

2012

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

47th Annual Report

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.	v
MEMBERS ADDRESSES AND PHONE NUMBERS.....	1
COMMITTEE AND SUBCOMMITTEE ASSIGNMENTS.	9
WESTFAST MEMBERS.	15
COUNCIL MEMBERS.	17
STAFF.....	18
COUNCIL MEMBERSHIP/STAFF/NEWS.	19
COUNCIL MEETINGS	
Spring - Washington, DC.....	21
Summer - Seattle, Washington.	24
Fall - San Antonio, Texas.....	27
OTHER MEETINGS	
Western Governors Annual Meeting.	30
Extreme Weather Events Workshop.	30
National Integrated Drought Information System Reauthorization Workshop.....	31
Western State Water Resources Infrastructure Needs and Strategies Symposium.....	31
REPORTS AND PUBLICATIONS	
Water Reuse in the West.....	34
Water Transfers in the West.....	34
CONGRESSIONAL TESTIMONY	
Senate Committee on Energy and Natural Resources Hearing on Indian Water Rights.	34
Senate Committee on Energy and Natural Resources Hearing on Rural Water Projects.....	39
WATER DATA EXCHANGE.	45
WESTERN STATES FEDERAL AGENCY SUPPORT TEAM.	47
OTHER IMPORTANT ACTIVITIES AND EVENTS	
Western States Water.	49
Western Governors' State of the State Addresses.....	49
Bureau of Reclamation.....	50
FY2013 Budget.....	50
FY2013 Energy/Water Appropriations.	51
Rural Water Projects.....	52
Rural Water Program Assessment Report.....	52
Reclamation Rural Water Construction Fund.....	53
Basin Studies.....	54
Cooperative Watershed Management Program.	55
Landscape Conservation Cooperatives.....	56
Water and Energy Efficiency Grant Program.	56
States Emergency Drought Relief Act.	57

Clean Water Act/Environmental Protection Agency.	57
Clean Water Act Regulatory Authority.	57
Concentrated Animal Feeding Operations.	58
Hardrock Mines Clean Up.	59
Jurisdiction Guidance.	59
Preserve the Waters of the United States Act.	60
Midnight Regulations.	61
National Pollutant Discharge Elimination System.	62
Stormwater Regulations on Forest Roads.	62
Water Protection and Reinvestment Act.	65
State Revolving Funds.	66
Wastewater Infrastructure.	67
Section 404 Implementation.	67
40 th Anniversary of the Clean Water Act.	69
Water Transfer Rule.	70
<i>Friends of the Everglades v. EPA.</i>	70
Corps of Engineers.	71
Water Resources Development Act.	71
Drought.	74
National Drought Information System.	74
Agricultural Disaster Assistance Act.	76
Climate Impacts and Outlook.	78
National Drought Forum.	79
Farm Bill.	80
Forest Management/Wildfires.	84
Hydraulic Fracturing.	85
Bureau of Land Management Proposed Rule.	87
Empower States Act.	90
Indian Water Rights.	90
Lummi Nation/Nooksack Tribe.	90
Navajo-Hopi Little Colorado Water Rights Settlement Act.	91
Senate Indian Affairs Committee Oversight Hearing.	93
Navajo-Gallup Pipeline.	94
Crow Tribe-Montana Water Rights Compact.	94
Confederated Tribes of the Goshute.	95
Interior.	95
FY2013 Budget.	95
Hydropower.	96
WaterSMART.	97
Glen Canyon Dam.	98
America's Great Outdoors Initiative.	98
Landsat.	99
Thermal Infrared Sensor.	99
Landsat 5.	99
40 th Anniversary.	100
Litigation/Water Rights.	101
Oklahoma.	101
Choctaw and Chickasaw Tribes.	101
Montana.	101
<i>PPL Montana v. Montana.</i>	101
Oklahoma/Texas.	102
<i>Tarrant Regional Water District v. Hermann.</i>	102
River Basins.	104
Colorado River.	104
Water Supply and Demand Study.	104
International Boundary and Water Commission.	105
Missouri and Mississippi Rivers.	106
Rio Grande River Basin.	108
Conservation Reserve Enhancement Program.	108

States.....	108
California.....	108
Central Valley Project Section 215 Water.....	108
San Joaquin Valley Water Reliability Act.....	109
Bay Delta Conservation Plan.....	112
South Dakota.....	113
State Revolving Funds.....	113
Utah.....	113
Green River Proposed Nuclear Power Plant.....	113
Nevada.....	114
Southern Nevada Water Authority Pipeline.....	114
Colorado/Wyoming.....	115
Flaming Gorge Pipeline.....	115
Colorado.....	116
Moffat Collection System Project.....	116
Texas.....	117
International Boundary and Water Commission.....	117
New Mexico.....	118
Drought Declaration.....	118
Groundwater Damage.....	118
Rio Grande/Groundwater.....	119
Climate Change.....	120
California/Oregon/Washington.....	120
Sea Level Rise.....	120
Nebraska.....	121
Republican and Platte Rivers.....	121
Water Supply Outlook/Drought.....	122

RESOLUTIONS AND POLICY POSITIONS

Energy and Water Integration Act of 2011.....	126
Federal Research on Climate Adaptation.....	128
State Primacy Over Groundwater.....	130
Bureau of Reclamation 10-Acre Water Transfer Policy.....	132
National Pollutant Discharge Elimination System Discharge Permits.....	134
Federal Rural Water Projects.....	136
A Vision on Water.....	137
Federal Water and Climate Data Collection and Analysis Programs.....	138
Reauthorization of the National Integrated Drought Information System.....	140
Reclamation States Emergency Drought Relief Act.....	143
States' Water Rights and Natural Flows.....	145

RULES OF ORGANIZATION.....	149
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2012 ANNUAL REPORT

OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

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

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

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

Associate membership has also been granted states exploring the benefits of membership, experiencing financial hardship, or otherwise temporarily unable to maintain full membership. In 2012, Nevada and Washington were Associate Members.

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

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

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2012, meetings were held in: Washington, DC on March 14-16; Seattle, Washington on June 6-8; and San Antonio, Texas on October 10-12. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office, or visiting our website. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. Dues are set by the Executive Committee and each state pays the same amount. During the Fall WSWC meetings in San Antonio, the Executive Committee authorized WSWC staff to move to a bi-annual audit as opposed to annual audits. Therefore no audit was performed in 2012.

During 2012, the Council staff was comprised of: Anthony G. (Tony) Willardson, Executive Director; Nathan Bracken, Legal Counsel; and a secretarial staff consisting of Cheryl Redding and Julie Groat. WSWC hired Sara Larsen in January to help implement and manage a Water Data Exchange Program. In September, Eric Stevens was selected to serve as the next WSWC Federal Liaison, representing the nine federal agencies under an intergovernmental agreement creating a Western Federal Agency Support Team (WestFAST). Eric replaced Dwane Young. Dwane returned to the U.S. Environmental Protection Agency Office in Washington, DC.

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WESTERN STATES WATER COUNCIL

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Vacant - Alaska
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)*
Scott Verhines - New Mexico
Todd Sando - North Dakota
J.D. Strong - Oklahoma
Phil Ward - Oregon
(Chair)
Steve Pirner - South Dakota
Garland Erbele - South Dakota
(Alternate)*
Carlos Rubinstein - Texas
Dennis Strong - Utah
Ted Sturdevant - Washington
Patrick T. Tyrrell - Wyoming
(Vice-Chair)

Management Subcommittee

Phil Ward - Oregon
(Chair)
Patrick Tyrrell
(Vice-Chair)
Jerry Rigby
(Secretary/Treasurer)
Garland Erbele - South Dakota
(Past Chair)
Tony Willardson
(Executive Director)

Nominating Subcommittee

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

Endangered Species Act Subcommittee

Dean Couch - **(Chair)** - Oklahoma
Roland Westergard - Nevada
Estevan Lopez - New Mexico
Phil Ward - Oregon
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
Scott Verhines - New Mexico
Garland Erbele - South Dakota
Carlos Rubenstein - Texas
Dennis Strong - Utah
Pat Tyrrell - Wyoming

Ex-Officio Representatives

USBR - Dionne Thompson
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
Scott Verhines - New Mexico

Ex-Officio Representatives

USBR - Dionne Thompson
Corps - Elliot Ng
EPA - Steve Albee
NRCS - Keith Admire
Doug Toews

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

LEGAL COMMITTEE

Vacant - Alaska
William Staudenmaier - Arizona
Jeanine Jones - California
Jennifer Gimbel - Colorado
James Eklund - Colorado
(Alternate)*
Jerry Rigby - Idaho
(Vice-Chair)
John Simpson - Idaho
(Alternate)*
Burke Griggs - Kansas
Candace West - Montana
Jay Weiner - Montana
(Alternate)*
Vacant - Nebraska
Roland Westergard - Nevada
Jason King - Nevada
(Alternate)*
Maria O'Brien - New Mexico
(Chair)
DL Sanders - New Mexico
(Alternate)*
Jennifer Verleger - North Dakota
Dean Couch - Oklahoma
Phil Ward - Oregon
John Guhin - South Dakota
John Elliott - Texas
Norman Johnson - Utah
Barbara Munson - Washington
Chris Brown - 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 - Lee Koss
USFS - Jean Thomas
FWS - Janet Bair

Tribal Reserved Water Rights Subcommittee

William Staudenmaier - Arizona
Bidtah Becker - New Mexico
DL Sanders - New Mexico
Garland Erbele - South Dakota
Norman Johnson - Utah

Water Transfers and the Public Interest

Jennifer Gimbel - Colorado
Jerry Rigby - Idaho
Tom Stiles - Kansas
Scott Verhines - New Mexico
DL Sanders - New Mexico
Phil Ward - Oregon
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)*
Curt Fransen - Idaho
Tom Stiles - Kansas
George Mathieus - Montana
Richard Opper - Montana
(Alternate)*
Michael Linder - Nebraska
Patrick Rice - Nebraska
(Alternate)*
Colleen Cripps - Nevada
Dave Martin - New Mexico
David Glatt - North Dakota
J.D. Strong - Oklahoma
(Chair)
Steve Thompson - Oklahoma
(Alternate)*
Vacant - Oregon
Steve Pirner - South Dakota
Carlos Rubinstein - Texas
(Vice-Chair)
Rick Rylander - Texas
(Alternate)*
Walter Baker - Utah
Ted Sturdevant - Washington
Stephen Bernath - Washington
(Alternate)*
Todd Parfitt - 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

Vacant - Alaska
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Mark Cowin - California
Jeanine Jones - California
(Alternate)*
Jennifer Gimbel - Colorado
(Chair)
John Stulp - Colorado
(Alternate)*
Dick Wolfe - Colorado
(Alternate)*
John Simpson - Idaho
Jerry Rigby - Idaho
(Alternate)*
David Barfield - Kansas
Tim Davis - Montana
Mary Sexton - Montana
(Alternate)*
Brian Dunnigan - Nebraska
Jason King - Nevada
Scott Verhines - New Mexico
Todd Sando - North Dakota
JD Strong - Oklahoma
Phil Ward - Oregon
Garland Erbele - South Dakota
Ricky Rylander - Texas
Herman Settemeyer - Texas
(Alternate)*
Dennis Strong - Utah
(Vice-Chair)
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)**

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

USBR - Becky Fulkerson
Corps - Steve Ashby
Boni Bigornia
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

**Western States Water Council
Committee Assignments**

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Vacant - Alaska
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Patrick Rice - Nebraska
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Walter Baker - Utah
Ted Sturdevant - Washington
Stephen Bernath - Washington
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Todd Parfitt - Wyoming
John Wagner - Wyoming
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WATER RESOURCES COMMITTEE

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DL Sanders - New Mexico
(Alternate)*
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Dean Couch - Oklahoma
Phil Ward - Oregon
John Guhin - South Dakota
John Elliott - Texas
Norman Johnson - Utah
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COUNCIL MEMBERS
Seattle, Washington
June 8, 2012



Front Row: Jennifer Gimbel, Jeanine Jones, Maria O'Brien, Dick Wolfe
Second Row: Scott Verhines, Sue Lowry, David Barfield
Third Row: Roland Westergard, JD Strong, Norman Johnson
Fourth Row: Patrick Tyrrell, Stephen Bernath, Maia Bellon, Carlos Rubinstein
Fifth Row: Jim Davenport, Phil Ward, Weir Labatt, Betty Olson, DL Sanders
Sixth Row: Brian Dunnigan, Ted Sturdevant, Todd Sando, John Simpson, Jerry Rigby

STAFF



Dwane Young, Julie Groat, Eric Stevens, Cheryl Redding, Tony Willardson, Nathan Bracken and Sara Larsen

Anthony G. Willardson (Tony). Executive Director
Nathan Bracken. Legal Counsel
Sara Larsen. Water Data Exchange Program Manager
Eric Stevens/Dwane Young (former).. . . . Federal Liaison
Cheryl Redding. Office Manager
Julie Groat. Receptionist/Secretary

COUNCIL MEMBERSHIP/STAFF CHANGES/NEWS

Arizona

Governor Jan Brewer named Arizona Department of Water Resources Director (ADWR) **Sandra Fabritz-Whitney** to the WSWC, replacing former WSWC member **Herb Guenther**, who stepped down in January 2011. Sandy has been with ADWR since 1992 and worked as the Assistant Director for Water Management prior to her appointment as Director. Brewer also named Arizona Department of Environmental Quality (ADEQ), Water Quality Division Director **Michael Fulton** to the WSWC. Mike has been with ADEQ since 1990 and has served in a variety of assignments as a hydrologist and in program management and executive management positions. Lastly, Brewer named **Cynthia Chandley**, a partner with Snell and Wilmer, as an alternate member. Cynthia practices in the areas of water, mining, natural resources, and energy, including representation of large private claimants in Arizona's General Stream Adjudication and other federal water decrees. **Bill Staudenmaier**, also a partner at Snell and Wilmer, will remain a full member of the WSWC.

Colorado

Governor John Hickenlooper named his Special Policy Advisor on Water, **John Stulp**, and his Deputy Legal Counsel, **James Eklund**, to the WSWC. The appointments follow the departure of former Colorado Department of Natural Resources Assistant Director for Water **Alexendra Davis**, who left state employment last year to join the law firm of Vranesh and Raisch in Boulder, Colorado.

Kansas

Governor Sam Brownback appointed **Burke Griggs** to the WSWC. Burke is the Legal Counsel for the Division of Water Resources within the Kansas Department of Agriculture (KDA). He will serve on behalf of Kansas Secretary of Agriculture **Dale Rodman**. Brownback also named **Chris Beightel** as an alternate member. Chris is KDA's Program Manager for Water Management Services. He will replace former Assistant Chief Engineer **Paul Graves**, who took a position with the University of Kansas in 2011. Kansas' other appointments will remain unchanged.

Nevada

Governor Brian Sandoval appointed State Engineer **Jason King** to the WSWC. Sandoval also appointed Nevada Division of Environmental Protection Administrator **Colleen Cripps** as an alternate. Nevada Department of Conservation and Natural Resources Director **Leo Drozdoff** will remain on the WSWC, as will former State Engineer and long-time member **Roland Westergard**. Jason and Colleen will replace Deputy State Engineer **Tracy Taylor**, attorney **James Davenport**, and former Speaker of the Nevada Assembly **Joseph Dini, Jr.**

New Mexico

Governor Susana Martinez appointed State Engineer **Scott Verhines** to the WSWC. Scott will replace former State Engineer and WSWC member **John D’Antonio**, who left state employment last year to work for the U.S. Army Corps of Engineer. Of further note, John has replaced **Mike Fallon**, who retired, as the Corps’ WestFAST representative.

Texas

Governor Rick Perry appointed Texas Water Development Board (TWDB) member **Fredrick “Rick” Rylander** to the WSWC. He will replace long-time WSWC member and former TWDB Chair **Weir Labatt**, whose term on the TWDB expired. Weir joined the WSWC in 2002 and chaired the WSWC from July 2010 until June 2012. Among other things, he was instrumental in the development of the WSWC’s Vision on Water, which it adopted during the WSWC summer meetings in Seattle, Washington. Additionally, Perry appointed **G. Dave Scott**, the Presiding Officer of the Brazos River Authority, as an alternate member. Dave will replace former Presiding Officer **Christopher D. DeCluitt**, whose term expired.

Wyoming

Wyoming Water Development Commission Director and WSWC member **Mike Purcell** retired effective July 6.

WSWC/WGA

In January, the WSWC hired **Sara Larsen** to help implement and manage a Water Data Exchange (WaDE) Program that will help the western states better support the Department of Energy water-energy studies, the U.S. Geological Survey’s Water Census, and other water availability and planning efforts.¹ Sara worked previously as a research engineer at Los Alamos National Laboratory, as an analyst for the Utah Division of Water Resources, and a GIS coordinator for the Provo River Water Users Association. She has a B.S. in Geography and an M.S. in Civil Engineering with a water resources emphasis from the University of Utah. She has also written a thesis, several technical reports, and a book chapter on water and energy topics.

On October 29, WGA Chair Governor Gary Herbert (UT) named **James Ogsbury** as the WGA Executive Director. Jim left his post as the Legislative Director for the League of Arizona Cities and Towns to begin work at the WGA on November 26. A graduate of Harvard College and the Arizona State University College of Law, he has represented public and private sector clients before the U.S. Congress and executive branch agencies. He also served as the Clerk and Staff Director for the House Appropriations Subcommittee on Energy and Water Development. Jim succeeds **Pam Inmann**, who retired earlier in the year.

¹<http://www.westernstateswater.org/wade/>.

COUNCIL MEETINGS

168th Council Meetings Washington, DC March 14-16

On March 15, the WSWC held its 168th meeting in Washington, D.C. During the Full Council meeting, the WSWC approved a letter to the Bureau of Reclamation on proposed changes to its policy manual that would classify deliveries of project water to lots of less than 10 acres for non-commercial irrigation purposes as municipal and industrial use subject to the payment of market rates. The letter states the changes: (1) could result in unaffordable water use changes and water delivery service rates; (2) ignore adverse impacts to state-issued water rights; (3) could create an inappropriate incentive for secondary water users to move to potable supplies; and (4) may impact market-based water transfers and water sharing arrangements. The Council opposed the change, and the letter asked Reclamation to enter into a dialogue with the WSWC to better define the potential impacts and implications.

The WSWC also adopted a position supporting state primacy over groundwater and opposing “...federal efforts that would establish a federal ownership interest in groundwater or diminish the primary and exclusive authority of States over groundwater.” The position also states the regulatory reach of federal statutes, including but not limited to the Clean Water Act (CWA), Endangered Species Act, National Environmental Policy Act, Reclamation Act of 1902, Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act, “...were never intended to infringe upon state ownership or control over groundwater.” States are in the best position to “...protect groundwater quality and allow for the orderly and rational allocation and administration of the resource through state laws and regulations....”

The WSWC readopted existing positions supporting federal climate adaptation research, and the Energy and Water Integration Act (S. 1343), to analyze the impact of energy development and production on the Nation’s water resources by the Department of Energy.

The Council passed resolutions of appreciation for former members Alexandra Davis of Colorado, John D’Antonio of New Mexico, and Jim Davenport, Joe Dini, and Tracy Taylor of Nevada. Former WestFAST Chair Mike Fallon, who has retired from the U.S. Army Corps of Engineers, also received a resolution of appreciation. Additionally, the WSWC presented Chair Weir Labatt with a jacket to commemorate his ten years of service, and recognized WSWC Office Manager Cheryl Redding for her 25th anniversary with the WSWC.

WestFAST Chair Jean Thomas of the Forest Service gave an overview of activities in 2011, including efforts to: (1) ensure that Landsat 8 includes a Thermal Infrared Sensor (TIRS); (2) promote universal access to water-related data; (3) support the National Integrated Drought Information System; and (4) identify high value watersheds and future water infrastructure and data needs.

The Council discussed proposed changes intended to expand and strengthen the WSWC's Vision on Water.

At the Water Resources Committee meeting, Idaho Water Engineering President Dave Tuthill, a former WSWC member, addressed the future of the Landsat missions. The U.S. Geological Survey (USGS) shut down Landsat 5 imaging operations due to technical problems, which could create a gap in thermal infrared sensor (TIRS) imaging data needed to map water consumption during the summer. Dave also said only the TIRS has the spatial resolution fine enough to help manage water at the agricultural field level. Landsat 8 includes TIRS and was scheduled for launch in January 2013, which Dave said was directly due to the WSWC's support.

In the Water Quality Committee meeting, Dave Evans, Environmental Protection Agency (EPA) Wetlands Division Director, discussed the development of guidance to clarify CWA jurisdiction under the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions. EPA and the Corps worked on rulemaking in 2011, but were unable to move a rule forward and have refocused on guidance as an interim measure. The Office of Management and Budget is reviewing a revised version of the guidance, which will likely be finalized in the next few months. Although it is uncertain "where the final guidance will land," Dave said it will likely utilize a "more expansive" approach than current guidance.

Adam Schempp, Environmental Law Institute (ELI) Western Water Program Director, spoke to the Legal Committee about a report ELI, American Rivers, and the Alliance for Water Efficiency completed on ways water efficiency can be used to improve instream flows in the Colorado River Basin. Successful efforts require: (1) willing partners; (2) a "champion for the cause;" (3) locally tailored approaches; (4) creative funding; and (5) a defined legal path. Major legal or policy changes are not necessary and "...connecting existing state programs [is] a place to start."

WestFAST member and EPA Senior Policy Advisor Roger Gorke described an EPA study that addresses the importance of water to the U.S. economy. The study is not intended to "put a price" on water, but to evaluate its value to the Nation. EPA is seeking "on-the-ground" perspectives from stakeholders. Roger also described a congressionally-mandated EPA study on the potential impacts of hydraulic fracturing on drinking water supplies. EPA will release initial study findings and research results in 2012, with the completion of a final report in 2014.

On March 14, the WSWC and the Interstate Council on Water Policy co-sponsored a roundtable discussion with Administration and Congressional officials on the federal role in supporting state water planning efforts.

Department of the Interior Assistant Secretary for Water and Science Anne Castle said that while USGS' FY2013 budget request would cut Cooperative Water Program (CWP) funding by \$4.7 million, the Administration is trying not to cut observational networks, but will limit spending on analytical studies. Castle supports a return to a 50-50 state-federal CWP match and full funding for the National Stream Information Program. She also expressed support for Landsat and TIRS.

Gary Carter, National Weather Service, Director, Office of Hydrologic Development, described the purpose of a National Water Center in Alabama as integrating federal agency capabilities to: (1) expand and improve river and flood forecasting; (2) enhance water resource management; and (3) provide a single portal for water resources information. It opens in 2013.

Corps Programs Integration Division Director Mark Mazzanti said a “perfect storm is brewing” with respect to aging water infrastructure and the potential for decreased federal funding. As a result, the Corps is developing a new infrastructure strategy aimed at maximizing services to the Nation in the context of strained federal budgets. Although the strategy is in its infancy, Mark said it will require significant stakeholder collaboration and flexibility and will likely support an integrated water management approach.

Dr. Ann Bartuska, Deputy Under Secretary for Research, Education and Economics, U.S. Department of Agriculture (USDA), discussed the Forest Service’s Watershed Condition Framework, which is aimed at establishing a new process for improving the health of watersheds on national forests and grasslands. In addition to other water-related efforts, Ann described USDA’s “Forests to Faucets” project, which is modeling and mapping those lands in the continental U.S. that are most important to surface drinking water sources. The effort will also analyze the role forests play in protecting those areas and the threats to critical forests.

EPA Acting Assistant Administrator for Water Nancy Stoner discussed a number of EPA initiatives, including efforts to prioritize how federal funding can “go further” to carry out federal water quality protection efforts. Nancy also said the revised EPA CWA guidance includes new language stating that it will not apply to “uplands,” or groundwater, which are not subject to CWA jurisdiction.

Michelle Nellenback, Natural Resources Director for the National Governors’ Association (NGA), described a number of the NGA’s policies with water components, including policies addressing the Clean Water and Drinking Water State Revolving Funds, endangered species, and energy development. Michelle also said the NGA is currently studying hydraulic fracturing.

The roundtable concluded with a Congressional panel of majority and minority staff from the Senate Environment and Public Works, and Energy and Natural Resources Committees, as well as the House Transportation and Infrastructure Subcommittee on Water Resources and the Environment. Among other things, the panel noted that budget offsets, a ban on earmarks in the House, and an unwillingness on the part of some members of Congress to compromise have made it difficult to pass water-related legislation. Nevertheless, water and energy continue to be critical issues that Congress needs to address in a bipartisan manner. David Wegner, with the House Water Resources and Environment Subcommittee, opined that the era of Indian water rights settlements with significant amounts of federal funding is “probably off for a while.”

On March 16, WSWC members met with lead officials from the eleven WestFAST agencies to stress the importance of state-federal collaboration and to highlight WestFAST’s accomplishments and ongoing efforts, as well as WSWC interests and activities. The WSWC thanked the agencies for their participation in WestFAST.

169th Council Meetings
Seattle, WA
June 6-8

On June 6-8, the WSWC held its 169th meetings in Seattle, Washington. The meetings included the election of new officers, with the WSWC selecting Phil Ward of Oregon as Chairman, Pat Tyrrell of Wyoming as Vice Chairman, and Jerry Rigby of Idaho as Secretary/Treasurer. The WSWC also presented outgoing Chairman Weir Labatt of Texas with a gavel to recognize his dedicated efforts over the past two years.

At the Full Council meeting on June 8, the WSWC adopted its “Vision on Water” as an external policy statement. The WSWC previously adopted the document as an internal matter at its fall 2011 meetings in Idaho Falls, Idaho. The policy makes the following key points:

- State primacy is fundamental to a sustainable water future
- Water must be given a high public 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
- 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 level¹

The WSWC also agreed to send a letter to Senate Energy and Natural Resources Committee Chair Jeff Bingaman (D-NM) and Ranking Member Lisa Murkowski (R-AK), calling for legislative action to create a dedicated funding source to complete authorized federal rural water projects constructed by the Bureau of Reclamation. The letter states: “These projects...benefit both Indian and non-Indian rural communities. Many of these communities, particularly small communities, are struggling to provide adequate water supplies to meet the needs of their citizens of a quality consistent with federal mandates. It is essential that these projects be completed in a timely manner for the benefit of these communities in fulfillment of long-standing promises and trust responsibilities, some dating back decades.... Accelerated construction scheduling, made possible by a more timely federal investment of modest amounts, will minimize long-term federal expenditures and create more jobs now.”

In addition, the WSWC renewed its support for the EPA’s longstanding policy that water transfers are not subject to National Pollutant Discharge Elimination System permit requirements under the CWA. The WSWC revised the position to cite a 2009 ruling by the 11th Circuit Court of Appeals that upheld EPA’s policy.

¹*Western States Water*, #1951, October 11, 2011.

At the Full Council Meeting, Washington Department of Ecology Director and WSWC member Ted Sturdevant discussed a series of principles that Washington is using to further sustainable water management. Sturdevant said there is a need for stakeholders and the public to realize that environmental impairments degrade the quality of life for all citizens. He then suggested that water managers employ a “value neutral” approach to water-related challenges based upon the belief that all interests, both the environment and economy, must be addressed because they are integral to our quality of life. He also said stakeholders should pursue mutually-acceptable solutions and cited examples in Washington, including collaborative efforts between tribes and farmers in the Yakima and Walla Walla basins.

WGA Executive Director Pan Inmann expressed a commitment to collaborative action between the WSWC and WGA. In particular, she urged WSWC members to speak regularly with their governors to ensure that every day water management remains a priority. Of note, Pam recently announced her retirement and the WSWC presented her with a resolution of appreciation and a jacket to recognize her service to the WSWC.

Jim Barton, Chief of the U.S. Army Corps of Engineers’ Columbia Basin Water Management Division, discussed the Columbia River Treaty (CRT) between the U.S. and Canada for cooperative management of the Columbia River. The treaty includes hydropower and flood control provisions in which Canada stores water to prevent flood damages in the U.S. Either nation can terminate the treaty in 2024 with ten years written notice. Current operating procedures are scheduled to change in 2024 independent of a decision to renew the treaty. Both nations are reviewing the treaty and Barton said failure to renew it could increase uncertainty for downstream U.S. hydropower, flood control, fisheries, and other non-power river uses.

Next, Paul Wagner, a fishery biologist with the National Marine Fishery Service (NMFS), discussed ecosystem benefits that NMFS is seeking through the CRT review process. In particular, NMFS is seeking benefits that would: (1) hold reservoirs higher and make river flows “more normative” to provide more productive habitats for endangered anadromous fish species; (2) lessen the time fish spend traveling to the ocean so they can come closer to their historic transit time; and (3) improve the river’s freshwater plume and near ocean estuary conditions.

WestFAST Chair Jean Thomas of the U.S. Forest Service announced that Becky Fulkerson of the Bureau of Reclamation will be WestFAST’s Vice Chair. Becky will replace Mike Fallon with the Corps, who has retired. Jean also noted that the Department of Defense has become the twelfth federal agency to join WestFAST.

During the Water Resources Committee meeting on June 7, Washington Department of Ecology Water Program Director and WSWC member Maia Bellon described some of the states water resources issues. Despite significant budget cuts, she said her program has made water rights information for at least 50% of the state available online and is working to complete the Yakima River Basin adjudication. Washington is also launching a groundwater study in the Yakima River Basin.

Tony Morse, with the Spatial Analysis Group in Boise, gave a presentation on the Idaho Department of Water Resources' (IDWR) use of Landsat data. Morse worked previously for IDWR and focused specifically on Idaho's use of the Mapping EvapoTranspiration at High Resolution with Internalized Calibration (METRIC) program. It uses Landsat data to provide information on evapotranspiration from soil and vegetation. The data is particularly helpful for water managers calculating agricultural consumptive use.

Trevor Boomstra with Rubicon Water, an engineering and technology firm with offices in Australia and the U.S., discussed an automated irrigation canal project in the Australian State of Victoria. Boomstra said the centrally managed project can identify high-loss sections of the canal and provide more consistent flows, resulting in increased efficiency of 70% to over 85%.

The Water Quality Committee heard a presentation by Kelly Susewind, the Director of the Washington Department of Ecology's Water Quality Program. Susewind touched on a number of "hot" issues, including nutrient management, forest road stormwater runoff, state revolving fund management, municipal stormwater requirements, and combined sewer overflows.

Krista Mendelman with EPA Region 10 then described a 2011 nationwide initiative to clarify green infrastructure within regulatory and enforcement contexts as well as provide information, financing, technical support and other resources to stakeholders. Mendelman also described EPA Region 10's green infrastructure efforts, which include funding and technical assistance as well as the development of permits and innovative total maximum daily load plans.

Other presentations included an overview of Colorado's efforts to develop numeric nutrient criteria by WSWC member Paul Frohardt, and an update on the Water Quality Standards Managers Association by Sarah Johnson with the Colorado Water Quality Control Division.

At the Legal Committee meeting, Washington Senior Assistant Attorney General Mary Sue Wilson described legal issues regarding exempt wells. In particular, she discussed a 2011 Washington Supreme Court ruling that held that the state's exemption does not limit the amount of water that can be withdrawn for stockwatering purposes, including confined feeding operations.

Tom Hicks, with the Resource Renewal Institute, discussed an effort by a number of conservation groups and other entities to submit a request to the Internal Revenue Service (IRS) asking it to issue a revenue ruling affirming that charitable contributions of appropriative water rights are tax deductible. Hicks also invited those WSWC members who may be interested in the effort to urge the IRS to accept the group's request.

On June 6, the WSWC held a pre-meeting workshop in which WSWC Water Availability Data Exchange (WaDE) Program Manager Sara Larsen discussed the WSWC's efforts to develop the exchange. She was followed by Tony Morse, who described recent Landsat thermal imaging developments and water resource applications. Following the workshop, Washington hosted a field trip to the Cedar River Watershed and a tour of green infrastructure in West Seattle's High Point neighborhood.

170th Council Meetings
San Antonio, TX
October 10-12

The WSWC held its 170th meetings on October 10-12, in San Antonio, Texas. The Council re-adopted a position supporting federal water and climate data collection and analysis programs, urging the Administration and Congress “...to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decision-makers and stakeholders, with significantly adverse consequences.”

The WSWC also approved three new external policy positions that were proposed following the 30-day notice of the meeting, requiring unanimous consent prior to consideration. They were sent to the WGA for review.

The first position supports States’ rights to natural surface water flows. It says that the WSWC “...urges the Army Corps of Engineers to recognize the legal right of the States to the development, use, control, distribution and allocation of the States’ surface waters.... [T]hat any policy of the [Corps] to require storage contracts to access natural flows within a reservoir boundary would be a violation of the States’ right to develop, use, control, and distribute surface water.... [T]hat the [WSWC] opposes any and all efforts that would diminish the primary and exclusive authority of States over the allocation of surface water.”

The second position “strongly supports” legislation to reauthorize the Reclamation States Emergency Drought Relief Act, which has expired. No stand-alone bill has been introduced in this Congress, but legislative language was drafted in the Senate to reauthorize the Act through 2017 and raise the limit on authorized appropriations.

The third position supports legislation to reauthorize the National Integrated Drought Information System (NIDIS), which expired last month. S. 3584 and H.R. 6489 were introduced to reauthorize NIDIS through 2017, and respectively authorize \$13.5 million and \$14.5 million per year for the program. The WSWC also approved a related letter to the National Oceanic and Atmospheric Administration (NOAA). It asks NOAA “...to develop new approaches for intraseasonal to interannual [ISI] drought predictions as part of its NIDIS efforts. The operational products now being provided by the National Weather Service lack the skill and spatial coverage needed for water management decision support. We recognize that the El Niño-Southern Oscillation (ENSO) is presently the primary source of skill in ISI forecasting, and urge NOAA to place a priority on maintaining monitoring systems such as the Tropical Atmospheric Ocean array that are used to track the status of ENSO conditions in the Pacific. [One] tool that could be useful in improving drought predictive capability is improved understanding of how extreme storms contribute to ending or mitigating drought.”

The WSWC also adopted resolutions of appreciation for former Chair Weir Labatt of Texas, who has completed his term as a member of the Texas Water Development Board (TWDB), and WestFAST Federal Liaison Dwane Young of the EPA, whose two-year detail was ending.

At the Full Council Meeting on October 12, WSWC member Carlos Rubinstein of the Texas Commission on Environmental Quality (TCEQ) and Robert Mace, TWDB, described water resource issues in Texas, including drought impacts, the effects of EPA's Clean Water Act (CWA) policies, aspects of Texas' water plan, and other issues.

Gerónimo Gutiérrez, managing director of the North American Development Bank (NADB), gave an overview of his organization and its efforts to improve water infrastructure in the border region between the U.S. and Mexico. The two countries created the NADB in 1993 to support infrastructure development in the border region by providing loans, grants, and other services to public and private entities for project implementation.

WestFAST Chair Jean Thomas, with the Forest Service, introduced incoming WestFAST Liaison Eric Stevens with the Corps, who reported to the WSWC offices in September.

During the Water Resources Committee meeting, WSWC members Todd Sando of North Dakota and Garland Erbele of South Dakota discussed the position taken by the Corps that all waters entering Corps reservoirs on the mainstem of the Missouri River require surplus contracts for any withdrawals. The Corps does not recognize the States' rights to natural flows that would be available without the reservoirs. Todd and Garland noted the 1944 Flood Control Act states "...it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control..."

Herman Settemeyer, TCEQ, discussed accounting of Rio Grande water by the International Boundary Water Commission (IBWC). The treaties that govern the Rio Grande allocate the waters below El Paso, Texas to the U.S. However, IBWC has historically allocated 50% of this water to Mexico when it reaches Fort Quitman, Texas. The State believes this water belongs entirely to the U.S. and is asking the IBWC to change its accounting policy and method.

Jorge Arroyo, TWDB, discussed efforts by the Consortium for Hi-Technology Investigations in Water and Waste Water (CHIWAWA) regarding desalination concentrate management. CHIWAWA is a partnership of various universities, cities, utilities, and others in the border region that are working to create sustainable urban and rural water supplies and to protect environmental quality, including efforts to advance brackish groundwater desalination. Management of the salty concentrate produced by desalination can be a barrier. However, efforts are currently underway to improve disposal technology.

Vince Tidwell, with Sandia National Laboratories, described efforts with the WSWC and WGA to develop a model to help water resources and energy planners analyze water requirements

for various types of electric power generation. The effort is also studying potential water impacts on transmission planning.

At the Water Quality Committee meeting, L'Oreal Stepney, Deputy Director of TCEQ's Office of Water, discussed Texas' Total Daily Maximum Load (TMDL) efforts. She said TMDLs and implementation plans in Texas are often developed together, which can reduce the total project implementation time by one to two years. Texas also uses a robust public engagement process focused on using "good science" and "buy-in" to create actual water quality improvements, which can be a time-intensive process. L'Oreal said EPA focuses on "pace," and noted that it is impractical to develop TMDLs that produce actual improvements, while also focusing on de-listing impaired waters and revising water quality standards.

WestFAST member Roger Gorke, EPA, summarized efforts to finalize a memo to improve administrative protections for parties that voluntarily clean up abandoned hardrock mines for which they are not legally responsible.

Eric Monschein with EPA's Office of Wetlands, Oceans, and Watersheds, and WSWC member Tom Stiles of Kansas described a collaborative effort with the Association of Clean Water Administrators (ACWA) to improve the TMDL process. They noted that the program has historically focused on producing TMDLs and that there is a desire to focus more on outcomes. The effort began last year and included outreach to the States. It has produced a vision on "what the program wants to become" that EPA and ACWA will continue to refine and develop over the next year.

At the Legal Committee meeting, attorney Ed McCarthy of Jackson, Sjoberg, McCarthy and Townsend discussed the Texas Supreme Court's decision in *Edwards Aquifer Authority v. Day*. That decision found that the Texas Constitution gives landowners a constitutionally protected vested property right in the groundwater in place beneath their property. However, Ed said the case raised a number of questions, including: (1) how that right may be "taken;" (2) if taken, how damages will be calculated and valued; and (3) when considering takings issues, whether courts should view the groundwater as being separate and apart from the land, or consider the existence of the land.

On October 10, the WSWC held a pre-meeting workshop in which WSWC WaDE Program Manager Sara Larsen and WestFAST Federal Liaison Dwane Young demonstrated WaDE's growing capabilities. Tom Iseman of the WGA and WSWC Legal Counsel Nathan Bracken then provided an update on the status of a WGA and WSWC report on water transfers. Next, Texas hosted a field trip that included a tour of flood control and restoration efforts along the San Antonio River's Mission Reach.²

²PowerPoint presentations given at the meetings are posted on the WSWC's website. See: <http://www.westernstateswater.org/upcoming-meetings/past-meetings/>.

OTHER MEETINGS

Western Governors Annual Meeting

The WGA held its annual meeting on June 10-12, in Cle Elum, Washington. WGA Chair Governor Christine Gregoire (D-WA) convened the meeting, where the governors elected Gary Herbert (R-UT) and John Hickenlooper (D-CO) as the WGA's new Chair and Vice-Chair. Governors Brian Schweitzer (D-MT), Brian Sandoval (R-NV), and Eddie Baza Calvo (R-GU) also attended, as well as the premiers for the Canadian provinces of Alberta and Manitoba.

During the meetings, Herbert announced a "Responsible Energy Development" initiative aimed at providing reliable, affordable, and cleaner energy. The pillars of the initiative are: (1) energy education to "ensure a realistic understanding of challenges and opportunities," including lessons learned from states' experience with hydraulic fracturing; (2) energy efficiency and alternative fuels, focusing on largest loads and needed infrastructure; (3) improved energy transmission; and (4) a greater role for states in energy policy, including development of a regional 10-year energy plan.

"We need an all-of-the above approach, making appropriate use of all energy sources," Herbert said. "Coal reserves in the West are enormous, with western states providing more than half of the nation's coal. The potential for wind and solar in the West is practically unlimited. Additionally, both geothermal and biomass resources contribute to the region's energy portfolio and continue to grow in importance." The boom in natural gas production is another element of our energy mix.

The initiative will identify and implement energy development strategies in the West, and will continue the WGA's work on regional transmission expansion for electricity. The WSWC is working closely with WGA to carry out this effort as it applies to water by developing a Water Data Exchange (WaDE) and completing an analysis of the water issues associated with concentrated solar development in the Southwest.

The WGA and the Outdoor Nation also announced a pilot project as part of WGA's Get Out West! Initiative to inspire teenagers and their families to take advantage of recreation opportunities in the West. Under the project, several governors will create a Youth Outdoor Recreation Outreach Coordinator in their offices to increase park visits.

Extreme Weather Events Workshop

On July 30-August 1, the WSWC and California Department of Water Resources (CDWR), in cooperation with WGA, held a workshop in San Diego, on *Extreme Weather Events: Science, Planning and Preparedness*. Nearly fifty federal, state, academic and other experts came together to address the current state of the science related to meteorology and hydrology, as well as policy. The West has been faced with unusual back to back weather events, such as the extreme flooding

in the Dakotas last year, followed by extreme drought over much of the West this year. Along the West Coast, extreme precipitation events led to serious flooding and have been found to be related to the development in the tropics of so-called “atmospheric rivers.” These can be identified, monitored and tracked, much like a hurricane. Such scientific advances can help improve our forecasting ability and emergency response. Monitoring drought can also improve planning and response, allowing us to mitigate some of the impacts, though our skill in predicting seasonal and interannual changes is limited. Building a stronger westwide observation system was discussed, as well as ways to leverage resources and coordinate actions.³

National Integrated Drought Information System Reauthorization Workshop

On September 24-26, the WSWC, the WGA, and CDWR held a National Integrated Drought Information System (NIDIS) Reauthorization Workshop in San Diego, California. NIDIS Director Roger Pulwarty and National Drought Mitigation Center Director Mike Hayes, as well as a variety of other drought experts from around the West attended. A number of state officials also participated, including WSWC Chair Phil Ward of Oregon and WSWC members Jeanine Jones of California, J.D. Strong of Oklahoma, D.L. Sanders of New Mexico, and Tom Buschatzke, representing the Arizona Department of Water Resources.

The workshop examined a number of topics that the WSWC and WGA may wish to emphasize in pursuing Congressional reauthorization of NIDIS, including ways to improve NIDIS implementation, state water agency perspectives on federal drought programs, data and information gaps, the federal role in drought, USDA programs, and examples of drought planning and response tools, among other topics.⁴

Western State Water Resources Infrastructure Needs and Strategies Symposium

On November 14-16, the WSWC held its 2012 Water Management Symposium in Phoenix, Arizona. Co-sponsored by the WGA and the Arizona Department of Water Resources (ADWR), the meeting brought together over 60 federal, state, and local officials, as well as bankers, consultants, and other experts to discuss western water infrastructure challenges.

ADWR Director and WSWC member Sandy Fabritz-Whitney moderated a panel on infrastructure financing and conservation in Arizona. Panelists included Melanie Ford with the Arizona Water Infrastructure Finance Authority, Brad Hill with the City of Flagstaff, Dennis Rule with the Central Arizona Groundwater Replenishment District, Guy Carpenter with Carollo Engineers, and John Felty with the Salt River Project. Sandy said the Arizona Legislature created a Water Resources Development Commission in 2010 to assess the state’s water demands and supplies. The Commission released a report that analyzed state’s water needs for the next 100 years and discussed ways to meet those needs.

³http://www.westgov.org/wswc/Extreme%20Weather%20Events%202012/extreme_weather_events_presentations.htm

⁴http://www.westgov.org/wswc/NIDIS%202012/NIDIS_presentations.htm

Three panels described state infrastructure projects, programs, and funding in the West. Representatives from 13 western states participated, including WSWC Chair Phil Ward of Oregon and fellow WSWC members Tracy Streeter of Kansas, Scott Verhines of New Mexico, Tim Davis of Montana, J.D. Strong of Oklahoma, and Sue Lowry of Wyoming. While the panels showed that state infrastructure programs vary, they also identified common challenges, including drought and rural infrastructure needs.

Next, J.D. Strong moderated a panel on drinking water and wastewater infrastructure financing. The panel consisted of Greg Swartz with Piper Jaffray, Dave Mitamura with the Texas Water Development Board, and WSWC member Walt Baker with the Utah Division of Water Quality. The panel noted that communities in some parts of the West are shifting away from the Clean Water and Drinking Water SRFs in favor of state programs, due in part to cumulative restrictions that Congress has tied to the use of SRF funds, such as Davis-Bacon Act and Buy American requirements.

WGA Water Program Manager Tom Iseman moderated a panel on construction innovations. Panelists included Chitra Foster of CDM Smith, John Awezec of HDR, and Paul Blanchard of Northwest Pipe Company. The panel noted that water infrastructure projects are becoming more complex, which has led to increasing interest in alternative project delivery methods and private-public partnerships.

Tom also moderated a panel that discussed the importance of water to the national economy. Ellen Gilinsky with the EPA described a study that her agency is preparing on the importance of water to the nation's economy. Ken Bruder with Bloomberg New Energy Finance discussed how water supply can impact the global supply chain, noting that major companies are now working to ensure that their operations have secure water supplies.

WSWC Executive Director Tony Willardson moderated a panel of federal representatives that discussed integrated water resources management. Participants included Dave Palumbo with the Bureau of Reclamation, James Hannon with the Corps, Astor Boozer with NRCS, and Ellen Gilinsky with EPA. The panel noted that federal funds for water infrastructure are not increasing and that partnerships with states and other stakeholders will be key in addressing the nation's water infrastructure needs.

Tony then moderated a panel on public and private roles in the financing and construction of water infrastructure projects. The panel included Shawn Dralle with RBC Capital Markets, Daniel Ferons with the Santa Margarita Water District Board, David Pitcher with the Central Utah Water Conservancy District, Bruce Moore with the Southern Nevada Water Authority, and Wes Strickland with Brownstein Hyatt Farber Schreck. Panelists observed that the private sector is interested in financing water projects, but that private financing is often less appealing because it is generally more expensive than subsidized public financing.

The symposium also included two stand-alone presentations. The first with Grady Gammage from the Arizona State University's Morrison Institute discussing the "disconnect" between how water professionals think about water compared to the general public. The second by Sharlene Leurig with CERES focused on financing sustainable water infrastructure.⁵

⁵<http://www.westernstateswater.org/2012-annual-water-management-symposium-western-state-water-resources-infrastructure-needs-and-strategies/>.

REPORTS AND PUBLICATIONS

Water Reuse in the West

WSWC Legal Counsel Nathan Bracken published a report entitled “Water Reuse in the West: State Programs and Institutional Issues” in the Summer 2012 edition of the University of California, Hastings College of the Law’s West-Northwest Journal of Environmental Law and Policy. The report is intended to help states investigate institutional mechanisms for furthering reuse, and describes the legal and regulatory frameworks governing reuse as well as the various legal and institutional issues that encourage or discourage reuse in 17 western states. Nathan prepared the report under the direction of and with assistance from a WSWC subcommittee.⁶

Water Transfers in the West

On December 3, the WGA released a joint WGA/WSWC report entitled *Water Transfers in the West*. The report provides an objective overview of voluntary, intrastate water right transfers in the West. It is intended to support longstanding WGA and WSWC policies that call on states to identify ways to transfer water among uses while avoiding or mitigating adverse impacts on agricultural communities and economies. The report also addresses impacts to the environment. Rather than provide a blueprint for states to follow, the report highlights successful transfers and practices to allow western states to learn from their collective experiences. It also recognizes that states’ individual circumstances will determine how they should address transfers.

The report is the product of a year-long effort that the WGA and WSWC carried out with funding assistance from the Walton Family Foundation. To gather information for the report, the WGA and WSWC conducted independent research, surveyed state water managers, and carried out three case studies of notable, multi-stakeholder transfer arrangements in California, Colorado, and Oregon. The project also convened three stakeholder workshops that drew insight from over 100 experts from across the West, including state administrators, environmental organizations, farmers, academics, and other water resource professionals.

“[W]ater transfers have occurred for decades,” said WGA Chair and Utah Governor Gary Herbert. “But with so many new citizens and industries settling in the water-scarce West, now is the time to evaluate how we use transfers in our approach to providing water.”⁷

⁶<http://www.westernstateswater.org/publications/>.

⁷http://www.westgov.org/index.php?option=com_content&view=article&id=373:water-transfers&catid=102.

CONGRESSIONAL TESTIMONY

Senate Committee on Energy and Natural Resources Hearing on Indian Water Rights

On March 15, 2012, the Western States Water Council (WSWC) was invited to testify on Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country before the Senate Committee on Energy and Natural Resources. Maria O'Brien an attorney with Modrall Sperling, P.A. in Albuquerque, New Mexico provided testimony in her official capacity as the Chair of the WSWC's Legal Committee.

The testimony presented was based on official WSWC reports, statements and positions, as well as efforts involving the WSWC's longstanding collaboration with the Native American Rights Fund (NARF) to support federal policies that facilitate the negotiated resolution of Indian water rights claims.

For three decades, the WSWC, WGA, and NARF have worked together as part of an Ad Hoc Group on Indian Water Rights to support the negotiated settlement of Indian reserved water rights claims. Although Congress has authorized 27 Indian water rights settlements, the water rights claims of many more tribes remain un-quantified and the cost and scope of resolving these rights is increasing sharply. However, obtaining federal funding necessary to resolve these claims has proven to be difficult. Providing the federal funding needed to negotiate and implement Indian water rights settlements is a trust obligation that is critical to the well-being of western states, Indian Country, and the Nation as a whole. Funding is also necessary to settle major claims against the United States.

The Prior Appropriation Doctrine and Indian Water Right Claims

For well over a century, the doctrine of prior appropriation has governed the allocation of water in most western states. Under this system, the right to divert water from a stream is based on the notion of "first in time, first in right," which means that the first parties to physically divert and use water for "beneficial use" have priority to use the water. Thus, senior water right holders with earlier priority dates (the date the water was first put to beneficial use) can force users with junior priority dates to curtail or stop their use in times of shortage.

Most non-Indian water development in the West occurred after the federal government entered into treaties with tribes to establish permanent homelands, or reservations, for the tribes. These treaties typically did not specify the tribes' water rights, an issue which the U.S. Supreme Court addressed in its 1908 decision in *Winters v. United States*, 207 U.S. 564 (1908). The Court held that tribal treaties impliedly reserved water rights necessary to meet the purpose of a tribe's reservation. These reserved rights, or "*Winters* rights," and other kinds of tribal water rights arising under federal law, exist as federal enclaves within state legal systems and differ from prior appropriation rights because they arise independently of beneficial use; are indeterminate in amount until adjudicated; are measured by the present and future supplies needed to fulfill the purpose of a reservation instead of past uses; and have priority dates that correspond to the date the federal government created the reservation.

The Need to Resolve Tribal Water Rights Claims

Resolving Indian water rights claims is critical for western states, because tribal rights typically have priority dates that are senior to non-Indian uses, and therefore have the potential to displace established state-issued rights. This is especially problematic where tribal rights pertain to river systems that are fully-appropriated for non-Indian uses. The unquantified nature of many tribal rights creates great uncertainty with regard to existing state-based uses and can serve as an impediment to local, state and regional economic development. Given that water supplies are increasingly stressed due to prolonged drought, reduced snowpack, and other factors, including growing demands, quantifying Indian water rights claims and determining their impacts on state-issued rights is essential for western states to address increasing water demands related to growing populations and to provide certainty as to state-based water uses. Moreover, the quantification of tribal claims may provide a mechanism to allow for [instate] water marketing between tribes and non-Indian users such as fast growing western cities.

Why Settlements are Preferred

Settlements are the preferred manner of resolving tribal water rights claims. First, they give states and tribes certainty and control over the outcome of water rights adjudications, whereas litigated outcomes are fraught with uncertainty. Second, settlements build positive relationships between states, tribes, and the federal government, which are essential because water is a shared resource that all parties must cooperatively manage after adjudication. Third, Indian water rights claims are extremely complex and settlements enable tribes and non-Indian neighbors to craft mutually-beneficial solutions tailored to their specific needs, including the development of water infrastructure and water markets which increase available water supplies for all users. Fourth, settlements can provide mechanisms that enable tribes to turn quantified rights into “wet water,” while litigation typically provides tribes with “paper rights” only. Fifth, settlements are often less costly and time-consuming than litigation, which can last for decades and can be extremely expensive for all parties.

The Need for Federal Funding

The federal government holds Indian water rights in trust for the benefit of the tribes and is joined as a party in water rights adjudications involving tribes. This means that the federal government has a fiduciary duty to protect tribal water rights and has a responsibility to help tribes adjudicate their rights and ensure that settlements are funded and implemented. It also means that each settlement must be authorized by Congress and approved by the President.

In many cases, tribes have significant breach of trust claims against the federal government for failing to protect their water rights. Generally, as part of a settlement, tribes will waive these claims and a portion of their claimed water rights in consideration for federal funding to build needed drinking water infrastructure, water supply projects, and/or tribal fishery restoration projects. Consequently, the obligation to fund settlements is analogous to, and no less serious than, the United States' obligation to pay judgments rendered against it.

Nevertheless, interpretations of the federal trust responsibility vary from one administration to another and require intensive discussions often on a settlement-by-settlement basis. Some prior administrations have taken a narrow view of this trust responsibility and settlements that benefit non-Indians, asserting that federal contributions should be no more than the United States' calculable legal exposure which is difficult to determine. It has long been an accepted premise that the federal government should bear the primary responsibility for funding tribal settlements. Congress should consider the federal government's fiduciary duty towards the tribes and ensure that appropriations for authorized settlements are sufficient to ensure timely, fair and honorable resolutions of tribal claims. Such an approach not only serves the interest of the United States in ensuring successful resolution of tribal rights, but assists western states in resolving these difficult and potentially disruptive claims.

Funding During the Settlement Process

Tribes need federal funding to retain attorneys and experts to undertake the complex and costly legal and technical studies that are a mandatory prerequisite to any negotiation. States and tribes also rely on federal negotiating teams under the Indian Water Rights Office within the Department of the Interior, which provides one federal voice and expedites the settlement process. Failing to adequately fund these programs hinders the resolution of tribal claims, thereby prolonging uncertainty regarding state-issued rights. Thus, Congress and the Administration should fully fund the Indian Water Rights Office and provide tribes with sufficient resources to participate in the settlement process.

Authorizing Funding to Implement a Settlement

In the arid West, where water is scarce and tribal rights often pertain to fully-appropriated stream systems, settlements often require the construction of water storage and delivery projects to augment or allow existing water supplies to be used more advantageously by all water users. These projects generally do not reallocate water from existing non-Indian water users, but allow tribes to develop additional water supplies in exchange for foregone claims. Without federal monetary resources to build these projects, settlements are simply not possible in many cases.

While federal support is essential to settlements, a number of western states have also acknowledged that they are willing to bear an appropriate share of settlement costs. To this end, western states have appropriated tens of millions of dollars for existing settlements and devoted significant in-kind resources, including the administrative resources associated with the negotiation process and the value of their water rights.

Appropriating Funding for Settlements

Congressionally-authorized settlements are receiving funding, but there is a need for increasing appropriations. Moreover, the House Republican Conference adopted a moratorium on earmarks in the 112th Congress that apparently includes Indian water rights settlements. Settlements are not earmarks benefitting a specific state or congressional district, but represent trust obligations of the United States. They involve a quid-pro-quo in which tribes receive federal funding in

exchange for waivers of tribal breach of trust claims against the federal government. If Congress is unable to implement settlements as a result of earmark reform, litigation will be the primary means of resolving tribal water right claims. This could result in decades of associated legal expenses and court-ordered judgments against the United States that would likely exceed the total costs of settlements, thereby increasing costs for federal taxpayers.

In addition, current budgetary policy (pay go) requires water rights settlement funding to be offset by a corresponding reduction in some other discretionary program. It is difficult for the Administration, states, and tribes to negotiate settlements knowing that funding is uncertain or may only occur at the expense of some other tribal or essential Interior Department program. Consequently, Congress should consider the unique legal nature of settlements, namely that the United States is receiving something of value in exchange for appropriating settlement funds and fulfilling its tribal trust responsibility, thereby avoiding potentially costly litigation.

The Reclamation Water Settlements Fund

In addition to the tool of direct appropriations which Congress has available to it to fund Indian Water Rights settlements, Title X of the Omnibus Public Lands Management Act, which became law in 2009, established a Reclamation Water Settlements Fund in the U.S. Treasury to finance Reclamation projects that are part of Congressionally-approved Indian water right settlements. The Fund will provide up to \$120 million per year for ten years with money transferred from the Reclamation Fund and prioritized for settlements in New Mexico, Montana, and Arizona. However, the Fund will not begin receiving money until FY 2020, leaving a significant gap in funding for various projects, the costs of which may increase significantly by FY 2020.

The Emergency Fund for Indian Safety and Health (EFISH)

One way Congress might address this gap is by appropriating money to the Emergency Fund for Indian Safety and Health (EFISH), authorized by Title VI of the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act 2008. EFISH currently authorized about \$600 million for water supply projects that are part of Indian water settlements approved by Congress over a five-year period beginning October 1, 2008. This funding is above amounts made available under any other provision of law.

EFISH funding is only authorized through FY2012, and the Administration has not yet requested money for EFISH in its budget requests. It is still in the process of creating a required spending plan for these funds. One way to address the absence of a federal spending plan might be for Congress to promptly appropriate authorized money into Reclamation's Settlements Fund, which already prioritizes funding in specified amounts for approved settlements.

The Consequences of Not Funding Settlements

If settlements are not authorized and funded, tribes may have no choice but to litigate their water claims. This is problematic because it may give them "paper rights," but may not provide them with a way of turning those rights into "wet water." Litigated outcomes could also provide

tribes with senior water rights that could displace established state-issued water rights that are essential to meet non-Indian industrial, residential, and municipal needs in the West.

For instance, the Navajo Nation's settlement with New Mexico, which Congress has authorized, provides the Nation with an amount of water within New Mexico's Colorado River Compact allocation. The settlement still requires court-approval and could fail for a lack of appropriated funds. If it fails, the Navajo Nation would have little choice but to litigate its water rights claims. The United States has already filed claims on behalf of the Navajo Nation that exceed New Mexico's Colorado River apportionment under the Compact. If the United States and the Navajo Nation were to prevail on these claims, the allocation of water between the seven Colorado River Basin states could be jeopardized, disrupting the entire Southwestern economy.

Montana has also reached settlements with the Fort Belknap and Blackfeet Tribes as part of a state-wide adjudication process aimed at resolving its federal reserved water rights claims by 2020. However, until Congress authorizes these settlements, state-issued water rights in basins where these tribes have claims will remain in limbo. If Congress delays authorization, the tribes may litigate their claims in court, which could disrupt established non-Indian uses.

In addition to the previously mentioned costs associated with litigated outcomes, postponing the implementation of Indian water rights settlements will be far more expensive for the federal government in the long-run because increasing water demands, decreasing water supplies, and other factors will only increase the costs of resolving these claims.

Senate Committee on Energy and Natural Resources Hearing on Rural Water Projects

On July 31, 2012, the WSWC was invited to testify on Rural Water Project before the Senate Committee on Energy and Natural Resources. Nathan Bracken, Legal Council for the WSWC provided testimony based primarily on WSWC Position #343, which was sent to Chairman Bingaman and Ranking Member Murkowski in the form of a letter on June 8, 2012. It expressed support for legislative action to establish a dedicated funding source for the completion of federal rural water projects authorized by Congress for construction by the Bureau of Reclamation. Portions of the testimony are also based on WSWC Position #333, which sets forth the WSWC's long-standing policy in support of using receipts accruing to the Reclamation Fund to finance western water development, including the types of rural water projects that would receive funding under S. 3385.

The Need for Rural Water Projects in the West

Across the West, rural communities are experiencing water supply shortages due to drought, decreasing groundwater supplies, and inadequate infrastructure. Some communities have had to haul water over substantial distances. Moreover, those water supplies that are available to these communities are often of poor quality and may be impaired by naturally occurring and man-made contaminants, including arsenic and carcinogens, which impacts their ability to comply with

increasingly stringent federal water quality and drinking water mandates. At the same time, many rural and Tribal communities in the West are suffering from significant levels of unemployment and simply lack the financial capacity to pay for drinking water system improvements.

Since the 1980s, Congress has authorized Reclamation to address this need by designing and constructing projects to deliver potable water supplies to rural communities in the 17 western states. Furthermore, Congress established Reclamation's Rural Water Supply Program when it enacted the Rural Water Supply Act of 2006 (Pub .L. 109-451), authorizing the agency to work with rural communities in the West, including Tribes, to assess potable water supply needs and identify options to address those needs through appraisal investigations and feasibility studies.

In 2009, the WSWC worked closely with Reclamation to identify sources of information on potable water supply needs in non-Indian rural areas of the West. Reclamation released a draft assessment report on July 9, 2012 that discusses the results of this effort, finding that the identified need for potable water supply systems in rural areas of the 17 western states ranges from \$5 billion to \$8 billion, not including another estimated \$1.2 billion for specific Indian water supply projects.⁸

The Draft Report noted that there are currently eight active rural water projects located in Montana, New Mexico, North Dakota, and South Dakota, including the Lewis and Clark Rural Water Supply Project, which is located mostly in South Dakota but encompasses parts of the non-Reclamation states of Iowa and Minnesota.⁹

The report also noted that of eleven rural water projects that Congress authorized Reclamation to undertake between 1980 and 2007 (when the Rural Water Supply Act was enacted), only four have been completed.¹⁰

According to Reclamation, the total amount of Federal funding needed to complete these eight authorized projects is now \$2.6 billion, which is substantially higher than the \$2 billion that Congress originally authorized. This increase is due in part to the rising costs of materials and labor as well as inflation. Nevertheless, Reclamation estimates that these authorized projects could be completed by 2029 at a total Federal cost of around \$3 billion, so long as Federal funding reflects the estimates provided in the original final engineering reports for each of the authorized projects – about \$162 million annually. However, at current funding levels of around \$50 million for construction, Reclamation estimates that some projects could be delayed beyond 2063 despite the expenditure of almost \$4 billion in Federal funds by that point. Moreover, an additional \$1.1 billion in Federal expenditures would be needed to complete those projects that are not completed by 2063.¹¹

⁸Bureau of Reclamation, Assessment of Reclamation's Rural Water Activities and Other Federal Programs that Provide Support on Potable Water Supplies to Rural Communities in the Western United States, 8 (July 9, 2012), available at: <http://www.usbr.gov/ruralwater/docs/Rural-Water-Assessment-Report-and-Funding-Criteria.pdf>.

⁹*Id.* 3 – 4.

¹⁰*Id.* at 1 – 3.

¹¹*Id.* at 5.

Federal Funding for Rural Water Projects Under S. 3385

S. 3385 would provide \$80 million per year for each of fiscal years 2013 through 2029 to complete the construction of rural water projects that have already received Congressional authorization. Other projects may be eligible for funding if: (1) the Secretary of the Interior completes a feasibility report for the project by September 30, 2012 that recommends its construction; and (2) Congress authorizes the project's construction after S. 3385's enactment.

This funding represents a relatively modest Federal investment, compared to the increased costs that will likely occur if funding remains at current levels. We recognize that there are Federal budget constraints. Nevertheless, such constraints do not negate the Federal responsibility to complete authorized rural water projects, particularly those intended to fulfill in part a solemn Federal promise and trust responsibility to compensate States and Tribes for lost resources as a result of the construction of Federal flood control projects. It is also important to note that the Federal expenditures provided under S. 3385 would generate significant and actual returns on this investment, including but not limited to:

- National Economic Impacts: According to a 2008 U.S. Conference of Mayors report, one dollar invested in water supply and sewer infrastructure increases private output, or Gross Domestic Product, in the long-term by \$6.35. Furthermore, for each additional dollar of revenue generated by the water supply and sewer industry, the increase in revenue that occurs in all industries for that year is \$2.62.¹²
- Economic Impacts and Job Creation in Rural Communities: Investments in rural water projects have a direct impact on the economies of the communities serviced by those projects. For example, a 2006 study by HDR, Inc. on the economic impacts of constructing the Lewis and Clark Rural Water System, which would receive funding under S. 3385, found that the total economic impact to South Dakota, Iowa, and Minnesota would total \$414.4 million. The report also estimates that the project's construction would directly or indirectly create 7,441 jobs. On a yearly basis, this equals the creation of 533 direct and indirect jobs with average annual salaries ranging from \$25,591 to \$33,462. Approximately 72% of the economic impacts would be realized in South Dakota, with 17% in Iowa and 11% in Minnesota.¹³

¹²The U.S. Conference of Mayors: Mayors Water Council, Local Government Investment in Municipal Water and Sewer Infrastructure: Adding Value to the National Economy (August 2008), available at:

<http://www.usmayors.org/urbanwater/documents/LocalGovt%20InvInMunicipalWaterandSewerInfrastructure.pdf>

¹³HDR, Inc., The Economic and Fiscal Impacts of Constructing the Lewis and Clark Rural Water System: 2004 Study and 2006 Update, 2 – 3, 63 – 64 (March 2006), available at:

<http://www.lcrws.org/pdf/EconomicImpactStudy/EconomicImpactStudy.pdf>. See also Bureau of Reclamation, *supra* note 1 at 4 (discussing Federal costs for currently authorized rural water projects).

- Improved Potential for Economic Development in Rural Areas: The economy of every community, especially rural communities, requires sufficient water supplies of suitable quality. Such supplies depend upon adequate water infrastructure. Improving the water infrastructure of the rural and Tribal communities that would be affected by S. 3385 will improve their ability to develop their economies in ways that are not possible with their current water supplies.
- Improved Quality of Life: The types of water projects that would receive funding under S. 3385 would meet the same water quality standards as public systems. These projects would therefore provide a higher quality of safe drinking water and associated health benefits than the water supplies upon which these communities currently rely.
- Reduced Costs: Rural communities would no longer need to expend limited resources drilling and maintained wells, softening and treating water, or hauling water. In addition, such communities would see decreased electrical pumping costs.
- Rural Fire Protection: Rural water systems provide access to water supplies for fire protection.
- Livestock Use: Rural water projects provide a more reliable and better supply of water for livestock. They also have the potential to decrease the impacts of livestock grazing on riparian areas by allowing for the delivery of water away from these sensitive areas.
- Increased Property Values: In some areas, the resale value of property may increase with a more reliable, safe, clean and adequate water supply.

The Use of the Reclamation Fund Under S. 3385

Section 3(a) of S. 3385 would provide funding for eligible rural water projects by establishing a Reclamation Rural Water Construction Fund (RRWCF) within the U.S. Treasury that would be financed from revenues that would otherwise be deposited in the Reclamation Fund. These funds would not be subject to further appropriation, would be in addition to other amounts appropriated for the authorized projects, and should not result in corresponding offsets to other critical Reclamation and Department of the Interior programs. The Secretary of the Interior would also invest the portion of these receipts not needed to meet current withdrawals, and the resulting interest and proceeds from the sale or redemption of any obligations would become part of the RRWCF. The RRWCF would terminate in September 2034, at which point its unexpended and unobligated balance would transfer back to the Reclamation Fund.

Congress established the Reclamation Fund when it enacted the Reclamation Act of 1902 (P. L. 57-161) and it was intended to be the principle means of financing Federal western water and power projects in the 17 western states. As stated in Section 1 of the Reclamation Act, it provides monies "...reserved, set aside, and appropriated as a special fund in the Treasury."

The Reclamation Fund's receipts are derived from water and power sales, project repayments, and receipts from public land sales and leases in the 17 western states, as well as oil and mineral-related royalties. However, the receipts that accrue to the Fund each year are only available for expenditure pursuant to annual appropriations acts. Over the years, rising energy prices and declining Federal expenditures from the Fund for Reclamation purposes have resulted in an increasingly large unobligated balance.

According to the Administration's FY2013 budget request, actual and estimated appropriations from the Reclamation Fund are \$953 million for FY2011, \$877 million for FY2012, and \$859 million for FY2013. While these appropriations have decreased, the Fund's unobligated balance has grown from an actual balance of \$9.6 billion in FY2011 to an estimated \$12.4 billion by the end of FY2013. Contrary to Congress' original intent, instead of supporting western water development, much of this money has gone instead to other Federal purposes.

The WSWC has long supported using the Reclamation Fund for its intended purpose of financing western water development, including the types of rural water projects that would receive funding under S. 3385. As stated in WSWC Position #333, Congress and the Administration should:

[F]ully 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.

Unlike typical Congressional authorizations that often do not specify a funding source and may require more Federal monies in addition to current authorizations, the RRWCF would rely on the established stream of receipts and associated interest that already accrue to the Reclamation Fund. Furthermore, as required by Section 3(b)(3) of S. 3385, no amounts may be deposited or made available to the RRWCF if the transfer or availability of the amounts would increase the Federal deficit.

It is also important to note that the concept of using receipts accruing to the Reclamation Fund to establish a separate account to finance specific water projects is not new. Specifically, Congress established the Reclamation Water Settlements Fund (RWSF) under Title X of the Omnibus Public Lands Management Act of 2009 (Pub .L. 111-11). Like the RRWCF, the RWSF consists of receipts transferred from the Reclamation Fund and provides specified levels of funding starting in FY2020 for a period of 10 years to help finance specified water infrastructure projects that are part of Congressional-authorized water settlements, especially Indian water rights settlements. The WSWC supports the RWSF for the same reason it supported the establishment of the RRWCF as proposed in S. 3385 – the use of these funds furthers the construction of much needed water infrastructure in the West in accordance with the Reclamation Fund's original intent and purpose.

Funding Prioritization Under S. 3385

Before expenditures from the RRWCF could be made, Section 3(c)(3) of S. 3385 would require the Secretary of the Interior to develop programmatic goals to ensure that the authorized projects are constructed as expeditiously as possible, and in a manner that reflects the goals and priorities of the projects' authorizing legislation and the Rural Water Supply Act of 2006. The bill would also require the Secretary to develop funding prioritization criteria that would consider: (1) the "urgent and compelling need" for potable water supplies in affected communities; (2) the status of the current stages of completion of a given project; (3) the financial needs of affected rural and Tribal communities; (4) the potential economic benefits of the expenditures on job creation and general economic development in affected communities; (5) the ability of a given project to address regional and watershed level water supply needs; (6) a project's ability to minimize water and energy consumption and encourage the development of renewable energy resources, such as wind, solar, and hydropower; (7) the needs of Indian tribes and Tribal members, as well as other community needs or interests; and (8) such other factors the Secretary deems appropriate.

As the WSWC stated in its June 8 letter, these programmatic goals and funding priorities "...should be developed in a transparent manner in consultation with the affected communities and States – and should consider existing state water plans and priorities." States and the affected communities have on the ground knowledge of the facts and circumstances associated with the authorized projects that would receive funding under S. 3385, and are therefore the most appropriate entities to assist the Secretary in developing these goals and priorities.

WATER DATA EXCHANGE

The WSWC began a new initiative in 2011 to develop a framework that would facilitate the sharing and publication of important water data between state and federal partners, and the public. This effort, under a contract with the Western Governors' Association, was overseen by the Council's Water Information and Data Subcommittee (WIDS). In 2012, the WSWC hired Sara Larsen as the new Water Data Exchange (WaDE) Program Manager, and in cooperation with WestFAST Liaison Officer Dwane Young, they began to develop the necessary components of the new data sharing program.

Much of the groundwork for the project was begun during the first portion of the year, while the latter half was devoted to infrastructure component development.

In parallel with the WaDE project, WSWC staff members and the WestFAST liaison also met with and collaborated extensively on a related water/energy project, headed by Sandia National Laboratory, designed to ascertain the constraints placed on energy development by the availability of water in the West. To facilitate state water agency participation in the Sandia assessment, WSWC staff assisted with the formation of a Water Availability Metric Development Team, consisting of state water agency and federal agency specialists. The team worked with Sandia to review and assemble the initial water availability metrics eventually used to produce data for a 20-year transmission planning study undertaken by the Western Electric Coordinating Council (WECC). In late 2012, the preliminary results of the water availability metric analyses were included in WECC's long-term planning as a new potential constraint.

In order to develop a robust framework for the data exchange, interested partners first needed to understand the current capabilities and methods used by member state water planning programs. They also needed to evaluate the current technologies employed by similar exchanges, document any issues that needed to be overcome and make recommendations to WIDS. This led to the formation of four workgroups:

- The State Capabilities Assessment Workgroup was charged with evaluating the current capabilities of the western states with respect to water allocation, supply, and demand data.
- The Methodologies Workgroup was to evaluate the existing science for estimating water availability and consumptive use. This workgroup was utilized to catalog and document the existing methods and identify gaps and needs for further science and new methodologies for estimating water availability and consumptive use.
- The Data Exchange Template (Schema Development) Workgroup was to identify the data elements necessary for exchanging data. Once the data elements were identified, this workgroup developed a data exchange schema, a standard format for transferring data using eXtensible Markup Language (XML).
- The Data Exchange Methodology Workgroup was charged with researching the existing field of data exchange technologies. They evaluated existing state, federal, and academic data exchange collaborations and made recommendations as to which approach should be taken.

In an effort to explain for the WaDE project and also review the schema developed by the Data Exchange Template Workgroup, the WaDE Program Manager and WestFAST Liaison conducted on-site outreach visits to fourteen of the eighteen WSWC member states. This also included visits to Sandia National Laboratory, as well as primary offices of federal agency partners, including the U.S. Department of Agriculture's National Resources Conservation Service (NRCS), the Department of Interior's Bureau of Reclamation, and U.S. Geological Survey (USGS). Over 22 outreach, conference, and council meeting presentations related to the Water Data Exchange (WaDE) program were given. These visits helped gather broad support for the program, and also a much greater appreciation for the hurdles that would need to be overcome before a Westwide and uniformly comparable water data exchange could be created. Many informational webinars related to WaDE development were also conducted.

During 2012, new file and web servers were purchased by the WSWC to house both the data exchange information and the gateway website portal. This also allowed for an update of the Council's general information technology (IT) related hardware, an overhaul of backup protocols, updated security and firewall software and hardware, significantly faster and less expensive broadband internet access, implementation of wireless network capability, and a substantial update to the WSWC's website.

The initial data exchange schema developed by the Data Exchange Template workgroup (version 0.1) was implemented as a full database in both PostgreSQL and SQL Server. Sample data from several state water agencies and from Sandia National Lab were imported into the database for demonstration purposes. The programming code was developed to access the data via the databases and return them as XML formatted data to a client's web browser using a Linux-Apache web server platform and the server-side scripting language Hypertext Preprocessor (PHP). A user-friendly mapping interface for implementing the web services calls was created using ESRI's proprietary Geographic Information System (GIS) software and cloud solution, ArcGIS Online.

These three major infrastructure components were demonstrated at the Fall Council Meeting in San Antonio, Texas, which included a successful live presentation of web service requests and data retrieval from the WSWC's database server in Utah.

After the majority of the outreach visits were conducted, version 0.1 of the data exchange schema required a significant number of changes (to version 0.2). These changes were made to the PostgreSQL database in 2012.

During outreach visits, state agency staff expressed their support of the project, but were concerned about not being able to complete mission-critical tasks with their limited resources. To assist the states with these concerns, the WaDE Program Manager assembled a five-state partnership between Texas, Oklahoma, Washington, Oregon and Idaho, and coordinated their efforts to apply for grant funding from the Environmental Protection Agency's National Environmental Information Exchange Network (NEIEN) or Exchange Network (EN) for short. The partners asked the EN to assist with the cost of implementing the WaDE databases and web service infrastructure within their state IT departments. WSWC also asked for additional funding to keep the WaDE Program Manager coordinating position on staff and for possible contractor assistance. The WaDE-EN Grant Partners submitted their application for \$500,000 in funding in late 2012.

WESTERN STATES FEDERAL AGENCY SUPPORT TEAM

The Western States Federal Agency Support Team (WestFAST) promotes collaboration between the WSWC and twelve federal agencies with water resource management responsibilities in the West. WestFAST was formed in 2008 in response to the Western Governors' Association report: *Water Needs and Strategies for a Sustainable Future: Next Steps Report* ("Next Steps"). From June 2012 to present, WestFAST has made progress on three focus areas from the Next Steps Report: Water to Meet Future Demands, Water Infrastructure Needs and Strategies, and Climate Impacts. The following are some highlights of WestFAST's work related to specific objectives in the report.

- WestFAST gave 30 presentations at five WSWC meetings.
- Conducted monthly conference calls between twelve federal agencies.
- Sent the monthly WestFAST Newsletter to 127 federal and state recipients.
- Hosted four federal Collaboration Series lectures via webinar to discuss federal initiatives.
- Developed and transitioned the WaDE project to the new WSWC WaDE program manager.

Water to Meet Future Demands - WestFAST facilitated the exchange of federal and state water data as part of the Water Data Exchange (WaDE) by:

- presenting the project plan to WSWC for approval;
- conducting workshops with fourteen of the eighteen WSWC member states;
- developing a survey to assess state capabilities to support the data exchange;
- designing the schema and database;
- facilitating four workgroups that met monthly;
- coordinating with the USGS Water Census, Sandia and other National Labs;
- assisting the WSWC in developing a WaDE demonstration; and
- transitioning the project to the new WSWC WaDE Program Manager for completion.

Water Infrastructure Needs and Strategies - WestFAST supported WSWC in hosting an Infrastructure Symposium in November 2012. Specifically, WestFAST recruited speakers for this symposium, held in Phoenix, Arizona. The symposium encouraged discussions on how federal agencies can better support the states in augmenting water supply and managing infrastructure to meet future needs.

Climate Impacts - WestFAST supported WSWC participation in a National Integrated Drought Information System (NIDIS) workshop to address issues related to climate and water supply variability. Specifically, WestFAST recruited federal speakers for the workshop, which was held September 24-26, 2012 in San Diego, CA.

Next Steps describes the need to improve collaboration between the states and federal agencies. In response, WestFAST developed a draft Principles of Collaboration report that was discussed extensively and substantially revised. WestFAST consulted with WSWC members to evaluate collaboration between state and federal agencies to determine what is working well and

what needs improvement. WestFAST intends to share the report among its member agencies and with the western states.

WestFAST is in the process of revising its Operating Guidelines and its Declaration of Cooperation to clarify the scope of work and include the additional agencies that have joined since the formation of WestFAST in 2008, when it only consisted of nine agencies.

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 problem solving, 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 2012 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.

Western Governors' State of the State Addresses

A number of western governors state of the state addresses touched on water-related issues. Kansas Governor Sam Brownback (R) said, "Almost since statehood, we have told Kansans with water rights they must 'use-it-or-lose-it.' This has encouraged the overuse of water, particularly of the Ogallala [Aquifer]. I propose to repeal the 'use-it-or-lose-it' doctrine of our water law [as with respect to groundwater]. It is way past time we move from a development policy with our water to a conservation ethic. We have no future without water. This is altogether fitting and proper. For our government is not only a compact among those who are living, but a covenant with those who are yet to be."

Arizona Governor Jan Brewer (R) expressed concern over certain federal policies, but noted, "We have so many monuments in Arizona that remind us of how things are supposed work - in partnership with Washington." She then cited examples of successful state-federal partnerships, including the Theodore Roosevelt Dam and the Central Arizona Project, which she said has brought "...life-sustaining water to cities, and farms and Native American communities."

In California, Governor Jerry Brown (D) said his state is working with the Department of the Interior on the Bay Delta Conservation Plan to preserve habitat for endangered fish species while diverting water for use in Central and Southern California. "Together we agreed that by this summer we should have the basic elements of the project we need to build," he said. "We know more now and are committed to the dual goals of restoring the Delta ecosystem and ensuring a reliable water supply. This is an enormous project. It will ensure water for 25 million Californians and for millions of acres of farmland as well as a hundred thousand acres of new habitat for spawning fish

and other wildlife. To get it done will require time, political will and countless permits from state and federal agencies.”

Colorado Governor John Hickenlooper (D) said, “...costly litigation and endless court battles have characterized the state’s water policy over many years.” However, he said Colorado’s Interbasin Water Roundtable process represents a “better way forward,” noting that the process created a “historic agreement” last year between Denver and the state’s Western Slope.¹⁴

Bureau of Reclamation

FY2013 Budget

On February 13, President Obama sent his \$3.8 trillion FY2013 budget request to Congress. “This Budget reflects the importance of safeguarding our environment while strengthening our economy,” he said. “We do not have to choose between having clean air and clean water and growing the economy.” The request is intended to cut the deficit by \$4 trillion over the next decade.

Under the FY2013 request, the Department of the Interior funding would remain relatively flat at \$11.4 billion. Within Interior, the Bureau of Reclamation would have received \$1 billion, a \$14 million cut from FY2012 enacted levels. Of this amount, \$423 million would have funded operation, maintenance, and rehabilitation activities at Reclamation facilities. Another \$395.6 million would have supported resource management and development efforts. WaterSMART funding would have risen \$6.8 million to \$53.9 million and would include \$20.3 million for the Title XVI program, \$21.5 million for WaterSMART grants, and \$6 million for the Basin Study program, among other efforts.

Reclamation sought funding for a number of efforts in California, including \$128 million for the Central Valley Project, \$36 million for the Bay-Delta Program, and \$39.9 million for the Central Valley Project Restoration Fund. In the Klamath River Basin in California and Oregon, \$18.6 million would go to the Klamath Project while \$7.1 million would fund restoration efforts in the upper basin. Other projects of note included \$17.8 million for the Multi-Species Conservation Program in the Lower Colorado River Basin; \$22.5 million for the Middle Rio Grande Project in New Mexico; and \$18 million for the Columbia and Snake River Salmon Recovery Project in the Northwest. Of further note, Interior’s budget requested proposes consolidating Central Utah Project (CUP) activities within Reclamation. CUP would receive \$21 million, a \$7.7 million cut.

Estimated appropriations from the Reclamation Fund would total \$859 million for FY2013. Projected FY2013 fund receipts are \$2.16 billion, most of which would be derived from mineral leasing revenues on federal lands. In comparison, actual fund receipts for FY2011 and FY2012 were about \$2 billion each, while appropriations totaled \$953 million and \$877 million respectively. The estimated unobligated balance at the end of FY2013 is \$12 billion, compared to \$9.6 billion in FY2011 and \$10.7 billion for FY2012.

¹⁴http://www.stateline.org/live/static/State_of_the_state_speeches. *Western States Water*, #1960, December 9, 2011.

With respect to tribal projects, Reclamation requested \$46.5 million to establish an Indian Water Rights Settlement Account to implement the four settlements that were authorized as part of the Claims Resolution Act of 2010, including \$10 million for the Crow settlement in Montana; \$2.5 million for the White Mountain Apache settlement in Arizona; and \$4 million and \$5 million for the Taos and Aamodt settlements in New Mexico. The remaining \$25 million would implement the Navajo-Gallup Water Supply project, a key part of the Navajo Nation settlement in New Mexico. In addition, the Bureau of Indian Affairs (BIA) sought \$9 million for the Nez Perce/Snake River settlement in Idaho and \$12 million for the Duck Valley settlement in Nevada. The BIA also requested \$8 million for the Navajo Nation settlement and \$6 million for the Navajo Nation Water Resources Development Trust Fund.

FY2013 Energy/Water Appropriations

On April 25, the House Appropriations Committee approved a FY2013 energy and water appropriations bill, which provided funding for the Bureau of Reclamation, the U.S. Army Corps of Engineers (Corps), and Department of Energy (DOE). The bill would appropriate \$32.1 billion, which is about \$965 million less than the President's budget request, but \$88 million above FY2012 levels. Under the bill, Reclamation would receive \$966.5 million, which is \$67.5 million below the President's request and \$81.2 million below FY2012 levels. Reclamation's WaterSMART efforts would also receive \$47.1 million, about \$6.8 million below the request and about even with current levels. Specific WaterSMART programs would be funded as follows: (1) \$24.6 million for the Title XVI program, which is \$4.4 million above the request; (2) \$12.2 million for the WaterSMART Grants program, \$9.3 million less than the request; (3) \$5 million for the Water Conservation Field Services Program, \$839,000 less than the request; (4) \$247,000 for the Cooperative Watershed Management Program, \$3,000 below the request; and (5) \$4.9 million for the Basin Studies program, \$1.1 million less than the request.

The bill rejected the Administration request for \$46.5 million to establish a separate Indian Water Rights Settlement Account within Reclamation to implement the four settlements that were authorized as part of the Claims Resolution Act of 2010. Instead, the bill would appropriate \$44.9 million for these settlements as part of Reclamation's Water and Related Resources account.

The CUP would receive \$21 million, \$7.7 million below last year's level and the same as the budget request. The bill also rejected an Administration proposal to transfer oversight of the CUP to Reclamation.¹⁵

On April 26, the Senate Appropriations Committee approved a FY2013 energy and water appropriations bill (S. 2465) to fund Reclamation, the Department of Energy, and the Army Corps of Engineers. According to the Committee, the bill totals \$33.4 billion, which is \$373 million below FY2012 levels and \$252 million less than the President's budget request. The bill follows the House Appropriations Committee's approval of its \$32.1 billion energy and water bill.

Under the bill, Reclamation would receive \$1.028 billion, \$19.7 million less than FY2012 but \$15 million more than the request and \$61.5 million more than the House bill. Of this amount,

¹⁵<http://appropriations.house.gov/News/DocumentSingle.aspx?DocumentID=292584>.

WaterSMART would receive \$53.9 million, which is \$6.8 million above last year's levels and about even with the request. Specific WaterSMART programs would be funded as follows: (1) \$21.5 million for the WaterSMART grant program; (2) \$5.9 million for the Water Conservation Field Services Program; (3) \$250,000 for the Cooperative Watershed Management program; (4) \$6 million for the Basin Studies program, and (5) \$20.3 million for the Title XVI Water Reclamation and Reuse Program. In comparison, the House bill included \$47.1 million for WaterSmart, which is about even with last year's levels.

Like the House bill, the Senate bill rejected an Administration request to establish a separate account within Reclamation to implement the four settlements that were authorized. Instead, the bills would fund the settlements through Reclamation's Water and Related Resources account. The Senate bill would provide the requested amount of \$46.5 million and the House bill would appropriate \$44.9 million.

Both bills also rejected an Administration proposal to fund the CUP through a separate account under Reclamation. Instead, both bills would appropriate \$21 million in CUP funding as a separate account within Interior, which is level with the request and \$7.7 million less than FY2012. The Secretary of the Interior would retain administrative responsibility for completion of the CUP under both bills.

Rural Water Projects

On February 8, Secretary of the Interior Ken Salazar announced \$50 million in Bureau of Reclamation funding for water infrastructure projects in the West. Of this amount, \$30 million would help to construct six rural water projects in North Dakota, Montana, South Dakota, and New Mexico. Reclamation selected the projects as directed by the Consolidated Appropriations Act of 2012, which contained funding and related requirements for most federal agencies. The other \$20 million would support fish passage and fish screen efforts, water conservation and delivery studies, environmental restoration efforts, and facility operation, maintenance, and rehabilitation.

"Building the infrastructure we need to deliver clean water to our nation's rural and tribal communities will create construction jobs and, when complete, will provide lasting benefits for local economies and public health," said Salazar.¹⁶

Rural Water Program Assessment Report

On July 9, the Bureau of Reclamation released a Rural Water Program Assessment Report that reviews the status of potable water projects for rural areas, sets forth the agency's plan for completing Congressionally authorized project's, and proposes construction funding prioritization criteria for Rural Water Program projects. The report also described federal programs supporting the development and management of water supplies in rural western communities, as well as Reclamation plans to coordinate the Rural Water Supply Program with similar programs managed by other agencies.

¹⁶<http://www.doi.gov/index.cfm>

Reclamation Commissioner Mike Connor said his agency has “...developed a comprehensive strategy for effectively using available resources towards the construction of rural water projects authorized for its involvement. Given the budgetary uncertainties, and rising construction costs, the strategy focuses on maximizing the impact of its limited available funding by establishing clear programmatic goals and a set of transparent prioritization criteria.” Connor further said this approach is intended to make “meaningful progress” in the construction of rural water projects.¹⁷

Reclamation Rural Water Construction Fund

On July 17, Senator Max Baucus (D-MT) and Senate Energy and Environment Chair Jeff Bingaman (D-NM) introduced a bill (S. 3385) that would provide \$80 million per year for high-priority rural water projects that Congress has already approved. In particular, the bill would establish a Reclamation Rural Water Construction Fund (RRWCF) financed from revenues that would otherwise be deposited in the Reclamation Fund. The RRWCF would terminate in September 2034, at which point the unexpended and unobligated balance of the RRWCF would be transferred back to the Reclamation Fund.

Before expenditures from the RRWCF can be made, the bill required that the Secretary of the Interior first develop programmatic goals that “...enable the completion of construction of the authorized rural water projects as expeditiously as possible; and reflect...the goals and priorities identified in the laws authorizing the authorized rural water projects [as well as] the goals of the Reclamation Rural Water Supply Act of 2006....”¹⁸

On July 31, the Senate Energy and Natural Resources Committee held a hearing on S. 3385. “According to Bureau of Reclamation analysis, an increase in funding for the construction of rural water projects to \$80 million per year would reduce the total Federal appropriations needed to complete the projects by more than \$1 billion,” said Committee Chair and bill co-sponsor Jeff Bingaman (D-NM). “So while the bill provides spending, it actually will save the Treasury over time.... Adequate water supplies are fundamental to our way of life, and far too many Americans still live without adequate, safe drinking water.” Senators Tim Johnson (D-SD) and Al Franken (D-MN) also voiced strong support for the bill.

Ranking Member Lisa Murkowski (R-AK) acknowledged the need for rural water infrastructure and said many communities in her state lack adequate sanitation. Nevertheless, she noted that “circumstances have changed” since Congress authorized the projects that would receive funding under the bill and that the spending “has to come from somewhere.”

Senator John Barrasso (R-WY) opposed the bill and cited a number of concerns, including among others: (1) a lack of transparency about how the bill will identify the offsets needed to ensure that it does not increase the deficit; (2) the bill would put some projects and states ahead of others; (3) there could be years in which the bill would be unable to transfer funds to projects because doing so would increase the deficit; and (4) that there are older authorized projects, including unfinished Indian irrigation projects, that would not receive funding.

¹⁷<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=40124>.

¹⁸See Rural Water Projects Testimony on p. 38.

Bingaman called on bill sponsor Senator Max Baucus (D-MT), who remarked, “When there’s no municipal drinking water system, you get your water from wells - sometimes they work and sometimes they don’t. Sometimes the water is contaminated. It’s unreliable, and there’s not enough good, clean water. We’ve got to get these rural water projects completed and the approach in this bill makes a lot of sense because the old way of doing things just hasn’t worked.”

Reclamation Commissioner Mike Connor testified that the Administration supports the goals of the bill but has concerns “with the mandatory funding aspects of it.” Connor did state that the bill will enable earlier completion of projects, some of which would not be completed until 2063 at current funding levels. He also expressed support for the use of offsets to ensure that the bill does not increase the deficit, but noted that “...even if an equivalent and acceptable offset is identified, use of those funds must be weighed against other priorities across the Federal government, including deficit reduction.” Connor further said that the Administration “...would expect that non-Federal entities will likely need to increase their share of funding to build these projects in the timeframes they have envisioned.”

WSWC Legal Counsel Nathan Bracken testified in support of the bill, stating, “We recognize that there are federal budget constraints. Nevertheless, such constraints do not negate the federal responsibility to complete authorized rural water projects, especially those projects intended to fulfill...a solemn federal promise and trust responsibility to compensate states and tribes for lost resources as a result of the construction of federal flood control projects.... The WSWC has long supported using the Reclamation Fund for its intended purpose of financing western water development, including the types of rural water projects that would receive funding under S. 3385.” Nathan also said the funds provided under the bill would “...generate significant and actual returns on this investment.”

Nathan’s testimony was based on WSWC Position #343, a letter that calls for a dedicated source of funding to complete rural water projects, and Position #333, which supports using receipts from the Reclamation Fund to finance western water development.¹⁹

Basin Studies

On March 21, Secretary of the Interior Ken Salazar announced that the Bureau of Reclamation would provide \$2.4 million in funding for five new basin studies to help states and local communities address current or projected imbalances between water supply and demand. The selected basins include the Sacramento-San Joaquin River Basin and the Los Angeles Basin in California; the Pecos River Basin in New Mexico; the Republican River Basin in Colorado, Kansas, and Nebraska; and the Upper Washita River Basin in Oklahoma. Interior’s WaterSMART program provides funding for the studies, which when coupled with \$3.9 million in funding from non-federal partners totals more than \$6.3 million.

¹⁹<http://www.energy.senate.gov/public/index.cfm/hearings?MonthDisplay=7&YearDisplay=2012>. *Western States Water*, #1992, July 20, 2012.

Each of the studies will consist of: (1) projections of future water supply and demand; (2) an analysis of how existing water and power operations and infrastructure will perform in the face of changing water realities; (3) development of options to improve operations and infrastructure to supply adequate water in the future; and (4) analysis of the options identified in the studies to help arrive at findings and recommendations about how to optimize operations and infrastructure to supply adequate water in the future.

“WaterSMART is a perfect example of the value of strong partnerships that bring Interior together with local water and conservation managers to create sustainable water supplies in the West,” said Salazar. “As we work together to study these complex river basins, we can explore options to help guide water management and administration for the future and ensure the health of our vital ecosystems for coming generations.”²⁰

Cooperative Watershed Management Program

On May 24, Reclamation Commissioner Mike Connor announced \$247,000 in Cooperative Watershed Management Program (CWMP) funding for eligible parties seeking to establish or expand local watershed management groups. Awards are limited to \$50,000 and no cost share is required. The program encourages stakeholders to form local groups to address their water management needs and is intended to reduce conflicts through collaborative conservation efforts in the management of local watersheds. It is part of Interior’s WaterSMART initiative. “The [program] will help coordinate and sustain clean and consistent water to communities in the West,” said Connor. “Reclamation continues to work with its stakeholders and partners to find better ways to conserve and reuse this precious resource.”²¹

On September 5, Commissioner Connor announced the selection of eight entities to receive \$333,500 in grants under the WaterSMART CWMP. The grants are intended to aid in the establishment and expansion of local watershed management groups, and will provide funding to organizations in Arizona, California, Colorado, Montana, Oregon, and Texas.

The CWMP is intended to improve water quality and ecological resilience, by providing financial assistance to watershed groups and encouraging diverse stakeholders to work together to address watershed needs. The program also supports Interior’s WaterSMART program and its National Blueways System. The Blueways System supports sustainable river and watershed strategies led by stakeholder communities and organizations.

“Developing and supporting local watershed management groups ensures local communities are involved in decisions and is vital to create healthy watersheds,” said Connor. “This funding will enable local communities to partner with Reclamation to conserve water in the West and will help Reclamation advance the goals of WaterSMART and the National Blueways System.”²²

²⁰<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=39545>.

²¹<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=39935>.

²²<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=40764>.

Senator Jon Tester (D-MT) first proposed the CWMP in 2008 as part of a stand-alone bill (S. 3085). Congress later established the program as part of the Omnibus Public Land Management Act of 2009. Of note, the WSWC wrote Tester in 2008 expressing support for the bill and to offer suggested changes.

Landscape Conservation Cooperatives

On August 15, Commissioner Connor announced \$1.7 million in WaterSMART funding for 12 applied science projects that will benefit the Desert and Southern Rockies Landscape Conservation Cooperatives (LCCs). Entities receiving funding must provide at least a 50% cost share and Reclamation estimates that combined federal and non-federal funding for the projects will total \$3.5 million. Some of the entities receiving funding include the New Mexico State Engineer's Office, the Arizona Game and Fish Department, the Nature Conservancy, Colorado State University, and the University of Arizona. "The projects we are funding will help resource managers as they strive to develop effective water management solutions," said Connor.²³

Secretary of the Interior Ken Salazar created the LCCs in 2009 to serve as a network of public-private partnerships that inform climate change adaptation strategies to ensure the sustainability of water, land, wildlife, and cultural resources in a specific ecological region. The Desert LCC encompasses portions of Arizona, California, Nevada, New Mexico, and Texas, as well as a large portion of northern Mexico. The Southern Rockies LCC includes large parts of Arizona, Colorado, New Mexico, and Utah, as well as smaller portions of Idaho, Nevada, and Wyoming.

Water and Energy Efficiency Grant Program

On October 30, the Bureau of Reclamation announced that it was seeking proposals under its WaterSMART Water and Energy Efficiency Grant program. Eligible projects should seek to conserve and use water more efficiently, increase the use of renewable energy, improve energy efficiency, protect endangered and threatened species, facilitate water markets, or address climate-related impacts on water or prevent water-related crises or conflicts. Eligible applicants include states, tribes, irrigation districts, water districts, and other entities with water or power delivery authority in the 17 western states.

Applications had to be submitted to one of two funding groups. The first group would provide up to \$300,000 for smaller projects that may take up to two years to complete. Reclamation expects that it will make the majority of awards under this group. The second group would provide up to \$1.5 million for larger, phased projects that take up to three years to complete. Applicants in this group may not request more than \$750,000 within a given year to complete each phase.²⁴

²³<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=40564>.

²⁴<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=41384>.

States Emergency Drought Relief Act

On December 13, House Natural Resources Committee Ranking Member Edward Markey (D-MA) introduced a bill (H.R. 6670) to reauthorize the Reclamation States Emergency Drought Relief Act of 1991, which authorizes the Bureau of Reclamation to assist state drought planning efforts and undertake efforts to minimize or mitigate drought damages or losses in the 17 Reclamation states and tribes within those states. Water and Power Subcommittee Ranking Member Grace Napolitano (D-CA) co-sponsored the bill with four other Democrats, including westerners Raúl Grijalva (D-AZ) and Ben Ray Lujan (D-NM).

The bill would reauthorize the act until 2017, and appropriate \$110 million to fund the program until that time, a \$20 million increase. It would also require Reclamation to review cooperative drought contingency plans that it developed under the Act to ensure that they reflect current hydrological conditions and address "...projected long-term climate variability and change...."

"Congress has failed to address extreme weather and climate change, and now with over fifty percent of the country in a state of drought, it's time for Congress to act and extend this critical...program," said Markey. "Let's provide drought relief to farmers and families now, before more livelihoods are destroyed." Napolitano also said the act "...provides Reclamation with the tools they need to help states plan for and deal with droughts. Coupled with water recycling and conservation efforts, drought planning readies our communities for future hydrologic challenges." Of note, WSWC Position # 347 "strongly supports" legislation to reauthorize the Act.

Clean Water Act/Environmental Protection Agency

Clean Water Act Regulatory Authority

On January 19, Republicans leaders from the Senate and House wrote EPA Administrator Lisa Jackson, expressing concern over a "sue and settle" tactic they believe the agency is using to expand its authority under the Clean Water Act (CWA). Specifically, the letter states "...EPA has been entering into settlement agreements that purport to expand Federal regulatory authority far beyond the reach of the [CWA] and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature."

The letter identifies various examples of settlements with the Natural Resources Defense Council and other groups that it believes exceeded EPA's authority. It also stated that EPA is negotiating with the Conservation Law Foundation and the Buzzards Bay Coalition over two lawsuits in the Northeast that allege the agency has a non-discretionary duty to regulate groundwater pollution and require states to regulate nonpoint sources of pollution. "Since neither allegation is true, we were very surprised to learn that EPA is choosing to settle these cases, rather than to honor the limits of its authority under the [CWA] and vigorously defend these cases," the letter said.

Although the letter does not seek details of the settlement discussions, it does ask EPA to answer questions regarding its perspective on the limits of its authority under the CWA, including among others: (1) whether a groundwater aquifer is a water of the United States under the CWA; (2)

whether EPA has authority under the CWA to regulate the leaching or direct discharge of pollutants into groundwater; (3) whether the agency has authority to “...commandeer a state legislature and require a state to enact an enforceable regulatory program for nonpoint sources;” and (4) whether the CWA gives the agency “any Federal regulatory authority” over nonpoint sources of pollution.

The letter was signed by Senate Environment and Public Works Committee Ranking Member James Inhofe (R-OK); Senate Subcommittee on Water and Wildlife Ranking Member Jeff Sessions (R-AL); House Transportation and Infrastructure Chair John Mica (R-FL); and House Subcommittee on Water Resources and Environment Chair Bob Gibbs (R-OH).

Of note, WSWC Position #337 affirms that the CWA was not intended and should not be applied to the management and protection of groundwater.²⁵

Concentrated Animal Feeding Operations

On January 19, the Attorney Generals of twelve states wrote the EPA, asking it to withdraw a proposed rule on Concentrated Animal Feeding Operations (CAFOs). According to the letter, the rule is intended to satisfy a settlement with environmental groups and would require all livestock operations falling under the CWA’s definition of a CAFO to respond to EPA information requests. However, the letter argues that EPA lacks jurisdiction over non-discharging CAFOs and has no authority to gather information from these operators. It also argues that the rule seeks data on nonpoint sources of pollution that fall outside of the National Pollutant Discharge Elimination System (NPDES) and are regulated by the states. Thus, the rule “...is beyond EPA’s authority under the CWA and usurps authority vested in the States.”

The Attorney Generals of the following western states signed the letter: Arizona, Nebraska, North Dakota, Oklahoma, South Dakota, and Utah. Kansas Governor Sam Brownback and his state’s Attorney General also sent a separate letter supporting the Attorney Generals’ position. It stated that the rule would “... place an undue and unnecessary burden on Kansas livestock producers.”²⁶

On July 13, the EPA announced its decision to withdraw the proposed rule in light of comments received from states regarding the amount of information they already have and include as part of the CAFO permitting process. Instead, the agency will use existing federal, state, and local sources of information to gather data about CAFOs and help ensure that CAFOs are implementing practices that protect water quality.²⁷

²⁵<http://transportation.house.gov/news/PRArticle.aspx?NewsID=1501>. *Western States Water*, #1951, October 11, 2011.

²⁶<http://ag.ks.gov/docs/documents/brownbackschmidtcafocommentletter.pdf>. *Western States Water*, #1894, September 3, 2010, and #1738, September 7, 2007.

²⁷<http://cfpub.epa.gov/npdes/afo/aforule.cfm#withdrawal>.

Hardrock Mines Clean Up

On February 10, Senate Environment and Public Works Committee Chair Barbara Boxer (D-CA) and Senators Mark Udall (D-CO) and Michael Bennet (D-CO) wrote EPA, asking it to provide additional certainty that “Good Samaritans” who appropriately clean up abandoned hardrock mines will not be subject to enforcement under the CWA. “We believe that there is flexibility under current law to help incentivize cleanups at abandoned hardrock mine sites,” the letter said. “We ask EPA to provide clarity to those qualified non-governmental organizations, while continuing to ensure that responsible parties are held liable for the harmful legacy at abandoned mines.”

Acidic drainage and runoff from abandoned hardrock mines have created a number of water quality impairments in the West, and the letter notes that there are about 160,000 abandoned hard rock mines in 13 western states. The letter also follows up on a similar request the Senators made in June 2011 and asked for a preliminary report on EPA’s response by February 29.

The WGA and the WSWC have long supported abandoned hardrock mine clean up efforts, including legislation to protect Good Samaritans from CWA liability.²⁸

On December 12, EPA issued a memorandum to its regional offices to encourage clean up activities at abandoned hardrock mine sites. Acidic drainage and runoff from such sites have created a number of water quality impairments in the West. However, responsible parties are often non-existent or financially insolvent and therefore cannot be compelled to undertake clean up efforts. At the same time, some third parties with no responsibility, or “Good Samaritans,” are willing to clean up certain sites, but are often reluctant to do so due to concerns that they may inherit perpetual liability under the CWA for any discharges that may remain after clean up.

EPA’s regulations require operators of sites that continue to discharge pollution after clean up to obtain NPDES permits under the CWA. The memorandum clarifies that Good Samaritans who complete clean up efforts pursuant to EPA policies will not be considered “operators” responsible for obtaining NPDES permits if they lack: (1) access and authority to enter the site; (2) an ongoing contractual agreement or relationship with the site owner to control discharges; (3) power or responsibility to make timely discovery of changes to the discharges; (4) power or responsibility to direct persons who control the mechanisms, if any, causing the discharges; and (5) power or responsibility to prevent and abate the environmental damage caused by the discharges. Nevertheless, the memorandum states that it “...does not address or resolve all potential liability associated with discharges from abandoned mines.”

Jurisdiction Guidance

On February 22, the EPA sent its draft CWA guidance to the Office of Management and Budget (OMB) for final review. If approved, the document would clarify CWA jurisdiction under

²⁸<http://water.epa.gov/action/goodsamaritan/index.cfm>. *Western States Water*, #1970, February 17, 2012.

the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions, which some have criticized for creating jurisdictional uncertainty. It would also replace guidance EPA and the Corps released in 2003 and 2008. Although the guidance would lack the force of law, it would guide federal agency determinations regarding the types of waters subject to CWA jurisdiction. It is uncertain when OMB will complete its review.

EPA released a draft version of the guidance in April 2011 and received over 200,000 public comments, including an August 2011 letter from the WSWC. Among other things, the WSWC's letter stated 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."²⁹

Preserve the Waters of the United States Act

On March 28, Senator John Barrasso (R-WY) introduced "Preserve the Waters of the United States Act" (S. 2245) to block the EPA and the Corps from finalizing their proposed CWA guidance, which is intended to clarify CWA jurisdiction under the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions.

The bill states: "Neither the Secretary of the Army nor the Administrator of the [EPA] shall finalize the proposed guidance...or use the guidance... as the basis for any decision regarding the scope of the [CWA] or any rulemaking... The use of the guidance...or any substantially similar guidance, as the basis for any rule shall be grounds for vacation of the rule."

"The Obama-EPA's proposed water guidance greatly expands the [CWA's] scope through a slew of new and expanded definitions," said Barrasso. "In addition to an increase in Army Corps jurisdictional determinations of as much as 17%, this...guidance will also result in a change in the responsibilities of states in executing their duties under the [CWA] and a change in how individual citizens are governed by the [CWA]. These kinds of changes, and passing along more unfunded mandates to state and local governments, should never be done via a guidance document."³⁰

Thirty-two other Republican Senators co-sponsored the bill, including westerners: Jon Kyl (AZ), Mike Crapo (ID), James Risch (ID), Pat Roberts (KS), Jerry Moran (KS), Mike Johanns (NE), Dean Heller (NV), John Hoeven (ND), James Inhofe (OK), Tom Coburn (OK), John Cornyn (TX), Kay Bailey Hutchison (TX), John Thune (SD), Mike Lee (UT), and Mike Enzi (WY).

On April 27, the House Transportation and Infrastructure Committee Chair John Mica (R-FL) and Ranking Member Nick Rahall (D-WV) introduced a similar bill (H.R. 4965) to prohibit the EPA and the Corps from finalizing their proposed CWA guidance.

²⁹*Western States Water*, #1943, August 12, 2011, and #1928, April 29, 2011.

³⁰<http://barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases>.

“This federal jurisdiction grab has been opposed by Congress for years, and now the Administration and its agencies are ignoring law and rulemaking procedures in order to tighten their regulatory grip over every water body in the country,” said Mica. Rahall also said “...EPA is seeking to impose its will via interim guidance and then asking for the public’s views after the fact.”³¹

Thirty-six other representatives co-sponsored the bill, including Frank Lucas (R-OK) and Collin Peterson (D-MN), the Chair and Ranking Member of the House Agriculture Committee, as well as Bob Gibbs (R-OH), Chair of the House Subcommittee on Water Resources and Environment. Western co-sponsors include Don Young (R-AK); Jeff Flake (R-AZ); Jeff Denham (R-CA); Scott Tipton (D-CO); Lynn Jenkins (R-KS); Adrian Smith (R-NE); James Lankford (R-OK); Kurt Schrader (D-OR); Greg Walden (R-OR); Kristi Noem (R-SD); John Carter (R-TX); Michael Conaway (R-TX); Blake Farenthold (R-TX); and Rob Bishop (R-UT).

On June 12, following the Committee’s approval of the bill, House Subcommittee on Water Resources and Environment Chair Bob Gibbs (R-OH) and Andy Harris (R-MD), Subcommittee on Energy and Environment Chair, wrote EPA Administrator Lisa Jackson seeking information on the scientific, technical, and legal justifications for the final guidance. The letter also requested information on the guidance’s potential impact on jobs and the economy.

In particular, the letter expressed concern over two EPA water studies, which it says had raised questions over “the due diligence, open process, and scientific basis” for the guidance. The first study, known as the “Value of Water Study,” intended to address the importance of water to the U.S. economy. The letter asked for a variety of information on the study, including any possible purpose the study may play in clarifying or expanding CWA jurisdiction and whether the final guidance will incorporate information from the study.

The letter expressed further concern about an EPA Office of Research and Development study on the connection between water bodies and navigable waters. Among other things, the letter asked for an explanation of the need, content, and “future utility” of the study, as well as any possible “jurisdictional purpose” it may have.³²

Midnight Regulations

On April 11, Speaker of the House John Boehner (R-OH) and Senate Minority Leader Mitch McConnell (R-KY) wrote President Obama, asking his Administration not to issue new regulations or guidance after the end of the fiscal year on September 30. The letter cites a January 2009 memorandum from the President that expressed his Administration’s commitment to transparency, openness, and accountability. It stated: “[W]e are concerned that as we approach the end of your current term, this commitment will be further undermined by a final push to issue a set of ‘midnight regulations,’ with little opportunity for oversight.”

³¹<http://transportation.house.gov/news/PRArticle.aspx?NewsID=1620>.

³²<http://transportation.house.gov/news/PRArticle.aspx?NewsID=1647>. *Western States Water*, #1982, May 11, 2012.

The letter defines “midnight regulations” as the “...practice of finalizing rules, guidance, findings or other directives that influence the rulemaking process during the final months of a presidency. Often times, these new rules are too controversial to have been adopted earlier and result in last minute giveaways to special interests or intentionally ties the hands of a newly-elected president. In addition, such regulations may not be subject to the normal political checks and balances of the electorate and timely Congressional oversight.”

The letter continued: “We believe that issuing a raft of midnight regulations would be inconsistent with your January 2009 commitment.... Moreover, with the nation facing continued economic challenges, it would be ill-advised to issue a series of last minute controversial or economically significant regulations that would distract a new Congress and potentially a new administration from focusing on jobs and the economy.”

The letter also said the Administration had “...promulgated controversial rules which are designed to circumvent the express will of the Congress.” Although the letter notes that the Obama Administration has promulgated fewer regulations than the previous administration during its first 33 months, it argues that the number of regulations with an annual economic impact of \$100 million or more had “increased significantly.”

Of note, OMB was reviewing proposed guidance that EPA developed to guide agency decisions regarding the extent of CWA jurisdiction under the U.S. Supreme Court’s *Rapanos* decision.

National Pollutant Discharge Elimination System

Stormwater Regulations on Forest Roads

On May 23, the EPA published a notice in the *Federal Register* indicating its intention to “expeditiously” revise its stormwater regulations to specify that stormwater discharges from logging roads do not require NPDES permits under the CWA. The notice responds directly to the Ninth Circuit Court of Appeals’ decision in *Northwest Environmental Defense Center (NEDC) v. Brown*. That case involved a claim against the Oregon State Forester and held that certain types of stormwater runoff from forest roads qualify as point sources requiring NPDES permits.

Among other things, the notice said EPA would work with stakeholders and federal partners to determine how best to address forest road runoff and consider a range of non-permitting approaches under the CWA, including voluntary programs and further support for state and tribal efforts. EPA was also seeking examples of successful state and tribal programs based on best management practices.³³

In related news, U.S. Solicitor General Donald Verrilli filed a brief with the U.S. Supreme Court on May 24, urging it to decline a request from Oregon to review the Ninth Circuit’s decision

³³<http://cfpub.epa.gov/npdes/stormwater/forestroads.cfm>.

(now titled *Decker v. NEDC* on appeal). In particular, the brief noted that no conflict exists among the federal courts of appeal and that both Congress and EPA are taking steps to address the matter. To support this argument, the brief cited EPA's May 23 rulemaking notice and the Consolidated Appropriations Act of 2012, which prohibited NPDES permits for forest road runoff until September 30, thereby giving EPA time to respond to the decision administratively. The brief also noted that legislation to overturn the Ninth Circuit's decision (S. 1369/H.R. 2541) was pending in Congress.

The brief stated that the Ninth Circuit erred in failing to defer to EPA's Silvicultural Rule, which historically considered all forest road runoff to be a non-point source not subject to NPDES permitting.

Of note, WGA's Resolution #11-15 expressed concern "...about the potential impacts of treating forest roads as point sources under the NPDES program and will seek solutions that are consistent with the long-established treatment of forest roads as nonpoint sources."³⁴

On June 25, the U.S. Supreme Court accepted for review (granted certiorari) two cases, *Decker v. NEDC* and *Georgia-Pacific West v. NEDC* to decide whether or not the Ninth Circuit erred when it held that stormwater from logging roads is an industrial discharge that should be regulated under the CWA's NPDES, or should have deferred to the EPA's long-standing position that such channeled runoff from forest roads does not require a permit, but is controlled separately as a non-point source. Since 1976, EPA has consistently defined activities related to forest road construction and maintenance as nonpoint sources of pollution. Further, in regulating stormwater discharges under 1987 CWA amendments, EPA again expressly excluded runoff from forest roads from NPDES permitting, and rather regulated runoff using a best management practices approach, like those imposed by the State of Oregon on the roads at issue in the *Georgia-Pacific* case.

The Ninth Circuit, in conflict with other circuit courts and contrary to the position of the United States as amicus, rejected EPA's interpretation of the law, giving it no deference, and directed EPA to regulate forest road runoff under the NPDES program, "associated with industrial activity." EPA's past consistent interpretation, over a period of 35 years, had heretofore survived proposed regulatory revisions and legal challenges, and has been repeatedly endorsed by the United States in its briefs and agency publications. Congress delegated to EPA responsibility to determine what activities qualify as "industrial" for permitting purposes.

While Congress provided for CWA citizen suits, and allowed for judicial review of EPA rules in the Courts of Appeals, it further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding (U.S.C. § 1369). Consistent with the statute, multiple circuit courts have held that if a rule is reviewable, it is exclusively reviewable under that statute and cannot be challenged in another proceeding. In the *Decker* case, the Ninth Circuit held that a citizen may bypass judicial review of an NPDES permitting rule, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA.

³⁴*Western States Water*, #1953, October 21, 2011.

On August 1, the House Transportation and Infrastructure Committee approved H.R. 2541 to clarify that stormwater runoff from logging roads does not require NPDES permits under the CWA. The bill responded to the Ninth Circuit Court of Appeals' decision in *NEDC v. Brown*. EPA proposed regulations to exempt such runoff from NPDES permitting requirements and the U.S. Supreme Court agreed to review the Ninth Circuit's decision.

"I'll continue fighting for this solutions-oriented bill supported by business, labor, Republicans and Democrats because it helps protect hundreds of thousands of forest industry-related jobs," said bill sponsor Rep. Jaime Herrera Beutler (R-WA). "We can preserve water quality and forest health, and we can do it without crushing businesses with this unnecessary permitting requirement,"

The Committee also reported legislation (H.R. 5961) that would limit EPA's ability to use aerial surveillance of farmland to assess CWA violations, as well as a bill (H.R. 4278) that would provide exemptions from Section 404 of the CWA for normal farming, ranching, silviculture, and other rural activities.³⁵

On September 4, the EPA published a notice in the *Federal Register* that sets forth proposed revisions to its regulations that would clarify that stormwater discharges from logging roads do not require NPDES permits. EPA's proposed revisions would clarify "...that for the purposes of defining stormwater discharges associated with industrial activity, the only activities...that are 'industrial' are rock crushing, gravel washing, log sorting, and log storage." The notice also says EPA "...did not intend logging roads themselves to be regulated as industrial facilities."³⁶

In related news, the Obama Administration filed a brief with the U.S. Supreme Court on September 4, arguing that the Ninth Circuit should have deferred to EPA's Silviculture rule. The EPA also argued that its interpretation of the rule as not requiring NPDES permits for logging road discharges is "...a reasonable construction of the regulation's text." Although EPA had previously asked the Court not to take up the case so that it could address the issue administratively, the Court decided in June to grant an Oregon request that asked it to review the case (now titled *Decker v. NEDC*).

Additionally, the National Governors Association, National Association of Counties, National Conference of State Legislatures, International City/County Management Association, and Council of State Governments filed an amicus brief in support of Oregon last month. The brief notes that state and local governments are already regulating stormwater runoff and that most states administer their own NPDES programs. As such, the brief argues that the Ninth Circuit's decision "...would greatly increase the regulatory burdens and costs to state and local governments without providing commensurate additional protection of water quality on forest lands."³⁷

³⁵<http://transportation.house.gov/News/PRArticle.aspx?NewsID=1697>.

³⁶<http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2012-0195-0184>.

³⁷*Western States Water*, #1991, July 13, 2012 and #1989, June 29, 2012.

On October 23, fifteen former senior EPA officials filed an amicus brief with the U.S. Supreme Court in *Decker v. NEDC* (formerly *NEDC v. Brown*), supporting the use of NPDES permits for stormwater runoff from logging roads. The brief stated that discharges from logging roads “...arise from limited, identifiable road segments, thereby allowing feasible implementation of an NPDES permit program... The use of the NPDES permitting program in similar non-logging-road contexts, such as stormwater discharges from Municipal Separate Storm Sewer Systems (MS4s), demonstrates that applying an NPDES permitting program to logging roads is both feasible and not unduly burdensome.... General NPDES permits provide one instrument that agencies can use to address concerns of administrative feasibility and still comply with the CWA...”

It continued: “For a limited set of applicants, individual NPDES permits may be required to address circumstances not covered through general NPDES permits. However, these individual NPDES permits can also be streamlined to allay concerns of practicability, by incorporating generalized elements and exceptions for activities found to create limited stormwater discharge. Both general and individual NPDES permits can and do address stormwater discharges through managerial mechanisms, rather than solely relying on technical requirements.”

On November 30, the EPA issued a final rule clarifying that stormwater discharges from logging roads do not require NPDES permits under the CWA.

On December 3, the U.S. Supreme Court discussed the new rule during oral arguments held in an appeal of *NEDC v. Brown* (now *Decker v. NEDC*). Oregon, the timber industry, and 31 states asked the Court to overturn the decision, but the issuance of the rule days before the hearing raised questions as to whether the Court should decide the case on its merits, vacate the Ninth Circuit’s decision and remand for a new decision, or dismiss the case.³⁸

Water Protection and Reinvestment Act

On August 1, Rep. Earl Blumenauer (D-OR) introduced the Water Protection and Reinvestment Act (H.R. 6249) to create a dedicated fund in the Treasury that would provide money to help states replace, repair, and rehabilitate wastewater infrastructure. The bill would finance the fund by taxing manufacturers that use water and contribute to water pollution, including those that make water-based beverages, soaps and detergents, water softeners, cooking oils, and pharmaceuticals. Blumenauer estimated that these sources would raise about \$6.5 billion per year. Most of the funding would go to the Clean Water State Revolving Fund, which provides financing to supplement existing local and state investments in wastewater infrastructure.

“We have dedicated funding for the nation’s transportation systems,” said Blumenauer. “It’s time to establish a similar trust fund to finance clean water infrastructure. We cannot continue to place the burden of protecting public health, restoring the environment, and reducing pollution on communities and individuals who are simply unable to afford it.”

³⁸*Western States Water*, #2006, October 26, 2012.

A number of organizations have expressed support for the bill, including the American Society of Civil Engineers, the Sierra Club, the National Association of Clean Water Agencies, the American Public Works Association, and the Alliance for Water Efficiency.³⁹

State Revolving Funds

On August 24, the WSWC wrote Congressional leaders, urging them to ensure that the FY2013 Interior and Environment Appropriations bill (H.R. 6091) provided states with “sufficient flexibility” to manage the Clean Water and Drinking Water State Revolving Loan Funds (SRFs). The House Appropriations Committee reported H.R. 6091 in July and the bill is awaiting action by the full House.

The letter stated: “In recent years, Congress has approved or considered an increasing number of restrictions on the states’ management and use of SRF funds, including mandating the use of between 20% and 30% of appropriated funds for principal forgiveness, negative interest loans, grants or a combination thereof; setting aside 10% of funds for green infrastructure, water or energy efficiency improvements, or other environmentally innovative activities; and most recently, so-called ‘Buy American’ provisions that would limit the use of SRF funds to purchase certain types of materials and services for SRF projects.”

It continued: “While these restrictions are well intended, they are often aimed at advancing policy objectives that are unrelated or contrary to the SRFs’ primary purpose of providing needed funding for basic water infrastructure. These types of restrictions reduce flexibility, substantially increase administrative burdens and capital costs, and hinder the states’ ability to manage the SRFs in the most cost effective manner, especially if they are implemented in an unclear or inefficient manner. They also represent unfunded federal mandates that impose significant regulatory burdens at a time when federal SRF funding is declining, which can delay or even prevent construction of needed water infrastructure projects.”

The letter says the principal forgiveness mandate “...reduces the states’ financing capacities by forcing them to give away a significant portion of their available SRF funds, thereby harming their ability to maintain the SRFs in perpetuity and reducing state leveraging opportunities by generating fewer loan repayments. “[M]andating a specific amount of principal forgiveness or similar financial assistance gives potential applicants for SRF funds an incentive to decline loan assistance, further postponing needed infrastructure projects.”

The letter noted that the bill would appropriate \$689 million for the Clean Water SRF and \$829 million for the Drinking Water SRF, representing respective cuts of \$777 million and \$89 million from current levels. It said, “If Congress proceeds with these reductions, it should at least ensure that states have greater flexibility to determine how best to utilize the limited SRF funding they receive, rather than placing additional restrictions on state SRF management.”

³⁹http://blumenauer.house.gov/index.php?option=com_content&task=view&id=2086&Itemid=73
Western States Water, #1989, June 29, 2012.

The letter is based on WSWC Position #330, which calls for greater flexibility and fewer restrictions on state SRF management, as well as stable and continuing federal SRF appropriations.⁴⁰

Wastewater Infrastructure

On November 13, House Subcommittee on Water Resources and the Environment Ranking Member Tim Bishop (D-NY) and 30 other Democratic Representatives wrote House leaders, urging them to include additional funding for wastewater construction in any end-of-the-year agreement that they might negotiate before the conclusion of the 112th Congress.

The letter stated that appropriations to the Clean Water SRF “...have failed to keep pace with, let alone address, the growing backlog of replacement and repair needs. Additional investment in wastewater infrastructure, through the Clean Water SRF, complimentary direct loan and loan guarantee programs, or other revenue-neutral options, has broad, bipartisan support in Congress, and among states, municipalities, and many stakeholder groups.”

“For every \$1[B] spent on wastewater infrastructure through the traditional SRF program, we can create as many as 33,000 jobs in communities across America while improving public health, as well as the health of local economies and the environment. It is a win-win proposition. “[I]f States and communities were to leverage this investment through the Clean Water SRF or other, complimentary guarantee programs, a similar investment could generate as much as \$10[billion] in local funding for such projects, which in turn would produce more than 300,000 new jobs. Such an investment would have a significant beneficial impact on our economic recovery efforts and our water resources around the country.”⁴¹

The WSWC supports Clean Water and Drinking Water SRF appropriations that are adequate to help states address their water infrastructure needs. It also supports greater flexibility for state SRF management.

Section 404 Implementation

On September 20, the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment held a hearing entitled “Forty Years after the Clean Water Act [CWA]: Is It Time for the States to Implement Section 404 Permitting?” The Corps has lead responsibility for administering Section 404, which regulates the discharge of dredged and fill materials into waters subject to CWA jurisdiction. However, only New Jersey and Michigan have delegated authority to administer this program, compared to 46 states with delegated authority from the EPA to administer the NPDES under Section 402.

“When Congress wrote the [CWA], it did not contemplate having a single, federally-dominated water quality program,” said Subcommittee Chair Bob Gibbs (R-OH). “Rather, Congress intended the states and EPA to implement the [CWA] as a federal-state partnership, where the states

⁴⁰*Western States Water*, #1941, August 1, 2011.

⁴¹<http://timbishop.house.gov/latest-news/>.

and EPA act as co-regulators. This is the essence of ‘cooperative federalism’.... [A]ssumption of Section 404 gives a state the lead role in evaluating and issuing permits. This can eliminate a significant amount of state and federal duplication and result in increased program efficiency and consistency in permit decisions. It also can help ensure that state-specific needs and conditions are more directly addressed.”

Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy testified on behalf of the Corps. She said Florida, Minnesota, Ohio, Oregon, and Virginia are considering assuming the 404 program, but listed the following challenges to state assumption: (1) states may lack funding to implement the program; (2) states may need to revise existing laws or requirements to match federal requirements; (3) states cannot assume navigable and tidal waters or their adjacent wetlands under Section 404; (4) there may be differences in how waters are covered or defined under federal and state law; and (5) public misconceptions about agency roles and procedures could lead to misunderstandings about how state assumption may change these procedures.

Denise Keehner, the Director of EPA’s Office of Wetlands, Oceans, and Watersheds, said 404 assumption could allow states and tribes to “...leverage and incorporate other statutes and regulations into their programs...effectively manage [their] resources on a watershed scale [and] define the waters for which they provide protections in a manner that is broader in scope than the federal program.” States considering 404 assumption can receive EPA technical assistance and apply for financial assistance through EPA’s Wetland Program Development Grant program, which provides about \$15 million per year in grants to develop state and tribal wetlands programs. While these grants cannot be used to implement a 404 program, Keehner said Section 106 funds can be used to implement state and tribal Section 404 regulatory and wetlands programs.

William Creal, Michigan’s Water Resources Division Chief, testified on behalf of his agency and the Association of Clean Water Administrators. He said his state’s 404 program saves the federal government \$3 million to \$5 million per year because it administers the program “...at a lower cost and with a greater level [of] efficiency.” He also said “strong diversified funding” is needed to continue Michigan’s program and make 404 assumption possible for other states. He said Congress could create “...a grant program to make up to [\$2 million] per year for ten years available to states that assume the 404 program. If ten states assumed the program...the annual cost to the federal government would be [\$20 million]. The annual savings...would be upwards of [\$30 million].”

David Paylor, Director of the Virginia Department of Environmental Quality, testified on behalf of his agency and the Environmental Council of the States. He said: “Congress could encourage state assumption by making federal funds available for states to implement the program, as is the case for Section 402 delegation.” He also said Congress could simplify the application process and allow phased and partial assumption in accordance with state resources and objectives.⁴²

⁴²<http://transportation.house.gov/hearings/hearingdetail.aspx?NewsID=1727>.

40th Anniversary of the Clean Water Act

On October 15, the Association of Clean Water Administrators, the Water Environment Federation, and the National Association of Clean Water Agencies, released a 2020 vision plan to mark the 40th anniversary of the Clean Water Act (CWA). “...one of the Nation’s most successful environmental statutes.... It has spurred a national investment of \$600 billion in federal, state, and local dollars to build, repair, and replace wastewater infrastructure since its 1972 enactment, creating jobs and expanding the economy. It has ensured that power to implement the program was vested in delegated state agencies, signifying the intent to keep decision-making close to the communities that would benefit most from its implementation. In 1972, nearly two-thirds of the Nation’s waters were impaired; today, that fraction has been reduced to one-third. Although this is progress, we have a long way to go to meet the goal of completely eliminating water quality impairment.”

It continued: “After 40 years of accomplishments, we all need to refocus on ideas and solutions that will ensure another 40 years of water quality progress.... This effort must focus on: [1] Developing holistic watershed approaches that can effectively address the diffuse and complex sources of water pollution that hinder additional progress; [2] Ensuring that maximum flexibility, creativity, authority, and innovation under the [CWA] are supported and that barriers which may stand in the way of these objectives are addressed; [3] Spreading awareness of the value of our Nation’s water including the vital role of water and wastewater infrastructure in job creation, economic expansion, and public health protection; [4] Maximizing the effect of limited human capital resources by focusing on the initiatives and projects that achieve the greatest water quality gains relative to the collective effort invested; and [5] Ensuring that municipalities and states have the funds and financial tools needed to implement programs that will ensure 40 more years of...improvements.”

The vision further stated: “We must renew, revitalize, and reinvest in our commitment to clean water. We have inherited the water quality and infrastructure of the 20th century from our parents and grandparents - our children and grandchildren deserve the same from us in the 21st century.”⁴³

On October 18, House Transportation and Infrastructure Committee Chair John Mica (R-FL) and Water Resources and Environment Subcommittee Chair Bob Gibbs (R-OH) issued a joint statement on the 40th Anniversary of the Clean Water Act (CWA). It says: “Clean water is vital for our health, communities, environment, and economy, but the continued success of the [CWA] is being threatened by EPA’s overzealous siege on the states’ important regulatory role and our ability to improve water quality around the nation.... It is through the cooperative efforts of the states and EPA, along with the efforts of municipalities and industry, that we have made great progress in reducing pollution in our nations’ waters over the past 40 years.”

The statement continued: “EPA is undermining the system of cooperative federalism established under the [CWA] by upsetting the long-standing balance between the federal and state partners in co-regulating the nation’s waters. EPA is now insisting on imposing its federal will on

⁴³<http://www.acwa-us.org/>.

states, municipalities, and the private regulated community with a heavy-handed, top-down, one-size-fits-all regulatory approach that is taking away the flexibility they need to address their environmental issues. And activists are using aggressive litigation tactics to hijack and dictate EPA's and the states' regulatory agenda.... These efforts...to undermine the cooperative federal-state partnership that has long existed under the [CWA] need to stop.”

It also said: “We need to restore the proper cooperative role of the states and get back to implementing the [CWA] as Congress envisioned it 40 years ago. [W]e need to set realistic and financially achievable water quality standards and allow communities flexibility in how they achieve compliance. By doing this, we can continue to improve water quality across the nation for the next 40 years.”⁴⁴

Mica and Gibbs introduced a bill (H.R. 2018) to limit EPA's ability to oversee state water quality standards and permitting decisions, which the House passed as part of a package (H.R. 3409) of energy and environment bills.⁴⁵

EPA prepared a website to mark the CWA's 40th Anniversary describing successes, challenges, and key programs and milestones.⁴⁶

Water Transfer Rule

Friends of the Everglades v. EPA

On October 26, the Eleventh Circuit Court of Appeals issued its decision in *Friends of the Everglades v. EPA*, finding that it did not have original subject matter jurisdiction to hear a consolidated challenge to EPA's water transfers rule. EPA's rule exempts certain water transfers from NPDES permitting under the CWA.

When EPA finalized the rule in 2008, opponents immediately challenged it in the Southern U.S. District Court of New York and the Southern U.S. District Court of Florida. However, in issuing the rule, EPA opined that judicial review of the rule could only take place before the U.S. Circuit Courts of Appeal, and not the federal district courts. Given this position, opponents filed protective challenges in multiple circuits, which were consolidated in the Eleventh Circuit. The district court challenges were then stayed pending the Eleventh Circuit's decision.

The Eleventh Circuit found it lacked original jurisdiction to review the consolidated challenge under the CWA's plain language. As a result, it dismissed the consolidated challenge, allowing the two district court challenges to proceed. Although the court found that the challenges were improperly filed at the circuit court level, it is expected that the district courts' eventual rulings on the rule's merits will be appealed to their respective circuits.

⁴⁴<http://transportation.house.gov/News/PRArticle.aspx?NewsID=1744>.

⁴⁵*Western States Water*, #2002, September 28, 2012.

⁴⁶<http://water.epa.gov/action/cleanwater40/>.

The WGA and WSWC generally support EPA's rule. The Attorney Generals of Colorado, New Mexico, and nine other western states also filed an amicus brief in the case, arguing against NPDES permitting.⁴⁷

Corps of Engineers

Water Resources Development Act

On September 20, the Senate Environment and Public Works Committee held a hearing entitled, "Water Resources Development Act [WRDA]: Growing the Economy and Protecting Public Safety." WRDA bills authorize funding for Corps water projects involving the construction and maintenance of dams, levees, and other water infrastructure. Congress has tried to pass WRDA bills on a regular basis (ideally about every two years) but last passed one in 2007.

Committee Chair Barbara Boxer (D-CA) said: "[WRDA] and the projects, policies, and programs it authorizes are essential components of creating jobs and keeping our economy growing." She also said that she is working with Committee Ranking Member James Inhofe (R-OK) to advance a WRDA bill later this year during the lame duck session following the November elections. Inhofe said: "It may not be as headline-grabbing as some other areas of government spending, but spending on infrastructure not only has job creation benefits, but is essential for long-term economic growth.... WRDA should be passed on a regular basis."

Andrew Herrmann, President of the American Society of Civil Engineers (ASCE), said the ASCE gives the nation's levees and inland waterways a "D-." "Deferring water resource projects creates costs that reverberate throughout our economy, causing exports and [gross domestic product] to fall, threatening U.S. jobs, causing a drop in personal income, and putting those that live behind a dam or levee at increased risk," he said. "A new [WRDA] must address these concerns by creating a national levee safety program, reauthorizing the national dam safety program, and correcting spending shortfalls out of both the Inland Waterways Trust Fund and the Harbors Maintenance Trust Fund."

Janet Kavinoky, the Executive Director of Transportation Infrastructure for the U.S. Chamber of Commerce, said there is "no shortage of evidence" showing that marine transportation and related water resources systems such as flood protection "...need more robust, innovative and effective investment.... With a WRDA bill that encourages Corps efficiency, opens up infrastructure projects to innovations such as public-private partnerships, and speeds project delivery, the United States could prevent disasters that cost lives as well as dollars, promote exports and the jobs and economic growth related to America's natural resource, agriculture, and energy industries."⁴⁸

⁴⁷ *Western States Water*, #1958, November 28, 2011.

⁴⁸ <http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.ByMonth&DisplayDate=09/20/12>.

On November 15, the Senate Environment and Public Works Committee held a hearing to discuss a draft bill prepared by Committee Chair Barbara Boxer (D-CA) that would become a new WRDA. The bill would: (1) increase flexibility for non-federal sponsors of Corps of projects; (2) encourage the Corps to fully implement ongoing efforts to accelerate project delivery; (3) urge the expenditure of unobligated funds in the Harbor Maintenance Trust Fund, which have actually been used to offset deficits elsewhere in the federal budget; (4) reform the process for delivery of inland waterways projects; (5) establish a National Levee Safety Program; and (6) get around Congressional bans on earmarks by allowing projects that satisfy specific criteria to secure automatic authorization. There are currently eighteen projects that would satisfy the proposed criteria, including projects in California, Kansas, and North Dakota.

The bill would also enact a pilot project known as the Water Infrastructure Finance and Innovation Act (WIFIA), based on the Transportation Infrastructure Finance and Innovation Act, that would authorize \$50 million a year for 2013-2017 for the Corps and the EPA to carry out water and wastewater projects with secured loans. States, state infrastructure financing authorities, and other specified entities would be eligible for WIFIA loans. Eligible projects included, but would not be limited to, projects that could receive funding under the Clean Water and Drinking Water SRFs. The estimated costs of eligible projects must not exceed \$20 million.

“I believe this draft bill is a good start toward addressing the nation’s water infrastructure needs,” said Boxer. She also announced the addition of a section on extreme weather in response to Hurricane Sandy that would direct the Corps “..to work with the National Academy of Sciences to evaluate options to reduce risks associated with future disasters, identify infrastructure investments needed, and explore potential funding sources for these investments. The bill also asks the Government Accountability Office to review the Corps’ policies and practices related to flood control and drought to ensure it is taking appropriate measures to prepare for and respond to these events. The provision also provides new authority to the Corps to conduct post-disaster watershed assessments and implement critical flood control and ecosystem restoration projects identified in those assessments.”

Committee Ranking Member James Inhofe (R-OK) said: “Chairman Boxer is to be commended for producing a draft... [A]s with any legislative proposal, there are things that I like, there are things that need to be improved, and there are things that I have serious concerns with... With the valuable information gained from this hearing, I expect the Committee’s work on this bill will continue into next year.”

ASCE At-Large Director Stephen Curtis said: “A WIFIA account that would access funds from the U.S. Treasury at Treasury rates and use those funds to support loans and other credit mechanisms for water projects provides states and public and private entities with another alternative for funding our growing water infrastructure needs. Providing \$50 million annually for fiscal years 2013 through 2017 for water resources and wastewater projects, which could be leveraged for perhaps \$500 million to \$1 billion annually, would allow for major improvements to the nation’s water infrastructure.”

National Waterways Conference President and CEO Amy Larson also testified: “It would appear that the drafting of various provisions throughout the bill has been hampered by the moratorium on earmarks. While efforts in Congress to eliminate wasteful spending are laudable...deferring to the Executive Branch complete decisionmaking as to which projects should be authorized or receive funding, how much (if any) funding should be allotted to each, and all related priority decisions, has resulted in the stoppage or delay of critical projects. Moreover, the Administration’s priorities...have not been established through an open, deliberative process, in contrast to the open process used by this Committee in developing past WRDAs.”⁴⁹

On December 3, the Family Farm Alliance, National Water Resources Association, and the Association of California Water Agencies wrote the leadership of the Senate Environment and Public Works Committee to express concerns over a provision in the draft WRDA bill that Committee Chair Barbara Boxer (D-CA) presented at a hearing last month. The provision, Title VI, would create a National Levee Safety Program within the Corps, but would exempt canals from being classified as a levee if “...regulated by a Federal agency in a manner that ensures that applicable Federal safety criteria meet or exceed the levee safety guidelines.”

The letter supported the need for adequate national flood protection and levee safety standards, as well as the bill’s “general deference” to state levee programs. However, it stated: “[W]e do not believe this exclusion entirely exempts canal facilities owned by and under the jurisdiction of the Bureau of Reclamation...from being held to new levee safety guidelines and standards designed...by the Corps...for flood control levees...that should not be misapplied to water delivery canals.”

It continued: “We do not believe the Corps should be in a position of setting canal safety standards for Reclamation owned water delivery canals. Western water delivery canals have unique design and engineering specifications that are much different than flood control levees, and we believe the misapplication of safety guidelines and standards developed for flood control levees to Western water delivery canals would not only be illogical, irrational and unnecessary, but also will be expensive and unaffordable. This requirement could dramatically increase costs for both federal and non-federal entities involved in the operation and maintenance of federal water supply canals without a corresponding increase in public safety. These costs would be solely borne by water user entities....”

The letter also: (1) noted that the exclusion would “open up” liability to non-federal project operators; (2) stated that Reclamation has authority to address aging canal systems under the Omnibus Public Lands Management Act of 2009; and (3) recommended ways to modify Title VI to address these concerns. It also referenced WSWC Position #329, which states that “...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.”

⁴⁹<http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Home>. *Western States Water*, #2001, September 21, 2012.

Drought

National Drought Information System

On July 25, the House Science, Space, and Technology Committee held a legislative hearing to examine the state of drought forecasting, monitoring, and decisionmaking, as well as the National Drought Information System's (NIDIS) role in drought planning. The Western Governors' Association (WGA) proposed NIDIS in a 2004 report and Congress authorized the program in 2006 to develop an effective early warning system for droughts, coordinate and integrate federal research in support of the system, and build upon existing forecasting and assessment programs and partnerships.

Committee Chair Ralph Hall (R-TX) presented a draft bill to reauthorize NIDIS and appropriate \$13.5 million for each of fiscal years 2013 through 2017 for the program. Among other things, the bill would require the Department of Commerce to produce a report that: (1) analyzes the implementation of NIDIS; (2) describes specific plans for the development of NIDIS programs; and (3) identifies research, monitoring, and forecasting needs to enhance the predictive capability of drought early warnings, the length and severity of droughts, and the contribution of weather events to reducing or ending drought conditions. In developing the report, the bill would also require Commerce to consult with relevant Federal, regional, State, Tribal, and local governments, the private sector, and research institutions.

In his opening statement, Hall said over half of the U.S. is experiencing moderate to extreme drought, while a third is suffering from severe to extreme drought. He also said the purpose of the hearing was to discuss: "What can be done to provide better and timelier information to help enable Federal, State, and local governments, and individual citizens better deal with drought impacts, and how to afford better forecasting and quicker reactions by government entities."

Committee Ranking Member Eddie Bernice Johnson (D-TX) said, "Reauthorization of NIDIS is an important step and I commend the Chairman for this, but this is only one step. And it baffles me that we gather today primarily on one accord to support this one particular climate service when my colleagues on the other side [have] attempted to stifle every other weather and climate product, service, and research [they] could in every federal agency possible."

Oklahoma Water Resources Board Director and WSWC member J.D. Strong testified: "Considering the substantial economic damage resulting each year from drought events - more than all other natural disasters combined - an effective drought early warning system is the most worthwhile and anticipated product that the NIDIS program could possibly develop. A national map may tell a good story, but users need more tailored information in order to create opportunities for investment and make management decisions." J.D. also urged the Committee to add language to the proposed NIDIS reauthorization bill "... explicitly focusing on those NIDIS components still lacking full implementation, particularly the early warning system and drought prediction strategy."

NOAA's NIDIS Program Director and WestFAST member Roger Pulwarty said NIDIS is currently making the following improvements: (1) improving the understanding and predictability of droughts across a variety of timescales; (2) improving collaboration among scientists and managers to enhance the public awareness and effectiveness of observation networks, monitoring, prediction, information delivery, and applied research; (3) improving the national drought information framework by transferring successful approaches to areas covered by the drought portal, but not yet having active early warning systems; (4) improving coordination between institutions that provide different types of drought early warning; (5) developing impact indicators to form part of a comprehensive early warning system; and (6) working with the private sector and others to develop products to support drought plans.

James Famiglietti, the Director of the University of California-Irvine's Center for Hydrologic Modeling, said "...water is on trajectory to rival energy in its importance, yet the investment in observations, models, and exploration of the subsurface pales in comparison.... [A]n investment in drought is an investment in our greater water future."⁵⁰

On September 21, House Science, Space and Technology Committee Chair Ralph Hall (R-TX) introduced a bill (H.R. 6489) to reauthorize the National Integrated Drought Information System (NIDIS), which is scheduled to expire on September 30. The bill would authorize \$13.5 million for each of fiscal years 2013 through 2017 for NIDIS, which is about the same as current levels. Representatives Dan Boren (D-OK) and Lamar Smith (R-TX) co-sponsored the bill.

The bill would amend current NIDIS system functions to state that the program will: (1) develop a drought early warning system that "...collects and integrates information on the key indicators of drought in order to make usable, reliable, and timely forecasts of drought, including assessments of the severity of drought conditions and impacts, and provides such information...on both national and regional levels;" (2) communicate drought forecasts, drought conditions, and drought impacts on an ongoing basis to state, federal, tribal, and local government decisions makers, as well as the public and private sectors; (3) "provide timely data, information, and products that reflect local, regional, and State differences in drought conditions;" (4) "coordinate, and integrate...Federal research in support of a drought early warning system;" (5) "build upon existing forecasting and assessment programs and partnerships;" and (6) "continue ongoing research activities related to drought."

The bill would also require the Department of Commerce to develop a report for Congress that describes NIDIS implementation and specific plans for the development of NIDIS programs. The report would identify research, monitoring, and forecasting needs to enhance the predictive capability of drought early warnings, the length and severity of droughts, and the contribution of weather events to reducing or ending drought conditions. In developing the report, Commerce would consult with relevant federal, regional, state, tribal, and local governments, the private sector, and research institutions.⁵¹

⁵⁰<http://science.house.gov/legislation?type=hearing>.

⁵¹<http://science.house.gov/bill/hr-6489-reauthorize-national-integrated-drought-information-system>.

Senator Mark Pryor (D-AR) also introduced a NIDIS reauthorization bill (S. 3584) on September 20, with Senator Jerry Moran (R-KS).

On October 25, the WGA wrote leaders of the House Science Committee and Senate Commerce Committee in support of legislation (H.R. 6489 and S. 3584) to reauthorize NIDIS. Governors Gary Herbert (UT) and John Hickenlooper (CO) signed the letter in their respective capacities as WGA Chair and Vice-Chair.

The letter states: “Western Governors have long been acquainted with the significant impacts that drought can have on life in the West. Dry conditions contribute to forest and rangeland fires, shortages of grain and other agricultural products, and threats to municipal water supplies. Currently, more than 75 percent of the contiguous United States is suffering from some degree of abnormally dry to extreme drought conditions, affecting almost all of our states.”

“NIDIS provides authoritative, objective and timely information on drought that farmers, ranchers, water managers, and policy makers need to prepare for and respond to drought. NIDIS has established a ‘drought portal’ where information is integrated across agencies, providing a single online source of information for users of drought information. Under NIDIS, [The National Oceanic and Atmospheric Administration (NOAA)] is building an emerging network of early warning systems for drought, working with local resource managers to recognize and address unique regional drought information needs.”

It continues: “Western Governors value the approach NOAA has taken in building and improving NIDIS. Rather than creating a new NIDIS bureaucracy, NOAA has invested in existing capacity at universities and state agencies and with local stakeholders, as called for in the original legislation. Given our shared fiscal challenges, we see this as a model for federal-state collaboration in shared information services.”

“For these reasons, Western Governors support the reauthorization of NIDIS. We are particularly pleased to see the bi-partisan sponsorship of both bills. We also support the Committees’ inclusion of a new reporting requirement for NIDIS, with a focus on enhancing predictive capabilities on length, severity, and recession of drought conditions.”⁵²

Agricultural Disaster Assistance Act

On August 2, the House passed a \$383 million Agricultural Disaster Assistance Act of 2012 drought relief bill (H.R. 6233) introduced by House Agriculture Committee Chair Frank Lucas (R-OK). The bill would temporarily reauthorize emergency assistance programs, primarily for livestock producers, that expired last year under the 2008 Farm Bill. It would pay for these efforts by cutting funding to conservation programs, including a 20% cut in mandatory funding from EQIP and a 26% cut to the Conservation Stewardship Program. It would also cut \$250 million in direct spending. In passing the bill, the House delayed work on the House version of the Farm Bill until after Congress’ August recess.

⁵²<http://www.westgov.org/letters-testimony>. *Western States Water*, #2002, September 28, 2012.

“You will...hear people complain that this isn’t the full farm bill,” said Lucas in his floor statement. “My priority remains to get a five-year farm bill on the books and put those policies in place, but the most pressing business before us is to provide disaster assistance to those producers impacted by the drought.... It is as simple as that: there is a problem out there, let’s fix it.”

Lucas also explained the bill’s cuts to EQIP, stating: “Ten years ago, in fiscal year 2002 we authorized \$200 million in EQIP spending. In fiscal year 2009, we authorized \$1.34 billion and for fiscal year 2013 we authorized \$1.75 billion. Yes, we are cutting real dollars: \$350 million that will not go to farmers and ranchers to help comply with the enormous regulations facing them. But, at the end of the day this will be the largest amount of money ever to be spent on the EQIP program, seven times as much as we spent in 2002.”⁵³

Agriculture Committee Ranking Member Colin Peterson (D-MN) and other Democrats criticized House leadership for not taking up the full Farm Bill. Peterson also expressed concern about the bill’s cuts to conservation programs and noted that the bill is targeted primarily at cattle and sheep producers, but not dairy, pork, and specialty crop producers. Nevertheless, he said, “I do recognize the effects the drought is having on our farmers and will vote in favor of H.R. 6233. However, this bill is a sad substitute for what is really needed - long-term farm policy.”⁵⁴

On September 18, thirty-eight members of the National Association of State Departments of Agriculture (NASDA) wrote Speaker of the House John Boehner (R-OH) and Minority Leader Nancy Pelosi (D-CA), urging Congress to “swiftly pass” a full five-year Farm Bill. Agriculture officials from every WSWC state signed the letter with the exception of Texas.⁵⁵

“We are...concerned about the serious impacts of Congress not passing a Farm Bill prior to the expiration of the current bill,” the letter said. “From the farmers and ranchers who are struggling through disastrous drought, to those facing increasing challenges in the dairy industry, agricultural producers nationwide need certainty about national agricultural policy. Without a Farm Bill, farmers will face significant challenges securing financing for planting next year’s crop, vital safety-net programs for dairy producers will lapse, livestock producers in drought-stricken regions of the country will be left without important disaster assistance, and important export promotion programs will be frozen. The uncertainty facing our farmers, ranchers, and rural economies compels swift and decisive action by Congress to pass a five-year Farm Bill.”

The House Agriculture Committee reported a House Farm Bill (H.R. 6083) in September, but the full House did not take up the measure. The current Farm Bill, passed in 2008, expired in September.

On October 1, Senate Agriculture Committee Chair, Senator Debbie Stabenow (D-MI) said, “It is unbelievable that we’re in this position now where the Farm Bill will expire and create so much uncertainty for farmers, ranchers, and small businesses. The Senate came together in a bipartisan

⁵³<http://agriculture.house.gov/>.

⁵⁴<http://democrats.agriculture.house.gov/press/PRArticle.aspx?NewsID=1146>.

⁵⁵<http://www.nasda.org/cms/7196/20728/32676/35149.aspx>. *Western States Water*, #1990, July 6, 2012).

way and we passed the Farm Bill. The House Agriculture Committee came together in a bipartisan way to pass a Farm Bill. It's absolutely unacceptable that the House Republican leadership couldn't devote just one day to rural America and the 16 million jobs across the country that rely on agriculture."

On December 13, Senators Max Baucus (D-MT), John Hoeven (R-ND), and a bipartisan group of 31 other Senators wrote Senate Majority Leader Harry Reid (D-NV) and Minority leader Mitch McConnell (R-KY), urging them to include the Senate Farm Bill (S. 3240) in any end-of-year bills package. The Senate passed S. 3240 in June. The bill would have set national agricultural, nutrition, conservation, and forestry policy for the next five years. It would authorize about \$500 billion over this period while also cutting the deficit by \$23 billion. It would achieve some cuts by consolidating 23 conservation programs into 13, and reducing conservation program funding by \$6.3 billion.

The letter states: "Agriculture supports over 16 million jobs in our country and is the heart of many rural economies across the United States. In order for our farmers and ranchers to plan for their future, it is imperative that we provide them the certainty of a full five-year-farm bill... Just this year[USDA] reported that agriculture exports for [FY 2013] are projected to reach a record of \$143 billion...resulting in an agricultural trade surplus of over \$26 billion."

"While the increase in...exports is welcomed news, our producers are still struggling from the extreme drought, spring deep freeze, and other weather disasters across the country this past season... As the historic drought conditions persist, farmers could suffer from the impacts of the drought in the 2013 crop year as well... With each passing day, the difficulty of enacting a farm bill before the end of this Congress grows."⁵⁶

Without reauthorization and new guidance, the Department of Agriculture is considering how to implement old permanent law provisions enacted in the 1940s.

Climate Impacts and Outlook

On October 4, the WGA and NOAA released a Quarterly Climate Impacts and Outlook update for Summer 2012. It found that extreme drought is likely to persist across the West. The update highlights western trends in temperature, precipitation, and climate, and is intended to help state officials and other managers in their planning efforts. It is the result of a memorandum of understanding that the WGA and NOAA entered into in June 2011 to improve the development and delivery of climate science and services to Western states. All of the information in the update is also available from the National Integrated Drought Information System.

"Information contained in the Outlook is an excellent resource for our on-the-ground folks who have to be prepared for that all-too uncontrollable factor: weather," said WGA Chairman and Utah Governor Gary Herbert. "This document indicates that our state should prepare for continued

⁵⁶http://www.baucus.senate.gov/?p=press_release&id=1197. *Western States Water*, #2001, September 21, 2012 and #1988, August 31, 2012.

drought impacts, especially for the farmers and ranchers who will continue to see a scarcity of rain through the end of the year.”

The update noted that water supplies in many of the 17 western states have continued to decline and that the upcoming fall and winter season rainfall “will be critical.” Fall will likely bring below-average precipitation to the Pacific Northwest, making drought development in that region more likely. Drought will also persist across much of the West and Great Plains, although signs of above-normal precipitation in Texas could bring some improvement.

In addition, the update made the following notable findings: (1) Summer 2012 was the warmest on record for Colorado and Wyoming; (2) August 2012 was the driest on record for Nebraska, Washington, and Wyoming; (3) 91% of Oklahoma was in extreme drought as of September 1; (4) the Southwest monsoon did bring some “rain and relief” to Arizona and parts of California, Colorado, Nevada, and Utah, although drought conditions endured; (5) wildfire activity was high in the southern Interior West for the first part of the summer and became more active further west and north over the second half of the season; and (6) the USDA reported that national corn and soybean production were down 13% and 12% respectively compared to 2011.⁵⁷

National Drought Forum

On December 12-13, the Western Governors’ Association (WGA) co-sponsored a National Drought Forum in Washington, D.C., along with numerous other governors associations, academic partners, and federal agencies, including the U.S. Department of Agriculture (USDA), the Department of the Interior, the Environmental Protection Agency (EPA), and the National Oceanic and Atmospheric Administration (NOAA). The goal of the meeting was to understand the impacts of the 2012 drought, and to provide information and guidance for coordinating national drought readiness in 2013 and preparedness for future droughts.

“The moderate to exceptional drought conditions we’ve seen this year in Kansas and throughout much of the West are hurting communities, economies, agriculture and the quality of life,” said Kansas Governor Sam Brownback (R). “Drought impacts next year could be far more severe, especially [since] reservoir storage in many basins has been depleted.... A key outcome of this forum is to identify strategies that we can put in place now, given that drought is projected to continue into 2013. As governors, we are anxious to work with partners to see real progress this spring.”⁵⁸

Secretary of Agriculture Tom Vilsack announced that NOAA and USDA had entered into a memorandum of understanding to improve their efforts to monitor and forecast droughts, and to share information. He also said USDA’s Natural Resources Conservation Service (NRCS) had begun a pilot effort in Kansas and Colorado as part of its Environmental Quality Incentives Program (EQIP) that will free-up more water for livestock needs by removing sediment from ponds. Finally,

⁵⁷<http://www.westgov.org/initiatives/406>. *Western States Water*, #1937, July 1, 2011.

⁵⁸<http://www.westgov.org/>.

Vilsack said NRCS had made available \$16 million in EQIP funds for farmers and ranchers to carry out water conservation efforts.⁵⁹

Congressional staff and a number of state, federal, private sector, academic, and other experts from around the country participated at the forum, including EPA Deputy Administrator Bob Perciasepe and Deputy Secretary of the Interior for Water and Science John Tubbs, a former WSWC member, among others. WSWC Executive Director Tony Willardson, South Dakota State Climatologist Dennis Todey, and WestFAST members Roger Pulwarty of NOAA and Mike Strobel of NRCS also participated.

Farm Bill

On June 21, the Senate passed the 2012 Farm Bill (S. 3240) by a vote of 64 to 35. The bill would set national agricultural, nutrition, conservation, and forestry policy for the next five years. It would authorize about \$500 billion over its five-year authorization and is projected to cost approximately \$969 billion over 10 years. At the same time, the bill would cut \$23.6 billion from the federal deficit, reducing conservation program funding by \$6.3 billion and consolidating them from 23 to 13. The bill now goes to the House, where the House Agriculture Committee is expected to begin marking up its version on July 11.

Although over 300 amendments were proposed, the Senate limited debate to only 73. Notable amendments that did not make it into the final bill would have: (1) prevented the EPA and the Corps from finalizing their proposed CWA guidance; (2) prevented the EPA and Corps from defining or interpreting the term “navigable water” as used in the CWA and prevented the EPA from using Justice Kennedy’s “significant nexus” test in the U.S. Supreme Court’s *Rapanos* decision to determine CWA jurisdiction; and (3) clarified that pesticide applications do not require NPDES permits under the CWA.

Senator Jeff Bingaman (D-NM) withdrew an amendment to promote water conservation in the Ogallala aquifer. Although there was some discussion of another Bingaman amendment to establish a dedicated funding source to complete authorized rural water projects, the amendment was not introduced. WSWC Position #343 supports such funding.

“The Farm Bill represents the greatest reform in agriculture in decades,” said Senate Agriculture Committee Chair and bill sponsor Debbie Stabenow (D-MI). “Bipartisan compromise is all-too-rare in Washington, so it is heartening to earn support from both sides on a major bill that cuts spending and helps create jobs.”⁶⁰ Committee Ranking Member Pat Roberts (R-KS) said: “American agriculture and those who depend on it around the globe need a Farm Bill... The House must act, and we must have something in place before current programs expire [on] September 30.”⁶¹

⁵⁹<http://usda.gov/wps/portal/usda/usdamediafb?contentid=2012/12/0358.xml&printable=true&contentidonly=true>.

⁶⁰<http://www.stabenow.senate.gov/>.

⁶¹<http://www.ag.senate.gov/newsroom/minority-news>.

On July 5, House Agriculture Committee Chairman Frank Lucas (R-OK) and Ranking Member Collin Peterson (D-MN) released a discussion draft of the Federal Agriculture Reform and Risk Management Act (FARRM). It is designed to cut spending and reduce the nation's deficit, while repealing outdated policies and reforming, streamlining, and consolidating others. It reduces the size of government and makes common-sense reforms to agricultural policy.

"I'm pleased to release this bipartisan legislation with my friend and colleague Collin Peterson. Our efforts over the past two years have resulted in reform-minded, fiscally responsible policy that is equitable for farmers and ranchers in all regions and will lead to improved program delivery. This bill is an investment in production agriculture and rural America. Those of us in the agriculture community are quick to point out that our producers provide us with the safest, most abundant, most affordable food and fiber supply in the history of the world. We say it because it's true. This legislation is a commitment to maintaining that tradition," said Chairman Lucas.

Ranking Member Collin Peterson said, "Congress needs to complete work on the 2012 Farm Bill before the current bill expires, otherwise we jeopardize one of the economic bright spots of our nations fragile economy. The legislation released today brings us yet another step closer to achieving this goal and I am pleased to have worked with the Chairman in this effort. We have a commodity title in place that will work for all parts of the country as well as continued support for the sugar program and my Dairy Security Act. I have long believed every government program must contribute toward deficit reduction and while I would have found other ways to accomplish the bills nutrition savings, the bottom line is that, working together, we need to keep this farm bill moving forward. There will be challenges ahead...."⁶²

FARRM saves more than \$35 billion in mandatory funding, repeals or consolidates more than 100 programs, and eliminates direct payments, streamlines and reforms commodity policy, in order to save taxpayers more than \$14 billion. It improves program integrity and accountability in the Supplemental Nutrition Assistance Program that is expected to save taxpayers more than \$16 billion.

FARRM also incorporates H.R. 872, providing regulatory relief for farmers, ranchers, and rural communities by eliminating a double permitting requirement involving the CWA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). It prohibits the Administrator of the EPA or a state from requiring a permit under the CWA for a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under FIFRA, or the residue of such a pesticide, resulting from the application of such pesticide.

However, it exempts from such prohibition the following discharges containing a pesticide or pesticide residue: (1) a discharge resulting from the application of a pesticide in violation of FIFRA that is relevant to protecting water quality, if the discharge would not have occurred but for the violation or the amount of pesticide or pesticide residue contained in the discharge is greater than would have occurred without the violation; (2) stormwater discharges regulated under the NPDES; and (3) discharges regulated under NPDES of manufacturing or industrial effluent or treatment

⁶²House Committee on Agriculture, Press Release, July 5, 2012.

works effluent and discharges incidental to the normal operation of a vessel, including a discharge resulting from ballasting operations or vessel biofouling prevention.

H.R. 872, was adopted by the House in March 2011, and placed on the Senate Legislative Calendar on June 21, 2011. No action was taken on the bill or companion legislation in the Senate in 2012, despite calls from state interests including the WSWC.⁶³

The changes in the Conservation Title still provide farmers, ranchers, foresters, and landowners with voluntary, incentive-based financial and technical assistance for conservation practices to protect and restore water quality and quantity, air quality, wildlife habitat, and meet regulatory requirements while providing a safe, secure, and affordable food supply. Under the past several farm bills, Congress has taken a piecemeal approach to conservation policies, addressing natural resource concerns by creating many farm bill conservation programs, some of which are regional initiatives and many of them have overlapping functions or goals. FARRM consolidates 23 conservation programs into 13, simplifying and improving program delivery to producers. It is expected to save taxpayers more than \$6 billion.

FARRM would improve and focus the Conservation Reserve Program (CRP) and maximum enrollment is gradually reduced to 25 million acres while focusing enrollment on the most environmentally sensitive lands and saving American taxpayers close to \$4 billion. Land-owners will be able to better manage their enrolled acres with added flexibility for haying and grazing. Additionally, two million acres are reserved for working grassland contracts. To maintain environmental benefits, expiring acres will receive priority consideration for working grassland contracts and Conservation Stewardship Program contracts, and producers will be given the ability to enter into contracts of working land programs before their CRP contracts expire.

The House bill would place a priority on maintaining funding for the Environmental Quality Incentives Program (EQIP), a popular and effective program to help farmers and ranchers face regulatory pressures. EQIP provides cost share incentives to producers to help meet or avoid the need to mandate national, state, or local conservation regulations. EQIP would provide additional incentives for wildlife by absorbing the functions of the Wildlife Habitat Incentives Program, while retaining the Conservation Innovation Grant subprogram to promote new and innovative conservation practices. Additionally, EQIP would maintain existing priorities for beginning farmers or ranchers, as well as socially disadvantaged producers, while including for the first time a priority for veteran farmers. Producers under these priorities would also be eligible to cover up to 50% of up front project costs.

The Conservation Stewardship Program encourages producers to adopt new conservation measures, while maintaining current practices to protect natural resources. Changes would allow more flexibility for local identification of natural resource concerns. Enrollment would be limited to 9 million acres per year.

⁶³*Western States Water*, #1946, September 2, 2011.

Under the Voluntary Public Access and Habitat Incentive Program, owners and operators of private land would be able to realize a benefit by creating wildlife habitats and opening their land to hunting and fishing activities. FARRM would reauthorize this program for the life of the bill.

The Agriculture Conservation Easement Program (ACEP) would consolidate existing easement programs into one program for streamlined and flexible administration. Under ACEP, land can be enrolled in an Agriculture Lands Easement to protect working grassland or farmland, or can be enrolled in a Wetlands Easement to protect and enhance water quality and wildlife habitat.

The Regional Conservation Partnership Program would consolidate four programs into one targeted initiative to leverage USDA funding and resources by partnering with private organizations or working directly with producers to address natural resource concerns. Targeted conservation initiatives would be developed on the local level and selected by USDA through a competitive, merit based application process. Additionally, USDA may designate Critical Conservation Areas to target conservation programs in specific regions.

The Small Watershed Rehabilitation Program would provide technical and financial assistance for planning, design, and implementation of projects for the purposes of rehabilitate aging watershed dam projects (including upgrading or removing dams) in communities to address flood prevention and health and safety concerns.

The Grassroots Source Water Protection program would encourage each state to use technical assistance for the purpose of allowing State rural water associations to address regulatory requirements and promote conservation practices with the intent of protecting and improving the quality the nation's drinking water.

The House Agriculture Committee began marking up the draft legislation during a July 11 meeting.

On June 21, the Senate passed S. 3240, the Agriculture Reform, Food and Jobs Act, by a 64-35 vote. Senator Pat Roberts (R-KS) the Agriculture Committee's Ranking Member applauded the bill's approval declaring, "Farm Bills are not easy.... For this Farm Bill...we had the added difficulty of negotiating in a bad economy with out-of-control federal deficit spending. So, under very difficult circumstances...I am proud to say this Farm Bill reforms farm programs and saves the taxpayer more than \$23 billion. We streamlined and eliminated programs where necessary. [V]ery few bills have passed the Senate with this level of bipartisan approval. Our work is not done. The House must act, and we must have something in place before current programs expire September 30. I will do everything I can to avoid adding to the economic uncertainties our farmers, ranchers and rural communities have been forced to face."⁶⁴

⁶⁴<http://www.ag.senate.gov/issues/farm-bill>.

Forest Management/Wildfires

In a July 11 letter to Congressional leaders, the WGA requested adequate resources be made available to ensure firefighters can protect lives, property and natural resources. Further, the letter urged Congress to fund critical restoration work. “One of the most urgent needs will be soil stabilization and erosion control in watersheds that provide municipal water supplies,” WGA Chairman, Utah Governor Gary Herbert (R) declared. “We express our heartfelt condolences to families who have lost loved ones during this challenging fire season and our deepest gratitude to those men and women battling the blazes.” The governors called for: (1) spending “Flame Funds” to ensure emergency fire suppression costs did not impact other federal non-fire budgets and programs; (2) taking action to address the deficiencies in the nation’s aerial firefighting resources; (3) ensuring completion and implementation of the National Cohesive Wildland Fire Management Strategy; (4) reforming federal land management policies so they encourage and expedite active forest and land management; and (5) coordinating federal, state and local reviews under environmental laws to speed up restoration work.

Colorado Senator Mark Udall (D) in an article for the *Greeley Tribune* stated: “We have already seen that this year, the High Park fire quickly growing from a lightning strike to one of the three largest blazes in Colorado history – and the Waldo Canyon and High Park fires both breaking the record for the most costly in terms of homes lost within two weeks of each other. I have been actively monitoring these [fires] to ensure the firefighters on the ground have all the federal resources they need. However, confronting wildfire involves more than fighting the blazes while they are burning. In the 10 years since the Hayman Fire of 2002 - Colorado’s largest wildfire - Coloradans have seen firsthand the devastation from wildfire does not end when the last ember is extinguished.”

He continued, “One of the biggest legacies of Hayman has been its long-term impact on the water supply for Denver and Aurora. Destructive wildfires lay waste to vegetation and allow ash, debris and sediment to flow directly into reservoirs during the next rainfall. Severe fires also tend to sterilize the soil, making it difficult for forests to come back. This lack of new vegetation increases fire areas’ soil erosion and creates areas prone to severe flooding. Responsible and proactive forest management is critical to confronting the long-term effects of large blazes and the ramifications they have on...precious water supplies. The cost of forest restoration is nothing compared to the price tag for fighting wildfires, restoring lost homes and businesses, and cleaning and maintaining water-storage facilities after each fire.... Forests protect 70% of Colorado’s drinking water – and much of the water that we send downstream to other states in the West.”

He concluded, “The smartest thing we can do to protect our public resources is to be proactive about managing our forests.” He notes that the Farm Bill passed by the Senate would have given the Forest Service additional flexibility to do so.⁶⁵

⁶⁵*Greeley Tribune*, July 13, 2012.

Hydraulic Fracturing

On February 1, the House Science Committee's Subcommittee on Energy and Environment held a hearing on a draft study the EPA issued in December 2011, linking hydraulic fracturing and groundwater contamination in Pavillion, Wyoming. According to EPA, the study is specific to Pavillion, where it says fracturing is occurring below the drinking water aquifer and near drinking water wells.⁶⁶

Subcommittee Chair Andy Harris (R-MD) questioned the science behind the study and expressed concern about "...indications that EPA's approach in Wyoming has been poorly conducted, unnecessarily alarming, and fits within a pattern of an outcome-driven, 'regulate-for-any-excuse' philosophy at the Agency." He also said, "Wyoming, despite decades of experience in ground water assessments, was not consulted with about the most important aspects of this investigation. The Agency did not even consult with the U.S. Geological Survey [USGS] before releasing the report, a sister agency that has extensive understanding of aquifer complexity and geological characteristics."

Ranking Member Brad Miller (D-NC) said, "The industry has refused to disclose the chemicals they inject into the earth, claiming the information is proprietary.... Some of the chemicals are known carcinogens.... The question is not whether we are pro-drilling or anti-drilling, the question is whether we will drill with our eyes open. The public wants to know if fracking is safe...but the industry and their political allies will say in effect, 'move along there is nothing to see here'.... With no disinterested scientists as witnesses, a reasonable question is whether this hearing is really about the integrity of the science or just a big 'wink and nod' to the industry that the majority is on their side no matter what." Miller also noted that the study is part of a risk assessment and does not call for regulation.

EPA Region 8 Administrator Jim Martin explained that his agency carried out the study at the request of residents in the area who had expressed concerns about objectionable taste and odor problems in well water. "EPA has acted carefully, thoughtfully, deliberately, and transparently in our ground water investigation and in sharing the data and findings contained in our draft report," he said. "We have applied the highest standards of scientific rigor. We hope and expect to continue in a spirit of collaboration and cooperation with Wyoming, the Tribes, and others as we conduct a peer review and consider additional study that may be warranted at this site."

However, Wyoming Oil and Gas Supervisor Thomas Doll said, "EPA dismissed requests to review data before it was publicized and has not addressed concerns with the data and the Pavillion Draft Report as raised by the Wyoming Oil and Gas Conservation Commission, the Wyoming Department of Environmental Quality, and the Wyoming Water Development Office.... The [report] contains questionable, unverified poor quality data; state agency experts cannot support EPA's analysis and conclusions. Additional short term sampling and a long term science based effort are

⁶⁶<http://www.epa.gov/region8/superfund/wy/pavillion/>.

being planned by [Wyoming and USGS] for the Pavillion area. This science based effort will utilize proven and repeatable science, along with critical analysis and full disclosure, and will lead to thoughtful conclusions about groundwater in the Pavillion area.”

Kathleen Sgamma, Vice President of Government and Public Affairs for the Western Energy Alliance, said, “When EPA releases a report concluding that hydraulic fracturing may be the source of contamination, the public expects accurate information. However...EPA’s own data...don’t support the conclusions presented up front. The report clearly had deficiencies that should have been addressed first with state regulators who have intimate knowledge and technical expertise with the aquifer in question. In addition, a conclusion with such broad implications should have first been tested through a scientific peer review of the work.”⁶⁷

Of note, EPA is conducting a broader study on the potential impacts of fracturing on drinking water. WGA Policy Resolution 10-17 urges EPA to collaborate with stakeholders and leverage state knowledge and policies in carrying out this broader study.⁶⁸

On September 26, the USGS released two reports that provided additional sampling data to help determine whether hydraulic fracturing contaminated groundwater near Pavillion, Wyoming. The reports do not interpret the data consistent with an agreement with Wyoming. USGS will provide the results to EPA, the Wyoming Department of Environmental Quality (WDEQ), and the public.

USGS prepared the reports at Wyoming’s request after EPA released a draft study in 2011 that showed a possible link between fracturing and groundwater contamination near gas production wells that Encana Corporation operates east of Pavillion. The draft report received national attention, although Wyoming and others have questioned its sciences and findings. The USGS data and EPA’s draft report will now go to a peer review panel. EPA is also expected to incorporate the USGS data in a final report to be released in 2013.

Notably, USGS collected groundwater quality data from only one of the two monitoring wells that EPA constructed for its report because of low yield from the non-sampled well. USGS did collect quality control data from both wells.⁶⁹

In response to the reports, Wyoming Governor Matt Mead said: “I have said that we will be guided by science in the way we react to the investigation of impacts on water outside of Pavillion. The collaborative effort used to gather this data allowed Wyoming experts to have a say about sampling methodology and testing procedures. I feel that the process used to acquire this data was an improvement on the process used for the draft EPA report last December. I thank our partners

⁶⁷<http://science.house.gov/legislation?type=hearing>.

⁶⁸*Western States Water*, #1956, November 14, 2011.

⁶⁹<http://www.usgs.gov/newsroom/article.asp?ID=3410#.UG3FYU3A9uN>. *Western States Water*, #1969, February 10, 2012.

for working together with Wyoming. We are now waiting as analysis of this data is done. It should help inform the peer review process.”⁷⁰

The Sierra Club, Earthworks, and the Natural Resources Defense Council have analyzed the USGS and EPA data, and report that “...thermogenic gas, which very likely comes from fracked deep shale formations, continues to increase in a monitoring well. This evidence suggests that as a result of fracking, gas is seeping into Pavillion’s water. A range of chemicals associated with the fracking process also continue to appear in the monitoring well, showing that hazardous pollution is spreading towards the surface. This...supports EPA’s hypothesis that natural gas drilling activities, including fracking, have contaminated the Wind River aquifer near Pavillion.”⁷¹

However, Encana reports that the USGS data does not show a link between hydraulic fracturing and water. In particular, Encana maintains that USGS’ decision not to sample one of the wells shows that EPA’s wells were not constructed properly. The company also says its comparison of the two data sets shows various inconsistencies, including a number of compounds that EPA found in its report that the USGS did not detect in its tests, as well as concentration levels for two compounds that were lower in the USGS report.⁷²

Bureau of Land Management Proposed Rule

On May 11, the Bureau of Land Management (BLM) published a proposed rule in the *Federal Register* that would require energy companies to disclose the chemicals they use in hydraulic fracturing on public and Indian lands, with certain protections for proprietary information. The rule also included provisions intended to: (1) improve well-bore integrity to verify that fluids used in wells during fracturing operations are not escaping; and (2) confirm that oil and gas operations have a water management plan in place for handling fracturing fluids that flow back to the surface.

“As we continue to offer millions of acres of America’s public lands for oil and gas development, it is critical that the public have full confidence that the right safety and environmental protections are in place,” said Secretary of the Interior Ken Salazar. “The proposed rule will modernize our management of well simulation activities...to make sure that fracturing operations conducted on public and Indian lands follow common-sense industry best practices.”

In developing the proposed rule, BLM sought feedback from a range of government entities, industry, members of the public, and other interested stakeholders. BLM maintained that the rule was needed because its regulations were over 30 years old and were not written to address modern hydraulic fracturing activities. Comments on the proposed rule were due July 10.⁷³

⁷⁰<http://governor.wy.gov/media/pressReleases/Pages/GovernorMead%27sStatementonUSGSReport.aspx>.

⁷¹http://www.earthworksaction.org/media/detail/new_study_supports_water_contamination_due_to_fracking.

⁷²http://www.rigzone.com/news/oil_gas/a/121046/USGS_Report_Shows_No_Evidence_Linking_Hydraulic_Fracturing_to_Water?rss=true.

⁷³<http://www.doi.gov/news/pressreleases/index.cfm>. *Western States Water*, #1969, February 10, 2012.

On June 25, the BLM announced that it was extending the public comment period for its proposed hydraulic fracturing rule to September 10.

On September 10, House Natural Resources Committee Ranking Member Ed Markey (D-MA) wrote Interior to comment on the BLM's proposed rules for hydraulic fracturing on public lands. Five other Democrats joined, including western Representatives Grace Napolitano (D-CA), Ranking Member of the House Water and Power Subcommittee, and Raúl Grijalva (D-AZ).

"These rules will serve as an important start to what we hope will be broader, comprehensive energy development policies that will embrace best practices for the management of our natural resources," the letter said. "[Interior's] proposed rule plays a vastly important role in putting in place basic safety protections and ensuring that the development of oil and gas does not come at the detriment of public health and safety or the environment."

However, the letter said the proposal lacked key elements and suggested: (1) requiring companies to disclose the chemicals and the volume used before a well is fractured, instead of after the fact; (2) reassessing the ability of FracFocus to serve as the platform for the public disclosure requirement; (3) stopping the use of open-pit storage of wastewater from fracturing, which the letter says has a higher risk of leaks and spills; (4) setting strict standards for well design and construction; and (5) delineating distance requirements from schools and populated areas from fractured wells.⁷⁴

In related news, the Independent Petroleum Association of America and the Western Energy Alliance submitted comments representing the views of nearly 50 oil and gas groups. They urged Interior to withdraw the rule and work with states to address issues requiring clarification. The comments argued that the rule was incorrectly based on the premise that fracturing has impacted water supplies and public health. They also criticized the proposal for stating that BLM intended to "protect all usable waters during drilling operations" and for proposing that operators be required to provide information about their water use. BLM would use this information to identify potential impacts and determine mitigation measures.

The letter stated: "BLM...seeks to create a federal 'super' water right or to impose riparian law on the western states. Neither is tenable under BLM's statutory authority and Congress' long-standing deference to state water allocations.... Such requirements could create a parallel federal permitting or adjudication system in conflict with the state-administered priority system. This would render existing water rights and the States' authority over water allocation meaningless.... Absent clear and specific congressional authorization, BLM has no authority to impose conditions or mitigation requirements on state water uses. So long as water is used consistent with state laws, BLM has absolutely no authority to require 'mitigation' for alleged 'impacts.'"

The letter continued: "Even requirements to report information to the BLM create the potential for a competing federal water rights system. Requirements for federal mitigation clearly interfere with the notion that water is held in trust by the state for use by the public in perpetuity." The letter further argued that the proposal could interfere with interstate compacts, stating, "BLM

⁷⁴<http://democrats.naturalresources.house.gov/>.

has absolutely no authority to impose conditions or otherwise regulate the interstate allocation of waters by regulatory fiat.”⁷⁵

On December 17, the Republican Governors Association and the Republican Attorneys General Association wrote President Obama asking him to withdraw the proposed rule.

The letter stated: “[W]e request the BLM withdraw the proposal based on the following: [1] the arbitrary and capricious nature of the proposal by the lack of justification, erroneous cost estimates, clearly overstated and unfounded benefits, and failure to take into account the strong objections of affected states; [2] the economic harm that states will suffer, both by increased costs to its citizens and investors, and by lost revenues; [and 3] the states...are best positioned to appropriately regulate hydraulic fracturing operations. Current state regulations already provide effective and efficient oversight that is specific to the needs of the states.”

The letter continued: “The BLM’s proposed rule only will discourage exploration and production on federal and Indian lands, potentially costing the federal government – and states that share in federal royalties – billions of dollars in revenue. The BLM rule places sweeping new regulations on hydraulic fracturing and related operations without any demonstrated problems that need to be addressed.”⁷⁶

EPA was developing a report on the potential impacts of hydraulic fracturing on drinking water resources, and was seeking its Science Advisory Board’s (SAB) advice on the status of the research. EPA planned to use this advice to develop a subsequent “report of results” to be released in 2014.

On October 16, House Science, Space and Technology Committee Chair Ralph Hall (R-TX) and Representatives Andy Harris (R-MD) and Dana Rohrabacher (R-CA) wrote EPA over concerns about its selection of a SAB panel to review a report on the relationship between hydraulic fracturing and drinking water. Congress directed EPA to prepare the report in 2010, with a progress report in 2012, and a final report in 2014.

The letter outlined concerns with a previous ad hoc panel that assisted with the review of the draft study plan for the project. According to the letter, that panel did not include industry experts with applied technical experience or adequate state, local, and tribal representation. In particular, the letter noted that the 22 member panel had only one state representative from the California EPA.

“Given the importance of this study and the potential implications it could have for oil and gas production in the U.S., we urge EPA to ensure selection of a balanced panel with relevant technical expertise, and one that does not unnecessarily exclude nominees with relevant (and, in fact, essential) industry experience,” the letter said. It also asked for information explaining how EPA

⁷⁵<http://westernenergyalliance.org/media-room/press-releases/>. *Western States Water*, #1989, June 29, 2012.

⁷⁶<http://www.rga.org/homepage/category/rganews/>. *Western States Water*, #2000, September 14, 2012.

determines whether potential reviewers have predetermined opinions about the subject under review, and what criteria it uses to assess impartiality.⁷⁷

On December 21, EPA released a progress report on the status of its study of the potential impacts of hydraulic fracturing on drinking water resources. There were 18 ongoing research projects. It included updates on work currently underway and the chemicals used in fracturing, but did not have conclusions or recommendations.⁷⁸

Empower States Act

On September 19, Senator John Hoeven (R-ND) introduced the Empower States Act of 2012 (S. 3573), which would give states primary control over regulations concerning hydraulic fracturing. Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK) co-sponsored the bill.

The bill would require federal agencies to hold a hearing and consult with states before drafting new regulations relating to oil and gas development, including hydraulic fracturing. It would also require federal agencies to develop an impact statement identifying any adverse effects on energy supply, reliability, price, and the potential for job and revenue losses to a state's general and educational funds. In addition, federal agencies would need to show that a state does not have an existing alternative to the proposed regulation and that the regulation is needed to prevent "immediate harm" to human health or the environment. Lastly, the bill would allow states that are adversely affected by an action carried out under a regulation to seek redress in federal court, where the court would review the action de novo rather than relying only on the agency's findings.

"The Empower States Act makes clear that America is safer and more secure when it has affordable energy supplies from domestic resources and that domestically produced oil and gas provides good jobs and economic opportunity for our people," Hoeven said. "The legislation also recognizes that states have a long record of effectively regulating oil and gas development, including hydraulic fracturing, with good environmental stewardship." Murkowski also said, "Given the differences in geology and drilling techniques around the country, it makes sense to let the states take the lead on regulating oil and gas development."⁷⁹

Indian Water Rights

Lummi Nation/Nooksack Tribe

On January 10, the Washington Department of Ecology announced that negotiations in the Nooksack Basin had been suspended while the Lummi Nation and Nooksack Tribe seek federal support to quantify their water rights. At issue is how much water should remain in various reaches

⁷⁷See: <http://science.house.gov/press-releases>. *Western States Water*, #1999, September 7, 2012.

⁷⁸<http://www.epa.gov/hfstudy/pdfs/hf-report20121214.pdf>

⁷⁹<http://hoeven.senate.gov/public/index.cfm/news-releases>. *Western States Water*, #1999, September 7, 2012.

and streams of the Nooksack River, and how much should be available for other uses. The tribes are asking the Department of the Interior to file a lawsuit that will lead to a declaration of their reserved water rights and protection of those rights.

The Nooksack Basin, most of which is closed to new water rights for all or part of the year, supplies water for a number of competing needs, including cities, industries, farms, homes, fish and other animals. Ecology reports that negotiations between a number of parties began in 2005 for Bertrand Creek and the Middle Fork but reached an impasse over Bertrand Creek uses. Subsequently, in 2008, Ecology, the Tribes, and the City of Bellingham decided to focus instead on the North, Middle, and South Forks in the upper watershed, where Bellingham has the largest state issued water right. Negotiation details are protected by a confidentiality agreement between the parties and not available.

“Our hope throughout the negotiations was that we could reach an agreement that satisfied all those needs and we believe that all parties worked in good faith to achieve that goal,” said Richard Grout, manager of Ecology’s Bellingham office. “We remain hopeful that, if a federal action is initiated, all of the complex issues involved will be resolved in a way that is acceptable to all the affected parties.” Lummi Natural Resource Department Director Merle Jefferson also said, “We encourage others to support our request to resolve this long-standing issue so that we can all have certainty and can plan accordingly.” Bob Kelley, Chairman of the Nooksack Tribe, further noted, “We made a lot of progress together, and, if the parties continue to cooperate, this can be noncontroversial.”⁸⁰

Navajo-Hopi Little Colorado Water Rights Settlement Act

On February 14, Arizona Senators Jon Kyl (R) and John McCain (R) introduced the Navajo-Hopi Little Colorado Water Rights Settlement Act of 2012 (S. 2109) to resolve the water rights claims of the Navajo Nation and the Hopi Tribes in Arizona. The settlement would authorize almost \$359 million to build two groundwater delivery projects on the Navajo reservation and one on the Hopi reservation that would allow the tribes to use existing groundwater supplies. In exchange, the tribes would settle their reserved water rights claims to the Little Colorado River. Unlike earlier proposals, which would have required up to \$800 million by some estimates, the agreement does not resolve tribal claims on the main Colorado River nor does it include a pipeline from Lake Powell to the Navajo reservation.

The settlement legislation would also make available 6,411 af/year from Arizona’s Colorado River allocation for use on the eastern Navajo reservation. The water would be delivered through the Navajo-Gallup pipeline, which Congress authorized for construction in 2009 as part of the tribe’s settlement with New Mexico regarding the San Juan River Basin. In exchange for the allocation, the tribe would work to ensure the long-term operation of the Navajo Generating Station near Page, which sits on tribal land. The plant’s owners are working to extend the land lease and other operating agreements and the bill requires the completion of this process before the tribe can receive the Colorado River allocation.

⁸⁰<http://www.ecy.wa.gov/news/2012/007.html>.

“[This bill] brings us one step closer to addressing the significant water needs of impoverished areas on the Navajo and Hopi reservations, while also providing certainty for non-Indian communities trying to plan for their water future,” said Kyl.⁸¹

Navajo lawmakers rejected both the settlement and the bill on July 5, due in part to concerns that the deal awarded groundwater that already belonged to reservation communities. Opponents also expressed concern over a provision in the bill that would have provided 6,411 af/year of water from Arizona’s Colorado River allocation if tribal leaders agreed to extend the land lease for the Navajo Generating Station near Page. The Hopi Tribal Council also voted down the bill in June, but narrowly approved the settlement.

It is possible that the tribes’ votes could require them to quantify their rights in court. Although the tribes can still try to save portions of the settlement, time is running out as the 112th Congress winds to a close. Kyl also announced that he will retire at the end of this year, which has raised questions about who in Congress would advocate for another Navajo-Hopi settlement after his departure.⁸²

On November 14, Secretary of the Interior Ken Salazar met with leaders from the Hopi Tribe and Navajo Nation to discuss the possibility of settling the tribes’ water rights claims to the Little Colorado River in Arizona.

“We had an extremely meaningful dialogue today that I believe will lay the groundwork for a fair and mutually beneficial agreement that the two tribes, the United States, and the state parties can agree upon,” said Salazar. “I deeply respect the sovereignty of the Hopi Tribe and the Navajo Nation and know that, for any water settlement to be successful, the tribes must be fully committed to it. It is my hope that over the coming days and weeks that we may work together to finalize the details of a settlement that will deliver critical water, infrastructure and economic development to the Navajo and Hopi people.”

Hopi Nation Chair Leroy Shingoitewa said, “Today’s historic meeting provided the Hopi Nation with an opportunity to identify outstanding issues that need to be resolved before a settlement can move forward. Because of the high level involvement of our leadership, the Navajo leadership, and Secretary Salazar and his team, I believe that we can and should move forward.”

Navajo Nation Council Speaker Johnny Naize also said, “We made practical progress today, thanks to Secretary Salazar’s personal involvement and commitment, to open possibilities for our nation to convert ‘paper’ water rights into ‘wet’ water that our people need and deserve.”⁸³

⁸¹<http://kyl.senate.gov/record.cfm?id=335999>.

⁸²Western States Water, #1971, February 24, 2012.

⁸³<http://www.doi.gov/news/pressreleases/index.cfm>. Western States Water, #1997, August 23, 2012.

Senate Indian Affairs Committee Oversight Hearing

On March 15, the Senate Indian Affairs Committee held an oversight hearing entitled, “Promoting the Negotiation and Implementation of Water Settlements in Indian Country.” Committee Chair Daniel Akaka (D-HI) said negotiating tribal claims is “...advantageous for all parties. It is cheaper, takes less time, and is more flexible than litigation. Negotiations may also foster better working relationships between all parties.”

Committee Vice Chair John Barrasso (R-WY) noted that many tribes lack basic water supplies and said, “Not all Indian tribes have a pending water settlement as a mechanism for funding the repair of their water systems. That certainly does [not] mean that their water infrastructure needs are less urgent.”

Deputy Secretary of the Interior David Hayes discussed the Administration’s support for settlements and said, “In recent years the Congress has been very creative about finding mandatory funding availability for Indian water rights. This is incredibly important because these settlements cannot be funded out of discretionary funds [from] the Bureau of Indian Affairs, and we applaud the work of the Congress in finding reliable funding streams for these settlements.”

Hayes also said, “To be clear, Indian water rights settlements should not be categorized as ‘earmarks’..... Under the ‘Criteria and Procedures,’ the Administration carries out careful analysis of the appropriateness of the costs of the settlement. Our support is not provided lightly; we have come to this Committee and testified regarding our concerns with proposed water rights settlements that we do not find to have met our requirements for reducing costs, including appropriate cost shares, and producing results. Settlements that are approved through this process are not earmarks.”

In addition, Bureau of Reclamation Commissioner Mike Connor said his agency has a “...role in promoting prosperity in Indian Country through the implementation of these settlements.” He also said Reclamation will need to spend \$150 million to \$200 million per year over the next 10 years to implement authorized settlements, which will sustain 1,600 to 2,200 jobs per year.

WSWC Legal Committee Chair Maria O’Brien testified on behalf of the WSWC. She highlighted the following aspects of the WSWC’s longstanding policy in support of settlements: (1) “quantification and resolution of Indian water rights claims is absolutely critical to the stability and certainty of state western resource management;” (2) “resolution should be through settlement as opposed to litigation, wherever possible;” and (3) “the federal government...has a trust obligation to provide federal funding to assist in both the negotiation and implementation of these settlements.” Maria also said, “Although Congress has authorized 27...settlements to date, the water rights claims of many more tribes remain un-quantified and the complexity as well as the cost of resolving these claims is increasing. While there have been recent successes...obtaining the federal funding that is absolutely essential to resolve Indian water rights claims has proven to be difficult.”⁸⁴

⁸⁴See pg. 34.

Native American Rights Fund Executive Director John Echohawk said Interior's Indian Water Rights Office "is doing a great job" with its available resources, but that additional federal resources are needed to assist tribes in the negotiation process. John also said, "Over the 30 years we have worked with the [WSWC] on this issue, we have always found that... funding is the most difficult issue."⁸⁵

Navajo-Gallup Pipeline

On April 16, the Bureau of Reclamation awarded a \$10.75 million contract to McMillen, LLC of Boise, Idaho to start construction of an early phase of the 280-mile Navajo-Gallup water supply pipeline. Reclamation, the Indian Health Service, the Navajo Nation, and the City of Gallup, New Mexico are all involved. The pipeline is a key component of the Navajo Nation's water rights settlement with New Mexico, which resolved disputes over its claims to water from the San Juan River. Eventually, the pipeline will divert 37,376 af/year of water from the San Juan River Basin and supply water to over 43 chapters of the Navajo Nation, the City of Gallup, and a portion of the Jicarilla Apache Nation. In total, the project will provide enough water to support a future population of 250,000 people by 2040.

Secretary of the Interior Ken Salazar said the contract "...marks a major milestone for this high-priority infrastructure project as we work to implement the historic water rights settlement that will deliver clean drinking water to hundreds of thousands of people and offer certainty to water users across the West." He also said the permanent water supply provided by the pipeline "...will vastly improve the quality of life and offer greater economic security for the Navajo Nation."⁸⁶

On September 27, Secretary of the Interior Ken Salazar and Navajo Nation President Ben Shelley announced a \$43 million financial assistance agreement for the design and construction of a portion of the Navajo-Gallup Water Supply Project. Under the agreement, the Navajo Nation will be responsible for the design and construction of the lower reaches of the Cutter Lateral, one of two branches of the project. The Bureau of Reclamation will be responsible for the uppermost reach of the lateral. Salazar said the agreement "...signifies not only another major milestone in progress toward the Navajo-Gallup Water Supply Project, but also the high priority that the Obama Administration has placed on completing the project to deliver clean running water to Navajo communities - many for the first time."⁸⁷

Crow Tribe-Montana Water Rights Compact

On April 27, Montana Governor Brian Schweitzer, Secretary of the Interior Ken Salazar, and Cedric Black Eagle, Chairman of the Crow Tribe, executed the Crow Tribe-Montana Water Rights

⁸⁵<http://www.indian.senate.gov/hearings/hearing.cfm?hearingID=eb997a7c3376c76b36a041cf2a0ba6c1>.

⁸⁶<http://www.doi.gov/news/pressreleases/index.cfm>.

⁸⁷<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=41029>. *Western States Water*, #1979, April 20, 2012.

Compact, marking a significant step towards implementation of the settlement. The agreement quantifies the tribe's water rights and authorizes \$460 million in federal funding to construct a municipal, rural, and industrial water system for the tribe and to rehabilitate and improve the Crow Irrigation Project. Congress directed Salazar to execute the compact when it authorized the settlement as part of the Claims Resolution Act of 2010. The Crow Tribe later ratified the compact in March 2011.

"The signing of the Crow-Montana Compact evidences the State's dedication to successfully resolving both Indian and federal reserved water rights claims through settlement negotiations," said Schweitzer. Salazar also said, "Signing the compact today demonstrates the Administration's continued commitment to resolving Indian water rights and providing settlements that truly benefit Indian tribes." Black Eagle noted that the settlement will provide his tribe with water and necessary infrastructure, stating, "Now the hard work continues to implement the Compact and Settlement legislation to ensure that Crow people realize these benefits from the settlement."⁸⁸

Confederated Tribes of the Goshute

On August 15, Utah Governor Gary Herbert and Confederated Tribes of the Goshute Chairman Ed Naranjo signed a memorandum of understanding (MOU) stating that both parties will enter into voluntary settlement discussions to quantify the tribe's water rights, while also recognizing limited water supplies and the potential for disagreement. Herbert and Naranjo signed the MOU during the 7th Annual Native American Summit, held in Salt Lake City on August 14-15.

The Goshute reservation covers approximately 112,870 acres in Utah's Juab and Tooele Counties, as well as Nevada's White Pine County. It is home to about 150 tribal members, and Goshute leaders have expressed a desire to quantify the tribe's rights in order to further development on the reservation. The tribe has not entered into a similar MOU with Nevada.

"I recognize how critical it is for the [tribe] to establish rights to water resources on its reservation; not just for now, but for the future lives of its residents," said Herbert. "This MOU is an important beginning to defining those rights." Naranjo said the tribe needs to quantify its rights in order for them to be "meaningful," while Goshute Vice Chair Madeline Greymountain said the MOU sets the "ground rules for dialog."⁸⁹

Interior

FY2013 Budget

Rep. Mike Simpson (R-ID), Chairman of the House Appropriations Committee's Subcommittee on Interior and the Environment, held a number of hearings on the Administrations

⁸⁸<http://www.doi.gov/news/pressreleases/index.cfm>. *Western States Water*, #1947, September 9, 2011, and #1908, December 10, 2010.

⁸⁹http://www.utah.gov/governor/news_media/article.html?article=7573.

FY2013 budget request for the U.S. Department of the Interior. On February 16, Secretary Ken Salazar testified that Interior “...manages and delivers water, arbitrates long-standing conflicts in water allocation and use, and actively promotes water conservation.” He noted Interior is the “largest supplier and manager of water in the 17 Western States, promotes and assists others to conserve water and extend water supplies, and provides hydropower resources used to power much of the Country. The Department estimates that the use of water, timber, and other resources produced from Federal lands supported 370,000 jobs and \$48 billion in economic activity.”

Speaking of spurring growth and innovation through science, Salazar said, “Investments in Interior’s research and development will improve management of U.S. strategic energy and mineral supplies, water use and availability, and natural hazard preparedness. Sustainable stewardship of natural resources requires strong investments in research and development in the natural sciences.”

Speaking about delivering sustainable growth through water and the role of the Bureau of Reclamation (which is not under the Subcommittee’s jurisdiction), Salazar said, “[It] plays a critical role in addressing the Nation’s water challenges.... Reclamation maintains 76 dams and 348 reservoirs with the capacity to store 245 million acre-feet of water. The Bureau manages water for agricultural, municipal, and industrial use, and provides flood control and recreation for millions of people. Reclamation’s activities, including recreation, generate estimated economic benefits of over \$55 billion and support nearly 416,000 jobs.... [It] provides water to over 31 million people...[and irrigation water for] an estimated 60% of the Nation’s vegetables....”

Further, “Reclamation facilities also reduce flood damages in communities where they are located and thereby create an economic benefit by sparing these communities the cost of rebuilding or replacing property damaged or destroyed by flood events.”

He testified that WaterSMART, a 2010 initiative, “...has assisted communities in improving conservation, increasing water availability, restoring watersheds, resolving long-standing water conflicts, addressing the challenges of climate change, and implementing water rights settlements. The program has provided more than \$85 million in funding to non-Federal partners, including Tribes, water districts, and universities, including \$33 million in 2011 for 82...grant projects....

Hydropower

On April 16, Anne Castle, Assistant Secretary of the Interior for Water and Science, released a progress report on the implementation of a 2010 interagency Memorandum of Understanding (MOU) on hydropower between the Department of the Interior, the U.S. Army Corps of Engineers and the Department of Energy. The purpose of the MOU is to build a working relationship between the agencies, foster collaboration, and align their renewable energy development efforts.

According to the report, the interagency collaboration has led to: (1) advances in hydropower technology; (2) streamlining of the licensing and permitting process; (3) assessment of the potential for adding hydropower at existing facilities; and (4) the development of a database for all existing U.S. hydropower infrastructure, among other things.

“Through collaboration and partnerships among federal agencies, the hydropower industry, the research community, and numerous stakeholders, we are succeeding in advancing the development of hydropower as a clean, reliable, cost-effective and sustainable energy source,” said Castle. “From assessing opportunities for new generation on existing Federal facilities to developing tools to get more energy from the same amount of water, we are working on many fronts to increase the potential of the largest source of renewable energy in the country.”⁹⁰

WaterSMART

On May 2, Secretary of the Interior Ken Salazar announced that the Bureau of Reclamation will provide \$20.3 million in WaterSMART funding for eight Congressionally authorized Title XVI Water Reclamation and Reuse projects. Reclamation will also provide \$943,000 for the development of eight new feasibility studies that will explore potential water recycling projects. Of this funding, seven of the projects and seven of the studies are located in California. One project and one feasibility study are located in Texas.

In addition, Salazar announced \$11 million in funding for 34 new WaterSMART Water and Energy Efficiency grants to conserve water and energy through improvements to existing facilities in California, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming. The projects are expected to save 56,826 af/year of water. Combined with the non-federal cost-share, these projects will complete \$51 million in improvements.

“This funding will not only help ensure a stable water supply for businesses and local residents but also create jobs, enhance the environment and strengthen local economies,” said Salazar. Reclamation Commissioner Mike Connor also noted that the funding will help several local communities “...secure their water supplies and reduce dependence on imported water sources.”⁹¹

On October 11, Interior released a report on the progress of WaterSMART over the last three years. Secretary of the Interior Ken Salazar launched the initiative to support water sustainability through a variety of conservation programs and other efforts. The report found that WaterSMART projects and other activities are expected to conserve an estimated 587,839 acre-feet of water per year. According to Interior, these results show that the agency is “well on the way” toward achieving its goal of saving 730,000 acre-feet per year by the end of 2013.

The report lists other accomplishments, including among others: (1) the conservation of 40 million kilowatt-hours of electricity, enough to power 3,400 households; (2) \$94 million in WaterSMART grants for 158 projects, leveraging over \$280 million in water management improvements in the West; (2) \$231 million in federal funding for Title XVI Water Reclamation and Reuse projects; (3) steps by Interior agencies to conserve water at over 2,400 facilities; (4) cost-shared funding for 129 small efficiency projects through the Water Conservation Field Services Program, 69 of which are now complete; and (5) over \$12 million for 17 basin studies in the West.⁹²

⁹⁰<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=39824>.

⁹¹<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=39874>.

⁹²<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=41164>.

Glen Canyon Dam

On May 23, Secretary of the Interior Ken Salazar announced the approval of two long-term experimental programs that will modify the operations of Glen Canyon Dam in Arizona. The programs are intended to provide high-flow releases of Colorado River water for native fish protections to preserve and improve their Grand Canyon habitat in Arizona. The programs are part of Interior's Glen Canyon Dam Adaptive Management Program. According to Interior, they represent the most important experimental modification of the dam's operations in over 16 years.

The first program establishes a long-term protocol for testing high-flow releases from the dam to determine whether multiple high flow events can rebuild and conserve sandbars, beaches, and associated backwater habitats that were lost following the dam's construction and operation. This protocol is intended to simulate natural flood conditions to provide key wildlife habitat, reduce erosion of archaeological sites, enhance riparian vegetation, maintain or increase camping opportunities, and improve the "wilderness experience" along the Colorado River in Grand Canyon National Park. The second program outlines actions and research to control non-native fish and protect endangered native fish in the river below the dam. The effort is also intended to ensure continued compliance with the Endangered Species Act and a biological opinion the Fish and Wildlife Service issued in 2011.

"Today's decisions constitute a milestone in the history of the Colorado River and will provide a scientific foundation to improve future operations to benefit resources in the Grand Canyon, as well as the millions of Americans who rely on the river for water and power," said Salazar.⁹³

On November 9, the Department of the Interior announced the first "high-flow experimental release" at Glen Canyon Dam since 2008. The release occurred on November 19, and is part of a new long-term protocol that Secretary of the Interior Ken Salazar announced in May. The protocol calls for more high-flow surges to maintain habitat for the endangered humpback chub and other native aquatic species. According to Interior, the surges will push sediment deposited below the dam by Colorado River tributaries downstream to rebuild banks and sand bars through the Grand Canyon. The surges will also benefit camping beaches, backwater habitats, riparian vegetation, and other downstream resources. The five-day release will peak at approximately 42,300 cfs and is designed to take advantage of sediment deposited as a result of recent rainstorms and monsoons.

America's Great Outdoors Initiative

On May 25, Secretary of the Interior Ken Salazar highlighted nine projects in the Southwest and Great Plains to serve as models for Interior's America's Great Outdoors River Initiative. The projects are part of 51 ongoing efforts under the initiative, one in each state and the District of Columbia, that are intended to conserve and restore key rivers, expand outdoor recreation opportunities, and support jobs in local communities.

⁹³<http://www.doi.gov/news/pressreleases/index.cfm>.

The nine projects include collaborative efforts between federal agencies, states, and others to: (1) remove invasive species, recover native fish, and develop education programs in Arizona's San Pedro River watershed; (2) promote river stewardship and recreational access to the Kansas River in Kansas, and to obtain a National Water Trail designation for the river; (3) improve outdoor recreation and restore habitat along the Missouri River in Montana; (4) implement a basin-wide, cooperative conservation and recreation program for the Platte River in Nebraska; (5) recover the razorback sucker and other species on the San Juan River in Colorado, New Mexico, and Utah; (6) restore and conserve habitat to help recover the pallid sturgeon in the Missouri River; (7) carry out a land management demonstration project along Oklahoma's Blue River; (8) install bridges across Gimlet Creek in South Dakota to improve recreation and protect native fish species; and (9) implement riparian, wetland, and stream restoration projects on the Rio Grande in Texas.

Landsat

Thermal Infrared Sensor

On January 19, the National Aeronautics and Space Administration (NASA) reported that the thermal infrared sensor (TIRS) for the next Landsat satellite (Landsat 8) has completed the last of its functional testing. NASA designed, built and tested the sensor in three and a half years, which it says is "...an incredibly fast development and delivery time." The instrument faced a series of closing inspections before being shipped to Orbital Sciences Corporation, the contractor building the satellite. NASA further reported that the sensor could be ready for integration into the spacecraft by February 20, about a week ahead of schedule. Landsat 8 is scheduled for launch in 2013. The sensor is an important component of Landsat 8 and will provide data that states can use to measure and calculate water consumption, as well as administer water rights and interstate compacts. The WSWC has long supported the Landsat program and has worked to ensure that Landsat 8 included a TIRS sensor.⁹⁴

Landsat 5

On February 16, the U.S. Geological Survey (USGS) announced that it had suspended Landsat 5 imaging operations for 90 days. USGS halted imaging in November 2011 when a component vital to the transmission of the satellite's thermal mapper (TM) data began showing signs of imminent failure. USGS will use the additional time to explore ways of restoring the imaging. If no significant improvement is possible, a limited amount of transmission life would remain. In that case, USGS would prioritize TM imaging to collect growing season imagery over the Northern Hemisphere.

USGS is also working to recover a second imaging instrument on Landsat 5. If it is unable to restore the TM data or the secondary instrument, it will decommission the satellite. At the same time, Landsat 7 remains in orbit but has experienced an instrument anomaly that has reduced the amount of data it collects per image. Both Landsat 5 and 7 have operated far beyond their design

⁹⁴http://landsat.gsfc.nasa.gov/news/news-archive/news_0427.html. *Western States Water*, #1958, November 28, 2011.

lives. Landsat 8, is scheduled for launch in January 2013 with a five year design life. Questions remain about how to fund and continue the series beyond Landsat 8.

“The challenge of attempting to recover operations of malfunctioning, 3-decade old components in an unmanned satellite orbiting 400 miles above Earth is daunting to say the least,” said USGS Director Marcia McNutt.⁹⁵

On June 4, the USGS announced that it had powered on Landsat 5’s multi-spectral scanner (MSS) in a test mode. The other data collection instrument on the satellite, a TM that provided thermal data, malfunctioned in 2011 and is nearing complete failure. The MSS sensor gathers data in fewer spectral bands than TM, has lower pixel resolution, and does not acquire thermal data, but covers the same areas as a TM scene. Landsat 5’s successor satellite, Landsat 7, continues to collect thermal images but experienced a hardware failure in 2003 that causes a 22% loss of data in every image.

USGS Director Marcia McNutt said that while the MSS sensor is “...not a complete replacement for the loss of the [TM], it does provide some insurance for ensuring Landsat data continuity should Landsat 7 fail prior to Landsat 8 achieving orbit next year.”

Landsat 8 is scheduled for launch in January 2013 with a TIRS. Landsat 5 has enough fuel to operate through 2013, and USGS will re-evaluate Landsat 5’s MSS data collection once Landsat 8 is operational.⁹⁶

40th Anniversary

On July 23, NASA and the USGS held a news conference to mark the 40th anniversary of the Landsat program, which has become the world’s longest-running Earth-observing satellite program. During the briefing, NASA and USGS announced the 10 most significant images from the Landsat record, the results of a contest showing local environmental changes, and the top five Landsat “Earth As Art” images selected in an online poll.

“Landsat has given us a critical perspective on our planet over the long term and will continue to help us understand the big picture of Earth and its changes from space,” said NASA Administrator Charles Bolden. Assistant Secretary of the Interior for Water and Science Anne Castle also said, “Landsat has been a game changer for agricultural monitoring, climate change research, and water management.”

Water managers across the West use Landsat data to calculate consumptive water use. However, Landsat 5 and 7 have both experienced technical difficulties, which could lead to a gap

⁹⁵<http://www.usgs.gov/newsroom/article.asp?ID=3109>. *Western States Water*, #1970, February 17, 2012.

⁹⁶<http://www.usgs.gov/newsroom/article.asp?ID=3231>. *Western States Water*, #1971, February 24, 2012.

in Landsat data before the launch of Landsat 8 in 2013. The WSWC has long supported the Landsat program⁹⁷

Litigation/Water Rights

Oklahoma

Choctaw and Chickasaw Tribes

On February 10, the Oklahoma Attorney General's Office filed a motion on behalf of the Oklahoma Water Resources Board (OWRB) with the state Supreme Court, asking it to initiate a comprehensive stream adjudication under the McCarran Amendment to determine who has rights to the waters of three major stream systems in southeastern Oklahoma. The motion follows an August 2011 lawsuit that the Choctaw and Chickasaw Tribes filed in federal district court, asserting federally-protected rights to, and dominion over, water within a 22-county area of southeastern Oklahoma. The tribes argue that these rights are based on federal treaties that gave them fee simple title to the water within their former treaty territory. Although much of the land within this territory has been allotted to non-Indians, the tribes maintain that they never abrogated their water rights and that these rights are "prior and paramount" to state-issued rights and state regulation.

Among other things, the tribes' lawsuit seeks: (1) declaratory judgments against the OWRB on a pending application by Oklahoma City and the Oklahoma Water Utility Trust for a permit to use stream water from Sardis Reservoir in southeastern Oklahoma or any other withdrawal or export of water from the area unless and until a general stream adjudication satisfying the McCarran Amendment is initiated; and (2) permanent injunctions against such actions until a general stream adjudication satisfying the McCarran Amendment is completed. The Oklahoma Attorney General's Office has filed a motion asking the federal court to dismiss the lawsuit.⁹⁸

"The state filed its application today with great reluctance," said Oklahoma Governor Mary Fallin (R). "However, the attorney general and I both believe that requesting the Oklahoma State Supreme Court to assume original jurisdiction over a comprehensive stream adjudication is the best way to protect and establish certainty over the water rights of all Oklahomans, including members of the Choctaw and Chickasaw nations."⁹⁹

Montana

PPL Montana v. Montana

On February 22, the U.S. Supreme Court issued its decision in *PPL Montana v. Montana*, unanimously ruling that a determination of navigability for purposes of ascertaining title to a riverbed must utilize a segment-by-segment analysis. The Court also held that navigability must be

⁹⁷http://www.nasa.gov/mission_pages/landsat/news/landsat-40th.html. *Western States Water*, #1971, February 24, 2012.

⁹⁸<http://www.owrb.ok.gov/util/legal.php>.

⁹⁹http://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=6145.

assessed as of the time a state entered the Union with respect to a river's usefulness for "trade and travel."

The case focuses on a dispute over the ownership of the beds of three Montana rivers. Montana argued that it owns the beds because the rivers were navigable under the Equal Footing Doctrine when it became a state. Conversely, *PPL Montana*, which operates hydroelectric facilities on the rivers, argued that the beds are private property and were not navigable at the time of Montana's statehood. The Montana Supreme Court agreed with Montana and ordered PPL Montana to pay \$41 million in back rent for use of the beds.

The U.S. Supreme Court reversed, reasoning in an opinion by Justice Kennedy that the Montana Supreme Court erred when it held that short interruptions, or certain portages in the rivers in question, did not defeat a finding of navigability in fact. Instead, the Court held that the "...segment-by-segment approach to navigability for title is well settled, and it should not be disregarded." The Court also held that the state court erred in its treatment of present day evidence of navigability, namely recreational use, in finding that the rivers were navigable because it did not consider if: (1) the watercraft is "meaningfully similar" to those in customary use for trade and travel at the time of statehood; and (2) the river's post-statehood condition is not materially different from its physical condition at statehood.

Of note, the Court did not address whether laches or estoppel could apply to bar Montana's claims. However, the Court did state that "...the reliance by PPL and its predecessors in title upon the State's long failure to assert title is some evidence to support the conclusion that the river segments were nonnavigable for purposes of the equal-footing doctrine."¹⁰⁰

Oklahoma/Texas

Tarrant Regional Water District v. Hermann

On April 2, the U.S. Supreme Court issued a one sentence statement inviting the U.S. Solicitor General to file a brief "expressing the views of the United States" in *Tarrant Regional Water District v. Hermann*. The case involves a claim that a Texas water district brought against the OWRB in 2007 over a series of Oklahoma laws that limit out-of-state water sales, which it argues violate the Commerce Clause of the Constitution. The case is part of a larger effort by Tarrant to divert water from Red River tributaries in Oklahoma for use in Texas. However, the Tenth Circuit Court of Appeals upheld a lower court's dismissal of the suit in 2011, reasoning that the Red River Compact already allocates the water in question and allows Oklahoma to regulate its apportioned water. The Court is considering whether to review the Tenth Circuit's decision and its request for a brief could increase the chances that it may take up the case.

The Court's statement follows its March 19 rejection of an appeal of the Tenth Circuit's decision in *City of Hugo v. Nichols*. That case involved a similar challenge to Oklahoma's laws that an Oklahoma city brought against the OWRB as part of an effort to sell 200,000 af/year to Irving,

¹⁰⁰*Western States Water*, #1957, November 18, 2011.

Texas. However, the Tenth Circuit held that the city lacked standing to sue the OWRB because it was a political subdivision of the state. The Court did not indicate why it did not take up the case.¹⁰¹

On November 30, the U.S. Solicitor General Donald Verrilli filed a brief urging the U.S. Supreme Court to review the Tenth Circuit Court of Appeals' decision which found that the Red River Compact between Oklahoma, Texas, Arkansas, and Louisiana apportioned the water in question to Oklahoma, thereby insulating the Oklahoma laws from Commerce Clause challenges. It found that the Compact demonstrated a presumption against preemption of Oklahoma's laws, citing consistent deference by Congress to state water laws. It also found that the Compact's provisions did not entitle states to divert water outside their borders.

The Solicitor General's brief argued that the Tenth Circuit improperly applied a presumption against preemption of the Oklahoma statutes, stating that such a presumption "...should not be applied to disputes over whether a state law conflicts with an interstate compact. An interstate compact approved by Congress is a federal law...but it is not a federal law imposed by Congress on the States. The compact is instead a collaborative effort among States to formulate a solution to a common problem, which is later given the status of federal law when the agreement is presented by the compacting States and approved by Congress." Without a presumption against preemption, the brief argues that "...the better reading...of the Compact is that a State, at least in certain circumstances, may access water from its allocated share...outside of [its] boundaries."

The Solicitor General also argued that the Tenth Circuit's Commerce Clause holding was "unnecessary" and questioned its finding that Tarrant sought water allocated to Oklahoma, stating: "[Tarrant] is asserting a right only to access water that, under its interpretation of the Compact, is allocated to Texas. [Tarrant] is not asserting a right to access water...allocated to Oklahoma.... If [Tarrant] is correct that Texas water users may not be altogether barred from accessing Texas's allocated share...at least in some circumstances, then it is the Compact that prohibits [OWRB] from enforcing state laws that would bar such access, not the Commerce Clause."

Next, the Solicitor General argued: "[T]his case implicates important state interests protected by an interstate compact, and the court of appeals' decision has potentially great practical consequences for the availability of water in a major urban area in Texas. Those concerns justify this Court's review."

Lastly, the brief noted that while the compact may allow Tarrant to access a portion of Texas' allocation in Oklahoma, that ability would not directly entitle the water district to the requested amount of water because: (1) the Compact entitles Texas to 25% of excess water in the subbasin, which "will change every year;" (2) the federal government is involved with litigation over water right claims of the Choctaw and Chickasaw Nations in Oklahoma; and (3) questions remain as to whether the compact allows out-of-state diversions as a matter of course, or only when states cannot secure access within their boundaries.

¹⁰¹ See: <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-889.htm>. *Western States Water*, #1947, September 9, 2011.

The justices are not obligated to follow Verrilli's recommendation, but the chances of them taking up a case generally improve when they ask for a Solicitor General's opinion. The Court is expected to decide whether to take up the case by the end of the year.¹⁰²

River Basins

Colorado River

Water Supply and Demand Study

On February 3, Reclamation announced updates to two technical reports that are part of its Colorado River Basin Water Supply and Demand Study. The first report, or Technical Report B, provides a qualified assessment for four water supply scenarios, including scenarios based on streamflow records and future climate projections. Updates include adjusted streamflow projections to account for hydrologic model biases and further analysis of streamflow projection sensitivity to greenhouse gas emissions. These adjustments do not change the finding of the study's June 2011 Interim Report that the Colorado River's mean natural flow as measured at Lees Ferry, Arizona is projected to decrease 9% over the next 50 years. The second report, or Technical Report D, described metrics developed for assessing the Colorado River system's future reliability. Updates include the addition of certain metrics, including those regarding water deliveries, recreation, and ecological resources.¹⁰³

On May 17, the Bureau of Reclamation released a technical memorandum describing current and future water demand imbalances in the Colorado River Basin over the next 50 years. The memorandum is part of Reclamation's Colorado River Basin Study and updates an earlier report issued last June that presented six water demand scenarios and historic consumptive use information. In particular, the memorandum presents water demand for a range of future scenarios within the basin. It also updates the method the study used to assess the impact of climate change on demand. Among other things, the memorandum estimates a range of about 13.8 to 16.2 million acre-feet of Colorado River water demand by 2060. When comparing the six demand scenarios to the median water supply projections that incorporate climate change information, the memorandum finds that the long-term imbalance in future supply and demand could be greater than 3.5 million acre-feet in 2060. Reclamation will use the demand scenarios to analyze the future reliability of the Colorado River system. This effort will analyze the river's reliability with and without options and strategies to mitigate future water supply and demand imbalances. The results of this analysis will be included in a final report.¹⁰⁴

On December 12, Secretary of the Interior Ken Salazar announced the release of the Colorado River Basin Water Supply and Demand Study. Congress authorized the study as part of the 2009 SECURE Water Act, and the Bureau of Reclamation developed and funded it jointly with the seven basin states. According to the study, the average imbalance between future water supply and demand

¹⁰²*Western States Water*, #1977, April 6, 2012.

¹⁰³<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=39144>.

¹⁰⁴<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=39911>. *Western States Water*, #1959, December 2, 2011, and #1934, June 9, 2011.

is projected to exceed 3.2 million acre-feet by 2060. The largest increase in demand will come from municipal and industrial users as a result of increased population growth in the region. The basin currently provides water to about 40 million people, which the study says could grow to approximately 76.5 million by 2060, under a rapid growth scenario.

The study lists over 150 adaptation and mitigation proposals received from study participants, stakeholders, and the public on potential ways to resolve future imbalances. These range from reuse, conservation, desalination, and efficiency improvements to a possible pipeline to divert water from the Missouri River. The study does not specify how to address future imbalances, but Reclamation has said it does not view proposals such as the Missouri River pipeline to be the most practical, and that it will work with stakeholders to explore in-basin strategies.

“There is no silver bullet to solve the imbalance between the demand for water and the supply in the Colorado River Basin over the next 50 years – rather, it’s going to take diligent planning and collaboration from all stakeholders to identify and move forward with practical solutions,” said Salazar. Anne Castle, Assistant Secretary of the Interior for Water and Science, also said this and other basin studies in the West will help “...stakeholders in each basin to come together and determine their own water destiny. This study is a call to action, and we look forward to continuing this collaborative approach as we discuss next steps.”¹⁰⁵

International Boundary and Water Commission

On November 20, the U.S. and Mexico delegations of the International Boundary and Water Commission (IBWC) adopted new rules to guide the countries’ management of the Colorado River through 2017. Known as Minute 319, the U.S. and Mexico will carry out the agreement under the 1944 Water Treaty, which allots 1.5 million acre-feet of Colorado River water to Mexico each year. Delegations from both countries developed the agreement over the last three years, with participation from the seven basin states, federal agencies, and non-governmental organizations.

In dry years, Minute 319 reduces water deliveries to Mexico by 50,000 acre-feet when Lake Mead’s elevation is at or below 1,075 feet; by 70,000 acre-feet when the reservoir is below 1,050 feet; and by 125,000 acre-feet when the level is below 1,025 feet. During wet years, Mexico can “increase its order” for Colorado River system water by 40,000 acre-feet when Lake Mead is at or above 1,145 feet; 55,000 acre-feet when the reservoir’s elevation is at or above 1,170 feet; 80,000 acre-feet when Lake Mead is at or above 1,200 feet and flood control releases are not required; and 200,000 acre-feet when “...flood control releases are required, regardless of elevation.” Mexico can also store up to 250,000 acre-feet per year of its annual allotment in Lake Mead. Notwithstanding these provisions, the agreement specifies that Mexico’s total annual water deliveries cannot exceed 1.7 million acre-feet.

Other provisions: (1) extend a previous agreement (Minute 318) that allows Mexico to defer delivery of its total allotment while it makes repairs to infrastructure damaged from a 2010 earthquake; (2) implement measures to address salinity impacts; (3) generate water for the Colorado River Delta environment through conservation projects; (4) outline opportunities for future

¹⁰⁵<http://www.usbr.gov/lc/region/programs/crbstudy.html>

cooperation on environmental restoration, water conservation, system operations, and new water sources projects; (5) establish the expectation that the IBWC will extend or replace the substantive provisions of the agreement; and (6) consider connecting the All-American Canal in the U.S. and the Colorado River-Tijuana Aqueduct in Mexico as a backup in cases of emergencies or failure of the Mexican aqueduct.

“Minute 319 gives us new tools to address the impacts of drought and climate change,” said IBWC U.S. Commissioner Edward Drusina. “It also sets the stage for cooperation between our two countries for many years to come.”¹⁰⁶

Missouri and Mississippi Rivers

The American Waterways Operators, National Waterways Conference, and Waterways Council, Inc. wrote the Corps on November 14, asking it to operate dams and reservoirs throughout the Missouri and Mississippi River systems to sustain commercial navigation on the Mississippi River in response to the continued drought. In particular, the letter asked the Corps to convene the Mississippi River Control Management Board to “...take action to ensure proper management of both rivers, specifically that the Corps consider any and all options that will maintain the 9-foot navigation channel in the Mississippi River. We do not expect, nor would we ask, the Corps to take any action with respect to the Mississippi River that would unduly burden another interest in the Missouri River reservoir system; we ask only that the Corps also take into account navigation on the Mississippi when exercising its discretion on how best to manage Missouri River water resources.”

The letter continued, “We understand the Corps believes it lacks legal authority to manage Missouri River reservoirs in a manner that would benefit navigation on the Mississippi River. We [submit] that (a) Congress specifically intended that the Missouri River reservoirs be operated in a manner that could, would, and should beneficially impact downstream areas in the Mississippi as well as the Missouri, and there is no legal prohibition against it doing so; (b) the [Board] was created to address issues relating to interconnected basins and the Corps itself invoked it to address needs on the Mississippi; (c) the Corps’ own Master Plan requires that it deviate from other provisions in the plan when circumstances like the current ones exist; [and] (d) the Corps had previously operated the Missouri in ways intended to benefit the Mississippi. Ultimately, the Corps must provide a rational basis for choosing not to protect navigation on the Mississippi while balancing its other obligations.”

Of note, Corps representatives have indicated that all surface waters entering Missouri River mainstem reservoirs are stored waters that the Corps allocates and controls without recognition of the states’ natural flow rights. WSWC Position #348 urges the Corps to recognize the states’ legal right to develop, use, control, distribute, and allocate surface waters within their borders, including natural flows.¹⁰⁷

¹⁰⁶http://www.ibwc.state.gov/Files/Press_Release_112012.pdf. To read Minute 319, see: http://www.ibwc.state.gov/Treaties_Minutes/Minutes.html.

¹⁰⁷*Western States Water*, #2004, October 15, 2012.

The Corps has indicated that it will not release water from Missouri River reservoirs to ensure commercial navigation on the Mississippi River, which has experienced decreased flows due to this year's drought. The Corps announced its decision in a December 6 letter from Assistant Secretary of the Army Jo-Ellen Darcy to Senator Dick Durbin (D-IL) and nine other Senators, who had asked the agency in November to analyze the impact of additional Missouri River releases to sustain navigation traffic on the Mississippi.

Darcy states: "The Corps lacks authority to alter the authorized purposes of the Missouri River Mainstem Reservoir System or to modify operation of the system under the water control manual for the express purpose of benefitting Mississippi River navigation." Darcy further noted that without additional rainfall, increasing releases from the Missouri would be "insufficient" to continue navigation on the Mississippi, while negatively impacting the 2013 navigation season for both rivers. Other potential "negative effects" to the Missouri River Basin include reduced hydropower production, endangered drinking water supplies, increased irrigation costs, adverse fish and wildlife impacts, and recreation declines, among others.

To help maintain navigation on the Mississippi, Darcy indicated that the Corps has begun processes to remove rock pinnacles and sediment shoals in the river. According to her letter, the combination of these efforts along with forecasted rainfalls, currently authorized releases, and other factors "...are expected to be sufficient to sustain navigation on the middle Mississippi River without additional releases from the Missouri River Mainstem Reservoir System. I assure you that the Corps continues to undertake all measures within its authority and available resources that are necessary to maintain navigation on the Mississippi River during these drought conditions."

In response, Durbin has announced that he intended to convene a meeting of stakeholders for a briefing from the Corps to discuss ways to ensure navigation on the Mississippi through means other than releasing additional water from the Missouri. "I hope they are right and I want them to meet with those directly impacted by this challenge," he said.¹⁰⁸

Darcy's letter follows requests by farm groups, shipping organizations, oil industry groups, and other organizations, which have asked the Corps to ensure that commercial navigation continues on the Mississippi.

In contrast, Senators Pat Roberts (R-KS), Jerry Moran (R-KS), Max Baucus (D-MT), Jon Tester (D-MT), Kent Conrad (D-ND), John Hoeven (D-ND), Tim Johnson (D-SD), and John Thune (R-SD) wrote President Obama, Darcy, and the Federal Emergency Management Agency on November 30, arguing that the Corps does not have authority to release water from the Missouri to aid navigation in the Mississippi. Governors Sam Brownback (R-KS), Dennis Daugaard (R-SD), and Jack Dalrymple (R-ND) also signed the letter, along with Representatives Lynn Jenkins (R-KS), Kevin Yoder (R-KS), Rick Berg (R-ND), and Kristi Noem (R-SD).¹⁰⁹

¹⁰⁸<http://durbin.senate.gov/public/index.cfm/pressreleases?ID=2ac37c1a-1a57-408e-bd3e-cf3d4e4a5dfd>.

¹⁰⁹http://www.testersenate.gov/?p=press_release&id=2694. *Western States Water*, #2011, November 30, 2012.

Rio Grande River Basin

Conservation Reserve Enhancement Program

On September 20, Secretary of Agriculture Tom Vilsack announced the terms of a new Conservation Reserve Enhancement Program (CREP) agreement to help conserve irrigation water and reduce groundwater withdrawals in parts of the Rio Grande River Basin in Colorado. The agreement is intended to reduce irrigation water use by about 60,000 af/year by establishing native grasses, wildlife habitat, and wetland restoration on up to 40,000 acres of eligible irrigated cropland.

CREP is an option under USDA's Conservation Reserve Program, which provides financial and technical assistance to agricultural producers who voluntarily establish conservation practices on their land. USDA's Farm Service Agency will administer the agreement in eligible Colorado counties and work with USDA's Natural Resources Conservation Service, Colorado's Division of Water Resources, and other state and local partners.

"USDA's Conservation Reserve Program continues to be one of our nation's most successful voluntary efforts to conserve land, improve our soil, water, air and wildlife habitat resources – and now producers in Colorado have even greater incentives to enroll in efforts to protect the Rio Grande Basin," said Vilsack.¹¹⁰

States

California

Central Valley Project Section 215 Water

On January 5, the Bureau of Reclamation announced the availability of temporary Section 215 water for Central Valley Project (CVP) water service contractors south of California's Bay Delta. Section 215 refers to a portion of the Reclamation Reform Act of 1982 that allows water supplies that are not storable for Reclamation project purposes to be applied to lands that would otherwise be ineligible to receive project water. Reclamation notes that the water is available because of current hydrologic conditions in the Delta and because the federal share of the San Luis Reservoir filled on January 2. Current CVP demands in the South-of-Delta service area are also less than the operational and export capacity of a key pumping plant.

The conditions that make the surplus water available will be monitored daily and may cease to exist on short notice if hydrologic or tidal conditions change Reclamation's operational requirements. As such, the actual amount of Section 215 water made available will depend on actual conditions in the Delta. The availability of the water is a separate action unrelated to the CVP water supply outlook.¹¹¹

¹¹⁰http://www.fsa.usda.gov/FSA/printapp?fileName=nr_20120920_rel_0304.html&newsType=newsrel.

¹¹¹<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=38943>.

San Joaquin Valley Water Reliability Act

On February 16, the House Natural Resources Committee reported a marked up version of the San Joaquin Valley Water Reliability Act (H.R. 1837) by a vote of 27-17. Changes were represented in the form of a substitute amendment, which would repeal the San Joaquin River Settlement and codify the 1994 Bay-Delta Accord, which includes provisions to regulate flows and export limits in the Bay-Delta to benefit fish species that are listed under the Endangered Species Act (ESA).

Like earlier drafts, the reported version would expressly preempt California law as applied to water allocations or species protections in the Bay-Delta. The bill states that such preemption would occur notwithstanding Section 8 of the Reclamation Act of 1902, which states that the Act will not interfere with state laws "...relating to the control, appropriation, use, or distribution of water used in irrigation...."

In addition, new language regarding the operation of the federal CVP would direct the Secretary of the Interior "...to strictly adhere to State water rights law governing water rights priorities by honoring water rights senior to those belonging to the [CVP], regardless of the source of priority." The bill would also direct the Secretary to "strictly adhere to and honor" water rights and other priorities that are obtained or exist pursuant to specified provisions of the California Water Code. Further, any action "...that affects the diversion of water or involves the release of water from any water storage facility taken by the Secretary or the Department of Commerce to conserve, enhance, recover, or otherwise protect any species listed under the [ESA] shall be applied in a manner that is consistent with water right priorities established by State law." Unlike earlier drafts, the latest version of the bill states that it would not serve as precedent for any other state.

Water and Power Subcommittee Chair Tom McClintock (R-CA) said his subcommittee held two hearings on the bill and consulted with over 60 northern California water agencies. "The sum total of this work broadens the measure to resolve long-standing disputes between Northern and Central California water users and brings the full force of federal law to protect the senior water rights held by Northern California areas of origin, and assures greater access to water by the communities throughout the region," he said.¹¹²

However, California, the Administration, Congressional Democrats, and others oppose the bill. "This is yet another example of the Republican war on water that wrests control away from the states and puts the American people's water up to the highest corporate bidder," said Committee Ranking Member Rep. Ed Markey (D-MA). Likewise, Subcommittee Ranking Member Grace Napolitano (D-CA) said, "This attempt to jump to the head of the water delivery line would be disastrous for all of California and set a dangerous precedent for other states." Democratic Committee staff have also released a report detailing concerns regarding the bill and its possible impacts.¹¹³

¹¹²<http://naturalresources.house.gov/News/DocumentSingle.aspx?DocumentID=280935>.

¹¹³<http://democrats.naturalresources.house.gov/reports@id=0007.html>.

On February 29, the House passed H.R. 1837 by a 246-175 vote. Introduced by Rep. Devin Nunes (R-CA) the bill, according to the Congressional Research Service, would among other things repeal the San Joaquin River Restoration Settlement Act, amend the Central Valley Project Improvement Act (CVPIA), limit Endangered Species Act requirements to the extent that the federal CVP and California State Water Project (SWP) are operated in compliance with a 1994 Bay-Delta Accord between the State and federal government, and preempt any state law that would impose more restrictive requirements than those authorized for restoration of the San Joaquin River. In order to accomplish the later, the bill also exempts implementation of authorized actions from the requirements of Section 8 of the Reclamation Act of 1902, which requires compliance with state law.

The WSWC opposed passage of the bill, and communicated its existing position on Preemption of State Law in Federal Legislation, adopted on July 29, 2011 in Bend, Oregon. It reads in part: “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 the Congress has historically deferred to state law as embodied in Section 8 of the Reclamation Act...and myriad other statutes; and 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...”

Further, it states: “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...states...are in the best position to identify, evaluate and prioritize their needs and plan and implement strategies to meet those needs.... Therefore, ...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.”

John Laird, Secretary, California Natural Resources Agency, said in a February 28 letter to California’s congressional delegation, wrote: “I write with great urgency to again declare the state of California’s strong opposition to H.R. 1837.... This bill...will not deliver on its promise of providing greater water reliability and alleviating joblessness. In fact, [it] will have the unintended effect of causing greater uncertainty.... California is particularly troubled by H.R. 1837’s preemption of state law (Section 204). The WSWC, a non-partisan organization...has rightly objected to H.R. 1837’s rejection of this long-held precedent. Congress should not pre-empt the right of California – or any other state – to manage water under state water rights law. Despite what proponents point to as the uniqueness of this bill, if passed and enacted, no state will be safe from congressional interference in their water rights laws.”

H.R. 1837 Section 204 reads: “Notwithstanding Section 8 of the Reclamation Act of 1902, except as provided in this part, including Title IV of the Sacramento and San Joaquin Valleys Water Reliability Act, this part preempts and supersedes any State law, regulation, or requirement that imposes more restrictive requirements or regulations on the activities authorized under this part.”

The intent is to preempt California laws for the protection of fisheries and other environmental purposes.

Section 8 of the Reclamation Act reads: “Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.”

H.R. 1837 Title IV reads: “Notwithstanding the provisions of this Act, Federal reclamation law, or the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)-(1) the Secretary of the Interior (“Secretary”) is directed, in the operation of the Central Valley Project, to strictly adhere to State water rights law governing water rights priorities by honoring water rights senior to those belonging to the Central Valley Project, regardless of the source of priority; (2) the Secretary is directed, in the operation of the Central Valley Project, to strictly adhere to and honor water rights and other priorities that are obtained or exist pursuant to the provisions of California Water Code.” This section was added as the original bill was criticized as potentially serving junior water users at the expense of senior water rights.

H.R. 1837 Title V reads: “SEC. 501. PRECEDENT. Congress finds and declares that-(1) coordinated operations between the Central Valley Project and the State Water Project, previously requested and consented to by the State of California and the Federal Government, require assertion of Federal supremacy to protect existing water rights throughout the system; and (2) these circumstances are unique to California. Therefore, nothing in this Act shall serve as precedent in any other State.”

A number of WSWC members and other state water officials from Colorado, Montana, Nevada, New Mexico, Oregon, and Wyoming have also written expressing opposition to provisions of the bill.

House Natural Resources Committee Chair, Rep. “Doc” Hastings (R-WA) managed the bill on the floor: “Mr. Chairman, I rise in strong support of H.R. 1837, the Sacramento-San Joaquin Valley Water Reliability Act. Like California, my central Washington district is heavily dependent on irrigated water to support my agricultural industry. I understand the importance of having a stable, reliable water supply. I’ve witnessed how government regulations and environmental lawsuits can create conflicts for people, and jobs are the losers. However, Mr. Chairman, I have never seen anything like the economic devastation that California’s San Joaquin Valley has experienced as a direct result of Federal policies that restrict water supply and that created this man-made drought.”

“Mr. Chairman, in 2009, Federal regulations to protect an endangered species 3-inch fish led to the deliberate diversion of over...300 billion gallons of water away from the San Joaquin Valley farmers. This caused hundreds of thousands of acres of fertile farmland to dry up. It put thousands of people out of work, and it caused unemployment to reach 40 percent in some communities...farm workers who normally feed the Nation [were] forced to stand in food bank lines to receive handouts of carrots--carrots from China. Mother Nature temporarily rescued this region with historic precipitation last year, but another man-made drought is just around the corner.... The Federal Government announced that the San Joaquin Valley farmers would receive only 30 percent of their initial water allocation for this year. This is unacceptable, and if Congress doesn't act now we will once again see farm workers having to abandon the fields and return to the food lines.”

Rep. Tom McClintock (R-CA), Chair of the Water and Power Subcommittee, said of H.R. 1837: “It does not repeal 20 years of California water law; it restores it by restoring the allocation that was agreed to by a broad bipartisan coalition in the Bay-Delta Accord of 1994. [Then] Democratic Interior Secretary, Bruce Babbitt, assured all parties that this agreement would be honored by the State and Federal governments. His promise was broken first by his own Department and most recently when a Federal court deemed the delta smelt to be more important than the livelihoods of thousands of Central Valley farm workers.... [W]ater that these communities had already paid for and depended upon were simply expropriated and blissfully and cavalierly dumped into the Pacific Ocean, turning much of California's fertile Central Valley into a dust bowl. This bill redeems the promise made to the people of California and restores the allocations that were agreed to.”

He added, “The California Department of Water Resources determined that pumps which deliver water to the Central Valley had a negligible influence on salmon and delta smelt migration. The National Academy of Sciences reported that nonnative and invasive predators, like the striped bass, are a far more significant influence on salmon and delta smelt populations.... It's common to find striped bass in the delta gorged with salmon smolts and delta smelt. This bill allows open season on these destructive, invasive, and nonnative predators. Fish hatcheries produce millions of salmon smolts each year, and tens of thousands return as fully grown adults to spawn, but these fish are not allowed to be counted. This bill counts them, ensuring that hatcheries will produce thriving and bountiful populations of salmon and delta smelts and any other species considered endangered. The San Joaquin River Settlement Act envisions an absurdly impractical year-round cold war salmon fishery on the hot valley floor at an estimated cost of \$2 million per individual fish. That act was adopted by the Democrats 2 years ago....”

Senators Barbara Boxer (D-CA) and Diane Feinstein (D-CA), were expected to block any Senate action on the bill.

Bay Delta Conservation Plan

On July 25, California Governor Edmund “Jerry” Brown, Secretary of the Interior Ken Salazar, and National Oceanic and Atmospheric Administration (NOAA) Assistant Administrator for Fisheries Eric Schwabb outlined revisions to the proposed Bay Delta Conservation Plan (BDCP). State, federal, and local agencies are developing the BDCP to address environmental and water

supply issues in the Delta. The revisions are intended to restore fish populations, protect water quality, and improve the reliability of water supplies for users who receive deliveries from the federal CVP and California's State Water Project (SWP). Officials will study the environmental impacts of the revisions and release a draft environmental impact report for comment this fall.

Among other things, the proposed revisions include the construction of two tunnels to convey water from the Sacramento River beneath the Delta to communities south of the Delta. These facilities would have an intake capacity of 9,000 cfs, down from an earlier proposal of 15,000 cfs. The facilities' operations would also be phased in over several years and would use a conveyance system designed to use gravity flow to maximize energy efficiency and minimize environmental impacts. Other alternatives, including not constructing a conveyance facility or the construction of facilities with capacities of 3,000 to 15,000 cfs, will also be considered as part of the environmental review process.

"This proposal balances the concerns of those who live and work in the Delta, those who rely on it for water and those who appreciate its beauty, fish, waterfowl and wildlife," said Brown. Salazar also said "...we are taking a comprehensive approach to tackling California's water problems when it comes to increasing efficiency and improving conservation." In a statement, NOAA Administrator Dr. Jane Lubchenco said the changes are needed because the "status quo isn't working."¹¹⁴

South Dakota

State Revolving Funds

On January 5, South Dakota Governor Dennis Daugaard announced \$2.5 million in state grants, loans, and principle forgiveness for drinking water, wastewater, and solid waste projects. The South Dakota Department of Environment and Natural Resources (DENR) will administer and distribute the funds to cities and other entities across South Dakota. The funding will come from DENR's Clean Water and Drinking Water State Revolving Fund (SRF) programs, as well as its Solid Waste Management and Consolidated Water Facilities Construction programs. The WSWC supports stable and continuing federal SRF appropriations and allowing states greater flexibility for effective SRF management.¹¹⁵

Utah

Green River Proposed Nuclear Power Plant

On January 20, Utah State Engineer Kent Jones approved water right change applications that would allow the developers of a proposed nuclear power plant to use 53,600 af/year of water from the Green River. Project sponsor Blue Castle Holdings is acquiring the water from two Utah water conservancy districts and must now obtain plant approval from the Nuclear Regulatory Commission (NRC). The NRC will oversee a design process to make sure the proposed site is safe and ensure

¹¹⁴<http://www.doi.gov/news/pressreleases/index.cfm>.

¹¹⁵<http://denr.sd.gov/dfta/info/pr/pr12/jan12.aspx>.

compliance with the National Environmental Policy Act and Endangered Species Act. Blue Castle Holdings plans to invest \$100 million pursuing NRC approval. Billions more will be required to construct the facility.

The project would be Utah's first nuclear power plant and has raised a number of concerns among environmental groups and others regarding possible endangered fish impacts, over-appropriation of the Colorado River, local water use interference, and various other issues. However, Jones found that the applications complied with Utah law, which requires him to approve applications that meet specified criteria regarding water availability, water right impairment, project feasibility, public welfare, and other factors.

"We have listened to and very much appreciate the concerns raised by those in the local community and others," said Jones. "Those concerns helped us look carefully and critically at the proposal as we considered the appropriate action on these applications." He further acknowledged that while the water at issue is "not a lot on the Green River," it is "...a significant portion of the water Utah has left to develop on the Colorado River and a significant new diversion from the Green River where efforts are underway to provide habitat for recovery of endangered fish."¹¹⁶

On March 27, a coalition of environmental groups, individuals, and other entities filed two similar lawsuits in Utah state court to overturn Utah State Engineer Kent Jones' January decision. Jones approved the applications because he found that they complied with Utah law, which requires approval for applications that comply with specified, statutory criteria.

However, the complaints challenged Jones' decision, alleging that: (1) there is an absence of unappropriated water; (2) the uses under the change application will interfere with existing water rights; (3) the plant's proposed plan of diversion is not physically or economically feasible; (4) there is a lack of evidence that BCH has the financial ability to complete the project; (5) the proposed use is speculative in nature; and (6) the application will detrimentally impact the natural stream environment and public welfare.

The plaintiffs also argued that Jones erred "...because he presumed that the [project's] many unanswered questions would be addressed in the federal government's permitting process. Essentially, the State Engineer deferred to other entities his statutory obligation to ensure that the nuclear project and its massive consumption of water will not detrimentally impact that natural stream environment, public welfare, existing water rights, or public safety."¹¹⁷

Nevada

Southern Nevada Water Authority Pipeline

On March 22, Nevada State Engineer and WSWC member Jason King issued four rulings partially approving the Southern Nevada Water Authority's (SNWA) request for water right permits to pump water from four valleys located in east-central Nevada. The rulings allow SNWA to pump

¹¹⁶<http://www.waterrights.utah.gov/pressRelease/greenRiverNuclearPowerPressRelease.pdf>

¹¹⁷*Western States Water*, #1967, January 27, 2012.

84,000 af/year, which it intends to transport to Las Vegas via a 300-mile, \$3.5 billion pipeline to decrease the city's reliance on the Colorado River and local groundwater. The rulings assume that SNWA will build the pipeline, which still requires Bureau of Land Management environmental permits.

Among other things, the rulings found that SNWA "...needs a water resource that is independent of the Colorado River and that it would not be advisable for the Applicant to continue to rely upon the Colorado River for 90% of Southern Nevada's water when that source is over-appropriated, highly susceptible to drought and shortage, and almost certain to provide significantly less water to Southern Nevada in the future." Before SNWA can export the water, the rulings also require two years of base biological and groundwater flow monitoring and dictate that management and mitigation programs must be in place for each basin.

The largest withdrawal totaling 61,127 af/year would occur in Spring Valley, where a first stage of pumping would withdraw 38,000 af/year over eight years. After that time, environmental conditions would be evaluated before an additional 12,000 af/year could be withdrawn over another eight year period. The full amount might be granted later. Withdrawals in other areas include 11,584 af/year in Dry Lake Valley, 6,042 af/year in Delamar Valley, and 5,235 af/year in Cave Valley.

The rulings do not address SNWA's request for water rights to withdraw water from the Snake Valley, which straddles the Utah-Nevada border. That request is still pending.¹¹⁸

Colorado/Wyoming

Flaming Gorge Pipeline

On March 23, Colorado entrepreneur Aaron Million's Wyco Power and Water, Inc. asked the Federal Energy Regulatory Commission (FERC) to reconsider an order the agency issued in February denying his request for a preliminary permit to study the feasibility of his proposed Flaming Gorge Pipeline. The proposed 500-mile pipeline would transfer 250,000 af/year of water from the Flaming Gorge Reservoir on the Green River to southeastern Wyoming and Colorado's Front Range. The project would use Colorado and Wyoming's shares of the Colorado River Compact to develop hydropower and provide water for municipal and agricultural uses.

The Federal Power Act (FPA) authorizes preliminary permits as a means of allowing hydropower project proponents to maintain the priority of their license applications while gathering information to support their applications. However, FERC found that Wyco could not comply with FPA requirements for a preliminary permit until "...a water conveyance pipeline is actually built, authorizations have been obtained for a specific route, or the process to identify a specific route has been substantially completed.... Until some certainty regarding the authorization of the pipeline is presented, Wyco will not be able to gather and obtain the information required to prepare a license application for a proposed hydropower project."

¹¹⁸<http://water.nv.gov/data/stateengineer/rulings.cfm> (rulings are: #6164, #6165, #6166, #6167).

Wyco argued that this reasoning will be detrimental to the development of future hydropower projects, stating, “The Commission’s Order implies that the final pipeline alignment, all authorizations to construct the pipeline, and even construction of the pipeline should be completed prior to filing an application for a Preliminary Permit.... [I]t will be counterproductive and cost-prohibitive to secure all necessary permits and authorizations to construct the pipeline without confirming the locations of the associated hydroelectric facilities.” Wyco also maintains that the dismissal is inconsistent with other preliminary permits that FERC has issued, including the Lake Powell Pipeline in Utah.¹¹⁹

On May 17, FERC denied a request by Aaron Million’s Wyco Power and Water, Inc. to reconsider its order, which denied an earlier request for a preliminary permit to study the feasibility of its proposed Flaming Gorge Pipeline. In an order denying Wyco’s request for rehearing, FERC reasoned in part that “...it is premature to issue Wyco a preliminary permit...at least until more concrete information regarding the authorization of the water conveyance pipeline is available.... Wyco has presented no information in its [preliminary] permit application or its request for rehearing to indicate that the planning, routing, or authorizations for the water conveyance pipeline are in progress or reasonably foreseeable. Until Wyco is able to do so, there is no point in issuing a preliminary permit for the hydropower developments because Wyco would be unable to study the feasibility of, and prepare a license application for, a project whose location has not been sufficiently narrowed.”¹²⁰

Colorado

Moffat Collection System Project

In a June 5 letter, Colorado Governor John Hickenlooper asked President Obama to expedite federal permitting on Denver Water’s Moffat Collection System Project. The project would expand the Gross Reservoir near Boulder to produce 18,000 acre-feet of new supply for Denver Water. The reservoir is located near Colorado’s Front Range and the water would be diverted from the Colorado River Basin on the state’s West Slope. A May agreement between Denver Water and West Slope counties, ski areas, and municipalities also lessened opposition to the project and set forth environmental and water supply enhancements for the Colorado River.

Hickenlooper stated: “We face a significant gap in our supplies to provide water for future growth – a gap that cannot be met by conservation and efficiencies alone....The environmental and water supply enhancements committed by Denver Water to the Western Slope under the Agreement are in addition to any environmental mitigation required under federal law.... But the implementation of the enhancements...cannot occur without a successfully permitted and constructed enlargement of Gross Reservoir. Therefore, we urge you to exercise your authority to coordinate your agencies and bring an expeditious conclusion to the federal permitting processes for this essential project, in order that we can move forward as a state.”

¹¹⁹ *Western States Water*, #1960, December 9, 2011.

¹²⁰ <http://www.ferc.gov/whats-new/commmeet/2012/051712/H-1.pdf>. *Western States Water*, #1976, March 30, 2012.

Hickenlooper's letter followed another letter he sent to the Corps on May 21, asking for an update on the status of its review of the Northern Integrated Supply Project in northern Colorado. That project would divert water from the Cache la Poudre River into new reservoirs to supply 40,000 acre-feet of water for the Front Range. "Given the ongoing drought conditions in Colorado and the pressing need for water supplies in both communities and agriculture, we hope that the Corps is making this project a high priority," the letter said.

Texas

International Boundary and Water Commission

Officials in Texas are challenging a decision by the U.S. Section of the International Boundary and Water Commission (IBWC) to allow Mexico to receive an early release of 12,275 af of water from the Elephant Butte Reservoir in New Mexico, beginning in early April. The IBWC says its decision is required by the Convention of March 1, 1906, which allocates water from the Rio Grande River between the U.S. and Mexico and apportions 60,000 af/year to Mexico. The IBWC consists of officials from the U.S. and Mexico and administers the Convention and other water agreements between the two nations.

On April 9, Texas Rio Grande Compact Commissioner Patrick Gordon wrote Edward Drusina, the IBWC's U.S. Section Commissioner, stating: "Article II [of the Convention] clearly states that the water must be in the vicinity of El Paso [Texas] and must follow a detailed delivery schedule. Article II also states, 'in the case...of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to the lands under said irrigation system in the United States.' The water was not in the vicinity of El Paso and we are in extreme drought. Nothing in Article II states that Mexico is entitled to receive its water in a manner that is inconsistent with the schedule."

Gordon also said the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas had planned to delay receipt of their deliveries until May to conserve water in light of extreme drought in the region. "Your short notice to the U.S. water districts made it impossible or extremely difficult for their users to accept water early," he said. Gordon further noted that the Convention requires U.S. water users to bear responsibility for the conveyance losses associated with delivering the water.

Gordon's letter follows a statement by Texas Environmental Quality Commissioner Carlos Rubinstein, a WSWC member, and Texas Agriculture Commissioner Todd Staples issued on April 6, which said: "Through their misinterpretation of the treaty, the IBWC has caused irreparable harm to U.S. agricultural interests through [the] loss of water that should have been apportioned to the United States. Commissioner Drusina needs to remember his obligation to protect U.S. interests." They also said the IBWC has cancelled meetings Texas officials scheduled with Mexican officials to address the issue, and noted that security concerns and travel advisories prevented them from attending meetings in Mexico.

Rubinstein and Staples also wrote Drusina on April 3, asking him to rescind the decision and stating: “We are gravely concerned that the 1906 Convention is being implemented in a way that discriminates against U.S. water users.” They also raised other issues related to the Water Treaty of 1944, including “...Mexico’s current under-delivery of water for the current cycle, the 78,000 acre-feet of Texas water releases to alleviate salinity conditions associated with the poor operation of the El Morillo Drain in Mexico, the allocation of water at Fort Quitman, and Mexico’s reluctance to meet and discuss these issues. We must admit that we have now become disillusioned with the prospects of a successful resolution of these issues in a manner beneficial to Texas water users based on your latest action.”¹²¹

New Mexico

Drought Declaration

On May 15, New Mexico Governor Susana Martinez issued a formal drought declaration for her entire state. Among other things, the declaration directs State Engineer Scott Verhines, a WSWC member, to convene the New Mexico Drought Task Force to examine ways the state can prepare for and mitigate drought impacts. Last year was the second driest on record for New Mexico, with 90% of the state experiencing severe drought at some point, with the remaining areas experiencing moderate drought.

“Fire danger is high, water reservoirs run low, and in some cases, we’ve seen towns like Las Vegas take dramatic steps to reduce basic water consumption in their residents’ homes and businesses,” said Martinez. “In addition to the work we’re doing at the state level to assist communities facing serious drought conditions, I’m hopeful this declaration will assist them in securing any available federal funding as well.”¹²²

Groundwater Damage

On May 25, WGA Executive Director Pan Inmann wrote Secretary of the Interior Ken Salazar and Secretary of Agriculture Tom Vilsack on behalf of the WGA, expressing concern over groundwater damage claims that federal trustees for both departments have made in a New Mexico natural resource damages case. The case focuses on pollution from a mine on private land that impaired groundwater beneath surrounding parcels of federal land, and involves the Comprehensive Environmental Response, Compensation, and Liability Act as well as the Clean Water Act (CWA).

“Claims by Federal Trustees of this nature are unprecedented and are of great concern to the Western States. While the impetus for this letter is the ramifications of the Federal Trustees’ claims on natural resources damage cases involving damages to water resources, the ramifications of such a legal position extend to the very heart of the Western States’ exclusive ownership and/or

¹²¹<http://www.texasagriculture.gov/Portals/0/DigArticle/1832/Rio%20Grande%20Water%20Issue.pdf>

¹²²<http://www.governor.state.nm.us/uploads/PressRelease/191a415014634aa89604e0b4790e4768/Drought.pdf>. *Western States Water*, #1981, May 4, 2012.

management and control of the groundwater resources within their respective boundaries. Current law clearly establishes Western States' ownership and control of waters within their boundaries....”

“[T]he consequences of the Federal Trustees' claims...will damage the working relationship between the Western States and the federal agencies that has taken more than a century to establish. [S]ince the early 1990s New Mexico and the Federal Trustees have worked cooperatively and effectively to resolve natural resource damage cases. However, the claims of the Federal Trustees for damages to New Mexico's groundwater have delayed the filing of a natural resource damage settlement reached several years ago. On behalf of the Governors, I respectfully request your views on the legal basis in support of the Federal Trustees' claims in this case.”

Of note, WSWC Position #340 opposes efforts to establish federal ownership interests in groundwater or diminish the states' "primary and exclusive authority" over groundwater.

Rio Grande/Groundwater

On August 16, a New Mexico district court dismissed groundwater claims the federal government had asserted in the Lower Rio Grande adjudication. In particular, the U.S. filed a motion for summary judgment in May that asked the court to determine that the source waters for the Bureau of Reclamation's Rio Grande Project, which provides water to New Mexico, Texas, and Mexico, included surface water in the lower Rio Grande River as well as groundwater hydrologically connected to surface waters in the river. The State of New Mexico and others filed simultaneous motions to dismiss the U.S. groundwater claims.

The U.S. argued that a conflict exists between New Mexico and federal law because the state may allow for the appropriation of groundwater that has historically been diverted for the project, which could hinder the U.S.'s ability to fulfill its obligations to deliver project water to Texas and Mexico. The court rejected this argument and found that state law governs the determination of the source or sources of water for Reclamation projects. It reasoned that a conflict did not exist because the U.S. "...may pursue any administrative action available under New Mexico law to protect its right from other appropriations...that encroach upon its right. The [U.S.] is also free to apply to the State for a supplemental right, as other appropriators have in the course of this adjudication.”

In addition, the court found that the notices of intent to appropriate that the U.S. filed for the project with the New Mexico Territorial Engineer and the project's points of diversion "...indicate that the [U.S.] has established a right to surface water under New Mexico law for purposes of the adjudication.” The court also found that "...the notices do not indicate that the U.S. intended to establish a separate groundwater right cognizable in an adjudication as a source of Project water.”

With respect to whether seepage and return flows from the project that are captured and reused may be identified as project water, the court said: "Determining whether Project water retains its identify as Project water is a condition-specific and technical inquiry.... The Court leaves the determination of whether the Project water retains its identification to administrative proceedings conducted before the State Engineer.”

Climate Change

On August 17, the Senate Energy and Natural Resources Committee held a field hearing in Santa Fe, New Mexico on the current and future impacts of climate change in the Intermountain West. The hearing focused on impacts related to drought and ecosystems, as well as wildfire frequency and intensity. “Here in New Mexico we are dealing with increased temperatures, drought and more intense fires, but citizens in places like Louisiana and Florida are dealing with the impacts of rising sea levels,” said Committee Chair Jeff Bingaman (D-NM). “It’s clear that communities across the country are paying the very real costs of climate change right now. I hope that the discussion today will restart a national conversation about climate change. Though talk of climate change has become highly politicized, it is critical that we reduce greenhouse gas emissions here and abroad.”

Western Regional Climate Center Director Kelly Redmond discussed drought impacts, stating: “At least some portions of the Intermountain West [have] been significantly affected by drought every year since the winter of 1995-96.... The most widespread drought during this time was in 2002, with exceptionally low flows on the Colorado River. Flows from the meager snowpack in 2012 have rivaled those of 2002. This drought has been warmer than previous droughts, a factor that has heightened its impacts. Drought has lowered the resistance of trees to pests, and higher temperatures have enabled pests to reproduce in larger numbers, and millions of acres of trees have died.” Redmond also said the National Integrated Drought Information System (NIDIS) “...has been very successful in addressing drought issues across a broad array of activities, from research to monitoring to preparedness to public understanding... Drought comes in many different flavors, and NIDIS has emphasized as a national theme the need for place based and application-specific products and services.” Redmond also noted that the Western Governors’ Association and WSWC have long supported NIDIS, and said western states should have a long term goal of developing “...a thorough understanding of all the major components of water budgets on spatial scales small enough to be relevant to each of the river basins in the region.”

William deBuys, a historian and author who has studied climate change in the Southwest, said: “A strong body of research suggests that the climate of the Southwest is moving to a new base state similar to the drought conditions of the 1950s and ‘30s. Droughts and wet periods will still occur, but they will be superimposed on this new base state. In time, what we currently conceive as drought will be understood as the new normal.” DeBuys also said the implications for water resources will be “severe,” and cited studies predicting streamflow declines of 10-30% by mid-century.¹²³

California/Oregon/Washington

Sea Level Rise

On June 22, the National Research Council (NRC) released a report on sea level rise in California, Oregon, and Washington. Among other things, the report estimates sea level rise for these states for 2030, 2050, and 2100. In particular, it finds the sea level off much of California is

¹²³<http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings>.

expected to rise one meter over the next century, an amount slightly higher than global sea level projections. Smaller increases of about 60 centimeters are expected for Washington, Oregon, and the northern tip of California over the same period of time.

The report also notes that sea level rise will magnify the impacts of storm surges and high waves. For instance, the report describes the results of a model that found that the incidence of extreme high water events (1.4 meters above historical mean sea level) in the San Francisco Bay area will increase substantially with sea level rise, from less than 10 hours per decade today, to a few hundred hours per decade by 2050, and to several thousand hours per decade by 2100.

“As the average sea level rises, the number and duration of extreme storm surges and high waves are expected to escalate, and this increases the risk of flooding, coastal erosion, and wetland loss,” said Johns Hopkins University professor Robert Dalrymple, chair of the committee that prepared the report.

The report stems from a 2008 executive order from previous California Governor Arnold Schwarzenegger, which directed state agencies to plan for sea level rise and coastal impacts and asked NRC to assess sea level rise to inform these state efforts. Oregon, Washington, the National Oceanic and Atmospheric Administration, Corps, and USGS later joined in sponsoring the study.¹²⁴

Nebraska

Republican and Platte Rivers

On October 23, four of Nebraska’s Natural Resource Districts (NRDs) announced a plan to use groundwater from idled irrigated farmland to boost flows in the Republican and Platte Rivers. Under the plan, the NRDs intend to purchase a 19,518 acre farm and retire 15,800 irrigated acres. They would then transport the saved water to the Republican and Platte Rivers via tributaries and possible pipelines. The project is expected to provide 45,000 acre-feet of water to help comply with the Republican River Compact with Kansas and Colorado, as well as the Platte River Recovery Implementation Program. NRDs are local government entities unique to Nebraska that have responsibilities for protecting the state’s natural resources.

Nebraska Department of Natural Resources Director Brian Dunnigan, a WSWC member, said: “The state is committed to complying with these agreements and sustainably managing natural resources, and this project meets both of those objectives.”

Kansas and Nebraska are involved in litigation before a special master of the U.S. Supreme Court over compliance with the Republican River Compact. Although the plan will not impact the lawsuit, the NRDs believe it will provide enough water to close much of the gap between supplies and allowable use under the compact during exceptionally dry years.¹²⁵

¹²⁴<http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13389>.

¹²⁵http://www.nrdnet.org/news-detail.php?news_id=101. *Western States Water*, #1900, October 15, 2010.

Water Supply Outlook/Drought

The Natural Resources Conservation Service (NRCS) Snowpack/Drought Monitor Update for January 3 indicated severe, extreme, or exceptional drought conditions persisting in southern and northern Arizona, southeastern Colorado, southern Kansas, most of New Mexico, western Oklahoma, and much of Texas. In Texas, the U.S. Department of Agriculture reported that 80% of the state's rangeland and pastures were in very poor to poor condition. Moderate drought or abnormally dry conditions also existed in much of California, most of Oregon, eastern Nebraska, most of Nevada, all of North Dakota, and parts of South Dakota. Abnormally dry conditions existed in western Idaho, eastern Montana, in scattered pockets in Utah, and the eastern half of Washington. Alaska and Wyoming are the only western states that were largely free of drought or abnormally dry conditions.

The update further reported that since the start of the 2012 water year on October 1, the Great Basin, Cascades, and Western Slope of the Rockies had seen significant precipitation deficits. However, heavy precipitation in the Northwest gave some locations from the Oregon coast to the Cascades over eight inches of precipitation. In contrast, California's key watershed and agricultural areas received little or no precipitation and numerous locations, including Salinas and Fresno in California as well as Reno and Elko in Nevada set December records for dryness. Similarly, monthly precipitation in Salt Lake City, Utah totaled only 0.03 inches, breaking a record established in 1976, the beginning of one of the most intense droughts of record.

Although seasonal moisture for the water year has favored the Southwest, the report noted a recent return of dry weather to the area. Nevertheless, snow water equivalent (SWE) levels in all but one basin in Arizona remained above 100% of average and all but four basins in New Mexico were above 100%. In contrast, SWE levels ranged from 6%-33% in California, 17%-33% in Nevada, and 14%-59% in Oregon. Most basins in other western states fall somewhere between 45%-95% of normal, with only a handful exceeding 100%.¹²⁶

A May 3 report showed that snowpack levels for much of the West were significantly below normal. All of the basins in Arizona, Colorado, Nevada, New Mexico, and Utah reported levels less than 50%, with some basins reporting levels as low as 0% to 1% of normal. Parts of southern Idaho, eastern Oregon, and most of Wyoming also reported similar levels. In contrast, basins in the remaining parts of the West, especially the northern half of the Pacific Northwest, generally reported levels of 70% to 109%, with most basins in Washington ranging from 110% to as high as 167%.

Year-to-date precipitation levels were closer to normal, with most basins in Idaho, Montana, Oregon, Washington, and northern and eastern Wyoming reporting levels of 90% to 109%. With some exceptions, most of the remaining basins in the Intermountain West and Southwest ranged from 70% to 89%.¹²⁷

¹²⁶<http://www.wcc.nrcs.usda.gov/cgi-bin/water/drought/wdr.pl>. *Western States Water*, #1959, December 2, 2011.

¹²⁷<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20120503.pdf>. *Western States Water*, #1977, April 6, 2012.

An update from November 1 showed that abnormally dry or drought conditions covered every western state except Washington. Exceptional to extreme drought conditions were mostly centered in the Great Plains, especially in Kansas, Nebraska, South Dakota, and Oklahoma, as well as eastern Colorado, parts of northern and southern Texas, and eastern Wyoming. Moderate to extreme drought covered much of the Intermountain West, while abnormally dry to severe drought existed throughout Arizona, California, Idaho, New Mexico, and Oregon, with a few pockets of extreme drought.

As for precipitation, basins in the Northwest reported year-to-date levels over 150% of normal, while most basins in other parts of the West ranged from 50% to 109%, with a few basins reporting levels over 110% of normal. Every basin in Arizona and New Mexico reported levels below 50%. The update also noted that statistics for the water year beginning October 1 were starting to reveal a “La Niña-like precipitation pattern” favoring northern tier states. However, given that the water year is new, the update noted that “these values can still change rapidly.”¹²⁸

¹²⁸http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dm_rpt-20121101.pdf. *Western States Water*, #2003, October 5, 2012, and #1999, September 7, 2012.

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RESOLUTIONS AND POLICY POSITIONS

From time to time, the Council adopts policy positions and resolutions, many of which address proposed federal laws, rules and regulations or other matters affecting the planning, conservation, development, management, and protection of western water resources. Policy positions sunset after three years, and are then reconsidered, reaffirmed, revised and readopted, or allowed to expire. The following actions were taken in 2012, during the regular Council meetings.

Position No. 338 is in the form of a letter, dated March 15, to the Honorable Jeff Bingaman, Chairman, and the Honorable Lisa Murkowski, Ranking Member, of the Senate Energy and Natural Resources Committee, expressing the Council's support for the implementation of the Energy and Water Integration Act of 2011.

Position No. 339 supports federal applied research and hydroclimate data collection programs that would assist water agencies at all levels of government in adapting to climate variability and change.

Position No. 340 opposes efforts that would establish a federal ownership interest in groundwater or diminish the primary and exclusive authority of States over groundwater.

Position No. 341 is in the form of a letter, dated March 15, to Commissioner Mike Connor, Bureau of Reclamation, expressing concern regarding some aspects of the BOR's proposed changes to the Reclamation Manual as set for in PEC 09, PEC 05, PEC 09-01, and Pec 5-01.

Position No. 342 is a renewed revised resolution supporting the Environmental Protection Agency's longstanding policy that water transfers are not subject to National Pollutant Discharge Elimination System permit requirements under the Clean Water Act. The revised position cites a 2009 ruling by the 11th Circuit Court of Appeals upholding EPA's policy.

Position No. 343 is in the form of a letter, dated June 8, to the Honorable Jeff Bingaman, Chairman, and the Honorable Lisa Murkowski, Ranking Member, of the Senate Energy and Natural Resources Committee, calling for legislative action to create a dedicated funding source to complete federal rural water projects authorized for construction by the U.S. Bureau of Reclamation. The letter states: "These projects...benefit both Indian and non-Indian rural communities."

Position No. 344 is an external "Vision on Water" policy statement. The policy makes the following key points: (1) "State primacy is fundamental to a sustainable water future;" (2) "[W]ater must be given a high public 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;" (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."

The WSWC re-adopted Position No. 345 supporting federal water and climate data collection and analysis programs, urging the Administration and Congress “to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decision-makers and stakeholders, with significantly adverse consequences.”

Position No. 346 supports legislation to reauthorize the National Integrated Drought Information System (NIDIS). The WSWC also approved a related letter to the National Oceanic and Atmospheric Administration (NOAA). It asks NOAA “...to develop new approaches for intraseasonal to interannual [ISI] drought predictions as part of its NIDIS efforts. The operational products now being provided by the National Weather Service lack the skill and spatial coverage needed for water management decision support.”

Position No. 347 expresses strong support for legislation to reauthorize the Reclamation States Emergency Drought Relief Act.

Position No. 348 opposes efforts that would diminish the primary and exclusive authority of States over the allocation of surface water, as it relates to natural flows and developed river systems with extensive federal water control and storage projects.

March 15, 2012

The Honorable Jeff Bingaman
Chairman
Senate Energy & Natural Resources Committee
304 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lisa Murkowski
Ranking Minority Member
Energy and Natural Resources Committee
304 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Bingaman and Senator Murkowski:

I am writing on behalf of the Western States Water Council, an affiliate of the Western Governors' Association, to commend you on the introduction of S.1343, the Energy and Water Integration Act of 2011, to conduct an analysis of the impact of energy development and production on our water resources. As you know, the Council advises our governors on water policy issues, and we recognize the close symbiotic relationship between water and energy resources development and use. Not since the 1970's has the Nation faced such increasingly important resource management challenges and policy decisions related to our energy independence and sustainable water future, which now like then will only become more serious.

In the West we face an uncertain future due to increasing demands related to population growth, climate variability and growing demands for water and energy to meet our economic needs while protecting our environment. Energy demands and their impact on our water and other natural resources, as well as our environment, are of particular concern. Our future prosperity as a Nation and a region will depend on wise investments in building, rebuilding and maintaining our capacity to provide adequate supplies of clean energy and clean fresh water for future generations.

We appreciate your leadership in addressing these challenges, and fully support the objective of S. 1343, to provide an in-depth analysis of the impact of energy development and production on our Nation's water resources. In general, we know far less than we would like regarding the sustainability of our increasingly scarce and threatened clean water supplies, current water uses and the future demands likely to be placed on those supplies. Similar uncertainty regarding our energy future compounds the problems policy makers and resource planners now face. States must be indispensable partners in addressing related issues, and we are currently working closely with the Western Governors' Association and Department of Energy's National Laboratories on water and energy studies.

Sound science is an important key to making wise investments in our future and decisions regarding water development and use. A knowledgeable lifecycle assessment of water and energy related needs for the transportation and electricity sectors is overdue. A comprehensive assessment and analysis of the water related impacts of different uses of fuels and power plant cooling technologies will help water and energy planners and policy makers better understand and cope with the challenges they face in the most efficient and effective manner possible.

Water conservation has always been a fundamental principle of western water law and policy. Often the related energy savings are important. In the West, interbasin transfers of water within states are common, often involving a considerable expenditure of energy to move water significant distances. Energy and water use and related costs are a primary constraint when it comes to the West's economic well being, which has traditionally been based on agriculture, mining and other water intensive consumptive uses, as well as important water-based recreation and other non-consumptive instream uses. Water development, treatment, distribution and wastewater treatment consume substantial amounts of energy. Emerging and expanding technologies involving water recycling and reuse, and desalination, also are energy intensive. States must be appropriately involved in any authorized studies.

No region of the country feels the water-related impacts of energy development and use more acutely than the West, and nowhere is water conservation and wise use more important. As we have in the past, we look forward to working with you on this legislation and other strategies designed to address the future water needs of the West and the Nation.

Sincerely,

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

Weir Labatt, Chairman
Western States Water Council

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
SUPPORTING FEDERAL RESEARCH ON
CLIMATE ADAPTATION

Washington, D.C.
March 15, 2012

WHEREAS, climate variability and change have serious potential consequences for water resources planning and management, water rights administration, flood management, water supply availability, and water quality management; and

WHEREAS, much of the West's water infrastructure was designed and constructed prior to our current understanding of climate variability and change, often from short hydrologic records from the first half of the 20th century;

WHEREAS, impacts of climate variability and change can include increased frequency and intensity of severe weather (droughts and floods), reduction of mountain snowpacks, changes in timing and amount of snowmelt runoff, and changes in plant and crop evapotranspiration resulting in changed water demand patterns; and

WHEREAS, climate variability and change are additional stressors on western water resources, which are already challenged by population growth, competition for scarce resources, increasingly stringent environmental regulations, and other factors; and

WHEREAS, water resources management and planning at all levels of government and sound future decision-making depend on our ability to understand, monitor, predict, and adapt to climate variability and change; and

WHEREAS, the 2006 Western Governors' Association (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; and

WHEREAS, the Council approved Position No. 285 in 2007, calling for the Administration and Congress to give a high priority for funding federal programs that provide for the application of basic research on climate variability and change to real-world water management; and

WHEREAS, the Council co-sponsored workshops in 2007, 2008, and 2011 to gather input on climate adaptation and research needs; and

WHEREAS, the U.S. Geological Survey (USGS) released its Circular 1331, *Climate Change and Water Resources Management: A Federal Perspective*, in February 2009, identifying knowledge gaps, research needs, opportunities to improve planning capabilities, and other activities that would assist in climate change adaptation including those that could impact water quality and thus, available water supply; and

WHEREAS, applied research needs and improvements to water resources planning capabilities identified in the WGA and federal reports and in the Council's workshops include subjects such as evaluation of modifications to reservoir flood control rule curves, evaluation of the adequacy of existing federal hydroclimate monitoring networks, improvements to extreme precipitation observing networks and forecasting capabilities, development and improvement of applications for remote sensing data (satellite imagery), preparation of reconstructed paleoclimate datasets for drought analyses, and development of new guidelines for estimation of flood flow frequencies; and

WHEREAS, many of the applied research needs and improvements to water resources management capabilities and hydroclimate data collections programs identified in the WGA and federal reports and in the Council's workshops are not presently incorporated into federal agency budgets;

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports federal applied research and hydroclimate data collection programs that would assist water agencies at all levels of government in adapting to climate variability and change.

**POSITION
of the
WESTERN STATES WATER COUNCIL
on
STATE PRIMACY OVER GROUNDWATER
Washington, D.C.
March 15, 2012**

WHEREAS, groundwater is a critically important natural resource that is vital to the economy and environment of the arid West;

WHEREAS, the Desert Land Act of 1877 and the United States Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) recognize States have exclusive authority over the allocation and administration of rights to the use of the groundwater within their borders and States and their political subdivisions are primarily responsible for the protection, control and management of the resource;

WHEREAS, the Congress has created and the U.S. Supreme Court has recognized federal reserved rights to surface water, but no federal statute has addressed nor federal court recognized any federal property or other rights related to groundwater; and

WHEREAS, the regulatory reach of federal statutes and regulations, including but not limited to the Clean Water Act, Endangered Species Act, National Environmental Policy Act, Reclamation Act of 1902, Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, were never intended to infringe upon state ownership or control over groundwater; and

WHEREAS, States recognize the importance of effective groundwater management and are in the best position to protect groundwater quality and allow for the orderly and rational allocation and administration of the resource through state laws and regulations that are specific to their individual circumstances; and

WHEREAS, the conditions affecting groundwater supplies, demands, and impairments vary considerably across the West and within individual states; and

WHEREAS, federal efforts to exert control over or ownership interests related to groundwater or otherwise infringe upon or supersede state groundwater management are contrary to federal law and threaten effective groundwater management and protection; and

WHEREAS, nothing stated in this position is intended to apply to the interpretation or application of any interstate compact.

NOW THEREFORE BE IT RESOLVED, states have exclusive authority over the allocation and administration of rights to the use of the groundwater located within their borders and are primarily responsible for allocating, protecting, managing and otherwise controlling the resource; and

BE IT FURTHER RESOLVED, that the Western States Water Council opposes any and all efforts that would establish a federal ownership interest in groundwater or diminish the primary and exclusive authority of States over groundwater.

March 15, 2012

Position No. 341

Michael L. Connor
Commissioner
U.S. Bureau of Reclamation
1849 C Street N.W.
Washington, D.C. 20240-0001

Dear Commissioner Connor,

On behalf of the Western States Water Council, representing western governors on water policy issues, I am writing to express our concern and questions we have regarding some aspects of the Bureau of Reclamation's proposed changes to the Reclamation Manual as set forth in PEC 09, PEC 05, PEC 09-01, and PEC 05-01.

Specifically, under Reclamation's current policy (WTR P02), project water is considered to be used for "irrigation" so long as it is an untreated, raw water supply applied to any outdoor use regardless of acreage. We believe the current policy is consistent with federal law and appropriately allows cities, irrigation districts, and other water users across the West to rely on and apply water from single purpose "irrigation" projects to lawns, golf courses, and parks, as well as gardens and crops or livestock watering, among other uses, for non-commercial purposes.

Under the Reclamation's proposed changes, deliveries of project water to lots of less than 10 acres for non-commercial irrigation purposes would be assumed to be a "municipal and industrial" (M&I) use subject to the payment of "market rates," which are substantially higher than irrigation rates. Although Reclamation has clarified that these draft policy changes are prospective, they will also apply whenever a contracting action is required. This means that existing users that need to renew, amend, or supplement their contracts will need to do so under the new policy, which would re-classify many uses recognized under state law as M&I even though the state water rights, project purpose, and place of use remain unchanged.

Although Reclamation has indicated that the new policies are intended to provide sufficient flexibility to establish workable rates, most market rates will almost certainly be substantially and possibly prohibitively higher than irrigation rates. As a result, we are concerned that such increases will result in water use changes and water delivery service rates will be unaffordable for many users, including those existing users subject to a future contracting action, and create an inappropriate incentive for secondary water users to move to potable supplies.

We are also concerned that the proposed policy ignores the potential adverse impact on some state-issued water rights in those instances where Reclamation facilities deliver water pursuant to a water right held by a non-federal entity. Specifically, the proposed definitions could result in price increases that force existing users subject to a contracting action to forgo the full exercise of their state-issued water rights. While we recognize that Reclamation has the right to determine the terms of contracts involving the use of project water, states still retain primacy in establishing and defining rights of use and any policy that impairs the full exercise of existing state-issued water rights abrogates or supersedes state law and the allocation of state water rights.

Lastly, we are concerned about the potential impacts of this policy on market-based water transfers and water sharing arrangements, especially those that involve a conversion of agricultural water to an M&I use. Namely, a more narrow definition for "irrigation" will result in additional steps to formalize conversions from agricultural to non-agricultural uses that may further complicate water sharing efforts. Moreover, many conversions of agricultural water to urban uses qualify as "irrigation" under the current policy, which means that reclassifying these uses to "M&I" could make such conversions financially infeasible in some instances.

In light of the above concerns, the Council supports the Reclamation Manual's current definitions for "irrigation" and "M&I," opposes the proposed changes insofar as they change these definitions, and asks that Reclamation enter into a dialogue with the Council to better define the potential impacts and implications under state water law prior to formalizing any changes to the present manual. Please be assured that nothing in our comments is intended to hinder the ability of Reclamation or of Council member states to carry out water conservation programs or administer water use efficiency activities associated with lots of less than ten acres.

We appreciate the opportunity to comment on this matter and look forward to continuing to build on our longstanding partnership and collaboration with Reclamation.

Thank you again for considering the Council's views on this matter.

Sincerely,

A handwritten signature in black ink that reads "Weir Labatt III". The signature is written in a cursive, slightly slanted style.

Weir Labatt, III
Chair, Western States Water Council

cc: Owen Walker

(See also No. 316, revised and reaffirmed July 17, 2009)

(See also No. 278, revised and reaffirmed July 21, 2006)

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
WATER TRANSFERS
and
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
DISCHARGE PERMITS
Seattle, Washington
June 8, 2012
(revised and reaffirmed)

WHEREAS, on August 1, 2003 the Western States Water Council adopted a resolution regarding water transfers and National Pollutant Discharge Elimination System (NPDES) discharge permits; and

WHEREAS, on July 21, 2006, the Western States Water Council adopted a resolution that generally supported the U.S. Environmental Protection Agency's (EPA) proposed amendment to its Clean Water Act regulations as published on the June 7, 2006 *Federal Register* (Vol. 71, No. 109), which exempted water transfers from the NPDES permitting program.

WHEREAS, in those resolutions the Western States Water Council declared its position that the transport of water through constructed conveyances to supply beneficial uses should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents; and

WHEREAS, in those resolutions the Western States Water Council also expressed support for the ability of each Western State to use available authorities to place appropriate conditions on water transfers to protect water quality; and

WHEREAS, on June 13, 2008, the EPA published in the *Federal Register* (Vol. 73, No. 115) a final amendment to its Clean Water Act regulations (40 CFR Part 122) that expressly excludes water transfers from regulation under the NPDES permitting program, and defines water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use; and

WHEREAS, the final rule relies on EPA's interpretation of the federal Clean Water Act and does not limit any ability of a State to use any available authority, including authority regarding nonpoint sources of pollution, to protect the water quality of the receiving water body in a water transfer;

(See also No. 316, revised and reaffirmed July 17, 2009)

(See also No. 278, revised and reaffirmed July 21, 2006)

WHEREAS, water transfers and water quality are essential to the social, economic and environmental well-being of the Western States, and

WHEREAS, the United States Court of Appeals in the case of *Friends of the Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009), upheld EPA's Water Transfer Rule holding it to be a reasonable construction of the Clean Water Act and therefore entitled to deference by the Federal Courts, and on which decision the United States Supreme Court subsequently denied a Petition for Writ of Certiorari;

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council generally supports EPA's amendment to its Clean Water Act regulations as published in the June 13, 2008 *Federal Register*.

BE IT FURTHER RESOLVED that the Western States Water Council supports the use by a State of available authorities to protect the water quality of the receiving water body in a water transfer.

June 8, 2012

Position No. 343

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

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

Dear Senators:

On behalf of the Western States Water Council, which represents eighteen states, I am writing to express our support for legislative action to establish a dedicated funding source for the completion of federal rural water projects authorized by the Congress for construction by the Bureau of Reclamation. These projects include components that benefit both Indian and non-Indian rural communities. Many of these communities, particularly smaller communities, are struggling to provide adequate water supplies to meet the needs of their citizens of a quality consistent with federal mandates.

It is essential that these projects be completed in a timely manner for the benefit of these communities in fulfillment of long-standing promises and trust responsibilities, some dating back decades. Another important consideration is the impact on the federal budget and economic growth. Accelerated construction scheduling, made possible by a more timely federal investment of modest amounts, will minimize long-term federal expenditures and create more jobs now.

With respect to programmatic goals and funding priorities established pursuant to directives in any legislation, these should be developed in a transparent manner in consultation with the affected communities and States -- and should consider existing state water plans and priorities.

We appreciate the opportunity to express our interests and look forward to working with you to address this important need.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is stylized and cursive.

Phillip C. Ward, Chairman
Western States Water Council

A VISION ON WATER
Adopted by the
Western States Water Council
on June 8, 2012

Our Present Condition

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.

Our Vision

- 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.
- 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.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
FEDERAL WATER AND CLIMATE DATA COLLECTION AND ANALYSIS
PROGRAMS
San Antonio, Texas
October 12, 2012**

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

WHEREAS, in the West, water is a critical, vital resource and sound decisionmaking demands accurate and timely data on precipitation, temperature, soil moisture, snow depth, snow water content, streamflow, groundwater and similar information; and

WHEREAS, the demands for water and related climate data continue to increase along with our population, and this information is used by federal, state, tribal, and local government agencies, as well as private entities and individuals to: (1) forecast flooding, drought and other climate-related impacts; (2) project future water supplies for agricultural, municipal, and industrial uses; (3) estimate streamflows for hydropower production, recreation, and environmental purposes, such as for fish and wildlife management, including endangered species needs; and (4) facilitate water management and administration of water rights, decrees and interstate compacts; and

WHEREAS, without timely and accurate information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss; and

WHEREAS, critical and vital information is gathered and disseminated through a number of important federal programs including, but not limited to: (1) the Snow Survey and Water Supply Forecasting Program, administered by the National Water and Climate Center (NWCC) in Portland, Oregon, and funded through USDA's Natural Resources Conservation Service (NRCS); (2) NWCC's Soil and Climate Analysis Network (SCAN); (3) the U.S. Geological Survey's (USGS) Cooperative Streamgaging Program and National Stream Flow Information Program, which are funded through the Department of Interior; (4) Landsat thermal data acquired through the National Atmospheric and Space Administration (NASA) and USGS; (5) USGS ground water measurement and monitoring; and (6) the National Oceanic and Atmospheric Administration's (NOAA) National Weather Service and Climate Programs Office; and

WHEREAS, state-of-the-art technology has been developed to provide real or near real-time data with the potential to vastly improve the water-related information available to decisionmakers in natural resources and emergency management, and thus better protect the public safety, welfare and the environment; and

WHEREAS, over a number of years, the lack of capital investments in water data programs has led to the discontinuance, disrepair, or obsolescence of vital equipment needed to maintain existing water resources related data gathering activities; and

WHEREAS, there is a serious need for adequate and consistent federal funding to maintain, restore, modernize, and upgrade federal water and climate programs not only to avoid the loss or further erosion of critical information and data, but also to address new emerging needs, with a primary focus on coordinated data collection and dissemination.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council urge the Administration and the Congress to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decisionmakers and stakeholders, with significantly adverse consequences.

November 6, 2012

Position No. 346

Dr. Jane Lubchenco, Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue, NW
Room 5128
Washington, DC 20230

Dear Dr. Lubchenco:

The Western States Water Council, a policy advisory body whose members are appointed by their Governors and represent eighteen states, strongly supports reauthorization of the National Integrated Drought Information System (NIDIS), as articulated in the attached position. We also wish to express our thanks for NOAA's participation in the recent workshops that we co-sponsored with the California Department of Water Resources on extreme weather events and on reauthorization of the NIDIS program. Extreme events – whether droughts or floods – are defining factors for western water management.

We appreciate NOAA's coordination with the states in its implementation of the NIDIS program. The program's regional pilot projects are proving to be a useful way for working with state and local water agencies in developing information to support drought early warning systems. Further, NIDIS has been making good progress in consolidating federal research information to depict the emerging status of drought conditions in many areas of the country.

It would be highly valuable to our member states and to local water agencies if NOAA were able to develop new approaches for intraseasonal to interannual (ISI) drought prediction as part of its NIDIS efforts. The operational products now being provided by the National Weather Service (NWS) lack the skill and spatial coverage needed for water management decision support. We recognize that the El Niño-Southern Oscillation (ENSO) is presently the primary source of skill in ISI forecasting, and urge NOAA to place a priority on maintaining monitoring systems such as the Tropical Atmosphere Ocean array that are used to track the status of ENSO conditions in the Pacific.

As was discussed at our extreme events workshop, one tool that could be useful in improving drought predictive capability is improved understanding of how extreme storms contribute to ending or mitigating drought. We have been impressed by the NOAA Hydrometeorology Testbed's work in California to understand and improve forecasting of the atmospheric river events that are major

Dr. Lubchenco
November 6, 2012
Page 2

Position No. 346

contributors to annual water supply, and whose presence or absence is a determining factor in whether or not the water year will be wet or dry. We have supported expansion of this important work on extreme precipitation more broadly in the West (brochure enclosed). We would hope that NOAA could combine this better understanding of extreme precipitation with other information, such as how the Madden-Julian Oscillation or Arctic Oscillation might modulate the expression of ENSO, to improve ISI prediction of drought.

The Council looks forward to collaborating with NOAA in working on the extreme events that define western water management. We want to work with you to identify opportunities for operationalizing NOAA's research, and to help you in building support for the observations and monitoring that are the backbone of weather and climate forecasting and decision support for water management.

Sincerely,

A handwritten signature in blue ink, appearing to read "Phillip C. Ward". The signature is stylized and cursive.

Phillip C. Ward, Chairman
Western States Water Council

Enclosures

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
REAUTHORIZATION OF
THE NATIONAL INTEGRATED DROUGHT INFORMATION SYSTEM (NIDIS) ACT
San Antonio, Texas
October 12, 2012**

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

WHEREAS, drought has been, is, and will be an ongoing fact of life in the relatively arid West; and

WHEREAS, in 2012 drought conditions existed throughout much of the western and central parts of the U.S., covering an area amounting to about two-thirds of the Nation; and

WHEREAS, the NIDIS Act of 2006, Public Law 109-430, was enacted to provide an effective drought early warning system, coordinate federal research in support of a drought early warning system, and build upon existing forecasting and assessment programs; and

WHEREAS, the authorization of appropriations in the 2006 Act extended from fiscal year 2007 through fiscal year 2012; and

WHEREAS, there is a need for maintaining and improving existing monitoring networks that help provide drought early warning as well as tracking impacts of drought; and

WHEREAS, there is a need for developing new monitoring technologies, such as remote sensing, that provide more timely data availability and better spatial coverage for assessing drought impacts; and

WHEREAS, present approaches for intraseasonal to interannual weather/climate forecasting are not capable of providing early warning of drought, a capability that would be immensely useful for managing water resources to lessen drought impacts; and

WHEREAS, the only factor now providing limited understanding of drought prediction is the El Niño-Southern Oscillation (ENSO), and continuing federal research to develop new predictive capability at intraseasonal to interannual time scales – such as research on the influence of other ocean-atmosphere interactions on ENSO – is sorely needed; and

WHEREAS, there is a continuing need for a federal role in coordination of research programs related to drought early warning and prediction;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council supports legislation to reauthorize the National Integrated Drought Information System (NIDIS) Act.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
REAUTHORIZATION OF
THE RECLAMATION STATES EMERGENCY DROUGHT RELIEF ACT
San Antonio, Texas
October 12, 2012**

WHEREAS, the Western States Water Council is a policy advisory body representing eighteen states affiliated with the Western Governors' Association; and

WHEREAS, since 1976, the Council has been actively involved in national drought preparedness, planning and response, as well as related policy development and implementation; and

WHEREAS, in 2012 severe to extreme drought conditions exist throughout much of the western and central parts of the U.S., covering an area amounting to about two-thirds of the Nation; and

WHEREAS, drought has been, is, and will be an ongoing fact of life in the relatively arid West; and

WHEREAS, the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2214(c)) and subsequent reauthorization through fiscal year 2012 has expired; and

WHEREAS, Title I provided the Bureau of Reclamation with authority for construction, management, and conservation measures to alleviate the adverse impacts of drought, including mitigation of fish and wildlife impacts, and provided Reclamation with the flexibility to meet contractual water deliveries by allowing acquisition of water to meet requirements under the Endangered Species Act, benefiting contractors at a time when they are financially challenged; and

WHEREAS, additionally, Title I authorized Reclamation to participate in water banks established under state law, facilitate water acquisitions between willing buyers and willing sellers, acquire conserved water for use under temporary contracts, make facilities available for storage and conveyance of project and non-project water, make project and non-project water available for non-project uses, and acquire water for fish and wildlife purposes on a non-reimbursable basis; and

WHEREAS, Title I also allowed Reclamation, as a "last resort," to help smaller, financially-strapped towns, counties, and tribes without the financial capability to deal with the impacts of drought; and

WHEREAS, Title II authorized Reclamation to prepare or participate in the preparation of cooperative drought contingency plans for the prevention or mitigation of adverse effects of drought conditions; and

WHEREAS, Title II authorized Reclamation to conduct studies to identify opportunities to conserve, augment, and make more efficient use of water supplies available to Federal Reclamation projects and Indian water resource developments in order to be prepared for and better respond to drought conditions; and

WHEREAS, Title II authorized the Secretary of the Interior to study establishment of a Reclamation Drought Response Fund to be available for defraying those expenses which the Secretary determined necessary to implement drought plans prepared under the Act, and to make loans for nonstructural and minor structural activities for the prevention or mitigation of the adverse effects of drought; and

WHEREAS, there is a continuing need for authority allowing Reclamation the flexibility to continue delivering water to meet authorized project purposes, meet environmental requirements, respect state water rights, work with all stakeholders, and provide leadership, innovation, and assistance; and

WHEREAS, proposed legislative action would reauthorize the Act through 2017, and raise the limit on authorized appropriations.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council strongly supports legislation to reauthorize the Reclamation States Emergency Drought Relief Act.

POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
STATES' WATER RIGHTS AND NATURAL FLOWS
San Antonio, Texas
October 12, 2012

WHEREAS, the Western States Water Council strongly supports preservation of the States' inherent right to develop, use, control, and distribute water; and

WHEREAS, States have exclusive authority over the allocation and administration of rights to the use of surface water located within their borders and are primarily responsible for protecting, managing and otherwise controlling the resource; and

WHEREAS, States are in the best position to protect and allow for the orderly and rational allocation and administration of the resource through state laws and regulations that are specific to their individual circumstances; and

WHEREAS, the Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows being the natural flows that would pass through the states in the absence of the U.S. Army Corps of Engineers dams; and

WHEREAS, the federal government has long recognized the right to use water as determined under the laws of the various states; and

WHEREAS, the various states have the authority and duty to manage permitting of stored water to supplement natural flows; and

WHEREAS, federal agencies in the western states, such as the Bureau of Reclamation, generally recognize western water laws and natural flows through reservoir operations, with releases from storage that supplement natural flows, and water service contracts that supplement natural flow; and

WHEREAS, representatives of the U.S. Army Corps of Engineers have indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the U.S. Army Corps of Engineers without recognition of the States' rights to natural flows being separate from the captured floodwaters stored within those reservoirs.

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council urge the Army Corps of Engineers to recognize the legal right of the States to the development, use, control, distribution and allocation of the States' surface waters.

BE IT FURTHER RESOLVED, that any policy of the U.S. Army Corps of Engineers to require storage contracts to access natural flows within a reservoir boundary would be a violation of the States' rights to develop, use, control, and distribute surface water.

BE IT FURTHER RESOLVED, that the Western States Water Council opposes any and all efforts that would diminish the primary and exclusive authority of States over the allocation of surface water.

**Nebraska abstained from voting on the position.*

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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, in order to ensure that the West has an adequate, sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

Article III – Interstate Water Transfer 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, and advise Council member states and governors as appropriate.
- (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.

(6) Encourage collaboration among federal, state, tribal and local governments, public and private water resources associations and water-related non-governmental organizations.

Article V – State Membership and Member State Representatives

(1) The Council shall consist 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. 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. The Executive Committee may also confer Associate Member status on states as described in section (5) below. Any state may withdraw from membership upon written notice by its Governor.

(2) Member state Governors may appoint not more than three member state representatives to the Council, but may name any number of standing alternate representatives.

(3) Member state representatives (members) and alternate representatives (alternates) so appointed may designate other individuals to represent them and participate in Council meetings and other activities provided that such designations are made in writing prior to the event by letter or email.

(4) 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.

(5) The Executive Committee of the Council shall set annual dues for Council participation and 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 a state's appointed representatives may participate as observers in Council activities and receive all information disbursed by the Council. However, 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, authorize and establish fees for participation in Council activities by non-member states and non-member state representatives (non-members).

(6) If any state fails to pay the appropriate level of dues established by the Executive Committee of the Council, the privileges afforded by virtue of its membership to participate in Council activities and to receive all information dispersed by the Council may 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 the annual regular summer meeting to be held 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 scheduled regular 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 in writing by letter or email an alternate to temporarily act on his/her behalf 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 and Policy Development

(1) Each state shall have one vote. Since state delegations consist of more than one person, but each state has only one vote, the Executive Committee member for each state shall be responsible as an internal state matter for coordinating and communicating the official position of the state relative to voting on proposed policy positions. An email message is sufficient to meet this requirement. Whenever a person who is not a Council representative is attending on behalf of a Council

representative at a regular or special meeting, either in person or via conference call, a written notification to this effect must be provided to the Council offices to assure that the person is serving in the appropriate capacity.

(2) A quorum shall consist of a majority of the member states (excluding associate member states).

(3) No recommendation may be issued or position taken by the Council except by an affirmative vote of at least two-thirds of all member states, with the exception of the following:

(a) Recommendations and external policy positions concerning out-of-basin interstate transfers require a unanimous vote of all member states; and

(b) Action may be taken by a majority vote of all member states on all internal administrative matters.

(4) 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 regular meeting of the Council. Further delays in voting on such matters may be obtained only by majority vote.

(5) The Council shall consider external policy positions for adoption at its three regular meetings held each year. No external policy matter may be brought before the Council for a vote unless advance notice of such matter has been mailed or emailed to each member of the Council at least 30 days prior to one of the Council's regular meetings.

(6) At the discretion of the Chair, in those instances where circumstances warrant consideration of an external policy position outside of the regular meetings, the Executive Committee may adopt positions at special meetings (including by conference call) provided that proposed positions are mailed or emailed to each member of the Executive Committee at least 10 days prior to the special meeting or conference call.

(7) Any proposed external policy positions can be added to the agenda of a regular or special meeting by unanimous consent of those states represented at the meeting provided that a quorum exists.

Article XI -Policy Coordination and Deactivation

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

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

Article XII - Conduct of Meetings

Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised. A ruling by the Chair to the effect that the matter under consideration does not concern an out-of-basin transfer is an appealable ruling, and in the event an appeal is made, such ruling to be effective must be sustained by an affirmative vote of at least 2/3 of the member states.

Article XIII - Meetings

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

These rules incorporate the last changes that were adopted in October 2011 at the Council's 167th meetings in Idaho Falls, Idaho.