwater.gov

L. William Staudenmaier, Attorney
Snell & Wilmer
One Arizona Center
400 East Van Buren Street, Suite 1900
Phoenix, AZ 85004-2202
(602) 382-6571
(602) 382-6070 (fax)
wstaudenmaier@swlaw.com

†**Michael Fulton**, Director
Water Quality Division
1110 West Washington Street
Phoenix, AZ 85007
(602) 771-2303
(602) 771-4834 (fax)
maf@azdeq.gov

†**Henry R. Darwin**, Director (Alt.)
Department of Environmental Quality
1110 West Washington Street
Phoenix, AZ 85007
(602) 771-2203
(602) 771-4834 (fax)
hrd@azdeq.gov

CALIFORNIA

***Honorable Jerry Brown**

Governor of California
State Capitol
Sacramento, CA 95814
(916) 445-2841

†Mark Cowin**, Director
Department of Water Resources
1416 Ninth Street
P.O. Box 942836
Sacramento, CA 95814
(916) 653-5791
(916) 653-5028 (fax)
mcowin@water.ca.gov

*Ex-Officio Member

**Executive Committee Member

†WSWC members denoted by this symbol are listed by virtue of their office, pending receipt of a letter of appointment by their Governor

⁺List as of December 31, 2011.

Darlene E. Ruiz
Hunter & Ruiz
1017 L Street, #599
Sacramento, CA 95814-3805
(916) 552-6700
(916) 552-6705 (fax)
derhr@earthlink.net

Jeanine Jones, P.E. (Alt.)
Interstate Resources Manager
Department of Water Resources
1416 Ninth Street
P.O. Box 942836
Sacramento, CA 94236-0001
(916) 653-8126
(916) 653-5028 (fax)
jeanine@water.ca.gov

Betty H. Olson (Alt.)
Professor
Civil & Environmental Engineering
University of California, Irvine
1361 SE II, Code: 7070
Irvine, CA 92697-7070
(949) 824-7171
(949) 824-2056 (fax)
bholson@uci.edu

COLORADO

***Honorable John Hickenlooper**
Governor of Colorado
State Capitol
Denver, CO 80203
(303) 866-2471

****Jennifer Gimbel, Director**
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203
(303) 866-3441
(303) 866-4474 (fax)
jennifer.gimbel@state.co.us

Paul D. Frohardt, Administrator
Water Quality Control Commission
OED-OLRA-A5
4300 Cherry Creek Drive South
Denver, CO 80246-1530
(303) 692-3468
(303) 691-7702 (fax)
paul.frohardt@state.co.us

Dick Wolfe
State Engineer
Colorado Division of Water Resources
1313 Sherman Street, Room 318
Denver, CO 80203
(303) 866-3581
(303) 866-3589 (fax)
dick.wolfe@state.co.us

†Ginny Brannon (Alt.)
Assistant Director for Water
Colorado Department of Natural Resources
1313 Sherman Street, Room 718
Denver, CO 80203
(303) 866-3311
(303) 866-2115 (fax)
ginny.brannon@state.co.us

Steve Gunderson, Director (Alt.)
Water Quality Control Division
WQCD-DO-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530
(303) 692-3509
(303) 782-0390 (fax)
steve.gunderson@state.co.us

Harold D. (Hal) Simpson (Alt.)
5967 South Birch Way
Centennial, CO 80121
(303) 771-3449 (home)
(303) 916-1093 (mobile)
halsimpson28@msn.com

IDAHO

***Honorable C. L. “Butch” Otter**
Governor of Idaho
State Capitol
Boise, ID 83720
(208) 334-2100

****Jerry R. Rigby**
Rigby, Andrus & Rigby, Chtd.
553 East 4th South
Rexburg, ID 83440
(208) 356-3633
(208) 356-0768 (fax)
jrigby@rex-law.com

Toni Hardesty, Director
Department of Environmental Quality
Statehouse Mail
1410 North Hilton Street
Boise, ID 83706-1255
(208) 373-0240
(208) 373-0417 (fax)
toni.hardesty@deq.idaho.gov

John Simpson

Barker, Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701
(208) 336-0700
(208) 344-6034 (fax)
jks@idahowaters.com

John Chatburn (Alt.)

Energy Policy Analyst
Office of Energy Resources
P.O. Box 83720
Boise, ID 83720
(208) 287-4892
(208) 287-6713 (fax)
john.chatburn@oer.idaho.gov

KANSAS

***Honorable Sam Brownback**

Governor of Kansas
State Capitol, 2nd Floor
Topeka, KS 66612-1590
(785) 296-3232

****David W. Barfield, Chief Engineer**

Kansas Dept. of Agriculture
109 SW 9th Street, 2nd Floor
Topeka, KS 66612-1283
(785) 296-4621
(785) 296-1176 (fax)
david.barfield@kda.ks.gov

Tracy Streeter, Director

Kansas Water Office
901 South Kansas Avenue
Topeka, KS 66612
(785) 296-3185
(785) 296-0878 (fax)
tracy.streeter@kwo.ks.gov

†Dale Rodman

Secretary of Agriculture
Department of Agriculture
109 SW 9th Street, 4th Floor
Topeka, KS 66612-1280
(785) 296-3556
(785) 296-8389 (fax)
dale.rodman@kda.ks.gov

Kim Christiansen (Alt.)

General Counsel
Kansas Water Office
901 South Kansas Avenue
Topeka, KS 66612
(785) 296-3185
(785) 296-0878 (fax)
kim.christiansen@kwo.ks.gov

Earl Lewis, Assistant Director (Alt.)

Kansas Water Office
901 South Kansas Avenue
Topeka, KS 66612
(785) 296-3185
(785) 296-0878 (fax)
earl.lewis@kwo.ks.gov

Tom Stiles, Chief (Alt.)

Kansas Dept. of Health & Environment
Office of Watershed Planning
Signature Building
1000 SW Jackson Street
Topeka, KS 66612-1367
(785) 296-6170
(785) 291-3266 (fax)
tstiles@kdhe.state.ks.us

MONTANA

***Honorable Brian Schweitzer**

Governor of Montana
State Capitol
Helena, MT 59620
(406) 444-3111

****Tim Davis**

Administrator, Water Resources Division
Dept. of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6605
(406) 444-0533 (fax)
timdavis@mt.gov

George Mathieus

Administrator
Planning, Prevention & Assistance Division
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-1601
(406) 444-7423
(406) 444-6836 (fax)
gemathieus@mt.gov

Candace West

Chief Legal Counsel
Dept. of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6702
(406) 444-0533 (fax)
wcandace@mt.gov

Richard Opper, Director (Alt.)
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620
(406) 444-6815
(406) 444-4386 (fax)
ropper@mt.gov

Mary Sexton, Director (Alt.)
Dept. of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-2074
(406) 444-0533 (fax)
msexton@mt.gov

Mike Volesky (Alt.)
Policy Advisor for Natural Resources
Office of the Governor
P.O. Box 200801
Helena, MT 59620-0801
(406) 444-7857
(406) 444-5529 (fax)
mvolesky@mt.gov

Jay Weiner (Alt.)
Assistant Attorney General
Civil Services Bureau
Office of the Attorney General
215 North Sanders Street, 3rd Floor
Helena, MT 59620
(406) 444-2026
(406) 444-3549 (fax)
jweiner@mt.gov

NEBRASKA

***Honorable Dave Heineman**
Governor of Nebraska
State Capitol
Lincoln, NE 68509
(402) 471-2244

****Brian Dunnigan**, Director
Department of Natural Resources
P.O. Box 94676
Lincoln, NE 68509-4676
(402) 471-2366
(402) 471-2900 (fax)
brian.dunnigan@nebraska.gov

Michael Linder, Director
Department of Environmental Quality
Suite 400, The Atrium
P.O. Box 98922
Lincoln, NE 68508-8922
(402) 471-3595
(402) 471-2909 (fax)
mike.linder@nebraska.gov

Patrick Rice, Assistant Director (Alt.)
Department of Environmental Quality
P.O. Box 98922
Lincoln, NE 68509-8922
(402) 471-2186
(402) 471-2909 (fax)
pat.rice@nebraska.gov

NEVADA (Associate Member)

***Honorable Brian Sandoval**
Governor of Nevada
State Capitol
Carson City, NV 89701
(775) 687-5670

****Roland D. Westergard**
207 Carville Circle
Carson City, NV 89703
(775) 882-3506

†Leo Drozdoff, Director
Dept. of Conservation and Natural Resources
901 S. Stewart Street, Suite 5001
Carson City, NV 89701
(775) 684-2700
(775) 684-2715 (fax)
ldrozdoff@dcnr.nv.gov

Tracy Taylor
Nevada Deputy State Engineer
Division of Water Resources
901 S. Stewart Street, Suite 2002
Carson City, NV 89701-9965
(775) 684-2861
(775) 684-2811 (fax)
ttaylor@water.nv.gov

James H. Davenport (Alt.)
Special Counsel
Colorado River Commission of Nevada
555 East Washington Avenue, Suite 3100
Las Vegas, NV 89101
(702) 486-2689
(702) 486-2697 (fax)
jdavenport@crc.nv.gov

Joseph E. Dini, Jr. (Alt.)
Speaker of the Assembly
Nevada State Legislature
104 North Mountain View
Yerington, NV 89447
(775) 463-2868
(775) 463-2816 (fax)
jdini@asm.state.nv.us

NEW MEXICO

***Honorable Susana Martinez**
Governor of New Mexico
State Capitol
Santa Fe, NM 87501
(505) 476-2200

†Scott Verhines, State Engineer
Office of the State Engineer
130 South Capitol Street, NEA Building
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6175
(505) 827-6188 (fax)
scott.verhines@state.nmus

†F. David Martin, Environment Secretary
New Mexico Environment Department
1190 Street Francis Drive, N4050
P.O. Box 26110
Santa Fe, NM 87502-0110
(505) 827-2855
david.martin@state.nmus

Bitah N. Becker, Attorney (Alt.)
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-7510
(928) 6200/7570/6177
bitahnbecker@navajo.com

Eileen Grevey Hillson (Alt.)
Agua Vida Resources
915 Camino Ranchitos NW
Albuquerque, NM 87114
(505) 238-0461 (cell)
(505) 898-0747 (fax)
ehillson@swcp.com

Maria O'Brien, Attorney (Alt.)
Modrall Sperling
Roehl Harris & Sisk, P.A.
500 Fourth Street NW
P.O. Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800
(505) 848-9710 (fax)
mobrien@modrall.com

DL Sanders (Alt.)
Chief Counsel and Director of Litigation
Office of the State Engineer
130 South Capital
Santa Fe, NM 87506-5108
(505) 827-6150
(505) 827-3887 (fax)
d.sanders@state.nmus

John Utton, Attorney (Alt.)
Sheehan and Sheehan, P.A.
40 First Plaza NW, Suite 740
Albuquerque, NM 87102
(505) 247-0411
(505) 842-8890 (fax)
jwu@sheehansheehan.com

NORTH DAKOTA

***Honorable Jack Dalrymple**
Governor of North Dakota
State Capitol
Bismarck, ND 58505
(701) 224-2200

****Todd Sando**
North Dakota State Engineer
State Water Commission
900 East Boulevard
Bismarck, ND 58505-0850
(701) 328-4940
(701) 328-3696 (fax)
tsando@nd.gov

L. David Glatt, Chief
ND Department of Health
Environmental Health Section
Gold Seal Center
918 East Divide Avenue
Bismarck, ND 58501-1947
(701) 328-5152
(701) 328-5200 (fax)
dglatt@nd.gov

Jennifer L. Verleger
Assistant Attorney General
Office of the Attorney General
500 North 9th Street
Bismarck, ND 58505
(701) 328-3537
(701) 328-4300 (fax)
jverleger@nd.gov

Michael A. Dwyer (Alt.)
North Dakota Water Users Association
P.O. Box 2599
Bismarck, ND 58502-2599
(701) 223-4615
(701) 223-4645 (fax)
mdwyer@btinet.net

OKLAHOMA

***Honorable Mary Fallin**

Governor of Oklahoma
State Capitol
Oklahoma City, OK 73105
(405) 521-2342

****J.D. Strong**

Executive Director
Oklahoma Water Resources Board
3800 North Classen Boulevard
Oklahoma City, OK 73118
(405) 530-8800
(405) 530-8900 (fax)
jdstrong@owrb.ok.gov

†**Steve Thompson**, Executive Director
Oklahoma Dept. of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677
(405) 702-7100
(405) 702-7101 (fax)
steve.thompson@deq.ok.gov

Dean A. Couch, General Counsel (Alt.)
Oklahoma Water Resources Board
3800 North Classen Boulevard
Oklahoma City, OK 73118
(405) 530-8800
(405) 530-8900 (fax)
dacouch@owrb.ok.gov

OREGON

***Honorable John Kitzhaber**

Governor of Oregon
State Capitol
Salem, OR 97310
(503) 378-3100

****Phillip C. Ward**, Director
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271
(503) 986-0900
(503) 986-0903 (fax)
phillip.c.ward@wrdd.state.or.us

†**Neil Mullane**, Interim Administrator
Water Quality Division
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204
(503) 229-5327
(503) 229-5408 (fax)
mullane.neil@deq.state.or.us

SOUTH DAKOTA

***Honorable Dennis Daugaard**

Governor of South Dakota
State Capitol
Pierre, SD 57501
(605) 773-3212

****Steven M. Pirner**, Secretary
Dept. of Environment & Natural Resources
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181
(605) 773-5559
(605) 773-6035 (fax)
steve.pirner@state.sd.us

Garland Erbele, Chief Engineer
Water Rights Program
Dept. of Environment & Natural Resources
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352
(605) 773-4068 (fax)
garland.erbele@state.sd.us

John Guhin (Alt.)
Assistant Attorney General
South Dakota Attorney General's Office
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215
(605) 773-4106 (fax)
john.guhin@state.sd.us

TEXAS

***Honorable Rick Perry**

Governor of Texas
State Capitol
Austin, TX 78711
(512) 463-2000

****Thomas Weir Labatt, III**
P.O. Box 12506
San Antonio, TX 78212-0506
(210) 732-2493
(210) 732-8082 (fax)
wlabatt@satx.rr.com

Carlos Rubinstein
Commissioner
Texas Commission on Environmental Quality
P.O. Box 13087, MC-100
Austin, TX 78711-3087
(512) 239-5505
(512) 239-5533 (fax)
crubinst@tceq.state.tx.us

Christopher D. DeCluitt (Alt.)
Presiding Officer
Brazos River Authority
4600 Cobbs Drive
Waco, Texas 76714
(254) 761-3100
(254) 761-3207 (fax)
cdd@hot.rr.com

John R. Elliott (Alt.)
Vice President
Headwaters Groundwater Conservation District
25 Lehmann Drive, Suite 102
Kerrville, TX 78028-6059
(830) 238-5176
(830) 238-4611 (fax)
elliottj@cebridge.net

Craig Estes, Senator (Alt.)
Texas Senate
2525 Kell Boulevard, Suite 302
Wichita Falls, TX 76308
(940) 689-0191
(940) 689-0194 (fax)
craig.estes@senate.state.tx.us

UTAH

***Honorable Gary R. Herbert**
Governor of Utah
State Capitol
Salt Lake City, UT 84114
(801) 538-1000

****Dennis Strong**, Director
Division of Water Resources
1594 West North Temple, Suite 310
P.O. Box 146201
Salt Lake City, UT 84114-6201
(801) 538-7250
(801) 538-7279 (fax)
dennisstrong@utah.gov

Walter L. Baker, Director (Alt.)
Division of Water Quality
Department of Environmental Quality
195 North 1950 West, P. O. Box 144870
Salt Lake City, Utah 84114-4870
(801) 536-4300
(801) 536-4301 (fax)
wbaker@utah.gov

Dallin Jensen (Alt.)
Parsons, Behle, and Latimer
201 South Main Street
P.O. Box 45898
Salt Lake City, UT 84145-0898
(801) 532-1234
(801) 536-6111 (fax)
djensen@pblutah.com

Norman K. Johnson (Alt.)
Assistant Attorney General
Utah State Attorney General's Office
1594 West North Temple, #300
Salt Lake City, UT 84116
(801) 538-7227
(801) 538-7440 (fax)
normanjohnson@utah.gov

WASHINGTON (Associate Member)

***Honorable Christine Gregoire**
Governor of Washington
State Capitol
Olympia, WA 98504
(360) 753-6780

†Ted Sturdevant**, Director
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
(360) 407-7001
(360) 407-6989 (fax)
tstu461@ecy.wa.gov

Maia Bellon
Program Manager
Water Resources Program
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
(360) 407-6602
(360) 407-6574 (fax)
maib461@ecy.wa.gov

Barbara Markham
Assistant Attorney General
Ecology Division, Water Section
Washington State Attorney General's Office
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6749
(360) 586-6760 (fax)
barbaram@atg.wa.gov

Stephen Bernath (Alt.)
Water Quality Program
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
(360) 407-6459
(360) 407-6426 (fax)
sber461@ecy.wa.gov

Evan Sheffels (Alt.)
Special Assistant to the Director
Department of Ecology
300 Desmond Drive
Lacey, WA 98503
(360) 407-7015
(360) 407-6989 (fax)
eshe461@ecy.wa.gov

WYOMING

***Honorable Matt Mead**
Governor of Wyoming
State Capitol
Cheyenne, WY 82001
(307) 777-7434

****Patrick T. Tyrrell**
Wyoming State Engineer
WY State Engineer's Office
Herschler Building, 4th Floor East
Cheyenne, Wyoming 82002
(307) 777-6150
(307) 777-5451 (fax)
ptyrre@seo.wyo.gov

John Corra, Director
WY Dept. of Environmental Quality
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, WY 82002
(307) 777-7937
(307) 777-7682 (fax)
jcorra@wyo.gov

Peter K. Michael
Senior Assistant Attorney General
WY Attorney General's Office
123 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6196
(307) 777-3542 (fax)
Peter.Michael@wyo.gov

Sue Lowry (Alt.)
Interstate Streams Administrator
WY State Engineer's Office
Herschler Building, 4th Floor East
122 West 25th Street
Cheyenne, WY 82002
(307) 777-5927
(307) 777-5451 (fax)
slowry@wyo.gov

Mike Purcell, Director (Alt.)
WY Water Development Commission
6920 Yellowtail Road
Cheyenne, WY 82002
(307) 777-7626
(307) 777-6819 (fax)
mpurce@state.wy.us

John Wagner, Administrator (Alt.)
WY Dept. of Environmental Quality
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, WY 82002
(307) 777-7072
(307) 777-5973 (fax)
jwagne@wyo.gov

WESTERN STATES WATER COUNCIL

Committee Assignments

EXECUTIVE COMMITTEE

Sandra Fabritz-Whitney - Arizona
Mark Cowin - California
Jeanine Jones - California
(Alternate)*
Jennifer Gimbel - Colorado
Hal Simpson - Colorado
(Alternate)*
Jerry Rigby - Idaho
David Barfield - Kansas
Tim Davis - Montana
Brian Dunnigan - Nebraska
Michael Linder - Nebraska
(Alternate)*
Roland Westergard - Nevada
Leo Drozdoff - Nevada
(Alternate)*
John D'Antonio - New Mexico
Todd Sando - North Dakota
J.D. Strong - Oklahoma
Phil Ward - Oregon
(Vice-Chair)
Steve Pimer - South Dakota
Garland Erbele - South Dakota
(Alternate)*
Thomas Weir Labatt - Texas
(Chair)
Dennis Strong - Utah
Ted Sturdevant - Washington
Patrick T. Tyrrell - Wyoming

Management Subcommittee

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

Nominating Subcommittee

Roland Westergard **(Chair)** - Nevada
Garland Erbele - South Dakota
Weir Labatt - Texas

Ex-Officio Representatives

*For purposes of Committee rosters, the designation as an "alternate" only reflect the person's function on the Committee

Endangered Species Act Subcommittee

Dean Couch - **(Chair)** - Oklahoma
Roland Westergard - Nevada
Estevan Lopez - New Mexico
Phil Ward - Oregon
Weir Labatt - Texas
Herman Settemeyer - Texas
Sue Lowry - Wyoming

Ex-Officio Representatives

FWS - Janet Bair
David Cottingham

Shared Water Vision Subcommittee

Sue Lowry - **(Chair)** - Wyoming
Hal Simpson - Colorado
Mike Volesky - Montana
John D'Antonio - New Mexico
Garland Erbele - South Dakota
Carlos Rubenstein - Texas
Dennis Strong - Utah
Pat Tyrrell - Wyoming

Ex-Officio Representatives

USBR - Kira Finkler
Corps - John Grothaus
Ray Russo
Stu Townsley
EPA - Roger Gorke
USGS - Pixie Hamilton

Water Resources Infrastructure Subcommittee

Jeanine Jones - California **(Chair)**
Hal Simpson - Colorado
Mike Volesky - Montana
John Utton - New Mexico
John D'Antonio - New Mexico

Ex-Officio Representatives

USBR - Kira Finkler
Corps - Elliot Ng
EPA - Steve Albee
NRCS - Keith Admire
Doug Toews

LEGAL COMMITTEE

Vacant - Alaska
William Staudenmaier - Arizona
Jeanine Jones - California
Jennifer Gimbel - Colorado
Jerry Rigby - Idaho
(Vice-Chair)
John Simpson - Idaho
(Alternate)*
Vacant - Kansas
Candace West - Montana
Jay Weiner - 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 Couch - Oklahoma
Phil Ward - Oregon
John Guhin - South Dakota
John Elliott - Texas
Norman Johnson - Utah
Barbara Markham - Washington
Peter Michael - Wyoming

Non-Tribal Federal Water Needs Subcommittee

Jennifer Gimbel - Colorado
Candace West - Montana
Ed Bagley - New Mexico
Dwight French - Oregon
Herman Settemeyer - Texas

Ex-Officio Representatives

BLM - Bob Boyd
USFS - Jean Thomas
FWS - Janet Bair
David Cottingham
DOI - Solicitor's Office

Tribal Reserved Water Rights Subcommittee

William Staudenmaier - Arizona
Bidtah Becker - New Mexico
John Utton - New Mexico
Garland Erbele - South Dakota
Norman Johnson - Utah

Water Transfers and the Public Interest

Jennifer Gimbel - Colorado
Jerry Rigby - Idaho
Tom Stiles - Kansas
John D'Antonio - New Mexico
John Utton - New Mexico
Phil Ward - Oregon
Weir Labatt - Texas
Dennis Strong - Utah
Pat Tyrrell - Wyoming

WATER QUALITY COMMITTEE

Lynn Kent - Alaska
Mike Fulton - Arizona
Darlene Ruiz - California
Betty Olson - California
(Alternate)*
Paul Frohardt - Colorado
Steve Gunderson - Colorado
(Alternate)*
Toni Hardesty - Idaho
Tom Stiles - Kansas
(Alternate)*
George Mathieus - Montana
Richard Opper - Montana
(Alternate)*
Michael Linder - Nebraska
Patrick Rice - Nebraska
(Alternate)*
Vacant - Nevada
Dave Martin - New Mexico
David Glatt - North Dakota
J.D. Strong - Oklahoma
(Chair)
Steve Thompson - Oklahoma
(Alternate)*
Neil Mullane - Oregon
Steve Pimer - South Dakota
Carlos Rubinstein - Texas
(Vice-Chair)
Herman Settemeyer - Texas
(Alternate)*
Walter Baker - Utah
Ted Sturdevant - Washington
Stephen Bernath - Washington
(Alternate)*
John Corra - Wyoming
John Wagner - Wyoming
(Alternate)*

Clean Water Act Subcommittee

Paul Frohardt - Colorado
Barry Burnell - Idaho
Tom Stiles - Kansas
Dean Couch - Oklahoma
Derek Smithee - Oklahoma
Carlos Rubinstein - Texas
Walt Baker - Utah
Stephen Bernath - Washington

Ex-Officio Representatives

Corps - Wade Eakle
EPA - Donna Downing

WATER RESOURCES COMMITTEE

Gary Prokosch - Alaska
Sandra Fabritz-Whitney - Arizona
Mark Cowin - California
Jeanine Jones - California
(Alternate)*
Harold (Hal) Simpson - Colorado
Ginny Brannon - Colorado
(Alternate)*
Dick Wolfe - Colorado
(Alternate)*
John Simpson - Idaho
Jerry Rigby - Idaho
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David Barfield - Kansas
Tim Davis - Montana
Mary Sexton - Montana
(Alternate)*
Brian Dunnigan - Nebraska
Tracy Taylor - Nevada
John D'Antonio - New Mexico
Todd Sando - North Dakota
JD Strong - Oklahoma
Phil Ward - Oregon
Garland Erbele - South Dakota
Thomas Weir Labatt - Texas
Herman Settemeyer - Texas
(Alternate)*
Dennis Strong - Utah
Maia Bellon - Washington
Evan Sheffels - Washington
(Alternate)*
Patrick Tyrrell - Wyoming
Sue Lowry - Wyoming
(Alternate)*

Border Water Issues Subcommittee

Jeanine Jones - California
Herman Settemeyer - Texas
Arizona
Idaho
Montana
New Mexico
North Dakota

Climate Adaptation and Drought Subcommittee

Jeanine Jones - California (**Chair**)
John D'Antonio - New Mexico

Ex-Officio Representatives

Corps - Rolf Olsen
NRCS - Mike Strobel

Water Information and Data Subcommittee

Phil Ward - Oregon (**Chair**)
Lane Letourneau - Kansas
DL Sanders - New Mexico
David Rodriguez - New Mexico
Estevan Lopez - New Mexico
Julie Cunningham - Oklahoma
Barry Norris - Oregon
Robert Mace - Texas
Dennis Strong - Utah
Stephen Bernath - Washington
Pat Tyrrell - Wyoming
Sue Lowry - Wyoming

Ex-Officio Representatives

BLM - Heidi Hadley
USBR - Kira Finkler
Corps - Steve Ashby
Boni Bigornia
EPA - Dwane Young (as LNO)
USGS - Pixie Hamilton and Eric Evenson
NASA - Brad Doorn
NOAA - DeWayne Cecil
NRCS - Mike Strobel

Water Use Efficiency/Conservation Subcommittee

Sue Lowry - Wyoming (**Chair**)
John Longworth - New Mexico
Estevan Lopez - New Mexico
Stephen Bernath - Washington

Ex-Officio Representatives

NRCS - Mike Strobel

Water Resources and Energy Subcommittee

William Staudenmaier - Arizona
Jeanine Jones - California
John Simpson - Idaho
Todd Sando - North Dakota
Robert Mace - Texas
Dennis Strong - Utah
Sue Lowry - Wyoming

Ex-Officio Representatives

Corps - John Grothaus

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Dennis Strong - Utah
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Evan Sheffels - Washington
(Alternate)*
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Sue Lowry - Wyoming
(Alternate)*

LEGAL COMMITTEE

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(Alternate)*
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(Alternate)*
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(Vice-Chair)
Herman Settemeyer - Texas
(Alternate)*
Walter Baker - Utah
Ted Sturdevant - Washington
Stephen Bernath - Washington
(Alternate)*
John Corra - Wyoming
John Wagner - Wyoming
(Alternate)*

Western States Federal Agency Support Team
(WestFAST)

Michael Fallon

Director of Programs
U.S. Army Corps of Engineers
Southwestern Division
1100 Commerce Street, Suite 821
Dallas, TX 75242
(469) 487-7028
(469) 487-7195 (fax)
michael.p.fallon@usace.army.mil

Kira L. Finkler

Deputy Commissioner
External and Intergovernmental Affairs
Bureau of Reclamation
1849 C Street NW
Washington, DC 20240-0001
(202) 513-7636
(202) 513-0319 (fax)
kfinkler@usbr.gov

Becky Fulkerson

Policy Analyst
Bureau of Reclamation
1849 C Street NW
Washington, DC 20240-0001
(202) 513-0638
(202) 513-0319 (fax)
rfulkerson@usbr.gov

Craig Zamuda, Ph.D.

Senior Policy Advisor
Office of Climate Change Policy & Technology
Office of Policy and International Affairs
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585
(202) 586-9038
Craig.Zamuda@hq.doe.gov

Roger Gorke (Chair)

Senior Policy Advisor, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, MC 4101 M
Washington, DC 20460-001
(202) 564-0470
(202) 564-0500 (fax)
gorke.roger@epa.gov

FedEx, Delivery or Courier Address:

U.S. Environmental Protection Agency
Office of Water
EPA East Building, Room 3226 E
1201 Constitution Avenue, NW
Washington, DC 20004-3302

Vacant

U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Room 840
Arlington, VA 22203
(703) 358-2443

Ward Staubitz (Vice-Chair)

Cooperative Water Program Coordinator
U.S. Geological Survey
12201 Sunrise Valley Drive, MS: 436
Reston, VA 20192
(703) 648-5061
(703) 648-5002 (fax)
staubitz@usgs.gov

Roger Pulwarty

Physical Scientist and Director, NIDIS
National Oceanic &
Atmospheric Administration
325 Broadway R/PSD
Boulder, CO 80305
(303) 497-4425
(303) 497-7013 (fax)
roger.pulwarty@noaa.gov

Claudia C. Hoeft (interim)

National Hydraulic Engineer
Acting Program Manager
Snow Survey & Water Supply Program
USDA - NRCS
1400 Independence Avenue SW, Room 6136-S
Washington, DC 20250
(202) 720-0772
(202) 720-0428 (fax)
Claudia.Hoeft@wdc.usda.gov

Jean Thomas

Water Uses Program Leader
USDA Forest Service, WFW
1400 Independence Ave, SW, MS: 1121
Washington, DC 20250-1121
(202) 205-1172
(202) 205-1096 (fax)
jathomas02@fs.fed.us

Fed Ex and UPS for Jean Thomas:

201 14th Street SW
Washington, DC 20024

Bob Boyd

Environmental Quality and Protection
Bureau of Land Management
1620 L St. NW, MC 504 LS
Washington, DC 20036
(202) 912-7136
(202) 653-9076 (fax)
robert_boyd@blm.gov

Mailing Address:

1849 C St NW
Washington DC 20240

Other Contacts:

Heidi Hadley

BLM Salinity Coordinator, UC 247
USDOI Bureau of Reclamation
125 South State Street, Room 6107
Salt Lake City, UT 84138-1147
(801) 524-3886
(801) 524-5499 (fax)
heidi_hadley@blm.gov

Rich Rankin

Idaho National Laboratory
2351 North Boulevard
P.O. Box 1625
Idaho Falls, ID 83415
(208) 526-3040
(208) 526-0425 (fax)
richard.rankin@inl.gov

Dwane Young

Federal Liaison Officer
Western States Water Council
5296 South Commerce Drive, Suite 202
Murray, UT 84107
(801) 685-2555
(801) 685-2559 (fax)
dyoung@swwc.state.ut.us

WSWC MEMBERS
Bend, Oregon
July 29, 2011



Front Row (left to right)

Jerry Rigby, Betty Olson, Jeanine Jones, Roland Westergard, Herman Settemeyer, Sue Lowry, Weir Labatt, Dennis Strong, Norm Johnson, Jennifer Gimbel, Pat Tyrrell, Tony Willardson

Back Row (left to right)

John Simpson, JD Strong, Garland Erbele, Alex Davis, Paul Graves, Phil Ward, Hal Simpson, Michelle Klose, Carlos Rubinstein

WSWC STAFF



Front Row: Julie Groat, Cheryl Redding, Nathan Bracken
Back Row: Dwane Young, Tony Willardson

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

WSWC MEMBERSHIP CHANGES/NEWS

IN MEMORIAM - D. LARRY ANDERSON

Our friend and colleague D. Larry Anderson passed away unexpectedly on March 7, after cancer treatment, leaving both a professional and personal void. Larry was a member of the WSWC for 26 years, during which time he served as Chairman from 1994-1996 and as Secretary- Treasurer from 1993-1994. Larry also worked for the State of Utah's Department of Natural Resources for 34 years, where he was the longest serving Director of the Division of Water Resources, with 22 years. He is survived by his wife of 43 years, Cozette, four children, and 12 grandchildren. Larry will be missed by those who served with him in the water community and for his hard work and dedication to the challenges facing western water managers. Services for Larry were held on March 12.

Arizona

Herb Guenther of the Arizona Department of Water Resources (ADWR) stepped down as Director on January 7. Herb served as the Director since 2003 and was a representative from Arizona to the WSWC. Herb made valuable contributions to the work of the Council as a member and Chair of the Water Resources Committee during his tenure. Governor Jan Brewer named **Sandra Fabritz-Whitney** as the new Director. Sandra had served as the Assistant Director of the ADWR's Water Management Division since 2005, and worked previously as Technical Administrator at the Arizona Water Banking Authority.

Colorado

Alex Davis, Colorado Department of Natural Resources Assistant Director for Water, and a WSWC member, announced she would be leaving her current position effective November 15. Alex accepted a position with Vranesh and Raisch, a Boulder, Colorado law firm specializing in water, environmental, and natural resources law. Alex made valuable contributions to the work of the Council as a member and as Vice-Chair of the Water Resources Committee during her tenure of service.

Kansas

Kansas Assistant Chief Engineer and WSWC member **Paul Graves** announced that he had accepted a position as the Deputy Director of the University of Kansas' Design and Construction Management Department effective August 29. Paul served since September 2007 as a representative of the Council from Kansas and made valuable contributions during his tenure.

Montana

Governor Brian Schweitzer named **Tim Davis** and **George Mathieus** as WSWC members, and named longtime alternate **Candace West** as a member. Tim is the Water Resources Division Administrator for the Montana Department of Natural Resources and Conservation (DNRC), and will serve as Montana's representative to the Executive and Water Resources Committees. George is the Administrator for the Planning, Prevention and Assistance Division within the Montana Department of Environmental Quality, and will serve on the Water Quality Committee. Candace is DNRC's Legal Counsel and will serve on the Legal Committee. Governor Schweitzer also named Assistant Attorney General **Jay Weiner** as an alternate member.

New Mexico

New Mexico State Engineer **John D'Antonio**, and WSWC member, announced his resignation in September after nine years of service. He accepted a position with the U.S. Army Corps of Engineers as Deputy District Engineer for Programs and Project Management within its Albuquerque office. Governor Susana Martinez named **Scott Verhines** to succeed John D'Antonio as State Engineer. Scott served previously as the Eastern New Mexico Rural Water Authority's Program Manager, where he oversaw a \$500 million regional water supply project.

Oregon

On February 15, Oregon Governor John Kitzhaber reappointed **Phil Ward** as the Director of the Oregon Water Resources Department. Phil has served as Director since 2004 and currently serves as the WSWC's Vice Chair.

Washington

Governor Christine Gregoire named **Maia Bellon** to the WSWC. Maia will replace former WSWC member **Ken Slattery**, who retired in July after 35 years of state service. Maia will also follow Ken as the Water Resources Program Manager at the Washington Department of Ecology. She served previously as a Washington Assistant Attorney General and has worked on a number of legal matters, including water resources.

COUNCIL MEETINGS

165th Council Meetings Santa Fe, New Mexico April 13-15

On April 13-15, the WSWC held its 165th meetings in Santa Fe, New Mexico. The State of New Mexico hosted a pre-meeting tour of the Buckman Direct Diversion Project, which pumps water from the Rio Grande River and transfers and delivers it to water users in the City of Santa Fe and Santa Fe County.

At the Full Council meeting on April 15, the WSWC adopted: (1) a resolution honoring former Utah Division of Water Resources Director and former WSWC Chair D. Larry Anderson, who passed away unexpectedly in March; (2) a position supporting the development of a national program of safety standards for levees and flood water conveyance canals, but specifies that such a program should not apply to water supply canals; and (3) a position calling for adequate appropriations to the Clean Water State Revolving Fund (SRF) and the Drinking Water SRF, and urging greater flexibility and fewer restrictions on state SRF management. The third position combines two prior SRF positions (#295 and #296), which were allowed to sunset.

New Mexico State Engineer and WSWC member John D'Antonio discussed his state's water resources. He reported that most of the state is experiencing its second driest year on record and that statewide average precipitation through March is 30% of normal. New Mexico has been engaged in an extensive effort to meter surface and ground water usage, and John noted that the state is almost 100% metered in key basins. John also said there are currently 12 active adjudications in New Mexico and that the state created an Indian water rights settlement fund to provide direct funding for the state's portion of authorized settlements.

The Full Council meeting included a panel discussion on water supply leadership. Peter Carlson, a governmental relations consultant with Will & Carlson in Washington, DC, said there is a need for state, local, and tribal governments to better collaborate to utilize existing tools and to make the best use of available federal funding. Next, National Waterways Conference Chairman Fred Caver, who served previously as the Deputy Director of Civil Works for the U.S. Army Corps of Engineers, said federal policy is changing to a paradigm of greater, centralized federal control over water resources planning in which environmental restoration interests take precedence over economic development. Caver also said a coordinated effort among water resources interests is needed to be effective in Congress.

Following the panel, WSWC Chair Weir Labatt proposed that the Western Governors' Association (WGA) and WSWC work with other water organizations to develop a "shared water vision" to elevate the importance of water in the public sphere. Three possible and overarching principles for such a vision include: (1) a recognition of the importance of an integrated, comprehensive, and collaborative approach to water resources management, development, and protection; (2) support for an approach that balances economic and environmental needs; and (3) recognition that any water policy, plan, or planning process must recognize, defer to, and support state, tribal, and local government water plans and planning processes. As a first step, Weir proposed that the WSWC agree on a list of issues that it could use in working with other organizations to develop a shared vision. A possible second step would involve the WSWC holding

a water summit with other organizations next March in Washington, DC to raise awareness of the importance of water.

Mike Fallon with the U.S. Army Corps of Engineers reported on WestFAST's 2010 accomplishments and highlighted action items from its 2011 work plan, which will focus generally on interagency collaboration, activities to support the WSWC's work plan, and the WGA's 2008 Next Steps report. Mike also mentioned that the Corps has placed a liaison in the Kansas Water Office to improve regional collaboration.

During the Water Resources Committee meeting, Avra Morgan, Dave Raff, Chris Perry, Jim Keys, and Dean Marrone with the Bureau of Reclamation discussed their agency's various grant programs, including WaterSMART, Title XVI projects, basin studies, and others. Keys also said Reclamation has met with the National Committee on Levee Safety to express its concerns regarding the national levee safety program the Committee is developing pursuant to the National Levee Safety Act of 2007. Reclamation does not believe the Act was intended to apply to water delivery canals.

Water Resources Committee Vice-Chair Alex Davis and Tom Iseman of the WGA discussed efforts under a Department of Energy grant to help infuse considerations regarding water demand and availability into energy transmission planning. Under the grant, the WGA and WSWC have been working with Sandia National Laboratories to analyze the implications of water stress for transmission and resource planning. To collect the necessary data, Vince Tidwell with Sandia reported on his efforts to work with Arizona, Colorado, Oregon, and Texas to determine the types of available water data and then create a template to collect similar data from the other WSWC states.

Stephanie Moore with Daniel B. Stephens and Associates described aquifer recharge efforts in New Mexico's Middle Rio Grande Basin, which encompasses the cities of Albuquerque and Rio Rancho. The basin has experienced groundwater declines since the 1960s, and the Albuquerque Bernalillo County Water Utility Authority and the City of Rio Rancho are implementing four recharge projects in the basin that range in volume from 700 to 3,000 acre-feet per year. The projects use infiltration or injection recharge techniques.

The Water Quality Committee heard two presentations from Environmental Protection Agency (EPA) representatives on current rule making efforts. First, Allison Wiedeman with EPA's Office of Water discussed the development of a general permit that will require National Pollutant Discharge Elimination System (NPDES) permits for pesticide applications. The permit will respond to the Sixth Circuit's decision in *National Cotton Council v. EPA*, which found that the text of the Clean Water Act requires NPDES permits for pesticide applications. The final permit will likely apply to pesticide use patterns for mosquitos and other flying insects, weeds and algae, animal pests, and forest canopy pests. Second, Holly Galavotti with EPA's Water Permits Division said EPA is undertaking rulemaking for its stormwater program that will consider developing performance standards for stormwater discharges from new and redeveloped sites that promote green infrastructure. The new rule will also expand the area subject to regulation. The rule will be published for comment in September.

The Water Quality Committee heard from a number of state water quality experts, including Marcy Leavitt with the New Mexico Department of the Environment, who discussed the water quality issues that her state is experiencing. She was followed by John Calkins, with the Arizona

Department of Environmental Quality, who reported on possible EPA efforts to address threats to drinking water from arsenic, fluoride, total chromium, and perchlorate. Sarah Johnson with the Colorado Water Quality Control Division then described her state's antidegradation program. Lastly, Andrew Bartlett with the Florida Department of Environmental Quality discussed EPA's nutrient standards for his state, which are the first in the Nation to establish numeric criteria for nitrogen and phosphorus discharges.

At the Legal Committee meeting, former Oklahoma Water Resources Board Director Duane Smith, a prior WSWC Chair, and Barney Austin with Intera, discussed their efforts working as consultants for Oklahoma's Choctaw and Chickasaw Tribes. The tribes are working to develop a regional water plan that builds upon Oklahoma's Comprehensive Water Plan to ensure the appropriate management of water resources in Southeast Oklahoma, where they claim water rights.

Next, DL Sanders reported on the Bounds and Tri-State cases, which have been appealed to the New Mexico Supreme Court and address the constitutionality of the state's domestic well statute and its Active Water Resource Management regulations. John Utton of New Mexico provided an update on the implementation of the Claims Resolution Act of 2010. Tom Iseman with WGA then described a WGA proposal to work with WSWC states and others to identify innovative ways of mitigating the adverse impacts of water transfers on agricultural and environmental values. Jennifer Gimbel of Colorado also reported on the activities of a newly formed WSWC subcommittee that will address ways to improve federal-state collaboration with respect to federal non-tribal water rights. WestFAST representatives from the Bureau of Land Management, the Forest Service, and the Fish and Wildlife Service will participate in an ex officio capacity.

On April 13, WestFAST coordinated a pre-meeting data exchange workshop intended to begin the discussion of how states and federal agencies can better share water data. The first half of the workshop focused on the issue of water use estimation, while the second half was focused on data sharing methodologies and concepts. The workshop included participation from a number of representatives from state, federal, and other entities, including: David Maidment with the University of Texas; Jeff Simley with USGS; Eric Evenson with USGS; Kansas Chief Engineer and WSWC member Dave Barfield; Vince Tidwell with Sandia; Tommy Dewald with EPA, Dave Wunsch with the National Groundwater Association; and Wayne Sleep with the National Resources Conservation Service.

166th Council Meetings Bend, Oregon July 27-29

On July 27-29, the WSWC held its 166th meetings in Bend, Oregon. The State of Oregon hosted a tour of the Three Sisters Irrigation District's diversion project, which includes a fish screen and fish passage, as well as channel restoration efforts. The tour also stopped at the Central Oregon Irrigation District's Pilot Butte Canal in-conduit hydropower plant and the High Desert Museum's Deschutes River exhibit.

At the Full Council Meeting on July 29, the WSWC adopted a position opposing the preemption of state water law in federal legislation. It states that "...nothing in any act of Congress should be construed as affecting or intending to affect in any way to interfere with the laws of the respective States relating to: (a) water or watershed management; (b) the control, appropriation, use, or distribution of water used in irrigation, municipal, environmental, or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interested compact, decree or negotiated water rights agreement." Separately, the WSWC sent a related letter

to Congress expressing “strong opposition” to H.R. 1837, which would set aside Section 8 of the Reclamation Act of 1902 to preempt California state law as applied to water allocations or species protections in California’s Bay-Delta.

The WSWC also adopted a position asking the federal government to update and revise its guidance documents for hydrologic data and methodologies, and to support and place a priority on extreme events research. The position also states that the WSWC supports development of an improved observing system for extreme precipitation events in the West, and will work with the National Oceanic and Atmospheric Administration (NOAA) in supporting efforts on climate extremes, variability, and future trends as called for in the agency’s June memorandum of understanding with the WGA.

The WSWC further agreed to send a letter to Congress setting forth concerns about proposed cuts to the Clean Water and Safe Drinking Water State Revolving Funds (SRFs) in the House Interior and Environment Appropriations bill (H.R. 2584). The letter is based on Position #330 and asks Congress to modify the current requirement that at least 30% of federally issued SRF funds be used for principal forgiveness.

The WSWC’s Executive Committee further agreed to send a letter to the EPA, commenting on its draft guidance regarding Clean Water Act (CWA) jurisdiction. Among other things, the letter states that: (1) the promulgation of a regulation is preferable to “legally unenforceable guidance;” (2) the guidance “...provides no clear and concise limits to federal jurisdiction;” and (3) any guidance and/or regulation regarding CWA jurisdiction should be developed with the states, and should “...not infringe upon the states’ primary authority to allocate water and administer water rights within their borders.”

Anne Castle, Assistant Secretary of Interior for Water and Science, discussed Interior’s recent water-related efforts, including: (1) WaterSMART activities such as the USGS Water Census and Reclamation’s Basin Study program; (2) Interior’s America’s Great Outdoors initiative; (3) Reclamation’s hydropower resource assessment; and (4) Landsat 8, which should launch in 2012 without significant obstacles. However, funding for Landsat 9 in the House Interior and Environment Appropriations bill has been zeroed out. Castle also said Interior is “very, very focused” on helping state and local governments achieve sustainable water use, and noted that she has relied on the WGA’s 2006 and 2008 “Water Needs and Strategies for a Sustainable Future” reports in placing Interior priorities and utilizing resources. Of note, she asked states to evaluate their efforts to implement recommendations in the 2008 WGA report on better integrating water and land use planning, including ways to address exempt well issues, among other things.

Oregon Water Resources Director and WSWC Vice-Chair Phil Ward discussed his agency’s efforts to develop an integrated water resources strategy for Oregon. The strategy will serve as a roadmap to help the state understand and meet its current and future water quantity, quality, and ecological needs. It will be developed with a strong focus on process and outreach. It is scheduled for delivery to the Legislature with policy and budget recommendations in 2013, with updates every five years. In describing the need for the strategy, Phil said surface water in Oregon is almost fully allocated in the summer and that groundwater is declining in many areas. In addition, over 1,861 water bodies are impaired and not meeting water quality standards, and 24 fish species have been identified as threatened or endangered under the Endangered Species Act.

Incoming WestFASTChair Jean Thomas of the Forest Service gave the WestFAST report, thanking outgoing Chair Roger Gorke of EPA for his service. She also reported that WestFAST has elected Mike Fallon of the U.S. Army Corps of Engineers as Vice-Chair. NOAA's Roger Pulwarty said the National Integrated Drought Information System is expanding into California and the Southeast, and that good coverage in Texas is needed. Brad Doorn with the National Aeronautics and Space Administration (NASA) then described a number of NASA satellite missions in addition to Landsat that have specific capabilities relative to water resources management.

During the Water Resources Committee meeting on July 28, Ada Benavides of the Corps discussed her agency's development of a federal support toolbox for integrated water resources management, which she said will provide states and local water managers with a system to readily access federal water resources information, planning assistance, and capabilities. The scope and design of the toolbox will be completed by December 2011, with a final version due in March 2014.

Next, Gary Carter with NOAA's National Weather Service discussed the development of the Integrated Water Resources Science and Services (IWRSS) initiative, which will provide a single portal for NOAA water science and data. Carter said IWRSS currently involves NOAA, the Corps, and USGS, but is intended to expand to include additional federal agencies.

NOAA's Marty Ralph then summarized efforts to characterize the hydrometeorological causes of extreme precipitation and runoff in the West, including the summer monsoon, rapid spring-summer snowmelt, and the impact of atmospheric rivers on inland states. He also described a "strawman future observing system" to support monitoring, prediction, and climate understanding of these conditions.

Mike Strobel of the Natural Resources Conservation Service discussed 2011 snowpack and precipitation levels in the West, noting that some areas of the Northwest had precipitation levels over 200% of normal. Conversely, drought persists in Arizona, Colorado, Kansas, New Mexico, Oklahoma, and Texas. Going forward, drought conditions in southern Kansas and much of Oklahoma and Texas are expected to persist or intensify, while conditions in eastern Arizona, southeastern Colorado, western Kansas, and western New Mexico are expected to improve.

Jas Adams with the Oregon Department of Justice discussed the Ninth Circuit Court of Appeals' *NEDC v. Brown* decision during a joint meeting of the Legal and Water Quality Committees. The case involves claims made by an environmental group against the Oregon State Forester that the Clean Water Act (CWA) requires NPDES permits for stormwater discharges from logging roads in an Oregon state forest that flowed into a system of ditches, channels, and culverts, and then discharged into adjacent rivers. The Ninth Circuit held that such discharges require NPDES permits, thereby limiting EPA's Silvicultural rule. Oregon is appealing the decision to the Supreme Court.

Ellen Gilinsky with EPA gave a presentation to the Water Quality Committee on her agency's nutrient pollution efforts. She reviewed elements for states to consider when developing frameworks to manage nutrient pollution, which were first set forth in a March memo by EPA Assistant Administrator for Water Nancy Stoner. Gilinsky said the elements are intended to build on existing state efforts and accelerate progress to produce results. Although EPA believes numeric nutrient criteria may be a useful tool in some cases, Gilinsky said EPA does not expect states to develop such

criteria in every instance. States also need flexibility to achieve near term nutrient reductions while making progress on long-term strategies.

The meetings also included a discussion that was aimed at developing a “shared vision” for the WSWC to use in elevating the importance of water within the federal government and the public sphere. WSWC members broke into groups and provided recommendations that the WSWC will further develop during its fall meetings in Idaho.

On July 27, the WGA and WSWC held a pre-meeting workshop to kickoff their Innovative Water Transfers project, which will seek to provide states with a toolbox of options to consider when seeking to improve water transfers or water sharing practices in the West, while avoiding or mitigating damages to agricultural economies, rural communities, and environmental values. WSWC members Jeanine Jones of California, Jennifer Gimbel of Colorado, and Phil Ward of Oregon participated in a panel that provided a state water manager perspective on transfers. They were followed by a stakeholder panel that discussed water sharing efforts in Oregon’s Deschutes River Basin.

**167th Council Meetings
Idaho Falls, Idaho
October 5-7**

On October 5-7, the WSWC held its 167th meetings in Idaho Falls, Idaho. The meetings began with a field trip to the Idaho National Laboratory (INL) that included tours of the world’s first atomic powered electric generator and an advanced test reactor. The Mountain West Water Institute sponsored the field trip.

At the Full Council meeting on October 7, the WSWC adopted a Vision on Water which states: “Water in the West is an increasingly scarce and precious resource, given population growth and an expanding range of often competing economic and ecological demands, as well as changing social values. Surface and ground water supplies in many areas are stressed, resulting in a growing number of conflicts among users and uses. A secure and sustainable future is increasingly uncertain given our climate, aging and often inadequate water infrastructure, limited knowledge regarding available supplies and existing and future needs and uses, and competing and sometimes un-defined or ill-defined water rights. Effectively addressing these challenges will require a collaborative, cooperative effort among states and stakeholders that transcends political and geographic boundaries.”

The document then makes the following points: “(1) State primacy is fundamental to a sustainable water future. Water planning, policy, development, protection, and management must recognize, defer to, and support state laws, plans, and processes. The federal government should streamline regulatory burdens and support implementation of state water plans and state water management; (2) Given the importance of the resource to our public health, economy, food security, and environment, water must be given a high public policy priority at all levels; (3) An integrated and collaborative approach to water resources management is critical to the environmentally sound and efficient use of our water resources. States, tribes, and local communities should work together to resolve water issues. A grassroots approach should be utilized in identifying problems and developing optimal solutions.”

It continues: “(4) Any approach to water resource management and development should accommodate sustainable economic growth, which is enhanced by the protection and restoration of significant aquatic ecosystems, and will promote economic and environmental security and quality of life; and (5) There must be cooperation among stakeholders at all levels and agencies of government that recognizes and respects national, regional, state, local and tribal differences in values related to water resources and that supports decision-making at the lowest practicable level.”

Additionally, the WSWC readopted existing positions supporting the negotiated resolution of Indian reserved water rights claims and setting forth recommendations regarding the federal government’s role in expediting general stream adjudications. It also readopted a resolution urging that any federal ground water strategy must recognize and respect state primacy, reflect a true state-federal partnership, and provide adequate funding consistent with current federal requirements.

Deputy Commissioner for the Bureau of Reclamation Kira Finkler described her agency’s river restoration, scientific integrity, and WaterSMART efforts, including the Basin Study Program, cooperative watershed management, and water conservation, among others. In particular, she said Reclamation selected 82 projects in FY2011 to receive \$33 million in WaterSMART grant funding and is continuing its efforts to increase available water supply in the West by up to 350,000 acre-feet by 2012 through Title XVI and other conservation-related programs. She also said the Department of Interior’s annual economic contributions include 1.4 million private sector jobs and \$370 billion in economic activity. Reclamation’s management and recreation activities have a \$55 billion economic impact and support 416,000 jobs.

Next, Marlene Finley, Deputy Regional Forester for the U.S. Forest Service’s Intermountain Region, said every National Forest is identifying two watersheds for which they will prepare action plans. Finley also described her agency’s efforts to address bark beetle impacts, noting that it conducts aerial surveys every year and that beetle populations are moving in from the East.

The Full Council meeting included three presentations on Idaho water resource issues. Idaho Water Resource Board (IWRB) Vice-Chair Roger Chase discussed water challenges, noting that collaboration has been an important tool that Idaho has utilized to address conflicts. Jon Bowling with Idaho Power described his company’s cloud seeding efforts, and Idaho Water District 01 Manager Lyle Swank discussed flood control efforts for reservoirs in his district.

WestFAST Chair Jean Thomas, U.S. Forest Service, said her group is conducting a “brainstorming” effort to identify areas for possible WestFAST involvement within their respective agencies and to encourage more cross-federal collaboration. WestFAST agencies are also engaged in the Western Regional Partnership, which is a Department of Defense collaboration effort involving federal, state, and tribal stakeholders looking at natural resources issues that impact military facilities in Arizona, California, New Mexico, Nevada, and Utah.

During the Water Resources Committee meeting on October 6, IWRB Planning Bureau Chief Brian Patton described IWRB’s Eastern Snake Plain Aquifer Comprehensive Aquifer Management Plan, which is working to resolve conjunctive administration water use conflicts through 100,000 af/year of managed recharge; 100,000 af/year in groundwater to surface water conversions; 95,000 af/year in demand reduction; and weather modification. Other efforts include flow restoration projects in the Upper Salmon River Basin and various water storage project studies.

U.S. Geological Survey (USGS) Staff Scientist Bret Bruce described the National Water Census, which includes a focused Colorado River Basin water availability assessment. The assessment will determine what science can contribute to basin-wide knowledge of water availability and will digest stakeholder input for use by local and regional water management agencies. USGS Supervisory Hydrologist Molly Maupin then discussed the National Water Use Information Program, saying a 2010 water use report will be undertaken soon.

ESRI Senior Account Executive Chris Friel described efforts by his company to help develop a wildlife corridor decision support system (DSS) for the Western Governors' Wildlife Council. The effort is engaged in pilot projects intended to: (1) determine regional compatibility across state systems; (2) how accessible state systems should be; and (3) how sophisticated state systems should be. The effort may also provide information that the WSWC and Western Governors' Association can use in carrying out their energy-water transmission planning project.

At the Legal Committee meeting, Idaho WSWC members John Simpson and Jerry Rigby discussed the Snake River Basin Adjudication, which began in 1987. The adjudication is nearing completion and will resolve over 150,000 claims. Of the 5,970 claims the federal government filed, only seven were ultimately allowed. Idaho also recently began the Coeur d'Alene-Spokane River Basin Adjudication and has received about 8,340 claims so far. Jerry then described the IWRB's Minimum Streamflow Program to preserve stream flows and keep waters from being diverted and used out-of-state.

The Water Quality Committee meeting began with a presentation by Jean Thomas on Forest Service efforts related to water quality, including a Forest Planning Rule that will be finalized by the end of 2011. Julie Hewitt with the EPA's Office of Science and Technology then described EPA rulemaking for cooling water intake structures at power plants and factories, which can impinge or entrain aquatic organisms. EPA is developing the rule under Section 316(b) of the Clean Water Act (CWA) and is reviewing public comments on a proposed version of the rule, including suggestions to replace a proposed numerical standard for impingement mortality with a best available technology approach to provide flexibility and address site-specific conditions.²

EPA's Leigh Woodruff and Dirk Helder also discussed EPA Region 10 efforts, including the availability of a multi-sector general permit and individual NPDES permits for stormwater runoff from forest roads in light of the Ninth Circuit's *NEDC v. Brown* decision, which held that runoff from logging road drainage systems requires NPDES permits under the CWA. Region 10 is also developing a nutrient reduction strategy focused on Idaho, Oregon, and Washington. Lastly, Ed Hagan, with the Idaho Department of Environmental Quality described water quality issues in Idaho, noting that nitrates and arsenic are the chemical constituents most frequently detected above water quality standards. Pesticides are generally found at low levels and few exceed such standards.

On October 5, the WSWC held a pre-meeting workshop on the linkages between data collection needs and extreme event monitoring, forecasting, science, and hydroclimate trend detection. Dave Reynolds and Harold Opitz with the NOAA's National Weather Center gave presentations on extreme event weather monitoring and prediction, while Marty Ralph with NOAA's Earth System Research Laboratory discussed the development of an observing network design for extreme precipitation, flooding, and climate. University of Washington professor Jessica Lundquist also discussed hydroclimate processes, snow, and trend detection.³

²*Western States Water*, #1928, April 29, 2011.

³PowerPoint presentations given at the WSWC meetings are posted on the WSWC's website. See: <http://www.westernstateswater.org/upcoming-meetings/past-meetings>.

OTHER MEETINGS

2011 Washington, DC Visits

On March 7-11, representatives from the WSWC and the WGA met with Administration and Congressional officials in a series of over 40 in-person visits to discuss recent WGA and WSWC positions and priorities. WSWC Chairman Weir Labatt, Water Quality Committee Chair Walt Baker, and former WSWC member and Indian water rights expert Susan Cottingham made the visits, accompanied by staff. They also met with WGA Staff Council members (for Alaska, Arizona, Nevada, and Washington), the Clean Water America Alliance, and National Waterways Conference to discuss and explore possible areas of collaboration.

The WSWC met with key officials from each of the eleven WestFAST agencies to thank them for their support and discuss current issues. Some of those officials included: Natural Resources Conservation Service (NRCS) Chief Dave White; U.S. Forest Service Deputy Chief Joel Holtrop; U.S. Geological Survey (USGS) Director Marcia McNutt; Acting EPA Assistant Administrator for Water Nancy Stoner; Principal Deputy Secretary for the Army (Civil Works) Terrence "Rock" Salt; Mary Glackin, Deputy Under Secretary of Commerce, over NOAA; William Shafroth, Deputy Assistant Secretary of the Interior for Fish, Wildlife and Parks; Edwin Roberson, Assistant Director for Renewable Resources and Planning with the Bureau of Land Management; and Margaret Luce, Deputy Director of the National Aeronautics and Space Administration's (NASA) Earth Sciences Division; and Craig Zamuda, a Senior Policy Advisor with the Department of Energy. The WSWC also met with U.S. Department of Agriculture Under Secretary for Natural Resources and Environment Harris Sherman and Deputy Assistant Secretary of the Interior for Water and Science John Tubbs, both former WSWC members. WestFAST Chair Roger Gorke of EPA, Federal Liaison Dwane Young, and other WestFAST members participated in these visits as well.

The Administration visits focused on a number of WSWC priorities, including: (1) water for federal non-tribal purposes; (2) NRCS' snow survey and SNOTEL funding; (3) Landsat funding; (4) developing a "Shared Water Vision;" as opposed to a national water policy; (5) Endangered Species Act (ESA) implementation; (6) water availability for energy production; (7) the USGS' water census and funding for streamgaging programs; (8) WGA and WSWC support for the EPA's water transfers rule and SRF programs; (9) the Department of the Interior's WaterSMART program; (10) water-related efforts of NASA's Earth Sciences Division; and (11) NOAA's climate efforts.

The WSWC also met with numerous Senate and House offices and committee staff, including the House Water Resources and Environment Subcommittee and Senate Environment and Public Works Committee. These visits focused on the WGA and WSWC support for Good Samaritan legislation to clean up abandoned hardrock mines, the Water Resources Development Act, EPA's water transfers rule, and the WSWC's support for legislation to clarify that pesticide applications complying with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) do not require NPDES permits.

On March 10, Native American Rights Fund (NARF) Executive Director John Echohawk and his staff joined WGA and WSWC staff on a series of visits aimed at supporting Indian water rights settlements. For almost 30 years, the WGA, WSWC and NARF have worked together as part of the Ad Hoc Group on Indian Water Rights to facilitate the settlement of tribal reserved water rights claims. The group met with Deputy Secretary of the Interior David Hayes, his Counselor Letty Belin, and others, including Bureau of Reclamation Commissioner Mike Connor. The group also met with Congressional Native American Caucus Co-Chair Rep. Tom Cole (R-OK), House Subcommittee on Water and Power Ranking Member Grace Napolitano (D-CA), Senator Jon Tester

(D-MT), and Senate Indian Affairs Committee and House Water and Power Subcommittee staff to discuss Indian water rights settlements in the 112th Congress.

The visits concluded on March 11 with a briefing on western water issues attended by over 30 House and Senate staffers. WGA Water and Climate Adaptation Program Director Tom Iseman provided an overview of the WGA and its 2006 and 2008 Water Reports, while WSWC Executive Director Tony Willardson described WestFAST and highlighted WSWC's efforts to carry out the Water Reports' recommendations. Lastly, John Echohawk discussed the Ad Hoc Group's efforts and the upcoming Indian Water Rights Symposium scheduled for August 23-25, in Billings, Montana.

WSWC-California Department of Water Resources Climate Workshop

On March 21-23, the WSWC and the California Department of Water Resources (CDWR) co-hosted a state-federal climate workshop in San Diego, California in coordination with the WGA. It focused on climate impacts related to extreme events and severe weather, including floods and droughts, and the development of methodologies to address non-stationarity. Over 45 climate and water resources experts attended the workshop, representing a variety of state and federal agencies, universities, consulting firms, and non-governmental organizations, as well as one tribe. One theme that emerged is that basic data collection and analysis is critical to identifying changing conditions and preparing for extreme events.

The first panel provided various perspectives on the impacts of climate change on extreme events. It consisted of Robert Mason, U.S. Geological Survey (USGS); Jonathan Overpeck, University of Arizona; Kelly Redmond, Western Regional Climate Center; Peter Ruggiero, Oregon State University; and Ken Kunkel, NOAA. Among other things, the panel discussed a number of issues related to updating Bulletin 17B, which USGS published in 1982 to provide guidelines for determining flood flow frequency.

The second panel was entitled "If Stationarity is Dead, What Do We Do About It?" Rolf Olsen with the U.S. Army Corps of Engineers described a Non-Stationarity Workshop that his agency and four others hosted in January 2010, noting that one idea that emerged is that "non-stationarity is here and always was." Next, Bob Hirsch with USGS said continuity of observations is crucial in a non-stationary world, and that climate modeling should synthesize observations, not replace them. He also cited studies indicating a possible link between CO₂ increases and flood magnitude. NOAA's Andrea Ray discussed the proposed Climate Service, which will bring NOAA's existing capabilities under a single management structure to respond to the demand for climate services.

Another panel discussed climate change and floods. Marty Ralph with NOAA said atmospheric rivers (AR) are associated with extreme flooding in West Coast states and may be a factor in the Intermountain West. Mike Dettinger with USGS said projections in California suggest more years with "lots of ARs" and increased flood risks in the northern and southern Sierra mountains. Mike Anderson with the CDWR discussed his agency's flood planning efforts and NOAA's hydrometeorological testbed (HMT), which is intended to accelerate the infusion of new observing technologies, models, and scientific results into daily forecasting operations. Nancy Steinberger with the Federal Emergency Management Agency (FEMA) also described some of her agency's flood related efforts, including a study on the impacts of climate change on the National Flood Insurance Program that is undergoing review.

The next panel explored non-stationarity and hydrologic design standards. The Bureau of Reclamation's Dave Raff discussed some of his agency's approaches, including requirements under the SECURE Water Act to consider the impact of changing water supplies on flood control management. Cindy Lin with the Environmental Protection Agency described her agency's perspective on stormwater and the benefits of green infrastructure in adapting to climate change. Other panelists included Glenn DeCou with the California Department of Transportation, Sam Riley Medlock with the Association of State Floodplain Managers, and Don Schroeder with CDM, which sponsored a social hour.

Data and science considerations were addressed by a panel that included Jonathan Overpeck, University of Arizona; Soroosh Sorooshian, University of California, Irvine; Greg Holland, National Center for Atmospheric Research; Dave Reynolds, National Weather Service; and Frank Gehrke, CDWR. Some of the key points that emerged included: (1) current models do not capture regional trends in extreme events; (2) climate model bias requires great care; (3) scientists should work with stakeholders to provide more information on regional climate science; (4) long-term funding for complex data networks is needed; and (5) obtaining funding for basic observation efforts is becoming increasingly difficult.

Jeanine Jones, CDWR's Interstate Resources Manager and a Council member, spoke on a panel that discussed possible approaches and outreach opportunities. She stressed the need to begin working on climate change now, to look for "low hanging fruit," and to build on existing capabilities. She also said adaptation is an iterative process and that tools will evolve over time. Kelly Redmond noted that good data collection requires complete and consistent records to ensure observation of extreme values. Redmond further noted that permitting requirements and a lack of funding pose challenges for monitoring networks. Lastly, Jeff Jacobs, Laura Helsabeck and Stephanie Parker with the National Research Council described their organization and various studies on hydro-climate variability and extremes that it has undertaken.

A wrap-up panel consisting of Dave Raff, Dave Reynolds, Frank Gehrke, and Rolf Olsen discussed strategies for moving forward, including near-term actions such as the HMT. A number of agencies are developing climate information networks. Panelists also discussed the possibility of developing an inventory of federal, state, and local flood efforts similar to the inventory of federal climate change efforts that WestFAST developed in 2010.

Other components of the workshop included an overview of the WGA's climate efforts by WGA Water and Climate Adaptation Program Director Tom Iseman, and a presentation by USGS' Mike Dettinger on the ARkStorm, a hypothetical storm that could cause extreme flooding in California. WSWC Executive Director Tony Willardson provided a wrap-up summary, noting that data is critical and that government must become more collaborative, take a "longer view," and be more adaptable. Group break out sessions also developed potential adaptation recommendations.⁴

Symposium on the Settlement of Indian Reserved Water Rights Claims

The WSWC and the Native American Rights Fund (NARF) held the 12th biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 23-25, in Billings, Montana. The Crow Nation hosted the event, which included presentations and speeches from Administration representatives, key Congressional staff members, and state and tribal leaders. Attendees also participated in a field trip to the Crow Reservation that included stops at the Little

⁴Powerpoint Presentations are posted on the WSWC's website. See: <http://www.westernstateswater.org/upcoming-meetings/past-meetings>.

Bighorn Battlefield and Yellowtail Dam, and concluded with a dinner and cultural celebration featuring Crow music and dancing.

On August 23, NARF Executive Director John Echohawk welcomed the over 225 people in attendance. He said the purpose of the Symposium is to provide a forum for water experts to exchange information and advice regarding Indian water rights settlements. He also mentioned that this year's Symposium would highlight the four settlements that Congress passed as part of the Claims Resolution Act (CRA) of 2010, namely the Crow Settlement in Montana; the Aamodt and Taos settlements in New Mexico; and the White Mountain Apache settlement in Arizona.

Next, WSWC Executive Director Tony Willardson provided an overview of the WSWC and recognized those WSWC members in attendance. He also discussed the recommendations contained in the WGA's 2008 Next Steps report, including its recommendations in support of the negotiated settlement of Indian water rights claims. Among other things, he stressed the importance of recognizing differences and needs, supporting tribal sovereignty and self-determination, and the value of balancing needs and uses. He also stated that settlement parties can build on their diversity and shared common values. He thanked Montana Senators Max Baucus and Jon Tester for supporting the CRA.

Following these remarks, Letty Belin, Counselor to the Deputy Secretary of the Interior David Hayes, conducted a presentation on the Administration's settlement policy. In particular, she said the Administration is committed to the settlement process, but noted that funding remains a challenge that impacts its ability to provide settlement resources, including federal negotiation teams. Belin also displayed a chart showing a significant downward trend in nominal settlement funding for the Bureau of Indian Affairs' budget from 1994 to 2010. Although significant obstacles exist, she said settlements have always faced challenges and that the four CRA settlements represent an incentive for other parties to be more creative and persistent in seeking approval for their settlements.

Principal Deputy Assistant Secretary for Indian Affairs Donald "Del" Laverdure warned that discretionary federal spending is shrinking, and will require additional work and collaboration to implement passed settlements and fund future ones. However, he said the President and others within the Administration are "absolutely committed" to the settlement process. A former Chief Legal Counsel and member of the Crow Tribe, Laverdure also discussed some of his experiences working on the Crow settlement prior to joining the Administration. He noted that the time the tribe took to conduct internal and external education was essential. After joining the Administration, Laverdure was partitioned from any involvement with the settlement.

NARF Staff Attorney David Gover moderated a response panel consisting of Scott McElroy, and John Stroud. McElroy, a partner with the law firm of McElroy, Meyer, Walker & Condon represented Pueblo interests in the Aamodt settlement. He said having a three-way discussion about the cost of the settlement with the Administration and the Pueblos' Congressional delegation was helpful in securing passage of the settlement. He also noted that early federal involvement is always helpful and that the Office of Management and Budget is unlikely to support settlements unless someone is advancing federal interests. Stroud, a sole practitioner who represented the State of New Mexico in the Aamodt settlement, noted that personnel turnover among settlement parties can be a substantial problem, and that determining appropriate cost sharing for states is a difficult challenge. Both panelists praised the Obama Administration for its settlement efforts.

Following the panel, Senator Jon Tester's Field Director Rachel Court read a letter from the Senator, which stated: "We're already seeing the benefits of water settlements in Montana - like jobs and stronger infrastructure. But our work is not done. In addition to the Crow Water Settlement,

which we passed last year, I continue fighting to get the resources necessary to build authorized projects at Rocky Boy and Fort Peck. We're also looking for opportunities to advance settlements on the Fort Belknap and Blackfeet reservations. Succeeding requires a lot of hard work on your part and my part, and a willingness to negotiate in good faith."

Stephen Walker with Lewis, Longman & Walker gave a luncheon presentation on the experiences of the Seminole Tribe of Florida in implementing its 1987 settlement. Among other things, he noted that the Tribe perfected its water rights by learning Florida's permitting system "inside and out," and noted that it is important to understand state and adjacent landowner concerns, which will continue to be raised if not addressed.

Navajo Nation Attorney and WSWC member Bidtah Becker moderated a panel discussion entitled, "Gathering Background Information and the Role of Technicians in Negotiations." The panel consisted of Bureau of Reclamation Policy Analyst John Peterson; Montana Assistant Attorney General and WSWC member Jay Weiner; Pueblo of Taos Water Rights Coordinator Gilbert Suazo, Sr.; and DOWL HKM Senior Water Resource Planner Rich Schilf. Some of the notable points to emerge from the discussion, include: (1) meaningful settlement negotiations cannot begin without sufficient technical information; (2) experts should "stick to the facts" and not shape information to meet policy goals; (3) it is important to keep in mind "by whom and for whom" data is collected; (4) in-house technical experts can be useful because "experience builds on experience;" and (5) technical information should be translated into a language that tribal leaders and members understand.

The final panel of the day was entitled "Identifying Parties and Issues and How Negotiations Bind Larger Groups." NARF Staff Attorney Amy Bowers moderated the panel. Senior Attorney Duane Mecham with the Department of Interior's Solicitor's Office noted that federal negotiation teams look to tribes to set priorities for settlement and that the current Administration is focused on having federal teams become active early in the negotiation process. Attorney Bob Brauchli, who represents the White Mountain Apache Tribe, and Snell & Wilmer attorney Bill Staudenmaier, a WSWC member, provided a joint presentation on settlement issues in Arizona, stating that "essential" elements of a successful settlement include patience, flexibility, creativity, and carrots (the benefits of settlement), as well as sticks (the threat of litigation). Bill also noted that grandfathering existing non-Indian uses has been a "bedrock principle" needed for settlement in the cases on which he has worked.

On August 24, Bureau of Reclamation Commissioner Mike Connor gave a keynote address that reaffirmed the Administration's support for settlements, noting that six settlements have been approved during its tenure. Connor also said the agency is working to provide tribes with the resources they need to provide the economic prosperity that exists elsewhere, noting that 11% of homes in Indian Country lack access to basic domestic water services, compared to 1% in other populations. He further said that \$1.00 invested in water infrastructure in Indian Country will result in a 20-fold improvement in health benefits. Settlements also have a positive impact upon jobs and the economy. Connor noted that the CRA's mandatory appropriations and his agency's FY2012 \$51.5 million budget request for settlement funding would provide Reclamation with about \$600 million to invest in Indian Country, which would create about 6,600 jobs.

Crow Tribe Chairman Cedric Black Eagle provided a co-keynote address that reflected upon his experiences working on his tribe's settlement, which he called a "win-win" that will help the tribe develop its economy. He noted that a number of court cases and other factors motivated the parties to negotiate in good faith, and that providing protection for state-based rights helped the state support

the settlement. Outreach efforts to address opposition and critics within the tribe also played an important role in securing tribal approval for the settlement.

The following panel provided state, federal, and tribal perspectives on the Crow settlement. Doug Davis, a Native American Affairs Program Director for Reclamation, said the technical team discussed the importance of developing settlements with an understanding that Congress will make significant revisions. Faye Bergen, former Legal Counsel for the Montana Reserved Water Rights Compact Commission, discussed the importance of the people involved in the negotiations, noting that the state negotiators benefitted from having a Governor and Attorney General who were familiar with the issues and eager to engage. She also said interstate issues can complicate settlement negotiation, and that the settlement parties worked to ensure that the tribal water right fell within the interpretation of the Yellowstone River Compact with Wyoming and North Dakota. Lastly, Heather Whiteman Runs Him, Joint Lead Counsel for the Crow Nation Executive Branch, said, “The work really starts” after a settlement is approved and implementation begins. Among other things, her tribe engaged in an outreach effort to address questions and concerns from tribal members prior to the tribe’s ratification of the settlement earlier this year. Susan Cottingham, the former Program Manager for the Montana Reserved Water Rights Compact Commission and a former WSWC member, moderated the discussion.

NARF Senior Attorney Steve Moore moderated the next panel on settlement implementation. Pam Williams, Director of the Secretary of Interior’s Indian Water Rights Office, said implementation can take five years on average, but can take as long as 10-15 years for settlements involving major construction. She also said issues can still arise after implementation and that flawed settlements can hamper implementation. Reclamation Project Engineer Rick Ehat said it is important to track costs over the course of a settlement construction project to see how they align with original estimates and appropriations. WSWC member Candace West, Chief Legal Counsel for the Montana Department of Natural Resources, discussed how Montana’s water courts approve settlements. She said the court does not address the factual issues of the settlement or the merits of the specific provisions, but the applicability of the decree and its fairness for all parties. Settlement parties should also be prepared for objections from water users not involved in the negotiation process. Lastly, Nez Perce Tribe Executive Director Rebecca Miles discussed her tribe’s settlement, noting that the tribe has not received all of the funding for its 2004 settlement and that they are still lobbying for the distribution of funds.

On August 25, WSWC Legal Counsel Nathan Bracken moderated a panel of past and present Congressional staff that discussed how to move settlement bills through Congress. Tanya Trujillo, a former Senior Counsel for the Senate Committee on Energy and Natural Resources and former WSWC member, now working for Interior, discussed the process of how bills are assigned to committees and move towards passage. Ryan Smith, a former senior legislative advisor to Senator Jon Kyl (R-AZ) now working as an attorney for Brownstein Hyatt Farber Schreck, described the process used to pass the CRA. He explained some of the factors that led to the bill’s passage, including creative offsets and the packaging of the settlements with the Pigford and Cobell settlements, two non-water settlements that had Administration support. Camille Calinlim Touton, Minority Professional Staff for the House Natural Resources Committee’s Subcommittee on Water and Power, said negotiations continue after a settlement is introduced in Congress, and that settlement parties should engage early and often with their Congressional delegation. David Mullan, Jr., Minority Staff Director and Chief Counsel for the Senate Committee on Indian Affairs, discussed the outlook for settlements in the 112th Congress and beyond, saying the current focus on reducing federal spending will increase competition for available federal funds, and that finding offsets may become more difficult. Lastly, Senate Indian Affairs Majority Counsel Cisco Minthorn stressed the

importance of educating members of Congress, particularly Eastern members who may not be familiar with the importance of settlements.

A response panel followed. Chastity Bedonie, an attorney-advisor with Interior's Office of Congressional and Legislative Affairs, said early engagement with the Administration is needed to secure federal support for settlement bills. Navajo Nation Water Rights Counsel Stanley Pollack discussed the value of Congressional "champions," such as Senator Kyl, in securing passage of settlement bills. Donald Pongrace, an attorney with Akin Gump Strauss Hauer & Feld who represents the Crow Tribe, said tribal leadership should be flexible during the Congressional process. He noted, "Just because you don't have the stars aligned when you begin, doesn't mean that they won't align later." WSWC member DL Sanders, Chief Legal Counsel and Litigation and Adjudication Program Director for the New Mexico State Engineer, said it is important for state negotiators to work with state legislatures to define limits for state financial commitments.

Chris Tweeten, Chairman of the Montana Reserved Water Rights Compact Commission, gave the concluding wrap-up summary. He stressed the need for settlement parties to not become discouraged by obstacles, noting that rules can be changed or re-interpreted and that patience is critical.

WGA-WSWC Water Transfers Workshop

On December 12-13, the WGA and the WSWC held a stakeholder workshop in Las Vegas, Nevada to identify ways to allow water-sharing among urban, environmental, and agricultural uses while minimizing impacts on rural communities. The meeting focused on transfer issues in the Colorado River Basin and included participation from over 50 experts representing state, federal, tribal, urban, environmental, agricultural, and other interests.

Nevada State Engineer Jason King gave a keynote address on water transfers, noting that many transfers, or changes in his state involve less than one acre-foot/year. He also said the majority of Nevada's population resides in fully appropriated areas, which often requires changes in use to satisfy growth. Of note, King explained that Nevada allows one-year, temporary transfers of agricultural water to instream flows. Such transfers do not require publication, are processed quickly, and can be renewed.

Former Bureau of Reclamation Commissioner Bob Johnson moderated the first panel, which discussed transfers involving Reclamation projects, and how partners have collaborated with the agency to accomplish transfers. Johnson also urged attendees to review recent draft policies that Reclamation has prepared to govern its transfer and water-related contracting activities. Panelists included Bonnie Colby of the University of Arizona; Richard Stevenson with Reclamation; Jesus Reyes with the El Paso County Water Improvement District #1; and Tom Glover with the Westlands Water District.

California Department of Water Resources Interstate Resources Manager Jeanine Jones, a WSWC member, moderated a panel that discussed infrastructure and water transfers. Dan Birch with the Colorado River Water Conservation District discussed the development of a water bank to address the potential impacts of a compact call on Colorado River users in Colorado. Next, Michael King with the Imperial Irrigation District (IID) in California gave an overview of infrastructure and conservation-related efforts in his district, which include a fallowing program that provides conserved water to urban uses in Southern California as part of the Quantification Settlement Agreement (QSA) involving California and various water agencies. Lastly, Tim Henley with the

Arizona Water Banking Authority described his organization's transfer efforts and noted that reclaimed water is a “blossoming” supply of water.

A third panel moderated by New Mexico Interstate Stream Commission Director Estevan López discussed the role of the private sector in water transfers, including private water providers, investment funds, and other interests, as well as how private investment can be integrated into water transfer policy. Some of the key themes that emerged focused on the importance of encouraging water development without encouraging speculation, and the need to address public concerns about private involvement in public water supply projects. Presenters included Rod Smith with Stratecon, Inc.; Mike Schlehner with Greenstone Resource Partners, and Tom Hicks with the Resource Renewal Institute.

A final panel of speakers discussed a long-term water transfer between California’s Palo Verde Irrigation District (PVID) and the Metropolitan Water District of Southern California (MWD). Bill Hasencamp with MWD said the 35-year agreement involves voluntary farmer participation in which MWD pays farmers to fallow a portion of their land, rotate crops, and transfer conserved water to urban Southern California. Ed Smith, PVID’s General Manager said land is fallowed on a rotational basis, with a given parcel of land being fallowed for no less than one year, but no more than five years. Lastly, Jay Abbs with the Palo Verde Valley Community Improvement Fund described his organization, which was created with \$6 million from MWD to carry out community improvement programs aimed at offsetting the economic impacts associated with the PVID fallowing.

The workshop also included a number of stand-alone speakers, including Jicarilla Apache Nation attorney Herb Becker, who discussed tribal water leasing. Brad Udall with the University of Colorado's Western Water Assessment described water market efforts in Australia's Murray-Darling Basin, and Carly Jean with Reclamation gave an update on the Colorado River Basin Study.

The workshop was the last in a series of three workshops that the WGA and WSWC have held as part of a project aimed at developing a toolbox of innovative strategies and policy recommendations for western states to consider when working to mitigate the adverse impacts associated with water transfers. Previous workshops focused on transfer issues in the Northwest and the Intermountain and Great Plains states.

WGA 2011 Annual Meeting - Coeur D’Alene, Idaho

The WGA held its annual meeting on June 29 - June 30 in Coeur d’Alene, Idaho. WGA Chair Governor C.L. “Butch” Otter (R-ID) convened the meeting, and Governors Christine Gregoire (D-WA) and Gary Herbert (R-UT) were elected as the next Chair and Vice-Chair. The following governors also attended: Jan Brewer (R-AZ), John Hickenlooper (D- CO), Brian Schweitzer (D-MT), John Kitzhaber (D-OR), and Matt Mead (R-WY). British Columbia Premier Christy Clark also attended.

During the meetings, the governors adopted a water resources resolution that builds upon the WGA’s 2008 Next Steps report and consolidates and revises previous WGA positions. The governors also adopted a similar resolution that combines the WGA’s water quality and drinking

water positions, and includes new policy statements on forest roads, pesticides, nutrient pollution, and antidegradation.⁵

Additionally, the governors accepted a report that the WSWC prepared on strategies to address water infrastructure needs. The report discusses identifying, prioritizing, and financing water-related infrastructure needs related to flood control, agricultural, municipal and industrial water supply, wastewater treatment, water quality protection, water conservation and reuse, and navigation. Among other things, it finds that there is a growing and serious need for collaboration and leadership at all levels of government, and that it will take political leadership and public support to find the financial resources needed to address the Nation's water infrastructure funding gap. It also finds that public-private investment partnerships offer opportunities and advantages that could help maximize public and private capital and financial resources to address water infrastructure needs.

The meetings included a plenary session focused on restoring and managing the health of forests in the West. The session discussed the challenge of funding efforts to improve forest health in the face of strained federal and state budgets. "We need to build public-private partnerships to a much greater degree than we have in the past," said Under Secretary of Agriculture for Natural Resources and the Environment Harris Sherman, a former WSWC member. "These forests provide huge benefits to many, many beneficiaries." Sherman also noted that 80 million acres of western forests present moderate to high wildfire risks.

The governors also signed a memorandum of understanding (MOU) with the National Oceanic and Atmospheric Administration to improve the development, coordination, and dissemination of climate information to support long-range hazard planning priorities and resource management decisions in the West. One of the MOU's priority areas is disaster risk reduction with a focus on the impacts of extreme events, such as droughts, floods, fires, and cyclones. The other priority area seeks improved science and climate information to support the management of coastal, estuarine, and marine resources needed for achieving resilient coastal communities and ecosystems. "This agreement will assist Western state resource managers, agencies and businesses who manage or are affected by natural disasters and weather variability," said Governor Otter.

At the close of the meeting, incoming WGA Chair Governor Gregoire launched the WGA's new "Get Out West!" initiative to: (1) highlight the importance of the recreational and tourism sectors of the Western economy; (2) support efforts to boost recreation, conservation, healthy communities, and tourism in the western states by partnering with and putting a spotlight on existing successful efforts; and (3) improve public policies that facilitate tourism, recreation, and conservation in the West. "Together, we can create a new dynamic for the 21st Century that conserves our natural wonders and creates prosperity for our rural communities by connecting more people with the land."

⁵Both resolutions are available on the WGA's website at www.westgov.org. *WGA Policy Resolution 11-7* was quoted extensively in the WSWC testimony. See page 44.

REPORTS AND PUBLICATIONS

In January, the WGA and the WSWC released a report entitled, *Improving Drought Preparedness in the West*. It summarizes findings and sets forth recommendations that emerged from a series of workshops that the WGA and the WSWC convened over the last two years to identify key ways of improving drought preparedness. These meetings brought together drought information “end-users” from a variety of sectors, as well as representatives from states, federal agencies, tribes, non-governmental entities, local governments, and the private sector. Western governors “accepted” it as a staff report at the WGA’s December 2010 meetings in Las Vegas.

The report’s findings fall into three broad areas. The first focuses on strengthening the National Integrated Drought Information System (NIDIS). It found there is a need to improve state partnerships, increase predictive capacity, develop regional early warning information systems, improve programmatic sustainability, and ensure basic data collection. The second area discusses ways to advance drought preparedness planning, and found broad support for a comprehensive and integrated drought policy that would complement and support state, local, and watershed-based plans without overriding or replacing them. The final area discussed the role of states in developing national climate services, such as the NOAA Climate Service and the Department of Interior’s Climate Science Centers and Landscape Conservation Cooperatives. It found that states, tribes, and other partners must have a role in the development process because they are the intended users of such services.

Based on these findings, the report recommends that the WGA: (1) support full funding of the collection of basic data relating to drought, especially for USGS streamgaging and Natural Resources Conservation Service snowpack monitoring; (2) work within the NIDIS program to extend regional drought early warning information systems to priority areas; (3) extend the authorization of NIDIS and promote full program funding; (4) present a vision and road map for drought planning; (5) advocate for NIDIS to be incorporated as a key component of a NOAA Climate Service; (6) support regionalizing climate services; (7) specify and prioritize the needs of western states for climate services; and (8) ensure legislation relating to the establishment of national climate services include the governors’ priorities.⁶

⁶To access the report online, go to:

http://www.westgov.org/index.php?option=com_content&view=article&id=231&Itemid=84.

CONGRESSIONAL TESTIMONY

House Water and Power Subcommittee hearing on San Joaquin Valley Water Reliability Act

The WSWC was invited to testify before the House Resources Committee's Water and Power Subcommittee on June 13, 2011 with regard to the San Joaquin Valley Water Reliability Act. The testimony presented was based specifically on a July 2010 WSWC policy position entitled, "A Shared Vision for Water Planning and Policy," as well as a June 2006 WGA Water Report entitled, *Water Needs and Strategies for a Sustainable Future*, the 2008 WGA "Next Steps" Water Report, and ongoing policy discussions. WSWC's 2010 position and the WGA Water Reports include a number of policy statements and recommendations related to federal programs and projects under the Subcommittee's jurisdiction.

Selected statements from the testimony follow:

With regard to provisions related to preemption of state law, the last paragraph of the WSWC's position related to A Shared Vision for Water Planning and Policy, states: "...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."

This language was intentionally patterned after Section 8 of the Reclamation Act of 1902 (and similar Congressional directives). Any weakening of the deference to state water law as now expressed in Section 8 is of concern to the WSWC – including Section 202 of H.R. 1837. Provisions of this nature are inconsistent with the policy of cooperative federalism that has guided Reclamation Law for over a century, and are a threat to water right and water right administration in all the Western States.

Recognizing that the "future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality," western governors created the WSWC in 1965 to address the need for an accurate and unbiased appraisal of present and future [water] requirements...and the most equitable means of providing for...such requirements...." On a west-wide regional level, the governors charged the WSWC "...to accomplish effective cooperation among western states in planning for programs leading to integrated development by state, federal and other agencies of their water resources." Since its creation, the WSWC has served as a unified voice on behalf of western governors on water policy issues.

Over the years, the WSWC has continually sought to develop a regional consensus on westwide water policy and planning issues, including many federal initiatives and legislation. The WSWC strives to collectively protect western states' interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management. With respect to the latter, the WSWC and eleven federal agencies have signed a Declaration of Cooperation creating what we call our Western Federal Agency Support Team (WestFAST), to increase collaboration on water issues of mutual concern.

The WSWC has long recognized the importance of planning and policy in protecting and wisely managing our water resources for the benefit of our present and future generations, including our environment. The water development, management and protection challenges in the

Sacramento-San Joaquin Bay-Delta System are not unique to California, but are reflected across the West and the Nation. Similarly, any solution to California's water and environmental needs (and compliance with state and federal mandates) affects the rest of the West to a greater or lesser extent. Perhaps this is best illustrated by California's physical dependence not only on the waters of northern and central California, but also the Colorado River Basin, shared by six other basin states.

In recent years there has been a growing debate over national water policy and the need to elevate water issues as a national priority. The WSWC has been and continues to be actively involved in those policy discussions.

The 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. States and their political subdivisions share primary responsibility for planning and managing our Nation's water resources, both surface and ground water, both quantity and quality.

2006/2008 Western Governors' Association Water Reports

The testimony noted that the WGA's 2006 Water Report declared: "States have the primary responsibility for water allocation and management. They have jurisdiction to sanction both new appropriations and transfers of existing uses. They also have the primary responsibility for integrating water quantity allocation and water quality protection. As a result, states can play a critical role relating to growth in the West where water is a scarce resource and competing demands vie for rights to its use."⁷

The WGA's 2008 Next Steps Report reiterated: "States have the pivotal role in water planning, as well as allocating and protecting the resources. But in the West, where the federal government is a substantial landowner and has a significant regulatory presence, the federal role is also critical. Cooperation among the states and the federal government continues to be vital. To support the state leadership role, the federal government should help by providing a rational federal regulatory framework, together with technical and appropriate financial assistance.... Developing optimal solutions to the challenges...will require an integrated approach and greater partnerships among state, local and federal agencies. This approach should consider all needs together, develop effective solutions which are complementary rather than conflicting, and provide direction for selecting the most appropriate...solutions."⁸

2011 WSWC Shared Water Vision Policy Position

The following WSWC recommendations are presented as a guide for evaluating actions related to federal-state relations and water resources, including H.R. 1837.

- 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.
- 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).

⁷*Water Needs and Strategies for a Sustainable Future*, p.4.

⁸*Water Needs and Strategies for a Sustainable Future: Next Steps*, p. I.

- Any federal legislation should avoid strategies that increase mandates on state, tribal and local governments.
- 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.
- 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.
- 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.

Water, the Economy and Environmental Policy

Clean, reliable water supplies are essential for communities throughout the West and the Nation to maintain or improve their citizens' quality of life. Strong state and national economies require sufficient supplies of good quality water, which in turn depend on protection of water supply sources and the environment and adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West.

A clean and safe environment and vibrant economy will best be achieved when government actions are focused on outcomes, not programs, and when innovative approaches to achieving desired outcomes are rewarded. Federal, state and local policies should encourage "outside the box" thinking in the development of strategies to achieve desired outcomes. Solving problems rather than just complying with programs should be rewarded. Governments should reward innovation and take responsibility for achieving environmental goals.

Successful environmental policy implementation is best accomplished through balanced, open and inclusive approaches at the ground level, where interested stakeholders work together to formulate critical issue statements and develop locally based solutions to those issues. Collaborative approaches often result in greater satisfaction with outcomes and broader public support, and they can increase the chances of involved parties staying committed over time to the solution and its implementation.

To better identify and understand opportunities for win-win solutions, an assessment of the costs and benefits of different options should be made looking at life-cycle costs and economic externalities. These assessments can illustrate the relative advantages of various methods of achieving common public goals. However, not all benefits and costs can be easily quantified or translated into dollars. There may be other non-economic factors such as equity within and across

generations that should also be fully considered and integrated into every assessment of options. The assessment of options should consider all of the social, legal, economic and political factors while ensuring that neither quantitative nor qualitative factors dominate.

Senate Water and Power Subcommittee Oversight Hearing on Opportunities and Challenges to Address Domestic and Global Water Supply Issues

The WSWC was invited to testify on the water resources challenges facing the West and the Nation before the Senate Committee on Energy and Natural Resources Water and Power Subcommittee on December 8, 2011. WSWC's testimony was based on official reports, statements and positions taken by both WSWC and the WGA, as well as the WSWC's continuing efforts to define and refine a vision and principles for effective water management strategies to help ensure a prosperous and sustainable future.

Selected statements from the testimony follow:

Water in the West (and elsewhere) is an increasingly scarce and precious resource, given population growth and an expanding range of often competing economic and ecological demands, as well as changing social values. Surface and ground water supplies in many areas are stressed, resulting in a growing number of conflicts among users and uses. A secure and sustainable future is increasingly uncertain given our climate, aging and often inadequate water infrastructure, limited knowledge regarding available supplies and existing and future needs and uses, and competing and sometimes un-defined or ill-defined water rights. Effectively addressing these challenges requires a collaborative, cooperative effort among federal, state, tribal and local governments and stakeholders that transcends political and geographic boundaries. The following principles are keys to effectively managing our challenges.

- State primacy is fundamental to a sustainable water future. Water planning, policy, development, protection, and management must recognize, defer to, and support state laws, plans, and processes. The federal government should streamline regulatory burdens and support implementation of state water plans and state water management strategies.
- Given the importance of the resource to our public health, economy, food security, and environment, water must be given a high public policy priority at all levels.
- An integrated and collaborative approach to water resources management is critical to the environmentally sound and efficient use of our water resources. States, tribes, and local communities should work together to resolve water issues. A grassroots approach should be utilized in identifying problems and developing optimal solutions.
- Any approach to water resource management and development should accommodate sustainable economic growth, which is enhanced by the protection and restoration of significant aquatic ecosystems, and will promote economic and environmental security and quality of life.
- There must be cooperation among stakeholders at all levels and agencies of government that recognizes and respects national, regional, state, local and tribal differences in values related to water resources and that supports decision-making at the lowest practicable level.

In June 2006, the WGA unanimously adopted as WGA policy a report prepared by the WSWC entitled, “Water Needs and Strategies for a Sustainable Future,” and similarly endorsed a follow up “Next Steps” report in 2008. A 2010 “Progress Report” was accepted by the governors.

The 2006 WGA report included 28 recommendations and the 2008 “Next Steps” report contained 42 recommendations for action in six different areas, focused on challenges related to growth and meeting future water-related demands, watershed planning and basic water data gathering, present and future water infrastructure needs, the resolution of Indian water rights claims, protecting aquatic endangered species, and climate adaptation. WGA Policy Resolution 11-7 on Water Resources Management in the West reaffirms many of the recommendations in the 2006 and 2008 reports and excerpts are highlighted below.

The testimony stressed that one common aspect of our water-related challenges and opportunities for developing successful management is the uncertainty surrounding our present uses and future needs. The importance of basic information regarding our water resources for sound decision-making cannot be over emphasized.

“Western Governors encourage continued investment in the Nation’s *water measurement and monitoring data networks* and the development of information services that promote collaboration between the research and management communities to ensure relevant information is developed and shared with decision-makers. Basic information on the status, trends and projections of our water resources is essential to sound water management.”⁹

The 2006 WGA Report called for “...a state-by-state and westwide summary of existing water uses..., current ground and surface water supplies, and anticipated water demands, ...[that] should address both consumptive and non-consumptive uses and demands.” The 2008 WGA Report recommended, “State and federal water resource agencies should work together to provide universal access to the water-related data collected by all state, local and federal agencies, as well as tools and models that better enable the synthesis, visualization and evaluation of water-related data...” It also called for “...an accurate assessment of the Nation’s water availability and water demands, with the goal of integrating the information into state water resources planning, recognizing that a truly national assessment must begin at the state and local level with appropriate technical and financial support from the federal government.”

In September 2007, the National Science and Technology Council’s Committee on Environment and Natural Resources, Subcommittee on Water Availability and Quality (SWAQ), released a report entitled: “A Strategy for Federal Science and Technology to Support Water Availability and Quality in the United States.” In part the report reads: “In 2006, the Nation supported 300 million citizens and the population was growing at a rate of almost 1 percent per year. Several regions and major metropolitan areas are growing at double-digit rates. Attempts to address the science and technology needs of the water community will require special consideration of areas with extreme growth in population or water consumption. In addition, trends in water use in the agricultural and energy sectors are major drivers of water resource needs. Other primary factors that influence the future availability of water include climate change and variability, pollution, and increased conflicts over water allocation among different users. Abundant supplies of clean, fresh water can no longer be taken for granted.”¹⁰

⁹WGA Policy Resolution 11-7, p. 1

¹⁰A Strategy for Federal Science and Technology to Support Water Availability and Quality in the United States, p. 7.

The SWAQ report continues, “Many effective programs are underway to measure aspects of our water resources. However, simply stated, quantitative knowledge of U.S. water supply is currently inadequate (U.S. Government Accountability Office, 2005; National Research Council, 2004). The United States should measure water resources more strategically and efficiently. A robust process for measuring the quantity and quality of the Nation’s water resources requires a systems approach. Surface water, ground water, rainfall, and snowpack all represent quantities of water to be assessed and managed – from the perspectives of quantity, quality, timing, and location. A comprehensive assessment of U.S. water resources should build upon significant monitoring programs by water management authorities, States, and Federal government agencies to ensure that regional and national water resources are measured accurately. Data and information about the Nation’s water supply should be widely available, should integrate physical and social sciences, and should be relevant to decisionmakers, from the individual homeowner to regional water managers. Without an adequate assessment of water supplies on a watershed or aquifer basis, optimal water management cannot be achieved. Improved knowledge of the size and distribution of the water supply and how it changes over time will allow more efficient and equitable allocation of this precious resource and will minimize over-allocation of limited supplies.... To manage water effectively, we should know our present and future demands for water in individual homes, businesses, farms, industries, and power plants, as well as water needed for sustainable ecosystems.”¹¹

“Western Governors support several federal programs that are particularly critical... Western Governors are concerned about declines in federal spending for...programs that provide important water supply information and believe that such programs should be fully funded by Congress.”¹²

We urge Congress to continue to support the U.S. Geological Survey (USGS) and its National Water Availability and Use Assessment, authorized by the SECURE Water Act, as well the National Streamflow Information Program and Cooperative Water Program, all of which are critical to providing a sound basis for improving water management and decision-making. We continue to join with scores of other government entities and stakeholders in calling on Congress to fully fund NSIP and re-balance the federal CWP cost-share to a 50-50 match, in order to reverse the loss of long-term streamgages and restore data that is critical to assessing our needs related to water supplies, drought and floods, emergency warning and management systems, infrastructure design, climate, interstate water compacts, international treaties and tribal trust responsibilities, as well myriad other federal, state and local government water planning, management and decision-making purposes.

We also strongly support NASA’s Landsat Data Continuity Mission (LDCM), with its thermal infrared sensor (TIRS) and imaging capability (that many western states are using to monitor and manage consumptive water uses, particularly agricultural uses). Further, we recognize the need for and importance of providing sufficient appropriations for USGS to complete and operate the necessary ground operations systems without having to take funds from other USGS programs. This is a priority for WGA and the WSWC, and hopefully for this Congress, given the impending failure of Landsat 5 and the need to launch Landsat 8 as planned and keep LDCM on schedule, so we do not lose this important thermal data which more and more states rely on to measure and monitor consumptive uses.

¹¹*A Strategy for Federal Science and Technology to Support Water Availability and Quality in the United States*, p. 7-8.

¹²*WGA Policy Resolution 11-7*, p. 2.

We are also very concerned about potential cuts to USDA's Snow Survey and Water Supply Forecasting Program, which is presently operating on a "shoe string." Western water managers depend on this vital information for water supply planning and decision-making. Any funding cuts will likely lead to the suspension of snow course readings, stop conversions of snow courses to automated SNOTEL (Snow Telemetry) sites, and ultimately result in the loss of data due to the failure of equipment that has to be actively maintained. Many snow courses and SNOTEL sites have been operating for decades, and the potential loss of such long continuous records is particularly troubling and problematic due to the impact on modeling and forecasting.

"Western Governors support federal efforts to coordinate water data gathering and information programs across multiple agencies.... Western Governors encourage federal agencies to partner with States in the gathering, coordination and effective dissemination of water-related data.... Western Governors call on the federal government to work with Western States to develop tools and models that better enable the synthesis, visualization and evaluation of water-related data."¹³

The WGA, WSWC and our member states are working closely with a number of federal agencies on various efforts to further our water related knowledge, including but not limited to the WaterSMART Assessment/Census and Basin Studies, Interior's Landscape Conservation Cooperatives, the National Integrated Drought Information System (NIDIS) Upper Colorado River Basin Pilot, climate and extreme event workshops, and energy and water demand studies.

Of particular note, the WGA and WSWC are working with the Department of Energy and National Laboratories 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. We are also evaluating the impact of those demands on other water use sectors. The WSWC is providing expert advice and state generated data, and will be preparing information on state institutions, statutes, policies and processes that govern water rights and control the allocation and use of water in the West.

We have also developed a project plan for a Water Use Data Exchange, collaborating with state and federal agencies, to make data available in a format that can be synthesized to support federal, state and local decision-making and improve water resources planning and management. Our initial efforts are focused on water for energy demands, but our intent is also to be able to better understand our capabilities and limitations related to estimating water use and prepare a foundation upon which to build better water budgets and demand projections through close collaboration between state and federal agencies.

"Western Governors support investment in water supply and water quality infrastructure. Infrastructure investments are essential to our nation's continued economic prosperity and environmental improvements, and they assist state and local entities in meeting federally mandated standards. Infrastructure investment is particularly critical now, as much of the water infrastructure that has served the West for decades is aging and in dire need of repair."¹⁴

In November 2010, the WGA, WSWC and Texas Water Development Board (TWDB) sponsored a Symposium entitled, "Western Water Resources Infrastructure Needs and Strategies" in San Antonio, Texas. Patrick Natale, Executive Director of the American Society for Civil

¹³WGA Policy Resolution 11-7, p.2.

¹⁴WGA Policy Resolution 11-7, p.4.

Engineers (ASCE), spoke and said: “The estimated five-year investment need for all infrastructure repairs and rehabilitation is \$2.2 trillion.” The most recent ASCE Report Card gave the Nation’s drinking and wastewater infrastructure a D- grade, its dams a D, and its levees and inland waterways a D-. Steve Stockton, Director of Civil Works, U.S. Army Corps of Engineers, reported, “The present value of the capital stock portfolio of the USACE has declined from a peak value of \$250 billion in 1983 to \$165 billion today, with \$60 billion in authorized projects and an annual investment of \$2 billion. Roughly \$100 billion is needed to repair levee systems, while \$125 billion is required to replace the current navigation lock system.” Steve Allbee, EPA Gap Analysis Program Director, added, “State and local governments have spend \$1.1 trillion since the 1960s on water and wastewater infrastructure, with an additional \$140 billion federal investment, but EPA’s 2002 analysis identifies a current need of \$540 billion.”

Separately, estimates of the Bureau of Reclamation’s 2010 backlog total some \$6.6 billion for major rehabilitation and replacement of aging infrastructure (\$930 million), authorized Title XVI water recycling and reuse projects (\$600 million), authorized construction and operation of rural water projects (\$1.2 billion), authorized environmental restoration programs (\$2 billion), and then authorized and pending Indian water rights settlements (\$1.9 billion). By comparison, Congress appropriated \$951.2 million in FY 2010 for Reclamation’s Water & Related Resources Account.

Construction related federal Stimulus spending totaled some \$135 billion, with \$22 billion for water and wastewater projects according to Ken Simonson, Associated General Contractors of America. Total construction spending is down 10% in the last five years, and private non-residential building is down 25%, said Perry Fowler, Texas Associated General Contractors.

Of note, a report by the Texas 2000 Commission entitled, “Texas Past and Future,” concluded: “Capital financing requirements to meet demands from municipal and industrial water and wastewater treatment during the next quarter century represent an outlay more than double the existing debt of the state and all of its political subdivisions.” TWDB has spent \$12.4 billion on water and waste-water projects, including \$1.5 billion in 2010 alone.

According to Stephen Fuller, George Mason University, every \$1 billion spent on water-related infrastructure produces 28,500 jobs, growth in personal earning of \$1.1 billion, and the gross domestic product (GNP) grows by \$3.4 billion. Infrastructure investments are an investment in our future.

In the West, our population is growing and water demands have changed since much of our infrastructure was built. Symposium participants identified a need to redefine and re-evaluate our water infrastructure needs based on standard criteria that include risks to: (a) health and human safety; (b) economic growth; and (c) the environment. We also need to evaluate risks to our existing infrastructure, and improve asset management and system operations.

There is a great need for stable or increasing funding of infrastructure, especially in small and rural communities, that must be addressed. While states recognize that they cannot depend on the federal government in Washington, D.C. to solve all their infrastructure problems, there is a legitimate continuing federal role related to federal landownership, tribal trust responsibilities and federal regulatory mandates. Federal financial incentives and technical assistance may also be appropriate to assist state and local governments, where they can’t reasonably meet their own needs. There is a need, and there are opportunities, to improve collaboration and leadership at all levels of government in addressing our water-related infrastructure needs. Moreover, it is important to make investment decisions based on long-term capital budgeting efficiencies, and move away from

“annual incremental choices.” Inconsistent, inadequate and untimely funding leads to project delays and ultimate higher costs.

Financing is the principal challenge to meeting our present and future infrastructure needs, particularly given important concerns over the national debt and federal spending. Infrastructure can be viewed either as a critical investment or “pork barrel” spending. We must differentiate between “good” and “bad” debt, and between projects we need and projects we would like to have. We must adequately weigh project costs and benefits, using planning and prioritization tools to set clear priorities. That being said, the project with the highest benefit-cost ratio or return on the federal investment is not necessarily the best project. State and local collaboration and appropriate cost sharing are important tools. Federal capitalization of State Revolving Funds for water and wastewater projects have been an effective and successful partnership, and have been especially critical to meeting the needs of small systems and small communities. Similar partnership mechanisms that rely on state operations and decision-making should be considered, such as federal loan guarantees, water-related private activity bond tax exemptions, and an infrastructure bank or water trust fund.

A 1964 compilation of papers on the economics of public policy in water resources development observed, “A reduction in the federal share of the costs of water resources projects should not be regarded necessarily as a desirable end in itself. Rather, requirements should be established to serve more specific objectives as achieving optimum resource development and use - and promoting desired incidence, distribution and stabilization policies.”¹⁵

A 1984 WSWC report on federal water project financing and cost sharing concluded: “The present Administration seems to be proposing further withdrawal of federal financing participation in national water resource development in order to reduce federal spending. While the urgent need to balance the federal budget may appear to necessitate a decreasing federal role, reduced federal appropriations for water projects will do very little, if anything, to solve our economic problems. The size of the national debt has mainly been caused by direct income transfers and national defense spending... While western states have previously endorsed the concept of cost sharing, they have not, and cannot support federal abdication of responsibility... where an appropriate federal interest is involved.” The same might be said today.¹⁶

Public Private Partnerships may help reduce overall public risk and capital investment requirements, as well as improve efficiencies and cost effectiveness. Governments can remove unnecessary obstacles to alternative infrastructure delivery methods, and provide a supportive statutory and political environment. We must also recognize that private risk capital is profit driven, and investors are intolerant of bureaucratic processes and litigation. Opportunities exist to minimize regulatory compliance costs and avoid unnecessary project delays by better defining reasonable and necessary protections, streamlining and coordinating regulations at all levels of government, and removing unnecessary regulatory obstacles. We need to promote both public and private accountability.

In the West, Congress provided the means to finance federal water resources investments through the Reclamation Act of 1902. Western Governors continue to urge the Congress to increase appropriation from the Reclamation Fund for authorized purposes to match average annual fund receipts.

¹⁵*Economics and Public Policy in Water Resource Development*, Stephen Smith & Emery Castle editors, Iowa State University Press, 1964.

¹⁶*State/Federal Financing and Western Water Resource Development*, 1984, p. 13-14.

In the end, there is no “silver bullet.” Resolving our infrastructure challenges will require real cash to service real debt. There has to be a revenue stream. However, despite budget pressures, now is a good time to invest in order to take advantage of opportunities related to both low material and capital costs.

“Western Governors support negotiated settlements of Indian land and water rights disputes in order to meet the nation’s obligations to tribes while providing increased certainty for all Western water users.”¹⁷

The WGA and WSWC are long-standing advocates of Indian water rights settlements, and we applaud Congress for passing the Aamodt, Crow, Taos, and White Mountain Apache settlement agreements last December as part of the Claims Resolution Act of 2010. “Western Governors urge the Administration to support a strong federal commitment to meaningful federal contributions that recognize the trust obligations of the United States government. Congress should also ensure that any land or water settlement, once authorized and approved by the President, will be funded and implemented in a timely manner without a corresponding offset to some other tribe or essential Interior program.” Settlements and related infrastructure investments are bringing economic development, environmental protection and peace to many valleys in the West – yet more needs to be done. “Negotiated settlements are flexible, promote sound management practices, provide a basis for partnerships between Indian and non-Indian communities, and save millions of dollars by avoiding prolonged and costly litigation.”¹⁸

“Western Governors recognize the potential benefits of market-based water transfers, and that the predominant water use in the West is agriculture, but they are concerned about maintaining the important cultural, economic, and environmental benefits of agricultural lands and food production.”¹⁹

With support from the Walton Family Foundation, the WGA and WSWC are carrying out a year-long project to identify and promote innovative water sharing strategies to allow temporary or permanent water transfers between different uses (including agriculture, urban, energy and environmental uses), while avoiding or mitigating damages to environmental values, agricultural economies and rural communities. Specifically, the WGA and WSWC are focusing on state-level programs, institutional arrangements, and administrative practices that can facilitate smart water sharing. The project is engaging state water managers and a broad stakeholder community of agricultural water users, municipal providers, energy/industrial developers, and the environmental community. Products will include a toolbox of innovative strategies, options for new programs or administrative practices, and potential policy recommendations for the Western Governors – with a focus on activities that can be implemented at the state level to address our growing and changing water needs.

Further, Western Governors encourage adoption of strategies to make existing water supplies go further, including water conservation and reductions in per capita water use. They also support investment in research into promising water-saving strategies. Moreover, Western Governors encourage the use of alternative water supplies (of appropriate quality for designated uses) through water reuse and recycling, desalination and reclamation of brackish waters.

¹⁷WGA Policy Resolution 11-7, p. 5.

¹⁸WGA Policy Resolution 11-7, p. 5.

¹⁹WGA Policy Resolution 11-7, p. 5.

“Western Governors recognize the important role of federal agencies in supporting sound water resource management in the Western states. Governors appreciate the efforts of federal agencies to coordinate water-related activities with the Western states through the ‘Western States Federal Agency Support Team’ (WestFAST) and recommend the continuation of this key state-federal partnership.”²⁰

Lastly, on behalf of the WGA and WSWC, we would like to recognize and applaud the collaborative efforts of twelve federal agencies, including the U.S. Army Corps of Engineers, U.S. Bureau of Reclamation and U.S. Geological Survey, in joining us in signing a Letter of Cooperation to work together for the sustainable and efficient use of western water resources. The WestFAST partnership is a continuing commitment on the part of federal and state agencies – working with local, tribal and other public and private stakeholders – to improve the effectiveness of collaboration in seeking grassroots, watershed solutions to water issues in the West. It emphasizes proactive, voluntary, participatory and incentive-based approaches to water resource management and conservation assistance programs. Each agency has designated a WestFAST member to represent them, and together support a federal liaison officer detailed to our office. We believe WestFAST represents a model for other collaborative federal-state partnerships.

²⁰*WGA Policy Resolution 11-7*, p. 4.

WESTERN STATES FEDERAL AGENCY SUPPORT TEAM

The Western States Federal Agency Support Team (WestFAST) is a collaboration between 12 Federal agencies with water resource management responsibilities in the West.

WestFAST was established to support the WSWC and the WGA in coordinating Federal efforts regarding water resources. WestFAST was formed in 2008 in response to Western Governors' Association report titled: Water Needs and Strategies for a Sustainable Future: Next Steps Report (Next Steps Report). WestFAST was formed to support the WSWC in the implementation of the Next Steps Report. Some of the areas that the report identifies for federal/state collaboration include: 1) water policy, 2) water to meet future demands, 3) water infrastructure, 4) Indian water rights, 5) climate change, and 6) endangered species. In 2011, WestFAST targeted a number of specific recommendations in the Next Steps Report, with particular focus on areas related to evapotranspiration and drought, climate, and data interoperability. Some WestFAST activities are highlighted below.

• **WestFAST made progress on six of the recommendations from the Next Steps Report:** One of the core purposes of West-FAST is to support the WSWC in the implementation of the recommendations in the Next Steps Report. WestFAST made significant advancements on several of these recommendations.

- NASA continued preparation for the launch of LandsAT 8 (supporting Objective 5).
 - The Colorado River Basin Forecast Center (part of the National Weather Service) provided an information meeting for the WSWC to help them better understand the Forecast Center's capabilities in providing water supply forecasts (supporting Objective 7).
 - NASA hosted three meetings on evapotranspiration and one meeting on drought (supporting Objective 7).
 - WestFAST Provided continued support for NIDIS (supporting Objective 8).
 - USGS has collaborated with the WSWC on the Water Census (supporting Objective 8).
 - DOI provided briefings on WaterSMART, the Landscape Conservation Cooperative (LCCs), and the Climate Science Centers to the WSWC. WestFAST participated in LCC meetings where appropriate (supporting Objectives 24, 25, and 26).
- **Expanded WestFAST Membership from 11 to 12 Agencies:** In 2011 the Department of Defense joined the WestFAST team. The addition of this department provides additional perspective to WestFAST, and allows WestFAST to better support the WSWC.
- **Water Data Exchange:** WestFAST collaborated with the WSWC to kick-off a new project that will seek to improve how water availability, water use, and water allocation data are shared. This project will support the states in their planning efforts as well as support national studies like the National Water Census.
- **WestFAST gave 21 presentations at the three WSWC meetings.**
- **USACE continued to provide support for a liaison to the Kansas State Water Office.**

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 2011 primarily taken from the newsletter. However, this does not represent an exclusive listing of all Council activities or other important events. Rather, it seeks to highlight specific topics.

Bureau of Reclamation

FY2012 Budget

On February 14, President Obama sent his \$3.7 trillion FY2012 budget request to Congress. "Now that the threat of a depression has passed, and economic growth is beginning to take hold, taking further steps toward reducing our long-term deficit has to be a priority, and it is in this Budget," Obama said. The request is designed to cut the deficit by \$400 billion over 10 years and reduce it to about 3% of the economy by the middle of the century. It included a five-year non-security discretionary spending freeze. The budget request came at a time when Congress had not yet enacted a FY2011 budget and federal agencies were operating under a continuing resolution (CR).

Under the FY2012 request, the Department of Interior would have received \$12 billion, representing a \$92 million drop. Within Interior, the Bureau of Reclamation would have received \$1 billion, a \$80 million reduction from the 2010 enacted level. Of this amount, \$398.5 million would have gone to water, energy, and other resource management and development activities. Another \$406.7 million would have funded operation, maintenance and rehabilitation activities at Reclamation facilities, including dam safety. With respect to WaterSMART, Reclamation would have receive \$58.9 million, encompassing \$18.5 million for grants, \$6 million for basin studies, and \$29 million for Title XVI projects.

Reclamation also sought funding for a number of projects in California, including \$154.6 million for the Central Valley Project; \$39.7 for the California Bay-Delta Program; and \$53 million for the Central Valley Project Restoration Fund. Funding for other programs in the West included: \$18.6 million for the Klamath Project in California and Oregon; \$23.6 million for the Middle Rio Grande Project in New Mexico; \$18.3 million for the Multi-Species Conservation Program in the Lower Colorado River Basin; \$17.8 million for the Columbia and Snake River Salmon Recovery Project in Idaho, Montana, Oregon, and Washington; and \$35.5 million for rural water projects in

Montana, New Mexico, North Dakota, and South Dakota. Separately, the Central Utah Project request was \$33 million.

As for tribal projects, Reclamation requested \$51.5 million to implement the four settlements authorized by the Claims Resolution Act, including \$8.3 million for the Crow settlement in Montana; \$4.9 million for the White Mountain Apache settlement in Arizona; and \$9.4 million and \$4 million for the Aamodt and Taos settlements in New Mexico. The request also included \$24.8 million for the Navajo-Gallup Water Supply Project, a key element of the Navajo Nation Water Rights Settlement on the San Juan River in New Mexico. Likewise, the Bureau of Indian Affairs (BIA) sought \$6 million for the Navajo Nation Water Resources Development Trust Fund, as well as \$4.4 million for the San Juan Conjunctive Use Wells and San Juan River Navajo Irrigation Rehabilitation Projects, which are part of the Navajo-Gallup settlement. BIA also requested \$9.5 million for the Nez Perce/Snake River settlement and \$12 million for the Duck Valley settlement.

Estimated appropriations from the Reclamation Fund would have totaled \$906 million for FY2012, with Reclamation's Water and Related Resources Account receiving \$696 million. The total estimated FY2012 fund receipts were \$2 billion, the majority derived from mineral leasing revenues on federal lands. In comparison, actual fund receipts were \$1.8 billion for CR 2011 and \$1.7 billion for FY2010, while appropriations totaled \$950 million and \$974 million respectively. The estimated unobligated balance at the end of FY2012 is \$10.5 billion, compared to \$9.3 billion for CR 2011 and \$8.5 billion in 2010.²¹

On March 10, the House Appropriations Energy and Water Development Subcommittee held a hearing on the Bureau of Reclamation's FY2012 \$1 billion budget request. In his opening statement, Subcommittee Chairman Rodney Frelinghuysen (R-NJ) said: "Reclamation's fiscal year 2012 budget request reflects a reduction of 3% from the fiscal year 2011 Continuing Resolution. Within this overall funding, however, water and energy management activities continue to be cut disproportionately when compared to funding for fish and wildlife activities. Your mission clearly states your primary responsibility is to meet the water demands of the West while protecting the environment and the public's investment in these structures. While I have been a long-time supporter of environmental conservation programs, I'm not sure now is the time to be making this shift of priorities away from your historical mission of water and power."

Bureau of Reclamation Commissioner Mike Connor testified that his agency's overall goal is to "...promote certainty, sustainability, and resiliency for those who use and rely on water resources in the West." He also said key areas of focus for FY2012 include water conservation, Landscape Conservation Cooperatives and renewable energy, ecosystem restoration, youth employment, supporting tribal nations, and maintaining infrastructure.

Connor further noted that Reclamation's multi-billion dollar backlog is stretching its ability to fulfill its basic obligations. This backlog includes \$1.5 billion in ecosystem restoration and endangered species protection projects, \$1.5 billion for tribal water rights settlement obligations, \$1 billion to fix aging infrastructure, and over \$600 million for Title XVI projects.²²

SECURE Water Act of 2009

On April 25, the Bureau of Reclamation released a report to Congress on the potential impacts of climate risks on water operations, hydropower, flood control, and fish and wildlife in the

²¹ *Western States Water*, #1864, February 5, 2010.

²² *Western States Water*, #1918, February 18, 2011.

West. The report responded to SECURE Water Act requirements and is the first “consistent and coordinated assessment” of risks to future water supplies across eight major Reclamation basins. Reclamation developed the report through original research and a literature synthesis of existing peer-reviewed studies, as well as climate models and projections of future greenhouse gas emissions, technological advancements, and population estimates.

The report found that projected changes in temperature and precipitation are likely to impact the timing and quantity of stream flows in all western basins. Specific findings included: (1) a temperature increase of 5-7 degrees Fahrenheit; (2) precipitation increases in the northwestern and north-central portions of the West; (3) a decrease in precipitation in the southwestern and south-central areas; (4) a decrease for almost all April 1 snowpacks; and (5) decreases in annual streamflow in several river basins by 2050. Notable mean annual runoff decreases included -8.5% in the Colorado River at Lee’s Ferry on the border of Utah and Arizona; -13.5% in the Rio Grande River at Elephant Butte Dam in New Mexico; and -8.7% in the San Joaquin River at Friant Dam in California.

“This report provides the foundation for understanding long-term impacts of climate change on Western water supplies and will help us identify and implement appropriate mitigation and adaptation strategies for sustainable water resource management,” said Secretary of the Interior Ken Salazar. Reclamation Commissioner Mike Connor also said, “Impacts to water are on the leading edge of global climate change, and these changes pose a significant challenge and risk to adequate water supplies, which are critical for the health, economy, and ecology of the United States.”²³

Title XVI Water Reuse Projects

On May 9, Bureau of Reclamation Commissioner Mike Connor announced the selection of nine feasibility studies for proposed water reclamation and reuse projects in California, Oklahoma, and Texas. The studies, which will receive a total of \$1,176,760 in Title XVI funding under the Department of Interior’s WaterSMART program, will look into the projects’ technical, institutional, and economic potential, as well as implementation steps at each project site. The studies will also focus on water and energy efficiencies that can be gained through reclamation and reuse. “The western United States faces great challenges in providing potable water while maintaining healthy aquifers and reliable regional water supplies,” said Reclamation Commissioner Mike Connor. “These...studies will examine where project sponsors can stretch available water supplies and protect against drought by using recycled water and advanced treatment technologies.”

In August, the Bureau of Reclamation awarded \$2.12 million to fund 13 Title XVI feasibility studies in California’s San Francisco Bay Area. The studies will assess the opportunity for reclamation and reuse of wastewater and naturally impaired ground and surface water. “We are hopeful that the studies...will result in projects that will increase the amount of recycled water available for irrigation, and municipal and industrial uses in the greater San Francisco Bay Area,” said Reclamation Regional Director Pablo Arroyave. “Funding these studies is another step in promoting the efficient use of water in California.”²⁴

Desalination

On October 31, Commissioner Conner announced that his agency had awarded \$1.5 million to seven new projects across the country under the Desalination and Water Purification Research

²³<http://www.usbr.gov/climate/>. *Western States Water*, #1819, March 26, 2009.

²⁴<http://www.usbr.gov/newsroom/newsrelease/index.cfm>.

Program, which facilitates the development of cost-effective, technologically efficient means to desalinate water. The awards include five research and laboratory studies and two pilot tests. Reclamation also announced \$686,488 in funding for the second phase of two previously awarded projects. This funding will be leveraged to support about \$2.8 million in research on alternative water treatment technologies. Western states where projects will take place include California, Nevada, and New Mexico.

“By investing in alternative water treatment technology research we are working to find ways to stretch the nation’s current water supply, use less energy and reduce impacts to the environment,” said Commissioner Connor. “The research we are funding has the potential to unlock efficiencies that ensure future water supplies, strengthen our economy, and create jobs.”²⁵

Colorado River Basin Study

On November 29, the Bureau of Reclamation said it is beginning Phase 4 of its Colorado River Basin Study, which it is carrying out with agencies from the seven basin states as part of the Department of Interior’s WaterSMART program under the SECURE Water Act. The study is intended to define and address future imbalances in water supply and demand in the basin through 2060.

Phase 4 will focus on developing a broad range of options to help resolve future imbalances by exploring the effectiveness of various options and groupings of options, referred to as strategies. The performance of these options and strategies will be evaluated over time and across a combination of water supply and demand scenarios. A variety of options will likely be explored, including conservation and reuse, local groundwater supply development, augmentation, water transfers, and operational efficiencies.

“Phase 4 of this basin study invites a broad discussion on ideas that can help identify how future water managers will address imbalances between supply and demand along the Colorado,” said Commissioner Connor. “Reclamation, the seven Colorado River Basin States and our many partners throughout the basin have much to learn from this study to guide future management, so it is critical that we provide this forum to gather a wide array of public input.”

Clean Water Act/Environmental Protection Agency

Pesticides/National Cotton Council v. EPA

In 2009, the Sixth Circuit Court of Appeals issued a decision in *National Cotton Council v. EPA*, holding that pesticide applications require NPDES permits under the CWA, regardless of whether they are made in compliance with FIFRA. The case involved lawsuits filed in multiple circuits and therefore has national implications. The court also gave EPA and states with NPDES authority until April 9 to implement its ruling.

Since 2010, the WSWC has had a policy (#328) supporting legislation to clarify that pesticide applications made in compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) should not require NPDES permits under the CWA. The following section describes notable regulatory developments involving the Sixth Circuit’s decision.

²⁵<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=38164>. *Western States Water*, #1942, August 5, 2011.

On March 2, the Council wrote EPA Administrator Lisa Jackson, asking her to ask the Sixth Circuit for a six-month stay of its decision in *National Cotton Council* to give EPA and states with delegated NPDES authority more time to determine how to implement the ruling.²⁶ EPA subsequently asked the Court to stay its decision, and the Court ultimately stayed its decision through October 31.

On September 19, EPA sent an Information Collection Request (ICR) to the Office of Management and Budget seeking permission to collect information as part of its proposed general NPDES permit for pesticide applications. If approved, the ICR would require the submission of information by pesticide permittees and permitting authorities. Permitting authorities would use the information to assess permittees' compliance and modify or add new permit requirements as appropriate. EPA estimates that the annual cost of complying with the ICR would be \$48,034,676, of which permittees would pay \$47,783,297. The remaining \$251,379 would be paid by permitting authorities, which includes the 44 states that have delegated authority under the NPDES program. EPA estimates that 847,652 hours are needed to comply with the ICR, including 841,037 hours for permittees and 6,615 hours for permitting authorities.²⁷

On October 31, EPA issued its final NPDES general permit for point source discharges from pesticide applications, covering the following pesticide use patterns: (1) mosquito and other flying insect pest control; (2) weed and algae control; (3) animal pest control; and (4) forest canopy pest control. Pesticide use patterns not covered by the permit may require an individual permit or alternative general permit if they result in discharges to water. The permit covers discharges in the six states where EPA is the NPDES permitting authority, including Alaska, Idaho, New Mexico, and Oklahoma in the West. Authorized states must now develop and issue their own permits.

Federal Insecticide, Fungicide, and Rodenticide Act

In addition to requiring EPA to develop a general permit for pesticide applications, the Sixth Circuit's *National Cotton Council* decision prompted lawmakers to study EPA's pesticide regulations and to introduce legislation to overturn the decision.

On February 16, the House Agriculture Committee's Subcommittee on Nutrition and Horticulture and the Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment held a joint hearing to consider the possible need for legislation to reduce the potential regulatory burdens posed by the Sixth Circuit Court of Appeals' decision in *National Cotton Council v. EPA*. Dr. Steven Bradbury, Director of EPA's Office of Pesticide Programs, described how his agency regulates pesticides under FIFRA, noting that it "...uses its full regulatory authority under FIFRA to ensure that pesticides do not cause unreasonable adverse effects on human health or the environment, including our nation's water resources." Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) President Andrew Fisk said they are asking EPA to seek a six-month stay of the court's ruling because EPA is still finalizing its general permit, which has complicated the efforts of states authorized to issue NPDES permits to finalize their programs. Idaho Water Users Association Executive Director Norm Semanko, a former WSWC member, raised a number of concerns about a draft general permit that EPA issued last year. He said the draft's requirements are "unrealistic, impractical, and burdensome" for local governments, and small, non-profit organizations to implement.²⁸

²⁶*Western States Water*, #1912, January 7, 2011.

²⁷<http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2010-0852-0016>.

²⁸<http://transportation.house.gov/hearings/>. *Western States Water*, # 1912, January 7, 2011.

On March 9, the House Agriculture Committee reported the Reducing Regulatory Burdens Act of 2011 bill (H.R. 872) to amend FIFRA and the CWA to prevent EPA and states from requiring permits under the CWA for "...a discharge from a point source into navigable waters of a pesticide registered under [FIFRA], or the residue of such a pesticide, resulting from the application of such pesticide." The bill would require NPDES permits for enumerated FIFRA violations, certain types of stormwater discharges, and municipal and industrial discharges. Rep. Bob Gibbs (R-OH) introduced the bill along with a bipartisan group of 78 co-sponsors, including 27 western Representatives.²⁹

The House subsequently passed H.R. 872 on March 31, by a vote of 292-130. Virtually every House Republican and 57 Democrats voted for the bill. "This bill eliminates a costly duplicative permitting requirement that is the result of a court's fundamental ignorance of Congressional intent," said House Agriculture Committee Chair Frank Lucas (R-OK). Committee Ranking Member Collin Peterson (D-MN) also praised the bill's passage, saying, "The courts are not the place to decide agriculture policy and this bill makes clear that it was never the intent of Congress to burden producers with additional permit requirements that would have little or no environmental benefit." Both Representatives urged the Senate to pass the bill.³⁰

On June 21, the Senate Agriculture Committee approved H.R. 872 by voice vote. However, Senate Environment and Public Works Committee Chair Barbara Boxer (D-CA) and Senator Benjamin Cardin (D-MD) expressed concerns over the bill and placed holds on the measure, effectively preventing it from coming to the Senate floor for a vote. Boxer also expressed concerns that the bill was subject to her Committee's jurisdiction.

On August 12, state and other environmental and public health organizations wrote Senate leaders, asking them to take action on H.R. 872. "Unless Congress intervenes, state CWA permitting authorities - already operating under severely constrained budgets and with limited staff - will be required to regulate over 365,000 new sources under the CWA despite the fact that another federal environmental statute has regulated these pesticide uses for decades," the letter says. "H.R. 872 only exempts *FIFRA compliant* applications from CWA permitting. Bad faith actors who misuse pesticides and pollute our nation's waters can and should be prosecuted to the fullest extent under FIFRA. Likewise, industrial or commercial development processes are also still covered under the CWA. [S]tates can - and have - enacted state pesticide permitting programs to address pesticide-related issues specific to individual states. This ability of states to respond to local issues is a hallmark of the state and federal partnerships under both CWA and FIFRA and should continue to be fostered."

The letter also says new pesticide permits would represent a 60% increase in the NPDES program, and that states will need to ensure compliance through a number of actions in addition to processing permit applications. Organizations signing the letter include the Association of State and Interstate Water Pollution Control Administrators; the National Association of State Foresters; the Association of American Pesticide Control Officials; the National Association of State Departments of Agriculture; and the Aquatic Plant Management Society.

On November 17, the House Small Business Committee's Subcommittee on Agriculture, Energy and Trade held a hearing on the possible impacts of EPA regulations on farmers and small businesses, including its new general permit for pesticide applications under the Clean Water Act's

²⁹*Western States Water*, #1918, February 18, 2011.

³⁰<http://agriculture.house.gov/>.

(CWA) NPDES. The permit went into effect on October 31, and EPA announced a 120-day phase-in period before enforcement begins.

In his opening statement, Subcommittee Chair Scott Tipton (R-CO) said the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) "...already regulates the registration, labeling, and use of pesticides and provides environmental and public health protection. This expanded requirement is duplicative and yet another costly form of red tape that brings with it no added environmental protection." No federal witnesses testified at the hearing.

Carl Shaffer, President of the Pennsylvania Farm Bureau, testified on behalf of the American Farm Bureau Federation, noting that failure to comply with the permit can carry penalties of up to \$37,500 per day. "EPA ignored the comments it received from the agriculture community and published a rule that offers no guidance on whether EPA believes farmers are required to have this permit for the traditional, land application of pesticides," he said. "Farm Bureau does not believe farmers should need a permit, but EPA's regulatory language is purposefully ambiguous. Now farmers face a daunting choice: to apply for a permit or not?"

Leonard Felix, President of Olathe Spray Service in Olathe, Colorado, testified on behalf of the National Agricultural Aviation Association. "[T]here will be enforcement penalties for a multitude of potential paperwork and performance violations, and activists will be able to challenge operators under the [CWA's] citizen suit provisions," he said. "Even if you are totally innocent, the costs of defending yourself against a citizen suit can put you out of business, and trigger a cascade of pest control problems.... And it is all unnecessary because FIFRA requires EPA to ensure a pesticide undergo rigorous testing for water safety before it is allowed to be registered for use."³¹

On December 20, the WSWC wrote Senate Majority Leader Harry Reid (D-NV) and Senate Minority Leader Mitch McConnell (R-KY), urging the Senate to take action on H.R. 872. The letter states: "The Sixth Circuit Court of Appeal's decision in *National Cotton Council v. EPA* requires [NPDES] permits for pesticide applications, even though [FIFRA] has effectively regulated such applications for decades. Further, states can – and have – used state permitting programs to address specific pesticide issues within their borders.... While we understand the concern associated with pesticide pollution, many of the pesticides detected in the Nation's waters are the result of older, legacy pesticide uses...that EPA now severely restricts or completely bans. Thus, requiring NPDES permits for prospective, FIFRA compliant pesticide applications will do little to mitigate [impacts]."

It continues: "Nevertheless, EPA estimates that the Sixth Circuit's decision will require the regulation of 365,000 new permittees, a 70% increase in the size of the NPDES program. Although western states will see little environmental benefit from regulating these new permittees, the costly burden of implementing, operating, and enforcing a new NPDES pesticides program will fall almost entirely on state water quality agencies. In fact, EPA estimates that 90% of pesticide activities requiring permits will fall under state-delegated NPDES programs."

"Many states have already expended scarce financial resources and devoted hundreds of man hours developing NDPEs pesticide programs to comply with the Sixth Circuit's decision. Unless Congress intervenes, states will incur further unnecessary and substantial costs without any additional federal funding at a time when state budgets and available administrative resources are under significant strain. Such circumstances could force states to allocate their resources away from more necessary and effective environmental programs, which could adversely impact the Nation's water and environmental quality.... Although the Sixth Circuit's decision went into effect on

³¹<http://smbiz.house.gov/Calendar/EventSingle.aspx?EventID=268566>

November 1, there is still time for Congress to act to prevent duplicative pesticide permitting. Further delay will only increase state costs without providing actual environmental benefits.”³²

Clean Water Cooperative Federalism Act of 2011

On May 26, House Transportation and Committee Chair John Mica (R-FL) and Ranking Member Nick Rahall (D-WV) introduced the Clean Water Cooperative Federalism Act of 2011 (H.R. 2018), which is intended to amend the Clean Water Act (CWA) to preserve the authority of states to make decisions relating to their water quality standards. “We must restore and preserve the federal-state partnership that is the foundation of the [CWA] but which is being progressively undermined by [the Environmental Protection Agency (EPA)] ,” said Mica. Rahall also said the bill is intended to help “...prevent EPA from steamrolling State permitting programs, ensuring that the States are truly partners with the Federal government in protecting water quality....”

Notable components of the bill would limit EPA’s ability to: (1) issue a revised or new water quality standard for a pollutant when a state has adopted a standard that EPA has already approved; (2) supersede a water quality certification granted by a state under Section 401; (3) withdraw approval of a state water quality permitting program under the NPDES or limit federal financial assistance for the state program; (4) object to a state’s issuance of an NPDES permit on the basis of a different EPA interpretation of an approved state water quality standard, or the implementation of federal guidance that directs a re-interpretation of a state’s approved standards; and (5) veto dredge and fill permits issued by the Army Corps of Engineers under Section 404.³³

On June 22, the Committee approved the H.R. 2018 by a vote of 35-19.

In related news, EPA sent a June 21 letter to House Subcommittee on Water Resources and Environment Ranking Member Tim Bishop (D-NY), stating that the bill would “...significantly undermine EPA’s longstanding role under the CWA to assure that state water quality standards protect clean water and public health and comply with the law. It would fundamentally disrupt the Federal-State relationship outlined in the 1972 CWA and would hinder the federal government’s ability to ensure that states protect interstate waters at a common level. This could lead to upstream states implementing standards that degrade waters in downstream states. This bill would prevent EPA from taking action without state concurrence even in the face of significant scientific information demonstrating threats to human health or aquatic life.”

EPA also said the bill would: (1) prevent it from providing its views on whether a proposed project would violate CWA standards; (2) remove its existing state coordination role and eliminate the federal/state balance under the current CWA; (3) prevent it from protecting communities from “unacceptable adverse impacts” caused by federal permits; and (4) “substantively eliminate” its opportunity to comment on federal permits impacting water quality and public health.³⁴

Rep. Bishop (D-NY) said that individual states have increased their capacity to protect water quality with their borders, but warned, “In my view elimination of EPA’s oversight and authority for a minimum standard would allow a potential ‘race-to-the-bottom’ for the establishment of pollution discharge limits within a state border.”³⁵

³²*Western States Water*, #1958, November 28, 2011 and #1912, January 7, 2011.

³³<http://transportation.house.gov/>.

³⁴*Western States Water*, #1933, June 3, 2011.

³⁵<http://timbishop.house.gov/>. *Western States Water*, #1936, June 24, 2011.

On July 12, over 120 business groups and other organizations, including the National Water Resources Association and the U.S. Chamber of Commerce, sent a letter supporting the bill to Speaker of the House John Boehner (R-OH) and Minority Leader Nancy Pelosi, stating, “Over the years, EPA has repeatedly challenged the states’ authority and expertise under the CWA and asserted its control as the sole arbiter of evolving CWA permitting requirements and standards. The agency’s actions jeopardize more than \$220 billion of annual economic activity subject to CWA Sec. 402 and 404 permits.”³⁶

However, the Office of Management and Budget also issued a statement on July 12, stating: “The Administration strongly opposes H.R. 2018 because it would significantly undermine the [CWA] and could adversely affect public health, the economy, and the environment... H.R. 2018 could limit efforts to safeguard communities by removing the Federal Government’s authority to take action when State water quality standards are not protective of public health. In addition, it would restrict EPA’s authority to take action when it finds that a State’s CWA permit or permit program is inadequate and would shorten EPA’s review and collaboration with the Army Corps of Engineers on permits for dredged or fill material... It could also eliminate EPA’s ability to protect water quality and public health in downstream States from actions in upstream states, and could increase the number of lawsuits challenging State permits.... If the President is presented with this legislation, his senior advisors would recommend that he veto the bill.”³⁷

On July 13, the House passed H.R. 2018 by a vote of 239-184. The bill would amend the CWA and limit EPA’s ability to oversee state water quality standards and permitting decisions. The House also approved amendments that would: (1) require EPA to examine the impact of certain CWA-related actions on jobs and the economy; (2) preserve EPA’s authority to oversee regulation of pipelines that cross streambeds; and (3) require annual reporting by EPA on increases or reductions in levels of pathogens, toxic chemicals, or toxic metals in state waters.

Transportation and Infrastructure Committee Chair John Mica (R-FL), who introduced the bill, said, “EPA’s recent unprecedented actions have created a regulatory nightmare that affects almost every state in the union....” Ranking Member Nick Rahall (D-WV), who co-sponsored the bill, also said, “Certainly, it would be preferable that agencies work with each other, with the States, and within the confines of their statutory authority so we did not have to craft this kind of legislation. But when they abuse their powers, the Congress has the Constitutional responsibility to serve as a check on them. This is clearly such a time.”

Silviculture Regulatory Consistency Act /*NEDC v. Brown*

On July 14, Senator Mike Crapo (R-ID) introduced the Silviculture Regulatory Consistency Act (S. 1369) to exempt silvicultural activities from NPDES permitting under the Clean Water Act (CWA). The bill would overturn the Ninth Circuit Court of Appeals’ decision in *NEDC v. Brown*, which held that logging road stormwater runoff that is managed by a system of ditches and culverts and deposited into rivers and streams is a point source of pollution subject to NPDES permitting requirements. The ruling also limits the application of EPA’s Silvicultural Rule, which had long used the agency’s authority to define non-point sources of pollution to exclude logging road runoff from NPDES permitting requirements.

³⁶<http://transportation.house.gov/>.

³⁷http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr2018r_20110712.pdf.

The bill states that EPA "...shall neither require a permit...nor directly or indirectly require any State to require a permit...for a discharge resulting from the conduct of any silvicultural activity, such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road use, construction, and maintenance, from which there is runoff." It also states that it does not exempt "...the conduct of a silvicultural activity resulting in the discharge of dredged or fill material from any permitting requirement under section 404 [of the CWA]."

In discussing the need for the bill, Crapo said the court's decision "...will have substantial impacts on our forests and those who rely on them... It will increase litigation, reduce sustainable and environmentally-friendly timber harvesting; further burden our forests with excess fuels and raise additional barriers to the vital mission of improving forest health." Co-sponsor Mark Begich (D-AK) also said, "This legislation puts decisions back in the hands of states, rather than the courts. We all want to protect water quality and we want efficient government. That is why we need strong state forest practice laws in place instead of wasting time and money on paperwork." Other co-sponsors included Senators Ron Wyden (D-OR) and Jim Risch (R-ID).³⁸

Of note, the Western Governors' Association's "Water Quality in the West" resolution, adopted in June 2010, expressed concern about the potential impacts of treating forest roads as point sources under the NPDES program, and stated that the Western Governors would seek solutions that are consistent with the treatment of forest roads as non-point sources.³⁹

Endangered Species Act

San Juan River

On January 31, a coalition of environmental groups filed a lawsuit in a Colorado federal court against the Department of Interior's Office of Surface Mining (OSM), alleging that it failed to protect the San Juan River from coal mining and coal combustion waste. Specifically, the Center for Biological Diversity, Dine Citizens Against Ruining our Environment, and the San Juan Citizens Alliance contend that OSM violated the Endangered Species Act (ESA) when it renewed a permit last fall for the Navajo Coal Mine without consulting with the Fish and Wildlife Service (FWS) over threatened and endangered fish. The mine produces coal for the Four Corners plant in northwest New Mexico, which is one of the Nation's largest coal-fired plants.

The suit says mercury, selenium and other toxins from the mine are seeping into the water supply and contaminating the river to the detriment of several endangered and threatened species, including the endangered Colorado pikeminnow and the razorback sucker. "There is now overwhelming scientific evidence that regional coal development is driving species in the San Juan River ecosystem towards total collapse," said Mike Eisenfeld of the San Juan Citizens Alliance. Hundreds of communities rely on water from the San Juan River and it is imperative that the government and industry take immediate action to eliminate these pollution sources and protect our human and ecological communities."⁴⁰

Chinook Salmon

On May 5, the San Joaquin River Group Authority filed a lawsuit in federal court in California, arguing that NOAA's National Marine Fisheries Service (NMFS) improperly reopened

³⁸http://crapo.senate.gov/media/newsreleases/release_all.cfm

³⁹*Western States Water*, #1931, May 20, 2011.

⁴⁰<http://www.biologicaldiversity.org/>

the commercial salmon season after years of closures. The Authority, which represents a number of Central Valley irrigation districts, maintained that the NMFS' decision violated its duty to protect the Sacramento River fall run of chinook salmon, which is currently a "species of concern" but is not yet listed as endangered or threatened under the ESA. The Authority is concerned that further population declines could lead to the salmon being listed, which could force its members to release water to sustain salmon runs. The winter and spring chinook runs are already listed under the ESA, and declining salmon numbers prompted the NMFS to close the commercial season off Oregon and California in 2008 and 2009. Concerns about the salmon and the Delta smelt have also led to decreased water deliveries and pumping restrictions in the Delta. However, the NMFS estimated that about 730,000 Chinook would return to the Sacramento River in the fall, exceeding the 120,000 to 180,000 needed for optimum spawning.

Endangered Species Act Implementation

On May 26, the Department of Interior announced that the FWS and the NOAA's Fisheries Service have launched a joint effort aimed at improving ESA implementation by considering changes to their practices, guidance, policies, and/or regulations to enhance the conservation of listed species. The effort will not seek legislative changes to the ESA, and is intended to ensure that key operational aspects of the ESA are up-to-date, clear, and effective.

Specific focus areas of the effort include: (1) expanding opportunities for states to engage more often and more effectively in ESA implementation, especially those pertaining to the listing of species; (2) improving the efficiency and effectiveness of critical habitat designation; (3) clarifying, expediting, and improving procedures for the development and approval of conservation agreements with landowners; (4) clarifying the scope and content of the incidental take statements in biological opinions, which specify the impact of an incidental taking of an endangered or threatened species and set forth measures to minimize impacts; and (5) working through an interagency group of senior policy leaders from FWS, NOAA, and the EPA to develop a strategy to address "...the challenge of conservation of endangered species and the administration of the Federal Insecticide, Fungicide, and Rodenticide Act."⁴¹

On December 8, FWS and NOAA Fisheries proposed a new policy intended to clarify which species or populations of species are eligible for protection under the ESA. The policy is also aimed at providing earlier and more effective opportunities to conserve declining species. Specifically, it would clarify that the FWS and NOAA Fisheries could list a species if it is endangered or threatened in a "significant portion of its range" even if that species is not endangered or threatened throughout all of its range. A portion of a species' range would be deemed "significant" if the species would be in danger of extinction without that portion of its range.

"This proposed interpretation will provide consistency and clarity for the services and our partners, while making more effective use of our resources and improving our ability to protect and recover species before they are on the brink of extinction, said FWS Director Dan Ashe. Eric Schwaab, NOAA's Assistant Administrator for Fisheries, also said, "A clear and consistent policy will help our partners and improve the process of evaluating species status under the [ESA]."⁴²

⁴¹http://www.fws.gov/endangered/improving_ESA/reg_reform.html. *Western States Water*, #1658, February 24, 2006.

⁴²<http://onlinepressroom.net/fws/>.

San Luis and Delta-Mendota Water Authority v. Salazar

On June 22, the Pacific Legal Foundation (PLF) petitioned the U.S. Supreme Court on behalf of three California farms to review the Ninth Circuit Court of Appeals' decision in *San Luis and Delta-Mendota Water Authority v. Salazar*. In that case, the farms argued that federal water pumping restrictions aimed at protecting the ESA-listed Delta smelt violate the Commerce Clause of the U.S. Constitution. In particular, they said the federal government cannot regulate water pumping to protect the smelt because the fish does not affect interstate commerce since it is specific to California and has no commercial value. The Ninth Circuit disagreed, saying the ESA "bears a substantial relation to commerce" and that while "...the ESA might ensnare...some purely intrastate activity...we refuse to excise individual components of that larger scheme."

In their petition to the Court, the farms argue that the Ninth Circuit's decision sanctions "virtually unlimited" federal power under the Commerce Clause, and is inconsistent with the Nation's constitutional form of government. They also note that the water restrictions have caused a variety of adverse impacts to humans and the human environment, including large amounts of fallowed farm land and the destruction of businesses.⁴³

However, some environmental groups, including the California Sportfishing Protection Alliance, are questioning claims that ESA restrictions have led to large reductions in irrigated agriculture. To the contrary, the groups say a significant portion of the land was fallowed because of high levels of salt and boron, not from pumping restrictions.⁴⁴

Federal Columbia River Power System

On August 2, Federal District Court of Oregon Judge James Redden struck down the National Marine Fisheries Service's latest biological opinion (BiOp) for salmon protection in the Federal Columbia River Power System in Idaho, Montana, Oregon, and Washington. The salmon are listed under the Endangered Species Act, and the Service had found that system operations were unlikely to jeopardize the fish through 2018 based on federal measures to protect salmon from the system's hydroelectric power components, which includes 14 dams. Redden disagreed, finding that "...Federal Defendants have failed...to identify specific mitigation plans to be implemented beyond 2013. Because the [BiOp's] no jeopardy conclusion is based on unidentified habitat mitigation measures, [the Service's] opinion that [system] operations after 2013 will not jeopardize listed species is arbitrary and capricious." This is Redden's third rejection of a BiOp for the system, and the fourth overall.

Redden remanded the BiOp and ordered the Service to produce a new version by January 2014 that, among other things, "...considers whether more aggressive action, such as dam removal and/or additional flow augmentation and reservoir modifications are necessary...." However, he also found that the BiOp does provide some protections through 2013, and ordered the Service to fund and implement it until then.

House Natural Resources Committee Chair Doc Hastings (R-WA) criticized the ruling, saying, "Judge Redden has zero authority to order the removal of dams and the agencies have no authority to breach dams. Only Congress can authorize removal...and I can definitively state that this will not happen on my watch."⁴⁵

⁴³<http://www.pacificlegal.org/page.aspx?pid=1612>.

⁴⁴<http://calsport.org/news/>.

⁴⁵<http://naturalresources.house.gov/>.

Conversely, John Kostyack of the National Wildlife Federation, one of the environmental groups behind the lawsuit that prompted the ruling, praised the decision and said, “Dam removal remains the most scientifically sound and economically smart solution to recover salmon in this region.”⁴⁶

Cooperative Endangered Species Conservation Fund

On August 24, the Department of Interior announced \$53 million in grants to seventeen states to work with private land owners, conservation groups, and other agencies in conservation planning and vital habitat acquisition for species listed as threatened or endangered under the Endangered Species Act. “Our solid partnerships with states are key to Interior’s continued success in preventing the extinction of hundreds of threatened and endangered species, and recovering species,” said Secretary of the Interior Ken Salazar. “These grant awards will support important state efforts to build and strengthen conservation partnerships, and to conserve and protect vital habitat for threatened and endangered animals and plants.” The grants will be awarded through the Fish and Wildlife Service’s Cooperative Endangered Species Conservation Fund, and western states receiving funding included Arizona, California, Colorado, Montana, Nebraska, Oregon, Texas, and Washington.⁴⁷

Indian Water Rights

Crow Settlement

On July 15, Secretary of the Interior Ken Salazar and other top Interior officials met with tribal leaders in Montana to take what he called “the latest steps to implement President Obama’s pledge for reconciliation and empowerment for American Indian nations.” Among other things, Salazar and Reclamation Commissioner Mike Connor joined a crowd of 200 at Crow Agency to celebrate the recently approved \$460 million Crow settlement, where they outlined how the settlement will create jobs on the reservation; improve the Crow Irrigation Project; develop a municipal, rural and industrial water system; and support development of the Crow Nation’s energy resources. Of the \$460 million authorized for the settlement, Salazar announced that, at the request of Crow Chairman Cedric Black Eagle, the first \$500,000 was released to the tribe on July 8, and another \$4.9 million had been made available for future disbursement.

“Today’s events in Montana signal a new era in the U.S. government’s relationship with Indian Country nationwide,” said Salazar. “[The] celebration in Crow Agency made me especially proud of our Administration’s support for water rights settlements that will deliver much-needed water to Indian communities such as the Crow Reservation.”⁴⁸

Aamodt Settlement

On September 29, Secretary Salazar and Senator Jeff Bingaman (D-NM), along with Assistant Secretary for Indian Affairs Larry Echo Hawk and Reclamation Commissioner Connor, met with Pueblo leaders in Santa Fe, New Mexico to celebrate the implementation of the Aamodt water rights settlement. The agreement settles water claims of the Tesuque, Nambe, Pojoaque, and San Ildefonso Pueblos in north central New Mexico. It also provides certainty to non-Indian water rights, ends over four decades of litigation, and includes the planning and construction of a regional

⁴⁶<http://www.nwf.org/>. *Western States Water*, #1868, March 5, 2010.

⁴⁷<http://www.doi.gov/news/pressreleases/index.cfm>.

⁴⁸<http://www.doi.gov/news/pressreleases/index.cfm>.

water system that will receive \$56.4 million in base funding from Reclamation. Congress passed the settlement as part of the Claims Resolution Act of 2010, which also authorized the Crow settlement in Montana, the Taos settlement in New Mexico, and the White Mountain Apache settlement in Arizona.

“I am proud of the water settlements signed by President Obama because they will deliver clean drinking water to Indian communities like yours,” said Secretary Salazar. “The one we celebrate today - the ‘Aamodt’ water rights settlement - resolves decades of litigation, will improve certainty for water users, and will create jobs through much-needed infrastructure investments.” Bingaman, who sponsored legislation to authorize the settlement, also said, “This settlement is the product of years of negotiation, and I want to thank everyone who helped see it through to completion.”⁴⁹

White Mountain Apache

On October 14, the Department of Interior announced a \$11.8 million agreement with the White Mountain Apache tribe in Arizona to fund planning and design activities for the Miner Flat rural water project on the tribe’s reservation. The project is part of the tribe’s recently approved water rights settlement and will include a dam, pumping plants, a water treatment plant, and water distribution pipelines. Under the agreement, the tribe will contract for the preparation of design specifications, cost estimates, and environmental documents. Reclamation will perform technical oversight, ensure adherence to federal requirements, and provide other technical assistance. “Advancing Indian water rights settlements like this one is a critical piece of President Obama’s efforts to empower tribal governments and help them build stronger and more prosperous communities,” said Salazar.⁵⁰

Blackfeet Settlement

On October 20, the Senate Committee on Indian Affairs held a hearing on the Blackfeet Water Rights Settlement of 2011 (S. 399). The bill would authorize a settlement of the water rights claims of the Blackfeet Tribe in Montana as well as \$591 million in federal funding, including \$125 million for the rehabilitation, improvement, and expansion of the Blackfeet Irrigation Project and Four Horns Dam and Reservoir. The State of Montana would provide \$35 million for the settlement.

Donald Laverdure, Principal Deputy Assistant Secretary of Indian Affairs, testified, “The Administration is committed to working with the Tribe and other settlement parties to reach a final and fair settlement of the Tribe’s water rights claims.... While we do not support S. 399 as introduced, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support.” Laverdure outlined the major concerns as: (1) the settlement’s federal cost; (2) the settlement’s lack of a “reasonable” non-federal cost share; (3) lack of information regarding what infrastructure the Tribe would pursue under the settlement and the actual costs for such projects; (4) the requirement that the U.S. establish a mitigation fund to benefit non-Indians; and (5) the lack of resolution of tribal claims in the St. Mary and Milk River Basins.

Chris Tweeten, Chairman of the Montana Reserved Water Rights Compact Commission, testified in support of the bill, stating that the settlement is a “linchpin” for the resolution of tribal

⁴⁹<http://www.doi.gov/index.cfm>. *Western States Water*, #1908, December 10, 2010.

⁵⁰<http://www.usbr.gov/newsroom/newsrelease/index.cfm>. *Western States Water*, #1907, December 3, 2010, and #1839, August 14, 2009.

water claims in northwest Montana. “[Economic development] provides intrinsic benefits to the people of the Blackfeet reservation who are among the poorest residents of the State of Montana,” he said. “The State of Montana develops whenever economic development occurs within our boundaries, whether it is on a Indian reservation or not.... And finally, and most importantly, the uncertainty that surrounds the un-quantified nature of Indian reserved water rights is eliminated when those rights are compacted and those compacts are brought to the Congress and ratified.... The benefits to the State of Montana from this bill, both economically and in terms of creating certainty for our water development going forward, are substantial incentives for the state.”

Terry J. Show, Chairman of the Blackfeet Tribal Business Council, supported the bill, saying it is crucial to his Tribe’s cultural, spiritual, physical, and economic survival. In particular, he said it will: (1) confirm the Tribe’s water rights on its reservation; (2) provide for the administration of tribal water rights along with protections for state water users; and (3) provide funding for reservation water projects critical to the development of the tribe’s water rights and the “homeland purpose” of its reservation. He also stressed that the settlement is the product of years of negotiation.⁵¹

On November 1, Rep. Denny Rehberg (R-MT) introduced H.R. 3301 to ratify the Blackfeet Tribe’s water rights settlement with Montana and the United States. The bill was referred to the House Committee on Natural Resources.

Soboba Settlement

On November 29, Secretary Salazar announced \$21 million in federal funding as part of the Soboba Band of Luiseo Indians water rights settlement, which Congress authorized in 2008 to resolve disputes between the Band and the Eastern Municipal Water District (EMWD), the Lake Hemet Municipal Water District (LHMWD), and the Metropolitan Water District of Southern California (MWD). The settlement recognizes a “tribal water right” that allows the Band to pump 9,000 af/year of water from the San Jacinto River Basin in California, the exercise of which the Band agreed to limit to 4,100 af/year for 50 years. The settlement also required the three water districts to build a groundwater restoration and recharge project for the basin.

Of the \$21 million in funding, \$11 million will cover the Band’s costs for water and sewer infrastructure on its reservation. The other \$10 million will be made available to LHMWD and EMWD to construct the groundwater recharge project. MWD will provide much of the water needed for the project, a total of 7,500 acre-feet of imported water each year until at least 2035. Interior says the settlement’s recharge provisions will enable the development of thousands of acres of residential and commercial land in the basin.

“Thanks to collaboration among the Band, the water districts and the U.S. government, the funds we are releasing today will have a real, lasting impact when it comes to a secure water supply and spurring economic development for the Soboba nation and the neighboring communities,” said Salazar. Deputy Secretary of the Interior David Hayes also said, “Water is the lifeblood of our communities, and I’m pleased that we can now begin a new chapter on water in this region - one marked by certainty, restoration and economic activity.”⁵²

⁵¹<http://www.indian.senate.gov/hearings/hearing.cfm?hearingID=0bd5589287f5bbb3d229c1850f700af8>. *Western States Water*, #1879, May 21, 2010, and #1828, May 29, 2009.

⁵²<http://www.doi.gov/news/index.cfm>. *Western States Water*, #1772, May 2, 2008.

Interior

Strategic Plan/WaterSMART

In January, Secretary Salazar released the Department's Strategic Plan for 2011-2016. It stated that the Bureau of Reclamation's WaterSMART and Title XVI programs will increase water conservation capacity by 930,000 acre feet by 2016. A related "priority goal" would also provide 490,000 acre feet of water conservation capacity through WaterSMART and Title XVI by 2012. An additional 1,500 acre-feet of water will be made available through other conservation projects. Other water-related strategies include achieving a 71% facility reliability rating for water infrastructure maintained in good condition, and improving infrastructure and operation efficiency of tribal water facilities. Salazar said the plan "...sets out mission priorities and guides our investments and allocation of resources for stewardship of America's Great Outdoors, sustainably managing natural resources and strengthening our nation-to-nation relationship with [tribal nations]."⁵³

On March 9, Reclamation Commissioner Mike Connor announced the availability of three grant opportunities under the Department of Interior's WaterSMART program. The first sought proposals for system optimization review projects that would assess the potential for water management improvements in an applicant's water delivery system or in a river basin. These proposals would identify specific improvements to increase efficiency, including a plan for implementing the recommendations.

The second grant opportunity requested proposals for advanced water treatment pilot and demonstration projects that would address the technical, economic, and environmental viability of treating and using brackish groundwater, seawater, impaired waters, or otherwise creating new water supplies within a specific locale. Both opportunities are open to states, tribes, irrigation districts, and other organizations with water or power delivery authority.

A third grant opportunity sought proposals for research projects that would develop climate analysis tools aimed at enhancing management of western water resources in a changing climate and was open to universities and non-profit research institutions, as well as organizations with water or power delivery authority.

"These grant opportunities will help Reclamation work smarter to address the water needs of a growing population and assist States, Tribes, and local entities in solving contemporary water resource challenges," said Connor. Reclamation will evaluate projects using established criteria listed in each announcement.⁵⁴

On May 19, the Department of Interior announced that the Bureau of Reclamation had selected 54 new projects in 14 western states to receive a total of \$24 million in WaterSMART Water and Energy Efficiency Grants. The projects will leverage federal funding with non-federal sources to complete over \$76 million in work to: (1) improve water management; (2) increase energy efficiency in the delivery of water; (3) facilitate water marketing projects; (4) protect endangered and threatened species; (5) address climate-related impacts; and/or (6) prevent water-related conflict and crisis. The projects are projected to save an estimated 102,221 af/year. Additionally, 24 of the projects are expected to save more than 15 million kilowatt hours of electricity per year.

⁵³<http://www.doi.gov/news/pressreleases/index.cfm>.

⁵⁴www.grants.gov and <http://www.usbr.gov/newsroom/>.

“It is through actions such as the WaterSMART grants that the Bureau of Reclamation continues to work with water districts, communities, other government agencies, and Native American Tribes to improve water and energy efficiency in the West,” said Reclamation Commissioner Mike Connor. “By working together, we can find more efficient ways to use the water available in the West to protect jobs, enhance the use of clean energy and promote the sustainable use of limited resources.” The projects are located in every Reclamation state except Oklahoma, North Dakota, and South Dakota.⁵⁵

CALFED Water Use Efficiency Grant Programs

On October 18, the Bureau of Reclamation announced that it awarded nearly \$3 million in funding to seven California water management improvement projects through the CALFED Water Use Efficiency Grant Program in FY2011. The funding, along with local cost-sharing contributions, will help implement \$8.2 million in projects over the next 24 months. Reclamation also says the projects will better manage or conserve about 16,000 acre-feet of water per year. CALFED is a state-federal collaboration focused on improving California’s water supply and the Bay Delta.

Reclamation also awarded over \$530,000 to projects in California and Nevada through its Water Conservation Field Service Grants Program. It reports that local cost-sharing will help implement over \$3.8 million in water management improvements over the next two years. These projects will either conserve or better manage 145,700 acre-feet of water per year, which Reclamation says will contribute to ecosystem health, water supply, reliability, and water conservation.⁵⁶

Basin Studies

On July 20, Secretary of the Interior Ken Salazar announced that the Bureau of Reclamation would provide \$1.8 million in WaterSMART funding to study seven basins and identify adaptation strategies in the West where imbalances between water supply and demand exist or are projected. This includes four full basin studies for the Hood River in Oregon; the Klamath River in California and Oregon; the Lower Rio Grande River in Texas; and the Santa Fe, Upper Rio Grande, and San Juan Rivers in New Mexico. These studies will include a non-federal cost-share and basin-specific plans that recommend collaborative solutions to help meet water demands and foster sustainable development.

In addition, Reclamation selected the Los Angeles Watershed in California, the Republican River in Kansas and Nebraska, and the Sacramento-San Joaquin Rivers in California to complete plans of study that will define the products and set the scope and focus for future basin study application opportunities.

Salazar said the funding “...provides just the latest example of how the WaterSMART program focuses on improving water conservation and sustainability while helping water resource managers provide for future water demand.” Anne Castle, Assistant Secretary of the Interior for Water and Science, also said, “Through these collaborative WaterSMART basin studies, Reclamation will come together with other federal, state and local governments and tribes to assess anticipated future water supplies and demands, and propose jointly crafted solutions to address shortages.”

⁵⁵<http://www.doi.gov/index.cfm>

⁵⁶<http://www.usbr.gov/newsroom/newsrelease/index.cfm>

Of note, Salazar also announced the selection of eight water systems in California, Kansas, Oregon, and Utah to receive a total of \$904,906 in WaterSMART grants to study improving water efficiency and operations. The recommended improvements may be eligible in the future for Reclamation's water and energy efficiency grant funding through WaterSMART.⁵⁷

On November 3, the Bureau of Reclamation announced that it is seeking non-federal participants for the 2012 Basin Studies program. Each study will include: (1) projections of water supply and demand within the basin, including climate change risks; (2) analysis of how existing water and power infrastructure and operations will perform in response to changing climate realities; (3) development of appropriate adaptation and mitigation strategies to improve operations and infrastructure to meet future water demands; and (4) a trade off analysis of the options identified, findings, and recommendations.

Eligible partners include states, tribes, water districts, cities, and other local governmental entities with water delivery or management authority in the 17 western states. Non-federal partners must contribute at least 50% of the total study cost of funding or in-kind services. Those selected for consideration will work with Reclamation to develop a joint study proposal for evaluation and prioritization.⁵⁸

Climate Applied Science Projects

On July 26, Reclamation announced that it will provide \$1.2 million in WaterSMART funding for seven applied science projects that are intended to “..better manage water resources in a “changing climate.” The funding will be leveraged to provide for over \$2.7 million in funding for projects in Arizona, California, Nevada, and Utah that will estimate evapotranspiration and irrigation water requirements; examine the impact of climate on water quality in Lake Mead; project seasonal precipitation cycles within the Upper Colorado River Basin; and develop and evaluate regional climate downscaling techniques, among other things. The projects will help inform Reclamation activities under the SECURE Water Act, and results will be integrated with ongoing activities at the federal Climate Science Centers, Landscape Conservation Cooperatives, and the National Oceanic and Atmospheric Administration's Regional Integrated Sciences and Assessments.

“The competition is growing for water used by agriculture, municipalities, the energy sector and the environment,” said Reclamation Commissioner Mike Connor. “Growing demand for water will continue with the impacts exacerbated by climate change. At Reclamation, the WaterSMART program and grants such as these enhance the knowledge and tools available to water resource managers so they can use water more efficiently and meet future demands.”⁵⁹

Landscape Conservation Cooperatives

On September 12, Commissioner Conner announced the award of \$1.2 million in WaterSMART funding to nine projects in the Desert and Southern Rockies Landscape Conservation Cooperatives (LCCs). “The Department of the Interior LCCs cross agency jurisdictions and political boundaries to address landscape-scale changes and impacts to land, water, wildlife and cultural resources,” said Connor. “These applied science projects will inform federal, state, tribes and local

⁵⁷ <http://www.doi.gov/news/pressreleases/index.cfm>.

⁵⁸ <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=38303>. *Western States Water*, #1940, July 22, 2010.

⁵⁹ <http://www.usbr.gov/newsroom/newsrelease/index.cfm>.

managers as they analyze and adapt to climate change and other stressors such as drought or invasive species.”

Institutions in the states of Arizona, Colorado, Kansas, Oregon, and Texas, received the applied science grants. Matching funds will bring the total available for research to \$2.5 million. The projects will: (1) examine climate impacts on stream low-flows, riparian vegetation, soil conditions and vulnerability, fish species and wildlife; (2) develop new information regarding the current biology and management of springs and seeps; (3) research ways to mitigate the impact and prevent the spread of golden alga; (4) evaluate the suitability and cost-effectiveness of rainwater and stormwater capture; and (5) improve technology for predicting various water demand scenarios.⁶⁰

Landsat

USGS/NASA Satellite Imagery

On May 3, Deputy Secretary of the Interior David Hayes announced a new website entitled “ChangeMatters,” which makes Landsat satellite imagery more accessible to the public. Created by GIS software developer Esri, the site allows users to view Landsat data developed by U.S. Geological Survey (USGS) and the National Aeronautics and Space Administration (NASA). The website allows users to view images from 1975 to 2005, choose the decade they want to view, and select different combinations of Landsat bands, each highlighting a different application. It also includes a change-detection tool for viewing and mapping landscape changes by decade. Many western states use Landsat’s thermal infrared sensor (TIRS) to remotely measure and calculate water consumption, as well as administer water rights and interstate compacts.

“Landsat satellite imagery is one of the most valuable resources for Earth observation,” said Hayes. Assistant Secretary for Water and Science Anne Castle also said, “We are very pleased that this Landsat data can be a platform for new innovative products that provide great value to many end users and are publically available.” The WSWC has long supported Landsat and has worked to ensure that the next Landsat satellite includes a TIRS sensor.⁶¹

Landsat 5

On November 18, the USGS announced that it had stopped acquiring images from Landsat 5 due to a rapidly degrading electronic component. The 27-year-old observation satellite, which collects global imagery that water managers use to measure water consumption, was launched in 1985 and designed to last three years. Although USGS has managed to bring the satellite back from the brink of total failure on several occasions, it now says there is an increasing likelihood that the Landsat 5 mission is nearing its end.

For several months, the Landsat flight operations team has been tracking the fluctuating performance of an amplifier essential for transmitting land-surface images. Problems with the amplifier led to reduced image download capabilities, a sign of impending failure. Rather than operating the amplifier until it fails completely, which could end the mission, USGS suspended imaging activities for an initial 90-day period to explore possible options for restoring satellite-to-ground image transmissions. Landsat 7, which was launched in 1999 with a five-year design life, is

⁶⁰<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=37263>. *Western States Water*, #1928, April 29, 2011, and #1935, June 17, 2011.

⁶¹<http://www.doi.gov/news/index.cfm>.

still operational, but has since experienced an anomaly that reduced the amount of data it collects per image.

“[The] decline of Landsat 5 provides confirmation of the importance of the timely launch of [Landsat 8] and the need for an operational and reliable National Land Imaging System,” said Anne Castle, U.S. Department of the Interior Assistant Secretary for Water and Science. “The USGS is committed to maintaining the unique long term imaging database that the Landsat program provides.”⁶²

Litigation/Water Rights

Republican River

On April 4, the U.S. Supreme Court granted Kansas permission to proceed with litigation against Nebraska for alleged overuse of water in violation of the Republican River Compact, which allocates water between the two states and Colorado. The decision reopens litigation that Kansas brought in 1998, and involves a 2003 Court decree that approved a negotiated settlement between the three states. However, in May 2010, Kansas sought permission to ask the Court to reopen the case and enforce the settlement, alleging that Nebraska violated both the settlement decree and the compact by overusing more than 78,000 acre-feet of water during a two-year period from 2005-2006. The Court has named William Kayatta of the Pierce Atwood firm in Portland, Maine as the special master for the case.

“We expect Nebraska to live up to our prior agreement governing water flow in the Republican River,” said Kansas Attorney General Derek Schmidt. “Today’s decision...allows us to proceed and gives Kansas the chance to press our case and protect our state’s and citizens’ interests.” Nebraska Attorney General Jon Bruning issued the following statement: “Thanks to the cooperation of our farmers in the Republican River Basin, we have the management tools in place to continue to be in compliance with the Compact. Our farmers have done what is necessary for the last several years to ensure we are doing our part.”

The Court’s decision follows a non-binding ruling that arbitrator Karl Dreher, a former WSWC member, issued in June 2009. The ruling affirmed Kansas’ estimate of Nebraska violations for 2005 and 2006, and recommended certain actions to ensure compliance in water short years. Dreher also found that Kansas had not adequately proven its claim for monetary damages and awarded damages of \$10,000 instead of the \$72 million Kansas originally sought. Colorado, Kansas, and Nebraska were unable to accept every aspect of the decision, thereby exhausting Kansas’ options under the Compact’s dispute resolution provision and clearing the way for its May 2010 filing.⁶³

Yellowstone River Compact

On May 2, the U.S. Supreme Court denied a Montana claim that Wyoming was depleting water from the Tongue and Powder Rivers in violation of the Yellowstone River Compact. The Compact protects appropriative water rights in both states that existed as of January 1, 1950. Montana argued that Wyoming breached the Compact by allowing pre-1950 appropriators to increase their net consumption by improving the efficiency of their irrigation systems, keeping run-off from flowing downstream to the detriment of pre-1950 Montana appropriators. The Court

⁶²<http://www.usgs.gov/newsroom/article.asp?ID=3040>. *Western States Water*, #1939, July 15, 2011.

⁶³<http://www.ksag.org/> and <http://www.ago.state.ne.us/>. *Western States Water*, #1877, May 7, 2010.

disagreed, finding, “And the best evidence we have shows that the doctrine of appropriation in Wyoming and Montana allows appropriators to improve the efficiency of their irrigation systems, even to the detriment of downstream appropriators.”⁶⁴

Oklahoma

On September 7, the Tenth Circuit Court of Appeals ruled in favor of Oklahoma in *Tarrant Regional Water District v. Herrmann* and *City of Hugo v. Nichols*. Both lawsuits were filed against the Oklahoma Water Resources Board (OWRB) and were aimed at securing water from southern Oklahoma for use by entities in north Texas. Both suits also challenged Oklahoma laws that allegedly limited allocation of water permits out-of state, thereby restricting interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

In *Tarrant*, a Texas water district sought to divert 460,000 acre feet per year (af/yr) of water from Red River tributaries in Oklahoma to Texas. However, the court upheld a lower court’s dismissal of the suit, holding that the Red River Compact between Oklahoma, Texas, Arkansas, and Louisiana “...insulates Oklahoma water statutes from dormant Commerce Clause challenge insofar as they apply to surface water subject to the Compact.” It also found that the Compact gives the states “unrestricted authority” to regulate their apportioned water, as well as “...congressional consent...to adopt measures protecting their water apportionments that might otherwise violate the dormant Commerce Clause.”

In *City of Hugo*, an Oklahoma city contracted with Irving, Texas to sell 200,000 af/yr of water. Hugo filed the necessary permits with the OWRB and both parties sued the OWRB. However, the court ruled that Hugo lacked standing as a political subdivision of Oklahoma because its claims were “...based on a substantive provision of the Constitution, and because the Supreme Court has made clear that the Constitution does not contemplate the rights of political subdivisions as against their parent states...” It also held that Irving lacked standing because: (1) it did not suffer an injury since it never filed a permit application that would be affected by the challenged laws; and (2) even if Irving suffered an injury, invalidating the laws at issue would not compel the OWRB to grant the applications or process them in a particular way.

“[I]t is always our preference to work with our neighboring states to resolve differences, said Oklahoma Governor Mary Fallin (R). “In these cases, however, we were forced to defend our state laws, federal obligations, and precious water resources [from] parties that chose the more aggressive course of litigation.”⁶⁵

States

New Mexico

Drought and Climate Impacts on Water

On April 27, the Senate Energy and Natural Resources Committee held a field hearing in Santa Fe, New Mexico that highlighted New Mexico’s current drought and a recent SECURE Water Act report by the Bureau of Reclamation on climate impacts on water. Committee Chair Jeff Bingaman (D-NM) said his state is experiencing severe to extreme drought conditions. “Even a

⁶⁴*Western States Water*, #1830, June 12, 2009.

⁶⁵<http://www.owrb.ok.gov/news/news2/pressrelease2011.php#090711>. *Western States Water*, #1889, July 30, 2010, and #1877, May 7, 2010.

quick look at the information to be presented today indicates that temperatures are rising and precipitation is decreasing,” he said. “The current conditions emphasize the need to support local and federal efforts to develop sustainable water supplies.”

Reclamation Commissioner Mike Connor described his agency’s SECURE Water Act report, saying 21st Century temperatures in the West may increase by 3 to 4 C in addition to the 1 to 2 C warming the region experienced during the 20th Century. In the Colorado Basin, the trend towards earlier spring runoff is expected to continue and projections indicate a 6% to 20% streamflow reduction by the middle of the 21st Century. “The risks of shortage to users in the lower Colorado River Basin...although averted in 2012 due to a reasonably good snowpack and runoff...are expected to increase over time to about 40 percent in 2026,” he said. “With current water management strategies throughout the Colorado River Basin, risks of full reservoir depletion are less than 5 percent through 2026, however these risks increase significantly between 2026 and 2057, inclusive.”

New Mexico Interstate Stream Commission Director Estevan López said all of New Mexico is facing drought-related issues, with significant areas experiencing severe to extreme drought conditions. Specifically, López said 2011 flows from the Lower Rio Grande River into Elephant Butte Reservoir are expected to be 33% of the long-term average. He also said the ability of the New Mexico State Engineer's Office to manage and administer water uses continues to improve, including measuring and metering advancements; the hiring of watermasters; alternative administration schemes; and water rights adjudications, including the Navajo Nation, Aamodt, and Taos settlements.⁶⁶

California/Nevada

Lake Tahoe

On June 17, Nevada Governor Brian Sandoval (R) signed state legislation (S.B. 271) that will allow the state to withdraw from the 1969 Tahoe Regional Planning Compact with California. The Compact, which was ratified by Congress, created the Tahoe Regional Planning Agency (TRPA) to regulate environmental and land use matters within the Lake Tahoe Basin. The bill responds to concerns in Nevada that the compact has unnecessarily impeded development. Among other things, the bill states that Nevada will withdraw from the Compact on October 1, 2015, unless an updated regional plan and a number of amendments to the compact are approved, including changes to the TRPA’s voting structure and a requirement that changing economic conditions be considered in decision-making. If Nevada withdraws from the compact, the bill provides that the Nevada Tahoe Regional Planning Agency would assume the duties and powers held by the TRPA for the Nevada portion of the basin.

Colorado/Wyoming

Flaming Gorge Pipeline Project

On July 22, the Corps issued a decision withdrawing entrepreneur Aaron Million’s Section 404 Clean Water Act (CWA) permit application for his proposed Regional Watershed Supply Project, also known as the Flaming Gorge Pipeline project. The Corps’ decision also terminated development of a required draft Environmental Impact Statement (EIS) for the project. The privately-funded project would transfer 250,000 af/year from the Green River at Wyoming’s Flaming Gorge Reservoir to Colorado’s Front Range via a 560-mile pipeline. Although originally intended as a water supply project, Million says the proposal has the potential to produce over 1,000

⁶⁶<http://energy.senate.gov/public/>. *Western States Water*, #1928, April 29, 2011.

megawatts of electricity. The water would come from Colorado's share under the Colorado River Compact. Estimated project costs vary, with some as high as \$9 billion.

In its decision, the Corps explained: "The original permit application submitted for the project stated that the purpose of the project was water supply for southeastern Wyoming and the Front Range of Colorado.... The primary purpose of the project may now change to electrical power generation, an activity appropriately under the purview of the Federal Energy Regulatory Commission [FERC]. Since the purpose of the project is now fluid and the need for a Section 404 [CWA] permit is uncertain, the Corps now considers the permit application incomplete." The Corps' decision will not prevent re-application at a later date.⁶⁷ On August 3, Million said he will issue a request within 30 days to the Federal Energy Regulatory Commission (FERC), asking it to review the environmental impacts of the project.

A coalition of 20 conservation groups consisting of American Rivers, the Environmental Defense Fund, and Western Resource Advocates (WRA) also announced its formal opposition to the project in 2011. In particular, the groups are concerned about the project's cost, its effect on recreation, and its environmental impacts on Flaming Gorge Reservoir and the Green and Colorado Rivers, among other concerns. WRA further reports that 7,400 people participated in a July 27 telephone "town hall meeting" that discussed the project's cost, impacts, and possible alternatives.⁶⁸

On September 14, the Colorado Water Conservation Board approved a grant for Colorado's Basin Roundtables to discuss the pros and cons of a potential Flaming Gorge Pipeline project. The Board approved \$72,000 with \$100,000 more available if the discussions are promising. The Basin Roundtable discussions will not seek consensus on whether or not to build a Flaming Gorge Project, but rather they will examine the issues involved in the project, the challenges or barriers to such a project, and potential benefits of such a project.⁶⁹

On December 16, Wyoming Governor Matt Mead (R) sent a letter to FERC expressing "deep concern" over the project. "This project would cut a vast swath across southern Wyoming, with the potential for huge impacts in many significant sectors of our economy and aspects of critical resources to Wyoming and Colorado," Mead said. "The proponent has stated this project will cost \$3 billion to construct but little is known about the future cost to consumers or others from such a massive project.... The proponent has, by all appearances, shifted federal permitting venues to short-circuit the regulatory process and/or sidestep fundamental issues. I do not believe FERC should be the lead or initial permitting agency for this project." Mead expressed further concern about the project's impacts on recreation in the reservoir and the Green River, as well as endangered species recovery programs in the Colorado and Green Rivers.

In addition, Mead wrote that the Upper Colorado River Basin Compact must be given full consideration, arguing that no project can disrupt Wyoming's potential to develop its remaining appropriation under the Compact. While most of the water for the project would reportedly come from Colorado's unused share of the Colorado River Compact, Mead said, "The applicant is proposing use of 25,000 acre feet of water per year from Wyoming's undeveloped allocation under the Compact, and Wyoming has not agreed to this allocation."⁷⁰

⁶⁷<http://www.nwo.usace.army.mil/html/od-tl/pn/nwo20071337den.pn.21-jul-11.pdf>

⁶⁸<http://www.westernresourceadvocates.org/water/pipeline/million.php>. *Western States Water*, #1875, April 23, 2010.

⁶⁹*Western States Water*, #1943, August 12, 2011.

⁷⁰<http://governor.wy.gov/media/pressReleases/Pages/PressReleases.aspx>. *Western States Water*, #1950, September 30, 2011.

Washington

Elwha and Glines Canyon Dam Removal

On September 15, Washington State Governor Gregoire joined Interior Secretary Ken Salazar, Assistant Secretary of Indian Affairs Larry Echo Hawk, Bureau of Reclamation Commissioner Michael Connor, National Park Service Director Jon Jarvis, Lower Elwha Klallam Tribe Chairwoman Frances Charles, U.S. Senators Patty Murray and Maria Cantwell, U.S. Rep. Norm Dicks and others marked the beginning of work to dismantle the Elwha and Glines Canyon dams on the Elwha River in Olympic National Park. The two hydropower dams lack fish passage facilities. They were an important part of the development of the Olympic Peninsula, but recently have been run-of-the-river only operations, since most of the region's power is now imported.

“America’s rivers are the lifeblood of America’s economy – from the water for farms that produce our food to the fish and wildlife that sustain our heritage, said Salazar. “Today as we begin the restoration of this river system, we look to a bright future that recognizes rivers for their many contributions to our economy and environment.” Proposals to remove the dams date back to the 1970s. In the year 2000, Interior purchased the dams and began preparing to remove them for river restoration purposes. The dam removal project is the nation’s largest to date at an estimated cost of around \$325 million. Biologists estimate river restoration will increase salmon runs from the current 3,000 to more than 300,000, and will further benefit more than 130 species of plants and animals.⁷¹

Five Corners Family Farmers v. Washington

On December 22, the Washington Supreme Court ruled in *Five Corners Family Farmers v. Washington* that the state’s exempt well statute does not limit the amount of groundwater that can be withdrawn for stockwatering purposes without a water rights permit. The case focused on whether a ranch needed a permit to pump a portion of the 450,000 to 600,000 gpd it needed to water 30,000 cattle. Although the statute specifies limits for the types of exempt uses, including 5,000 gpd limits for domestic and industrial uses, it does not include an explicit limit for stockwatering use. Neighbors and environmental groups concerned about impacts to aquifer levels sued the state, arguing that the exemption limited stockwatering withdrawals to 5,000 gpd.

The court disagreed, reasoning in part: “Each category [of the statute] is limited only by the qualifying phrase following it. The stock-watering exemption contains no qualifying phrase. Accordingly, under a plain reading...groundwater withdrawn without a permit for stock-watering purposes is not limited to 5,000 [gpd].” Following the decision, Attorney General Rob McKenna said, “The Legislature exercised its policy prerogative to provide this particular permit exemption, without further...limitation, and only the Legislature can adjust this policy by amending the statute.”⁷²

Water Supply Outlook

On January 13, the National Resources Conservation Service’s (NRCS) Snowpack/Drought Monitor Update reported that drought conditions have improved for much of the West. Abnormally dry conditions no longer exist in California and Nevada, while western Wyoming and the Four Corners region have seen improvements in abnormally dry and moderate drought conditions. Widespread heavy rain in Texas also made “significant” improvements” to areas experiencing short-term dryness. However, moderate to extreme drought conditions persist in the eastern, southern, and

⁷¹(DOI Press Release, 9-17-11)

⁷²<http://www.atg.wa.gov/pressrelease.aspx?&id=29258>.

panhandle regions of the state. Eastern Colorado and western Kansas are also experiencing moderate to severe drought conditions. Other areas with abnormally dry to moderate drought conditions include most of New Mexico and Oklahoma, southern and northeast Arizona, western and southern Nebraska, and eastern Kansas.

The update also shows that large portions of Utah and Nevada have snow-water equivalent (SWE) levels above 150% of normal, with some areas exceeding 200%. Additionally, many SWE levels in western Colorado, Idaho, western Montana, Oregon, Washington, and Wyoming range from 90% to over 130% of normal. However, areas with the highest values have decreased by 10-20% last week and there are significant deficits as low as 50% in parts of southwestern New Mexico and eastern Arizona. The update also said early surpluses do not necessarily translate into adequate snowpack in late winter, and that many areas will need “much more snow” to finish with near normal SWE levels.⁷³

A May 26 report showed that the majority of basins in the Northwest and Intermountain West had snow-water equivalent (SWE) levels well above normal, with many areas above 200% and 300%. Six basins in Oregon, Utah, and Wyoming exceed 400%, while two Idaho basins have levels of 885% and 645%. The high levels are the result of additional high altitude snowfall and below average temperatures, which have delayed seasonal snowmelt.

Precipitation levels for much of the Northwest and Intermountain West are also above normal for this time of year, with many areas ranging from 110% to over 130% of normal. The areas with the highest values are found over the Great Basin, Cascades, and parts of the Northern and Central Rockies, including most of the basins in Utah and eastern Nevada, where a number of basins exceed 150%. The greatest deficits are found over the extreme southern reaches of the Southwest where a group of basins along the Arizona-New Mexico border have levels ranging from 24% to 69% of normal.

Exceptional and extreme drought conditions exist in the southern two-thirds of New Mexico and most of Texas, as well as southeastern Arizona, southeastern Colorado, parts of southern Kansas, and western Oklahoma. Abnormally dry to severe drought conditions persist in much of Arizona, eastern Colorado, most of Kansas, northern New Mexico, and central Oklahoma. Nearly all of New Mexico is experiencing drought or water stress, while Texas is coping with its eighth year of drought in thirteen years.⁷⁴

An update from December 1 showed that the majority of basins in the Northwest and Intermountain West had snow-water equivalent (SWE) levels of about 65% to 100% of normal, with a handful reporting levels above 110% or below 50%. Some basins in Arizona and New Mexico were also over 100% of normal, but many were below 70% or even 50%. All of Nevada’s basins were below 50% of normal.

The report noted that an early season snow pattern had favored northern states in the West with respect to precipitation, with most basins in Colorado, Idaho, Montana, Utah, Washington and Wyoming reporting levels of at least 90% to 109% of normal. At the same time, most of Oregon’s basins had levels ranging from 62% to 88% of normal, and all but two of Nevada’s basins range from 55% to 81%. A little over half of Arizona and New Mexico’s basins were above 95% of normal while the others range from 72% to 79%.

⁷³<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20110113.pdf>

⁷⁴<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20110526.pdf> *Western States Water*, Issue #1913, January 14, 2011.

Exceptional and extreme drought persisted throughout New Mexico and Texas, with Texas having experienced the driest October-September period on record in 2010-2011. Similar drought conditions existed in southern and northeastern Arizona, southwestern Kansas, and western Oklahoma. Severe drought to abnormally dry conditions also persisted in other parts of these states, as well as southeastern Colorado, most of Kansas, eastern Nebraska, eastern and northwestern South Dakota, and the bottom half of North Dakota. Pockets of abnormally dry conditions were found in California, Montana, Nevada, Oregon, Utah and Washington.⁷⁵

Flooding

On July 6, the NOAA Weather Service reported that many rivers in the upper Midwest and northern Plains were above flood stage, and that the threat for more flooding would continue through the summer. With rivers running high and soils completely saturated, NOAA reported that even a small amount of rain could trigger more flooding, including areas that have already seen major to record flooding. NOAA's Climate Prediction Center also forecasted above-normal rainfall in much of the region over the next one to three months. Further, rising temperatures in the Rocky Mountains will release additional water from the remaining snowpack.

The highest flood risk areas include: (1) the Souris River in North Dakota; (2) the Red River of the North on the border of North Dakota and Minnesota; (3) the Lower Missouri River from Gavin's Point on the Nebraska and South Dakota border downstream along the border of Nebraska and Iowa, and continuing through the borders of Kansas and Missouri; (4) tributaries to the Lower Missouri River including the James and Big Sioux Rivers in North Dakota; (5) the North Platte River in Colorado, Wyoming, and Nebraska; and (6) the Yellowstone River in Wyoming and Montana. West of the Rockies, NOAA also reported that Utah and Colorado might also experience flooding.

To support states dealing with flooding, the Federal Emergency Management Agency (FEMA) provided federal disaster assistance to a number of states, including Kansas, Montana, Nebraska, North Dakota, and South Dakota. FEMA also embedded staff in state emergency operations centers to coordinate federal support efforts as needed, including centers in Wyoming and Kansas. Additionally, the agency set up field offices in North Dakota, South Dakota, Montana, Nebraska, and other states.⁷⁶

⁷⁵<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20111201.pdf>. *Western States Water*, #1932, May 27, 2011.

⁷⁶<http://www.noaa.gov/>.

RESOLUTIONS AND POLICY POSITIONS

Each year, 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 2011, during the regular Council meetings.

In 2011, the WSWC adopted five new resolutions. First, Position No. 329 supports the development of a national program of safety standards for levees and flood water conveyance canals, but specifies that such a program should not apply to water supply canals and that the Administration should request and Congress should appropriate adequate funding for the Aging Water Infrastructure and Maintenance Act.

Second, Position No. 330 calls for adequate appropriations to the Clean Water State Revolving Fund (SRF) and the Drinking Water SRF, and urges greater flexibility and fewer restrictions on state SRF management. The resolution also combines two previous WSWC resolutions on the SRFs.

Third, Position No. 330.5 is a letter commenting on EPA and the U.S. Army Corps of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*.

Fourth, Position No. 331 opposes the preemption of state water law in federal legislation. It states that "...nothing in any act of Congress should be construed as affecting or intending to affect in any way to interfere with the laws of the respective States relating to: (a) water or watershed management; (b) the control, appropriation, use, or distribution of water used in irrigation, municipal, environmental, or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interested compact, decree or negotiated water rights agreement."

Fifth, Position No. 332 asks the federal government to update and revise its guidance documents for hydrologic data and methodologies, and to support and place a priority on extreme events research. The position also states that the WSWC supports development of an improved observing system for extreme precipitation events in the West, and will work with the NOAA in supporting efforts on climate extremes, variability, and future trends as called for in the agency's June memorandum of understanding with the WGA.

The Council revised and readopted the following sunset positions: Position No. 333 urges full utilization of the Reclamation Fund; Position No. 334 is asking Congress to reauthorize and appropriate funds for the state water resources research institutes program; Position No. 335 sets forth recommendations regarding the federal government's role in expediting general stream adjudications; Position No. 336 reiterates support for the negotiated resolution of Indian reserved water rights claims; and Position No. 337 urges that any federal ground water strategy must recognize and respect state primacy, reflect a true state-federal partnership, and provide adequate funding consistent with current federal requirements.

The WSWC's Executive Committee also sent a letter to EPA in August, commenting on draft guidance the agency issued in April to clarify the extent of CWA jurisdiction in light of the U.S. Supreme Court's rulings in *SWANCC v. EPA* and *Rapanos v. U.S.* The letter states: (1) the promulgation of a regulation is preferable to "legally unenforceable guidance;" (2) the guidance "...provides no clear and concise limits to federal jurisdiction;" and (3) any guidance and/or

regulation regarding CWA jurisdiction should be developed with the states, and should “...not infringe upon the states’ primary authority to allocate water and administer water rights within their borders.” The letter did not originally receive a number following its adoption but has since been numbered as Position No. 345.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
THE NATIONAL LEVEE SAFETY ACT OF 2007
and the
INTERPRETATION OF LEVEES AND WATER SUPPLY CANALS

Santa Fe, New Mexico
April 15, 2011**

WHEREAS, Congress enacted the National Levee Safety Act of 2007 (the Act) in the aftermath of Hurricane Katrina and the failure of the levees and flood water conveyance canals in New Orleans, Louisiana;¹ and

WHEREAS, the Act created the “National Committee on Levee Safety” (NCLS) to develop recommendations for a national levee safety program, including a strategic plan for implementation of the program; and

WHEREAS, in January 2009, the NCLS released a draft report, “Recommendations for a National Levee Safety Program – A Report to Congress from the National Committee on Levee Safety;” and

WHEREAS, the report’s core recommendation calls for the creation of an independent National Levee Safety Commission to: (1) develop national safety standards for levees for common, uniform use by all federal, state, and local agencies; (2) inventory and inspect all levees on a periodic basis; and (3) develop national tolerable risk guidelines for levees; and

WHEREAS, Section 9002(3) of the Act defines the term “levee” as embankments that provide protection from weather events and are subject to water loading for only a few days or weeks a year, but also includes “structures along canals that constrain water flows and are subject to more frequent water loadings that do not constitute a barrier across a watercourse;” and

WHEREAS, the NCLS concluded that water supply canals are “... canals that constrain water flows and are subject to more frequent water loadings [than are levees] ...” and therefore treats the embankment sections of water supply canals as “structures along canals;” and

WHEREAS, the NCLS’s recommendations for a national program of safety standards and tolerable risk guidelines for levees would therefore apply to water supply canals throughout the West, including both non-federal facilities and federal facilities managed by the U.S. Bureau of Reclamation and state and local agencies; and

WHEREAS, Reclamation already has authority under the Aging Water Infrastructure and Maintenance Act, which Congress enacted as part of the Omnibus Public Lands Management Act of 2009,² to address the canals it owns, and inspections of those embankment sections of canals located in urban areas are in process; and

WHEREAS, the NCLS is now in the process of drafting proposed legislation that would implement the recommendations in its report; and

¹121 Stat. 1288, P.L. 110-114.

²123 Stat. 991, P.L. 111-11.

WHEREAS, the Act's definition of the term "levee" in no way binds the NCLS, which is free to recommend new definitions in any legislation it may propose; and

WHEREAS, all 50 states confront levee issues, but the issues associated with water supply canals are essentially confined to the 17 western states; and

WHEREAS, there are major institutional differences between levees and water supply canals and the "political systems" commonly used to govern levees that warrant treating them separately; and

WHEREAS, water supply canals are essentially standalone features whose integrity is not dependent on the performance of other canals, and therefore do not share the potential for systemic failure; and

WHEREAS, levees are designed to provide protection from flooding and make development behind them possible, while water supply canals serve a separate and distinct purpose; and

WHEREAS, the stakeholder communities and interests involved in addressing the issues related to levees and water supply canals are different, and addressing them jointly through a single national program would not be conducive to effectively addressing either set of issues; and

WHEREAS, potential public safety problems involving water supply canals do not often involve a lack of engineering expertise or design standards, but the ability to finance necessary improvements; and

WHEREAS, Reclamation and the states are in the best position to address the public safety issues presented by water supply canals because such issues are localized and minor in comparison to the risks associated with inadequately designed and maintained levees.

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council supports the development of a national program of safety standards for levees and flood water conveyance canals; and

BE IT FURTHER RESOLVED, that any proposed legislation creating a national program of safety standards for levees and flood water conveyance canals should not apply to federal or non-federal water supply canals; and

BE IT FURTHER RESOLVED, that the Administration should request and Congress should appropriate adequate funding for the Aging Water Infrastructure and Maintenance Act; and

BE IT FURTHER RESOLVED, that the Administration and Congress should work together to encourage implementation of Title II of the Rural Water Supply Act of 2006,³ and provide for the use of federal loan guarantees for addressing extraordinary maintenance needs related to the operation of federal Reclamation projects.

³120 Stat. 3345, P.L. 109-451.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding the
CLEAN WATER STATE REVOLVING FUND
and the
DRINKING WATER STATE REVOLVING FUND**

**Santa Fe, New Mexico
April 15, 2011**

WHEREAS, the economies of every state and the Nation as a whole depend upon sufficient water supplies of suitable quality, which require adequate water and sewer infrastructure; and

WHEREAS, the Environmental Protection Agency's (EPA) Clean Water State Revolving Fund and Drinking Water State Revolving Fund (SRF programs) provide states with capitalization grants that are leveraged with state contributions to offer financial assistance to cities, towns, communities, and others for the planning, design, construction and rehabilitation of drinking water and wastewater-related infrastructure; and

WHEREAS, both SRF programs are administered by each State in coordination with EPA, and these programs are one of the principal tools that states use to pursue the goals of the Clean Water Act and Safe Drinking Water Act; and

WHEREAS, the Nation's wastewater and drinking water infrastructure is aging and in need of repair and replacement; and

WHEREAS, public investment in water infrastructure yields significant economic benefits, as evidenced by U.S. Department of Commerce estimates that one dollar invested in water infrastructure generates \$2.62 in economic output in other industries and that each job created in the local water and sewer industry creates 3.68 jobs in the national economy; and

WHEREAS, the Environmental Protection Agency (EPA) estimates a total capital investment need of \$298.1 billion for water quality infrastructure and \$334.8 billion for drinking water infrastructure nationwide over the next 20 years; and

WHEREAS, the EPA has identified a significant funding gap under current spending and operation practices; and

WHEREAS, federal budget requests that propose significant reductions in SRF funding ignore the multitude of needs as identified by EPA, particularly given that many states and communities are struggling to meet their water and wastewater challenges in the face of growing populations and aging infrastructure; and

WHEREAS, to the extent federal law has established certain nationwide levels of treatment for drinking water and wastewater, the federal government has an obligation to provide states with the necessary financial and technical assistance needed to comply with such requirements, including the appropriation of adequate funding for SRF capitalization grants; and

WHEREAS, EPA's Clean Water and Drinking Water Infrastructure Sustainability Policy burdens state SRF programs with the exclusive responsibility of promoting sustainable systems; and

WHEREAS, the SRF Programs already have measures in place to ensure system sustainability and which account for individual state needs and priorities, making the SRF programs one of the most successful delivery mechanisms for federal assistance; and

WHEREAS, every federal dollar that EPA directs away from addressing the primary goal of the SRF programs – addressing public health and water quality protection – reduces the capacity of a state to leverage their programs and address infrastructure needs; and

WHEREAS, the more federal requirements that are placed on State SRF programs the less attractive the SRFs become to local entities.

NOW, THEREFORE, BE IT RESOLVED, that the Administration and Congress should work together to ensure that stable and continuing federal appropriations, increased annually by a construction inflation index, are made to the SRF capitalization grants at funding levels that are adequate to help states address their water infrastructure needs; and

BE IT FURTHER RESOLVED, that the SRF programs should provide for greater flexibility and fewer restrictions on state SRF management.

July 29, 2011

Position No. 330.5

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: EPA-HQ-OW-2011-0409

To Whom It May Concern:

On behalf of the Western States Water Council, representing the governors of 18 western states, we are writing to provide our comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. Before commenting on the guidance, we wish to express our preference for EPA and the Corps promulgating a clarifying rule, as opposed to legally unenforceable guidance.

We understand that the intent of the draft guidance is to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*⁴ and *Rapanos v. United States (Rapanos)*⁵ decisions. It is also our understanding that EPA and the Corps intend to undertake rulemaking after the guidance is final to provide further clarification regarding the extent of CWA jurisdiction. Indeed, Justice Kennedy's opinion in the *Rapanos* decision would appear to invite promulgation of a rule.

The guidance provides no clear and concise limits to federal jurisdiction. Further, it could actually lead to an expansion of claims of jurisdiction beyond the limitations delineated in *SWANCC* and *Rapanos*, and if promulgated as regulations, once applied, would likely lead to further litigation.

A. State Water Resources Allocation and Water Rights Administration

Section 101(g) of the CWA expressly states: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Section 101(b) of the CWA further states: "It is the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"

⁴ 531 U.S. 159 (2001).

⁵ 547 U.S. 715 (2006).

The guidance and any subsequent regulations regarding the extent of CWA jurisdiction should reference Sections 101(b) and 101(g), and should not infringe upon the states' primary authority to allocate water and administer water rights within their borders and protect water quality.

B. The Watershed Approach to Jurisdiction

The draft guidance sets forth a “watershed” approach for satisfying Justice Kennedy’s “significant nexus” test in which CWA jurisdiction is determined by reference to the nexus between the watershed and the closest traditional navigable water, not the nexus between the particular wetland or tributary in question and the navigable waters. Under this approach, virtually any tributary or wetland, or “other waters,” no matter how far removed, no matter how small or insignificant, could become jurisdictional if aggregated with all other tributaries and wetlands or other waters within a watershed. Such an outcome raises questions as to whether a watershed approach is consistent with *SWANCC* and *Rapanos*, which hold that the CWA’s jurisdiction is not without limits.⁶

Questions also remain as to whether the EPA and the Corps can use guidance to promulgate a “watershed” approach instead of a “case-by-case” determination. In particular, Justice Kennedy stated in his concurring opinion in *Rapanos* that “absent more specific regulations,” a “case-by-case” analysis is needed to determine jurisdiction for wetlands based upon adjacency to navigable tributaries.⁷ Kennedy further stated that such a showing is necessary to avoid “unnecessary application” of the CWA given the “potential overbreadth” of the federal regulations at issue in *Rapanos*.⁸ The draft guidance, while not a regulation, needs further clarification to ensure that it complies with this requirement.

With respect to CWA jurisdictional determinations for tributaries, the draft guidance states that a significant nexus is presumed to be established if it can be shown that the tributary: (1) contains a bed, bank, and ordinary high water mark; and (2) drains, or is part of a network of tributaries that drain, into a downstream navigable water or interstate water. However, the draft guidance does not address how much water a tributary is required to drain in order to meet this test, leaving open the possibility that an ephemeral or other stream with a *de minimis* volume of flowing water is enough to constitute a jurisdictional tributary. This could create uncertainty and lead to further confusion about the types of waters subject to CWA jurisdiction, particularly in the arid West where there are a variety of waters with minimal flows.

In light of the above, the Council urges EPA and the Corps to ensure that the guidance and any related regulations comply with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on CWA jurisdiction. In carrying out these tasks, EPA and the Corps should also ensure that the guidance does not displace nor circumvent the regulatory and legislative processes.

C. Groundwater

Page 16 of the draft guidance states that a wetland can be deemed to be “adjacent,” and therefore jurisdictional, if there is an unbroken “surface or shallow sub-surface hydrologic connection between the wetland and the jurisdictional waters.” Although the draft guidance does not use the term “groundwater,” nor define the term “shallow sub-surface hydrologic connection,” it could be interpreted as referring to groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil

⁶See *Rapanos*, 547 U.S. at 739 (stating, “The Corps’ expansive interpretation of the ‘waters of the United States’ is thus not ‘based on a permissible construction of the statute.’”); *Id.* at 778 – 79 (J. Kennedy concurring) (stating that the deference owed to regulations at issue in *Rapanos* does not extend so far as to apply CWA jurisdiction “...whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”). *Id.* at 778-79 (Kennedy concurring)

⁷*Id.* at 782.

⁸*Id.*

moisture, again expanding the jurisdictional reach without legal basis or limit, resulting in greater uncertainty and likely litigation.

Groundwater is not subject to the CWA and states are solely responsible for protecting, allocating and administering water rights pertaining to this resource. Accordingly, administrative and judicial interpretations of the CWA have consistently treated groundwater separately from “waters of the United States.” The guidance and any related regulations regarding the extent of CWA jurisdiction should make clear that such jurisdiction does not extend to groundwater, and that groundwater allocation and water rights administration fall under the exclusive purview of the states.

D. States as Co-Regulators

The states, EPA, and the Corps have made progress in working together to carry out the CWA’s goal of controlling water pollution. The EPA and Corps should continue to view states as co-regulators and should ensure that state water managers have a robust and meaningful voice in the development of any guidance and/or regulations regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

E. Conclusion

In sum, the guidance and/or regulations that EPA and the Corps may promulgate regarding CWA jurisdiction should: (1) provide clear and concise limits to federal jurisdiction; (2) not infringe upon the states’ primary authority to allocate water and administer water rights within their borders; (3) be consistent with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on the extent of CWA jurisdiction; (4) make clear that CWA jurisdiction does not extend to groundwater and that groundwater allocation and water rights administration fall under the exclusive purview of the states; and (5) be developed with robust and meaningful state participation.

We very much appreciate the opportunity to comment on the draft guidance, and look forward to continuing our work with EPA and the Corps to address water quality in the West. Thank you again for considering the Council’s views on this matter.

Sincerely,



Weir Labatt, III
Chair, Western States Water Council

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
REGARDING PREEMPTION OF STATE LAW IN FEDERAL LEGISLATION**

**Bend, Oregon
July 29, 2011**

WHEREAS, the future growth, prosperity and economic and environmental health of the West and the Nation depend upon the availability of adequate quantities of water for myriad uses; and

WHEREAS, Western states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of water resources, both groundwater and surface water, including protection of water quality, instreamflows and aquatic species; and

WHEREAS, the Congress has historically deferred to state law as embodied in Section 8 of the Reclamation Act, Section 10 of the Federal Power Act, Section 101(g) and 101(b) of the Clean Water Act, and myriad other statutes; and

WHEREAS, any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states; and

WHEREAS, federal deference to state water law is based on sound principles for the protection of private property rights and the collective public interest in managing our water resources and the environment; and

WHEREAS, states are primarily responsible and accountable for their own water development, management and protection challenges, and are in the best position to identify, evaluate and prioritize their needs and plan and implement strategies to meet those needs; and

WHEREAS, any legislation related to any federal water policy, water plan or planning process must recognize, defer to and support State, tribal and local government water laws, agreements, and management processes; and

WHEREAS, the federal government should explicitly recognize and provide support for ongoing watershed and state water management efforts both in and between the states, tribes and local entities, closely consult with the states and provide appropriate technical and financial assistance; and

WHEREAS, the federal government should avoid strategies that increase unilateral mandates on state, tribal and local governments; and

WHEREAS, from time to time federal legislation and regulatory actions have been proposed that are not consistent with sound federalist principles and primary state water related laws, authorities and responsibilities; and

WHEREAS, legislation preempting or discharging requirements for compliance with state law is not consistent with a balanced federalism approach;

NOW, THEREFORE, BE IT 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 management; (b) the control, appropriation, use, or distribution of water used in irrigation, municipal, environmental, 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.

BE IT FURTHER RESOLVED, that the Administration and Congress should strive to ensure federal laws, policies, rules and regulations are consistent with the principles set forth herein.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
supporting
FEDERAL RESEARCH AND DEVELOPMENT OF UPDATED HYDROCLIMATE GUIDANCE
FOR EXTREME METEOROLOGICAL EVENTS**

**Bend, Oregon
July 29, 2011**

WHEREAS, Western states have recently been experiencing near-record flooding, droughts, or wildfires that threaten public safety, tax aging water infrastructure, and/or have significant economic consequences; and

WHEREAS, before the first half of 2011 was over, the year had already set records for extreme weather events, with the nation having experienced eight \$1 billion-plus disasters, according to the National Oceanic and Atmospheric Administration (NOAA); and

WHEREAS, extreme weather events have grown more frequent in the U.S. since 1980, according to NOAA; and

WHEREAS, the top twelve warmest years on record globally all have occurred since 1997, and we must manage for frequency, extent, and/or severity of floods, coastal inundation, and droughts; and

WHEREAS, some of NOAA's probable maximum precipitation estimates used by water agencies for dam safety analyses have not been updated since the 1960s and the federal Guidelines for Determining Flood Flow Frequency Analysis (published as Bulletin 17B) have not been revised since 1981, and neither of these guidance documents address hydroclimate non-stationarity; and

WHEREAS, flood frequency analyses are used by public agencies at all levels of government to design and manage flood control and stormwater infrastructure, with Bulletin 17B still representing a default standard of engineering practice; and

WHEREAS, federal funding for hydrology research has waned since the 1970s-1980s, and alternative statistical methodologies for flood frequency analyses or deterministic analytical procedures are not being supported and transitioned to common engineering practice; and

WHEREAS, the Federal Emergency Management Agency has adopted a process for local communities to explicitly incorporate "future conditions hydrology" in the national flood insurance program's flood hazards mapping; and

WHEREAS, a federal agency committee composed of the U.S. Army Corps of Engineers, U.S. Bureau of Reclamation, NOAA, U.S. Geological Survey, and U.S. Environmental Protection Agency held a 2010 national science workshop on non-stationarity, hydrologic frequency analysis, and water management, to identify information gaps and the state of the science for handling hydroclimate uncertainty; and

WHEREAS, the Council co-sponsored a 2011 workshop on hydroclimate non-stationarity and extreme events, to identify actions that could be taken at planning to operational time scales to improve readiness for extreme events; and

WHEREAS, the federal and the Council workshops identified multiple approaches that could be employed at the planning time scale, including ensembles of global circulation models, paleoclimate analyses, and alternative techniques for flood frequency analysis; and

WHEREAS, advances in weather forecasting research, such as that of NOAA's Hydrometeorological testbed program on West Coast atmospheric rivers, demonstrate the potential for improving extreme event forecasting at the operational time scale; and

WHEREAS, the 2006 WGA report on *Water Needs and Strategies for a Sustainable Future* and the follow-up 2008 WGA *Next Steps* report identify addressing climate change impacts as a priority for moving forward, and make specific recommendations for actions that the federal government and the states should take to support adaptation, including detailing research and planning needs.

WHEREAS, WGA and NOAA signed a memorandum of understanding on June 30, 2011, regarding state adaptation to climate variability and change that focuses on climate extremes, variability and future trends as they relate to disaster risk reduction and improved science for coastal and marine resource management; and

WHEREAS, the Draft Vision and Strategic Framework for a Climate Service in NOAA includes changes in extremes of weather and climate as one of the four key societal challenges that will initially be a focus of the climate service.

NOW, THEREFORE, BE IT RESOLVED, that the federal government should update and revise its guidance documents for hydrologic data and methodologies – among them precipitation-frequency estimates, flood frequency analyses, and probable maximum precipitation – to include subsequently observed data and new analytical approaches; and

BE IT FURTHER RESOLVED, that the Western States Water Council supports development of an improved observing system for Western extreme precipitation events, to aid in monitoring, prediction, and climate trend analysis associated with extreme weather events; and

BE IT FURTHER RESOLVED, that the Western States Water Council urges the federal government to support and place a priority on research related to extreme events, including research on better understanding of hydroclimate processes, paleoflood analysis, design of monitoring and change detection networks, and probabilistic outlooks of climate extremes.

BE IT FURTHER RESOLVED, that the Western States Water Council will work with NOAA in supporting efforts on climate extremes, variability, and future trends as called for in the WGA-NOAA memorandum of understanding.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
THE RECLAMATION FUND
Bend, Oregon
July 29, 2011

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

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

WHEREAS, then President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children’s children...;”¹ and

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

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

WHEREAS, the Bureau of Reclamation has built facilities that include 348 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation’s vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 40 billion kilowatt hours of energy each year from 58 hydroelectric power plants, enough to serve 3.5 million home, and further providing flood control, recreation, and fish and wildlife benefits; and

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

¹State of the Union Address, 1907.

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

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

WHEREAS, according to the Administration's FY 2009-2011 requests actual and estimated appropriations from the Reclamation Fund are \$981 million for FY 2007, \$1.05 billion for FY 2008, \$870 million for FY 2009, \$974 million for FY 2010, \$950 million for FY 2011 and \$906 million for FY2012 -- compared to actual and estimated receipts of \$1.85 billion, \$2.09 billion, \$2.49 billion, \$1.729 billion, \$1.794 billion and \$2.013 billion respectively; and

WHEREAS, the unobligated balance in the Reclamation Fund continues to grow from an actual balance of \$5.67 billion at the end of FY 2006, to an estimated \$9.368 billion by the end of FY 2012; and

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

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

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to fully utilize the funds provided through the Reclamation Act and subsequent acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs -- recognizing and continuing to defer to the primacy of western water laws in allocating water among uses -- and work with the States to meet the challenges of the future. Such "needs" may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlement.

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

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of the
WATER RESOURCES RESEARCH INSTITUTES
Bend, Oregon
July 29, 2011

WHEREAS, in the West, water is a vital and scarce resource the availability of which has and continues to circumscribe growth, development, our economic well being and environmental quality of life; and

WHEREAS, the wise use, conservation, development and management of our water resources is critical to maintaining human life, health, safety and property; and

WHEREAS, water resources research, the dissemination and application of research results and technology transfer are increasingly important to meeting our present and future water needs; and

WHEREAS, the Water Resources Research Act of 1964 authorized a program that included the establishment of state water resources research institutes (WRRIs) or centers in each state to address our water resources challenges; and

WHEREAS, today's institutes and centers provide a research infrastructure that uses the capabilities of universities to greatly assist and provide important support to western state water agencies in long-term planning, policy development and management of the increasingly complex challenges associated with water in the West; and

WHEREAS, these challenges are exacerbated by the uncertainty surrounding population growth, climate, and economic and environmental water demands; and

WHEREAS, the Council and its member states continue to work with the institutes/centers and the academic community to ensure research investments are relevant to our most pressing water problems and allow each state to solve its problems by methods most appropriate to its own situation; and

WHEREAS, the institutes/centers' outreach and information transfer services and activities are very valuable to the water communities in the various western states; and

WHEREAS, this is a very worthwhile federal-state partnership that promotes collaboration, cooperation and the conservation of limited physical, financial and personnel resources;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to maintain the federal authorization and financial support for the state water resources research institutes program – requesting and appropriating funds as appropriate.

Position No. 335
(See also Positions #247, #272(a-b), and #308)
Originally adopted October 9, 2002
Reaffirmed October 21, 2005 and October 17, 2008

RESOLUTION
on the
FEDERAL GOVERNMENT'S ROLE IN EXPEDITING
STATE GENERAL STREAM ADJUDICATIONS
Idaho Falls, Idaho

Idaho Falls, Idaho
October 7, 2011

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

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

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

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

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

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

WHEREAS, requiring federal agencies to pay filing and other fees and follow the same procedures as all other water right claimants helps to ensure their claims are legitimate and made in good faith;

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

1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. The federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho.
2. General stream adjudications pursuant to the McCarran Amendment should be brought in state and not in federal court. Actions brought in federal court divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. There must be high-level federal involvement in negotiations and mediation that often occur with regard to federal claims within the context of ongoing adjudications in order to be effective. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.
5. Requiring the federal government to provide whatever evidence it may have to substantiate its claims at the time of filing is a way to ensure that claims have a sound basis in fact, and also to facilitate timely review of those claims. . Given the complexity and the contentiousness involving such claims, States are justified in asking the federal government to take this step. Doing so will expedite the process in two ways: (1) it will minimize the filing of questionable claims in the first place; and (2) it will provide a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS
Idaho Falls, Idaho
October 7, 2011**

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

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

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

WHEREAS, the advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

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

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

WHEREAS, the settlement of Native American water claims and land claims is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole and not just individual tribes or States; and

WHEREAS, the obligation to fund resulting settlements is analogous to, and no less serious than the obligation of the United States to pay judgments rendered against it; and

WHEREAS, Indian water rights settlements involve a waiver of both tribal water right claims and tribal breach of trust claims that otherwise could result in court-ordered judgments against the United States and increase costs for federal taxpayers; and

WHEREAS, current budgetary pressures and legislative policies make it difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be funded because either they are considered earmarks or because funding must be offset by a corresponding reduction in some other expenditure, such as another tribal or essential Interior Department program;

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

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

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

BE IT FURTHER RESOLVED, that Indian water rights settlements are not and should not be defined as Congressional earmarks; and

BE IT FURTHER RESOLVED, that steps be taken to ensure that any water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset, including cuts to some other tribal or essential Interior Department program.

Position No. 337
(See also Nos. 215, 230, 249, 274, and 309
originally adopted March 14, 1997
revised and reaffirmed Mar 14, 2000, Mar 21, 2003, Mar 29, 2006, and October 17, 2008)

**POSITION
of the
WESTERN STATES WATER COUNCIL
on
PROTECTING GROUND WATER QUALITY
Idaho Falls, Idaho
October 7, 2011
(revised and reaffirmed)**

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

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

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

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

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

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

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

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.

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 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.