

2013

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

48th Annual Report

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OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

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

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

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

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

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

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

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2013, meetings were held in: Denver, Colorado on March 14-16; Casper, Wyoming on June 24-26; and Deadwood, South Dakota on October 2-4. 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. A copy of the audit performed for the fiscal year ending June 30, 2013 can be obtained from the WSWC office.

During 2013, the Council staff was comprised of: Anthony G. (Tony) Willardson, Executive Director; Nathan Bracken, Assistant Director and General Counsel; Sara Larsen, Water Data Exchange Program Manager; Eric Stevens, WestFAST Federal Liaison; Cheryl Redding, Office Manager; and Julie Groat, Administrative Assistant.

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WESTERN STATES WATER COUNCIL

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EXECUTIVE COMMITTEE

Vacant - Alaska
Sandra Fabritz-Whitney - Arizona
Mark Cowin - California
Jeanine Jones - California
(Alternate)*
James Eklund - Colorado
Hal Simpson - Colorado
(Alternate)*
Jerry Rigby - Idaho
David Barfield - Kansas
Tim Davis - Montana
Brian Dunningan - 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 Pimer - South Dakota
Kent Woodmansey - South Dakota
(Alternate)*
Carlos Rubinstein - Texas
Utah - Eric Millis?
Maia Bellon - Washington
Patrick T. Tyrrell - Wyoming
(Vice-Chair)

Management Subcommittee

Phil Ward - Oregon
(Chair)
Patrick Tyrrell
(Vice-Chair)
Jerry Rigby
(Secretary/Treasurer)

Nominating Subcommittee

Roland Westergard **(Chair)** - Nevada
Hal Simpson - Colorado

Ex-Officio Representatives

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

Endangered Species Act Subcommittee

Roland Westergard - Nevada
Estevan Lopez - New Mexico
Phil Ward - Oregon
Herman Settemeyer - Texas
Sue Lowry - Wyoming

Ex-Officio Representatives

FWS - Andrew Hautzinger
David Cottingham

Shared Water Vision Subcommittee

Sue Lowry - **(Chair)** - Wyoming
Hal Simpson - Colorado
Mike Volesky - Montana
Scott Verhines - New Mexico
Carlos Rubenstein - Texas
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
DL Sanders - New Mexico
Scott Verhines - New Mexico

Ex-Officio Representatives

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

LEGAL COMMITTEE

Vacant - Alaska
William Staudenmaier - Arizona
Cynthia Chandley - Arizona
(Alternate)*
Jeanine Jones - California
James Eklund - Colorado
Jerry Rigby - Idaho
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
Jerry Barnett - Oklahoma
Phil Ward - Oregon
John Guhin - South Dakota
John Elliott - Texas
Norman Johnson - Utah
(Vice-Chair)
Alan Reichman - Washington
Chris Brown - Wyoming

Non-Tribal Federal Water Needs Subcommittee

Candace West - Montana
Melissa Hornbein - Montana
Ed Bagley - New Mexico
Dwight French - Oregon
Herman Settemeyer - Texas

Ex-Officio Representatives

BLM - Lee Koss
USFS - Jean Thomas
FWS - Andrew Hautzinger
DOD - Joe Cole

Tribal Reserved Water Rights Subcommittee

William Staudenmaier - Arizona
Cynthia Chandley - Arizona
Jay Weiner - Montana
Bidtah Becker - New Mexico
DL Sanders - New Mexico
Norman Johnson - Utah

Water Transfers and the Public Interest

Jerry Rigby - Idaho
Scott Verhines - New Mexico
DL Sanders - New Mexico
Phil Ward - Oregon
Pat Tyrrell - Wyoming

WATER QUALITY COMMITTEE

Lynn Kent - Alaska
Mike Fulton - Arizona
Thomas Howard - California
Betty Olson - California
(Alternate)*
Darlene Ruiz - California
(Alternate)*
Trisha Oeth - Colorado
Steve Gunderson - Colorado
(Alternate)*
Curt Fransen - Idaho
Tom Stiles - Kansas
George Mathieus - Montana
Tracy Stone-Manning - 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
Kent Woodmansey - South Dakota
Steve Pirner - South Dakota
(Alternate)*
Carlos Rubinstein - Texas
(Vice-Chair)
Walter Baker - Utah
Maia Bellon - Washington
Stephen Bernath - Washington
(Alternate)*
Pat Tyrrell - Wyoming
Kevin Frederick - Wyoming
(Alternate)*

Clean Water Act Subcommittee

Trisha Oeth - Colorado
Barry Burnell - Idaho
Tom Stiles - Kansas
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
Sandra Fabritz-Whitney - Arizona
Mark Cowin - California
Jeanine Jones - California
(Alternate)*
James Eklund - Colorado
John Stulp - Colorado
(Alternate)*
Dick Wolfe - Colorado
(Alternate)*
John Simpson - Idaho
Jerry Rigby - Idaho
(Alternate)*
David Barfield - Kansas
John Tubbs - Montana
Tim Davis - Montana
(Alternate)*
Brian Dunnigan - Nebraska
(Chair)
Jason King - Nevada
Scott Verhines - New Mexico
Todd Sando - North Dakota
JD Strong - Oklahoma
Phil Ward - Oregon
Kent Woodmansey - South Dakota
Carlos Rubinstein - Texas
Herman Settemeyer - Texas
(Alternate)*
Eric Millis - Utah
Tom Loranger - Washington
Evan Sheffels - Washington
(Alternate)*
Patrick Tyrrell - Wyoming
Harry LaBonde - Wyoming
(Alternate)*
Sue Lowry - Wyoming
(Alternate)*

Border Water Issues Subcommittee

Jeanine Jones - California
Herman Settemeyer - Texas

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
David Rodriguez - New Mexico
Estevan Lopez - New Mexico
Julie Cunningham - Oklahoma
Barry Norris - Oregon
Robert Mace - Texas
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
Sue Lowry - Wyoming

Ex-Officio Representatives

Corps - John Grothaus

**Western States Water Council
Committee Assignments**

EXECUTIVE COMMITTEE

Vacant - Alaska
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J.D. Strong - Oklahoma
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(Chair)
Kent Woodmansey - South Dakota
Garland Erbele - South Dakota
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Eric Millis - Utah
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Patrick T. Tyrrell - Wyoming
(Vice-Chair)

WATER QUALITY COMMITTEE

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Patrick Rice - Nebraska
(Alternate)*
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Dave Martin - New Mexico
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Steve Thompson - Oklahoma
(Alternate)*
Vacant - Oregon
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Maia Bellon - Washington
Stephen Bernath - Washington
(Alternate)*
Pat Tyrrell - Wyoming
Kevin Frederick - Wyoming
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WATER RESOURCES COMMITTEE

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Evan Sheffels - Washington
(Alternate)*
Patrick Tyrrell - Wyoming
Harry LaBonde - Wyoming
(Alternate)*
Sue Lowry - Wyoming
(Alternate)*

LEGAL COMMITTEE

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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
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Alan Reichman - Washington
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COUNCIL MEMBERS
Casper, Wyoming
June , 2013



Left to Right

Front Row: Greg Ridgley, Jeanine Jones, Anne Castle – Guest (Assistant Secretary of Interior for Water and Science), Sue Lowry, Scott Verhines, Herman Settemeyer

Middle Row: Betty Olson, Kevin Frederick, Pat Tyrrell, Phil Ward, Norman Johnson, Carlos Rubinstein, Jerry Rigby, Curtis Seaton, Dennis Strong

Back Row: Dick Wolfe, John Stulp, Chris Brown, John Simpson, Tracy Streeter, J.D. Strong, Brian Dunnigan

STAFF



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

Anthony G. Willardson (Tony)	Executive Director
Nathan Bracken	Assistant Director and General Counsel
Sara Larsen	Water Data Exchange Program Manager
Eric Stevens	Federal Liaison
Cheryl Redding	Office Manager
Julie Groat	Administrative Assistant

COUNCIL MEMBERSHIP/STAFF CHANGES/NEWS

Colorado

Governor John Hickenlooper named **James Eklund** to the WSWC. James is the new Executive Director of the Colorado Water Conservation Board. He served previously as Senior Deputy Legal Counsel to Hickenlooper and as an alternate member on the WSWC. He succeeded former WSWC member **Jennifer Gimbel**, who accepted a position as Counselor to Assistant Secretary of the Interior for Water and Science Anne Castle. Hickenlooper also named **Trisha Lea Oeth** to the WSWC. Trisha is the new Administrator of Colorado's Water Quality Control Commission, and succeeded former Administrator and WSWC member **Paul Frohardt**, who retired earlier this year.

Montana

Governor Steve Bullock named Montana Department of Natural Resources and Conservation (DNRC) Director **John Tubbs** as a member of the WSWC. John served previously as DNRC's Water Resources Division Administration, where he was also appointed to the WSWC, prior to serving as a Deputy Assistant Secretary of the Interior for Water and Science from 2009 to 2012.

Oklahoma

In March, Oklahoma Water Resources Board General Counsel and WSWC Member **Dean Couch** retired after 30 years of service with the Board. Dean served since October 1999 as a representative from Oklahoma and made valuable contributions to the work of the Council during his tenure of service.

South Dakota

Governor Dennis Daugaard named **Kent Woodmansey** to the WSWC. Kent is the Engineering Manager of the South Dakota Department of Environment and Natural Resources' Feedlot Permit Program. He replaced former South Dakota Chief Engineer and prior WSWC Chair **Garland Erbele**, who retired in March to take a position as a consultant with Wenck Associates. Garland served since March 2000 as a representative from South Dakota and made valuable contributions to the work of the Council, including serving as chairman.

Texas

Governor Rick Perry named **C. Tobias "Toby" Baker** to the WSWC. A Commissioner for the Texas Commission on Environmental Quality, Toby is a past policy and budget advisor on energy, natural resources, and agriculture issues for the Governor's Office. He also served previously as the natural resource policy advisor to Texas State Senator and WSWC member **Craig Estes**. Toby will replace former Texas Water Development Board Member **Rick Rylander** on the WSWC. Perry also named **F. Scott Spears** to the WSWC as an alternate member. Scott is a partner with the law firm of Arenson & Spears in Austin, and a Board Member of the Lower Colorado River Authority. He will succeed **G. Dave Scott** with the Brazos River Authority.

Utah

Dennis Strong, Director of the Utah Division of Water Resources, retired November 1. Dennis served since April 2006 as a representative from Utah and during his tenure of service he chaired the Water Resources Committee.

Washington

Governor Jay Inslee named Department of Ecology Director **Ted Sturdevant**, a WSWC member, as his Executive Director for Legislative Affairs and Policy. Water Resources Program Manager and fellow WSWC member **Maia Bellon** will succeed Ted as Ecology's Director. Inslee also named **Tom Loranger**, Manager of the Washington Department of Ecology's Water Resources Program, to the WSWC.

Wyoming

Governor Matt Mead named Department of Environmental Quality (WDEQ) Director **Todd Parfitt** to the WSWC. Todd succeeded former WDEQ Director and WSWC member **John Corra**, who retired. Mead also named Senior Assistant Attorney General **Chris Brown** to the WSWC, and designated Wyoming Water Development Commission Director **Harry LaBonde** as an alternate member to replace **Mike Purcell**, who retired in 2012.

Wyoming Water Quality Division Administrator and WSWC member **John Wagner** retired from the Wyoming Department of Environmental Quality after 40 years of public service. John served since November 2003 as a representative from Wyoming and made valuable contributions to the work of the Council during his tenure of service.

Western Governors' Association

The Western Governors' Association (WGA) announced changes to its leadership team. Effective April 1, long-time senior staff member **Chris McKinnon** became WGA Operations Director, **Holly Propst** began serving as Policy Director, and **Joe Rassenfoss** will become Media and Communications Director.

Chris has worked for WGA for 33 years, serving in a variety of roles, including as interim Executive Director and as a senior policy advisor. Holly served previously as the Executive Director and General Counsel of the Western Business Roundtable, a Colorado State Land Board Commissioner, a Manager of Public Policy for Xcel Energy, and in a variety of senior staff positions in Congress. Joe is a public relations and newspaper veteran, having founded a public relations firm and worked at the Rocky Mountain News for over 20 years.

COUNCIL MEETINGS

171st Council Meetings

Denver, Colorado

March 14-16

The WSWC held its 171st meetings on April 3-5, in Denver, Colorado. The WSWC adopted one new external policy position that was proposed after the 30-day notice of the meeting, requiring unanimous consent prior to consideration. The position calls for federal legislative and administrative actions that support "...reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources." The position also calls for energy and water conservation programs to minimize demands on natural resources and ecosystems. It was sent to the Western Governors' Association (WGA) for review prior to distribution.

The WSWC also revised and re-adopted two positions. The first urges Congress and the Administration to "...give a high priority to federal programs, such as the [National Oceanic and Atmospheric Administration's Regional Integrated Sciences and Assessments] that provide the translation function between basic scientific research on climate and weather extremes and the application of that research to real-world water management situations at the regional, state, and local levels." The second is a letter to Senate Energy and Natural Resources Committee Chair Ron Wyden (D-OR) and Ranking Member Lisa Murkowski (R-AK) supporting implementation of the Rural Water Supply Act of 2006.

The WSWC also approved a letter to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers, asking the agencies not to issue the draft Clean Water Act (CWA) guidance they submitted to the Office of Management and Budget for final review last year. The letter is based on comments the WSWC sent the agencies in 2011 regarding the draft guidance, and expresses a preference for rulemaking to determine the extent of CWA jurisdiction.

The WSWC adopted resolutions of appreciation for former Chair Garland Erbele, who retired as South Dakota's Chief Engineer to take a position as a private consultant, and WSWC Water Resources Committee Chair Jennifer Gimbel, who is leaving her position as the Executive Director of the Colorado Water Conservation Board. The WSWC also adopted resolutions of appreciation for former Oklahoma Water Resources Board General Counsel Dean Couch and former Washington Assistant Attorney General Barbara Munson, who have retired.

At the Full Council Meeting on October 12, U.S. Department of Agriculture Under Secretary for Natural Resources and Environment Harris Sherman, a former WSWC member, discussed significant increases in the size and scale of western wildfires, which are affecting watersheds in the region. Sherman said wildfire will remain a serious problem for a long time, and that active management efforts focused on cultivating partnerships with relevant stakeholders is the best defense.

Recently appointed WGA Executive Director Jim Ogsbury discussed efforts within WGA to strengthen its presence in Washington, D.C., improve coordination between its program areas, and

review its affiliate relationships. Jim said there is “nothing to fix” with respect to the WGA’s relationship with the WSWC, which he praised as being “extremely effective” and a “great resource.” Ogsbury also announced that WGA Water Program Manager Tom Iseman will be leaving this month to become a Deputy Assistant Secretary for Water and Science within the Department of the Interior.

WSWC member John Stulp, Special Policy Advisory for Water to Colorado Governor John Hickenlooper, discussed the importance of water to Colorado’s future, noting that the state is entering its third year of drought and is looking at ways to provide water for future demands, including alternatives to the transfer of agricultural water rights through “buy and dry” transfers. Colorado State Engineer and WSWC member Dick Wolfe also discussed current water resources issues in Colorado, including litigation involving the Republican and Rio Grande Rivers and Endangered Species Act (ESA) issues pertaining to the Gunnison sage grouse.

WestFAST Chair Jean Thomas of the Forest Service also reported that her team is working on ways to improve collaboration between its member agencies.

During the Water Resources Committee meeting on April 4, National Integrated Drought Information System (NIDIS) Director and WestFAST member Roger Pulwarty reported on current drought conditions, noting that 2012 was the warmest year on record for the continental U.S. and that drought is expected to persist across much of the West. Roger also updated the WSWC on recent NIDIS activities, including pending legislation (S. 376) to reauthorize the program.

Ada Benavides, Assistant Director for Civil Works within the Corps, gave a demonstration of her agency’s Federal Support Toolbox, which is a centralized website designed to allow federal agencies, states, tribes, and others to access and share water resources information for planning and management purposes.

Roger Gorke with EPA reported on a number of efforts his agency is undertaking that have a connection to water quantity, including efforts under EPA’s Urban Waters Program to connect people to local urban waterbodies and an “Importance of Water” study on how clean water availability may affect economic development. Roger also said he is developing a white paper on the interaction between EPA’s water quality programs and water quantity. The effort is intended to identify ways the agency’s water quality programs can assist state water quantity efforts, and is not intended to interfere with state water management.

During the Water Quality Committee, Dave Evans, Director of EPA’s Wetlands Division, discussed rulemaking efforts to clarify the extent of CWA jurisdiction. While the agency is focused on rulemaking, Evans said the Administration has not yet determined whether to release the CWA guidance.

Connie Bosma, Chief of EPA’s Municipal Branch, discussed her agency’s efforts to develop a proposed rule to revise its stormwater program. Connie said the “potential focus” of the rulemaking is on encouraging watershed approaches for managing municipal stormwater discharges

and ensuring a good fit with integrated planning and financial capability frameworks. She also said EPA is looking at establishing performance standards for discharges from newly developed and redeveloped sites. She further clarified that the performance standards would not apply to existing sites unless they are redeveloped. EPA intends to release the proposed rule for comment in June 2013 and to take final action in December 2014.

Colorado Water Quality Control Division Director and WSWC member Steve Gunderson discussed water quality developments in his state, including selenium, hydraulic fracturing, ammonia, nutrients, arsenic, and efforts to review the water quality impacts of a number of proposed reservoir projects. Colorado Water Quality Control Commission Administrator Paul Frohardt, also a WSWC member, and Sarah Johnson with the Division contributed to the update.

At the Legal Committee, Colorado Assistant Attorney General Karen Kwon discussed Colorado's concerns about federal application of the ESA. In particular, she said habitat designation for the southwestern willow flycatcher in the Rio Grande River Basin has raised the possibility of flow requirements at the Colorado-New Mexico state line, as well as the assertion of federal authority over storage limitations at Elephant Butte Reservoir in New Mexico, a key component of the Rio Grande River Compact between Colorado, New Mexico, and Texas. Kwon also said the presence of the endangered humpback chub in the Grand Canyon could influence the operations of Glen Canyon Dam in Arizona.

Colorado Attorney Peter Nichols discussed litigation involving EPA's water transfers rule, which exempts certain types of water transfers from National Pollutant Discharge Elimination System (NPDES) permits. A number of eastern states and the State of Washington are challenging the rule in the Southern U.S. District Court of New York. Alaska, the Arizona Department of Water Resources, Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming have intervened in the case to argue that EPA's rule is the only permissible reading of the Clean Water Act and that requiring NPDES permits for transfers would supercede state law and interfere with interstate compacts, among other things.¹

Native American Rights Fund (NARF) Executive Director John Echohawk discussed Indian water rights settlements in the 113th Congress, noting that legislation (S. 434) to authorize the Blackfeet settlement in Montana has been introduced. He also said the WSWC and NARF will hold their next biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 13-15 in Santa Fe, New Mexico. The four pueblos of the Aamodt settlement will host the meeting.

Prior to the meetings, the WSWC and WGA held a Water/Energy Workshop on April 2 that brought together over 70 water and energy experts to discuss ways to collaborate and improve their respective planning efforts.

The WSWC also met on April 3 to discuss future directions, opportunities, and strategies for the WSWC to possibly pursue. The WSWC will refine the results of the discussion at future meetings. Following the discussion, Colorado hosted a field trip that included stops at Chatfield and

¹*Western States Water*, #2008, November 9, 2012.

Strontia Springs reservoirs, a presentation on water rights for white water parks, and a stop at the Molson Coors Brewing Company offices for a discussion of the company's water rights.

**172nd Council Meetings
Casper, Wyoming
June 24-26**

The WSWC held its 172nd meetings on June 24-26, in Casper, Wyoming. The WSWC adopted three new positions. The first is a letter to House Water Resources and Environment Subcommittee leaders in opposition to H.R. 1460, which would remove "fish and wildlife" as an authorized purpose for which the Corps can manage the Missouri River Mainstem Reservoir System. Among other things, the letter notes that fish and wildlife provide substantial economic and recreation benefits in the basin, and that "...river management and states in the System may be better served by a comprehensive, simultaneous, and transparent review of all eight authorized purposes to develop a plan for the sustainable future management of the System."

The second position supports federal efforts to prepare for and respond to extreme weather impacts, including an expanded and enhanced west-wide extreme precipitation monitoring system. The position also supports legislation to: "(1) [minimize] the loss of life and property and economic, environmental and social cost from extreme weather events; (2) [improve] collaboration and coordination among agencies and organizations at all levels; (3) [increase] consultation with state, local and tribal governments; (4) [maintain] and [enhance] data gathering and monitoring, as well as communication capabilities, identifying and addressing gaps and overlap; (5) [identify] and [address] federal agency responsibilities, as well as regulatory and other preparedness and response barriers; (6) [recognize] and [address] regional differences; and (7) [avoid] unfunded mandates...."

The third position states that federal hydraulic fracturing efforts "...should leverage state knowledge, expertise, policies, and regulations." It also says such efforts "...should be limited in scope, based upon sound science, and driven by states...." Lastly, the position notes that the WSWC "...opposes any and all efforts that would diminish the primary and exclusive authority of states over the allocation of water resources used in hydraulic fracturing."

The WSWC also re-adopted a position in support of water research and development programs at the Department of Energy's (DOE) national laboratories. The WSWC approved a number of amendments to the position, including language urging Congress and the Administration to "...recognize the primary role of the States in allocating water for energy and the value of [DOE] hosted energy-water programs and research conducted at National Laboratories undertaken in collaboration with state water resources agencies...."

At the Full Council meeting on June 26, Assistant Secretary of the Interior for Water and Science Anne Castle discussed Interior's water resources activities, including: (1) President Obama's recently announced climate change action plan, which focuses on reducing carbon emissions; (2) Interior's drought efforts; (3) the future of the Landsat program; (4) the U.S. Geological Survey's (USGS) streamgaging programs; (5) forthcoming changes to Bureau of Reclamation policies regarding how the agency defines the use of project water for "irrigation;" and (6) revisions to the Bureau of Land Management's proposed hydraulic fracturing rule. Among other things, Castle

thanked the WSWC for its efforts in ensuring that Landsat 8 included a thermal infrared sensor and noted that the Office of Management and Budget has directed USGS and the National Aeronautics and Space Administration to develop a 20-year plan for how to sustain the Landsat program.

The meeting also included a presentation from Steve Wolff, the Colorado River Coordinator within the Wyoming State Engineer's Office, on how his state uses Landsat imagery for consumptive use estimates, including efforts in Wyoming's Green River Basin.

John Shields, Interstate Streams Engineer within the Wyoming State Engineer's Office, gave a presentation on the history of the office, which is celebrating its 125th anniversary this year. Shields discussed the achievements of Elwood Mead, the first State Engineer, and his successors, including former WSWC member Jeff Fassett and current State Engineer and WSWC Vice-Chair Pat Tyrrell.

The Water Resources Committee meeting on June 25 included a presentation from Barry Lawrence, a program manager with the Wyoming Water Development Commission, on a weather modification pilot project in Wyoming. The project will establish a controlled orographic cloud seeding program in the Sierra Madre, Medicine Bow, and Wind River ranges. It will also evaluate the feasibility and effectiveness of cloud seeding.

Elizabeth Erdmann and Lisa Vojta with the Government Accountability Office (GAO) discussed a study their agency is conducting on the nation's freshwater supplies. The study is intended to update a 2003 GAO report that described water availability and use, as well as state views on shortages and ways the federal government can help states meet those challenges. To carry out this effort, GAO issued a survey to water managers in all 50 states. Vojta said the survey had a 100% response rate and thanked the WSWC's members for their participation.

Carlos Rubinstein of Texas discussed Mexico's failure to comply with treaty obligations on the Rio Grande. As a result of Mexico's non-compliance, Carlos said delivery amounts this year were 6% of "what they should be," which has caused substantial economic harm and threatened municipal water supplies. In particular, Carlos said the lack of water has cost \$200M in crop revenues, causing \$394M in lost economic output and the loss of up to 4,800 jobs.

Jeanine Jones of California discussed her state's Irrigation Management Information System, which is intended to help California irrigators manage their water resources efficiently. Jeanine explained that the system manages a network of automated weather stations that gather a suite of weather data, and that California has partnered with the National Oceanic and Atmospheric Administration to blend this data with satellite information. She also said California is willing to work with other states to expand coverage.

During the Water Quality Committee meeting, Mike Smith, Executive Director of the Interstate Oil and Gas Compact Commission, and Mike Paque, Executive Director of the Groundwater Protection Council, discussed their organizations' States First Initiative. Among other things, the effort is intended to support greater recognition of excellence in state energy regulation, including regulation of hydraulic fracturing.

Patrick Snyder, an Environmental Scientist with the South Dakota Department of Environment and Natural Resources, discussed his state's concerns with EPA's draft 2008-2009 National Rivers and Streams Assessment. In particular, Snyder said the assessment contained a number of threshold value errors for phosphorus and nitrogen concentrations that led to an overestimation of the streams in poor condition for the two ecoregions that include portions of South Dakota. Snyder reported that EPA has agreed to fix the errors.

Wyoming Water Quality Division Administrator Kevin Frederick described how his state regulates hydraulic fracturing, noting that there has been no "conclusive evidence to date that groundwater has been impacted..." He also said the Environmental Protection Agency (EPA) has decided not to carry out a peer review of a draft report it issued in 2011 on possible groundwater contamination near the town of Pavillion. Wyoming has questioned the science and findings of the study, and Frederick said the state will lead further investigations regarding pollution in the area.

At the Legal Committee meeting, Pat Tyrrell described the process of acquiring water rights for hydraulic fracturing operations in Wyoming, including a recent decision regarding water rights for energy development in Laramie County that contained the state's most fully recorded public interest determination. Pat also said hydraulic fracturing in Wyoming uses an estimated four to ten acre-feet of water per well, and that estimated statewide water use for hydraulic fracturing was 2,408 to 6,020 acre-feet in 2012 and 5,356 to 13,390 acre-feet in 2011.

Next, Carlos Rubinstein gave a presentation on *TAP v. TCEQ*, in which a federal district court found that TCEQ's operation of the state's surface water permit system caused an unlawful "take" of 23 endangered whooping cranes in violation of the Endangered Species Act. In reaching this decision, Carlos said the court reasoned TCEQ had the authority to modify or amend existing prior appropriation water rights and to deny issuance of new permits to protect the cranes. The decision enjoined TCEQ from approving new water permits, but the Fifth Circuit Court of Appeals has agreed to review the decision and granted an emergency stay of the decision. It also ordered expedited briefings.

Ramsey Kropf, a partner with Patrick, Miller, Kropf, and Noto, discussed the Dividing the Waters Initiative, which is working to help train judges and decision makers regarding water disputes. The goal of the effort is to connect judges, special masters, and referees who preside over complex water litigation to the resources they need to resolve these disputes effectively.

Prior to the meetings, Wyoming hosted a field trip along the North Platte River that included a tour of Pathfinder Dam, a discussion of a recent conjunctive management issue along Bates Creek, and groundwater cleanup and river protection efforts related to redevelopment of a former oil refinery into a golf course.

**173rd Council Meetings
Deadwood, South Dakota
October 2-4**

The WSWC held its 173rd meetings on October 2-3 in Deadwood, South Dakota. Due to a severe blizzard warning, the WSWC cut its meetings short and adjourned early on October 3, in order to allow most members to safely avoid the winter storm. Atlas, which produced extremely heavy snowfall. Some members and staff were stranded in Rapid City, when the airport closed Friday, some until it opened Monday morning.

The WSWC revised and re-adopted four sunseting positions. The first, urges the Administration and the National Aeronautics and Space Administration (NASA) to enhance NASA's focus on research for water resources applications and to promote long term engagement with the WSWC, as well as state and regional agencies in the western U.S. responsible for water management and policy.

The Council also approved sending a letter to Senators Ron Wyden (D-OR) and Lisa Murkowski (R-AK), the Chair and Ranking Member of the Senate Energy and Natural Resources Committee. It addresses SECURE Water Act implementation and expresses concern that many of the programs and activities the law authorized are unfunded or underfunded, including the U.S. Geological Survey streamgaging and the WaterSMART Grants Program.

The third position supports legislation requiring federal payment of state filing fees in general stream adjudications. The position also urges the federal government to pay unpaid fees that states have incurred as a result of federal non-payment of adjudication fees.

The final position supports legislation to amend the Clean Water Act (CWA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to clarify that FIFRA-compliant pesticide applications do not require CWA National Pollutant Discharge Elimination System permits.

Additionally, the WSWC approved resolutions of appreciation for Paul Frohardt of Colorado, who retired this summer, as well as Dennis Strong of Utah, who was to retire at the end of the month. Dennis also received a jacket in appreciation of his service to the WSWC, as did Steve Pirner, Secretary, South Dakota Department of Environment and Natural Resources.

The WSWC also agreed to send a letter to the Environmental Protection Agency (EPA) and the Army Corps of Engineers regarding the draft Clean Water Act (CWA) rule submitted to the Office of Management and Budget last month for interagency review. The letter will express continued concern about the lack of state consultation in the development of the proposed rule and seek additional information on how the agencies intend to consult with the states as co-regulators in the future.

The Water Resources Committee heard Carlos Rubinstein of Texas describe the impact of Mexico's failure to comply with 1944 Treaty obligations on the Rio Grande, while the U.S. has

never failed to meet its water delivery obligations to Mexico on the Colorado River. As a result, some legislative action is likely.

Carlee Brown, Western Governors' Association (WGA), noted WGA is revising its water resources and water quality resolutions. Both will be considered at the WGA's winter meeting this December in Las Vegas, Nevada. Carlee also said WGA is working to become more accountable to the governors and has implemented a new resolution review process. As such, it has sent the resolutions to its Staff Advisory Council (SAC) for review. The WGA is seeking WSWC input, and Carlee invited WSWC members to contact their respective SAC member to obtain copies of the revised resolutions. Comments are due by the end of the month.

Mark Limbaugh, with the Ferguson Group, a Washington, D.C. based consulting firm, discussed the Reclamation Infrastructure Finance and Innovation Act (RIFIA). Yet to be introduced, it is modeled after the Transportation Infrastructure Finance and Innovation Act and would provide financing for Bureau of Reclamation water projects through direct loans that offer flexible repayment terms to cover construction and capital costs. RIFIA would also provide loan guarantees to enable institutional investors, such as pension funds, to make loans to project sponsors.

South Dakota State Climatologist Dennis Todey described a proposed flood and drought monitoring program in the Upper Missouri River Basin that would operate USGS streamgages and restore, maintain, and improve soil moisture and snowpack monitoring, including Natural Resources Conservation Service SNOTEL sites. Section 5008 of the Senate's Water Resources Development Act (WRDA) would authorize the program as well as \$11.25 million in funding. The House's WRDA bill (H.R. 3080) does not include a similar provision and would not authorize the program.

Ken Wolfenbarger with the National Aeronautics and Space Administration's Jet Propulsion Laboratory discussed remote sensing applications and research regarding snow and groundwater subsidence. He said remote sensing can cover large areas, be cost effective, and provide spatially dense information.

At the Water Quality Committee, Steve Pirner described the history and status of a proposal by Powertech Uranium Corporation to build a uranium mine in southwestern South Dakota.

The Committee also discussed a draft "connectivity" report EPA has issued for public comment regarding the connection between small, isolated waters and larger bodies of water, which EPA says will serve as a basis for CWA rulemaking. Among other things, the WSWC discussed concerns that the EPA Scientific Advisory Board that prepared the report does not include any state experts or administrators.

Next, the Legal Committee addressed recent changes that the Bureau of Reclamation has made to its Reclamation Manual and its Directives and Standards, describing how Reclamation will develop, execute, and administer contracts involving Reclamation project water. WSWC discussed the possibility that current uses that qualified as "irrigation" under the prior policies would now be

considered “municipal” use subject to higher rates when existing contracts are renewed, amended, or revised.

Steve Pirner also discussed litigation involving his state’s domestic wells statute, which allows for the use of up to 18 gpm for stockwatering and other uses without a water right permit. Longview Farm, a 4,900-head confined hog farm, sought to provide water for its operations under the statute, prompting the Yankton Sioux tribe to challenge the use as a commercial operation requiring a water right permit. A state circuit court agreed, prompting Longview Farm to apply for and obtain a water right permit. The decision also prompted the South Dakota Legislature to then amend the statute to clarify that water used for livestock, even a confined feeding operation, is to be considered a domestic use.

The Committee held a roundtable discussion of developments in the Colorado River Basin. Jeanine Jones of California began with a summary of the 2007 Interim Guidelines, providing coordinated operation of Lake Mead and Lake Powell, as well as shortage sharing in the Lower Basin. Sandy Fabritz-Whitney of Arizona, James Eklund of Colorado, Scott Verhines of New Mexico, Dennis Strong of Utah, and Pat Tyrrell of Wyoming also participated and expressed a desire to make the guidelines work. They also underscored the importance of continued collaboration between the states and the federal government to manage declining levels in Lake Powell and Lake Mead.

On October 2, South Dakota hosted a pre-meeting field trip of Spearfish Canyon in the Black Hills that included stops at the restored Little Spearfish Falls, and a hydropower plant and diversion dam owned and operated by the City of Spearfish. The former Spearfish mayor Jerry Krambeck discussed their experiences in obtaining a license required by the Federal Energy Regulatory Commission for the 1911 hydropower facility.

Prior to the field trip, Michelle Klose of North Dakota facilitated a discussion with Dave Ponganis, Regional Director of Programs for the Corps’ Northwest Division, to discuss the Corps rulemaking intended to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for water supply contracts. Jim Fredericks and Christina Austin-Smith with the Corps’ Northwestern Division, as well as Tiffany Vanosdall with the Corps’ Omaha District, also participated in a spirited discussion with the states.

Ponganis said water supply was not an initial authorized purpose of many Corps reservoirs and that his agency is pursuing the rulemaking to understand how water supply fits into its core operations. He also said the Corps is concerned about access across Corps lands to reach water in its reservoirs. In response, WSWC members expressed concern that the rulemaking has not included adequate state consultation, and that the Corps’ decision to restrict access to natural flows in the Missouri River infringes upon the states’ primary and exclusive authority over water allocation and administration. Of note, carry over funds from the prior fiscal year allowed them to participate in the discussion notwithstanding the federal shutdown that went into effect on October 1.

After the federal government re-opens, the WSWC will schedule calls with some of the federal agencies that were unable to participate in the meetings, including the Department of the Interior to discuss its policy changes regarding contracts for Reclamation project water, and EPA to discuss the CWA rulemaking and connectivity report, ammonia criteria, changes to EPA's water quality standards regulation, nutrients, and Total Daily Maximum Loads.¹

¹PowerPoint 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' Association

Annual Meeting

The Western Governors' Association (WGA) held its annual meeting on June 28-30, in Park City, Utah. WGA Chairman Gary Herbert (R-UT) convened the meeting, where the governors elected John Hickenlooper (D-CO) and Brian Sandoval (R-NV) as WGA's new Chairman and Vice-Chairman. Hickenlooper said the WGA motto for the coming year will be: "We all go together." He also said he expects his chairmanship to examine issues that are central to the West, including water and forest health. Governors C.L. "Butch" Otter (R-ID), Steve Bullock (D-MT), and Matt Mead (R-WY) also attended, as did American Samoa Governor Lolo Molinga, Canadian Ambassador to the U.S., Gary Doer, and Greg Selinger, the Premier of the Canadian province of Manitoba.

During the meeting, the governors unveiled the WGA's "10-Year Energy Vision" and two related reports that highlight their individual energy priorities and describe energy resources and consumption in the West. The vision provides "...regional energy objectives the governors can adopt to ensure that future [energy] development is done responsibly and in the best interest of the West's citizens. [T]his regional vision can serve as a blueprint to guide a national energy policy that promotes economic growth while protecting our valued natural and environmental resources."

The vision further states that it "...recognizes that an 'all-of-the-above' approach to planning our energy future for the West is most advantageous. Western Governors believe that resources should compete freely in the marketplace, but based on the policies and needs of its member states... [The vision] lays out the overarching goals of Western energy policy: energy security, affordability and reliability, environmental protection, energy efficiency, and a robust energy delivery system, as well as educational and technological development. It also emphasizes the critical importance of having an effective and genuine federal-state partnership in energy development, lands management and environmental protection."

In addition, the governors approved nine policy resolutions that: (1) adopt the 10-Year Energy Vision as the WGA's energy policy; (2) call on Congress to reauthorize and amend the Endangered Species Act based on seven broad goals; (3) address farm bill legislation; (4) reaffirm the WGA's support for legislation and administrative efforts that protect "Good Samaritans" who clean up abandoned hardrock mines from becoming perpetually liable for the sites under the Clean Water Act and other laws; (5) address the conservation of wildlife and critical habitat in the West; (6) urge Congress to simplify and expedite the federal-state land exchange and sale process; (7) support efforts to combat invasive species; (8) address wildfire management; and (9) call on Congress to develop a National Minerals Policy in consultation with the states.

BP Capital Management Chairman T. Boone Pickens provided a keynote address that touched on climate change. Although he acknowledged that it can be difficult to convince a

geologist like himself that climate change is new, he argued that the threat cannot be ignored, stating: “Be aware of it, and get started on accepting climate change.”

As for other natural resource issues, Secretary of the Interior Sally Jewell and House Subcommittee on Public Lands and Environmental Regulation Chairman Rob Bishop (R-UT) participated in a session that examined ways to align state and federal resources to improve public land management. Dan Ashe, Director of the U.S. Fish and Wildlife Service, and Samuel Rauch, Acting Assistant Administrator for Fisheries within the National Oceanic and Atmospheric Administration, also participated in a discussion on the Endangered Species Act. In addition, Environmental Protection Agency Acting Administrator Bob Perciasepe discussed President Obama’s recently released climate change plan.²

Winter Meeting

On December 11-12, the WGA held its 2013 Winter Meeting in Las Vegas, Nevada. WGA Chair John Hickenlooper (D-CO) convened the meeting, which WGA Vice-Chair Brian Sandoval (R-NV) and Governors Butch Otter (R-ID), Steve Bullock (D-MT), Gary Herbert (R-UT), and Matt Mead (R-WY) attended.

The Governors announced eight policy resolutions, including revised and updated versions of their existing water resources and water quality resolutions, as well as resolutions on radioactive waste, mine reclamation, rural schools, royalties and leasing revenues from federal lands, and coal combustion waste.

The water resources resolution re-asserts state primacy over water supply planning and management, but also identifies new infrastructure, innovative water management, and reliable water data as further priorities for the Governors. While maintaining longstanding WGA policies, the resolution includes new provisions stating that federal surplus water rulemaking and storage reallocation studies should defer to the states’ “...legal right to allocate, develop, use, control, and distribute their waters, including but not limited to state storage and use requirements.” The resolution also supports the WSWC’s Water Data Exchange (WaDE).

The water quality resolution similarly maintains existing WGA positions. New language underscores the need for states and the Environmental Protection Agency (EPA) to work together as co-regulators under the Clean Water Act (CWA) and Safe Drinking Water Act, specifically urging EPA and the U.S. Army Corps of Engineers to ensure that state water managers have a “robust and meaningful voice” in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development. Other new provisions state that CWA jurisdiction does not extend to groundwater, and that federal efforts to study hydraulic fracturing should leverage state expertise and should not diminish state authority over water allocation.

²*Western States Water*, #1987, June 15, 2012.

The meeting also included the public rollout of WGA's Crucial Habitat Assessment Tool (CHAT), an online GIS map of crucial wildlife habitat across 16 western states designed to help energy, transportation, and land use planners. CHAT's completion caps years of effort by the WGA to make "meaningful use" of state-developed wildlife data and analysis on a regional basis.

Secretary of the Interior Sally Jewell gave a keynote address that discussed Secretarial Order 3330, which she issued to establish an Interior-wide mitigation strategy focused on encouraging balanced development and landscape-level planning on federal lands. Her comments followed another keynote address from Governor Eruviel Ávila Villegas of Mexico on ways governors on both sides of the border can work together to strengthen the economies and security of both nations.

Three plenary sessions addressed accelerating the adoption of green vehicles, creating a regional transportation vision, and combating western wildfires.³

WGA/WSWC Washington, DC Visits

On March 4-8, representatives from the WSWC and the WGA met with Administration and Congressional officials in a series of over 30 visits in support of WGA and WSWC positions and priorities. WSWC Chair Phil Ward of Oregon, Vice-Chair Pat Tyrrell of Wyoming, Secretary-Treasurer Jerry Rigby of Idaho, and members Bill Staudenmaier and Cynthia Chandley of Arizona, as well as former member Susan Cottingham of Montana, participated with WGA and WSWC staff on the visits.

The Administration visits consisted of a "Principals Meeting" on March 6 with key officials from the 12 WestFAST agencies, and separate meetings with the Environmental Protection Agency (EPA), Department of the Interior, Office of Management and Budget, and the U.S. Army Corps of Engineers. The WSWC also met with the Senate Environment and Public Works, Indian Affairs, and Energy and Natural Resources Committees, as well as the House and Senate Appropriations Committees, the House Transportation and Infrastructure Water Resources and Environment Subcommittee, the House Science Committee, and numerous individual Congressional offices.

The visits addressed a number of WSWC priorities, including: (1) Indian water rights settlements; (2) the Natural Resources Conservation Service's snow survey and SNOTEL program; (3) the Landsat program; (4) the U.S. Geological Survey's streamgaging programs; (5) EPA's water transfers rule; (6) EPA and the Corps' Clean Water Act jurisdiction efforts; (7) the Clean Water and Drinking Water State Revolving Funds; (8) National Oceanic and Atmospheric Administration's programs; (9) state rights to natural flows; (10) water infrastructure and the status of Water Resources and Development Act legislation; (11) the FY 2014 budget; and (12) the impacts of the sequester.

³<http://westgov.org/news>.

Native American Rights Fund Executive Director John Echohawk and staff also accompanied the WSWC and WGA on a number of visits in support of Indian water rights settlements, including a March 11 briefing with the Congressional Native American Caucus. Over a dozen congressional staff attended the briefing.

Measuring, Quantifying and Reporting Drought Impacts Workshop

On August 5-7, the California Department of Water Resources (CDWR) and the WSWC held another in a continuing series of workshops on drought entitled: Measuring, Quantifying and Reporting Drought Impacts in San Diego. Workshop participants included federal, state and local resource and information managers, scientists and researchers. Jeanine Jones, a WSWC member and CDWR's Interstate Resources Manager, welcomed those attending and outlined the workshop's purpose and desired outcomes.

Federal drought program data sources, as well as state and local data needs and sources were discussed by two separate panels, which included: Mary Bohman, Administrator, U.S. Department of Agriculture (USDA), Economic Research Service (via phone); Vic Tolomeo, National Agricultural Statistics Service, USDA; Jeff Yasui, Regional Director, Risk Management Agency, USDA; Jeffrey Prestemon, U.S. Forest Service, Forest Economics and Policy Research; Bob Boyd, Branch Chief, Assessment and Monitoring, Bureau of Land Management; Rolf Olsen, Water Resources Systems Engineer, U.S. Army Corps of Engineers; and Dionne Thompson, Chief of Reclamation's Office of Congressional Affairs and drought lead.

Representing States and local interests were: J.D. Strong, Executive Director, Oklahoma Water Resources Board (via phone); Tracy Streeter, Director, Kansas Water Office; Dr. Robert Mace, Deputy Executive Administrator, Texas Water Development Board; Anne Steinemann, California-Nevada Applications Program, Scripps Institute; Greg Fisher, Water Demand Manager, Denver Water; and David Bolland, Senior Regulatory Advocate, Association of California Water Agencies.

Among other findings, participants noted that there is a lot of data on agricultural production, insurance and indemnity payments, and other drought impacts, including wildfire losses. Less information is available for other impacts on public lands and water resources. Small drinking water supply systems are particularly vulnerable, and many that depend on groundwater have little or no information, staff or resources to plan for drought and potential shortages.

One challenge is quantifying the impacts attributable to drought, and separating those from other causes when compiling statistics. Timing is another problem as information on impacts and losses may take weeks, months or years to compile. Another challenge is using temperature, precipitation, soil moisture, pasture/rangeland and other indices to project actual economic and environmental impacts.

The Obama Administration has launched a National Drought Resiliency Partnership (NDRP) as part of its National Climate Action Plan to help communities prepare for drought and wildfire by expanding and prioritizing forest and rangeland restoration efforts to make areas less vulnerable to catastrophic fire and by delivering tailored, science-based information to farmers, ranchers, and landowners to maintain agricultural productivity.⁴

A potential role for quantifying impacts through the National Integrated Drought Information System (NIDIS) was discussed by Veva Deheza, with the National Oceanic and Atmospheric Administration (NOAA). At present, NIDIS focuses on meteorological conditions and not drought impacts. Kelly Smith, with the National Drought Mitigation Center at the University of Nebraska, demonstrated the use of the Center's Drought Impact Reporter, which largely relies on anecdotal information from newspapers, other publications and individuals to compile reports on drought impacts.

Other presentations on the use of remote sensing tools to monitor and assess crop following, wildfire and evaporative demand were made by Forrest Melton and Son Nghiem, with the National Aeronautics and Space Administration's Ames Research Center and its Jet Propulsion National Laboratory, respectively, as well as Mike Hobbins of NOAA.

A number of breakout sessions were used to discuss data needs and sources, quantifying impacts, and building an institutional framework for quantifying and reporting drought impacts. A workshop summary and report on possible next steps is being prepared.

Symposium on the Settlement of Indian Reserved Water Rights Claims

The WSWC and the Native American Rights Fund (NARF) held their 13th biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 13-15, at the Buffalo Thunder Resort near Santa Fe, New Mexico. The Pojoaque, Tesuque, Nambé, and San Ildefonso Pueblos, which were involved in the Aamodt settlement, hosted the Symposium.

On August 13, NARF Executive Director John Echohawk welcomed the over 160 people in attendance. He said the Symposium focuses on the basics of the settlement process and that this year's event was intended to emphasize how parties have had success in the past and have worked with other necessary parties to overcome challenges.

WSWC Executive Director Tony Willardson emphasized that water is a sustaining force with deep spiritual and religious meaning. He said there is a need for parties to understand each other's interests, similarities, and differences, while also noting that "we still have time" to work on the obstacles associated with Indian water rights claims.

⁴<http://www.whitehouse.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan>.

Melanie Stansbury, a program examiner with the Office of Management and Budget (OMB), discussed federal procedures for reviewing settlements and the federal budget process. Among other things, she said OMB focuses on “what is achievable” on Capitol Hill when reviewing settlements. She also said President Obama’s FY 2014 budget request seeks a total of \$159.6M for Indian water rights, a \$35.8M increase that is 22.4% above 2013 levels. While the Senate has largely adopted the President’s request without significant markups, Stansbury said the House mark-up would cut the Department of the Interior’s budget by 18%.

Following Melanie’s remarks, Greg Ridgley, Deputy Chief Counsel of the New Mexico Office of the State Engineer, moderated a panel that discussed how to gather background information and the role of technicians in negotiations. WSWC Member Cindy Chandley, a Partner with Snell & Wilmer, described the work of technical experts in previous settlements, noting that future settlements will likely be more difficult and that experts and lawyers will need to work more closely together. Oliver Page, the CEO and CFO of Stetson Engineers, discussed the levels of technical analysis in a settlement and said it may be necessary to modify the scope and approach of settlement discussions due to technical findings. Christopher Banet, a Trust Resources and Protection Manager with the Bureau of Indian Affairs’ (BIA) Southwest Region, described the role of federal technical experts in negotiations and highlighted the need for patience. Peggy Barroll, a hydrologist with the New Mexico State Engineers Office, discussed how models were used to address concerns in the Taos settlement over the potential impact of pumping on the valley’s shallow groundwater system.

Professor Barbara Cosens with the University of Idaho College of Law gave a luncheon presentation on an Indian Water Rights Settlement Database, which she is developing with Darcy Bushnell of the Joe M. Stell Water Ombudsman Program within the University of New Mexico School of Law. Barbara explained that the database, or “e-repository,” is a free, publically-accessible resource containing a variety of non-confidential documents pertaining to 30 settlements. The purpose of the database is to provide online access to non-confidential settlement documents, such as legislation, court orders, decrees, public outreach, and information regarding implementation. Bushnell also gave a demonstration of a web-based application that allows users to search for settlement documents by geographic area.

Next, WSWC member Bill Staudenmaier, a Partner with Snell and Wilmer, moderated a panel that discussed how to identify parties and issues and how negotiations bind larger groups. Maria O’Brien, a Partner with Modrall Sperling and a WSWC member, said parties will never have all of the information they want and should identify parties that could disrupt the process at a later date if they are not brought in during the early stages of discussion. Nelson Cordova, Director of the Taos Pueblo Water Administration Office, said his pueblo and other entities were “bound” by being named as defendants in an adjudication, which compelled the parties to develop a mutually-acceptable solution. However, Duane Mecham, an attorney with Interior’s Office of the Solicitor, said binding parties through adjudications is a declining trend because states are not “lining up to do” large scale general stream adjudications due in part to their high costs. WSWC member DL Sanders, Chief Counsel and Director of the Litigation and Adjudication Program within the New Mexico Office of the State Engineer, said parties can secure a better result through settlement, even though mediation and negotiation can be as expensive and time consuming as adjudications.

Susan Cottingham, the former director of the Montana Reserved Rights Compact Commission and a former WSWC member, moderated a retrospective discussion on settlements. Pam Williams, Director of the Secretary of the Interior's Indian Water Rights Office, gave a historic overview of settlements from the federal perspective and discussed lessons learned, noting that funding continues to be the largest challenge, but that "...doing nothing is not an option." WSWC member Bidtah Becker, an Assistant Attorney General with the Navajo Nation Department of Justice, said she is "positive about the future" of settlements and that while challenges involving funding and other issues persist, the \$1 billion Navajo-San Juan settlement in New Mexico still secured Congressional approval. Chris Tweeten, Chairman of the Montana Reserved Compact Commission, said his Commission has negotiated 18 reserved water rights settlements, including six tribal settlements. Among other benefits, he said tribal settlements have brought hundreds of millions of dollars to Montana, which have benefitted all of the state's citizens.

On August 14, New Mexico Interstate Stream Commission Director Estevan López gave a keynote address that described his state's approach to Indian water rights. He said New Mexico is in the process of implementing the Aamodt, Taos, and Navajo-San Juan settlements and is also negotiating with eight pueblos. He also said New Mexico believes that the infrastructure components of settlements are a federal trust responsibility, the costs of which should not shift to the state. However, New Mexico is willing to contribute to settlements that include non-tribal benefits and has allocated about \$35 million to an Indian Water Rights Settlements Fund to support these components.

Following the keynote address, Assistant Secretary of the Interior for Indian Affairs Kevin Washburn said the Administration remains committed to settlements. He also said that while the Bureau of Indian Affairs' actively participates in the settlement process, the Secretary of the Interior's Indian Water Rights Office is "the lead." With respect to settlement legislation, Washburn said settlements should have cost-shares for non-tribal benefits and reaffirmed the Administration's position that settlements are not earmarks.

Assistant Secretary of the Interior for Water and Science Anne Castle discussed the newly updated Principles and Guidelines, which are now known as the Principles and Requirements (P&Rs). The P&Rs are intended to govern how federal agencies evaluate proposed water resource development projects, and Castle said they will apply to a broader set of activities and agencies and will consider social, environmental, and other issues in addition to economic benefits. Since Interior is developing agency-specific guidelines and still determining how the P&Rs may apply to settlements, she invited Symposium participants to submit comments on the issue. Castle also discussed settlements that are in development as well as efforts between Interior, the Environmental Protection Agency, and other partners to address Clean Air Act issues involving the Navajo Generating Station. The station provides power for the Central Arizona Project, which in turn provides water to a number of tribes as well as water needed to satisfy the requirements of various settlements.

NARF Staff Attorney Matt Campbell moderated a response panel. Blackfeet Nation Water Rights Counsel Jeanne Whiteing and Blackfeet Natural Resources Director Gerald Lunak discussed their experiences working with the federal government. They said more needs to be done to manage conflicts of interest between Interior's trust obligations to tribes and its obligations to the federal government. Phil Ward, Director of the Oregon Department of Water Resources and Chairman of the WSWC, discussed his state's experiences with the Klamath Basin Restoration Agreement, which is intended to be "the big settlement" of water issues in the basin, including Indian water rights claims, and is awaiting Congressional authorization. He explained that the state recently completed an adjudication in the basin that gave the Klamath Tribe a "time immemorial" instream right. Although the tribe has issued a call that has required water masters to curtail the water use of over 300 junior, non-tribal users to protect the tribe and the Bureau of Reclamation's Klamath Project, those users that join and worked within the settlement process have not been curtailed.

The remaining presentations on August 14, focused on the Aamodt settlement, with Pojoaque Pueblo Tribal Councilman James Rivera, Nambé Pueblo Governor Phillip Perez, Tesuque Pueblo Governor Mark Mitchell, and San Ildefonso Governor Terry Aguilar providing some brief opening remarks. Rivera said the settlement will support economic development in the four pueblos, with Mitchell noting that the settlement's approval is "just the start." Perez and Aguilar discussed efforts to work with the non-native community and the other pueblos involved in the settlement. Former Tesuque Governor James Hena and former Nambé Pueblo Governor Ernest Mirabal also described their decades of experience working on the settlement.

Next, NARF Staff Attorney Sue Noe moderated a panel of experts who worked on the Aamodt settlement. The panelists gave a joint presentation on the specifics of the settlement, which they said will end 45 years of litigation by quantifying the pueblos' water rights and developing a regional water system for pueblo and non-pueblo residents. The settlement also addresses impacts on aquifer and surface flows of future water development and includes protections for existing agricultural uses and existing domestic wells. The panel consisted of Charles Dorame, Chairman of the Northern Pueblos Tributary Water Rights Association, Arianne Singer, Managing Attorney of the Northern New Mexico Adjudication Bureau within the Office of the New Mexico State Engineer, Christopher Banet, Trust Resources and Protection Manager with BIA's Southwest Region, and WSWC member John Utton, a Shareholder/Director with Sheehan & Sheehan.

Following the panel, attendees participated in a field trip to the San Ildefonso Pueblo to tour an intake facility on the Rio Grande that is part of the settlement's regional water system. The field trip also included a stop at the San Ildefonso Visitor Center and concluded with a dinner and cultural celebration at the Buffalo Thunder Resort that included dancers from the Pojoaque and Tesuque Pueblos.

On August 15, NARF Staff Attorney Joel Williams moderated a panel of Congressional staff that discussed how to move settlement bills through Congress. Camille Calimlim, Minority Professional Staff for the House Natural Resources Committee, said parties need to consider the costs of settlements and look at issues broadly when working with Congress. Cisco Minthorn,

Counsel for the Majority for the Senate Committee on Energy and Natural Resources, said Indian Country needs to build alliances with non-Indian communities to develop support for settlements and that parties should “iron out” details and disputes before the introduction of settlement legislation. David Mullon, Minority Staff Director and Chief Counsel, for the Senate Indian Affairs Committee, said recent settlements have been the largest ever, but noted that it is becoming increasingly difficult to pay for them. Aaron Trujillo, Senior Legislative Assistant to Rep. Ben Ray Luján (D-NM), said continued community outreach is “absolutely needed” in developing support within local congressional offices. The panel also discussed the perspectives of some members of Congress, primarily in the House, that settlement legislation should be subject to earmark bans. The panel said the bans are likely to continue for the foreseeable future and that more outreach is needed to educate Congress on this issue.

WSWC Legal Counsel Nathan Bracken moderated a response panel that consisted of a facilitated discussion between Montana Assistant Attorney General Jay Weiner, a WSWC member, and NARF Staff Attorney David Gover. Weiner and Gover said all settlements bills move opportunistically and that parties must consider the right “vehicle,” which increasingly involves packaging a number of settlement bills together with other pieces of legislation as part of a large omnibus bill, such as the Claims Resolution Act of 2010. Both panelists also said funding is “always” the main challenge in moving settlement bills through Congress.

Stanley Pollack, Assistant Attorney General for the Navajo Nation, gave the concluding wrap-up summary. He said: “We do [settlements] because it’s a process that works.” He also said that while many obstacles to settlements remain the same, the approaches that states and tribes have used over the years to address these challenges do change and show that obstacles can be overcome.

CONGRESSIONAL TESTIMONY

Senate Energy and Natural Resources Committee – Subcommittee on Water and Power

On April 30, the WSWC submitted written testimony on two water bills pending before the Senate Energy and Natural Resources Committee's Subcommittee on Water and Power, which discussed the bills during a hearing on April 16. The first bill (S. 659) would reauthorize the Reclamation States Emergency Drought Relief Act, which expired in 2012. The second bill (S. 715) would authorize spending for Congressionally authorized rural water projects with \$80 million per year from the Reclamation Fund.

S. 659 – Emergency Drought Relief Act Reauthorization

WSWC's written testimony was based on WSWC Position No. 347, which strongly supports legislation to reauthorize the Reclamation States Emergency Drought Relief Act (the Act), Pub. L. 102-250, providing the Bureau of Reclamation with much-needed tools to respond to record-breaking drought in the West and to work with states, tribes, and local communities to plan for future droughts.

Drought in the West

Drought has been, is, and will be an ongoing fact of life in the arid West. According to the U.S. Drought Monitor map from April 23, nearly half (47.34%) of the contiguous U.S. was in moderate or worse drought, with abnormally dry to exceptional drought conditions covering much, if not all, of every western state except Washington.⁵

Although recent precipitation has somewhat improved drought conditions in the Midwest,⁶ the National Oceanic and Atmospheric Administration reports that drought conditions will likely persist in much of the West through July, with drought developing or intensifying in some parts of Arizona, California, Nevada, New Mexico, Oregon, and Texas.

These conditions follow the record breaking drought of 2012, which was unique in terms of its sudden onset, persistent dryness and warm temperatures, its magnitude of extremes, and the large area affected.⁷ For example, over 60% of the contiguous U.S. experienced moderate to extreme and

⁵Kelly Helm Smith, *Drought Shifts West on April 23 U.S. Drought Monitor as Heavy Rains Drench the Midwest*, Nat'l Drought Mitigation Ctr. News (Apr. 18, 2013), <http://drought.unl.edu/NewsOutreach/NDMCNews.aspx?id=90>.

⁶*Id.*

⁷*Hearing on Drought, Fire and Freeze: The Economics of Disasters for America's Agricultural Producers before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry*, 113th Cong. 1, 3 (Feb. 14, 2013) (statement of Roger Pulwarty, Director, National Integrated Drought Information System).

exceptional drought during 2012, with only 1934 comparable in duration and geographic extent.⁸ Last year was also the warmest year on record for the contiguous U.S. over a period of record dating back to 1895.⁹

Not surprising, these conditions coupled with the ongoing drought have adversely impacted a broad spectrum of economic, environmental, and other interests across the West and the nation as a whole, the effects of which will reverberate for years to come. Examples include:

- According to some estimates, drought costs the U.S. economy between \$6 billion to \$8 billion per year,¹⁰ with the cost of the 2012 drought possibly exceeding \$35 billion.¹¹
- Agriculture accounted for much of the economic costs of the 2012 drought,¹² due in part to moderate or exceptional drought conditions affecting around 70% of the nation's crop and livestock production at certain times during the year.¹³
- For only the third time in over 40 years, wildfires across the country burned more than 9 million acres in 2012, causing over \$1 billion in damage.¹⁴ The most damaging fires occurred in the West, including the Whitewater-Baldy Fire which burned 297,845 acres in New Mexico's Gila National Forest.¹⁵
- The Colorado River Basin experienced one of its driest years in the 1895-2012 period of record, with only 44% of its annual average runoff.¹⁶
- Skier visits to the 21 resorts that comprise Colorado Ski Country USA were down 11.5% in 2012, compared to 2011.¹⁷

⁸*Id.*

⁹Nat'l Climatic Data Center, Wildfires – Annual 2012 (Jan. 7, 2013), <http://www.ncdc.noaa.gov/sotc/fire/2012/13>.

¹⁰W. Governors' Ass'n, Creating a Drought Early Warning System for the 21st Century, preface (2006), http://westgov.org/reports/doc_download/394-creating-a-drought-early-warning-system-for-the-21st-century-nidis.

¹¹Pulwarty, *supra* note 3 at 2 (citing Aon Benfield Reinsurance Group's Annual Global Climate and Catastrophe Report).

¹²*Id.*

¹³U.S. Dep't of Ag., Economic Research Service, U.S. Drought 2012: Farm and Food Impacts, <http://www.ers.usda.gov/topics/in-the-news/us-drought-2012-farm-and-food-impacts.aspx#.UXhHzbU4udh>

¹⁴Pulwarty, *supra* note 2 at 1; Nat'l Climatic Data Center, Wildfires – Annual 2012 (Jan. 7, 2013), <http://www.ncdc.noaa.gov/sotc/fire/2012/13>.

¹⁵U.S. Forest Serv., Whitewater-Baldy Complex Final Community Update (June 28, 2012), <http://www.fs.usda.gov/detail/gila/news-events/?cid=STELPRDB5377297>.

¹⁶Pulwarty, *supra* note 3 at 1.

¹⁷*Id.*

Notwithstanding the severity of these impacts and the relative frequency of drought in many parts of the West and the Nation, in general, we have to often taken a reactive approach to drought, responding on an ad hoc basis to each drought crisis as it develops. However, over the years, many western states and federal agencies have undertaken more proactive approaches to coordinated planning and preparedness intended to avoid or mitigate adverse impacts before they happen.

In particular, the WGA set an aggressive goal in 1996 to change the way our nation prepares for and responds to drought, with subsequent efforts by the WGA and the WSWC to promote a comprehensive, coordinated, and integrated response to drought at all levels of government. We have worked with federal agencies, including the Bureau of Reclamation, to promote, proactive, cooperative drought contingency planning and response.

The Reclamation States Emergency Drought Relief Act

The Bureau of Reclamation is the nation's largest wholesale water supplier, providing water to over 31 million people and supplying irrigation water to one out of five western farmers.¹⁸ Notwithstanding Reclamation's vital role as a water supplier in the West, the Act constitutes the whole of its specific drought response and planning authority. Consequently, failure to reauthorize the Act will limit Reclamation's ability to deliver assistance in response to present drought impacts and also limit its ability to provide much needed assistance and technical expertise to states, tribes, and other stakeholders as they plan for future drought impacts.

Title I – Assistance During Drought

Title I of the Act authorizes Reclamation to undertake construction, management, and conservation measures during drought to minimize or mitigate damage or loss, including authority to act as a "last resort" to aid smaller towns, counties, and tribes that lack the financial capacity to address drought impacts on their own. It also authorizes Reclamation to acquire water to meet diverse requirements under the Endangered Species Act, while at the same time benefitting water users and water delivery contractors at a time when they often face significant financial challenges. Other beneficial drought response actions that Reclamation can undertake under Title I include:

- Participation in water banks established under federal law;
- Facilitation of water acquisitions between willing buyers and willing sellers;
- Acquisition of conserved water for use under temporary contracts;
- Making Reclamation facilities available for storage and conveyance of project and non-project water;

¹⁸U.S. Bureau of Reclamation, Bureau of Reclamation: Facts and Information, (Jan. 4, 2013), <http://www.usbr.gov/main/about/fact.html>.

- Making project and non-project water available for non-project uses; and
- Acquisition of water for fish and wildlife purposes.

Title II – Drought Contingency Planning

Title II of the Act responds to Benjamin Franklin’s oft-quoted adage: “By failing to plan, you are preparing to fail.” Specifically, it authorizes Reclamation to assist and participate in the preparation of drought contingency plans in all 50 states and U.S. territories to help prevent or mitigate future drought-related losses. Title II also authorizes Reclamation to conduct studies to identify opportunities to conserve, augment, and make more efficient use of water supplies that are available to federal Reclamation projects and Indian water resource developments to better prepare for and respond to drought conditions.

States have primary authority over the allocation and protection of water resources within their borders. However, the WSWC has long supported integrated water resource management and encourages the development of comprehensive water plans with state leadership and federal assistance. This includes a comprehensive and integrated response to drought in which states work with federal agencies, local communities, and other stakeholders to develop proactive drought preparedness and contingency plans.

Title II authorizes Reclamation to engage in exactly this type of planning, which is critical to the social, environmental, and economic well-being of the West. Failure to reauthorize the Act will limit Reclamation’s ability to carry out this important work. This would deprive states, tribes, and local communities of much needed technical assistance and expertise at a time when some projections indicate that large portions of the West, particularly the Southwest, will become hotter and drier in coming years. Many of these areas are also experiencing increasing demands on already scarce water supplies due to rapidly growing populations, environmental requirements, energy resource development and other factors. As a result, the need for effective drought preparedness and contingency plans has never been greater.

Conclusion

The exceptional drought conditions of 2012 and the ongoing drought that covers much of the West underscores the need to reauthorize the Act. Reauthorization will provide Reclamation with clearer direction and greater flexibility to continue delivering water and much needed financial and technical assistance to states, tribes and local communities suffering from record-breaking drought impacts. Reauthorization will also facilitate more effective state-based and other grassroots drought preparedness and mitigation efforts. Absent reauthorization, Reclamation will lack this critical authority to provide emergency assistance.

The WSWC expressed appreciation for the opportunity to submit testimony and urged the Committee to favorably report and the Congress to pass legislation to reauthorize the Act.

S. 715 – Authorized Rural Water Projects Completion Act

WSWC's written testimony was based primarily on WSWC Position No. 343, which was in the form of a letter sent to former Committee Chairman Jeff Bingaman and Ranking Member Lisa Murkowski on June 8, 2012 in support of similar legislation (S. 3385). The WSWC also testified in support of that bill and wished to reiterate 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 this testimony was also based on WSWC Position No. 333, which sets forth the WSWC's long-standing policy in support of using receipts accruing to the Reclamation Fund for authorized projects, including the types of rural water projects that would receive funding under S. 715.

The Need for Rural Water Projects in the West

Across the West, rural communities are experiencing water supply shortages due to drought, declining streamflows and groundwater supplies, and inadequate infrastructure, with some communities hauling water over substantial distances to satisfy their potable water needs. 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 and expertise to finance and construct needed 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 ("Draft Report") 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.¹⁹

The Draft Report notes 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

¹⁹Bureau 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>.

Water Supply Project, which is located mostly in South Dakota but encompasses parts of the non-Reclamation states of Iowa and Minnesota.²⁰ The report also notes 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.²¹

According to Reclamation, the total amount of Federal funding needed to complete the eight authorized projects is now \$2.6 billion, which is substantially higher than the \$2 billion Congress originally authorized. This increase is due in part to inflation and the rising costs of materials and labor. Nevertheless, the Draft Report 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 annually 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 2063.²² Notably, Reclamation is seeking only \$40 million for its rural water program in fiscal year (FY) 2014, a significant reduction from current levels.

Federal Funding for Rural Water Projects Under S. 715

S. 715 would provide \$80 million per year for each of fiscal years 2014 through 2030 to complete the construction of rural water projects that have already received Congressional authorization. Other projects may be eligible for funding if: (1) a feasibility study is submitted to the Secretary of the Interior by September 30, 2012; and (2) Congress authorizes the project's construction after S. 715's enactment.

This funding represents a relatively modest Federal investment, compared to the increased costs that will likely occur due to construction delays 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.

For example, the Garrison Diversion Unit, an altered version of which would receive funding under S. 715, is intended to compensate the State of North Dakota for the loss of over 300,000 acres of prime farmland that was lost as a result of the construction of the Pick-Sloan Missouri River Basin Program,²³ which also inundated over 550 square miles of Native American land and displaced more

²⁰*Id.* 3 – 4.

²¹*Id.* at 1 – 3.

²²*Id.* at 5.

²³Garrison Diversion Conservancy District, History & Federal Legislation: The Pick-Sloan Missouri Basin Program, http://www.garrisondiv.org/about_us/history_federal_legislation/.

than 900 Native American families.²⁴ Additionally, the North Central/Rocky Boys rural water project will implement the tribe's water rights settlement (as codified in P. L. 106-163) with the United States and the State of Montana.

Authorizing the increased use of Reclamation Fund revenues to expedite completion of these projects fulfills a financial and moral obligation that some beneficiaries have waited decades to see honored.

It is also important to note that the Federal expenditures provided under S. 715 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 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 and sewer industry, the increase in revenue that occurs in all industries for that year is \$2.62.²⁵

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 be eligible to receive funding under S. 715, 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 532 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.²⁶

Improved Potential for Economic Development in Rural Areas: The economy of every community, especially rural communities, requires sufficient water supplies of suitable

²⁴Senate Rep. No. 105-146, 4 (1997) (accompanying S. 156 and describing the impacts of the Pick-Sloan Missouri River Basin Program on the Lower Brule Sioux Tribe), <http://www.gpo.gov/fdsys/pkg/CRPT-105srpt146/pdf/CRPT-105srpt146.pdf>.

²⁵The U.S. Conference of Mayors: Mayors Water Council, Local Government Investment in Municipal Water and Sewer Infrastructure: Adding Value to the National Economy, i (August 2008), available at: <http://www.usmayors.org/urbanwater/documents/LocalGovt%20InvInMunicipalWaterandSewerInfrastructure.pdf>.

²⁶HDR, 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).

quality. Such supplies depend upon adequate water infrastructure. Improving the water infrastructure of the rural and Tribal communities that would be affected by S. 715 will improve their ability to attract business and 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. 715 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, these communities would see decreased electrical pumping costs.

Rural Fire Protection: Rural water systems provide water storage that fire trucks can use to assist with rural 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. 715

Section 3(a) of S. 715 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 (the "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 expenses, 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 2035, at which point its unexpended and unobligated balance would transfer back to the Fund.

Congress established the Fund when it enacted the Reclamation Act of 1902 (Pub. 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, the Fund provides monies "...reserved, set aside, and appropriated as a special fund in the Treasury."

The 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-leasing 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 FY2014 budget request, actual and estimated appropriations from the Reclamation Fund are \$872 million for FY2012 and \$873 million for FY2013. While these appropriations are projected to decrease to \$852 million for FY2014, the Fund's unobligated balance is expected to grow from an actual balance of \$10.8 billion in FY2012 to an estimated \$13.3 billion by the end of FY2014.²⁷ Contrary to Congress' original intent, instead of supporting western water development, much of the unobligated balance has gone instead to other Federal purposes.

The WSWC has long supported using the Fund for its intended purpose of financing western water development, including the types of rural water projects that would receive funding under S. 715. As stated in WSWC Position No. 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. Furthermore, as required by Section 3(b)(3) of S. 715, 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 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 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. 715 – the use of these funds furthers the construction of much needed water infrastructure in the West in accordance with the Fund's original intent and purpose.

²⁷The Appendix, Budget of the United States Government, Fiscal Year 2014, 631 (April 2013), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/int.pdf>.

Funding Prioritization Under S. 715

Before expenditures from the RRWCF could be made, Section 3(c)(3) of S. 715 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, 2012 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. 715, and are therefore the most appropriate entities to assist the Secretary in developing these goals and priorities.

Reclamation and Rural Water Projects

Reclamation is well suited to carry out the development and construction of the authorized rural water projects that would receive funding under S. 715. These specific projects are already authorized and under construction by Reclamation, which has a long history of planning, designing and constructing water infrastructure projects in the West. Most other existing federal water quality and supply programs typically provide loans, grants, or loan guarantees. However, many smaller and poorer rural communities have very limited capacity and little experience to be able to design and construct water projects with financial assistance alone. Consequently, they often need the experience and assistance that Reclamation can provide to help assess needs, design, plan, and construct large water infrastructure projects.

Conclusion

The expedited construction of authorized rural water projects facilitated by S. 715 will save the Treasury money in the long run, as costs continue to rise, and fulfill Federal obligations in a more timely manner, including Federal tribal trust responsibilities. Postponing spending on this obligation through inadequate or insufficient funding levels only increases Federal costs and perpetuates hardships to rural and Tribal communities in the West. S. 715 would not only fulfill solemn Federal obligations, but also provide needed economic development and job creation.

Importantly, the bill would use receipts that are already accruing to the Reclamation Fund for their intended purpose of financing the construction of western water projects.

House Natural Resources Committee – Subcommittee on Water and Power

On October 10, 2013, the WSWC was invited to testify on the reauthorization of the Reclamation States Emergency Drought Relief Act of 1991 before the House Committee on Natural Resources Subcommittee on Water and Power. Tony Willardson, Executive Director for the WSWC provided testimony based primarily on WSWC Position No. 347, which strongly supports legislation to reauthorize the Reclamation States Emergency Drought Relief Act (43 U.S.C. 40), providing the Bureau of Reclamation with much-needed tools to respond to record-breaking drought. Of note, “The Secretary is authorized to work with other Federal and State agencies to improve hydrologic data collection systems and water supply forecasting techniques to provide more accurate and timely warning of potential drought conditions and drought levels that would trigger the implementation of contingency plans.”

The WSWC strongly supports such authorized activities and similarly reauthorization of the National Integrated Drought Information System (NIDIS).

Drought in the West

Drought has been, is, and will be an ongoing fact of life in the arid West. Much of the West continues to be affected by drought, as demonstrated by the U.S. Drought Monitor. As recently as last summer, some two-thirds of the country was experiencing some level of drought, and this past spring nearly half the Nation was affected by moderate to exceptional drought conditions, including every western state except Washington.²⁸ Unfortunately, the most up-to-date information is unavailable due to the shut-down of National Oceanic and Atmospheric Administration’s (NOAA) website, www.drought.gov. Of note, NOAA estimates that three of the five most costly U.S. weather related disasters were droughts – with Hurricane Katrina ranked #1, and Super Storm Sandy #4. The cost of the Drought of 2012 has yet to be fully calculated. Still, the figures available underscore the economic, environmental and social costs related to drought, and the need to focus more resources on planning for and mitigating drought impacts, as well as facilitating a prompt response during drought emergencies.

Although spring rains and recent precipitation has somewhat improved drought conditions, particularly in the Midwest,²⁹ the U.S. Seasonal Drought Outlook suggests drought will likely persist in much of the West for some time.

²⁸Kelly Helm Smith., *Drought Shifts West on April 23 U.S. Drought Monitor as Heavy Rains Drench the Midwest*, NAT’L DROUGHT MITIGATION CTR. NEWS (Apr. 18, 2013), <http://drought.unl.edu/NewsOutreach/NDMCNews.aspx?id=90>.

²⁹*Id.*

Dry conditions this past summer follow the record breaking drought of 2012, which was unique in terms of its sudden onset, persistence, and magnitude – both in terms of extremes and the large geographic area affected.³⁰ For example, over 60% of the contiguous U.S. experienced moderate to extreme and exceptional drought during 2012, with only 1934 comparable in duration and geographic extent.³¹ Last year, was also the warmest year on record for the contiguous U.S. dating back to 1895.

The House testimony was largely identical to the Senate testimony however, it noted, many of the enumerated elements of such plans, including water banks and water rights transfers (both temporary and permanent), may require state authorization.

Conclusion

The exceptional drought conditions of 2012 and the ongoing drought that covers much of the West underscores the need to reauthorize the Act. Reauthorization will provide Reclamation with clearer direction and greater flexibility to continue delivering water and much needed financial and technical assistance to states, tribes and local communities suffering from record-breaking drought impacts.

Given our member states' experience with implementation of the Act, it may be well to further evaluate the current needs of the states, tribes and local communities and Reclamation's existing authorities and capability to assist in meeting those needs as appropriate. With minor exceptions, such as the drilling of wells, the Act authorizes only temporary, non-structural actions. To maximize the effectiveness and efficiency of such actions, they should be considered and undertaken within the context of both state emergency drought response plans, but broader state water planning activities.

Notably, the Act provides that the programs and authorities become operative “only after the Governor or Governors of the affected State or States...has made a request for temporary drought assistance....” Further, the Act states, “All actions taken pursuant to this chapter pertaining to the diversion, storage, use, or transfer of water shall be in conformity with applicable State and applicable Federal law.” Lastly, “Nothing in this chapter shall be construed as expanding or diminishing State, Federal, or tribal jurisdiction or authority over water resources development, control, or water rights.”

³⁰*Hearing on Drought, Fire and Freeze: The Economics of Disasters for America's Agricultural Producers before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry*, 113th Cong. 1, 3 (Feb. 14, 2013) (statement of Roger Pulwarty, Director, National Integrated Drought Information System).

³¹*Id.*

WATER DATA EXCHANGE

Through 2013, WSWC continued to work with member states, the Western Governors' Association (WGA) and Sandia National Laboratory to refine state water data acquired by Sandia. Vince Tidwell, the Sandia Principal Investigator, presented the preliminary water availability metric results of their study to WSWC members at the 2012 Fall Council Meeting in San Antonio, TX. WSWC members expressed a desire to review the estimates more closely, and a mapped format was proposed as easier for reviewing the Sandia data and methods. To accomplish this, the WaDE Program Manager developed a Sandia Data Review online mapping application where state representatives could effectively review the information using a streamlined process. The review process was phased over a six-month time period, beginning in March and ending in September. State agency staff expended significant time and resources to assist the Sandia research team with the final results. Initially it was proposed that, once finalized, the data be accessible through the WSWC website. However, during the 2013 Fall Council Meeting, members reviewed the final metric results and decided not to take this approach. Instead the WaDE Program Manager assisted Sandia with training and the development of their own data-mapping applications where their results could be viewed and accessed from their own website.

Sandia's research team agreed to provide a link back to the WSWC's WaDE Central Portal, once published. Sandia's final mapping application and all results were published in June 2013 at <https://snlwm.maps.arcgis.com/home/>. The peer-reviewed journal Environmental Research Letters also published the Sandia study findings in an article titled "Mapping Water Availability, Projected Use and Cost in the Western United States," published in June of 2014 (See: <http://iopscience.iop.org/1748-9326/9/6/064009/article>). WSWC staff were included as co-authors because of their heavy involvement in the larger DOE/WGA Regional Transmission Expansion Planning (RTEP) project.

The WSWC also continued work on its affiliated project - the Water Data Exchange (WaDE). As a preliminary step, WSWC conducted a survey of the states' water data practices and drafted a document containing survey results. The WaDE State Capabilities Assessment Workgroup was the primary editing group. The many outreach visits conducted led to revisions to the data schema that will host the shared datasets. The Schema Development workgroup finalized the data schema for WaDE Version 0.2, and then proposed to make it available to member states in three formats: an MSSQL database, a Postgres database, and an Oracle database. Software code was written that allowed for the extraction of requested data from the databases using an internet browser and a pre-configured RESTful web service query.

During the early part of 2013, at the suggestion of the Technical and Schema Development Workgroup, the web service code was re-written to match the Environmental Protection Agency's Exchange Network REST web service specification. The intent was to follow the EN's established, standardized format, and in case the WaDE schema were to be selected as a new Exchange Network (EN) dataflow. Other tasks included updating databases to reflect adjustments to the V0.2 schema, and the creation of a flow configuration document (FCD), which serves as a map or set of guidelines

for partners wishing to implement the WaDE node within their server environments. The FCD was published under the “Draft Items” section of the WaDE project on the WSWC’s website in late 2013. During the outreach phase of the WaDE effort, a majority of state agencies expressed their support for the WaDE project, but also expressed concerns about available resources. To address this, the WSWC proposed to assist with finding funding to make the WaDE component deployment less of a burden on state resources. One option presented was the opportunity to partner on a grant application submitted to the Environmental Protection Agency’s (EPA) Exchange Network (EN) program. Five partner states were selected - Texas, Oklahoma, Idaho, Oregon and Washington - to participate in the grant application. The grant in its entirety was awarded in July of 2013. The funding from the EN grant allowed the states to begin the process of receiving funds for work related to WaDE deployment. It also allowed the WSWC to continue to coordinate WaDE efforts for an additional one to two years beyond current WGA grant funding. The partners had their inaugural meeting in September of 2013 and began the process of assembling a steering committee and charter, as well as the contracts required between the Texas Commission on Environmental Quality (TCEQ) and the other partners to distribute and request funds, as the lead state agency.

Related to its work with Sandia and with WGA, WSWC hosted a Water/Energy Workshop the day prior to its Spring Council Meeting in April, in Denver, Colorado. The workshop was attended by approximately sixty participants in person and another ten attendees via webinar. The intent of the meeting was to convene water managers, electricity generators, and regulators to evaluate how electricity and water providers can better coordinate and integrate their planning. A summary of the meeting and related recommendations were published later in 2013.

Other related outreach efforts included invitations to speak at the National Ground Water Association (NGWA) annual meeting in San Antonio, TX in May. WSWC staff was also invited to speak on both Landsat and the WaDE project at the Universities Council on Water Resources (UCOWR)/National Institutes for Water Resources (NIWR) annual conference. These invitations included the submission of journal articles to UCOWR’s peer-reviewed journal on water data initiatives and management.

WESTERN STATES FEDERAL AGENCY SUPPORT TEAM

The Western States Federal Agency Support Team (WestFAST) promotes collaboration between the Western States Water Council (WSWC) and 12 federal agencies with water resource management responsibilities in the West.

WestFAST was established to support the Western States Water Council (WSWC), and the Western Governors' Association (WGA) in coordinating Federal efforts regarding water resources. WestFAST was formed in 2008 in response to the Western Governors' Association report titled: *Water Needs and Strategies for a Sustainable Future: Next Steps Report* (Next Steps Report). Specifically, WestFAST was formed to promote collaboration between federal agencies, and between states and federal agencies. WestFAST was intended to help the WSWC implement collaborative efforts outlined in its Next Steps Report. In 2013, WestFAST targeted a number of specific recommendations in the Next Steps Report, with particular focus on areas related to water data and non-tribal water-rights issues. WestFAST also focused on a number of emerging federal initiatives to promote communication between states and federal agencies. Some WestFAST activities in 2013 are highlighted below.

- WestFAST initiated a structure for improving collaboration between states and federal agencies by organizing WestFAST work groups to provide opportunities for WSWC subcommittees to work cooperatively with federal agencies on joint projects. The Drought Workgroup and Data Workgroup were stood up in 2013. These workgroups are comprised of current WestFAST members and other federal agencies representatives with expertise and responsibility in workgroup focus areas.
- In 2014 WestFAST agencies gave 37 presentations at 4 WSWC meetings sharing information and coordinating on priority issue areas for both the WSWC and the federal agencies. WestFAST assisted in the development and participated in several focused workshops during the year including:
 - Workshop on Measuring, Quantifying, and Reporting Drought Impacts; August 5 - 7, 2013; San Diego, California: WestFAST and WestFAST agencies including the U.S. Forest Service, the U.S. Army Corp of Engineers, NASA, and NOAA participated in presentations and discussion on drought assessment tools and impacts on water resources and federal lands. WestFAST Federal Agency participants included WestFAST team members Bob Boyd of BLM and Forrest Melton from NASA.
 - WSWC/NARF Symposium on the Settlement of Indian Reserved Water Rights Claims; August 13-15, 2013; Santa Fe, New Mexico - The 2013 symposium included presentations from DOI and Kevin Washburn, Assistant Secretary for Indian Affairs, and Anne Castle, Assistant Secretary for Water and Science.
 - WSWC/WGA Energy-Water Workshop; April 2, 2013; Denver, Colorado 28; which included and presentation and discussion on: "Federal Perspectives on the Nexus: A Water/Energy Partnership," led by Eric Evenson of the USGS.

- WestFAST has assisted in the coordination of the water-use component of the USGS National Water Census with WSWC efforts to develop and implement the WaDE. The National Water Census is the USGS research program on national water availability and use, and implemented through the Department of the Interior WaterSMART initiative. The program develops new water accounting tools and assesses water availability at the regional and national scales. Through the Water Census, USGS is striving to provide more comprehensive reporting of national information on withdrawal, conveyance, consumptive use, and return flow by sector of use. WestFAST has facilitated coordination between USGS National Water Census Program/WaterSMART Program leaders and the WSWC WaDE developers to understand how each effort might benefit the other. National Water Census leaders will also participating in WestFAST Work Groups to aid in that coordination.

- WestFAST worked with WSWC to conduct a survey regarding non-tribal water rights issues. As part of this process, WestFAST and WSWC followed up with respondents in planning for a workshop to discuss the recommendations gathered during the survey process. Specifically, the WSWC and WestFAST will hold a workshop In Helena, Montana on July 15-16, 2014 that will bring together 40-50 state and federal officials to identify “policy options” that states and federal agencies can use to improve the process used to resolve federal non-tribal water rights claims. The workshop will also discuss the specific issues, tools, and information to be included in a clearinghouse of relevant information, as well the framework, design, and format of the clearinghouse (e.g., a report, regularly updated website or database, etc.). The workshop will be held in conjunction with the WSWC’s summer meetings on July 16-18.

- All of the WestFAST agencies have a number of high-priority initiatives that can benefit from coordination with the other federal agencies. WestFAST provides a forum for these agencies to discuss these initiatives, and to allow for the agencies to better understand how they can better work together. In this role WestFAST also in 2013
 - Conducted monthly conference calls among the 12 WestFAST participating federal agencies

 - Developed and delivered a monthly WestFAST Newsletter to 130 federal and state recipients (<http://www.westernstateswater.org/westfast/westfast-news/>)

 - Hosted two federal Collaboration Series lectures via webinar to discuss federal initiatives relevant to WSWC activities and priority water issues, and

 - Developed a draft report to help new personnel understand how WestFAST works. The draft report “Intro to WestFAST” provides an overview of the history and current work of WestFAST.

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 2013 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 gave state of the state or inaugural addresses that discussed water and related issues. In Alaska, Governor Sean Parnell (R) said: "Federal law says that states have the right to regulate activities regarding their own lands and waters³² – and it's about time Alaskans exercise these rights over our resources. So tonight, I urge you to pass legislation giving our State authority to seek and assume primacy over dredge and fill operations within our borders [under Section 404 of the Clean Water Act]. By assuming primacy, the people of Alaska will have a greater say over their lands and waters."

California Governor Jerry Brown (D) said water "is central to the life of our state," noting that one sixth of that water flows through the San Joaquin Delta. He also said: "If because of an earthquake, a hundred year storm, or sea level rise, the Delta fails, the disaster would be comparable to Hurricane Katrina or Superstorm Sandy: losses of at least \$100 billion and 40,000 jobs. I am going to do whatever I can to make sure that does not happen.... My proposed plan is two tunnels 30 miles long and 40 feet wide, designed to improve the ecology of the Delta, with almost 100 square miles of habitat restoration. Yes, that is big but so is the problem." Brown then discussed climate change, citing efforts to reduce carbon emissions and meet renewable energy goals and stating that California "...is extremely vulnerable because of our Mediterranean climate, long coastline and reliance on snowpack for so much of our water supply."

³²<http://www.aascu.org/policy/state-policy/stateofthestate/>.

In Colorado, Governor John Hickenlooper (D) said: “About 95 percent of Colorado is under severe or worse drought conditions. Our snowpack is well below average. This affects far more than the outdoor recreation industry; it impacts all of Colorado. That’s why we set a goal of crafting a state water plan by 2015...and much work has already been done. While expanding reservoir capacity makes sense, and rotational fallowing of agricultural land shows great promise, every discussion about water should start with conservation.... We know that a plan is not a silver bullet, but it is an essential next step if we are to shape how Colorado will look in the future.”

Idaho Governor C.L. “Butch” Otter (R) also discussed his state’s water plan, which was revised and submitted to the legislature. “It’s the first update since 1996, and it reflects use of the latest technology in better evaluating our needs and the status of our water supplies,” he said. “Just as importantly, for the first time the plan is about more than our goals – it also include strategies and milestones for executing our management policies and evaluating their effectiveness.... It will help guide how we use, protect and replenish our water supplies for a more sustainable future.” Otter also thanked Idaho Water Resources Director and WSWC member Gary Spackman, the Idaho Water Resources Board, the water-user community, and the public for participating in the development of the plan.

Kansas Governor Sam Brownback (R) said: “Although the current drought is harsh, our reservoirs and aquifers continue to give us the water we need. But now they need attention. Several of our reservoirs and many of our lakes need dredging from siltation. The Ogallala Aquifer needs local action to reduce its use and save some of it for future generations.”

Nebraska Governor Dave Heineman (R) discussed the importance of agriculture to his state’s economy, noting that it “remains relatively strong in Nebraska.” However, he also said “...our farmers and ranchers have...faced the challenge of the drought this past year, and they have managed their operations with efficiency and flexibility. Water resources will continue to be a challenge for agriculture, businesses and communities due to the continued drought.”

North Dakota Governor Jack Dalrymple (R) said: “We cannot talk about the future of our state without talking about the management of our water resources. Flood control became foremost in our minds in 2011, and flood recovery took over in 2012. The state has provided hundreds of millions of dollars for home acquisitions, flood impact grants, and to fund loan programs.... Along with flood protection projects the state remains committed to providing communities with quality water supplies. [W]e need to make major investments.... The great news for our state is that it appears that oil and gas revenues will make possible significant investments in water projects for years to come - investments that create jobs and improve our quality of life.”

Texas Governor Rick Perry (R) said: “This session, we need to deal with our state’s infrastructure needs. We must particularly address our growing needs in water and transportation.... That’s why I support a move to utilize \$3.7 billion from the Rainy Day Fund for a one-time investment in infrastructure programs.... What I am proposing will support critical water and transportation systems across our state, addresses our needs both short- and long-term, and ensures

both water and traffic will flow in Texas for generations to come. None of us can deny the need for these improvements. Water and roads add to the quality of life for all Texans.... It also plays a major role in our continued economic development. Whenever we're recruiting a business seeking to relocate or expand, a chief concern...is ensuring there are adequate water, power and transportation systems for their needs."

Washington Governor Jay Inslee (D) said: "On climate change, we have settled the scientific controversy. What remains is how we respond to the challenge. Now I know Washington can't solve this global problem alone, but we must embrace our role as first responders as our children's health is in clear and immediate danger. We must also embrace our role as entrepreneurs and pioneers, ensuring that economic solutions to climate change begin here." Inslee also noted: "Nine of 10 of the hottest years on record happened in the past decade. We've had epic flooding, searing drought and devastating wildfires....and the rising tides along our coast. Our Pacific Northwest waters...are becoming too acidic.... In Eastern Washington, our long tradition in agriculture could be threatened if snowpack declines. Water stored as snow is money in the bank for Washington's rural economies, but the bank could fail if we don't act."

Lastly, Wyoming Governor Matt Mead (R) said: "There is no sense in talking about economic development if you don't have water, sewer, basic infrastructure."

Bureau of Reclamation

FY2014 Budget

On April 10, President Obama sent his \$3.77 trillion FY2014 budget request to Congress. The budget would replace across-the-board cuts required by the sequester with more strategic reductions and long-term reforms intended to eliminate waste and unnecessary programs.

Under the request, the Department of the Interior would receive \$11.7 billion in discretionary funding, 4% more than FY2012. Within Interior, Bureau of Reclamation funding would remain relatively flat at \$1 billion compared to FY2013 levels, with \$791.1 million of this amount going to its Water and Related Resources Account, a \$103.9 million cut. Within the account, rural water projects would receive \$40 million, \$29.5 million below FY2013 levels, while funding for Reclamation's WaterSMART programs would fall \$20.5 million to \$35.4 million. Funding levels for notable WaterSMART programs include \$4.7 million for the Basin Studies Program, \$14 million for Title XVI water reclamation and reuse projects, and \$12 million for WaterSMART grants, representing respective cuts of \$1.3 million, \$6.3 million, and \$12.5 million. Interior's budget request would also transfer Central Utah Project (CUP) activities from the Department's budget to Reclamation's budget, with CUP receiving \$3.5 million, a \$25.4 million cut.

Estimated appropriations from the Reclamation Fund would total \$852 million for FY2014. Projected FY2014 fund receipts are \$2.1 billion, most of which would be derived from mineral leasing revenues on federal lands. Receipts for FY2012 and FY2013 were also about \$2.1 billion

each, while appropriations totaled \$872 million and \$873 million respectively. The estimated unobligated balance at the end of FY2014 is \$13.3 billion, compared to \$10.8 billion in FY2012 and \$12 billion in FY2013. The WSWC supports using monies accruing to the Reclamation Fund for authorized purposes.

With respect to tribal projects, Reclamation is requesting \$78.7 million to establish an Indian Water Rights Settlement Account to implement certain settlements. Of this amount, \$18.2 million would fund the four settlements Congress authorized as part of the Claims Resolution Act of 2010, including \$7.5 million for the Crow settlement in Montana; \$2.0 million for the White Mountain Apache settlement in Arizona; and \$4 million and \$4.7 million each for the Taos and Aamodt settlements in New Mexico. The remaining \$60.5 million would implement the Navajo-Gallup Water Supply project, a key part of the Navajo Nation's settlement in New Mexico. The request would also seek \$21 million in the Water and Related Resources Account for operations and maintenance functions for other projects that are part of authorized settlements.

Rural Water Projects

Reclamation Rural Water Construction Fund

On April 16, the Senate Energy and Natural Resources Committee's Subcommittee on Water and Power held a hearing on a number of water bills, including S. 715 which would establish a Reclamation Rural Water Construction Fund (RRWC) to help fund high-priority rural water projects that Congress has already authorized. The bill would finance the RRWC with \$80 million per year in revenues that would otherwise be deposited in the Reclamation Fund for each of fiscal years 2014 through 2030. The bill also specifies that "no amounts" may be deposited in the RRWC if doing so would increase the federal deficit, and that the Secretary of the Interior "may use" money from the RRWC to complete construction of authorized projects subject to certain conditions.

Senator Max Baucus (D-MT) introduced and testified on the bill. It is nearly identical to legislation (S. 3385) he introduced last year, along with nine cosponsors, including western Senators Jon Tester (D-MT), Tom Udall (D-NM), Martin Heinrich (D-NM), John Hoeven (R-ND), Heidi Heitkamp (D-ND), and Tim Johnson (D-SD).

"This bill is an overdue step in using the Reclamation Fund for its intended purpose, and that is making the West habitable," said Baucus. "At the current rate of appropriations from the Fund, it will be twice as expensive as it should be to [construct] Reclamation projects in states like Montana, the Dakotas, and New Mexico. Investing in more water up front will result in less spending over time. I was dismayed at the \$40 million proposed for Reclamation's rural water projects in the President's budget [request]. I believe it demonstrated once again why Congress needs to act - we can't rely on the Administration. My bill will speed up construction, create good paying jobs, and cost taxpayers less money in the long run."

Senator Tim Johnson (D-SD) said: “After historic investment in rural water through the Recovery Act, discretionary budget requests for projects have fallen to levels insufficient to make any meaningful progress. This legislation offers a new approach to get these projects back on track and bring economic development opportunities to the communities they serve.”

However, Senator John Barrasso (R-WY) expressed concern that the bill’s language gives the Secretary of the Interior the discretion not to spend money from the RRWC to fund rural water projects. He also noted that the bill does not define the term “rural water project” and that deposits into the RRWC would require offsets to avoid increasing the deficit.

Bureau of Reclamation Senior Advisor Robert Quint said the Administration supports the goals of S. 715, but noted that the rural water program “...must compete with a number of other priorities within the Budget, including aging infrastructure, Indian water rights settlements, environmental compliance and restoration actions, and other priorities intended to address future water and energy related challenges. Notwithstanding the importance of rural water projects, current budget constraints have limited the ability to make Federal investments that match on-the-ground capabilities.”

Absent additional non-federal funding, Quint also said some authorized projects would not be completed until after 2063 at current federal funding levels, despite nearly \$4 billion being expended by that time. Another \$1 billion would still be needed to complete construction for some projects. However, he also said that expending \$80 million per year, as contemplated in S. 715, would allow authorized projects to be completed by 2039.

In response to questions, Quint said the Administration “supports the concept” of using the Reclamation Fund to fund rural water projects, but said: “The issue that the Administration...has...is that the mandatory funding requirement from the fund itself takes away the discretionary part of being able to decide what the priorities ought to be in each budget year.”

The hearing also addressed S. 659, which would reauthorize the Reclamation States Emergency Drought Relief Act of 1991. As introduced by Committee Chair Ron Wyden (D-OR), the bill would extend the program through 2018, and increase the amount of authorized federal appropriations from \$90 million to \$110 million to allow for greater Reclamation assistance to states, tribes, and local governments in their efforts to address drought impacts.

Quint said Interior supports extending the Act’s authorization through 2018, but said: “Given that there remains a capacity for over \$15 million in authorized appropriations for this program, the Department does not believe an increase in the authorized appropriations ceiling is necessary at this time. If the authorized appropriations ceiling should become a more urgent constraint, we will evaluate the need for an increase to the appropriations ceiling at that time.”

The WSWC submitted written testimony³³ on the two water bills and has long supported efforts to use revenues accruing to the Reclamation Fund for western water development, and to establish a dedicated source of funding to complete authorized rural water projects. It also supports legislation to reauthorize the Reclamation States Emergency Drought Relief Act.³⁴

Authorized Rural Water Projects Completion Act

On November 21, the Senate Energy and Natural Resources Committee reported a marked-up version of S. 715, the Authorized Rural Water Projects Completion Act by voice vote. In reporting the bill, the Committee approved a substitute amendment with new provisions developed by Committee Chair Ron Wyden (D-OR) and Senator John Barrasso (R-WY). The reported version dedicates a total of \$150 million per year through 2035 in revenues from the Reclamation Fund that would be divided into three separate accounts.

The first would receive \$80 million per year to support authorized rural water projects. The second would receive \$35 million per year to complete the construction, design, and planning for water projects that are part of authorized Indian water rights settlements, and to resolve tribal claims against the U.S. relating to the federal use of tribal land for hydropower generation. The final account would receive \$35 million per year for the repair, replacement, and maintenance of certain Indian irrigation projects.

The changes further specify that the Secretary of the Interior “may not use less” than the \$80 million and \$35 million per year that would accrue to the rural water project and Indian water rights settlement accounts in carrying out their stated purposes.³⁵

Water Contracting Requirements

On July 24, Reclamation announced that it had finalized four water-related policy changes to its Reclamation Manual and Directives and Standards that describe how the agency will develop, execute, and administer contracts involving Reclamation project water. In particular, the changes are intended to better align its definitions of irrigation and municipal and industrial (M&I) water use with relevant law, and to improve the parameters for contract price negotiations associated with future transfers of project water. The changes are also aimed at filling “policy gaps” and clarifying existing policies as they relate to the cost of Reclamation-supplied water.

Reclamation’s original version of the changes, which it issued for public comment in 2011, would have assumed that deliveries of project water to lots of less than 10 acres for non-commercial irrigation purposes would be M&I use subject to market rates, which are often substantially higher.

³³See pg. 39.

³⁴<http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings>. *Western States Water*, #2014, December 21, 2012, and #1992, July 20, 2012.

³⁵*Western States Water*, # 2031, April 19, 2013.

The original draft changes also would have applied whenever a contracting action is required. This prompted the WSWC to write a comment letter to Reclamation in March 2012, which expressed concern 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.” The WSWC’s letter also supported Reclamation’s then-current definitions of irrigation and M&I, under which project water could be used for “irrigation” if it was an untreated, raw water supply applied to any outdoor use regardless of acreage.

The final policy changes do not include the 10-acre threshold. Instead, they state that “irrigation” is “...the use of contract water to irrigate land primarily for the production of commercial agricultural crops or livestock, and domestic and other uses that are incidental thereto.” However, the policies clarify in a footnote that this definition “...does not include uses such as watering golf courses, lawns, and ornamental shrubbery used in residential and commercial landscaping gardens, parks, and other recreational facilities; pasture for animals raised for personal purposes or for nonagricultural commercial purposes; cemeteries; and similar uses (except to the extent that some of these uses may be incidental to uses that are primarily agricultural). It also does not include commercial agricultural uses that do not require irrigation, such as fish farms and livestock production in confined feeding and breeding programs.”

Reclamation says the final versions of the policy changes will provide additional clarification on how it will use “market rates” in contract price negotiations. Instead of requiring the use of “market rates,” the changes specify that market data, where available, will be among the sources Reclamation will use in formulating “the absolute ceiling” for the negotiating range.

According to Reclamation, the final changes narrowed the applicability of the new definitions and will not affect previously established nonagricultural uses. Instead, Reclamation reports that the final changes will only apply to new non-agricultural irrigation uses started after the new policies become applicable to a given contract, which occurs when a contract is executed, renewed, or supplemented, rather than automatically when policy changes are issued.³⁶

Landscape Conservation Cooperatives

On August 22, the Bureau of Reclamation announced \$1.4 million in funding for 12 projects that will develop applied science tools in support of the Desert and Southern Rockies Landscape Conservation Cooperatives (LCCs). Through cost-share agreements, Reclamation says the funding will provide \$3.1 million for the development of resource management tools to assist LCC stakeholders. Some of the entities receiving funding include Northern Arizona University, Southern Nevada Water Authority, Texas Tech University, The Nature Conservancy, and Utah State University.

³⁶<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=43944>.

The LCCs are a network of public-private partnerships intended to improve management of the nation's natural resources and make them more resilient to the projected impacts of climate change. The Desert LCC encompasses parts 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 parts of Idaho, Nevada, and Wyoming.

"These projects provide specific tools that can be used by resource managers making on-the-ground management decisions that help ensure landscape sustainability," said Bureau of Reclamation Commissioner Mike Connor.³⁷

Reclamation States Emergency Drought Relief Act

On October 10, the House Natural Resources Committee's Subcommittee on Water and Power held a hearing on two water-related bills. Committee Ranking Member Pete DeFazio (D-OR) introduced the first bill (H.R. 3176), which would reauthorize the Reclamation States Emergency Drought Relief Act through 2018 with \$15 million remaining in spending authority.

Subcommittee Chair Tom McClintock (R-CA) said no federal witnesses would testify due to the shutdown of the federal government. With respect to H.R. 3176, he said federal water projects were historically financed "...on the beneficiary pays principle in which federal money...is repaid by [project beneficiaries]. I am interested [in] knowing why that principle is not applicable here, and whether our approach to drought relief ought to be aimed at producing permanent abundance rather than managing temporary shortages."

Ranking Member Grace Napolitano, who co-sponsored the bill, said the Act "...provides Reclamation with the authority and flexibility to get water to entities and tribes who need it during times of drought." She further noted that almost 50% of the country is in moderate to severe drought and that drought costs the U.S. economy between \$6 billion and \$8 billion annually, with the costs of the 2012 drought possibly exceeding \$35 billion.

WSWC Executive Director Tony Willardson testified in favor of the bill pursuant to WSWC Position No. 347. He said: "Reauthorization will provide Reclamation with clearer direction and greater flexibility to continue delivering water and much needed financial and technical assistance to states, tribes and local communities suffering from record-breaking drought impacts. Reauthorization will also facilitate more effective state-based and other grassroots drought preparedness and mitigation efforts. Absent reauthorization, Reclamation will lack critical authority to provide emergency assistance." He also said the Act only authorizes temporary, non-structural

³⁷<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=44324>. *Western States Water*, #1996, August 17, 2012.

actions, and that its programs and authorities become operative only at the request of the governor of an affected state.³⁸

Clyde Wayne Crews, Vice President for Policy/Director of Technology Studies for the Competitive Enterprise Institute, testified against the bill, with many of his comments addressing California water issues. He said: “Western states should fund resolution of their environmental problems and water access issues without involving the far less blessed rest of the nation, who have their own crises. If funds...are received, they should be reimbursed.” Crews also supported an emphasis on “regulatory liberalization,” “environmental rationality,” and efforts to bring water resources under market systems.

Water Rights Protection Act

In addition, the Committee discussed the Water Rights Protection Act (H.R. 3189), which Rep. Scott Tipton (R-CO) introduced. The bill is intended, in part, to address recent attempts by the U.S. Forest Service (USFS) to require ski area operators to transfer their water rights to the federal government as a condition of receiving special use permits to operate on federal land.

The bill would prohibit the Departments of Agriculture and Interior from conditioning “...the issuance, renewal, amendment, or extension of any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on the transfer or relinquishment of any water right directly to the [U.S.], in whole or part, granted under State law, by Federal or State adjudication, decree, or other judgment, or pursuant to any interstate water compact...” It would also prohibit both departments from requiring water users to apply for a water right in the name of the U.S. as a condition for permission to operate on federal land.

McClintock, who co-sponsored H.R. 3189, said conditioning land use permits on the transfer of water rights to the U.S. “...amounts to an uncompensated taking, and is a violation of both the 5th Amendment to the Constitution and a violation of state law under which the federal government must acquire water rights through the proper channels as would any other user.” He also said the bill “...gets the [USFS] out of what has historically been a state prerogative.” McClintock noted that the USFS had previously declined to testify.

Napolitano said: “The Forest Service is concerned about their ability to manage the land if the ski resorts were to sell their rights. The legislation is so broadly written that it could apply to many actions on federal lands, not just to ski resorts.” She also supported reopening the federal government, stating: “We do not have all the answers to the questions we have asked of the administration...because of the shutdown.”

³⁸See page 49.

Witnesses representing Aspen Skiing Company, the National Ski Areas Association, two Colorado water districts, and the Utah Farm Bureau Federation also testified in support of H.R. 3189.³⁹

Clean Water Act/Environmental Protection Agency

Proposed Jurisdictional Guidance

The list of intended regulations that the Administration published on December 21, 2012 included a listing that indicated that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) “are developing a proposed rule” to clarify Clean Water Act (CWA) jurisdiction in light of the U.S. Supreme Courts’ *SWANCC* and *Rapanos* decisions. The listing stated: “After...*SWANCC* and *Rapanos*, the scope of ‘waters of the [United States]’ protected under all CWA programs has been an issue of considerable debate and uncertainty. The Act has a single definition for ‘waters of the United States.’ As a result, these decisions affect the geographic scope of all CWA programs. *SWANCC* and *Rapanos* did not invalidate the current regulatory definition of ‘waters of the United States.’ However, the decisions established important considerations for how those regulations should be interpreted, and experience implementing the regulations has identified several areas that could benefit from additional clarification through rulemaking.” The listing did not provide a timeline for developing the proposed rule.⁴⁰

The listing follows the EPA and Corps’ February 2012 submission of draft guidance for determining CWA jurisdiction to the Office of Management and Budget (OMB) for final review. Although the guidance was to be an interim step while the agencies worked towards formal rulemaking, OMB had not released the guidance.

On April 24, thirty Republican Senators wrote EPA Acting Administrator Bob Perciasepe, urging him not to release the proposed CWA guidance. “The draft guidance...if finalized, could expand the scope of the waters to be regulated beyond that intended by Congress,” the letter said. “Moreover, leaving the guidance in place would further frustrate any potential rulemaking process. Given the significance of redefining jurisdictional limits to impose CWA authority, a formal rulemaking process provides a greater opportunity for public input and greater regulatory certainty than a guidance document.”

The letter also said CWA rulemaking “...is of extreme significance, as the scope of the final rule will indicate whether EPA intends to redefine when isolated wetlands, intermittent streams, and other non-navigable waters should be subject to regulation under the CWA.... [W]e ask that you stay within the confines of current law and eschew attempts to expand jurisdiction beyond the intent of Congress. Any rulemaking should identify limits to EPA’s jurisdiction under the statute consistent

³⁹<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=352128>. *Western States Water*, # 2031, April 19, 2013.

⁴⁰<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2040-AF30>.

with those articulated in...*SWANCC* and *Rapanos*. In both of these cases, the U.S. Supreme Court made it clear that not all water bodies are subject to federal jurisdiction under the CWA. Any proposed rule should reflect this principle.”

Western Senators who signed the letter included: Lisa Murkowski (AK), John McCain (AZ), Mike Crapo (ID), Pat Roberts (KS), Jerry Moran (KS), Mike Johanns (NE), Deb Fischer (NE), Dean Heller (NV), John Hoeven (ND), James Inhofe (OK), Tom Coburn (OK), John Thune (SD), John Cornyn (TX), Orrin Hatch (UT), Mike Lee (UT), Michael Enzi (WY), and John Barrasso (WY).⁴¹

Of note, the WSWC also sent a letter to EPA and the Corps on April 10, 2013, urging the agencies not to release the proposed guidance and to focus on rulemaking instead. The letter was based on WSWC Position No. 330.5, which expressed a preference for rulemaking and set forth concerns that the guidance does not provide clear and concise limits to CWA jurisdiction.

On May 22, Senator John Barrasso (R-WY) introduced the Preserve the Waters of the United States Act (S. 1006) to prevent the EPA and the Corps from finalizing their proposed CWA guidance, or using the guidance as the basis for future rulemaking or any decision regarding the scope of the CWA. The bill is identical to both legislation Barrasso introduced last year (S. 2245) and an amendment he introduced to the Water Resources Development Act (S. 601). The Senate voted 52-44 in favor of the amendment, but it required 60 votes to pass.⁴² “The EPA’s plan to keep tabs on every single body of water, including prairie pot holes and mudflats is outrageous,” said Barrasso. “Washington’s unprecedented power grab will have a huge impact on farmers, ranchers, and small businesses that need to put a shovel to the ground to make a living. Our bill will protect private landowners by preventing this extreme guidance from going forward.”

Twenty-six Republican Senators co-sponsored the bill, including Senate Environment and Public Works Ranking Member David Vitter (LA) and westerner Senators Lisa Murkowski (AK) John McCain (AZ), Jeff Flake (AZ), Mike Crapo (ID), Jim Risch (ID), Pat Roberts (KS), Deb Fischer (NE), Dean Heller (NV), James Inhofe (OK), Tom Coburn (OK), John Cornyn (TX), Orrin Hatch (UT), Mike Lee (UT), and Mike Enzi (WY).⁴³

On September 17, the EPA and the Corps withdrew their proposed CWA guidance. The guidance received criticism from a number of groups, including the WSWC. EPA and the Corps informed WSWC staff and Congressional staff that they were withdrawing the guidance.

On October 2, six Republicans on the Senate Environment and Public Works Committee wrote Gina McCarthy, Administrator of the EPA, to ask EPA to publically announce that it had withdrawn its draft CWA guidance. Committee Ranking Member David Vitter (R-LA) and Senators John Boozman (R-AR), Mike Crapo (R-ID), Deb Fischer (R-NE), James Inhofe (R-OK), and John

⁴¹<http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases>.

⁴²*Western States Water*, #2035, May 17, 2013 and 1977, April 6, 2012.

⁴³<http://www.barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases>.

Barrasso (R-WY) signed the letter. The letter states: “EPA has not provided a notice or statement for public and agency dissemination which confirms the draft guidance’s termination... EPA’s claim that it is ‘withdrawing the draft guidance’ leads to questions on what exactly the draft’s ‘withdrawal’ means and when precisely the ‘withdrawal’ takes effect.... [B]ecause EPA chose to be less than forthright, [its] rulemaking efforts may now be plagued by uncertainty and distrust on interim jurisdictional questions.”

“We are...unconvinced that the...‘withdrawal’ will result in a meaningful practical change. [W]e were disturbed to learn that Corps field staff have apparently relied on the draft guidance in making recent CWA jurisdictional determinations, despite the fact that [it] was never finalized. It is disconcerting to hear of the Corps’ eagerness to use the draft guidance’s improper ‘aggregation’ approach in order to assert jurisdiction over one particular farmer’s drainage ditches. EPA’s vague announcement last month leaves open the possibility that federal officials may for the foreseeable future look to the draft guidance and its dubious regulatory agenda when making jurisdictional determinations.”⁴⁴

At the same time EPA and the Corps withdrew their proposed CWA guidance, the agencies announced that they had submitted a draft rule to clarify CWA jurisdiction to the OMB for interagency review. After the review, the agencies would publish the draft rule for comment.

EPA Acting Assistant Administrator for Water Nancy Stoner said the rule “...will provide greater consistency, certainty, and predictability nationwide by providing clarity for determining where the [CWA] applies and where it does not. These improvements are necessary to reduce costs and minimize delays in the permit process and protect waters that are vital to public health, the environment and economy.”⁴⁵

In addition, EPA said the rule is based on a draft report that its Science Advisory Board (SAB) released concurrently with the rule’s submission to OMB. Titled “Connectivity of Streams and Wetlands to Downstream Waters,” the report reviews and synthesizes peer reviewed literature on the connection between small, isolated waters and larger bodies of water. EPA also says any final regulations regarding CWA jurisdiction will be based on the final version of the report, and will maintain existing exemptions and exclusions. The report makes three initial conclusions. The first states: “Streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters. These streams supply most of the water in rivers, transport sediment and organic matter, provide habitat for many species, and take up or change nutrients that could otherwise impair downstream waters.” The second conclusion states: “Wetlands and open-waters in floodplains of streams and rivers and in riparian areas...are integrated with streams and rivers. They strongly influence downstream waters by affecting the flow of water, trapping and reducing non-point source pollution, and exchanging biological species.” The third conclusion

⁴⁴<http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases>. *Western States Water*, #2053, September 20, 2013.

⁴⁵<http://blog.epa.gov/epaconnect/2013/09/watersoftheus/>.

states: “[T]here is insufficient information to generalize about wetlands and open-waters located outside of riparian areas and floodplains and their connectivity to downstream waters.” EPA requested public comments on the draft report.⁴⁶

Of note, the WSWC expressed concerns about the draft guidance, and wrote EPA and the Corps on November 5, 2013, stating that formal rulemaking would be a better mechanism for the agencies to use in clarifying CWA jurisdiction. The WSWC’s letter urged EPA to view the states as co-regulators and to ensure “...that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.”⁴⁷

On October 18, House Science, Space and Technology Committee Chair Lamar Smith (R-TX) and Environment Subcommittee Chair Chris Stewart (R-UT) wrote EPA urging the agency to “immediately provide” its SAB with a copy of the CWA jurisdiction rule it submitted to the OMB for interagency review. Smith and Stewart say their request is consistent with the Environmental Research, Development and Demonstration Authorization Act (ERDDAA), which requires EPA to provide the SAB with proposed CWA regulations that it has given to other federal agencies for formal review and comment.

According to the letter, ERDDAA “...ensures that regulations are fashioned with the sound scientific foundation requisite for balanced decisions. Under the law, the advice of scientific experts is a pre-requisite, not an afterthought. It is clear from the statute that the [SAB] should review the scientific underpinnings of the draft rule as part of the interagency process. Any attempt to issue a proposed rule before completing an independent examination by the agency’s own science advisors would be to put the cart before the horse.... [T]he agency’s current approach to CWA jurisdiction appears to represent a rushed, politicized regulatory process lacking the proper consultation with scientific peer reviewers and the American people.”

The letter also expresses concern that “...EPA intends to expand federal regulatory authority under the [CWA] to include even the most isolated wetlands, seasonal drainages, and prairie depressions. A sweeping reinterpretation of EPA jurisdiction would give the agency unprecedented control over private property across the nation. In light of the significant implications this action would have on the economy, property rights, and state sovereignty, this process must be given more thought and deliberation to allow for important, statutorily required weighing of the scientific and technical underpinnings of the proposed regulatory changes.”

Of further note, the letter addressed the draft “connectivity” report the SAB released for public comment on the relationship between small, isolated waters and larger bodies of water. Since EPA had said the final report would serve as the basis of the final CWA rulemaking, the letter argued: “Without a copy of the draft rule, the [SAB] cannot meaningfully review this regulatory

⁴⁶<http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345>.

⁴⁷*Western States Water*, #2029, April 8, 2013.

science in context. Review of the report must be undertaken in conjunction with a thorough examination of the jurisdictional modifications contemplated in the draft rule.”⁴⁸

On November 7, the WSWC sent a letter to EPA commenting on the draft EPA Science Advisory Board (SAB) study that synthesizes peer reviewed literature on the connection between small, isolated waters and larger bodies of water. The letter states: “We are concerned that the report may be misinterpreted inappropriately to suggest that a scientific connection between waters alone is sufficient to establish CWA jurisdiction. The report only discusses well-known scientific principles of hydrology and geohydrology regarding the interconnections between waters, but does not and cannot describe how these principles apply to the legal and institutional boundaries that Congress and the Supreme Court have placed on CWA jurisdiction.”

“The overriding question in the rulemaking is not one of science, but of legal authority, namely the extent of federal authority over water resources under Justice Scalia’s plurality opinion and Justice Kennedy’s concurring opinion in *Rapanos*. For example, under Justice Kennedy’s test, a mere scientific connection or ‘nexus’ between waters is not sufficient to determine CWA jurisdiction. Instead, [his] test requires a fact-intensive, case-by-case physical and legal inquiry to determine whether that nexus is ‘significant’ enough to establish CWA jurisdiction. Since the report does not describe how its scientific findings apply to this test or Justice Scalia’s plurality decision, it is insufficient alone to establish or support CWA jurisdiction.”

“The report should not be used to support a rule that improperly asserts that the scope of the CWA is essentially unlimited. We recognize that there are differing interpretations of *Rapanos*, but it is undisputed that the Court rejected the EPA’s and the Corps’ pre-*Rapanos* interpretation of CWA authority. A rule that attempts to return CWA jurisdiction to the pre-*Rapanos* ‘status quo,’ using the report’s findings of global hydrologic connectivity would be contrary to the limits that Congress and the Court have established, and would be an improper use of the report and federal rulemaking authority. [T]he CWA does not apply to ground waters, which are protected and allocated by western states, and which recognize the hydrogeologic connections. Any reference to ground waters, including ‘shallow subsurface flows,’ is inappropriate in any related rulemaking.”

“As stated in our position regarding the draft CWA guidance, efforts to expand CWA authority beyond the limitations the Court established in *SWANCC* and *Rapanos* ‘would likely lead to further litigation’ and would do little to resolve the current uncertainty regarding the extent of CWA jurisdiction.... We are also concerned about the lack of state expertise and state representation on the [SAB panel that will review the report]. Not a single member...is a state agency expert or administrator. As stated in our April letter, the states have on-the-ground expertise and knowledge of water quality conditions and challenges within their borders... [W]e urge you to recognize the limitations of the report as it does not address the legal limits of CWA jurisdiction and authority, and how those limits apply to the scientific principles discussed in the report.” Of note, the letter was

⁴⁸<http://science.house.gov/press-release/epa-skirts-law-expand-regulatory-authority>. *Western States Water*, #2056, October 11, 2013.

based on WSWC Position No. 330.5 and a related April 2013 follow-up letter regarding EPA's now withdrawn draft CWA guidance.⁴⁹

On November 15, Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) wrote OMB, urging it to return a draft rule on CWA jurisdiction that the EPA and the Corps sent OMB last month for interagency review. House Judiciary Committee Chair Bob Goodlatte (R-VA) and House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law Chair Spencer Bachus (R-AL) also signed the letter. The letter states: "We are concerned that EPA's decision to base the final 'waters of the [U.S.]' rule on a report that is still only in draft form creates the appearance that peer review and public input for the *Connectivity Report* are nothing more than paper exercises. We likewise fear that EPA will rely on the *Report* regardless of any deficiencies which may be identified during the review process. We note as well that EPA's decision to transmit the draft rule to OMB prior to the completion of rigorous [SAB] peer review and [the] finalization of the *Connectivity Report* contradicts EPA and OMB peer review principles. Therefore, and in order to preserve the integrity of critical review of the rule's foundational scientific report, we ask that OMB immediately return the draft rule to EPA. Only by returning the draft rule to EPA may OMB's interagency review eventually proceed in a fully informed manner...."

"The consequences of a rushed 'waters of the [U.S.]' rulemaking are too important to ignore. The property rights of millions of Americans are at stake, as many fear their ability to make productive use of their land will become subject to EPA's regulatory whims. EPA has already sent a dangerous signal by committing to the *Connectivity Report* well before the *Report's* merits have been decided. Further, given that the draft rule would provide EPA with authority over ponds, tributaries, and ditches never before subject to federal regulation, the significance of the *Report* and its relationship to the rule make EPA's premature commitment to the *Report* even more suspect."⁵⁰

The letter follows similar requests the U.S. Conference of Mayors, the National League of Cities, and the National Association of Counties made in a November 8 letter to OMB, asking it to send the rule back to EPA and the Corps, who it said should "...refrain from developing a proposed rule until after [they] have thoroughly reviewed comments on the draft science report." The letter said: "By releasing the draft report for public comment at the same time as a proposed rule was sent to OMB for review, we believe EPA and the Corps have missed the opportunity to review any comments or concerns that may be raised on the draft science report..." The letter further asked for a briefing with state and local governments on the differences between the draft rule and the now withdrawn CWA guidance, as well as any cost analysis they may have completed on the draft rule.

Of note, the WSWC submitted comments on the draft connectivity report on November 5, stating that the question of CWA jurisdiction is also a legal one, and that the report's scientific findings are insufficient in and of themselves to establish jurisdiction.⁵¹

⁴⁹*Western States Water*, #2053, September 20, 2013.

⁵⁰<http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases>.

⁵¹*Western States Water*, #2060, November 8, 2013.

On December 16, eighty-nine House Democrats wrote EPA Administrator Gina McCarthy to urge her "...to swiftly propose a rule to restore protections to all of our nation's waterways. For the sake of our communities and the prospects of having waterways clean enough to swim in, fish from, and drink from, we must have a rule that protects all waters of the United States under the Clean Water Act [CWA], and we need your leadership to make that vision a reality."

The letter also quotes language from the House debate that preceded the CWA's passage in 1972, which stated: "...the conference bill defines the term 'navigable waters' broadly for water quality purposes. It means all 'the waters of the United States' in a geographical sense. It does not mean the 'navigable waters of the United States' in a technical sense as we sometimes see in some laws." According to the letter, "This definition protected our country's precious waterways by safeguarding our drinking water, alleviating flooding conditions, providing recreational opportunities, maintaining fish and wildlife habitat, and promoting a healthy economy."

The letter further cites EPA figures that the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions "...have left almost 60 percent of our country's stream, at least 20 million acres of wetlands, and the drinking water for 117 million Americans at increased risk of pollution. We are encouraged by EPA's commitment to follow sound science through their recent [connectivity] science report, which illustrates the significant relationship between tributaries and wetlands and the larger bodies into which they feed. EPA must continue to move this process forward swiftly and efficiently to prevent more pollution from entering our waterways."

Representatives John Dingell (D-MI), Louise Slaughter (D-NY), and Jim Moran (D-VA) developed the letter.⁵²

On November 20, the WSWC wrote the EPA and the Corps to "strongly urge" them to recognize the "significant federalism implications" of their CWA rulemaking efforts and to comply with Executive Order (E.O. 13132), which requires state consultation in the development of federal policies with federalism implications. The letter also seeks information on how EPA and the Corps "...will consult with the states regarding the development of this rule, including how they will ensure the treatment of states as co-regulators." The letter was based on WSWC Position No. 330.5 and related follow up letters from the WSWC.

The letter said the agencies' September submission of a draft rule to the OMB "...without any state consultation raises significant concerns about how and when [EPA] and the [Corps] will consult with the states.... Congress intended the states and EPA to implement the CWA as a federal-state partnership, delegating authority to the states to administer the CWA as co-regulators with EPA. As such, your agencies must treat the states as co-regulators in the development of any proposed rule regarding CWA jurisdiction. Ideally, EPA and the Corps would have consulted with the states prior to beginning the rulemaking process and certainly prior to submitting a draft rule...."

⁵²<http://dingell.house.gov/press-release/dingell-slaughter-moran-call-epa-protect-waterways>.
Western States Water, #1962, December 23, 2011.

“We are especially concerned that your agencies may not consider the rulemaking to have federalism implications requiring compliance with [E.O. 13132]. Such a perspective is in direct opposition to the principles of cooperative federalism embedded within the CWA. Any efforts to redefine or clarify the term ‘waters of the U.S.’ have, on their face, numerous federalism implications that necessitate compliance with E.O. 13132. In particular, such efforts qualify as ‘policies that have federalism implications’ under the order because they have ‘substantial direct effects’ on the states and on the ‘distribution of power and responsibilities among the various levels of government.’”

“[A]side from four states...every state is primarily responsible for regulating discharges of pollutants to jurisdictional waters because they have delegated responsibility from EPA to operate approved National Pollutant Discharge Elimination System permitting programs under Section 402 of the CWA. Any changes to the regulations and policies that govern which waters are jurisdictional will have a direct substantial impact to these programs.... Moreover, regardless of whether they have delegated authority under Sections 402 or 404, the requirements and limitations associated with jurisdictional waters will directly impact the ability of every state to enact policies regarding waters within their borders, as well as the allocation of their already limited resources. This is particularly true if the rule compels states to extend their Section 303(d) responsibilities to waters that are functionally marginal.”

“The considerable uncertainty and differences of opinion that exist regarding the extent of the CWA’s authority demand that states receive a unique audience with your agencies as co-regulators that is separate and apart from the general public, and gives as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for exactly this type of consultation....”

“[W]aiting until the publication of a rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to...alternative ways of meeting federal objectives. [I]t will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without changing the current trajectory of this rulemaking to include the states’ views and concerns before seeking public comment. [P]romulgating this rule without complying with E.O. 13132’s consultation criteria could threaten the historically positive and productive relationship that states have enjoyed with EPA and the Corps in implementing the CWA.”

The letter also reiterated WSWC concerns that require state consultation, including how to ensure: (1) deference to state water law under Sections 101(b) and 101(g) of the CWA; (2) that the rule is not misinterpreted as extending CWA jurisdiction to groundwater; and (3) compliance with Congressional and U.S. Supreme Court limits on the extent of CWA jurisdiction.

Of note, Western Governors’ Association (WGA) Executive Director Jim Ogsbury and WSWC Executive Director Tony Willardson met with EPA Deputy Administrator Bob Perciasepe on November 21 to discuss the WGA and WSWC’s concerns.⁵³

⁵³*Western States Water*, #2060, November 8, 2013.

On December 23, the WSWC wrote OMB, asking it to ensure that EPA and the Corps comply with Executive Order (E.O.) 13132 in the development of their CWA jurisdiction rule, which the agencies submitted to OMB for interagency review in September. E.O. 13132 requires federal agencies to consult with states in the formulation and implementation of federal policies that have federalism implications. The letter was similar to the WSWC letter sent to EPA and the Corps.

The letter stated: “Congress intended that the states and EPA would implement the CWA as a federal-state partnership, delegating authority to the states to administer the law as co-regulators with EPA. While EPA has conducted some outreach with the Council and other organizations, these efforts have consisted primarily of communicating EPA’s and the Corps’ goals and time lines for the rulemaking. There is a difference between communication and consultation, and EPA and the Corps have yet to engage the states regarding state needs, perspectives, or expertise in developing the draft rule. Ideally, EPA and the Corps would have conducted this types of consultation with the states prior to beginning the rulemaking process and before submitting a draft rule to OMB.”

“We are also concerned that EPA and the Corps apparently do not consider the rulemaking to have federalism implications requiring compliance with E.O. 13132.... According to Section 1(a) of the order, a policy will have federalism implications if it has ‘substantial direct effects on the States.’ Efforts to redefine or clarify the term ‘waters of the U.S.’ have, on their face, numerous federalism implications that many states believe will have very substantial and direct effects, thereby requiring compliance with E.O. 13132.”

Corps of Engineers

Water Resources Development Act

On February 7, the Senate Environment and Public Works Committee, chaired by Barbara Boxer (D-CA), held a hearing on U.S. Army Corps of Engineers’ water resources policies to inform the development of the next Water Resources Development Act (WRDA). Boxer identified a number of priorities for the bill, including: (1) helping communities “...better prepare for and reduce the risks of extreme weather-related disasters, including severe flooding;” (2) allowing the Corps “...to consider regional differences and work with state and local governments to develop the most appropriate approach for managing levee vegetation;” and (3) improving the process for “...providing credit for work carried out by non-Federal sponsors of Corps projects.”

Committee Ranking Member David Vitter (R-LA) said the hearing is “...another clear, bold statement that this entire Committee...is committed to a new WRDA bill... [W]e are well into the concrete work of that bill on a true bipartisan basis. So we’re going to do it in the near future....” Vitter shared Boxer’s concerns and identified additional issues with implementation of the last WRDA bill, which Congress enacted in 2007, citing ignored mandates, missed deadlines, and the loss of authorization for some projects, among other things.

Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), described the Corps’ water infrastructure efforts, including actions the agency has taken in response to the enactment of the 2007

WRDA bill. Darcy also said the Corps “...has been developing a strategy to (address) major challenges including ensuring the performance of the key features of the Nation’s infrastructure, and responding to shifting demographics, changes in societal values, and climate variability...to better equip the Civil Works program to effectively meet current and future needs and [ensure] decision makers are fully informed. This strategy is focusing on four main areas - planning modernization, budget development transformation, infrastructure strategy, and methods of delivery.” She also said the Administration is “...exploring alternatives for infrastructure financing, including public private partnerships and an infrastructure bank.”⁵⁴

On March 20, the Senate Environment and Public Works Committee reported the 2013 WRDA bill (S. 601) to authorize funding for U.S. Army Corps of Engineers water projects involving construction and maintenance of dams, levees, and other water infrastructure. Committee Chair Barbara Boxer (D-CA) and Ranking Member David Vitter (R-LA) introduced the bill. Congress has tried to pass WRDA bills on a regular basis (ideally about every two years) but passed the last one in 2007.

The bill is similar to a draft proposal that Boxer presented to the Committee in November, and includes provisions intended, among other things, to: (1) increase flexibility for non-federal sponsors of Corps projects; (2) accelerate project delivery; (3) develop a study and recommendations on ways to reduce risk to human life and property from extreme weather events; (4) create a commission to identify uncompleted projects for de-authorization; and (5) avoid Congressional earmarks bans by automatically authorizing projects that satisfy specific criteria, which 18 projects currently satisfy.⁵⁵

The bill would also establish a five-year Water Infrastructure Finance and Innovation Act (WIFIA) pilot program that the Corps and the Environmental Protection Agency (EPA) would carry out to provide loans and loan guarantees for flood control, water supply, and wastewater projects. Eligible entities would include: (1) corporations; (2) partnerships; (3) joint ventures; (4) trusts; (5) federal, state, or local governmental entities; (6) tribal governments or a consortium of tribal governments; and (7) state infrastructure financing authorities. The bill would authorize \$50 million for each of fiscal years 2014 through 2018 for WIFIA.

In addition, the bill would create a national levee safety program to provide national leadership and encourage establishment of state and tribal levee safety programs. It would authorize a total of \$600 million for FY2014 through FY2023 for program grants, including grants to state and tribal levee programs for levee rehabilitation efforts. The bill would only impact a “canal structure” that is “...an integral part of a flood risk reduction system that protects the leveed area from flood waters associated with hurricanes, precipitation events, seasonal high water and other weather-related events.” The term “levee” would not include canals that federal or state agencies regulate to assure satisfaction of federal safety criteria or levees or canals that: (1) are not part of a federal flood

⁵⁴<http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Home>. *Western States Water*, #2009, November 16, 2012.

⁵⁵*Western States Water*, #2009, November 16, 2012.

damage reduction system; (2) the National Flood Insurance Program does not recognize as providing protection from extreme floods; (3) are not greater than three feet high; (4) has a leveed area with a population under 50 individuals; and (5) has a leveed area under 1,000 acres.

Section 2105 of the bill would amend the Water Supply Act (WSA) to require Congressional authorization for a modification that "... provides storage for municipal or industrial water supply at a [federal] reservoir project that has been authorized, surveyed, planned, or constructed if, when considered cumulatively with all previous modifications of the project, the modification would...involve an allocation or reallocation of storage that is equal to or exceeds 5 percent of the conservation storage pool of the project." The WSA currently requires Congressional authorization for modifications that "seriously affect" authorized purposes or involve "major structural or operational changes."

Section 2014 of the bill would also authorize the Corps to "maximize" reservoir operations for "authorized project purposes" and "other related project benefits," which it defines as including environmental protection and restoration, increased water supply storage, increased hydropower generation, reduced flood risk, additional navigation, and improved recreation. It would also specify that "...activities carried out under this section shall not adversely impact any of the authorized purposes of the project."⁵⁶

Of further note, the bill would also establish a flood and drought monitoring program in the Upper Missouri River Basin to operate U.S. Geological Survey (USGS) streamgages and restore, maintain, and provide soil moisture and snowpack monitoring, including Natural Resources Conservation Service (NRCS) SNOTEL sites. The Corps would establish the program in coordination with the National Oceanic and Atmospheric Administration, NRCS, USGS, and the Bureau of Reclamation. The bill would authorize \$11.25 million for the program.⁵⁷

On May 7, the Western Governors' Association (WGA) wrote Senate Environment and Public Works Committee Chair Barbara Boxer (D-CA) and Ranking Member David Vitter (R-LA) to comment on the WRDA of 2013 (S. 601). Governors Gary Herbert (R-UT) and John Hickenlooper (D-CO), the Chair and Vice-Chair of the WGA, signed the letter.

"We strongly support Congressional reauthorization of this law which is so important to the West," said the letter. "Our region routinely faces both scarcity issues...and very real flood management challenges.... Whether for drought, flooding, or simply general allocation, proper water management is essential. WGA believes reauthorization of WRDA is critically important to the West in managing all of those issues."

The letter also commented on four specific provisions in the bill. In particular, it expressed support for Section 5008, which would establish a flood and drought monitoring program in the

⁵⁶*Western States Water*, #2027, March 22, 2013.

⁵⁷*Western States Water*, #2024, March 1, 2013 and #2012, December 7, 2012.

Upper Missouri River Basin, which the letter said “...is sorely needed given the floods of 2011 and the current drought.”

Next, the letter commented on Section 6003, which would create a national levee safety program, stating: “While the Western Governors generally support the development of such a program, we do not believe that it should apply to federal or non-federal water supply canals. There are major differences between levees and water supply canals, as well as the stakeholder communities and interests they serve, that warrant treating them separately.... [S]tates and [the Bureau of] Reclamation are best positioned to address the public safety issues presented by water supply canals, which are highly localized and relatively minor, compared to inadequately designed and maintained levees.”

The letter also expressed concern about Section 2014, which would authorize the Corps to operate dams for “other related project benefits” so long as project purposes are not “adversely impacted.” The letter said this language could give the Corps authority to favor one authorized purpose over another and raised questions as to whether “other related project benefits” could “reach outside” Corps authority. Given recent proposals to change Missouri River system operations to enhance Mississippi River navigation, the letter requested “...clear bill language that the Missouri River Mainstem System is not operated to support Mississippi River navigation....”

Lastly, the letter addressed Section 2015, which Alabama’s delegation inserted to address disputes involving the Corps’ operation of projects in the Apalachicola-Chattahoochee-Flint (ACF) and Alabama-Coosa-Tallapoosa (ACT) River Systems in the Southeast. As originally proposed, Section 2015 would have amended the Water Supply Act (WSA) of 1958 to require Congressional authorization for allocations or reallocations of storage water for municipal or industrial water supply at Corps and Reclamation reservoirs if the total cumulative amount allocated would exceed five percent of the reservoir’s conservation storage.

The letter asked that Section 2015 either be removed or amended to exempt western reservoirs, citing a number of “unintended consequences,” including: (1) water supply allocation limitations for projects that have already exceeded the five percent cap or lack conservation storage; (2) impacts to state primacy over water allocation; (3) limitations on efforts to make the highest and best use of existing reservoirs; and (4) prevention of reservoir adjustments to respond to emergencies, such as drought and flooding.⁵⁸

Notably, the Senate took up the bill on May 7 and debated a number of proposed amendments. The Senate agreed to a manager’s amendment (S.A. 799) that Boxer and Vitter submitted, which included new language that attempted to address the concerns the WGA raised in its letter. In particular, S.A. 799 stated that 2014 would not supersede or authorize “...any amendment to a multistate water-control plan, including the Missouri River Master Water Control Manual (as in effect on the date of this Act).” In addition, the amendment included language stating that Section 2014 would not affect “...any water right in existence on the date of enactment of this

⁵⁸<http://westgov.org/letters-testimony-30>.

Act; or [preempt] or [affect] any State water law or interstate compact governing water.” S.A. 799 also completely rewrites Section 2015 to express concern over the operation of projects in the ACF and ACT systems, stating that the “...Committees of jurisdiction strongly urge the Governors of the affected States to reach agreement on an interstate water compact as soon as possible.... Absent such action, the Committees...should consider appropriate legislation to address these matters including any necessary clarification to the [WSA] or other law.” In addition, S.A. 799 clarified that Section 2015 “...does not alter existing rights or obligations under law.”

On May 15, the Senate passed WRDA 2013 (S. 601) by a vote of 83-14. Among other things, the bill included amended versions of Sections 2014 and 2015. Many provisions from earlier versions of the bill also remained, including provisions that would establish a flood and drought monitoring program in the Upper Missouri River Basin, a national levee safety program, and a WIFIA pilot program.

The Senate also adopted an amendment (Section 5023) from Senator Dick Durbin (D-IL) that authorized a study of severe flooding and drought management in the Mississippi River Basin. Earlier versions raised concerns among some Missouri River states that the study would facilitate operation of authorized Missouri River System projects to support navigation on the Mississippi River. The final bill included a savings clause that: “Nothing in this section impacts the operations and maintenance of the Missouri River Mainstem System...”

Of note, the Senate rejected an amendment from Senator John Barrasso (R-WY) that would have prevented EPA and the Corps from finalizing their proposed CWA guidance, or using the guidance as the basis for future rulemaking or any decision regarding the scope of the CWA. The Senate voted 52-44 in favor of the amendment, which required 60 votes to pass.

The House, was working on its own WRDA bill. Of note, House Transportation and Infrastructure Committee Chair Bill Shuster (R-PA) expressed concern about the Senate’s approach to avoiding earmarks, which he said abdicates Congressional authority to the Corps.⁵⁹

Surplus Water

On August 6, the WSWC wrote Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy to comment on U.S. Army Corps of Engineers’ efforts involving surplus water and storage at Corps reservoirs. The letter sets forth a number of concerns about rulemaking the Corps is pursuing to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for surplus water contracts. The letter also comments on a system-wide analysis of storage water reallocation that the Corps is conducting in the Missouri River Mainstem Reservoir System.

The letter is based on WSWC Position No. 348, which states that any Corps policy requiring storage contracts to access natural flows within a reservoir boundary would be a violation of the

⁵⁹*Western States Water*, #2034, May 10, 2013.

States' rights to develop, use, control, and distribute surface water. Among other things, the letter states that the Corps "...must acknowledge the difference between a reservoir's storage capacity and stored water. Stored water does not encompass all of the water in a reservoir. To the contrary, it represents the difference between water flowing into a reservoir and the water flowing out of the reservoir.... [T]he natural flows that would exist absent the Corps' dams and reservoirs should not be considered stored water. Nor should the natural flows be subject to interference or require a contract or fee by the Corps to be appropriated by the states."

The letter also expresses concern about the Corps' decision to condition access to the natural flows in reservoirs along the Missouri River by requiring a determination that surplus water is available for withdrawal, and by requiring applicants to sign a water supply agreement to pay the Corps for the proportionate cost of storing the water. The letter says this decision is based on a misinterpretation of the Water Supply Act of 1944 and the Water Supply Act of 1958, and "...should not serve as the basis of any rulemaking or study."

Additionally, the letter states that the rulemaking "... should be flexible enough to accommodate the various state laws, prior appropriation and riparian doctrines, and diverse physical conditions found throughout the country. In almost all cases, the most effective way to provide this flexibility is on a project-specific basis rather than with a 'one-size-fits-all' approach.... Additionally, the rulemaking must treat prior appropriation states differently than riparian states to account for the differences in their water laws and policies."

The letter concluded by urging the Corps to engage the states as early as possible in the rulemaking and the development of the reallocation analysis before they are published for public comment "...and too much momentum has built towards federal policy decisions that may not account for state rights and needs."

Thirty Republican members of the House wrote Darcy on August 1 to express concern "...that this rulemaking may violate core water rights principles that could be detrimental to our states." The letter further states that "...it is imperative that through any rulemaking, states retain their primary authority over water within their borders and that the [Corps] does not impede that sovereign jurisdictional function."

It also expressed concern "...that there has been very little engagement with states during the rulemaking process. We understand the [Corps] has been involved in the rulemaking process for some time, yet has had little or no interaction with state water planning agencies. Further, regional [Corps] offices may not have been involved in the rulemaking and have very little knowledge on what the rulemaking may entail. To develop draft rules without engaging those who may be affected and excluding those within [the Corps] with the most experience in water supply, only builds mistrust at all levels. We strongly encourage you to begin coordination with states and other interested parties immediately."

The letter then asks the Corps to answer the following questions: (1) has the law authorizing the rulemaking changed since the enactment of the Flood Control Act of 1944 and the Water Supply

Act of 1958, and if not, what is the impetus for the rulemaking; (2) does the Corps "...presume the ability to assert control over water supply beyond providing storage for the water;" (3) has the Corps sought "early and active involvement" from the states or does it "...merely expect the states to review and comment on its rule once published for public review;" (4) when will the draft be released for public review; (5) will the proposed rule comport with the water supply policies and rules of other federal agencies, especially the Bureau of Reclamation; and (6) what is the Corps' definition of "stored water," including its plans for selling surplus water."⁶⁰

On August 21, the WGA wrote Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy, urging her to ensure that the U.S. Army Corps of Engineers has "a substantive dialogue" with the states regarding a draft rule the agency is developing that will impact how it defines and treats surplus water in Corps reservoirs. The letter asks the Corps to have this dialogue before publishing the rule in the *Federal Register* for public comment.

"WGA understands that the Administration is nearing completion of its review of a draft rule to address the policies by which it will determine prices for surplus water contracts. WGA is concerned that the Corps has not adequately engaged the states - which are responsible for the allocation and management of their water resources - in the development of this draft and that its release may be premature.... Releasing a proposed rule without first engaging in serious consultations with the states may significantly compromise our ability to reach a mutually acceptable solution that recognizes and balances both the rights and interests of the states and the responsibilities of the Corps as authorized by Congress."

The letter also notes: "It is critical that this important undertaking recognize the West's unique hydrology and legal doctrines, as well as Congress' longstanding deference to state water law with respect to the allocation and use of water. Water belongs to the states, which have exclusive and Constitutional authority over its consumptive use and the allocation and adjudication of water rights." In addition, the letter references comments the WSWC sent the Corps on August 6 to outline its concerns about the rulemaking. The WGA's letter asks Darcy to work with the states, the WSWC, and the WGA to address these concerns.⁶¹

On October 3, Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy wrote the WGA and the WSWC.

"In May 2012, I directed the Corps to initiate action to pursue notice-and-comment rulemaking in accordance with the Administrative Procedure Act to establish a nationwide policy for surplus water uses at Corps reservoirs pursuant to Section 6 of the Flood Control Act of 1944. A proposed rule is being developed within the Department of the Army, but its precise scope and timeline have not yet been decided.... My intention in directing the Corps to pursue rulemaking was to provide an opportunity to solicit and consider input from all interested stakeholders before

⁶⁰*Western States Water*, #2004, October 15, 2012.

⁶¹http://westgov.org/policies/doc_download/1752-corps-surplus-water. *Western States Water*, #2047, August 9, 2013.

establishing nationwide policy. Rulemaking would, in addition, provide an opportunity to clarify the Corps' interpretation of its statutory authorities as they relate to the states' primary responsibility to allocate the waters within their boundaries for consumptive use, as well as many of the other issues identified by the WGA and the WSWC." Darcy concludes by stating: "Please be assured that any rulemaking effort that the Army advances...will be an open and transparent process for all partners and stakeholders, and that sufficient notice will be provided to ensure that multiple perspectives are considered."⁶²

Drought

Regional Integrated Science and Assessments

On January 16, the National Oceanic and Atmospheric Administration (NOAA) announced \$3.5 million in Regional Integrated Science and Assessments (RISA) grants to Arizona and New Mexico to help them prepare for and adapt to climate variability and drought. NOAA also announced seven smaller grants totaling \$600,000 to existing RISA research teams to encourage collaboration with federal and non-federal partners on climate adaptation. Four grants totaling \$345,000 will go to research teams in Arizona, Colorado, Oklahoma, and Oregon. NOAA's RISA program, which is located in its Climate Program Office, supports research to inform resource management, planning, and public policy, including research involving water-related challenges.

"The southwest United States has the fastest growing population in the nation, yet cities and tribal lands in Arizona and New Mexico are severely affected by drought," said Richard Rosen, Acting Director of NOAA's Climate Program Office. "These projects will help people understand and make decisions to minimize the risks associated with changing water resources and other challenges posed by a changing climate. NOAA's smaller awards focused on partnerships between RISA teams and other research and decision making institutions as valuable mechanism for regional coordination."⁶³

National Integrated Drought Information System

On February 25, Senators Mark Pryor (D-AR), Jerry Moran (R-KS), John Thune (R-SD), Tom Udall (D-NM), and Mark Udall (R-CO), introduced S. 376 to reauthorize the National Integrated Drought Information System (NIDIS), which expired in September 2012. The bill is identical to passed legislation (S. 3584) Pryor introduced and would authorize \$14.5 million for each of fiscal years 2014 through 2018. The WGA proposed NIDIS in 2004, and the WGA and WSWC have long supported the program.

S. 376 would amend NIDIS to: (1) provide a drought early warning system that collects and integrates information on the key drought indicators to make "...usable, reliable, and timely forecasts of drought...on both national and regional levels;" (2) communicate drought information on an

⁶²*Western States Water*, #1955, November 4, 2011 and #2049, August 23, 2013.

⁶³http://www.noaanews.noaa.gov/stories2013/20130116_climategrants.html.

ongoing basis to state, federal, tribal, and local government decision makers, as well as the public and private sectors; (3) provide timely data, information, and products reflecting local, regional, and state differences; (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 drought research activities.

“Farmers and ranchers need timely information about droughts so they can take the necessary precautions to protect their crops and livestock,” said Pryor.⁶⁴

On December 5, the House Science, Space and Technology Committee held a mark-up during which it reported H.R. 2431 to reauthorize the NIDIS through FY2018. Introduced by Rep. Hall (R-TX), it would authorize \$13.5 million per year for NIDIS, and specify that the program’s purpose is “...to better inform and provide for more timely decisionmaking to reduce drought related impacts and costs.” It would further require NIDIS to: (1) provide certain information, forecasts, and assessments on national and regional levels; (2) build upon existing forecasting and assessment programs and partnerships through the designation of one or more cooperative institutes to assist with NIDIS functions; and (3) continue ongoing research and monitoring activities related to drought.

The Committee also approved an amendment from Rep. Eric Swalwell (D-CA) and Rep. Frederica Wilson (D-FL) specifying that NIDIS’ system functions encompass continued ongoing research and monitoring activities related to drought, including activities “...relating to length, severity, and impacts of drought and the role of extreme weather and climate variability in drought.” Conversely, the Committee rejected an amendment by Rep. Suzanne Bonamici (D-OR) that would have increased authorizations to \$14.5 million per year.

The Committee also reported the Weather Infrastructure Forecasting Improvement Act of 2013 (H.R. 2413) in the form of a substitute amendment from Rep. Chris Stewart (R-UT) and Rep. Bonamici. It requires NOAA to “...prioritize weather-related activities, including the provision of weather data, forecasts, and warnings for the protection of life and property and the enhancement of the national economy, in all relevant line offices.”

Other notable provisions include: (1) a program to improve forecast capabilities for atmospheric events and their impacts; (2) annual research and development plans to “...restore and maintain United States leadership in numerical weather prediction and forecasting;” (3) a Weather Research and Innovation Advisory Committee to advise NOAA regarding weather research, forecasting, and ways to improve communication between forecasters, the public, and emergency management personnel; and (4) establishment of an Interagency Committee for Advancing Weather Services to “...improve coordination of relevant weather research and forecast innovation activities across the Federal Government.”⁶⁵

⁶⁴<http://www.pryor.senate.gov/public/index.cfm/pressreleases>. *Western States Water*, #2002, September 28, 2012.

⁶⁵<http://science.house.gov/press-release/committee-approves-three-bills-bipartisan-support>.

Hydraulic Fracturing

On January 18, the Department of the Interior announced that it will revise a draft Bureau of Land Management (BLM) rule that would regulate hydraulic fracturing on federal lands. BLM intends to send the changes to the White House for review, with a new proposed rule to be released for comment later. The changes are intended to maximize flexibility, facilitate coordination with state practices, and ensure that operators implement best practices.

BLM's current draft rule would require disclosure of the hydraulic fracturing chemicals used on federal lands. It is also intended to improve well-bore integrity and ensure that water management plans are in place to handle fracturing fluids that flow back to the surface. The Republican Governors Association and the energy industry have argued that the draft rule could conflict with state water right systems and that the states are best positioned to regulate hydraulic fracturing processes, among other concerns.⁶⁶

On May 16, the BLM issued a revised version of its proposed rule. Like earlier versions, the rule would: (1) require disclosure of chemicals used in fracturing activities on public lands, with certain protections for proprietary information; (2) verify that fluids used during fracturing operations do not contaminate groundwater; and (3) ensure that operators have a water management plan in place for handling fluids that flow back to the surface. However, the rule includes a new variance process that would allow states to propose their own standards if they can prove that their regulations meet or exceed the BLM requirements.

“[W]e are proposing some commonsense updates that increase safety while also providing flexibility and facilitating coordination with states and tribes,” said Secretary of the Interior Sally Jewell. “As we continue to offer millions of acres of America’s public lands for oil and gas development, it is important that the public has full confidence that the right safety and environmental protections are in place.”⁶⁷

On June 7, the Bureau of Land Management (BLM) announced a 60-day extension of the public comment period for its revised rule regarding hydraulic fracturing on public lands, which it originally published on May 25, with a 30-day review.⁶⁸ “Extending the comment period ensures that we’ll have greater input from the public and from key stakeholders, including industry and environmental groups, Indian tribes, as well as other people who have hydraulic fracturing operations in their communities,” said BLM Principal Deputy Director Neil Kornze.⁶⁹

⁶⁶*Western States Water*, #2014, December 21, 2012.

⁶⁷http://www.blm.gov/wo/st/en/info/newsroom/2013/may/nr_05_16_2013.html. *Western States Water*, #2019, January 25, 2013.

⁶⁸*Western States Water*, #2035, May 17, 2013.

⁶⁹http://www.blm.gov/wo/st/en/info/newsroom/2013/june/nr_06_07_2013.html.

The extension follows a May 21 letter from House Natural Resources Committee Chair Doc Hastings (R-WA) and Ranking Member Ed Markey (D-MA), which sought a 120 day comment period and criticized the initial 30-day review as “...unacceptable and not nearly long enough to allow the public to formulate in-depth and constructive comments....”

On August 23, the WGA wrote Secretary of the Interior Sally Jewell to comment on the BLM’s re-proposed hydraulic fracturing rule. “Most of the federal and tribal lands where BLM has jurisdiction and where this new federal rule will apply are located in Western states that have a long history of oil and gas production and robust regulations designed to protect the environment and public health,” the letter said. Because there are often profound differences in geology, ecology, hydrology, and meteorology, the states are best equipped to design, administer and enforce laws and regulations related to oil and gas development.”

The letter continues: “It’s important to underscore that state regulatory programs have been thoughtfully designed by experts to address state-specific issues and factors. In addition, they are applied consistently by highly trained staff, regularly reviewed, and continuously subjected to thoughtful administrative oversight. Importantly, the states have greater flexibility to respond to new information and modify or update their rules...and to respond to continuous improvement of both technologies and best practices.... BLM has historically recognized the deep expertise and competence of state regulators. There is every reason to expect this system will continue to effectively oversee oil and gas operations.”

The letter further notes: “The [WGA] is unified in its position that states and the federal government should continue to promote and enhance partnerships - especially where we can more efficiently and cost effectively ensure environmentally responsible development of our public lands. While BLM has repeatedly indicated its intention to work with the states, there has never been a formal consultation with our state regulators, and we would welcome the opportunity to engage in a dialogue whereby we can demonstrate the effectiveness of our regulations. Although such a dialogue would have been preferable before the BLM considered any new rulemaking, it still may be possible as part of any [Memorandum of Understanding] process with the states. We believe that it would be fiscally and regulatorily responsible to leverage the existing state programs, resources and infrastructure as part of any BLM rule or program. This represents a real opportunity for the states and the federal government to work in concert to more effectively oversee a program that will help us achieve energy security.”⁷⁰

Of note, WSWC Position No. 353 states that federal efforts to study the impacts of hydraulic fracturing on water resources should rely on state expertise and should not diminish the states’ primary and exclusive authority over water allocation.⁷¹

⁷⁰http://westgov.org/policies/doc_download/1754-govs-letter-to-jewell-on-fracking.

⁷¹*Western States Water*, #2019, January 25, 2013.

Indian Water Rights

Aamodt Settlement

On March 14, New Mexico Governor Susanna Martinez joined Secretary of the Interior Ken Salazar, Assistant Secretary of the Interior for Indian Affairs Kevin Washburn, and tribal leaders to finalize the Aamodt Indian water rights settlement, which resolves the water rights claims of the Tesuque, Nambe, Pojoaque, and San Ildefonso pueblos in New Mexico's Rio Pojoaque Basin. Congress authorized the settlement as part of the 2010 Claims Resolution Act.⁷²

Montana/Blackfeet Tribe

On May 8, the Senate Indian Affairs Committee held a legislative hearing on S. 434, which would authorize a settlement of the Blackfeet tribe's reserved water rights claims in Montana. The bill would also authorize \$400 million in federal funding for drinking water projects, water storage projects, and irrigation and stock development on the Blackfeet reservation. "At the core of the principles of tribal self-governance and self-determination is the ability of tribes to exercise jurisdiction over their lands and their resources," said Committee Chair Maria Cantwell (D-WA). Ranking Member John Barrasso (R-WY) said the bill was "very important" and deserved the Committee's "careful consideration." The bill's sponsor, Senator Max Baucus (D-MT) testified in support of the bill, saying: "A settlement ratified by Congress is far preferable to unending litigation over an acknowledged breach of trust. It's a no brainer." Senator Jon Tester (D-MT) Tester, who co-sponsored the bill and was present at the hearing, also commented on the need to authorize the settlement before Baucus' pending retirement, saying: "When he's gone, it's a jump ball – we don't know what we're going to get."

Assistant Secretary of Indian Affairs Kevin Washburn said the Administration is unable to support the bill as introduced. Among other issues, he said the Administration objects to a provision that would require the United States to establish a mitigation fund to benefit non-Indian water users. He also said the Administration has been unable to reach agreement with the tribe on water management issues involving its water rights in the St. Mary River and Milk River Basins, including an "inherent conflict" between the tribe's water rights and those of the Fort Belknap Indian Community. Nevertheless, Washburn said the Administration will work with the parties to address its concerns. He also noted: "When Congress enacts an Indian water right settlement it is not approving an earmark: it is fulfilling Congress' unique obligation to Indian tribes."

Montana Assistant Attorney General Jay Weiner, a WSWC member, said the settlement "...promotes development for the benefit of the Blackfeet Nation while protecting other water uses." He also said "...Montana has now agreed to – and has fully funded – a contribution to the Blackfeet settlement in the amount of \$49 million." Shannon Augare, a Councilman of the Blackfeet Tribal Business Council, testified in support of the bill, noting that the tribe agreed to reduce the federal

⁷²<http://www.doi.gov/index.cfm>. *Western States Water*, #1950, September 30, 2011.

funding authorized in S. 434 by \$190 million compared to previous legislation (S. 399) Baucus and Tester earlier introduced to authorize the settlement.⁷³

White Mountain Apache Tribe

On July 30, Secretary of the Interior Sally Jewell signed an agreement that provides the final federal approval for the White Mountain Apache Tribe's water rights settlement, which resolves the tribe's water rights claims in the Gila and Little Colorado Rivers in Arizona. Congress approved the settlement as part of the Claims Resolution Act of 2010, which authorized over \$200 million for a rural water system and \$78.5 million to establish a fund for fish production, rehabilitation of recreational lakes, and other projects that will benefit the tribe. "Today we are taking a key step in fulfilling the Administration's commitment to resolving water rights in a manner that benefits Indian tribes and provides certainty to water users," said Jewell. Of note, the finalization of the agreement follows the first meeting of the President's new White House Council on Native American Affairs on July 29. President Obama created the Council in June to coordinate the Administration's engagement with tribal governments and to develop recommendations concerning policy priorities involving tribes. The Council consists of over 30 federal departments and will focus on five priorities, including protecting tribal lands, environments, and natural resources.⁷⁴

Landsat

"The Landsat program is the 'gold standard' of satellite observation, providing an invaluable public record of our planet that helps us tackle critical land, water, and environmental issues," said Anne Castle, Assistant Secretary of the Department of the Interior for Water and Science. USGS Director Marcia McNutt also said: "We look forward to a long and productive continuation of the Landsat program, but it is unlikely there will ever be another satellite that matches the outstanding longevity of Landsat 5."⁷⁵

On December 21, 2012 the U.S. Geological Survey (USGS) announced that it will decommission Landsat 5 over the coming months due to the failure of a gyroscope on the satellite. Launched in 1984 with a three-year design life, Landsat 5 is the longest-operating Earth observing satellite mission, having transmitted over 2.5 million images of land surface conditions from around the world. These include thermal infrared sensor (TIRS) images that states, federal agencies, and other water managers use to measure and monitor consumptive water use, among other things.

Landsat 7, which was launched in 1999 with a five-year design life, will continue to collect thermal images. However, Landsat 7 experienced a hardware failure in 2003 that causes a 22% loss of data in every image it provides. Landsat 8, the next satellite in the series, is scheduled to launch on February 11 at Vandenberg Air Force Base in Lompoc, California. The satellite will include a

⁷³<http://www.indian.senate.gov/hearings/index.cfm?t=session&p=legislative>. *Western States Water*, #1956, November 14, 2011.

⁷⁴<http://www.doi.gov/news/pressreleases/index.cfm>.

⁷⁵http://www.usgs.gov/newsroom/article.asp?ID=3485#.UOTBGHf_0oE.

thermal infrared sensor (TIRS) that provide images that states, federal agencies, and other water managers across the West will use to measure and monitor consumptive water use. The WSWC has long supported the Landsat program, and was instrumental in ensuring that Landsat 8 included a TIRS.

On February 11, NASA successfully launched its Landsat Data Continuity Mission (LDCM), also known as Landsat 8, from Vandenberg Air Force Base in California. The mission will extend the Earth observation program, which began in 1972. Once testing is complete, operations will be turned over to USGS and Landsat 8 will replace Landsat 5, which itself has had a remarkable nearly 29-year life. It has been 14 years since Landsat 7's launch, and over a thousand people gathered to view the launch, including NASA Administrator Charles Bolden, Secretary of the Interior Ken Salazar, Assistant Secretary for Water and Science Anne Castle, and USGS Director Marcia McNutt. Salazar said: "Landsat has been delivering invaluable scientific information about our planet for more than 40 years. It's an honor to be a part of today's launch to ensure that this critical data will continue to help us better understand our natural resources and help people like water managers, farmers, and resource managers make informed decisions." John Tubbs, the new Director of the Montana Department of Natural Resources and Conservation, and WSWC Executive Director Tony Willardson were also on hand. Members of the Landsat Science Team and others acknowledged the WSWC's key role in ensuring LDCM included a TIRS that many states and countries are using to better monitor and measure water use. Landsat's value to the West, the Nation, and all humankind were noted by many different officials, scientists, and foreign guests.⁷⁶

On May 30, NASA transferred operational control of Landsat 8 to USGS. NASA launched the satellite in February, and has since steered the satellite into orbit, calibrated its detectors, and collected test images. Now that Landsat 8 is under USGS control, USGS will collect at least 400 scenes every day from around the world to be processed and archived at its Earth Resources Observation and Science (EROS) Center in Sioux Falls, South Dakota.

Litigation/Water Rights

NEDC v. Decker

On March 20, the U.S. Supreme Court issued a 7-1 ruling that reversed the 9th Circuit Court of Appeals' decision in *NEDC v. Brown* (now titled *NEDC v. Decker*), which involved claims against the Oregon State Forester and held that runoff from logging roads managed by a system of ditches and culverts and deposited into rivers and streams is a point source of pollution subject to National Pollutant Discharge Eliminations System (NPDES) permitting under the Clean Water Act (CWA). The 9th Circuit's decision also reinterpreted EPA's Silvicultural Rule, which has historically defined stormwater runoff from logging roads as a non-point source of pollution not requiring NPDES permits, prompting Oregon to appeal the ruling.

⁷⁶<http://www.doi.gov/news/pressreleases/index.cfm>.

Shortly before the Court held oral arguments in the case, EPA amended its rule to clarify that stormwater discharges from logging roads do not require NPDES permits, which raised questions as to whether the amendment made the case moot. However, in an opinion by Justice Anthony Kennedy, the Court reasoned that a live controversy still existed regarding the legality of the discharges under the pre-amendment rule, which it found to be a permissible reading of the term “associated with industrial activity” in the CWA.

The Court also noted: “It is well established that an agency’s interpretation need not be the only possible reading of a regulation – or even the best one to prevail,” and that EPA had been consistent in its view of the types of discharges not requiring NPDES permits. The Court also said EPA’s definition of “industrial” activities subject to NPDES permits leaves “open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites, [and] other relatively fixed facilities.”

Justice Antonin Scalia was the lone dissenter, arguing that the court gave EPA too much deference, especially since the agency amended the rule days before the Court held oral arguments in the case. Justice Stephen Breyer recused himself because his brother was on the 9th Circuit panel that decided *NEDC v. Brown*.⁷⁷

On August 30, the 9th Circuit Court of Appeals issued an order remanding proceedings in *NEDC v. Decker* back to federal district court for further proceedings to determine if stormwater runoff from logging roads requires a NPDES permit under the CWA. The 9th Circuit ruled that the Supreme Court did not address the amended rule and “...left intact our holding that ‘when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a discernable, confined and discrete conveyance of pollutants, and there is therefore a discharge from a point source’ within the meaning of the [CWA’s] basic definition of a point source....”

Timber industry groups criticized the order, with National Alliance of Forest Owners President and CEO Dave Tenny stating that it “...essentially breathed fresh life into the legal quagmire.” Tenny also said groups that favor NPDES permitting for logging roads “...simply won’t quit so long as they have a legal theory to pursue,” and called on Congress to pass legislation clarifying that stormwater runoff from logging roads do not require NPDES permitting.⁷⁸

Oklahoma/Texas

Tarrant Regional Water District v. Herrmann

On January 4, the U.S. Supreme Court agreed to review the 10th Circuit Court of Appeals’ decision in *Tarrant Regional Water District v. Herrmann*. That decision dismissed a challenge that Tarrant, a Texas water district, filed against the Oklahoma Water Resources Board (OWRB), arguing

⁷⁷*Western States Water*, #2012, December 7, 2012.

⁷⁸<http://www.nafoalliance.org/ninth-circuit-resuscitates-the-legal-quagmire-on-forest-roads/>.

that Oklahoma laws that limited out-of-state water exports violated the dormant Commerce Clause of the U.S. Constitution. Tarrant filed the challenge as part of a larger effort to divert water from Red River tributaries in Oklahoma to provide a longterm water supply for north Texas.

In dismissing Tarrant's challenge, the 10th Circuit found that the Red River Compact between Oklahoma, Texas, Arkansas, and Louisiana apportioned the water in question to Oklahoma. Since Congress approved the Compact and its water allocations, the 10th Circuit found that the Compact gave its signatory states authority to protect their apportionments and therefore insulated the disputed Oklahoma laws from dormant Commerce Clause challenges insofar as they applied to surface water subject to the Compact. The 10th Circuit also found that the Compact's provisions did not entitle signatory states to divert water outside their borders.

In appealing the decision, Tarrant argued that the 10th Circuit relied on general language in the Compact, and therefore departed from previous direction from the Supreme Court that Congressional intent to waive the dormant Commerce Clause must be stated expressly and unambiguously. Tarrant also argues that the Compact preempts inconsistent Oklahoma law by allocating an equal portion of the disputed water to Texas.

On the other hand, OWRB maintained that the Compact's provisions demonstrated the signatory states' and Congress' consent to allow states to discriminately manage and regulate their respective water allocations contrary to the dormant Commerce Clause. It further argues that there is no express authorization in the Compact for Texas or its political subdivisions to divert water from another signatory state's territory.

In reviewing the 10th Circuit's decision, the Court addressed two primary questions: (1) What is required for interstate water compacts to insulate signatory states from dormant Commerce Clause challenges; and (2) Whether signatory states to the Compact are authorized to access compacted water in other states without express authorization in the Compact? Of note, OWRB Executive Director J.D. Strong encouraged WSWC members to provide amicus support for Oklahoma's position.⁷⁹

On June 13, the U.S. Supreme Court issued its decision in *Tarrant v. Herrmann*, ruling unanimously in favor of the OWRB. Tarrant brought the suit as part of a larger effort to secure water for North Texas' rapidly growing population. In particular, Tarrant argued that the Red River Compact between Arkansas, Louisiana, Oklahoma, and Texas preempted the statutes because language in the Compact entitled it to acquire water from a specific subbasin within Oklahoma. OWRB argued that the Compact lacked explicit language authorizing cross-border diversions.

In a decision by Justice Sonia Sotomayor, the Court rejected Tarrant's interpretation, stating: "Three things persuade us that crossborder rights were not granted by the Compact: [1] the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territory; [2] the fact that other interstate water compacts have treated

⁷⁹*Western States Water*, #2012, December 7, 2012.

cross-border rights explicitly; and [3] the parties' course of dealing." With respect to the third point, the Court noted that no signatory state had previously sought a cross-border diversion and that Tarrant had attempted to buy water from Oklahoma in 2000-2002, which the Court described as "...a strange offer if Tarrant believed it was entitled to demand such water without payment under the Compact."

The Court also rejected Tarrant's argument that the statutes violated the Dormant Commerce Clause of the U.S. Constitution. Tarrant based this argument on the premise that a portion of water in the subbasin at issue was not apportioned to any state and was therefore available to "permit applicants" like itself. The Court found that the Compact allocated the water in question to Oklahoma "...unless and until another State calls for an accounting and Oklahoma is asked to refrain from utilizing more than its entitled share." As a result, the Court concluded that Oklahoma's statutes "...cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves no waters unallocated."

Oklahoma Governor Mary Fallin praised the ruling as "...great news for the state of Oklahoma and yet another victory in the effort to protect our state's water resources. Oklahoma must have the ability to set its own water policy and today's unanimous Supreme Court decision solidifies that position." OWRB Director and WSWC member J.D. Strong said the decision was a "resounding victory" for Oklahoma citizens and a "vindication" for Arkansas and Louisiana, which filed amicus briefs in support of OWRB. J.D. also said the decision is a "victory" for Colorado, Idaho, Indiana, Michigan, Nevada, New Mexico, and Utah, which likewise filed an amicus brief in support of OWRB, and "...stood to lose at least as much control over their limited surface water supplies."⁸⁰

Tarrant General Manager Jim Oliver said the district was disappointed with the decision, but noted: "Securing additional water resources is essential to North Texas' continued growth and prosperity and will remain one of our top priorities. The population in our service area is expected to double over the next fifty years so we will act quickly to develop new sources. The decision does not address the problem of Oklahoma's lack of water infrastructure, and we believe solutions that benefit both Texas and Oklahoma still exist."⁸¹

River Basins

Endangered Rivers

On April 17, American Rivers announced its annual list of the nation's "Most Endangered Rivers." For 2013, the lists identifies the Colorado River as the most "endangered" because "...demand on the river's water now exceeds its supply, leaving the river so over-tapped that it no longer flows to the sea. A century of water management policies and practices that have promoted

⁸⁰<http://www.owrb.ok.gov/news/news2/pressrelease2013.php#061313>.

⁸¹<http://www.trwd.com/news?newsID=a54ce1d6-13d2-4e8a-9f51-c54e50a79595>. *Western States Water*, #2017, January 11, 2013.

wasteful water use have put the river at a critical crossroads. To address ongoing drought and increasing demand for water due to climate change, and to put the Colorado River on a path to recovery, the U.S. Congress must support robust funding of critical programs like WaterSMART that address water supply sustainability in the Colorado River Basin and across the West.” Other western rivers on the list include: (1) the San Saba River in Texas; (2) Rough and Ready and Baldface Creeks in Oregon; (3) the Kootenai River in Idaho and Montana; and (4) the Niobrara River in Nebraska, South Dakota, and Wyoming. California’s Merced River is listed as a “special mention.” According to American Rivers, the list is intended to identify rivers that are “...at a crossroads, where key decisions in the coming months will determine the rivers’ fates.”⁸²

International Boundary and Water Commission

In June, International Boundary and Water Commission (IBWC) U.S. Commissioner Edward Drusina warned that his agency “faces difficult challenges” given continued drought in the Rio Grande and Colorado River Basins. The IBWC consists of officials from the U.S. and Mexico and administers water treaties and agreements between the two nations. Drusina says Rio Grande project irrigators “...are likely to receive a tiny fraction of their normal water allotments in 2013 in what is shaping up to be the worst water year in a century.” He also said, “Elephant Butte Dam in New Mexico is at just 11% of conservation capacity. During a normal irrigation season, water releases last seven months or more. This year, the irrigation season is likely to last only about six weeks.” To address the shortages, Drusina said the IBWC is “...conducting monthly binational meetings with the affected irrigation districts and the U.S. Bureau of Reclamation to coordinate water delivery schedules for users in both countries. The U.S. Section [of the IBWC] is also spearheading a water budget study to help stakeholders manage single or multiple water release timings and volumes during years of water scarcity.”

In addition, Drusina said conservation capacity for the Lake Amistad and Falcon Dams along the Rio Grande between Texas and Mexico is at 24% and 17%, respectively. “Complicating the situation in the Lower Rio Grande Valley is Mexico’s deficit in water deliveries to the United States under the 1944 Water Treaty,” he said. “Some Texas irrigation districts have run out of water, causing a hardship to cities that rely on [them] to deliver municipal water.... This is the first time those Texas cities have had to look elsewhere to purchase so-called ‘push water’ to secure delivery of their municipal supplies.”

On the Colorado River, Drusina cites Bureau of Reclamation projections that the April-July unregulated inflow to Lake Powell in Arizona and Utah will likely be 42% of average. He further noted that Colorado River reservoirs are 53% full, down from 63% last year.⁸³

⁸²<http://www.americanrivers.org/newsroom/press-releases/>.

⁸³http://www.ibwc.state.gov/Files/IBWC_Newsline_060113.pdf. (WSW #2004 and #1978)

Colorado River

Water Supply and Demand Study

On July 16, the Senate Energy and Natural Resources Committee's Subcommittee on Water and Power held a hearing on the findings and next steps of the Bureau of Reclamation's Colorado River Basin Water Supply and Demand Study. The study found that an overall average imbalance of 3.2 million acre-feet between water supplies and demands is possible in the Basin by 2060. The study also included various strategies that stakeholders and the public proposed to resolve those imbalances, but did not endorse specific strategies or determine how to address the imbalances.

"In order to meet these challenges it is important for us first, to acknowledge that current management and use of the River is unsustainable," said Senator Mark Udall (D-CO), who chaired the meeting on behalf of Subcommittee Chair Brian Schatz (D-HI). "There will..be tradeoffs...but this study and the procedure it puts forward will get the process rolling to make decisions."

Ranking Member Mike Lee (R-UT) said the Colorado River Compact "...will continue to control water supply decisions along the Colorado River.... [The study] provides valuable information concerning the Colorado River, but does not serve as the foundation for any new regulatory or legislative proposals."

Bureau of Reclamation Commissioner Mike Connor said his agency has not taken a position on the merits of the proposed actions found in the study or on whether to support individual actions. Going forward, he said the federal government "...can provide a leadership role in appropriate processes to facilitate dialogue about addressing water supply and demand imbalances in the ...Basin." As part of this effort, Connor said three multi-stakeholder workgroups have formed to further refine options and strategies. The groups will consist of federal, state, tribal, and other stakeholders, and will investigate: (1) municipal and industrial conservation and water reuse; (2) agricultural conservation and water transfers; and (3) environmental and recreational flows.

Connor also criticized the FY2014 energy and water appropriations bill (H.R. 2609) the House had passed the week before. He said: "The bill eliminates the vast majority of WaterSMART funding that supported the...Study and would significantly hinder actions under the WaterSMART program that could help address water supply shortages in the...Basin and elsewhere. Overall, the House bill would cut WaterSMART by 53%, including the elimination of all funding for WaterSMART grants, despite already having helped facilitate the conservation of 616,000 acre-feet of water from 2010 through 2012."⁸⁴

Upper Colorado River Commission Executive Director Don Ostler said "...no single option is adequate to significantly reduce vulnerability. It will require a portfolio of effective options and strategies to be implemented to accomplish this. Even then, system vulnerability will not be fully eliminated so shortage management plans during the worst drought conditions will still be required.

⁸⁴*Western States Water*, #1943, August 12, 2011.

It is important to note that both the Upper Basin and the Lower Basin face challenges, but the problems are very different for each basin. The Upper Basin has yet to develop its full 1922 Compact apportionment and will continue to develop its supply. Such development will continue to be tempered by better knowledge of future supply, more efficient management of water use and our ability to tolerate drought through development of management options.”

Tanya Trujillo, Executive Director of the Colorado River Board of California and a former WSWC member, provided examples of efforts in the Lower Basin to address imbalances. She also said: “The Basin States plan to continue our successful collaborations...to develop tools and strategies to enable us to address ongoing challenges and meet the evolving demands on the Colorado River. The Basin Study’s technical foundation will help support that process.”⁸⁵

Minute 319

On July 31, representatives for the governors of the seven Colorado River Basin states wrote Secretary of State John Kerry and Secretary of the Interior Sally Jewell regarding efforts to link the Rio Grande with the Colorado River to address Mexico’s failure to deliver Rio Grande water supplies to Texas under the 1944 Water Treaty. Mexico’s noncompliance has caused substantial economic harm and threatened municipal water supplies in Texas, and the letter supports “...strong federal action to promptly address those issues.” However, it urges Kerry and Jewell to maintain “...the long held policy of treating the two river systems distinctly.”⁸⁶

The letter identifies legislation (S. 1125, H.R. 1863, and H.R. 2307) that Senator John Cornyn (R-TX) and Rep. Filemon Vela (D-TX) have introduced to require the State Department to report to Congress on Mexican efforts to meet treaty obligations on the Rio Grande and on the benefits the U.S. receives under Minute 319. The legislation would prevent the Department from extending Minute 319 if it fails to comply with these reporting requirements. Mexico and the U.S. executed Minute 319 last year to share surpluses and water shortages on the Colorado River and to allow Mexico to store water in Lake Mead, among other things. Vela is also on record as saying that it would be appropriate for Congress to look at Minute 319’s reauthorization if Mexico fails to comply with its Rio Grande delivery obligations.

The letter says “...the agreements developed through Minute 319 will...keep more water in Lakes Mead and Powell and...assist our countries in our...water management efforts. Any threats to the implementation of these agreements may have significant detrimental impacts to water users throughout the...Basin in the [U.S.]. In addition, Minute 319 provides a framework for discussion that may lead to the adoption of its key components for a longer period of time and successful implementation of the Minute is critical to that effort.”

⁸⁵<http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings>. *Western States Water*, #2013, December 14, 2012.

⁸⁶*Western States Water*, #1941, August 21, 2011.

“The Colorado River States support the efforts of our counterparts in Texas to find a fair solution to address the important delivery obligations of Mexico on the lower Rio Grande.... We urge the Administration to utilize the diplomatic tools available to improve the situation on the Rio Grande without undermining the successful cooperation that exists on the Colorado River.”

Three WSWC members signed the letter, including Wyoming State Engineer and WSWC Vice-Chair Pat Tyrrell, Arizona Department of Water Resources Director Sandy Fabritz-Whitney, and Utah Division of Water Resources Director Dennis Strong. Other signatories include Dana Fisher, Commissioner, Colorado River Board of California; John McClow, Colorado Governor John Hickenlooper’s representative; Jayne Harkins, Executive Director, Colorado River Commission of Nevada; Pat Mulroy, General Manager, Southern Nevada Water Authority; Estevan López, Director, New Mexico Interstate Stream Commission; and Don Ostler, Executive Director, Upper Colorado River Commission.

Lower Rio Grande

On December 17, the Bureau of Reclamation released its Lower Rio Grande Basin Study, which evaluated climate impacts on water demand and supply imbalances on the Rio Grande along the border between the U.S. and Mexico from Fort Quitman, Texas to the Gulf of Mexico. The study predicts a total shortfall of 678,522 acre-feet per year by 2060, due to less precipitation and increased evapotranspiration. The study also examined a number of possible alternatives for meeting future demands, including seawater desalination, reuse, brackish groundwater desalination and fresh groundwater development, finding brackish groundwater development to be “most suitable.”

“This study...will provide water managers with science-based tools to make important future decisions as they work to meet the region’s diverse water needs,” said Reclamation Commissioner Mike Connor. “In addition, the study will help inform water management discussions between the U.S. and Mexico through the International Boundary Water Commission [IBWC].”

Reclamation, the Rio Grande Regional Water Authority, and the Authority’s 53 member entities developed the study as part of the Department of the Interior’s WaterSMART initiative in collaboration with the Texas Water Development Board, the Texas Commission on Environmental Quality, the IBWC, and the Texas Region M Planning Group.⁸⁷

States

Utah

Energy Development Summit

On January 10-11, Utah Governor and WGA Chair Gary Herbert (R) hosted the second annual Utah Governor’s Energy Development Summit in Salt Lake City, Utah. The summit brought

⁸⁷<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=45486>.

together public and private sector experts from across Utah and the West to discuss a variety of energy-related topics, including water requirements for oil shale and nuclear development, the impacts of hydraulic fracturing on water quality, and western electric transmission, among other issues. The summit also included speeches from Utah Senators Orrin Hatch (R) and Mike Lee (R), and Utah Representatives Rob Bishop (R) and Chris Stewart (R).

“From each employee who brings home a paycheck, to the millions of dollars in economic impact, the energy industry is a vital component of a strong and growing economy,” said Herbert. “In all our efforts working together to advance the energy future of western states, our ultimate goal is responsible, balanced development of the energy resources.” WGA Executive Director James Ogsbury gave a keynote address in which he said western governors are “...making a real difference with respect to development of energy sources, implementation of efficiency measures and conservation resources.... The West truly is the nation’s energy breadbasket, and we will use these resources - along with Western ingenuity, gubernatorial leadership and hard work - to create jobs, support our military, help the third world develop and improve our own nation’s fiscal outlook.” James also cited examples of energy initiatives led by Governors Jan Brewer (R-AZ), John Hickenlooper (D-CO), Butch Otter (R-ID), Mary Fallin (R-OK), John Kitzhaber (D-OR), and Matt Mead (R-WY).

Of note, James praised Herbert’s 10-Year Strategic Energy Plan for Utah as a “legitimate all-of-the-above energy strategy” that “...synthesizes and balances Utah’s economic development objectives and its critical environmental protection goals.” He also said: “[The] plan has been so well received that Governor Herbert...has charged the WGA to develop a similar 10-year energy plan for the West. We’ll have such a plan by June, and our objective is not to produce a well written document that will look pretty on a bureaucrat’s shelf, but to create a dynamic and useful template for the pursuit of rational energy policies in the West.”

Texas

Aransas Project v. Shaw

On March 11, a judge for the U.S. District Court for the Southern District of Texas issued a decision in *The Aransas Project v. Shaw*, holding the Texas Commission on Environmental Quality (TCEQ) liable for causing an unlawful “take” of 23 endangered whooping cranes in violation of Section 9 of the Endangered Species Act (ESA). In particular, the court held that the state’s surface water permit system did not ensure sufficient in-stream flows in the San Antonio and Guadalupe river systems, which the court found led to a reduction in freshwater inflows to the Aransas National Wildlife Refuge during a severe drought in 2008-2009. According to the court, the reduction in fresh water increased salinity, which adversely affected the cranes’ primary food sources in the refuge.

In reaching this decision, the court held that TCEQ should have prevented the take, reasoning that its emergency powers authorize it to modify or amend existing prior appropriation water rights or deny issuance of new permits to protect ESA-listed species and can be compelled to do so in time of drought. The court also found that “...ESA prohibitions apply to actions by state water agencies

where their regulatory programs approve actions by third parties that contribute to causing the take.” In determining whether the non-profit organization that filed the suit had standing to sue TCEQ, the court also found that the organization satisfied the “causation” element of the standing analysis by establishing a causal relationship between freshwater inflows to the refuge and TCEQ’s water management practices, finding that “...federal courts have found causation where there has been a direct relationship between the challenged government regulation and the resulting ‘take.’”

In addition, the court enjoined TCEQ from granting new water right permits that affect the San Antonio and Guadalupe Rivers until Texas provides “reasonable assurances” that such permits will not take whooping cranes. It also ordered TCEQ to seek an incidental take permit from the Fish and Wildlife Service that will lead to the development of a habitat conservation plan.

On March 26, the 5th Circuit Court of Appeals granted a request by the Texas Attorney General to stay the decision. The 5th Circuit also ordered an expedited appeal and placed the case on its August oral argument calendar. In response, TCEQ issued the following statement: "Texas is appreciative of the Fifth Circuit’s decision to stay the lower court ruling. As we said previously, this case is an attempt to rewrite the Texas Water Code. It is critical that the state retain the ability to regulate state surface water as provided under state law, and not the [ESA].”⁸⁸

New Mexico

Bounds v. New Mexico/Domestic Wells

On July 25, the New Mexico Supreme Court issued its decision in *Bounds v. New Mexico*, unanimously upholding the state’s domestic wells statute, which requires the State Engineer to issue domestic well permits without determining the availability of unappropriated water. The New Mexico Constitution states that priority of appropriation “shall give the better right.” A district court found that the statute created an “impermissible exception” to the state’s prior appropriation system by requiring the issuance of domestic permits without consideration of the availability of unappropriated water or the priority of appropriated water. However, the New Mexico Court of Appeals overturned the district court’s decision, finding in part that issuing a domestic well permit is not a per se violation of the prior appropriation doctrine.⁸⁹

The New Mexico Supreme Court affirmed, finding that the statute is facially constitutional. The Court reasoned that the statute creates a more expeditious permitting procedure to obtain a permit to use water for domestic needs. Since the New Mexico Constitution is silent on the process for obtaining a water right, the domestic well permitting process cannot be in conflict.

The Court also considered the State Engineer’s rules and efforts to protect senior water rights from domestic wells, noting that domestic well permits “...though issued upon application without further inquiry, are subject in their *use* to many of the same conditions and restrictions as are permits

⁸⁸<http://www.tceq.texas.gov/news/releases/3-15TAPstay>.

⁸⁹*Western States Water*, #1904, November 12, 2010.

for other uses.... The State Engineer has designed these conditions to protect senior water users - the very class of users that, according to Petitioners, is threatened by the [statute]. We have difficulty envisioning how a water permit that is explicitly subject to curtailment by priority administration in times of shortage...can be at the same time...an impermissible exception to that doctrine.”

In addition, the Court found that the New Mexico Legislature has taken steps to protect senior users and noted that “...aggrieved citizens must look to the Legislature and the State Engineer for relief... We urge our Legislature to be diligent in the exercise of its constitutional authority over – and responsibility for – the appropriation process. We...urge the State Engineer to fulfill its superintending responsibility by applying priority administration for the protection of senior water users. Our courts remain available, based upon sufficient evidence, to intervene in appropriate cases to ensure that ‘priority of appropriation shall give the better right.’”

Finally, the Court addressed language in the Court of Appeals’ decision that the state’s priority doctrine “establishes a broad priority principle, nothing more.” The Court found that: “One could read that statement to mean that priority water rights are nothing more than an aspiration subject to legislative whim and administrative discretion. Such a reading would be wrong, and it would be a mistake for future litigants to cite the Court of Appeals’ opinion for any such proposition.

California

Lake Tahoe Restoration Act

On August 1, Senator Dianne Feinstein (D-CA), introduced The Lake Tahoe Restoration Act (S. 1451), which is intended to restore Lake Tahoe and the Tahoe Basin. In particular, the bill would authorize \$415 million over ten years to carry out a number of efforts intended to improve the lake’s clarity, reduce risks from catastrophic wildfire, combat invasive species, and restore and protect the environment in the Lake Tahoe Basin. Senate Majority Leader Harry Reid (D-NV) and Senators Barbara Boxer (D-CA) and Dean Heller (R-NV) co-sponsored the bill.⁹⁰ Feinstein said the bill “doubles down” on previous work to improve Lake Tahoe and is an “...opportunity to continue this important work so future generations can continue to enjoy the Jewell of the Sierra.”⁹¹

Water Reuse

On October 8, California Governor Jerry Brown signed a bill (S.B. 322) authorizing the study of direct potable water reuse as a potential water source in California. The bill requires the California Department of Public Health, in consultation with the State Water Resources Control Board, to convene an expert panel to investigate the feasibility of developing uniform criteria for direct potable reuse. A draft report is due by September 1, 2106, with a report to the California Legislature due by December 31, 2016. However, in his signing message for the bill, Brown said:

⁹⁰*Western States Water*, #1888, July 26, 2010.

⁹¹<http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=fe12ebae-20de-4a67-8bfc-57c5766ea383>.

“This information is past due.... The 3-year time frame mandated in this bill is too slow. California needs more high quality water and recycling is key to getting there.”⁹²

Oregon

Klamath Basin

On December 2, Oregon Governor John Kitzhaber, Reclamation Commissioner Mike Connor, and Senators Ron Wyden (D-OR) and Jeff Merkley (D-OR) announced an agreement in principle to address disputes between the Klamath Tribes and ranchers in the Upper Klamath Basin. The dispute stems from a first-ever call the tribes issued in June that resulted in tens of thousands of acres going without surface water during a drought. The tribes issued the call after Oregon completed a 38-year adjudication of their water rights in March, awarding them a “time immemorial” right to protect fisheries. Under the agreement in principle, upstream ranchers would reduce their water use to provide water for downstream ranchers, and to support fish habitat restoration projects and tribal economic projects. In turn, the tribes would agree not to cut off irrigation if the ranchers significantly reduce their irrigation withdrawals.

The deal still needs final approval from the Klamath Basin Task Force, which Kitzhaber, Wyden, Merkley, and Rep. Greg Walden (R-OR) convened last year. The Task Force developed the proposal and includes representatives from the basin’s agricultural community and tribes, as well as state and federal representatives. If finalized, the agreement would parallel the Klamath Basin Restoration Agreement, and serve as the basis for legislation that Wyden would likely introduce in Congress. “This is a momentous day because it shows that Oregon’s reputation as a place where people find solutions to tough problems is well-earned,” said Kitzhaber. “Between the Agreement and the Task Force’s recommendations, we are poised to move forward with federal legislation that supports a stable agricultural economy and sustainable fisheries.”⁹³

Water Supply Outlook

On January 31, the Natural Resources Conservation Service’s (NRCS) Snowpack/Drought Monitor Update reported that drought coverage in the contiguous U.S. decreased to 57.64%, down 5.01% over eight weeks. Nevertheless, drought conditions persisted in every western state except Washington. Severe to exceptional drought covered Colorado, Kansas, Nebraska, Oklahoma, South Dakota, parts of Texas, and much of Wyoming. Moderate to extreme drought extended throughout most of New Mexico and Utah, while abnormally dry to severe drought existed in Arizona, California, Montana, Nevada, North Dakota, and Oregon, with pockets of extreme drought in Arizona, Montana, and Nevada. Abnormally dry conditions covered much of Alaska and abnormally dry to moderate drought persisted in southern Idaho. Notwithstanding current drought conditions, snow water equivalent (SWE) levels for most basins in Arizona, Idaho, Montana, Nevada, Oregon,

⁹²http://gov.ca.gov/docs/SB_322_2013_Signing_Message.pdf

⁹³http://www.oregon.gov/gov/media_room/Pages/press_releases/press_120413.aspx. *Western States Water*, #1967, January 27, 2012.

Utah, Washington, and western Wyoming were 90% to 109% of normal, with some basins reporting levels above 110% or in the 70% to 89% range. Most basins in Colorado, New Mexico, and eastern Wyoming reported levels of around 59% to 89% of normal.⁹⁴

A July 3 report showed that abnormally dry or drought conditions existed in every western state except North Dakota, with extreme to exceptional drought present in parts of Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Texas, Utah, and Wyoming. While drought is expected to persist or intensify in most of the West, conditions were expected to improve in portions of Arizona, Colorado, Kansas, New Mexico, Oklahoma, and Texas. The update further noted that New Mexico experienced the most drought impacts for the period of June 21 through June 27, followed by Colorado, Texas, Arizona, Alaska, California, and Idaho. Among other impacts, the update reported that large wildfires continued to burn in Alaska, Arizona, Colorado, and New Mexico. June also recorded temperatures that were warmer than normal for a swath of land extending from Texas to California and up through Idaho. Much of the remaining parts of the U.S. experienced temperatures within a few degrees of the long-term average.⁹⁵

Year-to-date precipitation levels in most Northwest basins ranged from 90% to 109% of normal, with some basins along or near the Canadian border reporting levels over 110% and basins in southern Oregon and southern Idaho reporting levels below 89%. Most other basins in the West ranged from 70% to 89%, with two basins in New Mexico reporting levels below 50%. However, various basins in Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming also reported month-to-date precipitation levels well below 50%, with some basins reporting levels below 10% or as little as nothing.

An August 22 report showed that drought and abnormally dry conditions existed in every western state. Parts of Alaska, Idaho, Montana, Texas, and Utah had also seen an expansion of moderate, severe, or extreme drought. Fortunately, drought conditions had abated in a number of areas around the West, including eastern Colorado, western and central Kansas, northern Nebraska, eastern New Mexico, western and central Oklahoma, western and southern South Dakota, the Texas panhandle, and eastern Wyoming. The update further noted that wildfires “remain a problem” in parts of the West, noting that the National Interagency Fire Center reported 51 active, large wildfires on August 20, an increase from the week before. Large fires also continued in 10 western states, including the Elk Fire in Idaho, which had consumed over 130,000 acres of vegetation. The update also said the cost of battling wildfires in 2013 exceeded \$1 billion.⁹⁶

A November 7 report showed that every western state was experiencing abnormally dry or drought conditions to some degree, although the Dakotas and Washington were almost entirely

⁹⁴<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20130131.pdf>. *Western States Water*, #2016, January 4, 2013.

⁹⁵<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20130703.pdf>. *Western States Water*, #2028, March 29, 2013.

⁹⁶<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20130822.pdf>. *Western States Water*, #2042, July 5, 2013.

drought-free. Extreme to exceptional drought conditions were scattered across the West in portions of California, Colorado, Idaho, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, and Texas. Moving forward, the update predicted that drought is expected to persist over much of the West and south-central plains, although it is expected to improve in parts of eastern Texas. With respect to precipitation, the update reported that Colorado and Wyoming are “off to a good start” with abundant snow accumulation, and that most basins in Wyoming are reporting percentages above 130% of normal. Conversely, the update also finds that the Rocky Mountains in Montana, the Sierra Nevada, and the Cascades reflect opposite conditions.

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.

In 2013, the WSWC revised and readopted the following sunseting positions: Position No. 349 urges the Administration and the Congress to give a high priority to federal programs, such as the National Oceanic and Atmospheric Administration's Regional Integrated Science and Assessments (RISA) program; Position No. 350 supports the implementation of the Rural Water Supply Act of 2006; Position No. 355 urges the Administration and the Congress to support water research and development programs at the Department of Energy National Laboratories; Position No. 356 urges the Administration and NASA to enhance their focus on research for water resources applications and promote long-term engagement with the WSWC; Position No. 357 is a letter to Senate and House leaders regarding SECURE Water Act implementation; Position No. 358 supports legislation requiring the federal government to pay state filing fees in state general stream adjudications; and Position No. 359 supports legislation to amend the Clean Water Act (CWA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

The WSWC also adopted four new resolutions. Position No. 351 supports federal legislative and administrative actions to authorize and implement renewable hydropower projects and programs. The position also calls for energy and water conservation programs to minimize demands on natural resources and ecosystems.

Position No. 352 supports federal efforts to prepare for and respond to extreme weather events, including an expanded and enhanced west-wide extreme precipitation monitoring system.

Position No. 353 notes that the WSWC "...opposes any and all efforts that would diminish the primary and exclusive authority of states over the allocation of water resources used in hydraulic fracturing."

Position No. 354 is in the form of a letter to House Water Resources and Environment Subcommittee leaders in opposition to H.R. 1460, which would remove "fish and wildlife" as an authorized purpose for which the Corps can manage the Missouri River Mainstem Reservoir System.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
urging the
CONGRESS AND ADMINISTRATION
TO PRIORITIZE FEDERAL PROGRAMS
THAT TRANSLATE SCIENCE ON CLIMATE AND WEATHER EXTREMES
TO WATER RESOURCES MANAGEMENT ACTIONS**

**Denver, Colorado
April 4, 2013**

WHEREAS, climate and weather extremes have serious potential consequences for water resources planning and management, water rights administration, operation of state and local water projects, and future water use; and

WHEREAS, there is growing concern, particularly in the Arid West, over our ability to continue to supply water of adequate quality in quantities needed to sustain current and future uses, including environmental uses, as is demonstrated by the release of first (for the Colorado River Basin) of USBR's Basin Studies prepared pursuant to the Secure Water Act of 2009; and

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

WHEREAS, present water resources planning and sound future decision-making depends on our ability to understand, monitor, anticipate and adapt to droughts, floods, extreme storms, and other weather events; and

WHEREAS, climate and weather extremes, such as the drought that gripped much of the West in the summer of 2012, cause millions of dollars in damages and present substantial obstacles and uncertainties to present and future water resources planning and management; and

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

WHEREAS, the federal agencies participating in climate and weather research programs have historically concentrated heavily on basic scientific research, research that needs to be translated into decision support applications for water resources management and needs to be communicated to water managers through technology transfer institutions such as NOAA's RISAs; and

WHEREAS, important programs, such as the National Oceanic and Atmospheric Administration's Regional Integrated Sciences and Assessments (RISA) program, support research that addresses complex science issues of concern to water managers and administrators at the regional level;

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



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/lwswc

Position No. 350
(See also Position No. 322)

April 5, 2013

Senator Ron Wyden, Chairman
Energy and Natural Resources Committee
United States Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510

Senator Lisa Murkowski, Ranking Member
Energy and Natural Resources Committee
United States Senate
SD-304 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

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

Under Title I, we look forward to continuing to work with the Bureau of Reclamation to identify rural water needs and evaluate rural water supply projects and the demand for new projects, as well as to implement guidelines and criteria for determining program eligibility and establish project priorities.

As the legislation specifically states, it is important that Reclamation "...consult and cooperate with appropriate Federal, State, tribal, regional, and local authorities" as it conducts appraisal investigations and feasibility studies, prepares feasibility reports, and identifies funding sources. With respect to funding sources, we continue to strongly support the expenditure of Reclamation Fund revenues for authorized purposes, as intended by the Congress.

Moreover, again as recognized in the legislation, the program must be coordinated with "...existing federal and State rural water and wastewater programs to facilitate the most efficient and effective solution to meeting the water needs of the non-Federal project sponsors." Further, we appreciate the recognition that compliance with State water laws and interstate compacts is vital.

Upgrading and replacing inadequate rural water systems may require finding new water supplies, which will entail acquiring necessary state water rights.

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Phil C. Ward". The signature is fluid and cursive, with a large initial "P" and "W".

Phil Ward, Chairman
Western States Water Council

**POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
in support of
RENEWABLE HYDROPOWER DEVELOPMENT**

Denver, Colorado

April 5, 2013

WHEREAS, the water and hydropower resources of the West have been developed through partnerships between energy and water users, and continue to be inextricably connected;

WHEREAS, clean, efficient, inexpensive hydropower is a vital part of the energy resources needed to meet our present and future energy demands; and

WHEREAS, hydropower is the largest source of renewable electricity in the United States, producing some 100,000 megawatts or about 7% of the Nation's electricity needs; and

WHEREAS, the potential exists for further public and private development of as much as 60,000 more megawatts of this valuable resource, including upgrading existing generators, developing small hydro and the power potential from existing man-made conduits and canals, as well as hydroelectric pumped storage projects; and

WHEREAS, such development can often be undertaken with little impact on the environmental and important ecological resources, requiring minimal further environmental review; and

WHEREAS, permitting requirements may be appropriately minimized and streamlined so as to promote reasonable development while avoiding unnecessary costs; and

WHEREAS, the future development of potential hydropower resources should be appropriately undertaken in compliance with substantive and procedural state water law and interstate compacts; and

WHEREAS, the rights and preference privileges of existing water and power users should be respected; and

WHEREAS, federal legislation has been introduced to further authorize and promote the wise and sustainable development of our renewable hydropower resources, also creating jobs and reducing carbon emissions.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council supports federal legislative and administrative actions to authorize and implement reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources.

BE IT FURTHER RESOLVED, that the Western States Water Council also supports the development and implementation of appropriate energy and water conservation programs at all levels to minimize demands placed on our natural resources and ecosystems.

**POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
in support of
STRENGTHENING THE RESILIENCY OF OUR NATION
TO THE IMPACTS OF EXTREME WEATHER EVENTS**

**Casper, Wyoming
June 26, 2013**

WHEREAS, the Nation continues to suffer the effects, including loss of life and economic, social, and environmental damages, from increasingly extreme weather events, including tornadoes, hurricanes, extreme precipitation, and drought; and

WHEREAS, Western States have recently experienced extreme seasonal and year-to-year weather volatility that has brought record or near-record events with floods, followed by drought and wildfires, as well as devastating tornadoes, all threatening public safety and property, and often taxing the capacity of our aging water infrastructure system; and

WHEREAS, the 2012 prolonged drought afflicting the West and the Nation was nearly unprecedented in its scope, duration and severity – and developed so quickly as to be commonly referred to as a “flash drought;” and

WHEREAS, the drought has been magnified in regions of the country due to the failure of Mexico to deliver the water required to the United States under the treaties executed by the two countries, and

WHEREAS, present water resources planning and sound decision-making depends on our ability to understand, monitor, predict, and adapt to droughts, floods, extreme storms, and other weather events as well as reliable treaty commitments; and

WHEREAS, investments in research, forecasting, and monitoring the development of extreme weather events provide an opportunity to significantly improve planning and project design and operation to avoid or minimize the loss of life and property, as well as mitigate economic and environmental damages; and

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

WHEREAS, in the West, sound decisionmaking demands accurate and timely data on precipitation, temperature, soil moisture, snow depth, snow water content, streamflow, and similar information; and

WHEREAS, there is a need for maintaining and improving existing monitoring networks that help provide early warning as well as tracking impacts of extreme events; and

WHEREAS, the Council has supported development of an improved observing system for Western extreme precipitation events, to aid in monitoring, prediction, and climate trend analysis associated with extreme storms; 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, the Council supports reauthorization of the National Integrated Drought Information System (NIDIS) and the Bureau of Reclamation's Emergency Drought Response authority; and

WHEREAS, there is a continuing need for greater collaboration between and among federal agencies, federal and state agencies (including local government), non-governmental and public/private organizations and businesses;

NOW THEREFORE BE IT RESOLVED that the Western States Water Council supports as a high priority federal administrative actions to authorize and implement appropriate actions to plan, prepare for and avoid, minimize or mitigate the impacts of extreme weather events, including developing an expanded and enhanced westwide extreme precipitation monitoring system.

BE IT FURTHER RESOLVED that the Western States Water Council also supports legislation advancing the goals of: (1) minimizing the loss of life and property and economic, environmental and social cost from extreme weather events; (2) improving collaboration and coordination among agencies and organizations at all levels; (3) increasing consultation with state, local and tribal governments; (4) maintaining and enhancing data gathering and monitoring, as well as communication capabilities, identifying and addressing gaps and overlap; (5) identifying and addressing federal agency responsibilities, as well as regulatory and other preparedness and response barriers, (6) recognizing and addressing regional differences; and (7) avoiding unfunded mandates -- and pledges to work with the Congress to appropriately address current and future needs to improve extreme events response and resiliency.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
HYDRAULIC FRACTURING**

**Casper, Wyoming
June 26, 2013**

WHEREAS, hydraulic fracturing is a process that injects sand, water, and other fluids, including various chemical compounds, underground to aid in the extraction of oil and natural gas; and

WHEREAS, hydraulic fracturing has been used for over 60 years in conventional oil and gas production, with over one million wells having been fractured in the United States alone; and

WHEREAS, although concerns about hydraulic fracturing have been voiced by some, western states have experienced few, if any, adverse impacts involving water quality and water allocation attributable to hydraulic fracturing; and

WHEREAS, states have primary and exclusive authority over the allocation and administration of rights to the use of water used in hydraulic fracturing operations; and

WHEREAS, hydraulic fracturing is responsible for significantly increasing the nation's ability to recover oil and gas, lessening its dependence on foreign energy supplies and providing billions of dollars in direct and indirect economic benefits each year, including hundreds of thousands of jobs; and

WHEREAS, states have decades of experience, knowledge, and information regulating hydraulic fracturing and other oil and gas activities; and

WHEREAS, states are best positioned to regulate hydraulic fracturing because of their understanding of regional and local conditions and their ability to tailor regulations to fit the needs of the local environment; and

WHEREAS, states currently employ a range of programmatic elements and regulations to ensure that hydraulic fracturing does not impair water resources and environmental values, including but not limited to requirements pertaining to well permitting, well construction, the handling of exploration and production waste fluids, the closure of wells, and the abandonment of well sites.

NOW, THEREFORE, BE IT RESOLVED, that federal efforts involving hydraulic fracturing, including efforts to study potential adverse impacts on water quantity and quality, should leverage state knowledge, experience, policies, and regulations.

BE IT FURTHER RESOLVED, that federal efforts to study the potential impacts of hydraulic fracturing on water resources should be limited in scope, based upon sound science, and driven by states given the lack of significant widespread impacts associated with hydraulic fracturing in the experience of our member states and increasingly limited federal funds.

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 water resources used in hydraulic fracturing.



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/lwswc

Position No. 354

July 5, 2013

The Honorable Bob Gibbs
Chairman
Water Resources and Environment Sub.
U.S. House of Representatives
B-370A Rayburn House Office Building
Washington, DC 20515

The Honorable Timothy Bishop
Ranking Member
Water Resources and Environment Sub.
U.S. House of Representatives
2163 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Gibbs and Ranking Member Bishop:

I am writing on behalf of the Western States Water Council, representing the governors of 18 western states on water policy issues, to express concern about H.R. 1460. As introduced by Representative Sam Graves of Missouri, H.R. 1460 would remove "fish and wildlife" as an authorized purpose for which the Corps can manage the Missouri River Mainstem Reservoir System (the "System").

The System is the largest collectively managed group of reservoirs in the United States, consisting of six dams in four states that control runoff from approximately half of the Missouri River Basin. Pursuant to the 1944 Flood Control Act, the Corps operates the System for eight authorized purposes: flood control, navigation, irrigation, power, water supply, water quality control, recreation, and fish and wildlife.

However, the Act has not been reviewed since its passage in 1944, and there is now a question as to whether the System's current operations best satisfy the Basin's contemporary needs. In particular, flood control, hydropower, and water supply have provided significant benefits as originally expected, while navigation has fallen far short of its anticipated benefits. Congressionally authorized studies to review the System's eight authorized purposes and determine whether adjustments are needed have also stalled due to a lack of funding. Rather than singling out one authorized purpose for elimination before these needs can be studied, river management and states in the System may be better served by a comprehensive, simultaneous, and transparent review of all eight authorized purposes to develop a plan for the sustainable future management of the System.

Chairman Gibbs and Ranking Member Bishop
July 5, 2013
Page 2

In addition, maintaining fish and wildlife as an authorized purpose is necessary for management actions that benefit economically and recreationally important species. Prior studies have also shown that these species support substantial economic activity. For example, the Corps estimated in 2004 that recreation provided annual project benefits of \$87 million in the upper Missouri River Basin and \$20-\$38 million in the lower Missouri River Basin, which includes spending pertaining to fish and wildlife resources. In contrast, the Corps estimated that navigation provided \$9 million in annual project benefits. At the same time, while economic activity involving fish and wildlife has increased, the amount of commercial goods shipped on the Missouri River has decreased significantly since peak commercial tonnage in 1977.

Lastly, removing fish and wildlife as an authorized purpose will not negate the Corps' obligation to protect these resources in the System. The Corps will still need to coordinate with the U.S. Fish and Wildlife Service on recovery efforts for threatened and endangered species listed under the Endangered Species Act, including the pallid sturgeon, interior least tern, and piping plover. The U.S. Fish and Wildlife Coordination Act also requires the Corps to continue mitigating fish and wildlife habitat losses caused by the Bank Stabilization and Navigation Project.

In light of the above concerns, we urge you to oppose H.R. 1460 and other legislation that would alter the System's authorized purposes before a comprehensive study is completed. Thank you for considering the Council's views on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is stylized and cursive.

Phillip C. Ward
Chair, Western States Water Council

cc: The Honorable, Bill Shuster, Chairman, House Transportation and Infrastructure Committee
The Honorable Nick Rahall, Ranking Member, House Transportation and Infrastructure
Committee
The Honorable Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
urging the
ADMINISTRATION AND CONGRESS
TO SUPPORT WATER RESEARCH AND DEVELOPMENT PROGRAMS
at the
DEPARTMENT OF ENERGY NATIONAL LABORATORIES**

**Casper, Wyoming
June 26, 2013**

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

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

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

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

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

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

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

WHEREAS, electricity generation and other energy development is a significant driver of present and future water demands and the expertise and research of the national labs can supplement and enhance the ability of state, local and tribal water managers to understand and develop adaptation strategies; and

WHEREAS, water-related research at the Department of Energy and National Laboratories should be guided by State needs as expressed in state planning documents and through planning processes; and

WHEREAS, in the West, States in compliance with State law have exclusive authority over the appropriation and adjudication of water rights for all uses, and the allocation of water for energy development, including the determination of whether or not there is any unappropriated water available for use.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council urges the Administration and the Congress to recognize the primary role of the States in allocating water for energy and the value of Department of Energy hosted energy-water programs and research conducted at National Laboratories undertaken in collaboration with state water resources agencies, including but not limited to work at: the Idaho National Laboratory (INL) and its Mountain West Water Institute; Lawrence Berkeley and Lawrence Livermore National Laboratories in California; Los Alamos and Sandia National Laboratories in New Mexico; the National Renewable Energy Laboratory (NREL) in Colorado; and Pacific Northwest National Laboratory (PNNL) in Washington, that collaboratively links federal energy research programs and water issues of concern to the western states.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
NASA'S APPLIED SCIENCE RESEARCH PROGRAM**

**Deadwood, South Dakota
October 3, 2013**

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

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

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

WHEREAS, thermal infrared imaging data available from Landsat 7 and Landsat 8 is used to measure and monitor agricultural and other outdoor water uses and needs, and is increasingly important for present and future management of our scarce water resources, and is an example of the application of basic science pioneered by the National Aeronautics and Space Administration (NASA); and

WHEREAS, spaceborne interferometric synthetic aperture radar (InSAR) has a demonstrated ability to measure land subsidence due to groundwater extraction and is now being evaluated in a research mode for its potential ability to measure changes in groundwater elevations; and

WHEREAS, airborne light detection and ranging (LiDAR) using light waves instead of radio waves to measure the distance to objects and imaging spectroscopy are now being flown in California and Colorado to estimate basin-wide snow water equivalent; and

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

WHEREAS, NASA has identified the “water and energy cycle” and “water resources” as topics to support in the agency’s research and applications programs respectively; and.

WHEREAS, NASA’s ARRA demonstration project on California applications for use of remote sensing information has illustrated that the potential exists for repurposing data collected from certain present NASA missions for water management applications, and that additional potential exists for research applications with sensors planned in future Decadal Survey missions such as the Deformation, Ecosystem Structure and Dynamics of Ice mission (DESDynI), which would combine radar and LiDAR technologies to get three-dimensional views; and

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

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

BE IT FURTHER RESOLVED, that the Council urges the Administration and NASA to plan and provide for long-term continuity of observations from key sensors such as the thermal infrared sensor and InSAR; and

BE IT FURTHER RESOLVED, that the Council strongly supports an expedited NASA review of options for a continuing National Land Imaging Program, including existing thermal imaging capabilities, and expresses its strong preference for an immediate short-term effort to replicate and launch a satellite similar in design and instrumentation to Landsat 8 to minimize any loss of data – while exploring the potential for medium and longer-term advances in technology, design and future capabilities to meet existing and future uses.



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/lwswc

Position No. 357

October 8, 2013

The Honorable Ron Wyden, Chairman
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Office Building
Washington, DC 20510

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

Dear Chairman Wyden and Ranking Member Murkowski:

On behalf of the Western States Water Council, representing the governors of 18 western states on water policy issues, we are writing to express our continued support for implementation of the SECURE Water Act ("the Act"), which Congress passed as Subtitle F of the Omnibus Public Lands Management Act of 2009 (Pub. L. 111-11).

As noted in Section 9501 of the Act, "although States bear the primary responsibility and authority for managing the water resources of the United States, the Federal Government should support the States, as well as regional, local and tribal governments..." The Act authorized a number of important programs to provide this much needed support. However, as discussed below, we are concerned that many of these programs have largely gone unfunded or underfunded. As a result, we encourage you to ensure that the Act's authorized activities receive continued authorizations and appropriations that are adequate to fulfill their stated purposes.

A. Water Management Improvement

Western water law and policy are based on the reality of scarcity and the need to use water wisely. While the western states have made great strides in increasing efficiency and reducing water use, continued investments and sacrifices are needed to maintain our quality of life in the West and to protect our environment.

Section 9504 of the Act recognized this need by authorizing the Secretary of the Interior to provide grants or enter into cooperative agreements to assist states and other non-federal entities in carrying out a range of water use efficiency improvements. The Act authorized \$200 million for this and other efforts under Section 9504, to remain available until expended.

One important water management tool that relies on this funding is the Bureau of Reclamation's WaterSMART Grant program, which provides cost-shared funding on a competitive basis to address crucial water supply issues, stretch limited water supplies, and improve water management. To date, the program has provided assistance that has helped facilitate the conservation of over 616,000 acre-feet of water in the West from 2010-2012.

However, notwithstanding the benefits of this program, the House FY 2014 Energy and Water Appropriations Bill (H.R. 2609) would zero out funding for the WaterSMART Grants Program. Eliminating or drastically reducing funding from past levels would greatly diminish the Bureau of Reclamation's ability to partner with states and local communities to increase water efficiency in the West, while also threatening a range of economic and environmental interests. Consequently, we urge you to support appropriating sufficient funds to carry out the activities authorized under Section 9504 of the Act, including Reclamation's WaterSMART Grants program.

It is worth noting that this proposed cut comes at a time when the unobligated balance of the Reclamation Fund is projected to grow to about \$13.3 billion in FY 2013, an increase of over \$1 billion from FY 2012. The Reclamation Act of 1902 (Pub. L. 57-161) created the Fund to be the principle means of financing federal western water development in the West. The receipts that accrue to the Fund come from water and power sales, project repayments, and receipts from public land sales and leases in the 17 contiguous western states, as well as federal oil, gas and mineral leases. However, these receipts are only available pursuant to annual appropriation acts. Over the years, declining federal expenditures from the Fund for Reclamation purposes have created a growing unobligated balance that is used for other federal purposes. Thus, it is frustrating to see proposed cuts to the WaterSMART Grants Program and other critical Reclamation programs when the over \$2 billion in receipts that accrue to the Fund each year are more than sufficient to cover all current Reclamation expenditures and more.

The Council supports technical and financial assistance to states and local watershed groups and water districts as an appropriate federal role, consistent with authorized Reclamation programs, and as a suitable Reclamation Fund expenditure.

B. Water Data Enhancement

Real-time water resources data are critical for timely actions in response to droughts, flooding, and other extreme weather events. Without timely and accurate streamflow information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss. However, over the 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 data gathering activities.

Recognizing this need, the Act authorized a variety of activities to enhance the Department of the Interior's water data efforts, including the development of a national groundwater monitoring program, a brackish water assessment, and the establishment of a national water availability and use assessment. Section 9507 of the Act also authorized an additional \$10 million for each of fiscal years 2009 through 2019 for enhancements to the U.S. Geological Survey's (USGS) National

Streamflow Information Program (NSIP). NSIP is intended to provide a national backbone focused on national needs and interests. The authorized enhancements would increase the number of NSIP streamgages and also help ensure the NSIP streamgages are flood hardened and equipped with water quality sensors and modernized telemetry. Since federal investments have been insufficient to fully fund NSIP, these authorized enhancements, if funded, would go a long way towards achieving the program's mission.

The Council has long supported NSIP as well as USGS' Cooperative Water Program, which together provide vital water data that States and other public and private entities and individuals rely on in making day-to-day planning and management decisions. The Council also conducted a recent survey with its member states regarding USGS budget priorities that further underscores the importance of these programs, finding that almost 90% of the States identified USGS' stream monitoring networks as being "most important" with respect to their ability to carry out their surface water management and administration responsibilities.

C. Conclusion

The Council has long supported watershed and basin-wide coordination that involves all governmental entities and stakeholders interested in finding solutions to present and future water management challenges. The Act's authorized activities further this coordination and provide much needed support that States and other non-federal entities in the West use to provide adequate and safe supplies of water for human health, the economy, and the environment, as well as enhancing public safety.

We look forward to working with the Congress to improve western water management under the activities authorized under the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is written in a cursive style with a large initial "P" and "W".

Phillip C. Ward, Chairman
Western States Water Council

Position No. 358
Revised and Readopted
*(Originally adopted Nov. 17, 1995, readopted Nov. 20, 1998 and revised and readopted
Nov. 16, 2001, Oct. 29, 2004, Nov. 16, 2007, Oct. 29, 2010, and Oct. 3, 2013)*

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

**Deadwood, South Dakota
October 3, 2013**

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

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

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

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

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

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

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

(Originally adopted Nov. 17, 1995, readopted Nov. 20, 1998 and revised and readopted Nov. 16, 2001, Oct. 29, 2004, Nov. 16, 2007, Oct. 29, 2010, and Oct. 3, 2013)

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

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

WHEREAS, citing the U.S. Supreme Court's decision in *United States v. Idaho*, 508 U.S. 1 (1993), the United States claims immunity from the payment of adjudication filing fees required of all other claimants to offset the judicial and administrative expenses Western States incur in conducting general stream adjudications; and

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

WHEREAS, many Western States are facing budget shortfalls and limited resources, and the federal non-payment of state filing-fees is a significant impediment to their ability to begin or carry out general stream adjudications in a timely manner; and

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

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

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

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

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

*(Originally adopted Nov. 17, 1995, readopted Nov. 20, 1998 and revised and readopted
Nov. 16, 2001, Oct. 29, 2004, Nov. 16, 2007, Oct. 29, 2010, and Oct. 3, 2013)*

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

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

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

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

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

**Deadwood, South Dakota
October 4, 2013**

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

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

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

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

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

WHEREAS, the Sixth Circuit's decision requires compliance with NPDES permitting requirements for all point source discharges to waters of the United States of biological and chemical pesticides that leave a residue even if the application is performed in compliance with FIFRA; and

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

WHEREAS, the Sixth Circuit's ruling has created an unnecessary and duplicative level of regulation without providing clear environmental benefits; and

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

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

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

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

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

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

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.